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On the Declaration of Matters Which Have "Strong Interests" under Article 21 of the Convention on Choice of Court Agreements

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Abstract

The Convention on the Choice of Court Agreements provides for a declaration of a specific matter under Article 21 of the general provisions of chapter IV, that is, when a State has a strong interest in not applying the Convention to a particular matter, it may declare that the Convention is not applicable in this matter. However, for what is a "strong interest", what matters can constitute a "strong interest", the Convention does not make a statement. As a Contracting Party, EU declares that it will not apply the Convention to certain types of insurance contracts that EU has strong interests in when acceding to the Convention. Therefore, in-depth analysis of the connotation of the "strong interests", while clearly distinguishing it from public order, and learning from the European experience, will help China make a clear statement on matters related to the "strong interest" in the ratification of the Convention.

Keywords

Convention on Choice of Court Agreements, Strong Interests, Public Order, Article 21, Private International Law

1. Introduction

On June 30, 2005, the Twentieth Diplomatic Conference of the Hague Conference on Private International Law adopted the *Hague Convention on Choice of Court Agreements* (hereinafter referred to as "the Convention"), which aims to promote the recognition and enforcement of foreign judgments in civil or commercial matters. Public order, as the basic principle of private international law, has appeared in the relevant legal provisions of the Convention, but the Conven-

tion stipulates a declaration of specific matters of "strong interests" in the general provisions of Chapter IV, that is, Article 21. According to this provision, where a State has a "strong interest" in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. However, the Convention does not define the "strong interests" and what matters constitute "strong interests". The objective of this Article is to give the contracting parties to the Convention a certain degree of autonomy, so that those matters which cannot be reserved for public order from the scope of application of the Convention can be excluded by adopting a reservation mechanism such as a declaration of "strong interests".

On 4 and 5 December 2014, the Council of the European Union (hereinafter referred to as "EU") adopted the decision on the approval, on behalf of the EU, of the Convention. According to this decision, EU acceded to the Convention as a regional community, which means all EU Member States (except Denmark) are bound by the Convention, meanwhile, the declaration made by EU through the Article 21 of the Convention at the time of ratification shall also take effect simultaneously according to Article 32 the Convention.[1] The "strong interests" declaration made by the EU is in the insurance contracts. In order to protect the interests of policyholders, insured parties and beneficiaries, EU decided to adopt a positive list model, which detailed the insurance contracts that the Convention applies to and excluded the left types of insurance contracts that are not listed from the scope of the Convention. Therefore, based on the European experience, an in-depth analysis of the connotation of "strong interests" and a clear distinction from public order will help China make a clear declaration on matters involving "strong interests" when ratifying the Convention, so as to protect Chinese parties to commercial transactions and enhance judicial co-operation.

2. An Exploration of the Connotation and Extension of "Strong Interests"

2.1. The Definition of "Strong Interests"

"Interest" is a word that is easy to understand for people, but few people know what the essence of interest is. Therefore, Karl Heinrich Marx and Friedrich Engels took "interest" as their research object, which later became one of the most important theoretical categories of Marxist historical materialism. They believe that interest is the objective reason that motivates people to transform the objective world and conduct activities to meet their own survival and development

[1]According to Article 31(1) of CONVENTION ON CHOICE OF COURT AGREEMENTS, *this Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27*. Since Mexico acceded to the Convention on 26 September 2007, and the representative of EU formally deposited the instrument of ratification with the Dutch Ministry of Foreign Affairs on June 11, 2015, the Convention will enter into force on October 1, 2015. As a member of the Hague Conference on Private International Law, China has participated in the negotiation of the Convention throughout the process, and signed the Convention on September 12, 2017, but has not yet completed the domestic ratification process.

needs. "Strong interests" is a compound word (Marx & Engels, 1995). No matter in Chinese or English, "strong" is an adverb of degree, and when used before the word "interests", it means to highlight the importance and influence. However, in the analysis of the connotation of the word "interest", China and the West have experienced different development processes.

In China, the word "interest" has a long history and belongs to one of the categories of Chinese ethical thought. In Mohism, interest means the benefit of the whole society, so behaviors that can prosper the interests of the world were valued. In Taoism, the abandonment of selfish interests was advocated and pursued. In Confucianism, civilians' interests were protected, and even emperor Yao and Shun could not take advantage of them (Zhu, 2002). Although different scholars held different attitudes towards "interest", it also showed that they all paid more attention to the understanding of "interest", and the expression of such different viewpoints further promoted people's exploration of its connotation. According to the definition of "interest" in *Chinese Law Dictionary*, it contains reflections of people's positive relationship with the world around them, and objective relationship between themselves and the reality around them that can help their production and development as members of society. Besides, it is also the inner driving force of the various behaviors and actions of the people (Sun, 1997).

For the understanding of the concept of "interest", there are generally four viewpoints: the subjective theory, the objective theory, the subjective and objective unity theory, and the relational theory. The first one insists that "interest" is the demand of people's subjective desires and the direction of people's will to meet certain needs, which has the attribute of consciousness. The second view holds that the content and manifestation of "interest" are objective. The third view argues that the content of "interest" is objective, but the subjective form is manifested, so it is the product of the unity of the subjective and the objective. The fourth view believes that "interest" means the relationship between the subject and the object, which is manifested in the distribution of the object to meet the needs of the subject, thus various social relationships are formed (Wang, 2010). The latter two views are dominant in China. The author believes that among the above four theories, the relation theory reveals the essential characteristics of "interest" better, because it takes subjective demand as the premise, and strengthens the needs to rely on the distribution of objects to achieve the ultimate satisfaction of the subject. However, due to the constraints of social material conditions, the interests of different social subjects have the same and consistent sides, and there are also the different, even conflicting sides.

In the West, people did not have a clear understanding of the word "interest" at first, and it was not until the outbreak of the Renaissance movement of the bourgeoisie that ideologists began to discuss the word "interest". The 17th-century British materialist Thomas Hobbes believed that each person has his or her own interests for his or her own ends (Hobbes, 2017). Although this point of view

emphasizes self-interest and believes that people are self-interested, it makes the word "interest" appear in people's field of vision. Subsequently, the French Enlightenment ideologist Paul Henri d'Holbach linked love with interests through his book *Système de la nature* in the 18th century, thinking that "interest" is the motive for what people love and hate. Ultimately, bourgeois theorists equated "interest" with human needs, arguing that human needs shape interests.

In addition, the word "benefit" is also generally used in English to represent "interest". According to the explanation given by the dictionary, "interest" means that an organization or group has common concerns or concerns on certain specific matters, especially politics and business (Pearsall, 2001). Similarly, the word "strong" has many different expressions in English, but their meanings are very similar, that is, as an adjective to modify the following noun to indicate its importance, so in the phrase "strong interests", the emphasis is on the importance of "interest".

From the above analysis, it can be concluded that Chinese emphasis on "strong interests" is aimed at a certain type of social subjects, and those matters that have a significant and huge impact on the social relations of such subjects involve the "strong interests" of such subjects. However, the western cognition of "interest" emphasizes the subjective aspect, that is, the subject's needs or satisfaction, in which the subject can be one person or a group; and "strong interests" are of great significance to the subject, or those needs that form a great stimulus to the subject.

