Chinese Commercial Law
(By Kui Hua Wang, OUP, 2000)

It is pretty much understood by now that mainland China (the PRC) "matters" in world trade terms, and in the future it will most likely come to matter even more. At a global level the PRC already ranks as the world's 7th largest exporter (at NZ$593 billion), and 8th largest importer (some NZ$536 billion), according to World Trade Organization figures for the year 2000. With its economy containing nearly a fifth of the world's population, and its GDP continuing to expand by nearly 8 percent per annum, the PRC's share of future world trade looks set to become even larger. This state of affairs has a particular relevance for New Zealand. Currently the PRC forms New Zealand's sixth largest export market, taking more than $725 million in goods and services in the year to June, 2000. In itself, this figure represents an increase of 17.7 percent over the year before. So for the foreseeable future the PRC can be predicted to take on an increasing importance for New Zealand as a market for foreign trade and investment.

Therefore, New Zealand businesses, like those elsewhere in the world, ignore the PRC at their peril. But entering into a relationship with Chinese commercial interests presents a variety of problems for those who are operating from beyond its borders.[1] For one thing, there are obvious linguistic and cultural barriers to be confronted – the most famous example of this problem being when the "Come Alive With Pepsi!" slogan was translated in the PRC as "Pepsi Brings Your Ancestors Back From the Dead", with rather negative results for Pepsi's attempts to crack the Chinese market.[2] Aside from these sorts of obvious problems, the emerging status of the PRC as a force in world trade raises further uncertainties. Fuelling the PRC's emergence as an economic force has been the country's profound shift from a centralised, "command and control" economy to a more market-oriented amalgam of "socialism with Chinese characteristics".[3] And a central feature of this shift of economic regulation has been a rewriting of the legal rules that govern the exchange of goods and services in the PRC – what may be generally called the PRC's "commercial law" – to enable it to "get on track with the international community" (gen gouji jiegui).[4] Attempting to understand (or perhaps more appropriately, decipher) the operation of this new legal structure poses a real challenge for those wishing to do business with the PRC.

Against this background, the appearance of any general overview of the complexities of this area is to be welcomed, especially when it is one that provides as thorough a guide as does Ms Kui Hua Wang's *Chinese Commercial Law*. In her

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1 See Vaughan Yarwood, "In China, try not to bite the wax tadpole", *NZ Herald*, 6 June 2001, E4.

2 Although this story has been widely reported, and Pepsi has never denied this occurring, it should still be noted that it may simply be an "urban myth". See http://www.snopes2.com/business/misxlate/ancestor.htm (visited May 29, 2001)

3 Daniel Burstein & Arne de Keijzer, *Big Dragon: China's Future, What It Means for Business, the Economy, and the Global Order* 330 (1998)

4 Doug Guthrie, *Dragon in a Three-Piece Suit: The Emergence of Capitalism in China* xi, 151 (1999)

survey of the field Ms Wang traverses a very broad range of commercial law in admirable depth. So, contract law, joint-venture regulation, foreign trade law, the protection of intellectual property, taxation and banking regulation, foreign-exchange controls, and employment law all get coverage. Ms Wang's discussion quite clearly and concisely summarises the relevant sources of legal regulation, sets out the scope and effect of these regulations, and gives references to guide the interested reader who wishes to further explore any particular issue. Whilst not pretending to be a complete guide to the law – apart from the inclusion of some intellectual property cases there are few Chinese court decisions discussed, nor are copies of the relevant legislation provided – the book does a more than adequate job of informing the reader of the central issues involved in each area.

The overall usefulness of *Chinese Commercial Law* lies not only in its content, although this certainly is very valuable, but also in its general presentation and accessibility. Each general subject is helpfully divided into sub-categories, which makes the relationship of the individual point to the topic as a whole easily discernible. (That said, when I reached a section entitled "2.4.1.3.11: Where and when is the formation of a contract concluded?" I did wonder if this process had perhaps gone a little too far.) The subject matter is conveyed in language that is clear and concise, without being overly simplistic or patronising. In an era of jargon-filled texts this feature of the present work is exceptionally pleasing.

