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# Structured Problem Solving: German Methodology from a Comparative Perspective\*

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*Lutz-Christian Wolff\*\**

## Introduction

### *General*

German legal education and practice in the area of private law<sup>1</sup> is dominated by a specific problem solving methodology. Some German legal writers even suspect that methodology may have taken control over substantive law.<sup>2</sup> Despite its obvious significance, to date such methodology has not provoked much academic discussion.

This article introduces the German problem solving model and discusses its significance. It further tries to examine whether other jurisdictions have developed similar methodological tools. In particular, the difference between Civil Law<sup>3</sup> and

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1 The term “private law” means the law governing the (civil) relationships among individuals, associations and corporations excluding criminal law, administrative law and constitutional law.

2 B Großfeld, “Examensvorbereitung und Jurisprudenz” (“Preparations for Examinations and Jurisprudence”) (1992) JZ 22 at 25. “Substantive law” is used to describe the law that lays down people’s rights, duties, liberties and powers, excluding adjectival law which relates to the enforcement of rights and duties, in particular the law of procedure and evidence: G Williams, *Learning the Law* (12th ed, London: Sweet & Maxwell, 2002), pp 28-31.

3 “Civil Law” should be understood as the Roman law-influenced continental-European legal systems: C Graf von Bernstorff, *Einführung in das englische Recht* (Introduction to English Law) (2nd ed, München: Verlag C H Beck, 2000), p 6; W Tetley, “Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified)” (1999) 60 La L Rev 677 at 683.

Common Law<sup>4</sup> seems to suggest that different methodological approaches must be taken in related jurisdictions so far as the handling of private law problems is concerned.

Legal education in Common Law systems normally refers to “problem solving”<sup>5</sup> when it comes to ask students to analyse disputes, that is to decide how a specific dispute should be resolved on the basis of the applicable law. As shown below, however, the topic of this article is not limited to merely giving advice on how to deal with problem solving questions in legal examinations in order to guarantee the best possible grades. Further, this article does not aim at the discussion of forms of dispute resolution, such as arbitration, mediation or court proceedings, nor does it address legal writing skills. On the contrary, it focuses on the task of identifying potential (private law) problems arising out of a set of given facts and the sequence in which they should be dealt with. In other words, it discusses the structuring process of private law problem solving, which precedes the actual process of private law problem solving. The methodological devices, which are of relevance in this context, are of direct practical importance for any type of legal work in the area of private law. It is, therefore, the ultimate goal of this article to identify and explain these devices and thus facilitate their application in practice.<sup>6</sup>

## Scope of Research

The scope of this article had to be limited. Therefore, I will only discuss private law methodology.<sup>7</sup> Moreover, the article focuses

4 “Common Law” means the English law applied in the Commonwealth-countries and the USA: Graf von Bernstorff, note 3, pp 1, 6; Tetley, note 3, at 3. The phrase “Common Law”, however, has many meanings. It is, eg, also used for all the laws made by judges relating to the whole of the United Kingdom: R Pound, *The History and System of the Common Law* (New York: P F Collier, 1939) (referred to as Pound History), pp 22-23. See also S Hanson, *Legal Method* (London/Sydney: Cavendish, 1999) p 34; or law applicable to the whole of England as opposed to local law: Williams, note 2, pp 23-24.

5 M Costanzo, *Problem Solving* (London: Cavendish, 1995); R Krever, *Mastering Law Studies and Law Exam Techniques* (Sydney: Butterworths, 1989), pp 78-85; H McVea, P Cumper, *Learning Exam Skills* (London: Blackstone Press, 1996), p 4; R Clark, *Legal Skills and System Textbook* (London: HLT Publications, 1996), p 21; P H Kenny, *Studying Law* (London: Butterworths 1985), p 89; A Bradney et al, *How to Study Law* (London: Sweet & Maxwell, 1995), p 101; B Brody, *Write the “A” Law Exam Answer* (Calif: Barpassers, 1988), p 9.

6 B Wörlein, *Anleitung zur Lösung von Zivilrechtsfällen* (Guideline for the Solving of Civil Law Cases) (5th ed, Köln et al: Carl Heymanns Verlag KG, 1998), pp 6-7.

7 As opposed to public law/criminal law-methodology.

on substantive law.<sup>8</sup> Consequently, procedural questions and questions of private international law will not be considered. Further, it was necessary to concentrate on two legal systems for the comparative analysis of the German approach: the Common Law system with a focus on English law and the People's Republic of China as a developing legal system<sup>9</sup> and the country with the largest population worldwide. In addition, the IRAC<sup>10</sup> method, which is used in particular by many US and Australian law schools, will also be taken into (comparative) consideration.

## Problem Solving in Germany

### *General*

Continental European law, especially German law, has developed in a very different way from Common Law. Whereas law in Germany (after the reception of Roman law) had, and still has, an academic and theoretical quality, from its beginning Common Law was of a rather forensic and pragmatic character.<sup>11</sup> Consequently, it has been argued that it comes "as no surprise that the techniques of discovering and applying the law, indeed the typical methods of legal thought as a whole, have developed very differently".<sup>12</sup>

8 For the term "substantive law", see note 2.

9 A definition of "legal system" is provided by Tetley, note 3, at 3: "... the term 'legal system' refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction."

10 IRAC stands for Issue, Rule, Analysis, Conclusion. The IRAC approach is discussed below in the section on "Structured Problem Solving in Common Law Jurisdictions – General".

11 Pound History, note 4, p 24; R Pound, "What is the Common Law?" in *The Future of Common Law* (1937, reprint Gloucester, Mass: P Smith, 1965) (referred to as Pound Future), p 18; K Zweigert, H Kötz, *Introduction to Comparative Law* (3rd ed, Oxford: Clarendon Press, 1998), p 258; U Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997), p 71.

12 Pound Future, note 11, pp 18-19. D Sugarman, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition", in W Twining (ed), *Legal Theory and Common Law* (Oxford: Bast Blackwell, 1984), p 26. For the differences between Civil Law and Common Law, see Tetley, note 3, at 12-15; B Markesinis, "Reading Through a Foreign Judgement", in P Cane and J Stapleton (eds), *The Law of Obligations* (Oxford: Clarendon Press; New York: Oxford University Press, 1998), pp 266-68; B Markesinis, "Judicial Style and Judicial Reasoning in England and Germany" (2000) *Cambridge Law Journal* 59(2) 294; Post, "Stare Decisis: The Use of Precedence" in J Arthur/WH Shaw, *Readings in the Philosophy of Law* (2nd ed, Englewood Cliffs, NJ: Prentice Hall, 1993), p 19; Pound History, note 4, pp 57-62; R Pound, *The Spirit of the Common Law* (Francetown, NH: Marshall Jones, 1921) (referred to as Pound Spirit), pp 181-82; Pound Future, note 11,

Germany's private law system<sup>13</sup> is probably the most eminent example of a Civil Law system. As indicated above, German legal education and also, consequently, Germany's legal profession, is dominated by a certain methodological approach when it comes to the structuring of private law problem solving. Historically, this methodology has been developed since the 1950s and has been acknowledged and "picked up" in a more substantial way by academics during the 1980s.<sup>14</sup> The major textbook introducing this approach was written by Dieter Medicus and first published in 1968.<sup>15</sup> However, to date there has hardly been any deeper scholarly discussion of this approach and its scientific justification. Further, it is interesting to note that such a methodological approach seems to have one of its main origins not in academic writings, but in the training provided by private lecturers (so-called "Repetitoren") who act outside the (public) German universities. The up to two-year-long courses offered by these private lecturers are designed especially to prepare students for the state examinations and are attended by the major proportion of German law students.<sup>16</sup>

### *The Step-by-Step Method*

Generally speaking, according to the afore-mentioned methodological approach, private law problems in Germany are to be solved on a step-by-step<sup>17</sup> basis as follows:

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p 14; Stone, "The Common Law in the United States" in *The Future of the Common Law*, note 11, p 120; R Zimmermann, N Jansen, "Quieta Movere: Interpretative Change in a Codified System" in Cane and Stapleton (above), p 286; Zweigert, Kötz, note 11, pp 258-59, 261-71; Mattei, note 11, p 78.

13 Germany's most basic private law authority is the *German Civil Code*, which has been in force since 1 January 1900. Tetley, note 3, at 6, describes the *German Civil Code* from the point of view of the *French Civil Code* of 1804 as "more academic and technical and its rules more precise than those of the French Code".

14 Großfeld, note 2, at 23.

15 D Medicus, *Bürgerliches Recht* (Civil Law), (17th ed, Köln et al: Carl Heymanns Verlag KG, 1996) (referred to as Medicus 1996); also see D Medicus' article, "Anspruch und Einrede als Rückgrat einer zivilistischen Lehrmethode" (Claim and Defense as Backbone of a Civilistic Teaching Method) (1974) AcP (174) 313 (referred to as Medicus AcP).

16 N G Foster, *German Legal System & Law* (2nd ed, London: Blackstone Press, 1996), p 87; J Schapp, "Das Zivilrecht als Anspruchssystem?" (The Civil Law as a Claim System?) (1992) JuS 537 at 538.

17 J Braun, *Der Zivilrechtsfall* (The Civil Law Case) (München: C H Beck, 2000), p 17; Medicus AcP, note 15, pp 316-17, calls this method the "logical method" as opposed to the "historical method" used in former times.

- Step 1 Analysis of the facts of a problem in order to determine and identify claim relationships between different parties;
- Step 2 Identification of a legal rule as the hypothetical basis of a specific claim;
- Step 3 Identification of the preconditions for the application of such a legal rule and examination that these preconditions have been fulfilled, that is that the claim has been established;
- Step 4 Verification that the original claim is still with the claimant;
- Step 5 Examination of the enforceability of the claim.

Following is a more detailed discussion of these different steps, in particular their significance for the problem solving process.

