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CHINESE CONTRACT FORMATION:
THE ROLES OF CONFUCIANISM, COMMUNISM,
AND INTERNATIONAL INFLUENCES

*Amy Lee Rosen*¹

ABSTRACT

China has opened its doors to the world so understanding Chinese contract law is crucial to succeeding in international business transactions. The United States and China are both signatories to the United Nations Convention on Contracts for the International Sale of Goods (CISG), and both nations have declared that neither are bound under Article 1(1)(b), which means that if a contractual conflict arises, the domestic law of either nation may apply when interpreting the contract. China only requires offer and acceptance whereas the United States requires mutual assent and consideration, so contract interpretation may be problematic. Beyond offer and acceptance, Chinese contract formation law has also been heavily influenced by Confucianism, Communism, and China's desire to enter the World Trade Organization (WTO). This article addresses the background and impact of past, present, and future influences in Chinese contract law and discusses several imminent problems that still exist with Chinese law on contract formation.

INTRODUCTION

Contract formation is an important element in international transactions, but when doing business with China, foreigners

¹ Juris Doctor, Temple University Beasley School of Law. Thank you, Professor Mo Zhang, Associate Professor of Law, Temple University Beasley School of Law, for your patience, wisdom and guidance. I also want to thank Eugene Hsue, Foreign, Comparative & International Law Librarian at Temple University Beasley School of Law, for his exceptional research assistance. Finally, I want to dedicate this piece to my parents, Mark and Shirley Rosen, for all of the sacrifices they have made for me.

consider China's laws and courts to be mysterious.² In China, legal vagueness allows the judiciary to serve the public interest,³ but for that same reason "China's legal system simply cannot offer the certainty most investors require."⁴ Because the Chinese Constitution has no separation of powers,⁵ because judges are selected by the people's congresses and are paid by them,⁶ and because Chinese courts do not follow *stare decisis*,⁷ it is important to look elsewhere when trying to understand Chinese law. With no independent judiciary, foreign companies are concerned that by doing business with China, their financial interests may not be protected.⁸ So by understanding other elements such as Confucianism, the role of a socialist-market economy in the People's Republic of China (PRC), and China's desire to enter the WTO, Westerners will be able to more fully understand Chinese contract law, how contracts are formed, and crucial business steps after the formation of a contract.

The Chinese Contract Law (CCL)⁹ was China's attempt to overhaul the previous outdated contract laws in an effort to become part of the World Trade Organization.¹⁰ The Chinese Contract Law reflects significant changes in China's shift to a market economy.¹¹ Under Article 1 of the Chinese Contract Law, part of the purpose of

² Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 59 (2002).

³ John H. MATHESON, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L L. 329, 378 (2006).

⁴ *Id.* at 371.

⁵ Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L. J. 459, 504 (2003).

⁶ *Id.*

⁷ *Id.*

⁸ Zhang, *supra* note 2, at 59.

⁹ Chinese Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong. March 15, 1999, effective October 1, 1999); WEI LUO, *THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA WITH ENGLISH TRANSLATION*, art. 33 (W.S. Hein, Buffalo, NY 1999) [hereinafter CCL].

¹⁰ PATRICIA BLAZEY ET AL., *THE CHINESE COMMERCIAL LEGAL SYSTEM* 177 (Lara Leeks ed., Thompson Lawbook Co. 2008).

¹¹ Zhong Jianhua & Yu Guanghua, *China's Uniform Contract Law: Progress and Problems*, 17 UCLA PAC. BASIN L. J. 1, 9 (1999).

the law is to “promote socialist modernization.”¹² This departed from China’s previous purpose of “promoting a planned economy.”¹³ Since “contractual relationships constitute the most basic legal relationships in a market economy,”¹⁴ fostering transactions would help China’s market economy develop.¹⁵ China was accepted into the WTO in 2001 and was its 143rd member.¹⁶ China is the only WTO member that has a partial communist economy.¹⁷

Although China is a signatory to the United Nations Convention on Contracts for the International Sale of Goods (CISG),¹⁸ China has declared under Article 95 that it is not bound under Article 1(1)(b).¹⁹ The United States has adopted the same provision.²⁰ As such, if two contracting parties are from countries that are signatory nations to the CISG that have adopted Article 1(1)(b), the domestic law of either state may apply.²¹ Since contracts between parties in the United States and China may be subject to U.S. or Chinese domestic law, understanding Chinese contract law will help U.S. parties adapt to China’s different legal norms.²² In addition, China’s admission to the World Trade Organization in 2001 has allowed China to become

¹² CCL, *supra* note 9, art. 1.

¹³ See MO ZHANG, CHINESE CONTRACT LAW: THEORY AND PRACTICE 45 (2006) (quoted in DING BANGKAI, THE LAW OF SOCIALIST MARKET ECONOMY 6 (2002)).

¹⁴ Wang Liming & Xu Chuanxi, *Fundamental Principles of China’s Contract Law*, 13 COLUM. J. ASIAN L. 1, 23 (1999).

¹⁵ *Id.*

¹⁶ BLAZEY, *supra* note 10, at 157.

¹⁷ *Id.* at 158.

¹⁸ United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, s. treaty Doc. No. 98–9 (1983); I.L.M. 668–99 (1980). See also Final Act of the United Nations Convention on Contracts for the International Sale of Goods, Annex I, U.N. Doc. A/Conf.97/18 (1980), in Official Records, Conference on Contracts for the International Sale of Goods 178, U.N. Doc. A/Conf.97/19 (entered into force on Jan. 1, 1988) [hereinafter CISG]. See Pattison, *supra* note 5, at 465.

¹⁹ CISG, *supra* note 18, at art. 95 (An Article 95 declaration “restricts the role of private international law in determining the applicability of the CISG when both contracting parties do not have their relevant place of business in Contracting States.”). See Pattison, *supra* note 5, at 465.

²⁰ PATTISON, *supra* note 5, at 465.

²¹ CISG, *supra* note 18, at art. 2(a). See Pattison, *supra* note 5, at 465.

²² PATTISON, *supra* note 5, at 509.

part of the multilateral trading system,²³ and thus understanding China's domestic laws is more important than ever before.

Although there is a lot of business between China and Western countries, Westerners do not understand the roles that customs, culture, and law play in Chinese contract formation. Westerners believe that communications are finished after the contract is signed, but Chinese citizens believe that the business relationship begins at the time the contract is signed.²⁴ Clearly, the importance placed on Chinese cultural norms, China's government and market-economy plan, and World Trade Organization membership have greatly influenced how Chinese contracts are formed.

The purpose of this article is to analyze how China's view of the past, present, and future has affected China's current laws governing contract formation. Part I of this article identifies important concepts in Chinese culture. Part II will describe the history of Chinese contract law. Part III of the article assesses how Chinese cultural values, the Communist state, and China's interest in joining the World Trade Organization have influenced the current CCL. Part IV will describe how contracts are formed under the CCL. Part V will discuss pending issues that Chinese contract law has yet to resolve. Part VI will conclude that current Chinese law reinforces Chinese culture, supports a Communist/socialist state, adapts to some international legal principles, and that understanding these principles will help Westerners conduct more productive business with China in the future.

I. CHINESE CULTURE AND TRADITION: THE CONFUCIAN MORAL STANDARD

An important philosophy that has affected Chinese contract law is Confucianism, and understanding Confucianism is crucial in

²³ BLAZEY, *supra* note 10, at 168.

²⁴ *Id.* at 491. See Phillip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427, 429 (2001); see MATHESON, *supra* note 3, at 382 (noting that in China, the business relationship begins after the formal contract has been signed).

understanding China today. Confucian codes of conduct have been and are important in Chinese culture.²⁵ “Confucius has strongly influenced all sectors of Chinese society.”²⁶ Confucius lived from 551-479 BCE and believed in gentlemanly conduct that emphasized good manners, demeanor and gestures, dress and social grace.²⁷ Living together peacefully could be achieved if people lived by certain traditions that maintained tranquility and social order.²⁸ Community values contributed to ethical norms that influenced societal behavior.²⁹

Confucianism emphasizes that an ideal government is based on familial loyalty, ancestor worship, respect for elders and the family.³⁰ Confucians believe legal regulations of human conduct could not replace proper moral behavior.³¹ If only the law existed, people would search for ways to circumvent the law, whereas morality would bring a sense of propriety and an accompanying sense of shame, so people would self-regulate their behaviors.³² The goal of Confucianism was self-government and self-regulation.³³ Punishment and law should be used only when “moral instruction has failed.”³⁴ Important concepts in Confucianism are morality (礼/禮/Li), benevolence (仁/Ren), and righteousness (义/義/Yi).³⁵

²⁵ 1 JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 36 (3rd ed. 2010).

²⁶ JUNWEI FU, MODERN EUROPEAN AND CHINESE CONTRACT LAW: A COMPARATIVE STUDY OF PARTY AUTONOMY 9 (2011).

²⁷ ZIMMERMAN, *supra* note 25, at 36.

²⁸ *Id.* at 37.

²⁹ BLAZEY, *supra* note 10, at 22.

³⁰ FU, *supra* note 26, at 10.

³¹ BLAZEY, *supra* note 10, at 32.

³² FU, *supra* note 26, at 11.

³³ PATTISON, *supra* note 5, at 478.

³⁴ BLAZEY, *supra* note 10, at 32.

³⁵ FU, *supra* note 26, at 10. See ROGER T. AMES, CONFUCIANISM: CONFUCIUS (KONGZI, K'UNG TZU) 72-78 (Antonio, S. Cua ed., Encyclopedia of Chinese Philosophy, 2003).

