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# Contract Law of the People's Republic of China

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## INTRODUCTION

Contract law plays an integral part in a society's transactional order. For this and other reasons, the People's Republic of China ("P.R.C.") has, since the launch of its economic-legal reforms in 1978, devoted major efforts to developing its contract law.

The first major contract law promulgated by the P.R.C. was the Economic Contract Law,<sup>1</sup> adopted on December 13, 1981, governing contracts among domestic parties.<sup>2</sup> As a counterpart to the Economic Contract Law, the Foreign Economic Contract Law<sup>3</sup> was adopted on March 21, 1985, to regulate contracts between foreign and domestic parties.<sup>4</sup> In 1987, the P.R.C. promulgated the Technology Contract Law<sup>5</sup> to regulate

1. Zhonghua Renmin Gongheguo Jingji Hetong Fa [Economic Contract Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 13, 1981, effective July 1, 1982) [hereinafter Economic Contract Law], *translated in CHINA LAWS FOR FOREIGN BUSINESS – BUSINESS REGULATION*, Vol. 1, ¶5-500 (CCH, 1985).

2. Economic Contract Law, *supra* note 1, at Chapter 7, Article 55; *cf.* Revised Economic Contract Law, *infra* note 11, Chapter 7, art. 46.

3. Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa [Foreign Economic Contract Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., March 21, 1985, effective July 1, 1985) [hereinafter Foreign Economic Contract Law], *translated in CHINA LAWS FOR FOREIGN BUSINESS – BUSINESS REGULATION*, Vol. 1, ¶5-550 (CCH, 1985).

4. Foreign Economic Contract Law, *supra* note 3, at Chapter 1, art. 2.

5. Zhonghua Renmin Gongheguo Jishu Hetong Fa [Technology Contract Law of the P.R.C.] (promulgated jointly by the Ministry of Science and Technology, Ministry of Finance, and State Administration of Taxation June 23, 1987, effective Nov. 1, 1987), *translated in CHINA LAWS FOR FOREIGN BUSINESS – BUSINESS REGULATION*, Vol. 1, 6793-6,801, ¶5-577 (CCH, 1985) [hereinafter Technology

technology contracts among domestic parties.<sup>6</sup> In addition to these three contract laws, the General Principles of Civil Law,<sup>7</sup> promulgated in 1986, also bears importantly on contracts.<sup>8</sup>

As has been discussed elsewhere,<sup>9</sup> there existed major problems with the three specific contract laws. Such problems include, for example, the problematic notion of economic contract, the lack of basic contract law rules such as those on offer and acceptance, and major discrepancies and inconsistencies among these laws and, to a lesser extent, between these laws and the GPCL.<sup>10</sup> For such reasons, in 1993, the P.R.C. National People's Congress started to draft a new contract law that was to unify and improve upon the three particular contract laws.<sup>11</sup>

Five years in the making, the new Contract Law<sup>12</sup> was officially promulgated on March 15, 1999, and, upon taking effect on October 1, 1999, superceded the three previous

Contract Law].

6. *Id.* at Chapter 1, art. 2.

7. Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of Civil Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong. April 12, 1986, effective January 1, 1987), *translated in* ISINOLAW [hereinafter General Principles of Civil Law or GPCL].

8. *See, e.g.*, GPCL, *supra* note 7, at Chapter 5, Section 2, art. 85 (defining contract), art. 88 (interpreting contract), and Chapter 6, Section 1, art. 106–107 and Section 2, art. 111–116 (discussing liability for breach of contract).

9. *See, e.g.*, Xu Chuanxi, *Introduction to ZHONGGUO SHEHUI ZHUANXING SHIQI DE FALÜ FAZHAN (DAI XUYAN)* [LEGAL DEVELOPMENTS IN CHINA DURING ITS TRANSITION PERIOD], 1, 1–27 (Xu Chuanxi ed., Beijing, Falü Chubanshe [Law Press] (2004) (especially the discussion at 15–16) (author's translation); Wang Liming & Xu Chuanxi, *Fundamental Principles of China's Contract Law*, 13 COLUM. J. ASIAN L. 1, 2-9 (1999).

10. *See* Xu Chuanxi, *supra* note 9; Wang Liming & Xu Chuanxi, *supra* note 9.

11. *See* Ping Jiang, *Drafting the Uniform Contract Law in China*, 10 COLUM. J. ASIAN L. 245, 245–258 (1996) and Wang Liming, *An Inquiry into Several Difficult Problems in Enacting China's Uniform Contract Law* (Keith Hand trans.), 8 PAC. RIM L. & POL'Y J. 351, 351–392 (1999) for a discussion of the law's drafting process. Although the Economic Contract Law went through a major revision in 1993, that revision did not solve the majority of the problems identified above. *Compare* Zhonghua Renmin Gongheguo Jingji Hetong Fa [Economic Contract Law of the P.R.C.] (revised Sept. 2, 1993), *translated in* 1 CHINA LAWS FOR FOREIGN BUSINESS: BUSINESS REGULATION ¶5-500 (Singapore, CCH Asia Pte Limited) [hereinafter Revised Economic Contract Law] *with* Wang Liming & Xu Chuanxi, *supra* note 9, at 5.

12. Zhonghua Renmin Gongheguo Hetong Fa [Contract Law of the P.R.C.] (adopted Mar. 15, 1999, effective Oct. 1, 1999), *translated in* 1 CHINA LAWS FOR FOREIGN BUSINESS: BUSINESS REGULATION ¶5-650 (Singapore, CCH Asia Pte Limited) [hereinafter Contract Law].

contract laws as China's current contract statute.<sup>13</sup> The distinction between foreign and domestic parties, as seen in the previous contract laws, has essentially been abolished so that the Contract Law applies equally to both domestic and foreign parties. The Contract Law has also abolished the notion of economic contract,<sup>14</sup> and provides General Provisions (entitled *Zongze* as Chapters 1-8) for governing all types of contractual relationships.<sup>15</sup> Technology contracts, along with fourteen other particular types of contracts, are governed by their respective Particular Provisions (entitled *Fenze* as Chapters 9-23) of the Contract Law, in addition to the General Provisions.<sup>16</sup>

As China's primary contract statute, the Contract Law has also informed the promulgation/amendment of several related laws and regulations, such as the Bidding Law (adopted August 30, 1999),<sup>17</sup> the Rural Land Subcontracting Law (adopted August 29, 2002),<sup>18</sup> the Copyright Law (adopted September 7, 1990, amended October 27, 2001),<sup>19</sup> the Implementing Rules of

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13. *Id.* at Art. 428. According to Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Hetong Fa Ruogan Wenti de Jieshi (yi) [Interpretation of the Supreme People's Court on the Application of the Contract Law of the P.R.C. (I)] (promulgated Dec. 19, 1999, effective Dec. 29, 1999), translated in ISINOLAW (last visited Sept. 18, 2006) [hereinafter SPC Interpretation of Contract Law], the Contract Law applies to all contracts that have been formed after the Contract Law became effective (*i.e.*, after Oct. 1, 1999) (Art. 1); for contracts that had been formed before the Contract Law went into effect but whose period of performance covered or was to commence after Oct. 1, 1999, the Contract Law also applies (Art. 2).

14. See discussion *infra* on the Contract Law's definition of contract, Part I.A.

15. The few exceptions are contracts involving the parties' civil status or relationship, such as marriage, adoption, and guardianship. For a further explanation, see *infra* notes 25-26 and accompanying text.

16. Technology contracts are governed specifically by Chapter 18. The other types of contracts include sales contracts, contracts on the supply of electricity, water, gas or heat, gift contracts, loan contracts, and so on. Types of contracts not enumerated in Chapters 9-23 of the Contract Law are to be governed by the General Provisions (*Zongze*) and may be dealt with by reference and analogy to (*canzhao*) the Particular Provisions (*Fenze*) or other laws. See Contract Law, *supra* note 12, art. 124.

17. Zhonghua Renmin Gongheguo Zhaobiao Toubiao Fa [Invitation and Submissions of Bids Law of the P.R.C.] (promulgated Aug. 30, 1999, effective Jan. 1, 2000), translated in <http://www.law-bridge.net>.

18. Zhonghua Renmin Gongheguo Nongcun Tudi Chengbao Fa [Rural Land Contract Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003), translated in ISINOLAW (last visited Sept. 18, 2006).

19. Zhonghua Renmin Gongheguo Zhuzuoquan Fa [Copyright Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective June 1, 1991), translated in CHINA LAWS FOR

the Foreign-Capital Enterprise Law (adopted December 12, 1990, amended April 12, 2001),<sup>20</sup> and the Government Purchase Law (adopted June 29, 2002).<sup>21</sup>

This Article seeks to provide an overview of the doctrinal structure and major provisions of the Contract Law. For want of space, it focuses primarily on the General Provisions (*Zongze*), touching upon the Particular Provisions (*Fenze*) only where relevant. Comparisons and contrasts between the Contract Law, on the one hand, and the previous contract laws and the GPCL, on the other, are made frequently in this Article.

## I. BASIC PRINCIPLES OF THE CONTRACT LAW

### A. DEFINITION OF CONTRACT

The Contract Law defines a contract as an agreement that establishes, modifies, or terminates civil rights and obligations among natural individuals, legal persons, or other organizations of equal legal status.<sup>22</sup> Accordingly, the Contract Law covers not only the so-called economic contracts, which were the sole subject matter of the three previous contract laws, but also civil contracts, which were governed by none of the previous laws. In the previous contract law regime, an economic contract was defined as one that was made between legal persons (*faren*)—not natural individuals (*ziranren*)—for the pursuit of a certain economic purpose.<sup>23</sup> In contrast, civil contracts were between natural individuals only.<sup>24</sup> The Contract Law has effectively

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FOREIGN BUSINESS – BUSINESS REGULATION, vol. 2, 1371-1491 (CCH, 2004).

20. Zhonghua Renmin Gongheguo Waizi Qiye Fa Shishi Xize [Implementing Rules of the Foreign-Capital Enterprise Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 12, 1990, amended April 12, 2001, effective April 12, 2001), translated at [http://www.lehmanlaw.com/lib/library/Laws\\_regulations/investment/detail\\_wholly.htm](http://www.lehmanlaw.com/lib/library/Laws_regulations/investment/detail_wholly.htm).

21. Zhonghua Renmin Gongheguo Zhengfu Caigou Fa [Government Purchase Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Jan. 1, 2003), translated in ISINOLAW.

22. See Contract Law, *supra* note 12, at art. 2.

23. See the Economic Contract Law, *supra* note 1, at art. 2. A legal person is an organization that can independently bear civil rights and duties. See GPCL, *supra* note 7, at Chapter III, art. 36. As distinguished from legal persons, the term natural persons refers to individual citizens (*gongmin*) in general. See *id.* at Chapter II.

24. Cf. HETONGFA JIAOCHENG [A TEXTBOOK ON CONTRACT LAW] 25 (Liu Ruifu ed. Beijing: Zhongguo Zhengfa Daxue Chubanshe (The Publishing House of the

eliminated this artificial distinction.<sup>25</sup>

With the definition above, the Contract Law has also eliminated the distinction between economic contracts among domestic parties (the subject matter of the Economic Contract Law and the Revised Economic Contract Law) and those involving a foreign party (the subject matter of the Foreign Economic Contract Law). Excepting agreements that pertain to marriage, adoption, or guardianship,<sup>26</sup> the Contract Law now uniformly governs all types of contracting parties and transactions. Because of their unique subject matter, the excepted agreements are to be governed by their relevant laws, respectively.<sup>27</sup>

## B. FREEDOM OF CONTRACT

The Contract Law recognizes the parties' legal right to voluntarily enter into a contract, and forbids any entity or individual to unlawfully interfere with this right.<sup>28</sup> As will be discussed in greater detail below, the Contract Law has drastically reduced the mandatory provisions in the previous contract laws and upholds the parties' free will whenever possible, as demonstrated by the frequent use of the significant qualifier, "unless the parties have agreed otherwise."<sup>29</sup> The Contract Law's respect for and protection of the parties' right to contract and of their free will indicates that it has espoused—in

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China University of Political Science and Law) (1991)).

