The Comparative Studies of the Contract Law of the PRC from Civil Law Perspective - What the PRC and Japan, Germany or France Can Learn from Each Other -

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I Introduction

The Uniform Contract Law of the People's Republic of China (hereinafter referred to as "the PRC") was adopted at the Second Session of the Ninth Na-

tional People's Congress on 15 March 1999 and took effect on 1 October 1999 as the first uniform legislation governing contracts in the PRC[1] (hereinafter referred to as "Contract Law". Please refer to **Attachment I**).

First of all, this Contract Law is significant for its unification of the three pre-existing contract related laws: i.e., Economic Contract Law[2], Foreign Economic Contract Law[3] and Technology Contract Law[4]. Since Deng Xiaoping adopted the policy for the PRC to take off toward the more decentralised, market-oriented, incentive based economy in 1978[5], the PRC has made efforts to modernise the law regarding contracts including the enactment of these contract-related Laws. However, those three laws are heavily overlapping and inconsistent, which caused a serious confusion. In addition, the differential treatment of civil contracts and economic contracts, as well as domestic contracts and foreign economic contracts has been an obstacle for establishing a market-oriented economy[6]. Not only for the realising market-oriented economy but also for the accession to the WTO[7], there has been a strong need to change this chaotic state of contract law[8]. In this sense, the Contract Law may well be rec-

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[1] Mo Zhang, "Freedom of Contract with Chinese Legal Characteristics: A Closer Look at China's New Contract Law", 14 Temp, Int'l & Comp. L.J.237 (2000), at 238.

[2] Adopted 13 December 1981 at the Fourth Session of the National People's Congress and amended 2 September 1993.

[3] Adopted 21 March 1985 at the 10th Session of the Standing Committee of the 6th Session of the National People's Congress.

[4] Adopted 23 June 1987 at the 21st Session of the Standing Committee of the 6th Session of the National People's Congress.

[5] Donald L. Grace, "Force Majeure, China & the CISG: Is China's New Contract Law a Step in the Right Direction?" 2 San Diego Int'l L.J. 173 (2001).

[6] Zhong Jianhua and Yu Guanghua, "China's Uniform Contract Law: Progress and Problems", 17UCLA PAC, BASIN L.J. 1 (1999), at 3.

[7] The PRC's accession to the World Trade Organization was authorised on 11 December 2001.

[8] Feng Chen, "The New Era of Chinese Contract Law: History, Development and A Comparative Analysis", 27 Brooklyn J. Int'l L. 153 (2001), at 155.

ognised as a remarkable achievement as the first attempt to establish consistent and comprehensive contract law regime.

Second, the Contract Law provides for large extent of parties' autonomy and the freedom of contract[9], which had not been available in the old contract law regime and therefore the old contract laws had allowed the intervention of the government largely.

Third, the Contract Law that is one of the youngest contract laws in the world can take benefit of the fruits of the latest international development of contract law studies and practice. First, the Contract Law provides for the provisions that are not available in contract law of other civil law jurisdictions because the rules realised by those provisions are too new concepts for those countries to codify at the time of legislation, which took place a long time ago. For example, Article 42 of the Contract Law provides for the liability for damages incurred during the course of concluding a contract (*Culpa in Contrahendo* or Pre-contractual liability). Although the courts and scholars have long recognised this rule, the relevant provision are rarely found in the statutes of other civil law jurisdictions[10].

Second, the Contract Law has adopted many provisions from international harmonisation of contract laws including international treaties and conventions[11] such as United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "CISG")[12] and 1996 Model Law of Electronic Communication of the United Nations Commission on International

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[9] For example, Article 4.

[10] John Bell, Sophie Boyron and Simon Whittaker, PRINCIPLES OF FRENCH LAW, (1998), p 308; Nigel G. Foster, GERMAN LEGAL SYSTEM & LAWS, (1993), P261; KITAGAWA, Zentaro, et al. (eds.) DOING BUSINESS IN JAPAN, (Originally 1980, revised 2001) at 5-82.

[11] Supra Note 1, at 240.

[12] For example Articles 17, 18 and 31 correspondingly follow Articles 15(b), 16(a) and 19(a) (b) of CISG..

Trade Law[13].

However, the Contract Law still remains far from satisfactory for the following reasons:

First of all, the legislators of the PRC seem to lack systematic understanding of the whole civil law structure seriously enough to have failed to properly locate the Contract Law within the whole civil law regime.

Second, in order to establish a consistent civil law regime, General Principles of the Civil Law[14] (hereinafter referred to as "GPCL", Please refer to **Attachment II**) should also have been amended. As a result of not doing this, the Contract Law has many duplicative, inconsistent and even contradictory provisions in relation with the GPCL.

Third, even within the provisions of the Contract Law, there are many contradictions and some provisions lack feasibility and rationality.

The objective of this dissertation is to analyse the above problems and to suggest a proposal for the amendment to the Contract Law not only in terms of structure but also regarding individual problematic provisions. In order to do so, I will refer to the contract laws of other civil law jurisdictions, namely France, Germany and Japan. Particularly, Japanese Civil Code whose provisions are very close to the Contract Law, but are sophisticated enough to have greatly contributed to the economic development of Japan, surprisingly without any substantial amendment for these more than one hundred years[15]. However, an attention must be paid to the point that the comparative perspective would not

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[13] For example, the provision of Article 11 indicates consideration into 1996 UNCITRAL Model Law.

[14] Adopted 12 April 1986 at the Fourth Session of the Sixth National People's Congress to the effect on 1 January 1987.

[15] Except that provisions which became inconsistent with the newly adopted Constitutional Law after the World War II, such as the provision regarding "incompetency of a wife" were abolished in 1940s or 1950s.

only help criticise the Contract Law but also figure out the superiority of the Contract Law over the law of other countries in some areas.

In **II**, I will analyse structural problems from comparative law perspective including the need for the adjustment of the provisions of the Contract Law with those of GPCL. In order to do this, I will classify the provisions of the Contract Law in accordance with the systematic way inspired by the Civil Codes of other civil law jurisdictions. This approach will also clarify the significance of the existing provisions from comparative perspective. Therefore, I will make some comments on the evaluation of the relevant provisions. Sometimes I will criticise and sometimes appreciate the achievements of the Contract Law compared with the other jurisdictions' civil codes. At the end of this Chapter, the proposal for the amendment to the Contract Law will be presented. In **III**, the problems regarding contents of provisions of the Contract Law will be discussed.

II The Structure of Contract Law

1. Importance of Structure of Statutes – Why the Structure of the Contract Law should be Compared with the Laws of Other Civil Law Jurisdictions?

There has long been a futile debate on whether the Contract Law belongs to the civil law system[16] (or continental law system, hereinafter referred to as "civil law system") or the common law system[17]. No one opposes to the argument that the law of the PRC is not based on a case law system, but on statutes[18]. Nevertheless, nobody argues that the Contract Law is a purely civil law

[16] Civil law system is widely understood as the Roman law-influenced continental-European legal system, which is heavily based on statutes.

[17] Common law system is recognised as the body of law derived from judicial decisions, rather than from statutes (Black's Law Dictionary).

[18] Lutz-Christian Wolff and Bing Ling, "The Risk of Mixed Laws: The Example of Indirect

system, because the Contract Law adopts the concepts borrowed from common law system, such as indirect agency[19] and anticipatory repudiation[20]. In order to consistently explain those phenomena, some argue that it is an independent branch of law in both the common law and civil law tradition[21], while some call it a hybrid of civil and common law literature[22].

However, today, in the era of extensive development of globalisation, no single law can stand without influence of law of the other countries. In addition, the rapid growth of international economic transactions has promoted the international harmonisation such as CISG and thus greatly influences the legislation of each of member countries. The Contract Law is not an exception. It contains many provisions directly following CISG as discussed in **I**.

The creation of mixed laws must be not merely a "legislative cherry picking", but a very careful "assembling" in order to maintain consistent structures and to avoid systematic confusion[23]. In order to do so, the most important thing is to clearly recognise which part of the Contract Law is based on the civil law system and which provisions are borrowed from the common law system. Based on this classification, the consistency of each part shall be reviewed from the comparative perspective ; i. e ., the part based on the civil law system shall be evaluated in comparison with other countries' law of civil law system whereas the provisions adapted from the common law system shall be reviewed referring to other common law system.

I observe that the Contract Law adopts the structure and framework fol-

Agency under Chinese Contract Law", 15 Colum. J. Asian L. 173 (2002), at 177.

[19] Id.

[20] Wang Liming, "China's Proposed Uniform Contract Code", 31 St. Mary 's L.J.7 (1999), at 18. Mo Zhang, Supra note 1, at 239.

[21] John S. Mo, "The Code of Contract Law of the People's Republic of China and the Vienna Sales Convention", 15 Am. U. Int'l L. Rev. 209 (1999).

[22] Supra note 1, at 239.

[23] Supra note 18, at 175–176.

lowing the civil law system, whereas individual provisions are derived from both the civil law system (most of the provisions fall into this classification) and partially from the common law system or CISG.

The whole structure of civil law regime of the PRC belongs to the civil law system. One of the most significant characteristics of the civil law system is its comprehensiveness that can cover most of legal relationships. Such comprehensiveness is facilitated by two kinds of classification of law; i.e., horizontal classification and vertical classification of law. First, all the legal relationships must be classified precisely according to their features so that any inconsistency, redundancy or confusion can be avoided. Some relationships are related to transactions, while some are related to family relationships. Furthermore, a certain relationship is regarding a "real right or right in rem (物権 Wuquan)", whereas another relationship is involved in a "Obligation-right or right in personam (債権 Zhaiquan)". Although this classification is common in most of civil law jurisdictions, the PRC legislators, until recently, had intentionally avoided using the terminology of "real right (物権 Wuquan)"[24]. I suppose it is because of the government's concern that calling land use right "real right (物権 Wuquan)" might raise the politically sensitive suspicion concerning the consistency with the policy of the denial of private ownership system. However, in March 1998, the PRC government organised the Committee for Drafting of Civil Law composed of the nine prominent scholars including Liang Huixing and entrusted them to draft "Real Right Law" [25].

Accordingly, Japanese Civil Code (Please refer to **Attachment III**)[26] has

[24] For example, there is no terminology of 物権 in GPCL. Oda Misako, THE PRC LAND USE RIGHT AND OWNERSHIP, (2002), p105.

[25] The final draft was published as DRAFT OF THE PRC REAL RIGHT LAW - PROVISIONS, EXPLANATION, REASONINGS AND REFERENCE LAWS (中国物権法草案建議稿・条文、説明、理由與参考立法例), (edited by Liang Huixing, 2000).

[26] Japanese Civil Code was enacted in 1898.

five Books namely: I General Principles[27]; II Real Right (物権 Wuquan)[28]; III Obligation-right (債権 Zhaiquan)[29]; IV Family[30]; and V Succession[31].

The structure of German Civil Code (Please refer to **Attachment IV**)[32] is similar to that of Japanese Civil Code, in that it is composed of Book I: General Principles[33]; Book II: Obligation-right[34]; Book III: Property[35]; Book IV: Family[36]; and Book V: Succession[37]. This is not surprising at all because the structure of Japanese Civil Code was modelled after that of German Civil Code while both French Civil Code (Please refer to **Attachment V**)[38] and German Civil Code influenced the content of it. That is why Japanese Civil Code is thought to "wear German judicial robe."[39] Both German Civil Code and Japanese Civil Code precisely follow "Pandekten System"[40] originated in Roman Law. French Civil Code is also divided into Book I: Persons[41]; Book II: Property and Different Types of

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[27] Articles 1 to 174-2 of Japanese Civil Code

[28] Articles 175 to 398-22

[29] Articles 399 to 724

[30] Articles 725 to 881

[31] Articles 882 to 1044

[32] German Civil Code (Das Burgerliches Gesetzbuch: BGB) was effectuated in 1900.

[33] Articles 1 to 240.

[34] Articles 241 to 853.

[35] Articles 854 to 1296.

[36] Articles 1297 to 1921.

[37] Articles 1922 to 2385.

[38] French Civil Code (Code civil) was enacted in 1804 and effectuated in 1805 and largely amended in 1855 and 1955.

[39] OKUDA, Masamichi, "日本における外国法の摂取-ドイツ法 Nihonnni Okeru Gaikokuhouno Sesshu - Doitsu Minpo (The Introduction of Foreign Law in Japan - German Civil Code)", 外国法と日本法 GAIKOKUHO TO NIHONHO (FOREIGN LAW AND JAPANESE LAW) (1966) p223.

[40] Pandekten System has four features: (i)General Principles as the general rules covering all civil relationship; (ii) The distinction between Transactional Law and Family-related Law; (iii) The Transactional Law is divided into law of Obligation-right and law of Real Right; (iv) The Family-related Law is divided into Family Law and Succession Law.

[41] Articles 7 to 515.

Ownership[42]; and Book III: Different Modes of Acquiring Property[43].

