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Thomas M.J. Möllers/Hao Li (eds.)

The General Rules of Chinese Civil Law

History, Reform and Perspective

Nomos

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Introduction

Today, China is the second largest economy worldwide. No other nation exports an amount comparable to that which is exported by China. Being aware of its global influence, the 12th Chinese National People's Congress passed a new general part of Chinese civil law on March 15, 2017 which replaced the until then valid General Principles of Civil Law (GPCL) and came into force on October 1, 2017. This general part, now known as the General Rules of Civil Law (GRCL), is the first step for the new Chinese Civil Code that is to be finalised by 2020.[1]

The general part of the German Civil Code (BGB) has its foundation in the three-part structure, which was first introduced by the famous Roman legal practitioner Gaius in 162 AD and also builds the basis of todays French and Austrian Civil Codes: personae, res, actiones. The GRCL, on the other hand, consists of 11 parts. At the same time however, similar to the general part of the German Civil Code, the GRCL contains a general set of approximately 100 rules on natural and legal persons (sections 13–108 GRCL). The legal transactions which are laid out by sec. 104 et seq. in the German Civil Code, find a similar placement in the GRCL under the chapter civil legal transactions in sections 133 et seq. GRCL. The conference follows the classical four-step method of law comparison[2]: What is the current legal situation in one's own country? Which legal solutions does the foreign legal system present? What are the similarities that exist between both legal systems? Which solutions could appropriately be assimilated into the own legal system and which solutions cannot, and why?

In hindsight of the importance of such a codification in Chinese Law, the Research Center of Innovation between China and Europe (RICE) at the Law Faculty of the University of Augsburg under the leadership of Professor Dr. *Thomas M.J. Möllers* held a conference entitled "The Current Reform of Chinese Civil Law" on July 20, 2017. Aim of the conference was to recognise the fundamental changes made to the General Principles and to analyse these in a comparative way. For this occasion, seven renowned legal academics from throughout China were invited to Augsburg and engaged in a constructive dialogue with German scholars. Representative of

1 A German and English version of the General Principles of Law is attached as an Annex at the end of this publication, p. 295. For an overview oft he GRCL see *Yuanshi Bu*, ZChinR 183 et seq. (2017).

2 *Zweigert/Kötz*, Einführung in die Rechtsvergleichung, 3. Aufl. 1996, p. 45 et. seq.

the Consulate General at the Chinese Embassy in Munich, Professor Dr. *Chongling Huang*, emphasised in her opening speech the great significance of this first legal dialogue between Germany and China on the topic of the Chinese Civil Law reform. She stated that this reform would herald a "new era of Chinese jurisprudence".

This symposium is just the fruit of this first dialogue and shows mutual understanding between Germany and China. This publication includes 14 contributions selected from the contributions made during the conference and afterwards on other conferences in Germany and China by Chinese and German scholars on the topic of the reform. These articles show the historic development of Chinese civil legislation, the main controversies in the civil code drafting process and the main contents of the new General Part of the Chinese Civil Code. The topics include basic principles, natural persons, legal persons, civil juristic acts (particularly gross misunderstanding) and agency, unjust enrichment, and civil liability. They also discuss theoretical controversies and the future improvement of the new General Part as well as make a comparison between the German Civil Code and the new General Part of Chinese Civil Law. In addition, two articles examine the contentious topics in the field of Chinese property law and contract law.

Since the beginning of the 20th century, China has made numerous attempts to introduce a general codification of civil law. Professor Dr. *Hao Li* (Beihang University, Beijing) further explains this development in his article "The Codification of Chinese Civil Law – Innovations and Controversies". First Chinese civil codifications dated from the late Qing Dynasty, but all attempts since then were frustrated. The Kuomintang Party introduced the first Chinese civil code, the Republican Civil Code, in 1930. This civil code showed a strong orientation towards the German Civil Code. After the founding of the People's Republic of China in 1949, this civil code was abolished as it was considered reactionary and western. The new People's Republic tried to draft new civil codes three times from 1950s to 1980s, which were inspired by the foundations of the Soviet Civil Code. The General Principles of Civil Law (GPLC) introduced in 1986 was the result of the third drafting attempt, which still showed the heavy influence of the Soviet Union's legal system. The new GRCL is the result of the fourth attempt towards a complete civil code, one of whose most significant aims is to introduce a progressive, market-economy orientated code, which is able to withstand the challenges of the 21st century. Nonetheless, *Li* raises the question whether China is ready for such a modern codification of civil law. Because of the unique nature of the political system and cultural history of China, he warned that it was essential to find a way to unify reform and

tradition. The new GRCL should have paved the foundation for such unification. Further progress must however be made when it comes to law enforcement.

