

中国国际私法

霍政欣 著

PRIVATE INTERNATIONAL LAW IN CHINA

LEE

*

全英文法学精要

LAW ESSENTIALS IN ENGLISH

*

LIEE

*

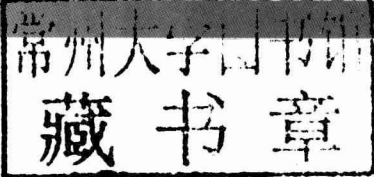
全英文法学精要

LAW ESSENTIALS IN ENGLISH

*

中国国际私法

PRIVATE INTERNATIONAL LAW IN CHINA



图书在版编目(CIP)数据

中国国际私法 = Private International Law in
China: 英文 / 霍政欣著. —北京: 法律出版社,
2010. 6

ISBN 978 - 7 - 5118 - 0905 - 6

I. ①中… II. ①霍… III. ①国际私法—中国—教材
—英文 IV. ①D997

中国版本图书馆 CIP 数据核字(2010)第 121176 号

© 法律出版社·中国

责任编辑/侯 鹏

装帧设计/乔智炜

出版/法律出版社

编辑统筹/法律教育出版分社

总发行/中国法律图书有限公司

经销/新华书店

印刷/北京北苑印刷有限责任公司

责任印制/张宇东

开本/787×960 毫米 1/16

印张/25.75 字数/601 千

版本/2010 年 7 月第 1 版

印次/2010 年 7 月第 1 次印刷

法律出版社/北京市丰台区莲花池西里 7 号(100073)

电子邮件/info@lawpress.com.cn

销售热线/010-63939792/9779

网址/www.lawpress.com.cn

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782 西安分公司/029-85388843 重庆公司/023-65382816/2908

上海公司/021-62071010/1636 北京分公司/010-62534456 深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5118 - 0905 - 6

定价:38.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)

作者简介

霍政欣 1976年11月生,2005年6月毕业于武汉大学法学院,获法学博士学位,现就职于中国政法大学国际法学院,兼任中国法学会理事、中国国际私法学会理事、韩国首尔国立大学中国研究所研究员。曾先后赴德国(2001)、奥地利(2003)、荷兰(2004)、美国(2006-2007)、韩国(2009-2010)等国进行访问研究。作者的主要专著有《不当得利的国际私法问题》(武汉大学出版社,2006),主要译著有《法律选择与涉外司法》(北京大学出版社,2007)、《如果你是平等主义者,为何如此富有?》(北京大学出版社,2009)等;先后在“American Journal of Comparative Law”、“Asian Pacific Law and Policy Journal”、“Journal of Cambridge Studies”、《法学研究》、《法学评论》、《比较法研究》、《武汉大学学报》、《求是学刊》、《民商法论丛》、《中国国际法年刊》、《中国国际私法与比较法年刊》、《武大国际法评论》、《人民法院报》、《南方周末》、《联合早报》等国内外刊物上发表中英文学术论文、译文及评论50余篇;其科研及教学成果曾获得湖北省第六届哲学社会科学优秀成果奖二等奖、北京市第十届哲学社会科学优秀成果奖二等奖、中国高等学校科学研究优秀成果奖(人文社会科学)三等奖、中国政法大学第四届青年教师教学基本功大赛冠军等奖项。

ABOUT THE AUTHOR

HUO Zhengxin received his PhD. in international law from Wuhan University in June 2005. He has held faculty appointment at China University of Political Science and Law (CUPL) since his graduation from law school. He is currently Deputy Director of the Institute of Private International Law of CUPL, member of China Law Society and research fellow at Institute of China Studies of Seoul National University, Korea. He has published one monograph, more than fifty articles & review essays, and he is the translator of several academic books. He has won various awards for academic and teaching achievements.