### Step 1: Obtaining Control Over the Facts

In order to be able to identify the legal questions that are to be answered as an initial step, the facts of a given problem/dispute must be analysed. For this purpose claim relationships, that is actual or potential claimants and defendants, must be identified.<sup>18</sup> In other words, “Who Wants What from Whom?”<sup>19</sup>

For the sake of transparency and in order to avoid confusion, it is necessary in this context that relationships between different parties (“Who from Whom”) must be “broken down” to two-party relationships.<sup>20</sup> Only the analysis of claim relationships between two parties guarantees the possibility of a clear distinction between the (potentially different) legal situations of different claim relationships. For example, in a given situation it could be that “(a) A wants B to pay damages” and “(b) A wants C to pay damages”.<sup>21</sup> It must be regarded as methodologically wrong to start the examination on the basis of the (confusing) assumption that “A wants B and C to pay damages”. This is because such an approach would obviously hinder a clear distinction between A’s (potential) claims against B from those he or she might have against C. A’s (potential) claims against B may, as far as preconditions

18 Großfeld, note 2, at 23; A Früh, “Die Anspruchsprüfung im Zivilrecht” (The Claim Analysis in the Civil Law) (1991) JuS 656 at 657 and 742.

19 In case of non-forensic work the question would be: Who may Want What from Whom?

20 Medicus 1996, note 15, p 4; Medicus AcP, note 15, at 324-25.

21 Medicus 1996, note 15, p 4.

and legal consequences are concerned, be totally identical with those A may or may not have against C. But that is not necessarily the case, for which reason a distinction from the start of the legal analysis is required. If more than one claim relationship<sup>22</sup> can be identified, then all of them have to be analysed<sup>23</sup> on a separate basis, as further explained below.

The same applies with regard to the object of the claim (the “What”). If different objects of potential claims are to be discussed, then for the sake of transparency a separate analysis for each object is required.<sup>24</sup> For instance, it would be correct to say that “(a) A wants B to pay damages” and “(b) A wants B to pay an agreed purchase price”. However, for the abovementioned reasons it would have to be regarded as methodologically incorrect to state that “A wants B to pay damages and the purchase price”. Again, this is due to the fact that the preconditions for the payment of damages and for the payment of the purchase price may not be the same, and therefore a joint examination may cause confusion.

## Step 2: Identification of a Hypothetical Legal Basis of the Claim

The next step in the legal analysis of a problem is the identification of a hypothetical legal basis for a specific claim of each party against another party.<sup>25</sup> A claim only exists if it is acknowledged by the law, that is, if it can be based on a legal rule. Consequently, it is necessary to start out with the identification of such a rule as the basis of a claim.<sup>26</sup> This identification can at this stage only be accomplished on a hypothetical basis since the final decision requires verification as to whether or not all claim-related preconditions have been fulfilled, that is if such rule can really serve as a legal basis for the related claim.<sup>27</sup> Nevertheless, it is necessary to start out with the identification of such a hypothetical legal basis of a claim in order to be able to determine the direction of any further analysis, that is, in order to decide which preconditions must be fulfilled for the establishment of the claim. Consequently, it is regarded as methodologically incorrect if the analysis of a claim relationship starts with a specific, but abstract, legal question, even if such a question were the main problem.<sup>28</sup>

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22 For example: (1) A against B; and (2) A against C.

23 Medicus 1996, note 15, p 4.

24 Medicus 1996, note 15, p 3.

25 Medicus 1996, note 15, p 2; Wörlein, note 6, p 7.

26 The identification of a potential basis for a claim seems to be the most difficult part of the process of solving a dispute: Medicus 1996, note 15, p 2.

27 Braun, note 17, p 23.

28 For example, it would be wrong to analyse if A has validly represented B

Which rules can serve as the basis of a claim? Only legal rules may function as the basis of a claim that grants to one party a certain claim against another party (upon fulfilment of stipulated preconditions)<sup>29</sup> as opposed to legal rules that do not provide for such contents, such as, for example, stipulations which serve to define legal terms<sup>30</sup> or for explanatory purposes.<sup>31</sup> These rules can either be found in the law itself or in contractual provisions on the basis of which one party (the claimant) has the right to request the other (the defendant) to do something, or not to do something. The question as to which legal rule can serve as the basis of a claim is determined by two aspects. First, the related rule must, as a matter of fact, stipulate the legal consequence that one party (the potential claimant) has a claim against the other (the potential defendant).<sup>32</sup> Related rules always take a conditional approach as follows: "If ... [=identification of pre-conditions], then ... [=legal consequence: claim of claimant against defendant]."<sup>33</sup>

The second aspect that needs to be considered for the identification of a legal rule as basis of a claim (only) comes into play where the claimant requires a specific legal consequence. In such a case the potential basis of the claim must lead to exactly such a consequence.<sup>34</sup>

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without having identified the claim relationship and the potential basis of a claim for which A's representation of B would be a precondition. Only if there is a (actual or potential) claim relationship will the question of agency be of relevance and only if a legal rule can be identified which supports such claim will it make sense to analyse agency-related questions.

29 Braun, note 17, p 33.

30 See, eg, Art 189 of the *German Civil Code*: "Half a year means a limitation of six months, a quarter of a year a limitation of three months, half a month a limitation of fifteen days."

31 See, eg, Art 194 para 1 of the *German Civil Code*: "The right to demand from another an act or an omission (claim) is subject to limitation."

32 Früh, note 18, at 658. Some provisions of statutory German civil law, which can be considered as the basis of a claim, are the following:

Art 433 of the *German Civil Code*: "By a sale contract, the seller of a thing is obliged to deliver and transfer title in the thing to the buyer ... The buyer is obliged to pay to the seller the agreed purchase price and to accept the bought thing."

Art 823 para 1 of the *German Civil Code*: "One, who designedly or negligently injures life, body, health, freedom, the property or any right of another is bound to indemnify the other for the injury arising therefrom."

Art 985 of the *German Civil Code*: "The owner may demand from the possessor the delivery of the thing."

33 For a comparison from the US-perspective, see R K Neumann, *Legal Reasoning and Legal Writing* (4th ed, Gaithersburg: Aspen Law & Business 2001), p 16.

34 Medicus 1996, note 15, p 2; Früh, note 18, at 742. For example, if an owner (as claimant) wants the thief to return stolen goods on the basis of ownership, then the legal basis of his claim could be Art 985 of the *German*



In a particular situation it may be possible to base a claim on different legal rules. In this case, a comprehensive legal analysis would have to deal with all of the rules which support the claim in order to be able to assess all existing alternatives.<sup>35</sup> But, again, the examination must distinguish between different legal rules, claim relationships and the object of such claims for the sake of precision, transparency and in order to avoid confusion. In the event that more than one hypothetical basis of a claim has to be analysed, it is generally assumed that a special order of examination should be observed. As a general rule those claims which may be pre-determining for others should be examined first. In Germany the following order of examination is commonly accepted: (1) contractual claims; (2) quasi-contractual claims (for example, pre-contractual liability); (3) claims based on property rights; (4) claims based on unjust enrichment; and (5) claims based on torts law.<sup>36</sup> The ratio behind this order is the attempt to deal first with those legal questions that are likely to be pre-determining for other questions. For example, contractual claims are to be analysed first because the contract is the most specific regulation of a related claim-relationship and can therefore determine the examination of other legal rules, which may serve as the basis of a claim.<sup>37</sup>

### Step 3: Analysis of the Preconditions of the Claim

Step 2 aimed at the identification of the basis of a claim (only) on a hypothetical basis. Whether or not such a basis can in fact support a claim in a given situation is subject to the fulfilment of the preconditions for the application of the related legal rule,<sup>38</sup> which are, in the case of statutory law, normally set forth by the related stipulation itself in theoretical terms. The identified hypothetical basis of the claim therefore determines the sequence of further legal analysis.

For the purpose of examining (in step 3) whether or not the preconditions for the application of a certain rule that shall serve as the basis of a claim have been fulfilled, again a two-step examination is necessary. First, the related preconditions need to be identified on an abstract basis.<sup>39</sup> Having identified

*Civil Code*, which reads as follows: "The owner may demand from the possessor the delivery of the thing."

35 Medicus 1996, note 15, p 8; Braun, note 17, p 26.

36 Braun, note 17, p 28; Medicus 1996, note 15, p 5; critical Großfeld, note 2, at 26; Schapp, note 16, at 538.

37 Medicus, note 15, p 5; Großfeld, note 2, at 26 with reference to Art 1134 of the *French Civil Code*, which reads as follows: "Les Conventions légalement formée tiennent lieu de loi à ceux qui les ont faites."

38 Braun, note 17, p 24; Früh, note 18, at 742.

39 For example, Art 985 of the *German Civil Code* (note 36) requires the fulfilment of the following preconditions: (1) ownership of the claimant;

the preconditions (on an abstract basis)<sup>40</sup> one must examine if, in the current situation, these preconditions have been fulfilled.<sup>41</sup> If the preconditions have been fulfilled, then it can be concluded that the claim has been established. Otherwise, the examination of this particular claim basis must be stopped here for the value of efficiency. The final conclusion would then be that the respective legal rule can not serve as a basis for the claim.

#### Step 4: Verification that the Original Claim is still with the Claimant<sup>42</sup>

If the examination in Step 3 has led to the result that the claim has been established, then further legal analysis is necessary. This is because the fact that the claim has (once) been established does not necessarily mean that the claimant is still holding this claim.<sup>43</sup> There are basically three reasons why this may no longer be the case: (i) the claim could have been transferred to another party (for example by way of assignment agreement); (ii) the claim could have been extinguished (for example by way of fulfilment or termination); or (iii) the claim could have been amended (for example through conclusion of an amendment agreement). It is logical to analyse these questions only after the examination of Steps 2 and 3 above, because only the establishment of the claim allows for its transfer, extinction or amendment.

