Problems of Private International Law of Electronic Commerce

电子商务的国际私法问题

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序

一

网络技术的发展和应用，于无声处扩展了一个空间——网络空间，并涵纳着人们在其中的各种活动与行为。网络、网络经济、网络观念与思维以及与之相适应的网络制度，在形成一种与现成的社会形态截然不同的方式的同时，也体现着一种先进的生产力、先进的文化和先进的社会制度。

而在这其中最引人注目的莫过于电子商务了。当初的狂飙突起并迅速席卷全球，让人为之欢呼鼓舞，吹捧颂扬；而刹那间的回落又让人为之牵肠挂肚，气暗神伤；而后，在经历风雨而又不见彩虹的情况下，人们开始想到对电子商务的规范，开始考虑相关社会制度的配置。于是，经济学家指点江山，法学家千呼万唤，从业者殷切期盼，一切似乎既符合逻辑又顺理成章。

在我国，电子商务近年来也取得了长足的发展，各种基础设施的建设及相应的配套机构包括数字认证机构、支付网关、现代化物流系统、信息资源开发、最终用户的高速宽带接入等诸多方面进展较快。各种企业纷纷利用网络开展电子商务，以改进其信息处理能力并提高生产效率，行业和政府网络平台的建设如火如荼，消费者上网的频率和人数也在急剧增加。但在客观的电子商务已经飞速发展的情况下，制度配套仍付阙如，于是，网络的从业者、研究电子商务的学者纷纷呼吁：要加强我国的电子商务立法。

但另一方面，互联网的发展历程也告诉我们，互联网服务和技术进步是在广泛的社会应用和创造中以商业驱动、民间主导的方式取得的，得益于各国政府在保留旨在维护国家安全和社会健康的必要介入权利的同时尽量避免干预和限制的明智立场。繁荣的电子商务，在继续遵循社会经济交往既定的商业原则和法律规范的基础上，同样受益于自由投资的动力和政府宽容的支持态度。只有在电子商务的发展过程中审慎调整和修订法律，保护并促进电子商务在成长中不断完善其规则与标准，才能开创电子商务的繁荣局面。

应该说，在社会自身发展而法律制度相对落后的情况下，力的互动致使一种新的平衡，并建立一种新的机制来维护这种平衡。我们没有必要抱残守缺，守着过时的制度不放。社会发展要求法律要适时而变，在变动中求生存，在变动中求完善，以建立适应社会需求的新的法律制度。立法不应仅是一门技术，更多的是一种实践。是否能回应社会需求，具备不具备长久存在的内因，都需要我们去认知去探索。另外，我们必须注意的是，法律制度所规制的只是社会生活的主要方面，是对社会秩序主流的一种制度化。对于社会生活的其他许多方面，还要靠一些非正式社会制度来进行调整。如果不考虑这些非正式制度的配合，合理的、得到普遍认可的长期正当秩序是很难形成的。网络和电子商务立法也是这样，网络中自发形成的一些合理性规则，网络运行和发展的技术规范，都需要我们在立法中予以充分的考虑，而不能妄自尊大，自以为是。

电子商务在需要规范的同时，我们必须意识到它毕竟是一个新生的事物，而除了发展的不确定性外，其现行的运行方式及人们在其中的活动规律，尤其是如何在保证网络的和谐有序而同时又不阻碍其发展的问题上，都需要不断的探索。我们是在有序和无序之间来寻找电子商务的发展规律。因此，我们只能在不断实践的同时，深入地进行理论上的博弈和探索，才能把握电子商务的运行规律，才能制定合理的电子商务法律。何其生博士的这本《电子商务国际私法问题》就是一部深入探讨电子商务国际私法问题的专著。

二

网络为各种商务活动提供了高效快捷的平台，同时也为跨国电子商务的进行提供了便利。在跨国电子商务量不断增加同时，不可避免地会带来电子商务争议的增多。解决这些争议，除了要有大量的实体规范以外，管辖权和法律适用是司法实践中首先需要解决的问题，而判决的承认和执行则是保证相关法律发生效力并能得到遵守的重要手段和依据。电子商务的国际私法问题是解决电子商务争议的一个重要课题。国际私法以解决法律冲突为核心任务，其所涉及的问题既广泛又复杂。对电子商务的国际私法这一崭新的领域进行深入地研究具有较大的难度。何其生博士的这本专著从管辖权、法律适用、判决和仲裁裁决的承认与执行方面对电子商务的国际私法问题进行了深入系统的研究，其内容丰富、结构合理、论证严谨，且自成体系，具有开拓性。作者在本书中围绕冲突法这一主线，从法律与实践的角度，结合各国不同的做法，在理论上深入剖析，并大胆地提出了自己的主张和观点，无疑站在了这一研究领域的前沿。