Second, all kinds of statutes must have the dual-structure; i.e., general provisions and specific provisions. One of the prevailing criticisms against the civil law system is that unlike the common law system in which the law is to be "found" instead of "stipulated", in the civil law system, the law is bound by the stipulation of the black letter law and thus lacks flexibility. For example, even if the horizontal classification is acute enough to catch all kinds of legal relationships at the time of legislation, those provisions might become unable to cover new legal phenomena and inevitably be out of dated. However, so long as the dual-structure system is adopted, even if the contents of specific provisions have become inappropriate or out of dated, the general provisions can play a role of gap-filler and thus the lack of law to apply will be avoided. Therefore, the legislators of civil law jurisdictions carefully classify the prospective provisions in accordance with how general or specific they are. For example, civil law, contrasted with public law, deals with relationship among legal private legal subjects (natural persons, legal persons, etc.) In most civil law jurisdictions, certain features that are commonly shared by all the civil relationships are extracted and codified as "General Principles". Furthermore, this vertical classification is extended not only to the relationship between the General Principles and the rest of the civil law regime, but also to the internal composition throughout all the provisions classified according to the horizontal perspective. For example, in Japanese Civil Code, Book I General Principles plays a role of the general rules applying to the Book II through V. In addition, each of Book II through V is divided into the General Provisions[44] and the Specific Provisions.

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[42] Articles 516 to 710.

[43] Articles 718 to 2283.

[44] In Book II, Articles 175 to 179; in Book III, Articles 399 to 520; in Book IV, Articles 725 to 730; in Book V, Articles 882-885.

Furthermore, some of the Chapters inside each Book have also own General Provisions and the Specific Provisions. For example, Book III is divided into five Chapters: namely, Chapter 1: General Provisions; Chapter 2: Contract[45]; Chapter 3: Management of Affairs without Mandate (事務管理 Shiwu Guanli)[46]; Chapter 4: Unjust Enrichment (不当利得 Budang Lide)[47]; Chapter 5: Delict (不法行為 Bufa Xingwei)[48]. Chapter 2 (Contract) is further divided into General Provisions[49], which provide for general rules applying to all kinds of contracts, and Specific Provisions[50], which deal with 13 kinds of individual typical contracts.

Similarly, Book II (Obligation-right) of German Civil Code is divided into General Provisions[51], which deal with general rules of the law of Obligation-rights, and Specific Provisions[52], which handle the most important and frequently employed obligational relationships[53]. In Book III of French Civil Code (Different Modes of Acquiring Property), Chapter 3 (Contracts or Conventional Obligations in General) plays a role of General Provisions of law of Contracts, while Chapter 6 (Sales), Chapter 7 (Exchange), Chapter 8 (Contracts of Rental or Hire), Chapter 9 (Civil Partnership and Joint Venture), Chapter 11 (Bailment and Sequestration), Chapter 12 (Contract of Chance), Chapter 15 (Compromise Settlements), Chapter 16 (Arbitration Agreement) collectively constitute Specific Provisions of law of Contracts.

In conclusion, we can say that the essential factors of the civil law system

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[45] Articles 521 to 696.
[46] Articles 696 to 702.
[47] Articles 703 to 708.
[48] Articles 709 to 724.
[49] Articles 521 to 548.
[50] Articles 549 to 696.
[51] Articles 241 to 432.
[52] Articles 433 to 853.
[53] Foster, supra note 10, pp252, 264.

are both horizontal and vertical detailed classifications.

Let's look at the civil law regime of the PRC. Different from Japanese Civil Code, French Civil Code or German Civil Code, the PRC civil law has no unified single code. Rather, each group of civil law that is correspondent to each Book of Japanese Civil Code constitutes independent Codes. The GPCL is the most basic legislation on civil law and other major pieces of civil law include the Contract Law, the Patent Law (1984), the Trademark Law (1982), the Copyright Law (1990), the Marriage Law (1980) and the Succession Law (1985).[54] In addition, as aforementioned, "Real Right Law" is now under the drafting procedure. In addition, the Contract Law has both General Provisions (§§ 1 to 129) and Specific Provisions (§§130–428). Thus, the Contract Law apparently borrows its structure and framework from the civil law system. However, the structure of the Contract Law has many problems.

The most serious problem is the misunderstanding of the concept of contract law. In order to analyse these problems, I will assume three fundamental principles of civil law system: (i) Contract is one of the juristic acts; (ii) Contract is one of the causes from which Obligation–rights (債権 Zhaiquan) derive; (iii) Contract has certain legal features which are commonly shared by all kinds of specific contracts.

2. Contract is One of the Juristic Acts – Relationship Between the Contract Law and the GPCL

(1) What Is a Juristic Act?

It is common feature of the civil law jurisdictions to define a contract as one of the juristic acts (法律行為 Falu Xingwei)[55]. In both German and Japa-

[54] Albert HY Chen, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (2nd ed. 1998) p191.

[55] Kalvis Torgans, "Some Comparative Aspects of Contract Law in Civil and Common Law

nese jurisprudence, a juristic act (Rechtsgeschafte) is classified into "a single act (単独行為 Dandu Xingwei)", "a contract (契約 Qiyue)" and "a joint act (合同行為 Hetong Xingwei)[56]. A single act is a juristic act that can be completed to create certain legal consequences by only one person's fulfilment of legal requisites, such as making of a testament or remission from an obligation-duty. A contract is the most important example of a juristic act, which requires the conformity of will of each contracting party who bilaterally and mutually intends to agree on a certain civil law matter. A joint act also involves plural parties, however, different from a contract, the intentions of the parties are toward the same direction, such as the establishment of a corporation, foundation or association. Interestingly, Japan's way to express the latter two concepts in Chinese characters (a contract = 契約 Qiyue; a joint act = 合同 Hetong) is the opposite to that of the PRC (a contract = 合同 Hetong; a joint act = 契約 Qiyue)[57].

Common to these various acts are the core feature that certain legal consequences are guaranteed under the law according to the intention of the parties to such acts. They are legal requisites to certain legal effects.[58] A declaration of will is an essential part of legal requisites of juristic act.[59]

(2) The PRC Law

The civil law regime of the PRC seems to follow the above principle.

Article 54 of the GPCL provides "Civil juristic acts are lawful acts by which citizens or legal persons establish, modify or terminate **civil rights and du-**

Systems", 12 Int'l Legal Persp. 37 (2001/2002).

[56] KITAGAWA, supra note 10, at 2-15; Wang Liming, "An Inquiry into Several Difficult Problems in Enacting China's Uniform Contract Law", 8 Pac. Rim L. & Pol'y 351 (1999) at 356.

[57] Wang, Id.

[58] KITAGAWA, supra note 10, at 2-14.

[59] Raymond Youngs, SOURCE BOOK GERMAN LAW (1994), p229.

ties." Regarding the definition of a contract, Article 85 of the GPCL stipulates, "A contract is an agreement whereby parties establish, modify or terminate **civil relationships**." Article 2 of the Contract Law further states "For the purposes of this Law, the term "contracts" refers to agreements by which natural persons, legal persons and/or other organisations, as equal parties, establish, modify or terminate **relationship of civil rights and duties**." (The author makes all the underlines and emphases.) The literature of Article 2 of the Contract Law is the integration of the relevant definitions made in the GPCL. Therefore, we can observe that the Contract Law is in line with the civil law system in that a contract is recognised as an example of a juristic act.

(3) Requisites of Juristic Act

Therefore, a contract, first of all, must be a duly enforceable juristic act. In other words, the most fundamental requisite for a contract to be dully enforceable is to fulfil all the requirements necessary for a juristic act (Please refer to **Table I**).

In order for a juristic act to be dully enforceable, there are four requisites:

(i) A juristic act shall be properly formed.

(ii) A juristic act shall be valid.

(iii) A juristic act shall be effective.

(iv) A juristic act shall bind the parties.

Professor Wang Liming argues that the formation (成立 Chengli) requirement and effectuation (生効 Shengxiao) requirement must be strictly distinguished, because (a) the formation is a manifestation of the will of the parties, while the effectuation is a manifestation of the state's appraisal of and intervention into the terms of the contract; (b) the non-formation can create only civil liability, while the lack of effectuation may create administrative and even criminal liability in addition to civil liability[60]. However, I think that a further

classification of the concept of the effectuation is necessary. First of all, the factors concerning the effectuation are classified into the matters that are directly related to the subject or object of a juristic act and the matters deriving from outside a juristic act. As the examples of the former, incompetency and illegality are found. If a subject of a juristic act is incompetent, the juristic act is invalid. If an object of a juristic act is an illegal drug, the juristic act must be held invalid, too. These factors are defects inherent in the juristic act itself and thus will deteriorate the validity of the juristic act fatally; therefore, we can call it "the validity requisite". The latter factor can be further divided into two kinds: one is the factor that makes a juristic act effective, but is independent of the subject or object of the juristic act; the other is concerning the case where the party who is bound by the juristic act is not the same as the person who actually makes the juristic act. The former includes conditions, times or legal/administrative procedures, on which the effectiveness of the juristic act is dependent, thus, can be called "the effectiveness requirement". The latter refers to the "binding or authority requisite" that requires the appropriate authority to be given by the principal to the agent.

(i) Formation Requisite

Formation requisites are varied depending on the type of juristic act, i.e., a contract, a single act or a joint act.

In case of contract, offer and acceptance shall be dully fulfilled. Both German Civil Code and Japanese Civil Code have provisions regarding offer and acceptance[61]. Although French Civil Code has no rules as to how a contract forms, the prevailing argument is that a contract should be analysed in terms of offer and acceptance[62]. The Contract Law also contains the provisions dealing with

[60] Wang Liming, supra note 56 at 365–367.

[61] See Articles 130 to 156 and 305 to 361 of German Civil Code and Articles 521 to 532 of Japanese Civil Code.

offer and acceptance[63].

In case of a testament, as a typical example of a single act, German Civil Code, French Civil Code, Japanese Civil Code and the Contract Law provide for requirement of execution of a testament, mainly in the context of law of succession[64].

In case of an incorporation of a legal person, as a typical example of a joint act, German Civil Code, Japanese Civil Code and the Contract Law provide for requirements of incorporation[65].

(ii) Validity Requisite

There are two kinds of the validity requisites: one is the subjective requisite; the other is the objective requisite.

The former involves the validity of the declaration of will of the parties. As mentioned in **(1)**, the valid declaration of will is the most critical component of any juristic act. In order for a declaration of will to be valid, first, a declaration of will must be made by a legally competent person because an incompetent person is deemed not to be able to make a sound declaration of will for his/her age or mental incapacity. German Civil Code, French Civil Code, Japanese Civil Code and the Contract Law contain provisions dealing with incompetent persons, mainly in the General Principles[66].

Second, a declaration of will must precisely reflect party's true intention and must be made fully voluntarily and independently. If a declaration of will

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[62] Bell, Boyron and Whittaker, supra note 10, p311.

[63] Articles 10 to 39.

[64] See Articles 2064 to 2273 of German Civil Code; Articles 967 to 1047 of French Civil Code; Articles 967 to 984 of Japanese Civil Code; and Articles 16 to 22 of the Contract Law.

[65] See Articles 21 to 88 of German Civil Code; Articles 33 to 51 of Japanese Civil Code; and Articles 50 to 53 of the Contract Law.

[66] See Articles 104 to 115 of German Civil Code; Articles 1123 to 1125–1 of French Civil Code; Articles 3 to 20 of Japanese Civil Code; and Article 58 of the GPCL and Articles 9 and47 of the Contract Law.

lacks such normality, the juristic act resulting from such a declaration of will must be invalid either by being void from the beginning or by party's rescission of the declaration of will. Japanese Civil Code classifies such abnormalities concerning a declaration of will into five categories[67]: mental reservation (心裡留保 Xinli Liubao)[68]; false declaration (虚偽表示 Xuwei Biaoshi)[69]; mistake which results in the lack of a will (錯誤 Cuowu)[70], fraud and duress[71]. These provisions are almost exact copy of German Civil Code[72] except that only the latter has the concept of nonconformity between an offer and its acceptance. In the PRC, the GPCL and/or the Contract Law have part of such provisions: mistake (Item 1 of Article 59 of the GPCL and Item 1 of Article 54 of the Contract Law); fraud and duress (Item 3 of Article 58 of the GPCL and Item 1 of Article 52 and Paragraph 2 of Article 54 of the Contract Law).

The objective validity requisite is concerning the objective feature of a juristic act. If either objective or content of a juristic act is uncertain, infeasible, illegal, socially inadequate, unfair, unconscionable, just pretending a legal act, or harmful to the state interest, the juristic act must be invalid either by being void from the beginning or by party's rescission of the declaration of will. As shown in **Table I**, in the PRC, the GPCL and/or the Contract Law extensively provide for these requisites. Japanese Civil Code contains some provisions regarding legality, public interest, fairness, unconscionability and pretensions[73].

(iii) Effectiveness Requisite

Even if a juristic act has been dully formed and is perfectly valid, some-

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[67] KITAGAWA, supra note 10, at 2–15 to 2–16.

[68] Article 93.

[69] Article 94.

[70] Article 95.

[71] Article 96 for both fraud and duress.

[72] Articles 116, 117, 119 and 123.

[73] For all of them, Article 1 and/or 90.

times the effectiveness of the juristic act is subject to a certain condition, a certain point of time, or certain legal or administrative procedures such as registration or approval of the competent authority. The GPCL and/or the Contract Law provide for such effectiveness requisite[74] and so does Japanese Civil Code[75] except for legal/administrative procedures. Both German Civil Code[76] and French Civil Code[77] contain similar provisions.

