Conclusion of Contract in China's New Civil Code

A comparative study in relation to China’s New Civil Code

Rasmus Svensson

Supervisor Boel Flodgren

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HARN63

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LUND UNIVERSITY

SCHOOL OF ECONOMICS AND MANAGEMENT

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Abstract

China has adopted a new Civil Code, which is a newly updated and modern legislation. The Code consists of seven parts, and the part regarding contracts consists of 526 articles, which is the most significant part of all seven. Technological development all over the world has changed the way how contracts are concluded. The purpose of this thesis is to get clarity and a better understanding of how Chinese contracts are concluded. Chinese contract law has been put into perspective in relation to contract law in two other countries, Sweden and the United Kingdom. In order to highlight the similarities and differences between the regulation of conclusion of contracts in China versus Sweden and England, a comparative method has been used.

The research has shown that Chinese contract law corresponds with Swedish and English contract law to a great extent. Contract law principles that have emerged from case law in Sweden and England have been incorporated into the Chinese Civil Code. For foreign jurists and people in business, the Code can be seen as a simplification of the other countries' contract law. The Codes modern and detailed formulating of articles show that the technological elements that exist in today's commercial trade have been taken into consideration.

1. Introduction

1.1 Background

The new Civil Code of the People's Republic of China[1] (The Code) consists of sevens parts: General Principles, Real Rights, Contract, Personality Rights, Marriage and Family, Succession, and Liability for Tort. In total, the Code consists of 1 260 articles, and it entered into force on 1 January 2021. The contract part contract consists of 29 chapters and 526 articles, making this chapter the largest in the Code.[2] What distinguishes China's Civil Code from other civil codes is that it entered into force in the twenty-first century. The adoption of the Code can be seen to accommodate for globalisation and technological development.[3]

Since the development has rapidly changed the way contracts are concluded, this area of law is of particular interest to examine in the new Chinese Civil Code. It is also interesting to examine whether the regulation in this area of law differs from how it is regulated in other parts of the world. To this end, Sweden and the United Kingdom have been chosen to represent two different legal systems.

While Chinese contract law is newly updated, and the Swedish and English contract law was adopted in the twentieth century, one can imagine significant changes have been made in Chinese contract law to cover technological development. Therefore, the Chinese contract law may be presumed to be adapted based on today's conditions and fall within China this high-tech era. The approach taken compares Chinese contract law with the Swedish contract law and the United Kingdom's contract law regarding the conclusion of contracts.

[1] Civil Code of the People's Republic of China (Adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020)

[2] Bing Ling, *The New Contract Law in the Chinese Civil Code,* The Chinese Journal of Comparative Law, (2020), Vol 8, No 3, pp 558–634.

[3] Dessie Tilahun Ayalew, "*The Recent Codification of the Chinese Civil Code (CCC) as 'a Generation of High-tech era' Civil Code: History, Innovations, and Key Lessons for Ethiopian 'Old Generation' Civil Code,* page 10.

1.2 Purpose and research question

The purpose of this thesis is to create clarity and a deeper understanding of how contracts are concluded in China's new Civil Code and put it into perspective in relation to how this area of law is regulated in other legal systems. Sweden is presentive of civil law, and the United Kingdom is representative of common law.

It is interesting to compare China's Civil Code conclusion of contracts to see if China's contract law is entirely new legislation or a simplification, or a codification of the two separate contract law combined.

To meet the aim of the thesis, the following research question will be answered: What are the similarities and differences between Chinese contract law and Swedish and English contract law?

1.3 Delimitations

It is not possible, but perhaps desirable to examine all parts of the new Chinese Civil Code in this thesis. As already been established, the topic of this thesis is the regulation of the conclusion of contracts in China, Sweden and England. Thus, other contract law issues, such as breach of contracts and liabilities during negotiation, fall outside this thesis's scope.

Furthermore, international trade will not be covered. Only domestic legislation will be examined, which means that the conclusion of contracts in cross-border trade is not covered unless the parties have agreed that their agreement is covered by domestic law. In countries that have joined the United Nations Convention on Contracts for the International Sale of Goods (CISG), contracts are governed by the provisions in CISG, like Article 14–22, where CISG sets up rules concerning the conclusion of contracts; thus, this section will not be covered.

International legislation and other international principles, like Principles of International Commercial Contracts and Draft Common Frame of Reference, this type of law will not be examined in depth since it is soft law. Since it is not possible to go into detail in all parts regarding the conclusion of contracts, even in domestic law. However, in the chapter concerning the Swedish incorporation of

standard terms, it will be shown to the reader that Swedish case law sometimes refers to international principles and draw inspiration from soft law to apply it to disputes.

1.4 Materials and method

A method based on the wording of the articles and a comparative method has been applied to examine China's Civil Code regarding the conclusion of contracts since preparatory work and case law has not found available in English.

The comparative method is mainly based on pursuing a deeper understanding of other legal systems, including its own.[4] Instead of focusing solely on the national legislation, the comparative method aims to expand ones perspective, in this way increase knowledge about other countries' legal systems.[5] The comparative method is made through 'a study of, and research in, law by the systematic comparison of two or more legal systems; or parts, branches or aspects of two or more legal systems.[6] The starting point in the comparative method is not to compare one specific legal area, followed by a statement within the same legal area in another legal system. The comparative method can be used to highlight and understand the similarities and differences between two or more legal systems.[7]

The chapter concerning Swedish contract law is based on domestic legislation, preparatory work and case law in order to interpret valid law. Swedish doctrine does not have the same legal authority as legislation and case law but Swedish doctrine has been used as a tool to fill the gaps where the legislation and case law do not have an answer. The selection of Swedish authors is based on their contribution and expertise to Swedish legal development in contract law. All have high status of entrusting within this area of law. Among these are, J, Ramberg and C, Ramberg, U, Bernitz, K, Grönfors, and R, Dotevall, and A, Adlercreutz.

[4] M, Nääv & M, Zamboni, Juridisk metodlära, andra uppl., 2018, Studentlitteratur, s. 144.

[5] M, Nääv & M, Zamboni, (n 4) 143.

[6] Kambra, W.J,. Comparative Law: A theoretical Framework, *The international and Comparative Law Quarterly,* 1974, s. 486.

[7] M, Nääv & M, Zamboni, (n 4) 143.

Articles written by professors at Chinese universities have provided the contextual background of why China has adopted the civil code. Regarding the chapter on Chinese contract law, the wording of the articles is the primary source because Chinese preparatory work and case law has not been made available in English. The approach taken to interpret the wording of the articles is by examining the content and meaning of the text or its structure and discourse.[8]

Because of the limitation of provisions in the English Contracts Act, the case law governing the legal development, the doctrine has guided to find relevant case law on the matter. The J, Cartwright doctrine has been a significant complement in this section. J, Cartwright adapts his work to a civil law jurist who performs his work in the United Kingdom. In addition to J, Cartwright's doctrine, the works of other English authors have played an essential part. The selection of authors has been encouraged based on their achievements in English contract law. Among these are Andrews, Sweet & Maxwell, J, Beatson and, A, Burrows.

When all chapters have been concluded, Swedish and English contract law will be compared with Chinese contract law. The comparison will be presented in chapter five, where the similarities and differences will be mentioned. And finally, a general remark will be highlighted as a summary.

1.5 Structure

The structure that follows in the thesis is a vertical approach, where each contract law is presented under each chapter, in the following order: Sweden, China, and the United Kingdom. In this order, the reader can easily compare Swedish contract law with Chinese contract law, and after that, compare with English contract law. The last chapter compares Swedish and English contract law with Chinese contract law and highlights the similarities and differences.

All chapters follow the same structure. It starts first with an introduction to domestic legislation, including historical background, the freedom of contract, and the definition of a contract. After that, the chapter regarding the conclusion of

[8] Lisa M. Given, The SAGE Encyclopedia of Qualitative Research Methods, *Textual Analysis,* SAGE Publications, Inc, 2012, page 2.

contracts will follow, in the following order: offer and acceptance, withdrawal and revocation, formal requirements, and incorporation of standard terms.

