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Conflict of Laws in the People's Republic of China:
Review and Commentary

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Tang Zheng Sophia, Xiao Yongping, Huo Zhengxin, *Conflict of Laws in the People's Republic of China*. Cheltenham, Northampton: Edward Elgar Publishing, 2016. xiv, 448. Casebound. Price $230.00. ISBN 978 84980 858 3.

Conflict of Laws in the People's Republic of China, by Tang Zheng Sophia, barrister and Professor at Newcastle University; Xiao Yongping, Cheung Kong Scholars Distinguished Professor at Wuhan University; and Huo Zhengxin, Professor at the China University of Political Science and Law, introduces conflicts rules that operate in China, being the first systematic compilation of Chinese conflict of laws in global legal literature.

The authors ambitiously summarize fundamental conflicts theories and analyze the current conflict rules with regard to certain foreign-related civil and commercial matters, combined with the examination of the "historic, theoretic, political and economic background" (p. xiv) and recognition of the contributions by Chinese legal scholars to the development of Chinese conflict of laws. To accomplish this, the authors draw upon the historical method, theoretical study, the comparative method, individual cases, and empirical data. They not only attempt to chart a relatively comprehensive map of Chinese conflict of laws, but also have proposed an approach to "the future modernization of the Chinese conflicts system" (p. xv).

The book is divided into five large parts, as follows:

(1) Conflict of Laws in China—History and Concept;

(2) Jurisdiction, Procedure, Foreign Judgments and Awards;

(3) Choice of Law;

(4) Interregional Conflicts and Cooperation;

(5) Final Remarks.

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The titles of the parts speak for themselves. The authors present the Chinese conflict of laws to an English-speaking readership by introducing its history, basic concepts, jurisdiction, procedures, foreign judgments and awards, choice of law rules, and interregional conflicts and cooperation.

The first part addresses the history and basic definitions of the conflict of laws. A sound understanding of the historical roots and evolution of Chinese conflict rules gives the reader a better understanding of the genesis and development of modern conflict of rules in China, as well as how the basic concepts are understood in Chinese courts. The basic concepts include qualification, renvoi, proof of foreign law, evasion of laws, the preliminary or incidental question, and the rolee of imperative rules and public policy. The sources of conflict law in China are explored, including statutes, judicial interpretation, international treaties, international customs, and usages, court decisions, and doctrinal opinions. The sources of Chinese conflict of laws are indeed numerous.

The second part considers two important issues in the conflict of laws — jurisdiction and the recognition and enforcement of foreign judgments in Chinese courts. The term "jurisdiction" in the book refers only to adjudicative jurisdiction (p. 49), which is explained from two perspectives: positive jurisdiction and negative jurisdiction. The authors note that there are five types of jurisdiction in Chinese courts referring to foreign-related cases: exclusive jurisdiction, jurisdiction by submission, prorogation jurisdiction, general jurisdiction, and special jurisdiction. Considering the complicated jurisdictional rules applied to domestic cases, and the fact that these rules can be applied in foreign-related cases as well, the book might have more to classify the types of international jurisdiction. Nevertheless, the authors provide some welcome knowledge relevant to the conflict of laws, even though this reviewer disagrees with their arrangement for reasons to be set out below.

Part three focuses on choice of law rules. The theory and practice of choice of law rules are introduced in four areas: contract, tort, unjust enrichment and *negotiorum gestio*, and

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ownership and intellectual property. This part includes subtopics under each field. For example, special contracts such as consumer and employment contracts are examined. Understandably, family-related matters are excluded because the authors will address these in another book. Nonetheless, the overall discussion of choice of law is only the tip of the iceberg. Other civil and commercial matters, such as shipping and civil aircraft, each of which has its own choice of law rules, deserved attention.

The fourth part considers the interregional conflict of laws between the Mainland, Hong Kong, Macau, and Taiwan. This is a unique aspect of the Chinese conflict of laws: the formation of four independent judicial districts and the problems that remain. As for the resolution of the conflicts between the four jurisdictions, the authors suggest dealing with them at the national level rather than as international issues.

