

DISSERTATION**CONCEPT AND EVOLVEMENT OF CHINESE CONTRACT LAW**

First Name : **Faizel**
Surname : **Jacobs**
Student number :
Course : **LLM (Commercial Law)**
Supervisor : **Professor Ignazio Castellucci**
University : **University of Cape Town**

Research dissertation paper presented for the approval of senate in fulfilment of part of the requirements for the Masters in Commercial Law in approved courses and a major dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of a Masters dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed: _____

Dated: 15 September 2015

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Dedication

Dedicated to and in memory of my dear father, Hoosain Jacobs an avid reader who sadly passed away on the 1 September 2015 during the process of finalising this dissertation. To quote an old Chinese proverb, "All of life is a dream walking, all of death is going home."

My father was indeed my first teacher. Writing this thesis brought back a childhood memory of him in which he told me as a young boy, "China is an ancient nation and a sleeping giant who will rise again". This is indeed happening. Also, dedicated to my dear mother Wareldia Jacobs who is still with me, and whose unconditional love and support is so invaluable and worth more than all the gold in the world.

A special thanks to Professor Castellucci, whose encyclopaedic knowledge and passion of Chinese Law aroused my interest therein. I am grateful for his supervision.

CONTENTS

1.	Preface	4
2.	Introduction	4
3.	Recent History and Source of Chinese Contract Law	6
	(i) Early Sources	
	(ii) Other Sources	
	(iii) Impact of the CISG on Chinese Contract Law	
	(iv) Effect of the International UNIDROIT Principles	
4.	Modern Chinese Contract Law	12
5.	Freedom of Contract in Chinese terms	14
6.	Formation of the Contract	19
7.	Standard Terms of Contracts	25
8.	Modification of Contracts	30
9.	Dissolution and Termination of Contract	31
10.	Breach of Contract	32
11.	The Role of the Judiciary	34
	(i) Rules of the Supreme Peoples' Court	
	(ii) FIE Dispute Rules	
	(iii) Doctrine of Precedent	
	(iv) Judicial Independence and Chinese Courts	
12.	Conclusion	46

Bibliography

1. Preface

This dissertation discusses the evolvement of Chinese Contractual law and establishes as to whether it converges or has any similarity with any Western legal norms and standards. I will view the recent history and early sources of Chinese law as influenced by political changes and tradition; as well as the influence of international commercial transaction agreements. The formation of a contract, standard terms and modification of contracts and the dissolution and breach in Chinese contracts will be discussed and also whether parties do in fact have the freedom to enter agreements with each other without third party interference. The role played by the Judiciary when addressing the issue of contractual disputes and in particular the Interpretations and Opinions of the Supreme Peoples' Court of China on the new Chinese Contract Law will be considered, as well as whether the concept of Doctrine of Precedent as practiced in the West does in fact exist in China.

My motivation for choosing this topic is based on the fact that China is (1) the second largest economy in the world and her consequential impact on world trade, (2) its economic influence in the world especially Africa, (3) the fact that China is South Africa's largest trade partner, (4) South Africa's membership of BRICS¹, and (5), China's growing influence in the world in the creation of parallel institutions to the West, such as the New Development Bank (formerly known as the BRICS Development Bank) rivalling current Western institutions such as the World Bank and the International Monetary Fund.

2. Introduction

Contracts are the legal basis upon which business relationships and partnerships are formed. By having a contract in place parties have certainty about each other's expectations as it would have a clear description of terms and conditions and the consequences of non-compliance.

The manner in which contracts work and operate is strongly influenced by the culture, legal system and traditions of a particular society as well as the political system. One can thus make a distinction between the actual law and the way it is applied in practice. Therefore the legal framework only constitutes one aspect of contract law.

In China there is a tradition called "Guanxi". Guanxi can be defined as "the relationships and connections between people which include mutual obligations, reciprocity and goodwill". It is also understood in a business sense to mean "a network of relationships designed to provide support and cooperation among the parties involved in doing business".² Whilst Guanxi has been viewed cynically in the West, the influence of the Guanxi philosophy played a significant role in the success achieved in the development of business in China.

This tradition has its roots in Confucianism which has had an embedded influence on the Chinese way of thinking overall and in negotiations. There are six values of Confucianism, namely to encourage "moral ethics, benefits arising from interpersonal relationships, family bonds, regard for age, the prevention of conflict, promotion of harmony and maintaining dignity when faced with confrontation".

¹BRICS is the acronym relating to the amalgamation of five major emerging national economies: Brazil, Russia, India, China and South Africa. All five are members of G-20.

² Pattison and Herron, 'The Mountains are High and the Emperor is Far Away: Sanctity of Contract in China',

The Chinese are strongly influenced by Guanxi in developing their contractual relationships and practice³.

China and the West differ in the manner in which they view the actual contract in practice.⁴ A contract is concluded in the West once all the parties to the contract have signed the contractual document. This results in a performance of obligations between the parties and should there be any dispute the courts are called upon to enforce the terms of the contract. In China, the signature of the contract is a start of a business relationship and the terms of the contract is not the only overriding factor in this relationship.

The Chinese do not view the terms of the contract as the single dominant factor. In the event of any issues arising from the contract, they expect the express terms of the contract to be overridden or even modified based on the surrounding circumstances as well as the relationships between the parties.

The Chinese thus often do not solely rely on the terms and conditions as contained in the written contract as they place greater emphasis on loyalty and mutual obligations in business relationships between the parties. Parties are expected to accommodate each other's shortcomings and make mutual adjustments when necessary in the contract.

The reason behind this approach is that trust and honour is basis of a Chinese contractual relationship and they are loath to approach the courts for the enforcement⁵ of the terms of the contract. Litigation in contractual disputes is frowned upon by the Chinese and they tend to view legal enforcement in a negative light. As the collective interest of society in China is of paramount importance, litigation is seen as promoting the private interest of an individual.

However, should there be a dispute between the parties, the emphasis is not on who prevails in a dispute, but the striving towards a peaceful outcome and reconciliation between the parties so that the relationship that existed at the time of the formal conclusion of the contract can continue. Thus, the status existing between parties, the current circumstances and the emphasis on maintaining the relationship between the parties plays a big role in settling the dispute as opposed to the merits of the case which is considered insignificant.

It is also of note that in China, that, in the event of a dispute, the primary terms of a contract may be overridden or modified. This process shall take into consideration the understanding of the parties' circumstances in relation to such misunderstanding.

One can thus see, that in the event of contractual disputes the Chinese emphasis is on upholding the relationship between the parties instead of the contractual terms (although important) as would be the focus in the West. The Chinese consider a written contract as a mere formality and are "considered unnecessary, sometimes offensive in some cases depending on the situation" and ignore them notwithstanding the fact that they have signed and bound themselves to such contract. They consider trust and honour to be the basis for a contractual relationship⁶

³ Chunlin Leonhard, *Beyond the Four Corners of a Written Contract: A Global Challenge to U.S*

⁴Pattison and Herron, *The Mountains are High and the Emperor is Far Away: Sanctity of Contract in China*.

⁵McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*. 450.

3. Recent History and source of Chinese Contract Law

(i) Early Sources

China's legal system evolved from the context of cultural and socio-historical values that had existed in the Law in China over hundreds of years

In 1902⁷ a "Law Codification Commission" was set up in China whereby the primary objective was to draft codes on, inter alia, laws governing civil and criminal procedure, bankruptcy.

However, the abdication of Emperor Puyi in 1912 following the Xinhai revolution put a stop in the process in the review of the Chinese law as initiated by the Commission.

The Chinese Nationalist party, known as "the Guomindang", which displaced the royal system of government brought about major changes to the existing law by their adoption and implementation of European legal codes⁸ in China, during the period they were in power which was from 1912-1949⁹. They also adopted the capitalist economic system which was reflected in the right to own property by the individual and to freely contract and the myriad of laws at the time reflected this system.

Following Chinese Nationalist party rule, the People's Republic of China ("PRC") arose as consequence of the Communist revolution and Mao Zedong was appointed as the new ruler in 1949. Following this change in government all European legal codes were repealed and replaced by Communist systems, resulting in a move away from the traditional Chinese system and Western law. The legal system under Mao was one of policy and thus policy was used to introduce Communist systems.¹⁰

Furthermore, the Constitution which existed at the time of the Chinese Nationalist party was abolished by the Communists as well as the "Code of Six Laws" of the Chinese Nationalists. Thus all the vestiges of the legal system of the previous Chinese Nationalist Party, including laws relating to contracts, were annulled.

Before the "reformist era" no legal provision was made for contracts save for party policy similar to that applied in Communist Russia.

The ensuing fifty years following the Communist revolution, and with the influence of communist Russia, Chinese Contract Law came into being. The process took place over four stages.

In the **first stage**¹¹ (1950-1956) a state-planned economic contract system was introduced whereby administrative laws relating to contract procedures were drafted and private enterprises were nationalized in an attempt to reverse economic losses.

The **second stage**¹² (1961-1965) arose under Chairman Mao's administration, ("The Great Leap Forward) when private ownership and free markets were banned. The application of this law negatively impacted on the incentive for contracting parties to meet their contractual obligations. It also inhibited the enforcement of the State-

⁷F. Michael, *op. cit.*, p. 133.

⁸Liang Huixing, *The Reception of Foreign Civil Laws in China, yue dan min shang fa (Yuedan Civil and Commercial Law)*, vol. 3, 2003.

⁹*Traditions and Foreign Influences: Systems of Law in China and Japan: Percy R. Luney, JR.*

¹⁰Zhang, Mo, *Chinese Contract Law, Theory and Practice 2006*

¹¹Wei Luo, *THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1999)*

¹²Wei Luo, *THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1999)*

Planned “economic contract system”. In 1961 the government relaxed its laws governing farmlands and in some instances ownership was reinstated to peasants. Regulations on contracts were also in the process of development with a view to rebuild China’s economy but the Cultural Revolutions interrupted progress. This stage is regarded as reinstatement of the Communist system whereby properties had been nationalized.

The **third stage**¹³(1978-1992) (“Reformed State-Planned Contract System 1978-1992”) During this stage Chairman Deng Xiaping introduced the reformed state-planned contract system in 1978 to develop and promote international interaction with the intention of establishing a legal system that would achieve a market orientated economy. Xiapoing was quoted as saying “It does not matter if the cat is white of black, as long as it catches the mice” and “Kai Fung!” which, when translated, means “open up”.

The 1978 Constitution established the “Law of the Peoples Republic of China on Foreign Equity Joint Venture” (hereinafter referred to as the “Equity Joint Venture Law”), effective 8 July 1979 whereby Article 3 encouraged parties to enter into joint ventures. The parties to such joint venture agreements were required to submit their “agreements, contracts and articles of association” to the “Examination and Approval Authority” for scrutiny and approval and thereafter to the “State Administration for Industries and Commerce” for registration.

In order to progress this new approach and to promote international economic cooperation and technological exchange, the People’s Republic of China introduced the “Equity Joint Venture Law” which contained a provision relating to the term “contract”. The objective was to encourage foreign economic entities to enter into equity joint ventures with Chinese companies, based on the premise of equality and mutual benefit. Any contracts entered into would be subject to the endorsement and ratification of the Chinese Government. The Chinese Government furthermore undertook to protect the “investments, profits due, lawful rights, and interests” in equity joint ventures of parties.

At that stage, contracts for “equity joint ventures” related to contracts entered into between Chinese and foreign investors and provided the basis for the rights and obligations of parties. “Equity Joint Venture Law” made provision for the term “contracts” but did not qualify it. These joint equity ventures led to the development and evolvement of contract law in China.

In 1981 the National People’s Congress, passed the “Economic Contract Law” (ECL), whose purpose was to develop an incentivised yet more decentralised, market based economy in order to grow business in China. This development played a significant role in the evolvement of the law towards a more “decentralised, market oriented and incentive-based economy”. However this legislation was limited to state economic policies due to its classification as economic law as opposed to civil law.

The “National People’s Congress” subsequently introduced the “Foreign Economic Contract Law” (1985), with the view to promote foreign trade and investment.

The purpose of the Law of the People’s Republic of China involving Foreign Interests was to promote foreign trade and investment. The “National People’s Congress”

¹³Chen Xuebin, *The Culture Mandala*, 4 no. 1, Millennium Issue 2000

stated that in the event of omissions in the provisions of a contract not governed by Chinese Law then those contained in international treaties would apply.

This law was followed by the “Technology Contract Law” enacted in 1987. These three laws, augmented by various administrative regulations, formed the basis for contract law. However, these three contract laws did not correlate in that they contradicted certain provisions between each other, resulting in confusion and complications in implementation.¹⁴

Whilst the “Economic Contract Law”, Foreign Economic Contract Law” and “Technology Contract Law”, together with various administrative regulations, formed the basis of contract law, certain provisions contained in these laws and regulations were contradictory, which frustrated the actual contracting process. Development and growth of China’s domestic economy required functional contract legislation. The inconsistencies contained in the existing contract legislation obstructed China to progress in international trade. The lack of a proper consistency in contract law and globalisation of trade necessitated the need for the reformation of the existing Chinese Contract Law. Furthermore the growth of the domestic economy required China to open up its economy further and to rewrite its laws in a more formal format. This contractual reform process can be described as the fourth stage.¹⁵

In an endeavour to create a more comprehensive Law, the Chinese government in 1986 enacted the all-encompassing “General Principles of Civil Law”, which contained six provisions relating specifically to governing contracts.

With progress achieved in developing the nation and, more particularly, the change in attitude towards international trade, the need for an all-encompassing contract law was evident.

(ii) Other Sources¹⁶

In addition to the aforementioned, in order to achieve the government’s resolve to incorporate all provisions that would apply in global trade, this was a complex exercise in that in certain instances the regulations of the Chinese government did not correspond or was consistent within the various levels of government.

The intention of the reform process was to take into account, inter alia, “local administrative legislations, rules, ordinances, ministerial rules, authoritative interpretations of Standing Committees of the National People’s Congress and guidelines within the different layers of the Chinese government structure”.

The process was complex due to the extensive number of conflicting legislation in provincial governments (there are 30) as well as city and local councils as these were only published in the applicable areas. The process was hampered where non-Chinese lawyers experienced problems locating documentation relating to all the laws. The undertaking was also challenging where lawyers were not familiar with how the Chinese legal system operated as they needed to establish background

¹⁴See e.g. Ling, *Contract Law in China*, supra note 2, p. 15; Hitchingham, ‘Stepping up to the Needs of the International Marketplace: An Analysis of the 1999 “Uniform” Contract Law of the People’s Republic of China’, supra note 2, pp. 3-4; Jainfu Chen, *Chinese Law: Context and Transformation* (Leiden: Martinus Nijhoff Publishers, 2008)

¹⁵ Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 *BROOK. J. INT’L. L.* 153 (2001); Pattison & Herron.

¹⁶ Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 *BROOK. J. INT’L. L.* 153 (2001); Pattison & Herron.

information to such legislature in order to familiarise themselves on the prevailing international legislation. This involved consultation with experts on Chinese law in instances where provisions of the law or local regulations, practice of the higher decision-making authority was deemed decisive.

(iii) The Influence of the CISG on Chinese Contract Law

“The United Nations Convention on Contracts for the International Sale of Goods” (“CISG”) was drafted by the United Nations Commission on International Trade Law “UNCITRAL”¹⁷ in order to provide a legal system governing contracts globally amongst various countries which are signatories to this agreement. The document included clauses relating to the rights and obligations of both the buyer and the seller.

The intention of the “CISG” was to create a legal document that would consolidate the differing rules that existed between international legal trade systems¹⁸. The “CISG” governs the formation of the contract of sale as well as the rights and obligations of the buyer and seller (including their remedies). It became effective on 1 January 1988 and applied to those countries that were at the time parties to it. The Chinese government signed the “CISG” on 30 September 1981¹⁹, demonstrating the resolve of the government and Chinese people to generate international trade and comply with international standards of rules governing market economy.