25. See Wang Liming & Xu Chuanxi, *supra* note 9, at 2–5 for a more detailed discussion. In practice, a few ministerial or provincial regulations still, for one reason or another, adhere to the concept of economic contract. See, e.g., Shuili Jingji Hetong Shenji Qianzheng he Beian Zanzing Banfa [The Interim Measures on Auditing, Approving and Recording Economic Contracts Involving Water Resources] (promulgated by the Ministry of Water Resources on Oct. 1, 2003; effective Oct. 1, 2003) (author's translation); Anhuisheng Jingji Hetong Guanli Banfa [The Anhui Province Supervision Methods on Economic Contracts] (adopted Oct. 26, 1990; amended Dec. 27, 1993; abolished only recently on Apr. 4, 2002) (author's translation); Hunansheng Jingji Hetong Guanli Tiaoli [The Hunan Province Regulations on Economic Contracts] (adopted June 6, 1996; abolished only recently on March 29, 2002) (author's translation). On the whole, however, the notion of economic contract as espoused by the previous contract laws has effectively become a thing of the past.

26. See Contract Law, *supra* note 12, at Chapter 1, art. 2.

27. *Id.*

28. See *id.* at art. 4.

29. See, e.g., Contract Law, *supra* note 12, at arts. 34 and 79 among the General Provisions and arts. 133, 142, 197, 220, 225, etc., among the Particular Provisions.



spirit if not in the exact word—the principle of freedom of contract.<sup>30</sup>

This freedom of contract, of course, is not absolute. For instance, in concluding and performing their contracts, parties must obey laws and administrative regulations, must respect social public morality, must not disturb China's socio-economic order, or harm the society's or the general public's interest.<sup>31</sup> Moreover, the Contract Law still allows for state mandatory plans and purchasing tasks.<sup>32</sup> These mandatory plans and tasks may, if relevant, necessarily influence a contracting party's freedom in entering and/or structuring a contract, though in practice this may have little effect because the State currently only imposes such plans in truly exceptional situations.

In addition, the requirements of equality and fairness in the Contract Law also pose a necessary limitation on the parties' freedom of contract. Article 3 of the Contract Law stipulates that contracting parties are of equal legal status (*pingdeng*); neither party may impose its will forcibly on the other. Article 5 provides that, in determining the rights and duties of each other, the contracting parties shall follow the principle of fairness (*gongping*). Major provisions that embody the requirements of equality and fairness include Articles 39, 40, 41, and 53, which impose restrictions on the use of form contracts and on clauses of indemnification.<sup>33</sup>

### C. GOOD FAITH

In exercising their rights and fulfilling their obligations, the contracting parties must follow the principle of good faith (*chengshi xinyong* or *chengxin*; literally, honesty and trustworthiness).<sup>34</sup> Although the Contract Law does not provide any detailed, precise definition of *chengshi xinyong* or good faith,<sup>35</sup> scholars in China generally hold that this principle

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30. In Wang Liming & Xu Chuanxi, *supra* note 9, we focus on discussing the principle of freedom of contract (and those of good faith and the fostering of transactions, *see infra* notes 30–38 and accompanying text), identifying major provisions of the Contract Law that reflect these principles, and explaining how these principles apply at various stages of a contractual relationship.

31. *See* Contract Law, *supra* note 12, at art. 8.

32. *See id.* at art. 38.

33. *See infra* Part II.C. and Part III.C. for a discussion of these provisions.

34. *See* Contract Law, *supra* note 12, at art. 6.

35. A clear definition of good faith indeed poses a challenge to many a business law regime. The Uniform Commercial Code (hereinafter U.C.C.), for example, provides only a perfunctory definition of good faith. *See* U.C.C. §1-201(19) (defining

requires that the contracting parties conduct themselves honestly and responsibly.<sup>36</sup> This means that parties to a contract should perform their duties in a responsible manner, avoid abusing their rights, avoid intentionally and maliciously harming the other party's interest, follow the law and common business practice, and so forth.<sup>37</sup>

The principle of good faith is embodied in major provisions of the Contract Law with respect to every major stage of the contract process. It applies not only to the formation and performance of a contract, but also to preliminary negotiations and post-contractual rights and duties. Thus, for example, a party is prohibited from conducting negotiations in bad faith under the false pretense of entering a contract<sup>38</sup> and from violating the principle of good faith in other ways,<sup>39</sup> whereas upon the termination of a contract the parties still owe to each other such good faith duties as loyalty and confidentiality.<sup>40</sup>

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good faith as honesty in fact in the conduct or transaction concerned).

36. See Wang Liming & Xu Chuanxi, *supra* note 9, at 16–22, especially at 16.

37. See *id.* at 2–9. See also Luzhou Longmatan Aoli Rihua Chang yu He Genfa Fenqi Fukuan Maimai Xiyifen Hetong Jiufen An [Luzhou City Longmatan District Aoli Everyday Chemical Plant v. He Genfa re an Installment Contract for the Purchase of Laundry Detergent] (Luzhou City Intermediate People's Court, Sichuan Province; decided June 11, 2001) [hereinafter Aoli v. He Genfa] (holding that disguising one's fake product as genuine or one's inferior product as superior constitutes a violation of the principle of good faith) (author's translation).

38. See Contract Law, *supra* note 12, at art. 42(1).

39. See *id.* at art. 42(3) (prohibiting “conduct that violates the principle of good faith in other manners”). See also the Supreme People's Court Stipulations on Certain Questions Concerning the Adjudication of Disputes Involving Future Commodities [Zuigao Renmin Fayuan Guanyu Shenli Qihuo Jiufen Anjian Ruogan Wenti de Guiding] (promulgated by the Sup. People's Ct. June 18, 2003, effective July 1, 2003), art. 16, [hereinafter SPC Stipulations on Futures] (If a futures trading company fails to call its clients' attention to the [standard] Statement of Risks Involved in Futures Trading when signing futures trading contracts with such clients, it shall be liable for such clients' losses in accordance with Art. 42(3) of the Contract Law, for violating the good faith principle) (author's translation); Zhongguo Gongshang Yinhang Zhoushan Shi Jiefang Lu Zhihang yu Zhoushan Shi Putuo Shanye Wuzi Youxian Gongsi and Zhoushan Jinsanjiao Gufen Youxian Gongsi Jiekuan Danbao Hetong Jiufen An [the Zhoushan City Jiefang Road Branch of the Industrial and Commercial Bank of China v. Zhoushan City Putuo Commercial Materials Co., Ltd. and Zhoushan Jinsanjiao Co., Ltd. re a Loan Guaranty Contract] (Zhoushan City Intermediate People's Court, Zhejiang Province; decided August 21, 2000) [hereinafter ICBC v. Putuo and Jinsanjiao] (holding that the defendant, by using an entity which it knew was non-existent as the guarantor of a loan contract, violated Art. 42(3) of the Contract Law) (author's translation).

40. See Contract Law, *supra* note 12, at art. 92 (providing that “After the termination of all contractual rights and obligations, the parties shall observe the principles of honesty and trustworthiness, and shall perform all notification, assistance and confidentiality obligations, etc, in accordance with business

Some of these provisions are discussed in greater detail below under separate headings.

#### D. THE FOSTERING OF TRANSACTIONS

Although the Contract Law does not articulate the fostering of transactions (*guli jiaoyi*) as one of its basic principles, this objective has been conscientiously adopted by the law's drafters and has guided, in a substantial way, the drafting of many provisions of the Contract Law.<sup>41</sup> For this reason, understanding of this principle will be helpful for our understanding of not only relevant provisions of the Contract Law, but also the many modifications it has made to the previous contract laws.

The principle of fostering transactions aims at facilitating and preserving contracts, as well as the transactions contemplated thereby, whenever it is in the contracting parties' interest to do so. In accordance with this principle, for example, the Contract Law has eliminated provisions in the previous laws that would automatically nullify contracts for defects such as fraud, duress, or exploiting a party's emergent situations.<sup>42</sup> Instead, the law now treats such contracts as being *voidable* by the disadvantaged party, rather than being *void per se*, so as to effectuate the parties' intent and to preserve and consummate transactions that remain, in the parties' judgment, mutually beneficial.<sup>43</sup>

Similarly, the principle of fostering transactions has motivated, often in association with the principle of freedom of contract, a variety of other provisions in the Contract Law. Such provisions include the permission of oral contracts,<sup>44</sup> the limitation on types of regulations that may invalidate a contract,<sup>45</sup> restrictions on when a breach of contract will justify a termination of the contract,<sup>46</sup> as well as other provisions that

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practices.”).

41. See Wang Liming & Xu Chuanxi, *supra* note 9, at 22–33, for a more detailed discussion.

42. See, e.g., Economic Contract Law, *supra* note 1, at art. 7(2); Foreign Economic Contract Law, *supra* note 3, at art. 10; Technology Contract Law, *supra* note 5, at art. 21(4); GPCL, *supra* note 7, at art. 58(3).

43. See, e.g., Contract Law, *supra* note 12, at art. 54.

44. See *id.* at art. 10.

45. See *id.* at art. 52.

46. See *id.* at art. 94.

will be discussed further below.<sup>47</sup>

## II. CONTRACT FORMATION

### A. CAPACITY

In order to enter into a contract, the parties must possess the relevant legal capacity for civil rights and civil acts.<sup>48</sup> For a natural individual, this means that he or she must be over 18 years of age, of sound mental state when entering into the contract in question, and so forth.<sup>49</sup> For a legal person, this means that it must have been duly formed and in due existence, that its entering the contract will not exceed its scope of business, and so on.<sup>50</sup> Where appropriate, a party—whether or not the party itself has the requisite capacity—may appoint a lawful agent to conclude a contract on its behalf.<sup>51</sup>

In situations where a party concludes a contract, although it lacks the appropriate capacity, the Contract Law may allow the party or its lawful representative to later ratify the contract. Therefore, in appropriate situations, a minor who has entered into a contract may elect to validate the contract if he or she so desires, although he or she does not have the capacity to conclude the contract in the first place.<sup>52</sup> As indicated above,<sup>53</sup> the Contract Law in this regard contrasts markedly with the previous contract laws, which would regard such contracts as being void *per se*. The major purpose for this significant change is to better protect and foster transactions that are beneficial to the contracting parties—in their own judgment—despite a party's lack of capacity.<sup>54</sup>

### B. FORMS OF CONTRACT

A contract may take the written form, the oral form, or

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47. See *infra*, notes 174–204

48. See Contract Law, *supra* note 12, at art. 9; see GPCL, *supra* note 7, at ch. 2, sec. 1 for specifications on the capacity for civil rights and civil acts that is required of a natural individual. For those required of a legal person, see *id.* at ch. 3, sec. 1.

49. GPCL, *supra* note 7, at ch. 2, sec. 1.

50. *Id.* at ch. 3, sec. 1.

51. See Contract Law, *supra* note 12, at art. 9.

52. See *infra* Part III.B. for a discussion on contracts with pending validity.

53. See *supra* notes 37–38 and accompanying text.

54. Cf. Wang Liming & Xu Chuanxi, *supra* note 9, at 24–27.

some other form.<sup>55</sup> A contract must take the written form if a relevant law (*falü*) or administrative regulation (*xingzheng fagui*)<sup>56</sup> so requires, or if the contracting parties have so agreed.<sup>57</sup> For certain types of contracts, the particular provisions provide more specific requirements on their forms. For instance, a loan contract (*jiekuan hetong*) shall be in writing, except in the case of a loan contract between natural individuals where the parties have agreed otherwise.<sup>58</sup> For a lease contract (*zulin hetong*), where the lease period is six months or longer, the lease shall be in writing.<sup>59</sup> That the Contract Law now allows oral contracts constitutes a notable change from the previous contract laws, which previously required all contracts to be in writing.<sup>60</sup> As a result of this rigid requirement, many contracts were found to be void *per se* simply because they were not put in writing, and many beneficial transactions underlying these contracts were thus invalidated.<sup>61</sup> The Contract Law seeks to remedy this problem by recognizing oral contracts where the norm of business practices so permits (e.g., in reality a loan may often take place between natural individuals without any written contract) or where it is so agreed upon by the contracting parties. The principal purposes of this change are, as indicated above,<sup>62</sup> to recognize the parties' freedom of contract, to facilitate contract formation, and to encourage and foster transactions.

According to the Contract Law, the written form refers to a document whose contents can be visibly expressed, such as a contract instrument (*hetong shu*),<sup>63</sup> a letter, or an electronic

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55. See Contract Law, *supra* note 12, at art. 10.

56. In the P.R.C., *falü* is a law proper and can only be promulgated by the legislature – i.e., the National People's Congress (hereinafter NPC) and/or its Standing Committee. In contrast, *xingzheng fagui* (an administrative regulation) is issued by the State Council and/or the ministries and commissions thereunder.

57. See Contract Law, *supra* note 12, at art. 10.

58. See Contract Law, *supra* note 12, Particular Provisions, ch. 12, art. 196.

59. See *id.*, Particular Provisions, ch. 13, art. 215.

60. See Economic Contract Law, *supra* note 1, at art. 3; Foreign Economic Contract Law, *supra* note 3, at art. 7; Technology Contract Law, *supra* note 5, at art. 9.

