# 涉外保证的国际私法问题研究

## ——以中国司法实践为视角

Study on Guarantee Involving Foreign Elements in Private International Law

from Perspective of PRC Judicial Practice

张磊 著

法律出版社
LAW PRESS·CHINA

# 涉外保证的国际私法问题研究

## ——以中国司法实践为视角

Study on Guarantee Involving Foreign Elements in Private International Law from Perspective of PRC Judicial Practice

张磊 著



法律出版社
LAW PRESS·CHINA

**图书在版编目(CIP)数据**

涉外保证的国际私法问题研究/张磊著. —北京:
法律出版社,2012.5
ISBN 978-7-5118-3508-6

Ⅰ.①涉… Ⅱ.①张… Ⅲ.①国际私法—研究—中国
Ⅳ.①D997

中国版本图书馆 CIP 数据核字(2012)第 091478 号

| 涉外保证的国际私法问题研究 | 张 磊 著 | 责任编辑 韩满春<br>装帧设计 马 帅 |
| --- | --- | --- |



**开本** A5　　**印张** 9.125　　**字数** 225 千
**版本** 2012 年 8 月第 1 版　　**印次** 2012 年 8 月第 1 次印刷
**出版** 法律出版社　　**编辑统筹** 独立项目策划部
**总发行** 中国法律图书有限公司　　**经销** 新华书店
**印刷** 固安华明印刷厂　　**责任印制** 吕亚莉

法律出版社/北京市丰台区莲花池西里 7 号(100073)
电子邮件/info@lawpress.com.cn　　销售热线/010-63939792/9779
网址/www.lawpress.com.cn　　咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)
全国各地中法图分、子公司电话:
第一法律书店/010-63939781/9782　　西安分公司/029-85388843
重庆公司/023-65382816/2908　　上海公司/021-62071010/1636
北京分公司/010-62534456　　深圳公司/0755-83072995

**书号**:ISBN 978-7-5118-3508-6　　**定价**:36.00 元

“不是因为事情困难我们才不敢去做，是因为我们不敢去做，事情才变得困难。”

——塞涅卡（Seneca）

# 中文摘要

本书在整体结构上包括引论、正文和结论三部分。

引论部分对涉外保证的法律界定、涉外保证民事关系在我国的产生与发展以及我国法院审判实践中出现的与涉外保证案件相关的问题进行简要介绍，在总结国内外研究现状的基础上，论证本书选题的理论和现实意义。

正文共分为五章：

第一章介绍涉外保证的基本理论，为研究相关的国际私法问题做好理论铺垫。本章首先介绍了保证的性质以及保证形成的特殊的三角型民事关系。在此基础上，将国际私法涉外保证的调整对象界定为“涉外保证民事关系”，接下来详细阐述“涉外保证民事关系”的范围及“涉外性”的界定标准。为强调涉外保证领域产生的特殊国际私法问题，本章还从实体法角度，对同样频繁使用于国际贸易的独立性涉外保证，包括信用证、备用信用证、见索即付银行保证等的性质进行分析，通过横向比较，总结出本书研究的涉外保证的从属性特征，以建立特

