

Contract Law in China, Bing Ling [Hong Kong: Sweet & Maxwell Asia, 2002, lxxiii + 552 pp, hardback, HK\$1,595, US\$204]

The study of Chinese law is gaining greater momentum following China's accession to the World Trade Organisation (WTO). Without doubt, Bing Ling's *Contract Law in China* is one of the best-written books in this field thus far. Its publication is timely, in the sense not only of China's recent accession to the WTO, but also in light of the entry into force of China's Contract Law on 1 October 1999.

In common with other jurisdictions, the law of contract is at the heart of the so-called socialist market economy in China. This has been recognised by the national legislature¹ and demonstrated in practice.² China's law of contract was overhauled during the course of negotiations for China's WTO membership. This was done by unifying different contract laws and administrative decrees.³ The reform process reflected not only China's political determination to address the "depth deficiency" in relation to international standards, but also its firm commitment to further reform and to a market economy.⁴ One of the most notable results of the new law is, to a large extent, to subject all market players – including foreign parties – to the same set of rules and to put them on an equal footing. In addition, three fundamental principles of contract law that have long been recognised in other developed markets (freedom of contract, good faith and promoting the making of transactions) are particularly emphasised in the new law.⁵ As such, as the author puts it, "the significance of the Law can hardly be overstated".⁶

For a long period after the economic reforms and implementation of the "open door" policy at the end of the 1970s, foreign investors and professionals were cautioned not to take contracts in China too seriously. It was believed in some quarters that contracts, together with relevant laws, constituted a

¹ The legislative explanation of the Draft Contract Law to the National People's Congress by Mr Gu Angran, the Director of the Legislative Affairs Committee of the Standing Committee of the National People's Congress (NPCSC) on 9 Mar 1999 states that contract law is the basic law of a market economy and affects not only business operations, but also people's lives. See Gu Angran, *Zhonghua Renmin Gongheguo Hetongfa Jianghua* (*Talks on the Contract Law of the People's Republic of China*) (Beijing: Legal Publishing House, 1999), p 178.

² According to incomplete statistics for recent years, approximately four billion contracts are concluded each year and the number of contract disputes heard by the people's courts has reached almost three million annually. See Gu, *ibid.*, pp 1–2.

³ Before the codification of 1999, three separate contract laws were promulgated to govern domestic contracts, foreign related contracts and technology contracts. In addition, an enormous number of contract rules were incorporated in other national laws and government regulations. At pp 11–14; see also Wang Shengming, "The Legislative Background, Guiding Ideology and Scope of Application of the Contract Law" (1999) 3 *China Law* 54.

⁴ Wang, *ibid.*, pp 55–57.

⁵ At pp 39–58; Wang Liming and Xu Chuanxi, "Fundamental Principles of China's Contract Law" (1999) 13 *Columbia Journal of Asian Law* 1.

⁶ At p lixx.

cage in which foreign business operations could be restricted.⁷ Although recognising legislative defects, institutional problems and practical concerns, which arguably exist in other jurisdictions to varying degrees, Mr Ling's book provides very convincing and solid evidence of the dynamic development of contract law in China in the past two decades. As the book vividly demonstrates, active academic research and judicial practice in the course of market growth have developed the law of contract and its underlying theories to a fairly sophisticated level. The author is to be congratulated for his achievements and for so successfully accomplishing the stated goals of the book.⁸

It is difficult to assess fully the merits of this book, given space constraints. It is, however, appropriate to highlight some of its major features.

The book is systematically structured in such a way as to enable effective use by the reader. It generally follows the order of provisions in the Contract Law, which in turn facilitates comparison and cross-referencing. The chapters are divided into sections, each of which is developed into issue-centred units with numbered sub-divisions. As such, the structure is easily accessible for both practitioners and students.

From the start, the reader can easily find detailed lists of national legislation, administrative regulations, and legislative and judicial interpretations. There are comprehensive references to scholarly books and journal articles written by leading domestic jurists. To make the book more useful and informative, more than 350 cases are examined. Furthermore, relevant contract laws in major civil law jurisdictions, including France, Germany, Italy and Taiwan, and some important international conventions, particularly the United Nations (Vienna) Convention on the International Sales of Goods 1980 (CISG) and the UNIDROIT Principles of International Commercial Contract 1994, are considered. Some contract rules of the Uniform Commercial Code of the United States are also included in the author's treatment. Last, but not least, particular recognition should be given to the author's great efforts in identifying and discussing the many national laws and regulations concerning contract practice adopted in the past two decades by different state authorities. The comprehensive treatment of domestic sources and wide international comparisons are particularly attractive features of the book and help the reader to appreciate the unique characteristics of contract law in China, both as a socialist country with a civil law tradition and as an economy in transition.

