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CHINESE CONTRACT LAW

COMPARATIVE CASE STUDIES

PART TWO



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Preface

The People's Republic of China (PRC) promulgated a new Contract Law on March 3, 1999. The importance of the Contract Law may be recognized by the fact that the law was put into effect on the 50th anniversary of the People's Republic of China on October 1, 1999. The Contract Law is a cornerstone in the transformation of the legal system of the PRC, which started at the end of the 1970's, when China revived its mandate to develop a Civil Code. The "General Principles of Civil Law" have been effective since January 1, 1987. Prior to the present unified Contract Law there have been three contract laws on domestic economic, foreign economic, and technology contracts, which have since been replaced with the new law. Now the new Contract Law complements the General Principles on Civil Law for China's development of a Civil Code. We are waiting for the completion of another cornerstone; Property Law, in order to have a comprehensive set of regulations. Chinese Contract Law is worthy of a comprehensive study book. This book focuses on contract law; however, it also touches on case studies of other civil laws such as the previously mentioned General Principles.

Theoretical knowledge of the law is not enough for lawyers. Every practicing lawyer needs to know how to apply the law; i.e. how to put the facts of his or her case together with the rule, which may be a legal provision or a precedent. Such procedures could be also referred to as rule handling or how to deal with legal provisions. The present book intends to

introduce both Chinese and German substantial contract law in theory and in practice. In order to accomplish this objective, the book consists of three components: introduction to techniques for implementation of the law, theoretical introduction to Chinese and German contract law and 34 case studies. Each case study offers a solution according to Chinese and German law. Every case study serves as an example of how rule handling works, and thus demonstrates implementation of the law in action.

The present book has been written as a study book. It has been designed for judges, practicing attorneys, and in-house counsels as well as for academics, scholars, and law students, who already have at least a basic knowledge of contract law. Practicing lawyers will probably benefit most from the implementation techniques, which will facilitate their daily work and will make them more efficient. Academics, scholars, and law students can furthermore take advantage of the comparative legal approach of the book. Legal systems can be best compared by confronting the solutions each legal system provides for a concrete case study. Moreover, law instructors may use the book as a teaching device. Each case study can serve as one teaching unit. Students can be asked to prepare the solution for a case study as homework, and the solution can be discussed subsequently in class. There are various ways of making use of this book. I hope our readers will find it beneficial and enjoyable.

This book is based on training materials developed for a series of courses, jointly organized by the Legal Cooperation Office Beijing of Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH and the Treaty and Law Department of the Ministry of Commerce (MOFCOM) of the PRC in their Joint Project "Training and Advisory Service on Commercial Laws at MOFCOM." GTZ acts on behalf of the German Federal

Ministry of Economic Cooperation and Development. This Project commenced in 1997 and arranges approximately twenty weeks of training annually. This includes training courses at the Law School of Peking University where the present case studies have been tested. Moreover, several draft laws and regulations have received advice from GTZ; for example on Foreign Trade Law, Law on Evidence, and Export and Import Regulations.

GTZ possesses more than twenty years of experience in drafting and implementing legal projects in developing countries and countries in transition. In the PRC, GTZ has been implementing legal advisory projects as early as 1985, and it has been supporting legal reform in the PRC continuously since then. A strong emphasis has been placed on economic laws including labour and social security law, and since 1999 GTZ also provided advice on administrative law. Currently, GTZ's Legal Cooperation Office in Beijing in cooperation with its Chinese partners, implements the following projects:

- Training and Advisory Service on Commercial Laws at MOFCOM
- Advisory Service to the Financial and Economic Committee of the National People's Congress (NPC)
- Advisory Service to the Ministry of Labour and Social Security
- Advisory Service to the Legal Affairs Commission of the Standing Committee of the NPC

For further information regarding our cooperation, please contact GTZ's Legal Cooperation Office in Beijing at Ta Yuan Diplomatic Office Building 1-13-2, No. 14 Liangmahe Nanlu, Beijing 100600, phone (86) 10-85321401, fax (86) 10-85321405, e-mail gtznpc@netchina.com.cn or visit our website at www.gtz-legal-reform.org.cn.

I want to thank my partner Zhang Yuqing, Director General of the Treaty and Law Department of MOFCOM. Furthermore, I thank all contributors for their precious participation. MOFCOM's support of our training courses by Li Ling, Zhou Xiaoyan, Zhao Hong, Han Liang, Lu Tao and Wang Yang was essential for their success. Last but not least, this publication would not have been possible without the effort of all members of our Legal Cooperation Office, especially Hu Lan, Dr. Alexander von Reden, Kerstin Olbrich, Regine Reim, Wu Nan, Liu Wei, Yang Jun and Wang Jing.