2. Swedish Contract Law

2.1 Introduction

Sweden belongs to the civil law family, which means the contract law is mainly based on legislation. Swedish contract law is based on contract law principles: party autonomy[9], freedom of contracts, and pacta sunt servandra. The freedom of contract is highly respected in Sweden; a party have the freedom to or not to enter into an agreement.[10] Pacta sunt servanda is a contract principle that means agreement shall be kept. In Swedish contract law, the offer-acceptance model is also a fundamental principle regulating how agreements are entered. It means that an agreement has been concluded when an offeror gives an offer that an offeree later accepts.[11]

Another element is the overall lack of formal requirements; a written form is only mandatory for specific contracts. Oral agreements enjoy the same legal protection as a written contract. Meanwhile, it is harder to prove that an oral agreement has been concluded. It is usually a good idea to put down terms and conditions in writing.[12]

2.2 Swedish Contracts Act

The first paragraph of the Swedish Contracts Act contains the most fundamental principle on which Swedish contract law is founded. Offers for the conclusion and responses to such offer shall be binding on the person who submitted the offer or acceptance.[13] This mechanism goes under the principle of promise, i.e., that the

[9] 'The freedom of parties to consensually execute arbitration agreement is known as the principle of party autonomy' Sunday A Fagbemi 'The doctrine of party autonomy in international commercial arbitration: myth or reality?', Vol. 6 No. 1 (2015).

[10] Regeringens proposition, 1975/76: 81 med förslag om ändring i lagen (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område, m.m., s 10.

[11] J, Ramberg & C, Ramberg, *Allmän avtalsrätt,* (tionde uppl., 2016, Nordstedts Juridik) 76.

[12] 6 J. Sustainable Dev. L. & Pol'y 222 (2015) The Doctrine of Party Autonomy in International Commerical Arbitration: Myth or Reality, accessed 4 May 2021.

[13] Swedish Contracts Act § 1.

offeror is unilaterally bound by his offer during the acceptance period while the offeree considers the offer. For a binding agreement to be concluded, there shall be an offer and acceptance corresponding to each other. When both parties are bound, it constitutes a binding agreement. Still, exception rules that govern the possibility to withdrawal or revoke are regulated in the 7 § Swedish Contract Act, presented later in the thesis.[14]

2.3 Conclusion of contract

In Sweden, the beginning of a contract starts with an offer to an offeree. Unlike other legal contract law, for example, English contract law, an offeror is not bound by his offer. Meanwhile, in Swedish contract law, the offeror is uniliteral bound by his offer, and the declarations of intent must correspond to each other in order to give rise to agreements.[15] Where the offeree dispatches the acceptance, after the specified time, the late acceptance is considered as a new offer.[16]

2.3.1 The offer and acceptance

Where the offeree gives the acceptance and assumes that it has arrived at the offeree's place at the right time, and if the offeror knows or should have known of the other party's response but does not want to accept the acceptance, without reasonable time, he has to inform the offeree thereof, if he fails to give notice, an agreement in accordance with the offeree's answer is concluded.[17]

The Swedish Contracts Act sets up rules governing the time period. The offeror who gives an offer is unilaterally bound by his offer, but the offeror can't be bound by his offer unreasonably long. Where an offeror gives an offer in an oral form, the offeree must be immediately accepted.[18] Where the offeror has not specified a specific time regarding the offer, the legal acceptance deadline applies.

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[14] A, Adlercreutz, L, Gorton, E, Lindell-Frantz, Avtalsrätt I, (14e uppl., Juristförlaget i Lund, 2016) 87.

[15] K, Grönfors & R, Dotevall, *Svensk avtalsrätt, en kommentar,* (fjärde uppl., Nordsteds Juridik, 2010) 49.

[16] Swedish Contracts Act, § 4, see also J, Ramberg & C, Ramberg, *Allmän avtalsrätt,* (nionde uppl., 2014, Nordstedts Juridik) 85.

[17] Swedish Contracts Act, § 4, second paragraph.

[18] Swedish Contracts Act, § 3, second paragraph.

When the legal acceptance deadline enters into force, the unwritten time must be reasonable. It can be considered onerous for the party who is unilaterally bound by his offer because, during that period, everything is in the offeree's hands to either accept or reject the offer.[19] In order to determine this time, two factors are to be taken into consideration: (1) how long time for consideration of the offer the offeree needs; and (2) how long time is reasonable for the offeror to be unilaterally bound.[20]

Through case law, it has been settled whether the Supreme Court has reasoned about the legal acceptance deadline where the offeror has not given a precise time frame. The Supreme Court held that it depends on the circumstances in the particular case regarding the time of consideration. Circumstances to be taken into account is the nature of the agreement, where greater urgency is required in the commercial relation. If the object is subject to price fluctuations, a higher requirement of greater urgency is present.[21]

For an agreement to be concluded within the offer-acceptance model, it is required that the acceptance will arrive within the legal or agreed acceptance deadline and correspond to the offer. An agreement will not be concluded if the acceptance is amended with additions, entirely or in part.[22] This change in acceptance constitutes a new offer to the original offeror.[23] Where a message arrives, which has the same character as an offer, such as completeness, precision, and addressee circuit, it does not have to constitute an offer within the law. It may be classified as an invitation to treat. [24] An invitation to treat is not legally binding. Still, the person who receives an invitation to treat who later offer an offer that corresponds with the invitation, the original offeror must, within a reasonable time, give notice to the offeree that an agreement has not entered into. Otherwise, the offeror, by not dispatches a response, he or she will become bound.[25]

[19] J, Ramberg & C, Ramberg, (n 11) 82.
[20] J, Ramberg & C, Ramberg, (n 11) 81–82.
[21] NJA 2004 s. 862.
[22] J, Ramberg & C, Ramberg, (n 11) 86.
[23] Swedish Contracts Act, § 6, second paragraph.
[24] Swedish Contracts Act, § 9.
[25] Swedish Contracts Act, § 9, second paragraph.

2.3.2 Withdrawal and revocation

The possibility to withdrawal an offer or acceptance is narrow in Swedish contract law.[26] It is possible to withdrawal an offer if the notice of withdrawal reaches the offeree before the offeree has taken a part of the original offer. The possibility goes both ways; if the offeree wishes to withdrawal his acceptance, the notice of withdrawal must reach the offeror before the offeror has taken part in the offeree's acceptance.[27] When it comes to revocation, there is slightly a difference. A withdrawal is possible, provided the notice reaches the offeree before the offeree has taken a part of the original offer. A revocation is possible even after the offeree has taken part in the original offer, but the notice of revocation must reach the offeree before he has dispatched the acceptance. Under the following circumstances, an offer cannot be revoked: (1) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (2) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.[28]

2.3.3 Enforceability by conduct

The main rule is that an agreement is concluded when the offeree to whom the offer is addressed accepts this offer, and the acceptance corresponds with the offer.[29] Swedish Contracts Act contains no provisions regarding the conclusion of contract except the offer and acceptance model. Meanwhile, the Swedish contract law has developed contract law principles during the years. In addition to the offer and acceptance model, there are other ways to enter into agreements. A usual to enter into an agreement is through conclusive actions. In a case where the tenancy has ceased, a landlord continues to receive rent and, for a long time, fails to apply for eviction, a new tenancy may arise.[30] According to the Supreme Court, the

[26] J, Ramberg & C, Ramberg, (n 6) 93.

[27] Swedish Contracts Act, § 7.

[28] United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 16. The Swedish Contracts Act does not provide regulation concerning revocation, instead Sweden applies CISG's regulation concerning the subject.

[29] Swedish Contracts Act, § 1.

