案例教程影印系列
CASEBOOK
SERIES

第五版 Fifth Edition

冲突法

CONFLICT OF LAWS

案例与资料

Cases and Materials

[美] 利·布里梅耶 (Lea Brilmayer)
杰克·戈德史密斯 (Jack Goldsmith) /著

中信出版社
CITIC PUBLISHING HOUSE

案例教程影印系列
CASEBOOK SERIES

CONFLICT OF LAWS

Cases and Materials

本书是美国哈佛、耶鲁等一流大学法学院广为推崇的主流课程教学用书，作者分别为耶鲁大学和芝加哥大学的知名法学教授。

本书立足于理论与实践相结合，精选了历史上的和近年的经典案例，重点阐述了冲突法的核心内容——法律选择问题以及对法律选择的宪法限制、判决的承认与执行、国家之间的法律冲突等方面的内容。

第五版反映了时代的发展变化对冲突法的影响，专章讨论了近年来国际上广泛关注的因互联网的普遍使用引起的管辖权及法律适用问题，分析了同性恋婚姻涉及到的法律冲突等问题。

另有配套的教师手册归纳教学重点，解答疑难问题。

本系列图书将要出版一百余种，以下是部分书目：

证券管理法：案例与资料
反垄断法精析：难点与案例
外交关系法：案例与资料
商法：难点与资料
公司法：案例与资料
财产法
合同法：案例与原理
>> 冲突法：案例与资料
侵权法：案例与资料
法律的经济分析
银行法
国际税收
谈判的理论与策略
国家安全法
电子商务法
网络信息法：案例与资料
民事诉讼程序
公司犯罪与白领犯罪：案例与资料
刑事诉讼程序全书
律师规范：法律和道德问题
刑法：案例与资料
宪法
行政法：难点与案例
现代美国法律救济：案例与资料

ISBN 7-80073-843-4
9 787800 738432 >
www.publish.citic.com

责任编辑　袁婉君
封面设计　AW工作室　刘军
经销：中信联合发行有限公司

ISBN 7-80073-843-4/D・102
定价：138.00元

案例教程影印系列
CASEBOOK
SERIES

第五版 Fifth Edition

冲突法

CONFLICT OF LAWS

案例与资料

Cases and Materials

[美] 利·布里梅耶 (Lea Brilmayer)
杰克·戈德史密斯 (Jack Goldsmith) /著

中信出版社
CITIC PUBLISHING HOUSE

图书在版编目（CIP）数据

冲突法：案例与资料（案例教程影印系列）/（美）布里梅耶等著. —影印本. —北京：中信出版社，2003.8
书名原文：Conflict of Laws: Cases and Materials
ISBN 7-80073-843-4

Ⅰ. 冲… Ⅱ. 布… Ⅲ. 冲突法-案例-分析-英文 Ⅳ. D997

中国版本图书馆CIP数据核字（2003）第060684号

冲突法：案例与资料

CHONGTUFA ANLI YU ZILIAO

著　　者：［美］利·布里梅耶　杰克·戈德史密斯
责任编辑：袁婉君
出版发行：中信出版社（北京市朝阳区东外大街亮马河南路14号塔园外交办公大楼　邮编　100600）
经 销 者：中信联合发行有限公司
承 印 者：霸州市长虹印刷厂
开　　本：787mm × 1092mm　1/16　**印　　张**：58.5　**字　　数**：1170千字
版　　次：2003年8月第1版　　**印　　次**：2003年8月第1次印刷
京权图字：01-2003-2995
书　　号：ISBN 7-80073-843-4/D · 102
定　　价：138.00元

总　序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出："为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。"

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要（Emanuel Law Outlines）美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析（Examples and Explanations）由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列（Casebook Series）覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要（Casenote Legal Briefs）美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

Conflict of Laws

Aspen Publishers, Inc.
Legal Education Division

About Aspen Law & Business Legal Education Division

With a dedication to preserving and strengthening the long-standing tradition of publishing excellence in legal education, Aspen Law & Business continues to provide the highest quality teaching and learning resources for today's law school community. Careful development, meticulous editing, and an unmatched responsiveness to the evolving needs of today's discerning educators combine in the creation of our outstanding casebooks, coursebooks, textbooks, and study aids.

