

GUOJI
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国际私法

陈茂 主编

全国高等农业院校教材

全国高等农业院校教学指导委员会审定

中国农业出版社

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图书在版编目 (CIP) 数据

国际私法/陈茂主编. —北京: 中国农业出版社,
2006. 9

全国高等农业院校教材

ISBN 7-109-09908-3

I. 国... II. 陈... III. 国际私法-高等学校-教材
IV. D997

中国版本图书馆 CIP 数据核字 (2006) 第 091669 号

中国农业出版社出版

(北京市朝阳区农展馆北路 2 号)

(邮政编码 100026)

出版人: 傅玉祥

责任编辑 夏之翠

北京通州皇家印刷厂印刷 新华书店北京发行所发行

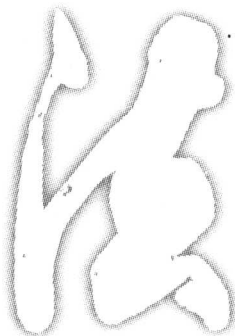
2006 年 8 月第 1 版 2006 年 8 月北京第 1 次印刷

开本: 720mm×960mm 1/16 印张: 16.75

字数: 293 千字

定价: 22.50 元

(凡本版图书出现印刷、装订错误, 请向出版社发行部调换)



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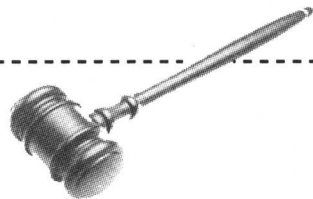
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PREFACE

I am honored to write a preface for this textbook, which is going to be used by many law students in China.

From my experience as lawyer, professor, and business executives, “Conflict or Choice of Law” is an important area not only for cross border litigations, but also for international business transactions.

In the context of today’s global commercial economy, the term “Conflict or Choice of Law” for private enterprise’s cross border contracts and transactions is probably inaccurate and somewhat misleading. In the world of private international commerce we are dealing with contracts and transactions which may have consequences in multiple sovereign jurisdictions, each of which may claim sufficient connection to the contract or transaction to have its laws apply. The parties’ ability to choose the jurisdiction which will apply to the entire transaction or contract or any part thereof must be balanced against a sovereign country’s right to declare that it has an overriding interest in the contract or transaction which cannot be waived by the parties.

Consider, for example the following real life example:

Italian Bank A is farsighted enough to acquire small banks in each of five former Eastern Bloc countries, which have recently been admitted to the “European Union”. Bank A desires to hire an executive level Manager X to oversee the operations and integration of these new banks into the parent bank’s operating system within the EU. Such manager must be experienced in the banking rules and regulations in the EU and within the EU member countries, and must, of course have a work permit for the EU. After a thorough interview process the chosen candidate has the following profile and proposed employment contract. Manager X is a Nigerian citizen, now resident and working in the UK with a work permit which entitles him to work anywhere

within the EU. Under the employment contract the parties agree that he can remain domiciled in the UK. The employment contract provides that he operates under the direct supervision of the senior executives of the Italian Bank in Milan. Manager X will live in the UK on weekends and holidays, will work in Milan on Monday of each workweek and will work the remaining four days of each workweek in one of the branch offices of the bank, alternating between each of the five new branches in the former Eastern Bloc countries now in the EU.

You are asked to draft the employment contract, and advise the Bank on any work visa issues in the local countries, retirement and social benefits, employment law, reporting and deduction of income and social taxes, and any other regulatory issues involved, including, finally, the terms of dispute resolution for the relationship.

How do you as a lawyer approach this assignment? To be successful, you will not only have to answer certain questions of law in each country, you will need to decide what questions should be asked.

- You may find that some countries do not even have laws addressing the questions you want to ask.

- You will need to remember that these are sovereign countries.

- You will want to know if there are treaties between the countries regulating the relationship in whole or in part.

- What is the impact of EU law on the relationship?

- Can the parties waive the application of a particular country's laws to the relationship, or is there an overriding social interest in a particular country regulating its citizens, its workers.

- You need to develop a process for the analysis and be sensitive to the issues as you draft the language of the contract to reach the results your client desires.

