

法律适用方法

合同法案例分析方法

(英文版)

Judicial Methodology

Methods for Case Studies in Contract Law

National Judges College
Sino-German Legal Cooperation Programme



Implemented by

giz Deutsche Gesellschaft
für internationale
Zusammenarbeit (GIZ) GmbH

中国法制出版社
CHINA LEGAL PUBLISHING HOUSE

Judicial Methodology

Methods for Case Studies in Contract Law

National Judges College
Sino-German Legal Cooperation Programme

丛书总编辑

Huang Yongwei (黄永维)

Jörg Binding (雅客)

丛书副总编辑

Feng Wenli (冯文利)

主要编写人员

Prof. Dr. Evelyn Henning (伊芙琳)

Wang Xiaofang (王晓芳)

中国法制出版社

图书在版编目 (CIP) 数据

法律适用方法·合同法案例分析方法 = Judicial
Methodology. Methods for Case Studies in Contract Law;
英文 / 国家法官学院, 德国国际合作机构著. —北京:
中国法制出版社, 2015. 5
ISBN 978 - 7 - 5093 - 6384 - 3

I. ①法… II. ①国…②德… III. ①合同法 - 案例 -
中国 - 英文 IV. ①D920. 5

中国版本图书馆 CIP 数据核字 (2015) 第 101967 号

责任编辑 周琼妮 (zqn - zqn@126. com)

封面设计 蒋 怡

法律适用方法·合同法案例分析方法 (英文原版)

FALÜ SHIYONG FANGFA · HETONGFA ANLI FENXI FANGFA (YINGWEN YUANBAN)

著者/国家法官学院, 德国国际合作机构

经销/新华书店

印刷/北京京华虎彩印刷有限公司

开本/730 毫米×1030 毫米 16

版次/2015 年 8 月第 1 版

印张/33 字数/477 千

2015 年 8 月第 1 次印刷

中国法制出版社出版

书号 ISBN 978 - 7 - 5093 - 6384 - 3

定价: 108. 00 元

北京西单横二条 2 号

邮政编码 100031

网址: <http://www.zgfzs.com>

市场营销部电话: 010 - 66033393

值班电话: 010 - 66026508

传真: 010 - 66031119

编辑部电话: 010 - 66067023

邮购部电话: 010 - 66033288

(如有印装质量问题, 请与本社编务印务管理部联系调换。电话: 010 - 66032926)

Preface

Ronald Myles Dworkin, an American legal scholar, defines a “hard case” as a case where the judge is required to move beyond the rules that are explicitly articulated in legal texts (such as constitutional provisions, statutes, and cases) and refer to principles. Dworkin argues that the judge must apply the right methods of legal interpretation and value judgment to reach the only correct decision in a hard case. Although it is still controversial whether “the only correct decision” exists as such, the objectivity and unity in application of law would not necessarily be impossible; we may consider that a judge has, to some extent, fulfilled the intrinsic requirements of unity of application of law if he or she applies the law in a way that is united and measurable by objective standards to make an adjudication that both fits within the framework established by legal rules and at the same time is true to the basic values of law. In this way, the German practice on application of law, known for its soundness and precision, is of great reference value for China to further develop and improve the application of law.

As a national training body for judges and an institution subordinated to the Supreme People's Court of the People's Republic of China, National Judges College of China has been dedicated for years to the friendly exchange and cooperation with foreign countries, drawing upon the good experience of other countries. Since 1998, the College has, jointly with Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, offered more than twenty sessions of training courses on the application of criminal, civil and administrative laws. Cases were selected for the training courses from those accordingly filed in the People's Republic of China and were solved by applying Chinese laws, while using German case analysis methods (e. g. inductive reasoning and relation analysis) to reach decisions. During the training, most participants found both inductive reasoning and relation analysis logically rigorous and highly enlightening methods for Chinese judges to refer to when they analyze cases and apply the law. As a collection of representative cases

which have been fully discussed in the training courses, this series of books embodies the achievements of Sino-German cooperation on the training of judges and is a testimony to the hard work and thoughtful decision making of judges from both sides.

The first edition of this book was sold out one year after its publishing, demonstrating its accessibility to all sectors of society. For this second edition we have taken into regard the questions, opinions and suggestions raised by the judges during the training courses and correspondingly revised some parts of this book on the basis of its original contents in order to better fulfill the demands of our readers. We are grateful for any comments and suggestions to this book from our legal colleagues.

黄永维

President of National Judges College of China

The Preface of Case Study Methodology

Since 2000 the Sino-German Legal Cooperation Programme of the Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ) and National Judges College of China have been closely working together in conceiving and carrying out long-term and short-term training courses on judicial methodology in civil, administrative and criminal law. In 2012, we began publishing the training material used in those courses, which marks another significant milestone in our longstanding and successful cooperation.

