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in Private International Law

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GUOJI SIFA ZHONG DE ZUI MIQIE LIANXI YUANZE YANJIU

马志强　著

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序　言

自1894年英国学者菲利摩尔(Robert Joseph Phillimore)的"*Commentaries upon international law: Private international law or comity*"为傅兰雅(John Fryer)以《各国交涉便法论》之名引入中国起算,我国近现代意义上的国际私法发展亦不过百余年的光景。虽说早在唐律中就有"化外人相犯"的规定,但中国法律传统中缺乏进行国际私法研习与实践的直接经验,应为不争之事实。于是,过去、现在乃至可以预见的未来,介引域外国际私法的理论资源及实践经验将是我国学界的重要工作之一。当然,这些介引的出发点和归宿,都必须是对我国国际私法的研究和实践有所助益。从这个意义上讲,以地方情境为基础的反思性研究当为此类介引的应有之意。

在现代国际私法的发展问题上,最密切联系原则以其先进的理念追求和灵活的规则设计而备受学界瞩目。国内学者也对此做了大量研究工作。但客观地讲,系统地梳理、总结、反思和展望该原则的成果还不多见,而上述工作对于我们把握最密切联系原则的精髓并将其科学地应用于我国国际私法实践却又是十分必要的。

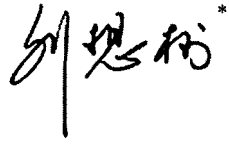
在我看来,马志强博士的这本专著正是其对最密切联系原则

系统思考的阶段性成果。在本书中，作者系统地回顾了最密切联系原则从萌芽到确立的理论及实践过程，全景式地展示了我国对该原则的继受情况。更为可贵的是，其在学术反思意识的导引下，对最密切联系原则的地位、利弊及其与国际私法基本制度之间的关系进行了较为深入的梳理，并在此基础上探讨了在中国地方情境中该原则的发展、完善路径。

读者在通读全书之后应该不难感受到作者的思辩精神和“中国情结”，而且，作者针对最密切联系原则所提出的绝大部分观点也是经得起推敲和检验的，其对学术的热情与执着应当得到充分肯定。

我自接触国际私法至今已近三十年，当下已到了为人作序的年纪。看到一大批专业基础扎实并且有思想、有活力的青年学者不断加入国际私法的研究阵营并逐渐活跃于学界前台，我想我的前辈、同辈也会和我一样深感欣慰。

是为序。



2010年5月于山城

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摘　要

最密切联系原则是20世纪中叶美国“冲突法革命”最卓越的成果，其一经产生便引起各国的瞩目，甚或成为判断一个国家国际私法立法是否现代化的标准之一。之所以如此，是因为该原则适应了国际社会迅速发展的形势需要，满足了国际社会对法律适用的公正性与合理性的追求。然而，该原则并非是对传统国际私法的完全否定，而是扬弃。它是传统法律选择方法的更新与发展，或者说是赋予了传统法律选择方法以“时代精神”，代表了国际私法价值取向由形式正义向实质正义的转变，科学合理地实现了法律适用的目的，在国际私法发展史上具有里程碑意义。

本书以国内外学者的研究成果为基础，采用比较研究方法、历史研究方法、经济学研究方法以及实证研究方法，对最密切联系原则从学说、立法到司法实践的全过程进行系统的探讨。全书除引言外，在主体结构上分为五个部分，分别厘定最密切联系原则的确立、最密切联系原则的适用、中国对最密切联系原则的继受、最密切联系原则之思问以及最密切联系原则在中国之完善。

第一章，最密切联系原则的确立。本章主要阐述最密切联系原则理论的形成过程以及产生的原因。任何理论的产生都并非是横空出世，而是在以前相关理论基础上的发展或者是在汲取了相

关理论精髓后的升华，最密切联系原则也不例外。虽然最密切联系原则在20世纪中叶才被运用于司法实践，但其基本精神却早已蕴涵在萨维尼的“法律关系本座说”之中。

20世纪50年代以后，美国国际私法学者力图从社会本来的面貌，而不是通过法律传统的有色眼镜去考察社会，他们运用经济学、社会学以及其他社会科学的方法，对传统国际私法进行猛烈抨击，创建了诸多新的理论，其中影响较大的有库克的“本地法说”、柯里的“政府利益分析说”、卡弗斯的“优先选择原则说”以及利弗拉尔的“法律选择五点考虑”等。这些理论中的“主张分析性、反对盲目性”，“主张灵活性、反对机械性”以及追求个案公正的理念与最密切联系原则的追求大体一致。美国各级法院在司法实践中也逐渐背离美国传统国际私法理论而另辟蹊径，其中纽约州法院针对“奥廷诉奥廷案”及“贝科克诉杰克逊案”的判决对最密切联系原则的确立起到了决定性的作用。理论上的猛烈抨击和实践中的急剧变革，将体现传统法律选择规则的《第一次冲突法重述》推到了修订的边缘。哥伦比亚大学的国际私法教授里斯担任报告员，历时17年之久，于1969年完成了《第二次冲突法重述》的起草，美国法学会于1971年正式批准。《第二次冲突法重述》在“冲突法革命”的各种理论中寻求妥协、综合、兼容，但其精髓依然是确立了最密切联系原则。最密切联系原则的最终形成与确立，既有其自身在现代国际关系中适应法律价值观从形式正义向实质正义转变的原因，也有社会经济的巨大变革及实用主义哲学的推动因素。