So as a general overview and guide for those seeking a practical insight into how the PRC's commercial law currently operates the book is by-and-large a success, subject to one (probably unavoidable) qualifier. The very fact that the PRC has so radically overhauled its commercial law in such a short period of time, and that it is continuing to do so today, means that on some occasions events would appear to have outstripped the author's ability to describe them fully. For instance, in chapter 2 Ms Wang describes the development of the law of contract in the PRC, leading up to the introduction of a new, codified *Contract Law* in 1999. Unfortunately, she then has to inform us that "...it is not clear whether those contracts entered into prior to 1999 under the three pieces of repealed contract legislation will be governed by the new *Contract Law*" (page 55). Furthermore, after concluding her discussion on the content of this new *Contract Law*, Ms Wang states that "[a]t the time of writing this book (late 1999) it is impossible to make any firm positive or negative comments upon [the legislation]..." (page 75). Now, given the fact that the *Contract Law* had only just been introduced when this book went to the publisher, it would be wrong to count this as too great a criticism of the author. Ms Wang still does a good job of outlining the form and content of the new legislation, and an admission that she does not know what the effect of the law will be seems preferable to a confident but possibly mistaken claim of certitude. Nevertheless, the inability to provide a firmer statement as to the overall effect of the new law leaves the reader with something of a dissatisfied feeling, and does detract from the book's overall practical utility.

When looked at from a more academic perspective, *Chinese Commercial Law* is limited by its author's admission that "the book certainly does *not* strive to provide an in-depth theoretical or critical analysis of [Chinese commercial laws]" (page xxv). That being so, aside from its purely descriptive analysis of the present legal regime the book's greatest interest for the academic reader lies in its

depiction of a concerted attempt to create through law a new system of social norms.[5] As *Chinese Commercial Law* constantly notes (*e.g.*, pages 142-152), the general economic policies of the PRC government have of late been designed to make the practices and behaviour of the economic actors in the country more attractive to foreign investors, and to partners in foreign trade. (A point I shall return to again at the conclusion of this review.) Reform-minded leaders within the PRC who champion the greater use of "free markets", as well as the PRC's Western trading partners, have urged that the new commercial law framework should provide a set of clear, bright line rules designed to protect individual property holdings, rules which in turn are applied consistently and enforced by neutral state agencies (page 43). Arguments in support of this position are often bundled together into a claim that the PRC's future economic prosperity depends upon it as a country abiding by "the rule of law". And as *Chinese Commercial Law* demonstrates, the PRC has over the past decade moved towards formalising this position through the reforms it has made to the ways in which its legal system regulates the exchange of goods and services. Indeed, it has done so even to the degree of amending its constitution in 1999 to state that "[t]he People's Republic of China shall practice ruling the country according to law, and shall construct a socialist rule-of-law state."[6]

However, if I may co-opt the words of Lou Reed, when it comes to trying to change societal behaviour through law we often find that "between the thought and the expression lies a lifetime."[7] The general problem is that formal legal rules prove to be of only limited value where the underlying social norms of a society are somehow in conflict with the content of those rules. By "social norms" I mean here those commands or obligations that are understood by members of a particular society as telling them what to do under a given set of circumstances, and that are therefore binding upon those who wish to be a part of the society that is at least in part formed by such commands or obligations.[8] Now, clearly a formal legal rule may incorporate or express a pre-existing social norm, and showing obedience towards such a formal legal rule may even in itself form a type of social norm, as H.L.A. Hart convincingly demonstrated.[9] But the command or obligation that constitutes a given social norm will most usually have its genesis in some other, non-legal source (such as the cultural practices, religious beliefs, or family expectations within a given society). And where a social norm derived from such a non-legal source prescribes a form of behaviour that is somehow in conflict with the behaviour demanded by a formal legal rule, then obvious difficulties will arise.