2.2. Exploration on the Connotation and Extension of "Strong Interests" in International Documents

2.2.1. The Connotation and Extension of "Strong Interests" in WTO Official Documents

As a world trade organization, WTO takes the interests of all parties into account other than only the disputing parties in the settlement of disputes, so as to ensure that each ruling can bring positive benefits to all countries in the world, whether it is a member or a non-member, and promote the development of world trade. Therefore, in order to protect third parties with "strong interests" to a greater extent, some provisions are deliberately reserved in the WTO's official documents to protect their interests (Yang, 2005), such as the *Understanding on Rules and Procedures Governing the Settlement of Dispute* (hereinafter referred to as "DSU"). According to Article 4.11 of DSU, if a third party believes that a dispute involves its "strong interests", it may request to join the consultations by the claim is well-founded; meanwhile, according to Article 10.2, any party having a strong interest in a matter shall have an opportunity to be heard by the panel and to make written submissions to the panel.[2] As for what is the meaning of "strong interest" in the above clauses, the WTO official documents do not give a clear definition, but leave it to each party to address its reasons in the

[2]Understanding on Rules and Procedures Governing the Settlement of Disputes, at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#4 (Last Visited on Feb 15, 2022).

submissions to prove that they have a "strong interest" in the dispute.

A very typical case should be the *Tobacco Plain Packaging Act* (hereinafter referred to as the "Tobacco Act").[3] In 2012, Cuba, Indonesia, Honduras and the Dominican Republic submitted to the WTO for consultations on Australia's Tobacco Act. A total of 24 countries have submitted written or oral reports to the WTO as third parties, stating that they have "strong interests" in this case. Although some of the submissions of the parties are not public based on confidentiality requirements, according to the official summary files, it is still possible to clearly summarize each third party's explanation of their "strong interests", and the submissions have formed both for and against the Tobacco Act.

As an opponent, Zimbabwe started its request by stating the "strong interest" as a third party to join the dispute. Then the argument pointed out that Tobacco was the largest agricultural product produced in Zimbabwe after corn and cotton, which was exported to customers around the world, making tobacco Zimbabwe's largest agricultural export by volume and value. The Tobacco Act would devalue superior Zimbabwe-produced Virginia tobacco, and such a devaluation would directly threaten the livelihood of millions of farmers and the prospects for the overall economic development of the country.[4] Another opponent Japan was mainly concerned with the protection of intellectual property rights. When explaining the "strong interests" of a third party in the case, it believed that Australia had introduced the Tobacco Act in the name of public health, but it also legalized the infringement of intellectual property rights in Australia, especially the infringement of intellectual property rights in terms of trademarks, which was in conflict with Japan's domestic intellectual property laws, and also run counter to the idea of intellectual property protection on an international scale advocated by Japan.[5]

As a supporter, when China stated its "significant interests" in the submission of applying to become a third party, it indicated that it agreed with Australia's view that tobacco harms public health. At the same time, China had also been committed to controlling the use of tobacco through various means, so China hoped to recognize the government's effective suppression of the tobacco industry for the sake of human health through the WTO's final ruling on this case, and to gain worldwide support for Chinese existing regulations and policies.[6] Uruguay deliberately used the words "strong interests" at the end of its report on

[3] *Tobacco Plain Packaging Act 2011*: *C2021C00466*, at https://www.legislation.gov.au/Details/C2021C00466 (Last Visited on Feb 15, 2022).

[4] *See* 18-4060, Annex C-24 Executive summary of the arguments of Zimbabwe C-79, WT/DS435/R/Add.1 • WT/DS441/R/Add.1 • WT/DS458/R/Add.1 • WT/DS467/R/Add.1, at https://www.wto.org/english/tratop_e/dispu_e/435_441_458_467r_a_e.pdf (Last Visited on Feb 15, 2022).

[5] *See* 18-4060, Annex C-7 Executive summary of the arguments of Japan C-28, WT/DS435/R/Add.1 • WT/DS441/R/Add.1 • WT/DS458/R/Add.1 • WT/DS467/R/Add.1, at https://www.wto.org/english/tratop_e/dispu_e/435_441_458_467r_a_e.pdf (Last Visited on Feb 15, 2022).

[6] *See* 18-4060, Annex C-4 Executive summary of the arguments of China C-14, WT/DS435/R/Add.1 • WT/DS441/R/Add.1 • WT/DS458/R/Add.1 • WT/DS467/R/Add.1, at https://www.wto.org/english/tratop_e/dispu_e/435_441_458_467r_a_e.pdf (Last Visited on Feb 15, 2022).

its submission to become a third party to express its attitude. Uruguay pointed out that the country was currently considering a series of domestic regulations to control tobacco, so it is hoped that through the ruling of this dispute, it would reconfirm that each country could pass domestic legislations or administrative policies to control industries such as tobacco that endanger public health, for its own public interests. and could seek the support of the WTO for the measures taken by the Uruguayan government in the future.[7]

To sum up, by analyzing the submissions of the above-mentioned four countries as third parties, the basic connotation of the "strong interests" listed in the relevant documents of the WTO can be summarized as certain matters that, 1) in one country can have significant impacts on the economy of other countries as a whole., or 2) bring great challenges to one country's existing policies and regulations, or 3) have a vane-like influence on one country's future plans to formulate and implement policies and regulations. If any third party can explain in detail that the impact of the ongoing dispute on itself has reached one of the above three situations, then there is what is called a "strong interest" in the WTO's official documents. In this regard, the WTO should accept it as the third party to join the consultations.

2.2.2. The Connotation and Extension of "Strong Interests" in Restatement of the Law, Second, Conflict of Laws

In the existing judicial system in the United States, each State has its own independent jurisdiction, and the court judgments of one State will not certainly be recognized and enforced in other sister States. Under the coordination of the U.S. Constitution and its amendments, the *Restatement of the Law, Second, Conflict of Laws* (hereinafter referred to as *Restatement of the Law*) has become one of the feasible ways to resolve the uniformity of interstate judgements.

According to Topic 4 of Chapter 5 of *Restatement of the Law,* there are nineteen defenses concerning the recognition and enforcement of non-own State's judgements.[8] The first defense, that is Article 103, claims that a judgment ren-

[7] *See* 18-4060, Annex C-22 Executive summary of the arguments of Uruguay C-75, WT/DS435/R/Add.1 • WT/DS441/R/Add.1 • WT/DS458/R/Add.1 • WT/DS467/R/Add.1, at https://www.wto.org/english/tratop_e/dispu_e/435_441_458_467r_a_e.pdf (Last Visited on Feb 15, 2022).

[8] *Restatement of the Law, Second, Conflict of Laws* §103 A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.

§104 A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.

§105 A judgment rendered by a court lacking competence to render it and for that reason subject to collateral attack in the state of rendition will not be recognized or enforced in other states.

§106 A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment, except as stated in§105.

§107 A judgment will not be recognized or enforced in other states insofar as it is not a final determination under the local law of the state of rendition.

