

A photograph of a desk setup. In the background, a laptop is open. In the foreground, there is a brown ceramic mug filled with coffee, several crumpled pieces of white paper, and two pens (one yellow pencil and one black pen) resting on a sheet of lined paper.

# The Editor's Desk

From the Editor's Desk: Challenges in English-to-Chinese Contract Translation

# Outline

- ▶ **Differences between the United States and Chinese legal systems**
- ▶ The asymmetry of various legal doctrines and key terms between Chinese and US contract law
- ▶ Avoid common pitfalls
- ▶ Parse complex contract language

# Differences between the United States and Chinese legal systems

Common Law vs. Civil Law

# Common Law vs. Civil Law

Common law is not codified

Civil law is a codified set of laws

Judicial precedents are binding

Judicial precedents are not binding

Judges make rulings, set precedent, and moderate between the conflicting parties

Judge's role is to establish the facts of the case and to apply the provisions of the applicable code

# Common Law vs. Civil Law

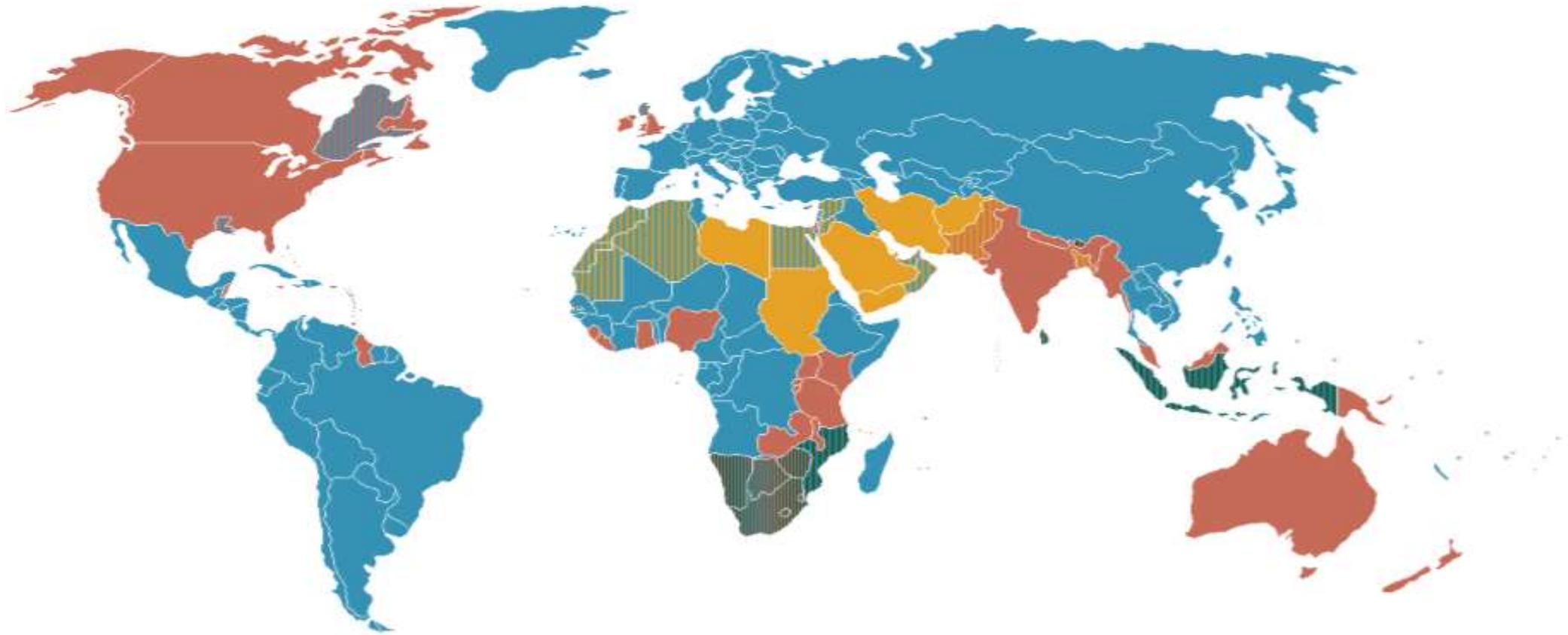
Main source is  
judicial precedents  
or case law

