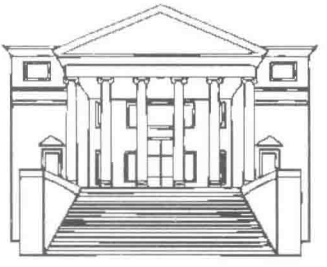

Chapter 1 Introduction

第一章 合同法概述

本章内容提要

本章主要讨论合同的概念、合同的分类及我国合同法的发展历史和基本原则。

在英美法系中，关于合同，一个通行的定义是：合同是能够直接或间接地由法律强制执行的允诺或一组允诺(promise)。它把重心放在单方同意表示上。在另一种十分通行的定义中，合同被说成是法律上能够强制执行的协议。这种定义把重心放在合同当事人双方的意思表示上，采用“协议”(agreement)一词来表明这种双方意思表示。在大陆法系中，合同被认为是双方当事人之间设立、变更、终止民事权利义务关系的协议。我国合同法中合同的概念采大陆法系协议说。

按照不同的标准可以对合同作出不同的分类：要式合同与不要式合同；诺成合同与实践合同；双务合同与单务合同；有偿合同与无偿合同等。

现行《合同法》颁布之前，我国合同法体系呈现出以《民法通则》为基本法，《经济合同法》《涉外经济合同法》和《技术合同法》三足鼎立的局面。1999 年 3 月 15 日，第九届人大第二次会议通过《合同法》。

合同法基本原则体现合同法的基本价值。我国合同法的基本原则主要包括：合同自愿原则、诚实信用原则、公平原则和鼓励交易原则等。

本章重点 合同的概念和特征 合同的种类 合同法的基本原则

关键术语 合同(contract) 诺成合同(consensual contracts) 单务合同(unilateral contracts) 双务合同(bilateral contracts) 有偿合同(onerous contracts) 要式合同(formal contract) 合同自由(freedom of contract) 诚实信用(good faith)

英文阅读

Introduction[1]

1.1 What Is a Contract?

1.1.1 Definition

Contracts are part of everyone's every day life. For example, when a person leases an apartment, buys a home or makes a charge purchase, a contract is involved. But what is a contract?

In traditional Continental civil law system, the two essential elements of a contract are the parties' intent and the expression of such intent by the parties. Article 1101 of the French General Principle of Civil Law states: "A contract is an **agreement** by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something." This reveals that the traditional Civil Law approaches the contract law from the perspective of the law of obligations.

The common law jurisdictions, on the other hand, view contract from a different perspective. One of the simplest definitions for a contract is that a contract is a **promise** enforceable by law. The promise may be to do something or to refrain from doing something. If one of the parties(persons) fails to keep his or her promise, the other is entitled to legal recourse against that person.

When the common law and continental civil law definitions of contract are compared, the definition of contract in Continental civil law is more abstract. It is based on expression of the parties' intent(or translated as "expression of will"). The

---

[1] 本章内容的编写主要参考以下资料:Stephen Graw, An Introduction to the Law of Contract(Fourth Edition), Karolina Kocalevski, 2002; Mo Zhang, Chinese Contract Law, Martinus Nijhoff Publishers, 2006; Bing Ling, Contract Law in China, Sweet & Maxwell Asia, 2002;[英]Hugh Collins 著,丁广宇、孙国良编注:《合同法》(第四版),中国人民大学出版社 2006 年版。

common law, on the other hand, defines it from the perspective of enforce ability in a court of law. This reflects the pragmatic approach of the common law, a tradition that can also be seen in the common law of tort and other subjects.

1.1.2 The Definition of Contract in China

The most known term equivalent to contract in Chinese tradition is Qi Yue (commonly translated as "agreement"). Interestingly, according to some Chinese legal history scholars, the term "contract" (He Tong) actually appeared in ancient China 2000 years ago, but was soon replaced by the term Qi Yue. At that time, contract was regarded as a form of Qi Yue, and therefore, contract itself was not a Qi Yue rather it was used as a mark or symbol evidencing the existence of the Qi Yue between the parties. In this sense, "contract" was once translated in Chinese as Qi Ju—certificate or written record of Qi Yue.