A. 礼/禮 (Li)

Li can mean propriety, good manners, civility, and politeness.³⁶ Confucius believed that li was important because it represented positive measures for preventing crime and maintaining social order.³⁷ During the Spring and Autumn period (770-475 BC³⁸), Li meant rites and rituals of the noble classes during the time of Confucius.³⁹ The meaning of Li expanded to rites and rituals for all social ranks during the Zhou Dynasty.⁴⁰ Li was more important than personal rights, and bound people at birth.⁴¹ "To the Confucianist, legal institutions were secondary to the judgment of moral men."⁴²

Li was not like 'natural law' in Western law; instead Li depended on one's status within the family.⁴³ Confucianism dictated a social structure which consisted of five cardinal relationships of man: ruler and minister; father and son; husband and wife; elder brother and younger brother; friend and friend.⁴⁴ "Confucians saw the state as an extension of the family unit."⁴⁵ Individuals were not important outside of the family structure, and individuals were regulated within the family structure, so protecting individual rights and liberties was not necessary.⁴⁶

A ruler's good moral character was the example for his subjects to follow, which should have made punishment unneces-

³⁶ BLAZEY, *supra* note 10, at 60.

³⁷ ZIMMERMAN, *supra* note 25, at 36.

³⁸ BLAZEY, *supra* note 10, at 23.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 30 (quoted in DERK BODDE, *ESSAYS ON CHINESE CIVILIZATION* 179 (Charles Le Blanc et al. eds., 1981)).

⁴² ZIMMERMAN, *supra* note 25, at 40.

⁴³ BLAZEY, *supra* note 10, at 31 (quoted in J. CHEN, *TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT* 8 (1999)).

⁴⁴ BLAZEY, *supra* note 10, at 31.

⁴⁵ *Id.*

⁴⁶ *Id.* (quoted in Lucien W. Pye, *The State and the Individual: An Overview Interpretation*, in *THE INDIVIDUAL AND THE STATE IN CHINA* 16-24 (Brian Hook ed., 1996)).

sary.⁴⁷ “Li is the vehicle of government . . . [w]hen [L]i is dishonored, government is lost.”⁴⁸ The purpose of a ruler was to demonstrate correct moral conduct and to promote the idea of “government of men, not laws.”⁴⁹

B. 仁 (*Ren*)

Ren means “benevolence”, “sympathy”, “charity”, “human kindness” and “compassion”.⁵⁰ Encompassed in this idea is recognizing other people’s needs.⁵¹ Confucius abided by a Golden Rule which is manifested by the Principles of Chung and Shu. Chung’s principle is “Do unto others what you want others to do unto you.” (己所不予, 勿施于人) Shu’s principle is “Do not do unto others what you do not want them to do unto you.”⁵² In order to become a person of Ren, one needs to follow the Golden Rule.⁵³ Confucius said, “A resolute scholar and a man of [R]en would never seek to live at the expense of injuring humanity. He would rather sacrifice his life in order to realize humanity.”⁵⁴

C. 义/義 (*Yi*)

Yi can mean righteousness, obligation and duty.⁵⁵ Yi emphasizes acting without an ulterior motive and the concept of Yi works in conjunction with Ren.⁵⁶ According to Confucian ideals,

⁴⁷ *Id.* at 42 (quoted in Hugh T. Scogin, *Civil “Law” in Traditional China: History and Theory*, in K. BERNHARDT & PHILIP C.C. HUANG, *CIVIL LAW IN QING AND REPUBLICAN CHINA* (15) (1999)).

⁴⁸ *Id.* at 31 (quoted in CHEN JINGPAN, *CONFUCIUS AS A TEACHER* 270 (1990)).

⁴⁹ *Id.* (quoted in J.H. WIGMORE, *A PANORAMA OF THE WORLD’S LEGAL SYSTEMS* 145 (vol. 1., 1928) cited in Ju-Ao Mei, *CHINA AND THE RULE OF LAW* 863 (1932)).

⁵⁰ BLAZEY, *supra* note 10, at 60.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* (quoted in J. KOLLER, *ORIENTAL PHILOSOPHIES* 266 (1985)).

⁵⁵ *Id.* at 60.

⁵⁶ BLAZEY, *supra* note 10, at 60.

people's actions were done because they were right.⁵⁷ Yi worked in context with Confucian respect for hierarchy. "The ruler's Yi is to be just; the follower's Yi is to be obedient; the father's Yi is to be benevolent; the mother's Yi is to be submissive; the son's Yi is to be filial."⁵⁸

Yi usually means focusing on what is fitting or right, and that goes hand-in-hand with reasonable judgment.⁵⁹ Yi is a guiding principle for all human relations, and focuses on pursuing material goods and the desires of pleasure and comfort.⁶⁰ In traditional China, commercial activity was based on worship, banquets, ritual, and law.⁶¹ Wealth was a result of blessings from Heaven, which has combined with the Confucian idea that righteousness was superior to the pursuit of profit.⁶²

II. CHINESE CONTRACT LEGISLATION: HISTORY AND PRESENT

Chinese legal history has been heavily influenced by Confucianism.⁶³ Although civil law had not developed in China until recently, the concept of contracts, or qiyue (agreement) can be traced back to before the creation of Chinese characters (BC 1200-1050).⁶⁴ Originally, about 2000 years ago, the word for contract, He Tong (合同), was replaced by the term Qi Yue (契约) or agreement, so the contract was the formal physical record of the Qi Yue.⁶⁵ But now the two terms are almost indistinguishable.⁶⁶

During the Han (206 BC-220 AD) and Qing (1644-1911) Dynasties, Li and Rule of Law were combined. China was a feudal

⁵⁷ *Id.*

⁵⁸ *Id.* at 61 (quoted in J. KOLLER, *ORIENTAL PHILOSOPHIES* 267 (1985)).

⁵⁹ FU, *supra* note 26, at 43 (quoted in A.S. CUA, *YI (I) AND LI: RIGHTNESS AND RITES* 842 (2003)).

⁶⁰ FU, *supra* note 26, at 43.

⁶¹ Mary Szto, *Strengthening the Rule of Virtue and Finding Chinese Law in "Other" Places: Gods, Kin, Guilds and Gifts*, 35 *SUFFOLK TRANSNAT'L L. REV.* 1, 23 (2012).

⁶² *Id.*

⁶³ FU, *supra* note 26, at 11.

⁶⁴ *Id.*

⁶⁵ ZHANG, *supra* note 13, at 25.

⁶⁶ *Id.*

state that was centrally controlled.⁶⁷ “But from as early as 3000 B.C., and continuing until the turn of the last century, China was isolated from the rest of the world.”⁶⁸ China favored agriculture and, with her closed-door policy, discouraged commerce.⁶⁹

The West began to affect China during the Qing Dynasty.⁷⁰ The First Draft Civil Code was completed in 1911.⁷¹ After the Qing Dynasty was overthrown in 1911, the new revolutionary government changed several times.⁷² The first National Civil Code, derived from the Qing Code, was completed in 1925.⁷³ The Nationalist Government, known as the Kumintang, or KMT, was established in 1927,⁷⁴ and the National Civil Code was redrafted from 1928-1930.⁷⁵ Later, the People’s Republic of China (PRC) was founded in 1949.⁷⁶ Despite the 1954 draft of the Civil Code, the Anti-Rightist Movement and the 1958 Great Leap Forward overwhelmed the role of law in society.⁷⁷

The first thirty years of the PRC’s history was characterized by lawlessness.⁷⁸ During the “Cultural Revolution” (1966-1976), revolutionary fervor and brutality aimed at “class enemies” basically destroyed any laws and the legal system.⁷⁹ State policy, and not law, dominated Chinese society.⁸⁰ The idea of Confucian virtue translated, under Maoist thought, to indisputable support for the Chinese Communist Party (CCP.) “A virtuous person in Maoist China was a person who followed the party line.”⁸¹ Since Mao’s death in 1976, he

⁶⁷ FU, *supra* note 26, at 12.

⁶⁸ Sam Hanson, *The Chinese Century: An American Judge’s Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 243, 245–46 (2001).

⁶⁹ FU, *supra* note 26, at 12.

⁷⁰ ZHANG, *supra* note 13, at 28.

⁷¹ FU, *supra* note 26, at 14.

⁷² BLAZEY, *supra* note 10, at 45.

⁷³ FU, *supra* note 26, at 15.

⁷⁴ BLAZEY, *supra* note 10, at 46.

⁷⁵ FU, *supra* note 26, at 15.

⁷⁶ BLAZEY, *supra* note 10, at 46.

⁷⁷ FU, *supra* note 26, at 16.

⁷⁸ J. CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 31 (1999).

⁷⁹ BLAZEY, *supra* note 10, at 49 (*quoted in* Chen, *supra* note 111, at 40).

⁸⁰ FU, *supra* note 26, at 16.

⁸¹ ZIMMERMAN, *supra* note 25, at 51.

has been considered the father of the People's Republic of China.⁸² It was not until the 1980s and 1990s that the present legal system was formed.⁸³

China's history is important because changing from lawlessness to a formal legal system was a dramatic shift in state policy. The Chinese contract laws that predated the current CCL were the Economic Contract Law (ECL), Foreign Economic Contract Law (FECL), General Principles of Civil Law (GPCL), and Law on Technology Contracts (TLC).⁸⁴ Contract law from the 1980s is different than current Chinese Contract Law because until the 1990s, China did not have a coherent body of contract law.⁸⁵ One element was that the previous laws did not describe contract formation, offer or acceptance.⁸⁶ These contract terms were unclear in the 1980 laws.

A. ECL (1981)

The Economic Contract Law (ECL) was the first major contract law in post-Mao China.⁸⁷ It was adopted on December 13, 1981 and went into effect on July 1, 1982.⁸⁸ The ECL contains 57 articles.⁸⁹ The ECL defined contracts as "agreements for achieving specific economic purposes and for defining rights and obligations of each party."⁹⁰

⁸² Szto, *supra* note 61, at 16.

⁸³ CHEN, *supra* note 78, at 31.

⁸⁴ John Gregory, *Uniform Contract Law of the People's Republic of China: First Comparative Look*, 12 Fla. J. INT'L L. 467, 468 (2000).

⁸⁵ Chunlin Leonhard, *A Legal Chameleon: An Examination of the Doctrine of Good Faith in Chinese and American Contract Law*, 25 CONN. J. INT'L L. 305, 327 (2010).

⁸⁶ Wang, *supra* note 14, at 29.

