

The Revised Contract Law and Its Implications on Consumerism in China

Mary Ip

School of Business, University of Sydney
M.Ip@econ.usyd.edu.au

ABSTRACT

Contract is one of the great pivots of commercial activity and an intrinsic part of nearly every consumer transaction. Being inspired by the discussion amongst western scholars that contract law is not a practical tool for protecting consumer, this paper scrutinizes the role of the Revised Contract Law in the field of consumer protection in China. Before examining the ramifications of the Revised Contract Law on Chinese consumerism, the paper outlines the development of the revised legislation and emphasizes its distinctive characteristics. Then the paper explores its implications. In the final remark, the paper concludes that the Revised Contract Law is positive for safeguarding consumer rights in China.

JEL: K12, K20, K39

Keywords: Business; China; Consumer protection; Contract law

I. INTRODUCTION

China's rapid economic growth in the past two decades has been accompanied by further legal reform. Accordingly, law relating to market economy has become a major component of the Chinese legal system. In 1999 the Chinese government passed a new contract law. The revised law not only unifies and expands the previous major legislations, but also embraces certain underlying principles, such as 'freedom of contract', or 'good faith', that are not manifest in preceding contract statutes. This paper aims to scrutinise the Revised Contract Law from the perspective of consumerism and is one of the first articles in this area. Since the Revised Contract Law is the second largest enactment¹ in the modern Chinese legal regime, a comprehensive analysis of the whole statute pertaining to consumer protection would be beyond the scope of any single paper. Thus, this pioneer study will focus on several provisions. To set the necessary background for readers, part one of the paper briefly traces the development of the Revised Contract Law and highlights its distinctive features. In part two, discussion will focus on the possible implications on consumerism in China of these new features and the underlying principles of the Revised legislation. Those rules relating to sale of goods contracts that affect the protection of consumers will also be analysed. The final part of the paper will comment on whether the Revised Contract Law is positive to consumer protection in China.

II. THE EVOLUTION OF THE REVISED CONTRACT LAW AND ITS DISTINCTIVE CHARACTERISTICS

Contract law is an essential part of every commercial law system including the Chinese. This is because much of the law regulating the sale of goods, insurance, business organisations, agencies, banking or property contains the general principles of contract. Contract law has an important impact in Chinese economic reform too. It has been used as a tool to effectively implement Chinese economic plans.² It has also been used to attract foreign capital, since foreign investors would not do business with China if there were no laws enforcing commercial promises. Thus, contract law plays a significant role in the Chinese economic and legal system.

Due to the planned economic structure and political turmoil³, the regime of contract law in China only started to take shape at the beginning of the eighties. Although there were earlier contract rules or regulations⁴, they were predominantly used for carrying out governmental economic plans, more than performing their legal function. The previous Chinese contract law framework rested on four key legislations, namely, the Economic Contracts Law (1981); the Foreign Economic Contract Law (1985); the General Principles of Civil Law (1986); and the Technology Contract Law (1987). All of these contracts and related statutes were formulated during the early stage of Chinese economic reform. Even though the primary role of these contract legislations in promoting state economy policy had been comparatively diminished, they were still oriented to realise planned allocation of resources. Besides, these statutes

divided contracts into two categories, economic contract and civil contract. By virtue of the titles, these key legislations mainly applied to economic contract. Furthermore, in accordance with the Economic Contract Law,⁵ economic contracts refer to transactions between legal persons only.⁶ Thus the previous contract statutes did not govern a broad sector of contractual relationships. Consequently, consumer contracts, which were regarded as civil contracts and usually involved private individuals, were barely covered by the previous contract legislations.

Since the promulgation of these contract statutes, there has been an enormous increase in Sino-foreign business relations, together with a high degree of transaction complexity. Consequently, the former contract statutes became incompatible with the prevailing economic reality. For example, a foreign technology contract was outside the ambit of both the Technology Contract Law and the Foreign Economic Contract Law. The former only covered technology contracts formed between domestic parties, while the latter did not govern the category of technology contracts.⁷ Moreover, inconsistency between the various contract statutes made their application even harder. An illustration is the Foreign Economic Contract Law whose underlying principle was 'equality, mutual benefit, consultation, and agreement', whereas the General Principles of Civil Law was based on the notion of 'voluntariness, fairness, equal compensation, and good faith'.⁸ Although the Economic Contract Law was revised in 1993, the revision was far from satisfactory. As Wang and Wu alleged, the Revised Economic Contract Law failed to eliminate the discrepancies between the preceding contract legislations.⁹ For instance, the Revised Economic Contract Law abolished from its predecessor a certain mode of terminating a contract, but the other contract statutes retained such method of contract discharge.¹⁰ The Chinese government realised that an incoherent and obsolete system of contract law would impede its on-going economic reform. Thus, restructuring of the contract law system was called upon.

