

INTERNET LAW AND POLICY
IN THE PEOPLE'S REPUBLIC OF CHINA

by

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With a population of approximately 1.3 billion people, the People's Republic of China ("PRC") has more citizens than any other state in the world. That fact, combined with the PRC Government's encouragement of Internet use, make it reasonable to suggest that the PRC is emerging as a major participant in the global use of the Internet. The potential of the PRC as a future market is augmented by the increasing strength of the PRC's economy. Currently the PRC is the fastest growing economy in Asia. Indeed, the rapid development of the Chinese economy is unprecedented in modern history. Further, there is currently a certain degree of fear about the impact that the PRC's restrictions on freedom of expression might have on the Internet.

It is against this background that this paper provides a 'snapshot' of some interesting aspects of Internet law and policy in the People's Republic of China. Particular attention is given to the extraterritorial reach of the PRC's regulation. More specifically, it examines the circumstances under which the PRC courts may claim jurisdiction over a foreign website in relation to contracts and defamation.

Some Words about the Legal System of the PRC [1]

The modern legal system of the People's Republic of China operates in a five-tier structure. Starting from the bottom the structure consists of the village level, the county level, the municipal level, the provincial level and at the top, the central level. All of these levels are largely in the control of the Communist Party of China, with its approximately 58 million¹ members.

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¹ Kui Hua Wang, *Chinese Commercial Law* (Oxford University Press, Melbourne, 2000) 14

Further, “[t]he important posts in the judicial system are held by CPC members without any exceptions”.² Against this background it is obvious that the CPC holds a firm grip of the legal system in the PRC.

While it has become considerably easier over the past years, researching Chinese law is far from uncomplicated:

The Chinese would say: ‘No you can’t do that, there’s a law against it.’ And we would say: ‘Okay, show us the law’, and they would say the law is confidential...you can’t see it.³

The situation in the PRC does not appear to be quite that bad now, but many foreign investors rate the legal system of the PRC as one of the worst in Asia.⁴ Legislation is enacted, amended and repealed at what seems to be an ever-increasing speed. Thus, it is very hard to obtain a sufficient over-all grip on the legislation of the PRC. This is particularly so in relation to information technology, an area currently regulated by a large number of different, but partly overlapping, pieces of legislation. Adding to the confusion is the fact that one and the same term can be used differently in different legislations (at least in their translated form). For example, in *Interim Administrative Measures of Beijing Municipality on Online Advertisements* (2001), Information Service Providers (otherwise referred to as Internet Content Providers ICP) are called ISPs in the abbreviated form (which is frequently used in that piece of legislation.). Normally, both internationally and in the laws of the PRC, the abbreviation “ISP” refers to Internet Service Providers.⁵ If indeed it is more severe than simply a translations issue, this lack of coordination in the terminology is obviously an obstacle for effective application of the legislation. Either way, it can doubtlessly be very confusing for “outsiders” trying to understand Chinese legislation and guidelines. However, it is not just the enormous amount of legislations that cause problems, also the inconsistency in the interpretation of the law is a problem, and this problem is augmented by overlapping agency authority.

² Kui Hua Wang, *Chinese Commercial Law* (Oxford University Press, Melbourne, 2000) p15

³ Molly Furzer, *crouching tiger hidden laws*, 10 e.Law Practice 38 (Feb. 2002), at 39.

⁴ Molly Furzer, *crouching tiger hidden laws*, 10 e.Law Practice 38 (February 2002).

⁵ see, for example, Article 8 of *Administrative Measures on Business Establishments that Provide Internet service* (2001).

Some Words about the Internet in the PRC [2]

The development of information technology and the use thereof in the PRC can rightfully be described as explosive. In July 2006, it was estimated that approximately 123 million Chinese citizens use the Internet at least for one hour per week.⁶ Yet, while the number of Internet users in the PRC is steadily increasing, it is still only a low percentage of the total number citizens of the PRC that use the Internet. Thus, even though it can be expected that the increase of number of Internet users will level out, there can be no doubt that the PRC Internet market is far from reaching its peak and we can be sure that it will continue to expand.