Concerning the Contract Law, the distinction between the validity requisite and the effectiveness requisite is particularly important in terms of the relationship between the Paragraph 2 of Article 44 and the Item 5 of Article 52. The Paragraph 2 of Article 44 provides: "Where a contract may become effective only after the completion of approval and/or registration procedure according to the provisions of law and administrative regulations, such provisions shall govern." On the other hand, the Item 5 of Article 52 of the Contract Law stipulates: "A contract is invalid under any of the following circumstances: — (v) mandatory provisions of laws and administrative regulations are violated." Although the definition of "mandatory provisions of laws and administrative regulations" in the Item 5 of Article 52 is not clarified, the mandatory provisions are thought to be considered as the provisions to be enforced by a certain administrative or criminal sanction. Therefore, it must be incorrect to say that "the provisions of law and administrative regulations" referred to in the Paragraph 2 of Article 44 are exactly the same concept as "mandatory provisions of laws and administrative regulations" in the Item 5 of Article 52, because the provisions of law and administrative regulations regulating the registration or the approval are not necessarily of mandatory feature. The consequence of non-ful-

[74] Condition: Article 62 of the GPCL and Article 45 of the Contract Law; Time: Article 46 of the Contract Law; Legal/Administrative procedures: Article 44 of the Contract Law.

[75] Condition: Articles 127 to 134; Time: Articles 135 to 137.

[76] See Articles 158 to 163.

[77] See Articles 1181 to 1188.

filment of such procedures may be merely a non-effectuation of a certain contract and the parties might not have to be penalised administratively or criminally. As a result, a problem will arise regarding a case where the parties of the contract have not fulfilled the requirement of the Paragraph 2 of Article 44, however, this requirement is not "mandatory". If we understand that both the Paragraph of Article 44 and Article 52 deal with the same type of effectuation requisite, the interpretation of this case will be contradicted: it will be "ineffective" in accordance with the Paragraph 2 of Article 44, while it will be "effective" in terms of Article 52. Only the argument that the Paragraph 2 of Article 44 deals with the effectiveness requisite, while Article 52 provides the validity requisite can make it possible to consistently interpret those two Articles.

(iv) Binding (Authority) Requisite

Finally, if somebody other than the person who is bound by the juristic act has made the actual juristic act, for example, an agent or a representative of a legal person, the former must have authority to make a juristic act on behalf of the latter. Therefore, German Civil Code, French Civil Code, Japanese Civil Code and the PRC law have provisions dealing with agency and/or representative of a legal person, mainly in the General Principles[78].

(4) Problems of the PRC Law

As we have seen above, among four kinds of requisites of enforceability of juristic act, only the formation requisite is varied depending on the type of a juristic act. The other three types of requisites: validity requisite, effectiveness requisite and binding requisite are the same at least regarding transaction-related juristic acts irrespective of whether the juristic act is a single act, a con-

[78] See Articles 164 to 181 of German Civil Code; Articles 1984 to 2010 of French Civil Code; Articles 53, 54 and 99 to 118 of Japanese Civil Code; and Article 66 of the GPCL and Articles 48 to 50 of the Contract Law.

tract or a joint act.[79] It is not surprising at all because those three types of requisites are the direct consequences of being a juristic act. The difference among a single act, a contract and a joint act are mostly placed with how to form them.

Therefore, it is much more reasonable for a civil code to unify provisions regarding those three requisites solely in the General Provisions. At least, those provisions must be included not only in the law of contract but also in the General Principles because most of the factors which invalidate or avoid a contract will also invalidate or avoid all the other types of juristic acts.

That is why as shown in **Table I**, both in Japanese Civil Code and in German Civil Code, all of provisions concerning the validity requisite, the effectiveness requisite and the binding requisite are codified solely in the General Provisions. Nevertheless, regarding the formation requisite, these two jurisdictions do not take the same way. The provisions concerning the formation of testament are given in the Book on succession in the both jurisdictions and the formation of incorporation is stipulated in the Book I (General Principles) in the both jurisdictions. However, while Book I regulates the formation of contract in German Civil Code, Japanese Civil Code has General Provisions for Contract dealing with the formation of contract in the Book II (Obligation-right). The issue whether the formation of contract should be in General Provisions or in Obligation-right will be discussed later (in **4. (3)**).

On the other hand, **Table I** evidences that PRC civil law regime is of much confusion. Most of those provisions are found in both the GPCL and the Contract Law and even worse, sometimes only in the Contract Law. Furthermore, there are even some contradictions between the relevant provisions of the GPCL and the Contract Law, and inconsistency among the provisions of the

[79] In some jurisdictions, the standard of minor is different whether the target juristic act is transaction-related or family-related.(Articles 3 and 961 of Japanese Civil Code).

Contract Law itself.

(i) The Problem of Article 123 of the Contract Law

As I have discussed, a contract is one example of a juristic act in most of the civil law jurisdictions and the literature of Articles 54 and 85 of the GPCL and Article 2 of the Contract Law clearly evidences that the PRC civil law regime also adopts this theory. In addition, the GPCL plays a role of the General Provisions covering all the provisions of civil law regime[80]. Therefore, the relationship between the GPCL and the Contract Law must be the one between the general law and the special law. Consequently, if there is a contradiction between the mutually corresponding provisions of the both Laws, the provisions of the Contract Law shall prevail, while if only the GPCL has the relevant provisions and the Contract Law is silent on this issue, the GPCL shall apply. The biggest obstacle to this understanding is the existence of Article 123 of the Contract Law. Article 123 provides: "If other laws make other provisions concerning a contract, those provisions shall govern". The literal interpretation of this provision will result in the conclusion that the provisions of the GPCL, which are contradicted with the correspondent provisions of the Contract Law, shall prevail [81]. In order to solve this problem, "other laws make other provisions concerning a contract" referred to in this Article must be restrictively construed to mean, "other special laws make more specific provisions concerning a contract". One may well argue that such interpretation is beyond the allowance of the black letter law, and thus, the amendment to Article 123 must be made.

(ii) Classification of Void and Voidable

As shown in Table II, regarding void and voidable contracts/juristic acts,

[80] Supra note 54.

[81] James Hitchingham, "Recent Development: Stepping Up to the Needs of the International Market Place: An Analysis of the 1999 'Uniform' Contract Law of the People's Republic of China", 1 Asian-Pacific L. & Pol'y J. 8 (2000); Jianhua and Yu, supra note 6, at 23.

there are considerable contradictions and confusions.

(a) Rescission through the Court or the Arbitration Institution

Both Article 59 of the GPCL and Article 54 of the Contract Law requires the party to request either a People's Court or an arbitration institution for a rescission. Such kind of strict procedural rule is quite unique. For example, Japanese Civil Code contains very few such provisions including Article 424 that provides for an obligee's right to avoid a harmful transaction taken by an obligor (similar to Article 74 of the Contract Law). However, the court establishes[82] that the right referred to in Article 424 should be exercised by litigation, and should not be exercised by the plea. Therefore, such an arrangement may make it impossible for the party to use these provisions as a plea in the civil procedure initiated by the other party. Accordingly, the requirement of involvement by the courts or arbitration institution should be limited to the provisions that have material impact on the third person's right.

(b) Fraud and Duress

In accordance with the Item 3 of Article 58 of the GPCL, a civil juristic act resulting from fraud or duress is simply void. On the other hand, the Contract Law classifies the case of fraud or duress into two situations: one is the case in which a party uses fraud or duress to conclude a contract, thereby harming the interests of the state (Item 1 of Article 52) and the other is the case in which fraud or duress causes the counterpart to conclude a contract which is contrary to his/her true intention and thus s/he is injured (Paragraph 2 of Article 54).

This classification reflects the thought of the legislators that void contracts should be limited to contracts that are illegal or that violate the public interest[83] (Limitation of Void Contract Doctrine). Professor Wang argues that too

[82] Supreme Court's decision on 12 June 1964 (Minshu 18-5-764).

[83] Wang, supra note 56 at 327.

many "void" provisions have allowed the courts to abuse the right to avoid contracts (as many as 10–15% of total contracts) and also the narrow range of "void" contracts can appropriately facilitate transactions to the greatest possible[84]. I agree with this Doctrine itself because if the cause of invalidity is not related to the mandatory law or public policy, it is more appropriate to respect the parties' decision as to whether they still want to keep the contract valid. This argument also strikes an appropriate balance of the parties' autonomy[85] and public policy.

However, this argument applies not only to a contract, but also to a juristic act as a whole because the significance of parties' autonomy is the general principle governing a whole juristic act. Therefore, the Item 1 of Article 52 and the Paragraph 2 of Article 54 of the Contract Law should replace the Item 3 of Article 58 of the GPCL so that this rule can apply to all kinds of civil juristic act.

(c) Unconsionability and Unfairness

Different from the Item 3 of Article 58 of the GPCL, the Paragraph 2 of Article 54 of the Contract Law provides that the unconscionable contract is voidable. The way to treat the unconscionable contract and the unfair contract (Item 2 of Article 58 of the GPCL and Item 2 of the Paragraph 1 of Article 54 of the Contract Law) seems to be the consequence of the above-mentioned Limitation of Void Contract Doctrine. However, it is not necessarily true. If a state adopts the policy of paternalism or consumer protection and thinks that the protection of the weak party is one of the most important public policies, in such a country, an unconscionable or an unfair contract will be void instead of merely voidable. For example, in Japan, Germany and France, both an unfair and an unconscionable juristic act are void. However, unlike the PRC, the abuse by the courts to use such provisions has rarely occurred in Japan. This is

[84] Id., at 372.

[85] Article 4 of the Contract Law.

because the courts and scholars are so conscious of the dangers caused by the possible abuse of the power to invalidate a juristic act that they have voluntarily developed the additional requirements to restrict the scope the application of such provisions. For example, the Paragraph 3 of Article 1 of Japanese Civil Code prohibits the abuse of rights, however, the courts have developed case law requiring the additional requirement (i.e., the malicious intention) for a juristic act to be invalidated in accordance with this provision. The similar case law has been developed in France as well[86]. Even concerning the juristic act, which is classified as a "voidable" act, the possibility for the courts to abuse the power to invalidate a juristic act is the same as a "void" act, because both "void" and "voidable" juristic acts may be adjudicated to be invalid only after the validity of them is challenged by the parties in the court in the jurisdiction which adopts the adversary system for the civil procedures. In fact, the argument that in terms of validity of a juristic act not involving law or public policy, the "void" and "voidable" are not critically different in practice, is prevailing in Japan[87]. Therefore, the attitudes of the judges and the more adversary systemised and party-oriented civil procedural law[88] are more critical than the content of substantial law in order to stabilise the security of transactions and parties' autonomy.

Anyway, I do not disagree with the Doctrine itself and appreciate the conclusion of the Contract Law to make an unfair or unconscionable contract "voidable." However, as discussed about fraud or duress, the rule that unfairness or unconscionability entitles the party to rescind should apply not only

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[86] HOSHINO, Eiichi and HIRAI, Yoshio ed., 民法判例百選 MINPO HANREI HYAKUSEN (CIVIL CASE LAW 100 SELECTION) VOL. 1 (4th ed., 1996) p9.

[87] SHINOMIYA, Kazuo, 民法総則 MINPO SOSOKU (General Principles of Civil Code), (4th ed. 1987), p207.

[88] Japan adopts a law of civil procedure which entitles the court to judge only the issues that the parties argue.

to a contract but also a civil juristic act as a whole. Therefore, the rule stipulated in the Item 2 of the Paragraph 1 of Article 54 of the Contract Law should replace the Item 2 of Article 59 of the GPCL, and the Paragraph 2 of Article 54 of the Contract Law should replace the Item 3 of Article 58 of the GPCL so that this rule can apply to all kinds of civil juristic act.

(d) Conspiracy

The provisions of the Item 4 of Article 58 of the GPCL and the Item 2 of Article 52 of the Contract Law are exactly identical, providing that a civil juristic act/contract is void if it is a malicious conspiracy to harm the interests of the state, a collective or a third person. However, in order to follow the above-mentioned Limitation of Void Contract Doctrine, the case where a conspiracy harms only a third person should be "voidable" so that the decision of the third person can be respected. In addition, the provision in the Contract Law shall be deleted because the provision in the GPCL covers a contract as well.