After years of arduous drafting, the Chinese National People's Congress promulgated its first Revised Contract law on 15 March 1999. The Revised Contract Law repealed three of the previous key contract statutes when it became effective on 1 October 1999.¹¹ Ranked next to the Criminal Law, the Revised Contract Law, consisting of 428 Articles, is the second longest legislation in the legal regime of modern China. A distinctive feature of the Revised Contract Law is the wide range of personnel involved in its drafting procedure. In addition to the usual law-drafters, such as legislators, renowned scholars, legal practitioners, and judges,¹² state ministers and officers from local governments or regional bureaus also contributed to the legislative process through consultation.¹³ It is uncommon in China to find foreign people being involved in the law making process. However in preparing the Revised Contract Law, foreign scholars and legal practitioners were invited to give seminars on specific issues of contract law. Furthermore, the American Chamber of Commerce was requested to comment on the earlier drafts of the legislation.¹⁴ Thus, it is submitted that the Revised Contract Law is the end product of a joint effort between Chinese and Western legal personnel, because it draws on a pool of domestic and foreign experience with regards to matters of contractual law.

In order to ensure that the Revised Contract Law achieves international standards, strong reference is made to *the United Nations Convention on contracts for*

the International Sale of Goods (CISG). Consequently, many western contractual concepts such as ‘offer’, ‘acceptance’, ‘good faith’ and ‘fairness’, which common law lawyers are accustomed to, can be found in the Revised Contract Law. Nevertheless, some scholars¹⁵ pointed out that particular care should be taken in using those terms. This is because those terms may have different meanings in the Chinese context.¹⁶ Furthermore, the Revised Contract Law has adopted the CISG with some modification. For example, under the CISG, the rule of valid acceptance allows extra or different terms to be added as long as these terms do not materially alter the contents of the original offer.¹⁷ However, under the Revised Contract Law, the acceptance rule only permits non-material modification of the particulars of the offer. It is unclear if non-material change can only be made on the exit terms of the offer, or whether it can be made by means of adding extra or different terms to the initial offer, like the CISG.¹⁸ In addition, the CISG does not apply to sale by auction, but the Revised Contract Law provides guidance¹⁹ to this type of sale. Another novelty of the Revised Legislation is the elimination of the distinction between domestic and foreign contract. Now, foreign investor doing business in China will not feel as if they are being treated differently. Moreover, the Revised Contract Law also recognises the entire legal capacity of a natural person to enter into a contract. Consequently, this recognition increases the dimension of contractual parties in business transactions in China.

III. IMPLICATIONS OF THE REVISED CONTRACT LAW ON CONSUMER PROTECTION IN CHINA

3.1 Abolition of the Difference between Economic and Civil Contracts and Recognition of the Individual as a Contractual Party

It is submitted that the Revised Contract Law further acknowledges consumer rights in China. Contracts were categorised into civil contract and economic contract within the preceding contract framework. An economic contract was defined as an agreement between legal persons to achieve certain economic purpose, such as increased production.²⁰ By virtue of such a definition, consumer contracts, which usually involve private individuals who acquire goods or services for personal consumption, were basically excluded from the earlier contract statutes’ coverage. The reason for this was that under a planned economy, the State nationalised resources and re-allocated them by means of contract in order to achieve its economic goal. Despite the fact that consumption and production are inter-dependant elements in the economic operation,²¹ consumption was once wrongly denied as having any impact on production. Hence private individuals were excluded from being a contractual party.²²

A consumer contract was classified as a civil contract²³ and was subject to the governance of the General Principles of Civil Law (GPCL). However, the GPCL has very limited provisions for contractual issues, and has even less to say about rules for consumer contracts. And those contract provisions were scattered across several chapters²⁴ within the GPCL. Therefore, there was not only a severe lack of law to deal

with contractual matters in consumer disputes, but it was also inconvenient in operation.

The Revised Contract Law removes the dichotomy between economic contract and civil contract, and is thus favourable to consumers in China because a more precise statute is now available for protecting their contractual rights. Furthermore, such abolition fully recognises the natural person as a contractual party in all types of contract. Since parties in a consumer contract are not restricted to private individuals, the recognition will extend the ranges of contractual parties in a consumer transaction with legal standing.

3.2 Formality of Contract

Previous legislation took little cognisance of oral contract. The Economic Contract Law only acknowledged oral contracts that could be performed immediately. This limitation excluded from the protection of the former contract statute many daily consumer transactions that might not be able to be fulfilled immediately.²⁵ The Revised Contract Law is more flexible in the area of formality. Apart from certain types of contract that must be in writing, such as sales of immovable property, sino-foreign joint oil exploration, and sino-foreign joint venture, oral contract is as enforceable as written contract.²⁶ Despite the general issue of proof of an oral contract, this flexibility in contract formality will foster and encourage consumer dealings to take place. Furthermore, the Revised Contract Law stipulates that a written contract can take the form of letters, telegrams, telexes, facsimiles, electronic interchange of data, and e-mail.²⁷ Since consumer transactions are moving toward the phase of e-commerce, the broader definition of a written contract will facilitate the future development of cyber contract and protect consumers for their on-line dealings.

3.3 Basic Contract Components – Offer and Acceptance

The Revised Contract Law has adopted and modified certain basic contract elements from the common law system, such as offer and acceptance. The offer and acceptance analysis is a useful device for consumers in evaluating the facts of a situation and in determining whether a contract has been made. Article 13 stipulates that the parties shall conclude their contract by the method of offer and acceptance. Articles 14, 15 and 16 also stipulate how to make a valid offer. The successive Articles²⁸ further provide when and in what way an offer can be withdrawn or revoked. Basically, an offer can be withdrawn if the withdrawal notice reaches the offeree before or at the same time as the offer arrives; and an offer can be revoked at any time before an acceptance is made. Nevertheless, if an offer has specified an irrevocable period, it cannot be revoked during that phase; or if the offeree reasonably believes that the offer is irrevocable and acts in reliance upon it, the offer is not revocable. From a consumer's point of view, these provisions are positive since consumer transactions generally commence²⁹ with making an 'offer'. Setting detailed rules for making an offer at the initial stage of negotiation can prevent the offeror, who could be a seller or consumer, from taking advantage of changes in market conditions, and from pulling out recklessly from the

negotiation, causing the other negotiating party to sustain monetary loss or lost opportunity.

