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China enacts a new Contract Law for the new millennium

Abstract

Extract:

With China about to enter the World Trade Organisation, and the immense implications this has for global trade and investment flows, it is worth examining the latest developments in the Chinese legal system. This is an important matter for it is the legal system which must ultimately underpin China's successful integration into a rules-based global economic system.

Keywords

Contract Law, legislation, Chinese Government, global

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China Enacts a New Contract Law for the New Millennium

*By Chen Xuebin**

With China about to enter the World Trade Organization, and the immense implications this has for global trade and investment flows, it is worth examining the latest developments in the Chinese legal system. This is an important matter for it is the legal system which must ultimately underpin China's successful integration into a rules-based global economic system. Most outstanding in terms of legal reform is the introduction of the Contract Law of the People's Republic of China (PRC) on National Day, October 1st, 1999 (hereinafter referred to as the new Contract Law). It replaced a host of existing laws, these being the Economic Contract Law of the PRC (hereinafter referred to as the Economic Law), the Law of the PRC on Economic Contracts involving Foreign Interests (hereinafter referred to as the Foreign Contract Law) and the Law of the PRC on Technology Contracts (hereinafter referred to as the Technology Contract Law).

The term "contract", is commonly used in diverse ways. Various writers have attempted to define what is meant by "contract". Most, like Stephen Graw, agree on the key elements, these being:

1. the need for a promise or promises;
1. the need for the promise or promises to be between two or more legally capable persons (called "parties to the contract");
1. the need for the promise to create an obligation; and
1. the need for that obligation to be enforceable at law.(1)

The Past: A category-based and policy-based legal system

Legislators in China generally used to categorise the contract concluded by and between parties, and gave each a legislation of law. The first category was the economic contract, which was governed by the Economic Contract Law; the second was the technology contract governed by the Technology Contract Law; the third was the economic contract involving foreign interests governed by the Foreign Contract Law but with one exception; the fourth was other contracts. The General Principles of Civil Law of the PRC (hereinafter referred to as the Civil Law), strongly affects legislation in China, and has influenced the new Contract Law. Under the Civil Law, the above-mentioned contracts belong to Creditor's Rights in Chapter 5: Civil Rights. Sometimes such categorisation failed to be of service as, for instance, when it was difficult to tell whether a contract was to be categorised as an economic or foreign contract. The criteria were not clear. For example, when does an economic contract cease being governed by the Economic Contract Law and become a technology contract governed by the Technology Contract Law, or even one governed by the Foreign Contract Law?

Legal systems emerge from cultural and socio-historical contexts. In China, prior to the watershed year of 1978 when it entered the current reformist era, there had been no law but only policy on the contracts. Influenced by the U.S.S.R., a fellow Communist Party ruled state, planning took place at various levels within the administrative and political hierarchy. Once there was a contract, it had to

be based on the State plan or relate to the key projects identified for imports and exports. At that time, ordinary people in China had little or no knowledge about contracts, and could not tell contractual rights from proprietary rights.

Post-1978 Requirements

Based on the 1978 Constitution, the Law of the People's Republic of China on Chinese-Foreign Equity Joint Venture (hereinafter referred to as Equity Joint Venture Law), effective on July 8, 1979, requires in Article 3 that all parties to an equity joint venture shall submit their agreements, contracts and articles of association to the State's Competent Department of Foreign Economic Relations and Trade (simplified as "the examination and approval authority" hereinafter) for examination and approval and to the concerned department of the State Administration for Industries and Commerce for registration. With a view to expanding international economic cooperation and technological exchange, the PRC permits foreign companies, enterprises, other economic entities or individuals to incorporate themselves, within the territory of the PRC, into equity joint ventures with Chinese companies, enterprises or other economic entities on the principle of equality and mutual benefit and subject to authorisation by the Chinese Government. The Chinese Government protects, by the legislation in force, the investments of foreign parties, the profits due them and their other lawful rights and interests in equity joint ventures, pursuant to the agreements, contracts and articles of association approved by the Chinese Government.(2)

At this stage, contracts for equity joint ventures were considered as documents agreed by and between Chinese and foreign investors, which provide their basic rights and obligations in the setup and operation of joint ventures. Equity Joint Venture Law introduced the term "contracts" and left it open. It did not give us a concept of contracts. This has since developed. Before the introduction of the new Contract Law in China, there have been at least 4 pieces of legislation (the above-mentioned) concerning the contract. On December 13, 1981, the Economic Contract Law (the Economic Contract Law of the PRC was effective on July 1, 1982, and thus we always call it 1982 Economic Contract Law) for the first time gave a concept of the economic contract.