[30] NJA 2008 s. 910.

landlord waited more than six months after the decision regarding the tenancy has ceased to request enforcement, which was more than enough.[31]

Another usual way to enter into an agreement is through passivity. A case regarding two parties had agreed to compensate a person. The parties had negotiated for a long time, and in the final letter to the party who would compensate, the letter contained "for signature", but it never got back to the sender with a signature. However, several payments were made to the person, but the amounts did not correspond to the agreed. The Supreme court held that the company had bound itself to the stated letter containing the signate through its passivity and without objection.[32]

Another contract principle is that an agreement can be concluded through actual actions, different from conclusive action. Actual agreements are a specific type of formal agreement, i.e., certain requirements must be fulfilled, where the agreement will not become binding before the performance occurs. It has been developed through case law, where a service had been purchased from a hospital. The performance must take place before the agreement become enforced.[33]

2.3.4 Formal requirements

The main rule in Swedish contract law is that agreement requires no formality. The agreement receives the same legal protection if it's written or in oral form. [34] The Swedish contract law contains dispositive rules, which means that the parties can agree otherwise, as long their agreement doesn't violate mandatory law. However, some exceptions require a written form of the agreement for it to become binding. Where a person purchases real estate, it is set by law to establish a written contract where the parties include information about the purchase price and an explanation by the seller that the realty is transferred to the buyer.[35] A person wishes to draw up a will, a written form is required, and two witnesses involved in the process can certify that the person in question has the power to

[31] Herre, J & Johansson O, S, *Svensk rättspraxis: Avtals- och obligationsrätt, 2005–2019,* SvJT 2020 s. 821.
[32] NJA 2006 s. 638, para 5.
[33]NJA 2011 s. 600, para 10.
[34] J, Ramberg & C, Ramberg, (n 6) 114.
[35] Swedish Land Code, chapter 4, § 1.

act.[36] A marriage between two people has no requirement in writing by law, but a prenuptial agreement has, where it must be dated and signed by the spouses or the future spouses.[37]

2.3.5 Incorporation of Standard term

The latest case which governs the incorporation rules is NJA 2011 s. 600[38]. In that case, the question of whether standard terms were part of the agreement arose. The main rule for a standard term to be incorporated is considered to be that standard terms must be brought to the attention of the counterparty before or at the conclusion of the agreement to become a part of the agreement.[39] Standard terms that have not been subject to individual negotiation, i.e., the standard term which the other party has not been given the opportunity to see or accept, it is required that the party who wants standard terms to be incorporated must take reasonable measures to draw the other party's attention to them at the latest in connection with the conclusion of the contract.[40] The Supreme court referred to soft law, such as Draft Common Frame of Reference, Article II.-9:103 (1)[41] , as a supplement where the Swedish Contracts Act does not provide statutory legislation regarding incorporating standard terms.

Three alternative ways have been established through case law for a standard term to be incorporated into the agreement between the parties: (1) when the standard terms are brought together with the individual negotiated terms in the same text, it is considered sufficient; (2) referred to by a reference clause, a clear reference to the back of the agreement; or (3) a clear reference is also required among the individual terms and conditions when the standard terms and conditions are contained in a specially attached document.[42]

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[36] Swedish Inheritance Code, chapter 10, § 1.

[37] Swedish Marriage Code, chapter 7, § 3.

[38] NJA stands for" New legal archive" Its prejudicial litigation from the highest court in Sweden.

[39] NJA 2011 s. 600, para eight.

[40] iBid.

[41] Art. II.-9:103 (1) "*Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded".*

[42] NJA 2011 s. 600 para 9, see also J, Ramberg & C, Ramberg, (n 11) 137, and U, Bernitz, *Standardavtalsrätt,* nionde uppl., 2018, Nordsteds Juridik, page 63.

When the standard term is classified as unexpected, surprising, and particularly onerous, stricter measures are required. Still, there is no formal requirement that the other party has taken part in the standard condition. [43] According to dispositive right, a particularly onerous standard term is unilaterally established by a party and puts the other party in an unfavourable situation. The most common onerous standard term is a disclaimer, which entirely or partially limits the liability for damages, errors in the equipment, or delays. When a party wants this type of condition in the contract, the main rule is the condition has been brought to the other party's knowledge, or the other party has otherwise known or is unaware of the condition.[44] In prior case law, an arbitration clause constituted a particularly onerous standard term.[45] In the later year, the Supreme Court has changed the legal matter. The Supreme Court held that the standard agreement became a part of the contract through reference to it. The Supreme Court also held that both parties were commercial actors, and no one took a weaker position. Each party could easily find out the content of the standard agreement.[46]

[43] NJA 2011 para nine, see also J, Ramberg & C, Ramberg, (n 11) 138.
[44] U, Bernitz, (n 37) 71.
[45] NJA 1949 s. 609, and NJA 1969 s. 258.
[46] NJA 1980 s. 46.

3. Chinese Contract Law

3.1 Introduction

China's earlier legal system was formerly governed by communism, where the State had a strong influence on the Chinese companies through state-owned enterprises. When foreign companies expanded their operations by establishing themselves in China, the State had to own part of the company, and it went under joint ventures. It resulted in the State deciding whom to contract with, what to contract about, and the terms of the contract through legal instruments. That is because the market lacked socialist features.[47] The purpose of this Code aims to protect all persons of the civil law in China. The law within this Code is formulated in accordance with the Constitution of the People's Republic of China to protect the lawful rights and interest of the persons of the civil law, regulate civil-law relations, maintain social and economic order, meet the needs for developing socialism with Chinese characteristics, and carrying forward the core socialist values.[48]

3.2 Historical background

Before the adoption of China's Civil Code, there was a strong need to create a uniform market economy, since prior 1999, before the National People's Congress of the People's Republic of China (NPC) adopted the Contract Law of China (CLC) the contract law was chaotic. China had several Contracts Acts dealing with different trade domains. These other Contracts Acts gave an overview of the need for a centralised planned economy, and at least three separate Contracts Acts existed, each containing several different requirements. This new legislation was entirely new for their previous attempt to make uniform legislation to enter the

[47] Hao Jiang, *The Making of a Civil Code in China: Promises and Perils of a New Civil Law",* (2020), Tulane Law Review, last revised 18 May 2021.

[48] Article 1.

World Trade Organisation (WTO).[49] Instead of having different contract laws that cover other trade domains, the purpose of CLC, which took effect in October 1999, was to improve uniformity and avoid confusion and uncertainty. Additionally, uniformity could also improve efficiency, an ultimate goal for the market economy, and modernisation and scientific innovations.[50]

Dr Wei Wen says one example of making uniformity legislation presented an article concerning the importance of legislating a uniform law. Dr Wei Wen claims that courts in different provinces have expressed contradictory decisions in urban areas, where some urban courts apply the writing for urban land sale contracts according to Urban Real Property Administration Law (URPAL). Other courts consider that the writing requirement contradicts the general informality rule because Contract Law outranks URPAL according to the hierarchy of laws where principles developed from Contract Law prevail.[51]

The prior legal system in China has been diversified and unstructured. It goes back to 551–479 BC, where the legal system was influenced by Confucius, who considered that judges and laws were an unnecessary mechanism to punish criminals. According to Confucius, commercial disputes should be resolved through ethical principles. In other words, humans should be governed by moral rules instead of legal rules.[52] But in recent years, China has changed focus and strive to become an industrial superpower. Therefore, I think China's Civil Code is an attempt, in one respect, to systematise and make a uniform contract law in China because this Code replaces primary legislation.

3.3 The Contract

A contract within the Code is an agreement on the establishment, modification, or termination of a civil juristic relationship between persons of the civil law. An

[49] Chen, F, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis,* (2001), Vol 27, No 1, Brooklyn Journal of International Law, page 154.

[50] Chen, (n 44)1 68.

[51] Dr. Wen, Wei, The Need for Certainty and Written Form in Land Sale Contracts in China: A Legal Reform Recommendation, Cardozo International Comparative, Policy & Ethics Law Review, February 9, 2019, page 385.