Detailed rules are also stipulated throughout Articles 21 to 31 for making a valid acceptance. Article 27 is of particular interest to consumers. It states that acceptance can be withdrawn before or at the same time it reaches the offeror. Consumers nowadays are exposed to various aggressive sale tactics. It is not uncommon for unsophisticated consumers to make emotional acceptance of an offer, or accept an offer without giving it much thought. However, the present consumer legislation in China does not provide for this aspect, such as by affording consumers a 'cooling off' period for credit purchase as found in some countries like Australia. A 'cooling off' period is a withdrawal period required by law during which time the consumer can cancel the door to door⁴⁰ credit agreement. Article 27 is alleged as parallel to the 'cooling off' period for consumers in China. A consumer would have the opportunity after due consideration to withdraw from his or her acceptance, and would be exempt from having to conclude an unwanted contract if the provision is satisfied.

Under the common law system, acceptance is only constituted when the terms of the offer are accepted absolutely. A purported or qualified acceptance is equivocal and may amount to rejection or counter-offer. This rigidity could lead to unnecessary commercial impediment or inconvenience, especially for consumer contracts which usually involve a great deal of bargaining before an agreement comes into existence. To allow negotiation, the Revised Contract Law follows the approach of the CISG³¹ and has adopted a more flexible rule of acceptance. Article 31 states that an acceptance is effective if the modification of an offer is non-material, unless the offeror objects to the variation or the offer is expressly non-variable. Article 30 further stipulates what constitutes material modification, which includes alteration to price, quality, quantity, time of performance, liability of contractual breach, and method of dispute resolution, etc. It transpires from Articles 30 and 31 that the term of the offer can be varied if it is a minor term.³² Thus, on the one hand, the potential parties in a consumer contract can enjoy the flexibility of bargaining. On the other hand, the non-alteration of major items in the offer advances the potential parties' interests by circumventing the negotiation and ensuring a 'meeting of minds'³³ actually take place.

To prevent contractual parties from abusing these provisions by making a speculative offer or acceptance, Article 42 imposes liability arising from negotiation of contract. Article 42(1) holds a party liable for damages if he or she has shown bad faith in negotiation, under the disguise of concluding a contract, and causes loss to the other party. Mo, a legal scholar concerned with the vagueness in the application of Article 42(1), pointed out that 'an act of pretending to negotiate a contract with ill intent' might not be easily distinguished from 'an act of changing of one's mind during negotiations'.³⁴ Despite this potential problem in application, Article 42 is a positive point for consumer protection as it prevents consumers and their counterparts from misusing the law and making a frivolous offer or acceptance. At the same time, it provides remedy for consumers and their counterparts who suffer from a promise negotiated in bad faith. It is submitted that by imposing a good faith requirement on

consumer contracts, mutual trust and confidence can be fostered between consumers and business operators, and ultimately benefits them in the long run.

3.4 Principle of Good Faith

The principle of good faith is not only embodied in the provisions regarding contract formation, it has also been adopted as the fundamental principle of the whole Revised Contract Law. The major provision which specifies this principle is Article 6. It sets out that parties should abide by the principle of good faith in exercising their rights and performing their obligations.³⁵ Article 6 is compatible with Article 4 of the General Principles of Civil Law which also stipulates that civil activities shall respect the principles of voluntary participation, equity, compensation at equal value and honesty and trustworthiness.

There are major reasons why the Revised Contract Law has broadly accepted this principle, and it offers a number of advantages. As Wang and Xu have identified, the principle of good faith is consistent with Chinese traditional business ethic as well as standards of international business practice.³⁶ Furthermore, the principle requires one to keep one's promise and be trustworthy so that the contract can be respected and performed.³⁷ Besides, in a complex and fast-moving business world, commercial legislation may easily become obsolete soon after it is passed. By applying the standard of good faith in interpreting the law, the judicial system is flexible enough to deal with situations not foreseeable by legislators.³⁸

The duty of good faith is well recognised as being connected with the duty of disclosure. This is of special concern to consumers who have the right to know the true facts concerning commodities purchased and used or services received.³⁹ The right of knowledge is safeguarded by Article 19⁴⁰ of the Law of the People's Republic of China on the Protection of the Rights and Interests of Consumers (Consumer Protection Law). The Revised Contract Law reinforces this right by imposing liability for disregarding the duty of disclosure. Under Article 42(2), a party who deliberately withholds information relevant for the conclusion of a contract, or who supplies false information, would be held liable for damage.