The fifth and final part concludes the discussion of the evolution of Chinese conflict of laws. The authors believe that Chinese conflict of laws has been well developed thus far but still requires modernization. The most urgent need to modernize the conflict of laws is in the areas of the enforcement of foreign judgments, international judicial cooperation and procedure, and international jurisdiction (p. 408). Eventually, they argue, the Chinese conflict of laws should move in the direction of a more systematic and comprehensive conflicts code and better judicial practice, which will require mature legislation and competent judges.

In sum, the five parts of the book are consistent and cogent. The authors have accomplished a significant undertaking in introducing Chinese conflict of laws to the English-speaking world. Generally, the book covers the most important themes in conflict of laws, even though some descriptions of the Chinese conflict of laws are not complete.

For example, the earliest practice of the conflict of laws can be traced back to the Han Dynasty. In the year 110 BC, the country Wusun offered a thousand stallions in its request to marry a princess of the Han Dynasty. The marriage was seen to be a way to quell the threat of the Huns by creating an alliance with the Han Dynasty. Emperor Wu agreed to the request and chose

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Liu Xinjun as the princess to marry the Wusun King, Kunmo. After the marriage, Kunmo died of old age and his grandson Cenzou took the throne. In accordance with Wusun's customary law, when taking the throne Cenzou also inherited the late king's wife. This meant that Liu Xijun had to marry her husband's grandson. However, in the Han Dynasty, such a practice was considered to be incest, punishable by death. Consequently, there was a question as to which law applied to this foreign marriage. Ever aware of the surrounding circumstances, Emperor Wu issued an edict stating that the Great Emperor would follow the customary law of Wusun. He did so in order to win the war against the Huns.[1] In the feudal times of China, an edict was an emperor's dedicated instrument, a form of legal document with legal effect. Liu Xijun could only comply with the edict and marry Cenzou. From that moment on, "follow its customary law" became a normative rule of the conflict of laws with regard to foreign marriages. In Chinese feudal history political marriages are too numerous to mention. Indeed, civilian intermarriages between Han Chinese and other ethnic minorities in border areas were widespread because of population migration. The rule of "follow its customary law" was applicable to most cases in the event of legal conflicts with foreign marriages. This rule became the original idea of conflict of laws in the feudal society of China.[2]

Also, the book makes several statements regarding jurisdiction that I would like to examine.

The book states that China is "not within any jurisdiction treaties" (p. 50). However, there are some international treaties that, although they are not specifically intended to govern jurisdiction, contain provisions concerning jurisdictional issues. For example, the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) has been applied to China

[1] [汉书・西域传] History of Han Dynasty· Stories of the Western Regions
[2] Qi Xiangquan, [中国国际私法探源] "The Original Source of China's Private International Law", [中国政法大学学报], *Journal of China University of Political Science and Law*, 1 (2008), p. 98.

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since March 9, 2009. Article 9 of this treaty delineates the courts that have jurisdiction over cases where an incident causes pollution damage in a territorial sea.[3]

The book's outline of international jurisdiction includes exclusive jurisdiction, jurisdiction by submission, prorogation jurisdiction, general jurisdiction, and special jurisdiction (p. 55). There are two problems with this classification. First, it does not include all existing categories of jurisdiction in the Chinese legal system; for example, jurisdiction by Forum Level and specialized jurisdiction.

Jurisdiction by Forum Level, or "Ji Bie Guan Xia," allocates jurisdiction within one territory to different levels of authorities, formed by the Primary People's Courts, Intermediate People's Courts, High People's Courts, and the Supreme People's Court. It is important to know that the Intermediate People's Courts have jurisdiction over major cases involving foreign elements.[4] Article 1 of the Interpretation of Civil Procedural Law also specifies that major cases involving foreign elements means cases involving a large amount in dispute, cases with complicated circumstances, cases in which one side consists of a large number of parties, and other cases having a major impact.