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and (2) possession of the defendant. In addition, it would have to be checked if the defendant/possessor has "a right to possess": Art 986 of the German Civil Code; from the viewpoint of legal reasoning under American Law, compare Neumann, note 33, p 18.

40 Anything that does not constitute a precondition of the claim is not to be mentioned: Braun, note 17, p 24.

41 Früh, note 18, at 745; N L Schultz and L J Sirico, *Legal Writing and Other Lawyering Skills* (3rd ed, New York: M Bender, 1998), p 41: "A legal argument is meaningless unless you apply the relevant authority directly to the facts of your case."

42 After having discussed the establishment of the claim in Steps 2 and 3, the remaining sections deal with possible defences in favor of the defendant. German legal theory distinguishes between two types of defences (replications): "Einreden" and "Einwendungen". Some confusion exists as to what the difference between these two categories is. As P Gröschler, in "Zur Wirkungsweise und zur Frage der Geltendmachung von Einrede und Einwendung im materiellen Zivilrecht" (On the Effects and the Question of the Raising of "Einrede" and "Einwendung" in substantive Civil Law) (2001) AcP 48, has recently pointed out, a sensible distinction can be made as follows: "Einwendung" means a replication which hinders the establishment of a claim or its continuing existence; "Einrede(n)" means those replications which do not affect the existence of a claim, but hinder its enforcement ipso iure or upon being raised by the defendant as determined by the law.

43 Compare Früh, note 18, at 743.

The examination should only be continued if it can be concluded at this stage that the claim is still with the claimant. If the claimant has lost the claim for whatever reason, then the analysis must be stopped here in order to avoid superfluous work.

### Step 5: Examination of the Enforceability of the Claim

Even if – as a result of the examination in Steps 2 to 4 – the claimant still holds the original claim, it must finally be analysed if the claim is enforceable.<sup>44</sup> A claim is only enforceable if it is not permanently or temporarily blocked by defences.<sup>45</sup> The unenforceability of a claim would not affect its existence as such,<sup>46</sup> but would block its realisation for reasons set forth by substantive law.

Reasons for the (permanent or temporary) lack of enforceability could, for example, be that the (statutory or contractual) time limit for bringing in a suit has expired (permanent obstacle to enforceability) or that the claimant has failed to fulfil corresponding obligations<sup>47</sup> (temporary obstacle to enforceability),<sup>48</sup> which enables the defendant to refuse performance. The enforceability of a claim must be examined at this final stage because only if a claim has been validly established and is still (unchanged) held by the claimant can its enforceability be questioned.

### Language

Legal language should always correspond with the contents discussed.<sup>49</sup> As suggested by the above step-by-step method, the legal analysis of a problem can never start out with

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44 Compare Früh, note 18, at 743.

45 The step-by-step method only deals with the application of substantive law. Therefore, issues from the point of view of procedural law are not to be discussed in this context.

46 Otherwise it would have to be examined in Step 2 or Step 3.

47 For example, the seller claims payment of the purchase price, but has not delivered the sold commodity yet as stipulated in the purchase agreement.

48 See, eg, Art 320 of the *German Civil Code*: “A party which is bound under a reciprocal contract may refuse performance due from him until the counter-performance is effected. If the performance is to be rendered to several parties, the part coming to any one may be withheld, until the entire counter-performance is rendered. The provision of Art 273 para 3 has no application. If one party has partially performed, the counter-performance cannot be refused if under the circumstances, particularly in view of the proportionate insignificance of the part in arrear, the refusal would be in violation of good faith.”

49 Braun, note 17, p 14: “Questions of style, however, are normally questions of substance.”

the final result. On the contrary, the final result must be developed step-by-step. German legal education emphasises that the language used by law students should reflect such step-by-step verification of an initial hypothesis by using the conditional form.<sup>50</sup> Such language is supposed to correctly reflect the real sequence of examination in order to provide the reader with an understandable, comprehensive and thus convincing answer of the related legal questions. This style is called “Gutachtenstil” (“legal opinion style”).<sup>51</sup>

It must be noted at this point that in German legal practice documents are often not drafted in this cumbersome and time-consuming way. In particular, language used by German courts for their judgments does not follow the above order, but states the conclusion first and then argues why such a result is correct. Consequently, this style is called “Urteilsstil” (“judgment style”). It needs to be kept in mind also, however, that German judges do not know the outcome of their legal examination of a dispute from the beginning and therefore have to carry out their examination on the basis of a hypothetical assumption of the outcome. The wording of German judgments does not reflect correctly such a work order.<sup>52</sup>

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50 Wörlein, note 6, p 8; for the Common Law, see Kenny, note 5, p 90.

51 Language that would correspond with the above sequence of examination could, eg, read as follows: “A could have a claim against B for the payment of a purchase price of US\$300 based on a contract concluded between both parties. Precondition would be that A and B have as a matter of fact concluded a contract according to which B is obliged to pay the purchase price of US\$300. A has offered to enter into such a contract. B has accepted this offer. Therefore A and B have concluded a contract. A’s claim against B has therefore been validly established. B has not yet paid the purchase price, for which reason the claim has not been extinguished. Since the contract was concluded only four months ago A’s claim is not time-barred. To conclude, A has a claim against B for the payment of US\$300 as purchase price.” On the other hand, the following wording would not appropriately reflect the work-order suggested by the step-by-step method: “A has a claim against B because A and B have concluded a contract according to which B has to pay the purchase price of US\$300, which was not paid yet, and the claim is not time-barred.”

52 Früh, note 18, at 747. Braun, note 17, p 17, explains the mainly historical reasons in the following terms. Until 1918 judgments in Germany were rendered in the name of the monarch. It would not have been in line with the sovereign authority of the monarch if a judgment had left the impression that there were any doubts regarding the outcome. This “authoritarian style” has been maintained for judgments until today. For French-inspired legal systems, see Tetley, note 3, at 13; cf, from the perspective of US-American legal writing, Schultz and Sirico, note 41, p 40: “When writing your argument with deductive analysis, always state your conclusion first, because readers of legal writing do not want to be left waiting in suspense for the conclusion.”

### Example

The following case study is meant to show, on the basis of the above method, how a private law problem would be solved under German law:

#### Facts

On 2 October A and B conclude a contract according to which A sells his painting ("Green Frog") to B for the purchase price of US\$3,000.

On 2 December A calls B and requests payment of US\$3,000. B refuses to pay. B argues that payment will only be made after delivery of the Green Frog. A is upset about B's unfriendly behaviour.

Therefore, on 15 December A (orally) "sells and transfers all his rights and claims arising out of the Green Frog-contract to C against payment of US\$2,500". A informs B about this sale and transfer on the same day.

What claims (if any) do A and C have against B?

#### Model Solution

[A wants B to pay US\$3,000. C wants B to pay US\$3,000.]<sup>53</sup>

1. Claim of A against B for the payment of US\$3,000 (Step 1)

(a) Basis of A's claim<sup>54</sup> (Step 2)

A's claim could be based on the contract concluded on 2 October, Art 433 para 2 of the *German Civil Code*.<sup>55</sup>

(b) Preconditions (Step 3)

Precondition for A's contractual claim would be that a valid contract has been concluded according to which A is entitled to request payment of US\$3,000 from B. On 2 October, A and B have concluded a contract, pursuant to which B has the obligation to pay the purchase price of US\$3,000 to A.

Therefore, the claim has been validly established.

(c) Is the claim still with A? (Step 4)

A could have lost his claim against B by way of assignment to C. Precondition for the effectiveness

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53 This identification of the claim relationships is only meant to help to understand the facts and the questions to be answered and would normally not show up in any written analysis of the dispute.

54 This dispute does not require the discussion of any procedural question.

55 Article 433, para 2 of the *German Civil Code*: "The purchaser is obliged to pay to the seller the agreed purchase price and to take the purchased thing." German private law theory acknowledges the right of the parties to a contract to claim specific performance on the basis of such a contract.

of such assignment would be that an assignment agreement has been concluded between A and C, Art 398 of the *German Civil Code*.<sup>56</sup> On 15 December A and C have agreed that all of A's rights and claims arising out of the Green Frog contract shall be transferred to C. Therefore, they have concluded a valid assignment agreement. A has lost his claim against B to C.

(d) Conclusion<sup>57</sup>

A has no claim against B for the payment of US\$3,000.

2. *Claim of C against B for the payment of US\$3,000* (Step 1)

(a) Basis of C's claim (Step 2)

C's claim could be based on the contract concluded between A and B on 2 October, Art 433, para 2 in connection with Art 398 S.1 of the *German Civil Code*.

(b) Preconditions (Step 3)

Precondition for C's contractual claim would be that (1) a valid contract has been concluded according to which B is obliged to pay the purchase price of US\$3,000; and (2) C holds the right to claim against B for payment under such a contract.

As explained above,<sup>58</sup> on 2 October A and B have concluded a valid contract pursuant to which B has the obligation to pay the purchase price of US\$3,000. Precondition (1) is therefore fulfilled.

Since the contract of 2 October was concluded between A and B, originally A was the holder of the right to claim against B for payment of US\$3,000. However, on 15 December A has validly transferred to C all rights arising out of the contract of 2 October in accordance with Art 398 of the *German Civil Code*.<sup>59</sup> Consequently, C now holds the respective contractual right to claim for the payment of US\$3,000 against C.

(c) Is the claim still with A? (Step 4)

C has not lost his claim by way of transfer or extinction, nor has the claim been amended.

<sup>56</sup> Article 398 of the *German Civil Code*: "A claim may be assigned by the creditor by agreement with another person to the latter (cession). From the conclusion of the agreement the new creditor (assignee) takes the places of the former creditor."

<sup>57</sup> Step 5 was to be left out because the analysis in Step 4 had revealed that A had no claim against B.

<sup>58</sup> See above, Step 1(b) of the Model Solution.