§108 A judgment for the payment of money will not be enforced in other states unless the amount to be paid has been finally determined under the local law of the state of rendition.

§109 A court will recognize or enforce a judgment rendered in a State of the United States that remains subject to modification in the State of rendition.

dered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State. In other words, although the *Full Faith and Credit* clause is derived from the *Constitution of the United States*,[9] the effect of this clause is not absolute, and when a judgment involves a state's "strong interest", this clause will be excluded from application (Sun, 2003). Besides, Article 117 is about public order, that is, if the judgment of one State is contrary to the public order of the sister State, it will also not be recognized and enforced. Therefore, it can be concluded that *Restatement of the Law* distinguishes "strong interests" from public order. Although there is no special clause in the whole regulation to explain the meaning of "strong interests", it emphasizes its unique status, and even in some cases, the validity of some policies issued by the federal government needs to give way to one State's own "strong interests".

It is found that the United States has a long history of emphasizing the "strong interests" that various States have, such as the divorce case of the Yarborough couple that occurred in 1927 (Kay, Kramer, & Roosevelt, 2013). The court of Georgia ruled that the divorce was favored, and at the same time Mr. Yarbrough was obliged to pay a total of $1750 in child support, including all living and education expenses for the daughter before she reached adulthood. Later, the daughter moved to Southern California to live with her grandfather. In 1930, when the daughter was 16 years old, she sued her father for the college tuition in the court of Southern California due to the child support paid by her father was not enough to cover the cost of college. Mr. Yarborough argued that according to the court of Georgia's decision, he had already finished his obligation for child support, and the court of Southern California should recognize the judgment based on the *Full Faith and Credit* clause. However, instead of recognizing and

§110 A judgment that is not on the merits will be recognized in other states only as to issues actually decided.

§111 A judgment will not be enforced in other states if the judgment is not subject to enforcement in the state of rendition because the judgment is subject to a condition not yet performed.

§112 A judgment will not be enforced in other states if it has been vacated in the state of rendition.

§113 A judgment will not be enforced in other states if the holder of the judgment has been permanently enjoined from enforcing the judgment.

§114 A judgment rendered in a State of the United States will not be recognized or enforced in sister States if an inconsistent，but valid，judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the State where the later judgment was rendered.

§115 A judgment will not be recognized or enforced in other states if upon the facts shown to the court equitable relief could be obtained against the judgment in the state of rendition.

§116 A judgment will not be enforced in other states if the judgment has been discharged by payment or otherwise under the local law of the state of rendition.

§117 A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim.

[9]*Constitution of the United States*, §4, Section 1 Each State to give credit to the public acts, etc. of every other State.

enforcing Georgia's previous judgment, the court of Southern California sentenced Mr. Yarborough to pay his daughter's college tuition on the grounds that the daughter's claim involved a "strong interest" of Southern California. As the judge Stone said, Georgia's court decision on child support was based on its own State's laws and policies, but Southern California also had its own statutes to protect juveniles, which were meant to provide support to ensure juveniles' basic normal life and study in this State, and it is also the responsibility of the State government. The issue of child support for juveniles involves the "strong interests" of the State, so if the previous judgment of the sister State was recognized, it would greatly sacrifice the interests of Southern California and cause undue interference with the judicial power of Southern California. That's why the sister State Georgia's court decision was not be recognized, but re-judged in accordance with Southern California's existing regulations (Kay, Kramer, & Roosevelt, 2013).

Through the above case analysis, it can be summarized that the connotation of "strong interest" in the *Restatement of the Law* is that, if the disputed matter involves the livelihood of a specific group of one State, and can also have substantial influence on this State, as well as causing undue interference with its jurisdiction, then this State can claim that it has a "strong interest" in the disputed matter.

2.3. The Connotation and Extension of "Strong Interests" in Convention on Choice of Court Agreements

2.3.1. The Relationship between "Strong Interest" and Public Order

Overview the provisions of the Convention, there are not only provisions concerning public order, but also the article relating "strong interests", which are intended to emphasize the differences in concept and application between them. Therefore, it is particularly important to clearly define the respective connotations of public order and "strong interests" in the Convention.

Public order originated from the concept put forward by the Italian jurist Bartolus de Saxoferrato, namely *Statuta Odiosa*. He believed that such foreign statues had no extraterritorial effect and could be excluded from their application within the territory in order to achieve the purpose of justice (Li, 2016). Since then, with the development of society, scholars of private international law have continued to elaborate the theory of public order step by step, such as Albert Venn Dicey of UK, Friedrich Carl von Savigny of Germany and other jurists, making this theory diversification. In 1804, the French Civil Code clearly stipulated the application of public order in the form of legal provisions for the first time, and Italy and Germany followed in their respective domestic laws. Today, public order becomes an indispensable chapter in countries that formulate their own private international laws (Jin, 1999).

Just as different legal systems have different understandings of public order, different countries have different legal terms for public order. According to Wil-

liam Tetley's point of view in the *International Conflict of Laws*, public order is composed of high standards of moral principles and social behaviors in civil law countries, while in common law countries, it consists of the fundamental principles of natural justice which are embodied in the national constitution, courts of rights, laws, statutes, precedents, and customary laws. Public order is called public policy in UK and US, vorbehaltsklausel or ausschie bungsklausel in Germany, and good customs or other social orders in South Korea. Public order in private international law focuses on the application of law in international civil and commercial disputes, so foreign laws that are applied under the guidance of conflicting rules can be excluded from application because they violate the public order of lex fori. Although most countries have made legislative provisions on public order, due to differences in traditional culture, customs, social development, etc., each country has its own standards for application of public order in judicial practice, and the unified standard does not exist worldwide. Therefore, Friedrich Carl von Savigny believed that there was no other way to apply public order than to interpret it in accordance with domestic morality, the spirit and purpose of domestic law (Huang, 2005).

Regarding the relationship between public order and "strong interests", we need to explore the meaning of public order firstly. Judging from the definition of "public order" in the general teaching material of private international law, it means that when a country's court hears a foreign-related civil and commercial dispute, according to the conflicting rules stipulated by its own country, the regulations of other countries should be applied. However, if the application of the foreign laws contradicts the "strong interests", basic policies, concepts of morality or fundamental principles of its country, then the foreign laws will be excluded from application, and the domestic laws will be used instead. It can be seen from this definition that the "strong interests" of the State of court seised are contained in public order, but considering the basic policies, concepts of morality or fundamental principles that are juxtaposed with, the emphasis of "strong interests" here is placed on the words basic or fundamental, whether social, moral, or legal (Huang, 2005).

From the analysis of the connotation of "strong interests" from different perspectives in the previous parts of this article, it can be found that when countries stress "strong interests", they always focus on specific matters, including events that could seriously affect the rights and lives enjoyed by certain types of subjects, and a collection of events that have a huge impact on a country's legislative planning and social governance for specific issues. Countries gain recognition and support from the outside world by explaining the importance of these specific matters to their own countries, so as to achieve the purpose of safeguarding their "strong interests". Since the "strong interests" used in the definition of public order emphasize the basic interests of the State of court seised, and although some "strong interests" are equivalent to basic interests, they do not cover all the "strong interests" of the State of court seised. That is to say, violat-

ing the public order of a country will inevitably involve violations of certain "strong interests" of the country; however, violating a country's "strong interests" does not necessarily violate the public order of that country. Therefore, when discussing the connotation of "strong interests" and the "strong interests" of the State of court seised in the definition of public order separately, it is obvious that the former one has a wider range.