Although the principle of good faith is not new in Consumer Protection Law, it only operates between consumers and business operators.⁴¹ Wang alleged that under the Revised Contract Law the principle has a wider application and is relevant to both contractual and non-contractual parties.⁴² While the principle of good faith increases its scope of application under the Revised Contract Law, it remains in doubt as to whether it protects consumers in certain circumstances. For example, a consumer may buy goods from a rogue who has obtained the goods from the original owner by fraud. In this not uncommon situation, if the adversely affected consumer were an innocent third party, acting in good faith and having paid the correct value, can the consumer be adequately protected by the principle?

Article 132 specifies that only a seller who is the owner or has the right of disposal can dispose of the subject matter of a sale. Article 51 also states that a party without right of disposal can dispose the subject matter of the sale only if the owner ratifies the disposal or if such right will be granted later. Certainly neither of these

situations applies in the case involving a rogue. Accordingly, a bona fide consumer who obtains goods from a fraudulent sale would not acquire ownership of the goods even if their value is paid. Could the good faith principle within the Revised Contract Law assist the innocent consumer in any way? Article 52 makes a contract void if a party uses fraud. Furthermore, Article 53 makes a contract voidable if the party who suffers from fraud petitions the court. It follows that the property, which is disposed under a void and voidable contract between the original owner and the rogue, shall be returned to the former in accordance with Articles 58. Could the original owner rely on Article 58 to enforce the right of return on the subsequent sale? Would the obligation of return under Article 58 extend to the innocent consumer who obtains the property in question from the subsequent sale in good faith and with value? If the obligation does extend, could the principle of good faith resolve the injustice towards the innocent consumer who is not a party in the original contract that now has been declared void or voidable? Unless the court applies the standard of good faith in interpreting the Law as Wang and Xu alleged, these questions remain unanswered.

3.5 Freedom to contract/standard contract

Another influential principle endorsed in the Revised Contract Law is the freedom to contract. This principle is vital to the development of Chinese socialist-market economy because transactions, which ultimately increase society's wealth, can only be promoted under an environment of freedom to form contracts.⁴³ The principle of contractual freedom has been spelt out explicitly or embraced in a number of provisions⁴⁴ within the Revised Contract Law.

Due to the political sensitivity of the word 'freedom' in China,⁴⁵ Article 4 is phrased as 'parties enjoy the legal right to voluntarily conclude contracts, and no work unit or individual may illegally intervene therein'. Being the major provision for the principle of freedom to contract, Article 4 restricts administrative or governmental interference with regards to the formation and validity of a contract, and upholds the contractual freedom of parties. Another confirmation of this principle in the Revised Contract Law is the recognition of the category of voidable contract.⁴⁶ Instead of rendering all contracts void once a defect is found, the adverse party's choice is respected⁴⁷ by granting him or her the option to avoid or to affirm the deficient contract at will. The Revised Contract Law also substantially respects contractual parties' freedom in choosing their own terms. Although the Law has listed some terms commonly found in most contracts, they are not mandatory.⁴⁸ Furthermore, free choice is given for the termination of a contract too.⁴⁹ Parties can agree in advance what sort of conditions would give rise to the right of termination and exercise that right when the conditions are satisfied. Parties can also accede beforehand the amount of compensation in the case of breach unless the liquidated damage is unduly high or low.⁵⁰ The principle of contractual freedom has been evinced significantly throughout the Law.

The principle of freedom to contract is developed against the background of a laissez-faire economy. It assumed that parties entering into a contract are of equal

bargaining power. However, this assumption is rebutted by the fact that there are disparities in the strength and position of parties in negotiation in a free market, particularly in consumer transactions. The lack of real freedom of contract led to the argument that contract law has little role to play in consumer protection.⁵¹ To circumvent the shortcomings of contractual freedom, the Revised Contract Law has embraced the principle of contractual justice.⁵² It is submitted that the principle of contractual justice enables a contract to function fairly by limiting its freedom.⁵³ Thus the principle justifies state intervention and control of contracts in the following aspects.

Firstly, the Revised Contract Law permits limited use of a standard clause. Such restriction coincides with Article 24 of the Consumer Protection Law, which also limits the practice of an exclusion clause that is detrimental to a consumer's interest. Article 39 of the Revised Contract Law requires the providers of a standard clause to abide by the principle of fairness when determining the rights and obligations of parties. It also requires the provider to call his counterpart's attention in a reasonable manner to the existence of the standard clause. This is particularly important in consumer contracts as the standard clause provider should realise that many consumers will sign or assent to terms that they have not read, contemplated or expected. Any standard clause that involves the circumstances proscribed in Article 52 is void.⁵⁴ A standard clause is invalid if it tries to avoid obligation for personal injury, and for property loss due to gross negligence or wilfulness.⁵⁵ In other words, an exclusion clause can still exclude liability for personal injury and for property loss if the negligence is not gross, or if it is not owing to deliberateness. Moreover, the obligation of a party cannot be exempted by a standard clause, nor can a standard clause increase liability or deprive the major right of another party. Nevertheless, ambiguity is found in Article 40 over the scope of obligation that can be exempted. Although some scholars⁵⁶ have given a narrow interpretation of the scope and referred it to the fundamental obligation, it still awaits judicial interpretation.

Secondly, the principle of contractual justice also serves as a means of interpreting an exclusion clause. When there is an inconsistency between a non-standard clause and a standard clause, the former one shall prevail.⁵⁷ In case of dispute over meaning, the standard clause shall be interpreted according to the *contra proferentem* rule⁵⁸ that is any ambiguity shall be construed against the interests of the person who drafted the clause. Because of the 'take it or leave it' nature of so many exclusion clauses in consumer contracts, such interpretative approach favours consumer wellbeing.