<sup>59</sup> See above, Step 1(c) of the Model Solution.

(d) Enforceability (Step 5)

It is questionable whether C's claim is enforceable. B has raised the defence that he will only pay upon delivery of the Green Frog. According to Art 320 para 1 sentence 1 of the *German Civil Code*<sup>60</sup> one party may refuse the other party's demand for performance, if the other party has not yet performed its obligation.

A has not yet fulfilled his contractual obligation to deliver the Green Frog and to transfer title thereto to B.<sup>61</sup> Pursuant to Art 404 of the *German Civil Code*, a debtor may avail himself against the assignee of the defences, which at the time of the assignment of the claim were good against the former creditor. Therefore, after the assignment of 15 December, the defence which B has raised against A on the basis of Art 320 para 1 sentence 1 of the *German Civil Code* is also valid against C. Consequently, B has the (temporary) right to refuse performance.

(e) Conclusion

C has a claim against B for the payment of US\$3,000. However, such a claim is currently not enforceable.

### *Justification of the Step-by-Step Method*

#### General

Despite its enormous importance in Germany, few legal writers have worked on the theoretical background of the step-by-step method.<sup>62</sup> Therefore, it is worthwhile discussing the theoretical justification of the step-by-step method and how it fits into the private law system.

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60 Article 320 sentence 1 of the *German Civil Code*: "A party which is bound under a reciprocal contract may refuse performance due from him until the counter-performance is effected. If the performance is to be rendered to several parties, the part coming to any one may be withheld, until the entire counter-performance is rendered. The provision of Art 273 para 3 has no application. If one party has partially performed, the counter-performance cannot be refused if under the circumstances, particularly in view of the proportionate insignificance of the part in arrear, the refusal would be in violation of good faith."

61 Article 433 para 1 of the *German Civil Code*. For the transfer of ownership of a movable thing, in general it is necessary that the owner delivers it to the purchaser and that both agree that the ownership be transferred: Article 929 sentence 1 of the *German Civil Code*. Possession of a thing is generally acquired by obtaining actual control of the thing: Art 854 para 1 of the *German Civil Code*.

62 Schapp, note 16, at 538, suggests that the fact that German legal scholars have widely ignored dispute solving methods as a topic of research may be caused by the fact that dispute solving methods (techniques) are regarded as belonging to legal practice rather than to legal science.

## Methodological Benchmarking

The general adoption of a specific method seems to indicate that this method is better than others. In order to find out if this conclusion is correct and if so, why, different methodological approaches need to be assessed. In order to do so, the first requirement is the identification of criteria, which allow for a comparison of different methodology. In the context of this article, therefore, these criteria must be identified with special reference to the step-by-step method.

It has been observed that the step-by-step method anticipates legal proceedings where the claimant presents his claim and the defendant tries to prove that such a claim does not exist, or at least is not enforceable.<sup>63</sup> This observation, however, cannot explain why the step-by-step method should be superior to other problem solving approaches – it does not provide criteria which allow a distinction of the step-by-step method from other approaches.

One might further assume that any superiority of the step-by-step method is based on the fact that it allows for appropriate conclusions. However, since misleading methodology would be useless, the outcome of a problem solving process would thus also not serve as a criterion to evaluate different problem solving methodology.<sup>64</sup> Problem solving methodology only provides for the framework which enables the most appropriate outcome to be reached, but should not affect it and must therefore be regarded as outcome-neutral.

An appropriate evaluation of different methodological approaches can therefore only be reached on the basis of the question as to how the legal analysis of a problem is carried out. If so, then the sole criterion which allows for the assessment of different methodological approaches is the criterion of efficiency.<sup>65</sup> Efficient problem solving stands for methodological optimised problem solving by way of the application of a logical, precise and clear work order.<sup>66</sup> If

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63 Braun, note 17, p 38 (“plea and counter-plea”); Medicus AcP, note 15, pp 326, 331.

64 It is for this reason that aspects of fairness and justice do not need to be discussed in this context.

65 In this context efficiency is to be understood as the characterisation of a particular work procedure (in this case the method of solving private law problems), which keeps the input of resources (time, labour, money) as low as possible.

66 Medicus 1996, note 15, p 4; Früh, note 18, at 742; L Bolman, in C L Cooper and C D Alderfer (eds), *Advances in Experimental Social Processes* (Chichester: Wiley 1978) Vol 1, pp 114-15. This optimisation of a specific work (ie dispute solving) process is not directly connected to the transfer of property rights, for which reason questions that are discussed in



one legal method is more efficient than another then the more efficient method must be regarded as superior. In other words, the most efficient problem solving method should prevail over others.

It must be emphasised at this point that the most efficient method of solving private law problems is of course not the only way to come to appropriate solutions. An appropriate solution of a particular problem may as well be reached by other, less efficient approaches. The advantage of the most efficient problem solving methodology simply lies in the fact that it requires only a minimum input of resources.

The step-by-step method, as it was introduced above, complies with the requirement of efficiency, in fact it embodies efficiency. The predominant objective and result of its application is to identify and solve legal problems as early as possible and to deal with those questions first which are predetermining for others. No more efficient way of structured problem solving is available. Because efficient problem solving is inherent in the step-by-step method, this may be regarded as its major advantage.<sup>67</sup>

### The Claim Approach

As explained above,<sup>68</sup> the step-by-step method requires the identification of different claim relationships, which are to be analysed separately. This claim-related approach, therefore, is of major significance as it is the basis of the step-by-step method.

The claim approach seems to suggest that private law relationships are always of a contradictory nature. That may provoke the (counter-) argument that it neglects the role of law as an integrating factor and over-estimates the role of law as a tool to solve conflicts.<sup>69</sup> Whether or not this argument is valid can only be decided on the basis of a fundamental discussion of the nature and function of (private) law as such. The limited scope of this article does not allow for such a discussion. An understanding, however, could be based on the following.

Law cannot solely be regarded as an instrument to “organise” the co-operation of different members of a society, as it was for instance suggested by traditional socialist legal

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connection with the so-called “Economic Analysis of Law” in Zweigert and Kötz, note 11, p 249, are of no relevance in the context of this article.

67 Medicus AcP, note 15, p 326.

68 See above, “Step 1: Obtaining Control over the Facts” (text accompanying note 18).

69 Großfeld, note 2, at 25; for a critique of similar arguments raised during the time of Nazi Germany, see Medicus AcP, note 15, p 322.

theory.<sup>70</sup> The main role of (private) law must be seen in its function of balancing the interests<sup>71</sup> of different actors within the private law area.<sup>72</sup> The conflict of different interests, therefore, is the presupposition for the existence of private law.<sup>73</sup> Consequently, the contradictory nature of the claim approach is justified by the nature and function of private law itself.<sup>74</sup>

The nature of (private law) legal work can be rather different. For example, the drafting of a legal opinion, of a statement of claim, of a judgment or of a contract or related negotiations seems to require varying practical skills and techniques. However, a closer look reveals that there is always one very fundamental question, which is the starting point of all the different types of legal work. This fundamental question relates to the existence of claim relationships, that is, whether and which parties have, or may eventually have, a claim against other parties. A private law judgment rendered by a court directly addresses this question. In addition, the legal opinion drafted by a lawyer (as long as it is not limited to answering abstract questions) has to assess actual or potential

70 U Manthe, "Bürgerliches Recht und Bürgerliches Gesetzbuch in der Volksrepublik China" (Civil Law and Civil Code in the People's Republic of China) (1987) 28 *Jahrbuch für Ostrecht* 11 at 21; I Markovits, "Socialism and the Rule of Law: Some Speculations and Predictions" in D S Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Berlin: Duncker & Humblodt, 1990), p 205.

71 See Pound History, note 4, p 163; S Riesenfeld, "The Impact of German Legal Ideas and Institutions on Legal Thought and Institutions in the United States" in M Reimann (ed), *The Reception of Continental Ideas in the Common Law World 1820-1920* (Berlin: Duncker & Humblodt, 1993), p 94.

72 This viewpoint is based on the so-called "jurisprudence of interests" ("Interessenjurisprudenz"), which has mainly been developed in Germany in the second decade of the 20th century, in particular by Philip Heck. For similar developments in the United States, see, eg, Pound History, note 4, pp 162-76; Pound Spirit, note 12, pp 91-93, 204; see also Riesenfeld, note 71, pp 94-96; A Altman, *Arguing About Law* (2nd ed, Belmont, CA: Wadsworth/Thomson Learning, 2001), pp 111-13; S P Sinha, *Jurisprudence* (St Paul, Minn: West Pub, 1993), pp 232-34. In Germany the jurisprudence of interests has later been further developed into the so-called jurisprudence of evaluation ("Wertungsjurisprudenz") by pointing out that the identification of contradicting interests alone does not suffice (see Sinha, above, p 244), but that also those criteria need to be identified which are determining why one interest is given priority over the other: W Fikentscher, *Methoden des Rechts in vergleichender Darstellung III* (Methods of the Law Explained Comparatively) (Tübingen: Mohr Siebeck, 1975-77), pp 383-89; F Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (Legal Methods and Legal Metaphores) (Wien, New York: Verlag Springer, 1982), pp 123-25.

73 Schapp, note 16, at 538.

74 Schapp, note 16, at 538; Medicus 1996, note 15, p 1.

claim relationships and eventually make related suggestions. A contract needs to be drafted on the basis of anticipated problems, that is, whether on the basis of a particular wording one party may have a claim against another or not.<sup>75</sup> Even (legal) negotiations are carried out in the same way, that is on the basis that all parties try to establish or avoid actual or potential claims against each other.