The role the “CISG” played in the course of modernisation of Chinese Contract Law, came about in three stages: (1) China's approval of the CISG; (2) the CISG's impact on the Law of Economic Contracts Involving Foreign Interests Foreign Economic Contract Law, and (3) the impact of the “CISG” on the new “Chinese Contract Law”.

The basic structure and central concepts of the CISG have impacted on international projects of unification of law and national law reforms.

The legal document compiled by the “CISG” provided the Chinese authorities involved in the process of legal reform with an excellent reference model for China when it was drafting its new Contract Law that came into effect in 1999.

The legislative guide contained the following: “Considering the real needs of the reform and opening-up of China and the development of the socialist market economy, the set-up of a nationally unified market and an access to the international market, we shall sum up the experiences of legislators and judges and the results of theoretical researches concerning contracts in China, draw broadly on the successful experiences of other countries and regions on laws and cases, adopt to the best of our abilities common rules reflecting objective laws of modern market economy, and harmonize rules of Chinese law with those of international conventions and international customs”

The modernisation of Chinese Contract Law followed correspondingly a market-oriented path. The basic concept had been shifted from "economic contract" to "contract". Contracts becomes a basic tool for market transactions and was no longer a means to realise the economic plan of the state. In the process, the “CISG” played an important role as a model of reference for Chinese legislative reform.

¹⁷ J. Chen, *Chinese Law: Context and Transformation*, Leiden 2008

¹⁸ H. Sono, *Contract Law Harmonization and Non-contracting States: The Case of The CISG*, 2007, p.1. www.uncitral.org/pdf/english/congress/Sono_hiroo.pdf

¹⁹ Shiyun Han in Franco Ferrari (ed) *The CISG and its Impact on National Legal Systems* (European Law Publishers, Munchen, Sellier, 2008).

Professor Huixing Liang²⁰, who was the main drafter of the new Contract Law, stated that the drafters of the law "have consulted and absorbed rules of the "CISG" on offer and acceptance, avoidance (termination), liabilities for breach of contract, interpretation of a contract and sales contract". The influence of the "CISG" on the Contract Law also encompassed both "sale-specific" topics and "non-sale-specific" issues.

China did not always recognise nor abide by all terms and provisions specified by the CISG and withdrew its "written form declaration" under the "United Nations Convention on Contracts for the International Sale of Goods" in 2013, thereby aligning itself with those members of "CISG" who too elected not to apply the written form only for contracts that related to international sale of goods and it was therefore no longer a requirement in China that contracts for had to be in the written form only.

There is a lot of commonality between the "CISG" and the new Chinese Contract Law. This can be found in the provisions regarding party autonomy²¹, an invitation to make offers²², the effect once an offer has reached the offeree²³, late acceptance²⁴, withdrawal of acceptance²⁵, the withdrawal of an offer²⁶, the formation of the contract, the principle of good faith in the parties' interaction with each other, the formation of the contract, the provisions of offer and acceptance and the authority of the agent in relation to its principal and the binding nature of a contract²⁷.

In the new Chinese Contract Law, the parties are allowed to use written, oral or other forms in concluding a contract. This is also contained in Article 11 of the "CISG".

Although there are many similarities (as discussed above) between the "CISG" and the new Chinese Contract Law and that both have the full compensation as far as damages is concerned, the new Chinese Contract Law goes further and also has liquidated and punitive damages.

(iv) The effect of the International UNIDROIT Principles

Considering the "UNIDROIT Principles" when drafting its new Chinese Contract Law, China recognised the need to familiarise itself with the Western legal systems²⁸. The similarities incorporated in the revised Chinese Contract Law are set out below.

Whilst "UNIDROIT Principles" respects an individual's right to freely enter a contract, its core principles is "equality, autonomy, fairness, good faith and the public interest". UNIDROIT provides that parties were free to enter and define the content of contracts of such contracts²⁹. In contrast, China's new contract law permits parties

²⁰ Huixing Liang *From Three Separate Parts to a Unified Contract Law*, 1995:3 *Zhongguo fa xue [China L Sci]* 9.

²¹ Articles 2,3,4 and 12 of the new Chinese Contract Law

²² CISG Article 14 (2) and the new Chinese Contract Law Article 15

²³ CISG Article 15(1) and the new Chinese Contract Law Article 16(1)

²⁴ CISG Article 21; CL and the new Chinese Contract Law Articles 28-29

²⁵ CISG Article 22 and the new Chinese Contract Law Article 27

²⁶ CISG art 15(2) and the new Chinese Contract Law Article 17

²⁷ Article 8 of the new Chinese Contract Law

²⁸ Ling B, *Contract Law in China, Hong Kong 2002*

²⁹ Article 1.1 of UNIDROIT

to voluntarily enter into contracts in accordance with the law and that no entity or individual may illegally interfere with such right.³⁰ However, the manner in which this is framed is that there can be a legal interference with such a right which can prove problematic to the parties to the contract.

In both the UNIDROIT Principles as applied in international trade and the new Chinese Contract Law, parties are expected to act in good faith³¹ in their negotiations with each other as well as when they comply and give effect to the terms and conditions as contained in the contract.

The UNIDROIT “principles of freedom of form in a contract”³², states “Nothing in these Principles requires a contract to be concluded in or evidenced in writing. It may be proved by any means, including witnesses”³³. In terms of prior contract laws of China, contracts had to be in writing. Article 10 as contained in the new Contract Law now conforms to UNIDROIT Principles and provides for parties to conclude contracts in writing, orally or other forms.

A contract is concluded in China by way of an offer between the two contracting parties.³⁴ The term offer³⁵ contained in Chinese law is similarly defined in UNIDROIT³⁶ and described as a “proposal made with a view to entering into a contract with other parties and the contents of such proposal must be detailed and definite, and indicate that the offeror is bound by the proposal in case of acceptance of an offer”.

In accordance with the terms of the Chinese law on contracts and UNIDROIT³⁷, an offer is considered effective once it is received by the offeree and this concept is known as the receipt doctrine.

Both UNIDROIT³⁸ and the new Chinese Contract Law³⁹ state that an offer can be withdrawn subject to the withdrawal notification⁴⁰ being received by the offeree simultaneously with the offer.

An offerer may revoke its offer subject to the offeror providing a notice of its intention to the offeree before the offeree has submitted an acceptance of such offer. Notwithstanding the aforementioned provision, should the person making the offer set a fixed time within which the offer must be accepted and such person specifically states that failure to meet the fixed period renders the offer revocable. Nonetheless, where the offeree understood the offer to be irrevocable and was in

³⁰ Article 4 of the new Chinese Contract Law

³¹ Article 6 of the new Chinese Contract Law

³² Zhang Yuqing and Huang Danhan, *The New Contract Law in the People’s Republic of China and the UNIDROIT Principles of International Commercial Contracts : A Brief Comparison (2000)*

³³ Article 1.7 of UNIDROIT

³⁴ Article 1.2 of UNIDROIT

³⁵ Zhang Yuqing and Huang Danhan, *The New Contract Law in the People’s Republic of China and the UNIDROIT Principles of International Commercial Contracts : A Brief Comparison (2000)*

³⁶ Zhang Yuqing and Huang Danhan, *The New Contract Law in the People’s Republic of China and the UNIDROIT Principles of International Commercial Contracts : A Brief Comparison (2000)*

³⁷ Article 2.2 of UNIDROIT

³⁸ Article 2.3 of UNIDROIT

³⁹ Article 17 of the new Chinese Contract Law

⁴⁰ Zhang Yuqing and Huang Danhan, *The New Contract Law in the People’s Republic of China and the UNIDROIT Principles of International Commercial Contracts : A Brief Comparison (2000)*

the process of performing in terms of the contract the offer, such contract cannot be revoked. This principle applies in both UNIDROIT⁴¹ and Chinese Contract Law⁴².

From a comparison of both China and UNIDRIOT law, it is apparent that China has incorporated a substantial number of the UNIDRIOT Principles.

4. Modern Chinese Contract Law

Due to the existing disjointed contract laws, the State Council in China decided that laws governing contracts should be significantly amended and consolidated to achieve a legal document that was complete and enforceable.

As a consequence of this decision, China embarked on a process of reforming the existing contract laws. This resulting in the enactment of new “Chinese Contract Law” by the Chinese legislature which came into effect in 1999.

As a result of the new Chinese Contract Law, the previous laws that existed at the time, namely the “Economic Contract Law”, “Foreign Economic Contract Law” and “Technology Contract Law” were repealed.

Of particular relevance to the introduction of the Chinese Contract Law was that it gave parties more freedom and flexibility in their contractual relations that existed prior to the enactment. It also demonstrated China’s willingness to open its legal system to foreign influences and to receive inspiration from foreign laws. The UNIDROIT Principles of International Commercial Contracts patently influenced the drafters when compiling the document, more specifically those relating to “general provisions”.

The Chinese Contract Law also provided for the protection of the rights of contracting parties, to maintain the existing socio-economic order and to modernise socialism⁴³.

The new Contract Law furthermore afforded parties more flexibility when entering into contracts than those existed prior to the establishment of the Chinese Contract Law. It also demonstrated China’s openness and intention to consider foreign influence when reviewing its legal system.

The new Contract Law was particularly relevant at that stage as China had hoped to become a member of the World Trade Organization. The Chinese Contract Law afforded parties more flexibility in their contractual negotiations and evidenced China’s intention to encompass global practices in the new Chinese Contract Law.

This revised legal dispensation was particularly necessary in order to achieve economic growth and to move from a centrally orientated economy to a market policy envisaged under the socialist regime. The objective of the new Chinese Contract Law was to promote global economic trade technological co-operation and Rules which were consistent with international practices and trends and such Rules were embodied in the new Chinese Contract Law.

The reforms in the Chinese system was a clear reflection of the influences of international treaties and practices. Many provisions as contained in the new Chinese

⁴¹ Article 2.4 of UNIDROIT

⁴² Articles 18 and 19 of the new Chinese Contract Law

⁴³ Hitchingham, ‘Stepping up to the Needs of the International Marketplace: An Analysis of the 1999 “Uniform” Contract Law of the People’s Republic of China

Contract Law correlate with those provisions as contained in both the “CISG” and the UNIDROIT Principles of International Commercial Contracts, the “UPICC”.

When formulating the new Contract Law, the Chinese government made reference to the principles of the UNIDROIT “International Commercial Contracts” and the chapter on general provisions⁴⁴ are the similar those reflected in the “UNIDROIT Principles”.

The objective of the new Chinese Contract Law was a “two pronged” which entailed providing contracting parties with the freedom and flexibility in entering into a contract and secondly to create a legal base to ensure regulations governing contracts protect the interests of both the state and the public.

The General Provisions and the Specific Provisions constitute the essence of the new “Chinese Contract Law” and the rules apply to all contracts, namely “how contracts are formed, the legality of contracts, the performance of obligations, the amendment and specifications of contracts, rights and obligations of parties to the contract, liability for breach of contract, rules on the interpretation of contracts and provisions governing the interaction between the various Laws”.

Specific types of contracts, e.g. “supply of electricity, gas and water, loan, technology, storage, warehousing, carriage, construction projects, commission, brokerage and intermediation, as well as contracts for sales, donation, lease agreements, financial lease” can be found in the “Specific Provisions of Chinese Contract Law”.

Rules applicable to specific provisions would apply to a contract falling within that category. The general conditions would apply to contracts that are not specifically categorised in respect of nominate contracts that are not categorised. Where a nominate contract is similar to a non-categorised in nominate contract, the provisions may be applied analogously⁴⁵.

5. Freedom of Contract in Chinese terms

In Western countries individuals could contract freely with each other. This idea has originated from Adam Smith's⁴⁶ theory of free economy where individuals were regarded as the competent as judge of their own affairs.

In free societies, the term “freedom of contract” constitutes a basic entitlement and is enshrined in law.⁴⁷ It is as an expectation that individuals should have the freedom choose how to conduct their affairs and also to make their own decisions as to whom to contract with and on what terms.

For a business to run effectively and profitably, a business must have the freedom to choose from whom they will source their goods, without constraints in respect of the terms of a contract and to offer their goods and/or services to whomsoever they may wish. This concept is imperative for an open market economy. This free exchange of goods and services promotes competition and economic growth and ensures that resources are used efficiently.

Laws in China prior to 1999, did not recognise the principle of freedom of contract as a fundamental right as held in the West because at that stage the Chinese economy

⁴⁴Wang Liming, *Study on the Contract Law* (People's University Press 2002)

⁴⁵Article 124 of the Contract Law

⁴⁶Scottish economist and philosopher considered to be the father of economics in the Western world.

⁴⁷Junwei Fu. *Journal of International Commercial Law and Technology*Vol.8, No.4 (2013)

was centrally planned and the emphasis was on the state plan or policy. The need for the principle of freedom of contract to be accommodated was clearly not entertained in compilation of the previous laws.⁴⁸

Every person and business was subject to the Chinese government's pre-determined plan which regulated the market and accordingly did not enjoy free access to the market. Non-compliance with requirements of the state plan or violation of the obligatory provisions of the state plan rendered such contracts void in its entirety. These conditions are reflected in Articles 4.11 and 7 of the Economic Contract Law as well as Article 58 of the General Principles of Civil Law.

Administrative departments at the time supervised contracts of an economic nature. This function included the "certification, inspection, oversight of the finalisation and performance of those contracts". In addition it dealt with the "arbitration of disputes, investigation and disposal of illegal contracts"⁴⁹.

The manner in which Chinese authorities acted at the time compromised freedom to contract and involved government interference⁵⁰ of businesses. It was thus not conceivable that individuals could even assume that they were entitled to freely enter into a contract, as contracts were subject to the state plan and supervision.

The primary intention to achieving a "market economy" led to a watering down of the government's strict communist ideals. The new Chinese Contract Law made little reference to the state plan, as was the case in the pre-1999 contract laws, save for Article 38 of the new Chinese Contract Law where reference is made to the likelihood of the state issuing an "enforceable State plan"⁵¹.

In order to meet the primary objectives of the new Chinese Contract Law, namely to move China towards a more socialist market economy, to ensure economic growth to have laws in place that were consistent with international practices, without the interference by the government there was a need to move towards freedom to contract. There was thus an increased support for the concept of freedom of contract as a fundamental principle in the law.

It was unclear at the time of the drafting of the new Chinese Contract Law as to whether to incorporate the principle of "freedom of contract". It was contended that freedom afforded parties to elect with whom they wish to conclude business agreements was essential to achieve a "market economy, encourage competition in the market place and effect a proficient process to manage the allocation of resources".

The new Chinese Contract Law does not clearly define the principle of freedom of contract. Notwithstanding such ambiguity, Chinese Contract Law does recognize parties' freedom of contract subject to it incorporating three essential components, namely "the concept of equality, voluntary participation and *pacta sunt servanda*" to facilitate and safeguard the entering into a contract.⁵²

⁴⁸Zhang Mo, *Chinese Contract Law, Theory and Practice* 2006

⁴⁹*Freedom of Contract With Chinese Legal Characteristics: A Closer Look at China's New Contract Law* Mo Zhang Temple University - James E. Beasley School of Law Temple International & Comparative Law Journal, Vol. 14, 2000

⁵⁰See Steve Dickinson, *China Contract Law: Going All Clear On US Now*. China Law Blog, 4 June 2009, available at http://www.chinalawblog.com/2009/06/china_gets_all_new_on_contract.html, (last visited 8 January 2010).

⁵¹Zhang Mo, *Chinese Contract Law, Theory and Practice* (2006)

⁵² Article 4 of the Chinese Contract Law: "A party is entitled to enter into a contract voluntarily under the law, and no entity or individual may unlawfully interfere with such right."

However, when taking into account the other clauses contained in the new Chinese Contract Law, which stipulates that China's new contract law affords priority to the "collective interest over the individual rights and interests of contracting parties", this provision essentially limits the rights of parties' freedom to enter into a contract.

Article 1 of the new Chinese Contract Law specifies that *"it is formulated in order to protect the lawful rights and interests of contracting parties, to safeguard social and economic order, and to promote socialist modernization"*.