[52] Bodgan, Michael, Juridikens återupprättande I Kina, SvJT 1985.

agreement concerning marriage, adoption, guardianship or the like personal relationships shall be governed by the provision of law providing for such personal relationships. In the absence of such provisions, the provisions of this Book may be applied *mutatis mutandis*[53] according to the nature of such agreement.[54] A contract formed by the Code's provisions is protected by law, and a contract that is formed by law is legally binding only on the parties thereto unless otherwise is provided by law.[55] For agreements that are not explicitly provided in the Code or other laws, then the General Provisions of this Book shall be applied, and provisions provided in this Book and other laws on a contract which is most similar to the said contract may be applied *mutatis mutandis*.[56]

3.4 Conclusion of Contract

The first step on how the conclusion of the contract takes place by the Code is an expression to be bound to the contract. It starts with an offer, which is an expression of intent to conclude a contract with another person, and the expression of intent shall conform to the following conditions: (1) the content shall be specific and definite; and (2) it is indicated therein that his expression of intent binds the offeror upon acceptance thereof by any offeree.[57] To perform an expression of intent which constitutes a civil juristic act, the following conditions need to be satisfied: (1) the person performing the act has the required capacity for performing the civil juristic act; (2) the intent expressed by the person is true; and (3) the act does not violate any mandatory provisions of laws or administrative regulations, nor offend public order of good morals.[58]

Whatever the content of the contract is, it shall be agreed by the parties to be legally binding. A contract, according to China's Civil Code, should generally include the following clauses: name or designation and domicile of each party, objects, quantity, quality, price or remuneration, period, place, and manner of

[53] The Latin phrase for 'by changing those things which need to be changed'.
[54] Article 464.
[55] Article 465.
[56] Article 467, first paragraph.
[57] Article 472.
[58] Article 143.

performance, default liability, and dispute resolution.[59] For a model contract to be concluded into the contract, a reference is required by the contracting parties.[60]

3.4.1 Offer and acceptance

An offer is, as mentioned earlier, an expression of intent to conclude a contract with another, and it shall conform to the following conditions.[61] The main rule is that an acceptance shall be made by means of notice, except that an acceptance can be made by other means, such as performing an act of the parties' course or as indicated in the offer.[62] The Code sets up when an acceptance shall reach the offeror. It shall be reached the offeror within the time limit specified in the offer, where there is no time limit for acceptance in the offer, acceptance shall reach the offeror in accordance with the following provisions: (1) if an offer is made in real-time communication, the acceptance shall be made promptly; or (2) if an offer is not made in real-time communication, the acceptance notice shall reach the offeror within a reasonable period of time.[63]

When an offer is not made in real-time and not real-time communication, where it is made through a letter or telegram, the time limit for acceptance shall be counted from the date shown on the letter or the date the telegram is handed in for dispatch or, if no date is shown, the time limit for acceptance starts from the mailing date shown by the postmark of the letter. Where offers are made by means, such as telephone calls, facsimiles, or e-mail, the time limit for acceptance shall be counted from the moment the offer reaches the offeree.[64] The offer can be constituted as a new offer if the offeree proposes in the acceptance any material alteration that changes the content of the offer. A material alteration is described in Article 488 as an alteration concerning the object of the contract, the price or

[59] Article 470.
[60] Article 470, second paragraph.
[61] See 3.3 Conclusion of Contract.
[62] Article 480.
[63] Article 481.
[64] Article 482.

remuneration, the quantity, quality, period of performance, place and manner of performance, default liability, the methods of dispute resolution, or the like.[65]

3.4.2 Withdraw and revocation

An offeror may withdrawal his offer under certain circumstances according to the Code.[66] A person performing a civil justice act may withdraw an expression of intent. The notice of withdrawal of the expression of intent shall reach the counterparty before or at the same time with the counterparty's receipt of the expression of intent.[67] An offer may be revoked, unless under any of the following circumstances: (1) the offeror has explicitly indicated that the offer is irrevocable by specifying a time limit for acceptance or in any other manner; or (2) the offeree has reasons to believe that the offer is irrevocable, and the offeree has made reasonable preparations to perform the contract.[68] To revoke an offer in real-time communication, the expression of intent to revoke, the content of such expression of intent shall be known to the offeree before the offeree makes an acceptance. If an expression of intent to revoke an offer is not made in real-time communication, it shall reach the offeree before the offeree makes an acceptance.[69]

The difference between real-time and not real-time communication is that it shall be known and reach the offeree before the offeree accepts. An offer can be invalid under any of the following circumstances: (1) the offer is rejected; (2) the offer is revoked in accordance with law; (3) the offeree makes no acceptance during the specified time limit for acceptance; and (4) the offeree materially alters the content of the offer.[70] Article 141[71] applies to the withdrawal of an acceptance.[72]

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[65] Article 488.

[66] Article 475.

[67] Article 141.

[68] Article 476.

[69] Article 477.

[70] Article 478.

[71] 'A person performing a civil juristic act may withdraw an expression of intent. The notice of withdrawn of the expression of intent shall reach the counterparty prior to or at the same time with the counterparty's receipt of the expression of intent'.

[72] Article 485.

3.4.3 Formation of Contract

Formation of a contract comes about when an acceptance becomes effective unless otherwise provided by law or agreed by the parties.[73] Where an acceptance is made by means of notice, the time when the acceptance becomes effective shall be governed by the provisions of Article 137. Which says an expression of intent made in real-time communication becomes effective from the time the person to whom the intent is expressed is aware of its content. Where an expression of intent is made in a form other than real-life communication, it becomes effective from the time it reaches the person to whom the intent is expressed. If an expression of intent is made through an electronic data message and the person to whom the intent is expressed has designated a specific data-receiving system, it becomes effective from the time such a data message enters that system; where no data-receiving system is specifically designated, it becomes effective from the time the person to whom the intent is expressed knows or should have known that the data message has entered the system. Where the parties have agreed otherwise on the effective time of the expression of intent made in the form of an electronic data message, such an agreement shall prevail.

Where an acceptance notice is not required, the acceptance becomes effective when an act of acceptance is performed according to the parties' course of dealing or as indicated by the offer.[74] When contracting parties conclude a written agreement, the contract is formed at the time when both parties sign, stamp, or put their fingerprints on the memorandum. Where the contracting parties haven't signed the agreement, but where the party has already performed the principal obligation and the other party has accepted the performance, the contract is formed at the time of such acceptance.[75]

A contract is required to be concluded in writing by law or administrative regulations or agreed by the parties, and the parties fail to make the contract in writing, but one of the party has already performed the principal obligation, and the other party has accepted the performance, the contract is formed when the

[73] Article 483.
[74] Article 484.
[75] Article 490.

latter party accepted the performance.[76] Where the contract is concluded in the form of a letter, data message, or the like, and a confirmation is required, the contract is formed when the confirmation letter is signed. [77] The place where an acceptance becomes effective is the place where the contract is formed.[78] If the contract is concluded by other means, such as a data message, the recipient's principal place of business is the place where the contract is formed, and in the absence of a place of business, the recipient's domicile is the place where the contract is formed.[79] Where the parties conclude a contract in the form of a memorandum, unless otherwise agreed by them, the place where the contract is formed is where the contract is finally signed, stamped, or fingerprinted.[80]

The Code also contains regulation about contracts that constitute a preliminary contract, the parties can make a letter of subscription, letter of order, and a letter of reservation, where the parties agree to conclude a contract within a period in the future, and such a document then constitutes a preliminary contract.[81] Where one of the parties fails to perform the obligation to conclude a contract according to the preliminary contract, the other party can request the party breaching the contract bear the liability for the breach of the preliminary contract.[82] During the course of concluding a contract, the party that falls under any of the following circumstances and causes loss to the other party shall bear the liability for compensation: (1) under the guise of concluding a contract, engaging in consultation with malicious intentions; (2) intentionally concealing material facts or providing false information concerning the conclusion of the contracts; or (3) conducting any other acts contrary to the principle of good faith.[83]

[76] Article 490, second paragraph.
[77] Article 491.
[78] Article 492.
[79] Article 492, second paragraph.
[80] Article 493.
[81] Article 495.
[82] Article 495, second paragraph.
[83] Article 500.

3.4.4 Formal requirements

China's Civil Code has no formal requirements whether the conclusion of the contract is to be made. The contracting parties can either conclude a contract in writing, orally or in other forms, which indicated that Chinese parties have a wide range of freedom to conclude contracts. A party's product or service, which has been released through the Internet, constitutes an offer. An electronic contract will be formed once the other party selects the product or service and places the order, which constitutes an acceptance. In addition to the freedom to enter agreements freely, there are requirements in writing, provided by the Code, regarding particular types of contract, such as adopting a child[84], a holographic will[85], or a property management service contract[86].

3.4.5 Incorporation of Standard term

The Code regulates where a party has in advance a formulated standard clause for repeated use that has not been negotiated with the other party when concluding the contract.[87] This type of standard terms is common in other jurisdictions, like in English and Swedish contract law. This article protects the weaker party of the contract. When a contracting party is adopting a standard term in the contract, the party providing the standard clause shall observe the principle of fairness in defining the rights and obligations of the parties.[88] The same party shall call the other party's attention to the clause concerning the other party's major interest and concerns, such as a clause that exempts or alleviates the liability of the party providing the standard clause, and give explanations of such clause upon request of the other party. In circumstances where the party which provides the standard term fails to perform, the obligation of calling attention or giving explanations, thus resulting in the other party's failure to become aware of the clause concerning his major interest and concerns, the other party may claim that such clause does not become a part of the contract.

