

The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts : A Brief Comparison

Zhang Yuqing* – Huang Danhan**

The new unified *Contract Law of the People's Republic of China* (hereinafter referred to as the *new Contract Law*) was adopted at the Second Session of the Ninth National People's Congress on 15 March 1999 and came into force on 1 October 1999. Simultaneously, the *Economic Contract Law of the People's Republic of China* (hereinafter referred to as the *Law on Economic Contracts*), the *Law of the People's Republic of China on Economic Contracts Involving Foreign Interests* (hereinafter referred to as the *Foreign Economic Contract Law*) and the *Law of the People's Republic of China on Technology Contracts* (hereinafter referred to as the *Technology Contract Law*), the three laws collectively referred to as the *three former contract laws*, were abrogated.

Structurally, the new Contract Law is divided into three parts – General Provisions, Specific Provisions and Supplementary Provisions – with 23 Chapters featuring 428 Articles. The first part – General Provisions – has 8 Chapters: General Provisions; Conclusion of Contracts; Effectiveness of Contracts; Performance of Contracts; Modification and Assignment of Contracts; Termination of the Rights and Obligations of Contracts; Liability for Breach of Contracts; Miscellaneous Provisions. The second part – Specific Provisions – contains 15 Chapters dealing with 15 types of contract: Sales; Supply and Use of Electricity, Water, Gas or Heating; Donation; Loans; Lease; Financial Lease; Hired Works; Construction Projects; Transport; Technology; Storage; Warehousing; Mandate; Commission Agency; Intermediation. The Supplementary Provisions contain one Article on the effectiveness of the new Contract Law and provides for the abrogation of the three former Contract Laws.

* Director General, Treaty and Law Department, Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China (MOFTEC); Vice Chairman of the International Law Society of China; Member of the UNIDROIT Governing Council.

** Attorney; Professor of Law; Counsel of the Chinese International Private Law Society; Member of the Working Group for the Preparation of the UNIDROIT Principles of International Commercial Contracts.

In drafting the new Contract Law, the Chinese legislators referred extensively to the UNIDROIT Principles of International Commercial Contracts.¹ Many Articles of the new Contract Law, in particular those in the chapter on General Provisions, are similar in spirit to the UNIDROIT Principles. From a practical point of view, it seemed insufficient to have only general provisions without specific rules to deal with concrete cases, and this is why specific provisions were included to regulate different kinds of contract.

I. – SIMILARITIES BETWEEN THE GENERAL PROVISIONS AND THE UNIDROIT PRINCIPLES

1. *Scope of application*

The scope of application of the UNIDROIT Principles is confined to international commercial contracts. It is clearly stipulated in the Preamble that “[t]hese Principles set forth general rules for international commercial contracts.” It is further emphasised that

“the concept of ‘commercial’ contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions such as investment and/or concession agreements, contracts for professional services, etc.”

In practice, the legal systems around the world apply different standards as to what constitutes “international contracts” and “commercial contracts”. Although the UNIDROIT Principles do not define the words “international” and “commercial”, they do provide some guidance in advocating that the concept should be understood in “the broadest possible sense”. This is to allow different countries to decide for themselves, in accordance with their domestic contract laws, which contracts are “international” and “commercial”, so promoting the widest possible application of the UNIDROIT Principles world-wide.

This broad scope of application of the UNIDROIT Principles has no doubt had an impact on the new Contract Law, whose Article 2 stipulates that

“[a] contract in this Law refers to an agreement establishing, modifying and terminating the civil rights and obligations between subjects of equal standing, that is, between natural persons, legal persons or other organisations. Agreements involving personal status relationships such as marriage, adoption, guardianship, etc. shall be governed by the provisions of other Laws.”

Compared to the three former Contract Laws, the scope of application of the new Contract Law has been appropriately widened to cover a broader range of contracts. Neither the former Economic Contract Law nor the former Foreign Economic Contract Law applied to contracts to which a natural person is a party. The former Technology Contract Law did not apply to technology contracts involving foreign elements. Under the new unified Contract Law, on the other hand, parties to contracts include both

¹ The UNIDROIT Principles of International Commercial Contracts, UNIDROIT (Rome), 1994.

natural persons and legal persons or other organisations. The range of contracts not only covers economic contracts and technology contracts, but also extends to all agreements establishing, modifying and terminating civil rights and obligations among independent parties. Only agreements involving personal status relationships such as marriage, adoption, guardianship, etc. are excluded.