⁸⁷ CHEN, *supra* note 78, at 278.

⁸⁸ ZHANG, *supra* note 13, at 7.

⁸⁹ BING LING, CONTRACT LAW IN CHINA 12 (2002).

⁹⁰ Zhonghua Renmin Gongheguo Jingji Hetong Fa [Economic Contract Law of the People's Republic of China] Art. 2 (1983), *translated in* 22 I.L.M. 330 (1983) [hereinafter ECL]. *See also* CHEN, *supra* note 78, at 279 (explaining the meaning of an economic contract).

The concept of “economic contract” came from the Soviet Union.⁹¹ Under the ECL, “Economic contracts are agreements between legal entities for the purpose of realizing certain economic goals and clarifying each other’s rights and obligations.”⁹² “Economic contracts” included contracts for purchase and sale, construction projects, professing and assembling, goods and transportation, electricity, storage, loans, property leases, and property insurance.⁹³

The ECL used the centralized, planned economy of China by emphasizing that the state economic plan was supreme.⁹⁴ Article 1 focused on “maintaining the economic order of society, increasing economic effectiveness, [and] ensuring the fulfillment of state plans”.⁹⁵ Under Article 4, economic contracts had to comply with the laws of the state and meet the requirements of state policies and plans.⁹⁶

The ECL does not explicitly define how a contract is formed. Article 3 only explains that contracts shall only be in written form.⁹⁷ Articles 4 and 5 use the language, “in concluding an economic contract,” but the ECL does not discuss how to create an economic contract. In Article 4, the ECL prevented natural persons from even making economic contracts.⁹⁸ Article 5 emphasizes following the principles of “equality and mutual benefit, achieving agreement through consulting and making compensation for equal value.”⁹⁹ Meeting of the minds may be met through Article 5 which states that “[n]o party may impose its own will on the other party”¹⁰⁰ but the

⁹¹ Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 BROOK. J. INT’L L. 153, 159 (2001).

⁹² ECL, *supra* note 90, art. 2.

⁹³ Chen, *supra* note 91, at 158.

⁹⁴ BING, *supra* note 89, at 12.

⁹⁵ ECL, *supra* note 90, art. 1.

⁹⁶ ECL, *supra* note 90, art. 4.

⁹⁷ ECL, *supra* note 90, art. 3.

⁹⁸ ZHANG, *supra* note 13, at 7; ECL, *supra* note 90, art. 4; *but see* ECL, *supra* note 90, art. 54 (stating that “[e]conomic contracts concluded between self-employed individuals or rural commune members and legal entities shall be implemented with reference to this Law”).

⁹⁹ ECL, *supra* note 90, art. 5.

¹⁰⁰ *Id.*

ECL does not define any terms or how “imposing its own will” relates to contract formation.

B. FECL (1985)

In response to China “opening-up” to the world there became a demand for laws that regulated economic contracts with foreign parties.¹⁰¹ The Foreign Economic Contract Law (FECL) was the second major set of China’s contract regulations; it was made to facilitate China’s new ‘open door’ policy.¹⁰² The FECL was promulgated on March 21, 1985¹⁰³ and included 43 articles.¹⁰⁴ The FECL regulated foreign-related contracts or contracts where a foreign element was involved.¹⁰⁵ The FECL applied to Chinese enterprises, foreign enterprises and foreign individuals, but did not include transportation contracts.¹⁰⁶

Chapter 1 of the FECL includes general provisions, and Chapter 2 discusses how contracts were concluded,¹⁰⁷ but similar to the ECL, the FECL does not clearly define how a contract is formed. Like under the ECL, Chinese citizens could not enter into a foreign contract.¹⁰⁸ Article 2 of FECL states that the law “shall apply to economic contracts concluded between enterprises or other economic organizations of the People’s Republic of China and foreign enterprises, other economic organizations or individuals.”¹⁰⁹ Article 3 explains that “[c]ontracts shall be concluded according to the principle of equality and mutual benefit and the principle of achieving agreement through consultation.”¹¹⁰

¹⁰¹ BING, *supra* note 89, at 12; CHEN, *supra* note 78, at 278.

¹⁰² CHEN, *supra* note 78, at 278.

¹⁰³ ZHANG, *supra* note 13, at 7.

¹⁰⁴ BING, *supra* note 89, at 12.

¹⁰⁵ *Id.*

¹⁰⁶ CHEN, *supra* note 91, at 162; ECL, *supra* note 90, art. 57.

¹⁰⁷ Zhonghua Renmin Gongheguo Shewai Jingyi Hetongfa (Law of the People’s Rep. of China on Econ. Contracts Involving for Interest) ch. 1, 2 (1985), [hereinafter FECL].

¹⁰⁸ ZHANG, *supra* note 13, at 7.

¹⁰⁹ FECL, *supra* note 107, art. 2.

¹¹⁰ FECL, *supra* note 107, art. 3.

Article 7 of FECL describes that a “contract shall be formed as soon as the parties to it have reached a written agreement on the terms and have signed the contract.”¹¹¹ Similar to ECL, both laws required the documents to be in writing, and both also did not directly explain the basic elements of how a contract was formed.

C. GPCL (1987)

In response to China undergoing major economic and social changes, the legislature decided to create general provisions of civil law.¹¹² In 1986, the General Principles of Civil Law (GPCL) was created.¹¹³ The GPCL applies to contracts other than ‘economic agreements’ regulated under ECL or FECL.¹¹⁴ The GPCL has 156 articles, and three provisions apply to contract.¹¹⁵ The first provision states that a contract is a type of civil juristic act.¹¹⁶ The second provision addresses contracts as forms of obligation, and the third section applicable to contracts discusses liability for breaching a contract.¹¹⁷ The GPCL has an entire section on Civil Liability for breach of contract,¹¹⁸ but does not specifically discuss how a contract is formed. Article 54 simply explains that a civil juristic act “shall be the lawful act of a citizen or legal person to establish, change or terminate civil rights and obligations.”¹¹⁹ Article 55 requires that civil juristic acts require that the “1. the actor has the relevant capacity 2. the intention expressed is genuine; and 3. the act does not violate the

¹¹¹ FECL, *supra* note 107, art. 7.

¹¹² BING, *supra* note 89, at 13.

¹¹³ CHEN, *supra* note 78, at 278; Zhonghua Renmin Gongheguo Minfa Tongze (General Principles of the Civil Law of the People’s Republic of China), translated in Legislative Affairs Comm’n of the Standing Comm. Of the Nat’l People’s Congress of the People’s Republic of China, *The Laws of the People’s Republic of China 1983–1986 225–49 (1987)* [hereinafter GPCL].

¹¹⁴ CHEN, *supra* note 78, at 279.

¹¹⁵ BING, *supra* note 90, at 13.

¹¹⁶ GPCL, *supra* note 113.

¹¹⁷ GPCL, *supra* note 113.

¹¹⁸ GPCL, *supra* note 113, sec. 2.

¹¹⁹ GPCL, *supra* note 113, art. 54.

law or the public interest."¹²⁰ The GPCL does not define contract in forms of offer, acceptance or mutual assent.

GPCL regulated the basic principles that governed commercial and civil transactions.¹²¹ GPCL emphasized equality between contractual parties as well as voluntary participation, equity, compensation at equal value and honesty and trustworthiness.¹²² Unlike previous laws, GPCL allowed a civil juristic act to be oral or in writing.¹²³

Similar to the ECL and FECL, the GPCL failed to adequately discuss contract formation, but does discuss fundamental concepts and principles of modern civil law.¹²⁴ The GPCL also stated that "[c]ivil activities shall have respect for social ethics and shall not harm the public interest, undermine state economic plans or disrupt social economic order."¹²⁵ But unlike ECL and FECL, the GPCL included limited protections for natural persons.¹²⁶ GPCL shifted away from focusing on a dominant state plan and has addressed the importance of private autonomy,¹²⁷ but by not defining specifically what a contract was, individual protections were still limited.

D. TCL (1987)

One year after GPCL was enacted, on June 23, 1987, the Law on Technology Contracts (TCL) was made into law.¹²⁸ Containing 55 articles, the TCL was made in response to the dramatic increase in the trade in technology.¹²⁹ TLC only covered "technology contracts" which included contracts for the transfer of technology, technical development, technical service, and technical consultancy.¹³⁰

¹²⁰ GPCL, *supra* note 113, art. 55.

¹²¹ Chen, *supra* note 91, at 157; GPCL art. 1, 2, 4, 85.

¹²² CHEN, *supra* note 78, at 280.

¹²³ GPCL, *supra* note 113, art. 56.

¹²⁴ BING, *supra* note 90, at 13.

¹²⁵ GPCL, *supra* note 113, art. 7 at 3.

¹²⁶ CHEN, *supra* note 78, at 279.

¹²⁷ BING, *supra* note 89, at 13.

¹²⁸ ZHANG, *supra* note 13, at 7.

¹²⁹ BING, *supra* note 89, at 14.

¹³⁰ *Id.*

For the first time, a law allowed Chinese individuals to form specific types of contracts, but TCL only applied to civil rights and obligations in technical development, technology transfer, technical consulting and services.¹³¹ Despite allowing individuals to form contracts, under the TCL Chinese legal persons and individuals could not contract with foreign parties.¹³²

Similar to GPCL, TCL contracts “must adhere to the principles of voluntariness and equality, mutual benefit and compensation, and honesty and credibility.”¹³³ And like the ECL and FECL, “the conclusion, modification and rescission of a technology contract shall be in written form”¹³⁴ and formation occurred “once the parties have signed their names and put their seals on it.”¹³⁵ Once formed, TCL contracts shall have legally binding force,¹³⁶ but similar to ECL, FECL and GPCL, this law does not specify how a contract is formed.

III. CULTURAL INFLUENCE ON THE FORMATION OF CONTRACTS AND INTAKES FROM INTERNATIONAL PRACTICES

Chinese culture, especially Confucianism and Communism, and China’s desire to enter the WTO have greatly influenced Chinese contract law.¹³⁷

A. *Confucian Influence on CCL*

Confucian ethics, and strong family networks underpin the Chinese economy.¹³⁸ “Although Confucianism has repeatedly come

¹³¹ ZHANG, *supra* note 13, at 8.