The PRC's use of Internet technology dates back to 1987 when Professor Qian Tianbai sent China's first e-mail with the expressive title "Crossing the Great Wall to join the World".⁷ In October 1990 the same professor further registered China's top domain ".cn" on behalf of the PRC.⁸ However, China's top domain name servers were not installed in the PRC not until 1994.⁹ In 1995 the PRC's first e-journal¹⁰ and first BBS¹¹ appeared, and that year is also considered to be the starting point of the public access to the Internet.¹²

The Internet in the PRC is structured according to a four-tier system not dissimilar to that of many other states. Starting from the bottom we have the individual Internet users (tier four). They connect to the Internet through Internet Service Providers (ISP) (tier three). The ISPs connect to an Internet Access Provider (IAP). The IAPs, representing the second tier, are the ones that actually own the physical networks, which are leased by ISPs. Finally the IAPs connect to the Government's gateway (tier one) and can thereby access the global Internet. What makes this system different to the

⁶ China Internet Network Information Center, *18th Statistical Survey Report on the Internet Development in China* (July 2006).

⁷ China Internet Network Information Center, *Evolution of Internet in China* (China Internet Network Information Center), www.cnnic.net.cn/evolution.shtml (Accessed: 1st April 2002).

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Lokman Tsui, *Internet in China: Big Mama is watching you* (MA Thesis; University of Leiden, Chinese Language & Cultures, 2001), www.lokman.nu/thesis/010717-thesis.pdf at p20

system of many other states is the fact that this is not merely the system normally used, but the system prescribed by law.¹³ Thus, for example, an Internet user may not connect to the Internet via a foreign ISP in order to circumvent the system, and any such attempts will be punished.¹⁴

Some Consequences of the Internet Structure in the PRC [3]

The question of what impact the Internet will have on the social structure of the PRC, has received a fair amount of attention:

All we know for sure is that the new technology will make a huge difference to China's future. It may empower ordinary people, but it may also endow authorities with a new tool to monitor private speech and manipulate public opinion.¹⁵

Whether or not the use of the Internet will work to favour the development of democracy in the PRC depends to a great extent on how the Internet is regulated by the PRC Government. So far, the political attitude towards information technology in the PRC could, a little simplified, be described as a struggle between two political goals. On one hand, the government is eager to take advantage of the Internet and support its rapid development, and on the other hand the Government is seeking to minimise the potential "harm" of the Internet. This is obviously a very difficult balancing act.

Either way, the consequence of the PRC's Internet structure is that the PRC Government can control the Internet traffic that enters and leaves the PRC part of the Internet, and the Government of the PRC has been known to block a range of foreign websites in order to limit the amount of foreign content available to its citizens. Examples of websites that have been blocked include CNN, BBC, Washington Post, New York Times, Yahoo!,

¹³ See: *Provisional Regulations of the People's Republic of China for the Administration of International Connections to Computer Information Networks* (1997). I have been unable to confirm whether this Provisional Regulation still is in force. However, the key point, that the PRC exercises a relatively strict control over what crosses the border to the PRC part of the Internet, is beyond doubt. See further: OpenNet Initiative, *Internet Filtering in China in 2004-2005: A Country Study* www.opennetinitiative.net/studies/china/ (Last visited 25 April, 2006).

¹⁴ See, for example, *Official Reply of the Supreme People's Procuratorate on the Application of Laws to Acts of Illegally Operating International, Hong Kong, Macao, or Taiwan Telecommunication Services*, 6th of February 2002, The Supreme People's Procuratorate, www.isinolaw.com.

¹⁵ Malinowski T, *China's Willing Censors* (Human Rights Watch), <http://www.hrw.org/editorials/2001/china0420.htm> (Accessed: 30th of April)

Amnesty International, Voice of America and foreign Falun Gong websites. However, the blocking of foreign websites is not static. Rather it comes on and off seemingly unpredictably, and may not always affect the whole country. Similar structures can be found, for example, in Saudi Arabia and Singapore, but are otherwise relatively rare.

If taken to the extreme (i.e. blocking access to all foreign websites), this method can arguably be seen as an alternative to aggressive extraterritorial claims of jurisdiction – foreign material that is effectively blocked simply cannot cause direct local harm in the PRC. Thus, if blocking was to be taken to its extreme, there would be no need, or indeed any ground, for claims of extraterritorial jurisdiction. It is noteworthy that, so far, the PRC has not made any wide Internet-related jurisdictional claims, while, for example, US, France, Australia, Italy, Germany, Canada and the UK have all made such claims.

With that background information in mind, it is now suitable to examine the circumstances under which the PRC courts may claim jurisdiction over a foreign website in relation to contracts and defamation.