It can be concluded from the above analysis that although countries are vague about the content and extension of public order, they are all emphasizing the basic interests, while stressing important interests as related to "strong interests", so these two phrases overlap partly, but the focuses are different. In addition, the abstractness of public order determines that it needs to be realized by means of interpretation in the process of application, and invisibly endows the court that decides to apply it greater discretion. By contrast, "strong interests" are often needed to be reflected by certain people or some specific matters, which are clearly understood and can be directly applied without ambiguity. Finally, the application of public order will produce different results due to different subjects or locations, so all countries have adopted this principle with caution, but "strong interests" are just the opposite. Due to the clear guidance, once the laws concerning "strong interests" are valid, it will be applied in disputes without further limitation.

2.3.2. The Relationship between "Strong Interest" and Public Order in Convention on Choice of Court Agreements

As an important principle in private international law, public order is explicitly regulated in foreign-related laws of one country and in international treaties, whose purpose is to maintain the basic social systems of one country, so the Convention is no exception. Article 6 of the Convention describes in detail the obligations of the non-chosen courts when dealing with an exclusive choice of court agreement,[10] and the third item states that if a court not chosen giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public order of the State of the court seised. In addition, Article 9 lists seven defenses in which the recognition or enforcement of court judgments can be refused,[11] and the fifth is that recognition or enforcement would be ma-

[10] *Convention of on Choice of Court Agreements*, §6, A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless
1) the agreement is null and void under the law of the State of the chosen court;
2) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
3) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
4) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
5) the chosen court has decided not to hear the case.

[11] *Convention of on Choice of Court Agreements*, §9, Recognition or enforcement may be refused if -
1) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
2) a party lacked the capacity to conclude the agreement under the law of the requested State.

nifestly incompatible with the public order of the requested State.

In addition, there are also provisions concerning "strong interests" in the Convention, that is, Article 21 of Chapter IV, where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter, and the parties to the dispute on that matter cannot determine the court of jurisdiction by signing an exclusive choice of court agreement, as well as the recognition and enforcement of judgments concerning that matter can be refused. According to the Explanatory Report of the Convention issued by the Hague Conference on Private International Law, the following statements are made regarding Article 21: Firstly, although Article 2(2) excludes certain matters from the scope of the Convention. Article 21 permits individual Contracting States to extend this list, as far as they are concerned, by making a declaration, considering the different national conditions of each Contracting State. Secondly, since the Convention does not clearly define the concept of "strong interests", so in order to prevent a Contracting State from abusing this right, the Convention requires that when making a declaration, a Contracting State must ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined. Thirdly, a Contracting State should not make a declaration without compelling reasons, because the interests of other parties must also be safeguarded. Lastly, the Contracting State that makes the declaration is required to use clear and unambiguous description, clearly define the specific matter, and cannot use any criterion such as the time and place limitations other than subject matter.[12]

It can be seen from the above analysis that public order and "strong interests" are stipulated in different provisions of the Convention respectively, and the "strong interests" clause is further interpreted in the Explanatory Report of the Convention, so it is obvious that there is no inclusive or equivalent relationship between them.

3) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

a) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

b) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

4) the judgment was obtained by fraud in connection with a matter of procedure;

5) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

6) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

7) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

[12] *See* Trevor Hartley & Masato Dogauchi, *Explanatory Report of the Convention of 30 June 2005 on Choice of Court Agreements*, p.843, at https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf (Last Visited on Feb. 15, 2022).

Overviewing the legislations and judicial practices of various countries, "strong interests" have not become a basic principle like public order in private international law, and at the same time, countries have different standards for the application of the principle of public order, so some countries believe that the connotation of public order consists "strong interests", and behaviors that violating the "strong interests" can be regulated by citing laws concerning public order. However, the views held by the Convention are consistent with the standpoints of WTO official documents and *Restatement of the Law, Second, Conflict of Laws* that discussed in the first part of this article, that is, "strong interests" are different from public order, and they should be stipulated by different provisions to reflect the equal importance, rather than a complete inclusive relationship. Therefore, behaviors that a violating a country's "strong interests", does not mean that they also violated the public order of that country. Besides, the Article 21 concerning "strong interests" can exclude specific matters from the scope of the Convention, and compared with the vagueness of the application of public order, Article 21 is more precise and transparency for the parties concerned, because it is more easy to judge that whether the disputed matter can be governed by exclusive choice of court agreements of the Convention (Takahashi, 2015).

By distinguishing "strong interests" from public order clearly, Contracting States of the Convention could make more proper and precise declarations on matters related to the "strong interest" in the ratification of the Convention, such as EU, China, etc.

3. The Application of Contracting States to Article 21 of Convention on Choice of Court Agreements: Taking EU as an Example

As discussed in the former chapters, the Convention allows Contracting States to make a declaration when they have "strong interests" in accordance with Article 21. EU is the first and only Contracting Party which made such declaration when acceding to the Convention according to the status table issued by the Hague Conference on Private International Law.[13] Therefore, the analysis of European declaration could help better understand the meaning of Article 21 of the Convention.

3.1. Necessity of Declaring a "Strong Interest" in the Insurance Contracts by EU

It is well known that, the EU has its own similar statue, that is *Council Regulations on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (hereinafter referred to as *Brussels Regulation I*) before the Convention. After the Convention was adopted by the Twentieth Dip-

[13] *See* STATUS TABLE: Convention of 30 June 2005 on Choice of Court Agreements, at https://www.hcch.net/en/instruments/conventions/status-table/?cid=98, (Last Visited on Feb. 15, 2022).

lomatic Conference of the Hague Conference on Private International Law on June 30, 2005, the EU members have never ceased to discuss whether to join the Convention. Therefore, considering the possibility of joining the Convention in the future, when the European Commission revised *Brussels Regulation I* in 2015 (hereinafter referred to as *Brussels Regulation II*) also referred to the Convention. The purpose to revise *Brussels Regulation I* is to reflect the achievements in the recognition and implementation of international civil and commercial judgments of the Convention since it was adopted, and to avoid the possible conflict of laws when acceding to the Convention in the future (Weller, 2017).