(e) Incompetency

While the Items 1 and 2 of Article 58 of the GPCL provides that a civil juristic act is void if it is performed by a totally incompetent person or a person of limited competence (hereinafter collectively referred to as "incompetent person"), there are no such provisions found in the Contract Law. It does not mean that a contract performed by a incompetent person is valid. The fact that only the general law has relevant provisions while the special law is silent should not be considered to be a contradiction. As discussed above, if the requisites which apply to all types of juristic act are provided in the General Principle, there is no need for the same requisites to be stipulated again in the Contract Law because a contract is one kind of juristic act. Otherwise, it would rather be redundant. That is why as shown in **Table I,** such provisions are only in the General Principles both in Japan and Germany. In this sense, Article 47 of the Contract Law is problematic. The Paragraph 1 stipulates detailed rules

regarding the contract performed by a person of limited competence, namely, the effect of ratification and an exception to necessity of ratification and the Paragraph 2 provides for detailed rules regarding the right of the counterpart to demand the statutory representative to ratify, all of which are not available in the GPCL. The problem is that such rule should apply to all types of juristic act, not limited to a contract. The legislators of the Contract Law seem to have assumed that the ratification and demanding take place only in the contractual relationship. However, it is not true. The addressee of the declaration of will by an incompetent person is not necessarily his/her counterpart of the contract entered into by the incompetent person. For example, the release of the obligation (債務免除, Zhaiwu MIanchu)[89] is classified as a single act, not a contract. However, the person who is released from his/her obligation is not always the party of the contract. The obligation concerned might have been incurred by a delictual act. In this sense, the provision of Article 105 of the Contract Law should not have been limited to contractual obligation. Therefore, Article 47 of the Contract Law should be transferred into the GPCL.

In addition, I think that a juristic act performed by an incompetent person should be "voidable" rather than "void". Even if an incompetent person independently performs a juristic act, that act might have no harmful effect for that person. Therefore, it is too much to make such a juristic act automatically void irrespective of the substantial effects. For example, Japanese Civil Code and French Civil Code consider such a juristic act just "voidable."

(iii) Other Contradictions and Inconsistencies

(a) Illegality

While the Item 5 of Article 58 of the GPCL simply refers to the violation of law, the Item 5 of Article 52 of the Contract Law stipulates "it violates mandatory provisions of laws or administrative regulation". The limitation of a void

[89] Article 105 of the Contract Law.

contract to the one that violates only mandatory provisions is also in line with above-mentioned Limitation of Void Contract Doctrine. A contract should not be void only because it is against non-mandatory provisions of laws or administrative regulations. This is because non-mandatory provisions merely provide for a default arrangement and the parties should be entitled to contract out therefrom. Accordingly, Article 91 of Japanese Civil Code stipulates "If the parties to a juristic act have declared an intention which differs from any provisions of laws or regulations which are neither mandatory nor concerned with public policy, such intention shall prevail." However, the problem will then arise as to the PRC's treatment of a contract that violates non-mandatory provisions of laws or administrative regulations. Because a contract is at the same time a civil juristic act and the Contract Law is special rule to the GPCL, the Item 5 of Article 58 of the GPCL should apply and thus such a contract should be void. Apparently, such a result is not what the legislators of the Contract Law intended. Therefore, the rule stipulated in the Item 5 of Article 58 of the GPCL should be replaced with the Item 5 of Article 52 of Contract Law.

(b) Against Directive State Plan

Although the Item 6 of Article 58 is located in the GPCL, it deals with "economic contracts" only. If so, this provision should be transferred into the Contract Law. However, the maintenance of the concept of "economic contracts" seems incompatible with the unification of three contract-related laws realised by the enactment of the Contract Law.

(c) Unauthorised Agent

Here is found the more serious contradiction between the provisions of the GPCL and those of the Contract Law. While the Paragraph 1 of Article 66 of the GPCL stipulates "If a person knows that another person is performing a civil juristic act in his/her name and does not object, s/he is **deemed to have consented**", the Paragraph 2 of Article 48 of the Contract Law provides "the

counterpart may demand that the principal ratify the contract within one month. If the principal fails to indicate a decision, s/he is **deemed to have refused ratification**." Even if taking into consideration of the difference that only the latter refers to the counterpart's demand, the serious contradiction arises. The latter rule is more suitable because (i) the counterpart can fix the time limit to find out whether the principal is willing to be bound by the juristic act made by a third person and (ii) the silence of the principal should be deemed a refusal because the act performed by an unauthorised agent is stipulated "void" instead of "voidable". From comparative perspective, the latter rule is prevailing, as well. Article 114 of Japanese Civil Code, the Paragraph 2 of Article 177 of German Civil Code and the Paragraph 2 of Article 1998 of French Civil Code provides for the same rule. In addition, the rule regarding the demand should cover all kinds of civil juristic act. Therefore, the latter rule should be provided in the GPCL.

(d) Condition and Time

As discussed above, both the matters of condition and time are the effectiveness requisite required for all types of juristic act. However, both the GPCL and the Contract Law have the provisions concerning conditions. While Article 62 of the GPCL provides for simple rule, Article 45 of the Contract Law is more detailed in that it classifies conditions into the condition precedent and the condition subsequent as well as provides for the rule regarding the disturbance of the fulfilment of the condition by the parties. The rules stipulated in the Contract Law should replace the one in the GPCL. Concerning the matter of time, only the Contract Law contains the provision. Again, as discussed regarding incompetency, the addressee of the declaration of will by an unauthorised agent is not necessarily the counterpart of a contract. Therefore, the matter of time as an effective requisite should apply to all types of juristic act, thus it must be transplanted into the GPCL.

(e) Representative of a Legal Person

The rule stipulated by Article 50 of the Contract Law is also found in the General Principles of both Japanese Civil Code[90] and German Civil Code[91]. Again, as discussed above, the addressee of the declaration of will by a representative of a legal person is not necessarily the counterpart of a contract entered into him/her and that legal person. Therefore, the rule stipulated by Article 50 of the Contract Law as a binding requisite should apply to all types of juristic act, thus it must be transplanted into the GPCL.

3. Contract is One of the Causes from Which Obligation-rights (債権 Zhaiquan) Derive

(1) What is an Obligation-right?

(i) Obligation-right v. Real Right

As discussed in 1., the PRC civil law regime follows the distinction between the Obligation-right (債権 Zhaiquan) and the Real Right (物権 Wuquan) like most of the other civil law jurisdictions. Especially, the jurisdictions following the Pandekten system originated in Roman Law always have this differentiation.[92] The real right is also called the right in rem while the Obligation-right is classified as the right in personam. The former refers to the absolute right that is effective against anybody, while the latter is merely the relative right the holder of which is entitled to request a certain person to do something or to forbear from doing something[93]. The holder of Obligation-right is called an obligee (債権者 Zhaiquanzhe) and the person who assumes an obligation-duty is called an obligor (債務者 Zhaiwuzhe).

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[90] Article 54.

[91] Article 26.

[92] Supra note 40.

[93] Wang, supra note 56, at 359-360.

(ii) Causes of Obligation-right

The most important fact here is that an Obligation-right is not always borne of a contract. Another distinctive feature of Roman Law that most of the civil law jurisdictions have inherited is the classification of causes out of which an Obligation-right arises. Roman Law distinguishes four sources of obligations: contract; quasi-contract (*quasi ex contractu*); delict and quasi-delict (*quasi ex maleficio*)[94]. However, the distinction between delict and quasi-delict (which is interpreted as referring to the presence or absence of intention) is not used in modern law[95]. Furthermore, most of civil law jurisdictions recognise two types of quasi-contract, i.e., Management of Affairs without Mandate (事務管理 Shiwu Guanli) and Unjust Enrichment (不当利得 Budang Lide). For example, Book III of Japanese Civil Code is divided into five Chapters: namely, Chapter 1: General Provisions; Chapter 2: Contract; Chapter 3: Management of Affairs without Mandate (事務管理 Shiwu Guanli); Chapter 4: Unjust Enrichment (不当利得 Budang Lide); Chapter 5: Delict (不法行為 Bufa Xingwei). In addition to many provisions regarding specific contracts, Chapter 7 of Book II of German Civil Code contains special Sections regulating Management of Affairs without Mandate (Section 12, Articles 677 to 687); Unjust Enrichment (Section 24, Articles 812 to 822); and Delict (Section 25, Articles 823 to 853). Although French Civil Code does not use the terms such as Management of Affairs without Mandate or Unjust Enrichment, the provisions under the title of "Quasi-contract" include both of these concepts (Articles 1371 to 1375 and Articles 1376 to 1381, respectively). French Civil Code contains the provisions regarding delict (Articles 1382 to 1386) as well.

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[94] Bell, Boyron and Whittaker, Supra note 10, p304.

[95] Id.

(2) Are the General Provisions of Obligation-right Necessary?

If X enters into a sales contract with Y and delivers the goods to Y, X possesses the claim for the price against Y (contract). If X finds Y seriously injured and unconscious on the road and takes him to a hospital, X is entitled to get refund of medical fee he paid for Y from Y (management of affairs without mandate). If X by error credits $100 in Y's bank account, X can request Y to return that $100 to him (unjust enrichment). If Y destroys the property of X, X possesses the Obligation-right to receive compensation from Y (delict). All those rights vested by X are Obligation-rights while causes are different. So long as they are all Obligation-rights, there should be some common features among them.

Therefore, theoretically, the Civil Code should contain general provisions that stipulate such common features or rules and should cover all kinds of causes of Obligation-rights. Japanese Civil Code typically reflects this idea and contains Chapter 1 (General Provisions) that is independent from the other four Chapters collectively called "Specific Provisions of Obligation-right" (2: Contract; 3: Management of Affairs without Mandate; 4: Unjust Enrichment; and 5: Delict) within Book III (Obligation-right). The composition of German Civil Code is less typical. The Book II (Obligation-right) is composed of 7 Chapters. Chapters 1 through 6 are considered as General Provisions of Obligation-right, however, Chapter 7 includes the both provisions concerning specific contracts and Sections dealing with Management of Affairs without Mandate, Unjust Enrichment, and Delict. The situation of French Civil Code is of much less genuine Roman Law tradition. The French Civil Code contains no general part governing Obligation-right as a whole, instead, has General Provisions of Contract (Articles 1101 to 1369)[96]. Nevertheless, this phenomenon arises from the concern that most of the General Provisions of Obligation-right, if existed,

[96] Id.

would apply only to contracts[97]. Scholars of Japan commonly share this observation as well[98]. Despite the actual structure of the Civil Code, French legal community recognises the General Rules to govern all kinds of Obligation-rights, irrespective of whether they arise from a contract, an unjust enrichment, or a delict and thus General Provisions of Contract should be applied by analogy to other Obligation-rights[99].

(3) What Constitute the General Provisions of Obligation-rights?

Then, a question will arise as to which kind of provisions shall constitute the General Provisions of Obligation-right.

The provisions governing Obligation-rights could be divided into these five categories:

(i) Occurrence

(ii) Objects

(iii) Effects

(iv) Transfer

(v) Extinction

An Obligation-right has a life history from its birth (occurrence) to its death (extinction) and during its life, the matters such as what is an object of the Obligation-right (objects), what are effects of the Obligation-right (effects) and how the Obligation-right is transferred (transfer) are important.

(i) Occurrence

As discussed above, how an Obligation-right occurs are varied depending on the causes (a contract, a management of affairs without mandate, an unjust

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[97] Id.

[98] KITAGAWA, supra note 10 at 5-72.

[99] Supra note 97.

enrichment or a delict). In other words, the matters regarding occurrence are not common among all the Obligation-rights. Therefore, the occurrence should not be provided in the General Provisions of Obligation-right, but in the Specific Provisions of that.

(ii) Objects

Objects of an Obligation-right refer to the content of the Obligation-right. The content may be a monetary claim[100], a delivery duty, or a duty to specific action. The target of obligation-duty may be a specific thing[101] or a thing that is designated only by a kind[102]. These differences are not dependent of what cause generates the Obligation-right. As shown in the **Table III**, although Japanese Civil Code[103], German Civil Code[104] and French Civil Code[105] contain such provisions, the Contract Law does not. This is one of the problems incurred by the fact that the PRC civil law regime contains no provisions for an Obligation-right as a whole.

(iii) Effects

Once an Obligation-right occurs, it maintains certain effects during its life.

(a) Obligor's Default

If an obligor fails to properly perform the Obligation-duty, as a direct effect of the Obligation-right, the obligee is entitled to request the obligor for either performance or compensation[106].

The Contract Law, at first glance, seems more advanced than Japanese

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[100] Article 402 of Japanese Civil Code; Article 244 of German Civil Code.

[101] Article 400 of Japanese Civil Code.

[102] Article 401 of Japanese Civil Code; Article 243 of German Civil Code.

[103] Articles 399 to 411.

[104] Articles 241 to 248.

[105] Articles 1168 to 1180 and 1189 to 1196.

[106] Articles 107 to 120 of the Contract Law; Articles 412 and 414 to 422 of Japanese Civil Code; Articles 249 to 277 and 279 to 292 of German Civil Code; Articles 1146 to 1155 and 1226 to 1233 of French Civil Code.

Civil Code in that the former contains Article 121 regarding "performance assistant" which is not available in the latter. The German Civil Code also has such provision[107]. This is regarded one of the exceptions to the privity rule. The rationale behind is that the obligor receives the benefits from using a performance assistance, and therefore, the obligor is also liable for non-performance that is imputable to a performance assistant. However, the existence of black letter law does not necessarily mean the superiority. In Japan, the case law and scholarly efforts have supplemented the lack of black letter law. While both the Contract Law and German Civil Code merely provides that the obligor must be liable for the action by his/her performance assistant, Japanese developed law is more detailed according to the different situations as follows:

- An assistant is merely the tool of the obligor.

The obligor is liable for the assistant's intention or negligence.

