高等院校**法律专业双语课程**规划教材

国际私法

（英文版）

霍政欣 /著

对外经济贸易大学出版社

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霍政欣，武汉大学法学博士（2005），现为中国政法大学副教授、硕士研究生导师、中国政法大学国际私法研究所副所长；曾赴德国、奥地利、荷兰、美国、韩国等国进行访问研究，曾经或正在主持国家社科基金、教育部人文社科基金、国家文物局等多项国家级、部级以及校级科研项目，并参与数项国际合作科研项目。作者的主要专著有：《中国国际私法（英文版）》（法律出版社 2010 年版）、《不当得利的国际私法问题》（武汉大学出版社 2006 年版），主要译著有：《法律选择与涉外司法》（北京大学出版社 2007 年版）、《如果你是平等主义者，为何如此富有？》（北京大学出版社 2009 年版）、《媒体与信息伦理学》（北京大学出版社 2009 年版）；先后在“American Journal of Comparative Law”、“Asian Pacific Law and Policy Journal”、“Journal of Cambridge Studies”、“Seoul Law Journal”、《法学研究》、《法学评论》、《比较法研究》等国内外刊物上发表中、英文学术论文、译文及评论 50 余篇；其科研与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、第五届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 an associate professor at CUPL, Deputy Director of the Institute of Private International Law of CUPL. He has published two monographs including one written in English, 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.

Preface

Law comes from many sources. In an ideal world, the authority of these sources would be clearly defined and neatly demarcated, so that no event or occurrence was ever subject to control by more than one law maker or law enforcer. But such is not the world where we are living. The power to make or administer law is often unclear and, even when clear, frequently overlaps. Conflicts arise, and a way is needed to resolve them. This, broadly speaking, is the subject matter of "private international law."

In a world which is shrinking by increased and improved means of communication and exchange, private international law, especially in a comparative perspective, has acquired extraordinary importance and become an indispensable tool for all lawyers. It is in this sense that this textbook fulfils its utilitarian purpose, as it explores both doctrinal and pragmatic aspects of Chinese private international law from the perspective of comparative law. Moreover, since the first Conflict of Laws Act of the PRC was passed on October 28, 2010 which shall be put into effect on April 1, 2011, Chinese private international law has witnessed a silent revolution; hence, there can be little doubt that the publication of this book is timely and necessary.

This textbook is designed for use in a typical three-credit course on private international law taught in English, which is devoted to providing detailed and in-depth analysis of the current conflict rules in China concerning jurisdiction, choice of law and recognition and enforecement of 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.

Part I consists of three chapters which provides an introduction to the course without enmeshing students in details and complexities better provided in later parts. Chapter 1 is a general description of private international law where its name, scope, nature, definition and *raisons d'être* are discussed. The remaining two chapters examine the sources of private international law and a vital concept of our subject—"Conflict Rules" respectively.

Part II explores the historical development which is composed of three chapters, *i.e.*, the European Continental History, the Anglo-American History, and the Chinese History. This part is important, insofar as modern private international law has been strongly influenced by its

own history.

Part III turns to the "Subjects of Private International Law." Under the Chinese scholarship, natural persons and legal persons are classified as "regular subjects," while states and international organizations are classified as "exceptional subjects." The first two chapters of this part lay out the nationality and domicile of natural persons and legal persons and the last chapter discusses the issues of states and international organizations as the subjects of private international law. China's position and practice on the immunities of states and their property have also been thoroughly analyzed in chapter 3.

Part IV deals with "International Civil Jurisdiction." As jurisdiction is usually the first issue that a court has to deal with when a dispute is submitted before it, this part examines the jurisdiction of courts in international civil litigation prior to the discussion of choice of law issues. Chapter 1 provides a comprehensive exegesis of the basics of international civil jurisdiction. Chapter 2 summarizes and analyzes the current Chinese legislation and judicial practice on international civil jurisdiction; thereafter it provides comments and suggestions.

Part V spells out the "General Part of Conflicts Law," which examines a number of conceptual issues recurring in discussions of choice-of-law problems such as characterization, *renvoi*, proof of foreign law, evasion of law and *ordre public* reservation.