Immanuel Gebhardt

Director, GTZ Legal Cooperation Office Beijing

前 言

1999年3月3日中华人民共和国颁布了新《合同法》。从这部《合同法》于当年10月1日正值中华人民共和国50周年之时生效这一事实也可以认识到它的重要性。20世纪70年代中国再次决定制定民法典，由此开始了其法制改革的进程，而《合同法》可以说是这一改革中的具有基石意义的法律。《民法通则》于1987年1月1日开始生效。在统一的《合同法》出台之前，中国存在三部分别规范经济合同、涉外经济合同和技术合同的法律，现在已经被新合同所取代。《合同法》补充了现行《民法通则》中的相关规定，推动了中国民法典的发展。为了建立一套全面的规范体系，现在我们正期待着另外一个基石——物权法——的完善。中国《合同法》值得一部书进行全面的研究，本书的焦点正是这部法律。但是，在某些问题上它在案例分析中也用到其他的民事法律比如前面所提的《民法通则》。对于从事法律工作的人而言，仅仅理论知识是不够的。他们每个人都需要知道如何适用法律，也就是如何将他所遇到的案件的事实与法律规范放在一起，这里的法律规范既有可能是一个法律条文，也有可能是一个先例。这一过程也可以被称为法律规范处理或者说如何对待法律规定。本书希望能够从理论和实践两个角度介绍中国和德国的实体合同法律制度。为了实现这个目标，这本书包括三部分内容：法律适用技术的介绍，中国和德国合同法理论介绍，以及34个案例分析。每个案例分析都分别提供了中国法和德国法的解决方案，都可以单独作为规范处理如何运作的范例，从而展示了法律在实践中的适用过程。

这本书是作为学习用书编写的，对象是至少已经具备基础合同法律知识的法官、执业律师以及公司法律顾问，还包括学者和法学院的学生等。执业律师可能是这种法律适用技术的最大受益者，因为这种技术可以为他们的日常工作提供便利，提高工作效率。本书运用的比较法研究方法还有助于学者的研究和法学院学生的学习，而比较不同法律制度的最好方式就是直接对照各个法律制度为一个具体案例提供的解决方案。此外，法律教师还可以拿这本书作为辅助教学工具，其中每个案例分析都可以作为一个教学单元，也可

以从中选择案例作为作业要求学生提供解决方案，然后在课堂上讨论。利用这本书的方式有很多种，我希望读者觉得它还有用，也比较有意思。

这本书是以德国技术合作公司（GTZ）法律合作项目北京办公室与中华人民共和国商务部条约法律司在“商务部经济法培训与咨询”合作项目下共同举办的系列课程所使用培训材料为基础编写的。德国技术合作公司代表的是德国联邦经济合作与发展部。它与商务部这一合作项目始于1997年，每年安排大约20个星期的培训课程，其中在北京大学法学院开设的课程用本书中这些案例进行了试验教学。此外，中国一些法律草案和法规的草拟与制定也得到了德国技术合作公司提供的咨询服务，比如外贸法，证据法和进出口条例等。

在拟定与执行发展中国家和转型国家法律项目方面，德国技术合作公司已有20多年的经验。德国技术合作公司早在1985年就开始在中华人民共和国执行法律咨询项目，并从此对中国法律改革提供了持续不断的支持。合作项目的重点是包括劳动法和社会保障法在内的经济法律。从1999年开始，德国技术合作公司也开始就行政法提供咨询服务。现在，德国技术合作公司法律合作项目北京办公室与合作伙伴共同执行以下几个项目：

- 商务部中德经济法培训与咨询项目
- 全国人大财经委经济法咨询项目
- 劳动与社会保障部法律咨询项目
- 全国人大常委会法制工作委员会行政法律咨询项目

有关合作项目的进一步信息可以浏览我们的网页 www.gtz-legal-reform.org.cn，或者联系德国技术合作公司法律合作项目北京办公室：

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在这里我想向我的合作伙伴、商务部条法司张玉卿司长表示感谢。此外，我还要感谢以前所有参与并为这本书的最终出版奉献心力的人。其中，商务部的李玲女士、周晓燕女士、赵宏女士，韩亮先生、路焘先生以及王洋女士对历次培训班提供了这些活动的成功所必不可少的支持。最后提及但决非最不重要的一点是，没有我们法律合作项目办公室全体同仁的努力本书是

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