Nonetheless, the EU has made no concessions in its jurisdictional rules for litigations involving protection of the weak. From the author's perspective, the so-called weak in commercial cases, as far as commercial contracts are concerned, refers to one party's capacity and other aspects are in a relatively weak position, such as the ability to negotiate, the level of professional knowledge, especially the cognition of the law and the ability to response to litigation. According to *Brussels Regulation II*, disputes involving insurance contracts, consumer contracts and individual contracts of employment can only be sued in the courts of the Member State in which the weak party is domiciled. Taking matters related insurance contracts as an example, the insurer can be sued not only in the courts of the Member State where he is domiciled, but also in the courts for the place where the claimant is domiciled. Besides, the insurer may in addition be sued in the courts for the place where the harmful event occurred. However, the insurer can only sue the policyholder, the insured or the insurance beneficiary in the Member State where the defendant is domiciled, which protects the rights of the weak to the greatest extent and avoids the high cost of cross-border litigation, and even language barriers.[14] Since the Convention has excluded consumer contracts and employment contracts from its scope of application, the EU made a conditional declaration under Article 21 that EU has a "strong interest" in not applying the Convention to insurance contracts.

It is important to notice that EU acceded to the Convention as an IGO, so there would be two regulations on the recognition and enforcement of judgments in civil and commercial matters in EU Member States after the Convention came into force. That is, the Convention and the *Brussels Regulation II* are applied within EU at the same time. The purpose of EU's accession to the Convention is to solve the current difficulties in the recognition and enforcements of judgments between EU Member States and other countries, but the conflicts arising from the simultaneous application of the two regulations within EU were also taken into consideration, and how to overcome these conflicts by making declarations (Du, 2014). However, EU did not make a declaration on all the in-

[14]*REGULATION* (*EU*) *No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (*recast*), SECTION 3 Jurisdiction in matters relating to insurance, CHAPTER II.

consistencies, it only declared not applying the Convention to specific matters involving its own "strong interests" under Article 21 of the Convention instead, and the protection of the weak is the matter that EU has always paid much attention to. Whether treaties adopted by EU Member States or the current regulations stipulated by EU Commission, mandatory provisions all have been made on the protection of the weak, because from the perspective of socioeconomics, the interests of the weaker party in contracts need not only the protection of substantive laws, but also the support of procedural laws by stipulating special jurisdictional rules (Galič, 2016). Therefore, in order to ensure the implementation of relevant provisions on the protection of the weak within EU, it is imperative to declare that EU has a "strong interest" in disputes of insurance contracts.

3.2. Feasibility of Declaring a "Strong Interest" in the Insurance Contracts by EU

Different from traditional IGOs, in order to truly realize the free flow of people, goods, services and capital within EU Member States and to promote economic and social development, EU has incorporated the construction of a unified legal system into its planning since its establishment, in which the recognition and enforcement of judgments among Member States is a goal that the EU has always been actively pursuing. Although the *Treaty Establishing the European Community* itself does not directly regulate the recognition and enforcement of judgements of one EU Member State by others, the *European Economic Community* Treaty clearly regulates that each Member State is obliged to negotiate with each other about the procedures of enforcing judgements to ensure the interests of citizens in each Member State. Therefore, the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968* (hereinafter referred to as *Brussels Treaty*), came into force, which detailed the recognition and enforcement of court judgments by member states, and the *Brussels Treaty* is also the predecessor of *Brussels Regulation I* (Xu, 2011).

Although the EU has many difficulties in realizing internal unified substantive private laws, it has made great achievements in the field of contract laws. As early as 1980s, EU Member States signed the *Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980* (hereinafter referred to as *Rome Convention*), which unifies the legal application of contracts. In order to solve the procedural problem that the application of *Rome Convention* requires each Member State's approval, the European Parliament and the Council adopted *the Law Applicable to Contractual Obligations* (hereinafter referred to as *Rome I*) on 17 June 2008, which can be applied directly by EU Member States, and further realize the unification of contract laws applied within EU (Xu, 2011).

Whether *Brussels Regulation I* concerning procedural laws[15] or the "R*ome I*

[15]OJ L 351 20.12.2012, *Brussels Regulation I*§10-§16.

involving substantive laws[16], they all have special provisions for insurance contracts, which standardize and unify the law application of insurance contracts, and more importantly, they could provide clear guidelines for the recognition and enforcement of judgments among Member States for disputes of insurance contracts. Therefore, the declaration of made by the EU under Article 21 when it acceded to the Convention, which excludes the application of the Convention to certain insurance contracts that has a "strong interest" in, could protect the interests of EU Member States, and resolve relavent disputes as well as the recognition and enforcement of judgements concerning insurance contracts in accordance with existing regulations of EU.

3.3. Reasons for EU Having a "Strong Interest" in Insurance Contracts

3.3.1. The Jurisdiction over Insurance Contracts

Regarding the jurisdiction over insurance contracts stipulated in regulations of EU, the earliest provisions were in Section 3, namely jurisdiction in matters relating to insurance, of the *Brussels Convention*, which stipulated in which courts the insurer can be sued in general, in which courts the insurer can be sued in respect of liability insurance or insurance of immovable property, in which courts the insurer can bring proceedings, and exceptions through six different legal provisions.[17] Although *Brussels Regulation I* and Brussels Regulation II replaced *Brussels Convention*, which can be directly adopted by EU Member States, but the framework for jurisdiction over insurance contracts has not changed due to the same classifications. The difference is that *Brussels Regulation I* and Brussels Regulation II pay more attention on protecting the rights of the weak, extending the rights to sue from policyholders to the insured and beneficiaries, and allow them to sue the insurer in the courts of their own domiciles (Huang & Zou, 2006).

Whether *Brussels Convention* or *Brussels Regulation*, EU's special jurisdiction over insurance contracts is mainly reflected in the fact that it does not allow the contracting parties to reach a choice of court agreement in advance. Due to the particularity of this type of contracts, not only is the policyholder at a disadvantage position to the insurer, but also a large number of standard clauses exist in this type of contracts which drafted by the insurer, and the policyholder often have no choice. If the two parties to an insurance contract are allowed to choose the jurisdiction of the court by agreement in advance, it will obviously make the interests of the weaker party represented by the policyholder unable to be protected. Therefore, legislations of EU limit the choice of court agreement can be entered into only after a dispute has arisen.[18] In addition, the choice of court agreement can be concluded in advance between a policyholder and an insurer,

[16]OJ L 177 4.7.2008, Rome I, §7.

[17]OJ L 299, 31.12.1972, *1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, §7-§12.

[18]OJ L 351 20.12.2012, *Brussels Regulation I*, §15 (1), The provisions of this Section may be departed from only by an agreement which is entered into after the dispute has arisen.

both of whom are domiciled in the same contracting State, and which has the, effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad.

In addition to recognitions of the choice of court agreements in the above conditions, the *Brussels Convention* and the *Brussels Regulation I* and its recast also detail several other situations in which the choice of court agreements in advance are permitted, and these types of insurance contracts are no longer bound by the principle of protection of the weak, so they are governed by general provisions if disputes arised. As mentioned at the beginning of Chapter 2, declarations made by the EU under Article 21 when acceding to the Convention adopt a negative list model, which are based on the exclusion of special jurisdiction over insurance contracts. For example, jurisdiction over insurance contracts concerning the liability for large risks[19], reinsurance contracts[20], etc. The special jurisdiction provisions are not applied to these types of contracts within EU, which means that EU does not have a "strong interest" in those contracts, so EU can apply the Convention to them.