殊的国际私法规则。本章还对涉外保证的定性标准做了探讨，针对我国法院审判实践中出现的承诺函应否识别为保证的混乱认识，提出切实可行的解决方法。

本章第二章至第五章涉及涉外保证中三大核心的国际私法问题，即涉外保证管辖权、涉外保证法律适用及法律适用的限制，以及主债务域外法院判决和仲裁裁决的承认与证据效力。

第二章触及涉外保证管辖权的难点——涉外保证管辖权冲突及其协调方法。这是具有创新性的问题。涉外保证包括主合同与保证合同纠纷，这使得涉外保证管辖连结因素多样化。一般保证人享有先诉抗辩权，债权人必须“先诉”主债务人取得法院或仲裁机构对主债务数额的确定裁决，并能够证明主债务人财产确实无法清偿债务之后，才能“后诉”一般保证人。只有当这两个条件同时满足时，一般保证人的保证责任才能够开始。涉外一般保证的债权人、主债务人和保证人构成共同诉讼，法院必须合并审理，以解决多方当事人关联诉讼分开审理造成的不便。保证具有相对独立性，因此主合同与保证合同可能各自约定不同方式或管辖地解决争议，这就导致两个合同在仲裁管辖权与法院管辖权、法院管辖权与法院管辖权之间产生冲突。尤其是当存在仲裁协议或协议法院管辖条款时，情况更为复杂。这也成为我国法院实践中难以解决的问题。为此，本章以图表方式详细列举了主合同与保证合同各自管辖权出现冲突的情形，对仲裁第三人与合并仲裁制度、强制合并仲裁制度、合并管辖制度论证分析，提出适合我国的解决管辖权冲突的立法建议。在第三人未与仲裁协议当事人重新达成新的书面仲裁协议时，仲裁庭不能将没有签字的第三人纳入仲裁程序中强制合并仲裁；在主合同与保证合同各自有独立的仲裁协议的情形下，如果债权人、主债务人和保证人未重新达成书面的合并仲裁协议，仲裁庭也无权合并仲裁。尽管有些国家为提高诉讼效率，方便审理，将关联争议强制合并仲裁，但本书与大多数国家一样，反对这种破坏仲裁契约性的做法。诉讼与仲裁不同，法院对案件行使管辖权，是履行国家赋予的司法审判权，法院管辖权的取得不以

当事人意思自治为基础。因此，基于主从合同的关联关系，法院在某些情况下可将保证合同的管辖权扩张至主合同，将本不具有管辖权的主合同纳入保证合同诉讼程序中合并审理，对主合同行使合并管辖权。但如果主合同约定了外国法院排他性协议管辖，我国法院则不能对主合同行使合并管辖权。对一般保证案件，我国法院应裁定驳回债权人对主债务人的起诉，中止保证合同的审理，指定债权人在一定期限内到域外对主债权人提起诉讼或仲裁，或者以其他方式确定主债务数额，等到债权人提交相应的生效裁判文书或者其他证明文件后恢复审理；如果债权人未能在法院指定的期限内对主债务人提起诉讼或仲裁，或者经其他方式仍未能明确主债务数额，经法院调解不成的，应裁定驳回债权人对保证人的起诉。对连带保证案件，我国法院应驳回债权人对主债务人的起诉，继续审理保证合同。如果主合同约定了外国法院非排他性协议管辖，我国法院仍然具有将主、从合同合并审理的合并管辖权。在建立了解决主、从合同管辖权冲突的法律协调方法后，本章还对我国法院放弃对主合同行使管辖权的特殊情况进行论证，提倡我国立法建立“不方便法院”原则，设置援引“不方便法院”原则拒绝行使管辖权的具体标准，以避免争夺国际管辖权，实现国际协调。但如果存在某些可能损害我国保证人利益的情况，我国法院则不能援引“不方便法院”原则拒绝行使管辖权的具体情况。同时应明确，我国法院援引“不方便法院”原则拒绝对主合同行使管辖权的法律后果是中止保证合同的审理，告知债权人到域外对主债务人提起诉讼或者仲裁以确定主债务数额，而不是驳回债权人的起诉，这样就保留了我国法院对保证合同继续审理的权利。

第三章是对涉外保证法律适用制度的研究。本章首先从涉外保证多方当事人及多重法律关系的复杂性入手，分析涉外保证法律冲突产生的原因，进而指出我国法院错误理解与适用我国《担保法解释》第129条关于“主合同与保证合同的准据法不一致时，保证合同的准据法根据主合同确定”的规定。通过分析主合同准据法对保证合同产生的影响，对保证期间与主合同诉讼时效的衔接进行探讨。本章还分别论证了主合