Jurisdictional Issues [4]

The fundamental jurisdictional rule in Chinese conflicts is that a civil suit against a Chinese citizen comes under the jurisdiction of the court at the place where the defendant is *domiciled*,¹⁶ or if not the same, under the jurisdiction of the people's court at the place of his regular abode, or residence.¹⁷ However, the law of the PRC provides for separate jurisdictional rules in foreign-related, or so-called, *shewai* cases.

A Judicial Interpretation of the Supreme People's Court from 1992¹⁸ provides rather clear guidelines as to when a case is a *shewai* case. A case is classed as a *shewai* case if one or both parties are foreigners (including stateless persons, foreign enterprises or foreign organisations). Further, a case is classed as a *shewai* case if the legal fact that the civil legal relationship

¹⁶ Law of Civil Procedure of the People's Republic of China (1991), Article 22.

¹⁷ Law of Civil Procedure of the People's Republic of China (1991), Article 22.

¹⁸ *Opinions (I-VII) of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, 14 July 1992, The Supreme People's Court, para. 304 www.isinolaw.com.

between the parties establishes, changes, suspends or occurs outside the territorial sphere of the PRC. Finally, with some exceptions, a case is classed as a *shewai* case if the civil case concerns subject-matter located outside the territorial sphere of the PRC. Although fairly clear, the definition of *shewai* gives rise to the following questions in relation to the Internet; first, can an e-commerce website located on a server within the territory of the PRC fall within the *shewai* category? Second, can an e-commerce website located on a server outside the territory of the PRC, but aimed at doing business in the PRC, fall within the *shewai* category?

The first question is easy to answer. Since all e-commerce operations (i.e. profit-making Internet information services) located on servers within the PRC must have a business licence issued by the PRC and must meet certain requirements,¹⁹ such operation could not fit within the *shewai* category; they are Chinese by their very nature. The second question is slightly more complex and will presumably depend on the ownership of the e-commerce operation. If the website is operated by foreign owners, a potential dispute would be between the foreign operator and the Chinese party, and would thus fall within the *shewai* category. However, it is also possible for a dispute arising out of a Chinese contact with a website located on a server outside the territory of the PRC, to fall within the *shewai* category even if the website is operated by a Chinese business. This can, for example, be the case if the contract was formed at the location of the foreign server.

Finally two more rules are to be observed. The foreign party to a *shewai* case enjoys “the same equal litigant rights and obligations as the citizens, legal persons and other organizations of the PRC”²⁰ and, the *Law of Civil Procedure of the People’s Republic of China* further provides that where there are no special rules provided in relation to *shewai* procedures, other relevant provisions of the law will apply.²¹

Different rules apply in relation to jurisdictional claims over contractual relations and jurisdictional claims over situations involving defamation.

¹⁹ See, e.g., Measures on Internet Information Services (2000), Article 6.

²⁰ Law of Civil Procedure of the People’s Republic of China (1991), Article 5(1).

²¹ Law of Civil Procedure of the People’s Republic of China (1991), Article 237.

Jurisdiction in Contracts Cases [4.1]

Chapter XXV of part four of the *Law of Civil Procedure of the People's Republic of China* supplies the rules of jurisdiction, specific for civil actions over contractual disputes involving foreigners or disputes over property rights against a defendant who does not reside within the territory of the PRC. Article 243 states that, if the defendant has a representative organisation within the territory of the PRC, or has detainable property within the territory of the PRC, or the contract is signed or carried out within the territory of the PRC, or the object of litigation is within the territory of the PRC, a civil action against a defendant not residing within the territory of the Peoples Republic of China is under the jurisdiction of the court of the place where:

- a) the contract was signed;
- b) the contract was carried out;
- c) the object of the litigation is located;
- d) the defendant has property that can be detained;
- e) the infringements of rights have taken place; and
- f) the representative organization of the defendant is located.

However, the parties to a foreign related contract have, with some limitations, the right to agree, in writing, to place the case under the jurisdiction of a court that has “an actual connection with the dispute”.²² If no forum is selected the rules outlined in Article 243 of the *Law of Civil Procedure of the People's Republic of China* apply.

In addition to the requirement of “an actual connection with the dispute”, mentioned above, there are also other limitations placed on contractual stipulations of the forum to have jurisdiction. Several Articles of the *Contract Law of the People's Republic of China* make the validity of unfair contractual terms, such as some jurisdictional clauses in contracts of adhesion (e.g. click-wrap agreements and disclaimers), questionable. For example, Article 3 states that “neither party may impose its will on the other party”.²³ Further, *Law of the People's Republic of China on Protecting*

²² Law of Civil Procedure of the People's Republic of China (1991), Article 244.