[84] Article 1109.
[85] Article 1134.
[86] Article 938.
[87] Article 496.
[88] Article 496, second paragraph.

When a dispute arises over understanding a standard clause, the Code sets up rules concerning the subject. The standard clause shall be interpreted in accordance with its common understanding. Are there two or more interpretations of a standard clause, the clause shall be interpreted in a manner unfavourable to the party providing the standard clause. Where a standard clause is inconsistent with a non-standard clause, the non-standard clause shall prevail.[89]

[89] Article 498.

4. English Contract Law

4.1 Introduction

English contract law is governed by common law. The common law system is judge-made law with very little legislation. The legal rules of the contract are found in particular cases. The judges in the United Kingdom are bound by the doctrine of stare decisis, which means "to stand by things decided"[90]. The judges in the United Kingdom follow the principles, rules, or standards of their prior decisions or decisions of higher tribunals when deciding a case with similar facts and similar circumstances. There are two types of aspects of stare decisis, horizontal and vertical. Horizontal stare decisis means the court will follow its prior decisions, and vertical stare decisis binds lower instances to follow strictly the decisions made by higher courts within the same jurisdiction.[91]

A usual and common way to view a contract is as an agreement covered by the force of law. In English contract law, the word contract, its derivation, and its common usage even outside the private law are founded on the parties' idea coming together in a mutual understanding or an agreement. It is essential to distinguish between enforceable and unenforceable transactions in English contract law. The enforceable agreement is covered with the force of law, which means the agreement falls within the protection of the law, covers rights and obligations to the parties, and is supported by remedies in the event of a breach of contract. Agreements that are not enforceable fall outside the protection of the law.[92]

There are two types of contracts in English contract law: unilateral agreements and bilateral agreements. In (1) unilateral contracts, the offeror is bound by his promise, for example, a person offers a reward for doing a certain thing for the

[90] The full Latin phrase is “stare decisis et non quieta movere - stand by the thing decided and do not disturb the calm”.

[91] Congressional Research Service, *The Supreme Court’s Overruling of Constitutional Precedent,* Legislative Attorney, page 4

[92] J, Carthwright, *formation and variation of contracts,* (2nd edition, 2018, Thomson Reuters) 56.

offeror; and (2) bilateral contract, where both parties are obliged to perform, for example, a party offers to pay the other party if the other party promises to perform a certain act. There is one exceptional situation where the contract can come into existence without any offer and acceptance. It goes under a promise of a deed, where a person establishes a deed, where he promises to donate a sum. This promise is binding no matter what.[93]

4.2 Freedom of Contract

The concept of freedom of contract follows two meanings. The first and most important one is the freedom of a party to choose or not to enter a contract, and whatever terms the parties may consider favourable to its interest. The other meaning refers to the idea that, as a general rule, there should be no liability without consent.[94] Each party in pre-contractual negotiations has the right to pursue their interest, so long as the parties avoid misrepresentation. The party is also entitled to withdraw without consequences from negotiations, i.e., each party is entitled not to enter a contract.[95]

Freedom of contract covers a set of powers, which is exercisable by individuals and legal entities. There is no general rule regarding when a party may withdraw from the negotiations. Each party has general freedom to enter into legally binding transactions and is free to walk away from a proposed deal. It is because parties during the negotiation do not owe each other any general duties, except for misinterpretation. To negotiate in good faith is not a requirement in English contract law.[96] The party can even stipulate that the contract will not be legally binding. A party also contains the power to formulate its terms within such a transaction or use standard terms. These exercise powers are presupposing that each party's purported consent is a free decision.[97]

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[93] J, Cartwright, *Contract Law, An introduction to the English Law of Contract for the Civil Lawyer,* (3rd edition, 2016, Bloomsbury) 33.

[94] J, Beatson, A, Burrows, J, Cartwright, *Anson's Law of Contract,* (31th edition, Oxford University, 2020) 4.

[95] N, Andrews, *Contract Law,* (2nd edition, Cambridge University, 2015) 22.

[96] J, Cartwright, (n 93) 113.

[97] N, Andrews, *Contract Rules, Decoding English Law,* Intersentia Ltd, 2016 page 3.

Is it common in other jurisdictions, like Swedish, German, and Israel, that the pre-contractual negotiations are covered by the general principle of good faith or fair dealing or a broader recognition of *culpa in contrahendo*[98]. This principle has gone from being a governing principle … applicable to all contracts and dealing with being a reaction by the majority and not a generally applicable principle in English contract law.[99] English lawyers consider good faith or fair dealing is an unattractively vague concept. It is up to the parties to decide which stage they wish to be bound by the agreement, even if the remaining terms agree between them. In *Pagnan Spa v. Feed Products Limited*, a company bought corn from an American company, and the contract was governed by English law. The parties had agreed on the price, product, quantity, and period of shipment. The Supreme Court held that the agreement had contractual force and could be enforced. The agreement had several remaining terms to be agreed between the parties, but the parties had started to carry out the performance.[100]

4.3 Definition of contract in English Contract Law

In English contract law, a contract is a promise or set of promises which the law will enforce, or a contract is an agreement giving rise to obligations that are enforced or recognised by law.[101] Sir William Anson, a British jurist, held that: '*a contract is an agreement enforceable at law made between two or more persons, by whom rights are acquired by one or more to acts or forbearances on the part of the other or others*'[102]. According to Sir John William Salmond, '*a declaration of the will of a person or the combined declarations of the wills of several persons, creating and defining a non-testamentary common law obligation or*

[98] Latin for "fault in conclusion of a contract".

[99] J, Munukka, *Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem*, Scandinavian Studies in Law, Vol. 48, s. 233–234.

[100] *Pagnan Spa v. Feed Products Limited* [1987] 2 Lloyd's Rep 601, 611, *per* Bingham J.

[101] Sweet & Maxwell, *Chitty on Contracts,* (*Volume 1, General Principles,* 1-016, Sweet & Maxwell Limited, 2012) 12

[102] Prakhar Jaiswal, *Contract and its essentials,* Law Times Journal, October 18, 2020, available at https://lawtimesjournal.in/contract-and-its-essentials/ , accessed 18 May 18, 2021.

obligations binding the declarant or declarants in favour of the person or persons indicated in that behalf in the declaration or declarations'[103].

4.4 The pre-contractual negotiation

Where the parties have not concluded the negotiations for their intended principal contract, they may, under certain circumstances, enter into a separate agreement, which is designated to govern some particular aspects of the negotiations. There are some well-established forms of pre-contractual contracts, for example, options contracts, right of pre-emption, and lock-out contracts, and the most common ones, letters of intent or comfort letters.[104]

The main rule in English contract law is that a pre-contractual undertaking is not legally binding, provided it is required by the parties to act in good faith, or reasonably, or using best endeavours when negotiating the terms of the prospective main agreement. But there are exceptions to this main rule where the agreements are legally binding in a pre-contracting stage: (1) an agreement for a fixed period to negotiate in a "friendly" or "reasonable" manner, at any time for a fixed period, if the negotiation clause exists to support an arbitration clause; (2) where an agreement for a fixed period to negotiate only with named parties and not with others; (3) an agreement to attempt to obtain planning permission or an export license; (4) and a mediation agreement.[105]

The court held in *Walford v Miles* that an agreement to negotiate in good faith or reasonable manner is void for uncertainty if the negotiation concerns a main prospective contract. The reason is that the requirements to negotiate in good faith or reasonable manner are too vague. The courts would be held responsible for examining inquiries into why the negotiation had broken down.[106] In a later case, this decision was acknowledged that *Walford v Miles* was binding authority for the proposition that an agreement to agree is not binding if it requires good faith,

[103] The Modern Law Review, Vol 9, No 2 (Jul., 1946), pp. 198–202, available at https://www.jstor.org/stable/1090575 , accessed 18 May 2021.
[104] J, Cartwright, (n 92) 26.
[105] N, Andrews (n 97) 16–17.
[106] *Walford v Miles* [1992] 2 AC 128 HL.

reasonably or best endeavours.[107] In *Barbudev v Eurocom Cable Management Bulgaria Eood,* the terms of the agreement were on two sheets, which stated that the agreement would be governed by English law. The claimant alleged that the parties had agreed that the claimant would receive 10 % shares in the newly formed entity. It was signed on a "side letter" by both parties but on "terms to be agreed". The court held that this "side letter" was not a legally binding agreement because it did not show that the parties intended to create legal relations. It referred to *Walford v Miles* that an agreement to agree is not legally binding.[108]

4.5 The Parol Evidence Rule

As mentioned earlier, English lawyers find the principle of good faith or fair dealing unattractive. Instead of that principle, and *culpa in contrahendo,* which other jurisdiction uses, English contract law provides the parol evidence rule. This rule prevents a party from including outside oral or written evidence to add to, subtract from, vary, or contradict the written terms in the contract. So, a party cannot refer to a draft or oral evidence or other aspects of changing the agreement's content in the pre-contractual negotiations.[109] The purpose of this rule is to promote certainty and to save time in litigations.[110] The parol evidence rule also prohibits evidence of prior negotiations to construe a written contract, and drafts will not be admitted altering the language of the contract or help its interpretation.[111]

4.6 Conclusion of Contract

In the absence of a contract code or a Contracts Act," the English contract law governs a contract's nature and definition. This includes the requirements of consideration, mistake, the content of contracts, the framework regarding illegal

[107] N, Andrews (n 97) 17.