Other provisions in the new Chinese Contract Law which potentially constrain the rights of individuals entering into contracts include:

Article 38 states that *"where the state has, in light of its requirements, issued a mandatory plan or state purchase order, the relevant legal persons and other organizations shall enter into a contract based on the rights and obligations of the parties prescribed by the relevant laws and administrative regulations"*.

Where approval is required: Although new Chinese Contract Law does not specifically state which contracts are subject to state approval, Article 44 does make reference to the "relevant law or administrative regulations", which apply, from time to time, and the "legislature or other state body" which may decide which contracts shall be deemed to be subject to ratification.⁵³ Any contract falling within the definitions contained in Article 44 of the new Chinese Contract Law⁵⁴, and the enforcement thereof, would be subject by law to approval first being obtained. The impact of this is that contracting parties might need the approval of some government department in China and where such approval has not been given, the contract cannot take effect.

Contracts which require prior authorisation include *"joint ventures, contracts entered into by and between the recipient and the supplier for the introduction of technology, contracts for the exploration of offshore petroleum resources in cooperation with foreign enterprises, the transfer of patent rights of a Chinese enterprise or individuals, the initial contract for the importation of pharmaceuticals, and the transfer of a right of land"*.

Harming the state interest: Article 127 of the new Chinese Contract Law, provides for the intervention of the "administration of industry and other relevant authorities" who is afforded authority. This provision provides that they are to "be responsible for monitoring and take preventative measures against any illegal act which may negatively impact on the state and the public interests". However, there is a lack of clarity because Article 127 of the new Chinese Contract Law does not clearly define the extent of such execution and supervision. The primary purpose of this provision appears to be the protection the interest of the socialist state.

Prior to the implementation of the new Chinese Contract Law, the supervisory power of authorities was quite wide in that it included the "inspection, supervision and performance" of the parties to the contract. Conversely, Article 127 of the new Chinese Contract Law limits the powers afforded authorities relating to the management of illegal acts that might be disguised under a contract that may harm state or public interests.

⁵³ Matheson, J. H. *Convergence, Culture and Contract Law in China*. *Minnesota Journal of International Law*, 15, 329 (2006).

⁵⁴ Zhang, *Mo Chinese Contract Law, Theory and Practice* (2006)

The new dispensation does not allow for the “advance assessment of contracts” as was required to be done in the past although in certain cases some contracts might still require approval from the authorities.

The collective interest: Article 7 of the new Chinese Contract Law imposes further constraints on the parties freedom to enter into a contract, namely that they are required to comply with laws and administrative regulations, namely to observe social ethics, do not disrupt the social and economic order or harm the public interests. This provision in the new Chinese Contract Law clearly prioritises the “collective interest” over the “rights and interests of the contracting parties”.

The new Law does not elucidate on the term “Social ethics”, and thus has the effect of permitting unimpeded discretionary power for intervention in contractual relationships aimed at promoting “good moral standard and fair practices”.

A positive development is that the new Chinese Contract Law does not contain the many compulsory provisions as contained in the previous contract laws. This “discretionary freedom to determine the content of the contract” had not been provided for in the former more stringent contract laws.

Compliance with State policies: Article 6 of the “General Principles of Civil Law” stipulated that civil activities fell within the ambit of policies of the state, and were deemed to be an augmentary source of law.

Nevertheless, Zhang⁵⁵, a legal author cautions that “one should not underestimate the potential influence of government policies on contractual activities”.

It is apparent that, similar to laws and administrative regulations in certain Western countries, the freedom of parties to enter into contracts can be limited, but the nature and extent to which those restrictions apply depends on the relevant contract.

Lawful interference: Although Article 4 of the new Chinese Contract Law protects party independence by emphasising that it would not permit any unlawful interference by any entity or individual interfering in the finalisation of contracts, lawful intervention is permitted.

Notwithstanding the aforementioned and the interpretation of “lawful interference”, the entitlement of the parties to freely contract may be obstructed and that may lead to “certain unpredictable restraints”. The distinction between legal and illegal intervention needed to be defined in that should the concept of “lawful interference” be vague, it would neutralise the independence of parties and entities and, similarly the “principle of freedom” would lose its value and import.

The interpretation of the term “lawful interference”, is not clear and consequently, for example how “the boundary between lawful and unlawful intervention is established in practice” may affect individuals entering into contracts where the parties may find themselves faced with “unpredictable restraints”.

Contracting with government entities: Article 3 of the new Chinese Contract Law specifies that parties to a contract should be treated equally. In practice, however, where a private party concludes a contract with a state entity or state-owned enterprise, the interests of the government is more dominant and is deemed to take

⁵⁵Zhang, Mo. *Choice of Law in Contracts: A Chinese Approach Northwestern Journal of international law & Business*, (2006).

priority, thereby negating the private company's right to be an equal party to the contract.

For example, a local government could apply measures to protect itself, where the other party would not enjoy access to the same advantage and might use whatever measures that is required to protect a state owned company in China. This creates an imbalance in the relationship between the two contracting parties.

Article 4 of the new Chinese Contract Law implies that "voluntariness" rather than the term "freedom of contract"⁵⁶ should apply. The notion of "freedom of contract" was not recognised by China until recently although it had a historical basis in China's past. China's reluctance to introduce this term is because, firstly, freedom of contract essentially translated means "individual" or "liberty" and secondly, freedom of contract had been considered for some time by China as a capitalist concept, which should be rejected by any socialist system⁵⁷.

In China, the "ideology of individualism" had for some time been interpreted as the primary difference between "capitalism" and "socialism" and this understanding continued to influence the concept of interpretation by the people in China even until today. That is the reason why the new Chinese Contract Law introduced the notion of "voluntariness" rather than that of "freedom of contract" in the context of contract formation, as that concept generated the understanding of transformation from a "centrally planned economy" to that of a developing a "socialist market economy".

The principle of "voluntariness" comprises two elements: (1) "parties are entitled to enter into a contract subject to such contract being within the realms of the limits of law", and (2) "it provides the parties protection from other parties illegally impeding the process".

Whilst the Chinese believe and interpret the terms "voluntariness" and "freedom of contract" to correlate in translation,⁵⁸ they contain several contradictions.

"Freedom of contract" recognises the entitlement of individuals to contract with a party of the same intent, to define the provisions and "format of the agreement, to modify or terminate the contract subject to mutual consent and to choose the form of a contract" without intervention of third parties.

Conversely, the new Chinese Contract Law does not refer to "freedom of contract" per se the concept of "voluntariness" which permits parties to voluntarily enter into contracts with each other, subject to the prevailing laws of China⁵⁹. In essence, notwithstanding the provision that parties may freely contract, such contract would be subject to government monitoring and interference.⁶⁰

The concept of "voluntariness" implies the principle of freedom of contract, which affords the contractual party the independence and freedom to elect the

⁵⁶ Zhang, Mo, *Chinese Contract Law, Theory and Practice* (2006)

⁵⁷ *Freedom of Contract With Chinese Legal Characteristics: A Closer Look at China's New Contract Law* Mo Zhang Temple University - James E. Beasley School of Law Temple International & Comparative Law Journal, Vol. 14, 2000

⁵⁸ *Freedom of Contract With Chinese Legal Characteristics: A Closer Look at China's New Contract Law* Mo Zhang Temple University - James E. Beasley School of Law Temple International & Comparative Law Journal, Vol. 14, 2000

⁵⁹ Article 4 of the Chinese Contract Law

⁶⁰ Matheson, J. H. *Convergence, Culture and Contract Law in China*. *Minnesota Journal of International Law*, 15, 329 (2006).

transactions they entered into, and therefore facilitates the allocation of social and economic resources⁶¹.

Historically, "Freedom of contract" emanated from the provisions of "consensus contract" in Roman law and embodies the core of a market related economy and represents the "essence of a market economy". Although the term "voluntariness", emanated from the "General Principles of the Civil Law of the People's Republic of China", (hereafter referred to as the GPCL established in 1986. The intention of this law was to move from China's "planned economy" and to achieve a "market related economy"⁶².

Despite the aforementioned and the history of "Confucianism" and that of centrally orientated economy, the state could enforce "intervention measures" to ensure, namely (1) "that the intent of the parties did not have a negative effect on the interests of the state and society (2) that contracts were fair and equitable and (3) that the alleviation of the more restrictive conditions that formerly existed was not abused, (4) that it was in line with the government's principles to improve China's economy."⁶³

Whilst the principles of the Chinese concept of "freedom of contract" allows for persons to contract freely with each other in contrast to the previous contract laws it has to apply "within the politico-economic environment in China" and there can be interference provided it is legal.⁶⁴

6. Formation of the Contract

The new Chinese Contract Law more clearly defines the differences between the contract formation and contract validity by distinguishing between void and voidable contracts, whereas previous laws voided all contracts which appeared to not conform to legislation. The law, nevertheless, states that contracts that are to be considered void per se were those entered into through "fraud or duress, through bad faith collusion", and those that are illegal, "which harm the public interest, or violate mandatory law or regulation".⁶⁵ Where a contract is an unfair one the party affected by such unfairness can void the contract.⁶⁶ This has implications in that the state can void a contract depending on the state's evaluation and attitude towards such contract.

In essence a contract under the new Chinese Contract Law will be "be effective and enforceable" if (a) "it is made by the parties who possess the required legal capacity", (b) "it is the product of real intention of the parties", and (c) "it does not violate any law or public interest".

⁶¹Freedom of Contract With Chinese Legal Characteristics: A Closer Look at China's New Contract Law Mo Zhang Temple University - James E. Beasley School of Law Temple International & Comparative Law Journal, Vol. 14, 2000

⁶²Matheson, J. H. Convergence, Culture and Contract Law in China. Minnesota Journal of International Law, 15, 329 (2006).

⁶³Sui, H., & Wang, D. Contract Performance and Remedies Business Law Review, 12(2), 71. (2007).

⁶⁴ Sui, H., & Wang, D. Contract Performance and Remedies Business Law Review, 12(2), 71. (2007).

Article 52 of the CHINESE CONTRACT LAW

⁶⁵Article 52 of the CHINESE CONTRACT LAW

⁶⁶ Article 54 ("Either party has the right to request a people's court or an arbitration institution to alter or rescind any of the following contracts: (1) any contract which is made under substantial misunderstanding; or (2) any contract the making of which lacks fairness.").

However, (c) may inadvertently be included in standard contracts, despite the fact that the terms of the contract complied with the applicable regulation, certain provisions may be invalid or contradict the law or public interest.

In accordance with the primary provisions of the new Chinese Contract Law, the formal agreement must include the following three essential points to constitute a legal contract; (1) "the parties to the contract" (2) "the actual agreement" and (3) "the object of the contract".

In terms of Article 13 of the new Chinese Contract Law, contracts are "formed" according to the "offer and acceptance" concept. An offer under the new Chinese Contract Law is defined as a "person's declaration of intention to conclude a contract with another person". This "definition" correlates with laws and provisions applied in international practice. The term "parties" can be found throughout the new Chinese Contract Law. However, the new Law does not clarify provisions relating to a unilateral contract.

The Chinese legal system does not prescribe on the "rule of consideration", both in the case of simple contracts and in formal deeds. In view of the omission of a provision relating to this principle, prudence should be observed when considering "an open offer" as the application of such an offer is likely to create complexity in practice⁶⁷ and a party entering into such contract may be faced with unexpected costs that may be incurred.

In practice, provisions may not be as simple as prescribed at the time in the "actual law" applicable. Whilst oral contracts are recognised as an acceptable form of contract, in the new Chinese Contract Law, should a dispute arise on the interpretation of the understanding of the parties evidence, an oral contract is more likely to be set aside by the court judges when a ruling has to be made in a particular case.⁶⁸

Although the "Economic Contract Law", "Foreign Economic Contract Law" and "Technology Contract Law" did not contain general rules specifically on the formation of contracts, contracts entered into with countries outside China were nevertheless required to meet certain prerequisites, namely they had to be in writing and, furthermore, in terms Articles 5 and 7 of the "Foreign Economic Contract Law", such contracts were contingent upon governmental approval. Under the New Chinese Contract Law, and to encourage foreign trade, the new Law allowed for more favourable specifications by the introduction of general rules on contract formation.

In terms of Article 2 of the Chinese Contract Law a contract is "***an agreement between natural persons, legal persons or other organizations with equal standing, for the purpose of establishing, altering or discharging a relationship of civil rights and obligations***".

When entering into a contract the parties needed to "reach agreement on the particular transaction or relationship to be established, altered or discharged". Chinese Contract Laws did not require that "the contract to be supported by consideration."

⁶⁷ Matheson, J. H. *Convergence, Culture and Contract Law in China*. *Minnesota Journal of International Law*, 15, 329(2006).

⁶⁸ Sui, H., & Wang, D. *Contract Performance and Remedies Business Law Review*, 12(2), 71. (2007).

Article 13 of the new Chinese Contract Law accommodates an “offer and acceptance” concept in Chinese Contract Law and defines that a contract is effective when “a contract is concluded by exchange of an offer and an acceptance”. As these provisions were not contained in previous “contract laws”, the inclusion of the revised provisions relating to “offer and acceptance” constituted progress in achieving China’s vision and objectives in the drafting of the new Chinese Contract Law.

In addition, Articles 32 and 33 of the new Chinese Contract Law covered circumstances where the notion of “offer and acceptance” was not applied, for example “when the parties simultaneously sign their copies of a formal contract upon the conclusion of their negotiations”.

Article 44 of the new Chinese Contract Law states that where a contract is contingent upon government approval, it, only becomes effective once it has been approved or registered. This could prove an impediment in the smooth flow of business.

Should one party to the contract not acquire government authorisation as specified then Article 8 of the “Supreme People’s Court’s second judicial interpretation of the new Chinese Contract Law ”⁶⁹, provides that the compliant party would be entitled to compensation for any losses incurred and the court may rule that the breaching party would be liable for such costs. Article 8 prohibits a party from reneging on this requirement or attempting to obstruct the process by not seeking approval of the contract.

The new Chinese Contract Law contains the provisions governing “offer and acceptance” in which was the contained in both the “CISG” and the “UNIDROIT Principles of International Commercial Contracts”⁷⁰. This was thus an alignment and adoption of a Western legal source. These changes were adopted by the Chinese authorities to achieve China’s objective to enter the international market.

For example, where a commercial advertisement complied with the provisions under Article 14 of the new Chinese Contract Law that the advertisement clearly stated specific and precise terms and that upon acceptance by the offeree, it would be deemed as the offeree acknowledges that he would bound by the terms and conditions contained therein, unless the person making the proposal specifies to the contrary.

In order to be deemed to be an offer, Article 14 of the new Chinese Contract Law requires that, firstly, “the offeror’s intention to be bound by the contract upon the acceptance of the offeree” and secondly “the proposal must contain the specific and definite terms that would apply”.

Contrarily, legal systems in Western countries differed in prescribing the objective of the respective parties to be legally bound. For example, South African law⁷¹, provides for an objective approach whereby should the offeree rationally construe that the other party intends to be legally bound will suffice. The Chinese Contract Law

⁶⁹ *Interpretation of the Supreme People’s Court on certain Issues concerning the Application of the Contract Law of the PRC, issued on 19 December 1999: Interpretation of the Supreme People’s Court on Certain Issue concerning the Application of the Contract Law of the PRC, issued on 13 May 2009.*

⁷⁰ *The UNIDROIT Principles 2004, Their Impact on Contractual Practice, Jurisprudence and Codification, Reports of the ISDC Colloquium (9/9 June 2006)*

⁷¹ *Christie on South African Contracts (2006)*

understanding is similar and as qualified by Mo Zhang⁷² that “if it could be reasonably believed from the offeror’s conduct that the offeror has the intent to make a contract, a contractual obligation may arise upon effective acceptance by the other party”.

Accordingly, an offer is dependent on its “outward appearance” whereby the offeror undertakes to bind itself on acceptance by the offeree, and is not contingent upon an offeror’s biased intention. This provision places the onus on the offeror to clearly define his intent in his communication and protects the offeree in his reasonable assumption of the applicable conditions provided for in the offer.