Aspen Law & Business
A Division of Aspen Publishers, Inc.
A Wolters Kluwer Company
www.aspenpublishers.com

To Our Teachers and Students

Preface to the Fifth Edition

Jack Goldsmith joins Lea Brilmayer in editing the fifth edition of this casebook begun by the late Professor James Martin in 1978. It has been almost seven years since the publication of the fourth edition of the casebook. Perhaps the most important change during this period has been the rise of the Internet, a communication technology that has generated many new and difficult conflicts problems. The importance of the Internet to conflict of laws is reflected in a new chapter (Chapter 8) devoted to the topic. The organization of the remainder of the book remains largely the same, but the chapters have been significantly updated to reflect changes during the past seven years. The following changes may be of particular note: The interstate (and federal-state) consequences of same-sex marriages are discussed in Chapters 1 and 6; Chapters 2 and 8 have more elaborate discussions of contractual choice-of-law; and Chapter 7 ("Conflicts in the International Setting") has been expanded a great deal. Many new cases and notes have been added to all of the other chapters as well. To make room for these changes, we have eliminated outdated material and we have cut down a bit on coverage in Chapter 4 ("The Jurisdiction of Courts over Persons and Property") on the theory that personal jurisdiction is thoroughly covered in the first-year civil procedure class. We hope that the book continues to meet the needs of teachers in the field and to attract curious students.

Lea Brilmayer
Jack Goldsmith

August 2001

Preface to the Second Edition

The teacher of conflicts already knows that it is a fascinating course. The student is about to find out. It is, moreover, one of those courses in which to be "theoretical" is to be "practical"; the supposed war between those two qualities is not even a skirmish in conflicts law, where changes have come (and will no doubt continue to come) so quickly that the only preparation is understanding, not memorization.

This book is organized to present the heart of conflicts first: choice-of-law problems. In the first chapter the "traditional" approach is exposed; in the second, the struggle of the courts and the commentators to come up with a more responsive (but not unduly complicated) approach. The remaining broad topics—constitutional limitations on choice of law, the *Erie* doctrine, personal jurisdiction, recognition of judgments, and conflicts in the international context—are considered in light of the wisdom derived from consideration of the basic choice-of-law problems. I have attempted to make the materials short enough so that they really can be covered in a three- or four-hour course, but we have all experienced the temptation to slow down and inspect in detail some of the particularly intriguing questions that are raised in conflicts.

Questions and comments at the ends of cases or case groupings tend to be brief, concentrating on the problems raised by the principal cases rather than adding notes about other cases. Occasionally the opinion of the editor may show through in questions and comments, but many questions that may seem to present a point of view are asked in the spirit of the devil's advocate.

Cases have been severely edited to eliminate citations. Thus, they do not read like real case reports, but they do read somewhat more smoothly. Citations are retained on some occasions when they refer to other important cases, when they refer to writings of important conflicts scholars, when they cite the editor of this casebook, or otherwise seem worthy of retention. Footnotes in cases and other quoted material have generally been eliminated without the use of ellipses. Those that have survived editing retain their original numbers, while the editor's footnotes employ asterisks and daggers.