As opposed to the German Civil Code, the GRCL include a number of general principles of law such as the freedom of contract (section 5 GRCL) and the principle of equal treatment (section 4 GRCL). Professor Dr. *Thomas M.J. Möllers* (University of Augsburg) further examines this in his article on the "Principles in the Chinese Civil Code" by defining the nature and work process with these general principles. When considered in an abstract manner, general principles of law are not yet subsumable and thus not tangible for law practitioners. Further substantiation through legal principles and the consideration of relevant circumstances is needed.

In this regard, *Möllers* introduces three possible techniques: First, the legal principles of *lex specialis* and *lex superior* can be used to concretise; in the case of a collision between legal principles these must be weighed up. He is however critical of section 3 GRCL, which protects absolute rights against all forms of legal violation. The absolute rights are concretised by special rules such as section 107 et seq. GRCL. Second, *Möllers* illustrates the way in which a principle is derived from applicable law and in a second step further refined as a legal institution with the example of private autonomy. Third, the principle of *lex superior derogat legi inferiori* allows for further concretisation. Superior rules of law for example are found when examining the legal relationship between federal law and state law. Furthermore, the "Green Principle" in section 16 GRCL is touched upon, although *Möllers* considers this more of a legal idea, than a legal principle as such.

Under the GRCL, the Chinese Civil Law on natural persons is no longer only applicable to citizens of the People's Republic of China but to everyone. This shows a clear abdication from the earlier influence of Soviet Union law. With this realisation, the article by Professor Dr. *Hongjie Man* (Shandong University, Qingdao) "The Law of Natural Persons in the GRCL: Innovations, Debates and Prospects" introduces the main progress of the GRCL in the field of natural persons. Section 16 GRCL for the first time bestows legal capacity even on the foetus under certain circumstances. As a precautionary measure to deal with China's ageing population and the threat of the increasing number of persons suffering fading consciousness due to health problems such as Alzheimer's disease, sections 21 and 22 GRCL lay out rules for cases of the limited legal capability of fully aged persons and guardianship. As a result of Alzheimer's disease, experts assume that approximately 24 million persons in China will be limited in their legal capacity by 2040. Whilst the interests of these persons became the

focus of the legislative procedure, *Man* notes that the regulations on guardianship are not yet precise or comprehensive enough to cope with this threatening challenge.

In German law, the general part of the Civil Code and the part on family law include rules on natural persons. Section 1 of the German Civil Code declares all people as natural persons. As illustrated by Professor Dr. *Raphael Koch* and *Finn Mrugalla* (University of Augsburg) in their article "The Natural Person in German Civil Law", legal capacity in German Civil Law is bestowed on an individual with the completion of birth. German law however, also protects unborn life. By analogy to section 16 GRCL, section 1923 para. 2 of the German Civil Code renders unborn life as capable to inherit and is protected by tort law. *Koch* mentions however, that the case law of the German Federal Court of Justice on the matter of "wrongful life" (see BGHZ 86, 240, 251 *et seq.*) must be taken into account when considering protection through tort law. Similar to Germany, China also has cases in which unborn life is protected, especially in tort liability cases such as traffic accidents, medical malpractice and liability for environmental pollution. But it is still unclear exactly how China will continue dealing with this issue in the coming years. Each country's regulations on legal capability only differ slightly. Like the German Civil Code (section 828), Chinese civil law also contains specific rules on the liability of minors for civil wrongs (Chinese Tort Liability Law section 32). In German Law, persons with limited legal capacity can only obligate themselves to legal transactions that provide them solely with a legal advantage. In contrast, Chinese Law allows in section 19 GRCL persons with limited legal capacity to obligate themselves if the legal transaction provides them solely with an economic advantage or if the transaction is appropriate when considering the age and understanding of the individual.

