INTERNATIONAL LAW REVIEW

国际法评论

（第四卷）

主　　编　孔庆江
执行主编　张　玲

清华大学出版社

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内 容 提 要

本卷包含国际法各方向近期研究成果，包括国际私法全球论坛、中加高端学术交流中收录的部分论文。其中，国际公法方向涉及气候变化国家立法、国际海洋法法庭在“自由号案”中规定临时措施的实践、国际刑事法院个人刑事责任认定等内容。国际私法方向的论文涉及国际私法立法的国际比较、网络冲突法、外国法的查明、亚洲国际私法在合同领域的发展、国际民商事诉讼管辖权、外国判决的承认与执行、国际商事仲裁程序、海峡两岸民商事争端解决机制等。国际经济法的论文涉及长江三角洲地区国外直接投资的法律协调、国际商船安保问题、国外司法出售船舶之登记、WTO反倾销法律制度下国别税率的违法性、世贸裁决与公共道德与文化多样性的关联性等。此外，本卷内容还包括国别法和比较法的研究，涉及加拿大文化多样性与法律、加拿大宪法、行政法等。

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国际私法全球论坛北京宣言

2011 年 10 月 23 日

公元 2011 年，在人类进入 21 世纪第二个十年之际，中华人民共和国第一部国际私法单行法——《中华人民共和国涉外民事关系法律适用法》（以下简称《涉外民事关系法律适用法》）正式实施。在此值得记忆的时刻，中国国际私法学会与中国政法大学国际法学院于 2011 年 10 月 22～23 日在中国北京举办“国际私法全球论坛”，全球国际私法学界百余位专家、学者和实务工作者欢聚北京，共襄盛举。

与会者深切感受到当代中国在政治、经济、法治、社会、文化等方面取得的巨大进步，在国际民商事交往中的积极贡献，以及在国际私法立法、理论与实践方面取得的令人瞩目的成绩，高度关注中国未来在各方面，尤其是在国际私法领域的新发展。

与会者紧紧围绕“全球化背景下的国际私法：机遇与挑战”这一主题，就中国《涉外民事关系法律适用法》、合同与侵权的法律选择规则、婚姻家庭的法律选择规则、各国国际私法立法的新发展、国际民商事纠纷的多元解决机制等议题展开了热烈而深入的讨论，并达成了广泛共识。

论坛认为，作为调整国际民商事关系、解决国际民商事法律冲突的法律部门，国际私法是实现全球治理不可或缺的重要一环。在全球化背景下，国际民商事交往日益频繁，国际民商事关系愈加复杂，这既对国际私法学科提出了挑战，也为国际私法学科提供了新的课题，为其生生不息注入了新的活力。

论坛注意到，以仲裁、调解为代表的替代性纠纷解决办法在当代国际民商事纠纷的解决中占有重要地位，并相信多元纠纷解决机制必将在立法、理论与实践中得到进一步发展与完善，在缩减讼源、化解纠纷、维持社会秩序方面发挥更大作用。

论坛了解到，各国在国际私法领域的合作卓有成效，并倡议各国在现有的合作机制之上，进一步拓展国际民商事立法与司法的合作领域、创新合作机制，为在全球范围内实现民商事纠纷公平与高效的解决营造更加理想的环境，促进全球经济社会的科学发展。

论坛认为，作为世界上最大的发展中国家，中国制定并实施《涉外民事关系法律适用法》具有划时代的意义，必将对中国深化改革、扩大开放、与其他国家建立更加密切的民商事关系起到重要而深远的积极作用。鉴于发展中国家在全球事务中正发挥着愈加重要的作用，国际社会应高度关注国际私法在发展中国家的发展，关注其在发展

中国家遇到的挑战和机遇。

论坛倡议,为了便利各国国际私法教学与研究机构以及专家、学者、实务工作者更好地交流与合作,保障国际私法这一古老而年轻的学科可持续发展,有必要建立一个全球性的国际私法学术组织。论坛相信,这一学术机构的成立,必将更加有力地推进国际私法在全球的发展与繁荣。