The final piece of work, which is required from legal professionals in different areas or in different situations, may take different forms (for example a judgment, a legal opinion, a statement of claim or defence, a contract, the presentation of arguments during negotiations and so on) and may not directly reflect the claim approach. However, the first step in carrying out any such work must always be the analysis of actual or potential claim relationships, that is, the question as to who has, or may have, a claim against whom. In other words, the claim approach always determines the direction and sequence of (private law) legal work.<sup>76</sup>

Consequently, the decision over (potential) claim relationships must be regarded as the main task of private law<sup>77</sup> and the analysis of claim relationships is the basis of any private law-related legal work. This further entails that the claim approach is the natural basis of efficient problem solving. Efficient problem solving cannot be carried out by analysing abstract legal questions, but must be determined by the ultimate goal in deciding who has a claim against whom. The step-by-step method is based on, and incorporates, the claim approach.

One might further argue that the claim approach does not take into account social, economic and political factors and therefore leads to a one-sided analysis of a problem based only on legal aspects.<sup>78</sup> However, of course the “balancing of contradicting interests”, as the main task of private law, also entails consideration of all related aspects, including social, economic and political factors.<sup>79</sup> Applying the step-by-step method, therefore, does not exclude such factors, but only channels them – that is, it suggests the most efficient manner in which they should be considered.

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75 Medicus AcP, note 15, p 317.

76 Großfeld, note 2, at 25; Medicus AcP, note 15, p 322.

77 Schapp, note 16, at 538.

78 Großfeld, note 2, at 25; G E Frug, “A Critical Theory of Law” (1989) *Legal Education Review* (No 1) 43.

79 For the area of legal education from the Chinese perspective, Wang Liming, *Hetongfa yinan anli yanjiu* (Research on tricky contract law cases) (Beijing: Zhongguo renmin daxue chubanshe, 1997) (referred to as Wang Liming 1997), p 4.

## Problem Solving Methodology and Legal Creativity

It has been argued that the application of the step-by-step method may lead to a situation where technicalities rather than substance become the determining factors of legal work and that the connected methodological constraints may hinder, or at least limit, legal creativity.<sup>80</sup> This argument can only be correct if the step-by-step method is regarded or used as a legal instrument which replaces substantive law as such or if it is used as a mere checklist without reflecting about the rationale behind it. However, methodology can never replace substantive law and should also not be applied for its own sake. On the contrary, methodology is only the tool used to apply and implement substantive law efficiently. If this methodological functioning is kept in mind then the claim approach and the step-by-step method<sup>81</sup> do not at all hinder legal creativity but can provide major input for a disciplined and structured jurisprudence.<sup>82</sup>

In addition, the step-by-step method is not one legal tool among others which is “forced” upon legal professionals and/or students. On the contrary, the application of the step-by-step method should be the automatic result of efficient problem solving<sup>83</sup> and thus only reflects given limitations of the problem solving process itself.<sup>84</sup>

## Comparative Analysis

### *Introduction*

The above discussion of German problem solving methodology of course provokes the question as to what extent similar models are applied, or should be applied, in other jurisdictions. This question is pursued in the following by looking into two non-German legal systems<sup>85</sup> – the Common Law system and (briefly) the mainland Chinese<sup>86</sup> legal system. The election of these systems as examples is of course arbitrary and linked

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80 Großfeld, note 2, at 25.

81 Braun, note 17, p 17: “There is no better way to challenge one’s own prejudices ...”

82 Medicus AcP, note 15, pp 321, 331.

83 Compare the section on “Methodological Benchmarking” above.

84 Braun, note 17, p 38.

85 For the significance of the selection of legal systems in comparative legal research, see M Oderkerk, “The Importance of Context: Selecting Legal Systems in Comparative Legal Research” (2001) NILR XLVIII 293.

86 Mainland China stands for the People’s Republic of China excluding the Hong Kong SAR, the Macau SAR and Taiwan. The legal systems of the latter are different from the legal system of mainland China.

to the author's own familiarity with the related jurisdictions.<sup>87</sup> However, for the following reasons the analysis of these examples is also of special interest.

The discussion of the Common Law situation in the context of this article is the natural consequence of the perceived differences between Common Law and Civil Law.<sup>88</sup> However, the mainland Chinese legal system serves as an (additional) example to demonstrate that the scope of this article is not limited to the comparison of Common Law and Civil Law structures. Moreover, the mainland Chinese legal system stands for an emerging jurisdiction, which is subject to the influence of a variety of different legal traditions and cannot simply be regarded as belonging to any of the "traditional" legal families, but is rather a "mixed jurisdiction".<sup>89</sup>

The following discussion explores whether methodological tools similar to the step-by-step method can be identified in the afore-mentioned legal systems and/or if the step-by-step method can be applied in the related jurisdictions.

### *Structured Problem Solving in Common Law Jurisdictions*

#### General

Margot Costanzo, a Common Law legal writer, has stated in her book, *Problem Solving*, that lawyers rarely share common approaches to problem solving.<sup>90</sup> In fact, the author was not able to identify a commonly accepted model that provides for a comprehensive problem solving method which can be applied by Common Law lawyers.<sup>91</sup> Instead, large numbers of

87 For comparative purposes for the election of legal systems on the basis of factors related to the researcher personally, see Oderkerk, note 85, at 305.

88 See above, "Introduction – General" (text accompanying note 3).

89 The mainland Chinese legal system is not a case law-based system, Wang Liming, 1997, note 79, p 2; Wang Zhaoneng (ed), *Shiyong falu anli pingdian – minshiquan* (Commentary on practical law cases – civil law) (Nanning: Guangxi renmin chubanshe, 2001), p 1; Qiao Xianzhi (ed), 2000 *Shanghai fayuan anli jingxuan* (2000 – Selected cases of Shanghai courts) (Shanghai: Renmin chubanshe, 2000), p 2 ("cases are used to supplement the legislation and the accumulation of the experience provides material for future legislative work"). One might therefore argue that the Chinese legal system belongs to the Civil Law legal family: see L C Wolff and B Ling, "The Risk of Mixed Laws: The Example of Indirect Agency under Chinese Contract Law" (2002) 15(2) *Columbia Journal of Asian Law* 173 at 176. For comparative law purposes, however, the question of the sources of law is of minor importance: Zweigert and Kötz, note 11, p 71.

90 Costanzo, note 5, p 51.

91 Compare, however, Neumann, note 33, p 16, whose explanation of the "inner structure of a rule" comes close to the concept of the step-by-step method: "Every rule has three separate components: (1) a set of elements, collectively called a test; (2) a result that occurs when all the elements are

books and articles have been published addressing students' technical skills, in particular how problem solving examination questions should be handled.<sup>92</sup> Likewise, related literature for practitioners hardly<sup>93</sup> discusses comprehensive problem solving methods, but provides technical advice, such as how to improve negotiating skills, how to plead or how to improve legal writing skills.<sup>94</sup>

Of course, there is broad Common Law literature on legal reasoning.<sup>95</sup> If one regards legal reasoning as the process through which the correct solution of a legal problem can be found, then the step-by-step method as it was introduced above must be regarded as addressing one aspect of legal reasoning. However, the discussion regarding legal reasoning generally focuses on the approach to be taken in order to solve specific (isolated) legal problems, rather than providing a pattern for the efficient legal analysis of a set of facts and the sequential analysis of related problems.

The same is true for the so-called IRAC method, which is used by many law schools, in particular in the United States and in Australia, as a cognitive, rhetorical, analytical, organisational and pedagogical tool. IRAC stands for: (I)ssue<sup>96</sup>

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present ...; and (3) what ... could be called a causal term that determines whether the result is mandatory, prohibitory, or discretionary ... Additionally, many rules have (4) one or more exceptions that, if present would defeat the result, even if all the elements are present."

- 92 Constanzo, note 5; Krever, note 5; McVea and Cumper, note 5; Clark, note 5, pp 21-22; Bradney et al, note 5, pp 99-105; Kenny, note 5, pp 88-99.
- 93 A more systematic approach is taken by P A Jones, *Lawyers' Skills* (7th ed, London: Blackstone 2000), pp 5-26, with focus, however, on practical aspects of problem solving such as identifying and classifying information and the use of solutions to gather evidence.
- 94 M M Asprey, *Plain Language for Lawyers* (2nd ed, Leichhardt: Federation Press, 1996); M Chartrand, C Millar and E Wiltshire, *English for Contract and Company Law* (London: Sweet & Maxwell, 1997); M Fox and C Bell, *Learning Legal Skills* (3rd ed, London: Blackstone, 1999); M Hyam, *Advocacy Skills* (4th ed, London: Blackstone Press 1999); R H Mookin, S R Peppert and A S Tulumello, *Beyond Winning* (Cambridge, Mass: Belknap Press of Harvard University Press, 2000); A Sherr, *Client Care for Lawyers* (2nd ed, London: Sweet & Maxwell, 1999); C Maughan and J Webb, *Lawyering Skills and Legal Process* (London: Butterworths, 1995).
- 95 A Aarnio, D N MacCormick (eds), *Legal Reasoning* (Aldershot: Dartmouth, 1992), Vols I and II; E H Levi, *An Introduction to Legal Reasoning* (Chicago: Chicago University Press, 1961); A Peczenik, *On Law and Reason* (Dordrecht: Kluwer Academic, 1989); Neumann, note 33, pp 15-26.
- 96 [http://law.slu.edu/academic\\_support/irac.html](http://law.slu.edu/academic_support/irac.html) (last visited 30 March 2004); Rohr, "How to Take a Law School Exam", <http://nsulaw.nova.edu/stuprograms/arp/documents/examtake.pdf> (last visited 30 March 2004) (referred to as nsulaw), IVA; [http://lexopolis.com/library/handouts/irac\\_lexis.pdf](http://lexopolis.com/library/handouts/irac_lexis.pdf) (last visited 30 March 2004) (referred to as lexopolis), p 1; Neumann, note 33, p 265.

