

8-2017

Chinese Conflicts of Law: A Restatement and Legisprudence Proposal

Shaoming Zhu

Follow this and additional works at: <https://elibrary.law.psu.edu/sjd>

 Part of the [Comparative and Foreign Law Commons](#), and the [Conflict of Laws Commons](#)

Recommended Citation

Zhu, Shaoming, "Chinese Conflicts of Law: A Restatement and Legisprudence Proposal" (2017). *SJD Dissertations*. 6.
<https://elibrary.law.psu.edu/sjd/6>

This Dissertation is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in SJD Dissertations by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

The Pennsylvania State University

The Dickinson School of Law

**CHINESE CONFLICTS OF LAW:
A RESTATEMENT AND
LEGISPRUDENCE PROPOSAL**

A Dissertation in Law by

Shaoming Zhu

© 2017 Shaoming Zhu

Submitted in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Juridical Science

August 2017

Abstract

China has a long history of addressing conflict issues between different legal systems. However, there is as yet no unified legislation on Conflicts of Law in China. Rules on the topic of Conflicts of Law can be found in various legal sources without a clear structure or statement of their hierarchy and effectiveness. This research draws a comprehensive, well-organized map of Conflicts of Law rules in China by introducing the evolution of Conflicts of Law in China, defining the scope of Conflicts of Law as a legal science, restating the structure and contents of Chinese Conflicts of Law rules, and examining the theory and legislative technique on these rules. The restatement addresses issues of inconsistency and confusion in the current rules. Based on the restatement and the analysis of the current Conflicts of Law rules, unified legislation on Chinese Conflicts of Law is proposed, within which a legislative paradigm is adopted and the missing subjects that Conflicts of Law should cover are addressed.

Acknowledgements

Writing an SJD dissertation has been a great journey for my academic life, even though the right thesis did not strike me until I had wandered for a year or two examining my thoughts back and forth, redoing the outline over and over, and finally gaining confidence in the relevant knowledge I gained. During this journey, I have created an incredible relationship with my dissertation; it has become a close friend who knows my strengths and encourages me to demonstrate what I can do, and an enemy who knows my weaknesses and drives me to improve where I am not yet good enough. I am deeply grateful that I have finally reached the conclusion of this process.

I know that I could have never been able to conquer the difficulties, finish my dissertation, and learn so much without the great advice and support from my advisor, Professor William E. Butler. As a world-class scholar, Professor Butler has generously supervised me with his time, knowledge, mind, and experience. He encouraged me with the idea of doing a restatement of Chinese Conflicts of Law, which turned out to be an ideal approach to my dissertation. He also taught me the pragmatic methodology and serious spirit of academic research. I still vividly remember one conversation I had with Professor Butler. I asked him how many hours he works every week to have amassed more than 3500 publications. He says, "I work zero hours. They are not my work." I was deeply inspired and moved by his attitude and philosophy towards academic work. I believe that is the real appeal of devotion to academia.

I also want to thank Professor Larry C. Backer. I have worked with Professor Backer as a research assistant for three years. Not only did we work together on many great research projects, but also I have learned a wide worldview by talking with him

about various topics ranging from law and politics to domestic development and global challenges. I deeply appreciate that.

I also would like to take this opportunity to thank my colleagues from the Foundation for Law and International Affairs. I am so proud of working with all FLIA team members. These volunteers from all over the world work on a mutual vision and hope to promote international academic communication, education, and cooperation; they are truly an inspiration for me.

My sincere gratitude must also been expressed to the great support from my parents, my older sister, my uncle Jianlin Leng, my college Professor Guihua He, and my friends Sean Jorgensen, Pengyu Su, Shi Li, and Yinghao Zheng. My friends Bill Cheung, Bill Saxton, Barb Saxton, Katie Masters Richard, Senorpe A-Hiablie also offered me their kind friendship to help me adapt the life in State College. I thank them as well. I am also grateful that I shared this journey with all of my SJD colleagues and the graduate student group, during which we supported one another in not only academic work, but also graduate student life.

As this dissertation is finished, my academic life has just started as a new phase. I shall carry on all the knowledge, experience, and support that I have gained and continue my journey with gratitude and hope for further growth in scholarship.