- An assistant would perform the Obligation-duty on behalf of the obligor.
- The mandate is statutorily prohibited.

The obligor is liable whether or not the assistant has intention or negligence.

- The mandate is statutorily allowed.

The obligor is liable only if s/he is negligent in the selection or supervision of the assistant.

- The mandate is construed by the feature of the Obligation-duty not to be prohibited.

The obligor is liable for the assistant's intention or negligence.

(b) Obligee's Default

It is not only an obligor to owe some burdens, but an obligee must also co-operate with the performance by an obligor. For example, an obligee must

[107] Article 278.

promptly accept the performance by an obligor[108]. However, the Contract Law lacks such provisions.

(c) Stabilisation of the Obligation-right

An obligee is given certain means to protect his/her Obligation-right. Among them are a subrogation right; a right to avoid harmful action taken by an obligor; or plural parties such as joint obligors.

(c)-1 Subrogation Right

A subrogation right is found in both Japanese Civil Code and French Civil Code. Article 423 of Japanese Civil Code stipulates "(1) An obligee may, in order to protect his/her claim, exercise the rights belonging to the obligor; however, this shall not apply to such rights as are strictly personal to the obligor. (2) So long as the claim is not yet due, the obligee cannot exercise the rights mentioned in the preceding paragraph except by judicial subrogation; however, this shall not apply to an act of preservation." The provision of Article 73 of the Contract Law is similar to the Paragraph 1 of Article 423 of Japanese Civil Code. However, the former is more advanced than the latter. The requirements that are not available in Article 423 but available in Article 73 are: causing injury to the obligee; petition in the obligee's own name; limitation of scope of the claim of the obligee. In order to fill the blank of the statutes, the Japanese courts have developed the same rules as stipulated in Article 73 of the Contract Law[109]. In this sense, Article 73 coinsides the latest development of law of Japan.

(c)-2 Right to Avoid

However, Articles 74 and 75 of the Contract Law regarding obligee's right to avoid the juristic act taken by an obligor are problematic. While Japanese

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[108] Article 413 of Japanese Civil Code; Article 293 of German Civil Code.

[109] Supreme Court's decision on 27 February 1973 (Minshu 28-8-1670); Supreme Court's decision on 30 August 1922 (Minshu 507); Supreme Court's decision on 24 June 1969 (Minshu 23-7-1079), respectively.

Civil Code, German Civil Code and French Civil Code have such provisions, Japanese one is most similar to that of the PRC. Article 424 of Japanese Civil Code stipulates "(1) An obligee may apply to the Court for the avoidance of any juristic act effected by the obligor with the knowledge that it would prejudice by the obligor; however, this shall not apply in cases where a person who has derived benefit from such act or a subsequent purchaser was, at the time of the act or of the purchase, unaware of the fact that it would prejudice the obligee. (2) The provisions of the preceding paragraph shall not apply to a juristic act whose target is not a property."

The major differences between the provisions of two countries are: in the Contract Law, (i) the limitation to the cases of transfer of the property without proper compensation and (ii) that if the transfer is a gift, the knowledge of the transferee is not required. The former is problematic because such an arrangement makes it difficult to avoid the other important harmful acts taken by the obligor. For example, how about the case in which an obligor sets a security right for a certain obligee on his/her property that is otherwise free from any security interest for a particular? The rationale behind Article 74 is to ensure the equality among obligees and to maintain the value of the property of the obligor for all the obligees. Therefore, the coverage of Article 74 is not wide enough. In addition, the arrangement that only in the case of transfer at unreasonably low price, the obligee cannot avoid the juristic act unless the transferee has knowledge is not proper, either. First, the effect of exercise of this right to avoid is not only so broad in that it affects the right of the third person but also so drastic in that it deprive the third person of the right, that the protection of a bona fide third person must be more seriously considered. Second, the difference between a transfer of property without any compensation and the one with an unreasonably low compensation is not critical enough to lead to such a big difference of requirements. If even a compensation of RMB1 entitles the

transfer to fall into the second category, the parties would be willing to do so.

(c)-3 Plural Parties

Japanese Civil Code considers the surety as one of the issues of plural parties[110], because similar rules apply to the relationship between an obligor and a guarantor, a joint obligor, a joint and several guarantor, and an ordinary guarantor. German Civil Code and French Civil Code regulate the surety in Specific Provisions of Contract[111]. However, all those three jurisdictions are the same in that they treat the surety in the provisions of Obligation-rights whereas they treat a security on things in the provisions of Real Right or Property. On the other hand, the PRC civil law regime codifies both a surety and a security in the Security Law. This is a very unique feature compared with the other civil law jurisdictions, however, so long as necessary provisions are properly stipulated, to locate the surety in the Security Law would have no problem. Nevertheless, doing so might cause a huge amount of redundancy. Since an obligee's right to claim against a guarantor is one of Obligation-rights, the general rules regarding Obligation-rights that are stipulated in the Contract Law should be included in the Security Law as well. Similarly, the general rules on the Real Right, which would be codified in the prospective Real Right Law being drafted now, should be provided in the Security Law, because mortgages, pledges and detentions are all classified as real rights. In order to avoid much redundancy, the Security Law should contain the provisions facilitating precise references to the relevant provisions of the Contract Law or the Real Right Law, however, there are no such provisions found in the Security Law. An amendment to the Security Law to satisfy this requirement would have difficulties and not be convenient for users because unlike Japanese, German and French civil law regimes, which have a unified Civil Code, the PRC civil law regime tends to enact

[110] Articles 446 to 465 of Japanese Civil Code.

[111] Articles 765 to 778 of German Civil Code; Articles 2011 to 2043 of French Civil Code.

individual Laws that otherwise would have been integrated into a single civil code. Making reference into other independent statutes would be very cumbersome and not feasible.

(iv) Transfer

An Obligation-right[112] and an Obligation-duty can be transferred to another person without any change to the other factors of Obligation, subject to certain conditions. Regarding the assumption of an Obligation-duty, only the Contract Law and German Civil Code contain the relevant provisions[113]. Therefore, Japanese courts have developed the case law governing the assumption of Obligation-duty. In accordance with the Japanese case law, the assumption of Obligation-duty is classified into two types, namely, a Discharging Assumption (免責的債務引受 Mianzede Zhaiwu Yinshou) and a Cumulative Assumption (重畳的債務引受 Chongdiede Zhaiwu Yinshou). While by the former, the old obligor will be discharged, the latter makes the old obligor still be an obligor with the person who assumes the Obligation-duty and the relationship between them is that of joint obligors[114]. A contract for cumulative assumption of an Obligation-duty between an obligee and a third person can be made even against the will of the obligor[115]. This is a good means for an obligee to avoid the extinction of the Obligation-right by the prescriptions and to get repaid of the claim if the obligor has disappeared and the interested person (for example, the wife of the obligor living in the house on which the obligee establishes the mort-

[112] Articles 79 to 83 of the Contract Law; Articles 466 to 473 of Japanese Civil Code; Articles 398 to 413 of German Civil Code; Articles 1689 to 1701 of French Civil Code. Only France has the relevant provisions in Specific Provisions of Contract whereas the other three jurisdictions locate them in General Provisions of Obligation-right/Contract.

[113] Articles 84 to 87 and 414 to 419, respectively.

[114] Supreme Court's Decision on 20 December 1966 (HOSHINO, Eiichi and HIRAI, Yoshio ed., 民法判例百選 MINPO HANREI HYAKUSEN (CIVIL CASE LAW 100 SELECTION) VOL. 2 (4th ed., 1996) p36.

[115] Supreme Court's Decision on 25 March 1926 (Minshu 5-219).

gage) who, otherwise would not be justified to repay the debt, is willing to repay. Therefore, it is recommended that the Contract Law will introduce such a concept as a cumulative assumption of an Obligation-right.

(v) Extinction

The extinction of Obligation-right means the death of it. As the causes to kill an Obligation-right, most of the civil law jurisdictions enumerate Performance[116]; Deposits[117]; Set-off[118]; Novation[119]; Release[120], Merger[121], Loss of the Thing Owing[122], or Rescission[123].

The fact that only the Contract Law and German Law contain the provisions concerning the assumption of an Obligation-duty is relevant to the fact that only Japanese Civil Code and French Civil Code provide for the matters of novation. This is because it used to be argued that either one of the assumption of Obligation-duty or the novation is enough. However, it is not true because those two concepts are too different to substitute each other. In the case of the former, only the obligor is changed and the other contents of the Obligation-right will be kept intact. On the other hand, in the novation, a totally new Obligation-right is created and will replace the old one and thus the pleas attached to the old obligor will no longer be able to be alleged[124]. Therefore, the legisla-

[116] Article 91(i) of the Contract Law; Articles 474 to 493 of Japanese Civil Code; Articles 362 to 371 of German Civil Code; Articles 1235 to 1248 and 1253 to 1256 of French Civil Code.

[117] Articles 91(iv) and 101 to 104 of the Contract Law; Articles 494 to 498 of Japanese Civil Code; Articles 372 to 386 of German Civil Code; Articles 1257 to 1264 of French Civil Code.

[118] Articles 91(iii) and 99 to 100 of the Contract Law; Articles 505 to 512 of Japanese Civil Code; Articles 387 to 396 of German Civil Code; Articles 1289 to 1299 of French Civil Code.

[119] Articles 513 to 518 of Japanese Civil Code; Articles 1271 to 1281 of French Civil Code.

[120] Articles 91(v) and 105 of the Contract Law; Article 519 of Japanese Civil Code; Article 397 of German Civil Code; Articles 1282 to 1288 of French Civil Code.

[121] Articles 91(vi) and 106 of the Contract Law; Article 520 of Japanese Civil Code; Articles 1300 to 1301 of French Civil Code.

[122] Articles 1302 to 1303 of French Civil Code.

[123] Articles 1304 to 1314 of French Civil Code.

[124] See Article 85 of the Contract Law.

tors may well consider introducing the concept of novation into the Contract Law.

The Contract Law is unique[125] for including the termination and discharge of the contract by statutory or contractual arrangement[126]. The extinction of Obligation-right is the issue applying to all kinds of Obligation-right, not limited to what have arisen out of contracts. This is another evidence of the systematic confusion of the PRC civil law regime.

4. Contract Has Certain Legal Features Which are Commonly Shared by All Kinds of Specific Contracts

The third Principle is regarding the General Provisions of Contract.

(1) Are the General Provisions of Contract Necessary?

One can well argue that there are certain features shared by all types of the contracts, which, nevertheless, are not necessarily shared by all kinds of Obligation-rights. For example, the rules of how to form a contract (offer and acceptance) shall govern all kinds of contracts, however, they do not apply to the other causes to generate an Obligation-right, i.e., a management of affairs without demand, unjust enrichment, and delicts.

In addition, the categorisation of contracts is one of the significant features of the civil law system, which is not found in the common law system[127]. Japanese Civil Code[128], German Civil Code[129], French Civil Code[130] and the Con-

[125] The rescission referred to by Articles 1304 to 1314 is not the termination of the contract, but the rescission caused by the invalidity of the juristic act (for example, the one executed by a minor.).

[126] Article 91 (ii) and (vii).

[127] John S. Mo, supra note 21; Torgans, supra note 55.

[128] The Sections 2 to 14 of Chapter 2 of Book III (Specific Provisions of Contract), i.e., Articles 549 to 696.

[129] Sections 1 to 23 of Chapter 7 of Book II, i.e., Articles 433 to 811.

tract Law[131] have a group of provisions for categorised contracts. Those categorised contracts are merely the types of contracts, which the legislators enumerated as the most typical kinds of contract that were frequently executed at the time of legislation. However, as the development of the economic activities and technologies along with the globalisation, more and more new kinds of contract appear which may not fall into any of the typical contracts provided in the existing civil code. As the solution of this problem, the amendment to the Civil Code is most comprehensive means, however, it sometimes takes a long time. Alternatively, the courts and/or judicial scholars may develop the law supplementing the blank of black letter law, however, it takes time as well to establish such law. Meanwhile, the General Provisions of Contract can play a significant role as a gap-filler[132]. This idea is clearly stipulated in Article 124 of the Contract Law. Therefore, so long as the civil law regime contains provisions governing specific typical contracts, the General Provisions are inevitably necessary.

(2) What Constitute the General Provisions of Contract?

Then, a question will arise as to which kind of rules are recognised as general to all kinds of contract. As shown in **Table IV**, Similarly to an Obligation-right, the general rules of a contract are according to the life stage of it:

(i) Creation

The core factors of the creation of a contract are an offer and acceptance not only in the common law jurisdictions but also in most of the civil law jurisdictions. Therefore, Japanese Civil Code[133] and German Civil Code have the relevant provisions[134]. The Contract Law[135] also contains the relevant provisions

[130] Chapters 6 to 16 of Book III, i.e., Articles 1582 to 2070.

[131] Chapters 9 to 23 (Specific Provisions).

[132] John S. Mo, supra note 21.

[133] Articles 521 to 532.

[134] Articles 145 to 157.

that are very similar to CISG[136]. Although French Civil Code does not contain any rules as to how a contract arises, French jurists well recognise the concept of an offer and an acceptance[137].