例 言

本书为世界上首部以中国法为视角并用英文写作的国际私法专著。本书之用途有三:其一,它是一座桥,可以消除横亘在外国学者与中国国际私法之间的语言障碍,促进中、外国际私法学术界的互通互动。进入 21 世纪以来,随着各国民商交往的日益密切以及中国国力的迅速增长,西方法学界对中国法愈加重视,兴致日盛,而中国国际私法,作为调整中国涉外民商事交往的法律部门,更成为他们关注的焦点与重点。然而,由于语言隔阂、中国法律体制的相对封闭性以及国际私法自身的特点,中国国际私法,在改革开放已逾 30 载的今天,对大多数外国学者而言,依然保持着神秘和陌生之态。鉴此,本书的出版适时填补了一块学术空白,有助于推进中国国际私法的“去神秘化”与国际化,推动中国国际私法在国际法学界发出自己的声音。

其二,它是一扇窗,可以为中国的国际私法研究者与学习者提供审视国际私法的不同视角。本书立足中国,放眼世界,特别注重比较研究,大陆法与英美法兼顾,理论与实践并重。本书所引之文献,大都源自欧美各国及中国的专著、教材及学术期刊,在确保引证详实的基础上,亦参入作者之管见。本书之行文,通常在完成比较研究的基础上,重点对中国国际私法的相关立法、理论与司法实践做出评述并提出建议与意见,俾资研究者参考。此外,作者还以本书探讨的若干议题为基础,撰写了系列英文论文,它们大都刊登在英美主流法学刊物上。相信通过阅读本书以及相关论文,读者可以看到一幅与众不同的国际私法画卷,从而对扩展研究视角、提高研究兴趣有所助益。

其三,它可用作国际私法双语及全英语教学的教材,为建立以中国法为本位、符合中国实际的法学双语及全英语教学体系提供基础性支持。众所周知,近年来,国内各高校正大力推行法学课程的双语及全英文教学,作者所在的中国政法大学甚至在法学试验班中施行国际法三门必修课的全英文教学,大有“西风压倒东风之势”。对于法学教学的这种“国际化”乃至“去汉语化”现象,作者无意置喙,但需指出,我们目前的双语及全英语法学教学已出现的明显的“空心化”与“异化”趋势,即此种教学大都以外国教科书或专著为素材,极度匮乏以中国法为主体的文献,这

势必导致中国法的“缺位”与“失语”，导致此种教学沦为中国老师在中国法学院里用英文给中国学生讲外国法的“错位”课程。难怪不少学生常向我描述，这样的课程往往“高开低走”，多以人头攒动、座无虚席的第一节课华丽开场，却以师生相对两迷茫、人去楼空的最后一课黯然收场。鉴此，本书的面世可以改变我国国际私法双语及全英语教学“无中国书可教、无中国法可学”的尴尬困局，对回归以中国法为本位的法学双语与英文教学的本旨起到示范作用。

本书的写作历经艰难。坎坷心路，间难或忘。执笔之初，为确保能有足够的时间与精力完成此书，我辞别新婚不久的妻子，只身赴韩至今。在异国他乡的几百个日日夜夜里，我忘却了时间与空间，在首尔南郊冠岳山下这间小小的书斋里埋首于书卷，倾力于写作。然而，过度的积劳却令我在研究与写作的关键阶段患上了重疾。更为不幸的是，正当我与病痛斗争之际，奶奶与爷爷竟分别于今年2月23日与4月24日相继离世，可谓祸不单行。父母担心我的身体会再受噩耗打击，故强忍着悲痛，将实情隐瞒于我，只是在电话里听似随意地说到，爷爷奶奶偶然微恙，望我能在身体好转后中途回家探望。待到今年5月，身体终于得以恢复，我迫不及待地返回家乡，满怀欣见爷爷奶奶之欢愉，殊不知面对的却是黄土一抔，坟冢两座。我跪倒在坟前，回想着他们的音容笑貌，悔恨悲痛，此生永自责。而今书成，谨以赤诚，先以之献于我未能见上最后一面的爷爷奶奶。

我不得不承认，本书的诞生过程见证了我近年来少有的人生低潮，但是，我终究从困顿中走出来了，终究在这个初夏迎来了来之不易的收获。我更要承认，在写作这本书的四百多天中，我得到的鼓励与帮助远胜于我遭遇的挫折，可以说，正是来自亲人与师友们的关爱，才让我获得了“加持”，让原本软弱的我得到勇气与毅力，从而扛起重担，渡过难关。惠我助我者甚多，在此恕不一一提及，有心之读者可在本书的“preface”中，寻到他们的名字以及我对他们的诚挚谢意与敬意。

