

# Chinese Civil Code - the General Part

Bearbeitet von  
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1. Auflage 2019. Buch. XXI, 264 S. Hardcover (In Leinen)  
ISBN 978 3 406 71478 8  
Format (B x L): 16,0 x 24,0 cm

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party, the weaker party is allowed to reject performance. If both parties were aware of the unlawfulness, no restitution will take place.

#### 4. Lex Specialis

Art. 157 GRCL contains the following sentence, the purpose of which is still controversial: “If the law stipulates otherwise, such stipulation shall apply.” So far, at least five opinions have emerged as to the construction of this norm: 134

- One commentary views it as the basis to impose sanction such as confiscation under illegal contracts, such as drug dealing, and furthermore, illegal contracts generally should not involve the question of return.<sup>251</sup>
- Another commentary is of the view that this norm is superfluous.<sup>252</sup>
- A third commentary cites art. 12 Marriage Law and art. 103 Enterprise Bankruptcy Law as such deviant stipulations.<sup>253</sup>
- One author believes that it provides a special remedy to disgorge the unjust benefit in the case of malicious collusion;<sup>254</sup>
- *Liang Huixing* makes the reference to art. 106 Property Law (good faith acquisition) and holds that only if the contract is invalid due to lack of disposal right pursuant to art. 51 CL, art. 106 Property Law applies. Art. 106 Property Law is inapplicable to other types of void, effectively avoided and definitely ineffective juristic act.<sup>255</sup>

### VI. Reinterpretation and Confirmation of Void Juristic Act

The GRCL sets out neither reinterpretation (转换) nor the confirmation of void juristic acts. The first legal institution has already been adopted by the judiciary according to one scholarly opinion.<sup>256</sup> One example is art. 25 of the Interpretation of the SPC on the Application of Law for the Trial of Cases of Disputes on Contracts Involving the Right to Use State-owned Land (关于审理涉及国有土地使用权合同纠纷案件适用法律问题的解释). This provision deals with the situation where a party provides capital to a real estate developer and receives a fixed number of flats in return. The real intention of the parties is a loan agreement, which is prohibited under Chinese law. The cooperation contract of real estate development is the simulated act. Art. 25 of the above-mentioned Interpretation classifies the legal relationship between the both party as a sales contract by applying reinterpretation.<sup>257</sup> In the above-mentioned opinion, reinterpretation has three prerequisites: (1) the contract is void; (2) the void contract fulfils the validity conditions of another contract; (3) the reinterpretation complies with the intentions of the parties.<sup>258</sup> 135

<sup>251</sup> Li Shishi (ed.), 493.

<sup>252</sup> Chen Su (ed.), 1107.

<sup>253</sup> Li Yu, 744.

<sup>254</sup> Zhang Pinghua, CLS 2017/4, 217.

<sup>255</sup> Liang Huixing, JoSU 2017/4, 63.

<sup>256</sup> Cui Jianyuan, Jilin University Journal 2018/1, 32.

<sup>257</sup> Cui Jianyuan, Jilin University Journal 2018/1, 32.

<sup>258</sup> Cui Jianyuan, Jilin University Journal 2018/1, 32; Chang Peng'ao, LS 2016/2, 42.

## Chapter 12 Conditions and Terms

- 1 Conditions and terms are regulated in the 4<sup>th</sup> Section of the 6<sup>th</sup> Chapter of the GRCL, which comprises merely three articles. Accordingly, detail issues such as the definition of condition, permissible conditions, duties of the parties prior to the fulfillment of the condition and expiration or commencement of a time limit are left open.

### I. Conditions

#### 1. Concept

- 2 Art. 158 GRCL provides that a civil juristic act may be made conditional, except that it is precluded by the nature of the act. A condition is a future uncertain event agreed upon by the parties. An event is uncertain if its occurrence is uncertain both from a subjective view and an objective view.<sup>1</sup> Where a past event, a certain event or an impossible event is made a condition, the effect of the juristic act is controversial.<sup>2</sup> One opinion believes that the juristic act is invariably deemed unconditional where such an invalid condition is agreed upon.<sup>3</sup> The other opinion holds a juristic act void in the case that the occurrence is impossible and a condition precedent is at stake; if a condition subsequent is at stake, the juristic act is definitely valid.<sup>4</sup> If a statutory requirement or a past event is incorporated into the juristic act as a condition, the juristic act is deemed unconditional.<sup>5</sup>
- 3 The juristic act conditional on an illegal event is void and the part that does not constitute the core of the juristic act may still remain valid.<sup>6</sup> If the omission of certain illegal acts is made a condition, the juristic act may be deemed valid, if the condition operates to prevent the illegal conduct.<sup>7</sup>

#### 2. Preclusion of Conditions

- 4 In the following situations, conditions are impermissible:<sup>8</sup>
  1. Unilateral juristic act such as set-off, avoidance, termination, ratification, withdrawal, right to election, pre-emptive right, acceptance or waiver of the succession, because the uncertainty caused by a condition is unfair to other involved parties. Conditions may be allowed in court proceedings, for example set-off or revocation as an alternative pleading. Condition on right of formation is allowed only if the counterparty agrees or the fulfillment of the condition is solely decided by the counterparty.<sup>9</sup>

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<sup>1</sup> Chen Su (ed.), 1111.