[108] *Barbudev v Eurocom Cable Management Bulgaria Eood* [2012] EWCA Civ 548; [2012] 2 All ER (Comm) 963, at [46].

[109] N, Andrews (n 95) 324.

[110] J, Beatson, A, Burrows, J, Cartwright (n 94) 144.

[111] Sweet & Maxwell (n 101) 945.

agreements, the effect on the third party, and the remedies for breach of contract.[112]

To form a contract under English contract law, beyond agreeing, the contracting parties must have agreed on a sufficient of terms that the law can recognise as a contract. Not all terms have to be expressed in the contract, the purpose of implied terms is to fill the gap between the expressed terms. All terms do not have to be determined to conclude a contract, and the parties can have agreed on sufficient terms to conclude a contract under the law. That means that the parties can agree on the significant terms to be binding and detailed terms can be agreed upon later.[113] The parties can determine which terms are essential for the contract to be complete. For example, in a contract of sale of goods, the term which regulates price is essential for the contract to receive the enforceable effect.

In the case of *Gibson v Manchester City Council,* the City Council had adopted a policy of selling Council houses to its tenants. The city treasurer responded to a tenant that the City Council might be prepared to sell him the house at the purchase price…' and providing details of the mortgage. Following the local election, the Council's control passed from the Conservatives to Labor, where the Labor Council's new policy was that the houses would not be for sale. The House of Lords held that no binding agreement had been concluded, and the parties were not legally bound, as the Council's letter did not state the price, and it was not an offer but an invitation to treat.[114]

Invitation to treat originates from *Grainger & Sons v. Gough*. Whether the price list in a catalogue constituted an offer to sell wine at a specific price, the House of Lords held that the price list could not constitute an offer. Because interpreting the list as an offer would mean, in theory, that the seller would be obliged to deliver an unlimited quantity of wine at the stated price, this would not reflect the parties' intentions as the seller's merchant's stock is necessarily limited.[115]

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[112] Sweet & Maxwell, (n 101) 4–5

[113] J, Cartwright, (n 92) 61.

[114] *Gibson v Manchester City Council* [1979] 1 WLR 294.

[115] *Grainger & Son v Gough* [1896] AC 325 HL

4.6.1 Offer and acceptance

In English contract law, an offer is defined as "an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed”[116]. Acceptance can be defined as "the expression, by words or conduct, of assent to the terms of the offer prescribed by the offeror".[117] The reason is to determine whether an agreement has been concluded between the parties. During the negotiations, it is necessary to examine if there has been a definite offer by one party; and an equally definite acceptance of that offer by the other party.[118] A contract is usually formed by the exchange of an offer and acceptance between two parties.

The English contract law analyses the conclusion of a contract through the communicated intentions if there has been an offer made by one party, followed by an acceptance of the offer by the other party. Where the acceptance has arrived at the offeror and corresponds with the offer, an agreement has been concluded, and it is called the contract principle.[119] This principle is based on that a person can't unilaterally bind himself; therefore, in English contract law, it is common that an offer presumes remuneration in return by the offeree, not the performance itself, but a symbolic sum. It indicates that the offeree intends to become bound. This remuneration is called consideration. [120]

Where a contract is alleged to have been formed by the parties' communication, it is usually necessary to look to those communications to establish the agreement's existence and content.[121] For an agreement to become binding on the parties, each party must have an opportunity of considering. In a case regarding cross-offers, Mr Hoffman wrote an offer to sell 800 tons of iron to Mr Tinn, and Mr Hoffman requested a reply to this offer by post. On the same day, Mr Tinn wrote to Mr Hoffman to buy the iron on similar terms. The Court of Appeal held that Mr Tinns's offer was made simultaneously as Mr Hoffman's offer, which constitutes a

[116] J, Beatson, A, Burrows, J, Cartwright, (n 94) 35, 42.
[117] J, Beatson, A, Burrows, J, Cartwright, (n 94) 35, 42.
[118] J, Beatson, A, Burrows, J, Cartwright, (n 94) 31–32.
[119] J, Cartwright, (n 93) 103–104.
[120] A, Adlercreutz, L, Gorton, E, Lindell-Frantz, (n 14) 349.
[121] J, Cartwright, (n 92) 65.

cross offers, and without knowledge of one another, were not binding on the parties.[122]

4.6.2 Withdraw and revocation

The general rule is that an agreement is not fully complete until the acceptance has been communicated to the offeror. The English contract law does not distinguish between withdrawal and revocation; a revocation means the offeror withdraws an offer. The other party can expect an offer to be revoked or withdrawn before the acceptance has been communicated, provided the revocation is communicated before the acceptance arrives.[123] Where an offeror is granting the offeree time to enter into a contract, the offeror is free to withdraw his offer at any time until the moment when it is accepted. Even if the offeror has given the offeree a particular period of time to consider, the offeror is free to withdrawal his offer.

An agreement does not contain an expressed term regarding the time limit for acceptance. An offer contains an implied provision where the time limit will lapse if the offer is not accepted within a reasonable time. But until the offeree receives actual notice of withdrawal, the offeree is entitled to believe that the offer is still valid to accept.[124]

The offeror can't withdraw his offer when the offeror's acceptance has been communicated back to the offeror. Still, until the offer is accepted, no legal rights and obligations are created, and it may be withdrawn at any time. Withdrawal of the offer may be concluded in two rules: (1) an offer can be revoked at any time before acceptance[125] and; (2) the offer is made irrevocable by acceptance.[126]

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[122] *Tinn v Hoffman & Co* (1873) 29 LT 271, 277 (Grove J, obiter)

[123] J, Beatson, A, Burrows, J, Cartwright, (n 90) 54.

[124] J, Cartwright, (n 93) 113.

[125] Supported in Payve v Cave (1789) 3 T.R. 148; 100 E.r. 502 “where the court held that an offer can be revoked at any time before acceptance”.

[126] J, Beatson, A, Burrows, J, Cartwright, (n 94) 54.

4.6.3 Enforceability by conduct

A commercial contract is presumed to be legally binding between the parties. In *Edwards v Skyways Ltd,* the question arose whether there was an intent to create legal relations and obligations in the agreement. The Court of Appeal held that an agreement is reached between commercial actors and not in a domestic or social context. It is presumed the parties intend to create legal relations, and their legal relations should be affected. It is up to the other party to prove that they expressly intended to create a mere moral agreement and not legal obligations.[127] The commercial presumption is only applicable if there is an expression or apparent promise.[128]

Two parties carry on long negotiations. It is challenging to identify when an offer and an acceptance has been made. During the negotiation, each party may make concessions or new demands. Courts, in this case, must look at the whole correspondence between the parties and decide whether the parties had agreed on the same terms.[129] A contract may be concluded after the expiration of a letter of intent. When the letter of intent expired, the negotiations continued, and the issue arose whether a continuing contract or a new contract had been formed upon expiry. In the case *RTS Flexible System Ltd v Molkerei Alois Müller,* a question arose if a contract is valid despite containing a "subject to contract" clause. The parties had begun to perform their obligations. The Supreme Court held that where a contract is negotiated "subject to contract" and the parties start to perform before the final agreement is executed, it depends on if the parties have waived the subject to the contract term. If the parties agreed to waive the subject to a contract clause and the parties start to work, it would be no commercial sense to make the contract void.[130]

[127] *Edwards v Skyways* [1969] 1 WRL 349.
[128] N, Andrews, (n 95) 165.
[129] Sweet & Maxwell, (n 101) 188.
[130] *RTS Flexible System Ltd v Molkerei Alois Müller* [2010] UKSC 14.