Another significant contribution by the author to the foreign reader's understanding of China's contract rules is his own translation of the Contract

⁷ Stanley B. Lubman, *Bird in a Cage – Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999), pp 200–202.

⁸ As the author states, the book is intended to present a comprehensive picture of the major doctrines and concepts of the Chinese law of contract and to lay a solid ground of doctrinal study for the development of advanced theoretical critique in the future: at p lixx.

Law and the recent Supreme People's Court interpretation thereon. These appear in the book as Appendices 1 and 2 respectively.⁹ The lack of timely and accurate English language translations of Chinese law has often been a considerable obstacle to the effective study of it by foreign practitioners and students. Even certain translations provided by the legislative authorities may not satisfactorily convey the real meaning of all the rules.¹⁰ Since its promulgation, the Contract Law has seen several versions of its translation, but Mr Ling's translation is, in this reviewer's opinion, the best one thus far. Readers will benefit from both Mr Ling's profound expertise and a proficiency in English that has impressed many.¹¹

Comprehensive insights add further value to the book. Although some doctrines that apply in other jurisdictions may be found in the Contract Law with the same or similar wording, conditions in China often result in their having different theoretical and practical dimensions. As such, the analyses and elaboration offered by the author, as a well-established scholar of Chinese law, are of particular importance in enabling readers to understand many crucial rules and the policy behind them. For example, the discussion on the principle of fairness provides readers with a clear understanding of its development, together with the progress of marketisation in China. In Article 5 of the Economic Contract Law of 1981, this principle emphasised "making compensation for equal value" (*denjia youchang*), since government-controlled prices at that time would allow little bargaining between the parties concerned. The 1993 amendment to the Economic Contract Law improved matters by deleting *denjia youchang* and substituting "equality and mutual benefit" (*pingdeng huli*) as the core of the principle,¹² thus indicating more freedom to negotiate and conclude a contract. Article 5 of the Contract Law of 1999 further stipulates that the parties to a contract shall determine their rights and duties in accordance with the principle of fairness. As the author correctly points out, the significance of this principle "is essentially to prevent the strong parties from abusing their bargaining power and imposing unconscionable terms on the weak parties".¹³ The analysis here not only clearly

⁹ At pp 469–525.

¹⁰ In China so far there is no official English language translation of national legislation as such, although the Legislative Affairs Committee of the NPCSC publishes an annual volume of English translations of national laws adopted in the previous year. Despite great effort, sometimes certain inaccuracies still show the need for improvement. For example, the first sentence of Art 74 of the new Contract Law is translated by the Legislative Affairs Committee as: "If a debtor disclaims its due creditor's right or transfer gratis its property and thus causes losses to the creditor, the creditor may apply to a people's court to rescind the debtor's action." The version given in Ling's translation is: "If the debtor waives his claim that has matured or gratuitously transfers his property, thereby causing damages to the creditor, the creditor may apply to the people's court for the revocation of the debtor's act."

¹¹ This is particularly acknowledged by Professor Jerome A. Cohen in the Foreword, at p lixx.

¹² Economic Contract Law of China 1981, as amended in 1993, Art 5.

¹³ At p 51.

reflects the convergence of principle and practice in China with those commonly accepted in the rest of the world, but also demonstrates the implications of the principle in China, where the state sector has dominated the national economy.

Another useful insight can be found in the section dealing with the doctrine of change of circumstances, where the reasons why this long-established doctrine was not maintained in the 1999 codification are explained. The author's research finds that Article 27(1)(4) of the Economic Contract Law of 1981 actually recognised the doctrine, and that although the 1993 amendment thereto deleted the relevant provision, the people's courts continued to apply it in practice.¹⁴ However, concerns about the excessive exercise of judicial discretion by the people's courts, in many cases resulting in abuse, corruption and unlawful protection of local interests, finally prevailed over pressure to reintroduce the doctrine in the 1999 Contract Law. The discussion here, in addition to providing the legislative background, raises some important issues concerning the political interplay between the legislature and the judiciary, as well as the impact of judicial quality on the development of contract law in China.