– (R)ule<sup>97</sup> – (A)pplication<sup>98</sup> – (C)onclusion<sup>99</sup> and is meant to be:

... the architectural blueprint for the legal discussion. It gives legal writing continuity and clarity and organizes the contents of the discussion. IRAC provides support and analysis for the issues posed by the problem and is supposed to guide the writer toward a well-supported conclusion.<sup>100</sup>

IRAC, however, cannot be regarded as a comprehensive problem solving model.<sup>101</sup> As far as IRAC is intended to deal with the application of legal rules, it appears to be addressing only isolated questions even if it can be used seriatim.<sup>102</sup> This scope of IRAC's applicability corresponds with the approach taken by the step-by-step method, which also requires the identification of legal problems and the analysis of whether or not a particular legal rule can be applied in order to solve such a question. However, IRAC fails to provide the methodological tools necessary to structure the analysis of the solution of a "whole dispute".<sup>103</sup> In other words, IRAC is not

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97 "What is the governing law for the issue?": see Neumann, note 33, p 265; nsulaw, note 96, at IVB; lexopolis, note 96, p 1.

98 "Does the rule apply to these unique facts?": see Neumann, note 33, p 265; nsulaw, note 96, at IVC; lexopolis, note 96, p 2.

99 Neumann, note 33, p 265; nsulaw, note 96, at IVF; lexopolis, note 96, p 2. For a similar approach from the perspective of legal writing, see Schultz and Sirico, note 41, pp 43-65.

100 A B Yelin, *The Legal Research and Writing Handbook: A Basic Approach for Paralegals* (Boston: Little Brown, 1996), p 381. Models similar to IRAC are used by other law schools. For example, Bond Law School uses "MIRAT" which stands for: (M)aterials/missing facts; (I)ssue(s); (R)ule (principle of law/research); (A)pplication/argument; (T)entative solution. Queensland University of Technology uses "ISAACS", which stands for: (I)dentify a legal issue arising from the facts; (S)tate the relevant law and the (A)uthority for it; (A)pply the law to the facts; (C)ome to a conclusion on that issue, then repeat the above steps for another issue; (S)ynthesise the practical conclusion into an overall conclusion: H Ward, "The Adequacy of their Attention" (2000) LER 1 at 26.

101 In addition, many legal writers seem to regard IRAC only as a device to structure answers to exam questions; cf Neumann, note 33, p 265; [http://law.slu.edu/academic\\_support/irac.html](http://law.slu.edu/academic_support/irac.html) (last visited 30 March 2004); lexopolis, note 96, p 3; different Brown, "Problem Solving and Advocacy: Two Separate Skills", <http://law.gonzaga.edu/ilst/Newsletters/Fall00/brown.htm> (last visited 30 March 2004), para 6. This limitation does not apply with regard to the step-by-step method, as explained above in "Introduction – General" (text following note 1) and "The Claim Approach" (text following note 68).

102 Compare Neumann, note 33, p 265 ("several IRAC-structured discussions"); Brown, note 101, para 5: "By proceeding methodically through IRAC, a student can solve even the most difficult legal problem."

103 IRAC is meant to be used for the application of legal rules in any area of law, such as the law of contracts, law of civil procedure, criminal law and torts law.

helpful when it comes to deciding in which order to deal with different legal questions arising out of a set of facts – it only provides methodological support with regard to one “(I)ssue”. Thus, as opposed to the step-by-step method, IRAC’s scope of application is limited.

### Can the Step-by-step Method be Applied in Common Law Jurisdictions?

With regard to the question whether the step-by-step method can also be applied in Common Law systems, first of all a distinction must be drawn within Common Law between statutory law and case law.<sup>104</sup> As far as statutory law is concerned, there are in principle no obstacles for the application of the step-by-step method. The same applies for problems that are directly governed by international agreements such as the CISG<sup>105</sup> as long as those agreements provide for a whole set of the rules governing respective claim relationships.

If the legal rules which support a specific claim are to be derived from case law, then obviously the legal technique for the identification of those rules and the related preconditions are different from those which would be applied under Civil Law or with regard to statutory law within Common Law jurisdictions.<sup>106</sup> Precedents would have to be analysed in order to extract (by way of induction<sup>107</sup>) the rule, which may support a claimant’s claim, and the preconditions for the application of such a rule as well as potential defences. A closer look, however, reveals that as far as the structuring of problem solving is concerned, no major differences between case law and statutory law can be found.

First, the application of case law requires the identification of a general rule behind the relevant precedents for that is the only way to tell whether this or another decision really controls a following case.<sup>108</sup> In other words, the inductive method generally applied in Common Law jurisdictions, as opposed to the deductive method applied in Civil Law legal systems,<sup>109</sup> also leads to the necessity of identifying an abstract legal rule or rules which shall be applied for another

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104 Compare Hanson, note 4, p 21. For the rather minimal significance of the sources of law for comparative purposes, see note 87.

105 *United Nations Convention on the International Sales of Goods*: accessed online, eg, at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (last visited 30 March 2004).

106 Zweigert and Kötz, note 11, pp 258-59; Pound Future, note 11, pp 18-19.

107 Foster, note 16, p 85; Markesinis, in Cane and Stapleton, note 12, pp 271-74.

108 Zweigert and Kötz, note 11, p 269.

109 Levi, note 95.



(new) problem. Further, also under Common Law, such a rule must first be identified on a hypothetical basis in order to be able to determine the direction and contents of any further examination, that is, in order to verify the applicability of such rule for another (new) problem. Here, the (only) difference between Civil Law and Common Law is the (opposite<sup>110</sup>) starting point: under Civil Law the rule must be identified from within an abstract statutory framework whereas under Common Law the rule must be extracted from precedents.<sup>111</sup> Under Civil Law the preconditions for the application of such a rule are basically set forth by the (abstract) rule itself. Case law generally requires that the facts of the problem to be decided are similar to those of the precedent from which the rule to be applied derives.

One may further ask if the historical development of the Common Law, in particular the significance of the principles of equity,<sup>112</sup> requires a different approach towards the application of the step-by-step method in the Common Law context. While statutory rules in Civil Law jurisdictions have general clauses to correct clearly inappropriate results, these provisions can hardly rival the discretionary power of a judge applying the principle of equity.<sup>113</sup> Further, equity has developed instruments, such as the trust, that can be used in a wide variety of situations and have no equivalent in Civil Law.<sup>114</sup> Indeed, the characteristics of the principles of equity may affect practical legal work. For example, the broader discretionary power of a judge may require that pleadings address the wider range of available remedies.<sup>115</sup> This, however, does not exclude the applicability of the step-by-step method, which is certainly based on the idea that legal rules can be identified and the application of these rules and related legal

110 Markensinis, in Cane and Stapleton, note 12, p 271.

111 Zweigert and Kötz, note 11, p 271.

112 J Martin, Hanburg and Martin – *Modern Equity* (16th ed, London: Sweet & Maxwell, 2001), pp 3-46; L B Solum, "Equity and the Rule of Law" in I Shapiro (ed), *The Rule of Law* (New York: New York University Press, 1994), p 123.

113 Kötz, in Cane and Stapleton, note 12, p 243; Zimmermann, note 12, pp 169-77; R Zimmermann and S Whittaker, *Good Faith in European Contract Law* (Cambridge, UK; New York: Cambridge University Press, 2000).

114 J P Thorens, "The Common Law Trust and the Civil Law Lawyer" in Clark, note 70, p 309; Zimmermann, note 12, pp 163-66; D J Heyton, S Kortmann and H Verhagen (eds), *Principles of European Trust Law* (The Hague: Kluwer Law International; Deventer: The Netherlands: W.E.J. Tjeenk Willink, 1999), pp 3-8.

115 For the relationship between the form of presentation and the step-by-step method, cf above the section on "Language" (text following note 49); from a practical point of view, see Zimmermann, note 12, pp 177-82.

consequences can be predicted to a certain extent. The broader range of possible remedies available under the principles of equity does not eliminate such predictability, nor does it have any impact on the sequence in which legal problems should be addressed in order to “solve a case” efficiently as long as equitable discretion is exercised within set limits. Only if “equity” did not allow for such identification and prediction would the application of the step-by-step method not be possible. This conclusion would, however, entail that “equity” is not consistent with the ideal of the rule of law.<sup>116</sup>

It must further be considered whether the differences between legal education in Germany and in the Common Law countries do hinder the introduction of the step-by-step method. In Germany the state examination and advanced courses in civil law may examine<sup>117</sup> the students’ knowledge of the entire private law, including, for example, family law, law of inheritance, company law and labor law.<sup>118</sup> On the other hand, law schools in Common Law countries examine the knowledge of students on individual subjects, and examination problems are usually clearly related to the area of law that has been taught in a particular course.<sup>119</sup> Further, examination questions in Common Law countries are not always based on claim relationships, but may require, for

116 Solum, note 112, passim and p 139: “Moral and legal vision is required in order to reveal that a case is governed by a rule. For this reason, both the application of legal rules and the practice of equity require the virtue of judicial wisdom ... This insight allows us to see how the practice of equity may actually reinforce, rather than undermine, the values of predictability and regularity that support the ideal of the rule of law.” Compare also D Higham, “Does Justice Play Dice? Can Lawyers Predict the Chances of Success in Litigation?” (2003) 12(1) *Nottingham Law Journal* at 20-26. See also B Thompson, *Constitutional and Administrative Law* (3rd ed, London: Blackstone Press, 1993), p 67: “the basic idea of the rule of law is that not only should law be obeyed, but that the law should be such that people will be able to be guided by it.” See further, D W Kahn, *The Cultural Study of Law* (Chicago: Chicago University Press, 1999), p 117: “law’s rule is never at stake in the outcome of a particular case ... The rule of law establishes the domain of possible outcomes.” And see M A Eisenberg, *The Nature of the Common Law* (Cambridge, Mass: Harvard University Press, 1988), pp 10-12.