Article 12 of the new Chinese Contract Law defines the eight major terms that should be included in the contract, for example, the “names and domiciles of the parties”; the “subject matter”; “quantity”; “quality”; “price or remuneration”; “time limit”, “place as well as method of performance; liability for breach of contract”; and “method for dispute resolution”.

Notwithstanding the provisions contained in the previous paragraph, should a contract not contain one or more of these terms, Article 12 of the new Chinese Contract Law specifies that providing the content and intent of the contract can reasonably be assumed, then the contract may still be enforceable. Any omission in the express terms of the contract may, subject to agreement of both parties, may be incorporated in a supplementary contract. Such provisions shall not negate the terms contained in the original contract. In the case of trade usage (Article 61 Chinese Contract Law) the contract should comply with trade usage and the law.

Notwithstanding the revision of the previous contract laws, the new Chinese Contract Law which creates a more definitive framework for contracts, rulings by the judges to the new legislation is yet to take root, particularly as the new Chinese Contract Law continues to allow the courts to apply discretion when evaluating the content of an omission in a contract.

Article 61 of the new Chinese Contract Law provides that where there is a lacuna in a contract of trade it may be rectified in line with “the relevant clauses of the contract or usage of trade”. Further, Article 62 also provides guidelines to be applied by courts when considering primary terms such as “quality, price or remuneration and place, time or method of performance”

Under the previous contract laws, Judges applied the criteria that was “according to people’s feelings or affection, according to propriety or reason, according to law” to insert additional provisions when ruling on cases to rectify the “very incomplete legal framework” for contracts.

Therefore, the intention behind the drafters of the new Chinese Contract Law was to allow for a more flexible manner for the conclusion of contracts by excluding the stringent requirements imposed under the “Economic Contract Law”, “Foreign Economic Contract Law” and “Technology Contract Law”.

The new Chinese Contract Law correlates with Western legal systems whereby it distinguishes between offers and invitations to treat. For instance, communications relating to a “delivered price list, announcement of auction, call for tender, prospectus or a commercial advertisement” shall not constitute an offer.

⁷²Zhang, Mo. *Choice of Law in Contracts: A Chinese Approach* Northwestern Journal of international law & Business, (2006).

Notwithstanding the aforementioned law, under Article 14 of the new Chinese Contract Law provides that should a commercial advertisement clearly indicate the offeror's intention to be bind itself upon acceptance by the offeree and should it contain unambiguous contain terms, it shall be considered as an offer. This accords with Article 14(2) of the "CISG" whereby an offer may be perceived as an invitation unless it specifically indicates to the contrary by the person making the proposal.

Chinese civil law adopted the "receipt theory", which correlates with that applied in many Western civil law systems, to determine the effective point of an offer. According to the definition contained in Article 16 of the new Chinese Contract Law, "an offer comes into effect when it reaches the offeree", but omits to specify when the offer is deemed to have reached the offeree. Notwithstanding this omission, the term "reach" is understood to mean it shall be when it received and under the control of the offeree, and not where the offeree has not actually seen or read the offer.

Article 17 of the new Chinese Contract Law also contains a provision whereby the offeror can obstruct the process from becoming effective, namely that the offeror can retract the offer, provided the notice of such revocation reaches the offeree before or simultaneously with the offer itself. This provision corresponds with that contained in Western laws.

Notwithstanding that the contract is deemed to have become effective, it is therefore essential that the offeree ensure that the terms of the contract do not provide for the entitlement to the offeror to revoke his offer. In Western legal systems, diverse criteria are considered when establishing the question of revocability. In South African law,⁷³ the offeror may only revoke its offer if notice is given prior to acceptance by the offeree.

Article 19 of the new Chinese Contract Law states that there are two situations where an offer cannot be revoked. Firstly, if the intention that an offer is irrevocable, it must expressly contain the word "irrevocable". The second instance is where an offer expressly specifies a fixed period within which it must be accepted, in terms thereof the offeror undertakes not to accept any other offers for the duration of that period.

Chinese doctrine, however, implies that by fixing a period in the offer within which the offer must be accepted, even though the offer does not specifically state that it may be revoked during that period, is sufficient to render the offer irrevocable until the expiry of that period.⁷⁴

The offeree is also protected where the offeree places reasonable reliance on his understanding that the offer is irrevocable and acts his belief.

The interpretation of Article 19 Chinese Contract Law is vague insofar as whether the offeree's interpretation should be considered as subjective or objective. The wording of this Article can be interpreted that a subjective understanding that the offer is irrevocable and that the contract can be construed as subjective, the offeree may be required to justify his belief.

Ling⁷⁵ points out, however, that the interpretation as to whether an offer is irrevocable should be assessed by way of an "objective test and reasonableness" as

⁷³ Christie, *South African Contract Law 2016*

⁷⁴ Zhang Mo, *Chinese Contract Law, Theory and Practice*

⁷⁵ Ling, *B Chinese Contract Law 2015*

to the offeree's interpretation to the irrevocability or otherwise would need to be established. He furthermore states that where an offeree has a "reasonable belief in the irrevocability of the offer, the offeree must also have acted in accordance with his belief".

To justify his understanding, offeree must have initiated performance of the contract by, for example, the procurement of "raw materials, hiring workers, renting premises, arranging finances". Furthermore, measures initiated by the offeree based of his interpretation must be reasonable in order to assess whether the belief and action taken are reasonable, cognisance will be taken of the "nature of the transaction, the offerors conduct and statements, previous dealings between the parties and trade usage".

Article 25 of the new Chinese Contract Law provides that, a contract is formed when the offer has been accepted by the offeree and such acceptance shall be unconditional, unambiguous and conform to the terms of the offer. In this regard, Article 21 defines acceptance as the offeree's "manifestation of intention to assent to an offer" and the determination of the offeree's assent to such offer would depend on the interpretation applied to the acceptance. In addition, the Chinese Contract Law adopts an "objective" attitude when assessing an agreement, whereby the relevance of the outward appearance of the offeree's statement would be considered. Nonetheless, the offeree's acceptance would need to be complete, unconditional and unambiguous and be "consistent with the offer".

However, should the offeree amend terms of the offer that impact on the intent of the offeror's offer, such "acceptance" shall be deemed to be a rejection of the offer by the offeree and would constitute a "counter offer." (see Article of the 30 of the new Chinese Contract Law)

In terms of Article 22 of the new Chinese Contract Law, the offeree must notify the offeror of its acceptance of the offer, unless where the "usage of the offer indicates that acceptance" be evidenced by performance. Whilst there may not be a form to allow the offeree to communicate its acceptance, the offeree should take reasonable measures to inform the offeror of such acceptance. Whilst the offeror may specify in the terms of the offer his preferred method whereby the offeree should notify the offeror of its acceptance, it is understood that the offeree may communicate its acceptance through means that differ from that specified by the offeror, provided it is "more expeditious or advantageous" to the offeror.

In accordance with the new Chinese Contract Law, where the offeree can undoubtedly demonstrate his acceptance of the offer by commencing with performance in terms of the contract and where the offeror becomes aware of such performance, it can be construed that the offeree has accepted the offer. In contracts involving trade usage, only once the offeree performs the act shall its acceptance become effective.

Article 22 Chinese Contract Law clearly states that where the offeree has not communicated his acceptance nor commenced with its performance as set out in the contract, his inaction would not be considered as acceptance. This provision would not apply should the parties have agreed thereto or where the specific application restricts the offeree.

However, Article 171 of the new Chinese Contract Law states that in the case of “sale by trial”, it shall be understood that the buyer will have acted in terms of his obligations notwithstanding his failure to inform the offeror by the end of the trial period that he intends to purchase or reject the subject matter. It is the view of the law that in such instance the offeree’s action or inaction constitutes acceptance.

According to Article 23 of the new Chinese Contract Law confirmation by the offeree is required to be received by the offeror prior to the expiry of the period set for acceptance in the offer, unless the parties had agreed or the usage is clearly specified.

Article 24 of the Chinese Contract Law specifically defines that a period of acceptance commences, where it is communicated in writing, “on the date reflected on the letter or telegram”. Whereas, In the case of “instantaneous communication (telephone, fax, etc.)” the period shall commence on receipt by the offeree.

Article 25 of the Chinese Contract Law defines that at the point of acceptance the contract shall be deemed to have been formed. Article 26 qualifies that and states that “acceptance becomes effective” once it reaches the offeror and this is also known as the “receipt theory”, which corresponds to that applied in Western legal systems. Should the offeree not be required to notify acceptance, “acceptance becomes effective once the act of acceptance has been performed in accordance with the relevant trade usage or the requirements of the offer”.

Article 16 of the new Chinese Contract Law deals with instances where “an offer transmitted by electronic means reaches the offeree. On interpretation of Article 16, the provisions contained therein are not limited to offers. Its provision nevertheless is applicable to the “conclusion of a contract by the exchange of electronic messages” and the rule would also apply to the “acceptance”.

Where an acceptance is received after the expiry of the term specified, it is construed as a new offer, unless the offeror informs the offeree without delay that notwithstanding the late submission, the acceptance is valid (see Article 28 of the new Chinese Contract Law).

Furthermore, should the acceptance have been dispatched within the time specified period and would, under normal circumstances, have reached the offeror timeously under normal circumstances, the acceptance shall be considered valid, unless the offeror notifies the offeree as soon as possible that the offer was rejected as a consequence of the late receipt. (see Article 29 of the new Chinese Contract Law)

The new Chinese Contract Law furthermore prescribes that in instances where contract formation is entered into by way of a memorandum of contract, the contract is deemed to have been entered into once signed by the parties thereto (see Article 32 of the new Chinese Contract Law). Notwithstanding this provision, a contract shall be deemed to have been formed if, prior to the signing of the contract, a party thereto has performed its primary obligation and the other party acknowledge such performance (Article 37 of the new Chinese Contract Law).

Where a contract having been entered into by exchange of letters or electronic messages, Article 33 of the new Chinese Contract Law provides that one party may request a confirmation letter, in which event the contract shall be considered legally formed upon receipt of such the confirmation letter.

7. Standard Terms of Contracts

Standard clauses are defined by the new Chinese Contract Law as “clauses which a party formulated in advance for repeated use, and which the offeror did not specifically negotiate with the other party when entering into the contract”.

Article 30 Chinese Contract Law states that the terms of the acceptance shall not deviate from those contained in the offer, namely the offeree “must accept the terms of the offer in their entirety, and may not add, qualify or modify any of those terms”. Should the offeree materially modify the terms of the offer, the acceptance shall constitute a counter- offer.

Should amendments to an offer not have a material impact on the terms on the offer, Article 31 Chinese Contract Law recognises that such amended acceptance as valid, unless the offeror specified that no changes to the offer may be changed and/or the offeror indicates his objections to the changes without delay.

For clarification, the new Chinese Contract Law defines the differences between “material” and “non-material” amendments. Article 30 states that changes impacting on the “subject matter, quantity, quality, price or remuneration, time, place and method of performance, liabilities for breach of contract or the method of dispute resolution” are deemed to be material changes as they are considered to be pivotal terms of a contract on which the parties thereto must agree.

These terms are considered as central to the contract, on which the parties must reach agreement. The drafters of Article 30 of the, have stated that the list is not all-inclusive but the areas specified merely indicate certain types of terms where the amendment of which may be considered as material.

In order to avoid misinterpretations, Article 30 should be read with Article 31 of the new Chinese Contract Law. The determining factors should be the “materiality” of the amendment and not the nature of the term. Whether any amendment to the offer is to be regarded as material, thus rendering the purported acceptance a counter offer, would be based on the individual circumstances surrounding the matter.

Article 30 Chinese Contract Law refutes the assumption that changes to terms specified in the offer are to automatically be considered as material. The onus therefore rests on the offeree to demonstrate why an amendment is not material, and if his version is recognised, the acceptance shall be considered as valid. This shall apply unless the offeror, without delay, records his objection to the amendments. Accordingly, whilst alterations to the terms of the offer may be presumed as material, it should not necessarily assume that the acceptance constitutes a counter offer.

In order to simplify and facilitate the process of entering into international business transactions and to expedite the efficacy of contracts, companies often use standard forms to formalise transactions, especially those of sales. It would be advantageous to establish such international contracts.

Since the “CISG” does not consider the terms of international sales transactions as valid, they are dealt with in accordance with national law (Article 4 CISG)⁷⁶. It is

⁷⁶ *On standard form contracts and the CISG, see for instance, Jan Hellner, ‘The Vienna Convention and Standard Form Contracts’, in Petar Sarcevic and Paul Volken (eds.), International Sale of Goods*

therefore imperative to take into account provisions of Chinese Contract Law with regard to the use of standard terms, particularly as Chinese Contract law could be the law applied in such contracts.

As “standard term contracts” are regularly applied for international contracts, it is important to identify the jurisdiction under which the contract falls. It is for this reason that there is an increase use of “standard form contracts” in China which contains provisions which regulate the use of the standard terms.

Standard terms are defined in Article 39(2) of the Chinese Contract Law as “*contract provisions which were prepared in advance by a party for repeated use, and which are not negotiated with the other party in the course of concluding the contract*”. As mentioned earlier, the use of “standard form contracts” did not result as a consequence of negotiations between the parties but are submitted by one party to the other on a “pre-printed” form which does not allow for deviation or negotiation. It is of concern though that the use of standard forms could allow for inequality of bargaining power should the other party, without being fully informed as to the nature and extent of the terms, conclude a contract which contains certain provisions that may be detrimental to its interests.

In view of the aforementioned, Article 39 Chinese Contract Law⁷⁷ states the contracting party applying a form which contains its standard terms must draw the attention of the other party “in a reasonable manner” of any provisions whereby the rights of the other party is excluded or limits that party’s rights and, and should at the request of the other party, elucidate on such provisions should the other party require clarification. The requirement for clarification may also be enforceable even should the other party expressly or implicitly accept such terms.

Furthermore, the party requiring the use of a “standard term contract” must inform the other party in a “reasonable manner” depends on the specific circumstances of the contract, and shall take into account “the nature of the transaction, the language of the standard term, and the extent to which the user of the standard term exempts liability”.

To highlight those conditions deviating from the standard agreement form, the user may also be required to specifically draw the attention to the other party any such exclusion or limitation clause by “printing them in a distinctive colour, style or size, or display them on its premises”.

The interpretation of this requirement was ratified by the Supreme People’s Court, who further ordered that the notice must be submitted to the other party prior to the conclusion of the contract to enable the other party to make an informed decision when evaluating the terms of the contract. (Article 6 of the Second Judicial Interpretation of the Chinese Contract Law).

The duty to highlight and clarify the terms, nature and content of the contract is initiated by the other party. In principle, should the other party not request such elucidation, the user would not be required to do so. However, in terms of the “principle of good faith” (Article 6 of the Chinese Contract Law) it would be prudent

⁷⁷Article 2.1.9 UPICC

to clarify its “standard terms”, even should the other party not request it, particularly if the other party is not familiar with the language of the terms.⁷⁸

Consequently, if the party submitting a contract with “standard terms” fails to clarify the terms clearly and accurately, such “standard term contract” would render the term or terms that have not been clearly translated to the other party as void. The remaining terms contained in the contract would, however, still apply. The absence of clarity could result in a disadvantage to the user or frustrate the bargaining process, as the user would have based the value of the contract on the entire document, including the clause subsequently deemed to be invalid. Chinese Courts are of the view that terms contained in Chinese law cannot be waived and would accordingly consider its provisions.⁷⁹

Where there has been a “battle of forms”, the party submitting the final “standard form” is obligated to ensure that the other party clearly understands that it differs in certain material terms, for example “exclusion or limitation of liability” as the purported acceptance would, in essence, constitute a counter offer and could result in the offeree unwittingly conclude the contract on terms included in the contract which may favour the other party.

In accordance with the Article 39 Chinese Contract Law the offeror must clearly indicate that he acknowledges and accepts such material amendment made by the offeree and thereby mitigate any negative consequences which may arise from the “exclusion or limitation of liability” provided for in the counter offer.

