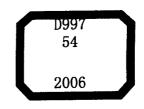
德国国际私法:

理论、方法和立法的变迁





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杜涛 著



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谨以此书献给韩德培教授 96 华诞

《中国民商法专题研究丛书》总序

我于1988年起担任中国社会科学院法学研究所民法研究室主任,开始考虑学术发展和人才培养问题。时值90年代初,中国内地遭遇学术著作出版难,尤其未成名的年轻学者的学术著作出版更难。遂仿照王泽鉴先生担任台湾大学法律学系主任时编辑出版《台大法学丛书》的办法,编辑出版《中国民商法专题研究丛书》。预计用二十年时间,出版100部民商法专题研究著作。

其编辑宗旨是,从中国改革开放和发展现代化的市场经济的实际出发,广泛参考发达国家和地区民商事立法的成功经验和最新判例学说,深人研究民商法的基本理论和实践中的重大法律问题,为中国民商事立法的现代化和民商事审判实务的科学化提供科学的法理基础,提升民商法理论水平,推出民商法理论研究人才,使中国民商法理论研究尽快赶上发达国家和地区的水平。

著作之人选丛书,不论作者职称、地位、亲疏,以学术性为惟一考量。不约稿、不组稿、不需推荐,概由作者自荐。欢迎自荐博士学位论文。丛书虽以"民商法专题研究"为名,其人选著作并不以民商法学为限。涵盖民法、商法、民事诉讼法、仲裁法、经济法、环境法、国际私法、国际经济法、民商事国际公约惯例等领域,而与广义之"私法学"概念相若。

自 1994 年推出第一部著作始,迄今已有十余年了,已出版著作 50 部。出版社方面注意到本套丛书在国内外已产生良好影响和社 会效益,决定自第 51 部著作始,重新设计、增大开本、改变装帧、更加 精编精印。特补述丛书编辑缘起及宗旨,作为总序。

梁慧星 于北京城南清芷园 2005 年 12 月 8 日

内容摘要

本书研究德国国际私法从 15 世纪的"法则区别说"到 21 世纪初的发展历程,着重探讨其理论学说及立法的发展演变。本书的着眼点在于通过对德国国际私法历史的介绍和分析,为中国国际私法的进一步发展提供新的"增长点",同时为将来中国国际私法立法提供比较和借鉴的"参照系"。

中国现代法律制度的建立受到德国法的巨大影响。中国法律,尤其是私法,包括国际私法,从整体上来看应当属于大陆法系,并偏向于大陆法系中的德国分支。如果将我国的国际私法著作与德国国际私法著作进行比较的话,二者之间的相似之处是惊人的,不仅是在体系结构上,而且反映在具体概念和法律术语上,甚至包括"国际私法"这一名称上。

我国目前正在进行《民法典》的起草工作。 我国将来的《民法典》很可能也会采用或大量借 鉴德国法模式。民法如此,作为民法典的施行法的国际私法也应当如此。

中国加入世界贸易组织后,与国外的民商事交往必将以更快的速度发展,国际私法将会拥有更大的用武之地。但是我国国际私法立法尚存在诸多空缺,现有的立法也有许多有待完善之处。中国民法典的编纂正在紧锣密鼓地进行之中,国际私法的法典编纂相信也是不久之后的事。中国国际私法学会长期以来致力于中国国际私法立法的研究,并于1999年出版了《中国国际私法(示范法)》,以期对将来中国的国际私法立法树立典范。作为法典编纂必要的前期准备工作,加强对外国国际私法立法、理论和实践的研究实属当务之急。我国在这方面已经取得了一定成就。

然而,尽管我国国际私法受到德国国际私法如此巨大的影响,但 是自从新中国成立之后,我国学者对德国国际私法的介绍和研究基本上处于空白状态。因此,本书试图填补这一空白,并希望能对未来的中国国际私法立法起到一定借鉴作用。