Furthermore, specialized courts are an important part of the Chinese court system. Academic work has barely examined the jurisdiction exercised by specialized courts when considering foreign jurisdiction rules. There have been maritime courts, intellectual property courts, railway transport courts, military courts, forest courts, mine courts, oil field courts, Heilongjiang Province land reclamation courts, Xinjiang Crops courts, and so on. Some of these

[3] Article 9 Jurisdiction (1) Where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in Article 2 (a)(ii)of one or more States Parties, or preventive measures have been taken to prevent or minimize pollution damage in such territory, including the territorial sea, or in such area, actions for compensation against the shipowner, insurer or other person providing security for the shipowner's liability may be brought only in the courts of any such States Parties. (2) Reasonable notice of any action taken under paragraph (1) shall be given to each defendant. (3) Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention.

[4] Civil Procedural Law, Article 18: The intermediate people's courts shall have jurisdiction over the following civil cases as a court of first instance: (a) Major foreign-related cases. (b) Cases which have a major impact within their respective jurisdictions. (c) Cases which are under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court.

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courts have played important roles in the past but have now stepped down from the stage of Chinese history as their duties are fulfilled, such as oil field courts and mine courts. Some of them were born recently, however, such as the intellectual property courts. The specialized courts are generally established based on localities and professional fields. Courts like the maritime courts, railway transport courts, and intellectual property courts more likely have the opportunities to hear international cases involving their fields.

In addition to the lack of the introduction of specialized jurisdiction, it is not entirely clear what "special jurisdiction" means in the book. It is stated in the book that special jurisdiction "is based on objective connections between the dispute and China" (p. 50). But without examples, it is difficult to understand how special jurisdiction is practiced in Chinese courts, especially given the fact that specialized jurisdiction and special jurisdiction seem to have overlapping meanings on the semantic level. Therefore, it might be helpful to introduce this type of jurisdiction to Western academia by use of the term "specific jurisdiction," as well as providing its exercise in contract, tort, and property. For example, "specific jurisdiction" can be applied in international disputes involving insurance contracts[5], leases,[6] online contracts,[7] transportation contracts,[8] maritime contracts,[9] and negotiable instruments.[10] In other words, special (i.e., specific) jurisdiction rules specifically provided for international cases are nevertheless too simple and incomprehensive (p. 80) cannot be correct because "special jurisdiction" is neither simple nor incomprehensive. Rather, it is unnecessarily convoluted and derived from numerous disparate sources.

[5] Civil Procedural Law, Article 24; Interpretation of Civil Procedural Law, Article 21
[6] Interpretation of Civil Procedural Law, Article 19
[7] Interpretation of Civil Procedural Law, Article 20
[8] Convention for the Unification of Certain Rules for International Carriage by Air, Article 28; Agreement Concerning International Carriage of Goods by Rail, Article 29; Special Maritime Procedure Law, Article 6 (2) (b); Interpretation of Special Maritime Procedure Law, Article 5; Civil Procedural Law, Article 27
[9] Special Maritime Procedure Law, Article 6 (2) (c); Interpretation of Special Maritime Procedure Law, Article 6, Article 8
[10] Civil Procedural Law, Article 25

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Regardless of these small details, we turn to address one major issue not clearly addressed in the book: the scope and nature of conflict of laws.

First, the terms "private international law" and "conflict of laws" are used interchangeably throughout with no discussion of their potentially disparate meanings. In continental scholarship, of course, the discipline is referred to "private international law";[11] this term is preferred and used more frequently in China. On the contrary, in common law countries such as the United States, the term "private international law" is not popular. Inasmuch as the book is intended to introduce the Chinese approach to conflict of laws to an English-speaking readership, it is important to explain how the two terms are perceived in China.

Second, it is not correct to refer to the Act on the Application of Laws over Foreign-related Civil Relationship (AALFCR) simply as the "Conflicts Act". Although the AALFCR is the first specific legislation on choice of law rules since the People's Republic of China was founded in 1945, it is not a comprehensive conflict of laws act. On one hand, it does not include rules concerning jurisdiction and the recognition and enforcement of foreign judgments. On the other hand, it does not include all choice of law rules that exist in other laws in force. Calling the AALFCR the "Conflicts Act" may raise the question of whether "choice of law rules" is equivalent to "conflict of laws" and generate further ambiguity over the scope of conflict of laws in China.