最后，需要指出，本书之撰写，我虽甚尽力，惟限于学养，偏失遗漏，势所难免，故祈方家教正，谨此志谢。

霍政欣

2010年6月1日

Preface

This book has been long in gestation. Originally conceived as a book for the students of China University of Political Science and Law (CUPL) who attend my private international law class taught in English, it has developed to a significant deeper study. It is now a work that is hoped to be of great interest to both foreign conflicts and comparative scholars interested in Chinese private international law and Chinese scholars and students who are expecting to deepen their understanding of private international law from the perspective of comparative law.

As we know, private international law aspires to provide solutions to disputes that have legal implications involving more than one sovereign. It answers three questions that usually occur in international civil and commercial disputes, namely, (1) jurisdiction (will a court of a particular state or nation take the case?), (2) choice of law (what law will the court apply if it does take the case), and (3) recognition and enforcement of foreign judgments (can other states and nations be expected to honor the judicial determinations of the court that decided the dispute?).

It is believed that private international law exists because of the existence of separate municipal systems of law, and because of the cross-border civil and commercial activities that bring together elements relating to different countries. In a globalized world, private international law, needless to say, will be of more importance in international exchanges.

After many years of rapid development, China has undeniably played a significant role in international community. It is estimated that China will surpass Japan in the year of 2010 to become the world's second largest economy. Within such a setting, Chinese private international law has been gradually developed and modernized, and quite a few breakthroughs in the area of law are observable in the past few years in order to adapt to the new situation that China finds itself is facing. However, China's private international law remains more or less mysterious to many foreigners, despite the fact that China has been opening up to the outside world for more than three decades and the presence of foreign business companies in China has increased by leaps and bounds.

Several factors may explain this seemingly paradoxical phenomenon. Firstly, Chinese private international law, by far, has not been codified. The current conflicts law legislation in China is scattered throughout different laws and there is clearly a lack of systematic form. Secondly, the lack of updated law report system contributes to the widespread unawareness of the recent development of private international law in China. Thirdly, the absence of an updated and comprehensive academic book on Chinese private international law written in English also adds difficulties for the systematic understanding of Chinese private international law for the foreign scholars and lawyers.

This book attempts to fill the gap and to be the first monograph written in English that

explores both doctrinal and pragmatic aspects of Chinese private international law. It is devoted to providing detailed and in-depth analysis of the current conflicts rules in China concerning jurisdiction, choice of law and foreign judgments and awards in civil and commercial related disputes, and to carrying out updated case analysis which could discover the judicial practice in the Chinese People's Courts. In detail, the book is divided into nine chapters plus an annex, totaling 220,000 words approximately.

The opening part is "Introduction" which provides an overview of the prerequisite theory of private international law where its name, scope, nature, definition, *raison d'être* and sources are discussed. The relevant Chinese doctrines are introduced as the emphasis.

Chapter Two is entitled "Historic Survey", which consists of three sections, *i.e.*, European Continental History, Anglo-American History, and East-Asian History in which the historic development of Chinese private international law has been systematically elaborated. This chapter is important, insofar as modern private international law has been strongly influenced by its own history.

Chapter Three, "Subjects of Private international Law", mainly discusses the nationality and domicile of two categories of subjects: natural persons and legal persons as one category, whereas states and international organizations as the other. China's position and practice on the immunities of states and their property have also been thoroughly analyzed in this chapter.

Chapter Four is "Jurisdiction of Courts in International Civil Litigation". This chapter contains three sections. Section one provides a comprehensive exegesis of the basics of international civil jurisdiction. Section two analyzes international civil jurisdiction in the United States from the perspective of Chinese lawyers. Section three summarizes and analyzes the current Chinese legislation and judicial practice on international civil jurisdiction; thereafter it provides comments and suggestions.