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5 For a discussion of "social norms" and their relation to formal legal rules see Lawrence E. Mitchell, "Understanding Norms" (1999) 49 *University of Toronto Law Journal* 177.

6 Albert H.Y. Chen, "Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law", (Fall 1999-Spring 2000) 17 *UCLA Pacific Rim Law Journal* 125, 128 (quoting the amendment)

7 The Velvet Underground, "Some Kinda Love", *The Velvet Underground*, Verve Records, 1969.

8 Mitchell, *supra* note 5, 183.

9 H.L.A. Hart, *The Concept of Law* (2d. ed. 1994) chs. 2-4.

One manifestation of the general problem just described, where a society's underlying norms contradict some formal legal rule, is that those who are in charge of enforcing the rule will not always do so, or will do so without any great enthusiasm for their task. We may call this the "reluctant policeman" problem. A second aspect is that even if state officials are prepared to try and vigorously enforce the formal legal rule, the fact that it has not been internalised as a social norm by those who are meant to obey the rule means that there is likely to be wide-spread non-compliance, leading to heavy enforcement costs and even potential social conflict created by what may be seen as over-zealous state action. Therefore, we might conclude that those formal legal rules that are most successful at regulating social conduct will actually be those that require the least enforcement because the legal rule overlaps with an already existing social norm that governs the behaviour. Compare, for instance, the effectiveness in New Zealand of the legal prohibition on murder with the current legal prohibitions on cannabis smoking.[10]

The issue is important in the present situation because – as *Chinese Commercial Law* points out (particularly at pages 37-47) – the forms of behaviour that we in the West usually associate with the "rule of law" have, at best, an uneasy fit with traditional customary and social practices in the PRC.[11] This fact probably should not be surprising given the PRC's unique cultural heritage, its long and complex history, and in particular the radical social upheaval it experienced between the late 1950s and the mid 1970s.[12] But it means that many of the reforms to the PRC's commercial law that have been introduced at the level of formal legal rules have only had a limited success in altering its actual commercial practices. The discussion in *Chinese Commercial Law* of the legal protection afforded in the PRC to Intellectual Property Rights (IPR) provides a nice illustration of this point. Chapter six of the book provides a summary of the recent laws that have been introduced in the PRC to achieve the protective goal, including new shields for copyright, trademarks, and patents. However, when the chapter turns to discuss how well these laws have worked in practice it finds "[t]he main elements that are proving to be obstacles to the effective enforcement of Chinese IPR laws are political, economic, historical, cultural, educational, regional and national elements (*sic*)" (page 204).

All of which rather leaves one wondering what *isn't* an obstacle to the enforcement of these new laws! Whimsy aside, however, these factors do present

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10 For the general ineffectiveness of laws criminalising the use of cannabis see K. Dawkins, "Cannabis Prohibition: Taking Stock of the Evidence", (2001) 10 *Otago Law Review* 39.

11 For a discussion of the idea of "the rule of law" in China see Eric W. Orts, "The Rule Of Law In China" (2001) 34 *Vanderbilt Journal of Transnational Law* 43.

12 A time period when the PRC "was [what] one might call an 'a-legal' society – a nation with neither lawyers, nor law enforcement, nor laws. Policy and administrative decisions rested instead upon interpretation of edicts and slogans – in some cases explicit and clear, in others as vague as 'Criticize Confucius and Lin Biao,' or 'Smash the Four Olds' – by officials aware at all times that they might be arrested either for insufficient dedication to these slogans, or for what might retroactively be seen as excessive dedication when policies changed." Charlene Barshefsky, "Trade Policy and the Rule of Law" (2000) 9 *Minnesota Journal of Global Trade* 361, 364.

rather a challenge to the idea that the introduction of a set of formal legal rules alone can work to control and change commercial behaviour. Consider just one of the "elements" listed above – the cultural. *Chinese Commercial Law* informs us that "[IPRs] are something very foreign to Chinese culture but *(sic)* imitating and sharing have a long history, and are rooted, in China's social development" (page 205). The net effect of this social norm would thus appear to be:

(1) That an "idea" or a "concept" is not seen by the members of society in the PRC as a "thing" that is capable of being owned; and

(2) That the more popular an idea or concept is, the more it *should* be studied and imitated by others.