Third, some sections are misleading with regard to the scope of this book. For example, the book includes sections on "selected procedural issues in foreign-related litigation in China" and "recognition and enforcement of arbitration awards in Chinese courts". The authors state that "[a]lthough this book focuses on private international law questions, it cannot avoid certain important procedural issues in foreign-related actions" (p. 118). This implies that "procedural

[11] William W. Park, "Rules and Standards in Private International Law, Review of Sir Lawrence Collins (General Editor), Dicey, Morris and Collins, The Conflict of Laws, 14th edn. (London: Sweet & Maxwell, 2006)", *Arbitration*, LXXIII (2007), p. 441.

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issues in foreign-related actions" are not a private international law issue and leaves unclear whether the "recognition and enforcement of arbitration awards in Chinese courts" is a part of private international law. This reviewer neither agrees with the former statement, nor is satisfied with the reason for including the "recognition and enforcement of arbitration awards in Chinese courts" in the book.

Fourth, the authors believe that conflict of laws is a blend of municipal and international law that is "striving towards the realm of international law" as "international conventions and custom gradually became the sources of private international law" (p. 20). Although this reviewer appreciates that the book takes an evolutionary approach to defining the nature of conflict of laws and concurs that sources from the global community are becoming part of private international law, the nature of conflict of laws is not changing. This is still a matter of whether the "conflict of laws" is equivalent to "private international law" and, if not, what defines the nature of conflict of laws.

The foregoing reflects a typical phenomenon among Chinese legal scholars: that academia has no common view of the fundamental jurisprudential questions of conflict of laws — what is the scope and nature of the conflict of laws? This most fundamental issue the book fails to explain when introducing a concept from one legal system to another.

In common law countries, the conflict of laws seeks to answer three major questions: (1) in which court(s) can or should litigation involving foreign elements be initiated? (2) what law shall the court apply? (3) how may the judgment be enforced in a foreign State? These three questions encompass three indispensable elements of the conflict of laws: (1) jurisdiction; (2) choice of law; and (3) recognition and enforcement of judgments.[12] As discussed above, the book under review includes jurisdiction, choice of laws, some related procedures, and the recognition

[12] Eugene F. Scoles, Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, *Conflict of Laws* (3d ed.; 2000), p. 3.

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and enforcement of foreign judgments. That is to say, the book basically suggests that the scope of the Chinese conflict of laws is the same as the conflict of laws in a common law system.

However, what the book describes is not the general view in Chinese academic circles. There are many different ideas regarding the scope of the subject. Some scholars think that the conflict of laws means the corpus of choice of law rules and that "questions of jurisdiction and judgment-recognition form part of 'international procedural law' rather than of 'private international law'". [13] For example, Professor Weizuo Chen believes that the "[p]rivate international law of a country is that part of the legal system of that country, which, when faced with civil and commercial cases involving foreign elements, determines which legal system shall be applicable to civil and commercial legal relationships involving foreign elements, if the countries involved have different substantive private laws in place".[14] Other scholars believe that the conflict of laws/private international law includes choice-of-law rules, nationality, status of foreigners, international civil procedural norms, and unified substantive norms. And yet others even posit that international commercial arbitration belongs to the field of conflict of laws.[15]

The above leads to the following observations. First, private international law differs from conflict of laws. It is helpful to discuss the nature of private international law and conflict of laws by comparing them with public international law generally. Public international law and private international law share some obvious commonalities. For example, they both deal with foreign-related issues and implicate State national interests. Both respect sovereignty and try to find resolutions to challenges or disputes that extend beyond sovereignty. However, the fundamental difference that defines their disparate natures is that "international law exists only to the extent that it is recognized as a rule of decision by [a country's] courts".[16] To be sure,

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[13] Ibid.
[14] Chen Weizuo. [比较国际私法], *Comparative Private International Law* [北京：清华大学出版社] (2008), pp. 8-9, 46.
[15] Yu Xianyu [冲突法], *Conflict of Laws* [上海：上海财经大学出版社](1999), p. 8; Zhang Zongbo [国际私法学], *Private International Law* [北京：中国政法大学出版社] (2007), pp. 7-9.
[16] Anthony D'Amato, *International Law Anthology* (1994), p. 3.