<sup>2</sup> Chen Su (ed.), 1113.

<sup>3</sup> Li Yu, 751–753. In his opinion, an impossible condition could be a government approval that is not required by law, because such an approval will not be issued since the government agency agreed by the party does not have the relevant competence.

<sup>4</sup> Chen Su (ed.), 1114.

<sup>5</sup> Chen Su (ed.), 1112 et seq.

<sup>6</sup> Chen Su (ed.), 1113; Li Yu, 753, holds that only when the condition contravenes a mandatory norm on validity, such a condition may result in nullity of the juristic act.

<sup>7</sup> Chen Su (ed.), 1114.

<sup>8</sup> Chen Su (ed.), 1111; Wang Liming (ed.), 696.

<sup>9</sup> Li Yu, 754 et seq.; Wang Liming (ed.), 696.

2. In family and personal status issues, such as marriage and divorce, adoption and revocation of adoption, conditions are impermissible. The same is true with regard to establishment of a legal person or non-legal person organization.<sup>10</sup>

The effect of an impermissible condition is still unsolved under Chinese law. One opinion holds that, as a rule, the juristic act is void, only if particular reliance is to be protected, the condition may be deemed non-existent, while the other opinion believes that the juristic act is void in case of an impermissible condition precedent and the juristic act is partly void in case of a condition subsequent.<sup>11</sup> According to a third opinion, the condition is void if the juristic act may not be subject to a condition and the agreement on condition thus contravenes public order, but the rest of the juristic act may still remain valid if it is not affected by the condition. If a juristic act may not be formed by registration due to the condition such as marriage and divorce, the juristic act is void.<sup>12</sup>

### 3. Condition Precedent and Condition Subsequent

Chinese law also distinguishes between two types of conditions, namely condition precedent (生效条件/延缓条件), the fulfillment of which renders a juristic act effective and condition subsequent (失效条件/解除条件), the fulfillment of which puts a juristic act to an end. The condition may refer to the juristic act in whole or in part. The relevant fictive point of time for the fulfillment of the condition is the time at which the condition would have been fulfilled without the interference of the party.<sup>13</sup>

### 4. Conditions Dependent upon the Will of One Party

A condition that is dependent upon the will of one party is a condition at will (随意条件), which may be divided into conditions entirely dependent upon the will of one party (纯粹随意条件) and conditions not entirely dependent upon the will of one party (非纯粹随意条件). The legal effect of such conditions is still controversial.<sup>14</sup> One opinion holds that condition at will is generally permissible, in particular, if the condition is dependent upon the will of the obligee, the condition is valid, while if it is dependent upon the will of the obligor, only when the condition is a condition subsequent, it is valid.<sup>15</sup>

### 5. Legal Fiction of the Fulfillment of Condition

The condition is deemed fulfilled if a party for its own benefit unfairly prevents the fulfillment of this condition. Conversely, the condition is deemed not yet fulfilled if a party for its own benefit unfairly brings about the fulfilment of this condition (art. 159 GRCL). This legal fiction in the case of unfair interference with conditions is derived from the principle of good faith.<sup>16</sup> Unfair means that the conduct either violates the law or common notion of justice.<sup>17</sup>

Art. 159 GRCL is criticized to be too rigid as the counterparty is not entitled to invoke the more favorable legal result other than art. 5.3.3 PICC.<sup>18</sup>

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<sup>10</sup> Li Yu, 754.

<sup>11</sup> Chen Su (ed.), 1112.

<sup>12</sup> Li Yu, 755 et seq.

<sup>13</sup> Chen Su (ed.), 1125.

<sup>14</sup> Chen Su (ed.), 1117 et seq.

<sup>15</sup> Cui Jianyuan, *Jilin University Journal* 2018/1, 27.

<sup>16</sup> Chen Su (ed.), 1122.

<sup>17</sup> Li Yu, 757.

<sup>18</sup> Li Yu, 760.