论坛认为,青年人才的培养,事关国际私法的前途与未来,为此,各国国际私法学界应对青年人才的成长给予更多的关心与关注,为青年人才的发展创设更加有利的学术扶植与激励机制,从而确保国际私法学科薪火相传,永葆活力。

与会者相信,国际私法必将在全球范围内取得更大的发展与进步,必将为促进国际民商事交往、构建和谐的国际民商事秩序、推进全球法治、实现社会公平正义做出更大的贡献。

论坛代表

Beijing Consensus of the Global Forum on Private International Law

October 23,2011

In 2011, the beginning of the second decade of the 21st century, the People's Republic of China implemented its first conflict of laws act, the Act on the Application of Laws on Foreign-Related Civil Relationships. To explore the implications of this Act, the China Society of Private International Law (CSPIL) and the China University of Political Science and Law (CUPL) faculty of international law jointly sponsored the Global Forum on Private International Law on October 22-23, 2011. Over 100 experts in private international law, including judges, scholars, and practitioners from throughout the world gathered in Beijing to take part in this groundbreaking event.

The Forum took note of the importance of China's contribution to this field of law, especially against the backdrop of China's notable progress in political, economic, legal, social, and cultural areas. The Forum recognized China's significant contribution to international civil and commercial transactional law as well as the growing sophistication of China's private international law legislation, scholarship, and practice. The Forum also renewed its commitment to continue research and publication in this field to help guide China and the international community in this field.

The theme of this meeting was "Private International Law in the Context of Globalization: Opportunities and Challenges." Participants engaged in spirited and detailed discussion of several topics, including China's new conflict of laws act; choice of law in contracts, torts, marriage, and family law; domestic legislation related to

private international law; and various mechanisms for civil and commercial dispute resolution.

The Forum recognized that private international law, which governs international civil and commercial relationships, plays an indispensable role in global governance. As international civil and commercial relations have grown more complex in an increasingly globalized world, private international law faces new challenges and opportunities.

The Forum noted that alternative dispute resolution (ADR) mechanisms, such as arbitration and mediation, play a key role in resolving international civil and commercial disputes. Legislation, scholarship, and legal practice will influence the growth of ADR, which in turn will have a positive impact on reducing litigation, resolving disputes, and maintaining social order.

The Forum observed that international cooperation is essential for the effective development of private international law. More advocates are needed in the international community to strengthen cooperation in international law and judicial practice in order to create an environment that is more conducive to resolving international civil and commercial disputes as well as to help promote the growth of the global economy.

The Forum recognized that the adoption of the Act on the Application of Laws on Foreign-Related Civil Relationships is greatly significant. By implementing this Act, China will further expand its reforms and establish closer civil and commercial relationships with other countries. China is one of the largest developing countries in the world, and developing countries in general are playing a larger role in global affairs. The Forum suggested that the international community should pay greater attention to the development and enforcement of private international law in these developing regions.

In order to facilitate further international collaboration between scholars at research institutions and legal practitioners, as well as to promote the sustainable development of private international law, the Forum called for establishing a global association on private international law. Such an association would be an effective mechanism to promote the awareness, study, and development of private international law.

The Forum underscored the importance of cultivating young scholars to ensure the future of private international law. Thus, countries' individual private international law societies should encourage young scholars by providing academic support, resources, and incentives. Such attention to young scholars would ensure the vitality and development of private international law.

The Forum concluded that private international law will make even greater progress in the future by further enhancing international civil and commercial relationships, building a harmonious international civil and commercial order, developing the system of global governance, and achieving fairness and justice.