We are proud to present the English edition of this *Judicial Methodology: Methods for Case Studies in Contract Law* to our Chinese colleagues one year after the 1st edition of the Chinese Version. It corresponds to the 2nd Chinese edition as of 2014. The fact that the Chinese version has seen two editions within only two years is a reflection of the high demand for such training material. This English edition also reflects an increasing interest of the international legal community in the developments in China's legal system, including the education of lawyers.

Both our training material and our training courses aim at supporting the efforts of the P. R. China's authorities to establish a socialist market economy based on the rule of law. Therein lie significant challenges not only for the legislator but also for all those who would implement legal acts in their daily practice—including judges, civil servants, attorneys-at-law, among others. Over the long run, the implementation of law would only be successful if its outcome was predictable. Otherwise, the law and the acts undertaken for its implementations may not truly be accepted by the public as binding and reliable guidelines for conduct. Such a prerequisite for successful implementation of law, however, cannot always be met, since legal acts are often complicated and not easily understood, even by trained legal professionals. Sometimes they are unclear, ambiguous or even incomplete and thus unable to cover all the various situations that may occur in real life. This is why a methodology of law application is essential for enhancing the predictable and comprehensible results.

It is self-evident that this ambitious aim can only be achieved through professionally

trained staff. Therefore, thorough training of those in charge of the application of law is essential.

We are confident that this book will be helpful to all those who wish to improve their professional capacity in implementing law. The German methodological approach presented in this book is characterized by the “subsumption technique” (*Subsumtionstechnik*), a method used for solving cases where the facts are already clear, and the “relation technique” (*Relationstechnik*), a method used for solving cases where the facts are unclear. This methodology has a long and deep-rooted tradition in the German legal tradition. Its teaching in the legal education and application in the legal practice ensure that all legal professionals have the same approach to solving legal cases.

The subsumption technique is completely independent from the content of the jurisdiction where it is applied. Thus, it can be used for solving cases under German law, under Chinese law or under any other law applicable, as the case may be. The relation technique, on the other hand, reflects basic principles of the German civil procedure law which in parts are different from those of the Chinese civil procedure law. However, the structure of the relation technique can be adapted to procedural rules—even if they rely on different principles—by adapting this structure to the given procedural system.

Accordingly, the case studies presented in this book serve as examples of how the German methodology can be applied to cases under Chinese law. We should stress that we are experts only in legal methodology and not in Chinese law itself. Nevertheless we have done our best to adapt the German methodology to, as accurately as possible, reflect the specific characteristics of Chinese law. Nevertheless, we kindly ask for indulgence for any errors made as regards the application of Chinese law.

We hope that our Chinese colleagues, judges from Chinese courts at all levels, from all regions and provinces of P. R. China, will find the case study methodology helpful to their work. Then the aim of this book would be achieved.

On behalf of GIZ's Sino-German Legal Cooperation Programme, I would like to thank all the organizers and supporters of this publication. I am particularly grateful to the National Judges College, notably President Huang Yongwei, Vice President Cao Shibing and Ms. Wang Xiaofang, head of the International Department, for their continuous support and long-lasting trustful cooperation.

The development of and fundamental improvements to the training material are mainly owed to the efforts and achievements of Prof. Dr. Evelyn Henning, whose long-term

professional practice as a judge in Germany, as a trainer and an academic teacher facilitated the high quality of our course material. Many German judges who have joined us over all those years as trainers in our courses made valuable contributions to the development of the course material. German judge Dr. Johannes Schlichte, who is in charge of the judicial training and exchange activities of the Sino-German Legal Cooperation Programme, was responsible for this English edition and the coordination of our team. Ms. Hu Lan, Ms. Wan Di, Ms. Zhao Xiaolan, Ms. Ji Mengtian, Ms. Tian Hengyan and Ms. Britta Beylage-Haarmann have also put a lot of effort into this book. I would like to thank all of them very cordially.



Dr. Jörg Binding

Programme Director

GIZ Sino-German Legal Cooperation Programme

德国国际合作机构-中德法律合作项目和国家法官学院

自1996年以来，我们一直在中华人民共和国卓有成效的司法改革中为最高人民法院和国家法官学院提供支持。为确保法治原则在法律适用过程中得到更好的实施和遵循，我们已为9000多名法官提供了法律适用方法的培训。

欲了解更多信息，请访问：

德国国际合作机构（GIZ）
中德法律合作项目

国家法官学院

塔园外交办公楼1-13-2
亮马河南路14号
100600 北京，中国

丰台区南四环西路111号
100070 北京，中国

电话：+86 (0)10 8532 1401
网址：www.law-reform.cn

电话：+86 (0)10 6755 9245
网址：njc.chinacourt.org

CONTENTS

Part I Introduction

Case Study Methodology—Introductory Remarks	3
Structure	5
Part 1: Theoretical Background	7
Part 2: Subsumption Technique	23
Part 3: Relation Technique	52