(ii) Effects

Once a contract is created, several effects inherent in a contract are observed as follows:

(a) Simultaneous Performance

This rule gives a party a defence not to perform before the counterpart performs. As shown in **Table IV**, this rule is found in the Contract Law, Japanese Civil Code, German Civil Code and French Civil Code.

(b) Passage of Risk

The rule concerning the passage of risk facilitates the fair and equitable distribution of the risk of the subsequent defects of the target of the contract between the parties of the contract. Japanese Civil Code[138], German Civil Code[139] and French Civil Code[140] have the relevant provisions. The Contract Law[141] also contains the relevant provisions that are very similar to CISG[142]. The systematic problem of the Contract Law is that the provisions regulating the passage of risk are stipulated solely in the Provisions concerning Sales. The passage of risk is the issue of whether or not the counter-performance (payment of the contract price) in a two-sided/mutual contract is to be discharged when performance (delivery of the target of the contract) becomes impossible due to a reason which is not imputable to the obligor and which consequently

[135] Articles 1 to 43.

[136] Articles 11 to 25.

[137] Bell, Boyron and Whittaker, supra note 62.

[138] Articles 534 to 536.

[139] Articles 321 to 325.

[140] Article 1611.

[141] Articles 142 to 149.

[142] Articles 66 to 69.

discharges the obligor from the Obligation-duty[143]. Therefore, this issue applies to all kinds of two-sided/mutual contracts, i.e., sales, lease, employment, or contract for work. That is why not only Japanese Civil Code, but also German Civil Code and French Civil Code locate the relevant provisions at least partially in the General Provisions of Contract. The arrangement made by the Contract Law is the consequence of careless introduction of relevant provisions of CSIG.

(c) Contract for the Benefit of a Third Person

This is also an important concept of Contract and those four jurisdictions adopt the relevant provisions. In Japan, a contract between an obligor and a third person by which the latter will assume the Obligation-duty together with the former (a cumulative assumption of an Obligation-duty) is considered an example of a contract for the benefit of a third person (in this case, the beneficiary is an obligee) by the Courts and the majority of the scholars[144].

(d) Transfer of Contractual Position

Articles 88 and 89, together with the provisions concerning the assumption of an Obligation-right, are achievements of the Contract Law, which are rarely found in other civil law jurisdictions.

(e) Liability from Formation Procedure

Article 42 of the Contract Law provides for the liability for damages incurred during the course of concluding a contract (*Culpa in Contrahendo* or Liability from Procedure of the Formation of Contract). This issue arises from the strict application of "Freedom of Contract" that has two features: one is the idea that no one can intervene with the parties' decision regarding the contract; the other is the theory that the parties are bound by their own intentions. If the latter theory strictly applies, a contract must involve only the parties' in-

[143] KITAGAWA, supra note 10, at 5-71.

[144] Supreme Court's decision on 19 October 1935 (Shinbun 3909-18).

tention. Thus, many problems have been discerned. First, if parties are bound only by the contract, what will happen to the case where a contract has not been dully concluded by one party's fault and as a result the other party is injured? (Liability from Procedure of the Formation of Contract) Second, if the obligor destroys the furniture of the obligee while the former is delivering goods to the latter, what kind of remedy is available for the latter? This is called "Positive Violation of Contract". Is the argument that so long as the obligor performs the principal Obligation–duty, s/he is not contractually liable, but could be liable in accordance with delicts correct? Third, if an employee is injured by the accident at the office, is the employer contractually liable? (Duty of Care and Safety) These three cases are all involved with the issue of ancillary obligations of the party of contract.

Although the courts and scholars have long recognised these problems, the relevant provision are rarely found in the statutes of other civil law jurisdictions[145]. However, neither French Civil Code, German Civil Code, nor Japanese Civil Code, which were effectuated more than one hundred years ago, have no provision of such liabilities while the necessity to have provisions has been widely recognised in legal community of those countries[146]. Actually, in those countries the solution of this problem has heavily relied on the courts' efforts to develop case law and scholars' studies and arguments, which have supplemented the lack of black letter law.[147] In this sense, Articles 42 and 122 (positive violation of contract) of the Contract Law can be evaluated as a remarkable achievement.

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[145] Bell, Boyron and Whittaker, supra note 10 p308; Foster, supra note 10, p261; KITAGAWA, supra note 10 at 5–82.

[146] Id.

[147] D. James Wan Kim Min v. Mitsui Bussan K.K., 1232 Hanrei Jiho 110, Tokyo High Court, March 17,1987. English translation is available at: YANAGIDA, Yukio et al. (eds.) LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS, Harvard University Press, 2000, p255.

(f) Trade Secret

Trade Secret protection provided by Article 43 is another achievement of the Contract Law. This is one of the variations of the Liability from Procedure of the Formation of Contract. It is a business custom that parties often disclose secret information to each other during the negotiation for a prospective contract. If the negotiation fails, no contractual relationship arises, and thus the parties will have no duties against each other including trade secrets of the other. In order to avoid such situation, it is common practice to conclude a confidential agreement before starting the negotiation.

(g) Anticipatory Repudiation

While a legislator argues that Article 68 provides for "anticipatory repudiation[148]", some argue that it is merely an "Unrest Defense"[149].

(iii) Termination

In addition to the provisions concerning the act of the termination of a contract that are found in the Contract Law, Japanese Civil Code, German Civil Code and French Civil Code, the Contract Law contains the provision regarding the liability after the discharge from the contractual relationship[150]. Both Japanese Civil Code and German Civil Code have the correspondent provision[151] in the Provisions of Mandate Contract, but not in the General Provisions of Contract. This is the exception to the principle of contract law that the Obligation–right and the Obligation–duty arisen out of the contract shall extinguish when the contract extinguishes. Even after the contract extinguishes, in the reality, there usually left many things to do. This is a remarkable achievement of the Contract Law in that it has enlarged the extent to which the standard of good

[148] Wang Limig, supra note 20 at 18.

[149] Mo Zhang, supra note 1, at 258 to 259.

[150] Article 92.

[151] Article 654 and Article 674, respectively.

faith applies.

(3) Where should the General Provisions of Contract Be Located?

As discussed above, we can observe that the General Provisions of Contract are necessary. A question then will arise as to where those provisions should be located. Although the PRC, Japan, Germany and France locate these provisions, at least partially, in the area of Obligation-right, it is not of an absolute necessity.

We must be aware of the fact that a contract has dual significance within civil law regime. A contract is an example of juristic act while it is at the same time a representative type of the cause of an Obligation-right. That is why, as shown in **Table IV**, German Civil Code locates the provisions regarding the creation of a contract in the Book I (General Principles). In addition, many of the provisions regarding other forms of a juristic act, i.e., a single act and a joint act can be found in the General Principles of Japanese Civil Code[152].

However, I think that General Provisions of Contract should be located in the area of Obligation-right. First, although the General Provisions of Obligation-rights theoretically apply to all the Obligation-rights irrespective of whether they have arisen from contracts, management of affairs without mandate, unjust enrichment, or delicts, in the reality most of them apply only to the contractual relationships[153]. That is why the General Provisions of Contract (Chapter 3 of Book III) of French Civil Code plays a role of General Provisions of Obligation-right. In fact, the comparison of **Table III** and **Table IV** tells us that this Chapter contains more provisions concerning Obligation-rights as a whole than general rules governing contracts only. Therefore, it is more com-

[152] Articles 33 to 42, 119 to 126.

[153] Supra, note 97 and 98.

prehensive to locate the General Provisions of Contract in the area of Obligation-right. Second, the reason why the provisions concerning the creation of contracts are located in Book I of German Civil Code is that, unlike Japan[154] and France, Germany adopts "the Theory of Conformity"[155] in addition to the other requirements in order for a juristic act to be valid. This Theory requires the conformity of the wills of the parties not as the requisite for the formation of contract but for the validity requisite of juristic act[156]. That is why it is located in General Provisions

5. How the Civil Law Regime of the PRC must Be Restructured?

As discussed above, the PRC civil law regime has no Law of Obligation-right. Although the Contract Law contains many provisions which should have been in the Law of Obligation-right as shown in **Table III**, the legislators seem to have stuck to the genuineness of the Contract Law. The strong evidence of this observation is the fact that the provisions concerning the management of affairs without mandate[157], unjust enrichment[158] and delicts[159] are found in the GPCL. Regarding the treatment of these non-contractual causes of Obligation-rights, among these four jurisdictions, Japanese Civil Code most precisely follows the Pandekten System. Book III (Obligation-rights) is divided into General Provisions and Specific Provisions. The Specific Provisions are further divided into 4 Chapters according to the cause of Obligation-rights (contract; management of affairs without mandate; unjust enrichment; and delict). In addition, Chapter 2 (Contracts) are also classified into General Provisions and

[154] See II 2. (3) (ii).

[155] Articles 145 and 155 of German Civil Code.

[156] KITAGAWA, supra note 10, at 2-16.

[157] Article 93.

[158] Article 92.

[159] Articles 117 to 133.

Specific Provisions. German Civil Code takes a slightly different way. Book II (Obligation-rights) can be divided into general part (Chapters 1 to 6) and specific part (Chapters 7). Among other Sections on typical specific contracts, Sections 11, 24 and 25 are respectively assigned for management of affairs without mandate; unjust enrichment; and delict as if they were part of the typical specific contracts. The situation of the French Civil Code is complicated. Book III (Different Modes of Acquiring Property) has 20 Chapters, among which are Section 3 (Contracts or Conventional Obligations in General) and Section 4 (Quasi-contracts and Delicts and Quasi-delicts).

The question here will arise as to whether the Law of Obligation-right must be enacted in addition to the existing Contract Law, or either the GPCL or the Contract Law must be amended so that it can play a role of the Law of Obligation-rights. I think the Contract Law should be restructured into the New Law of Obligation-rights because the comparison of **Tables III** and **IV** evidences that the General Part of the existing Contract Law has more provisions governing the Obligation-rights as a whole (provisions enumerated in **Table III**) than the provisions solely applying to contracts (provisions enumerated in **Table IV**). Those two sets of provisions should be well classified and organised within the New Law of Obligation-right. In addition, the redundant provisions of the GPCL appeared in **Tables I** through **IV** should be removed from the GPCL and be integrated into the correspondent provisions of the New Law. The provisions on non-contractual causes of Obligation-rights must be transferred into the New Law.

III Problems of the Contents of Provisions of the Contract Law

In the above **II**, I have mainly discussed on the structural problems of the Contract Law. In this Chapter, some of the problems concerning the contents of the provisions of the Contract Law will be analysed.

1. Article 44

Article 44 is one of the most problematic provisions of the Contract Law in two meanings: (1) in accordance with the principle of transfer of a real right (物権変動 Wuquan Biandong); (2) with respect to the provisions concerning the passage of risk (Articles 142 to 149).

(1) Transfer of a Real Right

The Paragraph 2 of Article 44 provides:

"Where **a contract may become effective** only after the completion of approval and registration procedure according to the provisions of law and administrative regulations, such provisions shall govern. (An emphasis is made by the author)" This provision undoubtedly assumes the case where an effectiveness of **contract itself** rather than the result of the contract is subject to a registration or an approval. The provision subjecting the effectiveness of **the transfer or the establishment of a real right** to certain procedures is not so strange. For example, in accordance with Japanese Civil Code, a pledge of right shall be effective only upon the delivery of the certificate of that right (if any)[160]. However, making the effectiveness of contract may bring about serious problems. Particularly, as to contracts concerning a transfer of real right, many problems have been recognised. Let me explain this referring to the case of mortgage.

(i) Significance of Registration

Article 41 of the PRC Security Law[161] stipulates:

"The parties to a mortgage on property provided for in Article 42 hereof shall carry out registration of mortgaged property. A mortgage contract for

[160] Article 363.

[161] Adopted at the 14th Session of the Standing Committee of the 8th National People's Congress and promulgated on 30 June 1995, which became effective as of 1 October 1995.

such property shall become effective on the date of registration". It is apparent that Article 41 of the PRC Security Law is one of the typical examples of "provisions of law" referred to in Article 44 of the Contract Law.

This issue is regarding the significance of the registration in transfer of "real right" as a whole. As well known, the registration is not necessarily the condition precedent to the validity of transfer of property right in every jurisdiction. In some countries, the registration is merely the requirement to compete against the third person who has an independent interest in that property[162]. Therefore, this principle will well be discussed from comparative perspective.

(ii) Classification of Doctrines

Professor Liang Huixing classifies the doctrines regarding the significance of the registration in terms of the transfer of property right into the following 4 categories[163]:

(a) Solely Will Doctrine (意思主義 Yisi Zhuyi)

(b) Registration Perfection Doctrine (登記対抗主義 Dengji Duikang Zhuyi)

(c) Registration Validity Doctrine (登記要件主義 Dengji Yaojian Zhuyi)[164]

(d) Formalism Doctrine (形式主義 Xingshi Zhuyi)

The doctrine (b) is adopted by French and Japanese law. For example, Article 1138 of the French Civil Code stipulates that the obligation to deliver goods is accomplished by the mere consent of the parties[165]. Further, Article

[162] For example, France and Japan.

[163] Liang Huixing, "Some Topics on the Formulation of the Law of Real Rights", CASS Journal of Law, Vol. 22, No. 4 (2000), 3, p11.