61. See Wang Liming & Xu Chuanxi, *supra* note 9, at 31.

62. See the relevant discussion in *supra* Sections I.B. and I.D.

63. In practice, various government agencies (both at the national and provincial/municipal levels) have made it a custom to promulgate model contracts for people to consider adopting. See, e.g., Gongcheng Danbao Hetong Shifan Wenben [Model Guaranty Contracts for Construction Projects] (promulgated by the Ministry of Construction, May 11, 2005) (author's translation); Model Contracts for Intermediary Services in Connection with Privately-Funded Studies in the

message (including telegram, telex, facsimile, electronic data interchange, and e-mail).<sup>64</sup> The written form is recognized and favored as a more tangible form of evidence for the existence and terms of a contract.<sup>65</sup> From this point of view, some types of contracts, such as loan contracts between legal persons<sup>66</sup> and lease contracts for six months or longer<sup>67</sup> are required to be in writing. For contracts that need to be approved by relevant governmental agencies, such as Chinese-foreign equity joint venture contracts and cooperative joint venture contracts, the written form is also prescribed.<sup>68</sup>

But even where a contract is required to be in writing, the Contract Law still allows for certain exceptions. Where a law or administrative regulation requires a contract to be in writing or where the parties agree to conclude their contract in writing,<sup>69</sup> even if the contract fails to take the written form, it is still treated as duly formed if one of the parties has performed its major obligation under the contract and the other party has accepted that performance.<sup>70</sup> Similarly, where a contract is to be concluded by a contract instrument, if prior to signing or affixing seals thereupon, one party has performed its major obligation under the contract in question and the other party has accepted that performance, the contract is to be treated as duly formed as well.<sup>71</sup>

Overseas; Zifei Chuguo Liuxue Zhongjie Fuwu Weituo Hetong (Shifan Wenben) (promulgated by the Ministry of Education and State Administration of Industry and Commerce, March 26, 2004) (author's translation); Beijing Shi Fangwu Zhulin Hetong Shifan Wenben [Beijing City Model Leasing Contracts] (promulgated by the Beijing Municipal Administration of Industry and Commerce, Apr. 29, 2004) (author's translation).

64. See Contract Law, *supra* note 12, at art. 11.

65. See Wang Liming & Xu Chuanxi, *supra* note 9, at 30–31.

66. See *supra* note 46 and accompanying text.

67. See *supra* note 47 and accompanying text.

68. See Article 7(3), *Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa* [The Law on Chinese–Foreign Cooperative Enterprises of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 13, 1988, effective Apr. 13, 1988) art. 7 (revised 2000), *translated in CHINA LAWS FOR FOREIGN BUS. – BUS. REG. 1*, ¶ 6-100 (2004) (P.R.C.); *Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa* [The Law on Chinese–Foreign Joint Equity Enterprises of the P.R.C.] (adopted July 1, 1979, effective July 1, 1979) art. 3 (amended 1990, 2001), *translated in CHINA LAWS FOR FOREIGN BUS. – BUS. REG. 1*, ¶ 6 – 500 (2004) (P.R.C.).

69. See *supra* notes 55–57 and accompanying text.

70. See Contract Law, *supra* note 12, at art. 36.

71. See *id.* at art. 37; *cf.* Zuigao Renmin Fayuan Guanyu Shenli Zhuzuoquan Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Jieshi [Sup. People's Ct. Interpretation on Certain Questions Concerning Applicable Laws for Civil Disputes

### C. TERMS OF CONTRACT

The terms of a contract are to be agreed upon by the parties.<sup>72</sup> Generally, such terms will include: (i) the titles, names, or domiciles of the parties; (ii) the subject matter; (iii) the quantity; (iv) the quality; (v) the price or remuneration; (vi) the time, place, and methods of performance; (vii) liability for breach of contract; and (viii) methods of dispute resolution.<sup>73</sup> In specifying the terms of their contract, the contracting parties may consult various model contracts that are relevant.<sup>74</sup>

By stipulating that the terms of a contract are to be determined by the parties, the Contract Law clearly indicates that it does not mandate that all contracts contain all of the terms listed above; the list is provided merely to suggest some of the most common terms. As a consequence, a contract's lacking of some of such terms does not necessarily invalidate that contract. This contrasts with the Economic Contract Law, which stipulated that economic contracts were to have a set of major terms<sup>75</sup> similar to those listed by the Contract Law. However, the Economic Contract Law was—at best—unclear about whether those terms were mandatory. In practice, the unfortunate consequence was that the absence of any of those terms would often be held to nullify a contract.<sup>76</sup>

A contract may be concluded with standard terms or clauses (*geshi tiaokuan*), which are contract provisions that are prepared in advance by a party for repeated use and are not negotiated with the other party in the course of concluding the contract.<sup>77</sup> When a contract is concluded with such terms, the party supplying those terms must observe the principle of fairness in prescribing the rights and obligations of the parties and shall, in a reasonable manner, call the other party's attention to the provisions that exclude or limit the other party's liabilities.<sup>78</sup> Upon request by the other party, the supplying

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Involving Copyright] (promulgated by the Sup. People's Ct., Oct. 12, 2002, effective Oct. 15, 2002) art. 22 (regarding copyright transfer contracts that are not in writing, the people's courts shall apply art. 36 and 37 of the Contract Law in deciding whether the contracts have been duly formed) (author's translation).

72. See Contract Law, *supra* note 12, at art. 12.

73. See *id.*

74. See *supra* note 51 and accompanying text.

75. See Economic Contract Law, *supra* note 1, at art. 12. See also Wang Liming & Xu Chuanxi, *supra* note 9, at 13–14.

76. See Wang Liming & Xu Chuanxi, *supra* note 9, at 13–14.

77. See Contract Law, *supra* note 12, at art. 39.

78. See *id.*; cf. SPC Stipulations on Futures, *supra* note 39, at art. 16.

party must also explain the effect of such provisions.<sup>79</sup>

A standard term will be invalid if it eliminates the liability of the party supplying that term, increases the liability of the other party, or deprives the other party of any of its material rights.<sup>80</sup> Such a term will also be invalid if it falls into any of the circumstances as set forth in Articles 52 and 53 of the Contract Law, which, as will be discussed later in this Article,<sup>81</sup> cover certain public policy grounds that will invalidate individual contract terms as well as entire contracts.

Where any dispute arises over the construction of a standard term, such term shall be interpreted in accordance with the way it is commonly understood. If a discrepancy exists between the standard term and a non-standard term, the non-standard term shall be adopted. If the standard term is subject to two or more interpretations, it shall be interpreted against the party supplying the term—as is required by the principles of good faith and fairness.<sup>82</sup>

#### D. OFFER AND ACCEPTANCE

In contrast with the previous contract laws, which lacked basic rules on offer and acceptance, the Contract Law promulgates a series of provisions thereon. Consequently, such crucial issues as what constitutes an offer or acceptance, what distinguishes an offer from an invitation to deal, and so on, are no longer left to the discretion of individual judges—as was the case under the previous laws—and thus are less conducive to discrepancy and other problems.<sup>83</sup>

##### 1. *Definition of Offer and Acceptance*

Under the Contract Law, a contract is to be concluded by

79. See Contract Law, *supra* note 12, at art. 39.

80. See *id.* at art. 40.

81. See discussion *infra* Part III.C.

82. See Contract Law, *supra* note 12, at art. 41; see Huizhou TCL Jinneng Dianchi Youxian Gongsi su Huizhou Shitong Tongxun Youxian Gongsi Jingxiao Hetong Jiufen An [Huizhou TCL Jinneng Battery Co., Ltd. v. Huizhou Shitong Communications Co., Ltd. re Product Distribution Contract] (Huizhou City Interm. People's Ct., Aug. 9, 2002) (holding that, in accordance with Art. 41 of the Contract Law and despite the standard Product Distribution Contract that was supplied by the appellant, the respondent should be treated as a general distributor—rather than a mere distributor—of the appellant and as such was entitled to greater rights and privileges than the appellant argued) (author's translation).

83. Cf. Wang Liming & Xu Chuanxi, *supra* note 9, at 7, 29–30.



the exchange of an offer and an acceptance.<sup>84</sup> An offer is a party's manifestation of its intention to enter into a contract with the other party, which shall (i) have terms that are specific and definite; and (ii) indicate that upon acceptance by the offeree, the offeror will be bound thereby.<sup>85</sup> An acceptance is the offeree's manifestation of its intention to assent to an offer.<sup>86</sup>

## 2. Offer Versus Invitation to Deal

As distinguished from an offer, an invitation to deal is a party's manifestation of its intention to invite the other party to make an offer thereto. Examples of invitations to deal include a delivered price list, an announcement of auction, a call for tender, a prospectus, or a commercial advertisement.<sup>87</sup> Where the contents of a commercial advertisement meet the requirements of an offer,<sup>88</sup> however, it shall be deemed as an offer.<sup>89</sup>

## 3. Effectiveness of Offer

An offer becomes effective when it reaches the offeree.<sup>90</sup> Where a contract is concluded by the exchange of electronic messages, if the recipient has designated a particular system to receive the message, the time when the message enters that system is deemed the time when the offer reaches the offeree; if no particular system has been designated, the time when the message first enters any of the recipient's systems is deemed the

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84. See Contract Law, *supra* note 12, at art. 13; Guangzhou Haishang Jiuzhu Dalao Ju su Fuzhou Xiongsheng Hangyun Maoyi Youxian Gongsì Haishang Jiuzhu Hetong Jiufen An [Guangzhou Maritime Rescue and Salvage Bureau v. Fuzhou Xiongsheng Shipping and Trade Co., Ltd. re a Maritime Rescue Contract] (P.R.C. Maritime Ct., Mar. 27, 2001) [hereinafter *Guangzhou Maritime Rescue v. Fuzhou Xiongsheng*] (holding that, in accordance with art. 13 and other relevant provisions of the Contract Law, the parties formed a valid contract by the exchange of an offer and acceptance re the rescue of the defendant's ship) (author's translation).

85. See Contract Law, *supra* note 12, at art. 14.

86. See *id.* at art. 21.

87. See Contract Law, *supra* note 12, at art. 15; Mo Kaiqian su Mo Mingqiang Jianshe Gongcheng Chengbao Hetong Jiufen An [Mo Kaiqian v. Mo Mingqiang re a Construction Project Contract] (Hainan Interm. People's Ct, Mar. 14, 2000) (holding that the defendant's announcement of opening the construction of his reservoir for public bidding constituted an invitation to deal, rather than an offer *per se*) (author's translation).

88. See *supra* note 85 and accompanying text.

89. See Contract Law, *supra* note 12, at art. 15.

90. See *id.* at art. 16.

time it reaches the offeree and, therefore, the time the offer becomes effective.<sup>91</sup>

#### 4. *Withdrawal and Revocation of Offer*

An offer may be withdrawn. For a withdrawal to be effective, the notice of the withdrawal must reach the offeree before or at the same time the offer reaches the offeree.<sup>92</sup> Similarly, an offer may be revoked. For the revocation to be effective, the notice thereof shall reach the offeree before the offeree has dispatched any notice of acceptance.<sup>93</sup>

An offer may not be revoked if: (i) it expressly indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (ii) the offeree has reason to regard the offer as irrevocable and has undertaken preparation for its performance.<sup>94</sup> In general, the Contract Law in this regard accords sufficient respect to the offeror's expressed intent, while protecting the offeree's good faith reliance on the offer in appropriate, limited situations.

#### 5. *Termination of Offer*

An offer is terminated (i) if the offeree rejects the offer and the notice of its rejection reaches the offeror; or (ii) if the offeror revokes its offer lawfully, as set forth in Article 18, discussed above.<sup>95</sup> Alternatively, an offer can also be terminated if the period for the offer's acceptance has expired and the offeree has not yet accepted the offer, or if the offeree makes a material alteration to the terms of the original offer.<sup>96</sup>

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91. *See id.*

92. *See id.* at art. 17.

93. *See id.* at art. 18.

94. *See id.* at art. 19.

95. *See id.* at art. 20.

96. *Id.*; cf. Beijing Xintuozhan Yingshi Cehua Zhongxin su Beijing Weining Xin Yingshi Jishu Youxian Gongsì deng Banquan Zhuanran Xieyi Jiufen An [Beijing Xintuozhan Film and Television Design and Planning Center v. Beijing Weining New Film and Television Technology Co., Ltd. et al re a Copyright Transfer Contract] (Haidian Dist. People's Ct, Aug. 19, 2003) [hereinafter Beijing Xintuozhan v. Beijing Weining] (holding that where an offer does not specify a definitive time period for its acceptance, it shall expire after a reasonable period of time; in the instant case, two years was more than such a reasonable period) (author's translation).