同与保证合同各自的法律适用规则及特征履行地的界定。在适用法律规则确定出准据法后，本书还讨论了主合同和保证合同各自准据法可调整的实体法律问题的范围。

第四章是对涉外保证法律适用的限制的研究。本章主要讨论涉外保证领域中一国具有管理经济职能的强制性规则得以直接适用于合同而排除当事人意思自治选择适用法律的理论基础，针对我国法院以公共秩序保留或以法律规避为由排除域外法适用的错误，提出应以强制性规定作为排除域外法适用的理据。这种强制性规定在理论上属于“直接适用的法”，与法律规避和公共秩序保留属于不同法律范畴。此外，本章还讨论了准据法国和第三国“直接适用的法”对法律选择的限制。

第五章是对主债务域外法院判决和仲裁裁决的承认与证据效力进行分析。主合同纠纷与保证合同纠纷可能分处两个法域审理，在一般保证案件中，债权人在域外“先诉”主债务人后，再到我国“后诉”保证人，而主债务在域外法院或仲裁机构取得的判决或仲裁裁决，未经我国法院承认程序，其认定的事实和所判决的结果是否具有证据效力，是否属于当事人免证事实，以及未参加域外诉讼或仲裁程序的保证人是否具有主债务人的抗辩权等问题，都是我国法院审判实践遇到的难题。本章从域外法院判决或仲裁裁决在域内承认的理论研究入手，分析比较域外与域内法院判决所具有的不同既判力，及域外法院判决或仲裁裁决在域内所具有的法律效力。接着本章根据法院地国证据规则的要求，考证域外法院判决或仲裁裁决具有证据效力的条件，提出将域外法院判决或仲裁裁决的承认程序植入涉外保证案件审判程序之中，我国法院可按照承认的标准进行审查，一并作出认定，而必须要求当事人另行提起承认程序。经过我国法院审查承认的域外法院判决或仲裁裁决，其认定的事实和所判决的结果，可被直接采信，成为当事人免证事实；但如果保证人能提供相反证据予以推翻的除外。未经我国法院审查承认的域外法院判决或仲裁裁决，其认定的事实和所判决的结果，不能被直接采信，不能作为当事人免证的事实。尤其是域外法院或仲裁机构对被告经合法传唤仍未

到庭所作的缺席判决或仲裁裁决，不能免除债权人对其诉讼请求的证明责任，我国法院仍应对债权人提交的证据材料进行审查。

结论部分概括了本书的基本观点。涉外保证的特殊性，包括多方当事人、三角型民事关系及多个争议解决机制等导致很多令人困惑的国际私法问题产生。主合同可能被一个法域管辖，而保证合同却被另一个法域管辖。那么，哪一个法域法律可以决定保证责任的开始、有效性及责任大小，哪一个法域法律决定主债务的成立、有效性及未能履行情况？在审理主合同的法域，其法律可能规定债权人有权要求保证人履行保证责任，而在审理保证合同的法域，其法律可能规定保证人承担责任的条件尚未成就，这就引起主合同与保证合同在管辖权方面、法律适用方面及实体判决方面的冲突。因此，有必要针对涉外保证案件的特殊性建立一系列特殊的国际私法规则。为解决主、从合同管辖权的冲突，基于主、从合同在事实上和法律上形成的牵连关系，引入合并仲裁和合并管辖制度具有现实意义，能保证冲突法上的程序正义得以实现。在实体审理中，尊重一国具有公法性质的强制性规则予以直接适用，允许其排除当事人选择的准据法，符合国际趋势。尽管“直接适用的法”在理论上存在争议，但其作为强制性规则的适用方法仍应被肯定。主债务域外法院判决或仲裁裁决的证据效力，与传统国际私法中的承认程序有所差别。法院地国给予其具有证明主债务事实的证据效力，并不违反国家主权原则。但承认域外法院判决或仲裁裁决的域内效力，仍然需经过适当的承认程序。本书提出直接将承认程序并入涉外保证案件实体审理程序之中，有利于便利当事人诉讼，也有利于提高诉讼效率。立法者如何在方便当事人诉讼与尊重外法域司法主权两个价值目标之间取得平衡，最大限度地实现公平、高效的涉外保证案件审理成为关键问题。