An adversarial  
system

Statutes and other  
subsidiary  
legislations are the  
main sources

An inquisitorial  
system

# Legal families of the World



civil law

common law

religious law

customary law

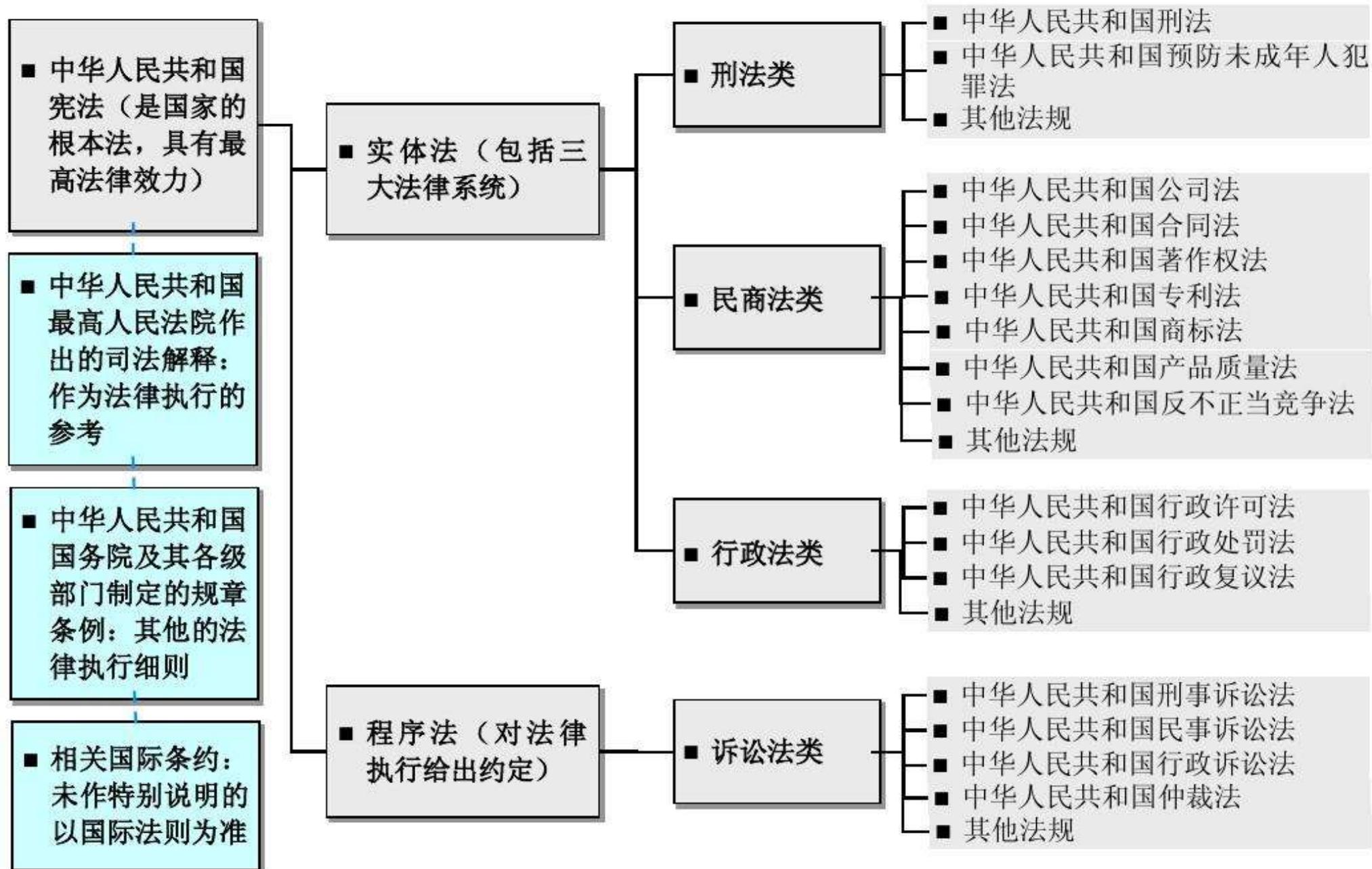
# Legal framework of contract law in China

Constitution

General Rules of the Civil Law of PRC

Contract Law

# 中国法律体系概述



# Legal framework of US contract law

- ▶ No Civil law code. (Except **Louisiana**)
- ▶ Contract law is more **within the state** instead of federal laws.
- ▶ In this century, the US started to have **statutes** regarding Contracts. For example, the Uniform Commercial Code, Labor Law, and Insurance Law.