[164] The terminology of "登記要件主義" was invented by Professor Liang. He himself used to utilize the terminology "債権形式主義" in REAL RIGHT LAW (Liang Huixing & Chen Huabin, 1997, p84) and in STUDIES ON THE PRC REAL RIGHT LAW, (Liang Huixing, 1998, Vol. 1, at 185), and "実質主義登記的立法体制" in supra 25, p138).

[165] Bell, Boyron and Whittaker, supra note 10, p289.

2146 provides "Registered mortgages are priorities on realty".[166] In addition, Article 176 of Japanese Civil Code provides that "The creation and transfer of real rights take effect by a mere declaration of intention by the parties"[167]. Article 177 states that "The acquisition or loss of, or any alteration in a real right over an immovable cannot be set up against a third person until it has been registered in accordance with the provisions of law concerning registration of property"[168].

Although Professor Liang defines French system as (a), I am afraid it is an misunderstanding[169]. While French Civil Code enacted in the year of 1804 had no provision to make the registration the requirement for perfection (for example, Article 2146), from 1855 amendment thereon, there has been the one, which was further amended in the year of 1855[170]. The reason why Japanese Civil Code seems more comprehensive is just that Japan's enactment of the Civil Code which was 1898 (after the Meiji Revolution) was late enough to introduce the whole fruits of the historical development of French Civil Code.[171]

(iii) Separation of Real Right Action (物権行為独自性 Wuquan Xingwei Duzixing) and Cause-non-Affect Doctrine (無因主義 Wuyin Zhuyi)

The jurisdiction adopting Doctrine (d) is represented by Germany. German law recognises "Real Right Action (物権行為 Wuquan Xingwei)" as a separated concept from "Causal Action (原因行為 Yuanyin Xingwei)". Causal action

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[166] John H. Crabb, THE FRENCH CIVIL CODE, (1995).

[167] KITAGAWA, supra note 10, at 1-15.

[168] Id.

[169] Professor Liang was correct in classifying both French and Japanese law as the same category "Solely Will Doctrine" in his previous works: in REAL RIGHT LAW (Liang Huixing & Chen Huabin, 1997, p84) and in STUDIES ON THE PRC REAL RIGHT LAW, (Liang Huixing, 1998, Vol. 1, p185),supra, note 164.

[170] Supra, note 10, p290.

[171] Hoshino Eiichi, 民法概論 II (CIVIL LAW II), (1976), p40.

is the underlying contract for transfer of real right, including sales agreement of real estate, and so on. This is a famous dispute regarding whether "Separation of Real Right Action (物権行為独自性)" is recognisable.

In French and Japanese laws that have adopted Solely Will Doctrine, the underlying contract is indivisible and "Real Right Action" cannot be extracted from "Causal Action", and for the validity of transfer of real right, the parties' consent on the underlying contract is sufficient (one-step). On the other hand, German law requires three steps, i.e., "Causal Action (原因行為)", the parties' consent on "Real Right Action (物権行為)", and finally, the execution of "Real Right Action (物権行為)" in other words, the registration or the delivery[172].

The other important feature of German law is the principle that the invalidity of "Causal Action (原因行為)" does not affect the validity of "Real Right Action (物権行為)". It is called Cause-non-Affect Doctrine (無因主義). It is argued that the Formalism Doctrine adopted by German law can most greatly contribute to the safety of transactions and it is also most logically consistent with the principle of the separation of real right and Obligation-right[173].

Therefore, even in Japan, the representative country of Solely Will Doctrine, the argument that interprets Article 176 of Japanese Civil Code in line with the Formalism Doctrine used to prevail and be supported by the courts at the beginning of this century. They argued that the "intention" provided in the Article 176 is the intention regarding "Real Right Action (物権行為)", not regarding "Causal Action (原因行為)". In other words, the scholars supporting this theory recognized "Separation of Real Right Action (物権行為独自性)". However, this argument was criticised that it is merely the clarification of the content of "intention" and has not departed from Solely Will Doctrine[174]. Profes-

[172] Howard D. Fisher, THE GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE, (1999) p68; Foster, supra note 10 p284.

[173] SUZUKI, Rokuya, LECTURES ON REAL RIGHT LAW, (1989), pp74-75.

sor Liang also considers that this dispute is regarding the question whether Article 176 of Japanese Civil Code is regarding intention concerning a real right or an Obligation–right[175].

(iv) The Chart

The classification of these doctrines is frequently confused, so I will describe as follows:

"Real Right Action" must be separated from "Causal Action"?

↓ Yes

Registration or Delivery is required for the validity in addition to consent on "Real Right Action"?

Yes → Validity of "Causal Action" affects?

Yes → **Germany**

No → **Old prevailing argument and Case law in Japan**

No → Registration or Delivery is Required for the validity?

Yes → Validity of underlying transaction affects?

Yes → **PRC**

No → **Switzerland**

Austria

No → **France**

Japan

[174] TAKIZAWA, Itsuyo, "物権変動の時期 Bukken Hendo no Jiki (The Timing of the Transfer of Real Right)", in 民法講座(CIVIL LAW SEMINAR) 2 (Hoshino, Eiich, ed., 1984), 31, p54.

[175] Supra, note 164, STUDIES ON THE PRC REAL RIGHT LAW, p178.

(v) The Position of the PRC

Together with Swiss and Austria law[176], the PRC has adopted **(c)** Registration Validity Doctrine. The transfer of real right requires not only the consent of agreement, but also the registration or the delivery as the requirement for validity. This theory is argued to be the world's most popular doctrine and could overcome the deficiency of the other three doctrines.[177] However, I do not think the doctrine adopted by Article 44 of the Contract Law or Article 41 of the Security Law is exactly the same as this Doctrine. In the other jurisdictions, by adopting "Registration Validity Doctrine," regulate the validity of the transfer of real right, not the validity of underlying contract[178]. In addition, I am afraid this doctrine can work only in the jurisdiction in which the registration system is sophisticated enough for creditors or prospective creditors to be able to easily access to the registration record. However, the registration system of the PRC is far from sophistication. First of all, the public accessibility to the registration record is not guaranteed[179].

(vi) Practical Problems

The practical problems is the effectiveness of the mortgage contract shall

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[176] F. Dessemontet & T. Ansay, INTRODUCTION TO SWISS LAW, (1997), p93; Herbert Hausmaninger, THE AUSTRIAN LEGAL SYSTEM, (2000), p248.

[177] Supra, note 164, REAL RIGHT LAW, p91.

[178] Supra, note 176.

[179] The Paragraph 2 of Article 62 of Rules on Land Registration stipulates that: "The assignment, mortgage and lease of land use rights shall be based upon the land registration documents and information. For inquiries relating to land registration documents and information, the assignee, mortgagee or lessee should make a written request. The land administration department shall reply in writing to the inquiries made in compliance with requirements for such." Second, the procedure and the effects differ locally". Jan Hoogmartens, "Chinese Law: Taking and Enforcing Mortgages in China: A Lender's Perspective", 30 Hong Kong L.J. 520 at 528; Kerry Long, "Taking Security in Securing Loans in the PRC", Asia Law & Practice, 1998, p85, at 86; Joyce Palomar, "Land Tenure Security as a Market Stimulator in China", 12 Duke J. Comp. & Int'l L. 7, at 59.

be subject to the registration in accordance with Article 44 of the Contract Law and Article 41 of the Security Law. The right of the mortgagee who has already signed the contract and have paid the price may not be well protected[180]. Article 15 of *Reply of the Supreme People's Court upon Several Problems in Handling the Cases on the Operation of Real Estate Development Before the Enforcement of the Managing Law of Real Estate*[181] (hereinafter referred to as "SPC Reply") clearly provides that "The mortgage contract shall be deemed invalid in case the land user mortgaging the land-use right with not formality of mortgage registry for the land-use right. In addition, the PRC courts frequently hold that the sales of house contract of which the transfer of title procedure has not yet been done is invalid, or invalidates the mortgage contract where the registration has not been finished.[182] It means that the position of the mortgagee prior to the registration is so unstable that the problem that a mortgage contract with the non-registered mortgage is not enforceable has been recognised as a considerable obstacle for creditors[183].

As discussed in **II**, I take the that Article 44 of the Contract Law deals only with the "Effectiveness" of contracts, but not the "Validity" of them. However, the Item 5 of Article 52 might be an obstacle, stating "A contract is invalid under any of the following circumstances: mandatory provisions of laws and administrative regulations are violated" Of course, it might be argued that Article 41 of the PRC Security Law is not a "mandatory provision". However, the language of "The parties to a mortgage on property provided for in Article 42 hereof shall carry out registration of mortgaged property" and the fact that (although it is the ownership case), the failure to register sometimes amounts to a

[180] Mo Zhang, supra note 1, at 263.

[181] Promulgated and effectuated on 27 December 1995.

[182] Supra note 163, p10.

[183] Priscilla M.F. Leung, "Land Law", Wang Chen Guang and Zhang Xian Chu INTRODUCTION TO CHINESE LAW, (1997), 541, p562.

imposition of fine[184] make it difficult to agree with this argument.

Is it the problem only owed by the PRC? How about Germany which also makes the registration the effectiveness requisite of a real right action? Germany has no problem because it distinguishes a real right action from a causal action and the effectiveness of the latter action is not affected by the lack of registration. In this sense, the statement of Professor Liang, criticizing the above mentioned courts' holding[185], that the PRC clearly does not adopt "Formalism Doctrine", nor recognises "Separation of **Real Right Action** (物権行為的独自性) and Cause-non-Affect Doctrine (無因主義)", however, it has adopted the doctrine of "Separation of **Transfer of Real Right** (物権変動 **Wuquan Biandong**) from Causal Action"[186] seems the evidence of the rightness of German Theory. This is because, although he insistently denies, the more closely I scrutinise this argument, the more I notice that his opinion is based on Formalism Doctrine. It is proved by the fact that he stated that these courts' decisions confuse the "Causal Action (原因行為)" and "Real Right Action (物権行為)".[187] Therefore, the interpretation has not solved this problem.

(vii) Solution by the Judicial Interpretation

Regarding Article 44 of the Contract Law, Article 9 of *Supreme People's Court, Several Issues Concerning Application of the PRC, Contract Law Interpretation (1)*[188] stipulates "If laws or administrative regulations provide that procedures for the registration of a contract shall be carried out but do not provide that the contract shall become effective after registration, the failure of the parties to carry out registration procedures shall not affect the validity of

[184] Patrick A. Randolph, Jr. & Lou Jianbo, CHINESE REAL ESTATE LAW (2000), p159.

[185] Supra, note 181.

[186] Supra, note 163, at 138.

[187] Supra, note 183.

[188] Promulgated by the Supreme People's Court on 19 December 1999 and effective as of 29 December 1999.

the contract, but ownership of and other real rights over the subject matter of the contract may not be assigned."

Accordingly, although these are regarding the assignment of land use and the protection of mortgagee is denied by Article 15 as mentioned before, The SPC Reply[189] have several rescue provisions:

Article 5 stipulates that:

"If the use right of land assigned by the assignment contract, for which the formalities for the examination and approval and registration formalities have not been handled, the contract shall be generally determined as invalid, however, in the course of the first instance litigation, if requisition formalities for assignment of the collective land use right are handled according to law to change the collective land into the state-owned land, and the land assignment formalities are handled separately according to law, or if the assignment of the use right of the state-owned land goes through separately the examination and approval, registration formalities, the contract can be determined as valid."

Article 7 states that:

"The transferring party of the transfer contract shall be the land user who has handled the formalities for registration or registration of changes of land use right and obtained the certificate of land use. The land user who has not obtained the certificate of land use signs the contract with other party for the transferring purpose, the contract shall be generally determined as invalid, however, the transferring party has invested to develop and utilise the land according to the terms and conditions stipulated in the transfer contract, and in the course of the first instance litigation, or the transferring party has handled the formalities for registration or registration of changes of land use right upon the approval of the departments in

[189] Supra note 181.

charge, the contract can be determined as valid.

This spirit was succeeded in Articles 49 and 59 of Several Issues Concerning the Application of the PRC, Security Law Interpretation[190].

Article 49 stipulates that:

"If a mortgage is created over property for which the procedures for obtaining a certificate of title have not been carried out, **the mortgage may be determined to be valid** if a certificate of title can be submitted or registration procedures are carried out before the conclusion of pleading in the court of first instance. If the parties have not registered the mortgaged property, they may not oppose third parties."

Article 59 provides that:

"If at the time or the parties carry out procedures for the registration of mortgaged property they are unable to obtain registration due to a reason attributable to the registration authority but the mortgagor delivers proof of the right to the creditor, the creditor **may be recognized as having property** in receiving payment from such property. However, third parties may not be opposed if the mortgaged property has not been registered."

It seems to have amended Article 41 of the PRC Security Law. Then, a question will arise whether such kind of interpretation as to amend the law rather than to clarify the law is permitted. I suppose that this concern may have the language of the above provisions "**the mortgage may be determined to be valid**" or "**may be recognized as having property**", was chosen instead of "the mortgage contract may be determined to be valid" or "may be recognised as having effective contractual status", respectively.[191]

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[190] Promulgated by the Supreme People's Court on 8 December 2000 and effective as of 2000.

