Judicial Methodology
Methods for Case Studies in Tort Law

法律适用方法
侵权法案例分析方法
（第2版）

国家法官学院
德国国际合作机构　著

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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5000多名法官提供了法律适用方法的培训。

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再版序言一

美国法学家德沃金将没有清晰的法律规范加以确定指导的案件定义为"疑难案件",认为对于"疑难案件",法官需要通过运用正确的法律解释方法以及价值判断,发现案件的唯一正解。法律适用的结果是否存在唯一正解尚存争议,但是法律适用方法的客观化和统一却并非不可能:法官通过运用统一的、能为客观标准所衡量的法律适用方法,作出契合法律规范和承载法律基本价值内涵的裁判结论,在某种程度上也是回应了统一适用法律的司法本质要求。从方法论的意义上讲,素以完备和严谨著称的德国法律适用方法无疑对我国法律适用技术的完善和发展具有很强的借鉴意义和参考价值。

国家法官学院作为最高人民法院下属的全国法院法官培训机构,多年来一直致力于对外友好交流合作,学习、借鉴有益的经验。自1998年至今,国家法官学院与德国国际合作机构联合举办二十多期法律适用方法培训班,内容涉及刑法、民法、行政法等多个领域,选取中国的案例,运用中国的法律,采用德国的案例分析方法(归入法、关系分析法)分析案件,得出结论。在举办培训班的过程中,参加培训的法官纷纷表示,此两种案例分析方法逻辑严密,推理缜密,对于分析案情、运用法律具有很大的启发和借鉴作用。在举办的二十多期培训班上,对本套书所选的案例都进行了讨论,我们将这些精选的案例集结出版,既是中德双方在法官培训领域的合作成果,也凝结了中德法官的智慧和心血。

此书出版一年,即销售告罄,反映出社会各界对于此书的厚爱。此次再版,我们将法官在培训过程中提出的问题、意见和建议进行详细整理,在原有基础上对部分内容进行了修改,以期能够满足读者的需求,也希望各位法律界同仁提出批评意见。

黄永维

国家法官学院院长

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 Si-no-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.

Huang Yongwei
President of National Judges College of China

再版序言二

2000 年以来，德国国际合作机构（GIZ）中德法律合作项目与国家法官学院在民法、行政法和刑法的法律适用方法方面举办了长期及短期培训班并取得了丰硕的成果。2012 年我们将培训中所涉及的材料整理成《法律适用方法》丛书出版。这是双方长期以来卓有成效合作的又一重要里程碑。

我们非常高兴能够向我们的中国同仁呈现《法律适用方法——侵权法案例分析方法》（第二版）。本书两年后即再版，充分反映了此类培训材料具有很高的市场需求度。

培训材料以及以往的培训旨在协助中方合作伙伴建立起以法治为基础的社会主义市场经济。这不仅要求立法者制定相应的法律，同时，也需要法律实践者——包括法官、公务员、律师及其他人有效地实施法律。长远来看，法律只有在其结果可预见的情况下才能很好的执行，否则它的实施不能真正被社会公众所接受并且作为有约束力且可信赖的指导其行为的准则。这一前提经常难以得到保证，因为法律本身常常极为复杂并且即使对法律专业人士来说亦是难以理解。有时法律因为不够明确、存在歧义或者不完整而不能涵盖现实生活中可能出现的各种各样的情况。这也是法律适用方法对于提高结果的可预见性和可理解性至关重要的原因。

上述宏伟目标只有通过接受过专业培训的人员才能实现。因此，对法律实施者的深入培训就显得尤为重要。

我们坚信，本书能帮助法律专业人士提高自身适用法律的能力。本书中介绍的德国方法论由"归入法"（*Subsumtionstechnik*）以及"关系分析法"（*Relationstechnik*）构成。前者是在事实清楚的情况下解决案例的方法，后者则是在事实不清楚的情况下解决案例的方法。该方法论在德国是历史悠久且根深蒂固的法律传统。它在法学教育以及法律实践应用中得到传播，确保了所有法律专业人士都运用同样的方法解决法律问题。

归入法对于所适用的法律具有完全的独立性。因此它能够适用德国法、中国法或者其他国家的法律来解决案件。相对而言，关系分析法反映了德国民事诉讼法的基本原则，这些原则有些区别于中国民事诉讼法的原则。然而，即使各程序法立基于不同的原则，关系分析法也可以通过将其结构适用于既定程序体系的方式，在给

定的程序规则中得到应用。

我们在本书中编写了一些适用中国法的案例作为介绍法律适用方法的素材。需要强调的是，我们仅仅是法律方法论的专家而不是中国法方面的专家。我们尽可能准确地适用德国方法论解决中国的法律问题。尽管如此，对于在适用中国法过程中可能出现的错误希望读者予以包容。