# Outline

- ▶ Differences between the United States and Chinese legal systems
- ▶ **The asymmetry of various legal doctrines and key terms between Chinese and US contract law**
- ▶ Avoid common pitfalls
- ▶ Parse complex contract language

# Implications of different legal systems on contract translation

- Doctrine of consideration vs. meeting of minds
- Doctrine of promissory estoppel vs. irrevocable offer
- Comparisons of Remedies for breach of contract

# Doctrine of consideration in US contract law

- ▶ Consideration must be of **value** (at least to the parties)
- ▶ Is **exchanged** for the performance or promise of performance by the other party (such performance itself is consideration).
- ▶ In common law, it is a **prerequisite** that both parties offer consideration before a contract can be thought of as **binding**.
- ▶ Historically, a consideration is deemed to be more of a “formality”. It does not require **economical adequacy** and **equivalence** in the thing to be given by both parties.
- ▶ Now it is considered as “**a substantive rather than a formal basis**” for a contract or an offer to be enforceable (Restatement 2<sup>nd</sup> of Contract)

Offer

Acceptance

Consideration



contract

# Case study:



# Example:

- ▶ Now therefore, in **consideration** of the premises, and the representations, warranties, covenants, and undertakings of the parties hereinafter set forth, and for other good and valuable **consideration**, the parties agree among themselves as follows.
- ▶ 鉴于上述事实和各方在下文所作的陈述、保证、立约和承诺，及其他有效的有价约因，现各方达成协议如下。

# Meeting of minds in Chinese contract law

- ▶ As long as there is an offer and an acceptance, a contract is deemed to be established even without “being fair” (e.g., gift contract)
- ▶ Therefore, “**declaration of intention**” and “**meeting of minds**” by both parties is core to the establishment of a contract.

# Elements of contract formation

## Offer and Acceptance



# Doctrine of promissory estoppel in US contract law

- ▶ Unique to **common law** contracts.
- ▶ This doctrine appeared in the judicial practice of the 19th century & was formally established in the 20th century.
- ▶ American Restatement of Contract has also provided this doctrine.
- ▶ **Case to establish this doctrine** in USA: Ricketts V. Scothorn (57 Neb. 51, 77 N. w. 365 (1898) ).
- ▶ It imposes the legal liability on the basis of the promisee's **reliance** damage (even without consideration).
- ▶ An **exception to or substitution** for consideration
- ▶ Mainly used as a basis for the validation of a bestowal contract in which no consideration is incorporated.

## RESTATEMENT (SECOND) OF CONTRACTS

### § 90. Promise Reasonably Inducing Action or Forbearance

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Offer

Acceptance

promise inducing  
reasonable reliance



# “Irrevocable offer” in Chinese contract law

## Contract Law of China:

### ► Article 19 Irrevocable Offer

An offer may not be revoked: (i) if it **expressly** indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable;

(ii) if the offeree has **reason** to regard the offer as irrevocable, and has undertaken preparation for performance.

Promissory Estoppel

# Remedies for breach of contract in US contract law

## ▶ 约定的补救 (Stipulated remedies)

- ▶ 违约金，即“预定的损害赔偿金” (liquidated damages, a fixed amount or a formula for calculation stipulated in a contract. Liquidated在此是“预先确定”的意思)
- ▶ 清偿协议 (settlement agreements)

## ▶ 期待利益赔偿 (expectation damages)

## ▶ 衡平救济 (equitable relief)

- ▶ 特定或实际履行 (specific performance)
- ▶ 强制令 (injunction)
- ▶ 恢复原状 (restitution)

- Purpose for remedy: to protect the **expectation interest** of the promise.
- Principles limiting the scope of the expectation interest:
  - Foreseeability Rule**
  - Certainty Rule**
  - Avoidability Rule**



# Remedies for breach of contract in Chinese contract law

- ▶ Article 107 Types of Liabilities for Breach

If a party fails to perform its obligations under a contract, or rendered non-conforming performance, it shall bear the liabilities for breach of contract by-

- ▶ **specific performance** (继续履行)
- ▶ **cure of non-conforming performance** (补救措施) or
- ▶ **payment of damages** (损害赔偿), etc.