¹³² Chen, *supra* note 91, at 166; Zhonghua Renmin Gongheguo Jishu Hetong Fa [Technology Contract Law of the People’s Republic of China] (promulgated by the Standing Comm. of the Nat’l People’s Cong., Jun. 23, 1987, effective Nov. 1, 1987) Art. 2, translated in Legislative Affairs Comm’n on the Standing Comm. of the Nat’l People’s Cong. 1987–1989 25–39 [hereafter TCL].

¹³³ TCL, *supra* note 132, art. 4 at 1.

¹³⁴ TCL, *supra* note 132, art. 9. at 3.

¹³⁵ TCL, *supra* note 132, art. 10. at 4.

¹³⁶ TCL, *supra* note 132, art. 16 at 4.

¹³⁷ MATHESON, *supra* note 3, at 372.

under attack by the successive governments in modern China, the values of the family and the class have been given greater importance in the past 30 years as China experiments with entrepreneurial capitalism."¹³⁹ Under the rule of men, those in power derive their authority to govern from their superior virtue—Confucian virtue in traditional China and Communist virtue in social China.¹⁴⁰ Staying within established hierarchies was crucial in Confucianism.¹⁴¹ Because Confucianism emphasizes that when people stay in their established roles, the rule of man will be sufficient; people staying in their roles is still seen throughout personal relationships in business transactions.¹⁴²

Article 5 of CCL includes fairness, which is derived from Yi. Article 6 of CCL incorporates good faith, which is derived from Ren. Chinese scholars believe that Chinese moral tradition was one important influence on the doctrine of good faith.¹⁴³ Good faith enforces and recognizes the “traditional Chinese notions of morality and business ethics.”¹⁴⁴

B. *Communism's Influence on CCL*

Communism has also strongly influenced China's current philosophy and culture.¹⁴⁵ Stressing the importance of the entire community, Communism focused on owning no personal property and everyone working for everyone.¹⁴⁶ Even prior to Communism,

¹³⁸ BLAZEY, *supra* note 10, at 58.

¹³⁹ ZIMMERMAN, *supra* note 25, at 38.

¹⁴⁰ MATHESON, *supra* note 3, at 371. See Teema Ruskola, *Law Without Law, Or Is “Chinese Law” an Oxymoron?*, 11 WM. & MARY BILL OF RTS. J. 655, 659–60 (2003) (explaining that Confucian ideas were integrated into Communist ideals).

¹⁴¹ MATHESON, *supra* note 3, at 372.

¹⁴² *Id.*

¹⁴³ Leonhard, *supra* note 85, at 310.

¹⁴⁴ *Id.* See Tong, Guangfa shilun Chengshi Xinyoung Yuanze [On the Doctrine of Good Faith] 3, <http://vip.chinalawinfo.com> (last visited July 22, 2009) (translated by Chunlin Leonhard).

¹⁴⁵ MATHESON, *supra* note 3, at 373.

¹⁴⁶ *Id.*

China has had a strongly collectivistic culture.¹⁴⁷ Combining old philosophies and new philosophies, China still focuses on group roles over personal ownership or achievement.¹⁴⁸

Since the group is more important than the individual, collectivism allows order to be established by strict regulations that strengthen the state. Communism focuses on dismantling social classes by favoring the proletariat over the bourgeois. The PRC creates equality through paternalistic behaviors through its use of a state plan and regulation of China's economy. The change from a planned economy to a market economy has greatly influenced Chinese law, but the law still apportions CCP control over certain elements in contract formation.

1. The Shift to a Market Economy Has Influenced CCL

Deng Xiaoping introduced the idea that "socialism may also practice market economy," and since then there has been an attempt to find a balance between market economy and socialism.¹⁴⁹ The ECL, FECL and TCL were products of a state planned economy. When Deng Xiaoping announced a change to a market economy, these three laws were inadequate for a market economy.¹⁵⁰ Although in 1993 China amended the ECL and deleted the section that defined that the purpose of the contract was to guarantee the implementation of state plans,¹⁵¹ a new Chinese Contract law was necessary to adjust to this new form of economy.

After 1978, China's markets began opening to the world.¹⁵² "Contract law is largely a product of the 1980s and 1990s."¹⁵³ Within the last two decades, government has supported the rule of law, mainly for two reasons: "First, China's economic reforms created a

¹⁴⁷ Leonhard, *supra* note 85, at 324; Pattison, *supra* note 5, at 477–88.

¹⁴⁸ MATHESON, *supra* note 3 at 373.

¹⁴⁹ ZHANG, *supra* note 13, at 45 (*quoted in* DING BANGKAI, THE LAW OF SOCIALIST MARKET ECONOMY 6 (2002)).

¹⁵⁰ BING, *supra* note 89, at 18.

¹⁵¹ ZHANG, *supra* note 13, at 7.

¹⁵² FU, *supra* note 26, at 16.

¹⁵³ CHEN, *supra* note 78, at 277.

new set of social circumstances, such as corruption, international and commercial disputes and economic crime, which all demanded the development of a stable and competent judiciary. Second, the creation of the “socialist market economy” has forced the CCP to loosen its control over political and social development.”¹⁵⁴

Originally under the centrally planned economy, businesses could not have free access to the market.¹⁵⁵ The State’s economic plan controlled business.¹⁵⁶ Shifting to current CCL, the People’s Republic of China still influences many aspects of law¹⁵⁷ and heavily controls various aspects of contract formation.

The state plan is always a high priority, as it is described as “mandatory task” and “state purchasing order.”¹⁵⁸ “Mandatory task” is a task assigned by the state, and the “state purchase order” is an order placed by a business assigned by the state to purchase something from another business entity.¹⁵⁹ Here in a state purchase order case, a contract between two businesses is made through the state itself.¹⁶⁰

Despite freedom of contract, fairness, and good faith, the State influence still can control Chinese contract formulation, as described in Articles 7 (legality),¹⁶¹ Article 38 (state mandatory task contract),¹⁶² and Article 44 (state approval for certain contracts).¹⁶³ The strong idea of supporting the ‘Common Good’ persists in Chinese contract formation, especially because state goals can supersede or void contracts.¹⁶⁴

Article 7, Article 38 and Article 44 show the continued influence of the CCP. Article 7 prevents contracts from disrupting the

¹⁵⁴ BLAZEY, *supra* note 10, at 51–52.

¹⁵⁵ Mo Zhang, *Freedom of Contract with Chinese Legal Characteristics: A Closer Look at China’s New Contract Law*, 14 TEMP. INT’L & COMP. L. J. 237, 241 (2000).

¹⁵⁶ *Id.*

¹⁵⁷ Pattison, *supra* note 5, at 504.

¹⁵⁸ ZHANG, *supra* note 13, at 120.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ CCL, *supra* note 9, art. 7.

¹⁶² CCL, *supra* note 9, art. 38; ZHANG, *supra* note 13, at 49.

¹⁶³ CCL, *supra* note 9, art 44; ZHANG, *supra* note 13, at 120.

¹⁶⁴ MATHESON, *supra* note 3, at 373.

social and economic order or from impairing the public interest.¹⁶⁵ Similarly, under Article 38, using the basis of necessity, either in a mandatory task or state purchasing order, the government can force contracts to be concluded in the way that the government desires.¹⁶⁶ Both mandatory tasks and state purchasing orders allow the state plan to dominate in the formations of certain contracts.¹⁶⁷ Finally, Article 44 states that a contract is valid when it is established, and that contracts that are subject to approval need to follow the administrative regulations or relevant provisions of the law.¹⁶⁸ Article 44, once again, allows an administrative agency to sometimes decide that certain contracts require government surveillance.¹⁶⁹

C. *International Influence on CCL*

Originally, “[t]he common law and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) served as the basis for the structure and principles of this law [ECL], and the common law and international treaties have since had a profound impact on the Chinese legal system.”¹⁷⁰ But after the switch from a planned economy to a market economy, the ECL, FECL and TCL were not appropriate anymore.¹⁷¹

The purpose of the Chinese Contract Law is to “protect the legitimate rights and interests of the parties to contracts, maintaining the socio-economic order and promoting the socialist modernization.” This provision of the CCL is important because China wanted to join the World Trade Organization (WTO).¹⁷² The Working Party in China spent almost 15 years negotiating China’s terms of WTO membership.¹⁷³

¹⁶⁵ CCL, *supra* note 9, art. 7.

¹⁶⁶ CCL, *supra* note 9, art. 38.

¹⁶⁷ ZHANG, *supra* note 13, at 120.

¹⁶⁸ CCL, *supra* note 9, art. 44.

¹⁶⁹ ZHANG, *supra* note 13, at 120.

¹⁷⁰ FU, *supra* note 26, at 16.

¹⁷¹ LING, *supra* note 89, at 18.

¹⁷² MATHESON, *supra* note 3, at 334.

¹⁷³ BLAZEY, *supra* note 10, at 160.

China enacted the Chinese Contract Law in anticipation of China's admission to the WTO.¹⁷⁴ The purpose, in addition to entering the WTO, was to create a uniform market economy.¹⁷⁵ China had responded to unique political, legal and economic reforms to meet the requirements of WTO membership.¹⁷⁶ Also, likely in order to be admitted into the WTO, China amended their Article 5 of the Constitution so that the country "shall construct a socialist rule-of-law state."¹⁷⁷ However, with the development of the economy and with China knocking on the door of the WTO, all parties willing to enter into the contract are now treated equally.¹⁷⁸ Chinese contract law is more market-economy oriented than previous contract laws because of the transition from a planned economy to a market economy.¹⁷⁹

China's definition of an offer ("a person's declaration of intention to conclude a contract with another person") is almost identical to that in the UNIDROIT Principles.¹⁸⁰ Under contract formation, Article 2.1 states that "A contract may be concluded either by the acceptance of an offer or by the conduct of the parties that is sufficient to show agreement."¹⁸¹ Comment 1 to Article 2.1.1 explains that the agreement itself is sufficient to conclude a contract, although traditional concepts of offer and acceptance may still be used.¹⁸² However, conduct alone can be sufficient to show a legal

¹⁷⁴ PATTISON, *supra* note 5, at 459.