第二章，最密切联系原则的适用。本章对几个具有代表意义的国家运用最密切联系原则的情况、国际条约中最密切联系

原则的采用情况以及最密切联系原则的发展走势进行了深入的剖析。

笔者在英美法系国家中选取了美国、英国和加拿大为研究对象，主要分析了以最密切联系原则为核心的美国《第二次冲突法重述》、英国1990年《合同（法律适用）法》及涉及侵权之债内容的1995年《国际私法（杂项规定）法》。在大陆法系国家中，笔者以奥地利、瑞士、德国和日本为代表进行研究，着重分析了最密切联系原则在1999年德国国际私法改革后的适用以及在2007年1月1日起施行的日本《法律适用通则法》中的运用。通过研究认为，最密切联系原则的传统适用领域主要是合同和一般侵权行为，但各国在此领域接受最密切联系原则的方式有所不同，英美法系国家多采用完全自由裁量式的灵活性方法，而欧陆国家采用的是改良后的最密切联系原则，如在合同领域运用特征性履行理论将最密切联系原则具体化。

对于最密切联系原则在国际条约中的适用情况，重点分析了《联合国国际货物销售合同法律适用公约》、《关于合同之债准据法的罗马公约》、自2009年12月17日起适用的《欧洲议会和欧洲联盟理事会关于合同之债准据法的593/2008号（共同体）规则》（简称《罗马Ⅰ规则》）以及自2009年1月11日起适用的《欧洲议会和欧洲联盟理事会关于非合同之债准据法的864/2007号（欧共体）规则》（简称《罗马Ⅱ规则》）。从历史的角度看，无论是美国冲突法“规则”的回归趋势还是特征性履行理论在欧陆国家的普遍适用，都是对最密切联系原则嵌入一定规则、适当对其硬化，以使法律适用的确定性与灵活性这对矛盾在此消彼长的运动中得以平衡，实现个案公正。

最密切联系原则在晚近各国冲突法立法中已经由传统领域向其他领域渗透，如国籍和住所积极冲突的解决、准据法所属国区际冲突或人际冲突的解决、婚姻家庭及继承关系的法律适用、物权关系的法律适用、不当得利与无因管理的法律适用、电子商务与网络侵权的法律适用、国际商事仲裁的法律适用等。几乎在任何一种法律关系或者法律问题的法律适用规则中都能或明或隐地看到最密切联系原则的影子，表现出其强大的生命力。

第三章，中国对最密切联系原则的继受。本章主要论述了最密切联系原则在中国立法与司法实践中的现状及存在的问题。通过透析现行立法《中华人民共和国民法通则》与《中华人民共和国合同法》、司法解释《最高人民法院关于贯彻执行〈中华人民共和国民法通则〉若干问题的意见》与《最高人民法院关于审理涉外民事或商事合同纠纷案件法律适用若干问题的规定》、民间建议稿《中华人民共和国国际私法示范法》以及《中华人民共和国民法草案》第九编关于最密切联系原则的规定，总结出中国适用最密切联系原则的特质：适用领域广且几率大；立法与司法解释相结合；确定性与灵活性相结合；未针对争诉点进行分割等。

通过理论阐释与案例分析，指出中国立法与司法解释中存在的问题主要是：对法官自由裁量权限制不够；设置适用最密切联系原则的领域不合理；应用规则推定与自由裁量相结合的方法不具备一般性等。而中国司法实践中存在的问题主要是：裁判文书中对适用最密切联系原则的理由论理不足；重连结点的数量标准轻质量标准；对最密切联系原则适用的理解存在偏差等。

第四章，最密切联系原则之思问。本章对最密切联系原则中存在争议的重要理论问题进行了深入的研究。通过对最密切联系

原则地位的各种观点的剖析，认为最密切联系原则本身就是一个有层次的系统，既是法律选择的指导原则又是法律选择的方法；最密切联系原则的客体应表述为既包括“法域”也包括“法律”，它是在立法和司法层面的综合表征；最密切联系原则指向国际条约或国际惯例有一定的可行性。最密切联系原则的优势是阐明法律适用的理由从而使法制正规化、可以增强冲突法对案情的适应能力、有利于实现个案公正，但最密切联系原则是一把双刃剑，如果对其不正确适用，可能会走上单边主义的歧途，以至颠覆整个国际私法体系。识别、反致、公共秩序保留、法律规避及外国法内容的查明是冲突法的基本制度，在适用冲突规范选择准据法的过程中会经常碰到，而最密切联系原则大多是通过冲突规则表现出来的，因而它们在不同程度上相互作用、相互影响。

