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中国程序法

CHINA'S PROCEDURAL LAW

□ 朱羿锜 著

English Edition

英文版

中国程序法

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朱羿崑,男,生于1967年8月,四川仪陇人,教授、博士、律师、仲裁员、暨南大学法学院副院长、英国行政管理协会资深会员。在《英国行政管理》、《现代法学》、《政治与法律》、《著作权》、《中国工业经济》、《财贸经济》、《经济学动态》、《民商法论丛》和《经济法论丛》等刊物发表英文论文16篇和中文70多篇。主持完成国家自然科学基金和省部级项目5项,参与并完成国家自然科学基金和教育部项目4项。出版专著8本,主要有*China's Business Contract* (Butterworths, 1997)、《公司治理论》(广东中青年社会科学家文库,1999)、《公司控制权配置论》(经济管理出版社,2001)、*Concise Chinese Law* (法律出版社,2003)、*China's Commercial Law* (法律出版社,2003)、*China's Procedural Law* (法律出版社,2003)。

编写说明

面对经济全球化和科技革命的挑战,中国的法律日趋与国际接轨;我国法学教育的国际化自不待言。国家教育部因势利导,于2001年颁发《关于加强高等学校本科教学工作,提高教学质量的若干意见》,即2001年4号文件(以下简称“《意见》”),提出了十二项提升本科教学质量的举措,其中第八项举措就是积极推动国内高等学校使用包括英语在内外国语进行教学,积极创造条件使用英语等外国语进行公共课和专业课教学。对于法律等专业,《意见》则明确要求先行一步,力争在三年内,使用外语教学课程达到所开课程的5%~10%。为此,许多高校相继尝试用英语讲授部分法律专业课,不少高校还专门成立国际学院,所有课程均用英语讲授,其中“法学概论”或“法律基础”为各个专业的公共必修课。法学自有其独特的概念体系,其中不乏艰深晦涩的专业术语,阅读中文已令人生畏,要在英文背景下讲授和学习,又缺乏英文教材,学生更容易就坠入云山雾海之中。因此编写适合全英教学的法学教材,其紧迫性不言而喻。

China's Procedural Law(《中国程序法》)为全英教材,采用与国际接轨的读者中心主义(reader friendly)的写作风格。全书紧扣现行程序法的逻辑体系,涵盖程序之概述、行政程序、民事诉讼、行政诉讼、刑事诉讼和替代性争议处理机制,简洁地勾勒出中国现行程序法的基本制度。选材精当,层次分明,主次鲜明,摒弃了细枝末节的问题,读者能够在短时间内对中国程序法有比较全面系统的把握。为达到简约之目标,本书在体例结构、观点阐述等进行了大胆的探索,或曰创新。归结起来,主要有4点:(1)每章篇首均用简短的篇幅,尤其是表格,将浩繁的立法用简洁的命题串连起来,勾勒出了该领域涉及的法律法规全貌及其变迁历程,便于读者对该领域的立法先有一个总体的把握和了解,为理解和领悟其后的具体制度安排做好铺垫。(2)正文引入多个精选案例,以案说法。既生动而简洁地阐释了相关法律制度,又能够启发读者深思,领悟精妙之处,举一反三。(3)设计并使用47个图表

2 编写说明

(41个表和6个图)。法学概念和法律规则可谓纷繁芜杂,运用表格和图形进行精心梳理,通过一个个简洁的主题之串连,化繁为简,简洁明了,有助于进行横向比较和研究,体味不同制度的微妙差异。(4)大胆使用规范化的缩略语,正文目录之后还配专门的缩略语目录,减少或消除了赘笔,大大节约了篇幅,读者易于阅读。

作为一项全新的事业,本系列教材能够面世,得益于法律出版社尤其是丁小宣先生的鼎力支持和西南财经大学法学院院长、教授、博士生导师高晋康博士的大力举荐。作者本人虽已走出产业经济学领域,暨南大学的云冠平教授、黄德鸿教授、副校长胡军教授和广东金融专科学校校长张丙申教授作为我的导师和恩师,仍然一如既往地给予关心和教诲,这一切我都将永志不忘,感念终生。我与暨南大学徐暄博士、刘颖博士、吕国民博士等诸位同事的讨论,使我受益匪浅。需要特别提及的是,本书接近完成之际,电脑遭受肆虐的病毒袭击,转瞬间所有的书稿全部丢失,我的两位学生张宏鹏和杨少雄同学以及广东理治律师事务所的麦允良和谢子坚先生,昼夜兼程,奋力拼搏,文稿得以挽救。否则,我可能无力承受。自然,书中一切文字责任当由我个人承担。新的事业本来就意味着有不成熟、不完善之处,本书所作上述新尝试,必然伴随着相应的风险和疏漏。如蒙方家指正,当不胜感激。