Entitled "Selected Areas of Conflict Rules," Part VI exposes students to the core set of issues needed to understand private international law. This part focuses on conflict rules that scatter through various Chinese laws, including new Conflict of Laws Act of 2010, whose balance will be devoted to a survey of selected areas of Chinese conflict rules, scrutinizing the relevant legislation as well as judicial practice and providing systematic comments. The conflict rules for capacity, contract, tort, family issues, succession and property are selected as the topics of discussion in this part. 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.

Part VII is "Recognition and Enforcement of Foreign Judgments and Awards" which includes two chapters. Chapter 1 provides an overview of the recognition and enforcement of foreign judgments and addresses the recognition and enforcement of foreign judgments in China. Chapter 2 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.

Part VIII, the closing one of the book, is "The New Conflict of Laws Act of the People's Republic of China." As its heading suggests, this part attempts to make an objective and comprehensive assessment of the Conflicts Act by tracing its history, scrutinizing its most important provisions, and drawing a conclusion. It should be noted that I have attempted to state the law on March 31, 2011, although it has proved possible to take account of certain later developments when correcting proof.

Undoubtedly, the theme of this book is truly international. For this reason, I want it published in today's "*lingua franca*"—English. Since language is the most important—and even the only—weapon in lawyer's armory, the linguistic quality of this book was one of the utmost concerns to me. The readers should bear in mind that considerable parts of this book consist of the translation of original Chinese language works. This will become apparent in the style and the types of footnotes, which also refer to literature written in neither Chinese nor English language. Thus the book represents a symbol for the experience of comparative law.

As the author of this book, I am immensely grateful to the University of International Business and Economics Press. Their teamwork is always outstanding, and it is a joy to work with them. I am especially indebted to Ms. WANG Yu who, in my eyes, is a dream editor: I do not think anyone could have been more supportive.

Last but not least, I want to acknowledge the understanding and sacrifice of my family. Without the enduring love, encouragement, and support of my loving parents and dearest wife, little would be possible.

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. Conflicts scholarship is always a risky undertaking,[①] and a conflicts book written in a foreign language is perhaps even more fraught with reputational risk. I can only hope 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
June, 2011
Beijing, China

[①] As Judge Porter of the Louisiana Supreme Court lamented about 180 years ago, this is "a subject, the most intricate and perplexed of any that has occupied the attention of lawyers and courts: one on which scarcely any two writers are found to entirely agree, and one which it is rare to find one consistent with himself throughout." Saul v. His Creditors, 5 Mart. (n.s.) 569, 589 (la. 1827).

前　言

法律之渊源纷繁多样。在理想世界中，这些渊源应有明确的定义与清晰的界限，所以，任何事件，不论发生于何地，只会受制于一位立法者或执法者。然而，我们所生活的现实世界并非如此：立法及执法权时有不清，或纵然清晰但相互重叠。故此，法律之冲突生焉。如何解决此类冲突，概言之，即为“国际私法”的中心议题。

如今，信息技术愈加发达，各国交往日益繁赜，世界随之变小。在此背景下，国际私法已获得前所未有的重要地位，已成为法律人不可或缺的工具；若以比较法为视角观之，情况尤胜。从这个意义上说，本教材的出版极具现实意义，它旨在以比较法为视角，对中国国际私法的理论与实践进行详尽的阐述。尤须指出，中华人民共和国的首部国际私法法规已于 2010 年 10 月 28 日颁布，并于 2011 年 4 月 1 日生效；中国国际私法因而经历了一场静悄悄的变革，如此，本书之出版更添及时性与必要性。

本书作为国际私法英文及双语教学的教材，对国际民事诉讼管辖权、法律选择、外国法院判决及仲裁裁决的承认与执行等事项作了详尽而深入的分析与介绍，并结合最新案例对中国国际私法的司法实践进行了评述。

本书第一编“导论”，分为三章，第一章交代国际私法的名称、范围、性质、存在理由等事项；其余两章则分别探讨了国际私法的渊源与本学科的一个重要概念——“冲突规范”。

第二编为“国际私法简史”，它回溯了本学科的历史发展进程，亦由三章构成，分别探讨了欧陆、英美与中国的国际私法发展与演进历程。本编之所以重要，在于当代国际私法的理论与实践深受其历史影响。