2. Basic principles

Articles 3-7 of the new Contract Law set forth its basic principles, *i.e.* equality (Article 3), party autonomy (Article 4), fairness (Article 5), good faith (Article 6), public interest (Article 7). Such basic principles are likewise embodied in the UNIDROIT Principles, albeit in different words. For example, Article 4 of the new Contract Law says:

“The parties shall have the right voluntary to enter into a contract in accordance with the law. No entity or individual may illegally interfere with such right.”

while Article 1.1 of the UNIDROIT Principles emphasises the freedom of the contract, stipulating that

“[t]he parties are free to enter into a contract and to determine its content.”

The same applies to the principle of good faith. Article 6 of the new Contract Law states that

“[t]he parties must act in accordance with the principle of good faith, whether exercising rights or performing obligations,”

while Article 1.7 of the UNIDROIT Principles stipulates that

“(1) [e]ach party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty.”

Clearly, the basic principles in the new Contract Law and the UNIDROIT Principles are much alike.

3. Effectiveness of contract

Article 8 of the new Contract Law on the effectiveness of a contract reads as follows:

“A contract established in accordance with the law shall be legally binding on the parties. The parties shall perform their respective obligations in accordance with the terms of the contract. Neither party may unilaterally modify or rescind the contract. The contract established according to law shall be under the protection of law.”

Article 1.3 of the UNIDROIT Principles stipulates:

“A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.”

Although expressed somewhat differently, the two stipulations are almost the same in content.

4. *Form of contract*

As to the form of contract, the UNIDROIT Principles set forth the principle of freedom of form:

“Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses” (Article 1.2),

and provide that

“‘[w]riting’ means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.” (Article 1.10)

In China, under the three former Contract Laws, contracts had in principle to be in writing, although there was no definition of what “written form” was. This requirement was no longer in tune with the rapid development of commercial transactions, in particular that of electronic commerce. The principle of freedom of form represents the new trend of commercial contract law around the world. Taking its cue from the UNIDROIT Principles, Article 10 of the new Contract Law stipulates that

“[t]he parties may conclude a contract in written, oral or other forms.”

While this is a further step towards the principle of freedom of form, the new Contract Law nevertheless imposes some restrictions on the form of contract, as discussed in Section II(1) *infra*.

5. *Conclusion of contract – offer and acceptance*

Like the UNIDROIT Principles, the new Contract Law (Article 13) assumes that a contract is normally concluded by means of an exchange of offer and acceptance.

As to specifics, the two texts present strong similarities, which to a great extent depend on the fact that the relevant provisions in the UNIDROIT Principles taken as a model by the Chinese legislator were, in their turn, inspired by the United Nations Convention on Contracts for the International Sale of Goods (CISG). The most striking examples are the following:

Offer: Article 14 of the new Contract Law and Article 2.2 of the UNIDROIT Principles provide exactly the same definition. An offer is a proposal made with a view to entering into a contract with other parties, and such a proposal must comply with the following stipulations: the contents must be detailed and definite, and indicate that the offeror is bound by the proposal in case of acceptance.

Effectiveness of an offer: both Article 2.3 of the UNIDROIT Principles and Article 16 of the new Contract Law follow the “receipt doctrine”: an offer becomes effective when it reaches the offeree.

Withdrawal of an offer: Article 2.3 of the UNIDROIT Principles and Article 17 of the new Contract Law are definitely the same: both stipulate that an offer may be withdrawn if the withdrawal notice reaches the offeree before or at the same time as the offer arrives.

Revocation of an offer: Article 2.4 of the UNIDROIT Principles and Articles 18 and 19 of the new Contract Law set forth the same rule. An offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance. It may not be revoked if (1) the offeror indicates a fixed time for acceptance or otherwise explicitly states that the offer is irrevocable; or (2) the offeree has reasons to rely on the offer as being irrevocable and has made preparation for performing the contract.

Meaning and form of acceptance: Article 2.6 of the UNIDROIT Principles and Articles 21, 22 and 26 of the new Contract Law are the same in content. Both stipulate that acceptance is a statement made by the offeree indicating assent to an offer. Unless based on usages or if the offer indicates that the offeree may indicate assent by its conduct, acceptance shall be by means of notice.

Time of acceptance: the stipulations of Article 2.7 of the UNIDROIT Principles and Article 23 of the new Contract Law are similar in general, differing slightly only with respect to oral offers. The former stipulates that

“an oral offer must be accepted immediately unless the circumstances indicate otherwise,” whereas the new Contract Law reads that

“[i]f the offer is made orally, acceptance shall be indicated immediately except as otherwise agreed upon by the parties.”