第五章，最密切联系原则在中国之完善。本章对中国国际私法中最密切联系原则制度的构建提出管窥之见。最密切联系原则有利有弊，但由于国情不同其利弊在不同国家并非完全一致。完善中国图景下的最密切联系原则必须立足于中国的国情，不能脱离中国的实际。中国适用最密切联系原则从理论上应把握以下几点：理性认识一般性例外条款；协调最密切联系原则与意思自治原则的关系；理清最密切联系原则与特征性履行理论的关系；构建中国国际私法判例制度；提高法官驾驭最密切联系原则的能力。基于理论分析，笔者对中国适用最密切联系原则从一般规定，合同、一般侵权行为、不当得利、无因管理的法律适用及其他领域方面提出了适合中国国情的立法建议。

Abstract

As the most predominant fruit of "Conflict of Laws Revolution" in theUnited States at the mid-20th century, the Doctrine of the Most Significant Relationship, once it came into being, has become one of the standards that determine whether the private international law of one nation is modern one. The Doctrine of the Most Significant Relationship, corresponding to rapid development of international community, satisfies the pursuit of fairness and rationality. However, the Doctrine of the Most Significant Relationship shall not be deemed to overrule the traditional private international law. In a way, it reforms the traditional private international law and endows traditional choice-of-law principle with zeitgeist. The Doctrine of the Most Significant Relationship indicates the value of private international law changing from formal justice to substantial justice and achieves the purpose of application of law scientifically and rationally. It becomes a landmark in the history of private international law.

On the basis of the study made by home and abroad scholars, this paper adopts the research methods of comparative study, historical study, economic study, empirical study, to approach the Doctrine of the Most Significant Relationship from different angles. In addition to the

introduction, the main structure of the paper is divided into five parts, namely the establishment of the Doctrine of the Most Significant Relationship, the application of the Doctrine of the Most Significant Relationship, the succession of the Doctrine of the Most Significant Relationship in China, the rational reflection on the Doctrine of the Most Significant Relationship and its perfect in China.

Chapter One: The Establishment of the Doctrine of the Most Significant Relationship. The chapter mainly elaborates the formation of the Doctrine of the Most Significant Relationship, as well as the reason it generated. As we know, all of the theories, including the Doctrine of the Most Significant Relationship, turn out to derive from the past or relevant theories. Although being taken into practice just after the World War II, the spirit of the Doctrine of the Most Significant Relationship had appeared in Savigny's "Doctrine of the Seat of Particular Legal Relationship".

After the 1950s, the scholars ofAmerica's private international law tried to observe through the nature of the community rather than use tainted glasses of tradition laws to study the society. They used economic, sociology and other scientific methods to attack the traditional private international law. In the meanwhile, they also created a host of new theories and some of them have a great influence, including Cook's "Local Law Theory", Currie's "Governmental Interests Analysis Theory", Cavers's "Principles of Preference", Leflar's "Five-Choice-Influencing Considerations" etc. These theories that claim analyzing against blindness, advocate

flexibility against mechanical and pursue individual justice are in the same line as the Doctrine of the Most Significant Relationship. In the judicial practice, the court of US had gradually departed from the traditional theory of private international law and sought new roads. What's more, the judgments of "Auten v. Auten" and "Babcock v. Jackson" directly fueled the establishment of the Doctrine of the Most Significant Relationship. Being criticized in theory and coldly treated in practice, *the Restatement of Conflict of Laws*, which reflected the traditional rules of choice of law, was pushed to the edge of amendment. Then, Rees, as the private international law professor of Columbia University, took charge of *the Restatement (Second) of Conflict of Laws*. Over 17 year, the draft finally was completed in 1969 and formally was approved by the American Law Institute in 1971. *The Restatement (Second) of Conflict of Laws*, the essence of which is the Doctrine of the Most Significant Relationship, successfully made compromises and synthesis with varieties of competing theories and viewpoints. The formation of the Doctrine of the Most Significant Relationship has been motivated by both the necessity of adapting itself to changing the legal values from formal justice to substantial justice as well as social and economic reform and pragmatic philosophy.

Chapter Two: The Application of the Doctrine of the Most Significant Relationship. The chapter analyses deeply the application and development trends of the Doctrine of the Most Significant Relationship in some typical countries and the international treaties.