## 6. Modes of Acceptance

An acceptance shall be manifested by a notification thereof, except where—in accordance with relevant business practices or explicit indications in the offer—it may be manifested by conduct.<sup>97</sup> An acceptance shall reach the offeror within the time period prescribed in the offer.<sup>98</sup> Where the offer does not specify a time period for its acceptance, the time when the acceptance must reach the offeror depends on whether or not the offer is made orally.<sup>99</sup> Where the offer is oral, the acceptance shall be dispatched immediately, unless the parties have otherwise agreed; where the offer is not oral, the acceptance shall reach the offeror within a reasonable time.<sup>100</sup> The time period for an acceptance of a written offer commences in accordance with how the written offer is made.<sup>101</sup> Where an offer is made with a letter or telegram, the period for acceptance begins on the date shown on the letter or when the telegram is handed in for dispatch.<sup>102</sup> If the letter does not specify any particular date, the period commences on the date of the postmark.<sup>103</sup> Where the offer is made through an instantaneous communication, such as by telephone or facsimile, the period for its acceptance starts once it reaches the offeree.<sup>104</sup>

## 7. Effectiveness of Acceptance

An acceptance becomes effective once the notice thereof reaches the offeror,<sup>105</sup> whereby a contract is formed.<sup>106</sup> Where an acceptance may be manifested by conduct,<sup>107</sup> the acceptance becomes effective once the conduct is performed in accordance with the relevant business practices or the requirements in the

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97. See Contract Law, *supra* note 12, at art. 22; cf. Guangzhou Maritime Rescue v. Fuzhou Xiongsheng, *supra* note 84 (holding that by sending a rescue ship to the defendant's stranded ship, the plaintiff had effectively accepted the defendant's offer/request for help).

98. See Contract Law, *supra* note 12, at art. 23.

99. See *id.*

100. See *id.*; cf. Beijing Xintuozhan v. Beijing Weining, *supra* note 96.

101. See Contract Law, *supra* note 12, at art. 24.

102. See *id.*

103. See *id.*

104. See *id.*

105. See *id.* at art. 26.

106. See *id.* at art. 25.

107. See *supra* note 97 and accompanying text.

offer.<sup>108</sup> For contracts that are concluded through an exchange of electronic messages, the time when the acceptance reaches the offeror is to be determined in accordance with Article 16, as discussed above.<sup>109</sup>

Where the offeree dispatches its acceptance after the period for accepting the offer has expired, the acceptance only becomes effective if the offeror so advises the offeree in a timely manner, otherwise it shall constitute a counter offer.<sup>110</sup> Where the offeree dispatches its acceptance within the period specified and its acceptance would have reached the offeror in time under normal circumstances, if the acceptance reaches the offeror after the period has expired due to any other reason(s), the offeror may timely advise the offeree that he rejects the acceptance due to its delay, otherwise the acceptance shall be effective.<sup>111</sup>

### 8. *Withdrawal of Acceptance*

An acceptance may be withdrawn. For a withdrawal to be effective, the notice of the withdrawal shall reach the offeror before or at the same time as its acceptance reaches the offeree.<sup>112</sup>

### 9. *Terms of Acceptance*

The terms of an acceptance shall be identical to those of the offer.<sup>113</sup> A purported acceptance that materially alters the terms of the offer constitutes a new or counter offer.<sup>114</sup> Any change in the subject matter, quantity, quality, price or remuneration, time, place and methods of performance, liability for breach of contract, or methods of dispute resolution<sup>115</sup> is a material alteration of the original offer.<sup>116</sup>

Where an acceptance contains only nonmaterial changes to the terms of the offer, the acceptance is nevertheless valid and the terms thereof shall prevail as the terms of the contract,

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108. See Contract Law, *supra* note 12, at art. 26; *cf.* Guangzhou Maritime Rescue v. Fuzhou Xiongsheng, *supra* note 84.

109. See *id.*

110. See Contract Law, *supra* note 12, at art. 28.

111. See *id.* at art. 29.

112. See *id.* at art. 27.

113. See *id.* at art. 30.

114. See *id.*

115. *Cf.* discussion *supra* Part II.C.

116. See Contract Law, *supra* note 12, at art. 30.

unless the offeror timely objects to such changes or unless the offer has indicated that an acceptance may not contain any changes to the terms of the offer.<sup>117</sup>

#### E. TIME OF FORMATION

As indicated above,<sup>118</sup> a contract is formed when the acceptance becomes effective.<sup>119</sup> Where the parties enter into a contract by a contract instrument, the contract is formed when the parties sign or affix their seals on the instrument.<sup>120</sup> Where the parties enter into a contract by an exchange of letters or electronic messages, a party may request that a confirmation letter be executed before the contract is formed.<sup>121</sup> In that case, the contract is formed at the time the confirmation letter is executed.<sup>122</sup>

#### F. PLACE OF FORMATION

A contract's place of formation is a crucial factor in determining the applicable jurisdiction should a dispute later arise. Normally, the place where the acceptance becomes effective is the contract's place of formation.<sup>123</sup> Where a contract is concluded by a contract instrument, its place of formation is where the parties sign or affix their seals on the instrument.<sup>124</sup> Where a contract is concluded by an exchange of electronic messages, the recipient's principal place of business is the contract's place of formation; if the recipient does not have a

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117. See *id.* at art. 31.

118. See discussion *supra* Part II.D.

119. See Contract Law, *supra* note 12, at art. 25.

120. See *id.* at art. 32. But see *supra* Part II.D (a contract may be deemed as duly formed without the contract instrument being signed or sealed, provided that a party has performed its major obligation under the contract and the other party has accepted that performance); (a contract may be deemed as duly formed without the contract instrument being signed or sealed, provided that a party has performed its major obligation under the contract and the other party has accepted that performance); and *supra* note 22 (it is imperative that the individual signing the contract in question is the legal representative [fading daibairen] -- or at his or her authorized representative [shouquan daibai] -- of the entity, and that the official seal or the seal especially for contracting purposes [hetong zhuanrong zhang] of the entity is affixed, otherwise the contract may run the risk of being invalidated by a court or arbitration tribunal.)

121. See Contract Law, *supra* note 12, at art. 33.

122. See *id.*

123. See *id.* at art. 34.

124. See *id.* at art. 35.

principal place of business, its usual place of residence shall be the place of formation.<sup>125</sup> As it is with many other provisions of the Contract Law, the above are merely default rules for a contract's place of formation, which may be trumped by the parties' agreement should they have agreed otherwise.<sup>126</sup>

### G. PRE-CONTRACT LIABILITIES

In accordance with the principle of good faith, the Contract Law imposes certain liabilities even before a contract is formed.<sup>127</sup> Specifically, in the course of concluding a contract, a party shall be liable for compensatory damages if it has negotiated in bad faith under the false pretence of concluding a contract and has thereby caused a loss to the other party. Such liabilities will also attach where a party has intentionally concealed a material fact, has supplied false information relating to the contract's formation, or if it has engaged in any other act that violates the principle of good faith.<sup>128</sup>

Under the same principle, a party is prohibited from disclosing or improperly using any trade secret that the party has become aware of in the course of negotiating a contract, regardless of whether a contract has been formed. Should a party disclose or improperly use such trade secret and have thereby caused a loss to the other party, it shall be liable for the other party's compensatory damages.<sup>129</sup>

## III. CONTRACT VALIDITY

In comparison with the previous contract laws, the Contract Law makes a much clearer distinction between contract formation and contract validity. Because the previous laws

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125. *See id.* at art. 34.

126. *See id.*

127. *See* Wang Liming & Xu Chuanxi, *supra* note 9, at 17–19.

128. *See* Contract Law, *supra* note 12, at art. 42; *see also* Zhongguo Renmin Baoxian Gongsu Wulumuqi Shi Fengongsi su Li Huitong, Xu Xin deng 120 Goufanghu Huanben Shoufang Hetong Jiufen An [The Urumqi Branch of the P.R.C. Ins. Co. v. 120 Apartment Purchasers (including Li Huitong, Xu Xin et al) re Purchase Contracts Promising Purchase Price Recovery] (Sup. People's Ct. July 26, 2001) (holding that although the Insurance Branch was not a party to the apartment purchase contracts, by allowing the real estate developer to run newspaper ads claiming that its offer of purchase price recovery was insured by the Branch, the Branch had incurred pre-contract liabilities for the purchasers' losses) (author's translation); *cf. supra* notes 33–34 and accompanying text.

129. *See* Contract Law, *supra* note 12, at art. 43.

made no such distinction, many courts treated contracts that were duly formed but that lacked certain conditions for taking effect as invalid, thus nullifying a great number of contracts.<sup>130</sup> Under the Contract Law, contract formation is understood as a process whereby the contracting parties reach their agreement, typically by an exchange of offer and acceptance. Contract validity, on the other hand, is taken to be the State's evaluation of and attitude toward a contract that is already formed. A duly formed contract may not necessarily be valid; valid or effective contracts are those the State considers enforceable. There are three categories of contracts that are not valid immediately upon their formation. These include contracts that have pending validity, that are void *per se*, and that are voidable by a disadvantaged party.

#### A. VALID CONTRACTS

A contract that is formed in accordance with the law becomes valid or effective immediately upon its formation.<sup>131</sup> As a necessary limitation, however, where a law or administrative regulation requires such procedures as approval and registration, a contract shall take effect only upon its successful completion of such procedures.<sup>132</sup>

The parties may agree to subject the effectiveness of their contract to certain conditions.<sup>133</sup> Such may be conditions precedent, upon whose satisfaction the contract shall take effect, or conditions subsequent, upon whose satisfaction the contract shall cease to have effect. Satisfaction of such conditions must be free of any foul play. Where, in order to further its own interests, a party has improperly prevented a condition from being satisfied, that condition is deemed as having been satisfied; where a party has improperly facilitated the satisfaction of a condition, that condition is deemed as having

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130. See Wang Liming & Xu Chuanxi, *supra* note 9, at 28–29; see also *infra* note 133 and accompanying text (providing that parties may subject the effectiveness of their contract to certain conditions). In order to avoid nullifying contracts that had been formed before the Contract Law took effect but that would be held valid thereunder, Article 3 of the SPC Interpretation of Contract Law provides that the Contract Law—not any of the previous contract laws that would invalidate such contracts—should apply in such cases. Cf. *supra* note 13.

131. See Contract Law, *supra* note 12, at art. 44.

132. See *id.*

133. See *id.* at art. 45.

failed.<sup>134</sup>

The parties may also agree to attach a certain time limit to the effectiveness of their contract, which agreement shall be upheld by the Contract Law. The parties are free to specify a time when their contract is to become effective or, alternatively, to cease to have effect.<sup>135</sup>

## B. CONTRACTS WITH PENDING VALIDITY

Under the Contract Law, a contract will have only pending validity (*xiaoli daiding*) where, although the contract has been duly formed, it is defective in some fashion and whether it will become effective will depend on someone's manifest ratification.<sup>136</sup> As will be discussed below, such contracts mainly include those that are: (i) concluded by persons who have only limited capacity; (ii) entered into in the name of a principal by persons who are not authorized as an agent, who in concluding the contract exceed their authority as an agent, or whose authority has already terminated when they conclude the contract; and (iii) entered into by persons who have no authority to dispose of the property specified in the contract.<sup>137</sup>

### 1. *Contracts Concluded by Persons with Limited Capacity*

Where a contract is concluded by a person with limited capacity,<sup>138</sup> the contract shall be valid only upon the subsequent ratification by the said person's legal representative.<sup>139</sup> However, where the contract is purely for the benefit of said person, or the conclusion of the contract is appropriate for the person's age, intelligence or mental condition, it does not require the person's legal representative's ratification in order to be enforceable.<sup>140</sup>

Where subsequent ratification is thus required, the other party may demand that the legal representative in question

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134. *See id.*

135. *See id.* at art. 46.

136. *Cf.* Zhou Linbin et al, *BIJIAO HETONG FA [COMPARATIVE CONTRACT LAW]* 410 Lanzhou: Lanzhou Daxue Chubanshe (Lanzhou University Press) (1989) (author's translation).

137. *See infra* notes 138–150 and accompanying text.

138. *See supra* Part II.A. for a discussion of the requisite capacity for entering into contracts.

139. *See Contract Law, supra* note 12, at art. 47.