3.3.2. The Application of Laws to Insurance Contracts

EU's protection of the disadvantaged party in an insurance contract is not only reflected in the special provisions on its jurisdiction, but also in the application of laws to the insurance contract, which is different from general contracts. The EU takes the *Rome I* as a watershed in the law applicable to international insurance contracts. Before *Rome I* came into being, there were two different rules of applications, namely, the *Rome Convention* was applied to insurance contracts which cover risks situated outside the territories of the EU member states, and for insurance contracts within the territory of the EU, various insurance directives promulgated by EU were applied, such as the *First Council Directive 79/267/EEC of 5 March 1979*, *Second Council Directive 90/619/EEC of 8 November 1990, Council Directive 92/96/EEC of 10 November 1992* (*third life assurance Directive*) and *Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance*, etc. (Shang, 2008). *Rome I* was formulated by the European Parliament and the Council of EU on the basis of *Rome Convention*, which was promulgated on June 17, 2008 and came into force on December 17, 2009. It unified the law applicable to insurance contracts within EU Member States, and ended the era of different rules were applied based on where the risks covered are situated.

According to Article 7 of the *Rome I*, an insurance contract covering a large

[19]OJ L 177 4.7.2008, *Rome I*, §7(2), An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (2) shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

[20]OJ L 177 4.7.2008, *Rome I*, §7(1), This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

risk shall be governed by the law chosen by the parties rather than mandatory provisions. As for the meaning of a large risk, it is based on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance, and the last one is *Directive 2009|138|EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance* (*Solvency II*) (*recast*), which was amended on 30 June 2021. In the Section 3 Definitions, referring to the classification of all risks in the annex, the insurance contracts covering large risks are listed in detail. In the aforementioned *Brussels Regulation II*, insurance contracts covering large risks are allowed to choose the court by agreements at any time, and the definion of large risks here are the same as *Rome I*. For reinsurance contracts, EU has never formulated any special provisions to regulate them, because they are signed by two insurers, which means that only commercial entities can reach a reinsurance agreement. Since there is no relatively weak party in this type of contract, the special protection is no longer needed, and the relevant provisions regulating commercial activities can be applied. In *Rome I*, the law application to reinsurance contracts is excluded from the scope. Similarly, in terms of jurisdiction over insurance contracts, there are no limitations on the jurisdiction over reinsurance contracts in *Brussels Regulation II*.

From the above analysis, it can be concluded that insurance contracts covering large risks and reinsurance contracts are not subject to the special provisions on insurance contracts in *Rome I*, giving parties in these two types of contracts complete freedom and no limitations in the application of laws to them. Therefore, when the EU acceded to the Convention, even though it made a declaration on the application of the Convention to insurance contracts due to the "strong interests" of EU has, EU agreed to apply the Convention to insurance contracts covering large risks and reinsurance contracts to achieve the goal that existing EU laws link with the Convention, and further promote the EU's openness in international insurance contracts.

3.3.3. Analysis on the Relationship between Insurance Contracts and Public Order

Based on the idea of taking the party represented by the policyholder in the insurance contract at a disadvantaged position to provide special protection, whether treaties signed by EU Member States, such as the *Brussels Convention* and the *Rome Convention*, or the regulations and directives directly legislated by EU, such as *Brussels Regulation I*, *Brussels Regulation II* and *Rome I*, there are special provisions on insurance contracts, including mandatory provisions in all of them. These articles are designed to protect the rights of the weak and to balance the interests between policyholders and insurers.

Different countries or districts have different understandings of public order, but EU has not clearly explained the connotation of public order through any provisions in the above-mentioned regulations. It simply stipulates that when one Member State of EU is guided by conflicting rules to apply the laws of other

Member States, they could not violate the public order of that Member State, which means that EU does not have an overall unified standard for the application of public order. Just as the British jurist Albert Venn Dice believes that if the rights obtained by recognizing the laws of other countries will violate the British legal policies, moral principles or political systems, UK will not recognize them, because such provisions violate the basic understanding of fairness, justice, freedom and human rights (Huang, 2005). Nonetheless, the rules on the recognition and enforcement of judgments among Member States would be useless if there were no constraints on the application of the principle of public order. Therefore, after the *Brussels Treaty* came into force, the Contracting States signed an agreement on June 3, 1971, which gave the European Court of Justice the right to interpret *Brussels Treaty*, so as to ensure the uniformity of the application of the provisions, including the interpretation of problems confronted when applying the principle of public order in judgments (Pontier & Burg, 2004). According to the interpretation of the Court of Justice, it is one of its responsibilities to ensure that all Member States must abide by the fundamental values and principles inherent in the regulations of EU. Take the protection of fundamental human rights for example, the constitutional traditions of each Member State and the international treaties concerning human rights protection acceded to in the name of the EU constitute the main basis for the Court of Justice to affirm these basic human rights, especially the *Convention for the Protection of Human Rights and Fundamental Freedoms* provides guidelines for the interpretation and application of public order in each Member State of EU (Xiao & Zhu, 2008). Although the law currently applied by the Member States directly is the *Brussels Regulation II*, it derived from the *Brussels Treaty*. Therefore, the guiding significance of the interpretation of public order by the European Court to the application of laws of each Member State cannot be ignored.

To sum up, whether it is the Member States or the EU itself, the interpretation and application of public order emphasizes the protection of basic legal concepts or moral standards, and the interests of policyholders obviously do not belong to that category. Therefore, policyholders' interests cannot be protected through the application of the principle of public order in the international civil and commercial matters. Similarly, the policyholder does not belong to the disadvantaged group in the traditional social sense, but they are in a weaker position compared to the insurer in the insurance contract, so in order to prevent the undue injustice and realize the concept of protecting the rights and interests of the weak in civil and commercial activities, the interests of both parties in the insurance contract can only be balanced by formulating special rules.

4. Opinions on the Declarations of Specific Matters Which Have "Strong Interests" under Article 21 of the Convention on Choice of Court Agreements

In view of the above analysis of the difference between "strong interests" and public order, and European declaration under Article 21 of the Convention, vi-

olations of mandatory provisions in laws and regulations and the principle of public order are different, so for those mandatory provisions, additional analysis is needed to determine whether it is necessary to further exclude certain matters from the scope of the Convention through where China has a "strong interest" in.

4.1. The Analysis of Specific Matters in Which China Have Existing "Strong Interests"

According to Article 2 of the Convention, if an exclusive choice of court agreement to which a natural person is one party or relating to contracts of employment, the Convention shall not be applied. At the same time, there are sixteen categories of matters excluded from the application of the Convention, including the status and legal capacity of natural persons, family law matters, wills and succession, anti-trust matters, etc. Regarding the application to intellectual property rights, as a participant of the Convention, China has always been against it (Xu, 2005), but due to the inconsistent opinions of other countries, the Convention finally is not applied to the infringement of intellectual property rights other than copyright and related rights, however, infringement proceedings are brought for breach of a contract between the parties relating to such rights that are not excluded from the application.[21] According to the provisions on intellectual property rights in Chapter V, Section 3 of the *General Principles of the Civil Law of the People's Republic of China* (*2009 Amendment*), copyright and related rights are protected under the same conditions as patents, which include inventions, utility models and designs, so China could declare that has a "strong interest" in not applying this Convention to copyright and related rights. In addition, although *Copyright Law of the People's Republic of China* was issued and effective in 1990 to further protect copyright and related rights, which was also amended in 2001, 2010 and 2020 respectively, there is still a certain gap between China's copyright protection and developed countries, such as the term of copyright protection.