朱羿锜

2003年6月于广州暨南园

Abbreviations

| | |
|---------------|---|
| ADR | Alternative Dispute Resolution |
| AIC | Administration of Industry and Commerce |
| ALL | Administrative Litigation Law |
| ALL Opinions | Opinions on Implementing the ALL (Trial implementation) |
| APL | Administrative Penalty Law |
| ARIC | Administrative Rules on Insurance Companies |
| ARL | Administrative Reconsideration Law |
| ASL | Administrative Supervision Law |
| BOD | Board of Directors |
| BOS | Board of Supervisors |
| CAA | Chinese Arbitration Association |
| CCPIT | China Council for the Promotion of International Trade |
| CGA | Customs General Administration |
| CIETAC | China International Economic and Trade Arbitration Commission |
| CIPL | Civil Procedure Law |
| CIPL Opinions | Opinions on Application of the CIPL |
| CJV | Contractual Joint Venture |
| CLS | Company Limited by Shares |
| CMAC | China Maritime Arbitration Commission |
| CMC | Central Military Commission |
| COFTEC | Commission of Foreign Trade and Economic Cooperation |
| COSTIND | Commission of Science and Technology Industry of National Defense |
| CPC | Communist Party of China |
| CPPCC | Chinese People's Political Consultative Conference |
| CrPL | Criminal Procedure Law |
| CSRC | China Securities Regulatory Commission |

2 *China's Procedural Law*

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| EBL | Enterprise Bankruptcy Law |
| EBL Measures | Measures on Several Questions in Hearing Enterprise Bankruptcy Cases |
| EJV | Equity Joint Venture |
| ELDRR | Enterprise Labor Dispute Resolution Regulations |
| ENPPCL | Environment Noise Pollution Prevention and Control Law |
| EPA | Environment Protection Administration |
| EPL | Environment Protection Law |
| ETDZ | Economic and Technological Development Zone |
| FDI | Foreign Direct Investment |
| FICLS | Foreign-Invested CLS |
| FIE | Foreign Invested Enterprise |
| GATT | General Agreement on Tariff and Trade |
| GPCL | General Principles of Civil Law |
| GPCL Opinions | SPC Opinions on Questions Concerning the Implementation of the GPCL (for trial use) |
| ICC | International Chamber of Commerce |
| IICH | Individual Industrial and Commercial Household |
| INCOTERMS | International Chamber of Commerce of Terms |
| IP | Intellectual Property |
| IPO | Initial Public Offering |
| IPO | Intellectual Property Office |
| JV | Joint Venture |
| LAC | Legislative Affairs Commission of the SCNPC |
| LLC | Limited Liability Companies |
| MII | Ministry of Information Industry |
| MOA | Ministry of Agriculture |
| MOC | Ministry of Communication |
| MOC | Ministry of Commerce |
| MOC | Ministry of Culture |
| MOC | Ministry of Construction |
| MOE | Ministry of Education |
| MOF | Ministry of Finance |
| MOFA | Ministry of Foreign Affairs |
| MOFERT | Ministry of Foreign Economic Relations and Trade |

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| MOFTEC | Ministry of Foreign Trade and Economic Cooperation |
| MOH | Ministry of Health |
| MOJ | Ministry of Justice |
| MOLSS | Ministry of Labor and social Security |
| MOND | Ministry of National Defense |
| MOP | Ministry of Personnel |
| MOR | Ministry of Railway |
| MOS | Ministry of Supervision |
| MOSS | Ministry of State Security |
| MOST | Ministry of Science and Technology |
| MPS | Ministry of Public Security |
| MSL | Mines Safety Law |
| MWR | Ministry of Water Resources |
| NAO | National Audit Office |
| NIL | Negotiable Instrument Law |
| NPC | National People's Congress |
| PEOC | People's Bank of China |
| PMC | People's Mediation Committee |
| PMCOR | Organic Regulations on the People's Mediation Committee |
| PRC | People's Republic of China |
| QTSB | Quality and Technology Supervision Bureau |
| RCOH | Rural Contracting Operation Household |
| RMB | Ren Min Bi |
| RPMAR | Regulations on Procedure for Making Administrative Regulations |
| RPMR | Regulations on Procedures for Making Rules |
| SAEC | State Administration of Exchange Control |
| SEPA | State Environmental Protection Administration |
| SAIC | State Administration of Industry and Commerce |
| SAR | Special Administrative Region |
| SAT | State Administration of Tax |
| SCL | State Compensation Law |
| SCNPC | Standing Committee of the National People's Congress |
| SDA | State Drug Administration |
| SDPC | State Development and Planning Commission |
| SEAC | State Ethnic Affairs Commission |

