Out now: German Journal of Chinese Law Vol. 26 No. 1 (2019) – Comparative Views on Freedom of Contract

In July 2018, Professors Claudia Schubert (then University of Bochum, now Hamburg), Yuanshi Bu and Jan von Hein (both University of Freiburg) organised a comparative, Chinese-German symposium on the recent codification of the general principles of Chinese private law and their implications for freedom of contract (including choice of law) in Freiburg. The contributions to this conference have now been published in a special edition of the German Journal of Chinese Law (Zeitschrift für Chinesisches Recht [*ZChinR*]) Vol. 26 No. 1 (2019). The full issue is available (for subscribers) here. All the articles are in German, but the authors have kindly provided the following English abstracts:

Franz Jürgen Säcker: **The Development of Civil Law in Accordance with the Constitutional and Economic Order (§ 1 General Part of the Chinese Civil Code)**

The article compares the General Part of the German Civil Code with the General Part of the Chinese Civil Code. The author positively assesses the fundamental-rights-related provisions at the top of the Chinese Civil Code, their serving as ideal guiding principles on interpretative matters. Further, he welcomes the inclusion of intention and fault as relevant bases of obligations. The structure and system of the General Part of the Chinese Civil Code is very similar to that of the German Civil Code. However, legal uncertainties and doubts remain here as well, as shown by the example of regulations on usury.

BU Yuanshi: **The Principle of Legal Equality**

The legal equality of all civil law subjects in China has been codified in § 2 of the General Part of the People's Republic of China's Civil Code. The article conveys the significance of the codification by detailing the difficulties in finding a consensus and agreeing upon a choice of words for § 2 GPCL on the one hand and §§ 4 and 113 GPCL on the other. The purpose and content of the codification are

clarified in particular by a comparison to the earlier General Principles of Civil Law. Since the principle of legal equality was already entailed in the General Principles of Civil Law, the main function of § 2 GPCL is one of consolidation. Such a function also appears to be of greater significance in light of China's legislative history. The codification of § 2 GPCL is criticized with regard to the separation of civil and administrative law. However, a comparison to foreign codifications justifies such a separation. The true significance of § 2 GPCL lays in both its "ripple effect" on other codifications as well as in its justiciability. The principle of legal equality has penetrated into various laws, whereas the application of the principle of equality by courts is still debated in legal literature. Nonetheless, the principle has served as grounds for various judgements, some of which were announced by the SPC itself.

Andreas Engert: **Contractual Freedom vs. Contractual Justice – §§ 5 and 6 of the General Part of the Civil Code of the People's Republic of China**

The article examines the relationship between the principles of contractual freedom and justice as enshrined in the new General Part of the Chinese Civil Code. To this end, it considers the contract theory of German legal scholar *Walter Schmidt-Rimpler*. According to this theory, contractual freedom is merely a means of creating a "correct" (just) regulation of a contractual exchange between parties. However, the free bargaining process does not guarantee that the resulting contract will be perfectly just. Therefore, it seems obvious at first glance that the contract should be subject to comprehensive judicial review. *Schmidt-Rimpler* objected to such far-reaching interventions as a serious threat to legal certainty. The article elaborates on this claim in more detail. It thus provides a reason why judicial review of a contract must remain narrowly limited even if freedom of contract is only a means to the end of contractual justice.

ZHANG Shuanggen: **The Principle of Good Faith in Chinese Civil Law**

The article focuses on two aspects in relation to the topic of good faith. First, the state of the current commentary on the Chinese ATZR is briefly presented and evaluated against the yardstick of German legal commentary. Second, individual questions typical of the commentary on § 7 ATZR and the principle of good faith are addressed, such as whether a "special rights relationship" is a prerequisite for the application of Section § 7 ATZR, and how the relationship between the principle of good faith and other individual legal institutions should be

understood.

Claudia Schubert: **The Principle of Good Faith and Fair Dealing (§§ 6, 7 AT ZGB)**

Good faith and fair dealing is a basic principle in German and Chinese civil law. Whereas the German Civil Code does not expressly regulate the principle and relies instead on a general clause in paragraph 242, Chinese law specifies the principle and its manifestations. In both countries the principle of good faith limits the exercise of rights and creates individual justice on the basis of a balancing of interests. Unlike German law, the Chinese Civil Code includes a separate principle of iustitia commutativa. Therefore, the principle of good faith and fair dealing is not completely congruent in both countries.

FENG Jieyu: **Public Law Limitations on the Freedom of Contract – A Commentary on § 8 General Part of the Chinese Civil Code**

In § 8 of the General Part of the Chinese Civil Code (GPCC), which originated from § 8 of the General Principles of Chinese Civil Law and § 7 of the Contract Law, illegality and public morality are regulated. Compared to the German BGB, it is a special feature of § 8 GPCC that illegality and immorality are regulated in the same paragraph. This reflects the discussion in China about the relationship between prohibitive legal rules and public morality. As a principle, § 8 GPCC is specified in the field of contract law by § 52 No. 4 and 5 Contract Law. The interpretation of "law" in the sense of § 8 GPCC and § 52 No. 5 Contract Law encountered problems in the application of law. Legal theory and legal interpretations in China seek to limit the scope of legal prohibitions. In order to assess the validity of a contract, recent Chinese theory creates a flexible system comprising eight evaluative elements, e.g. the degree to which a contract has been fulfilled.