## II. Terms

### 1. Concept

- 10 A future event that is bound to happen is a term. A juristic act may be attached with a time limit, unless it is precluded by the nature of the juristic act. Normally, those juristic acts that preclude conditions also preclude a time limit.<sup>19</sup>

### 2. Types

- 11 A specific time at which a juristic act is to take effect is an effectiveness time limit (生效期限), while a specific time at which a juristic act is to come to an end is a termination time limit (终止期限).

### 3. Preclusion of Terms

- 12 Art. 99 Contract Law provides that set-off may not be subject to terms. Juristic acts not subject to conditions may not be subject to terms either. If a term is agreed upon, the juristic act is void.<sup>20</sup>

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<sup>19</sup> Chen Su (ed.), 1128.

<sup>20</sup> Li Yu, 761–763.

# PART V AGENCY

## Chapter 13 Overview

### I. Evolution History

The general concept of agency in Chinese law is similar to its counterpart in Continental-European legal systems, although elements of common law system such as indirect agency have also been incorporated by the GRCL. In this sense, Chinese law on agency is a prime example of mixed legal borrowings. In contrast to the GPCL and also the German Civil Code, agency has been put into a separate chapter under the GRCL. The reactions to this new structural arrangement of agency law vary: some scholars consider this change unnecessary, but may still accept it,<sup>1</sup> while others believe agency law should be part of juristic act,<sup>2</sup> since agency merely constitutes a special form to perform juristic act and there is no comparative law precedent in separating agency law from the part of juristic act. The separation of agency law could even be understood as an attempt at expanding it to other areas than juristic act, which was not intended by the legislator.<sup>3</sup>

Practical implication of this debate is limited. The question is rather what stood behind the decision to take out agency from the chapter of juristic act in the GRCL.

### II. Scope of Application

#### 1. Juristic Act

By definition of art. 161 GRCL,<sup>4</sup> agency may only be employed to carry out juristic act and is ruled out with regard to real acts (事实行为),<sup>5</sup> tortious acts, and acts of breach of contract, as the case in German law.<sup>6</sup> Nevertheless, agency is applicable by analogy to the so-called quasi juristic act (准法律行为) (*supra* chap. 9 at 1) and certain legally relevant actions such as paying tax, patent and trademark application.<sup>7</sup> An example of the first category is the appointment of an agent to conduct the necessary registration formality in closing a real estate transaction. Here, the registration in real estate register may be construed as a quasi juristic act.<sup>8</sup> Examples of the second category are refusal of acceptance, notification of defects and reminder. Agency rules do not apply to possession, which is also a real act, this is why special rules are needed to cover the situation where a third party takes possession on behalf of the right holder. Chinese

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<sup>1</sup> Xu Diyu, PULJ 2017/3, 686.

<sup>2</sup> Chen Huabin, PSL 2016/7, 90; Ma Xinyan, Jurist 2016/5, 121 et seqq.

<sup>3</sup> Ma Xinyan, Jurist 2016/5, 122.

<sup>4</sup> Art. 161 GRCL: "Civil subjects may perform civil juristic acts through their agents."

<sup>5</sup> A real act may be inspection of the accounting materials of a company by a shareholder, Li Yu, 766.

<sup>6</sup> With regard to Chinese law: Wang Liming (ed.), 707; Leipold, 361 et seq.

<sup>7</sup> Wang Liming (ed.), 707.

<sup>8</sup> Chen Su (ed.), 1134 et seq.; Wang Liming (ed.), 708.

scholars proposed to adopt comparable provisions like artt. 855, 868 German Civil Code to fill in this loophole.<sup>9</sup>

- 4 Another question has been raised as to the possibility to employ agency in the case where the juristic act is invalid or voidable, given that in the past juristic act must be lawful and valid and an illegal act could only be a real act which excludes the use of agency.<sup>10</sup> Currently, this hurdle has been overcome and representation may also be recognized even if the act of the agent is invalid.<sup>11</sup>

## 2. Exclusion of Agency

- 5 Agency may be ruled out by statutory provisions, party agreement or the nature of the juristic act to be entrusted. Normally, marriage, divorce, adoption and draft of testament are often cited as relevant statutory prohibition of agency.<sup>12</sup> However, the scope of this prohibition is less clear. Some believe that only the direct declaration of intention before the registration authority must be made in person, while agency is allowed in other related issues such as during the preparation for marriage, divorce, adoption and so on.<sup>13</sup> As to the exclusion of agency agreed upon by the parties, it is still possible to assume the existence of apparent agency if the elements are met. The prohibition on agency due to the nature of the juristic act covers the situation where the juristic act is highly personal or based on personal trust in the principal. However, all conceivable scenarios of the last category are already provided for by statutory provisions, therefore it should be regarded a catch-all clause.<sup>14</sup>
- 6 The legal consequence of a violation of this prohibition is not mentioned in the GRCL. If representation is absolutely impermissible, the conduct of the agent has no legal effect, while the possibility of ratification remains if the representation is barred by party agreement or due to the nature of the juristic act.<sup>15</sup>