At the beginning of the post-1978 economic reform, unlike Stephen Graw's statement about need for the promise(s) in Western countries, there were two issues pertinent to the contract in Chinese consideration. The first was that of the economic goals, and the second was that of the subjects, that is, the contract parties. The key to the aim for a contract the parties sign is for the purpose of realising certain economic goals. The Economic Contract Law of July 1, 1982, says in Article 2 that economic contracts are agreements between legal entities for the purpose of realising certain economic goals and clarifying each other's rights and obligations. The 1982 Economic Contract Law introduced contractual rights and obligations and thereby advanced China's legal system.

At this stage, the technology contract belonged to one type of economic contracts.(3) It was not until November 1, 1987, that the Technology Contract Law became effective. From then on, the technology contract has not been considered to be an economic contract though it often seems to operate for the purpose of realising an economic goal. As influenced by the Economic Law (1982), Article 2 of the Foreign Contract Law - effective on July 1, 1985 - provides that the Foreign Contract Law shall apply to economic contracts concluded between enterprises or other economic organisations of the People's Republic of China and foreign enterprises, other economic organisations or individuals. It still expresses contracts as economic contracts, i.e. a contract with the purpose of realising certain economic goals.

Some change occurred in the Economic Contract Law amended in 1993. According to Article 2, the 1993 Economic Contract Law applies to contracts signed between the subjects who enjoy equal rights in civil affairs, in order to clarify each other's rights and obligations in the realisation of certain economic goals. Here parties to a contract are intending to clarify each other's rights and obligations "in" not "for the purpose of" the realisation of certain economic goals. I am not sure whether it has

been influenced by the Civil Law, which was effective on January 1, 1987. In any case, we can read the provision contained in the Civil Law which states: "A contract shall be an agreement whereby the parties establish, change or terminate their civil relationship." There is no particular requirement for the purpose of economic goals: all that is mentioned is that the parties to a contract establish, change or terminate their specific civil relationship. Such civil relationship, governed and protected by Chinese laws, arises between contractual civil subjects with equal status. The contract on a property relationship in the Civil Law relates to the objects of property including tangible and intangible ones, which we could not say are without economic value. We find the provision reasonable here. Similarly, Allan and Hiscock wrote: "Contracts today are seen either creating rights or transferring them. Rights have economic value and, therefore, are part of assets or property of the person in whom they are vested" and "it is appreciated that all property, tangible as well as intangible, is a matter of rights."⁽⁴⁾

The New Contract Law, 1999

What does the new Contract Law say to a contract? Article 2 of the new Contract Law provides that "a contract in this Law refers to an agreement establishing, modifying and terminating the civil rights and obligations between subjects of equal footing". A contract stipulated in the new Contract Law, the same mainly as the Civil Law, is an agreement which is to establish, modify and/or terminate the civil rights and obligations between specific subjects. The essentials of any contract, in Graw's statement, are the rights, duties and liabilities that arise from the promises made by the parties.⁽⁵⁾ Such rights and obligations are based on contracts which represent a consensus of promises between civil subjects of equal status, irrespective of whether it is for the purpose or realising one's economic goals. There is no exception to this, even if a contract involves foreign interest. The new Contract Law gives us a new concept of contract.

All natural persons are legal persons. Contracts create legal rights and duties, and legal personality in the form of power to enter into contracts, to acquire rights and to incur obligations may pertain not only to natural persons but also to non-natural or juridical persons.⁽⁶⁾ At the time the Economic Contract Law (1982) was effective, the parties to a contract could only be legal entities, not natural persons. If one party to a contract was a natural person, there sometimes arose a problem in the Chinese court. This was so even if another provision in this Law, concerning economic contracts concluded between self-employed individuals or rural commune members and legal entities, might be considered with reference to the Law.⁽⁷⁾ But for other natural persons, there seems they have nothing to do with economic matters even if he or she had the specific purpose of realising his or her economic goals.