**关键词** 涉外保证；先诉抗辩权；协议合并仲裁；合并管辖；直接适用的法；域外法院判决或裁决的承认；证据

# Abstract

This article has three parts: introduction, main body, and conclusion.

The introduction discusses the legal definition of guarantees involving foreign elements, the emergence and development of international commercial guarantees, and related cases of international guarantees. It also explains the theoretical and practical significance of this topic, drawing upon past and present Chinese and foreign scholarship on the private international law of guarantees.

The main body of the article consists of five chapters.

Chapter One explains some problems with the basic theory of guarantees involving foreign elements, laying the foundation for further inquiry. This chapter first introduces the character of guarantees and the special tripartite relation established by such guarantees. On this basis, the subject matter of private

international law is defined as "relations of guarantees involving foreign elements". The contours of the terms "relations of guarantees involving foreign elements" and the definition of "involving foreign elements" are explained in detail. In order to emphasize the special problems under international private law raised by guarantees involving foreign elements, this chapter, from the perspective of substantive law, compares guarantee involving foreign elements with independent guarantee that are frequently used in international trade, including Letters of Credit, Standing Letters of Credit, and Bank Guarantees on Simple Demand, and then concludes that the special characters of guarantee involving foreign elements to establish special principles of International Private Law. This chapter investigates the characterics of guarantees involving foeign elements and proposes practical solutions for the problem of whether PRC courts should define letter of comfort as guarantees.

Chapters Two through Five discuss three core private international law problems related to guarantees involving foreign elements: jurisdiction over international guarantees; the applicable law for guarantees involving foreign elements and restrictions upon it; and the recognition of foreign judgments and arbitral awards of the principal debts, and the consequences for evidence.

Chapter Two concerns theproblem of jurisdiction over guarantees involving foreign elements. How to understand conflicts of jurisdiction over guarantees involving foreign elements, and how to resolve them, are novel legal questions. Disputes over guarantees involving foreign elements include disputes over the principal contract as well as the guarantee contract, thus increasing the connecting factors of guarantees involving foreign elements. General guarantors enjoy a counterplea right, which means that the creditor must "claim first" from the principal debtor to get an affirmative judgment

for the amount of the principal debt from the court or arbitral tribunal. After proving that the assets of the principal debtor cannot satisfy the debt, the creditor can "claim afterwards" from the general guarantor. When these two elements are present, the liability of the general guarantor is triggered. The creditor, principal debtor and guarantor in a guarantee involving foreign elements constitute a joint lawsuit, and the court must join them together, in order to avoid any inconvenience for the parties. The guarantee is relatively independent of the underlying contract, in the sense that the principal contract and guarantee contract may be resolved differently or subject to different jurisdicions, which can cause conflicts of jurisdiction between courts, as well as conflicts between courts and arbitral tribunals. Especially when there is an arbitration clause or a clause stipulating which court has jurisdiction, the situation can be even more complicated. This is a difficult problem in PRC courts' practice. In this regard, this chapter explicates in detail the different types of jurisdictional conflict between the principal contract and the guarantee contract, and presents accompanying tables and charts; analyzes the third party in arbitration and consolidated of arbitration, compulsory consolidated of arbitration, and combined jurisdiction; and proposes strategies for resolving jurisdictional conflicts that are suitable to the PRC legal environment. When the parties to a contract agree to an arbitration clause but the third party guarantor does not, the arbitral tribunal cannot compel all three parties to consolidate the arbitration case; likewise, if the principle contract and guarantee contract have separate arbitration clauses, then the arbitral tribunal has no right to conduct combined arbitration ,unless the creditor, main debtor and guarantor have agreed to a new combined arbitration clause. Some countries even require compulsory combined arbitration of related disputes in order to promote the efficiency and convenience of the proceedings, but this chapter-agreeing with the majority