Time limit for acceptance: again, the new Contract Law and the UNIDROIT Principles are essentially the same. Both Article 2.8 of the UNIDROIT Principles and Article 24 of the new Contract Law stipulate that

“where the offer is made in a letter or a telegram, the time limit for acceptance commences from the date shown in the letter or from the moment the telegram is handed in for dispatch. If no such date is shown in the letter, it commences from the date shown on the envelope. Where an offer is made by means of instantaneous communication, such as telephone or facsimile, the time limit for acceptance commences from the moment that the offer reaches the offeree.”

The one (slight) difference between the new Contract Law and the UNIDROIT Principles is that the latter provide more detailed rules on such matters as holidays and non-business days, whereas the new Contract Law contains no such provisions. Article 2.8(2) of the UNIDROIT Principles stipulates that

“official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.”

The reason why the UNIDROIT Principles go into such detail in this matter is that they are intended to apply in wide range of countries and that each country may look at such matters differently, so the more detail the better. In China, the matter of official holidays or non-business days occurring within the time limit is covered by Article 154 of the *General Principles of Civil Law*, so there is no need to repeat it in the new Contract Law.

Withdrawal of acceptance: both Article 27 of the new Contract Law and Article 2.10 of the UNIDROIT Principles stipulate that acceptance may be withdrawn provided notice of withdrawal reaches the offeror before or at the same time as the notice of acceptance.

Late acceptance and delay in transmission: Articles 28 and 29 of the new Contract Law and Article 2.9 of the UNIDROIT Principles are essentially the same in that they allow the late acceptance to be effective if the offeror expresses its consent. Failing this, the new Contract Law provides that the late acceptance constitutes a new offer.

Modified acceptance: Articles 30 and 31 of the new Contract Law and Article 2.11 of the UNIDROIT Principles differ on some counts. The UNIDROIT Principles stipulate that

“a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.”

The new Contract Law for its part stipulates that

“[t]he contents of an acceptance shall correspond to those of the offer. If the offeree substantially modifies the contents of the offer, it shall constitute a new offer. Modifications relating to the contract object, quality, quantity, price or remuneration, time or place or method of performance, liabilities for breach of contract and the settlement of disputes, etc. constitute substantial modifications of an offer.”

As to the effect of insubstantial modification, Article 31 of the new Contract Law and Article 2.11(2) of the UNIDROIT Principles are basically the same. The UNIDROIT Principles provide that

“... a reply ... which do[es] not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.”

Article 31 of the new Contract Law stipulates that:

“The acceptance which does not substantially modify the contents of the offer shall be effective, and the contents of the contract shall be subject to those of the acceptance, unless rejected promptly by the offeror or if the offer indicates that an acceptance may not modify the offer at all.”

To conclude, over 20 Articles of the new Contract Law relating to offer and acceptance closely follow the provisions contained in the UNIDROIT Principles as well as in CISG.

6. *Standard terms*

Although standard terms are commonly used in transactions involving large-scale industries, e.g. water, electricity, post and telecommunications, railways, aviation, maritime transport, etc., the three former Contract Laws in China contained no provision on standard terms, rendering them unequal to the growing needs of social and economic development. Articles 2.19, 2.20, 2.21 and 2.22 of the UNIDROIT

Principles provide general rules on standard terms which served as a model for the new Contract Law, whose Articles 39-41 now provide similar rules in the matter. The two texts offer the same definition of "standard terms"; both reflect the *contra proferentem* rule and, following Article 2.21 of the UNIDROIT Principles, Article 41 of the new Contract Law stipulates that

"where the standard terms are inconsistent with non-standard terms, the latter shall be adopted."

7. Negotiations in bad faith and duty of confidentiality

The three former Contract Laws ignored both the concept of bad faith and the duty of confidentiality. The new Contract Law does contain provisions on both concepts, worded much as Articles 2.15 and 2.16 of the UNIDROIT Principles.

Article 42 of the new Contract Law stipulates that

"a party shall be liable for damages if, in concluding the contract, it acted under one of the following circumstances, thereby causing a loss to the other party: (1) pretending to conclude a contract, and negotiating in bad faith; (2) intentionally concealing a fact relevant to the contract or providing wrong information; (3) any other circumstance which runs counter to the principle of good faith"

whereas Article 43 provides that

"A business secret of which a party becomes aware in the course of negotiating the contract shall not be disclosed or unfairly used, regardless of whether the contract is concluded or not. The party who causes the other party to suffer losses due to disclosure or unfair use of the business secret shall be liable for damages."