依据中国国际私法学理，自然人与法人被归类为国际私法的基本主体，而国家与国际组织为特殊主体。本书第三编“国际私法的主体”对这两类主体进行了系统介绍。该编第一章与第二章分别讨论了自然人与法人的国籍与住所问题，第三章则在探讨国家和国际组织在国际私法中的地位基础上，着重对国家及其财产豁免理论进行了深入研究，并对中国在该理论上的立场与实践作了系统梳理与评析。

由于管辖权通常是法院在审理涉外民事案件时处理的第一个法律问题，故本书在阐述法律选择问题之前，先设一编，即第四编，专门讨论“国际民事诉讼管辖权”问题。

该编第一章对国际民事诉讼管辖权的基本理论与原则进行了介绍，第二章总结、分析了中国国际私法法立法与司法实践中的管辖权问题，并提出相应的意见与建议。

第五编为“冲突法总论”，该编重点探讨了常与法律选择伴生的一系列问题，包括识别、反致、外国法的查明、法律规避以及公共秩序保留等。

第六编为“冲突规则”，旨在向读者阐释国际私法的核心部分——涉外民事关系的法律适用。本编以中国法（尤其是2010年颁布的《涉外民事法律关系适用法》）中包含的各类冲突规范为中心，深入考察了相关的立法与司法实践，并作出系统评论。该编主要涵盖了民事能力、合同、侵权、物权、婚姻家庭以及继承等领域。如此安排，部分是考虑到它们在涉外交往中的实际重要性，部分是因为这些领域积累的素材与资料较多，便于展开深入探讨与研究。

第七编“外国法院判决与仲裁裁决的承认与执行”包括两章，第一章概述了关于承认与执行外国法院判决的基本理论，并对外国法院的判决在中国承认与执行的条件与程序进行了介绍与分析；第二章首先辨析了承认与执行外国仲裁裁决的区别，再结合《纽约公约》的适用讨论了在中国承认与执行外国仲裁裁决的问题。

作为全书的最后一编，第八编为“中华人民共和国新国际私法法规评析”，如题所示，它旨在对这部新法作出客观、综合的评价与分析。本编从中国国际私法的立法背景入手，进而对新法的各主要条款作出深入、具体的学理阐释与评析，最后对这部法规的历史意义、存在的瑕疵与完善的途径进行了总结性的阐述。需要提及的是，本书所论述的法律，以2011年3月31日为限，此后发生的法律变动或更新，待今后再版再行论述。

毫无疑义，本书的主旨极具国际性。职是之故，我决定用当今世界的通用语言——英语写作、出版之。由于语言是法律人最重要（甚至是唯一）的武器，语言质量遂成为我在撰写本书时最关注的事项之一。需要提及的是，本书涉及的相当一部分内容源自中文文献，这从其脚注的格式中可以窥见；除中文与英文文献外，本书还援引了少量其他语言的文献，这遂使本书为比较法研究提供了较为丰富的素材。

作为本书作者，我首先要向对外经贸大学出版社表以谢意与敬意。贸大出版社的编辑团队素以高水平闻名，与他们的合作始终让人舒心而惬意。王煜老师更是一位梦幻般的编辑，我无法想象还有谁比她更助人惠友。此外，中国政法大学国际法学院的硕士研究生朱寒超同学为本书的编辑校对付出了辛勤努力，并此致谢。

最后，我要感谢我的家人。多年来，父母与妻子对我和我所热爱的事业给予了无条件的理解与支持，作出了无私的奉献；没有他们的爱、鼓励与支持，我将一无所成。

还须交代，对于本书之撰写，我虽已尽力，然钻研未邃，谬误难免，恳请读者赐正。

坦率地说，冲突法著述之撰写向来被视为高风险的工作，[①] 而用外语写作，风险弥高，甚至有毁誉之虞。所以，倘若一位耐心和宽容的读者在掩卷后觉得本书有助于增进其对中国国际私法的理解，则我心满意足矣。

霍政欣
2011 年 6 月
于北京海淀寓所

① 约 180 年前，路易斯安那州最高法院波特（Porter）法官曾感叹道：法官在法院与律师所关注的领域中，冲突法最为错综复杂，在这个学科中，几乎找不到两个观点完全一致的学者，也几乎难以发现一位观点保持前后一致的学者。就我们所知，法学理论中，再没有哪个领域如此纷乱；也没有哪个领域能像冲突法这般，教会人们怀疑自己，而对他人的观点宽以待之。Saul v. His Creditors, 5 Mart. (n.s.) 569, 589 (la. 1827).