There was no clear definition of contract in China until 1986 when the General Principles of Civil Law was adopted. Nonetheless, because of the civil law tradition, a commonly held concept was that "contract in essence is an agreement" and this concept was accepted in the Chinese contract law legislation. Under Article 85 of the GPCL, a contract is defined as an agreement establishing, modifying and terminating the civil relations between the parties. Following this concept, Article 2 of the 1999 Contract Law further defines contract as an agreement establishing, modifying and terminating the relations of civil rights and obligations between natural persons, legal persons or other organizations of equal status.

The seemingly plain and straightforward definition of contract in Article 2 includes the following element.

Firstly, contract is an "agreement". The notion of agreement means that the legal effect of contract arises from the will of the parties, rather than from operation of state law or policy. The essence of contract is the autonomy of parties and freedom of contract. The private, consensual nature of contract also distinguishes it from other major civil law categories such as real rights, personal rights, tort, unjust enrichment, management without mandate, and pre-contractual liability, all of which arise from the operation of law.

Secondly, the parties that can enter into a contract are natural persons, legal persons or other organizations. Natural person refers to Chinese citizens, foreigners as well as stateless person. Other organizations are not defined in the law. However,

according to a judicial interpretation of the Supreme People's Court, other organizations would mean to include those organizations that are formed under the law with certain assets and organizational structure, but have no independent civil ability and capacity.

Under the GPCL, legal person is an association that has capacity for civil rights and civil conducts, and independently enjoys civil rights and assumes civil obligations in accordance with the law. Legal person is different from other organizations in that a legal person independently bears civil responsibilities while an "other organization" does not.

Compared with the previous laws, the definition of contract in the Contract Law was expanded the scope of contracting parties so that the Contract Law virtually applies to contracts made by any person.

Thirdly, the parties to a contract are "equal parties". Whilst this may sound axiomatic, the reference to "equal parties" serves to exclude from the concept of contract those agreement that arise from administrative relationships, the so-called administrative contracts.

Fourthly, contract is an agreement establishing, modifying and terminating relationship of civil rights and duties. This element defines the content of contract. Three theories were suggested during the drafting of the Contract Law. The first theory would define contract as an agreement affecting all kinds of legal rights and duties. Under this broad definition, administrative contract would be included. This definition was rejected by majority of the drafters, as it was seem to disrupt the normative object and content of the Contract Law. An all-embracing concept of contract would render the content of the law unwieldy and complex and its structure confusing. The second theory would define contract as an agreement creating, modifying and terminating obligations. This is the definition adopted by the GPCL and was accepted by all the drafts of the Contract Law. During the discussion of the draft Contract Law within the Standing Committee of the National People's Congress (NPCSC), however, the definition was questioned for being too narrow. It was pointed out that there are in practice contracts that are not concerned with obligations, such as contracts altering real rights (mortgage contract, pledge contract and contract for the assignment of land-use rights), contract altering intellectual property rights and contracts for common undertakings (partnership contract and joint operation contract). Also, the term

"obligation" could be misinterpreted to mean "money debt" only. It was thus decided at the meeting of the NPCSC that the reference to "obligations" be changed to "relationship of civil rights and duties".

The problem with the third theory is that such a definition would apparently include agreements on family and personal status agreements that most jurists believe involving special moral and policy considerations and are thus different from ordinary contracts. A second Paragraph of Article 2 was finally added by the Law Committee during the plenary National People's Congress session, so that agreements concerning civil status such as marriage, adoption and guardianship are excluded from the purview of the Contract Law. These agreements are governed by the GPCL and special Laws.

1.1.3 Advertisements of Rewards

It is important to know whether an advertisement of rewards constitutes a unilateral juristic act or a contract in Chinese law. Assume that Don tenders a monetary reward for the return of his much-loved but lost dog called Sebastian. Mary finds Sebastian and returns him. If Mary is not aware of the advertisement, will she be entitled to the reward? If the advertisement constitutes a contract, Mary will be entitled to the reward only if she reads the newspaper before she returns the lost property. On the other hand, if it is a unilateral juristic act, she will be entitled to the reward regardless of her knowledge of the advertisement. If Mary is of limited civil capacity, says a child of 6, will she be entitled to the reward? If the advertisement constitutes a contract, she will not be entitled to it, because she has no sufficient civil capacity to enter into a contract. However, if it is a unilateral juristic act, she is arguably entitled to the reward.