140. *See id.*



ratify the contract within a month.<sup>141</sup> Should the representative fail to respond within the time period thus specified, the representative is deemed to have declined ratifying the contract. Until the contract is ratified, the other party, acting in good faith, is entitled to cancel the contract with proper notification.<sup>142</sup>

## 2. *Contracts Concluded by Unauthorized Agents*

Where a person concludes a contract in the name of a principal despite the fact that the person is not an authorized agent, is acting beyond the person's authority, or the person's agency has already terminated when entering the contract, such contract shall have no effect with respect to—and hence does not bind—the principal, unless the principal subsequently ratifies the contract.<sup>143</sup> Without the principal's subsequent ratification, the purported agent shall alone be held responsible for the contract.<sup>144</sup>

As it is with contracts concluded by a person with limited capacity,<sup>145</sup> the party who has entered a contract with an unauthorized agent may demand that the principal ratify the contract within a month.<sup>146</sup> Where the principal fails to respond within the specified time period, the principal is deemed to have declined ratifying the contract. Prior to the contract's ratification, the other party may also, in good faith, cancel the contract with proper notification.<sup>147</sup>

Notwithstanding Article 48, however, where a person concludes a contract on behalf of a principal despite the fact that the person is not an authorized agent, is acting beyond the person's authority, or the person's agency has already terminated when entering the contract, if the other party

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141. *See id.*

142. *See id.*

143. *See id.* art. 48.

144. *See id.*; cf. Li Chunxin su Zhongguo Pingan Baoxian Gufen Youxian Gongsi Beijing Fengongsi Baoxian Hetong Jiufen An [Li Chunxin v. Beijing Branch of P.R.C. Pingan Ins. Co.] (Xicheng Dist. People's Ct., Nov. 9, 2000) (holding that because the plaintiff signed the contract in his wife's name without her proper authorization, he was an unauthorized agent and the contract was—at best—one with pending validity; furthermore, the contract should be nullified because the plaintiff failed to prove his wife's ratification of the contract, and such ratification was no longer feasible due to her untimely death) (author's translation).

145. *See discussion supra* on art. 47 of Contract Law.

146. *See Contract Law, supra* note 12, at art. 48.

147. *See id.*

reasonably believes—at the time the parties conclude the contract—that the said person has apparent authority, the contract shall be valid and thus binding upon the principal.<sup>148</sup>

By the same token, where the legal representative or an officer-in-charge of a legal person or any other entity exceeds its authority in concluding a contract, it is assumed to have apparent authority and, unless the other party knows or should have known that the representative is acting beyond its authority, the contract shall be binding on the legal person or entity it so represents.<sup>149</sup>

### 3. *Contracts for Unauthorized Disposal of Property*

A contract that purports to dispose of property must be supported by an actual right to so dispose of the property. Where a person contracts to dispose of property the person has no right to dispose of, the contract shall be invalid, unless the person having such right thereafter ratifies the contract, or if the contracting person has subsequently acquired such right.<sup>150</sup>

#### C. SITUATIONS WHERE A CONTRACT IS VOID PER SE

In contrast with a contract that has pending validity, as discussed above, a contract can be invalid or void *per se* on a number of public policy grounds. The Contract Law has articulated five such situations: (i) one party has induced the conclusion of the contract through fraud or duress, and thereby harms the interests of the State; (ii) the parties have colluded in bad faith, and thereby harm the interests of the State, the collective, or a third party; (iii) the parties have intended to conceal an unlawful purpose under the disguise of a legitimate contract or transaction; (iv) the contract harms public interests; or (v) the contract violates a mandatory provision of a law or administrative regulation.<sup>151</sup> Regarding Clause (v) above, the Supreme People's Court further stipulates that after the Contract Law went into effect, the various courts must only look to laws as adopted by the NPC and/or its Standing Committee and administrative regulations as adopted by the State Council (including the ministries and commissions thereunder) when

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148. See *id.* at art. 49.

149. See *id.* at art. 50; *cf.* the relevant discussion in *supra* note 73.

150. See Contract Law, *supra* note 12, at art. 51.

151. See *id.* at art. 52.

invalidating a contract; no provincial, municipal or other local rules or regulations should be applied in this regard.<sup>152</sup>

As with an entire contract, an individual contract clause may also be found to be void *per se*. In accordance with the principles of fairness and good faith, the Contract Law deems certain contract clauses as invalid, although the contract as a whole may still be effective. Such clauses include those that: (i) exclude a party's liabilities for personal injuries sustained by the other party; and (ii) exclude a party's liabilities for property damages sustained by the other party through the said party's intentional misconduct or gross negligence.<sup>153</sup>

Although these provisions of the Contract Law are still, arguably, broad and susceptible to varying interpretations, they represent a major improvement over the previous laws. According to Clause (v) above, for example, only a law or administrative regulation may invalidate a contract.<sup>154</sup> Moreover, it is not just any provision of a law or administrative regulation that can invalidate a contract; it is only those *mandatory* provisions that have the power to do so. In contrast, the previous laws had allowed provisions in provincial and municipal rules and regulations—whether they were mandatory or merely elective—to eliminate contracts and their underlying transactions.<sup>155</sup> As compared with the previous contract laws, these provisions have greatly limited the scope of void contracts.<sup>156</sup>

In addition, the Contract Law no longer grants state executive agencies the power to determine the validity or

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152. See SPC Interpretation of the Contract Law, *supra* note 13, at art. 4; see also Chen Fei deng su Han Lunguang deng Tudi Chengbao Dingjinkuan Jiufen An [Chen Fei et al v. Han Lunguang et al re a Deposit for Land Subcontracting] (Hainan Interm. People's Ct., Aug. 1, 2002) [hereinafter Chen Fei et al v. Han Lunguang et al] (invalidating a land subcontracting agreement between the parties because it was in essence a transfer of mining rights and thus violated the Mineral Resources Law of the P.R.C. [Zhonghua Renmin Gongheguo Kuangchang Ziyuan Fa] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 19, 1986, effective Oct. 1, 1986), which, along with the Constitution of the P.R.C. [Zhonghua Renmin Gongheguo Xianfa] (adopted Dec. 4, 1982, amended April 12, 1988, March 29, 1993, March 15, 1999 and March 14, 2004, effective April 12, 1988), establishes the State as the sole owner of China's mineral resources) (author's translation); *cf. supra* note 45 and accompanying text.

153. See Contract Law, *supra* note 12, at art. 53; *cf. supra* Part II.C. for a discussion of standard contract terms.

154. *Cf. supra* note 82 and accompanying text.

155. *Cf. Wang Liming & Xu Chuanxi, supra* note 9, at 26.

156. For the legal consequences (e.g., restitution) of a contract's being found to be void *per se*, see the relevant discussion in *infra* Part III.D.

effectiveness of a contract, as did some of the previous contract laws.<sup>157</sup> In accordance with Article 127 of the Contract Law, authority for departments of the Industry and Commerce Administration and other relevant agencies has been limited to monitoring and handling illegal acts that harm the State or public interests through the conclusion of a contract, in accordance with the relevant laws and administrative regulations.

#### D. VOIDABLE CONTRACTS

Voidable contracts are contracts that can be validated by amendment or invalidated by cancellation. Under the Contract Law, voidable contracts are generally those that lack a genuine expression of the parties' intention.<sup>158</sup> Based on the principle of fostering transactions, the Contract Law allows the disadvantaged party to such a contract to validate the contract if it so chooses, thus helping to protect its interest as well as to preserve transactions that may still benefit the contracting parties despite the contract's defect(s). In contrast with a voidable contract, a contract that is invalid or void *per se* has no legal effect *ab initio*.<sup>159</sup>

Specifically, the Contract Law provides that, where a contract is concluded due to a material mistake or is clearly unfair at the time of its conclusion, the aggrieved party has the right to petition the People's Court or an arbitration tribunal to amend or cancel the contract,<sup>160</sup> thereby modifying the contract's validity. By the same reasoning, where a contract is concluded against a party's intent by fraud or duress, or by exploiting its emergent situations, the aggrieved party is entitled to amend or cancel the contract as well.<sup>161</sup> Where a party petitions for an

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157. See, e.g., the Economic Contract Law, *supra* note 1, at arts. 51–53.

158. See Contract Law, *supra* note 12, at art. 54; see also the discussion below.

159. See Contract Law, *supra* note 12, at art. 56.

160. See *id.* at art. 54.

161. See *id.* It should be noted that of contracts that are tainted with fraud, duress, or bad faith, only those that do not harm the interest of the State (and/or that of the collective or a third party) are voidable contracts (*i.e.*, can be ratified by the disadvantaged party if he so chooses); those that harm the interest of the State (and/or that of the collective or a third party) are void *per se*. See the relevant discussion in *supra* Part III.C; see also Wu Shuoke *su* Sanya Yinhai Dajudian Fangwu Zulin Jiufen An [Wu Shuoke *v.* Sanya Yinhai Grand Hotel *re* a Building Lease Contract] (Sanya City Interm. People's Ct., Jan. 23, 2002) [hereinafter Wu Shuoke *v.* Sanya Yinhai] (invalidating a lease contract between the parties for fraud and harm to State interest because the building in question had been confiscated by

amendment only, the court or arbitration tribunal shall not cancel the contract instead,<sup>162</sup> because to do so will violate the principles of fostering transactions and the parties' freedom of contract.

However, there are some necessary limitations to a party's right to cancel a contract. First, such a right cannot be available forever: where a party fails to exercise this right within one year from when the party came to know or should have known the ground for canceling the contract, this right shall be extinguished.<sup>163</sup> Second, this right may also be waived by the right-holder through either an express statement or conduct upon learning the grounds for its exercising this right.<sup>164</sup>

As it is with a contract that is void *per se*, a voidable contract that has been canceled has no legal force *ab initio*.<sup>165</sup> Under the concept of severability, where a contract is only partially invalid, and the validity of the remaining provisions is not affected by the invalid part,<sup>166</sup> the remaining provisions shall nevertheless be valid.<sup>167</sup>

Where a contract is invalidated or, being a voidable contract, canceled, the parties shall make restitution of any and all property acquired thereunder.<sup>168</sup> Where restitution in kind is impossible or unnecessary, allowances shall be made in cash based on the value of the property in question.<sup>169</sup> The party at fault shall indemnify the other party against its loss resulting from the contract's invalidation or cancellation; where both parties were at fault, the parties shall bear their respective liabilities in proportion to their fault.<sup>170</sup> Where a contract is

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the municipal government when the contract was formed) (author's translation).

162. See Contract Law, *supra* note 12, at art. 54.

163. See *id.* at art. 55.

164. See *id.*

165. See *id.* at art. 56.

166. Cf. discussion *supra* Part III.C on invalid contract clauses (article 53 of the Contract Law).

167. See Contract Law, *supra* note 12, at art. 56.

168. See *id.* at art. 58; see Chen Fei deng su Han Luguang deng Tudi Chengbao Dingjinkuan Jiufen An (Hainan Interm. People's Ct., Aug. 1, 2002) [hereinafter Chen Fei v. Han Luguang] (holding that because the land subcontracting agreement between them was invalid, the parties should return to each other any and all of the cash and/or property that was already transferred).

169. See Contract Law, *supra* note 12, at art. 58.

170. See *id.* at art. 58; see, e.g., Sichuan Deyang Shi Dishi Jianzhu Gongcheng Gongsu Xizang Fen Gongsu yu Xizang Lasa Shi Yunshu Zong Gongsu Zhuanbao Hetong Jiufen An [The Tibetan Branch of Sichuan Province Deyang City No. 10

invalidated because the parties have colluded in bad faith and the contract thereby harms the interests of the State, the collective, or a third party,<sup>171</sup> any property acquired under the contract shall be turned over to the State or returned to the collective or the third party.<sup>172</sup>

This distinction between voidable contracts and contracts that are void *per se* represents a new development in China's contract law. Under the previous laws, such contracts were all treated as void *per se*. Contracts that were defective in some way but that were still in the parties' interests, as evidenced by the disadvantaged party's voluntary ratification, were declared void.<sup>173</sup> In contrast, the Contract Law represents a much more rational treatment of such contracts. By recognizing the aggrieved party's right to ratify as well as to cancel the contract, it better protects the contracting parties' interests and freedom of contract while, at the same time, it functions to better preserve and foster valuable transactions.