Jim Martin

January 1984

Acknowledgments

Numerous people deserve thanks for their contributions to the publication of the fifth edition of this casebook. Our most enthusiastic thanks go to Jason Callen, a law student at the University of Chicago who provided truly outstanding assistance in research and editing. Jeannie Heffernan and Shelley Pierce, also law students at the University of Chicago, provided important research help as well. Kathie Kepchar provided invaluable typing, organizational, and moral support. Perry Dane, Ryan Goodman, Derek Jinks, Larry Kramer, Jonathan Nash, Erin O'Hara, Hank Perritt, Larry Ribstein, and Allan Stein provided helpful comments on various chapters. Professor Goldsmith thanks the extraordinary library staff at the University of Chicago Law School for its quick, reliable, and cheerful help, and the Russell Baker Scholars Fund for generous financial support.

We also thank the copyright holders who kindly granted their permission to reprint excerpts from the following materials.

American Law Institute, selections from Restatement, Conflict of Laws. Copyright 1934 by The American Law Institute. Reprinted with the permission of The American Law Institute.

———, selections from Restatement (Second), Conflict of Laws. Copyright 1971, 1989 by The American Law Institute. Reprinted with the permission of The American Law Institute.

———, selections from Restatement (Revised) of Foreign Relations Law. Copyright 1986 by The American Law Institute. Reprinted with the permission of The American Law Institute.

Currie, Comments on *Babcock vs. Jackson.* Copyright © 1983 by the Directors for the Columbia Law Review Association, Inc. All rights reserved. This article originally appeared at 63 Colum. L. Rev. 1242-1243, 1247 (1969). Reprinted by permission.

———, Selected Essays on the Conflict of Laws, Copyright © 1963 by Duke University Press.

Escher, drawing entitled "Tekenen." Copyright Beeldrecht, Amsterdam/VAGA, New York, Collection Haags Gemeenthmuseum—The Hague.

Goldsmith, Against Cyberanarchy, 65 U. Chi. L. Rev. 1199 (1998). Reprinted by permission of the University of Chicago Law Review.

Johnson & Post, Law and Borders—The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367 (1996). Reprinted with permission of David Johnson and David Post.

Lapres, translation of Licra and UEJF v. Yahoo! Inc. (Tribunal de Grande Instance de Paris, May 22, 2000), available at *www.lapres.net/html/yahen.html.* Reprinted with permission of the translator.

Leflar, Choice-of-Law Statutes, 44 Tenn. L. Rev. 951, 958 (1977). Reprinted by permission of the author and the Tennessee Law Review Association.

———, Conflicts Law: More on Choice-Influencing Considerations, 54 Cal. L. Rev. 1584 (1966). Copyright © 1966, California Law Review, Inc. Reprinted by permission.

Perritt, Dispute Resolution in Cyberspace: Demand for New Forms of ADR, 15 Oh. St. J. Dis. Res. 675 (2000). Reprinted with permission of Henry Perritt, Jr.

Perritt, Will the Judgment-proof Own Cyberspace? 32 Int'l Lawyer 1121 (1998). Reprinted with permission of Henry Perritt, Jr.

Reppy, Eclecticism in Choice of Law: Hybrid Method or Mishmash?, 34 Mercer L. Rev. 645 (1983). Copyright © 1983 Walter F. George School of Law, Mercer University.

Introduction

A (Very) Brief History of the Subject

Conflict of laws encompasses several related areas of law: choice of law, constitutional limitations on choice of law, jurisdiction of courts, recognition of sister-state judgments, and *Erie* problems.

Of these topics, choice of law is at the heart of the course. A choice-of-law problem arises in the selection of the governing law for a case with connections to two or more jurisdictions. Choice-of-law questions have arisen wherever people have been subject to the authority of more than one state, nation, or tribal law. The late Professor Yntema said that a choice-of-law rule was found on the wrappings of a crocodile mummy in Egypt. Yntema, The Historic Bases of Private International Law, 2 Am. J. Comp. L. 297, 300 (1953). The Corpus Juris of the Roman Empire tended to eliminate such problems by the direct method of eliminating all laws but one (namely, Roman law). Choice-of-law problems arose again in the Middle Ages, however, especially in Italy, which was divided into many commercially active city-states. The "statutists" of medieval Italy approached conflicts problems by dividing statutes into the "real" and "personal" category — the former applied only within the jurisdiction that promulgated it; the latter followed the person wherever he went. Unfortunately, the statutes were not labeled, and the crunch came in trying to determine which statutes were which. Overriding the Italian efforts in the area was the notion of what is now sometimes termed a "superlaw," which was based in part on the natural law and which was viewed as having more authority than the local laws in conflict.