本书将德国国际私法的发展划分为三个阶段,即"法则区别说"时期、"近代国际私法"时期和"当代国际私法"时期。"近代国际私法"时期和"当代国际私法"时期。"近代国际私法"和"当代国际私法"均属于现代国际私法。当然,这种划分也仅是出于研究的方便。本书因此而分为三编,共十二章。第一编为"法则区别说"时代,包括第一、二、三章。第二编为"近代国际私法",包括第四、五、六、七、八章。第三编为"当代国际私法",包括第九至十二章。

本书首先介绍 15 世纪到 19 世纪中期德国国际私法的历史发展。由于在 18 世纪末 19 世纪初的大立法时代之前,国际私法主要是一种学说法,因此这一部分的介绍也就依照学者的年代顺序进行(第二章)。相对于意大利、法国和荷兰等国而言,德国的国际私法发展比较晚。因此为了正确理解德国"法则区别说",有必要对在此

之前的其他国家国际私法的理论发展进行介绍(第一章)。直到 16 世纪,德国才出现了专门研究法律冲突的学者,他们的理论同属于"法则区别说"。德国的"法则区别说"并没有多少独创之处,基本上是对意大利、法国和荷兰学者理论的继受。但个别学者如赫尔特等,在国际私法史上也具有独特的地位。赫尔特写出了世界上第一部冲突法专著。

但是,"法则区别说"是在德国学者手里被终结的,其终结者是 薛夫纳、魏希特和萨维尼。薛夫纳和魏希特是从"法则区别说"到现 代国际私法理论的过渡人物,但他们的理论对后世产生了巨大影响 (第三章)。薛夫纳首创了"国际私法"这一名称;而魏希特的理论则 开创了国际私法中的"民族主义"路线。可惜他们都没能建立起新 的国际私法理论体系。

萨维尼被公认为是现代国际私法理论的创立人。因此,萨维尼的国际私法理论是本书的研究重点(第四章)。萨维尼提出了"法律关系本座说",实现了国际私法方法论上的革命性转折,被誉为国际私法史上的"哥白尼革命"。

19 世纪末期,围绕着德国国际私法立法产生了巨大争论,最终于 1896 年颁布的德国《民法典施行法》并没有完全实现萨维尼的主张,而是一种政治妥协的产物(第五章)。

萨维尼之后,现代国际私法理论形成两大派别,即国际主义学派(第六章)和民族主义学派(第七章)。在两大学派的推动下,国际私法得到迅速发展。由于国际私法所具有的独特性质使得两大学派的理论主张均无法完全实现国际私法的目的。因此,在两大学派之外,一些学者开始探求"第三条道路",因而产生了所谓的"比较法学派"(第八章)。这一学派的影响一直持续到今天。

以萨维尼为代表的现代国际私法受到 19 世纪实证主义法学和 "潘德克顿"法学影响,逐渐发展成为一套烦琐的概念主义理论体

系。随着 20 世纪 30 年代以后国家职能的转换和社会结构的变化,这套概念主义的法律选择体系首先在美国受到质疑和批判,形成声势浩大的所谓的"冲突法革命"。这场"革命"继而在欧洲大陆引起广泛反响。"激进派"学者接受美国"革命"理论的影响,他们或者主张抛弃传统的冲突法规范,或者主张对传统理论进行改造,并提出了许多替代性理论(第九章)。

但是,德国的传统学者反对这种激进主义思想,并对其进行了抨击。他们主张维护传统国际私法规范的权威,并在此前提下对国际私法进行改造,其中最具影响的人物是克格尔和他所提出的利益法学理论(第十章)。德国 20 世纪 80 年代以后的国际私法改革立法也遵循了这一思路(第十一章),没有接受美国学者的激进理论。

在人类即将进入 21 世纪之际,世界形势发生了巨大变化。"后现代思潮"席卷全球,法学也难以独善其身。一些学者从未来主义角度对所谓的"后现代国际私法"进行了探讨,提出了一些富有启发性的观念(第十二章)。其中最有意义的是从文化角度来探讨法律冲突的解决途径。

为了使读者对德国国际私法的立法渊源有一个完整而清晰的了解,作者将从1896年以来德国关于国际私法的法规条文翻译出来,并按照时间顺序附录在文后。这些条文均根据其颁布时的原始文字译出。

关键词:德国,国际私法,冲突法,法律史,立法

Abstract

The modern Chinese law system was greatly affected by the German law system. Viewing the situation as a whole, Chinese law, especially the private law, including the private international law (PIL), belongs to the continental law system and approaches the German law system. If we compare the Chinese PIL literatures with the German ones, we will find a striking similarity, not only in their system, structure, but their concepts and terminologies, such as "Private International Law".