EU issued *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights* in 1990s, and substantially amended it in 2006, namely *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights*, which was amended again on 31 October 2011 (hereinafter referred to as the *Directive 2011*). According to Article 1 of the *Directive 2011*, the rights of an author of a literary or artistic work shall run for the life of the author and for 70 years after his death. President William Jefferson Clinton signed the S*onny Bono Copyright Term Extension Act* on October 27, 1998, which extended the term of the rights of an author of a literary or artistic work which was created after January 1, 1978 to the life of the author and 70 years after his death.[22] However, according to *Copyright Law of the People's*

[21] *See* Convention on Choice of Court Agreements, §2.
[22] *See* U.S. Copyright Office, Circular 1: Copyright Basics, p.5-6.

Republic of China, the current term of copyright protection is limited to the author's life and 50 years after his death.[23] Considering the current gap between Chinese regulations on copyright and the international community, the provisions of the Convention on copyright and related rights are obviously contrary to Chinese "strong interest" in this area. As a result, it is recommended that how to further protect Chinese intellectual property should be considered when China acceding to the Convention.

According to Article 34 of *Civil Procedure Law of the People's Republic of China* (*2021 Amendment*) (hereinafter referred to as the *Civil Procedure Law 2021*), actions instituted for a real estate dispute, a dispute arising from harbor operations and an inheritance dispute shall be under the exclusive jurisdiction of the people's courts as specified. Besides,[24] according to Article 273 of *Civil Procedure Law 2021*, actions instituted for disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures or Chinese-foreign cooperative exploration and exploitation of natural resources in the People's Republic of China shall be under the jurisdiction of the people's courts of the People's Republic of China. Regarding the above-mentioned three cases which are under the exclusive jurisdiction, the Convention is not applied to inheritance disputes, but concerning the immovable property, only rights in rem and tenancies are excluded for the application, as well as disputes arising from harbor operations are not in the list of exclude

[23] *Copyright Law of the People's Republic of China* (*2020 Amendment*) Article 23 In respect of a work of a natural person, the term of protection of the right of publication and of the rights provided in Items (5) through (17) of Paragraph 1 of Article 10 of this Law shall be the lifetime of the author and fifty years after his death, expiring on December 31 of the fiftieth year after his death. In the case of a work of joint authorship, such term shall expire on December 31 of the fiftieth year after the death of the last surviving author.

For a work of a legal person or an unincorporated organization, and a work for hire whose copyright (excluding right of signature) is owned by a legal person or an unincorporated organization, the protection period for its right of publication shall be 50 years, ending on December 31 of the 50th year after the creation of the work; and the protection period for its rights as prescribed from items (5) to (17) of paragraph 1 of Article 10 herein shall be 50 years, ending on December 31 of the 50th year after the first publication of the work, but if a work has not been published within 50 years after the completion of the creation, it shall no longer be protected by this Law.

For an audiovisual work, the protection period for its right of publication shall be 50 years, ending on December 31 of the 50th year after the creation of the work; and the protection period for its rights as prescribed from items (5) to (17) of paragraph 1 of Article 10 herein shall be 50 years, ending on December 31 of the 50th year after the first publication of the work, but if a work has not been published within 50 years after the completion of the creation, it shall no longer be protected by this Law.

[24] *Civil Procedure Law of the People's Republic of China* (*2021 Amendment*) § 34 The following cases shall be under the exclusive jurisdiction of the people's courts as specified below:

1) An action instituted for a real estate dispute shall be under the jurisdiction of the people's court at the place where the real estate is located.

2) An action instituted for a dispute arising from harbor operations shall be under the jurisdiction of the people's court at the place where the harbor is located.

3) An action instituted for an inheritance dispute shall be under the jurisdiction of the people's court at the place of domicile of the deceased upon death or at the place where the major part of estate is located.

matters of the Convention.[25] Therefore, when China accedes to the Convention, it is necessary to pay attention to matters involving immovable property, harbor operations, and the three types of Chinese-foreign joint venture contracts. The detailed analysis is as follows:

Firstly, according to Article 28 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* (*2020 Amendment*), the jurisdiction over a contractual dispute involving contracted operations on rural land, tenancy, construction of a building project, or purchase of a policy-based property shall be determined according to the jurisdiction over an immovable property dispute, so more attention should be paid to foreign-related disputes in immovable property. Since the principle of public order may not be applicable when such mandatory provisions are violated, it is necessary to declare that China has a "strong interest" in these matters under Article 21 of the Convention and prevent the application of the Convention in such matters from affecting Chinese stability.

Secondly, although there is not a clear explanation of harbor operations in the current laws in force, the Ministry of Communications once issued *Harbor Operations Regulation* in 2000, which was invalid in 2016, but defined harbor operations, so it still has reference value. According to Article 3 of *Harbor Operations Regulation*, activities such as the shipment and storage of port cargo all belong to the harbor operation. In addition, according to Shao Wei suing Zhou Liang and others on transportation contract disputes, the Intermediate People's Court of Xuzhou City, Jiangsu Province explained the harbor operations in the award of (2017) Su 03 Civil No.674, which is the operation matters arising from the process of transportation, shipment matters and storage of goods in harbors, and infringements caused by faulty operations of

[25] *CONVENTION ON CHOICE OF COURT AGREEMENTS* Article 2(2) This Convention shall not apply to the following matters -
1) the status and legal capacity of natural persons;
2) maintenance obligations;
3) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
4) wills and succession;
5) insolvency, composition and analogous matters;
6) the carriage of passengers and goods;
7) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
8) anti-trust (competition) matters;
9) liability for nuclear damage;
10) claims for personal injury brought by or on behalf of natural persons;
11) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
12) rights in rem in immovable property, and tenancies of immovable property;
13) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
14) the validity of intellectual property rights other than copyright and related rights;
15) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
16) the validity of entries in public registers.

ships berthed in ports.[26] From the above analysis, it can be drawn that the exclusive jurisdiction over disputes arising from harbor operations only emphasizes the territorial nature, that is, the location of the harbor. Therefore, the "strong interest" that China has in such disputes is not clear.