Chapter Five, "General Part of Conflicts Law", examines a number of conceptual issues recur in discussions of choice-of-law problems such as characterization, *renvoi*, proof of foreign law, evasion of law and *ordre public* reservation where the relevant Chinese theory, legislation and judicial practice have been analyzed in detail.

Chapter Six, the core of the book, is entitled "Selected Areas of Conflicts Rules. This chapter focuses on conflict rules that scatter through various Chinese laws whose balance will be devoted to a survey of selected areas of Chinese conflicts rules, scrutinizing the relevant legislation as well as judicial practice and, providing systematic comments. The conflicts rules for capacity, contract, tort, family issues, succession and property are selected as the topics of discussion in this chapter. The highlighted areas are chosen partly for their importance in terms of their effect on the relationships between China and other states and between Chinese citizens and foreigners, and partly because of the lack of available materials other than these subjects.

Chapter Seven is "Recognition and Enforcement of Foreign Judgments" which includes two sections. Section one provides an overview of the recognition and enforcement of foreign judgments where the definition, the theoretical bases, and the conditions and procedures of recognizing and enforcing foreign judgments are explored. Section two addresses the recognition and enforcement of foreign judgments in China.

Chapter Eight, is “Recognition and Enforcement of Foreign Arbitral Awards” which reviews, *inter alia*, the distinction between recognition and enforcement, the regime for recognition and enforcement of foreign awards in China and, the application of the New York Convention in China.

Chapter Nine, the closing one of the book, is “China’s Codification of Conflicts Law: Latest Development”. As its heading suggests, this chapter attempts to describe the latest efforts made by Chinese conflicts scholars and legislators in enacting China’s long-expected conflicts code, and to provide an objective and comprehensive analysis of the latest draft of the code. It should be noted that I have tried to state the draft as it stood on 30 April 2010, although it may be possible to take account of certain later developments when correcting proofs.

As Morris said, “law books are like babies: they are the greatest fun to conceive, but very laborious to deliver”, I have to concede that the writing of this book has turned out to be an extremely difficult task. During this period, I am seriously ill which almost forces me to give up, and more unfortunately, just before I finish the book, my grandparents passed away successively who had been awaiting me to come back to hometown till their breath; however, I let them down, since my parents conceals the fact from me who worry that my health would deteriorate if I knew the sad news. What I can do now is to dedicate this book to my dear grandparents who must be watching me with smiles in heaven.

It should be emphasized that I am grateful to many professors, colleagues and friends who help along the way. My greatest thank is to Professor XIAO Yongping (Dean of Wuhan University School of Law). I was in the very fortunate position of having him as my supervisor when I was a PhD candidate at Wuhan University. His instruction and generous assistance can not be overstated. His influence can be seen throughout my academic career, including this book.

I also owe a special debt of gratitude to Professor HUANG Jin (President of CUPL). He was my respected teacher when I was a student at Wuhan University whose scholarship and personality deeply affected me. Dramatically, four years after I joined the faculty of CUPL, he was appointed as President of the University in 2009. Since then, I, again, have the access to seek instruction from him frequently. His continued guide and support are and will be treasured by me for always.

Many thanks must also go to Professor MO Shijian (Dean of School of International Law, CUPL). He was one of the few persons who read the draft of the book; his advice is invaluable. I have also immensely profited from countless conversations with scores of colleagues and scholars. Directly, or indirectly, they helped me with this work. They include Professor SONG Lianbin at Wuhan University, Professor DU Xinli at CUPL, Professor Kwang Hyun SUK at Seoul National University, and Mr. HUANG Wei of People’s Bank of China.

Finally, I must acknowledge the sacrifices of my parents and wife. Any scholar’s commitment to a project of this sort comes always at a substantial cost to one’s family. I just hope that the costs have been modest enough, and compensated (to some degree) with my attention, respect, and love.

As always, I fully accept responsibility for the errors and omissions found in this book.

Despite my best efforts, I am sure some will be identified. What I can only hope is that a gentle and patient reader will find it a useful contribution to the understanding of Chinese private international law from the perspective of comparative law.