This book studies the history of German PIL from "Statute Theory" before 16th century till "Postmodern PIL" at the end of the 20th century. The focal point of this book is the evolution of its theories, doctrines and legislations. The purpose of this book is to provide a consult for the Chinese PIL-legislation in the future and an increase-point

for the Chinese PIL-Research.

The Chinese legislation of a "Civil Law Code" is in progress. The Chinese "Civil Law Code" in the future will probably follow the German model. As the applicable law of civil law, PIL must follow the same model.

After China enters into the WTO, the civil and commercial exchange between China and other countries will increase in higher speed. PIL will have a wider scope to play its role. But there are many gaps in the Chinese PIL legislations. The PIL in force must be perfected.

The codification of Chinese civil law is in progress. The codification of Chinese PIL must be put into the agenda of Chinese legislators. For a long time past, the Chinese Academy of PIL devote itself to the study of Chinese PIL codification. As the preparatory stage of Chinese PIL legislation, we must pay more attention to the PIL theories and legislations of other countries. We have made great achievements in this respect. But in spite of the great influence of German PIL to China, we didn't have many understanding of German PIL since the founding of PR China. This book will try to fill this gap. I hope that my study will promote the legislation of Chinese PIL.

This book falls into three parts. The first part "Statute Theory" includes chapter 1—3. The second part "Modern PIL" includes chapter 4—8. The third part "Contemporary PIL" includes chapter 9—12.

The first part inquires into the history of German "statute theory" since the 15th century till the 19th century. Before the end of the 18th century and the beginning of the 19th century, the PIL is mainly a "doctrine law". This part is written in chronological sequence. Its main content is to introduce the theories of each scholar. Contrary to the

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situations in Italy, France and Holland, the development of the German PIL theory is relatively late. In order to understand the German "Statute Theory", we must firstly introduce the development of PIL in these countries (Chapter 1). German "Statute Theory" had little originality. Its main content came from the scholars of Italy. But some German scholars such as Hert had made a great contribution to the PIL development.

German scholars, especially by Schäffner, Wächter and Savigny, overcame "Statute Theory". Schäffner and Wächter were transition persons from "Statute Theory" to "Modern PIL". Their theories exerted a tremendous influence to the PIL development afterwards (Chapter 3). Schäffner initiated the name of "Internationales Privatrecht"; Wächter's theory initiated a "nationalist school" of PIL.

Savigny was generally acknowledged as the founder of "modern PIL". His theory is the focal point of this book (Chapter 4). Savigny's "Sitz-Theory" was a great turn of the modern PIL method and was called a "Copernican revolution".

At the end of 19th century there was a great debate around the codification of German civil law. "Das Einführungsgesetz" of BGB in 1896 didn't realize the ideal of Savigny. It is a product of compromise (Chapter 5).

After Savigny, the modern PIL theory was divided into two great schools: the "Internationalist School" and the "Nationalist School" (Chapter 6 and Chapter 7). Under the promotion of the dispute between the two schools, PIL had made great development. But because of the distinctive character of PIL, neither of these two schools could completely realize the purpose of PIL. Some scholars began to find out a third way, the so-called "Comparative School" (Chapter 8). This school

has great influence till today.