Finally, the premise for the court to have exclusive jurisdiction over the three types of Chinese-foreign joint venture contracts is that when disputes occur, the place of performance of the contract is in China, that is, the joint venture is an enterprise legal person in China,[27] and the exploration and exploitation of natural resources are in China. Therefore, the foreign party has made a commitment when setting up an enterprise in China, and both Chinese and foreign parties should accept the exclusive jurisdiction of the people's courts of China. It is well known that the formulation of basic foreign investment laws was included in the legislative plan in 2018 in order to meet the needs of building a new open economy system,[28] so the *Foreign Investment Law of the People's Republic of China* (hereinafter referred to as the *Foreign Investment Law*) was issued on 15 March, 2019, and came into force on 1 January, 2020 based on the plan. According to Article 2 of *Foreign Investment Law*, an enterprise formed and registered within China under the laws of China in which all or part of investment is made by a foreign investor can be called a foreign-funded enterprise. Besides, foreign-funded enterprises formed under other Chinese laws before the *Foreign Investment Law* comes into force may maintain their original business forms, among others, for five years after this Law comes into force. However, the *Foreign Investment Law* is still the substantive law that determines the rights and obligations of Chinese and foreign investors, and does not mention the jurisdictions over disputes arising from contracts for Chinese-foreign joint ventures. Therefore, according to the above-mentioned provisions of the *Civil Procedure Law 2021*, actions instituted for disputes arising from the performance of these contracts still are under the exclusive jurisdiction of the people's courts of China, especially for contracts for Chinese-foreign cooperative exploration and exploitation of natural resources that require relevant government approval in advance. In view of the current legal provisions, the five-year buffer period regulated in *Foreign Investment Law*, and the timeliness of Chinese domestic ratification of the Convention, the author suggests that China could declare that it

[26] *See* China Judgements Online, at https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=273ba8a077194bd2a77ca83c00f1d303 (Last Visited on Feb.15, 2022).

[27] *See Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (*2016Amendment*), §16(2), Where no arbitration clauses have been included in the joint venture contract or no written arbitration agreement have been reached after a dispute arises, any party may bring a suit with the people's court.

Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures (*2017 Amendment*), §26(2), The Chinese or foreign party may bring a suit in a Chinese court, if no arbitration clause is provided in the contractual joint venture contract and if no written agreement is concluded afterwards.

[28] *See* National People's Congress Standing Committee's 2018 Legislative Work Plan, at http://www.npc.gov.cn/npc/c30834/201804/1c1b9070eb574282b8ef6d2f33615383.shtml (Last Visited on Feb.15, 2022).

would not apply the Convention to these three types of contracts for Chinese-foreign joint ventures since China has "strong interests" in these matters. If China finds that it does not have "strong interests" in them in future, then such declarations referred to in Articles 21 can be modified or withdrawn at that time in accordance with Article 32 of the Convention.

In addition, it should be noted that Chinese supervision on insurance contracts is still at a relatively early stage compared to EU. At present, there are only general provisions on the application of laws and jurisdictions over insurance contracts, especially for disputes arising from foreign-related insurance contracts, whether in *Civil Procedure Law 2021*, or the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* (*2020 Amendment*), which were just amended, and do not have any specifical provisions involving the insurance contracts besides general regulations on all contract, as well as the choice of court agreement is allowed.[29] In other words, China does not categorize different types of insurance contracts and formulate different jurisdictions over them to protect the interests of the disadvantaged group represented by policyholders the same as EU. Therefore, China does not have a "strong interest" in insurance contracts as opposed to the declaration of EU when it acceded to the Convention, and could accept the application in these matters.

4.2. Recommendations on Chinese Declarations under Article 21

In view of the requirement of declarations under Article 21 of the Convention, a State need to define the matters where it has a "strong interest" clearly and precisely without other additional conditions. It can be shown from the above analysis of "strong interests", whether it is foreign laws or the Chinese regulations, only certain conditions are met can be called "strong interests". In addition, the purpose of the Convention is to unify rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters. If each Contracting State wants not to apply the Convention to matters that are inconsistent with their own laws by declaring that it has "strong interests" in them,

[29] *Civil Procedure Law of the People's Republic of China* (*2021 Amendment*) Article 272 Where an action is instituted against a defendant which has no domicile within the territory of the People's Republic of China for a contract dispute or any other property right or interest dispute, if the contract is signed or performed within the territory of the People's Republic of China, the subject matter of action is located within the territory of the People's Republic of China, the defendant has any impoundable property within the territory of the People's Republic of China, or the defendant has any representative office within the territory of the People's Republic of China, the people's court at the place where the contract is signed or performed, where the subject matter of action is located, where the impoundable property is located, where the tort occurs or where the domicile of the representative office is located may have jurisdiction over the action.

Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (*2021 Amendment*) Article 531 The parties to a dispute over a foreign-related contract or any other right or interest in property may, by a written agreement, choose the foreign court at the place of domicile of the defendant, at the place where the contract is performed or signed, at the place of domicile of the plaintiff, at the place where the subject matter is located, at the place where the infringement is conducted or at any other place actually connected to the dispute to have jurisdiction over the dispute.

then the Convention would become meaningless. EU was the first Contracting Party to make a declaration under Article 21, and it only declared that it has a "strong interest" in insurance contracts when acceding to the Convention. Therefore, it is suggested that if China intends to make a declaration under Article 21 in the future, the matters in which China has "strong interests" should be imperative and not too much at the same time. The specific declaration matters can be considered from the following two aspects.

Firstly, in terms of intellectual property rights, it is recommended that China makes a declaration of jurisdictions over all intellectual property disputes where China has "strong interests". According to the Explanatory Report of the Convention issued by the Hague Conference on Private International Law, when a State declares that it will not apply the Convention to matters that it has a strong interest in under Article 21, such a declaration may even be made with regard to matters excluded from the exclusionary provisions in Article 2(2) of the Convention, which can also be understood and accepted by the Hague Conference on Private International Law. Therefore, although intellectual property rights are already excluded from the scope of the Convention, it is still recommended that Chinese declaration under Article 21 can be expressed as follows:

In order to protect and promote the development of intellectual property rights in China, in accordance with Article 21 of the Convention, China declares that it will not apply the Convention to all disputes arising from the following intellectual property rights, including the validity, infringements and contractual disputes:

1) copyright and related rights;

2) patents, including inventions, utility models and designs.

Secondly, in terms of exclusive jurisdiction, it is recommended that China makes a declaration of jurisdictions over disputes arising from immovable property, the performance of contracts for immovable property, Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and Chinese-foreign cooperative exploration and exploitation of natural resources in China where China has "strong interests". Since Article 2 of the Convention has excluded rights in rem in immovable property, and tenancies of immovable property from its scope of application, it is recommended that China only declare that it has "strong interests" in the jurisdictions over a contractual dispute involving contracted operations on rural land, construction of a building project, and purchase of a policy-based property, which is not only consistent with Chinese existing provisions involving exclusive jurisdictions, but also can meet the requirements of the Convention that declarations are no broader than necessary. Besides, for disputes arising from the three types of Chinese-foreign joint ventures, it is suggested to keep the premise of the performance of those contracts is in China, which is more clear and precise. Therefore, it is recommended that Chinese another declaration under Article 21 can be expressed as follows:

In order to safeguard the fundamental interests of Chinese people and main-

tain the stable development of Chinese society, in accordance with Article 21 of the Convention, China declares that it will not apply the Convention to jurisdictions over the following cases:

1) contracted operations on rural land;

2) construction of a building project;

3) purchase of a policy-based property;

4) the performance of contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and Chinese-foreign cooperative exploration and exploitation of natural resources in China.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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