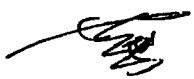
作者为增加论证的说服力，在行文过程中特别注重理论联系实际，比较研究和判例研究是本书的一大特色。以电子商务的管辖权为例，作者不仅分析了电子商务的运行平台——互联网对现行管辖权的挑战，各国学者所提出的独立管辖权体制理论，而且紧密结合各国法院的不同实践，并通过一个个典型案例和不同的管辖权标准比较分析，找寻其中的特点和规律。我们知道，尽管电子商务方兴未艾，但各国法院相关实践不仅不多而且公布的也很少，作者能在如此困境之下收集到这么多国家的资料，真可谓煞费苦心。这种努力无疑增加了作者论证结论的说服力和针对性，也使其在有关电子商务国际私法许多问题上的见解具有重要的理论与实用价值，对我国相关问题的立法和司法实践无疑具有重要的借鉴意义。

本书的另一个重要特色就是本书作者自如地运用了他所收集的

大量新颖翔实的资料。在这些资料中，既有各国学者对相关理论的探讨，又有法院的判例、各国的立法规定、相关国际组织的法律文件，作者能够纵横捭阖、恰当处理，显示了作者在写作过程驾驭资料的能力。

电子商务的许多国际私法问题具有一定的前瞻性和不确定性，处理这些问题具有一定的难度。这也许是书中还有不足之处的原因之一。希望作者今后进一步跟踪研究，在引进、分析、批评国外电子商务国际私法理论与实践的同时，加强对我国如何规制相关问题的探讨，并提出相应的立法建议，从而推动我国电子商务国际私法理论研究和立法及司法实践不断向前发展。

作为作者的博士论文导师，值此书出版之际，谨识数语以为序。



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摘 要

电子商务近年来的迅速发展，受到了国际社会的普遍关注。但由于电子商务与既存的其他商务相比具有许多不同特点，因此，如何规制电子商务就成为人们所共同关心的问题。本文主要从冲突法的角度，对电子商务案件的管辖权、法律适用以及外国法院判决与仲裁裁决的承认和执行三个方面进行了讨论，并对其中所涉及的许多问题提出了一些解决的思路和方案。

全文共分三个部分、七章，约240,000字。

文章的绪论主要对本文所称的"电子商务"出于行文的需要进行了界定，并概括了电子商务与其他商务相比所具有的不同特点，以及电子商务的运行平台——互联网对现行法律制度所带来的冲击。

文章第一部分即第一章至第三章讨论的是电子商务与管辖权问题。

第一章主要分析了互联网对现行管辖权体制的挑战。互联网不仅动摇了现行的管辖权标准，而且针对互联网的特点，目前许多学者提出了一些独立管辖体制理论。文章通过对这些理论的分析，论述了国家对网络案件管辖的合理性和必要性。

第二章通过对大量电子商务案件和相关立法的讨论，揭示了目前各国有关电子商务案件管辖权实践的困境。作为电子商务最为发达的国家，美国法院的众多案例成为笔者考察的重点。之后，文章又就欧盟及其一些成员国、加拿大、澳大利亚和中国等司法实践中所面临的困境进行了初步的探讨。并通过比较认为，美国法院的弹性管辖权标准更有利于电子商务案件管辖权的解决。

第三章针对电子商务管辖权所面临的挑战，就适合于电子商务的管辖权模式进行了探析。文章首先对一些新的管辖权根据如“网络服务器所在地”、“网址”等进行了博弈，并认为这些管辖权根据可以作为行使管辖权权衡因素之一，但不能单独构成一个司法管辖权的根据。鉴于海牙国际私法会议目前就电子商务管辖权方面达成国际条约的努力，文章对其在1999年的日内瓦会议和2000年加拿大渥太华会议上的讨论进行了详细地介绍。在此基础上，文章对管辖权基础从历史发展的角度全面反思，并通过对美国管辖权模式和欧洲管辖权模式的比较，认为管辖权基础从传统的领域体制向“联系说”的发展，是管辖权规则为适应社会发展的不断扬弃，也是解决电子商务案件管辖权问题的出路所在。在“联系说”的标准下，笔者认为确立电子商务管辖权所要权衡的因素有：物理位置的关联性、目的性、损害相关性、权利衡平、契约选择、管辖权与中间人实体责任的交合、以及其他一些因素。当然，在确立电子商务案件管辖权标准时，还要注重整体上的国际协调。通过整合，文章认为电子商务管辖权将呈现如下趋势：(1)协议管辖将得到国际社会的一致认可；(2)消费者住所地这一管辖标准将会得到许多国家的首肯；(3)弹性管辖权标准将会得到更多国家认可；(4)传统属地性管辖权标准含义将多样化，许多新的管辖权标准将得以确立。