HUO Zhengxin

May 2010

Seoul, Korea

Table of Contents

Preface	1
Chapter One Introduction	1
1.1 Name, Scope and Nature	1
1.1.1 Name	1
1.1.2 Scope	2
1.1.3 Nature	5
1.2 Definition: A Chinese Approach	7
1.3 Justification for Private International Law	9
1.3.1 Justice and Reciprocation	10
1.3.2 Sovereign Justification	10
1.3.3 Economic Justification	11
1.3.4 Chinese Doctrine	14
1.4 Sources of Private International Law	16
1.4.1 Domestic Sources	16
1.4.2 International Sources	20
1.4.3 Sources of Chinese Private International Law	22
1.5 Structure and Categories of Conflicts Rules	24
1.5.1 Structure of Conflicts Rule	24
1.5.2 Categories	26
Chapter Two Historical Survey	27
2.1 European Continental History	27
2.1.1 Antiquity	27
2.1.2 Personal Law Period	28
2.1.3 The Statute Theories	29
2.1.4 The German Contribution: Seat Theory	32
2.2 Anglo-American History	34
2.2.1 English History	34
2.2.2 American History	35
2.3 East Asian History	43
2.3.1 Japanese History	43
2.3.2 Chinese History	49

Chapter Three The Subjects of Private International Law	57
3.1 Natural Persons	57
3.1.1 Nationality	58
3.1.2 Domicile	62
3.2 Legal Persons	65
3.2.1 Nationality	65
3.2.2 Domicile	69
3.2.3 Recognition of Foreign Legal Persons	71
3.3 States	72
3.3.1 Characteristics of States as the Subjects of Private International Law	72
3.3.2 Immunities of States and Their Property	73
3.4 International organizations	80
3.4.1 Characteristics of International Organizations as the Subjects of Private International Law	80
3.4.2 Privileges and Immunities	82
3.4.3 Applicable Law	83
 Chapter Four Jurisdiction of Courts in International Civil Litigation	 85
4.1 Basic Theory of Jurisdiction	85
4.1.1 Definition of Jurisdiction in the Context of Private International Law	85
4.1.2 Categories of Jurisdiction	86
4.1.3 Conflicts of Jurisdiction	88
4.2 International Civil Jurisdiction in the United States Courts	92
4.2.1 Types of Civil Jurisdiction in the United States	92
4.2.2 Bases for Jurisdiction in the United States	94
4.2.3 Limits on Jurisdiction: <i>Forum non conveniens</i>	101
4.3 International Civil Jurisdiction in Chinese Courts	104
4.3.1 Overview	104
4.3.2 Jurisdiction of the Chinese People's Courts in International Civil Litigation	108
 Chapter Five General Part of Conflicts Law	 123
5.1 Characterization	123
5.1.1 The Need for Characterization	123
5.1.2 Conflict of Characterizations	125
5.1.3 Application of Law for Characterization	126
5.1.4 Characterization in Chinese People's Courts	129
5.2 <i>Renvoi</i>	130
5.2.1 Definition	130

5.2.2	Debate on <i>Renvoi</i>	132
5.2.3	Application of the Doctrine in Certain Foreign Countries/Regions	133
5.2.3	<i>Renvoi</i> in Chinese Legislation and Judicial Practice	136
5.3	Proof of Foreign Law and Evasion of Law	137
5.3.1	Need for the Proof of Foreign Law	137
5.3.2	Proof of Foreign Law in Some Foreign Jurisdictions	138
5.3.3	Proof of Foreign Law in Chinese People's Courts	143
5.3.4	Evasion of Law	147
5.4	Public Order Reservation	149
5.4.1	Introduction	149
5.4.2	Legislative Development of the Doctrine of <i>Ordre Public</i> in China	150
5.4.3	Cases in which the Doctrine is Invoked by the People's Courts of China	154
5.4.4	Chinese Scholarship on <i>Ordre Public</i>	165
5.4.5	Conclusion	167
Chapter Six	Selected Areas of Conflicts Rules	170
6.1	Capacities	170
6.1.1	Natural Persons	171
6.1.2	Legal Persons	177
6.2	Contracts	179
6.2.1	Overview	179
6.2.2	Party Autonomy	181
6.2.3	Applicable Law in the Absence of Choice	188
6.3	Torts	192
6.3.1	Overview	192
6.3.2	Conflicts Rules in Torts in Certain Foreign Countries	194
6.3.3	Chinese Conflicts Rules in Torts	200
6.4	Property	215
6.4.1	The Distinction in Law between Movables and Immovables	215
6.4.2	The Law Applicable to Immovables	216
6.4.3	The Law Applicable to Movables	217
6.4.4	The Sphere of the <i>Lex Situs</i>	218
6.4.5	Chinese Conflicts Rules in Property	219
6.5	Family Issues	220
6.5.1	Introduction	220
6.5.2	Marriage and Divorce	221
6.5.3	Matrimonial Causes	226
6.5.4	Conclusion	230
6.6	Succession	232
6.6.1	Overview	232