It need hardly be stated that in this context any attempt to enforce a formal legal rule guaranteeing the owner of a trademark, patent, or other form of IPR the exclusive right to use and profit from some idea or concept will involve fighting a steeply uphill battle.

This is especially so when the other "elements" discussed in *Chinese Commercial Law* are thrown into the mix. These include the benefits gained by the PRC economy through replicating successful foreign concepts or inventions at a lower cost (pages 204-205); the problems of corrupt officials charged with overseeing laws they feel are unimportant anyway (pages 206-207); the regionalism of the PRC (page 204); and the lack of a strong, centralised judicial system (page 204). The net effect, of course, is that despite the creation of a quite complete formal legal regime to cover IPRs, the actual protection afforded by the legal system in the PRC is significantly less complete than exists in Western jurisdictions. It also means that "infringements" of the IPRs of Western firms – as perceived by those firms, but not necessarily by those carrying out the "infringing" – continue to be rife within the PRC. Which may lead a reader of *Chinese Commercial Law* to ask exactly what is the "cash value" of the PRC's moves to introduce a regime of IPR protection. Does it have much purpose besides being window-dressing designed to placate the demands of foreign trading partners and the like?

It is possible to extrapolate from Ms Wang's comments in *Chinese Commercial Law* and fashion at least two responses to this challenge. First of all, she rightly tells us, just because the creation of such a legal regime is not in itself sufficient to protect fully IPRs (or to alter other forms of behaviour by commercial actors in the PRC) does not necessarily mean that the introduction of formal legal rules to govern these sorts of issues has no function. Indeed, to an extent the introduction of such rules can be seen as a step in the development of a new set of social norms.

> [O]nce some locally developed IPR or products have been infringed, it will be easier for locals to understand the importance of protecting the intangible property of foreign investors. Local Chinese will appreciate intellectual property as another form of property and ownership once their own particular invention or creation has been counterfeited as well. (page 214)

So the further development of the PRC's economy along market-capitalist lines – which the new commercial law regime will both enable and encourage – might lead to the creation of a domestic IPR owning class within the PRC. In

turn, the self-interest of this IPR owning class may encourage a shift in social norms whereby copying and imitating are seen in a less positive light, and thereby create domestic pressure for the stricter enforcement of legal rules granting individual rights over "ideas" and "concepts". In other words, as Ms Wang reminds us, the relationship between social norms and formal legal rules is not a one-way street. The very act of instituting some rule at a formal legal level can have a flow-on effect at the level of social norms, by helping to create a new social climate which encourages members of society to internalise the content of the legal rule as a norm.

We might see this claim as representing a kind of legal existential committment, or a jurisprudential version of the "if you build it, they will come" dicta. Behind this committment lies a particular vision, derived from the presumed rationality of *homo economus*, of the nature of markets and their connection to "the rule of law". So once a clear set of legal rules is in place that protect individual property holdings, Ms Wang then assumes that the majority of economic actors in the PRC will come to realise that it is in their long-term material interest to abide by these rules, irrespective of whatever short-term gains breaking or ignoring the rules might bring. But there is, of course, no guarantee that the PRC's new commercial law will become internalised in this way as a new set of social norms. Indeed, the conflict between the new legal order and the pre-existing social norms may become so great that the new legal order is rebelled against.