Article 5 of the new law emphasises that “the parties shall abide by the principle of fairness in prescribing their respective rights and obligations”. This requirement will protect the “rights and duties of parties” as required in accordance with the principle of “fairness” is often clearly reflected in Article 39 of the Chinese Contract Law.

The principle of “fairness” must be taken into consideration when drafting the “standard terms contract”, so as to ensure equity of the contracting parties’ “rights and obligations, fair and just apportionment of rights, and the obligations and risks between the parties”.

According to Ling⁸⁰ it is rare that a contract is challenged on the validity of a contractual term contained in the application. However, contract terms deemed to be biased are reviewed on the basis of unconscionability.

Article 59(1)(2) of the “General Principles of Civil Law” permits a contracting party to apply to a court or arbitration tribunal to rule that an amended or cancelled contract is void if it is clearly unfair or “grossly unconscionable”. Article 54(1)(2) of the Chinese Contract Law also makes specific reference to the adoption of an “unconscionability” review where there is clear bias.

⁷⁸ Ling, *Contract Law in China*, supra note 2, p. 111. Compare Article 2.1.10 UPICC which renders standard terms that could not reasonably have been expected by the other party to be ineffective, unless they were expressly accepted.

⁷⁹ Chen, F. *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*. *Journal of International Law*, 27 153. (2001).

⁸⁰ Ling, *Contract Law in China* (2002)

Since this provision is based on the “General Principles of Civil Law”, the “Supreme People’s Court’s judicial interpretation with regard to Article 59 “General Principles of Civil Law” will apply. According to the Court, in terms of an unconscionable contract involves two elements: 1) the party abused its advantageous position, alternatively the other party’s lack of experience (e.g. where there is a discrepancy in bargaining power which favours , such as political, economic, and technological or information advantages and; 2) unfairness in the terms of the contract is evident, for example , a term is considered unfair if there is “an imbalance on the rights and obligations of the parties to a contract”, and the advantages that the contract accords one party is not in proportion to the requirements that the other party performs.⁸¹

The first element relates to circumstances where there is a disparity in bargaining power which favours one party, such as political, economic and technological or information advantages.

It is unclear as to whether exploitation or inexperience constitutes unconscionability or is merely a noteworthy factor. LING explains that in certain instances the courts consider only substantive unfairness and not exploitation.⁸²

Insofar as the second element is concerned, a term is considered unfair if it constitutes “an imbalance on the rights and obligations of the parties to a contract and the advantages that the contract accords one party is disproportionate to the requirements that that party performs.

In considering whether the terms of the contract constitute imbalance depends on the intention of the contract. The Chinese Contract Law defines specific the types of “contractual terms” that are deemed to advantage one party, such as those relating to “exemption, deposit and liquidated damages”.

For example, Article 53 of the new Contract Law decrees that a term which excludes liability for personal injury to the other party, is unfair to that party and accordingly nullified.

Article 52 of the new Chinese Contract Law specifically states that a contract shall be invalid if “(i) it was induced by fraud or duress, thereby harming the interests of the state; (ii) the parties colluded in bad faith, thereby harming the interests of the state, the collective, or any third party; (iii) the parties intended to conceal an illegal purpose under the guise of a legitimate transaction; (iv) the contract harms public interests; or, (v) the contract violates a mandatory provision of any law or administrative regulation”.

⁸¹Ling, *Contract Law in China (2002)*

⁸²Ling, *Contract Law in China (2002)*

Article 53 of the new Chinese Contract Law furthermore states that the following provisions are invalid and void, even should a supplier notify the other party that they form part of the contract: “(i) which a party excludes liability for personal injury caused to the other party; or, (ii) excludes liability for property loss caused to the other party through intentional misconduct or gross negligence”.

Article 40 further stipulates that where a standard term in the contract precludes any liability on the part of that party is void as the risks inherent to a particular contract would favour the interests of that party.

Ling suggests that this rule should be restricted and be considered void where the other party has not been informed in accordance with Article 39(1) and where the terms exclude the user’s liability. However, even in instances where the other party has been notified of the exemption clause, it contravenes the provisions of Article 54(1)(2) of the Chinese Contract Law (“unconscionability review”) and even where the other party has been notified of the exemption clause, it can be argued that it constitutes a “flagrant disequilibrium between the rights and duties of the parties” and can furthermore be invalidated on this basis.

Article 40 of the new Chinese Contract Law provides further protection in that a contract is void where a standard term is more onerous on or unfair to the other party. However, standard terms should not be read in isolation in order to establish whether the contract in its entirety constitutes an imbalance in the rights and duty of the parties but which favours one party. According to Ling, Article 40 Chinese Contract Law states that the provision would particularly apply to clauses relating to “liquidated damages, forfeiture and termination”.

Thus, the user of the standard term contract cannot “enforce a liquidated damages clause” where it exceeds the value of the actual loss sustained by him, or a “termination clause” that would not be recognised under the general law. Conversely, Article 40 of the Chinese Contract Law would not apply if there is an increase of liability for one party and it has an unfair outcome.

Finally, according to Article 40, where the entitlement of material rights of a party are negated by the provisions of a “standard term contract”, such contract is deemed to be void. Whilst the term “material rights” is not defined in the Chinese Contract Law, it implies “major duties or increases the other party’s responsibilities”, or “rights the party normally will have in the kind of contract”. Ling explains that “the deprived right is one that the other party would have had, but for the standard term”.⁸³ This could include “(i) terms that exclude or limit a party’s contractual defences; (ii) terms that provide for the forfeiture of a party’s property; (iii) terms that restrict a party’s freedom to contract with others; and (iv) arbitration clauses (which exclude the parties’ access to the court”.

⁸³Zhang, *Mo Chinese Contract Law, Theory and Practice* (2006)

8. Modification of Contracts

The new Chinese Contract Law allows for the modification of a contract subject to the mutual consent of both parties.⁸⁴ The validity of modification is governed by the same rules that would apply in determining the validity of the contract.

The modification of contract has to be definite in terms of Article 78 of the new Chinese Contract Law⁸⁵. According to the author Ling⁸⁶ if the modified contents are indefinite there will be a presumption in the law that the original contract has not been modified.

Besides the consensus required to modify the contract, in certain cases approval can be required by law or administrative regulation. This is to be found in Article 77(2) of the new Chinese Contract Law which provides that “if laws or administrative regulations provide that procedures such as approval or registration shall be carried out to modify a contract, such provisions shall govern”.

Article 54 provides that a party may apply to the “People’s Court” or the “Arbitration Tribunal”, for the contract to be reviewed if the contract was established under the following circumstances: there has been “significant misunderstanding, under the situation and obvious unfairness or by fraud, threats or taking advantage of others”.

As a consequence of the global economic downturn in the world in 2008, many in China experienced difficulties in competently performing in contracts which came into effect prior to the crisis. Many then tried to have their contracts modified or rescinded.

The “Judicial Interpretation on Contract Law II” was introduced by the “Supreme People’s Court” of China (Article 26) in order to elucidate certain rules contained in the new Chinese Contract Law. It was called the “Fundamental Change in Circumstances Provision. This provision contained guidance relating to the right of a party to make modifications or to withdraw from a valid contract where a “Fundamental Change of Circumstances” arises post its formation.

A “Fundamental Change of Circumstances” differs from a *force majeure* as it does not take into account the normal commercial risks nor the intention of the contract and accordingly may inhibit performance, possibly resulting in extreme unfairness to one of the parties.

Article 26 states that “After a contract is legally formed, in view of objective circumstances not anticipated by the parties when the contract was formed, not caused by force majeure nor commercial risks, and significant changes occur so that continuing the performance of the contract is unfair and inequitable to one party or the objective of the contract cannot be fulfilled, then a party or both parties may request the people’s court to modify or rescind this contract. The people’s court shall abide by the principle of fairness and consider the actual situations involved in this case before making a decision on modifying or revoking the contract at issue.”

Four criteria must exist in order to lodge a prima facie case when a party has applied to court to “modify or rescind” a valid contract. They are, objective circumstances

⁸⁴Article 77 of the CHINESE CONTRACT LAW- “the parties may modify the contract upon reaching a consensus by consultation

⁸⁵Article 78- “ a contract term is construed not to have been modified if the parties failed to clearly prescribe the terms of the modification

⁸⁶Ling, *Contract Law in China* (2002)

that exist that were not anticipated by the parties when the contract was formed; the change of circumstances is not caused by force majeure; the change of circumstances is not a result of a normal commercial risks; and the continuing performance of the contract would be unfair and inequitable to one party or the objective of the contract cannot be fulfilled”⁸⁷.

In arriving at a decision as to whether or not to approve a request by one of the parties for a contract to be modified or revoked, the “People’s Courts” will consider “(1) the principle of fairness and (2) the surrounding facts involved in each individual case”.⁸⁸

Similar to Western legal systems the new Chinese Contract Law recognises that, through mutual consent between the parties, contracts can be adapted.

However, such mutual consent between the parties must satisfy two requirements namely, “the modification term shall be definite and it is subject to the obtainment of approval required by the current laws or administrative regulations”. The Western legal system provides that a contract may be modified where a contract contains unfair advantages to a party and there is a change in circumstances which affects the operation of the contract. Conversely, Chinese contracts can be modified in the event of threats and fraud. Whilst this may be considered “immoral” to Westerners, it is applied in China to promote business transactions.⁸⁹

9. Dissolution and Termination of Contracts

The new Chinese Contract Law has set rules regulating the termination of the contract. The first one is by agreement which is a principle in the West.

The effect of termination consists of three parts that is release from performance, restitution and damages⁹⁰.

In release of performance both parties are released in respect of future obligations. The writer Ling⁹¹ submits that if a contract involves several parts or instalments, then the contract can only be terminated for the defective part of the instalment. In this case termination cannot release the parties from their obligations to other parts or instalments.

In terms of Article 97 of the Chinese Contract Law where a party has rendered certain actions provided for in the terms of the contract, the other party may require that party to remedy the situation or restore it to its original condition. However the remedies are not specified in the new Chinese Contract Law. The scholar Ping Jiang⁹² has attempted to explain the remedies as follows; (a) If the performance of the contract involves the supply of service or the use of a thing that cannot be restored by its nature, the party, which supplied the service or the thing could demand its value,(b) if the thing delivered for the performance has been destroyed, damaged or lost, the party, which benefits from the thing shall compensate its value and (c) if the

⁸⁷ Zhang, *Mo Chinese Contract Law, Theory and Practice* (2006)

⁸⁸ Fu, *Junwei Modern European and Chinese Contract Law, A Comparative Study of Party Autonomy* 2011

⁸⁹ Fu, *Junwei Modern European and Chinese Contract Law, A Comparative Study of Party Autonomy* 2011

⁹⁰ Article 97 of the CHINESE CONTRACT LAW “After a contract is terminated, the unperformed party ceases to be performed. As to the performed party, a party may demand restoration to its original status, resort to other remedial measures and have the right to claim damages depending on the amount of performance and the nature of the contract”.

⁹¹ Ling, *Contract Law in China* (2002)

⁹² *A Detailed Explanation of the Contract Law, China University of Political Science and Law Press, 1999*

thing delivered for the performance has been transferred to a third party in good faith, the third party shall not be required to return it. However, the party which transferred it to the third party shall be required to compensate for its value.

Article 97 of the new Chinese Contract Law⁹³ allows the parties to claim for damages where such loss are incurred as a result of the termination. The “damages” provision as contained in the new Law refers not only to interests of reliance, but also expectation interests. Some authors have define damages as meaning “(a) necessary expenses spent on the establishment of the contract, (b) costs for the performance of the contract,(c) the costs of losing other opportunities when concluding the contract,(d) costs incurred by restoring the situation to its original status and (e) costs resulting from the termination”.

Besides termination by agreement between the parties, there can be unilateral termination of the contract based on statutory reasons as contained in the new Chinese Contract Law. Those are (a) force majeure (b) anticipatory repudiation (c) unreasonable delay (d) frustration of contract purpose and (e) other reasons regulated by other laws or regulations.

Western legal systems including South Africa⁹⁴ share the new Chinese Contract Law provision regarding the termination of a contract by agreement. As can be seen this principle is consistent with freedom of contract. However, the effect of the Chinese termination of contract has retroactive effects and other reasons regulated by other Laws.

10. Breach of Contract

The new Chinese Contract Law defines a breach of contract in two circumstances, that is “actual breach” and “anticipated breach”⁹⁵. Chinese law does not specifically address the concept of fundamental breach. Breach of contract constitutes a failure by a party to perform in terms of the contract timeously. Article 107 of the new Chinese Contract Law divides actual breach as:

- “a) non-performance of contract obligation (*bu lüxing hetong yiwu*);
- b) non-conforming performance (*lüxing hetong yiwu bu fuhe yueding de*)”

Note that no liability would not apply to a party “unable to perform obligations that are objectively considered impossible to perform”.

The interpretation of “non-conforming performance” is where the obligor has performed his obligations, but in an “inadequate or incomplete manner” and is contrary to that as contemplated and expected in the contract. “Incomplete performance” would constitute a situation where the whole obligation had not been fulfilled. In terms of “proper performance” the person would be obliged to “perform the contract in the way that the quality, quantity, time, location as well as manner of the performance match the conditions agreed in the contract”.

Liability for Breach of Contract

⁹³A Detailed Explanation of the Contract Law, China University of Political Science and Law Press,1999

⁹⁴Law of Contract in South Africa-Christie (2006)

⁹⁵Zhang Mo, Chinese Contract Law: Theory and Practice, Leiden (2006)

“Common Law”, defines the understanding of a “genuine pre-estimate”. For example, where a party to the contract is able to demonstrate that the value in the contract constitutes a “pre-estimate” agreed upon by the parties of deficit which may result of the a party’s inability to competently perform the contract, then that amount will be considered by the court as the base value when assessing the loss and damages incurred. The one party would have to validate the “genuine pre-estimate” to enable to Court to consider the nature of the non-performance and compensation payable.

Article 114 of the Chinese Contract Law provides that “the parties may stipulate that in case of breach of contract by either party a certain amount of penalty shall be paid to the other party according to the seriousness of the breach”, and also specifies the method for the calculation of the sum of compensation payable for losses incurred as a result of the breach of contract. This approach differs significantly from the “Common Law” principle applied by the courts in common law countries for centuries.

“Common Law” lawyers need to be diligent when drafting contracts with parties resident in the People’s Republic of China. Such draft contract should specifically and clearly contain provisions regarding breach of contract and the remedies and penalties that would be enforceable in the event of such breach.

Should the parties not be able to accurately calculate the exact amount when drafting the contract, such contract should include a method of calculation or, at a minimum, a guideline on how to arise at a value, for example, by way of a percentage of the value of the entire contract or of each instalment. A court in adjudicating a dispute may, however, elect to apply its discretion to reduce the penalty, but such discretion is not commonly applied⁹⁶.

Similarly, notwithstanding that Article 114 contains a mechanism whereby parties can be awarded an amount greater than that originally set, the likelihood of such a ruling is rare. It is therefore preferable for the parties to define the value and include the defined amount in the contract.

11. The Role of the Judiciary

Judicial interpretation plays an important part of Chinese Contract Law and can be divided into particular categories.

For example, interpretation refers to rules regarding the application of the law concerning a particular law or issue. The Supreme People’s Court has issued two interpretations of the law of contracts.

(i) Rules of the Supreme People’s Court

The “Supreme People’s Court”, in 1999, published its first “judicial interpretation” which provided definitions and rulings on the questions of law that it would henceforth apply.

Second Interpretation

However, due to the vagueness of the first interpretation, it was superseded in 2009 by a second interpretation, which came into effect on 13 May 2009 and which

⁹⁶*Convergence, Culture and Contract Law in China John H. Matheson (2006)*

provided guidance on the resolution of discrepancies and qualified the interpretation of provisions of the “Chinese Contract Law”. This resulted in a more meaningful and practical understanding of Chinese Contract Law. The influence of international sources were also taken into consideration with the drafting of the document. The aim of this provision was to inhibit or review bad interpretations by lower courts arising from inadequate legal knowledge on the interpretation of the law in a manner which conformed to the legislator’s intent.