Representatives of the Forum

Internet Choice of Law Governance

Laura E. Little[1]

The internet is no longer a new innovation, and is now central to daily life for much of the world's population. Indeed, the students entering colleges and universities in 2011 are not only much younger than the internet, but were born after commercial internet service providers became a significant presence in many households.[2] Today's young adults are "digital natives" who do not know of a world without electronic communication and are largely acquiring knowledge to navigate that world primarily through internet communication. Further bolstering its credential as a powerful social force, the internet is credited with the success of what has come to be called the "Arab Spring"—democratic uprisings inspired by the youth in the Middle East, particularly in Egypt.[3] Moreover, the internet not only plays an integral part of the lives of young people, but permeates the lives of older, power brokers—in business and government—as well. What does this mean for legal doctrines governing internet interactions? I take the position that, for the particular area of choice of law, we should treat internet legal issues as special, remaining mindful of potentially unique problems (and solutions) that the internet may pose—at least for the present.

When the internet was a new, although already important part of life, many thought that it challenged traditional notions of governance, which historically have focused on physical, territorial boundaries. A debate raged about whether existing legal principles will prove adequate to govern internet disputes or, alternatively, whether cyberspace is so unique that it demands new rules. On the one hand were those who advocated for the status quo, seeing no need for significant change in governing principles.[4] On the other hand, were those who took the position that such a revolutionary technological change as the internet called for a revolution in legal regulation as well.[5] This debate is particularly acute for choice of law issues, which are often magnified in the internet context: the net affects participants in the

"whole wide world," potentially implicating the legal interests of multitudes.

Despite the internet's increasing integration into modern life, the debate about internet governance has not resolved. As the internet has become intertwined with other aspects of modern life, one finds considerable support for the "status quo" advocates. Indeed, plenty of evidence suggests that conflict of law doctrines predating the internet are sufficiently flexible to accommodate disputes with internet elements. We have seen personal jurisdiction doctrine work with relative ease, distinguishing between passive websites and interactive websites. The doctrines also identify purposeful electronic gestures toward a forum state sufficient to establish minimum contacts. With at least some regularity, U. S. courts have also applied standard choice of law methodology—the Restatement (Second) of Conflict of Laws, Governmental Interest Analysis, and the like—in internet disputes involving multiple states of the United States and foreign countries. In addition, parties have avoided many paralyzing choice of law problems by pervasively deploying choice of law clauses, with internet users "agreeing" with the click of a mouse to submit their disputes to particular dispute resolution systems,[6] to particular tribunals, and to governance by particular substantive laws.

Does the maturing of digital natives and the law's success in accommodating existing doctrines to internet realities mean that the "status quo" position on choice of law doctrines has prevailed? A recent new edition of a Conflict of Laws textbook in the United States eliminated a special chapter on the internet. The preface to the book explains the omission as follows: "Material from the chapter on Internet conflicts has been incorporated into chapters throughout the book on the theory that courts' treatment of Internet conflicts are not different in kind from other types of conflicts."[7] The decision not to lead choice of law students through a separate study of internet issues reflects the decision that existing legal paradigms are sufficient to handle internet conflicts issues.

This is not, however, the exclusive position among U. S. choice of law scholars.[8] Indeed, I maintain that wisdom counsels against abandoning special focus on internet choice of law issues at this time. Whether or not the "status quo" position might ultimately declare victory in the debate over the proper form of internet governance, judges, practitioners, and legal thinkers will continue to benefit from concerted focus on how law intersects with internet use. Even if one could say that we fully understand the interaction with law and the internet,[9] the time is not right to declare the debate over: world interactions through the internet are still so much in flux that it is unwise to minimize the importance of internet choice of law issues, treating them as no different than non-internet legal issues.

Telling evidence of the work yet to be done in resolving the interplay of the internet and conflict of laws issues comes from a concurring opinion written by Justice Breyer of the United States Supreme Court in a personal jurisdiction decision handed down in June 2011.[10] Like four other justices in the case, Justice Breyer expressed concern that the time had come to expand or to clarify personal jurisdiction doctrine, since two decades had passed since the Court had handed down a personal jurisdiction decision with international components.[11] Justice Breyer, however, did not believe that the case before the Court provided the right vehicle for doing so, noting that the case did not present issues that would illustrate "recent changes in commerce and communication."[12] Presumably, a case with internet communications touching the forum state would provide Justice Breyer with the proper vehicle for exploring contemporary ramifications of personal jurisdiction doctrines. He apparently did not want to change personal jurisdiction law without a concrete case capable of demonstrating how that change would affect the new world of internet transactions and communications.