¹⁷⁵ CHEN, *supra* note 91, at 153.

¹⁷⁶ BLAZEY, *supra* note 10, at 157.

¹⁷⁷ PATTISON, *supra* note 5, at 460–461.

¹⁷⁸ FU, *supra* note 26, at 50.

¹⁷⁹ Zhang, *supra* note 155, at 238–239. *See* CHINESE LAW SERIES: THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 7 at 34 (translated by Wei Luo 1999).

¹⁸⁰ MATHESON, *supra* note 3 at 341. *See also* BING, *supra* note 89, at 64 (noting that per Article 14 of the CCL, the content of the declaration of intention to conclude a contract be specific and definite and that it must indicate that the offeror will be bound by it upon acceptance by the offeree); *see also* UNIDROIT Principles, art. 2.2 ("A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in the case of acceptance.")

¹⁸¹ International Institute for the Unification of Private Law, art. 2.1.1 (Rome, 2004) [hereinafter UNIDROIT].

¹⁸² UNIDROIT art. 2.1.1, Comment 1.

agreement.¹⁸³ This formulation is similar to China's contract law with regards to offer and acceptance.¹⁸⁴

Similarly, UNIDROIT Article 2.2 mimics Chinese Contract Law's Article 14. UNIDROIT explains that "[a] proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in the case of acceptance."¹⁸⁵ The phrase "sufficiently definite" is seen in Article 14 of the CCL, and the "intent" requirement is seen in Article 16 of the CCL.

China had to confront its unique economic and legal reforms to be responsive to WTO requirements.¹⁸⁶ Part of the terms of China's membership included domestic compliance with WTO requirements,¹⁸⁷ which entailed revising its trade-related domestic laws, rules, regulations, and institutions to be in full compliance with the WTO.¹⁸⁸ China considered accession to the WTO to be beneficial.¹⁸⁹ Mirroring UNIDROIT principles of contract formation was not a coincidence. Overall, in compliance with the WTO agreement, China changed over 2,000 laws, regulations and rules.¹⁹⁰

China formally became a WTO member on December 11, 2001.¹⁹¹ Since China has made efforts to promote her "market economy," other countries have recognized her status.¹⁹² Some provinces did not even follow the CCL until China joined the WTO.¹⁹³ But overall, China's desire to become a WTO member influenced the country to use international principles (i.e. UNIDROIT principles) combined with traditional ideas (fairness, good faith, and legality), while still allowing state power to dominate.

¹⁸³ UNIDROIT art. 2.1.1, Comment 2.

¹⁸⁴ CCL, *supra* note 9, art. 14.

¹⁸⁵ UNIDROIT art. 2.1.2.

¹⁸⁶ BLAZEY, *supra* note 10, at 157.

¹⁸⁷ *Id.* at 160.

¹⁸⁸ *Id.* at 160–61.

¹⁸⁹ *Id.* at 167.

¹⁹⁰ *Id.* at 169.

¹⁹¹ ZIMMERMAN, *supra* note 25, at 6. *See also* M. Dudek & A. Wang, *China's Lost WTO March*, CHINA L. & PRAC. (April 2001).

¹⁹² ZHANG, *supra* note 13, at 46.

¹⁹³ MATHESON, *supra* note 3, at 377.

IV. CONTRACT FORMATION UNDER THE CURRENT CONTRACT LAW: PROCESS AND FACTORS

During the 1990s, the Standing Committee of the NPC began creating a uniform Chinese contract law.¹⁹⁴ The Chinese Contract Law (CCL) was adopted in March of 1999 and became effective on October 1, 1999.¹⁹⁵ The CCL was “deemed as one of the pivotal achievements in China’s legal reform to accommodate the emerging market economy because the Contract Law reduced state intervention to the minimum level, demonstrating that contracts are no longer deemed as vehicles of carrying out the state economic plan.”¹⁹⁶ The CCL includes 23 chapters and 428 articles which are separated into General Provisions, Specific Provisions and Supplementary Provisions.¹⁹⁷

The CCL is defined as “an agreement that establishes, modifies, or terminates relations of civil rights between a natural person, legal person, or other organization of equal status.”¹⁹⁸ The CCL combines civil law and common law, attempts to be more market-economy oriented, and adopts provisions from international treaties in an effort to be more in line with internationally accepted practices.¹⁹⁹

The CCL has clearly been influenced by Western norms and international treaties, but it has retained two essential Confucian tenets: the predominance of public interest and limitations to individual freedom.²⁰⁰ The CCL relies on equal status, fairness,

¹⁹⁴ ZHANG, *supra* note 13, at 11.

¹⁹⁵ FU, *supra* note 26, at 19.

¹⁹⁶ Jun Zhao, *Article & Essay: The Puzzle of “Freedom of Contract” in China’s Contract Law*, 17 ILSA J. INT’L & COMP L. 105, 125 (Fall 2010); Zhang, *supra* note 155, at 237; *see also* Jiang Ping et al., *Lun Xin Hetongfa Zhongde Hetong Ziyou Yuanze yu Chengshi Xinyong Yuanze* [On the Principles of Freedom of Contract and Good Faith in the New Contract Law], 1 TRIB. POL. SCI. & L., 2, 3–7 (1999); Zhou Jianhua & Yu Guanghua, *China’s Uniform Contract Law: Progress and Problems*, 17 UCLA PAC. BASIN L.J. 1, 2 (1999).

¹⁹⁷ ZHANG, *supra* note 13, at 11.

¹⁹⁸ Zhang, *supra* note 155, at 241; CCL, *supra* note 9, art. 33.

¹⁹⁹ ZHANG, *supra* note 13, at 12–13.

²⁰⁰ FU, *supra* note 26, at 22.

respect for social ethics/morality, and obedience of the law; some scholars believe freedom of contract, good faith and fostering transactions are three major influences on contract law.²⁰¹

A. Important Principles in Contract Formation

Under Article 2 of the CCL, a contract is “an agreement whereby natural persons, legal persons or other organizations, as equal parties, establish, modify and extinguish relationships of civil rights and duties.”²⁰² Four important principles in CCL are freedom of contract, fairness, good faith, and fostering of transactions.²⁰³

1. Freedom of Contract (合同自由/Hetong Ziyou)

Confucianism had no room for development of liberty or individualism, so Confucianism is generally averse to the idea of “freedom of contract.”²⁰⁴ The idea of freedom of contract, however, has recently become more accepted.²⁰⁵ Freedom of contract is a relatively new concept in Chinese contract law and has been derived from civil law.²⁰⁶ “In contract law, freedom of contract is usually referred to as a concrete expression of party autonomy.”²⁰⁷ Party autonomy is interpreted as “freedom to do” something; thus, if there is no autonomy, then freedom of contract does not exist.²⁰⁸

Article 4 of the CCL is titled “Freedom of Contract” and says that “[a] party is entitled to enter into contract voluntary under the law, and no entity or individual may unlawfully interfere with such

²⁰¹ *Id.* at 38; Wang, *supra* note 14, at 2.

²⁰² BING, *supra* note 89, at 1.

²⁰³ Wang, *supra* note 14, at 34.

²⁰⁴ FU, *supra* note 26, at 39 (*quoted in* Chaibong Hahm, *Confucianism and the Concept of Liberty*, ASIA EUROPE J., 481 Springer-Verlag, (2006)).

²⁰⁵ *Id.*

²⁰⁶ ZHANG, *supra* note 13, at 51.

²⁰⁷ FU, *supra* note 26, at 5.

²⁰⁸ *Id.* at 6.

right. Any party has the right to enter a contract in his free will under the law. No unit or individual shall illegally interfere.”²⁰⁹

The Chinese idea of freedom to contract is instead “voluntariness,” because it still leaves room for a socialist market economy.²¹⁰ Parties can enter into a contract voluntarily but unlawful interference is prohibited.²¹¹ Essentially, the freedom allows parties to make contracts only in accordance with the law.²¹²

Freedom of contract includes the idea that parties should be autonomous while negotiating and deciding the contract’s contents.²¹³ “Voluntariness” rests on two ideas: (1) the right of contractual parties to enter into a contract voluntarily and within the limits of the law; and (2) the prohibition on others to interfere with the contract illegally.²¹⁴ “Voluntariness” governs only with the beginning stages of contract formation.²¹⁵

Freedom of contract helps China’s market economy by fostering transactions.²¹⁶ However, China’s government plays a paternalistic role by prohibiting certain conduct that may be contrary to the actor’s own welfare.²¹⁷ Usually Chinese courts are willing to help a party that is perceived as weaker, or will intervene to promote the greater good.²¹⁸ Article 38 is China’s “State mandatory task contract”²¹⁹ which states, “[i]f the state places a directive order or a state’s purchasing order according to the needs of the state, the relevant legal persons and other organizations concerned shall reach

²⁰⁹ CCL, *supra* note 9, art 4; LUO, *supra* note 9, at 34 (“Any party has the right to enter a contract in his free will under the law. No unit or individual shall illegally interfere.”); FU, *supra* note 26, at 39.

²¹⁰ FU, *supra* note 26, at 39.

²¹¹ Zhang, *supra* note 155, at 243.

²¹² *Id.* at 244.

²¹³ Zhao, *supra* note 196, at 110.

²¹⁴ FU, *supra* note 26, at 40.

²¹⁵ *Id.*

²¹⁶ Wang, *supra* note 14, at 12.

²¹⁷ Zhao, *supra* note 196, at 113–114.

²¹⁸ Leonhard, *supra* note 85, at 328.