4 *Private International Law in China*

6.6.2	Legal Succession	233
6.6.3	Testamentary Succession	234
6.6.4	Vacant Succession	236
6.6.5	Chinese Legislation and Practice	237

Chapter Seven Recognition and Enforcement of Foreign Judgments

7.1	General Observations	243
7.1.1	Definitions	243
7.1.2	Theoretical Basis for Recognition and Enforcement	244
7.1.3	Conditions of Recognition and Enforcement	246
7.1.4	Enforcement Procedures of Recognized Foreign Judgments	247
7.2	Recognition and Enforcement of Foreign Judgments in China	248
7.2.1	Domestic Rules Regarding Recognition and Enforcement of Foreign Judgments	249
7.2.2	International Treaties and Bilateral Agreements	252

Chapter Eight Recognition and Enforcement of Foreign Arbitral Awards

8.1	Characteristics of International Commercial Arbitration	254
8.1.1	Overview	254
8.1.2	The Meaning of "International" and "Commercial"	255
8.2	Basic Theory of Recognition and Enforcement of Foreign Awards	258
8.2.1	Distinction between Recognition and Enforcement	258
8.2.2	Place of Recognition and Enforcement	259
8.2.3	Consequences of Refusal of Recognition and Enforcement	261
8.3	The Regime for the Recognition and Enforcement of Foreign Awards in China	261
8.3.1	The New York Convention in China	262
8.3.2	Chinese Domestic Law on Recognition and Enforcement of Foreign Awards	267

Chapter Nine China's Codification of Conflicts Law: Latest Development

9.1	A Brief Summary of the Draft	269
9.2	Comments on the Important Issues of the Draft	270
9.2.1	General Provisions	270
9.2.2	Civil Parties	278
9.2.3	Family Relationships	281
9.2.4	Succession	283
9.2.5	Property or Real Rights	284
9.2.6	Intellectual Property	286
9.2.7	Contracts	286

9.2.8	Torts	291
9.2.9	Other Civil Relationships	294
9.3	Concluding Remarks	295
Selected Bibliography		297
Annexes		300
Annex I	Glossary of Private International Law	300
Annex II	Model Law of Private International Law of The People's Republic of China	330
Annex III	Chapter Eight of the General Principle of Civil Law of the People's Republic of China	354
Annex IV	Part Four of the Civil Procedure Law of the People's Republic of China	356
Annex V	Part Seven of Opinions on Application of the General Principle of Civil Law	363
Annex VI	Part Eighteen of the Opinions of the Application of the Civil Procedure Law	365
Annex VII	Provisions on Several Issues Concerning the Application of Laws in Hearing the Cases Involving Foreign-related Civil or Commercial Contractual Disputes	368
Annex VIII	Cases Study	372

We are living in a globalized world where human affairs freely cross national boundaries; we are living in the world where exist a number of separate municipal systems of law that differ greatly from each other. Therefore, we need a kind of law to reconcile sovereignty and the exigencies of international transactions. Private international Law is just what we need. It comes into play when the issue before the court affects some fact, subject matter, or transaction that is/are so closely connected with a foreign system of law as to necessitate recourse to that system.^① It has, accordingly, been described as meaning “the rules voluntarily chosen by a given State for the decision of cases which have a foreign complex.”^② This Chapter provides an introduction to private international law, this important yet perplexing subject, where its name, scope, nature, definition and *raison d’être* are discussed.^③