Whether or not generic principles of law will ultimately accommodate the needs of internet disputes, several qualities of internet choice of law decisions suggest that they still call for special attention. Perhaps most importantly, such attention is necessary to explore and to clarify persistently unilateral reactions to internet disputes by forum courts (both in the United States and elsewhere). For American courts, practitioners, and legal thinkers, special consideration of internet disputes provides a unique learning opportunity about non-U. S. approaches to regulation and a chance to develop consensus with other countries. Moreover, in one area in particular—freedom of expression—American citizens, companies, and lawmakers are less inclined toward compromise than they are on many other legal and political issues. Focusing on freedom of expression issues in the internet choice of law context provides a vehicle for Americans to gain greater perspective on other points of view toward freedom of expression. I explore in greater detail below these two phenomena: the general tendency (1) toward a unilateral orientation in internet choice of law decisions and (2) toward American exceptionalism in the First Amendment internet context—in greater detail below.

I. Unilateral Decisionmaking

Consider the following curious tendency in internet cases: even though the disputes invariably possess significant multi-jurisdictional elements, courts often do not bother with traditional choice of law analysis. Instead, courts frequently focus only on whether the case falls within the ambit of local law. If the answer is "yes,

local law can regulate," then they do not engage the question whether another jurisdiction's law has a greater claim to regulation. Sometimes, this unilateral orientation has even spawned legislative initiatives unique to internet problems.

This is not to say that courts do not engage a multilateral analysis in many internet cases—evaluating competing claims to regulation. They do so regularly. But unilateral analysis continues to have a remarkably strong presence in choice of law cases.[13] It is ironic that, in an era of globalization and rapid progress in technology, courts are indulging what could be called a regressive impulse to ignore competing regulatory claims. Importantly, this impulse casts personal jurisdiction doctrine in a pivotal role for restraining sovereign attempts to regulate. Under a unilateral orientation, courts apply their own law so long as they are satisfied that they possess personal jurisdiction to adjudicate the dispute. Thus, in these circumstances, personal jurisdiction analysis ends up being determinative of what law governs the merits of the controversy. This is a lot of weight for personal jurisdiction doctrine to carry, particularly in the United States where substantial uncertainty about the parameters of personal jurisdiction doctrine persists.[14]

Does this unilateral approach extend outside the internet context? While random examples no doubt exist, one cannot readily discern a pattern of unilateralism as is obvious in multi-jurisdictional internet cases. In the United States, at least three states in contemporary times have formally embraced what many denominate as a lex fori approach to choice of law,[15] where the court gives particularly strong consideration to the option of applying forum law. In each of these jurisdictions, however, courts explicitly evaluate the propriety of applying forum law rather than the law of another jurisdiction, and integrate into their analysis values focused on "conflicts justice": considerations of judicial efficiency, the appropriate exercise of state sovereignty, and the like. That is not the case in the unilateral choice of law cases for the internet.[16] In short, the lex fori tradition existing in some U. S. jurisdiction does not provide precedent for the unilateral approach to multi-jurisdictional internet cases.

One also wonders whether the international character of many internet cases might trigger the unilateral analysis: the idea being that U. S. courts confronting international parties or international contexts are more prone to regulate using U. S. law, without allowing choice of law analysis to introduce complications or to suggest relaxing U. S. control. While it is true that many internet disputes have international elements, U. S. case law does not support the hypothesis that international elements are a primary cause of the unilateral analysis. U. S. courts confronting non-internet contexts generally handle international choice of law cases with the same confidence