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international law may be defined "a set of rules generally regarded and accepted as binding in relations between States and between nations",[17] but its rules are only binding to the extent that a sovereign State agrees to be bound. That is, international law is ultimately just the moral order that is wished to be followed by States in the global community. Most simply put, it is generally not enforceable in court.

The function of private international law, on the other hand, is to formulate rights and obligations in international civil and commercial legal relations, deal with existing legal disputes using relatively explicit procedures and standards, and enforce judgments in foreign jurisdictions. This purpose is shared by conflict of laws, the unified substantive norms, international commercial arbitration, and some other legal norms.[18] Conceptually, therefore, private international law could be said to include conflict of laws, unified substantive conflict norms, international commercial arbitration, and other legal norms that serve the same purpose of assisting in resolving international civil and commercial legal disputes.

That is also to say, private international law should not be conceptualized as the equivalent of conflict of laws. It is much broader. Unified substantive norms and international commercial arbitration fall broadly within the realm of private international law, but are not included as part of the conflict of laws. The major goal of the conflict of laws is to identify how to deal with the conflicts between laws in different jurisdictions, whereas unified norms and international commercial arbitration aim to provide alternative mechanisms that avoid the conflicts by creating a mutual system within which jurisdiction and applicable law are no longer at issue.

Unified substantive norms refer to the provisions of international treaties that regulate the rights and obligations of parties in foreign-related civil relations directly. However, the purpose

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[17] Jeremy Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908* (2009), p. 68.

[18] e.g., the determination of legal status of foreigners or foreign corporations, foreign judicial assistance, etc.

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of unified substantive norms is to avoid conflicts among the laws of different jurisdictions. Cases governed by unified substantive norms usually do not need to determine the applicable law because the unified substantive norms are themselves the applicable law. Unified substantive norms and conflict of laws are two approaches to adjust foreign-related civil relations.

International commercial arbitration shares the same mission with unified substantive norms, namely, avoiding the conflict of laws and questions about jurisdiction, choice of law and recognition and enforcement of foreign judgments. International arbitration constitutes the international procedural rules agreed by consensus among private parties in order to deal with foreign-related private commercial issues, and to recognize and enforce the result within a mutual framework. Of course, it is irrefutable that arbitration plays an important role in the international legal regime, for the principle of autonomy of will is being increasingly applied in legal relations and more parties are willing to choose arbitration as the preferred choice to deal with international legal disputes. However, many legal relations, such as those concerning marriage and family, must be governed by conflict of laws. Conflict of laws and international commercial arbitration are two approaches that harmoniously work toward resolving international disputes, one protecting State judicial sovereignty and the other providing space for individual autonomy.

It is critical to recognize that conflict of laws does not only mean choice of law. This is one reason that it is inappropriate to refer to the AALFCR as the "Conflicts Act." Conflict of laws is more than a tool for organizing choice-of-law rules in order to determine the applicable law. It refers to the legal system that resolves cases involving international civil or commercial disputes to be heard by the court with legitimate jurisdiction, helps the court and the parties identify the appropriate applicable law by reference to choice of law rules, and eventually guarantees that the judgment will be recognized and enforced. Conflict of laws is not substantive law or procedural law, but is the premise for the application of substantive and procedural laws. Conflict of laws aims to provide a guiding criterion to determine what substantive and procedural laws to apply. It ensures that the legal civil and commercial relationship will be recognized among different

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jurisdictions and governed by appropriate substantive and procedural laws that might be from other jurisdictions. It undertakes to identify the court that has jurisdiction when disputes occur and confirms the recognition and enforcement of judgments that might be from other jurisdictions. Therefore, in addition to choice of law rules, jurisdictional rules and the rules for the recognition and enforcement of foreign judgments should be considered to be components of the conflict of laws.