#### IV. PERFORMANCE OF CONTRACT

##### A. FULL PERFORMANCE

The Contract Law requires that the parties to a contract fully perform their respective obligations in accordance with the contract.<sup>174</sup> In performing their contract, the parties shall, in line with the principle of good faith, also fulfill such obligations as notification, mutual assistance, and confidentiality in light of the contract's nature and purpose and in accordance with business customs.<sup>175</sup>

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Construction Project Co. v. Tibet Lhasa City General Transportation Co. re Construction Subcontracting Agreements] (High People's Ct. of Tibet Autonomous Region, May 8, 2003) (invalidating the construction subcontracting agreements between the parties for violation of the Construction Law of the P.R.C. [Zhonghua Renmin Gongheguo Jianzhu Fa] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 1997, effective Mar. 3, 1998) and holding the parties liable for restitution of each other's economic losses in proportion to their respective fault) (author's translation).

171. See discussion *supra* Part III.C on Art. 52 of the Contract Law; *cf. supra* note 89 and accompanying text.

172. See Contract Law, *supra* note 12, at art. 59.

173. See Wang Liming & Xu Chuanxi, *supra* note 9, at 24–25.

174. See Contract Law, *supra* note 12, at art. 60.

175. See *id.*; see, e.g., Xineng Keji Gongsu su Guotai Junan Zhengquan Gongsu Weituo Guanli Zichang Hetong Jiufen An [Xineng Science & Technology Co. v.

## B. PERFORMANCE OF CONTRACT WITH INDETERMINATE TERMS/CONTRACT INTERPRETATION

If a term such as quality, price, or place of performance is not prescribed, or not prescribed clearly, the parties may supplement it through mutual agreement.<sup>176</sup> Should the parties fail to reach a supplementary agreement, such term shall be determined in accordance with the contract's relevant provisions or business customs.<sup>177</sup> Where neither of these methods can determine the term in question, it shall be resolved in accordance with principles of contract interpretation.

First, if the term pertains to a quality requirement, performance of the contract shall be in accordance with the State or industry standard. Absent any State or industry standard, performance shall be in accordance with custom or any particular standard that is consistent with the contract's purpose. Second, if the term pertains to price or remuneration, performance shall be in accordance with the prevailing market price at the place of performance when the contract was concluded. Where the law requires the adoption of a price mandated by the government, or suggested by government-issued pricing guidelines, such requirement shall govern.<sup>178</sup> Third, where the term pertains to the place of performance, if the obligation is payment of money, performance shall be at the place where the payee is located. If the obligation is delivery of immovable property, performance shall be made where the

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Guotai Junan Securities Co. re an Asset Entrustment and Management Contract] (Sup. People's Ct., Feb. 19, 2004) (holding that, as the trustee and manager of the appellant's asset of 100 million RMB, the respondent had the duty to fully perform the contract in question, including the duty to furnish periodic asset management reports thereto) (author's translation).

176. See Contract Law, *supra* note 12, at art. 61.

177. See *id.*; see, e.g., Pan Jianyou v. Chen Zhengyou Maimai Hetong Jiufen An [Pan Jianyou v. Chen Zhengyou re a Sales Contract] (Wenling City People's Ct., Mar. 26, 2001) (holding that, although the parties' oral contract for the purchase of a truckload of sugar cane was unclear as to the place of delivery, it was nonetheless clear as to the buyer's responsibility for the transportation cost; therefore, by entrusting the sugar cane to a designated driver, the seller should be deemed to have properly delivered the goods in question) (author's translation).

178. See, e.g., Mianyang Shi Suliao Chang su Sichuan Sheng Suliao Gongye Zonggongsi Jiesuan Huokuan Jiufen An [Mianyang City Plastic Plant v. Sichuan Province General Plastic Company re Payment for Purchased Goods] (Sup. People's Ct., Sept. 28, 2003) (illustrating that because neither party could prove the exact purchase prices for the goods delivered, the court had to resort to the State's relevant pricing guidelines and the parties' course of performance to determine the total payment) (author's translation); *cf.* discussion *infra* Part IV.C. on price changes.

immovable property is located. For any other subject matter, performance shall be made at the place where the obligor is located. Fourth, where the term pertains to the time of performance, the obligor may perform, and the obligee may require performance, at any time, provided that the other party shall be given requisite time for preparation. Fifth, where the term pertains to the method of performance, performance should be rendered in a manner which is conducive to realizing the purpose of the contract. Sixth, if the party responsible for the expenses of performance is not clearly prescribed, the obligor shall bear the expenses.<sup>179</sup>

It should be noted that a contract may be amended if the parties have so agreed, even if the term to be amended is clear in the first place.<sup>180</sup> Where an amendment to the contract is subject to such procedures as approval or registration, as required by a law or administrative regulation, such amendment will become effective only upon its compliance with the procedures required.<sup>181</sup> However, where the terms of the amendment are not prescribed clearly, the amendment shall not be effective and the contract is not to be deemed as having been so amended.<sup>182</sup>

### C. PRICE CHANGES

Where a party delays its delivery of the contract's subject matter, the original price shall apply if the price has increased, whereas the price at the time of the actual delivery shall apply if the price has decreased. Where a party delays in taking delivery or making payment, the price upon its actual acceptance of delivery or payment shall apply if the price has increased, and the original price shall apply if the price has decreased.<sup>183</sup>

Where a contract is to be performed at a price mandated by the government or based on government-issued pricing

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179. See Contract Law, *supra* note 12, at art. 62. Provisions of Art. 62 are generally in line with Art. 125 of the Contract Law, which provides, *inter alia*, that in case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with business customs and the principle of good faith.

180. See Contract Law, *supra* note 12, at art. 77.

181. See *id.*; *cf.* discussion *supra* Part III.A. on art. 44 of the Contract Law.

182. See Contract Law, *supra* note 12, at art. 78.

183. See *id.* at art. 63.



guidelines,<sup>184</sup> if the government adjusts the price during the contract's prescribed period of delivery, the contract price shall be the price at the time of the delivery.<sup>185</sup> Delays in delivery, in acceptance of delivery or in payment are subject to the same price adjustments as outlined above.

#### D. PERFORMANCE TO OR BY A THIRD PARTY

Where the contracting parties prescribe that the obligor render its performance to a third party, if the obligor fails to so render its performance, or if it renders non-conforming performance, it shall be liable to the obligee for breach of contract.<sup>186</sup> Conversely, where the parties prescribe that a third party render performance to the obligee, if the third party fails to perform or renders non-conforming performance, the obligor shall be liable to the obligee for breach of contract.<sup>187</sup>

Should the obligor delay in exercising its creditor's right against a third party that becomes due, thereby harming the obligee, the obligee may petition the People's Court for subrogation, except where such creditor's right is exclusively personal to the obligor. The scope of subrogation is limited to the extent of the obligee's right to performance. The necessary expenses for subrogation incurred by the obligee shall be borne by the obligor.<sup>188</sup>

Similarly, where the obligor waives its creditor's right against a third party that becomes due or assigns its property gratuitously, thereby harming the obligee, the obligee may petition the People's Court for cancellation of the obligor's act.<sup>189</sup> Where the obligor assigns its property at a price that is manifestly unreasonable, thereby harming the obligee, and the assignee is aware of the situation, the obligee may also petition the People's Court for cancellation of the obligor's act.<sup>190</sup> The scope of this cancellation right is limited to the extent of the obligee's right *vis-à-vis* the obligor. The necessary expenses for the obligee's exercise of its cancellation right shall be borne by

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184. Cf. discussion *supra* Part IV.B. on art. 62(ii) of the Contract Law.

185. See Contract Law, *supra* note 12, at art. 63.

186. See *id.* at art. 64; discussion *infra* Part VII on breach of contract.

187. See Contract Law, *supra* note 12, at art. 65; discussion *infra* Part VII on breach of contract.

188. See Contract Law, *supra* note 12, at art. 73.

189. See *id.* at art. 74.

190. See *id.*

the obligor.<sup>191</sup> The obligee's cancellation right shall be exercised within one year from the date when it became, or should have become, aware of the cause for cancellation.<sup>192</sup> Nonetheless, if not exercised within five years from the date when the obligor's relevant act has occurred, this cancellation right shall be extinguished.<sup>193</sup>

#### E. SIMULTANEOUS VERSUS CONSECUTIVE PERFORMANCE

Where the parties owe performance toward each other and no order of performance is prescribed, the parties shall perform simultaneously.<sup>194</sup> Prior to performance by the other party, a party is entitled to reject the other party's requirement for performance. Should the other party render non-conforming performance, a party is entitled to reject the other party's request for performance.<sup>195</sup>

The parties shall perform consecutively where an order of performance is prescribed in the contract.<sup>196</sup> Prior to performance by the party required to perform first, the party who is to perform subsequently is entitled to reject the other party's request for performance. Should the party required to perform first render non-conforming performance, the party who is to perform subsequently may also reject the first party's request for performance.<sup>197</sup>

The party required to perform first may suspend its performance if it has conclusive evidence establishing that the other party is in any of the following circumstances: (i) its business has seriously deteriorated; (ii) it has engaged in transfer of assets or withdrawal of funds for the purpose of evading paying debts; (iii) it has lost its business creditworthiness; or (iv) it is in any other circumstance which will or may cause it to lose its ability to perform.<sup>198</sup> But where a party suspends its performance without such conclusive evidence, it shall be liable for breach of contract.<sup>199</sup>

Where a party suspends its performance in accordance with

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191. *See id.*

192. *See id.* at art. 75.

193. *See id.*

194. *See id.* at art. 66.

195. *See id.*

196. *See id.* at art. 67.

197. *See id.*

198. *See id.* at art. 68.

199. *See id.*

Article 68, as discussed above, it shall notify the other party in a timely fashion.<sup>200</sup> Should the other party provide appropriate assurance for its performance, the suspending party shall resume performance. After performance is suspended, if the other party fails to regain its ability to perform and fails to provide appropriate assurance within a reasonable time, the suspending party may terminate the contract.<sup>201</sup>

Where it is difficult to render performance because, after effecting merger, partition, or change of domicile, the obligee fails to notify the obligor, the obligor may also suspend its performance or place the subject matter in escrow.<sup>202</sup> A party's internal change after the contract becomes effective, such as a change in its name, legal representative, officer-in-charge, or the person handling the contract, constitutes no ground for its refusing to perform the contract.<sup>203</sup>

#### F. EARLY OR PARTIAL PERFORMANCE

The obligee may reject the obligor's early or partial performance, except where such early or partial performance does not harm the obligee's interests. Any additional expense incurred by the obligee due to the obligor's early or partial performance shall be borne by the obligor.<sup>204</sup>

### V. ASSIGNMENT AND DELEGATION OF CONTRACT

#### A. ASSIGNMENT OF CONTRACT

The obligee may assign its rights under a contract—in whole or in part—to a third party, except where prohibited by the nature of the contract, an agreement between the parties, or law.<sup>205</sup> For its assignment to be effective, the obligee must notify the obligor thereof.<sup>206</sup> Where an assignment is subject to

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200. *See id.* at art. 69.

201. *See id.*; discussion *infra* Part VI.A. on termination of contract.

202. *See Contract Law, supra* note 12, at art. 70.

203. *See id.* at art. 76.

204. *See id.* at arts. 71–72.

205. *See id.* at art. 79.

206. *See id.* at art. 80; *see, e.g.*, Zhongguo Changcheng Zichan Guanli Gongsi Nanjing Banshichu su Xu Yingli deng Jiekuan Hetong Jiufen An [The Nanjing Branch of China Great Wall Asset Management Corporation v. Xu Yinli et al re a Series of Loan Contracts] (Jiangsu Province High People's Ct., July 19, 2002)

such procedures as approval or registration, as required by a law or administrative regulation, the assignment shall also comply with such procedures in order to become effective.<sup>207</sup> Once given, a notice of assignment may only be revoked with the consent of the assignee<sup>208</sup> because, upon such notice, the assignee has become the owner of the right so assigned. With an effective assignment, the assignee shall also assume any incidental right associated with the right assigned, except where the incidental right is exclusively personal to the obligee.<sup>209</sup>

Upon its receipt of the obligee/assignor's notice of assignment, the obligor may assert against the assignee any defense it may have against the assignor.<sup>210</sup> Moreover, if the obligor has any right to any performance by the assignor which is due before or at the same time as the assigned right, the obligor may set it off against the assigned right.<sup>211</sup>

## B. DELEGATION OF CONTRACT

The obligor may delegate its obligations under a contract—in whole or in part—to a third party, subject to the consent of the obligee.<sup>212</sup> Where a delegation is subject to such procedures as approval or registration, as required by a law or administrative regulation, the delegation shall also comply with such procedures.<sup>213</sup> As with an assignment of contract, when the obligor has delegated an obligation, the new obligor may assert against the obligee any defenses the original obligor may

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[hereinafter *Great Wall Asset Mgmt. v. Xu Yinli*] (holding that, by properly notifying the respondent, the respondent's creditor—the Huaiyin County Branch of the Agricultural Bank of China—has effectively assigned its rights under the loan contracts to the appellant) (author's translation).