The Supreme People’s Court was granted delegated power by the “National People’s Congress” to make judicial interpretations in respect of specific application of laws in court practice. The Supreme People’s Court, in order to achieve its aim to “prevent or correct inaccurate interpretations of the Chinese Contract Law” provided support and assistance to the Chinese Contract Law to achieve these goals when addressing the deficiencies in its laws⁹⁷. These “judicial interpretations” are deemed to be essentially on the same level with laws and “widely applied in court practice”.

Interpretation No. 2 and the implications and interpretation thereof is significant for foreign investors seeking to do business in China.

In view of the rapid social development and economic growth of China in recent years, it appears that the motivation for issuing Interpretation No. 2 was a sense that the new Chinese Contract Law as interpreted by the Supreme People’s Court in Interpretation No. 1 was no longer adequate to address the increasingly complex issues raised by China’s socialist market economy.⁹⁸

Furthermore, a number of cases triggered by the global financial downturn have been brought before the Chinese courts, and this has further emphasised the need for a more sophisticated legal framework to address issues that are completely new, or to rebalance the rights between commercial factors such as business operators and their creditors⁹⁹.

Article 30 required that this Interpretation apply to all disputes relating to contracts post the promulgation of “Contract Law”. -It furthermore states that this provision would also apply to those instances where a final judgment had not yet been awarded on disputes which arose prior to the date when the Interpretation became effective.

Certain definitions provided in the Interpretation are set out below:

Place of Execution: The court shall accept the location where the parties signed the agreement as reflected in the contract as being the place of execution of the contract¹⁰⁰ although the actual signing of the contract could have taken place elsewhere. The “place of execution” of the contract is particularly relevant in the People’s Republic of China as it is taken into account when determining whether its courts had legal jurisdiction to rule on a contractual dispute. Should the place of signing the agreement not be stated in the contract, the Court shall refer to the place where the contract was last signed by the parties?

⁹⁷ *Convergence, Culture and Contract Law in China* John H. Matheson (2006)

⁹⁸ Zhang Mo, *Chinese Contract Law. Theory and Practice*, 2006

⁹⁹ Zhang Mo, *Chinese Contract Law. Theory and Practice*, 2006

¹⁰⁰ Article 4 of the Second interpretation by the SUPREME PEOPLE’S COURT

The People's Republic of China considers the location where a contract was signed as essential to determine the domestic court's jurisdiction to decide on a contractual dispute in the absence of any express provision in the agreement.

Parties commonly prefer to refer the matter to a neutral country with the view to ensuring a fair trial and resolution of their dispute.

Jurisdiction: The Interpretation allows for contracting parties to elect a court¹⁰¹ based in the location of either party as the location where the contract is to be performed, thereby granting the parties "freedom to agree on the jurisdiction for litigation".

Where registration or approval is required: In those instances where a contract only becomes effective once it has been approved or registered under the applicable law or administrative provisions,¹⁰² should the party on which the onus falls fail to take appropriate measures to give effect to this provision (Article 42(3) of the "Contract Law") states that such non-compliance shall be considered as "actions which violate the principles of honesty and creditworthiness". The court can then in such circumstances, in its discretion, order that the other party may apply for registration or approval and that the defaulting party shall be liable for losses and expenses incurred by the compliant party to remedy the situation.

The above provision is particularly relevant for parties contracting from other countries as contracts entered into are required to be registered with or approved by the relevant authorities in order to take effect. This would include "joint venture contracts, loan agreements with foreign banks or mortgages involving foreign mortgagees, etc." It affords protection to foreign parties who will be entitled to complete the registration or approval process. It nevertheless remains unclear as to whether the relevant authorities will consider such unilateral submissions by one party to the agreement valid.¹⁰³

Limitation of Liability: Article 39 of the "Contract Law" provides that the party using a "standard terms contract" highlight those terms which may "exclude or limit his liability" and draw the other party's attention thereto.

Reliance on standard term: The interpretation of the term "reasonable manner" referred to in the preceding paragraph is clarified in Article 6, which requires that such clauses should be highlighted by being printed "using words, symbols or fonts etc." to draw the attention of the other party and that the onus lies with the party relying on the standard terms to prove that those terms have been sufficiently highlighted to enable the other party to identify them.

Trade Practice: A significant number of contractual disputes in China arise from the understanding as to whether or not the particular practice is in fact "the actual trade practice for which the contract is entered into".

Where a supplemental agreement is not reached: Article 61 provides that should a supplemental agreement not be reached between the parties with regard to the "quality, price, remuneration or the place of performance", these terms shall be determined and take into account related provisions of the contract and normal trade practices.

¹⁰¹ Article 25 of the Second Interpretation of the SUPREME PEOPLE'S COURT

¹⁰² Article 8 of the Second Interpretation of the SUPREME PEOPLE'S COURT

¹⁰³ Article 8 of the Second Interpretation of the SUPREME PEOPLE'S COURT

Burden of Proof: Article 7 stipulates that the onus of proving the trade practice will lie with the party instigating the trade practice. The following provisions are defined as “trade practices” and will be considered by the Court when evaluating the matter.

They are “(a) the practice usually applied in the location or specific industry or area of the business, which is known or should be known to the parties when the agreement is signed; and (b) the habitual practice implemented by both parties”.

It should be noted that opinions by the Supreme People’s Court are Rules and not Law.¹⁰⁴

The second category¹⁰⁵ of judicial interpretation is the “regulation” which refers to the guidelines or provisions on judicial administration, while the last category is the “reply” which is the responses to the High Peoples Courts or Military Courts on the question of a specific application of the law during practical judgements.¹⁰⁶

(ii) Foreign- Invested Enterprises “FIE” Dispute Rules

The “FIE Dispute Rules”¹⁰⁷, which were issued by the Supreme People’s Court came into effect on August 16, 2010.

The intention of “FIE Dispute Rules” was to address two major factors.

Firstly, “the laws and regulations governing foreign-invested enterprises”, such as “the Law on Chinese-Foreign Contractual Joint Ventures, the Law on Chinese-Foreign Equity Joint Ventures and the Law on Wholly Foreign-Owned Enterprises”¹⁰⁸, which failed to take into account provisions necessary to accommodate the acceleration of China’s economy.

Secondly, as a consequence of the increase in foreign investment there was a concomitant increase in disputes involving foreign entities. According to Jungong Sun, a spokesman from the Supreme People’s Court, “the proportion of disputes arising from foreign-invested companies constituted 20 percent of the foreign-related civil and commercial cases over the preceding two years”.

The “FIE” Dispute Rules are authorised to address only “disputes which arose during the establishment and change of “FIE” and the “Supreme People’s Court” is empowered to “define additional rules on disputes which relate to termination of the Foreign-Invested Enterprises” body.

The “FIE Dispute Rules” comprise 24 articles:

- (a) Articles 1 to 4 “prescribe, in the main, the effectiveness of contracts, which are subject to approval by the “FIE Examination and Approval Authority”;
- (b) Articles 5 to 13 relate to “disputes arising out of the transfer of equity” in an “FIE”;

¹⁰⁴Castellucci, Ignazio *Rule of Law and Legal Complexity in the People’s Republic of China* Universita degli Studi di Trento (2012); Article 58, Chapter 3 of People’s Republic of China constitution states ‘the law-making power is held by the People’s Congress and the Standing Committee of the People’s Congress only.’

¹⁰⁵Fu, Junwei, *Modern European and Chinese Contract Law, A Comparative Study of Party Autonomy* 2011.

¹⁰⁶*Convergence, Culture and Contract Law in China* John H. Matheson (2006)

¹⁰⁷*In respect of foreign invested enterprises the SUPREME PEOPLE’S COURT passed the “Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises”*

¹⁰⁸http://www.watson-band.com/publication/pub?id=96&language=en_US

- (c) Articles 14 to 21 deal with “disputes arising from nominal investment” in “FIE”; and
- (d) The remaining of provisions govern the application of “FIE” Dispute Rules.

The “FIE” Dispute Rules only address issues arising during the establishment and amendments of the “FIE” and it is expected that the Supreme People’s Court will issue additional rules on disputes related to termination of “FIE” when required to do so.

Essentially the efficacy of contracts, “the resolution of FIE equity transfer disputes and “the resolution of disputes relating to nominal investment in FIE require the approval of the “FIE Approval Authority.

Where there has been no approval of a particular contract the court will determine that such contract is not yet operational and the court will decide that a contract is invalid if requested by the contracting parties to do so.

Where amendments to the supplementary agreement are not deemed to constitute “significant or substantial changes” to a contract which has been approved by “FIE”, Article 2, the court will not rule supplementary agreement invalid merely because the supplementary agreement had not been approved.

The "significant or substantial changes" referred to above include “changes to the registered capital of the company, the type of company, the term of the company's operation, the proportions of the capital contributions by the company's shareholders, changes to the method of capital contribution to the company, and the merger or division of the company or transfer of shares in the company”.

In accordance with Article 3, where the court that rules that a contract is invalid but establishes during a dispute hearing that the “FIE Approval Authority” had approved the contract, the court may favourably consider a rescission of the contract upon a request from both parties where such contract is in fact voidable.¹⁰⁹

Article 4 provides that the court must accept that a party has met its “capital contribution obligation” in the event that the following is established:

- (a) “a party to “FIE” conducts its business from a property where change of ownership is in the process of being registered as its capital contribution or its condition of cooperation”;
- (b) “the property is delivered to “FIE” and used by “FIE”; and
- (c) “The party obligated to give effect to the change of ownership registration completes the registration within the time limit prescribed by the court”.

However, the court will not view that such failure by a party to execute its “capital contribution obligations or provide the condition of cooperation with the other parties in the enterprise” despite an assertion by the “FIE” or its shareholders that the defaulting party is “not entitled to its rights as a shareholder following its failure to perform its capital contribution obligations or provide the condition of cooperation with the other parties in the enterprise”. However, in instances where the “FIE” or its shareholders are able to prove that they have suffered losses and claim compensation as a result of such party's failure to meet its obligations, the court will rule in favour of such application such compensation which arose as a result of the failure of that party to meet the deadline agreed upon.¹¹⁰

¹⁰⁹<http://www.hg.org/article.asp?id=20982>

¹¹⁰<http://www.hg.org/article.asp?id=20982>

Furthermore, the court will not support any claim by the FIE or its shareholders that such a party does not hold rights as a shareholder due to its failure to perform its capital contribution obligations or provide the evidence that the FIE has suffered losses due to such party's delay in registering for the change of ownership and bring a claim for compensation to the court.

Prior to the establishment of the "FIE Dispute Rules", the courts often ruled contracts invalid where "they had not been examined and approved by the 'FIE Approval Authority'". However, under the "FIE Dispute Rules", courts were not entitled to invalidate contracts, but such contracts should be deemed "not yet valid." This distinction is particularly relevant.¹¹¹

The new "Chinese Contract Law" does not consider contracts that are "not yet valid." However, confusion may arise regarding the effect of other provisions of such contracts unrelated to the registration obligation. It therefore follows that, if one party can demonstrate that the other party responsible for registering the contract has delayed the process, and the party alleging the other party's default has suffered losses as a result of this delay, then the court may grant compensation applied for by the party negatively affected by such default.¹¹²

The "FIE Dispute Rules" endeavours to encompass all situations that might arise while a FIE contract has been submitted to the "FIE Approval Authority" for approval. During the assessment period where the market value of the shares may of have become more favourable, should the transferor intend to sell its shares rather than continue with the application for approval,¹¹³ the "FIE Dispute Rules" shall be applied.

Where a transferee suffers losses as a result of the transferor not applying for the approval of the contract, Article 5 of the "FIE Dispute Rules" states that the transferee may apply for the "termination of the contract and compensation for actual losses incurred". Similarly, the court may grant an order in favour of the transferee for "the dissolution of the contract and/or compensation incurred as a result of such default"¹¹⁴. The court may also allow the transferee to make application for approval of the contract.

Despite the aforementioned, the execution of such provisions in China has proven to be difficult. The support of the transferor is required even in instances where the transferee applies for approval of a contract. In addition, it is vague as to whether the rules of the local "FIE" authorities will consider a submission by the transferee.

For these reasons, according to Article 6, where the transferor and, or the FIE fail to comply with a Court order, additional punitive measures for compensation may be awarded to the transferee. Furthermore, where the transferor and FIE fails to submit the contract for approval within the time period specified by the court and the court awards the transferee compensation for, for example, "those arising from differences in the value of the shares, shareholder earnings, and other reasonable losses, whereas the loss provided for in Article 5 is limited to "actual loss."¹¹⁵

The court may also approve an application by the transferee for a refund and return of all amounts already paid by the transferor, should the parties not be granted the

¹¹¹Jingzhou Tao, *Arbitration Law and Practice in China*

¹¹²Simpson Thacher & Bartlett, *Comparison of Asian International Arbitration Rules*

¹¹³Michael J. Moser, *Dispute Resolution in China*

¹¹⁴Vivienne Bath, Luke Nottage, *Foreign Investment and Dispute Resolution Law and Practice in Asia*

¹¹⁵Michael J. Moser, *Dispute Resolution in China*

approval of the “FIE Approval Authority” as a consequence of the transferor’s failure to undertake its obligations.¹¹⁶ The court will consider the transferee’s allegation based on evidence that such failure exists and extent of the transferor’s failure to apply for approval, and if the claim is deemed valid, will determine whether the transferor should be held liable to compensate the transferee, and the amount of compensation. (See Article 7)

Article 8, however, states that in the event that the transferor is required to apply for or comply with approval procedures only once the transferee has paid the consideration specified in the contract, and the transferee has failed to pay such consideration within a reasonable time despite the transferor requesting him to do so, the court may grant the transferor the right to terminate and order the transferee to pay the transferor compensation for the “actual justifiable losses incurred as a result of the delay”.

The “FIE Dispute Rules” would apply where, after the formation of a contract, the transferee fails to pay the costs inherent to the transfer of equity in FIE, and also in the event that the transferor and the “FIE” have similarly not met their obligation to submit the contract for approval by the “FIE Approval Authorities”.

In such circumstances, should the transferor lodge an application to the court for the transferee to remit payment for the transfer, the court may “adjourn the matter and order that transferor to undertake the approval procedures within a prescribed time limit”. In the event of the “share transfer contract” is approved by the “FIE Approval Authority”, the court will grant the transferor’s request for payment of the consideration for the transfer (see Article 9).

Similarly, Article 10 states that where, prior to the approval by the “FIE Approval Authority” and the payment of equity in the “FIE”, the transferee has already performed actual business operations and management of the “FIE” and as a shareholder has received dividends from “FIE”, the transferor can request that the transferee withdraw from the “management and business operations of the FIE” and reimburse the transferor with any earnings received by the transferee as a result of his participation in the business, subject to the deduction of costs and expenses incurred by the transferee, which request may be approved by the court.

Article 11 provides that should one of the shareholders in an “FIE” obtain the “unanimous consent of the other shareholders”, then it may transfer all or part of its shares in the FIE to a third party despite the fact that that party is not an existing shareholder in the “FIE”. Should the party transfer its share without obtaining unanimous consent, the other shareholders may request that the share transfer contract dissolved. The court is empowered to uphold such request, except in one of the following circumstances: “where there is evidence that the other shareholders had approved the transfer; the transferring shareholder has issued a written notice regarding the transfer of shares and the other shareholders have failed to respond within 30 days from their receipt of such written notice; or the other shareholders do not consent to the transfer, but fail to purchase the shares from the transferring shareholder”.¹¹⁷

¹¹⁶Michael J. Moser, *Dispute Resolution in China*

¹¹⁷Michael J. Moser, *Dispute Resolution in China*

Furthermore, in the event that the shareholder of an “FIE”, “transfer all or part of its shareholding to a third party” the other shareholders are entitled to insist that the “share transfer contract” be based on the fact on the basis that such omission “infringed on their right of first refusal”. In such a case, the court may approve the application of the other shareholders.¹¹⁸

The only exception to the aforementioned would be where the remaining shareholders fail to act on their right of first refusal within one year from the day that they were informed that the share transfer contract had been signed. Should, however, the transferor or transferee apply to a court for dissolution of the contract on the basis that it infringed upon the “right of first refusal”, the court may favourably consider such request. (See Article 12)

When there is an effective “equity pledge contract” entered into by the shareholders and creditors of the “FIE”, unless the “laws and administrative rules and regulations, or otherwise agreed by the parties to the contract”, the failure to register the pledge render the contract invalid.¹¹⁹

Article 13 of the “FIE Dispute Rules” provides states that the court will not uphold a party's claim that an “equity pledge contract be considered invalid or ineffective” due to the fact that the approval of the “FIE Approval Authority” was still awaited. Once “equity pledge contract” has been approved, the effective date of the pledge in accordance with the relevant provisions of “Property Law” shall be apply from the date of registration.