# Remedies for breach of contract in Chinese contract law

## Article 113:

- ▶ Where a party failed to perform or rendered non-conforming performance, thereby causing loss to the other party, the amount of damages payable shall be equivalent to the other party's loss resulting from the breach, including any **benefit that may be accrued** from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which **was foreseen or should have been foreseen** by the breaching party at the time of conclusion of the contract.

expectation damages



Foreseeability Rule

# Remedies for breach of contract in Chinese contract law (Cont.)

## Article 114

- ▶ The parties may prescribe that if one party breaches the contract, it will pay a **certain sum of liquidated damages** to the other party in light of the degree of the breach, or prescribe a method for calculation of damages for the loss resulting from a party's breach. **Liquidated damages**
- ▶ Where the amount of liquidated damages prescribed exceeds, or is below the loss resulting from the breach, a party may petition the People's Court or an arbitration institution **to decrease or increase** the amount. **Reasonableness**
- ▶ Where the parties prescribed liquidated damages for delayed performance, the breaching party shall, in addition to payment of the liquidated damages, render performance.

# Key terms - **execution**

- ▶ Upon **execution** of this Agreement, Party A hereby agrees to submit to continuing psychological testing and counseling if requested by any of the Parties.
- ▶ “**Execution** date” of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender’s order.

# Key Terms

<b>action</b>	行动	诉讼
<b>alienation</b>	疏远	转让
<b>assign</b>	分派	转让
<b>avoidance</b>	逃避	宣告无效
<b>construction</b>	建筑	解释
<b>defense</b>	防卫	答辩（理由），被告方
<b>determination</b>	确定	终止
<b>distress</b>	危难	扣押货物

# Key terms

**equity**

**infant**

**limitation**

**omission**

**prejudice**

**satisfaction**

公平

婴

限制

省略

偏见

满意

衡平法，股份

未成年人

时效

不作为，不行为

损害

清偿，补偿

# Key Terms - More

specialty  
subject matter  
discovery  
dishonor

专长  
主题  
发现  
耻辱

盖印合同  
标的物  
调查证据  
拒付

# Outline

- ▶ Differences between the United States and Chinese legal systems
- ▶ The asymmetry of various legal doctrines and key terms between Chinese and US contract law
- ▶ **Avoid common pitfalls**
- ▶ Parse complex contract language

- Avoid common pitfalls

- **COMPREHENSION**
  - Punctuation
  - Adverbs
  - Dates
- **TRANSLATION**

# Comprehension: Punctuation

## ► Semicolon

1. Use a semicolon to unite two closely connected sentences—even if the independent clause begins with a conjunction.

*(The Chicago Guide to Grammar, Usage, and Punctuation)*

Either party may terminate this Agreement and neither party shall have any further obligation hereunder to the other; **provided**, however, the Company may waive any defect or condition of title and proceed with the closing of the acquisition.

任何一方均可终止本《协议》，且任何一方均不在本《协议》下对另一方有任何进一步的义务；但前提是，公司可放弃任何履行标的物上的瑕疵或产权条件，并继续完成收购。

# Comprehension: Punctuation

## ► Semicolon

2. Use a semicolon to separate items in a list when (1) any single element contains an internal comma, (2) the enumeration follows a colon, or (3) the items are broken into subparagraphs.

*The Chicago Guide to Grammar, Usage, and Punctuation)*

# Comprehension: Punctuation

- ▶ Force Majeure. Any delay in the performance of any of the duties or obligations of the Parties hereunder shall not be considered a breach of this Agreement and the time required for performance shall be extended for a period equal to the period of such delay, provided that such delay has been caused by or is the result of any acts of God; acts of the public enemy; insurrections; riots; embargoes; labor disputes, **including strikes, lockouts, job actions, or boycotts**; shortages of materials or energy; fires; explosions, floods or, with respect to construction deadlines, sustained adverse weather conditions (any such event, an “Event of Force Majeure”).