207. See Contract Law, *supra* note 12, at art. 87; *cf.* discussion *supra* Part III.A. on Art. 44 of the Contract Law.

208. See Contract Law, *supra* note 12, at art. 80.

209. See *id.* at art. 81; see *Great Wall Asset Mgmt. v. Xu Yinli*, *supra* note 206 (holding that, because the local government—Wangying Town Government—had agreed to help repay the respondent's debt to his creditor, the appellant assumed an incidental creditor's right against the local government as well).

210. See Contract Law, *supra* note 12, at art. 82.

211. See *id.* at art. 83.

212. See *id.* at art. 84; *cf.* discussion *supra* Part V.A. on arts. 79–80 of the Contract Law (for an assignment of contract, the assignor need not obtain the consent of the other party to the contract; proper notification is all that is required); *supra* note 104.

213. See Contract Law, *supra* note 12, at art. 87; *cf.* discussion *supra* Part III.A. on Art. 44 of the Contract Law.

have against the obligee.<sup>214</sup>

Upon a delegation of contract, the new obligor shall assume any incidental obligation associated with the obligation delegated, except where such incidental obligation is exclusively personal to the original obligor.<sup>215</sup>

#### C. CONCURRENT ASSIGNMENT AND DELEGATION

Upon consent by the other party, one party may concurrently assign its rights and delegate its obligations to a third party.<sup>216</sup> A concurrent assignment and delegation shall also be subject to the provisions of Article 79, Articles 81 to 83, and Articles 85 to 87, as discussed above.<sup>217</sup>

#### D. ASSUMPTION IN THE CASE OF MERGER OR PARTITION

Where a party has effected a merger after it has entered into a contract, the legal person or organization resulting therefrom shall assume the party's rights and obligations under the contract.<sup>218</sup> Where a party has effected a partition after it has entered into a contract, unless otherwise agreed upon by the obligee and obligor, the legal persons or other organizations resulting from the partition shall jointly and severally assume the party's rights and obligations under the contract.<sup>219</sup>

### VI. DISCHARGE OF CONTRACTUAL RIGHTS AND OBLIGATIONS

The rights and obligations under a contract are discharged in any of the following circumstances: (i) the obligations have been performed in accordance with the contract; (ii) the contract has been terminated; (iii) the obligations have been set off against each other; (iv) the obligor has placed the contract's subject matter in escrow in accordance with the law; (v) the obligee has released the obligor from performance; (vi) both the obligee's rights and the obligor's obligations have been assumed by one and the same party; or (vii) any other discharging

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214. See Contract Law, *supra* note 12, at art. 85.

215. See *id.* at art. 86.

216. See *id.* at art. 88; *cf. supra* note 97 and accompanying text.

217. See Contract Law, *supra* note 12, at art. 89; see *supra* notes 205, 207, 209-211, 213-215, and accompanying text.

218. See Contract Law, *supra* note 12, at art. 90.

219. See *id.*

circumstance that is provided by law or prescribed by the parties.<sup>220</sup>

Item (i), performance of contract, has been discussed in Section IV above. The following discussions will examine, respectively, Items (ii) to (vi). It should be noted that, in all these situations, the parties shall—in accordance with the principle of good faith and business customs—fulfill duties such as notification, assistance, and confidentiality.<sup>221</sup> In addition, a discharge of contractual rights and obligations in any of these situations shall not affect the validity of contract clauses that pertain to settlement of account and winding-up.<sup>222</sup>

#### A. TERMINATION OF CONTRACT

A contract may be terminated if the parties so agree. The parties may prescribe a condition under which a party is entitled to terminate the contract; upon satisfaction of that condition, the party holding the termination right may thus terminate the contract.<sup>223</sup>

In addition, there are legally prescribed conditions that entitle a party to terminate a contract. These conditions include when: (i) a force majeure has frustrated the purpose of the contract; (ii) before the time of performance, the other party has expressly stated or indicated by its conduct that it will not perform its main obligations; (iii) the other party has delayed performance of its main obligations, and has failed to perform within a reasonable time after receiving demand for its performance; (iv) the other party has delayed performance or has otherwise breached the contract, thereby frustrating the purpose of the contract;<sup>224</sup> and (v) any other circumstance that is provided by law has occurred.<sup>225</sup>

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220. See *id.* at art. 91.

221. See *id.* at art. 92.

222. See *id.* at art. 98.

223. See *id.* at art. 93.

224. See, e.g., *Zhongguo Renmin Jiefangjun Bayi Dianying Zhipianchang su Beijing Xiandai Wenhua Yishu Zhongxin Hezuo Shezhi Hetong Jiufen An* [The Chinese People's Liberation Army Bayi Film Studio v. Beijing Modern Culture and Art Center re: a Film Co-Production Contract] (Beijing City High People's Ct., Mar. 19, 2003) (holding that, because after entering into its film co-production contract with the respondent, the appellant finished producing the film in question by cooperating with other entities, the purpose of the contract was frustrated and the respondent was therefore entitled to terminate the contract and demand damages) (author's translation).

225. See *Contract Law, supra* note 12, Art. 94. For an example of such other

Where the law or the parties have prescribed a period for exercising such termination right, failure by a party to exercise it at the end of the period shall extinguish such right.<sup>226</sup> Where no period has been prescribed, the party holding such right shall exercise it within a reasonable time after receiving demand from the other party; otherwise the right shall be extinguished.<sup>227</sup>

The party who terminates a contract according to Articles 93 and 94, as outlined above, shall notify the other party.<sup>228</sup> The contract is effectively terminated when the notice reaches the other party.<sup>229</sup> Should the other party object to the termination, the terminating party may petition the People's Court or an arbitration tribunal to affirm the validity of its termination.<sup>230</sup> Where the termination is subject to such procedures as approval or registration, as required by a law or administrative regulation, such procedures must be complied with.<sup>231</sup>

Upon termination of a contract, performance that has not been rendered is discharged; if performance has been rendered, a party may, in light of the extent of performance and the nature of the contract, require the other party to restore the subject matter to its original condition or otherwise remedy the situation.<sup>232</sup> The party is also entitled to damages.<sup>233</sup>

The Contract Law's provisions on the termination of a contract, as discussed above, represent a significant change from the previous laws.<sup>234</sup> As we have indicated elsewhere,<sup>235</sup> the previous laws lacked necessary limitations on contract termination. For instance, the Revised Economic Contract Law provided that where "a party [did] not perform . . . within the

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circumstance provided by law, *see* Beijing Shi Gaoji Renmin Fayuan Guanyu Shenli Gongsu Jiufen Anjian Ruogan Wenti de Zhidao Yijian (Shixing) [Beijing City High People's Ct. Guiding Opinion on Certain Issues in the Adjudicating of Disputes Involving Companies (Provisional)] (promulgated Feb. 24, 2004, effective Feb. 24, 2004) (providing that where, after a share transfer contract becomes effective, the transferor has its business license revoked by the relevant government authorities, the transferee shall have the right to terminate the contract in question) (author's translation).

226. *See* Contract Law, *supra* note 12, at art. 95.

227. *See id.*

228. *See id.* at art. 96; *see supra* notes 223–225 and accompanying text.

229. *See* Contract Law, *supra* note 12, at art. 96.

230. *See id.* at art. 96.

231. *See id.*; *cf.* discussion *supra* Part III.A. on art. 44 of the Contract Law.

232. *See* Contract Law, *supra* note 12, at art. 97.

233. *See id.*; *see also* discussion *infra* Part VII. on damages.

234. *See supra* notes 223–233 and accompanying text.

235. *See* Wang Liming & Xu Chuanxi, *supra* note 9, at 25–26.

time limit specified in the contract," the non-breaching party had the right to notify the other party and terminate the contract.<sup>236</sup> Under this provision, many courts used to decide that, once a party to a contract failed to perform on time, no matter whether or not the failure was merely a delay in its performance, the contract could be terminated.

Moreover, although the previous contract laws recognized that parties might terminate a contract through mutual consultation,<sup>237</sup> they did not recognize that parties may terminate their contract through the exercise of an agreed-upon right of termination. The Contract Law has attempted to rectify such problems with the provisions examined above, so that the parties will enjoy greater freedom in structuring their contract, that transactions will be preserved where they are still valuable, and that terminations are effected only in good faith.

## B. SET-OFF OF OBLIGATIONS

Where the parties to a contract owe to each other performance that is due, and the obligations' subject matter is identical in type and quality, either party may set off its obligations against those of the other party, except where prohibited by law or by the nature of the contract.<sup>238</sup> The party who initiates the set-off shall notify the other party, which notice shall become effective when it reaches the other party. A set-off may not be subject to any condition or time limit.<sup>239</sup>

Where the subject matter of the parties' obligations is not identical in type and quality, the parties may also set-off their obligations through mutual consultation and agreement.<sup>240</sup>

## C. PLACING SUBJECT MATTER IN ESCROW

Where any of the following circumstances makes it difficult to render performance, the obligor may place the subject matter in escrow: (i) the obligee refuses to take delivery of the subject matter without cause; (ii) the obligee cannot be located; (iii) the obligee is deceased or incapacitated, and its heir or guardian has

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236. Revised Economic Contract Law, *supra* note 11, at art. 26.

237. See Economic Contract Law, *supra* note 1, at art. 27(1); Art. 31(3), Foreign Economic Contract Law, *supra* note 3; and Technology Contract Law, *supra* note 5, at art. 23.

238. See Contract Law, *supra* note 12, at art. 99.

239. See *id.*

240. See *id.* at art. 100.



not been determined; or (iv) any other circumstance provided by law has occurred.<sup>241</sup> Where the subject matter is not fit for escrow, or the expenses for escrow are excessive, the obligor may auction or liquidate the subject matter and place the proceeds in escrow.<sup>242</sup>

After placing the subject matter in escrow, the obligor shall timely notify the obligee or its heir or guardian, except where the obligee cannot be located.<sup>243</sup> Once in escrow, the subject matter's risk of damage or loss is borne by the obligee.<sup>244</sup> The fruits or interest of the subject matter accrued during escrow, as well as escrow expenses, belong to the obligee.<sup>245</sup>

The obligee may accept the subject matter in escrow at any time; however, if the obligee owes performance to the obligor that becomes due, before the obligee performs or provides assurance thereof, the escrow agent shall—at the obligor's request—reject the obligee's attempt to take delivery of the subject matter.<sup>246</sup> The obligee's right to take delivery shall be extinguished if not exercised within five years from the date when the subject matter is placed in escrow. When that happens, the subject matter shall, after deduction of escrow expenses, be turned over to the State.<sup>247</sup>

#### D. RELEASE

An obligee may release the obligor from performing its obligations in whole or in part, whereupon its rights and obligations under the contract will be discharged accordingly.<sup>248</sup>

#### E. MERGER OF RIGHTS AND OBLIGATIONS

If one and the same party assumes all the rights and obligations under a contract, the rights and obligations will be discharged, provided that the contract does not involve the interests of any third party.<sup>249</sup>

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241. *See id.* at art. 101.

242. *See id.*

243. *See id.* at art. 102.

244. *See id.* at art. 103.

245. *See id.* at art. 103.

246. *See id.* at art. 104.

247. *See id.*

248. *See id.* at art. 105.

249. *See id.* at art. 106.

## VII. BREACH OF CONTRACT

If a party fails to perform its obligations under a contract, or has rendered non-conforming performance, it is in breach of the contract and shall bear liabilities therefore, such as continuing its performance, curing its non-conforming performance, and paying damages.<sup>250</sup> In accordance with the concept of anticipatory breach, a party does not have to wait until after the time of performance in order to hold the other party liable for its breach, provided, however, that the other party has expressly stated or indicated by its conduct that it will not render its performance.<sup>251</sup>

In comparison with the previous laws, the Contract Law thus accords a non-breaching party greater flexibility in choosing its form of remedy when the other party breaches. Article 107, as outlined above,<sup>252</sup> has essentially abandoned the previous mandatory rule of specific performance.<sup>253</sup> It allows the non-breaching party to choose, for example, payment of damages, liquidated damages, or specific performance.<sup>254</sup> This broader range of possible remedies will better protect the contracting parties' interests, including allowing efficient breach in appropriate situations.

These various types of remedies for breach of contract, as well as other related topics, are discussed below.

## A. SPECIFIC PERFORMANCE

1. *Monetary Specific Performance*

If a party fails to pay the price or remuneration, the other party may require payment thereof.<sup>255</sup>

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250. See *id.* at art. 107.