Advertisements of rewards for the return of lost or stolen property are commonly regarded as offers at common law. What is the position of Chinese contract law? Article 112 of the Property Law of PRC (also translated as the "Real Right Law") confirms the validity of advertisements of rewards: "The right holder of the object, when obtaining a lost-and-found object, shall pay the person who finds the object or the related department such necessary expenses as the cost for safekeeping the object. Where a right holder promises to offer a reward for finding the object, he shall, when claiming the object, perform the obligation of granting the reward. Where the person who finds the object misappropriates the lost object, he/she shall be deprived of the right to ask for paying the expenses he/she has paid for safekeeping the object."

Article 3 of Interpretations of the Supreme People's Court on Certain Issues concerning the Application of Contract Law of the People's Republic of China(II) also confirms the validity of advertisements of rewards: "In case the reward offer or make a public announcement to pay the person who finishes a certain activity and the said person requests such payment upon the completion of such activity, the people's court shall uphold such request, unless the reward has one of the circumstances as prescribed in Article 52 of the Contract Law."

An advertisement of rewards used to be generally regarded as a unilateral juristic act in China.

1.2 Types of Contracts

Generally, contracts are of two types: consumer contract and business or commercial contract.

The essential difference between a business contract and a consumer contract is this element of negotiation. Consumer contracts usually "take it or leave it", with no element of bargaining involved. When a consumer buys a shirt, a pair of shoes, or a meal in a restaurant, the color, design, and price are generally fixed and not negotiable.

This essential difference between business or commercial contracts and consumer contracts, has led to rules being developed to safeguard the rights of consumers whose lack of bargaining power denies them the rights they would otherwise enjoy under strict contract law.

1.2.1 Formal Contracts and Informal Contracts

The essential differences between the two are the degrees of formality involved in their creation and the bases of their enforceability.

Formal contracts are those that must be made pursuant to certain legal formalities, such as in writing, registration or notarization. On the other hand, informal contracts are those that may be made orally or in any other manner.

Modern civil law adopts the principle of autonomy, allowing much freedom of the parties to decide the form of contracts. Most contracts are informal contracts.

1.2.2 Verbal Contracts and Written Contracts

Verbal contracts are made orally, or in sign language as used by the deaf. The

problem of verbal contracts is often the lack of evidence in proving the existence or terms of the contract. Therefore, this form of contract may not be suitable for transactions involving substantial sums of money or complicated contractual terms.

Where the parties conclude a contract in written form, the contract is formed when it is signed or stamped by the parties. Article 11 of the Contract Law defines "written form" to mean any form in writing such as documents, letters and electronic data text (including a telegram, telex, fax, electronic data exchange and e-mail) that can tangibly express the contents contained in it.

Where a particular type of contract is required to be made in writing by legislation, and the parties only make the contract orally, it will still be valid under some circumstances. Article 36 of the Contract Law provides that where a contract is to be concluded in written form as required by relevant laws and administrative regulations or as agreed by the parties, and the parties fail to conclude the contract in written form, but one party has performed the principal obligation and the other party has accepted it, the contract is considered validly formed. Article 37 further provides that where a contract is to be concluded in written form, if one party has performed its principal obligation and the other party has accepted it before signing or sealing of the contract, the contract is considered validly formed. The above rules prevent a party from denying the contract if the other party has performed his own contractual obligation.

In recent years, Chinese academics have been advocating that, as long as both parties can demonstrate a consensus, the contract should be regarded as valid.

1.2.3 Unilateral Contracts and Bilateral Contracts

In common law, an unilateral contracts is a contract in which one party promise to pay in exchange for performance, if the potential performer chooses to act.

In a unilateral contract, one side is bound to perform it. A typical unilateral contract is a contract, in the sense that one party binds himself by a conditional promise leaving the other party free to perform the condition or not, as he pleases.

A bilateral contracts is a contract in which the parties exchange promises for each to do something in the future.

In a bilateral contract both parties shall equally execute their promises respectively. Either party shall perform his own duties and have his own rights. An example of typical bilateral contract is a contract for sale of goods—the buyer promises

to pay for certain goods whereas the seller promises to gender them.

In China, a bilateral contract is one in which both parties enjoy some rights and bear obligations respectively. In a contract for sale of goods, the seller's right is to receive payment and his obligation is to deliver the goods. The buyer's right is to receive goods and his obligation is to pay the price for the goods. Most contracts are bilateral. A unilateral contract is one in which only one party bear obligations. A typical example of a unilateral contract is a contract for a gift.

The major distinction between unilateral contracts and bilateral contracts lies in the right of defence. Articles 66 to 69 of the Contract Law specify three types of right of defence that are only applicable to bilateral contracts.