我们希望法律适用方法对中国同仁，来自各级各地法院的法官们的工作都能有所帮助。这样我们编写本书的目的就达到了。

我代表德国国际合作机构（GIZ）中德法律合作项目对组织和支持本次出版的人员和机构表示感谢。特别要感谢我们的合作伙伴国家法官学院的黄永维院长、冯文利副院长以及国际合作处处长王晓芳女士对我们长期以来的支持。

德国教授博士伊芙琳女士（Prof. Dr. Evelyn Henning）为编写及改进培训材料做出了巨大的贡献。伊芙琳教授博士作为德国的资深法官、培训专家及教授确保了培训材料的质量。培训材料的改进也离不开往年作为培训专家参与培训课程的众多德国法官。作为中德法律合作项目法官培训及交流活动的负责人，德国法官杨翰博士（Dr. Johannes Schlichte）负责本书第二版的修订以及团队协调工作。胡兰女士和万迪女士也对本书的出版做出了努力。我对他们表示衷心的感谢。

雅克博士（Dr. Jörg Binding）

项目主任

德国国际合作机构中德法律合作项目

Case Study Methodology-Preface

Since 2000 the Sino-German Legal Cooperation Programme of the Deutsche Gesell-schaft für Internationale Zusammenarbeit GmbH (GIZ) and China's National Judges College 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 2nd edition of this *Judicial Methodology-Methods for Case Studies in Tort Law* to our Chinese colleagues. The fact that the book has seen two editions within only two years is a reflection of the high demand for such training material.

Both our training material and our training courses aim at supporting the efforts of the PR 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 will only be successful if its outcome is 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 *Judicial Methodology-Methods for Case Studies in Tort Law* will be helpful to all those who wish to improve their professional capacity in implementing the Chinese tort law. The German methodological approach presented in this book is char-

acterized by the "subsumption technique" (*Subsumtionstechnik*), a method used for solving cases were 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 resolving 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 PR China, will find the case study methodology helpful for 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 Feng Wenli 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 joint 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 the revision of this book for its 2nd edition and the coordination of our team. Ms. Hu Lan and Ms. Wan Di 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

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第一部分

法律适用方法导论

导 论

中国正在走向法治国家。法治至少具有两方面的特点：首先必须由立法机关来制定法律，其次制定的法律也必须得到实施。对于法律工作者来说，无论是法官、检察官、律师或是政府工作人员，他们最主要的工作就是实施法律。成功实施成文法律的一个关键要素是它的统一适用，但是这并非总能得到保证，因为法律通常非常繁复，有时没有明确规定，或者无法穷尽丰富多彩的现实生活中各式各样的情形。法律适用的方法论对于解决这一难题是非常有用的，它可以帮助我们获得更统一的结果。

为了实现这一目的，对于法律适用者进行良好的训练是十分重要的。正是出于这个原因，中国的有关部门近年来采取许多措施来保证法律适用者获得必要的培训，一方面他们通过改革现有的相关法律规则，另一方面他们设立并扩建了法律培训设施。在我们的"法律适用方法导论"当中，我们希望能够帮助您了解一种系统性的方法，这种方法是德国的法律工作者在他们法律学习初始阶段所要学习的内容。这种方法使大家都用同一种思维方式来思考问题；您以后会发现，几乎每一个在德国学习法律的人都用的是这种思路。这种方法的好处在于，它与被适用的法律条文内容几乎完全独立存在，自成一体，因此，这种方法也就同样可以帮助中国的法律职业者适用法律。为了使中国读者更容易掌握，我们根据中国法的规则编制了案例与其他示例。当然，我们可能是方法论方面的专家，而您实际上是中国法律的专家。对于我们适用中国法律内容时可能发生的错误，我们恳请您多多包涵，并且请帮助我们改进这本教材。正如我们一贯强调的，方法论并非是一个黑白分明的选择题，它并不是要教给你法律条文的具体内容，而是要提供给你一种分析框架和思路。

本篇"法律适用方法导论"由三个部分组成：第一部分是对于基本原则的介绍，包括法律的目的、法律的实施以及采用法律适用方法的理由。第二部分与第三部分大致浓缩了德国法律职业者在参加工作之前所必须学习的内容：四年的大学阶段学习法律以及在给定的事实下如何适用法律（归入法）。此后，两年的实践训练阶段，他们需要学习当各方当事人对事实存在争议时如何适用法律，而这正是现实生活中最常见的情况（关系分析法）。在本文以及其他用来培训学员应用上述方法解决案件实际能力的其他培训材料当中，我们将通过中国民法方面的案例来作为教学范例。

如果你发现我们介绍的法律适用方法论对你的实际工作确有帮助，那么我们的目标和愿望也就实现了。