For example, even though the market reforms underpinned by the PRC's new commercial laws have raised the absolute level of wealth of most Chinese, they have also acted to increase greatly the disparity in wealth between the richest and poorest. Another effect has been the systematic undermining of the guaranteed social services provided to the citizens of the PRC by the state. In a culture that has traditionally placed great emphasis on collectivist ideology, both before and after the Revolution of 1949, and in which the "iron rice bowl" has until recently guaranteed workers an income irrespective of the economic success of the enterprises they worked for (page 247), these changes have led to a state of affairs where:

> there is no doubt that China is in the grip of widespread discontent. Rising crime and serious, if sporadic, protests are a sign that even though absolute poverty is declining, at least in the countryside, rising relative poverty is resented. And in the cities, absolute poverty is increasing as well.[13]

So many ordinary Chinese do not actually like the effects the new market system, underpinned by the reformed commercial laws, is having upon their society and the relationships therein. Whether or not this conflict forces the PRC leadership to rethink its move towards a more-marketised economic system is a moot point; the treatment of dissent in the PRC from the Tiananmen Square massacre through to the recent repression of Falun Gong supporters shows that the authorities are more than prepared to crush those perceived to be challenging the path that the leadership has chosen to take. Which brings us to the second

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13 "To each according to his abilities", *The Economist*, 2 June 2001, 17.

way in which the introduction of a set of formal legal rules to govern commercial practices in the PRC can have an influence on social behaviour.

Social norms in general rely for their efficacy upon a mix of internalised sanctions (such as the guilt felt by a union member for crossing a picket line) and informal responses by other members of society (such as the contempt expressed by other members of the union towards such behaviour). By contrast, formal legal rules have the characteristic of being coercively enforceable by the state.[14] Such enforcement is not guaranteed (the "reluctant policeman" problem), and in itself carries costs (including raising the resentment of those who are subject to the coercive power of the state). But it can be effective in altering social behaviour, especially when the state that is deploying the coercion is one that is as authoritarian as the PRC. Consider the problem of corrupt local Communist Party officials who have been acting to protect those who are involved in breaching IPRs for commercial gain. Such officials have become a recent target of a "strike hard" campaign by the PRC national government. The result has been a rash of executions, estimated by Amnesty International at over 40 people per week.

Ms Wang makes repeated calls in *Chinese Commercial Law* for the PRC to use its coercive power to punish those who fail to abide by formal legal rules to "enforce" the newly created commercial law framework. But she then rather tends to gloss over the manner in which the PRC government does this enforcing. We can see this tendency, for instance, when she broadly opines that "[w]ithout a successful anti-corruption campaign and the elimination of local protectionism, the protection of foreign IPR will only exist in theory or on paper, rather than in practice" (page 214). Whilst this statement may be correct in theory (an unenforced law is, after all, but a paper tiger), in practice it also means Ms Wang appears to be endorsing an approach under which such human rights niceties as open and public trials, rights of appeal, rights to a full defence, and the like go by-the-by. In evading this issue Ms Wang shares a common trait with many Western commentators – the compartmentalising of trade and economic issues from human rights issues. On the one hand, the PRC is urged to construct a legal regime that accords with the expectations of Western trading partners and investors, and to punish those who break the rules. On the other, Western governments pronounce themselves shocked – shocked! – to find out that human rights are being abused by the authorities in Beijing in the process of carrying out this enforcement.

The issue of Western pressure on the PRC to reform its commercial law and practices brings me nearly full circle in my discussion, and leads me to one final, and more major criticism, of *Chinese Commercial Law*. As has been already highlighted, an important goal of the PRC's efforts to harmonize the rules governing its commercial practices with those of other trading nations is to win membership in the new international "trading club" of the World Trade Organization (WTO).[15] In fact, we can draw a parallel between the commands

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14 See Grant Lamond, "Coercion and the Nature of Law" (2001) 7 *Legal Theory* 35.

15 See Article X of the *General Agreement on Tariffs and Trade*, requiring member states to have an internal legal system administered in a "uniform, impartial, and reasonable manner".

or obligations contained in the rules of the WTO and the social norms that operate at an individual level within each nation state. In order to enjoy the benefits that flow from being a member of the emerging international "community of Law"[16] being constructed by institutions such as the WTO, the PRC is expected to pattern the behaviour of its economic actors to match the trading and commercial norms expected by the other members of that community.