Table of Contents

Abbreviations	1
Introduction	4
§1: Scope and Significance of the Research	4
§2: Terminological Issues	9
§3: Methodology	12
Part 1: History.....	14
Chapter 1: Historical Roots of Conflict Rules in China	15
§1: Germination.....	15
§2: Recession.....	20
§3: Importation.....	21
§4: Stagnation.....	22
§5: Indigenization	23
Chapter 2: Philosophical Evolution of Conflicts of Law	26
through a Western Lens	26
§1: Historical Roots of Western Conflict Theories.....	26
§2: From Traditional to Modern Conflict Theories.....	28
§3: Value Orientation of Traditional Conflicts of Law	30
§4: Value Orientation of Modern Conflicts of Law	33
§5: Future Theories of Conflicts of Law	38
Part 2: Restatement.....	40
Chapter 1: Overview	41
Topic 1: Scope of Conflicts of Law	41
Topic 2: Sources of Conflicts of Law	47
Topic 3: Hierarchy of Sources of Conflicts of Law Norms.....	60
Chapter 2: General Provisions	68
Topic 1: Purpose of Legislation on Conflicts of Law	68
Topic 2: Definition of Foreign-Related Civil Relations.....	70
Topic 3: Principle of the Most Significant Relationship.....	75
Topic 4: Principle of Autonomy of Will	78
§1: Applicable Scope of Autonomy of Will	78
§2: Effect of Choosing Law.....	79
§3: Time to Choose Applicable Law	80
§4: Way to Choose Applicable Law	81
§5: Exception to Autonomy of Will.....	81
Topic 5: Determination of the Nature of Foreign-Related Civil Relations	82
Chapter 3: Limitations on the Application of Foreign Law	85
Topic 1: Imperative Provisions	85
Topic 2: Reservation of Public Interests	88
Topic 3: Evasion of Law.....	90
Topic 4: Renvoi	91
Chapter 4: Habitual Residence	97
Topic 1: Application of Habitual Residence.....	97
Topic 2: Meaning of Habitual Residence.....	99
Topic 3: Habitual Residence vs. Domicile	101
Chapter 5: Civil Subjects.....	103
Topic 1: Natural Persons	103
§1: Conflict of Nationalities	103
§2: Capacity for civil rights	104

§3: Capacity for civil acts.....	105
§4: Declaration to be Missing or Declaration of Death.....	107
§5: Right of Personality	107
Topic 2: Juridical Persons	108
§1: Nationality of Juridical Persons.....	108
§2: Capacity for Civil Rights and Capacity for Civil Acts.....	109
§3: Principal Place of Business Place and Place of Registration	111
Chapter 6: Jurisdiction	115
Topic 1: Foreign-related jurisdiction in the system of foreign-related civil procedure in Chinese legislation generally	115
Topic 2: Jurisdiction by Forum Level.....	119
Topic 3: Specialized Jurisdiction.....	123
Topic 4: General Territorial Jurisdiction.....	126
Topic 5: Specific Territorial Jurisdiction	134
§1: Contract.....	134
§2: Tort	144
§3: Property (in Maritime Cases).....	149
Topic 6: Exclusive Jurisdiction	153
§1: Real Property.....	153
§2: Harbor Operations	153
§3: Inheritance.....	155
§4: Contract.....	155
§5: Oil Pollution Damage.....	156
Topic 7: Contractual Jurisdiction.....	159
Topic 8: Transfer and Designation of Jurisdiction.....	163
Topic 9: Implied Jurisdiction	167
Topic 10: Conflict of Jurisdictions.....	168
§1: Forum non Conveniens.....	168
§2: Parallel Proceedings.....	171
Topic 11: Jurisdiction over the Recognition and Enforcement of Foreign Judgments and Arbitral Awards	172
Chapter 7: Status.....	174
Topic 1: Marriage.....	174
§1: Getting Married.....	174
§2: Divorce.....	176
§3: Husband and Wife	178
Topic 2: Family.....	179
Topic 3: Adoption.....	179
Topic 4: Maintenance	183
Topic 5: Custodianship	187
Chapter 8: Inheritance.....	187
Topic 1: Legal Inheritance (Intestate Succession)	187
Topic 2: Testamentary Inheritance (Testate Succession)	189
Topic 3: Administration of Estates.....	190
Topic 4: Vacant Estates.....	190
Chapter 9: Property	192
Topic 1: Immovables	192
Topic 2: Movables	194
§1: General Rule.....	194
§2: Transportation of Moveables.....	196
Topic 3: Negotiable Securities.....	197
Topic 4: The Right of Pledge.....	197
Chapter 10: Contract	198
Topic 1: General Rules.....	198