- You may need to then monitor the relationship because the tax and employment laws of countries have a habit of being changed periodically by the countries' legislatures.

In summary, there are so many variables to consider that the development of a process or procedure for their consideration is essential. This book begins the process of developing the procedure for resolving conflict or

PREFACE

choice of law in today's global economy. You are a participant in this process.

A handwritten signature in black ink, reading "David A. Hildebrandt". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Hildebrandt; President, Association Internationale Pour la Participation Financiere (International Association for Financial Participation, "IAFP"), Paris, France

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第一章 国际私法介绍

Chapter 1 Introduction to Private International Law

In the middle of a galaxy, there is a blue planet. Comparing with the countless other planets, this planet is so uniquely positioned and provided that it has enough air, water, temperature and other element to sustain lives.

在广袤的星系之中，有一颗蓝色的星球。和无数其他的星球比起来，这颗星球位置独特，并且能够提供足够的空气、水、合适的温度和生命赖以存活的其他要素。

There are three large pieces of land on this planet, the three pieces of land are separated by large bodies of waters.

在这个星球有三块广阔的大陆，它们被大量的水体所分离。

One piece of the land is located in the north part of the planet; none can tell exactly when human beings were found on this land. Human beings on this land belong to many different tribes and groups, although the different tribes speak different languages and observe different customs and cultures, there are many similarities among them.

一块大陆位于这个星球的北边，没有人能确切地了解人类是何时来到这块大陆上的。这个大陆上的人类属于不同的部落和人群，尽管各个部落说着不同的语言，有着不同的生活习惯，可是他们中也有许多相似之处。

They call this piece of land Westrope. In Westrope, there were reasonably good natural resources. The climate was temperate and the people quite industrious and independent. No one in Westrope had ever ventured beyond its ocean borders.

这块大陆可以叫做 Westrope。在 Westrope，这里有着优良的自然资源，气候宜人，居民很勤劳，并且独立性强。从来没有一个 Westrope 居民冒险跨

越过他们的海界线。

East of Westrope, there is another large piece of land. There are a variety of topographies found on this land: mountains, deserts, plains, rivers, small streams, terrains, small hills, lakes, forests, farm land. The outskirts of this land is dotted with many peninsulas and islands, large and small. People dwelling on this land live a very different life. The natural barriers, such as broad rivers and inhospitable desert, make frequent contact and communication within the same land impossible.

在 Westrope 的东面, 有另外一块广袤的大陆。这块大陆的地形多种多样: 山脉、沙漠、平原、河流、小溪、岩石、湖泊、森林、耕地。这块大陆的外围由许多大大小小的半岛和岛屿组成。居住在此的人们有着十分不同的生活。诸如广阔的河面和荒凉的沙漠, 这些天然的隔离使得在同一块大陆上人们之间进行联络和沟通是很困难的。

This land is known as Eastina. Similar to Westrope, no one in Eastina has ever ventured beyond its border. The people in Eastina are brave, hard-working and very talented in both art and science.

这块大陆被称为 Eastina。和 Westrope 相类似的是, 从来没有一个 Eastina 居民冒险跨越过他们的边界。Eastina 上的居民生性勇敢, 工作勤劳, 并且在艺术和科学方面有着很高的天赋。

Separated by great bodies of water, there is another large piece of land. This piece of land has rich natural resources and habitable climate. However, the population on this land is very small. Most of them engage in hunting and raising cattle. Because of the great distance from both Westrope and Eastina, the residents on this land know nothing about anything beyond its coastal borders. The residents call this land Amstria.

另外还有一块大陆也被大量的水体隔开。这块大陆有着丰富的自然资源和宜人的气候。然而, 这个岛上的人口十分稀少。大多数人从事打猎和放牧的工作。由于 Westrope 和 Eastina 之间距离很远, 岛上的居民对于他们海界线之外的事情一无所知。这个岛被称为 Amstria。

In Westrope, people started to master new skills in both hunting and farming, they invented many new tools, some were made of wood, some were made of stone, and some are even made of metal. Because of the improved productivity levels, not every family in Westrope had to engage in food industry, some became professional tool makers, some became professional