²³ Contract Law of the People's Republic of China (1999), Article 3.

Consumers' Rights and Interests makes the validity of contracts of adhesion even more questionable.²⁴ For example, Article 24 states that:

[b]usiness operators must not set unfair and unreasonable regulations against consumers by the use of format contract, circular, statement, shop or store notice and other means, or try to alleviate or avoid their civil responsibility they must bear for harming the legitimate rights and interests of consumers by resorting to the above means.²⁵

In light of these very general rules, it could be argued that what otherwise would have been a valid contract is not even considered a contract if there is an unreasonably unequal division of power between the parties. However, it seems rather far-fetched to assume that the very existence of a power-imbalance between the parties would invalidate the contract, and there are no court decisions indicating that such a strict interpretation is correct. A more reasonable approach is to assume that the focus is not on the power-imbalance as such, but rather on the misuse of a power-imbalance.

Contracts of adhesion may also be governed by the provisions of the *Contract Law of the People's Republic of China* regulating standard contracts. Article 39 ensures that:

Where a contract is concluded by way of standard terms, the party supplying the standard terms shall abide by the principle of fairness in prescribing the rights and obligations of the parties and shall, in a reasonable manner, call the other party's attention to the provision(s) whereby such party's liabilities are excluded or limited, and shall explain such provision(s) upon request by the other party.

Standard terms are contract provisions which were prepared in advance by a party for repeated use, and which are not negotiated with the other party in the course of concluding the contract.²⁶

Furthermore a standard term of a contract is deemed to be invalid "if it excludes the liabilities of the party supplying such term, increases the liabilities of the other party, or deprives the other party of any of its material rights",²⁷ all of which can obviously be the consequence of a forum, or law, selection clause.

²⁴ That is, in relation to consumers.

²⁵ Law of the People's Republic of China on Protecting Consumers' Rights and Interests, Article 24.

²⁶ Contract Law of the People's Republic of China (1999), Article 39.

²⁷ Contract Law of the People's Republic of China (1999), Article 40.

In summary, it could be said that the PRC's approach towards jurisdictional claims over contractual situations is rather similar to that of many other states; the parties' choice is ordinarily upheld except in some circumstances where protection is provided for a weaker party, and where no choice is made, the court searches for a forum with a close connection to the dispute.

Jurisdiction in Defamation Cases [4.2]

A defamation case comes under the jurisdiction of the people's court at the place where the infringing acts were committed or at the place where the defendant is *domiciled*.²⁸ However, this can be misleading as, "the place of the infringement act includes the place of the occurrence of the infringement act and the place of the occurrence of the results of the infringement",²⁹ for the sake of determining the question of jurisdiction. Furthermore, the place of the result of the infringement may be determined as the place of *domicile* of the defamed person.³⁰ Having noted that the "place of the occurrence of the results of the infringement" *may* be determined as the place of *domicile* of the defamed person, we must obviously question what other place(s) may also be the "place of the occurrence of the results of the infringement". However, no official guidance has been found to help clarify this important question. Fu and Cullen state that "[a] defamatory statement must be published for defamation to have occurred. [...] A plaintiff can sue once a defamatory statement has been transmitted to a third party."³¹ While Fu and Cullen do not provide any reference to support this statement, and their writing on defamation draws heavily upon common law principles of defamation

²⁸ Law of Civil Procedure of the People's Republic of China (1991), Article 29.

²⁹ *Reply of the Supreme People's Court to the Questions in the Trial of the Cases Concerning the Right of Reputation*, promulgated 7 August 1993, The Supreme People's Court www.isinolaw.com. See also *Opinions (I-VII) of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, 14 July 1992, The Supreme People's Court, para. 28 www.isinolaw.com.

³⁰ *Interpretation of the Supreme People's Court on the Trial of the Case Concerning the Right of Reputation*, promulgated 15 September 1998, The Supreme People's Court, www.isinolaw.com.

³¹ H.L. Fu and R. Cullen, *Media Law in the PRC* (Hong Kong, Asia Law & Practice Publishing Ltd, 1996), p. 195.

law,³² it seems reasonable to assume that the “place of the occurrence of the results of the infringement”, if not defined as the place of *domicile* of the defamed person, is the place where the defamatory material is received by a third party or where the defamatory material enters into the mind of a third party.³³ These definitions are obviously of great relevance in an online context.