Given this fact, it is questionable whether the coverage in *Chinese Commercial Law* adequately reflects just how much pursuing the goal of "gen gouji jiegui" has shaped the law,[17] or adequately outlines the further consequences that will follow if and when the PRC does become a member of the WTO. I do not mean to imply that Ms Wang *completely* ignores the role of the WTO. At various points she does point out that "[a]ll these reform measures [in respect of domestic trade laws] are part of China's attempt to join the WTO" (page 152), and "[b]efore China can be accepted into the WTO, it is crucial that China brings its practices in foreign trade into line with international rules and disciplines" (page 174). But the overall analysis of the likely impact of China's accession to the WTO does not progress much beyond these generalities.

Indeed, it gets off to a very bad start when we are solemnly told that "[w]orld trade is mainly governed by the General Agreement on Tariffs and Trade (GATT) of the United Nations", and that "China wants to resume its GATT membership..."(page 146). First of all, the original GATT treaty was not part of the United Naitons. It formed an entirely separate international framework. In addition, it is misleading to characterise the GATT as the centerpiece of world trade regulation. For on the 1st of January, 1995 the GATT became simply a subsidiary agreement within the broader auspices of the new WTO framework. The point may seem like a carping one, given that Ms Wang does go on to recognize that the WTO is the GATT's "successor organisation", but I cannot help but feel it is symptomatic of a deeper failure to grapple adequately with the importance that the accession of the PRC to membership in the WTO may have.[18]

For instance, *Chinese Commercial Law* tells us that "[g]enerally, [foreign funded financial institutions] cannot engage in local currency ... business unless they receive special approval from the People's Bank of China" (page 232). However, under the terms of the deal whereby the PRC is to get membership in the WTO, foreign banks will be permitted to engage in local currency corporate banking with local enterprises two years after the PRC's accession, and local currency retail banking with local individuals is to be permitted within five years. It seems probable that anyone interested in how the law in the PRC governs the actions of foreign banks would want to know of the possibility of these future legal developments. In a similar manner, as a part of the price for gaining entry to the WTO, the PRC will have to implement the provisions found in the *Trade-Related Aspects of Intellectual Property Rights Agreement*, which will further

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16 See, *e.g.*, Anne-Marie Slaughter, "A Liberal Theory of International Law" (2000) 94 *American Society of International Law Proceedings* 240.

17 See *supra* note 4 and accompanying text.

18 Raj Bhala, "Enter the Dragon: An Essay on China's WTO Accession" (2000) 15 *American University International Law Review* 1469, 1523-1528.

strengthen the rights of foreign owners of intellectual property. But the reader will search chapter six in vain for the fact that this agreement even exists at an international level, let alone that there is a possibility it will be adopted by the PRC in the near future.

Again it would be wrong to criticize Ms Wang here for failing to crystal ball gaze, or for failing to comment on events that had not yet occurred before the book was published. It is true that the final form of the agreement on the terms under which the PRC would join the WTO was not reached until September, 2001, and the PRC's actual accession to the body will not occur until early 2002. But that being said, the desire of the PRC to gain accession to the WTO has been evident for some time (as *Chinese Commercial Law* does to some extent recognise). Given this fact, I would like to have seen more discussion of how the pursuit of this goal has affected, and is likely to continue to affect, the development of the commercial law of China. After all, Ms Wang (quite properly and instructively) devotes the entire first chapter of the book, at some 50 pages, to "China's Legal System: Yesterday and Today". It would have improved this book if a similar amount of coverage had been given to the unfolding impact of the new world trading regime on the commercial law of the PRC, instead of the 2 1/2 pages that *Chinese Commercial Law* does devote to it.

That being said, *Chinese Commercial Law* does provide a reasonably detailed roadmap to an important and emerging area of law, and Ms Wang is to be commended for that. Her book gives a newcomer to the territory a grasp of the essentials, while at the same time providing enough contextual material to satisfy a reader looking for some deeper understanding of the sources of the stresses and conflicts that the PRC is currently going through.

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