Thirdly, the principle of contract justice may declare a contract voidable if it lacks a party's genuine consent. Untrue consent of a contractual party can result from unconscionability or from a major mistake.⁵⁹ Article 54(1) fails to explain what amounts to a major mistake. In accordance with the Supreme Court's Opinion in the Implementation of the General Principle of Civil Law,⁶⁰ 'a major mistake' refers to mistakes of 1) the nature of the contract; 2) the identity of contractual parties; or 3) the nature, the quality, the quantity and the specification of the subject matter that contradict the real intent of the party, and subsequently cause significant loss. If this is the correct referencing, Article 54(1) is of limited practical benefits to a consumer who

suffers from a mistake where the loss is not substantial enough to attract the application of this provision.

Article 54(2) appears to be designed more for consumer protection. Article 54(2) makes a contract voidable if it is apparently unconscionable. Thus, contracts with unfair terms would be void in accordance with the free will of the disadvantaged consumer. This provision, while not limited to consumers, benefits them greatly as consumers usually constitute the vulnerable party in commercial transactions. Unconscionable dealing may occur when the seller takes advantage of his or her superior bargaining position or of the consumer's lack of experience, to exploit the dire needs of the consumer, or to impose unfair and harsh terms resulting from a bad bargain.⁶¹

3.6 'Specific Provisions' Section

Discussion of the consumer perspective in the Revised Contract Law would not be complete without examining the stipulations in the 'Specific Provisions' section. The Specific Provisions cover 15 specific types of contract. Of the 15 categories, sales and purchase contract is of most relevance to consumers. Although provisions governing sale of goods are not new, they were broadly drafted and limited in several stipulations in the previous contract statutes.⁶² Furthermore, there was an extreme paucity of law governing the sale of goods in the former consumer legal regime. Thus Part Nine of the 'Specific Provisions' section is submitted as a primary guide for consumers in sale and purchase contracts.

However, there are certain insufficiencies in the guidance. Part Nine regulates the performance of a sale contract. It governs the major aspects of sale of goods, such as transfer of property, delivery, risk of loss, and inspection of goods. Mo argued⁶³ that while Part Nine was compatible with the Sale Law under common law practice, its rules regulating transfer of title appeared to refer to specific goods only. In the common law jurisdictions, goods are generally classified into specific goods, unascertained goods and future goods. And different rules of title passing and of risk transferring apply to different types of goods. Nevertheless, Part Nine does not use the term 'goods' but refers to 'subject matter' of the contract. Part Nine does not define the meaning of 'subject matter' of the contract, unlike its common law counterparts which define what constitute goods.⁶⁴ Thus, it remains unclear which categories of subject matter are covered by this Part.

Another shortfall of Part Nine in protecting consumers is its right of inspection, which is associated with the obligation to notify of non-conformity.⁶⁵ Article 157 requires the buyer to carry out an inspection within the stipulated time or 'in a timely manner' when no time has been stipulated. Difficulty arises in determining what a 'timely manner' is. Wang submitted that 'timely manner' is decided by the nature of the subject matter.⁶⁶ However, this submission only provides a vague standard which still renders the term 'timely manner' uncertain.

Closely related with the right of inspection is the buyer's obligation to notify the seller of any non-conformity. Article 158 sets the time limit for honouring the

obligation. Firstly, the buyer shall inform the seller of any non-conformity within the stipulated time of inspection. Failure to notify would deem the subject matter to correspond to its specifications. Secondly, in the absence of a stipulated time and after the defect of the subject matter is discovered or ought to have been discovered, the buyer shall bring the non-conformity to the attention of the seller within a reasonable time. In any case, this should be within two years upon receipt of the subject matter, unless there is a guarantee period, which would prevail. Thirdly, if the seller knows or ought to have known of the presence of a defect in the subject matter, the buyer is not bound by the above-mentioned time periods of notifications.

The first time period may work against a buyer who has inspected the subject matter but the inspection is not adequate to discover the non-conformity; or in a case where the defect is not apparent at the stipulated time of inspection. Since time starts to run from the act of inspection instead of the discovery of a defect, this stipulation may be unfair to the buyer - the consumer in a consumer sale. It also transpires from Article 158 that the seller's liability for non-conformity lasts two years from the date of delivery, or is limited by the guarantee period. This time period may impose hardship on those consumers who buy goods that may not be used for a while or very often, or which require a certain amount of use before the defect can adequately be discovered. Besides, it appears that the obligation to give notice depends upon the buyer's actual or constructive knowledge of a defect. However, Article 158 does not clarify what circumstances would give rise to that assumption of knowledge. Despite the crucial relationship between knowledge of a defect and commencement of the limitation of time of notification, Article 158 fails as a proper guide for consumers.

It is asserted that the main cause of consumer grievance is 'non-compliance' with the sale contract. In addition to Part Six, which specifies the ways of discharging contractual rights and obligations, Part Nine prescribes⁶⁷ further rules for the termination of a contract due to non-compliance. However, it does not provide any remedy available under such termination. Thus, disgruntled consumers have to resort to the 'General Provision'⁶⁸ section for redress.