- ▶ 不可抗力。双方对本协议中任何职责或义务之履行期间的任何延迟不得被视为违反本协议，履行相关职责或义务所需时间应按此等延迟的持续时间予以延长，但前提是此等延迟的原因在于任何自然力，社会公敌之行为，叛乱，骚乱，禁运，劳资纠纷（**包括罢工、停工、劳资诉讼或抵制**），物资或能源短缺，火灾，爆炸，洪水或施工截至日期相关的持续恶劣天气条件（任何此等情况均被称为“不可抗力事件”）。

# Comprehension: Punctuation

- ▶ **Placement of punctuation and quotation mark**

Place quotation marks correctly in relation to other punctuation:  
(1) commas and periods go inside, and (2) colons and semicolons go outside.

*(The Chicago Guide to Grammar, Usage, and Punctuation)*

# Comprehension: Punctuation

## ► Placement of punctuation and quotation mark

Place quotation marks correctly in relation to other punctuation:  
(1) commas and periods go inside, and (2) colons and semicolons go outside.

ABC and XYZ are referred to herein individually as a “Party,” and collectively as the “Parties.”

ABC与XYZ以下单独称作“协议一方”，统称“协议双方”。

# Comprehension: Adverbs

- ▶ **Therein, thereupon, thereof, etc.**

Progress so far has been very good. We are, **therefore**, confident that the work will be completed on time.

# Comprehension: Adverbs

## ► **Therein, thereupon, thereof, etc.**

Except with respect to any good faith dispute of an invoice by ABC, if ABC delays the payment of an invoice for over 90 days and the Parties cannot resolve the dispute involved **therein** through consultation, XYZ has the right to hold shipping of the goods ordered under such disputed invoice.

除ABC对发票提出的善意异议以外，若ABC逾期支付发票金额超过90天，并且协议双方无法协商解决**其中涉及的**争议，XYZ有权将该争议发票下订单的货物暂停发货。

# Comprehension: Adverbs

## ► **Therein, thereupon, thereof, etc.**

When a Claim that is not an Allowed Claim as of the Effective Date becomes an Allowed Claim (regardless of when) the holder of such Allowed Claim shall **thereupon** become entitled to receive the Plan Distributions in respect of such Claim, the same as though such Claim had been an Allowed Claim on the Effective Date.

截至生效日尚属非承认的债权成为承认债权（不论何时）时，该承认债权的持有人**随后**应有权领取有关该债权的计划分配，如同该债权在生效日已是承认债权一样。

# Comprehension: Adverbs

► **Therein, thereupon, thereof, etc.**

ABC shall deliver a certification of completion of the Facility Footprint in accordance with the Pad Specifications by ABC's project engineer within seven (7) months from the commencement of actual construction **thereof**.

在**厂区占地实际施工开始**后七（7）月内，ABC应由ABC的项目工程师按照地块规划交付一份厂区占地筹备完成之证书。

# Comprehension: Adverbs

► **Otherwise = in other ways ≠ other**

“Personal Data” means any information related to an identified or identifiable person (or as otherwise defined by Privacy Law).

“个人数据”指经识别或可识别的个人相关的（或按隐私法规定的其他）任何信息。\*

“个人数据”指经识别或可识别的个人相关的（或隐私法另行定义的）任何信息

# Comprehension: Dates

- |   |                     |   |
|---|---------------------|---|
| 1. at the Effective Time  | 1. 在生效时间            | 1. 在生效时间 <del>之前</del> 之时                 |
| 2. at or prior to the Effective Time                                  | 2. 在生效时间当时或之前       | 2. 在生效时间 <del>之前</del> 当时之时或之前            |
| 3. no later than four (4) Business Days prior to the Closing          | 3. 交割之前不迟于四（4）个工作日内 | 3. 交割之前 <del>不迟于</del> 至少提前不迟于四（4）个工作日内   |
| 4. as of the Closing Date and immediately prior to the Effective Date | 4. 截至交割日期而且就在生效日期之前 | 4. 截至交割日期 <del>而且就在生效日期之前</del> 且在生效时期前一刻 |

- Avoid common pitfalls

- COMPREHENSION
- **TRANSLATION**
  - Demonstrative pronouns
  - Passive voice
  - Ambiguity or changed meaning

