

China

The new Chinese Contract Law: a brief introduction

by Shan Gao

The Contract Law of the People's Republic of China ('the Contract Law') was finally adopted at the Second Session of the Ninth National People's Congress ('the NPC') on 15 May 1999 and is effective from 1 October 1999. The promulgation of the Contract Law is a significant event in China's civil legislation because it integrates three previous contract laws (the Economic Contract Law of 1981, the Law on Economic Contracts Involving Foreign Interests of 1985 and the Law on Technology Contracts of 1987 – 'the old contract laws').

BACKGROUND

The legislative process for the new Contract Law began in 1993 when problems could no longer be resolved by the old contract laws: domestic contracts, foreign contracts and technology contracts were governed by different contract laws with different principles and even different regulations; the provisions of the old contract laws were too general to prevent fraud; and the new economic activities such as financing, leasing, entrustment and commission agencies needed specific new regulations. In accordance with the legislative schedule of the NPC's Standing Committee of the National People's Congress and entrusted to the Legislative Affairs Committee, academics provided the first draft of the Contract Law for discussion in early 1995 (Lihai Sun (ed), Deputy Director of the Civil Department of the Legislative Affairs Committee of the Standing Committee of the National People's Congress of the PRC, 'The Practical Annotation of the Contract Law', the Industrial and Commercial Publishing House, 1999, p. 7). After numerous discussions, including four reviews by the Standing Committee between August 1998 and January 1999 and publication of a draft to solicit opinion nationwide in September 1998, the Contract Law was finally adopted and the old contract laws were repealed (art. 428).

PROVISIONS

The Contract Law is composed of 428 articles under three sections: General Part (Chap. 1–8), Specific Part (Chap. 9–23) and Supplementary Part.

Chapter 1 ('General Provisions') stipulates that:

'the contract in the Contract Law refers to the agreement for establishing, amending or terminating the civil rights/obligations relationship between subjects with the equal status of natural persons, legal persons and other organisations',

and not to the agreements for the status relations such as marriage, adoption or guardianship (art. 2). This regulation enlarges the scope of the old contract laws accordingly. Chapter 1 also clarifies the general principles stipulated in the old contract laws, i.e. equality, voluntary character, fairness, honesty and good faith, observance of the law and legally binding force (art. 3–8).

Chapter 2 ('Conclusion of Contracts') stipulates the qualification of the parties (art. 9), the contents of a contract

(art. 12) and the form (art. 10, 11). In addition, it provides new procedures for offer and acceptance (art. 13–34), fault liability in concluding a contract (art. 42–43), and the standard form of a contract (art. 39–40). Unlike the old contract laws, the new Contract Law allows a contract to be concluded in written, verbal or other form (including electronic data interchange and e-mail), unless the laws stipulate otherwise. The Contract Law has clearly made reference to international experience: e.g. art. 41 stipulates that 'in the case of conflict between a standard term and a term which is not a standard term, the latter prevails'. (Cf. art. 2.21 of *Principles of International Commercial Contracts*, International Institute for the Unification of Private Law, Rome, 1994.)

Chapter 3 ('Effect of Contracts') stipulates the situations where a contract becomes valid (art. 44–46) or void (art. 52–53), where a contract may be rescindable (art. 54–55), and where the validity of a contract shall be determined (usually in the case of a contract which is unauthorised or ultra vires) (art. 47–51), as well as the legal effects of these situations (art. 56–59). The provisions in this chapter are based mainly upon the General Principles of Civil Law of 1986 as well as the relevant regulations in the old contract laws, but more emphasis is given to the principle of freedom to conclude a contract. Under the new law, a contract concluded by means of cheating or coercion will be void only when it violates the interests of the State (art. 52(1)), and will be either amended or rescinded when other interests are violated (art. 54). Furthermore, the regulation that only contracts that violate the compulsory provisions of laws are void (art. 52(5)) is intended to encourage the freedom to conclude a contract.

Chapter 4 ('Performance of Contracts') stipulates the principle of full performance (art. 60). In order to safeguard the performance of a contract, the Contract Law adds the right of plea for simultaneous performance (art. 66), to stop first performance (art. 68) or to stop later performance (art. 67). The creditor's rights to execute the rights of a debtor (art. 73) and to cancel an action by the debtor to avoid the debt (art. 74) are also new rights.

Chapter 5 ('Amendment and Assignment of Contracts') is based upon the old contract laws but sets out in greater detail the change in the contractual contents (art. 77–78), the assignment of rights and obligations (art. 79–89), as well as their impact upon the respective parties.

Chapter 6 ('Termination of Contractual Rights and Obligations') sets out in some detail the conditions where termination of contract may be possible. In particular, it adds that the off-setting of debts (art. 99–100), deposit of the object of the contract by a third person according to law (art. 101–104), remission of debt (art. 105), and situations where both the credit and the debt apply to the same person (art. 106) are instances where a contract can be terminated. In addition this chapter stipulates the 'agreed termination' and the 'legally-

specified termination' of a contract and their respective conditions as the forms of termination (art. 93–97).