Unlike its common law counterparts, the Revised Contract Law includes a pure exchange of subject matters, without reference to monetary value, into the sale of goods category. Article 175 stipulates that if the parties agree to an exchange agreement whereby ownership of the subject matter is transferred, reference shall be made to the relevant provisions in respect of sale and purchase contracts. It is doubtful if this reference is appropriate, as Article 30 defines a sale contract as an agreement for transfer of property with a price value.

The Revised Contract Law also recognises the transaction of sale on approval. Under a 'sale on approval' dealing the buyer can try out the subject matter before approving the sale, while assuming no responsibility except the risk of damage or loss of the subject matter as provided by law or by the parties.⁶⁹ However, this type of sale could be subjected to abuse by a 'buyer' who uses the goods but has no intention of adopting the transaction. As a result, a seller may have to pass on the resulting costs through setting a higher price generally for the goods. Ultimately, genuine consumers absorb all of these costs and thereby would suffer. Another issue in the 'sale on approval' transaction is the ambiguity regarding the period of trial and the period of

inspection associated with the obligation to notify any non-conformity.⁷⁰ It is unclear whether the two periods run concurrently. Although the impact is minimal in practice, as the act of testing the subject matter usually involves the act of inspection, consumers' interests would nonetheless be better served if such ambiguity could be removed. Furthermore there is a call for clarification of Article 171 as it places the burden on the consumer to give notice of a rejection of the 'sale on approval' transaction. However, Article 171 fails to elucidate what types of conducts are necessary to satisfy the requirement of notification.

IV. CONCLUSION

After six years of tremendous preparation, the final draft of the Revised Contract Law was adopted in March 1999. Though the Law is by no means a perfect legislation, it demonstrates the Chinese government's remarkable effort in restructuring and harmonising the previous fragmented contract regime. Now the Revised Contract Law is more in line with international business practice and better meets the needs of the current economic situation in China.

Generally, the Revised Contract Law is good news for business people. The Law has taken the opportunity to eliminate the distinction between economic and civil contracts, to unify foreign and domestic contracts, and to recognise the private individual as a contractual party. Furthermore, the Law has also filled the gaps in previous contractual frameworks by incorporating certain contract rules of the common law system, such as offer and acceptance. It has also adopted some contract principles from western countries, namely the principle of good faith and the principle of contractual freedom. Now a more comprehensive and systematic body of contract law is available for people doing business in China.

The impact of the Revised Contract Law on consumerism should be positive on the whole. It is pro-consumer in recognising a natural person as having full contractual status, and by accepting oral agreement as a type of contract formality. The basic contract rules, like offer and acceptance, not only provide the consumer with a procedure for formation of a contract, they also protect the consumer's interest during the process of negotiation. The application of the good faith principle, which enhances consumer's right of knowledge, is favourable to the consumer although doubt remains over its scope of application in certain circumstances. Freedom of contract is essential for the development of a market economy, but the Revised Contract Law also acknowledges the problem of economic coercion that arises from disparities in the strength and position of the market participants, which result in unfairness. To redress this imbalance of bargaining power and to acknowledge the true economic circumstances, the Revised Contract Law has introduced the concept of contractual justice in facilitating the operation of contractual freedom. Accordingly, in the case of consumer business dealings, the Revised Contract Law controls the seller's usage of the standard terms; interprets the standard terms against the interest of the seller when there is ambiguity; and disallows the seller to enter into unconscionable contract with a

disadvantaged consumer. It is not an easy task to recognise the need to protect consumers from abuse resulting from inequality of bargaining power, while at the same time supporting and upholding the basic notion of a free market economy. Through applying the general rules of contract to most consumer transactions and by imposing restrictions in necessary areas, the Revised Contract Law has done a good job in achieving the appropriate balance.

In spite of the longstanding debate over whether contract law is a useful vehicle in safeguarding consumers' interests, the Revised Contract Law is an important tool for consumer protection in China. Though the stipulations in the 'General Provisions' are adequate to provide the legal basis of all aspects of transaction, the existence of Part Nine has added a further dimension. Most key elements dealt with in the consumer sale contract, such as the transfer of ownership, the duty of delivery, the passing of risk, and the obligation of non-conformity are more comprehensively spelt out in Part Nine of the 'Special Provisions' section. Since case law does not have a strong base in Chinese courts, detailed legislation is necessary for adjudication in resolving contractual disputes for consumers regarding sale and purchase.

Having said all this, it is important to note that there are shortcomings in the Revised Contract Law in safeguarding consumers' interests. Particular attention should be paid to the ambiguous meanings and the vague standards set in the above-discussed provisions. Unless clarification is given or more guidance is provided, any benefit initially provided to consumers in those provisions would be substantially undermined.

In evaluating the Revised Contract Law from the perspective of consumerism, it is important to bear in mind that the primary objective of the Law is not to protect the consumer. Despite some flaws, the consumer-related provisions previously discussed in this paper should be sufficient in considering the Revised Contract Law as a consumer-friendly legislation. Furthermore, in response to the questions arising from the application of the Revised Contract Law since its promulgation, the People's Supreme Court has already handed down rules concerning interpretation for those issues. It is expected that the Supreme People's Court will announce further guidelines or interpretative rules when necessary. By then, the Law will be in better shape for both Chinese consumers and traders doing business in China.