8. Performance of contract

The new Contract Law features many new provisions on performance of contract – largely echoing the corresponding rules in the UNIDROIT Principles. Especially worth mentioning is the introduction by the new Contract Law of the concept of implied obligations as embodied in the UNIDROIT Principles, whereas under the three former Contract Laws it was not clear whether parties could be bound only by explicit contract terms. Under Article 60, parties are expected, in addition to performing their obligations according to the terms of the contract, to abide by the principle of good faith and to perform implied obligations such as notice, assistance, confidentiality etc., based on the nature and purpose of the contract or on usages. This is a great step forward in Chinese contract law.

In cases where there is no provision in the contract between the parties on terms such as quality, price or remuneration and place of performance, etc., or where such provision is unclear, Article 61 of the new Contract Law stipulates that the parties may agree on supplementary terms through consultation. If they fail to agree, the terms shall be determined in the light of relevant clauses of the contract or of usages. Article 62 gives further criteria for determining such terms, most of which are similar to those set out in Articles 5.6, 5.7 and 6.1.6 of the UNIDROIT Principles. However, there is one

difference which may be stressed as regards the approach adopted in dealing with cases where the time limit for performance is unclear: whereas Article 6.1.1(c) of the UNIDROIT Principles provides that in such cases, performance must take place “within a reasonable time after the conclusion of the contract,” under Article 62 of the new Contract Law, the obligor may fulfil the obligations towards the obligee at any time; the obligee may also at any time require that the obligor perform its obligations provided it gives the latter time to make the necessary preparations.

9. *Liability for breach of contract*

The concept of “non-performance” illustrated by Chapter 7 of the UNIDROIT Principles is regarded as “breach of contract” in Chinese legal thinking. Some of the rules set forth in Chapter 7 of the new Contract Law, entitled “Liability for Breach of Contract” (Articles 108-112, 114 and 118-120), closely resemble those set forth in the UNIDROIT Principles, in particular as regards non-performance of monetary obligations, non-performance of non-monetary obligations, anticipatory non-performance, cure and replacement of defective performance, right to damages, agreed payment for non-performance, *force majeure*, mitigation of harm, and harm due in part to aggrieved party.

II. – SOME SPECIAL FEATURES OF THE NEW CONTRACT LAW

1. *Some restrictions on form of contract*

The UNIDROIT Principles apply freedom of form as a general rule for the conclusion of a contract (but see Comment (2) to Article 1.2). Although the new Contract Law, too, provides that as a rule, the contract may be concluded orally (*cf. supra*), Article 10.2 states that

“where the law or administrative regulations so require, the contract shall be in writing.”

This restriction of the general principle was found necessary on account of the existence, in China, of a number of domestic laws and regulations which specifically require the contract to be concluded in writing (*e.g.*, the Chinese Guarantee Law in respect of guarantee contracts). In practice, furthermore, in some cases the parties may have difficulty coping with a contract in oral form, while the courts for their part may not find it easy to settle disputes arising from a contract not concluded in writing. In this sense, the new Contract Law reflects Chinese reality. However, it still leaves room for manoeuvre in implementing this restriction, as illustrated in Article 36:

“When a contract is required to be in written form in accordance with the law and administrative regulations or with the agreement of the parties, the contract shall be deemed concluded even though it was not in writing, when one party has performed the principal obligation and the other party has received it.”

This approach of upholding the contract notwithstanding its non-compliance with a formal requirement highlights the substantial progress made by the new Chinese Contract Law in international practice, in harmony with the general

philosophy underlying the UNIDROIT Principles, in particular the *favor contractus* principle.

2. *Contracts concluded by electronic means*

As to written form, the UNIDROIT Principles give a general definition of "writing" in Article 1.10 which covers

"any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form."

The new Chinese Contract Law by contrast adopts quite a descriptive approach in its Article 11 to what constitutes "written form", listing as it does the various possible forms, *i.e.* a written contractual agreement, letters and electronic data (including telegram, telex, fax, electronic data interchange (EDI) and electronic mail). It is worth stressing the explicit inclusion of electronic data in this definition, in recognition of the spectacular increase world-wide of the number of contracts concluded by means of electronic communication, in particular by e-mail. In China in recent years, such contracts mostly concern securities and options in international trade, and the Chinese regard a more concrete definition of "written form" rather than a general one as more acceptable or, at any rate, more understandable.