文章第二部分即第四章和第五章讨论的是电子商务的法律适用问题。

第四章主要讨论的是电子商务对冲突法的挑战。这种挑战主要表现为：电子商务对现行连结点的挑战、电子商务下准据法的落空和公法冲突的普遍性。在理论上，针对网络空间的特点，一些学者提出了网络空间自治的理论，但文章认为这种理论存在着明显的误区。

第五章则就电子商务的法律适用以及冲突法即将发生的变化作以讨论。在电子合同的法律适用方面，文章分别从当事人的缔约能力、形式要件和实质要件进行了讨论。在电子合同实质要件的法律适用方面，文章认为：(1)意思自治原则仍将是调整电子合同法律适

用的首要原则，对其的限制逐渐减少；(2)在当事人没有进行法律选择时，最密切联系原则将是支配电子合同法律适用的主要原则；(3)在具体的连结点的确定上，对电子合同的不同方面进行分割将进一步细化，对电子合同的不同部分或不同环节将会规定不同的连结点；(4)以消费者保护法律为代表的各国强行性法律，将在电子合同的法律选择上得以直接适用；(5)公共秩序保留依旧是各国在电子合同法律适用中的安全阀。

对于电子商务中侵权行为的法律适用，文章分别对侵权行为地法、法院地法、原始国规则、当事人意思自治原则和最密切联系原则进行逐个分析，并认为，考虑到侵权行为适用侵权行为地法得到了世界上大多数国家的认可，不排除许多国家通过扩大对侵权行为地的解释，来适用侵权行为地法。而作为当事人意思自治原则和最密切联系原则，将会在电子商务案件中得到越来越多地体现和适用。

鉴于有学者提出的准据法"落空"问题，文章进行了反驳，并认为在准据法的发展趋势上，趋同化和统一化的趋势更加明显，电子商务的自治规则将在电子商务活动方面发挥重要作用。另外，在准据法的选择中，公法适用的可能性增加。

至于冲突法对电子商务的回应与变革，文章认为，电子商务冲突法立法基础在从国家本位向国际社会本位的转换过程中，国际社会本位的观念将得到大大提升；在其价值取向方面，实质正义将备受关注；在冲突规则的发展趋向上，将会出现在现代灵活的法律选择方法内发展定型化的电子商务冲突规则；而且由于国际合作的加强，电子商务冲突规则的统一将会加强。考虑到因特网上查询资料的方便与快捷，外国法查明上将更加容易，"结果选择"的可能性增加。

文章第三部分即第六章和第七章主要讨论的是电子商务与外国法院判决和仲裁裁决承认与执行。

第六章论述的是电子商务对外国法院判决的承认与执行所带来的一些问题。这些问题有：如何界定"外国法院判决"，Internet 技术、消费者保护以及公法冲突法所带来的判决承认与执行问题。在

外国法院判决承认与执行的条件上，最主要的考验来自于执行管辖权和诉讼程序公正的要求。对于前者，文章认为最好通过制定有关国际条约，达成统一的标准。在具体的判断上，被请求国法院应对原审法院的管辖权进行核实，但应受原审法院所依据事实的约束，除非是缺席判决。对于后者，文章主要讨论的是对当事人的电子送达问题，并认为，对于电子送达合法有效性，原则上应以原判决国法律进行判断。被告未被及时有效地通知参加诉讼，各国可以拒绝承认与执行该判决。但如原审国法律允许被告就未被及时通知提出异议，而被告并未表示反对意见且出庭答辩的除外。另外，即使被告及时得到参加诉讼的通知，但通知方式与通知地法律或相关的国际条约的规定相违背的，被请求国也可拒绝承认与执行。