117 Based on related law enacted by the different German states: Foster, note 16, pp 81, 84.

118 Foster, note 16, pp 84-85; more generally, see J H Merryman, *The Loneliness of the Comparative Lawyer* (The Hague; Boston: Kluwer International Law, 1999), pp 61-63; Leith, “Legal Education in Germany: Becoming a Lawyer, Judge, and Professor”, [www.ncl.ac.uk/~nlawwww/articles4/leith4.html](http://www.ncl.ac.uk/~nlawwww/articles4/leith4.html) (last visited 30 March 2004) text following footnote reference 43: “the differences in the general flavour in German law schools is striking”. See also Crossley, “Legal Education in England”, [www.jura.uni-sb.de/english/London/crossle.html](http://www.jura.uni-sb.de/english/London/crossle.html) (last visited 30 March 2004).

119 Neumann, note 33, p 263: “a teacher reads your exam answers to decide ... how much you have learned in the course”.

example, the verification of the validity of a trust or of any disposition.<sup>120</sup>

The above observations may explain why the step-by-step method is not (yet) actively taught in Common Law jurisdictions. However, they do not constitute arguments against its application for the following reasons. First, it is of course true that a structuring device like the step-by-step method becomes more important in more complicated cases as they appear, for example, in German law examinations. That, however, does not mean that the step-by-step method should be ignored in less complex cases or that it even reduces the importance of the step-by-step method as such. Moreover, the step-by-step method does not of course help to solve examination questions that are not based on claim relationships. Nevertheless, one needs also to keep in mind that in the area of private law the discussion of abstract topics is eventually thought to support the analysis of claim relationships.<sup>121</sup> For example, the analysis of the validity of a trust or of any disposition is (only) carried out in order to establish who may eventually have a claim against whom. Finally, as explained above, the step-by-step method is not only a tool for students to deal with examination questions, but a structuring device for all kinds of legal work in the area of private law.<sup>122</sup>

In conclusion, the characteristics of Common Law do not hinder the application of the step-by-step method.<sup>123</sup> The solution of a private law problem on the basis of Common Law can be carried out by:

120 Neumann, note 33, pp 265-66; D H Barber, *Answering Law Exams* (2nd ed, Silverthorne, Colo: Winning in Law School Inc, 1992).

121 See above, "The Claim Approach" (text following footnote reference 68).

122 See above, text following footnote reference 3, particularly "Methodological Benchmarking" (text following footnote reference 62) and "The Claim Approach" (text following footnote reference 70).

123 In order to illustrate this conclusion, the Model Solution above (see 2(d) shall in the following be solved as far as the claim relationship of C against B is concerned on the basis of English law by way of application of the step-by-step method:

Claim of C against B (Step 1)

1. For the payment of US\$3,000 (Step 1)

1.1 Basis of C's claim (Step 2)

C's claim could be based on breach of the contract concluded between A and B on 2 October, *Sale of Goods Act 1979* (UK), s 49 (referred to as SGA).

1.2 Preconditions (Step 3)

Precondition for C's claim would be that: (1) a valid contract of sale has been concluded according to which B is obliged to pay the purchase price of US\$3,000; (2) the property in the goods has passed to B (SGA Act, s 49(1)), or the price is payable on a certain day irrespective of delivery

- narrowing down the facts to claim relationships;
- identifying a hypothetical basis for a claim;<sup>124</sup>
- examining the preconditions of a hypothetical basis of the claim;

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(SGA, s 49(2)); (3) B wrongfully neglects or refuses to pay such a price (SGA, s 49(1)); (4) C holds the right to claim against B for the payment under the contract. All these preconditions have been fulfilled.

1.3 Is the claim still with C? (Step 4)

C has not lost the claim against B by way of transfer or extinction nor has the claim been amended.

4.4 Enforceability (Step 5)

There is no reason why the claim should not be enforceable.

1.5 Conclusion

C can claim against B for the payment of US\$3,000. (The exercise of this claim is, however, subject to non-exercise of the claim under SGA, s 50(1).)

2. For damages for failure to pay and accept the Green Frog (Step 1)

2.1 Basis of the C's claim (Step 2)

C's claim could alternatively be based on SGA, s 50(1): see P S Atiyah, J N Adams and H MacQueen, *The Sale of Goods* (10th ed, Harlow: Longman, 2001), pp 481-82.

2.2 Preconditions (Step 3)

Precondition for C's claim would be that: (1) a valid contract of sale has been concluded according to which B is obliged to pay the purchase price of US\$3,000 and accept the Green Frog; (2) B wrongfully neglects or refuses to accept the Green Frog and to pay the price (SGA, s 49(1) and (2)); (3) C holds the right to claim against B for the payment under such contract.

Precondition (1) and (3) have been fulfilled as explained above (Model Solution 1(b) and (c)). Further, B has wrongfully refused to pay the purchase price: see above Model Solution 1(b). B has not explicitly refused to accept the Green Frog. However, he has requested A to deliver the Green Frog while A had already done everything that was required from his side in order to effect such delivery. Consequently, C has wrongfully neglected his obligation to accept A's delivery.

The claim against B on the basis of SGA, s 50(1) for damages for non-acceptance has therefore been validly established and transferred from A to C.

2.3 Is the claim still with C? (Step 4)

C has not lost the claim against B by way of transfer or extinction nor has the claim been amended.

2.4 Enforceability (Step 5)

There is no reason why the claim should not be enforceable.

2.5 Conclusion

C can claim against B for damages for non-acceptance. The realisation of this claim is, however, subject to non-exercise of the claim under SGA, s 49(1).

124 Compare Jones, note 93, p 13, with regard to the construction of arguments for one or more potential legal actions: "First, it assumes that you have identified a legal right from the facts. To give a very simple example, you will have established that there is a contract, a term of which has been broken. You should also seek to identify the legal source of that right – in specific common law or statutory rules ... Second, it assumes that you can identify the cause of action accruing from that right ..."

- verifying that the (once established) claim is still with the claimant and has not been amended; and
- checking if the claim is enforceable.<sup>125</sup>

### *Structured Problem Solving in Mainland China*

#### General

Since the Chinese economic reforms began in 1978,<sup>126</sup> mainland Chinese law has been and is continuously being renewed and amended in order to be in line with the different stages of reform. Therefore, as already indicated above,<sup>127</sup> Chinese law must still be regarded as a law in transition. In particular, in the area of private law, to date no comprehensive Civil Law Code has been enacted, although several drafts have been under discussion.<sup>128</sup> On the contrary, many laws on more or less specific private law issues, such as property law, family law, contract law and law of inheritance were put into force.<sup>129</sup>

For a very long time, until the beginning of the 1990s, problem solving was rarely used for the purposes of legal education in mainland China,<sup>130</sup> which rather focused on theoretical concepts.<sup>131</sup> In more recent years the picture has changed. Casebooks have been published<sup>132</sup> and collections

125 Jones, note 93, p 138: "Draw into your net all possible defendants, and then turn round and consider all the possible defences open to them on the facts given."

126 Wang Liming, "Specific Performance in Chinese Contract Law: An East-West Comparison" [1992/2] *Asia Pacific Law Review* 18 at 20.

127 Compare above, text accompanying note 9.

128 Manthe, note 70, at 17.

129 In the private law sector, there are two more significant laws. These are: (1) *General Principles of Civil Law of the PRC* (effective since 1 January 1997 (referred to as GPCL)), Chinese/English, eg, in *China Laws for Foreign Business* (4) (Australia: CCH Australia Limited), pp 19-150; and (2) the *PRC Contract Law* (effective since 1 October 1999), English/Chinese, eg, in CLP 5/1999, p 19; W Shenming, R Cai and M Lee, *An Insider's Guide to the PRC, Contract Law* (Hong Kong: Asia Law & Practice, 1999), p 111.

130 For general aspects of legal education in mainland China, see R O'Brien, "Legal Training in the People's Republic of China at the Turn of the Century" (2000) 34(2) *The Law Teacher* 204. In 1997 Wang Liming, note 79, one of the most prominent Chinese law professors, published his book "Research on Tricky Contract Law Cases". In the foreword, p 1, he complained that the current law teaching methods have many disadvantages and claimed that, although China is a statutory law country, law should (also) be taught on the basis of disputes.

131 Legal journals and newspapers, however, had always reported on court decisions.

132 Wang Liming, note 79; Li Yanfang (ed), *Yian shuofa – hetongfa pian* (explaining law through cases – contract law) (Beijing: Zhongguo renmin daxue chubanshe, 2001); Lin Jia (ed), *Yian shuofa – qinquan minshi zeren pian* (Explaining law through cases – tortious liability) (Beijing: Zhongguo

of judgments of People's Courts have been made available.<sup>133</sup> However, it would appear that to date no distinctive problem solving method can be identified in the PRC. Methodological issues as such are not topics of a wider academic discussion<sup>134</sup> and it seems that methodological aspects of problem solving are yet to be discovered as a research topic.<sup>135</sup> It is for this reason that for the purpose of this article the Chinese situation can only provide input with regard to the question if the step-by-step method can be (and should be) applied in mainland China as a jurisdiction which does not traditionally belong to the Common Law or Civil Law legal families.<sup>136</sup>

### Can the Step-by-step Method be Applied in Mainland China?

As explained above, mainland Chinese statutory law is not always as clear as one would wish and particular areas of law are not yet codified at all.<sup>137</sup> The applicability of the step-by-step method<sup>138</sup> may, therefore, cause difficulties, for example when it comes to identifying a specific legal rule that can serve as the basis of a claim.<sup>139</sup> Despite these problems, which are

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renmin daxue chubanshe, 2001); Xie Lianguan (ed), *Hetongfa xinshi yu lijie – shang/xia* (New explanation of the contract law and case solutions, 1 and 2) (Beijing: Tonxin chubanshe, 2000); Zhang Dongmei, *Minfa tongze xinshi yu lijie – shang/xia* (New explanation of the contract law and case solutions, 1 and 2) (Beijing: Tongxin chubanshe, 2000).