Contrary to the aforementioned, Article 13 effectively negates Rule 12 of the “Rules on Foreign Invested Entities' Equity Transfer”, provided by the “State Administration for Industry & Commerce” and the former “Ministry of Foreign Trade and Economic Cooperation” (now known as the “Ministry of Commerce”), and stipulates that until an “equity pledge contract” has been registered, it shall not be considered as valid. The reasoning behind the “Supreme People's Court's decision is that an “equity pledge contract” itself does not affect the ownership of shares.¹²⁰

It is frequently happens where shareholders of an FIE have agreed that one party shall make the investment in the “FIE”, and that the other party shall only merely act as a “nominal shareholder”. The “FIE Dispute Rules” clearly states that the court will uphold a mutual decision by the parties, provided they it is not invalidated as a consequence of the parties not meeting their obligations relating to other laws and administrative regulations (see Article 15).

Article 14 of the “FIE Dispute Rules” states that the court will not acknowledge that investor as a shareholder in the FIE, where unless (a) “the actual investor has already invested in the FIE”; (b) “shareholders other than the nominal shareholder recognize the actual investor's identity as a shareholder”; “and during the period of the court proceedings, the court or the parties received the consent of the “FIE Approval Authority” for the actual investor to become a shareholder in the FIE.

In terms of Article 15, the court will not consider a contention by a party that the contract “is invalid or has yet to become valid because it has not been approved by the FIE Approval Authority”. Also, in the case where the parties are not of one mind

¹¹⁸ Michael J. Moser ,*Dispute Resolution in China*

¹¹⁹ Michael J. Moser ,*Dispute Resolution in China*

¹²⁰ Vivienne Bath, Luke Nottage ,*Foreign Investment and Dispute Resolution Law and Practice in Asia*

regarding the distribution of benefits, the court may allow the “actual investor” to apply to the “nominal shareholder” to recompense the “actual investor” the earnings which it had received from the “FIE”. Further, in terms of Article 15 the court may also, after considering the circumstances in the case, permit the nominal shareholder to request the actual investor to pay remuneration to the remaining shareholder.

Article 16 authorises the court the right to uphold the application by the “actual investor” for termination of contract in instances where the “nominal shareholder” in the “FIE” fails to perform as required in the contract. Notwithstanding this provision, the court will not support an application from the “actual investor” for compensation relating to the “distribution of profits” or its exercise other rights as a shareholder on the basis of its agreement with the nominal shareholder. In such a case the court will not support the claim by the actual investor.

The “FIE Dispute Rules” also cover with the complex issue of valuation. Article 18 and 19 of such rules relate to the issue of valuation. Article 18 provides that where a contract between the “actual investor” and the “nominal shareholder” is deemed invalid, and there is a discrepancy in the value of shares whereby that of the “nominal shareholder” is greater than the actual amount of the investment, the court may grant the “actual investor” the right to demand from the “nominal shareholder” reimbursement of his initial investment as well as benefits that arose as a consequence of “participation in the management and business operations of the FIE”.

Notwithstanding the aforementioned provision, Article 19 provides that in the event of the contract between the “actual investor” and the “nominal shareholder” is deemed invalid, and in the event that the value of the shares held by the “nominal shareholder” is lower than the actual contribution invested, the court will permit the “actual investor” to demand that the “nominal shareholder” pay to it an “amount equal to the current value of the shares”.

Alternatively, should the “nominal shareholder” state that it wishes to forfeit its shares or refuses to retain them, the court may order that the “actual investor's investment be returned to it from the proceeds of an auction or forced sale of the nominal shareholder's shares in the FIE”.¹²¹

The court will undertake a reasonable assessment of the equity income between the parties in accordance with the provisions contained in Articles 18 and 19 of the “FIE Dispute Rules”. The calculation of the distribution shall be applied on the value of the investment made by the “actual investor” and shall take into consideration on the “nominal shareholder's” contribution in the operation and management of the FIE.

Should the “actual investor” request compensation from the “nominal shareholder” for any shortfall, the court will rule on whether the “nominal shareholder” is liable for such losses and the extent thereof which shall be calculated on the basis of the “existence and extent of any negligence on the part of the “nominal shareholder””.¹²²

In Article 20, the court is afforded authority to expropriate or compel the return of any property acquired by the parties “where the contract between the actual investor and the nominal shareholder in the FIE is deemed invalid based on malicious conspiracy, or on the grounds of actions detrimental to the interests of the state or

¹²¹Michael J. Moser, *Dispute Resolution in China*

¹²²Vivienne Bath, Luke Nottage, *Foreign Investment and Dispute Resolution Law and Practice in Asia*

those of any collective or individual. In practice, a significant number of nominal investor arrangements were set up to avoid the limitations on the types of industry in which a foreign-invested enterprise can conduct business”.

The issue of fraud and the concomitant repercussions are covered under Article 20. Should the FIE or one or more of its shareholders commit fraud (for example “providing false material information in applications to the FIE Approval Authority which altered the shareholders reflected in the FIE's approval certificate”) such actions may result in the other shareholders in the FIE lose their “status as shareholders or their original shareholding percentage”.

In such instances, the court may rule favourably an application by the other shareholders and re-establish their status as shareholders and/or validate their “original shareholding percentage or compensation”, save for where a third party has already acquired the shares without being informed of the situation or default on its part.

The court is empowered to requisition or return any property obtained by the parties where the contract between the actual investor and the nominal shareholder in the FIE is deemed invalid on the grounds of malicious conspiracy or on the grounds of harming the state or the interests of any collective or individual.

To summarise, the policy governing the nominal investment rules is to adjudicate on disputes between the “actual investor” and the “nominal investor” taking into consideration their respective obligations governed by their contract. Therefore it cannot be assumed that Chinese law would apply to such a contract.¹²³

Where a contract is not governed by the “Law on Chinese-Foreign Equity Joint Ventures”, the “Law on Chinese-Foreign Contractual Joint Ventures” and the “Law on Foreign Capital Enterprises”, the court will apply the general choice of law principles in deciding which jurisdiction will apply.¹²⁴

(iii) Doctrine of Precedent

Notwithstanding the fact that precedent is a crucial source of the contract law in the Western legal system and has proven essential in resolving international trade disputes under UNIDROIT in respect of International Commercial Contracts, precedent does not play a significant role in the Chinese Contract Law system. In the People’s Republic of China only a small percentage of court decisions or cases are published or made available to the public.

The reliance on a previous court ruling for authority “precedent” when arguing one’s case in the West plays a critical role in resolving contractual disputes. This practice is applied in international commercial contract disputes under UNIDROIT as well. However, precedence does not play a significant role in the Chinese “contract law system”, as precedence of previous court rulings is not normally taken into consideration in a contractual dispute as not all court rulings or cases are published.¹²⁵

¹²³Michael J. Moser, *Dispute Resolution in China*

¹²⁴Vivienne Bath, Luke Nottage, *Foreign Investment and Dispute Resolution Law and Practice in Asia*

¹²⁵X. Wang, *Choose the Right Chinese Law and the Choice of Law. Renmin University Law review*, 51(1), 135 (2007)

Whilst the “Supreme People's Court”, and the “Standing Committee of the National People's Congress” will occasionally interpret or apply those laws where ambiguities are at issue, or clarification is deemed necessary by the Communist Party leadership, this practice is not common.¹²⁶

A further controversial issue in China is where “re-interpretation of the judicial interpretation” may be prudent. This has resulted in extensive debates in which the essence relates to situations where the “People's Republic of China Supreme Court” identifies the need to elucidate, to get clarity or to review specific interpretations arrived at previously, by introducing revised interpretations under similar circumstances. However, the vagueness, validity and effectiveness of the original judicial interpretation¹²⁷, can render the re-interpretations as more complex and confusing.

(iv) Judicial Independence and Chinese Courts

Judicial Independence is a recognised principle in the Chinese Constitution.¹²⁸ Article 126 of the Constitution requires that the “People's Courts” are authorised to exercise judicial power independently “within the confines of the law”. Such power, which correlates with that applied in the West, shall be not be subject to interference by “administrative agencies, social organisations or individuals”.

However, because China is a Communist party state, the consequence is that in China this practice does not necessarily have the same result as it would when applied in the West because China as a Communist-party dominated socialist country (the doctrine of separation of powers does not exist) as a consequence of the Communist-party and its domination of the “National Peoples' Congress”¹²⁹ which is the nations' political power.

In terms of the Chinese Constitution, the National People's Congress, constitutes the highest body of state power under governance of the “Communist Party”.¹³⁰ The Supreme Peoples' Court however, is required to report to the National People's Congress, which is responsible for the “local people's congresses” to which the lower people's courts are answerable.

The appointment of Judges of the “lower people's courts” is influenced by the local Communist Party. Such judges do not have the security of a statutory term of office as they can be removed and replaced at any time at the discretion of the local People's Congress. Furthermore judicial decisions can be overruled by “local governments” with the view to “protect local industries or litigants or, in the case of administrative lawsuits, to shield themselves from liability”. This interference is accepted as local governments regulate “salaries of the local judiciary and court finances” and influence judicial appointments.

The Communist Party also influences individual cases through the “Political-Legal Committees” at government level. Committees have oversight over state legal institutions, including the courts. These Committees are staffed primarily by court

¹²⁶ Snow, J. *The Understanding of the Chinese Legal System*. *Beijing University Law Review*, 134(2), 76. (2008).

¹²⁷ Snow, J. *The Understanding of the Chinese Legal System*. *Beijing University Law Review*, 134(2), 76. (2008).

¹²⁸ *Constitution of the People's Republic of China 1982*

¹²⁹ Mo Zhang, *Chinese Contract Law, Theory and Practice* (2006)

¹³⁰ Mo Zhang, *Chinese Contract Law, Theory and Practice* (2006)

presidents, the heads of law enforcement agencies, officials of the justice ministry or bureau, and other legal organs". The Political-legal Committees are in a position to impact on the outcome of cases, particularly where those of a sensitive nature.

This illustrates that the concept of "judicial independence" differs from what is accepted and practiced in Western countries. Reference to "judicial independence," does not specifically not relate to the independence of judges, but to the independence of the courts when compared to other entities and government institutions. Furthermore, even though the "Chinese Constitution" provides that the courts are not subject to interference by "administrative organs, social organizations, or individuals", there is an expectation that judges recognise the leadership of the Party and acknowledge the supervision of the "people's congresses and the procuratorate" notwithstanding that these are not deemed to be improper restraints on judicial independence.

A decision by Intermediate People's Court in the famous "Seed" case demonstrates the "Chinese Courts'" limitation of judicial independence in practice.

In 2003, as a consequence of a decision by a judge at the "Luoyang Municipal Intermediate People's Court" the judge was nearly dismissed for ruling in a civil case that the provisions of certain local regulations were invalid as they conflicted with a national law.

The incident was made public and was debated in legal circles. The case furthermore substantiated the (perceived) absence of a system to resolve conflicts between national and local (lower-level) laws in view of the power imposed by the current legal and political systems.

In essence the case related to a contract dispute regarding the delivery of corn seed.¹³¹ The issue on which the panel of judges deliberated was whether, when calculating damages, market price for the corn seed should apply in line with provisions of the national "People's Republic of China Seed Law" or to apply the "government-set price range" applied by the local government in the local People's Congress.

As a consequence of her ruling Judge Li was accused of undermining the legislative authority by reaching an illegal ruling, thereby violating the law.¹³²

The Judges in this case overruled the local pricing regulation in the dispute and applied national pricing regulation regarding seeds.

In defending her decision, Judge Li cited Article 64 of China's Law on Legislation, which provided that "where a national law or administrative regulation enacted by the state has come into force, any provision in the local decree which contravenes it shall be invalid".

The absence of a system to review conflicting or inconsistent local regulations resulted in requests to revise the courts' judicial review process. Professor Jiang Ming'an of Peking University Law School pointed out: "Given that the Constitution has set forth the principle of judicial unity and that the Law on Legislation has stipulated the hierarchy of our laws, regulations and rules, when a court faces two conflicting laws on the same issue during the adjudication process, it should be

¹³¹ heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein...9

¹³² 21st Century Economic Report, November 17 2003

allowed to choose the applicable law of the higher legal authority; it should not be required to submit the issue to higher levels of courts, to the point that it must wait for a final answer from the Standing Committee of the National People's Congress."¹³³

In the light of this case other legal experts such as Zhang Xiaoling¹³⁴ proposed that the "Administrative Adjudication Law" must be amended to afford courts the right to review local regulations and to grant the Supreme Peoples' Court the final adjudication authority to address the validity of local regulations and the related conflict of laws issues to the Supreme People's Court.

Even should the Chinese judiciary be empowered to review local regulations, local judges are appointed and remunerated by local governments, and are therefore unlikely to involve themselves in matters which may result in a situation where they may have to rule between local and national laws.

12. Conclusion

In order to understand the extent of the limitations or restrictions in Chinese Contract Law cognisance should be taken of the fact that in China, law¹³⁵ is based on the ideal of the "rule of men", "*ren-zhi*", which is contrary to the rule of law which is applied applied in Western legal systems and which is supreme. Under the "rule of men", those in power are appointed by the government of the day.

In traditional China, men were believed get their authority to govern from Confucian virtue whereas in socialist China Communist virtue would apply.

Western legal ideals are based primarily on those of universal law and is applied equally to everyone over a broad spectrum of society. China's philosophy on both law and life are "premised on obedience to superiors within a hierarchy".

The term "Freedom of contract" as understood by the Chinese in the new Chinese Contract Law means that parties have autonomy when negotiating and deciding on the essence and terms of a contract. (See Article 124)

Whilst the Chinese Contract Law does not specifically include a provision for freedom of contract, certain provisions allude to this particular principle, for example: "equality between contracting parties, the right to voluntarily enter into contracts, and the principle of *pacta sunt servanda*". These principles, read in conjunction, afford individuals the right to elect to enter into a contract, with whom and the terms of the contract.

However, sections in the new Chinese Contract Law relate to "administrative supervision, mandatory plans, lawful interference, the requirement of governmental approval and the open norms" which refer to discretionary powers whereby "individual rights and interests of the contracting parties are subject to the collective interest, allows for potential restrictions to the freedom of contract".

¹³³ 21st Century Economic Report 27 December 2003

¹³⁴ See Zhang Xiaoling, "Constitutional Considerations Regarding the Li Huijuan Incident", <http://www.law-lib.com>, November 22, 2003 and Han Zhe, "Establishing a Sound Adjudication Mechanism for Conflicts of Law", 21st Century Economic Report, November 24, 2003)

¹³⁵ *Convergence, Culture and Contract Law in China* John H. Matheson (2006)

“Freedom of contract” is recognized in both the West and the new Chinese Contract Law although the emphasis and application differs in China. In the West, more emphasis is placed on the concept of “good faith and fair dealing, the protection of human rights and social justice”, whereas in China, the law is more restricted to the “collective interests and the welfare of the state”.