As for common law countries, the author pay much attention to analyzing*The Restatement (Second) of Conflict of Laws* in the united states, *Contracts (Applicable Law) Act* 1990 and *private international law (Miscellaneous Provision) Act* 1995 in England. What's more, among civil law countries, the article mainly talks about Austria, Switzerland, Germany and Japan and focused on analysis the application of the Doctrine of the Most Significant Relationship in the reform of the private international law in Germany and Japan's *Act on General Rules on Application of Laws*. The Doctrine of the Most Significant Relationship is often used in contract and general tort. However, the way that every country accepts the Doctrine of the Most Significant Relationship differs from each other. Common law countries always use discretionary-type methods, while the European mainland countries adopt the improved Doctrine of the Most Significant Relationship like the detailed regulation in the field of contract through Characteristic Performance Theory.

As regard to the application of the Doctrine of the Most Significant Relationship in international treaties, the article focused on*United Nations Convention on Contract for the International Sale of Goods*, *Rome Convention on Lex Causae for the Obligation of Contract*, *Rome I* and *Rome II*. With the view of history, both from the coming-back of the "rules" in the conflict of laws in America and the wildly used of Characteristic Performance Theory in European mainland countries, we could find that the reform of the Doctrine of the Most Significant Relationship should be embedded in new rules and defined

properly. So that, the definiteness and flexibility of application of law could be balanced and finally achieve the justice in individual cases.

In recent years, the legislation of conflict of laws in many countries has broken the traditional barrier and infiltrated into other areas, such as conflict of nationality and residence, interregional conflict laws and interpersonal conflict of laws of in lex causae country and application of law which is concerning family and inheritance law, real right, unjust enrichment, negotiorum gestio, electronic commerce, network infringement, international commercial arbitration. That the shadow of the Doctrine of the Most Significant Relationship almost could be found clearly or potentially in every applicable rules of legal relationships.

Chapter Three: The Succession of the Doctrine of the Most Significant Relationship inChina. The chapter mainly discussed status in quo and the issues arising from legislation and judicial practice in China. Through analyzing the provisions concerning the Doctrine of the Most Significant Relationship in *General Principles of the Civil Law of the People's Republic of China*, *Contract Law of the People's Republic of China*, *Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)*, *Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters*, *The People's Republic of China Model Law on Private International Law* and *The People's Republic of*

China Civil Code (*Draft*), the article concludes the characteristics of it, including using wildly, combination of legislation and judicial interpretation, combination of certainty and flexibility, ignorance of point of dispute.

Through the explanation of theory and analyzing the cases, the article also points out the main issue inChina's legislation and judicial practice, namely the ignorance of limiting discretion power of judge, unreasonable area of application of the Doctrine of the Most Significant Relationship, and narrow use of combination of presumption and discretion. Hoverer, in Chinese judicial practice, the issue mainly includes the absence of the reasons in applying the Doctrine of the Most Significant Relationship in the judgment, focusing too much on the number of connection factor instead of the quality of it and judge's different understandings on the application of the Doctrine of the Most Significant Relationship.

Chapter Four: The Rational Reflection on the Doctrine of the Most Significant Relationship. The author made an in-depth study on the theoretical issues of the Doctrine of the Most Significant Relationship which are in dispute. Through analyzing all kinds of theories, the author finds that the Doctrine of the Most Significant Relationship has different sides. On one side, it's the golden rule of choice of law, while it's also a method of choice of law. On the other side, the object of the Doctrine of the Most Significant Relationship could be expressed as "region", as well as "law". It is integration in legislation and judicature. Otherwise, corresponding to the Doctrine of the Most

Significant Relationship, the international treaties and international conventions have certain feasibility. The advantages of the Doctrine of the Most Significant Relationship are that it can normalize the legal system and enhance the ability of private international law to adapt the new case as well as achieve the justice in individual cases. But as we know, the Doctrine of the Most Significant Relationship is a rapier. Being not properly applied, it could lead to unilateralism and overthrow the whole system of private international law. As the basic system of conflict of laws, characterization, renvoi, reservation of public order, evasion of law and ascertainment of foreign law always play important roles in choosing the lex causae by applying conflict rules. In the meanwhile, the Doctrine of the Most Significant Relationship always takes effect through conflict rules, so we can find that, to a certain extent, they are interrelated and interact on each other.

Chapter Five: The Perfect of the Doctrine of the Most Significant Relationship inChina. The chapter provides several suggestions for the reestablishment of system. Having advantages and disadvantages, the Doctrine of the Most Significant Relationship often changes from countries to countries, so we should improve the Doctrine of the Most Significant Relationship on the basis of the condition of China. Generally speaking, when the Doctrine of the Most Significant Relationship is applied in China, the issues we should pay attention to are as follows, namely pondering reasoningly general exception clause, harmonizing the relationships between the Doctrine of the Most Significant Relationship and the Doctrine of Party autonomy, making