As a true scholar of Chinese law, the author pays close attention to similarities and differences between Chinese contract rules and practice and relevant international treaties. For instance, according to the author, while the precise term "fundamental breach" (also known as fundamental non-performance), which justifies termination of a contract, is used in two United Nations conventions¹⁵ but is not adopted in the Contract Law, the concept reflected in the relevant provision of the Law is equivalent to the notion expressed in the conventions.¹⁶ The book further identifies some key factors that may be taken into account to find fundamental breach.

Contract Law in China also addresses very well the significant changes or improvements brought about by the new code. Two good examples of this are the treatment of the newly introduced doctrine of apparent authority and the revised concept of voidable contracts. With regard to the former, the author not only analyses the course of its development, commentators' opinions and cases, but also carefully notes the differences between the Chinese version of the doctrine and those of the CISG and other civil law jurisdictions.¹⁷ The latter, which is considered to be a major improvement regarding freedom of contract, changes the legal status of a contract made through fraud or duress

¹⁴ At pp 291–292.

¹⁵ The UNIDROIT Principles of International Commercial Contracts 1994 and the CISG.

¹⁶ See Art 94 of the Contract Law.

¹⁷ At pp 146–151; see also Lutz-Christian Wolff and Bing Ling, "The Risk of Mixed Laws: The Example of Indirect Agency under Chinese Contract Law" (2002) 15 *Columbia Journal of Asian Law* 174.

and not harming the state's interest from being void *per se* to voidable, depending on the actions of the parties concerned. In this regard, the author correctly identifies the balanced approach of the law: on one hand, the change is effected in line with the principle of voluntariness and courts are no longer empowered to void or modify such contracts without party initiative; on the other hand, the Chinese rules still afford special protection to state interests and are different from the traditional rescission rules in other civil law jurisdictions, in that rescission may not be made by a unilateral declaration, but rather through court or arbitration proceedings. As such, the judiciary may retain control over controversies arising from rescission. In light of this, the book provides the reader with important practical advice: that a contract should remain effective until it is set aside by a court or arbitration tribunal.¹⁸

Having discussed the book's major merits, this reviewer would venture to suggest some areas to which improvements could be made. First, given the size and comprehensiveness of the book, it could have been more critical. The author acknowledges at the very beginning that the book only briefly presents the author's critique, so it may not be fair to ask for more if the author did not intend to do more in the first place. It seems, however, that some issues would have received better treatment if more critical analysis had been incorporated. For example, the author very accurately describes the loss of the power of the State Administration of Industry and Commerce (SAIC) to supervise contracts and its resistance to retaining such power in the market development of China.¹⁹ Although Article 127 of the Contract Law still recognises the SAIC's power to deal with violations in contracting in accordance with the law and regulations, the book correctly concludes that the SAIC's power of "administrative supervision does not include advance examination of contracts".²⁰ Later, however, the author further discusses the practice known as contract certification (*hetong renzheng*) developed by the SAIC and based on a self-serving provision in 1997²¹ whereby the SAIC does not rule on the invalidity of a contract, but instead on its validity. In commenting on this practice, the author seems troubled with consistency. On the one hand, he considers the procedure to be a form of administrative supervision of contract designed to reduce contract disputes; on the other hand, he

¹⁸ At pp 209–211.

¹⁹ Under the Economic Contract Law of 1981, the SAIC had the power to declare a contract void based on its examination. This power was abolished by the 1993 amendment of the Law. However, the SAIC has never ceased advocating the continuation of its regulatory and supervisory power: at pp 47–48.

²⁰ At p 48.