Under the influence of the reform of the state-owned enterprises of 1986, the GPCL divided legal entities into four categories: enterprises, state institutions, institutions and social organisations. Professor Dr. *Tong Zhang* (China University of Political Science and Law, Beijing) describes the renunciation from the socialist character in the new GRCL in her article "Classification of Legal Entities in General Section of the Civil Code: Reforms and Problems". The GRCL distinguishes between for-profit and non-profit legal persons. There are specific regulations for Special Legal Persons such as state bodies, village committees and neighbourhood committees. *Zhang* mentioned however, that there still ceases to be a clear differentiation

between legal persons of public law and those of private law. She also criticised the lack of harmonisation between civil and commercial law in relation to legal persons.

Professor Dr. *Michael Kort* (University of Augsburg) notes in his supplementary article "Recent Developments of the Legal Capacity of Economic Entities and Legal Persons" that case law is developing in a direction slowly closing the gap between economic entities with legal capacity and legal persons. In this context, he referred to a decision passed by the German Federal Court of Justice in 2017 (BGH, NZG 2017, 696) on the consumer status of private companies which involve a legal person. In addition, *Kort* stated that the fundamental right protected by section 19 para. 3 of the German Constitution also includes economic entities. When it comes to liability issues however, economic entities and legal persons still find their differences.

Sections 113 et seq. GRCL, which contain rules on property law questions, have been almost entirely taken over from the Chinese Statute on Property Law. At the beginning of his article "Introduction to New Property Rules in the GRCL", Professor Dr. *Jiayuan Zhuang* (Shanghai Jiaotong University, Shanghai) notes that the fundamental principles of Chinese property law are comparable with those contained in the German Civil Code. The Numerus Clausus concept is in this sense also known to Chinese law (section 117 GRCL). The existing legal structures for the ownership of real estate still reflect the early socialist influence. Private property ownership is only possible for buildings, not however, for land ownership. In the case that one wishes to actually use or build on a plot of land, a right of use must first be applied for. *Zhuang* compares this structure to that of the German Heritable Building Law. In addition, the right of the state to expropriate property in China is closely tied to the public interests (section 117 GRCL).

Similarly to earlier codes, the GRCL only contain a general rule for the issue of unjustified enrichment (section 122 GRCL). This general clause is then substantiated through further rules contained in contract law and other more special laws. In his article "The Chinese Civil Code and Unjustified Enrichment: Evaluation and Future Prospects", Professor Dr. *Guangyu Fu* (University of International Business and Economics, Beijing) mentions that unlike in Germany, the dogmatic foundations of enrichment law were never thoroughly examined in China. Because of the prevailing view that there is no such thing as the German "Abstraktionsprinzip" (Abstraction principle) in Chinese law, it is disputed which role enrichment law plays. Also unclear remains the relationship between enrichment law and other restitution claims. As the future Civil Code could probably refuse a general

part of the law of obligations, unjustified enrichment would be located in the book of contract law as part of 'quasi contracts'. It is desirable, that the future Civil Code could, to a certain extent, reduce disputes and uncertainty concerning unjustified enrichment with further supplementary regulations.

Under the title "Civil Juristic Acts: History, Comparison and Problems" Professor Dr. *Yongqiang Chen* (China Jiliang University, Hangzhou) illustrates the prerequisites of the civil juristic acts in section 143 GRCL. These include legal capability and an honest intent. In addition, the acts may not violate mandatory rules, general discipline or social morals. *Chen* continues by examining the similarities to sections 134 and 138 BGB. The Chinese rules on interpreting declarations of intent (section 142 GRCL) are of specific interest. In cases of a unilateral agreement, the literal sense of the declaration as a whole must be considered. In addition, individual concepts, habits and the principle of good faith are to be borne in mind. In cases of one-sided declarations, it is necessary to identify the declaring party's real will.

"Significant misunderstandings in Chinese Civil Law" are the topic of the article by Dr. *Tianfan Wang* (Beihang University, Beijing). Section 147 GRCL rules that a legal transaction that was entered into as a result of a significant misunderstanding can be revoked. Part of *Wang's* article therefore revolves around the question how a "significant misunderstanding" is to be differentiated from the German legal idea of a "misconception" consequently. To further ascertain this issue, *Wang* points out that the Civil Code of the Republic of China, which finds strong parallels to the German Civil Code and was abolished in China in 1949, is still valid in Taiwan. She adheres to the idea, that when considering the literal meaning, a "misconception" always occurs on the side of the declaring party, whereas a significant misunderstanding arises on the part of the recipient. It is therefore all the more complicated that section 147 GRCL does not contain any concrete legal conditions, which allow drawing a clear line between the two.