1.1 Name, Scope and Nature

1.1.1 Name

From the perspective of comparative law, “private international law” and “conflict of laws” are two usual titles of the subject. The expression ‘private international law’ is thought to have been first employed by Joseph Story and is commonly adopted in most civil law countries. However, at the end of the 19th century, the influential jurist A.V. Dicey chose the title “conflict of laws” for his treatise upon the subject. Since then, the expression “conflict of laws” has tended to be used in common law countries.^④ Objections have been raised to both the title “private international law” and “conflict of laws”. The former is

① Private international law is inseparably connected with the widening of international trade and economic, scientific-technical, and cultural cooperation. The rules of private international law have an important role to play in the legal regulation of this cooperation, the significance of which grows as international economic links strengthen and as new organizational forms in various fields of international cooperation develop.

② Private international law centers on disputes and transactions that have legal implications involving more than one sovereign. To be more specific, this branch of law aspires to provide solutions to international or interstate legal disputes between persons or entities other than countries or states as such. THOMAS BATY, *POLARIZED LAW* 148 (1986).

③ It should be mentioned that though the importance of private international law is widely recognized, there is an astonishing lack of consensus on its name, scope and nature, which constitutes an outstanding characteristic of our subject.

④ It is very interesting to note that the phrase “private international law”, which is now widely used in civil law countries as well as in England, was coined by Joseph Story, an American judge and professor; while the term “conflict of laws”, or “conflicts law” (or simply “conflicts”), which is used in common law countries except England was invented by Dutch authors. See FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 4, 19 (2000).

open to criticism in that it can lead to confusion with public international law and does not properly reflect the fact that the subject embraces the difficulties that arise when one state includes more than one jurisdiction, such as China and the United States. Likewise, the latter is misleading in that the entire object of the subject is to promote harmony rather than conflict between the different legal systems of the world.^①

Nevertheless, the author submits that as both titles have long been used throughout the world and as nobody has found a better one, it hardly seems worthwhile to devote further thought to this merely terminological issue.^② For this reason, the two terms are used alternatively in this book without actual difference in meaning.^③

1.1.2 Scope

The scope of private international law is another issue that invites debate, and the following discussion is a tentative description of the different arguments on this issue from the perspective of comparative law.

1. Common Law Approach

In common law countries, conflict of laws, or private international law, is a body of rules designed to determine whether domestic or foreign law is to be applied when a domestic court is faced with a claim that contains a foreign element.^④ The peculiarity of private international law in common law doctrines is that it has no material content, in the sense that it does not provide any immediate solution to a particular dispute, but merely indicates the legal system which is competent to provide the rules to be applied.^⑤ Specifically, conflict of laws in common law countries poses three questions; or to put it another way, here are three main aims of this subject which are as follows:

- First, to set out the conditions under which a court is competent to hear an action. This is the question of jurisdiction.
- Second, to determine by what law the rights of the parties are to be ascertained. In a contract dispute, for example, it is necessary to determine the law governing the contract (its 'applicable law'). This is the question of choice of law.
- Third, where a dispute has been litigated in another country, to specify the circumstances in which the foreign judgment can be recognized and enforced by action in domestic country. This is the question of recognition and enforcement of foreign judgments.^⑥

In this light, conflict of laws in common law countries is not a separate branch of law in the same sense as, say, the law of contract or of tort. It is all-pervading. As Frederic

① See PETER NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 13 (13th ed., 1999).

② As Voltaire said, quite correctly, that the "Holy Roman Empire" was not holy, nor Roman, nor an Empire, we still use the term.

③ The author selects "Private International Law" as the title of the book and uses this term probably more frequently than "Conflict of Laws (or "Conflicts Law") simply because the former accords with the usage of civil law countries.

④ ABLA MAYSS, *PRINCIPLE OF CONFLICT OF LAWS* 9 (1999).

⑤ See J.G. COLLIER, *CONFLICT OF LAWS* 1 (3rd ed., 2001).

⑥ See FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 3 (2000).