The new Contract Law explicitly refers to contracts concluded by electronic means in Articles 16.2, 26.2 and 34.2 with respect to the time of arrival of an offer and acceptance, and to the place of formation of the contract.

3. *Contracts concluded under a mandatory State plan or a State purchase order*

As the new Contract Law was drafted on the basis of the three former Contract Laws, it naturally bears traces of each of those laws. For example, the former Economic Law stipulated that

"where the State issues a mandatory plan to enterprises according its requirements, the relevant enterprises shall conclude contracts among themselves in accordance with the rights and obligations as stipulated by the relevant laws and administrative regulations."

The new Contract Law's addition of "State purchase order" to State "mandatory plan" is a definite step forward. Its Article 38 stipulates that

"where the State issues a mandatory plan or a State purchase order according to its requirements, the relevant legal persons or other organisations shall conclude contracts among themselves in accordance with the rights and obligations as stipulated by the relevant laws and administrative regulations."

This particular provision was maintained to safeguard national defence projects, important construction work and strategic storage operations. It means that the parties may not refuse to fulfil the tasks allotted under State mandatory plans or purchase orders by invoking "freedom of contract". At all events, this provision is a transitional one, since China is in the process of moving from a planned to a market economy.

4. *Extinction of the right to avoid the contract*

The issue of the extinction of the right to avoid the contract was not addressed in China's three former Contract Laws, whereas the new Contract law does set forth rules on this point in Article 55. The UNIDROIT Principles deal with this issue on one occasion (Article 3.12), stipulating:

“If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded.”

Reflecting the same principle, the new Contract Law stipulates that a party loses its right to avoid the contract when it makes a statement or performs an act to waive its right after it has become aware of the causes for avoidance. It also covers the situation where a party entitled to avoid the contract fails to exercise its right within one year from the day it became aware or ought to have become aware of the causes for avoidance. This was done in order to encourage the party entitled to avoid the contract to exercise its right without undue delay.

5. *Compensation for loss*

Article 113 of the new Contract Law provides that

“where a party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract and causes loss to the other party, the amount of compensation for loss shall be equal to the loss caused by the breach of contract, including any benefit derived from the performance of the contract, provided such amount does not exceed the probable loss caused by the breach of contract which was foreseen or which ought to have been foreseen by the party in breach when it concluded the contract.”

In its treatment of compensation for loss, the new Chinese law does not go as far as the UNIDROIT Principles in Articles 7.4.2 (*Full compensation*), 7.4.3 (*Certainty of harm*), 7.4.4 (*Foreseeability of harm*), 7.4.5 (*Proof of harm in case of replacement transaction*), 7.4.6 (*Proof of harm by current price*). For example, the new Contract Law does not touch upon issues such as future harm or loss of a chance, which are contemplated by the UNIDROIT Principles as a compensable loss, although when the amount of damages cannot be established with a sufficient degree of certainty, it is left to the discretion of the court. Likewise, the new Contract Law is silent on compensation for non-pecuniary harm, unlike the UNIDROIT Principles which explicitly point out that harm sustained as a result of non-performance may indeed be non-pecuniary and include physical suffering or emotional distress.

6. *Interpretation of contracts*

The UNIDROIT Principles pay much attention to the interpretation of contracts, providing a whole series of general rules in Chapter IV. Although the new Contract Law contains only one Article (Article 125) relating to interpretation, this is nevertheless great progress compared to the three former Contract Laws, which were completely silent on the matter. Much in line with the UNIDROIT Principles, according

to Article 125 of the new Contract Law interpretation of a contract clause is to be based on its true meaning, which

“shall be determined according to the terms and expressions used in the contract, the contents of the relevant clauses, the purpose of the contract, usages and the principle of good faith.”

As to cases where a contract is drawn up in two or more language versions and it is agreed that all the versions are equally authentic, and where there is a discrepancy between the versions, the UNIDROIT Principles indicate a preference for an interpretation according to the version in which the contract was originally drawn up, whereas the new Contract Law refers to an interpretation “according to the purpose of the contract,” thus leaving more room for assessment by the courts.