Chapter 7 ('Liability for Breach of Contract') mainly lays down provisions for the principles and forms of liability. The Contract Law makes a significant change in the principle of liability: it takes the principle of strict liability as the main principle of liability, and replaces the principle of 'fault' (art. 107) (although the latter still exists, e.g. under art. 203 of the Special Part, where a carrier is liable for the compensation of the property of his passenger only when he is at fault); only by force majeure can there be exemption from liability (art. 117–118). There is a new regulation in art. 108, where a party to a contract may claim liability for breach of a contract before completion, if the other party states clearly, or shows by his actions, that he will no longer fulfil the contractual obligation. In contrast to the old contract laws, the new law clearly stipulates that the damages shall also include the expected interest (art. 113). It also provides that the parties to a contract may make an agreement upon the sum for breach of contract or the method to calculate the amount of compensation in case of breach of contract. Furthermore, when the agreed sum is higher or lower than the actual damages, the relevant party may request the Court of Arbitration to make a proper adjustment (art. 114).

Chapter 8 ('Other Provisions') stipulates that the provisions of the General Part shall apply to a contract, unless the Specific Part or other laws stipulate otherwise, (art. 123–124) and that the interpretation shall be made according to the purpose of the contract when a contract has more than two versions and there is any discrepancy between them (art. 125), and that a contract shall be supervised by the relevant administration according to the laws (art. 127). Finally, the Contract Law stipulates that the time limit for making a claim in relation to a contract for an international sale or the import and export of technology is four years (art. 129).

The Specific Part of the Contract Law contains 15 chapters, covering contracts relating to the following: sales, supply and use of electricity, water, gas and heat, gifts, loans, leases, financial lease, processing works, construction projects, transportation, technology, storage, warehouse storage, trusts, commission agencies and brokerage. Most of these contracts are based on the old contract laws and relevant experience gained in the past, although some of them have been significantly rewritten.

The sales contract is given considerable prominence. In cases where there is no regulation for a paid contract under the law, the regulations for sales contracts will apply (art. 174). Chapter 9 stipulates in great detail the terms of the contract of sale, especially delivery (art. 135–141, except art. 137), transfer of ownership (art. 130, 133 and 134), guarantee of rights (art. 132, 150), quality of goods (153–158), liability of risk (art. 142–147), method of instalment (art. 167), sale with samples (art. 168–169) or on approval (art. 170–171) and barter contracts (art. 175). For other terms such as payment (art. 159–162) or special sale contracts such as auction (art. 173), the Contract Law makes stipulations on the basis of the old contract laws or refers to other special laws.

Of the above-mentioned contracts, those concerning gifts, financial leases, trusts, commission agency and brokerage are brand new ones which were not regulated under the old contract laws. With regard to gifts, the Contract Law stipulates

the obligations of the donor and the rights of the donee and, in particular, that the donor shall not revoke a gift when the contract has the character of social and public benefit or moral duty, such as disaster relief or help for the poor, and is certified by a notary (art. 188).

Articles 237–239 of the Contract Law stipulate the terms and form of the financial lease, and art. 243 and 248 the principle of the determination of rent and payment. In addition, the Law stipulates clearly that the lessee may execute the right to claim for compensation if so agreed by the lessor, lessee and seller, and if the seller fails to fulfil his obligation as specified in the contract (art. 240); the subject of the lease shall belong to the lessor upon expiry of the lease if that is not clearly agreed and the ownership cannot be determined according to the law (art. 250).

FURTHER READING

An article by Roderick O'Brien on the introduction of China's new Contract Law appeared in Issue 20 (September 1999) at p. 29. A two-part article by Dr Ye Feng on recent criminal law reform in China also appeared in Issue 19 (July), at p. 29, and Issue 20, at p. 30.

Concerning trusts, commission agencies and brokerage, the Contract Law stipulates the terms for concluding the contract where the trustee is entrusted to carry out the business of the trustor (art. 396). For these three contracts, the trust contract is the basic contract. However, the contract of 'commission agency' is applicable where the agent is required to engage in trade activities for the trustor in the agent's own name (art. 414) and the brokerage contract where the broker provides the intermediary service for the trustor (art. 424). Following other international models, the Contract Law stipulates the conditions where the trustor may directly claim rights of the third party (art. 402–403; cf. art. 12 and 13 of the UNIDROIT Convention on Agency in International Sale of Goods, Geneva, 1983).

CONCLUSION

The Contract Law is the first unified contract law in China. It was formulated on the basis of Chinese experience and with reference to relevant international models, and its promulgation will certainly play a positive role in the development of the Chinese socialist market economy. 

Ms Shan Gao

Faculty of Law, Beijing University, People's Republic of China

The author is very grateful to Professor Shizhou Wang of Beijing University for organising and editing this article, and also to Deputy Director Mrs Hong Yao of the Civil Law Department and other officials of the Legislative Affairs Committee of the Standing Committee of the National People's Congress of the People's Republic of China for providing the authoritative materials and other support.