WANG Hongliang: **Public Morality and Contractual Penalties**

This article first discusses the principle of public morality. Any legal transaction which violates public morality is void. Thereafter, it is analysed how the principle of public morality affects the concept of contractual penalties. In the view of the legislature, only penalties having the nature of a sanction are compatible with the principle of public morality. However, penalties having a punitive character are not prohibited, instead being only limited. Thirdly, the article considers how an

agreed contractual penalty may be reduced. If the contractual penalty that the parties have agreed to is excessive, the judge can reduce it on application of a party. However, not infrequently the judges in China will apply the principle of public morality to a contractual penalty ex officio. In addition, the article looks at legislative provisions limiting usury and the permissible annual interest rate for loan agreements.

Jan Lieder / Philipp Pordzik: **Environmental Protection as a Limitation of the Freedom of Contract**

With § 9 of the General Part of the Civil Code of the People's Republic of China, an obligation to protect the environment was incorporated into Chinese civil law. Henceforth, when legal entities conduct legal transactions, they must contribute to the conservation of resources and protect the ecological environment. This article considers the extent to which § 9 limits the contractual freedom guaranteed in § 5 of the General Part of the Civil Code. For this purpose, the content and scope of the provision will be subject to a critical-constructive analysis with recourse to comparable provisions in German law.

HE Jian: **The Green Principle and Law and Economics in Chinese Civil Law**

Article 9 of the General Provisions of the Chinese Civil Code (the green principle) aims not only at protecting the environment but also at preserving resources. Although environmental protection is a crucial part of the green principle, this aspect of the principle can rarely be applied in the context of public law or private law. The notion of preserving resources can be interpreted in different ways. A single dimension interpretation is quite common in practice, but it is erroneous. A comprehensive interpretation is synonymous with a minimization of social costs or a maximization of social wealth and leads to a law and economics approach. This must be the future of the green principle.

Phillip Hellwege: **The Role of Common Practices under the General Part of the Chinese Civil Code**

According to § 10 of the Chinese General Part of the Civil Code, a court may refer to common practices only where there are gaps in the law. Although on its face an easily grasped provision, its interpretation raises a number of problems. The present contribution formulates an interpretation from a comparative perspective. This viewpoint suggests that § 10 uses the term common practices in the meaning

of customary law. Furthermore, it would be preferable to interpret § 10 such that customary law is of equal rank to statutory law, thereby allowing customary law to also trump non-mandatory statutory law.

ZHUANG Jiayuan: **Draft-Commentary on § 79 Contract Law – An Excerpt**

This article presents an excerpt from a commentary on § 79 Contract Law regarding the assignment of claims. In principle, legal claims constitute an important property asset and therefore can be assigned freely. Such an assignment transfers a legal right, which thus requires the assignor to hold legal title of the transferred claim. Reasons for limiting or prohibiting assignment can stem from the content of the claim at hand, the underlying circumstances or societal policies. In addition, parties often agree on the non-assignability of a certain claim. It is pointed out in this article that a prohibition or limitation of assignment also serves to limit the content of the claim itself. The doctrines of relative validity and similar theories are discussed, with focus also placed on the legal status of an assignor, an assignee and a debtor as well as on liquidity and the interests of third parties.

Jan von Hein: **Limitations to Contractual Freedom in Private International Law (§ 12 General Part of the Chinese Civil Code)**

Although the principle of territoriality has been codified in section 12, 1st sentence, of the General Part of the Chinese Civil Code (GPCC), it merely serves as a default rule in legal practice because, pursuant to the 2nd sentence of section 12 GPCC, the provisions of the Chinese Act on Private International Law and the judicial interpretation by the Supreme People's Court take precedence. In the present article, the rules governing party autonomy in Chinese international contract law are compared with their counterparts in the Rome I Regulation and the Hague Principles on Choice of Law in International Commercial Contracts. Although EU and Chinese PIL differ in some technical details, their general approach to party autonomy and the laws that may be chosen is quite similar. Substantial differences exist with regard to consumer and individual employment contracts, but their practical impact appears to be limited. Insofar, the Hague Principles do not offer any guidance for further harmonisation because their scope is limited to B2B scenarios. Both the EU and the Chinese PIL rules are characterised by gaps and uncertainty as far as foreign overriding mandatory rules are concerned.

ZHU Xiaozhe: **Party Autonomy and its Limitation when Determining the Law Applicable Law to Foreign Related Civil Relations**

12 of the General Part of the new Chinese Civil Code originates from § 8 of the former General Principles of Civil Law. Specifying an absolute principle of territoriality, and thereby reflecting a traditional emphasis on sovereignty, the provision has been heavily criticized in terms of both theory and its legal application. In the view of the legislature, this problem should be remedied by China's Code on Private International Law (PIL Code) taking precedence over § 12. China's PIL Code states that the parties can exercise party autonomy so as to agree on the applicable law before or even after the formation of legal relationships. While the menu of eligible laws traditionally encompassed laws having a "substantial connection"to the case at hand, this requirement has been relaxed in § 7 of the Supreme People's Court interpretive guidelines. Nonetheless, party autonomy is limited by overriding mandatory rules, public policy and notions of consumer protection.