# Translation: Demonstrative pronouns

the Agreement

# Translation: Demonstrative pronouns

## ▶ 该 & 本

the Agreement

- ▶ That 该：指上文说过的人或事物  
该生品学兼优  
该地交通便利
- ▶ This 本：指代自己的、现今的  
本分、本宫

《现代汉语词典第6版》

# Translation: Demonstrative pronouns

- ▶ You shall maintain any records of your employment with the four companies.  
您应保留四家公司的任何工作记录。\*

# Translation: Demonstrative pronouns

- ▶ **Any** = 任何 or 所有?
- ▶ **Any** terms or conditions stated in **any** order, acknowledgement or invoice which is conflicting with this Agreement shall be of no force nor effect unless expressly agreed to by both parties in writing.

与本协议相冲突的**任何**订单、确认函或发票中声明的**任何**条款或条件均无效，除非协议双方明确书面接受。
- ▶ You shall maintain **any** records of your employment with the four companies.

您应保留四家公司的**任何所有**工作记录

# Translation: Passive voice

- ▶ Appointer/Appointee

委任者/~~被委任者~~受任者

# Translation: Passive voice

Either Party may transfer or assign its rights and obligations under this agreement to any of its subsidiaries or affiliates, or any other entity merged or consolidated with, or acquired by, such Party.

任何一方可以将本协议项下的权利和义务转让或出让给其任何子公司或关联公司，或者与该方兼并或合并、或被该方所收购的任何其他实体。\*

# Translation: Passive voice

## ► 为.....所 vs 被

悲夫！有如此之势，而**为秦人积威之所劫**，日削月割，以趋于亡。为国者无使**为积威之所劫**哉！（苏洵《六国论》）

真可悲啊！有这样的有利形势，却被**秦国积久的威势胁迫**，天天割地，月月割地，以至于走向灭亡。治理国家的人不要**被积久的威势胁迫**啊！

# Translation: Ambiguity or changed meaning

“XYZ” means ..., as in the form set out in Annex 2.

“XYZ”指.....（如附件2中规定形式）。\*

# Translation: Ambiguity or changed meaning

“XYZ” means ..., as in the form set out in Annex 2.

“XYZ”指.....（如附件2中规定形式）。\*

- ▶ 如：正如；例如
- ▶ 以：凭借

以附件2中规定形式 or 形式以附件2为准

# Translation: Ambivalence or changed meaning

Notwithstanding anything to the contrary contained herein, the terms set forth in this Section 4.3 shall be subject to the terms set forth in Exhibit E, as may be amended by the Parties from time to time.

尽管本协议中另有任何相反规定，本第4.3条中规定的条款须受制于附件E中规定的条款（协议双方可不时修订）。\*

~~尽管~~即使

Even if the world ends/were to end/ended tomorrow,...

Even though it's raining today,...

# Outline

- ▶ Differences between the United States and Chinese legal systems
- ▶ The asymmetry of various legal doctrines and key terms between Chinese and US contract law
- ▶ Avoid common pitfalls
- ▶ **Parse complex contract language**

# Exercise 1

- ▶ Holders of the Class A and Class B stock certificates will be entitled to receive on each Payment Date, to the extent monies are available therefor (but not more than the Class A Stock Certificate Balance or Class B Stock Certificate Balance then outstanding), a distribution.



# Exercise 1

- ▶ Holders of the Class A and Class B stock certificates will be entitled to receive on each Payment Date, to the extent monies are available therefor (but not more than the Class A Stock Certificate Balance or Class B Stock Certificate Balance then outstanding), a distribution.

## Exercise 2

- ▶ Except as set forth in Schedule 10.09(b), neither the whole nor any portion of the business or assets of the Company or **any** Company Subsidiary is subject to **any** Order to be sold or is being expropriated or **otherwise** taken by any Governmental Authority with or without payment of compensation **therefor**, and, to the Knowledge of the Company, no such expropriation or taking has been planned, scheduled or proposed.