251. See *id.* at art. 108; see also discussion *supra* Part VI.A. on art. 94(ii)-(v) of the Contract Law.

252. See *supra* note 250 and accompanying text.

253. See Economic Contract Law, *supra* note 1, at art. 31; cf. Liu Zhongya (ed.), XIN JINGJI HETONG FA [THE NEW ECONOMIC CONTRACT LAW], Beijing: Zhongguo Shenji Chubanshe p. 60 (Liu Zhongya ed., China Audits and Statistics Press) (1990) (author's translation). For a similar discussion see Wang Liming & Xu Chuanxi, *supra* note 9, at 14-15.

254. Examples of specific performance include continued performance or cure of non-conforming performance.

255. See Contract Law, *supra* note 12, at art. 109.

## 2. *Non-monetary Specific Performance*

Where a party fails to perform, or has rendered non-conforming performance of, a non-monetary obligation, the other party may require specific performance thereof, except where: (i) performance is impossible in law or in fact; (ii) the obligation's subject matter does not lend itself to enforcement by specific performance or the cost of specific performance is excessive; and (iii) the obligee fails to require specific performance within a reasonable time.<sup>256</sup>

Where a performance does not meet the prescribed quality requirements, and the remedies for breach are not prescribed or not prescribed clearly in the contract and cannot be determined in accordance with Article 61 of the Contract Law, as discussed above,<sup>257</sup> the aggrieved party may, by reasonable election in light of the nature of the subject matter and the degree of its loss, demand specific performance such as repair, replacement, or remaking.<sup>258</sup>

## B. DAMAGES

Where a party fails to perform or has rendered non-conforming performance, if the other party has sustained other loss notwithstanding the breaching party's subsequent performance or cure of its non-conforming performance, the breaching party shall pay damages.<sup>259</sup>

The amount of damages shall be equivalent to the other party's loss resulting from the breach, including any benefit that may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of the contract's conclusion.<sup>260</sup>

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256. See *id.* at art. 110; see, e.g., Hainan Jinyuan Zulin Gongsi su Haikou Zhongxiang Shangmao Gongsi deng Fangwu Maimai Jiufen An [Hainan Jinyuan Leasing Co. v. Haikou Zhongxiang Commerce and Trade Co. et al re a Bldg. Purchase Contract] (decided by Haikou City Interm. People's Court on Dec. 25, 2000) (holding that the defendant shall, as demanded by the plaintiff, transfer the deeds for three floors of the building in question to the plaintiff, provided that the plaintiff delivers to the defendant the remainder of the building's purchase price) (author's translation).

257. See discussion *supra* in Part IV.B.

258. See Contract Law, *supra* note 12, at art. 111.

259. See *id.* at art. 112.

260. See Contract Law, *supra* note 12, at art. 113; see, e.g., Qingdao Fangzhong Gongmao Youxian Gongsi su Hanguo Cixiu Shebei Youxian Gongsi Maimai Hetong

Where a merchant engages in any fraudulent activity while supplying goods or services to a consumer, the merchant shall be liable for damages in accordance with the Consumer Rights and Interests Protection Law of the P.R.C.<sup>261</sup>

### C. LIQUIDATED DAMAGES

The parties may prescribe that if one party breaches the contract, it shall pay a certain amount of liquidated damages to the other party in accordance with the extent of breach, or they may prescribe a method for calculating the damages for the loss that will have resulted from a breach.<sup>262</sup>

With respect to the terms of liquidated damages, the Contract Law will generally follow the agreement between the contracting parties. But where the amount of liquidated damages is below the actual loss resulting from the breach, the aggrieved party may petition the People's Court or an arbitration tribunal to increase the amount; where the amount of liquidated damages is excessively above the actual loss, the relevant party may petition the Court or tribunal to decrease the amount appropriately. Where the parties have prescribed liquidated damages for delayed performance, the breaching party shall, in addition to payment of the liquidated damages, render its performance within a reasonable time.<sup>263</sup>

### D. DEPOSIT

The parties may prescribe that a party—in accordance with the Guaranty Law of the P.R.C.<sup>264</sup>—deliver a deposit to the

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Jiufen An [Qingdao Fangzhong Indus. and Trade Co., Ltd. v. Korean SWF Embroidery Equipment Co., Ltd. re an Equip. Purchase Contract] (decided by Shandong Province High People's Ct. on Dec. 30, 2002) (holding that, by failure to pay the full purchase price for the embroidery machine that was delivered properly by the respondent, the appellant was in breach of the contract in question and shall pay to the respondent the remainder of the purchase price plus interest [*i.e.*, expectation damages]) (author's translation).

261. See Contract Law, *supra* note 12, at art. 113; Zhonghua Renmin Gongheguo Xiaofeizhe Quanyi Baohu Fa [Consumer Rights and Interests Protection Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) [hereinafter Consumer Protection Law]. Pursuant to Article 49 of the Consumer Protection Law, a merchant who is found to be fraudulent when providing goods or services to a consumer shall pay to the consumer double the original purchase price or service fee as damages.

262. See Contract Law, *supra* note 12, at art. 114.

263. See *id.* at art. 114.

264. Zhonghua Renmin Gongheguo Danbao Fa [The Guaranty Law of the

other party as a guarantee for the performance of an obligation.<sup>265</sup> Upon performance by the obligor, the deposit shall be set off against the obligee's payment for such performance or returned to the obligor. If the party delivering the deposit fails to perform its obligation under the contract, it is not entitled to any refund of the deposit; conversely, if the party receiving the deposit fails to perform its own obligation, it shall return to the other party twice the amount of the original deposit.<sup>266</sup>

If the parties have prescribed both liquidated damages and a deposit, in the case of a breach, the non-breaching party may elect to apply the liquidated damages clause or, alternatively, the deposit clause.<sup>267</sup>

#### E. FORCE MAJEURE

As is common among other legal systems, the Contract Law recognizes force majeure as a major excuse for breach of contract. The Contract Law defines force majeure as an objective circumstance that is unforeseeable, unavoidable, and insurmountable.<sup>268</sup> Where a party is unable to perform a contract due to force majeure, it will be exempted from liability in whole or in part, in accordance with the impact of the event, except as otherwise provided by law.<sup>269</sup> Because the event of force majeure has to be the actual cause of the failure of performance, an event that has occurred after a party's delay in its performance does not exempt the party from liability.<sup>270</sup>

Where a party is unable to perform due to force majeure, it shall notify the other party in a timely fashion so as to mitigate the loss the other party may sustain; in order to prevent fraud and other illegal behavior, the party in question shall also provide proof of the force majeure within a reasonable time of its occurrence.<sup>271</sup>

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P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 1995, effective Oct. 1, 1995) [hereinafter Guaranty Law]. In accordance with Article 91 of the Guaranty Law, the amount of deposit shall be decided by the contracting parties through mutual consultation, but shall in no event exceed 20% of the total contract price.

265. See Contract Law, *supra* note 12, at art. 115.

266. See *id.*

267. See *id.* at art. 116.

268. See *id.* at art. 117.

269. See *id.*

270. See *id.*

271. See *id.* at art. 118.

#### F. DUTY TO MITIGATE DAMAGES

When a party has breached its contract, the other party shall take appropriate measures to prevent any further damages or loss; where the other party fails to do so and has sustained further loss as a consequence, it is not entitled to claim damages for the loss so sustained.<sup>272</sup> Any reasonable expenses incurred by the other party in preventing its further loss are to be borne by the breaching party.<sup>273</sup>

#### G. BILATERAL BREACH

In the case of a bilateral breach, the parties shall assume their respective liabilities proportionately.<sup>274</sup> In this and in other situations, if a party's breach is attributable to a third party, it shall nevertheless be liable for the breach. Any dispute between it and such third party shall be resolved in accordance with the law or the agreement between them.<sup>275</sup>

#### H. ELECTION OF REMEDIES IN TORT OR IN CONTRACT

Where a party's breach has harmed the personal or property interests of the other party, the aggrieved party may elect to hold the breaching party liable for breach of contract, in accordance with the Contract Law, or to hold the party liable for tort, in accordance with the GPCL and other relevant laws.<sup>276</sup>

### VIII. DISPUTE RESOLUTION

The Contract Law does not effect any substantial changes from the previous laws in the area of dispute resolution. In accordance with the Contract Law, there are three major methods for resolving a contractual dispute: (i) conciliation or mediation; (ii) arbitration; and (iii) adjudication.

#### A. CONCILIATION OR MEDIATION

Where a dispute arises regarding a contract, the contracting parties may resolve their dispute through conciliation between

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272. *See id.* at art. 119.

273. *See id.*

274. *See id.* at art. 120.

275. *See id.* at art. 121.

276. *See id.* at art. 122.

the parties or through mediation with the help of a third party mediator.<sup>277</sup>

#### B. ARBITRATION

Where the parties do not wish, or are unable, to resolve a dispute through conciliation or mediation, the dispute may be submitted to the relevant arbitration institution for arbitration in accordance with the arbitration agreement or clause between the parties. Parties to a foreign related contract may apply to a Chinese arbitration institution or any other arbitration institution for arbitration.<sup>278</sup>

#### C. ADJUDICATION

Where the parties did not conclude an arbitration agreement or clause, or the arbitration agreement or clause is invalid, either party may bring a lawsuit to the People's Court in order to resolve their dispute.<sup>279</sup>

The parties shall perform any judgment, arbitral award, or mediation agreement which has taken legal effect; if a party refuses to so perform, the other party may apply to the People's Court for enforcement.<sup>280</sup>

#### D. THE INDEPENDENCE OF DISPUTE RESOLUTION CLAUSES

A contract's invalidity, cancellation or termination does not affect the effectiveness of its clauses on dispute resolution, which are deemed to exist independently of the rest of the contract.<sup>281</sup>

#### E. STATUTE OF LIMITATIONS

For a dispute regarding a contract for the international sale of goods or a contract for technology import or export, the time limit for bringing a lawsuit or applying for arbitration is four years, commencing on the date when the aggrieved party knew or should have known that its rights and interests were

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277. *See id.* at art. 128.

278. *See id.*

279. *See id.*

280. *See id.*

281. *See id.* at art. 57.

harmed.<sup>282</sup> For disputes arising from other types of contracts, the time limit for bringing a lawsuit or applying for arbitration shall be governed by the relevant laws,<sup>283</sup> because where there is another law that provides otherwise regarding a contract, such provision shall prevail.<sup>284</sup> The General Principles of Civil Law provides generally that the time limit for bringing a civil lawsuit is two years,<sup>285</sup> and that where the dispute involves such matters as sale of defective goods without disclosure, delay or refusal to pay rent, or loss of or damage to bailed property, the time limit shall be one year.<sup>286</sup>

#### F. CHOICE OF LAW IN FOREIGN-RELATED CONTRACTS

Parties to a foreign-related contract may select the applicable law for resolution of their dispute, unless the law provides otherwise.<sup>287</sup> Where the parties fail to select the applicable law, such dispute shall be governed by the law of the country with the closest connection to the contract.<sup>288</sup> However, for Chinese-foreign equity and cooperative joint venture contracts that are to be performed within the P.R.C., and Chinese-foreign contracts for joint exploration or development of natural resources in the P.R.C., the P.R.C. law shall apply.<sup>289</sup>

### CONCLUSION

In comparison with its previous contract codes, the P.R.C.'s recently-promulgated Contract Law has effected many substantive and formal changes. Formally, the Contract Law has subsumed, under its governance, types of contracts that used to be governed separately by the previous contract codes, thereby achieving a significant degree of uniformity in China's contract law regime. Substantively, the Contract Law now mandates many new, different, or more sophisticated provisions in all major stages of the contract process. The principles of the freedom of contract, of good faith, and of the fostering of transactions have informed and guided the formulation of the

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282. *See id.* at art. 129.

283. *See id.*

284. *See id.* at art. 123.

285. *See* GPCL, *supra* note 7, at art. 135.

286. *See id.* at art. 136.

287. *See* Contract Law, *supra* note 12, at art. 126.

288. *See id.*

289. *See id.*



Contract Law and are embodied in many of its major provisions.

To a significant extent, the Contract Law has represented a major effort to develop and improve China's civil and commercial law in light of the increasingly vibrant and diversified economic activities during China's transitional period. It has based itself not only on China's own experience in attempting to develop a market economy since the launch of its economic reforms, including the lessons it has gained from enacting and implementing the previous contract codes, but also the contract regimes of other countries and regions, including that of the United States. In this sense, it is of necessity an eclectic, transitional piece of legislation, whose maturity and perfection must await China's further consolidation of its social and economic order.