In China there is potential for conflicting rules in other sources of law (that is a specific laws relating to marketing, farming, consumers etc.) pertaining to contracts. To address this the new Chinese Contract Law a provision (see Article 123) provides that whereby “other laws have other provisions for contracts, those provisions shall apply”. Furthermore, “The General Principles of Civil Law” contains more general rules that cover issues that are not provided for in the provisions of the new Chinese Contract Law, and subject that such rules not conflicting with those of the new Chinese Contract Law, it will apply.

The People’s Republic of China Constitution clearly states that the validity of the law can only be assessed and approved by the “National People’s Congress”. However, despite many debates on this issue, no clarity has been reached.

It is apparent that the new Chinese Contract Law recognises the “principle of equality between contracting parties, the right to voluntarily enter into contracts, and the principle of *pacta sunt servanda*. These principles, read in conjunction, recognise that individuals are free to elect whether or not to contract with whom or on what terms and in what form.

However, as can be seen in the new Chinese Contract Law “administrative supervision, mandatory plans, lawful interference, the requirement for governmental approval and the open norms contained in Article 7 of the Chinese Contract Law which introduced a broad discretion to subject the individual rights and interests of the contracting parties to the collective interest” may result in constraints to the “freedom of contract” under Chinese rule.

As can be seen, Judgments can evolve into political processes, and the courts normally lack the power to enforce rulings that may be deemed to conflict with “Communist Party policy”, values, or current laws. (This is evidenced by the Seeds case discussed above).

In a Western democratic constitutional state the Constitution would be the supreme law of the land and the executive, judiciary and parliament would be obliged to comply with the Constitution. Conversely, in China, laws and decisions have to be interpreted as specified by the “National People’s Congress” which, is influenced by the Chinese Communist Party¹³⁶.

The ruling of Judge Li in the *Seeds case* when she declared that national law prevailed over the provincial law drew attention to “judicial independence” in China's “closed political system” whereby the government, and not the court, is the final arbiter of the law. Her ruling also highlighted the limitations on judicial authority and the constraints placed on judges.

In Article 20 of the Foreign Investment Enterprise, the “FIE” dispute rules, the court is empowered to appropriate any property acquired by the parties where a contract between the actual investor and the nominal shareholder in the FIE is deemed invalid

¹³⁶ Mo Zhang, *Chinese Contract Law, Theory and Practice*

on the basis of “malicious conspiracy, or, alternatively on the grounds of harming the state or the interests of any collective or individual”.

The issue as to whether any action in contravention of China's “industrial policy” negatively impacts on interests of the state is not addressed. The FIE Dispute Rules have endeavoured to clarify the law insofar as it impacts on FIE disputes in China. The “Supreme People’s Court” has adopted a very practical approach to FIE investment disputes, which corresponds to that applied in many foreign jurisdictions.

It is of note that the FIE “Dispute Rules” also apply to investors from “Taiwan¹³⁷, Hong Kong¹³⁸, and Macau¹³⁹, as well as Chinese citizens with permanent residence outside of China”.

The concept of precedence is also not readily applied in China. The understanding of reasons leading to the reluctance of Chinese law to adopt this approach would assist in acquiring a better understanding of Chinese law insofar as trade contracts are concerned.

When a legal practitioner from a Common law jurisdiction is party to a dispute in China where he or she might wish to cite a precedent, the practicality of doing so may have little impact. He is unlikely to be able to establish the appropriate authority or have access to the legal practice in China, even should it be a case from an official source such as “People’s Republic of China supreme court” case database.

Another ineffective feature of Chinese case law is its inadequate record database system. The only official case database is www.chinacourt.org, which was generated by the “People’s Republic of China Supreme Court”, which differs significantly from the English site.

Information available on the Chinese site include “case law database, anti-corruption forum, free posting sections for website visitors and many current news” which are not reflected on the English site, This may be due to a protracted process of setting up the English website to incorporate various sections; it can also be as a result of unrevealed political reasons.

In Chinese courts a case may be selected for publication with a view to highlighting an issue as an example in order to elevate confidence in the judicial system. In other instances it is to set an example for the public in order to build confidence in the judicial system. Other cases published may be to demonstrate the "Rule of Law" to persons or entities from other jurisdictions, or to set out new policies relating to foreign investment, or the activities of foreigners in China.

Litigation in China is conducted in a very efficient manner. In particular, Chinese litigation procedure makes provision for preliminary seizure of assets and other pre-judgment relief, which can facilitate the resolution of issues. However, where possible, arbitration proceedings are conducted as opposed to litigation, as this prevents the plaintiff from taking advantage of this preliminary relief.

Whilst litigation is considered preferable to arbitration, under the court system, contracts that provide for foreign law and a foreign language can be protracted and

¹³⁷ Also called the Republic of China. Established by the Nationalist government of General Chiang Kai-Chek who fled mainland China following the Chinese civil war.

¹³⁸ China's first special administrative region following the takeover from the British on 1 July 1997.

¹³⁹ China's second administrative region following China's takeover of the former Portuguese colony in 1999

render litigation essentially futile.¹⁴⁰ The Chinese court will furthermore require the parties to prove any issues on foreign law which may require ratification by the court¹⁴¹. Thus, before any proceedings begin, the court will require the plaintiff to prove all aspects of import relating to foreign law applicable in the matter.

To ensure that a contract with a Chinese entity is legally enforceable, the court will need to identify which body of law and which court system governs the provisions of the contract. While foreign business owners may want the contract to fall under the law and courts of their home country, except in certain rare situations, this would make it almost impossible to “enforce the terms of a contract in China”¹⁴² in that a Chinese court or entity would not accept the jurisdiction of a foreign court.

The burden of judicial interpretation in China has been an unresolved issue in that there can be conflict between a court’s decision and that of a local law or regulation as seen in the *Seeds case*. However, it is clearly stated in Article 4 of the Rules of the “Supreme People’s Court on the Work of Judicial Interpretation” that judicial interpretation has the same power as that of legislation.

Article 123 (as discussed earlier) is responsible for regulation of certain sections which are not specifically governed by the Chinese Contract Law, such as “advertisement, agriculture, construction, consumer protection, insurance, copyright, unfair competition, maritime transportation, etc.” and the decisions of that body will prevail subject to such decisions are not inconsistent with that of the Chinese Contract Law.

The new Chinese Contract Law builds on the Pre-1999 Contract Law, thereby maintaining the development of China's socialist market economy. The new contract law, is based on China's actual conditions, with reference to laws prescribed in Western countries and facilitates the incorporation of China’s current economic situation.¹⁴³ The new Law is accordingly similar to the principles applied in Western countries and international trade such as UNIDROIT and the CISG, albeit with Chinese “characteristics”. The Confucian principles of public interest and limitations to individual freedom (in terms of approval required for a contract in some cases) have also been retained.

The new Chinese Contract law has also included provisions not provided for in previous contractual provisions by incorporating certain rules that were applied under the common law system and adopted certain contract principles applied in Western countries. This is evident as can be seen in China’s recognition of the right of any person to freely enter into a contract, and the adoption of the concept of good faith.

These changes have created a more comprehensive system of contract law for persons conducting business in China and indicates the Chinese government’s efforts in unifying the various contract laws.

¹⁴⁰Li, X. *The Details of Winning a Case in the Complicated Regulatory Structure*. *ZhengZhou University Law Review*, 56(4), 77. (2007).

¹⁴¹Li, X. *The Details of Winning a Case in the Complicated Regulatory Structure*. *ZhengZhou University Law Review*, 56(4), 77. (2007).

¹⁴²Farewell, J. *The Supremacy of the Judgment in China*. *Journal of Asia Study*, 3(1), 20. (2006).

¹⁴³Matheson, J. H. *Convergence, Culture and Contract Law in China*. *Minnesota Journal of International Law*, 15, 329 (2006).

The Chinese government appears to have achieved its objectives in that the new Chinese Contract Law has been technically improved upon in comparison to its predecessors, it is now more market friendly, people can now freely contract with each other, the rights of contracting parties is better protected and government interference in contracts is restricted to what is legal.

One can conclude that despite some differences in Law and process between China and the West, Chinese Contract Law is modern and compatible for trade with Western countries, in that it is aligned to international business practices and it meets the economic needs of the Chinese people. China has a unique way of dealing with legal issues and in order for a Western businesses to be successful in negotiating contracts with Chinese entities a mind shift is required in that Westerners need to familiarise themselves with the Chinese way of doing things, instead of being too critical of something which differs from their perception.

BIBLIOGRAPHY

Beale, J. H. What Law Governs the Validity of a Contract. *Harvard Law Review*, 23(1), 1.(1909).

Castellucci, Ignazio Rule of Law and Legal Complexity in the People's Republic of China *Universita degli Studi di Trento*(2012)

Chen, F. The New Era of Chinese Contract Law: History, Development and a Comparative Analysis. *Journal of International Law*, 27 153.(2001).

Chen, Y. J. The Right of Subrogation In J. H. Zhang (Ed.), Beijing: China Central University of Political Science and Law (2000).

Chen, Chinese Law: Context and Transformation, Leiden 2008,

Christie, RH The Law of Contract in South Africa (fifth edition 2006)

Cong, H. Knowing the Chinese Market Economy from <http://info.news.hc360.com/HTML/001/002/007/014/001/87908.htm>(2004).

Cusumano, S., Wiseman, L., & Christensen, S. *Contracts*. Sydney: Butterworths.(1996).

Farewell, J. The Supremacy of the Judgment in China. *Journal of Asia Study*, 3(1), 20.(2006).

Fu Yulin and Randall Peerenboom, 'A New Analytic Framework for Understanding and Promoting Judicial Independence in China' (1 February 2009).

Fu, Junwei, *Modern European and Chinese Contract Law, A Comparative Study of Party Autonomy* 2011

Fouche, MA *Legal Principles of Contracts and Commercial Law*(Revised Sixth Edition 2007)

Hitchingham, J. Stepping Up to the Needs of the International Market Place: An Analysis of the 1999 "Uniform" Contract Law of the People's Republic of China. *Asian-Pacific Law & Policy Journal*, 8(1), 4(2000).

Hitchingham, 'Stepping up to the Needs of the International Marketplace: An Analysis of the 1999 "Uniform" Contract Law of the People's Republic of China

Henseler Peter of Henseler & Partners Duesseldorf/Germany, HE (CISG)2007

Hsu, 'Contract Law of the People's Republic of China' Interpretation of the Supreme People's Court on Certain Issues concerning the Application of the Contract Law of the People's Republic of China, issued on 19 December 1999:

Jiang, Z. Establishing a better socialist society and exploring a new era with Chinese characteristics (No.001). Beijing: Chinese Communist Party National Congress(2002).

Kreise, S. Convergence, Culture and Contract Law in China *Minnesota Journal of International Law* 15,329.(2006).

Larusson, Hafliði K. and Sharp, David J., "West Meets East: The New Chinese Contract Law," *Ivey Business Journal*, Vol. 64, Issue 2, Nov 1999, pp66-70.

Li, X. The Details of Winning a Case in the Complicated Regulatory Structure. *ZhengZhou University Law Review*, 56(4), 77.(2007).

Ling, B *Contract Law in China*, 2015

Matheson, J. H. Convergence, Culture and Contract Law in China. *Minnesota Journal of International Law*, 15, 329(2006).

Matheson, 'Convergence, Culture and Contract Law in China' 2006

Mei, G., Fu, Q., & Xu, H. Cultural Revolution and the Damages It brought to China. *Asian Journal of Politics and Law*, 12(1), 45.(2002).

McConnaughay, 'Rethinking the Role of Law and Contracts in East-West Commercial Relationships'

Mo, John, "The Code of Contract Law of the People's Republic of China and the Vienna Sales Convention," *American University International Law Review*, Vol. 15, No. 1, 1999, pp209-70.

Pattison, P., & Herron, D. *The Mountains Are High and the Emperor is Far Away: Sanctity of Contract*(2003).

Law in China. *Business Law Journal* 40, 459. *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Randall Peerenboom (ed.) New York, Cambridge University Press, 2009

Ping, Jiang, "Drafting the Revised Contract Law in China," *Columbia Journal of Asian Law*, Vol. 10, No. 1, 1996, pp245-258. *Sale of Goods Act (NSW) 1923* <http://www.austlii.edu.au>

Potter, P. *The Economic Contract Law of China Legitimizing and Contract Autonomy in the People's Republic of China* University of Washington Press, 97.(1992).

Shan, T. *The War of Re-Interpret the Judicial Interpretation Business Law Review*, 122(4), 23.(2007).

Snow, J. *The Understanding of the Chinese Legal System*. *Beijing University Law Review*, 134(2), 76.(2008).

Sui, H., & Wang, D. *Contract Performance and Remedies Business Law Review*, 12(2), 71.(2007).

Shiyuan Han ,*THE CISG AND MODERNISATION OF CHINESE CONTRACT LAW**www.victoria.ac.nz/law/nzacl/PDFS/.../06%20Han.pdf

Schlechtriem Peter, *Internationales UN-Kaufrecht*, 4 Aufl (Mohr Siebeck, Tübingen, 2007) S 4.

Scogin, Hugh T. and Braude, Brett D., "New Contract Basics," *The China Business Review*, January-February 1999, pp36-41.

The United Nations Convention on Contracts for the International Sale of Goods <http://www.uncitral.org/en-index.htm>

The UNIDROIT Principles 2004, Their Impact on Contractual Practice, Jurisprudence and Codification, Reports of the ISDC Colloquium (9/9 June 2006)

Tong, H. *The Four 'Most' Features in the Decade Long Court System Reform. Review of Judicial Reform in People's Republic of China from* <http://www.jcrb.com/200711/ca656834.htm>(2007).

UNIDROIT. (1980). *United Nations Convention On Contracts For The International Sale Of Goods* (1980)

[CISG]. Retrieved. from <http://www.cisg.law.pace.edu/cisg/text/treaty.html>.

UNIDROIT. (2004). *UNIDROIT Principles of International Commercial Contracts*. Retrieved from

<http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>.

Van Huysteen et al *Contract Law in South Africa*, Kluwer Law International BV, The Netherlands(2012)

Wang, L. *The Political Structure of RPC and Its Implication to the Legal System*. *WuHan University Law Journal*, 112(1), 45.(2008).

Wang, W. *Choose the Right Chinese Law and the Choice of Law*. *Renmin University Law review*, 51(1),(2007).

Wang, X. Are We Closer to the Equality Through the Way of Making a Fair Contract? . Beijing University Law Journal, 24(4), 11.(2003).

Wang, X. Jurisprudence in the Modern Chinese Legal System. Wu Han: Wu Han University (2007).

Wang, W. Choose the Right Chinese Law and the Choice of Law. Renmin University Law review, 51(1)(2007).

Wang Liming, "An Inquiry Into Several Difficult Problems In Enacting China's Uniform Contract Law," Pacific Rim Law & Policy Journal, Vol. 8, No. 2, March 1999, pp351-392.

Wang, Liming and Xu, Chuanxi, "Fundamental Principles of China's Contract Law," Columbia Journal of Asian Law, Vol. 13, No. 1, Spring 1999, pp1-34.

Wu, A. Improve the Qualification of Our Lawyers (No. 4). Beijing: National Lawyers Association(2007).

Wu, X. A Study of the Effect of Judicial Interpretation in Criminal Matters from <http://www.iolaw.org.cn/showarticle.asp?id=1155>(2004).

Zhang, Mo. Choice of Law in Contracts: A Chinese Approach Northwestern Journal of international law & Business, 26, 289.(2006).

Zhang, Y., & Huang, D. The New Contract Law in the People's Republic of China and the UNIDROIT(2001).

Wang Kui Hua, Chinese Commercial Law (Oxford New York Melbourne: Oxford University Press, 2000), p. 62.

Zaloom, E. Anthony and Liu, Hongchuan, "China's Contract Law Marks a New Stage in Commercial Law Drafting," China Law and Practice, May 1999, pp15-18.

Zhang Mo, Chinese Contract Law. Theory and Practice, 2006

Zhang Y, Harmonization of contract law, 2007,

Zhong, Jianhua and Yu, Guanghua, "China's Uniform Contract Law: Progress and Problems," UCLA Pacific Basin Law Journal, Vol. 17, No. 1, Summer 1999, pp1