1.2.4 Express Contracts and Implied Contracts

An express contract is a contract in which all elements are specifically stated (offer, acceptance, consideration), and the terms are stated. Rights and duties of parties are clearly expressed so that the parties may perform it correctly and avoid misunderstanding. Once a dispute arises, the court can promptly settle it by judging who's right and who's wrong according to an express manifestation of their intentions.

An implied contract is a contract which is found to exist based on the circumstances when to deny a contract would be unfair and/or resulted in unjust enrichment to one of the parties. An implied contract is distinguished from an "express contract".

1.2.5 Titled Contracts and Untitled Contracts

A titled contract is one to which the Contract Law gives a name, such that it is subject to the part entitled "Specific Provisions" (Chapters 9 to 23) of the Contract Law. There are 15 types of contract specified under the Specific Provisions.

All other types of contracts are known as untitled contacts.

According to the Contract Law, where there are no express provisions in the Specific Provisions or in any other legislation for a certain contract, the provisions in the General Provisions (Chapters 1 to 8) shall apply, but reference may be made to the most similar provisions contained in the Specific Provisions or in any other legislation. Here, "the most similar provisions" are those provisions applicable to the types of contracts most similar to the subject contract, for example, the provisions for sales contracts (Chapter 9 of the Contract Law) may be applicable to a contract for

transfer of state land use rights.

1.2.6 Gratuitous Contracts and Onerous Contracts

A gratuitous contract is a contract in which one party promises to do something without receiving anything in return. An onerous contract is a contract in which each party obligates himself or herself in exchange for the promise of the other.

1.2.7 Consensual Contracts and Real Contracts

A consensual contract is a contract formed merely by consent. Contracts are divided into those which are formed by the mere consent of the parties, and therefore they are called consensual, such as sale, hiring and mandate; A real contract is a contract in which it is necessary that there should be something more than mere consent, such as the loan of money, deposit or pledge, which, from their nature, require the delivery of the thing, whence they are called real.

1.3 The Contract Law

1.3.1 What is Contract Law?

Contract law is initially concerned with determining what promises or agreements the law will enforce or recognize as creating legal rights.

Contract law's focus on promises and agreements distinguishes it from the two other major areas as private law: property law and tort law. Promises and agreements look to the future. Contract law, therefore, is concerned with what will be. When someone makes a promise and fails to keep it, contract law makes her pay because she has failed to bring about a future state of affairs to which her promise committed her. Property law, on the other hand, deals with what is. When a trespasser enters someone's property without permission, the trespasser is liable for interfering with an existing state of affairs—the owner's right to use the property and to exclude others from using it. Tort law looks to what was—the past state of affairs before harm occurred. A driver who negligently injured a pedestrian in liable because he has made the pedestrian worse off than he was before by taking away something the pedestrian had before the accident, such as his health or earning capacity.

In other words, the law of contract is not concerned so much with the specific of the obligation (these will differ from agreement to agreement), but with the mechanics involved in and the principles regulating the formation, performance, continuance and

discharge of the party's individually created obligations.

Therefore, when a court is called upon to intervene in a contractual dispute, it does two things:

(a) It applies the law of contract to see whether the agreement is a contract at all, and if so, whether it is legally valid and enforceable.

(b) If it decides that there is a valid contract, it interprets the words of that contract to determine the true nature and extent of the rights and obligations to which the parties have agreed.

Only after both steps have been taken can a court properly adjudicate on the dispute. What we have in contract, then, is something that exists in no other area of the law—a situation where the parties create the obligations and liabilities that form the substance of their relationship. The courts then simply enforce those individually agreed obligations and liabilities as legally binding. The sole restraint on the parties' freedom of contract is the fact that their agreement must not go outside the general parameters of principle that form what we know as the law of contract. Provided those principles are adhered to, the parties agreement will be legally enforced.

The law of contract states the fundamental legal rules governing market transactions. In most societies, markets serve as the principal mechanism for the production and distribution of wealth. This part of the law reveals some of the basic organizing principles of their economic arrangements. The law of contract supports these practices by making transactions legally enforceable, but at the same time it places restraints on conduct, shapes the types of obligations which can be created, and limits the extent to which the parties may enforce their agreement by means of self-help or coercion from legal institutions.