As the rules outlined above predate the widespread use of the Internet, it is also interesting to note the current development in related fields. For example, Article 1 of *Interpretation of the Supreme People’s Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright*³⁴ states that:

The infringement dispute cases concerning the network copyright shall be under jurisdiction of the people’s court at the place of the commission of an offense or at the place at which the defendant is. The places of the commission of an offense cover the place at which the network server, computer terminal, and so on engaging in infringement are located. If the place of the commission of an offense or the place of the defendant is difficult to be determined, the place at which the plaintiff discovers the computer terminals with infringement contents are located shall be regarded as the place of the commission of an offense.³⁵

A similar provision can be found in an instrument relating to domain name disputes.³⁶ This approach may, thus, arguably be seen as a wider regulatory approach. Considering the similarities between an infringement upon copyright and an infringement upon the right to reputation, it could be argued that this provision may give some guidance also in relation to the likely development of the regulation of Internet defamation.

³² Which may very well be an appropriate approach if their assertion about “the tendency of PRC defamation law to track the Common Law of defamation” (H. L. Fu and R. Cullen, *Media Law in the PRC* (Hong Kong, Asia Law & Practice Publishing Ltd, 1996), p. 195) is correct.

³³ Also Fu and Cullen’s statement fails to clarify this distinction.

³⁴ *Interpretation of the Supreme People’s Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright*, 22 November 2000, The Supreme People’s Court www.isinolaw.com.

³⁵ *Interpretation of the Supreme People’s Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright*, 22 November 2000, The Supreme People’s Court, Article 1 www.isinolaw.com.

³⁶ *Interpretations of the Supreme People’s Court on Some Issues Concerning Application of Laws When Trying Civil Dispute Cases Related to Network Domain Names*, 17 July 2001, The Supreme People’s Court, Article 2 www.isinolaw.com.

Finally, it should be observed that the plaintiff is, as noted above, free to choose the forum if the matter comes under the jurisdiction of more than one people's court.

The approach taken in the PRC towards jurisdiction over defamation could in summary be said to be very accommodating indeed, and rarely would a people's court find itself prevented from exercising jurisdiction. However, that is not all that different to how, for example, Australia, the US and many other western states approach the matter.

Discretion to Decline Jurisdiction [4.3]

In contrast to the laws of e.g. Australia and other common law countries, PRC law does not really recognise the doctrine of *forum non conveniens*. This does not mean, however, that there are no instances where a people's court may choose to decline exercising jurisdiction. For example, a prior foreign judgment may prevent the same matter from being heard in a people's court.³⁷

While Chinese law does not expressly address *lis alibi pendens*, the doctrine is recognised in the practice of the people's courts. In this context it is interesting to note Kong and Hu's assertion that "[i]t is not difficult to observe that People's Courts choose to accept or reject the doctrine of *lis alibi pendens* depending on whether the treatment would be favourable to the Chinese party".³⁸

Concluding Remarks [5]

The rapid uptake of Internet usage in the PRC is interesting on several levels. As noted above, it may e.g. affect the democratisation of the PRC.

From a business perspective, the potential of the PRC market is undeniable, and several western businesses have done extraordinarily well in the PRC. For example, the search-engine *Google* has a large market share also in the PRC.³⁹

³⁷ H.K. Yang's analysis attached to *Huigao Yuntong Co. Ltd. v. Uchida Electronics Co. Ltd and the Uchida Electric Appliances Manufacturing (Xiamen) Co. Ltd. for Joint Fraud and Act of Tort*, 5 August 1995, Fujian Provincial Higher People's Court www.isinolaw.com.

³⁸ Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law' (2002) 3 *Melbourne Journal of International Law*, 421-422.

³⁹ China Internet Network Information Center, *China Online Search Market Survey Report'* 2005 (August 2005).

As to the jurisdictional issues discussed, it is worth noting that, should a PRC court claim jurisdiction over a foreign website, the website operator may find some comfort in the fact that the PRC's choice of law rules may point to the application of foreign law. Further, many western states lack recognition and enforcement agreements with the PRC and thus, the courts in those states will often only recognise and enforce PRC judgments in rather limited circumstances. Both these factors impact on the severity of the fact that a PRC court can claim jurisdiction over a foreign website operator.