This had been changed in the Economic Contract Law amended in 1993 for the subjects. Article 2 states the law applies to contracts signed between legal persons, economic organisations, individual households engaging in industry and commerce, and rural households contracting for independent operations who enjoy equal rights in civil affairs to clarify each other's rights and obligations in the realisation of certain economic goals.

The Foreign Contract Law provides in Article 2 that the Foreign Contract Law "shall apply to economic contracts concluded between enterprises or other economic organizations of the People's Republic of China and foreign enterprises, other economic organizations or individuals". A contract involving foreign interest (henceforth referred to as foreign economic contract) here is based upon the subjects as well as economic matters. For a Chinese contractual party, it has to be an enterprise or other economic organisation, excluding an individual. No natural person of Chinese citizenship would be permitted to conclude a foreign economic contract, but a natural person of foreign citizenship could be.

The Technology Contract Law applies to contracts concluded between legal persons, between legal persons and citizens, and between citizens for establishing relations of civil rights and obligations

with respect to technology development, technology transfers, technical consultancy and technical services, but not to contracts to which a foreign enterprise, organisation or individual is a party.(8) Here no provision limits the subjects to a domestic contract but to a contract involving foreign interests, so if one contract party is a foreign company, the contract should be called a foreign economic contract. There is still a certain confusion on this matter. Some professional people, such as professors of law, lawyers and judges, usually prefer the Civil Law to the Economic Contract Law. According to the provision of Article 85 of the Civil Law, "a contract shall be an agreement whereby the parties establish, change or terminate their civil relationship." Such a civil relationship including property relationships and personal relationships governed and protected by Chinese laws arises from contracts between specific civil subjects with equal status - that is, between citizens, between legal persons, and between citizens and legal persons. The concept of the contract in the Civil Law covers a complex and comprehensive meaning. It covers a contract between natural persons - that is, between citizens, and sometimes between citizen(s) and legal person(s). This is usually said to be a narrow civil concept. It also covers a contract between legal persons, and sometimes between natural person and legal person(s). Companies and enterprises are generally thought to be legal entities or legal persons. What about the other organisations? The Civil Law (1987) let contracts pertain to the Debtor's Rights, which is different from Proprietary Rights, but it could not resolve everything in understanding the concept of the contract. The Civil Law could not cover specific cases in particular kinds of contracts at all.

Calls for a united contract law emerged. The new Contract Law of 1999 expresses a fundamental factor: A contract is an agreement between the subjects, no matter they are natural persons, legal persons or other organisations. A contract should be an agreement of civil relationship being concluded and signed by and between specific civil subjects, that is, by and between two or more natural persons, by and between natural person(s) and legal person(s) or other organisation(s), by and between legal persons, by and between legal person(s) and other organisation(s).

A unified concept of contracts

The old classification system in contracts used to cause confusion in China. Although a technology contract was said to be different from an economic contract since 1987, and they became two kinds of contract under different laws, the concept used for these contracts was applicable only to domestic cases; if the contract relates at least to one party who is a person or enterprise from another country, that might be another case - an international case. In China, the latter has, as mentioned above, been called a Foreign Economic Contract and has been governed by the Foreign Contract Law. An equity joint venture contract is one kind of economic contract involving foreign interests. The provisions of the Foreign Contract Law, however, do not apply to all economic contracts involving foreign interests. The commodity trade contracts, joint equity enterprise contracts, co-operative enterprise contracts, contracts for the co-operative exploration and exploitation of natural resources, credit contracts, leasing contracts, technology transfer contracts, project tender contracts, contracts to supply complete sets of equipment, processing contracts of work, labour contracts, compensation trade contracts, contracts for scientific or technical consultancy or design service, contracts of guarantee, insurance contracts, storage and custody contracts and agency contracts, which are concluded between an enterprise or other economic organisation of the People's Republic of China and a foreign enterprise, other foreign economic organisation or foreign individual, shall follow the Foreign Contract Law.(9) Nevertheless, international transport contracts, including international shipping contracts, international air-freight contracts, international rail-freight contracts and international double entry through-transport contracts, shall be excluded.(10) They should be governed under the Maritime Code of the People's Republic of China. Technology transfer contracts that involve foreign interests belong to economic contracts, but those concluded between domestic parties do not.