133 Qiao Xianzhi, note 89.

134 Wang Liming, note 79, pp 5-6, who suggests that the disputes should be analysed by “applying all sorts of research methods (for example the comparative law method, the method of economic analysis etc)” and that the conclusion must be drawn on the basis of careful reasoning and with focus on the distinction of factual and legal questions. The solutions presented by Wang Liming throughout his book, however, are mostly problem-focused and not standardised as far as methodology is concerned.

135 Qiao Xianzhi, note 89, p 2: “Although our country has entered into a new historic era of rule of law, the legislative work is still lagging behind and some laws and regulations are not well drafted.”

136 Compare the previous section, “Structured Problem Solving in Mainland China – General”.

137 Compare the previous section, “Structured Problem Solving in Mainland China – General”; see also text following footnote reference 138.

138 In the years 2000-03, I have taught several courses on Chinese Civil Law and Economic Law of China at the School of Law of the City University of Hong Kong on the basis of the step-by-step method. The students were 2nd and 3rd year Hong Kong LLB students or Hong Kong legal professionals with Common Law background taking part in different LLM programs.

139 For example, under German law the claim of the owner against the (unjustified) possessor for restitution of the owned subject matter is based on Art 985 of the *German Civil Code*: see note 32. An equally clear provision cannot be found in current PRC property law.

caused by the (still) early stage of the establishment of the PRC legal system, no structural problems exist which might hinder the application of the step-by-step method.<sup>140</sup>

### *Should the Step-by-Step Method be Applied in Non-German Jurisdictions?*

The possibility of applying the step-by-step method in non-German jurisdictions does not necessarily mean that this possibility should be utilised. One might argue that, for example, the fact that the step-by-step method is not (yet) acknowledged outside Germany implies that its application is not appropriate in related jurisdictions. However, this argument is based on the assumption that the step-by-step

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140 In order to underline this statement the example discussed above (see “Example – Facts”) shall in the following be solved on the basis of PRC law by applying the step-by-step method to the claim relationship C against B. It can be seen that as far as the structuring is concerned basically no difference exists as compared with the model solution based on German law:

Claim of C against B for the payment of US\$3,000 (Step 1)

1. Basis of C’s claim (Step 2)

C’s claim could be based on the contract concluded between A and B on 2 October, Art 135 in connection with Art 79 PRC Contract Law.

2. Preconditions (Step 3)

Precondition for C’s claim would be that: (1) a valid contract has been concluded according to which B is obliged to pay of US\$3,000; (2) C holds the right to claim against B for the payment arising out of such contract:

(i) On 2 October A and B have concluded a contract. Pursuant to such contract B has the obligation to pay the purchase price of US\$3,000.

(ii) According to the contract of 2 October between A and B, originally A was the holder of the right to request B to pay US\$3,000. However, A assigned this claim to C on 15 December.

3. Is the claim still with C? (Step 4)

C has not lost his claim against B by way of assignment, extinction, nor has the claim been amended.

4. Enforceability (Step 5)

It is questionable if C’s claim against B is enforceable. B has raised the defence that he will only pay upon delivery of the Green Frog. According to Art 66 sentence 2 of the PRC Contract Law, one party may refuse the other party’s demand for performance if the other party has not yet performed its obligation.

A has not yet fulfilled his contractual obligation to deliver the Green Frog and to transfer title thereto to B according to Art 72 of the GPCL and Art 133 of the PRC Contract Law. Consequently, B had the right to refuse performance. After the assignment of A’s contractual rights to C and notification of B, B now has the right to raise this defence also against C (Art 82 PRC Contract Law). Consequently, A’s claim is currently not enforceable.

5. Conclusion

C has a claim against B for the payment of US\$3,000. However, this claim is currently not enforceable.

method does indeed only have significance in Germany, and that may already be questionable.

For instance, as Polanyi<sup>141</sup> has demonstrated, the acknowledgment and formulation of specific knowledge is not a precondition for its application.<sup>142</sup> Therefore, it could well be that the step-by-step method is applied outside Germany without ever having been formulated in abstract terms. As a matter of fact, Common Law lawyers normally confirm<sup>143</sup> that the step-by-step method is exactly how they would approach the legal analysis of a private law problem.

Moreover, it must be emphasised that also within non-German jurisdictions a unified problem solving-model can act as:

- a checklist for all the categories of relevant risk factors a lawyer needs to avoid;<sup>144</sup>
- as a directing device for structuring problem solving so that lawyers do not get drawn into one aspect of the problem solving process (perhaps by personal preference), and forget about other aspects;
- as a checklist of choice for thinking, communicating and acting so that all possible choices are considered.<sup>145</sup>

With reference to the advantages of the step-by-step method as they were introduced above,<sup>146</sup> one might therefore conclude that its application is justified wherever private law is regarded as a device to solve disputes among individuals and/or legal persons. The step-by-step method solely “turns this function into structure”, for which reason its application is not limited to Germany, the Common Law countries, mainland China or any other jurisdiction. Moreover, if the application of the step-by-step method is advantageous in order to guarantee efficient problem solving, then it can further be assumed that such a method is private law-inherent and not the product (only) of one (that is, the German) legal system. On the contrary,

141 M Polanyi in M Grene (ed), *Knowing and Being* (Chicago: University of Chicago Press, 1969), pp 123-37, 138-158, 211-24; M Polanyi, *The Tacit Dimension* (Gloucester, Mass: Peter Smith, 1983), pp 3-54; M Polanyi, *Personal Knowledge* (Chicago: University of Chicago Press, 1962), pp 69-131; Bolman, note 66, p 113.

142 Compare Polanyi, *The Tacit Dimension*, note 141, p 4: “we know more than we can tell”; see also Bolman, note 66, p 111; Solum, note 114, p 143.

143 In discussions with the author.

144 Compare Schultz and Sirico, note 41, p 43: “The single most important thing to remember about legal analysis is that completeness is everything.”

145 Costanzo, note 5; Jones, note 93, p 5; Krever, note 5, p 134.

146 Compare “Methodological Benchmarking” above (text following footnote reference 62).



the function of private law as such suggests the application of the step-by-step method even if that may not be obvious in any jurisdiction or if this acknowledgment is yet to be formulated.<sup>147</sup>

This conclusion is supported by the fact that the criteria, which are to be applied in order to assess problem solving methods, are not linked to one specific legal system. Certain legal rules, their historical development or the authority on which these rules are based may differ from jurisdiction to jurisdiction. This, however, does not in any way affect the assessment of problem solving methods on the basis of the criterion of efficiency.<sup>148</sup> In other words, the significance of efficiency<sup>149</sup> for legal work is “borderless”.

### *Consequences for Legal Education*

It is the natural objective of legal education to “create” the best lawyers. The difference between a good lawyer and the best lawyer lies not (only) in the amount of legal information that can be memorised. On the contrary, the difference mainly lies in the ability to apply law.<sup>150</sup> Moreover, the ability to apply private law includes the skill to work efficiently.

As argued above,<sup>151</sup> due to a lawyer’s desire to use efficient work practice, he or she should apply the step-by-step method when it comes to solving private law problems in any jurisdiction. The application of the step-by-step method is of course tremendously facilitated where awareness of the method exists and how and why it should be applied. I argue that one of the main tasks of legal education in the field of private law lies in creating such an awareness.<sup>152</sup> The acknowledgement of this task, however, inevitably leads to the necessity of groundbreaking changes.

### Summary and Kiss of Death

Solving private law problems means analysing and deciding (actual or potential) claim relationships between different

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147 Bolman, note 66, p 113 (“tacit knowledge”).

148 Compare “Methodological Benchmarking” above (text following footnote reference 62).

149 Compare “Methodological Benchmarking” above (text following footnote reference 62).

150 Pound History, note 4, p viii.

151 Compare above “Methodological Benchmarking” (text following footnote reference 62) and “The Claim Approach” (text following footnote 68).

152 In a broader context, Sugarman, note 12, p 26; Frug, note 78, at 56.

parties. An optimum problem solving method should provide for the most efficient work order in this context. The work order that fulfils this requirement comprises five steps as follows:

- Step 1 – analysis of the facts of a problem in order to determine and identify claim relationships between different parties.
- Step 2 – identification of a legal rule as the hypothetical basis of a specific claim.
- Step 3 – identification of the preconditions for the application of such a legal rule and examination to assess if these preconditions have been fulfilled, that is, assessment as to whether the claim has been established.
- Step 4 – verification that the claim is still with the claimant, that is, that it has not been transferred to a third party, extinguished or amended.
- Step 5 – examination of the enforceability of the claim.

German legal education and consequently also German legal practice is dominated by this step-by-step approach.

The late Karl N Llewellyn<sup>153</sup> once advised a young colleague never to identify an idea as being based on foreign law because such a revelation would be “the kiss of death”.<sup>154</sup> Accordingly, it is not the intention of this article to suggest that any German methodology should be applied also in other jurisdictions. As it was demonstrated in this article, however, the above step-by-step method is neither a product of any specific country or culture nor is its application limited to any single jurisdiction.<sup>155</sup> It rather gives expression to the logical sequence a lawyer would always follow when analysing claim relationships in the most efficient way. The step-by-step method is therefore a logical result of efficient problem solving and applicable and inherent (sometimes as tacit knowledge) in any private law system. Acknowledging the significance of the step-by-step method facilitates the utilisation of this methodological tool, which guarantees efficient problem solving. Ignoring this significance means to neglect the impact of efficiency on successful legal work.

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153 For Karl N Llewellyn, see Zweigert and Kötz, note 11, pp 247-48.

154 Riesenfeld, note 71, p 91; Mattei, note 11, p 219; for the skepticism of Chinese scholars to adopt foreign legal doctrines, see Wang Liming 1997, note 79, p 4.

155 See above, “Should the Step-by-Step Method be Applied in Non-German Jurisdictions?” (text accompanying note 140).