## Exercise 2

Except as set forth in Schedule 10.09(b),  
neither the whole nor any portion  
of the business or assets  
of the Company or any Company Subsidiary  
is subject to  
any Order to be sold  
or is being expropriated or otherwise taken  
by any Governmental Authority  
with or without payment of compensation therefor,  
and,  
to the Knowledge of the Company,  
no such expropriation or taking has been planned, scheduled or proposed.

## Exercise 2

- ▶ Except as set forth in Schedule 10.09(b), neither the whole nor any portion of the business or assets of the Company or any Company Subsidiary is subject to any Order to be sold or is being expropriated or otherwise taken by any Governmental Authority with or without payment of compensation therefor, and, to the Knowledge of the Company, no such expropriation or taking has been planned, scheduled or proposed.
- ▶ 除了清单 10.09(b) 中规定的情况以外，公司或任何公司子公司的业务或资产的全部或任何部分，均不受任何要求出售的法令的影响，或正被政府部门征用或以其他方式被任何政府部门占用（无论是否就其支付相关报偿），而且据公司所知，并无对任何此等征用或占用的计划、规划或提议。

# Bonus

- ▶ Except as otherwise provided in section 10.3 of the Plan, the Disbursing Agent, together with its officers, directors, employees, agents and representatives, are exculpated pursuant to the Plan by all Persons, holders of Claims and all other parties in interest, from any and all Causes of Action arising out of the discharge of the powers and duties conferred upon the Disbursing Agent (and each of its respective paying agents), by the Plan, any Final Order of the Bankruptcy Court entered pursuant to or in the furtherance of the Plan, or applicable law, *except* solely for actions or omissions arising out of the Disbursing Agent's willful misconduct or gross negligence.

# Bonus

- ▶ Except as otherwise provided in section 10.3 of the Plan, the Disbursing Agent, together with its officers, directors, employees, agents and representatives, are exculpated pursuant to the Plan by all Persons, holders of Claims and all other parties in interest, from any and all Causes of Action arising out of the discharge of the powers and duties conferred upon the Disbursing Agent (and each of its respective paying agents), by the Plan, any Final Order of the Bankruptcy Court entered pursuant to or in the furtherance of the Plan, or applicable law, except solely for actions or omissions arising out of the Disbursing Agent's willful misconduct or gross negligence.
- ▶ 除《计划》第10.3条另有规定外，根据《计划》的规定，所有人士、债权持有人和所有其他利益相关方免除支付代理人及各代理其支付的高级职员、董事、雇员、代理人 and 代表由于履行通过《计划》、根据或为促进《计划》而达成的破产法院最终命令、或适用法律而获得的权力和职责所产生的任何及所有诉因，但唯有因支付代理人故意的不当行为或重大过失而产生的作为或不作为除外。

# Summary

- ▶ Differences between the United States and Chinese legal systems
- ▶ The asymmetry of various legal doctrines and key terms between Chinese and US contract law
- ▶ Avoid common pitfalls
- ▶ Parse complex contract language

# Resources

- ▶ **Restatement (second) of Contracts**
- ▶ **Cases and problems on Contracts:** 6th Edition, by John Calamari (Author), Joseph Perillo (Author), Helen Bender (Author), Caroline Brown (Author)
- ▶ 中华人民共和国合同法（中英文对照）
- ▶ 元照英汉法律词典对照 Black's Law Dictionary
- ▶ 英美契约法论（第四版）：杨桢，北京大学出版社

# Resources

- ▶ 万律网: [http://www.westlawchina.com/index\\_cn.html](http://www.westlawchina.com/index_cn.html)
- ▶ MBA智库百科
- ▶ 知识产权数据库: <https://ipkey.eu/en/china>
- ▶ [www.findlaw.com](http://www.findlaw.com)
- ▶ 北大法律信息网 : <http://www.chinalawinfo.com>
- ▶ **LLI: <https://www.law.cornell.edu>**
- ▶ LexisNexis: <http://www.lexisnexis.com/terms/>

# Contact information

- Liming Pals

limingpals@gmail.com

- Tianlu Redmon

tianlu@tianluchinese.com

# Copyright Notice

**This presentation, prepared and given by Liming Pals and Tianlu Redmon at the 59<sup>th</sup> Annual Conference of the American Translators Association, is protected by U.S. and international copyright laws. Reproduction and distribution of the presentation without written permission of both of us is prohibited.**