But one might argue that many other important issues are relevant to the conflict of laws. To clarify why these relevant issues do not belong to the conflict of laws, we adopt the concept of legislative structure.

Legislative structure is essentially a framework for the systematization and organization of legislation. In modern times the system of law is intricate and complicated by reason of the intersections and overlapping of subject matter between different branches and sources of law. Nevertheless, it can be divided into two basic parts: external structure and internal structure. Clarifying the external structure of the legislation is the premise for confirming the scope of the legislation.

The internal structure refers to the scientific arrangement of the object of the law in accordance with its internal relation. Specifically speaking of the conflict of laws, the internal structure deals with the classification and composition of the conflict rules according to the nature of the rules and the legal relations that these rules govern. Given that the internal structure is not relevant with the commentary being made here, it will not be further discussed in this review.[19]

The external structure refers to the external environment within which the law is located as part of the system of legal and involves the relationship with other legal norms. The external structure shapes the scope of the law and clarifies the authority of the law. A coherent and logical external structure can ensure the accessibility of the provisions and improve the efficiency of law

[19] Generally, the internal structure can be divided into three parts: general principles, specific provisions, and supplementary provisions.

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application and implementation. There are four avenues on the map describing the external structure of conflict of laws.

The first is the vertical relationship between conflict of laws and private international law. As mentioned above, private international law is a complex system within which the conflict of laws shares the status as a sub-branch with other branches or norms of law. This is the basic external scope of conflict of laws.

The second is the parallel relationship between the conflict of laws and unified substantive norms, international commercial arbitration, and certain other legal norms that have been outlined above. They are parallel laws directed towards the same objective but do not disturb one another.

The third is the ministrant relationship between conflict of laws and other legal norms that supports the implementation of conflict of laws, such as formulations on the legal status of foreigners, the determination of nationality and residence, and international judicial assistance. Although they are not part of the conflict of laws, they serve the purpose of the conflict of laws and play a great role in helping conflict of laws to achieve its function.

The fourth is the subsequent relationship between the conflict of laws and the applicable law, including domestic substantive and procedural laws and foreign substantive and procedural laws. Some applicable laws directly formulate the rights and obligations of foreigners, whereas others do not. But that does not affect their position in the system. In other words, substantive norms involving foreign civil and commercial elements are not necessarily part of the conflict of laws.

Finally, by discovering the scope and external structure of conflict of laws, one can define its nature. The authors of the book under review believe that the nature of private

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international law is determined by the sources.[20] This reviewer disagrees: the nature of private international law is decided by its content and scope.

Rules on jurisdiction, choice of law and recognition and enforcement of foreign judgment are all made by the domestic legislator without negotiation or agreement with another State. The legislation and domestic courts decide whether a case will be heard, what law will govern, and whether a foreign judgment will be recognized and enforced. Although the enforcement of the rules may require international judicial cooperation, this is due solely to the fact that conflict of laws governs foreign-related issues. Globalization is not something new. Therefore, in this reviewer's opinion the authors' assertion that "[b]ased on the historical background, the discipline depends on the specific stage where private international law is situated now in its evolutionary process".[21] The evolutionary process of globalization will, to a varying extent, affect the level of judicial cooperation and relevant treaties. That is a matter of the development of private international law, rather than the nature of conflict of laws. Therefore, as an independent discipline, the conflict of laws belongs to the domestic legal system.

The book under review has thoroughly addressed many fundamental issues of the conflict of laws in China. Even though there are some conceptual drawbacks, these shortcomings do not prevent the book from being a valuable resource. It is to be hoped that the comments herein on the basic jurisprudential questions of conflict of laws will prompt further discussion between foreign and Chinese scholars.

[20] Note 8 above.
[21] Ibid.

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