Part II Case Subsumption

Case 1	83
Case 2	92
Case 3	100
Case 4	106
Case 5	110
Case 6	121
Case 7	127
Case 8	141
Case 9	157
Case 10	161
Case 11	174
Case 12	183
Case 13	193
Case 14	205
Case 15	212
Case 16	219
Case 17	225
Case 18	232
Case 19	238

Case 20	251
Case 21	262
Case 22	273
Case 23	277
Case 24	284
Case 25	292
Case 26	296
Case 27	305

Part III Case Relation

Case 1	313
Case 2	326
Case 3	337
Case 4	348
Case 5	367
Case 6	380
Case 7	393
Case 8	410
Case 9	428
Case 10	445
Case 11	459
Case 12	476
Case 13	491

Part IV Moot Court

Moot Court based on Case 8 Relation	507
-------------------------------------------	-----

Part I

Introduction

Case Study Methodology—Introductory Remarks

China is on the way becoming a nation under the rule of law, the concept of which includes at least two aspects: first, laws need to be legislated; then more importantly, they have to be implemented. It is the major task for the law specialists to carry out laws, whether they are judges, prosecutors, or officials from administrative departments of the state. One of the key factors for the successful implementation of statutory laws is uniform application. However, this is not always guaranteed, since the law is very often complicated or vague and cannot cover every situation that happens in real life. To cope with that, a methodology of law application is very helpful to more uniform results.

In order to achieve this goal, qualified trainings for those being responsible for law applications matter a lot. Therefore, Chinese legislators have been continuously undertaking considerable efforts to provide necessary training opportunities through reform of legal stipulations and establishment or enlargement of legal training facilities.

With our *Introduction to Case Study Methodology*, we hope to give you an overview of a methodological approach that German lawyers learn from the beginning of their studies. This approach leads to a similar way of thinking because it is used by almost everyone who studies law in Germany. The advantage of this method is that it is, to a large extent, independent of the contents of the applicable law. Therefore, it can also be useful for Chinese lawyers.

In order to make it easier for Chinese readers, we try to analyse cases and other examples using the Chinese law. We might be experts in the methodology; however, you are definitely the experts in Chinese law. Therefore, we ask in advance for understanding for any mistakes we may have made in the application of Chinese stipulations as well as for your help to improve the course materials. As said before, the methodology is far beyond the simple question of “right or wrong”. It provides structures and approaches rather than details of the legal stipulations.

The *Introduction to Case Study Methodology* includes three parts. The first part will provide you with some basic principles regarding the purpose of law, implementation of the

law, and reasons for applying the methodology. The second and third part roughly correspond with what German lawyers learn before starting a career. First, four years will be spent in university to master legal knowledge and apply them in given factual situations (Subsumption Technique). Afterwards, two more years of practical training that enables lawyers to deal with the law application when, as it usually is the case in practice, the factual situation is disputed among the parties involved (Relation Technique). In this Introduction as well as in the training materials, the above mentioned methodology will be used to develop your case-solving abilities. It is the Chinese civil laws that will be used when solving cases.

If you find the case study methodology helpful in your work, the aim and objective of this book will be achieved.

Structure

PART 1: THEORETICAL BACKGROUND

I . *The Purpose of Law, Regulations and the Legal Order*

- 1. The Purpose of Law*
- 2. The Importance of Law Application*
- 3. Law in Everyday Life*
- 4. Violation of Laws and Disputes*
- 5. Law and Justice*

II . *Why People Obey or Disobey Legal Rules*

- 1. Natural Adherence to Certain Rules*
- 2. Adherence Due to Constraint Measures*

III . *Alternatives to the Law as the Organizing Principle?*

IV . *Reasons for a Methodical Application of the Law*

- 1. Problems in Law Application*
- 2. How does a Uniform Method of Application Can Deal with These Problems*
- 3. Legal Certainty as a Main Advantage of Uniform Application*
- 4. Challenges of a Uniform Method of Law Application*
- 5. A Possible Method; Subsumption*

PART 2: SUBSUMPTION TECHNIQUE

I . *Short Overview of the Subsumption Method*

- 1. Basic Principles of the Subsumption Method*
- 2. Preconditions; Find the Correct Legal Rule and Determine Its Single Requirements*
- 3. Subsumption Technique*
- 4. Difficulties within the Subsumption Method*
- 5. Development of the Law*
- 6. Determination of the Legal Consequences*

II . *Solving a Civil Law Case*

- 1. The Basic Assessment of a Case; WWW. Legal Basis*
- 2. The Legal Basis for a Claim and the Structure of Legal Provisions*

3. *Subsumption; Did the Claim Arise?*

4. *Exceptions*

5. *Result*

6. *Model Case*

III . *Schemes*

1. *Subsumption*

2. *Solving Civil Cases in General*

3. *Solving a Civil Case Based on a Contractual Agreement*

PART 3: RELATION TECHNIQUE

I . *Introduction*

II . *Relation Technique in Civil Law Cases*

1. *Accompanying Case*

2. *Methodical Approach*

ANNEX: ON EVIDENCE