of countries-objects to such activity as impairing the consent of arbitration. On the other hand, in litigation, the court's jurisdiction over cases is granted by the country adjudicating the case, so the court's jurisdiction need not respect the parties' autonomy to the same extent. Therefore, courts may, under some circumstances, exercise jurisdiction over the guarantee contract and then extend their jurisdiction to the principal contract, compelling a consolidation of the cases. However, if the principal contract contains a clause stipulating that a foreign jurisdiction has exclusive jurisdiction, Chinese courts cannot extend their jurisdiction in this manner to compel consolidation. For general guarantee contracts, Chinese courts may terminate the proceedings by dismissing the case, ordering the creditor to file a claim against the principal creditors in another country within a fixed time period; or the court may first determine the amount of principal debt and resume the proceedings after the creditor presents an effective award or verdict from the courts of another jurisdiction. If the creditor fails to bring a lawsuit or arbitration claim against the principal debtor or the amount of the principal debt can not be determined, and the court fails to mediate an agreement between the parties, it must dismiss the entire lawsuit. For cases arising from joint guarantee contracts, Chinese courts must reject claims brought by the creditor against the principal debtor and continue the trial for the guarantee contract. However, Chinese courts will still exercise jurisdiction to consolidate the cases if the principal contract has a clause stipulating that a foreign court has exclusive jurisdiction.

Chapter two also examines the special circumstances under which Chinese courts should refuse to exercise jurisdiction over the principal contract. The author calls for the application of the doctrine of forum non convenience, and the establishment of detailed standards for the invocation of the doctrine, in order to minimize international conflicts over jurisdiction-

unless submitting to a foreign jurisdiction would impose an undue hardship on the Chinese guarantor. Also, the author notes, the legal effect of the invocation of forum non convenience to deny jurisdiction over the principal contract is not to *dismiss* the creditor's suit but rather to *suspend* it, during which time the creditor may bring a lawsuit or arbitration in another country. In such instances, the Chinese court retains the right to resume court proceedings to adjudicate the guarantee contract.

Chapter Three discusses the applicable law for guarantees involving foreign elements. This chapter first examines complications in the relationship between the parties and the different bodies of law that might apply to the guarantee contract, and then explains how conflicts arise between different bodies of applicable law. Furthermore, the author notes that Chinese courts have misunderstood and incorrectly applied clause 129 of the Interpretation of Chinese Guarantee Law, which states:

*"When there is a discrepancy between the applicable law of a guarantee contract and its principal contract, the applicable law of the guarantee contract shall be determined by the applicable law of the principal contract."*

In this context, the author examines the how the applicable law of the principal contract constrains the choice of law for the guarantee contract. This chapter then explains and distinguishes the rules for choice of law, and the definition of the place of performance, for both the principal contract and the guarantee contract. After demonstrating how the applicable law is determined, this chapter also analyzes the consequent differences in substantive law that may arise for the principal contract and the guarantee contract.

Chapter Four discusses limitations on the judicial application of the law of guarantees involving foreign elements. This chapter mainly discusses the theoretical basis for the application of economic rules and regulations directly

to the contract which impinges on the autonomy of the parties. The author argues that when Chinese courts refuse to apply extraterritorial law to contracts, they should have recourse to such rules and regulations. By contrast, in practice, Chinese courts often rely on other doctrines-the preservation of public order and the evasion of (national) law-in order to justify their refusal to apply extraterritorial law. The author argues that such justifications are theoretically "directly applicable laws". In addition, this chapter discusses limitations on choice of laws imposed by the directly applicable laws of different countries.