On the symposium in July 2017, Professor Dr. *Martin Maties* (University of Augsburg) explained how the concept of a "misunderstanding" is treated in German law (His talk, however, has not been put in writing). A misunderstanding occurs, when a declaration is not understood by the recipient in the way that was initially intended. Here the law differentiates between three cases: whilst invalidity ipso iure is the result of the cases in sections 116 and 118 of the German Civil Code, cases in which a misconception has occurred require an appeal (sec. 119 German Civil Code). In both cases, a one-sided misconception exists on the side of one of the involved parties. The essential issue here is the question of causality: would the declaring

party have decided differently, if he were to have had subjective knowledge of the situation and an objective understanding of the case? Section 313 para. 2 sentence 1 BGB allows for a collaborative adaptation of the contract in case of a misconception on both parts. The corrective measure here is the concept of reasonability.

Dr. *Jieqiong Li* (Sun Yat-sen University, Guangzhou) contributes with her article on "Civil Liability Provisions in the GRCL". According to *Li*, the chapter on civil liability of the GRCL is still characterised particularly heavily by socialist morals (see for example the protection of heroes and martyrs in section 185 GRCL). *Li* also draws particular attention to section 184 GRCL, which contains a "Good Samaritan" clause. The clause contains an comprehensive exemption from liability with the aim of encouraging the willingness to help in accident situations. This exemption goes beyond the regulation of section 680 BGB. During the conference, the continuing discussion quickly found its focus on section 179 GRCL, which contains a clause for punitive damages. Because of its systematic position in the GRCL, section 179 GRCL is applicable to all legal rights protected by section 109 et seq. GRCL that have a general preventive effect. This could, in individual cases, lead to very high compensation claims.

Besides the above-mentioned articles, this conference transcript also includes two articles from Ms. *Qiangzhi Hu* (University of Bochum) and Assistant Professor Dr. *Jing Jin* (China University of Political Science and Law, Beijing).

In her article "The Prohibition of Self-contracting in section 168 para. 1 GRCL: From the Perspective of Comparative Law", *Hu* analyses the legal effect of the issue of self-contracting by an agent. Generally, there exists a conflict between the representative's personal interests and those of his principal. It is assumed especially in the case of so-called self-contracting that the agent may act to maximize his own economic interests rather than those of his principal. Section 168 para. 1 GRCL, section 181 para. 1 BGB, Art. 2. 7. 7 PICC and Art. 3: 205 PECL regulate this situation. Section 168 para. 1 GRCL stipulates that an agent can't contract between the principal and himself, unless he has been expressly authorised or approved to do so. However, the legal consequence of violating this rule is missing. In German Civil Code, sec. 177 et seq. could apply to this situation. According to Art. 2. 7. 7 PICC and Art. 3: 205 PECL, the principal could also avoid the contract. These provisions could be commendable for the section 168 para. 1 GRCL by considering its main aim to provide protection to the principal.

Under the title "The Conflicting Standard Terms in Chinese Contract Law: The Way of Interpretation and the Possibility of Codification during

the Drafting of Chinese Civil Code" Assistant Professor Dr. *Jing Jin* (China University of Political Science and Law, Beijing) illustrates the theoretical development of the battle of forms in commercial transactions. This evolved from the "first blow doctrine" in the beginning, to the prevailing "last shot doctrine" in the 20th century, and ultimately to the current "knock out doctrine". *Jin* states that China should carefully examine the relationship between Article 19 of the CISG and Article 30 of the Contract Law. With respect to the background of the compilation of Chinese Civil Code, China should try to construct or update relevant systems through legislation, introduce special rules on the conclusion of contract or on standardised terms and supplement them with clear rules on interpretation. In doing so, China could get itself out of the dilemma of normative application and the interpretation of the battle of forms.

This conference transcript gives an extensive insight into the current reform of Chinese Civil Law and its background. It becomes apparent, that the German Civil Code has an ongoing worldwide influence and is often used as an exemplary code for proposed legislation. Throughout the conference, it was however often mentioned, that "learning" is certainly not a one-way street. It is imperative that Germany also takes interest in the developments made by such modern civil law codes as the GRCL and how these could give inspiration for future reforms.

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