As influenced by the Civil Law as well as by international treaties and practice, the new Contract Law of 1999 unified the concept of contract into the civil law line. Except for agreements involving

personal status relationship, such as on matrimony, adoption, guardianship, etc., under the provisions of other laws,(11) the new Contract Law governing all other contracts divides contracts into two categories. The first is based on contract parties, that is, domestic contracts and foreign contracts which involve foreign interests; the second is based on the diversification to 15 kinds of contracts in the Specific Provisions. They are contracts for sales, contracts for supply and use of electricity, water, gas or heating, contracts for donation, contracts for loans, contracts for lease, contracts for financial lease, contracts for work, contracts for construction projects, contracts for transportation, contracts for technology, contracts for storage, contracts for warehousing, contracts for commission, contracts for brokerage, contracts for intermediation. If there are provisions as otherwise stipulated in respect to contracts in other laws, such as contracts for guarantee or for insurance, or there is any contract which is not addressed explicitly in the Specific Provisions, the new Contract Law says, the former shall follow the provisions of the other laws, such as the Guarantee Law or the Insurance Law; and the latter shall follow the provisions of the General Provisions of this Law. The most similar provisions in the Specific Provisions of this Law or in other laws may be applied *mutatis mutandis*.(12)

As to the concept for a contract, Article 2 of the new Contract Law provides, as stated above: "a contract in this Law refers to an agreement establishing, modifying and terminating the civil rights and obligations between subjects of equal footing, that is, between natural person, legal persons or other organizations." It expresses another key point: A contract is an agreement between the subjects, a consensus of the parties' intentions on certain rights and obligations relating to property. The intention to create legal relations between the parties, to create and effect the legal rights and duties between them, is an essential characteristic of all contracts.(13) That is to say, the intention must be to impose a duty on the promisor to fulfil his promise, and to confer a right on the promisee to claim its fulfilment - which is not merely a moral, but a legal obligation,(14) irrespective of the purpose of realising economic goals. All subjects in a contract should have equal status, parties are free via agreement to establish, modify or terminate the civil rights and obligations between the subjects; it matters not whether the subjects are domestic or foreign natural persons, legal persons or other organisations. Every subject is equal before the contract and contract parties should have the equal footing, even if a government organisation is in a contract while the other party is a foreign citizen. Such a condition covers the subjects in an ordinary civil contract, an economic contract, a technology contract and/or a contract involving foreign interests. Now that the rights relating to property are considered as having economic value, we need not focus on the economic goals in particular. A contract is concluded, modified or terminated by the agreement of the parties, without any further requirement.(15) That is enough. The new Contract Law unifies the concept of contracts and becomes the uniform contract law.

As a complex output of experts' work, influence from international treaties and practice, and experience, China has travelled along the route of reform for the past two decades. The new Contract Law, as a uniform contract law, is said to have resolved the problems above, and to bring China into the new millennium better prepared for the rigours of global economic life.

Footnotes

* Chen Xuebin, of the Jt. International Law Firm, Nantong, Jiangsu Province, China, is a Visiting Scholar with the Law School of Bond University.

1. Stephen Graw, *An Introduction to the Law of Contract*, The Law Book Co. Ltd., ed 1990, p. 1.
2. See Joint Venture Law, Article 1 & 2
3. See 1982 Economic Contract Law, Article 26.

4. David Allan & Mary Hiscock, *Law of Contract in Australia*, CCH Australia Ltd., ed 1987, p.24.
5. Graw, *An Introduction to the Law of Contract*, p.1.
6. Allan & Hiscock, *Law of Contract in Australia*, pp.105 &110.
7. See 1982 Economic Contract Law, Article 54.
8. See Article 2, Law of the People's Republic of China on Technology Contract which was adopted at the 21st Meeting of the Standing Committee of the Sixth National People's Congress and promulgated by Order No.53 of the President of the People's Republic of China on June 23, 1987.
9. See the People's Supreme Court Response of the People's Supreme Court to certain questions concerning application of the Foreign Economic Contract Law, question 1.
10. See Foreign Contract Law, Article 2..
11. See new Contract Law, Article 2.
12. See new Contract Law, Article 123 & 124.
13. Allan & Hiscock, *Law of Contract in Australia*, p.321.
14. William R. Anson, *Principles of the English Law of Contract*, Oxford, 10th Ed, 1952, p. 4.
15. See Unidroit, *Principles of International Commercial Contracts*, Art. 3.2.

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