Chapter Five analyzes the recognition of foreign judgments and monetary awards, as well as related problems in the law of evidence. Disputes arising from the principal contract and the guarantee contract can be resolved differently by different jurisdictions. For a general guarantee contract, a creditor would first sue the principal debtor in a foreign court, and then bring a suit against the guarantor in a Chinese court. In such a case, when the verdict or overseas award is not recognized by Chinese courts, a great deal of problems can arise in subsequent litigation in Chinese courts, such as whether the verdict or award has probative value, or whether the guarantor involved in the foreign legal proceedings is entitled to the same defenses as the principal debtor. After inquiring into the jurisprudence governing the recognition of foreign verdicts and awards, this chapter analyzes and compares the effectiveness of different types of domestic and foreign verdicts, and the effectiveness of foreign judgments and awards in China.

This chapter then discusses the particular situation where a PRC court hears a dispute over a guarantee involving foreign elements, and during such a case the court is asked to stipulate the judgment of a foreign court or an arbitral tribunal as a fact of evidence. Ingeneral, in order for such stipulation to take place, the parties must commence separate judicial proceedings. Once

these proceedings have been successfully concluded, the PRC court can directly adopt the judgment as a fact, without the need for evidentiary proof. On the other hand, in the absence of a successful conclusion of such proceedings, PRC courts may NOT stipulate the judgment as a fact of evidence. In particular, where the foreign courts or arbitral tribunals issue judgments or awards when the defendant or respondent is absent after proper summons, the creditor's burden of proof regarding his claims in a PRC court is not excused, and PRC courts must examine any evidence submitted by the creditor.

The Conclusion summarizes the key points of this article. Disputes over guarantees involving foreign elements are unique as they involve multiple parties, a tripartite legal and commercial relationship and multiple dispute resolution regimes, which together can lead to much confusion in both international law scholarship and legal proceedings. The principal contract is governed by one legal jurisdiction, but the guarantee contract may be governed by another. In such a case, which jurisdiction determines the starting point, the validity and the scope the guarantor's obligations, and which jurisdiction determines when the principal debt is assumed, whether it is valid, and when it is excused by reason of impossibility or impracticability? The jurisdiction governing the principal contract might allow the creditor to require the guarantor to perform its obligations, but the jurisdiction governing the guarantee contract might indicate that the guarantor's responsibilities have not yet been triggered. This situation would cause a conflict of laws of the two jurisdictions, possibly resulting in the application of different legal rules and different resolutions of the substantive legal issues. Therefore, there is a need to establish a system of international legal rules and regulations to address the rather unique legal problems posed by guarantees involving foreign elements. To avoid such jurisdictional

conflicts of laws, arbitration proceedings over the principal contract and the guarantee contract should be consolidated and judicial proceedings over the principal contract and the guarantee contract should be combined within a single jurisdiction. In adjudicating of substantive legal issues, in accordance with international legal trends, courts should comply with and apply countr y's public law, and respect the parties' choice to reject particular jurisdictions. Even though some theoretical controversy still surrounds the concept of directly applicable law, it should still be applied in practice. As for evidentiary issues, it does not violate the principle of sovereignty for domestic courts to accept foreign courts' or arbitral tribunals' determinations of fact regarding the principal debt. However, domestic courts should apply proper procedures before recognizing the foreign judgments or awards. Directly incorporating this recognition procedure into the adjudication of the substantive legal issues, as this article proposes, would make the litigation process more convenient for the parties and more efficient. It is therefore a key issue for legislators to balance the parties' convenience and the judicial sovereignty of foreign jurisdictions, and at the same to realize, to the fullest extent possible, the equitable and efficient adjudication of disputes over guarantees involving foreign elements.

**Key words**: guarantees involving foreign elements; right of plea for preference claims; consolidated of arbitration by consent; combined jurisdiction; directly applicable laws; the recognition of foreign judgments and arbitral awards; evidence