²¹⁹ ZHANG, *supra* note 13, at 49.

contracts among them according to the rights and obligations proscribed by the relevant laws and administrative regulations."²²⁰

Because there is a strong state interest, this interest trumps private interests if private interests conflict with the state or collective interests.²²¹ "Business. . . is directed to meet the 'state's development goals,' not just serve the financial interests of the business sector."²²² The purpose of limiting contractual freedom is that it can help protect weaker parties while maintaining the public interest.²²³ Despite this limitation, "[contracting] parties have the right to determine and arrange their business affairs themselves without interference."²²⁴ One can decide for oneself whether to enter into a contract, with whom the contract is made, the contents of the contract, the contract forms, as well as whether to modify or rescind a contract, what remedy or relief to seek, and possible settlement methods."²²⁵

2. Fairness (Yi)

Righteousness (Yi) is a guiding principle for all human relations; it involves trying to achieve a situation in which both sides are satisfied. The purpose of Yi is to achieve "social justice" in society.²²⁶

Article 5 in CCL states that, under the Obligation of Fairness, "[t]he parties shall abide by the principle of fairness in prescribing their respective rights and obligations."²²⁷ Under the basis righteousness (Yi) in Confucianism. . . the CCL has treated the concept of "fairness" as a fundamental principle. The CCL also

²²⁰ LUO, *supra* note 9, at 40.

²²¹ ZHANG, *supra* note 13, at 55.

²²² Andrew Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354, 391 (2011).

²²³ FU, *supra* note 26, at 40.

²²⁴ ZHANG, *supra* note 13, at 56.

²²⁵ *Id.* at 57–59.

²²⁶ FU, *supra* note 26, at 44.

²²⁷ CCL, *supra* note 9, art. 5; LUO, *supra* note 9, at 34 ("All parties shall follow the principle of equality when formulating rights and obligations for both sides").

requires contractual parties to “abide by the principle of fairness in defining the rights and obligations of each party.”²²⁸

3. Good Faith (Chengxin/Ren)

Good faith is important in Chinese contract law because it allows China's traditional morals and commercial ethics to be maintained.²²⁹ As such, good faith is a requirement for contracts under Article 6 of the CCL.²³⁰ Article 6 states that “parties should abide by the doctrine of good faith when exercising their rights or fulfilling their obligations.”²³¹ Good faith is also mentioned in Article 42, which states that if good faith is violated, damages may be appropriate, and Article 60, which requires good faith with notification.²³² Because good faith requires a person to be truthful and trustworthy, this requirement will help contracts be performed and respected.²³³

During contract formation and before the contract has been formed, good faith means that parties owe each other the duty of loyalty in forming the contract, the duty of honesty and non-deception, the duty to keep promises, and the duty of confidentiality.²³⁴ Chinese courts have used good faith to find parties

²²⁸ FU, *supra* note 26, at 43–44.

²²⁹ Wang, *supra* note 14, at 16.

²³⁰ CCL, *supra* note 9, art. 6. *See also* LUO, *supra* note 9, at 34 (“All parties shall follow the principles of honesty and faithfulness when executing their rights or performing their obligations.”)

²³¹ CCL, *supra* note 9, art 6. *See also* Leonhard, *supra* note 85, at 309 (quoted in Wang Liming & Xu Chaunxi, *Fundamental Principles of China's Contract Law*, 13 COLUM. J. ASIAN L. 1, 16–22 (1999)); Zhonghua Remin Gongheguo Hetongfa [Contract Law of the People's Republic of China] 3 (Law Press China 2007).

²³² CCL, *supra* note 9, art. 85. *See also* LUO, *supra* note 9, at 41, 45; Zhang, *supra* note 155, at 259. (“[A] party shall be liable for damages if during the process of contract formation it commits any of the following conduct causing loss to the other party: (1) negotiating in bad faith by disguising or pretending to conclude a contract; (2) concealing deliberately the material facts relating to the conclusion of the contract or intentionally providing false information; or (3) other activities in violation of the principle of good faith”).

²³³ Wang, *supra* note 14, at 16.

²³⁴ *Id.* at 17–19.

liable for actions done before a contract was even formed because, before a contract is formed, parties owe each other duties of mutual assistance, mutual care, mutual protection, mutual notification, and mutual duties of care.²³⁵ Unlike in China, U.S. contract law does not require good faith to exist prior to contract formation.²³⁶ In China, good faith can act as a gap-filler when legislative and doctrinal holes exist.²³⁷

Good faith in the CCL is different than its United States counterpart.²³⁸ Consideration, which is required in the United States,²³⁹ is not required in Chinese contracts. "In the United States, the good faith in Section 1-201(19) is defined as 'honesty in fact in the conduct or transaction concerned.'" ²⁴⁰ Chinese scholars criticize the UCC definition because it does not maintain harmony between the parties and the greater interest of society.²⁴¹

4. Fostering of Transactions (Guli Jiaoyi)

Fostering transactions primarily means advancing lawful transactions.²⁴² Under Article 7, "[i]n concluding or performing a contract, the parties shall abide by the relevant laws and administrative regulations, as well as observe social ethics, and may not disrupt social and economic order or harm the public

²³⁵ Leonhard, *supra* note 85, at 318 (Chongqingshi Chengkouxian Lantianxiang Zhongzhi Yangzhichang Su Zhongguo Nongye Yinghang Chengkouxian Zhihang Diyue Guoshi Zeren Peichangan [Chong Qing City Cheng Kou County Lan Tian Village Nursery v. China Agricultural Bank Cheng Kou County Branch Contract Formation Liability Compensation Case], Chong Qing City No. 2 Intermediate People's Court (translated by Cunlin Leonhard), at 7).

²³⁶ *Id.* at 319.

²³⁷ *Id.* at 311.

²³⁸ *Id.* at 307.

²³⁹ U.C.C. § 2-201 (2011).

²⁴⁰ ZHANG, *supra* note 13, at 76 (quoted in XU GUODONG, CONCEPT AND HISTORICAL EVOLUTION OF GOOD FAITH PRINCIPLE 4 Legal Research (1989)); See also U.C.C. § 1-201(19) (2011).

²⁴¹ ZHANG, *supra* note 13, at 76 (quoted in XU GUODONG, CONCEPT AND HISTORICAL EVOLUTION OF GOOD FAITH PRINCIPLE 4 Legal Research (1989)).

²⁴² Wang, *supra* note 14, at 24.

interests."²⁴³ Common examples of void and voidable contracts result from fraud, mistake, coercion, lack of capacity, or duress.²⁴⁴ Individual parties may not be able to protect themselves from policy interferences because state policies may influence commercial activities.²⁴⁵

B. *How a Contract Is Formed*

Article 13 of the CCL states that when making a contract, the parties shall take the form of offer and acceptance.²⁴⁶ "The CCL . . . adopts offer and acceptance as the main elements of the contract formation under the principle of promoting business transactions, on the grounds that they make business transactions more convenient and efficient."²⁴⁷ Formation happens when there is mutual assent.²⁴⁸ Consideration is unnecessary in the formation of Chinese contracts.²⁴⁹

1. Offer

Article 14 defines offer as "a manifestation of an intent showing the desire to enter into a contract with others."²⁵⁰ When an offer reaches the offeree, it becomes effective, but the offeree does not need to have the offer in hand.²⁵¹ An offer requires that "the contents. . . be concrete and specific" and "as soon as the offeree

²⁴³ CCL, *supra* note 9, art. 7.

²⁴⁴ Pattison, *supra* note 5, at 469.

²⁴⁵ Zhang, *supra* note 155, at 247–248.

²⁴⁶ ZHANG, *supra* note 13, at 91.

²⁴⁷ FU, *supra* note 26, at 52.

²⁴⁸ MATHESON, *supra* note 3 at 341.

²⁴⁹ ZHANG, *supra* note 13, at 91.

²⁵⁰ CCL, *supra* note 9, art. 14; ZHANG, *supra* note 13, at 92 (" . . . an offer is defined as 'a manifestation of an intent showing a desire to enter into a contract with others.'"). *See also* LUO, *supra* note 9, at 35 ("An offer is an expressed intention which expects to form a contract with others").

²⁵¹ James C. Hitchingham, *Stepping Up to the Needs of the International Market Place: An Analysis of the 1999 "Uniform" Contract Law of the People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 8, 8 (2000).

expresses his acceptance of the offer, the offeror is bound by his expressed intention.”²⁵²

i. The Contents Are Specific and Definite

The CCL does not clearly describe the meaning of “concrete and specific.”²⁵³ To understand this phrase, it is helpful to look at a reasonable person or industry standards. An offer would be “concrete and specific” if an ordinary person believed it was an offer.²⁵⁴ Other Chinese scholars believe that concrete and definite means that “the contents of an offer are clear enough to make the offeree understand both the the offeror’s true intent and the major terms that would be contained in the contract to be concluded.”²⁵⁵ Normally specific and definite can include the following: “names and domiciles of the parties; subject matter; quality, quantity, price or remuneration; time place and method of performance; liabilities for breach of contract; and the method of dispute resolution.”²⁵⁶

ii. When the Offeree Has Indicated Acceptance, the Offeror Shall Be Bound by the Expression of Intention

Chinese contracts are created by meeting of the minds.²⁵⁷ “In the west, there exist[s] both subjective and objective tests for determining the intent. There are no such tests in China, but it seems that the Contract Law has made the actual intent an essential element of an offer because it stresses the ‘desire to enter into a contract with others.’”²⁵⁸ Factors include whether the minds of the parties require that the expression of the will must be made mutually, and a

²⁵² LUO, *supra* note 9, at 35–36.

²⁵³ ZHANG, *supra* note 13, at 93.

²⁵⁴ *Id.*

²⁵⁵ *Id.* (citing JIANG PING, DETAILED EXPLANATION TO CONTRACT LAW OF CHINA 14–15 (1999)).

²⁵⁶ CCL, *supra* note 9, art. 12. *See also* Pattison, *supra* note 5, at 467.

²⁵⁷ ZHANG, *supra* note 13, at 35.