NOTES

1. The Revised Contract Law consists of 428 articles, whereas the Criminal Law, which was passed in 1997, consists of 452 articles.
2. Wang, Guiguo, 'A Survey of China's Economic Contract Law', China Law Reporter, Summer 1986, Vol. 3 No. 4, pp259-269, at p268. (hereafter referred to as Wang Guiguo)
3. For example, the Cultural Revolution from 1966 to 1976.
4. Examples of earlier contract rules and regulations are: Provisional Rules Regarding Contracts among Governmental Organizations, State-Owned Enterprises and Collective Units (1950); Decision Concerning the Strict Implementation of Contract (1950); The Interim Regulation on Contract for Ordinary Industrial and Mineral Products (1963). Reference from Zhong, Jianhua and Yu, Guanghua,

- ‘China’s Uniform Contract Law: Progress and Problems’, *UCLA Pacific Basin Law Journal*, Vol. 17, No. 1, Summer 1999, pp1-24. (hereafter referred to as Zhong & Yu)
5. Economic Contract Law, Article 2.
 6. With the exception of Economic Contract Law Article 54, ie contract between legal persons and farmer; Office of Economic Law Study Center of the State Council Interpretations of the Economic Contract Law of the People’s Republic of China (1982), ie contract between private enterprise and natural persons in rural areas. Reference from Wang Guiguo, p264.
 7. Wang, Liming and Xu, Chuanxi, ‘Fundamental Principles of China’s Contract Law’, *Columbia Journal of Asian Law*, Vol. 13, No. 1, Spring 1999, pp1-34, at p6. (hereafter referred to as Wang & Xu)
 8. *Ibid*, p7
 9. *Ibid*, pp5-7.
 10. The Revised Economic Contract Law abolished Article 27 (5) of the Economic Contract Law, which stated that a party might terminate a contract if the other party’s breach rendered the performance impossible or unnecessary. However, the concept of this Article was still retained in the Technology Contract Law. Reference from Wang & Xu, p6.
 11. With the exception of the General Principles of Civil Law, the Economic Contracts Law, the Foreign Economic Contract Law, and the Technology Contract Law were repealed on 1 October 1999.
 12. Zaloom, E. Anthony and Liu, Hongchuan, ‘China’s Contract Law Marks a New Stage in Commercial Law Drafting’, *China Law and Practice*, May 1999, pp15-18, at p15. (hereafter referred to as Zaloom & Liu)
 13. Ping, Jiang, ‘Drafting the Revised Contract Law in China’, *Columbia Journal of Asian Law*, Vol. 10, No. 1, 1996, pp245-258, at p245.
 14. Zaloom & Liu, p15. Peerenboom, Randall, ‘A Missed Opportunity? China’s New Contract Law Fails to Address Foreign Technology Providers’ Concerns’, *China Law and Practice*, May 1999, pp83-87, at p83.
 15. Scogin, Hugh T. and Braude, Brett D., ‘New Contract Basics’, *The China Business Review*, January-February 1999, pp36-41, at p36. (hereafter referred to as Scogin & Braude); Larusson, Hafliði K. and Sharp, David J., ‘West Meets East: The New Chinese Contract Law’, *Ivey Business Journal*, Vol. 64, Issue 2, Nov 1999, pp66-70, at p68. (hereafter referred to as Larusson & Sharp)
 16. Larusson & Sharp, p68.
 17. Article 19(2).
 18. Scogin & Braude, p39.
 19. Article 173.
 20. Zhong & Yu, p3.
 21. *Ibid*, p5.
 22. *Ibid*, p3.
 23. *Ibid*, pp3-4.

24. Contract rules within the General Principles of Civil Law can be found under Chapter IV, Civil Legal Acts and Representation; Chapter V, Civil Rights and Interests; Chapter VI, Civil Obligations.
25. The term 'immediate fulfilment' in Article 3 of the Economic Contract Law was not defined.
26. The Revised Contract Law, Article 10.
27. Article 11.
28. Articles 17, 18 and 19.
29. Under the common law system, a dealing may begin with an 'invitation to treat', ie inviting others to forward a proposal or offer.
30. Reference from the booklet provided by the Department of Fair Trading Australia: a Door to door sale is a credit agreement made at one's home or place of work when one:
 - 1) had no previous contact with the seller;
 - 2) requested a visit for information or brochures;
 - 3) agreed to a salesperson's visit after being contacted by phone, or responded to promotional material offering benefits eg prizes, no-obligation free quote etc.
31. The United Nations Convention on Contracts for the International Sale of Goods, Article 19(2).
32. Wang, Bong Fa, *He Tong Fa Shi Yong Wen Da* (Contract Law Questions and Answers), Legal publication, 1999, p59. (hereafter referred to as Wang Bong Fa)
33. The principle of offer and acceptance assists in determining the consensus of the parties, and whether their consensus has come into being for concluding a contract.
34. Mo, John, 'The Code of Contract Law of the People's Republic of China and the Vienna Sales Convention', *American University International Law Review*, Vol. 15, No. 1, 1999, pp209-70, at p267. (hereafter referred to as Mo)
35. People's Republic of China, Contract Law (English version), China Law & Practice, May 1999, pp19-82, at p19.
36. Wang & Xu, p16.
37. Ibid.
38. Ibid, p17.
39. Article 8, the Law of the People's Republic of China on the Protection of the Rights and Interests of Consumers.
40. Article 19 states that a business operator shall provide consumers with true information concerning commodities and shall not conduct false advertising. A business operator shall provide true and clear answers to questions raised by consumers concerning the quality and use of commodities or services provided by it, and other related issues. A retailer shall clearly check the marked price on commodities provided by them. (Reference from China Laws for Foreign Business – Business Regulation (Loose-leave service), CCH International, p 20,087)
41. Article 4.
42. Wang Bong Fa, p26.
43. Wang & Xu, p11. Wang, Liming, 'An Inquiry Into Several Difficult Problems In Enacting China's Uniform Contract Law', *Pacific Rim Law & Policy Journal*, Vol. 8, No. 2, March 1999, pp351-392, at p357. (hereafter referred to as Wang)