In the 1600s, Holland became influential in choice-of-law theory. The greatest of the Dutch scholars was Ulric Huber, who took the position that states defer to the law of other states in appropriate cases not because some superlaw requires them to do so, but rather because of "comity" — a kind of golden rule among sovereigns. His book, *De Conflictu Legum Diversarum in Diversis Imperiis* [On The Conflict of Diverse Laws of Different States], translated in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws 136 (1947), set forth three postulates from which he derived his solutions to conflicts problems:

> (1) The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
>
> (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
>
> (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

Lorenzen, *supra*, at 163.

Huber's work had a strong effect on Joseph Story, a Justice of the United States Supreme Court who was considered the foremost conflicts scholar in the English-speaking world in the nineteenth century. Story's approach was similar to Huber's and helped entrench the "comity" rather than "superlaw" orientation in the United States. Story's *Commentaries on the Conflict of Laws* (1834) was the most influential work in the field until A. V. Dicey, in England, produced his vested-rights theory at the turn of the century. In the United States, Professor Joseph Beale of the Harvard Law School took up Dicey's vested-rights theory, with strong doses of territorialism. The theory was enshrined in the American Law Institute's *Restatement of Conflict of Laws* (1934) and appeared for a time to be headed for apotheosis by the United States Supreme Court as a branch of the law of due process. Beale's system tended to select a governing law on the basis of where various critical acts occurred, such as where a contract was signed or where a tort was committed.

Beale's approach was heavily criticized by three outstanding scholars — Cook, Lorenzen, and Cavers. But these criticisms had little influence in the courts for many years. In the 1950s, Professor Brainerd Currie attacked the First Restatement approach and suggested in its place a system of conflicts known as "interest analysis." Currie's work influenced courts and provided a basis for others to build on. In 1971, the American Law Institute published the *Restatement (Second) of Conflict of Laws,* which tried to accommodate the policy-based insights of Currie and others. Today choice of law in the United States is something of a hodge-podge. In the context of torts and contracts, most states have rejected the traditional approach and have adopted one of a variety of policy-based approaches. But the traditional approach fares better in other contexts, such as marriage, corporate internal affairs, and real property.

About the Terminology

The late Professor Prosser once said, in an oft-quoted comment, that "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it." Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 971 (1953). A small

amount of introduction to the terminology may then be in order. *Comity*, a term already used above, indicates the nonmandatory acceptance by one jurisdiction of the law of another. *Vested rights* is a term with meaning very similar to its meaning in constitutional law and is used in connection with theories that indicate, for example, that the victim of a tort would acquire a vested right to recovery under the law of the place where the tort occurs, a right that thereafter accompanies the person and may be used as the basis for a lawsuit even in a jurisdiction that would not impose liability if the same events had taken place within its own borders. Closely connected with vested rights is the phrase *lex loci* and its children, *lex loci contractus* and *lex loci delicti. Lex loci* is simply "the law of the place," with *contractus* adding "of the contract" and *delicti* adding "of the tort." Another term important to your reading of the cases is *domicile*, which refers to the political jurisdiction (state, country, etc.) in which a person makes his or her permanent home. We will see many cases elaborating that sketchy definition.

Finally, you will probably already have noted that several terms are used interchangeably for the topic under discussion. "Conflicts of laws," "choice of law," and "private international law" are common labels for what you are about to study, although "choice of law" is often restricted to choice-of-law questions, excluding such other questions as jurisdiction and recognition of judgments.