²⁵⁸ *Id.* at 92.

consensus between the parties must be reached.²⁵⁹ “[N]ot every manifestation of intent will constitute an offer.”²⁶⁰ One example of a non-offer occurs when a manifestation does not indicate that a contract is being formed, and another example of an invalid offer is an advertisement or a proposal that just introduces business information.²⁶¹

Article 10 states that “[f]or parties to form their contract, there are written, oral, and other forms.”²⁶² Article 10 means that contracts, absent those where an administrative regulation requires it in writing, can be in oral form as well.²⁶³ This is different than the ECL, FECL, and TCL which all required contracts to be in written form.²⁶⁴

The CCL has a “firm offer,” which states that, if the revocation reaches the offeree before or at the same time as the offer, the offer may be withdrawn.²⁶⁵ Conversely, if it is indicated that the offer is irrevocable, or if there is a set period of time for acceptance, the “firm offer” rule may not apply.²⁶⁶

2. Acceptance

Article 21 of the CCL states that acceptance is “a manifestation of the offeree’s assent to an offer.”²⁶⁷ Essentially, to accept, one must express an indication of assent to the offer.²⁶⁸ “Articles 21-23 of the CCL govern when a response to an offer becomes an acceptance and provide that a statement made by the offeree that indicates assent to an offer is an acceptance.”²⁶⁹ Unless the business custom or the offeror does not require notice, an

²⁵⁹ *Id.* at 36.

²⁶⁰ *Id.* at 94.

²⁶¹ *Id.*

²⁶² Wang, *supra* note 14, at 31. *See also* CCL, *supra* note 9, art. 10.

²⁶³ Wang, *supra* note 14, at 31.

²⁶⁴ *See generally* Hitchingham, *supra* note 204.

²⁶⁵ Pattison, *supra* note 5, at 468.

²⁶⁶ *Id.*

²⁶⁷ CCL, *supra* note 9, art. 21; LUO, *supra* note 9, at 37. *See also* ZHANG, *supra* note 13, at 92.

²⁶⁸ Zhong, *supra* note 11, at 13.

²⁶⁹ Chen, *supra* note 92, at 173.

acceptance becomes effective when it reaches the offeror.²⁷⁰ Acceptance requires three things: (1) “contents consistence” with the offer; (2) the “Arrival Rule;” and (3) that acceptance must be made by the offeree to the offeror.²⁷¹

i. The Expression of Intent by the Offeree to Assent to the Offer

Under Article 16, “[a]n offer, once made, will not become effective until it is received.”²⁷² Intent is necessary because, upon acceptance, an offeror is bound by the intent indicated in the offer.²⁷³ “If it could be reasonably believed from the offeror’s conduct that the offeror has the intent to make a contract, a contractual obligation may arise upon effective acceptance by the other party.”²⁷⁴ Advertisements and price lists are not offers; they are simply invitations to make an offer.²⁷⁵

ii. Acceptance in Form of Notice

Under the CCL, the offeree must notify the offeror about the acceptance unless the offer says otherwise or custom indicates otherwise.²⁷⁶ Both offers and acceptances become effective when they are under the control of the recipient.²⁷⁷ The mirror image rule does not exist in the CCL.²⁷⁸ Generally, offers can be revoked unless the offer—or non-mirror image offer—is perceived as irrevocable.²⁷⁹ A

²⁷⁰ Hitchingham, *supra* note 251, at 8.

²⁷¹ Zhang, *supra* note 13, at 105–106.

²⁷² CCL, *supra* note 9, art. 16. *See also* LUO, *supra* note 9, at 376; ZHANG, *supra* note 13, at 99.

²⁷³ Pattison, *supra* note 5, at 467. *See* Chen, *supra* note 91, at 172–173.

²⁷⁴ Zhang, *supra* note 13, at 92.

²⁷⁵ Pattison, *supra* note 5, at 467.

²⁷⁶ Zhong, *supra* note 11, at 13.

²⁷⁷ Pattison, *supra* note 5, at 468.

²⁷⁸ Hitchingham, *supra* note 251, at 10.

²⁷⁹ *Id.* at 9.

non-mirror image offer may also be irrevocable when it is clearly irrevocable.²⁸⁰

iii Material Change Is a Counter Offer

A material change in the contract is not an acceptance but is, instead, a counter-offer.²⁸¹ If subject matter, price, quantity, quality, time, place, methods of performance, etc. are changed, then that constitutes a material variation.²⁸²

3. Conclusion of Contract

Under Article 25, "a contract is concluded at the time the acceptance takes place."²⁸³ A contract is entered into when the acceptance becomes effective.²⁸⁴ Contract Law depends on the effectiveness of the acceptance.²⁸⁵ But even if a contract has been concluded, it does not mean that the contract has become effective.²⁸⁶ The conclusion of a contract only shows that the parties have reached an agreement, whereas the effectiveness of the contract makes a contract legally binding.²⁸⁷

Article 44 states that "[a] contract formed according to law shall become effective as soon as it is formed."²⁸⁸ In other words, the contract is effective upon its conclusion.²⁸⁹

²⁸⁰ *Id.* at 10.

²⁸¹ Zhong, *supra* note 11, at 13.

²⁸² *Id.*

²⁸³ CCL, *supra* note 9, art. 25. See LUO, *supra* note 9, at 38; see also ZHANG, *supra* note 13, at 104.

²⁸⁴ CCL, *supra* note 9, art. 25; Zhong, *supra* note 11, at 13.

²⁸⁵ ZHANG, *supra* note 13, at 109.

²⁸⁶ *Id.* at 111.

²⁸⁷ *Id.*

²⁸⁸ CCL, *supra* note 9, art. 44. See LUO, *supra* note 9, at 41.

²⁸⁹ ZHANG, *supra* note 13, at 111.

C. *How a Contract May Not Be Legally Enforceable*

Formation of a contract (*chengli*) is different from the effectiveness of a contract (*shengxiao*).²⁹⁰ A contract may be formed but may be ineffective and therefore not legally binding.²⁹¹ The principle of equality has thus been incorporated into the CCL as a fundamental principle. Equal capacity, legal standing, and treatment are three requirements for a contract to be enforceable.²⁹²

Article 52 lays out when contracts will be deemed invalid.²⁹³ A contract is invalid if the contract consists of: (1) fraud; (2) malicious collusion that harms the interest of the state; (3) an illegitimate purpose that is concealed under the guise of legitimate acts; (4) harm to the public good or; (5) a violation of mandatory law and regulation.²⁹⁴ Finally, Article 55 determines when a contract is effective.

Finally, Articles 44-59 describe the effectiveness of a contract. The test for effectiveness of a contract is in Article 55 of China's Civil Code (GPCL).²⁹⁵ The GPCL requires that in a civil act, which can include forming a contract: (1) the party must have the capacity to do the conduct; (2) the manifestation of intent must be genuine; and (3) the public interest must not be violated.²⁹⁶ According to Article 55 of China's Civil Code, the contract will not be effective if the standards of capacity, genuine intent and public interest are not followed.²⁹⁷

²⁹⁰ MATHESON, *supra* note 3, at 340–341. See BING, *supra* note 89, at 59.

²⁹¹ MATHESON, *supra* note 3, at 341.

²⁹² FU, *supra* note 26, at 50–51.

²⁹³ ZIMMERMAN, *supra* note 25, at 283.

²⁹⁴ See CCN, *supra* note 9, art. 52; Chen, *supra* note 91, at 177. See also ZIMMERMAN, *supra* note 25, at 283.

²⁹⁵ BLAZEY, *supra* note 10, at 186.

²⁹⁶ *Id.* See also the Gen. Principles of the Civil Law of the People's Republic of China, adopted at the Fourth Session of the Sixth Nat'l People's Cong. on April 12, 1986 (promulgated by Order No. 37 of the President of the People's Republic of China, April 12, 1986), at art. 55.

²⁹⁷ ZHANG, *supra* note 13, at 111 (citing the Gen. Principles of the Civil Law of the People's Republic of China, adopted at the Fourth Session of the Sixth Nat'l People's Cong. on April 12, 1986 (promulgated by Order No. 37 of the President of the People's Republic of China, April 12, 1986), at art. 55.

V. UNFINISHED BUSINESS

Despite the past, present and future influences on Chinese contract formation, there are three ongoing problems with the current Chinese contract law. The first is that freedom to contract is still limited. The second is that the Chinese judiciary still lacks independence. Finally, current law still does not take into account or explicitly educate foreigners about the Chinese cultural elements of Guanxi/relationships (关系), Mianzi/saving face (面子) and Tan Shengyi/talking business (谈生意).

A. *Limitations on Freedom to Contract*

Freedom of contract in Chinese law is still “freedom to [legally] do things” and not “freedom from” governmental inference.²⁹⁸ “In Chinese legal history, freedom of contract was [originally] not recognized, as the concept of individual autonomy was meaningless.”²⁹⁹ Freedom of contract has not been embraced by China until recently and it is still limited because it is seen as a capitalist concept that must be purged in a socialist system.³⁰⁰ There has been a continuing struggle between allowing parties the freedom to contract and maintaining the state plan through a market economy.

In drafting the CCL, the idea of “freedom of contract” was hotly debated and China never explicitly recognized this principle.³⁰¹ Freedom of Contract, in Article 5, is limited to ‘voluntariness’ in Chinese contract formation.³⁰² The ability to contract voluntarily simply means the ability to make a contract in accordance with the law.³⁰³ State plans, through Articles 7, 38 and 44, may still dominate by changing the elements of a contract or making a contract void.

Parties have the opportunity to determine the contents of the contract, to choose the form of the contract, whether or not to enter

²⁹⁸ FU, *supra* note 26, at 40.

²⁹⁹ *Id.* at 6.

³⁰⁰ Zhang, *supra* note 155, at 241–42.

³⁰¹ Zhao, *supra* note 196, at 110.

³⁰² FU, *supra* note 26, at 40.