Topic 2: Consumer Contracts	201
Topic 3: Employment Contracts	201
Topic 4: Other Topics.....	202
Chapter 11: Agency	202
Chapter 12: Trusts.....	204
Chapter 13: Tort	206
Topic 1: General Rules.....	206
Topic 2: Product Liability	208
Topic 3: Personal Rights (Misappropriation of Name or Likeness, Defamation, Invasion of Privacy, etc.).....	209
Chapter 14: Ill-gotten Gains and <i>Negotiorum Gestio</i>	210
Chapter 15: Intellectual Property	211
Topic 1: Property Generally	211
Topic 2: Contract.....	214
Topic 3: Tort.....	215
Chapter 16: Negotiable Instruments.....	216
Topic 1: The Meaning of Foreign-related Negotiable Instruments.....	216
Topic 2: The Capacity of Civil Acts of Debtors of Negotiable Instruments.....	217
Topic 3: Form of Negotiable Instruments.....	218
Topic 4: Acts of Negotiable Instruments	219
Topic 5: Time Limit for Exercising the Right of Recourse	219
Chapter 17: Maritime Matters.....	221
Topic 1: Property.....	221
Topic 2: Contract.....	224
Topic 3: Torts	225
Topic 4: Adjustment of General Average.....	226
Topic 5: Limitation of Liability for Maritime Claims	227
Chapter 18: Civil Aircraft.....	228
Topic 1: Aircraft Property.....	228
§1: Ownership and Mortgage Right.....	228
§2: Preemptive Rights	228
Topic 2: International Air Transport Contracts.....	229
Topic 3: Aircraft Torts	230
Chapter 19: Inter-regional Conflicts of Law.....	231
Topic 1: Inter-regional Conflicts of Law within China.....	231
Topic 2: Inter-regional Conflicts of Law within Foreign States	248
Chapter 20 Recognition and Enforcement of Foreign Judgments.....	249
Topic 1: General Rules.....	249
Topic 2: The Limitation on Recognition and Enforcement of Foreign Judgments	252
Topic 3: Request to Foreign Courts for Recognition and Enforcement of Judgments	256
Topic 4: Recognition and Enforcement of Foreign Arbitral Awards	256
Part 3: Legisprudence	260
Chapter 1: The Rational Paradigm of Conflicts of Law with Chinese Characteristics	261
§1: Legislative Paradigm.....	261
§2: Legislative Jurisprudence.....	262
§3: Legislative Background.....	269
§4: Legislative Structure.....	273
§5: Legislative Content	275
§6: Legislative Technique	277
§7: Legislative Procedure.....	281
Chapter 2: A Draft Code of Conflicts of Law of People's Republic of China	283
§1: General Provisions	283

§2: Jurisdiction.....	292
§3: Civil Subjects.....	315
§4: Status.....	319
§5: Inheritance.....	324
§6: Property.....	326
§7: Contract.....	328
§8: Agency.....	331
§9: Trusts.....	331
§10: Torts.....	332
§11: Ill-gotten Gains and <i>Negotiorum Gestio</i>	334
§12: Intellectual Property.....	334
§13: Negotiable Instruments.....	336
§14: Maritime Matters.....	338
§15: Civil Aircraft.....	342
§16: Environment.....	344
§17: Bankruptcy.....	345
§18: Recognition and Enforcement of Foreign Judgments.....	345
§19: Supplementary Provisions.....	347
Conclusion.....	349
§1: Chinese Conflicts of Law as a Historical Evolution.....	349
§2: Chinese Conflicts of Law as Legal Science.....	350
§3: Chinese Conflicts of Law as an Expression of Foreign Policy and Internal Governance.....	351
§4: Chinese Conflicts of Law as Legislation.....	351
Bibliography.....	353