## III. Types of Agency

### 1. Authorized, Statutory and Designated Agency

- 7 In the past, Chinese civil law used to distinguish between authorized agency (委托代理), statutory agency (法定代理) and designated agency (指定代理).<sup>16</sup> However, the GRCL no longer follows this distinction established by the GPCL and has retained instead only the first two types of agency (art. 163 GRCL). This amendment has so far been endorsed in legal literature, since designated agency is in essence nothing more than a special form of statutory agency<sup>17</sup> and this threefold division was questioned long before the enactment of the GRCL.<sup>18</sup>
- 8 Yet, art. 163 GRCL failed to replace the term “authorized agency” by “representation by juristic act” (意定代理), which is broader than authorized agency and constitutes the traditional denomination of the counterpart of “statutory representation” (法定代理). Representation by juristic act refers to the situation where the power of agency is

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<sup>9</sup> Chen Su (ed.), 1138.

<sup>10</sup> Chen Su (ed.), 1133; Wang Liming (ed.), 708.

<sup>11</sup> Chen Su (ed.), 1133.

<sup>12</sup> Ma Xinyan, *Jurist* 2016/5, 125.

<sup>13</sup> Chen Su (ed.), 1133; Wang Liming (ed.), 711.

<sup>14</sup> Chen Su (ed.), 1137; Wang Liming (ed.), 711.

<sup>15</sup> Chen Su (ed.), 1137 et seq.

<sup>16</sup> Hui Zheng, Chap. 2 at 29.

<sup>17</sup> Chen Su (ed.), 1152; Wang Liming (ed.), 723.

<sup>18</sup> Fang Xinjun, *ECUPL Journal* 2017/3, 36.

derived from the principal's intention, while statutory representation means that the power of agency is granted by statutory provisions such as the representation of a minor by his/her parents. Two issues are to be addressed here:

1. The conduct of the legal representative is not regarded as a statutory representation, which will be discussed in more details below. 9
2. It is still controversial whether the representation of a spouse by the other is to be classified as agency.<sup>19</sup> Art. 17 of the Interpretation on Marriage Law (I)<sup>20</sup> has nailed down, albeit very rudimentarily, the spouse's representation, according to which "(1) Husband and wife have equal rights in dealing with matrimonial assets owned jointly. Each of them is entitled to make decisions if a disposal of the joint assets due to needs in daily life is necessary. (2) The couple shall equally discuss and obtain consensus if husband or wife has to make a decision over a significant disposal of the joint assets not due to daily life needs. If another person has reasons to believe that it is the joint declaration of intention of both of the couple, the other party may not defend himself towards a *bona fide* third party with lack of consent or knowledge." One commentator pointed out that the spouse who represents the other does not exit from the transaction, but remains party thereof, thus, the spouse's representation does not form an agency relationship.<sup>21</sup> Spouse's representation is limited to daily life and does not cover personal debt.

## 2. Representation of a Legal Entity by its Employees

Art. 170 GRCL states: "If a person in carrying out the work tasks of a legal person of a non-legal-person organization, performs an act on behalf of the legal person or the non-legal-person organization within the scope of his/her competence, the act is effective for the legal person or the non-legal-person." With this provision, the GRCL has introduced the representation of a legal entity by its employees (职务代理), which is believed to sit in between representation by juristic act and statutory representation.<sup>22</sup> The predecessor of art. 170 GRCL is art. 43 GPCL, which states that an enterprise legal person bears the civil liability for the business activities of its legal representative and employees. 10

The necessity of this hybrid type of agency is justified by the actual existence theory of legal persons (法人实在说)<sup>23</sup> followed by Chinese company law.<sup>24</sup> According to this theory, a legal person is not a figurative concept, but exists in reality, and may therefore directly conduct juristic acts. Of course, the factual acting person is not the legal person, but a natural person, namely its legal representative (art. 61 par. 2 GRCL). Following the actual existence theory, the legal representative's conduct is not deemed as agency, but a direct act of the legal person or a representative act (代表).<sup>25</sup> In this sense, statutory representation does not include the representation of a legal person by its legal representative and it is fair to say that the black letter law in China does not recognize the so-called concept of "institutional representation" (机关代理), since a legal person's organs commonly lack the power to represent the legal person. On the other side, in Chinese casebooks, the institutional representation is normally seen as a typical statutory representation like in the Continental-European legal system. 11

<sup>19</sup> Fang Xinjun, 1154, believes that it is a representation.