³⁰³ Zhang, *supra* note 155, at 244.

into an oral agreement, and to modify or terminate a contract,³⁰⁴ but “making a contract voluntarily” and “freedom of contract” are not the same. “Freedom of contract” recognizes party autonomy to enter into contracts through mutual consent, whereas “voluntariness” is narrower because the autonomy is limited to only the initial stage of contract.³⁰⁵ “Freedom of contract” was derived from Roman Law and is supposed to maximize economic efficiency, whereas ‘voluntariness’, which came from the GPCL, shows the ability of a government to intervene through a planned or market economy.³⁰⁶

Although Chinese law in contract formation is similar to UNIDROIT principles, there are distinctly Chinese characteristics that limit the actual freedom to contract. The CCL applies to foreign and domestic contracts, but if a Chinese legal entity is contracting with a foreign company, the parties can choose to apply the laws of the foreign country.³⁰⁷ A Westerner may not understand the nuances between freedom of contract and voluntariness. Recognizing these differences is essential because, if a foreign business finds itself subject to Chinese domestic law, the foreign entity may have its business contract modified or voided through the actions of Chinese government. Freedom is not an inherent right for Chinese citizens, it is a special privilege granted by the ruling authority.³⁰⁸ This can be problematic if the PRC can dominate contract formation in transactions with foreign companies.

B. Judicial Independence

The Supreme People’s Court of China (SPC)’s judicial interpretation in the form of notice (*gui ding*), reply (*pi fu*) or opinion (*yi jian*) is an important source of Chinese contract law.³⁰⁹ But the role of the judiciary is different in China than it is in other countries because the people’s courts have to abide by law or statute rather

³⁰⁴ *Id.* at 245.

³⁰⁵ FU, *supra* note 26, at 40.

³⁰⁶ *Id.*

³⁰⁷ Zhang, *supra* note 155, at 261.

³⁰⁸ ZHANG, *supra* note 13, at 55.

³⁰⁹ FU, *supra* note 26, at 2.

than precedent.³¹⁰ Despite this difference, the lower Chinese courts must follow the Supreme People's Court opinions.³¹¹ Rather than having a sophisticated judiciary, some argue that government-driven reform may even be more efficient.³¹²

Despite the transformation of Chinese law, the lack of judicial independence is still problematic because courts do not have the ability to interpret the law independently of governmental influence.³¹³ Article 126 of the China's Constitution provides that "the people's courts shall exercise the judicial power independently according to stipulations of laws, free of any interference by administrative agencies, social organizations or individuals,"³¹⁴ the dominance of the state persists because, as a communist-party-dominated socialist country, the "separation of powers is not the main theme of the nation."³¹⁵

The role of judges is slowly evolving because there is no independent judiciary.³¹⁶ In addition, ex-parte influences on judicial decision-making expected rather than prohibited.³¹⁷ Decisions that are appealed result in a trial de novo.³¹⁸ "Never underestimate the power of the Communist Party in China. It has the power to influence and thus appeal cases to higher courts and the power to overturn them."³¹⁹ Courts cannot properly interpret the law if outside influences are strong, and thus, foreigners will face difficulties in knowing what to expect in Chinese courts.³²⁰

³¹⁰ ZHANG, *supra* note 13, at 31.

³¹¹ *Id.*

³¹² Zhao, *supra* note 196, at 126.

³¹³ ZHANG, *supra* note 13, at 15.

³¹⁴ *Id.* See Xianfa (Constitution of the People's Republic of China) (1981) (China) (English translation available at <http://www.qis.net/chinalaw/lawtran1.htm>).

³¹⁵ ZHANG, *supra* note 13, at 16.

³¹⁶ Sam Hanson, *The Chinese Century: An American Judge's Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 243, 250 (2001).

³¹⁷ *Id.*

³¹⁸ *Id.* at 251.

³¹⁹ MATHESON, *supra* note 3, at 380. See also Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 FORDHAM INT'L L. J. 218, 239–40 (2003).

³²⁰ Zhang, *supra* note 2, at 59.

C. *The Importance of 关系(Guanxi), 面子(Mianzi), and 谈生意(Tan Shengyi)*

Although Chinese contract law has successfully included Confucian concepts through maintaining a communist-party dominated socialist country, the contract law has failed to account for other cultural ideas like Guanxi (relationships), Mianzi (saving face), and Tan Shengyi (talking business). These exclusions will likely put foreigners at a disadvantage because these Chinese cultural norms are critical to understanding how negotiations are made, how Chinese citizens view business, and how the creation of a contract is just the beginning of a business relationship.³²¹

1. 关系(Guanxi/Relationships)

The concept of guanxi is complicated and dynamic, especially because it not well known in the West.³²² Guanxi means “a special relationship or connection.”³²³ Guanxi’s history goes back to Confucius’ philosophy regarding tradition, hierarchy, saving face, egalitarianism and respect for age.³²⁴ Guanxi is a form of a social morality in traditional Chinese society.³²⁵

The key Confucian element that has influenced Guanxi is the idea that unequal relationships between people help maintain a stable society.³²⁶ The Confucian state is comprised of interconnections, not individuals, so social networks are very important.³²⁷ The three levels of Guanxi are: (1) the highest which is one’s inner circle of family; (2) non-family members who are trusted; and (3) strangers who are not trusted or known.³²⁸ Chinese deal with people they

³²¹ Pattison & Herron, *supra* note 5, at 491.

³²² BLAZEY ET AL., *supra* note 10, at 57.

³²³ *Id.* at 58.

³²⁴ *Id.* at 59.

³²⁵ FU, *supra* note 26, at 13.

³²⁶ BLAZEY ET AL., *supra* note 10, at 59.

³²⁷ MATHESON, *supra* note 3, at 374.

³²⁸ *Id.*

know and trust, and Guanxi usually results in favoritism to certain businesses or companies.³²⁹ Loyalty and obedience to the group in China manifests itself in contracts, and it is sometimes difficult for Westerners to understand that family may be more important than legal obligations.³³⁰

Guanxi, although an old concept, is crucial in current business transactions in China.³³¹ If one does not have Guanxi, it is difficult to start business in China.³³² Generally, "Chinese people will only work with people they know and trust."³³³ Guanxi is incorporated into business deals to allow transactions to be done with ease.³³⁴ Instead of relying on formal contracts, the Chinese believe that Guanxi and trust in business dealings is more important.³³⁵ The CCL does not include elements of Guanxi so, without a cultural education, it would be difficult for Westerners to innately understand such an important Chinese cultural concept.

2. 面子(Mianzi/Saving Face) and 谈生意 (Tan Shengyi/Talking Business)

Mianzi means saving face, or respecting the "face" of your colleagues.³³⁶ The idea of reciprocity is important in understanding Mianzi.³³⁷ Mianzi is similar to having good credit or purchasing power.³³⁸ Confrontation is generally avoided because if you publicly

³²⁹ *Id.*

³³⁰ Pattison & Herron, *supra* note 5, at 486.

³³¹ MATHESON, *supra* note 3, at 374.

³³² *Id.*

³³³ BLAZEY ET AL., *supra* note 10, at 58.

³³⁴ *Id.* at 59.

³³⁵ Zhao, *supra* note 196, at 124. See Janet Tai Landa, Coasian Foundations of a Unified Theory of Western and Chinese Contractual Practices and Economic Organisations, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 347 (Richard P. Appelbaum, William L.F. Felstiner & Volkmar Gessner eds., 2001).

³³⁶ BLAZEY ET AL., *supra* note 10, at 61.

³³⁷ Pattison & Herron, *supra* note 5, at 487.

³³⁸ *Id.*

embarrass a colleague, they lose face, or Mianzi.³³⁹ For example, in negotiating a contract, Chinese parties will almost never directly say “no.”³⁴⁰ Because of Guanxi’s loyalty to family and Mianzi’s idea of not publicly embarrassing a colleague, there is an aversion to conflict and litigation.³⁴¹ The idea of maintaining harmony has affected how Chinese people do business.³⁴²

In conducting business in China, the idea of *tan sheng yi* (谈生意), or “talking business” prevails.³⁴³ Doing business is not a “winner-takes-all” enterprise; rather, the goal is for both sides to win.³⁴⁴ Having good relationships with people is necessary to do business.³⁴⁵ Negotiations are important and, accordingly, the Chinese ideal results in negotiating are fairness and solid business in the future.³⁴⁶ Chinese care more about personal feelings in business than formal contracts because they believe feelings are more reliable than legal documents.³⁴⁷

In China, “a contract is not necessarily a binding document, but may be only an agreement on the general principles that expresses the spirit behind the document. As relationships evolve and situations change, the Chinese may want to take the new circumstances into account.”³⁴⁸ After an agreement has been signed, there is no stigma attached if the terms of the agreement are altered.³⁴⁹ So, in light of Guanxi, Mianzi and Tan Shengyi, Western businesses should expect that they may need to renegotiate parts of the contract because the working relationship with the Chinese party has only just begun.³⁵⁰ These key concepts are not included in the

³³⁹ BLAZEY ET AL., *supra* note 10, at 61.

³⁴⁰ Pattison & Herron, *supra* note 5, at 490.

³⁴¹ MATHESON, *supra* note 3, at 375.

³⁴² Pattison & Herron, *supra* note 5, at 488.

³⁴³ BLAZEY ET AL., *supra* note 10, at 63.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 68.

³⁴⁷ *Id.*

³⁴⁸ Pattison, *supra* note 5, at 491 (citing MING-JER CHEN, *INSIDE CHINESE BUSINESS* 143 (2001)).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

CCL, but would be particularly helpful for Western businesses so that both parties could be clear about each other's expectations when making international transactional deals.

VI. CONCLUSION

Chinese contract formation differs from contract formation law in other countries; Chinese contract law has been influenced by Confucian concepts, Communism and international influences. "Westerners view contract formation as the culmination of a negotiating process and period. The contract is the "end result."³⁵¹ From the Chinese perspective, the final contract signifies that a relationship exists and terms-negotiations may now continue."³⁵² The final contract also signals the beginning of real contract negotiations.³⁵³ "Unlike Western cultures, business is not separate from family and relationships."³⁵⁴ Western businesspersons need to understand CCL; otherwise, they will remain at a distinct disadvantage in business dealings.³⁵⁵ Continued pursuit of cultural understandings will only strengthen and increase faith in future international business transactions between China and other countries.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* at 483.

³⁵⁵ *Id.* at 477.