44. For example, Articles 34, 79, 133, 142, 197, 220, and 225, which include the proviso of 'or the parties have agreed otherwise'.
45. Wang Bong Fa, p24.
46. Article 54.
47. Ibid.
48. Article 12.
49. Article 93.
50. Article 114.
51. Goldring, John, 'Consumer Law and Legal Theory: Reflections of a Common Lawyer', *Journal of Consumer Policy*, Vol. 13, 1990, pp113-132, at p130.
52. The principle of contractual justice means that parties should conclude and perform the contract on the basis of fairness and voluntariness, the terms of the contract should embody the principles of fairness and honesty, and the contracting parties should not abuse their economic power or strength, nor harm the interests of the other party. Reference from Wang, p362.
53. Wang, p362.
54. Article 40.
55. Articles 40 and 53.
56. Zhong & Yu, p8; Wang Pong Fa, p66.
57. Article 41.
58. Contra proferentem rule is the interpretative approach for exclusion clauses under the common law system.
59. Article 54(2).
60. Reference from Wang Bong Fa, p93.
61. Wang Bong Fa, p94.
62. Examples of provisions scattered amongst previous contract statutes are provided in Ip, Mary, 'Chinese Consumer Law: Recent Developments And Implications', *Journal of International Business*, Vol. 6, No. 2, 2001, pp111-134.
63. Mo, p233.
64. Article 5 of the Sale of Goods Act (NSW) 1923 defines 'Goods' as 'including all chattels personal other than things in action and money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale'.
65. Articles 157 and 158.
66. Wang Bang Fa, p206.
67. Articles 164 and 165.
68. Articles 111 and 113.
69. Article 142.
70. Article 158.

REFERENCES

- China Laws for Foreign Business – Business Regulation (Loose-leaf service), *CCH International*, 1997.
- Department of Fair Trading Australia <http://www.fairtrading.nsw.gov.au>
- Goldring, John, “Consumer Law and Legal Theory: Reflections of a Common Lawyer,” *Journal of Consumer Policy*, Vol. 13, 1990, pp113-132.
- Ip, Mary, “Chinese Consumer Law: Recent Developments And Implications,” *Journal of International Business*, Vol. 6, No. 2, 2001, pp111-134.
- Larsson, Hafliði K. and Sharp, David J., “West Meets East: The New Chinese Contract Law,” *Ivey Business Journal*, Vol. 64, Issue 2, Nov 1999, pp66-70.
- Mo, John, “The Code of Contract Law of the People’s Republic of China and the Vienna Sales Convention,” *American University International Law Review*, Vol. 15, No. 1, 1999, pp209-70.
- Peerenboom, Randall, “A Missed Opportunity? China’s New Contract Law Fails to Address Foreign Technology Providers’ Concerns,” *China Law and Practice*, May 1999, pp83-87.
- People’s Republic of China, Contract Law (English version), *China Law & Practice*, May 1999, pp19-82.
- Ping, Jiang, “Drafting the Revised Contract Law in China,” *Columbia Journal of Asian Law*, Vol. 10, No. 1, 1996, pp245-258.
- Sale of Goods Act (NSW) 1923 <http://www.austlii.edu.au>
- Scogin, Hugh T. and Braude, Brett D., “New Contract Basics,” *The China Business Review*, January-February 1999, pp36-41.
- The United Nations Convention on Contracts for the International Sale of Goods <http://www.uncitral.org/en-index.htm>
- Wang, Bong Fa, *He Tong Fa Shi Yong Wen Da* (Contract Law Questions and Answers), Legal publication, 1999.
- Wang, Guiguo, “A Survey of China’s Economic Contract Law,” *China Law Reporter*, Summer 1986, Vol. 3, No. 4, pp259-269.
- Wang Liming, “An Inquiry Into Several Difficult Problems In Enacting China’s Uniform Contract Law,” *Pacific Rim Law & Policy Journal*, Vol. 8, No. 2, March 1999, pp351-392.
- Wang, Liming and Xu, Chuanxi, “Fundamental Principles of China’s Contract Law,” *Columbia Journal of Asian Law*, Vol. 13, No. 1, Spring 1999, pp1-34.
- Zaloom, E. Anthony and Liu, Hongchuan, “China’s Contract Law Marks a New Stage in Commercial Law Drafting,” *China Law and Practice*, May 1999, pp15-18.
- Zhong, Jianhua and Yu, Guanghua, “China’s Uniform Contract Law: Progress and Problems,” *UCLA Pacific Basin Law Journal*, Vol. 17, No. 1, Summer 1999, pp1-24.