<sup>20</sup> 最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释(一), promulgated on 25<sup>th</sup> December 2001, effective since 27<sup>th</sup> December 2010.

<sup>21</sup> Wang Liming (ed.), 719.

<sup>22</sup> Yin Fei, CJL 2016/6, 63 et seq.; Li Yu, 793, classifies art. 170 GRCL as a representation by juristic act.

<sup>23</sup> Werthein, Chap. 2 at 6.

<sup>24</sup> Fang Xinjun, ECUPL Journal 2017/3, 41.

<sup>25</sup> Wang Liming (ed.), 713.

- 12 In practice, in addition to the legal representative, other employees may also act on behalf of the legal person, even if they are not explicitly entrusted by their employer through a formal juristic act. The question is how to classify this type of employee's representation in the dichotomy of representation by juristic act and statutory representation. The GRCL puts it into the chapter on authorized agency, as normal employees are not organs of the legal person so that the existence of statutory representation can in any case be excluded. However, to assume an authorized agency, one needs a granting act on the side of the principal, which seems to be lacking in terms of the employee's representation. Thus, the power of representation may only be implicitly granted. The scope of implied authority is to be ascertained on the basis of statutes, administrative regulations, usage, bylaws, and partnership agreements.<sup>26</sup>
- 13 The practical implication of art. 170 GRCL is not to be underestimated, as most legal disputes related to agency arise in the area of representation of businesses instead of natural persons. The question is then how to apply art. 170 GRCL in practice. The first step is to examine whether the acting person is employed by the legal entity. Subsequently, it is to figure out whether that person has acted on behalf of the legal entity. Lastly, one has to examine whether the activity falls within the competence of that person gained through the employment. An employee of a legal person acting without the corresponding authority used to be solved by art. 43 GPCL<sup>27</sup> or apparent agency<sup>28</sup> and may now fall under art. 170 GRCL. Courts are reluctant to clearly distinguish exactly between these legal institutions in their reasoning.<sup>29</sup>
- 14 In the eyes of commercial law scholars, the scope of art. 170 GRCL is both overly broad and overly narrow at the same time. It is too broad because non-profit legal persons are also covered although they are not engaged in commercial activities and the justification of security of transaction does not apply here.<sup>30</sup> It is too narrow because art. 170 GRCL is supposed to fill in the legal vacuum regarding commercial agency, but it neither specifies general commercial power of representation nor the commercial power of attorney.<sup>31</sup> In addition, art. 170 GRCL fails to distinguish between manager and other employees.<sup>32</sup> Thus, art. 170 GRCL may only serve as a reference norm to cover commercial agency, which calls for special rules.<sup>33</sup> Also with regard to commercial apparent agency (商事表见代理), it is argued that imputability is not a prerequisite; otherwise, the stability of commercial transactions would be disturbed.<sup>34</sup>

### 3. Direct and Indirect Agency/Disclosed and Undisclosed Agency

- 15 a) **Relevant Provisions.** After lengthy discussions the GRCL finally explicitly adopted the principal of disclosure (显名主义) in agency law, which means that in order to assume an agency relationship,<sup>35</sup> the agent has to act in the name of the principal.<sup>36</sup>

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<sup>26</sup> Wang Liming (ed.), 764.

<sup>27</sup> Xu Shencheng, Zhejiang Journal 2017/5, 109 et seq.

<sup>28</sup> The distinction between art. 170 par. 2 GRCL and art. 172 GRCL see Li Yu, 796 et seq. He is of the opinion that art. 170 par. 2 GRCL prevails over art. 172 GRCL in the case where an employee exceeds its representation power.

<sup>29</sup> Yang Fang, Jurist 2017/6, 160.

<sup>30</sup> Zhang Gu, CRAJ 2017/4, 156.

<sup>31</sup> Xu Shencheng, Zhejiang Journal 2017/5, 108.

<sup>32</sup> Zeng Dapeng, LS 2017/8, 94.

<sup>33</sup> Xu Shencheng, Zhejiang Journal 2017/5, 115.

<sup>34</sup> Xu Shencheng, Zhejiang Journal 2017/5, 113 et seq.

<sup>35</sup> Liang Huixing, Jinan Journal 2016/1, 34; Geng Lin/Cui Jianyuan, Jilin University Journal 2016/3, 28 et seq.; Ma Xinyan, Jurist 2016/5, 135 et seq.

<sup>36</sup> Compared to German law, the difference is that the mentioning of the name must be expressly.