4 *China's Procedural Law*

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| SEPA | State Environment Protection Administration |
| SETC | State Economic and Trade Commission |
| SEZ | Special Economic Zone |
| SFPC | State Family Planning Commission |
| SIPO | State Intellectual Property Office |
| SOE | State-Owned Enterprise |
| SPC | Supreme People's Court |
| SPP | Supreme People's Procuratorate |
| SQTSB | State Quality and Technology Supervision Bureau |
| STL | Secured Transaction Law |
| TRIMs | Agreement on Trade-Related Investment Measures |
| TRIPS | Trade-Related Aspects of Intellectual Property Rights |
| UN | United Nations |
| VAT | Value Added Tax |
| WTO | World Trade Organization |

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1 A Survey of China's Procedural Law

1 Procedural and Substantive Law

The law can be broadly classified into substantive and procedural law. The former deals with rights and obligations that each individual and business entity enjoys in society. Some examples are the right to have trade name, to own property, to register and own patents and trademarks, to enter into contracts to sell or give away property or industrial property, to enter into joint ventures; the obligation to avoid injuring other, to perform contractual obligations, to pay taxes, and to avoid infringement upon intellectual property rights of others. The latter deals with protection and enforcement of the foregoing rights and obligations. Thus substantive rules decides which of two parties infringes upon patent of the other, but it is through rules of procedural law that patent owner obtains damages and other remedies against the wrongdoer. The procedural law provides the machinery and tools by which the right and obligations of individuals recognized in substantive law are actually realized and enforced, if there is a dispute. Thus substantive law is concerned with what, while procedural law is concerned with how. That is why major jurists refer the relation between the substantive and procedural law as the relation between the plant's shape and the plant itself, and the relation between animal's shape and its blood and flesh. Apparently both the substantive and procedural law are indispensable part of the legal system. In absence of the procedural law the substantive law cannot be put into operation and functioning, and in absence of the substantive law the procedural law is meaningless.

2 China's Procedural Law

The reason why we need the procedural law is that the law must be implemented, applied and enforced in a reasonable way that does not completely defeat people's expectations. This entails the normative and practical limits on the decision-makers who interpret and apply the law and principles of due process such as access to impartial tribunals, a chance to present evidence and rules of evidence. Else, people will quickly realize that there is no need to follow the law and adjust their behavior accordingly. Traditionally China has lacked a rule of law culture in which law was held in high esteem. Instead people are more willing to rely on connections to circumvent the law, the emphasis on substantive justice. Since the late 1970's China has endeavored to provide a fair mechanism for resolution of disputes, such as impartial adjudicators and fair procedures. The increasing reliance on the courts to settle disputes in modern Chinese society indicates that the procedural law matters.

2 Types of Procedural Law

Table 1—1: Major procedural laws and regulations

| Category | Name of laws & regulations | Issuer | Time |
|--------------------------|----------------------------|---------------|------------|
| Judicial procedure | CiPL | NPC | 1991 |
| | CrPL | NPC | 1979, 1996 |
| | ALL | NPC | 1989 |
| Administrative procedure | RPMAR | State Council | 2001 |
| | RPMR | State Council | 2001 |
| ADR | Arbitration Law | SCNPC | 1994 |

In accordance with the status of the dispute settlement organ and decision-maker, the procedures fall into judicial procedure, administrative procedure and alternative dispute resolution (ADR). The judicial procedure is only concerned with the procedures of lawsuits through the court system. China's law of judicial procedure is led by three fundamental laws on litigation, i.e.

Civil Procedural Law (CiPL) adopted by the National Peoples Congress (NPC) in 1991, Criminal Procedural Law (CrPL) adopted by the NPC in 1979 and substantially revised in 1996, and Administrative Litigation Law (ALL) adopted by the NPC in 1989. Obviously all these laws are adopted as basic law by the NPC. So far the only law on ADR is the Arbitration Law adopted by the Standing Committee of the National People's Congress (SCNPC) in 1994. Since it is adopted by the SCNPC it belongs to the non-basic law. However there is no basic law, nor non-basic law in the area of administrative procedure. Such non-pure administrative procedural laws as the Administrative Punishment Law (APL) adopted by the NPC in 1996 and the Administrative Reconsideration Law (ARL) adopted by the SCNPC in 1999 involve lots of rules on administrative procedures. So far the pure administrative procedural law includes two administrative regulations promulgated by the State Council in 2001, i.e. Regulations on Procedure for Making Administrative Regulations (RPMAR) and Regulations on Procedures for Making Rules (RPMR). Therefore there is large room for improving the administrative procedural law, and many administrative law jurists have even called for the comprehensive Administrative Procedural Law.

3 Basic Principles

The procedural law is subject to four (4) common basic principles, i.e. rule of law, procedural fairness, procedural openness and procedural efficiency. These principles represent the soul of the procedural law, which are not the specific rules, but the rule of rule instead.

3.1 Rule of law

It requires that the entire dispute settle organs and decision-makers shall behave in accordance with law both substantially and procedurally. Any act exceeding its authority or jurisdiction shall be null and void (*ultra vires*). Abuse of executive and judicial power of any kind shall be held accountable. The judicial review is available as a remedy so as to curb administrative