7. Change of circumstances

The UNIDROIT Principles provide general rules on hardship. Although there is no legal term for “hardship” under Chinese laws and regulations, nevertheless, in China too one party’s performance may at times become meaningless in that it would suffer great loss by reason of a dramatic change of circumstances – such as changes of State economic policy or a change in the economic situation – subsequent to the conclusion of the contract, which could not reasonably have been contemplated by the parties at the time the contract was concluded and which is beyond their control.

The drafters of the new Contract Law did initially include such a provision on change of circumstances which was drawn from the definition and effects of hardship provided by the UNIDROIT Principles. It gave the disadvantaged party the right to request the other party to renegotiate the content of the contract and, failing agreement, to request the court to modify or terminate the contract. However, many law experts considered such a provision too vague and apt to create uncertainty and ambiguity in its interpretation and application, and in the end the concept of “change of circumstances” was dropped from the new Contract Law. Many other countries also take a cautious stand on this issue and forbear to provide any express legislative rules on hardship or change of circumstances.

III. – CONCLUSION

It is evident from this brief comparison between the new Chinese Contract Law and the UNIDROIT Principles that the new Contract Law has assimilated many of the general rules set forth by the UNIDROIT Principles. Of these, many are new to the Chinese contract system, there being no equivalent rules in the three former Contract Laws. This Chinese experience is a convincing example of the UNIDROIT Principles’ role as a model for national legislators.

Last but not least, it should perhaps be mentioned that the new Contract Law also touches upon some issues such as agency, set-off, third party rights under contracts, assignment of contractual rights and duties, and limitation of action by prescription,

all of which are now under the consideration by the UNIDROIT Working Group for the Preparation of a second volume of the Principles of International Commercial Contracts. This highlights the urgent need for the UNIDROIT Principles to provide general rules on those issues not covered by the present version. It is to be expected that the Chinese Contract Law will be further perfected as contract law develops world-wide, both in an international and a national context.



LA NOUVELLE LOI SUR LES CONTRATS DE LA REPUBLIQUE POPULAIRE DE CHINE ET LES PRINCIPES D'UNIDROIT RELATIFS AUX CONTRATS DU COMMERCE INTERNATIONAL : BREVE COMPARAISON (Résumé)

par ZHANG Yuqing (Directeur Général, Département des traités et de la législation, Ministère du commerce et de la coopération économique avec l'étranger (MOFTEC); Vice-Président de la Société de droit international de Chine; Membre du Conseil de Direction d'UNIDROIT) et HUANG Danhan (Avocate; Professeur de droit; Membre du Conseil de la Société chinoise de droit international privé; Membre du Comité d'étude pour la préparation des Principes d'UNIDROIT relatifs aux contrats du commerce international)

La nouvelle loi chinoise sur les contrats adoptée le 15 mars 1999 est entrée en vigueur le 1 octobre de la même année, et simultanément ont été abrogées les trois législations antérieurement applicables à la matière. La loi est extrêmement détaillée (elle comprend 428 articles structurés en 23 chapitres), et apporte des modifications radicales au traitement de la matière contractuelle. Elle concerne tous les accords concernant des droits civils, quels que soient la qualité des parties (personnes physiques, personnes morales, et "autres organisations"), seuls les accords relatifs aux droits individuels et à la famille étant exclus.

Les solutions des Principes d'UNIDROIT relatifs aux contrats du commerce international – elles-mêmes dans une certaine mesure inspirées de la Convention de Vienne de 1980 – ont constitué une référence de poids dans l'élaboration de la loi chinoise. Le présent article souligne les très nombreuses similarités entre les deux instruments, dont un grand nombre sont des innovations dans la législation chinoise: il est en ainsi des principes fondamentaux (liberté contractuelle, bonne foi, équité, effet obligatoire du contrat), des règles concernant l'offre et l'acceptation, de la teneur de plusieurs dispositions en matière d'exécution (ainsi les dispositions types, les obligations implicites, l'obligation de confidentialité) ou d'inexécution.

Cependant il existe un certain nombre de divergences entre la loi chinoise et les Principes d'UNIDROIT: on se limitera ici à citer les restrictions posées à certains principes fondamentaux, ainsi à la liberté de forme du contrat, ou à la liberté contractuelle s'agissant de contrats conclus en vertu d'un plan obligatoire de l'Etat ou une commande de l'Etat; le préjudice ouvrant droit à indemnisation, ou encore les changements de circonstances et le hardship.

La loi chinoise sur les contrats est un instrument important face aux besoins économiques actuels; elle pourra être améliorée au fur et à mesure que le droit des contrats évoluera dans le monde, tant au niveau international que national.