在外国电子商务判决承认与执行的程序上，文章主要就请求书的数据电文形式及请求书的电子送达进行了讨论，并认为通过一定的国际安排，这些并非构成承认与执行外国判决的障碍，相反还能够提高国际合作的效率。

第七章主要讨论的是电子商务与仲裁裁决的承认与执行。文章首先就在线仲裁的含义、技术支持和现状等进行了介绍，在仲裁裁决的承认与执行问题上，文章主要讨论的是电子仲裁协议的形式要件和实质要件问题、在线裁决的形式和国籍问题。

文章的结论在总结全文的基础上就电子商务立法（实体法和冲突法）进行了讨论，认为电子商务立法应注意发现与创制、国际化和本土化、法律与其他社会规范及技术规范的互动关系。就现行中国电子商务的发展现状，文章认为不要盲目“追赶”立法潮流，仅在必要的范围内方才进行修订或新增法律。

关键词：电子商务　管辖权　法律适用　冲突法

Abstract

The rapid development of the electronic commerce is paid universally attention by international society in recent years. But because of its different characteristics from other forms of commerce, how to regulate electronic commerce has become the subject of people's common concern. Centering on the conflict of laws, this dissertation discusses jurisdiction, application of law, the recognition and enforcement of foreign court's judgments and arbitral awards about the dispute of electronic commerce, and puts forward some thoughts and proposals to resolve relative questions.

The dissertation consists of three parts, 7 chapters, about 240,000 Chinese characters.

The introduction of the dissertation defines the term "electronic commerce", summarizes distinguishing features of electronic commerce compared with other forms of commerce and the challenges to current legal system in force posed by Internet——the operation platform of electronic commerce.

The first part of the dissertation, from chapter 1 to chapter 3, expounds electronic commerce and jurisdiction.

Chapter 1 analyses the challenges posed by Internet to jurisdiction system in effect. Internet has shaken the current jurisdiction standards. Besides, due to its distinguishing features, many scholars have raised various theories of independent jurisdiction system. The

dissertation proves the reasonableness and necessity that the nations have jurisdiction over Internet case through the analysis of these theories.

Chapter 2 makes a study on a lot of electronic commerce's cases and relative legislations, and reveals the current dilemma on jurisdiction practices of electronic commerce's cases in many countries. Great quantities of cases in the U. S. court are the author's focus of investigation, for the U. S. is the most developed country in electronic commerce. Then the dissertation talks initially over some difficult positions in judicial practice in the European Union and its members, Canada, Australia, China, etc. By comparison, the dissertation draws a conclusion that flexible jurisdiction standards of American court are more beneficial to resolving the questions on electronic commerce.

Chapter 3 explores jurisdiction model suitable to electronic commerce. The dissertation weighs pros and cons of some jurisdiction basis, such as "the place of internet server", "internet sites" and so on, and holds that these jurisdiction basis can be taken as one factor of jurisdiction to adjudicate, but not as an independent foundation of jurisdiction to adjudicate. In consideration of the great efforts made by the Hague Conference on Private International Law in reaching an international convention on electronic commerce's jurisdiction, the dissertation introduces the discussion of its Geneva round table in 1999 and Ottawa conference in Canada in 2000 in detail. On this basis, the dissertation looks back into jurisdiction foundation with a view of historical development. By a comparison between American and European jurisdiction models, the dissertation believes the jurisdiction foundation develops from traditional territorial system to contacts theory. It is the continuous sublation of jurisdiction rule in order to suit social development, and the way out for the problem of the

jurisdiction of electronic commerce's cases. The author thinks that to establish the jurisdiction of electronic commerce, the following factors should be taken into consideration: the relevance of physical location, targeting, damages correlation, power parameters, contractual choice, the intersection between jurisdiction and substantive liability for intermediaries, and others. Of course, the court should lay stress on international coordination when it establishes the jurisdiction of electronic commerce. Through summarization, the dissertation holds that the jurisdiction of electronic commerce's disputes take on the following tendencies: (1) contractual choice of forum will be accepted by international society unanimously; (2) the place of consumer's domicile will be approved by many countries; (3) flexible jurisdiction standards will be confirmed by more countries; (4) the implications of traditional territorial jurisdiction standards will be diverse. Many new jurisdiction standards will be established.

The second part of the dissertation, chapter 4 and chapter 5, expounds the application of law of electronic commerce.