4.6.4 Formal requirements

English contract law recognises two types of contract, a contract by deed and a simple contract.[131] As the main rule, there are no specific formal requirements to form a contract; it is formed by the agreement of the parties, usually established by the acceptance by one of an offer made by the other.[132] But the English contract law provides specific formality rules regarding the formation of a specific contract. The Statute of Frauds contained many rules that required writing by way of evidence to enforce specific contracts. But most of these have now been repealed, but the remaining part, sector four, requires writing to become protected by law. Section four regulates the contract of guarantee, marriage, transfer of an interest of the land, and will. If the requirements are not met, there is no contract, provided there is an agreement between the parties which satisfies the general rules governing the formation of the contract, such as offer and acceptance.[133]

4.6.5 The Deed

For a deed to exist, an instrument must make it clear on its face that it is intended to be a deed, either by the person making it or the parties to it.[134] A deed contains a promise or an agreement typically, and it becomes enforceable by the formality of the deed. Same as an offer, which is not legally binding, a promise is neither because it is not supported by consideration.[135]

4.6.6 Simple Contract

For a simple contract to be enforceable, the agreement needs to be supported by consideration by the parties. A one-way consideration does not constitute a valid contract, and it requires both parties to include consideration. In *Currie v Misa* the court held that consideration could consist either in some right, interest, profit, or benefit accruing to the promisor, and some forbearance, loss or responsibility, given, suffered, or undertaking by the promisee. Since there can be no legal

[131] J, Beatson, A, Burrows, J, Cartwright, (n 94) 77.
[132] J, Cartwright, (n 92) 136, see also J, Beatson, A, Burrows, J, Cartwright, (n 94) 77.
[133] J, Cartwright, (n 93) 126–127.
[134] J, Beatson, A, Burrows, J, Cartwright, (n 90) 78.
[135] J, Cartwright, J, (n 93) 127.

contract unless there is a consideration in the form of a benefit gained or detriment suffered agreement by the parties.[136]

4.6.7 Incorporation of Standard terms

A document contains standard terms; a person signs it, even though the person has not read the standard terms, is usually bound by the term in question. There are three exceptions: (1) the party's signature is included by misrepresentation; (2) a party claims *non est factum*[137]; and (3) where the document does not have an effect.[138] English contract law provides rules for a term to become binding as a part of the contract. The party must bring the standard term to the other party's notice before the conclusion or when the contract is concluded.[139] In the case, *Olley v Marlborough Court Ltd,* a guest, Mr Olley, in the defendant's hotel was deprived of her property. Mrs Olley sought damages in negligence. The defendant held that the proprietors would not be held responsible for any items lost or stolen unless handed in for safekeeping. The Court of Appeal held that a contract was concluded at the reception desk where the guest did not have an opportunity to take part in the contract term, sense the notice purporting was not visible until the guests entered the bedroom where the standard term was displayed.[140]

Another case about incorporating standard terms is *Hollingworth v Southern Ferries*, where the claimant went on a holiday with her friend who arranged the trip. The friend received the defendant's brochure, which stated that the ferry company's conditions of the carriage were printed inside the ticket covers. Within this condition, a general exclusion clause was contained. Supreme Court held that the defendants had not shown the claimant the brochure at the time or before the contract was made. The claimant's friend knew and had also seen the brochure. As a result, the conditions of carriage would be included on the ticket covers, but this was not sufficient to incorporate the conditions of the carriage into the contract

[136] *Currie v Misa* (1874) LR 10 Ex 153.

[137] Latin for ”it is not my deed” - is a defense which may be available to someone who has been misled into signing a document which is fundamentally different from what he or she intended to execute or sign, <http://www.austlii.edu.au/au/journals/UWSLawRw/2009/4.pdf> accessed 13 April 2021.

[138] J, Beatson, A, Burrows, J, Cartwright, (n 94) 185.

[139] J, Beatson, A, Burrows, J, Cartwright, (n 94) 185.

[140] *Olley v Marlborough Court Ltd* [1949] 1 KB 532.

itself. Supreme Court held that a statement in a brochure is not the same as seeing the conditions at the time of the conclusion of the contract. For a party to include a term into the contract, the term on the printed notice must have been drawn to the other party's attention at the same time of the conclusion or before the agreement is entered. [141] Another case in which the incorporation of an exclusion clause was invalid is *Thornton v Shoe Lane Parking Ltd.* The Court of Appeal held that the defendant had not done enough to bring the existence of the terms to the claimant's attention before the contract formation. The offer contained within the notice of the entrance and the exclusion clause was placed on the ticket machine. Therefore, it was too late to incorporate the exclusion clause into the contract. [142]

Three rules have been established in *Parker v South Eastern Ry Co* whether the standard terms will bind the person: (1) A person receiving a ticket without seeing or knowing that there was any writing will not be bound; (2) a person who knows there was writing and knows, or believes that the writing contains conditions, is bound by the conditions; and (3) a person who knows that it is written on the ticket, but have no awareness or believes that the writing contains conditions, will be bound, even though the delivery of the ticket, in such manner, the writing could be noticed, is reasonable notice that the writing contained conditions.[143]

For a party that invokes a standard clause that constitutes an onerous or unusual standard clause, stricter measures are required by the party who has presented the standard term, such as fairly, to bring it to notice of the other party.[144] In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd,* there is a dispute regarding a holding fee of £5 per day. At the time of the contract's conclusion, no copy of the seller's conditions had been sent. Even where a document been dispatched, the Stiletto Visual Programmes had not taken sufficient measures to communicate their onerous terms. The Court of Appeal held where a clause is particularly onerous (the fee was exorbitant at ten times the level of other photographic

[141] *Hollingworth v Southern Ferries Ltd* [1977] 2 Lloyd's Rep 70.

[142] *Thornton v Shoe Lane Parking Ltd* [1971] QB 163.

[143] *Parker v South Eastern Ry Co* [1877] 2 CPD 416, 421, 423, see also J, Beatson, A, Burrows, J, Cartwright, (n 94) 186.

[144] J, Beatson, A, Burrows, J, Cartwright, (n 94) 188.

libraries), the party providing and relying on the clause must have taken reasonable steps to bring the clause to the other party's attention. [145]

[145] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

5. Comparison between Swedish and English contract law with Chinese contract law

5.1 Introduction

In this chapter, the comparison between the different contract law versus Chinese contract law will occur, and the similarities and differences will be highlighted. Although the Chinese choose to name this piece of work to China's Civil Code, it necessarily does not have to mean it only correspond with Swedish contract law. The material presented in the thesis shows that some articles concerning the conclusion of the contract correspond with Swedish contract law and English contract law. There are essential differences between Swedish contract law and English contract law to conclude a contract. Because the Code is new, detailed, and updated, it seems to have acquired various parts of the conclusion of contracts from other countries domestic legislation but simplified and codified them into a common code to make it attractive legislation on the world trade.

5.1.1 Pre-contractual negotiations

The Code set up rules concerning liability while concluding a contract. The party that falls under the following circumstances and causes loss shall bear the liability for compensation. A party shall bear the liability for payment, provided the party violates through engaging in consultations with malicious intentions, intentionally concealing material or providing false information or violates good faith, which means to uphold honesty and honor commitments.[146]

The English contract law follows that no obligations arise during negotiating. Parties are free to walk away at any time of the negotiation. Even if they cause damage during the negotiation to the other party, the party is not being held liable.

[146] Article 500.

The Swedish contract law includes *culpa in contrahendo*. A contract principle regarding causing damages to the other party during the negotiations. A party can be held liable to pay damages to the other party. However, a party is free to withdrawal from negotiations, which follows from the freedom of contract. If a party has laid out costs for the purpose to perform, and the other party withdraws from negotiations, the other party may be held liable and compensate the party for the same amount, provided in the course of concluding a contract has had been handle with care.