The modern PIL, whose representative figure Savigny was, was greatly affected by the positive jurisprudence and the "Pandekten" law theory. It evolved into a set of scholastic system of concepts. With the transform of the function of states and the changes of social structure, this choice-of-law system was doubted and criticized by the American scholars. In the fifties and the sixties of the 20th century, a new "revolution" broke out in America and evoked worldwide repercussions (Chapter 9). Many European scholars began to criticize the traditional PIL theories and methods. They maintained that the traditional PIL rules must be replaced by the new approaches and principles. Some of them believed that the traditional PIL theory should be reformed. But most European scholars fought against these radical doctrines. They maintained that the traditional PIL methods shouldn't be given up. Some of them had developed their own doctrine. Gerhard Kegel was the most well known representative. He advanced an "Interessenjurisprudenz" (Chapter 10). The legislations of German PIL had also followed this thinking (Chapter 11) and rejected the American approaches.

At the turn of centuries, the situation of the world has greatly changed. The postmodern theory was popular in the whole world. "The postmodern jurisprudence" emerged as the times required. Some scholars applied the postmodern law theory to the analysis of conflicts of law problems (Chapter 12). They maintained that conflict of laws had its cultural background. The PIL in the 21st century must pay great attention to the cultural divergences of different countries and areas, and try to coordinate then well.

In order to give the readers a complete and clear impression of the sources of German PIL, I have translated the legislations of German PIL

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from 1896 till 2001 in Chinese and put them in the appendix at the end of this book. They were all translated from the original text.

I want to express my thanks here to the Chinese Scholarship Council and the DAAD. They have aided my study in Germany financially.

It must be especially explained that the academic standards of this book follows the German current norms. The object of this book is the history of German PIL. But most of the literatures of German PIL before 18th century were written in Latin. Owing to my poor knowledge of Latin language, I had to quote many secondhand documents; most of them were written in German. Even in Germany, most scholars of PIL didn't quote Latin literatures directly, they quote mostly the work "Geschichte des Internatonalprivatrechts" of Professor Max Gutzwiller. So do I.

I must express also here my thanks to Mr. Bai Gang, who studies classic language and classic philosophy in University Trier. He had given me a lot of suggests for the translation of Latin language.

The notes of this book follow the German standard too. Many abbreviations are used in this book; therefore I have made an appendix of abbreviations at the beginning of this book. This book has quoted many literatures of English, German and French. In order to save space, I didn't translated then in Chinese in footnotes, but in the appendix of literatures.

Key Words: Germany, Private international law, Conflict of laws, History of Law, Legislation

导 论 / 1

- 一、本书的研究目的/1
- 二、目前的研究现状 / 10
- 三、本书的研究方法 / 13
- 四、本书的结构安排 / 13
- 五、其他说明 / 15

第一編 "法則区别说"时代 (19世纪中期以前)

第一章 16世纪前欧洲国际私法史 / 19

第一节 国际私法的萌芽 / 19

- 一、古典时期 / 19
- 二、中世纪早期 / 21
- 三、中世纪中晚期(14世纪以前)/22

第二节 国际私法的诞生与发展 / 23

- 一、注释法学派 / 23
- 二、法则区别说 / 26
- 三、16世纪"法则区别"说在法国的发展 / 33

第二章 德国的"法则区别说"/38

第一节 概论 / 38

第二节 德国"法则区别说"的初创与发展期 (1688 年以前)/40

- 一、主要学者及其理论 / 40
- 二、对这一时期理论的总结与评价 / 66

第三节 德国"法则区别说"的鼎盛期

——赫尔特的国际私法理论 / 70

- 一、赫尔特的生平 / 70
- 二、赫尔特的冲突法理论 / 71
- 三、赫尔特的理论渊源 / 78
- 四、对赫尔特理论的评价 / 82
- 五、对赫尔特理论的继承与发展(18世纪)/83

第四节 德国"法则区别说"与18世纪国际私法立法/90

- 一、1756 年《巴伐利亚民法典》Codex Maximilianeus Bavaricus civilis) / 90
- 二、1794 年《普鲁士普通邦法》(Allgemeinen Landrecht für die Preußischen Staaten)/91

第三章 对"法则区别说"的批判与超越

——薛夫纳与魏希特的国际私法理论/93

第一节 概论 / 93

第二节 薛夫纳的国际私法理论 / 95

- 一、威廉・彼特・薛夫纳的生平与著作 / 95
- 二、薛夫纳的理论及其贡献 / 95

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