1.3.2 Historical Development of Contract Law

Contract law was well developed in Roman Law. Roman law for the first time distinguished breaches of contract from tortious acts. Prior to that, as in ancient Greece, non-performance was simply regarded as infringement. Various provisions of the Roman law have become the origin of modern contract law in Continental Europe, based on which the French General Principle of Civil Law and the German General Principle of Civil Law were drafted. The French General Principle of Civil Law established for the first time the principle of freedom of contract, which has become the core principle of modern contract law.

Legal recognition of the parties' freewill marked a significant milestone in the development of modern contract law. In the Middle Ages, the validity of a contract was premised on the notion of "fair price", meaning that the parties were required to enter into a contract at a "reasonable price" as consideration, failing which the contract would be void. In the 19th century, the doctrine of freedom of contract was firmly established, and the courts no longer looked into the adequacy of the consideration when adjudicating the validity of a contract.

Contract law in the 19th century was developed against the backdrop of the rise of the free economy, while the contemporary trend is the emergence of the welfare state. Freedom of contract is now regulated for various reasons, such as the pursuit of social welfare, consumer safety and environmental protection. The interplay of these social factors and contractual freedom is unavoidably the subject of political and jurisprudential controversy.

Another contemporary trend is the internationalization of contract law. As early as 1930, the International Institute for Unification of Private Law (UNIDROIT) embarked on the work of unifying the laws regarding the international sale of goods. In 1964, at the Hague Conference, the Uniform Law on International Sale of Goods and the Uniform Law on the Formation of Contract for International Sale of Goods were adopted. However, since these two conventions failed to achieve the objective of establishing a unified code on the international sale of goods, the United Nations International Trade Law Committee (UNCITRAL), on the basis of these two conventions, formulated in 1978, the United Nations Convention on Contract for the International Sale of Goods, adopted in 1980 and effective from 1 January, 1988. In May 1994, the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) gave its imprimatur to the publication of the Principles of International Commercial Contracts. Meanwhile, the European Union has been actively formulating the uniform principles of European contract law. The Commission on European Contract Law made up of legal experts and academics from European Union member states has developed the Principles of European Contract Law (PECL).

1.3.3 Development of Contract Law in China

1. Contract Law before 1999

The contract law legislation in China began in 1980 when the Economic Contract Law was drafted. The Economic Contract Law was adopted on December 13, 1981

and went into effect on July 1, 1982. In essence, the Economic Contract Law regulated contracts that were entered into for business purposes between legal persons, other economic organizations, individual businesses, and rural business households. It is important to note that under the Economic Contract Law the contact was termed as "economic contract" because at that time the contract was viewed as the legal means to realize economic goals as stipulated by the State plans. Also important to note was that the Economic Contract Law excluded natural person from making economic contracts. The Economic Contract Law was amended in 1993 to reflect China's on-going economic reform. The most striking change in the amended Economic Contract Law was the deletion of the provision that defined the purpose of economic contract as to guarantee the implementation of the state plans. However, the exclusion of natural person remained unchanged.

The second important piece of contract legislation was the Foreign Economic Contract Law, which was promulgated on March 21, 1985. The Foreign Economic Contract Law was designed to apply to the contracts where foreign party or foreign element was involved. Under Article 2 of the Foreign Economic Contract Law, the law applied to economic contracts, concluded between enterprises or other economic organizations of the People's Republic of China and foreign enterprises, other foreign economic organizations or individuals. Once again, no Chinese citizen was allowed as an individual contracting party to enter into a foreign contract. In addition, the Foreign Economic Contract Law did not apply to the contracts of international transportation.

On June 23, 1987, the Technology Contract Law was adopted with a stated purpose of providing impetus to scientific and technical development in China. The application of the Technology Contract Law, however, was limited to the contracts between legal persons, between legal persons and citizens, and between citizens, which establish civil rights and obligations in technical development, technology transfer, technical consulting and services. It was the first time in the contract law legislation that the Chinese individuals were permitted to make contract. Because its intended domestic nature, the Technology Contract Law did not apply to contracts in which one party is a foreign enterprise, other foreign organization or foreign individual. In addition the participation of Chinese individuals in making contract was limited to the technology contract only.