Chapter 4 elaborates on the challenges to the conflict of laws caused by electronic commerce. The challenges are mainly displayed as: the challenges to the connecting factor in effect, the falling through of lex causae and the universality of the conflicts between public laws. In theory, some scholars put forward self-government of cyberspace doctrines against the characteristic of cyberspace. But the dissertation maintains that there are some obvious errors in such theory.

Chapter 5 deliberates the application of law of electronic commerce and the innovations in the conflict of laws that are about to take place. In aspect of the application of law of electronic contract, the dissertation makes studies from parties' contracting capacity, the

contractual form and the substance. As for the application of law of substantial factors of electronic commerce, the dissertation holds: (1) the autonomy of will doctrine will still be the first principle of the adjustment of the application of law of electronic commerce. And the limitations of it will be reduce gradually; (2) when the party's choice of the law is unavailable, electronic contract is governed by the law of the place with which it has the closest connection in principle; (3) in order to define the specific connecting factors, the electronic contract will be cut apart delicately, and different connecting factors will be provided against different parts and links of electronic contract; (4)the mandatory law on behalf of the law of consumer protection will directly apply to electronic contract; (5) the reservation of public order is still the safety valve in the application of law of electronic contract in each country.

With regard to the application of law of torts in electronic commerce, the dissertation analyses separately lex loci delicti, lex fori, lex voluntatis, and law of the place of the most significant relationship. And considering that the overwhelming majority countries approve that the lex loci delicti applies to torts, the dissertation doesn't rule out the possibility that many countries apply lex loci delicti by means of expanding the explanation of lex loci delicti. However, the doctrine of autonomy of will and the most connection will be reflected and applied more and more in the case of electronic commerce.

On the question of the falling through of lex causae raised by some scholars, the dissertation rebuts it, and holds the development tendency of lex causae is more obvious trends toward convergence and unification, and the self-government rule will take an important role in regulating the activity of electronic commerce. In addition, the

possibility of applying public laws is on the rise in the choice of lex causae.

As for the reactions and innovations of the conflict of laws to electronic commerce, the dissertation thinks the idea of the departmentalism of international society will be promoted during the process of legislative foundation of the conflict of laws of electronic commerce shifting from the departmentalism of nation to the one of international society. In aspect of value tendency, the substantive justice will be more followed with interest. On the development tendency of conflict rules, those of electronic commerce will fall into a pattern in modern flexible approaches of choice of laws.

Owing to the strengthening of the international cooperation, the unification of conflict rules of electronic contract will be enhanced. Considering convenience and swiftness in inquiries about materials by Internet, the ascertainment of foreign law will become much easier, therefore, and the possibility of the result-selecting rules increases.

The third part of the dissertation, chapter 6 and chapter 7, concentrates on electronic commerce and the recognition and enforcement of foreign court's judgments and arbitral awards.

Chapter 6 discusses the problems electronic commerce brings to the recognition and enforcement of foreign court's judgments. They are how to define "the foreign court's judgments", the problems raised by Internet technology, consumer protection and the conflict of public law. As concerns the condition of the recognition and enforcement of foreign court's judgments, the biggest difficulty comes from jurisdiction to enforce and the requirement of procedural justice. For the former, the dissertation believes the best way is to reach consistent standards by drafting international conventions. In verifying the jurisdiction of the court of origin, the court shall be bound by the

findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default. For the latter, the dissertation mainly talks over electronic service to parties, and holds the law of the state of origin governs the effect and legality of electronic service. If the defendant was not notified in sufficient time and in effective way to take part in lawsuits, the recognition or enforcement of a judgment may be refused, unless the defendant entered an appearance and presented his case with contesting the matter of notification in the court of origin, provided that the law of the court permits objection to the matter of notification and the defend did not object. Even if the defendant was notified in sufficient time, but the way to notify violated the domestic rules of law of the state where such notification took place or relative international convention, the requested country may refuse to recognize and enforce the judgment, too.

On the procedure for the recognition and enforcement of foreign judgments of electronic commerce, the dissertation discusses the data message form of the request and the transmission by electronic means, and advocates with some international arrangements they are not obstacles to the recognition and enforcement foreign judgments, but on the contrary, they can improve the efficiency of international cooperation.

Chapter 7 expounds electronic commerce and the recognition and enforcement of arbitral awards. The dissertation firstly introduces the definition, technology and status quo of online arbitration. As to the recognition and enforcement of arbitration awards, the dissertation discusses the formal and substantial factors of electronic arbitral agreements, the form and the nationality of online awards.

The conclusion of the dissertation makes a study on the legislation