Contents

Part One

I ntroduction

We are living in a globalised world where human affairs freely cross national boundaries; we are living in a 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. 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."[1]

In a world in which international transactions take place with increasing frequency, knowledge of the private international law is necessary not only for scholars and litigants, but also for all lawyers who give advice or draft documents to international activities. Therefore, no law school course anywhere in the world today can be regarded as comprehensive if it fails to include private international law, nor any law school student can ignore the subject in the 21st century if he/she wishes to fulfill his/her career dream.

Part one of this book provides a general introduction to the course without enmeshing students in details and complexities better provided in later parts.

Chapter One

Description of the Subject

【Learning Objectives】

By the end of this Chapter and the relevant readings, you should be able to:

☆ State the definition of private international law from the perspective of comparative law

☆ Define "foreign element" in Chinese legal context

☆ Understand the scope and nature of private international law from the perspective of comparative law

☆ Comprehend the reasons why Chinese scholarship uphold a broader scope of private international law

☆ Understand the *raisons d'être* of private international law

【Key Conceptions or Terms】

private international law, conflict of laws, foreign element, sovereignty, forum shopping

【Case Study】

On May 23, 2004, a section of the futuristic, cylindrical passenger terminal at Paris' Charles de Gaulle airport collapsed, killing four people. The dead included two Chinese, one Czech and one Ukrainian. Three other people were injured in the collapse. In February 2005, the results from the administrative inquiry were published. The experts pointed out that there was no single fault, but rather a number of causes for the collapse, in a design that had little margin for safety. The enquiry found the concrete vaulted roof was not

resilient enough and had been pierced by metallic pillars and some openings weakened the structure. Sources close to the enquiry also disclosed that the whole building chain had worked as close to the limits as possible, so as to reduce costs. Paul Andreu, the designer of the terminal, denounced the building companies for having not correctly prepared the reinforced concrete.

Where should the victims or their relatives sue for damages? Whom should the victims sue? What law governs their claims? Should different laws govern the victims of different nationalities? Are the plaintiffs entitled to the benefit of the French rule that allows an award of "moral damages" for grief over the loss of the injury of close relatives? If the plaintiffs chose to submit their claims before a French court in Paris, can the judgment rendered by that French court be recognized in China?

This case provides the issues with which private international law has to cope. The legal issues it poses are difficult because law has become the prerogative of territorial sovereigns, whereas human affairs freely cross state and national boundaries. As this case illustrates, the tension between sovereignty and mobility raises a series of questions which can be grouped together under the following three headings:

(1) Jurisdiction (where can the parties resolve a dispute by suit or other means, such as arbitration or reconciliation?)

(2) Choice of law (what law will a judge or an arbitrator apply to resolve the dispute?)

(3) Recognition and enforcement of judgments or awards (what will be the effect of any judgment or award? Or to be more specific, can other jurisdictions and nations be expected to honor the determinations of the court or the arbitrators that decided the dispute?)

Basically, the above three questions consist of the main topics of private international law. Consequently, the subject matter of this course is central to planning international transactions and to resolving disputes resulting from those transactions.

1. Name

The branch of law with which this book deals has been called by various names, of which the two most common are "private international law" and "conflict of laws." 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.[①]

Objections have been raised to both the title "private international law" and "conflict of laws." The former is 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 different legal systems of the world.[2]

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. As Voltaire said, quite correctly, that the "Holy Roman Empire" was not holy, nor Roman, nor an Empire, we still use the term. For this reason, the two terms are used alternatively in this book without actual difference in meaning. 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.

2. Scope

As mentioned above, private international law deals with issues that spill across national lines; nevertheless, scholars around the world have never reached consensus on the scope of the subject; the following paragraphs, therefore, attempt to provide a tentative description of the different arguments on this issue from the perspective of comparative law.

2.1 Com mon 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.[3] 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.[4] Specifically, conflict of laws in

① It is very interesting to notice 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).