The adoption of the Technology Contract Law marked the beginning of China's "triarchy" period of contract law legislation, where three contract laws simultaneously operated to deal with contracts in respective areas. This practice not only caused much confusion about application of these laws, particular when a contract involved overlapping domestic, foreign and technology matters. But also, it resulted in the inconsistency among the contract laws because each contract law is different from the other in terms of terminology, contents, structures as well as the wordings of contractual principles. For example, under the Economic Contract Law, the contractual remedies were based on the principle of "fault", which meant that whoever at fault in case of breach would be responsible for the damages. According to the Foreign Economic Contract Law, however, a breaching party would be liable for the damages in case of breach regardless of the breaching party's fault. Clearly, the Foreign Economic Contract Law did not premise the contractual liability on the fault principle, but on that of strict liability. The conflicting liability principles in the Foreign Economic Contract Law indeed made it difficult, if not impossible, to apply these laws in a predictable and uniform way. Therefore, a call for a unified contract law in China inevitably became an appealing voice all over the nation ever since the Economic Contract Law was amended in 1993.

The most compelling one was the need for a unified national legislation that regulates civil affairs(rights and obligations) taking place in the economic reform and establishes a common legal norm for the nation's booming civil activities to follow. Another reason seemed to be that both the Economic Contract Law and the Foreign Economic Contract Law had provided useful experiences for the legislators to identify the legal issues involving civil matters and to regulate some of the civil matters in a relatively comfortable way.

As we know, a market economy needs a uniform market that is open to all types of enterprises and individuals equally. Because of this, the previous contract laws were unfavorable to developing a uniform market in China and to providing a uniform contract law to all types of parties and transactions.

2. The 1999 Uniform Contract Law

On March 15, 1999, the Contract Law of the People's Republic of China was adopted by the Second Session of the Ninth National People's Congress and scheduled to take effect on October 1, 1999. The Contract Law's promulgation constitutes not

only a major development of China's contract law, but also an important step in China's enactment of its much-awaited General Principle of Civil Law.

It contains general provisions applicable to all contracts in chapters 1 – 8, as well as specific provisions relating to 15 types of contract such as sale, lease and technology. The Contract Law was the first law in China to have been drafted by law school professors and judges from the Supreme People's Court rather than administrative officials, most of the latter having little experience in legal education. The Contract Law did not only replace the existing patchwork of legislation and regulations governing contract law, but it also provided a much more comprehensive framework as it contained a total of 428 Articles, whereas the previous laws had contained 145 Articles in total. In fact, the Contract Law was the longest piece of legislation ever passed by the National People's Congress at that time.

It is believed that the drafters of the new Contract Law, consisting of many legal academics this time, had made extensive reference to various sources, such as the UNIDROIT Principles of International Commercial Contracts, the United Nations Convention on Contracts for International Sale of Goods, the Principles of European Contract Law, the General Principle of Civil Laws of France and Germany, and the English common law.

The Contract Law unifies and improves upon China's three previous contract laws. The Contract Law seeks to establish a more advanced, systematic, and comprehensive contract law to better suit the particular needs of China's transitional economy.

The Contract Law demonstrated a desire to progress towards a market-driven economy and away from state control. Previously, the purpose of China's contract system was seen as three-fold:" to uphold the socialist economic order, to strengthen and develop socialist public ownership and to protect the lawful interests of citizens, and to fulfill the material and cultural needs of the people." As a result, previous legislation had focused on the governance of state plan-related contracts key to a centrally planned economy. The Contract Law, on the other hand, had the stated aim: "to protect the lawful rights and interests of the contracting parties, to maintain social and economic order, and to promote the process of socialist modernization." Thus, the rights of individuals to freely enter into contracts are firmly at the heart of the legislation. The passing of the Contract Law was also significant because previous

commercial practice had only recognized a formal contract , whereas the Contract Law showed willingness to enforce oral contracts for the first time.

Compared to the three former Contract Laws, the scope of application of the unified Contract Law has been appropriately widened to cover a broader range of contracts. Under the unified Contract Law, parties to contracts include both natural persons and legal persons or other organizations. The range of contracts not only covers economic contracts and technology contracts, but also extends to all agreements establishing, modifying and terminating civil rights and obligations among independent parties. The extended scope of the contract law includes provisions governing new forms of contracts not specified in the three annulled contract laws but which have appeared following development of the market economy in recent years.

1.4 Principles of Contract Law

The fundamental doctrines of Chinese contract law are set out in Articles 3 to 7 of the Contract Law. They are the principles of equality, freedom of contract, good faith, public policy and fostering transactions. These fundamental doctrines of contract law serve as the guidance for legislation and judicial interpretation of the relevant legislative provisions.