²¹ Measures of Contract Certification issued by the SAIC on 3 Nov 1997. Art 1 of the measures clearly stipulates that contract certification is a supervisory and administrative instrument to examine the truthfulness and lawfulness of contracts. Art 4 indicates that certain contracts are subject to a mandatory certification procedure. Art 11 empowers the SAIC to carry out necessary investigations in the course of examining contracts.

notes that certification does not create any particular legal effect. He then adds that the SAIC certificate may be regarded as strong evidence before the court.²² In this regard, this reviewer would argue two points. First, given its long struggle for power, the clear motivation of the SAIC seems to lie more in maintaining its supervisory power than in reducing the potential for disputes. Second, to what extent the court should defer to a SAIC certificate is not certain. Although thus far there appears to be no case where the effect of a SAIC certificate has been litigated before a people's court, the rapid development of judicial independence may soon challenge traditional government authority. As Mr Wang E-Xiang, Vice President of the Supreme People's Court, stated recently, China's WTO accession will force the people's courts to take an impartial position in trials concerning the exercise of administrative powers. He further opined that, as a result of the transition to a society under the rule of law from one under government dominance, administrative authority and the instrumentalism of law must give way to the authority of law and every dispute must be handled in accordance with the law.²³

As already stated, this book articulates and analyses fundamental contract rules in China in a very precise way. In certain respects, however, the discussion could be improved. For instance, the author opines, on the basis of a provision of a draft of the Contract Law which was not adopted in the final codification, that "whether the defaulting party is able and willing to cure its non-performing is a significant factor in determining whether the breach 'mak[es] it impossible to accomplish the purpose of the contract'".²⁴ As promulgated, however, the Contract Law seems to provide little support for this proposition. Article 94 permits the aggrieved party to terminate the contract in the circumstances of non-performance or fundamental breach, without mentioning the defaulting party's willingness to cure it. Article 96 stipulates that the contract will be terminated when notice by the aggrieved party is received by the defaulting party. Any disagreement by the defaulting party may only be resolved in judicial or arbitral proceedings. These rules appear to be consistent with Article 48 of the CISG. As one scholar observed, the CISG, unlike the United Nations Principles of International Commercial Contract, appears to bar the seller from curing defective performance after the buyer has declared the contract avoided, which is destructive to the cure principle.²⁵ It may, therefore, be more convincing to argue that the exercise

²² At pp 102–103.

²³ Wan E-Xiang, "Rushi yu Woguo de Sifa Gaige," ("WTO Accession and the Judicial Reform") in The Political Department of the Supreme People's Court (ed), *Rushi yu Renmin Fayuan (World Trade Organisation and the People's Court)* (Beijing: The People's Court Press, 2002), pp 109–114.

²⁴ At p 342.

²⁵ Michael Bridge, "The UK Sale of Goods Act, the CISG and the UNIDROIT Principles," in Peter Sarcevic and Paul Volken (eds), *The International Sales of Goods Revised* (The Hague: Kluwer Law International, 2001), pp 145–146.

of rights under Article 94 by the aggrieved party should be governed by the principle of good faith rather than focusing on the defaulting party's ability and willingness to cure defective performance.²⁶

The secondary sources relied on by the book comprise commentaries written by virtually all Chinese experts.²⁷ However, given that the book is in English and its audience comprises practising lawyers and students of comparative law, some foreign experts' opinions should be considered where they are relevant to the subject matter. For example, some practising lawyers have noted that some changes in the new law may not be favourable to foreign contracting parties. Under Article 5 of the Foreign Economic Contract Law of 1985, where Chinese laws made no provision on a particular issue, relevant international practice could be applied. Such a provision is, however, omitted from the Contract Law, which may make foreign parties feel less comfortable about contracting under Chinese law.²⁸ Regardless of the merits of the argument, the author could have paid more attention to this issue. The book's treatment of the two relevant Articles is very limited. Discussion of Article 124 focuses on innominate contracts, while the discussion of Article 126(1) on the governing law of foreign-related contracts is relegated to a footnote.²⁹

On balance, however, this is a very well-written book. It is an admirable work and is to be highly recommended.

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²⁶ The word "may" is used in Art 94 so that the aggrieved party may employ other options to deal with a fundamental breach. Moreover, even in considering the feasibility of curing defective performance, factors such as reasonable time and the inconvenience caused need to be assessed from the aggrieved party's perspective. Some domestic experts also discuss the application of Art 94 in the context of good faith in terminating a contract. See Wang and Xu (n 5 above), pp 20–21.

²⁷ At pp 527–531.

²⁸ E. Anthony Zaloom and Hongchuan Liu, "China's Contract Law Marks a New Stage in Commercial Law Drafting" (1999) *China Law & Practice* 18.

²⁹ At pp 18–19 and 247.

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