This article concerning liability corresponds to a large extent with Swedish contract law, where the parties may be held liable for causing loss during the contract negotiation. To regulate liability in their Code indicates that agreement must be kept, corresponding with pacta sunt servanda. China has incorporated this contract law principle into their Code. While concluding a contract, parties would be aware of the risks to compensate the other party.

5.1.2 Offer and acceptance

The main rule in China is that the parties may conclude a contract by making an offer and acceptance or other means, which gives the parties freedom to conclude a contract that suits the parties. The offer constitutes an expression of intent to conclude a contract with another person. This expression of intent shall contain two conditions: (1) the content shall be specific and definite; and (2) it is indicated therein that the offeror is to be bound by his expression of intent upon acceptance. English contract law follows an offeror is not unilaterally bound by his offer. The offeror becomes bound by his offer when the offeree has accepted the offer. In addition to the offer and acceptance, consideration is required between the parties. Each party must have had an opportunity of consideration to entering into an agreement.

The parties become bound when the final document is signed by signature, stamp, or fingerprints on the memorandum. Also, when the offeree accepts the offer from the offeror, each party become bound. On the contrary, in Sweden, where his offer unilaterally binds the offeror, provided the offeror has given the offeree a specific time period to evaluate the offer.

The Code's wording, where his expression of intent upon acceptance binds the offeror, indicates that the Code corresponds with English contract law, mainly for the offeror becoming bound upon acceptance. In which the offeror becomes bound when the offeree accepts the offer.

But simultaneously, Swedish contract law set out the condition intended to be bound to conclude a contract. This expression of intent could also correspond with the Swedish contract law. Meanwhile, the Code does not regulate whether the acceptance must have reached the offeror to become binding explicitly, but upon acceptance may involve that the acceptance has reached the offeror.

5.1.3 Withdraw and revocation

The Code regulates how an offer may be withdrawn or revoked. A person may withdraw an expression of intent, and the notice shall reach the counterparty before or at the same time with the counterparty's receipt of the expression of intent. Regarding revocation, a party may revoke his or her offer, unless under any of the following circumstances: (1) the offer has explicitly indicated that the offer is irrevocable by specifying a time limit for acceptance or in any other manner; or (2) the offeree has reasons to believe that the offer is irrevocable, and the offeree has made reasonable preparations to perform the contract. This approach corresponds with Swedish contract law, where a party may withdraw their offer, provided the notice of withdrawal reaches the offeree before the offeree takes part in the original offer. And a party may revoke his or her offer, provided the notice of revocation reach the offeree before the offeree dispatches the acceptance, which means the offeree may have taken part in the offer, and revocation is valid.

English contract law set up rules regarding revocation, where a party is free to withdrawal/revoke at any time before acceptance, even if the offer was expressed to be open for a particular time period.

Chinas part of the conclusion of the contract corresponds with Swedish contract law, where withdrawal is possible if the notice of withdrawal reaches the offeree before or at the same time. Under the following circumstances, an offeror cannot

withdrawal its offer if a fixed time for acceptance or reasonable for the offeree to rely on the offer as irrevocable, and the offeree has acted in reliance on the offer.

The Code regulates similar concerning revocation as Swedish contract law regulations. The Code uses the phrase “the offeree has reasons to believe that the offer is irrevocable, and the offeree has made reasonable preparations to perform the contract”. The first sentence in the Code corresponds with Swedish contract law regarding revocation. The second sentence is formulated different but includes the same purpose. Acted in reliance on the offer, which Swedish contract law states, and the offeree has made reasonable preparations to perform the contract, which the Code says. The Code also consists of the word reasonable preparations. This word may create differences when interpreting the article. Still, for a foreign jurist, the wording of the article in the Code would correspond with their understanding of acted in reliance.

5.1.4 Formal requirements

The main rule in China is that a party can conclude a contract in writing, orally, or in other forms. A party is free to choose the form of the contract. A written form according to the Code refers to any form that renders the content contained therein capable of being represented in a tangible form, such as a written agreement, letter, telegram, telex, or facsimile. The Code regulates even when a data message is involved. A data message shall be deemed as writing when the content therein can be represented in a tangible form and accessible for reference and use at any time. It is not a formal requirement for a data message has to be in writing it is only deemed to be classified as writing. For the Swedish contract aw and English contract law, there are no significant differences concerning formal requirements. If a specific type of contract is required to be in writing, the given article will provide it, such as adopting a child[147], a holographic will[148], or a property management service contract[149].

[147] The Code, Article 1109.
[148] The Code, Article 1134.
[149] The Code, Article 938.

The main rule in the other contract law is that an agreement has no formal requirements, and the Code set up the same regulation. One difference that arises and deviates from the other contract law is "or in other forms", expressed in their legislation. But in other forms, in addition to writing and oral, it is implied in both Swedish and English contract law. The Code attempt to cover newly developed ways as the Code has regulated in their legislation of data messages. Data messages in the other legal system have probably been up for litigation in case law, but it is not statutory yet.

5.1.5 Incorporation of Standard term

Both Swedish contract law and English contract law have their mechanism for incorporating standard terms, mainly because this type of contract law is not statutory. It has been developed through case law in both legal systems. According to Swedish case law, a standard term to be incorporated must be brought to the attention of the counterparty before the conclusion of the agreement. In English contract law, a term must become binding as a part of the contract, and the standard term must be brought to the notice of the contracting party before the conclusion or when the contract is made. Each contract law requires that the other party who provided the standard term must bring the standard term to the other party's attention before or at the same time when a contract is concluded. The principle is the same, in which the standard term has not been subject to individual negotiation. It is required that the party who provides the standard terms needs to have taken reasonable measures to draw the other party's attention to it.

The Code sets up a definition of a standard term as a standard clause. Both Swedish and English contract law defines it as a standard term, but the purpose is the same. According to the Code, a standard clause is a clause formulated in advance by a party for the purpose of repeated use, which has not been negotiated with the other party when concluding a contract. How the incorporation procedure looks like, the party providing the standard clause shall determine the parties' rights and obligations in accordance with the principle of fairness. The party providing the standard clause shall also, in a reasonable manner, call the other

party's attention to the clause concerning the other party's major interests and concerns. Where a party providing the standard clause fails to perform the mentioned above obligation of calling attention or giving explanations, which results in the other party's failure to pay attention to or understand the clause concerning his major interest and concerning, the party receiving the standard clause may claim such clause does not become part of the contract.

To determine the parties' rights and obligations in accordance with the principle of fairness deviates from other contract law. The principle of fairness is explained in article 6 of the Code, saying, "when conducting a civil activity, a person of the civil law shall, in compliance with the principle of fairness, reasonably clarify the rights and obligations of each party". This article is new for foreign jurists and people in business when the Code incorporates the principle of fairness and the other party's major interest and concerns in their legislation.

6. General remarks and reflections

The Code corresponds with both Swedish contract law and English contract law in particular aspects. Regarding liability, during negotiations, the Code corresponds with Swedish contract law. Offer and acceptance in the Code correspond with English contract law wherein it is indicated since his expression of intent upon acceptance binds the offeror. Before the offeree has accepted the offer, the offeror is not bound. The aspect of withdrawal and revocation in the Code corresponds with Swedish contract law. One significant difference is the offeree has made reasonable preparations to form the contract. The English contract law set up rules only where withdrawal is possible before the offeree dispatches the acceptance. Formal requirements are the same in all different contract laws. An agreement can be concluded in written or oral form, but the Code advances and regulates data messages because digitalisation outranks previous communication methods.

It is common that English contract law is often used as applicable law if parties argue which law will govern the contract. Sweden Arbitration Institute is attractive for foreign companies if their contract contains an arbitration clause.

Could the purpose be with China's new civil Code to try competing with the other legal contract law for concluding agreements and thus make this Code the primary legislation when purchasing or selling goods. Or is the idea to make China's legislation regarding how contracts are concluded attractively and that other countries draw inspiration and apply China's contract law in their national legislation.

As a conclusion of the presented material, China’s new civil Code corresponds with Swedish contract law and English contract law to a large extent. For foreign people, the Code can be seen as a simplification of the other countries contract law. The Code could have based its legislation on the principle of good faith, which is placed as Article 6. Further examining would be interesting in the Code’s different areas of law to see how updated this Code is. One example that the thesis

noticed is a holographical will. How does the Code regulate artificial intelligence compared with other legal systems?

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