1.4.1 Freedom of Contract

A contract is an expression and exercise of the free will of parties. One principle value underlying the law of contract is the freedom of contract. This principle is founded on the belief that optimum economic consequences could be achieved when parties are free to negotiate at their own volition, desire the benefits from the economic undertaking, and base their contractual obligations upon mutuality.

Freedom of contract is the core principle of the modern civil law and contract law. Intrinsic value in the doctrine of freedom of contract is that, so long as it does not violate the law and is not against public interests, a contract reached by parties is legally binding and has the force of law and it should be recognized by law and be enforceable in court.

A major reflection of the Contract Law's adoption of freedom of contract—in spirit if not in the exact words—is that it has, to the greatest extent possible, limited the mandatory provisions in the previous contract laws and, at the same time, broadened the scope of elective provisions. For instance, many Articles of the

Contract Law include the important qualifier "except where the parties have otherwise agreed", indicating the law's respect for the parties' freewill.

The essential elements of the doctrine of freedom of contract under Chinese law include: the freedom to make a contract or not to make any contract; the freedom to choose with whom one should contract; the freedom to decide the contents of the contract; the freedom to decide the mode in which the contract is to be made; the freedom to stipulate the remedies for a breach, and the freedom to decide the dispute resolution mechanism to be stipulated into the contract. The principle of freedom of contract governs every stage of the contracting process and is in many ways the most crucial of all contract law principles.

1. Contract Formation

According to Article 4 of the Contract Law, "parties have the right to voluntarily enter into a contract, no entity or individual may unlawfully interfere [with this right]". It is true that Article 38 of the Contract Law provides that "where the State according to its need issues mandatory plans or state purchasing tasks, the concerned legal persons and other organizations shall form contracts in accordance with their rights and duties as provided in relevant laws and administrative regulations", thus placing some limitation on the parties freedom to form a contract. Nonetheless, because the State currently only imposes mandatory plans in truly exceptional situations, this provision does not seem to significantly restrict the parties'freedom with respect to contract formation.

2. Terms of A Contract

The Contract Law provides that the terms of a contract are to be decided by the parties through agreement. Although the law lists some terms that are generally included in a contract, such as the parties' names and domiciles, the subject matter of the contract, and the quantity and quality of the goods involved, it does not require that all contracts contain all these terms. The law does not impose uniform provisions on the terms in all types of contracts. The contracting parties enjoy freedom and flexibility in determining what to include in their contract.

3. Contract Termination

The Contract Law explicitly recognizes the parties' right to agree upon contract termination and allows the parties to stipulate—e. g. at the time when a contract is formed—a right to terminate the contract. After a contract takes effect, if the

conditions for terminating the contract are materialized, a party that holds the right of termination shall be allowed to terminate the contract by exercising its agreed-upon termination right.

4. Liability for Breach of Contract

The Contract Law accords substantial respect for a non-breaching party's freedom to choose the form of remedy where the other party breaches. For example, Article 107 of the Contract Law stipulates that "where one party fails to perform its contractual obligations or fails to perform its contractual obligations in accordance with the contract, it shall bear the liability for breach by continuing its performance, taking remedial measures, or paying damages". This provision allows the non-breaching party to choose the form of remedy, including liquidated damages, damages, as well as specific performance (excepting special situations where the law recognizes that specific performance is impossible). With regard to the terms of liquidated damages, the Contract Law will generally follow the agreement between the parties. Even where the liquidated damages do not correspond to the damages as determined by law, the liquidated damages are to be deemed valid unless they are determined to be unduly high or low.

As it is true with the exercise of all other types of freedoms, the exercise of freedom of contract is not absolute. The freedom of contract is often subject to various restrictions, for example: in order to safeguard the legal interests and social and public interests of vulnerable groups, the contracting parties are sometimes required to observe certain mandatory obligations. For instance, public utilities in China, such as water supply, electricity, gas, public transport, are prohibited from refusing consumers' offers. The use of standard form contracts by business operators greatly restricts the choice of customers, who are in the weaker bargaining position. The inequality in bargaining power is adjusted by legislation.

1.4.2 Doctrine of Good Faith

"Good Faith" is the highest principle in Continental civil law system. Article 6 of the Chinese Contract Law provides that the parties shall observe the principle of honesty and good faith in exercising their rights and performing their obligations.

The doctrine of good faith is considered crucial in enhancing business ethics. Its two basic functions are: to guide the parties to act honestly in commercial transactions; and to give the necessary discretionary power to the judges.