[191] MORIKAWA, Shingo, "Interpretation of the PRC Security Law", International Commercial Law Journal, Vol. 29, No.5at 596.

However, I believe the amendment to Article 44 of the Contract Law is the most convenient way rather than those circumventing means because above-mentioned mess is really a co-product of Article 44.

(2) Passage of Risk[192]

The other problem will arise in relation with the provisions concerning the passage of risk.

Regarding the rules governing the passage of risk, civil law jurisdictions adopt different principles. The PRC[193] and Germany[194] adopt "Doctrine of Delivery," that the transferee shall assume the risk of loss or damage of the target of the contract upon the delivery. On the other hand, the position of Japan[195] and France[196] is "Doctrine of Contract". The position taken by Japan and France is relevant to the fact that those jurisdictions adopt Registration Perfection Doctrine as discussed in **(1)**. The transfer of real right occurs upon the conclusion of contract and the registration is merely the requisite for setting up against the third persons. Similarly, the risk shall also be transmitted by the conclusion of the contract.

The PRC and Germany are different as to the treatment of registration. In accordance with the Paragraph 2 of Article 446 of German Civil Code, if the registration is made earlier than the delivery, the risk shall be transmitted to

[192] See Table IV.

[193] Articles 142 to 149 of the Contract Law.

[194] Articles 323, 324, 446, 447, 450, 451, 615 and 651 of German Civil Code.

[195] Articles 534 to 536 of Japanese Civil Code.

[196] Article 1138. Paragraph 2 states "it makes the creditor the owner and places the thing at his risk from the moment when it should have been delivered, although the transfer has not been made, unless the debtor is in delay in delivering it, in which case the thing remains at the risk of the latter." However, the courts and prevailing scholarly argument hold that the risk is transmitted upon the conclusion of a contract.(HANDA, Yoshinobu, "危険負担 Kiken Hutan (The Assumption of Risk" in 民法講座 MINPO KOZA (Civil Law Seminar) Vol 5 (HOSHINO, Eiichi, ed., 1985) p76.

the transferee at the time of the registration. The Contract Law contains no such provisions, therefore, if in the PRC, the registration is made earlier than the delivery, the risk shall remain with the transferor. This is not appropriate at all.

In addition, the more serious problem is regarding the situation where the transferee has paid the price and the delivery of the targeted real property has occurred, however, the registration is not made yet. The risk has already been transmitted to the transferee at the time of the delivery, however, because of Articles 44 and 133 of the Contract Law, s/he is not the owner of the real property. Even if the real property is lost by fire through the third person's delicts, the transferee is not entitled to the fire insurance or compensation from the third person because s/he is not the owner. On the other hand, in Germany, even before the registration, the underlying sales contract is effective as the Obligation-right contract. Therefore, the transferee might be able to prove his/her right based on the contract.

2. Assignment of Obligation-rights

Now that we have analysed the issues of the transfer of real right in **1.**, the assignment of Obligation-rights will be discussed here.

As shown in **Table III**, the Contract Law, Japanese Civil Code, German Civil Code and French Civil Code contain the provisions of assignment of Obligation-rights. The Contract Law considers this issue as the matter of perfection (対抗要件 Duikang Yaojian) like Japanese Civil Code and French Civil Code. The principle of perfection is the theory that the assignment of Obligation-right is valid between the obligee and the assignee upon the conclusion of the contract, however, certain procedures are required to set up the assignment against the other persons including the obligor. In accordance with this theory, the procedures required are not requisites in order for an assignment

contract to be valid. It is widely recognised that there are two kinds of perfection requisites for the assignment of Obligation-right. One is the requisite in order for an assignee to set up the assignment against the obligor; the other is the requisite for perfection against third persons. This is because the rules governing the situation where the obligee assigns the Obligation-right which s/he has already assigned to somebody (dual assignment). In addition, the rapid development of securitisation of receivables requires the sophisticated system of perfection of assignment of the receivables in order to separate them from insolvency risk of the assignor/originator/servicer (bankruptcy remote)[197]. That is why both Japanese Civil Code and French Civil Code provide for the rules governing both dimensions of the perfection. Article 467 of Japanese Civil Code stipulates "(1) The assignment of a nominative claim cannot be set up against the obligor or any other third person, unless the assignor has given notice thereof to the obligor or the obligor has consented thereto. (2)The notice or consent mentioned in the preceding paragraph cannot be set up against a third person other than the obligor, unless it is put in a writing under a notarial act." Whereas the Paragraph 1 deals with the issue of perfection against the obligor, the Paragraph 2 governs the rule of the perfection against third persons other than the obligor. Similarly, Article 1690 of French Civil Code states "(1) The assignee is entitled with regard to third parties only through notification of the assignment given to the obligor. (2) Nevertheless, the assignee may also be entitled through acceptance of the assignment made by the obligor in a certified

[197] Of course, it is recognised that even if the rule governing assignment of Obligation-right is well provided in the Civil Code, they are not necessarily appropriate for assignment of a huge amount of receivables by securitisation. That is why many jurisdictions have special law or system governing the assignment of receivables performed by securitisation procedure, such as Loi Dailly (1981) of France, the UCC Filing system of the USA, and The Special Law for the Registration of Assignment of Obligation-right of Japan. However, these special rules can be established only in accordance with the basic legal framework, so having the good law for primitive assignment is most important.

instrument[198]". In accordance with these provisions, both Paragraphs 1 and 2 handle the perfection against both the obligor and third persons.

Whether German Civil Code adopts "principle of perfection" in terms of the assignment of Obligation-rights has been debated. Some argue that in accordance with German Civil Code, the assignment of Obligation-rights shall be effective upon the conclusion of the contract[199]. However, German Civil Code also contains the provisions regarding the perfection against the obligor[200] and the second assignee[201].

Therefore, the lack of the provisions governing the perfection against the third persons other than the obligor in the Contract Law may be considered a serious defect.

3. Lack of Definition

Another distinctive·feature of the civil law system is the comprehensive definition of terminology. Laws of the civil law system are based on the written statutes, therefore, the comprehensive and consistent definition of (at least) basic terms is of a key importance, otherwise serious ambiguity and confusion might be brought about.

However, the Contract Law lacks the comprehensive definitions. Along

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[198] Article 467 of Japanese Civil Code is considered to have been originated in Article 1690 of French Civil Code. (IKEDA, Masao, 債権譲渡の研究 SAIKENJOTO NO KENKYU (Studies on Assignment of Obligation-rights), (2nd. Ed.1997)) p106.

[199] Article 409 of German Civil Code provides "If the obligee notifies the debtor that he has assigned the principal Obligation-right, the assignment of which s/he has given notice is effective against him/herself in favour of the obligor, even though the assignment was not made or is ineffective. It is equivalent to notice, id the obligee has delivered a document of assignment to the assignee named in the document, and the latter presents it to the obligor" Thus some scholars argue that the significance of notice is not a perfection requisite. (Id., p109).

[200] Articles 405, 407, 409 and 410.

[201] Article 408.

with others, for example, the term of "Responsible Person (負責人 Fuzeren)" referred to in Article 50 is such an important word, however, the definition of it cannot be found anywhere in the civil law related statutes or other documents. Accordingly, the counterpart of a transaction with a legal person is not able to judge whether a certain person falls into "Responsible Person", thus the protection of the counterpart, which is the objective of this Article may not be fully realised.

IV Conclusion

As discussed above, the Contract Law has not reached the standard s that the other major civil law jurisdictions have attained both in terms of structure and with respect to contents. The principal cause of this problem is the lack of basic studies on and understanding of civil law system. Even if the law regime of the PRC does not purely belong to the civil law system, no one can ignore the fact that the basic framework of the PRC private law derives from the civil law system. In order to introduce good institutions from different legal systems consistently, the basic understanding of the features of the both systems is critical. Only after doing this, the legislators can choose appropriate institutions from other jurisdictions and can codify them consistently. In other words, the legislators should understand the essence of the civil law system so that they can find out which kinds of institutions of the common law system are useful to supplement the framework based on the civil law system. Otherwise, the law would be merely the cause of confusions. In this sense, the comparative studies of the PRC law from the civil law perspective is most important while most of the academic works have been done as to the comparison with the common law system.

However, the Contract Law also shows considerable achievements. The Principle of "Freedom of Contract" or "Parties' Autonomy" has been the core

principle of civil law jurisdictions. However, the strict application of this principle has resulted in the theory that "the parties are bound only by what they have agreed in terms of a contract" and has sometimes led to the inflexibility of the interpretation of contracts in the following ways: (1) Limitation concerning the duration of effects of a contract; (2) Limitation concerning the content of Obligation-duties; (3) Limitation concerning the subjects. The issue of (1) involves the liability before the formation of the contract (Culpa in Contrahendo or Liability from Procedure of the Formation of Contract) and the liability after the discharge of the contract. The issue of (2) is concerning the ancillary duties such as "Positive Violation of Contract" and "Duty of Care and Safety". The problems of (3) is the exceptions to the privity of the contract or the effects of contracts over third persons such as "Performance Assistance".

These issues have long been recognised in the legal communities of civil law jurisdictions, however, provisions are rarely found and thus the solutions to those problems have heavily relied on the efforts of the courts and scholars to develop the legal rules. Nevertheless, the Contract Law contains the provisions concerning all the above-mentioned problems, while the contents are not necessarily satisfactory compared with the well-developed case law in the other jurisdictions. This fact may be considered to be an achievement made by the Contract Law.

In conclusion, the drastic restructuring that I propose in this dissertation for the existing Contract Law must be made in the manner to minimise the problems and to maximise the existing achievements.

Table I: REQUIREMENTS OF JURISTIC ACT

Requisite	Details		CG *1	CC/ CS	JG	JO/JS *2	GG	GS
(i) Formation	Contract	Offer & Acceptance		10–39		521–523	145–157	
	Single Act	Case of Testament		CS 16–22		JS960–1027		2064–2273
	Joint Act	Case of Incorporation	50–53		33–51		21–89	
(ii) Validity	Subjective	Competency	58	9,47	3–20		104–115	
		Declaration of Will	58,59	52,54	93–98		116–144	
	Objective	Certainty		62				
		Feasibility		117–118				
		Legality	58	52	90		134–137	
		Public Interest	58	52	90		138(i)	
		Fairness	59	3,54	1,90		138(ii)	
		Conscionability	58	5,6,54	1,90		138(ii)	
		Pretensions	58	52	1,90			
		Directive State Plan	58					
		Conspiracy	58	52	94		117	
(iii) Effectiveness	Condition		62	45	127–134		158–162	
	Time			46	135–137		163	
	Legal/Administrative Procedures			44				
(iv) Binding	Agent		66	48,49	99–118		164–181	
	Representative of a Legal Person			50	53,54		26	

*1: CG: the PRC GPCL; CC: the PRC Contract Law; CS: the PRC Succession Law; JG: Book I of Japanese Civil Code (General Principles); JO: Book III of Japanese Civil Code (Obligation –right); JS: Book V of Japanese Civil Code (Succession); GG: Book I of German Civil Code (General Principles); GS: Book V of German Civil Code (Succession).

*2: The number indicates the Article of JO unless referring to JS.

Table II: GPCL AND CONTRACT LAW

*1			GPCL	CL	Japan*2	Germany	France
SV	Incompetency		V*3 58(i)(ii)*4	V47	A4, 9,12,16	V104–115,131	A1123–1125–1
	Mental Reservation				V93	V116	
	False Declaration				V94	V117	
	Mistake		A59(i)	A54(1)(ii)	V95	V119,120	A1109, 1110
	Fraud or duress	Against State Interest	V58(iii)	V52(i)	A96	A123	A1111–1117
		Others		A54(2)			
OV	Illegality	Mandatory Law	V58(v)	V52(v)	V90,91	V134–137	V1133
		Others		?	Valid91		
	Against Public Interest		V58(v)	V52(iv)	V90	V138(i)	V1133
	Unfairness		A59(ii)	A54(1)(ii)	V1,90	V138(ii)	V1133
	Unconscionability		V58(iii)	A54(2)	V1,90	V138(ii)	V1133
	Pretensions		V58(vii)	V52(iii)	V1,90	V138(ii)	
	Against Directive State Plan		V58(vi) (Economic Contract)				
	Conspiracy		V58(iv)	V52(ii)	V94	V117	
E	Condition		V62	V45	V127–134	V158–162	
	Time			V46	V135–137	163	
	Procedure			V44			
B	Unauthorised Agent		V66	V48	V114	V177	V1998
	Representative of a Legal Person			V50	V54	V26	

*1: SV: Subjective Validity Requisite; OV: Objective Validity Requisite; E: Effectiveness Requisite; B: Binding Requisite (See Table I)

*2: CL: the Contract Law; Japan: Japanese Civil Code; Germany: German Civil Code; France: French Civil Code. (Figures indicate Articles of respective law.)

*3: V=Void; A=Voidable

*4: (1), (2) ··· refers to the number of Paragraph within an Article whereas (i)(ii) ··· means the number of Item within an Article or a Paragraph within an Article.

Table III: GENERAL PROVISIONS OF OBLIGATION-RIGHT

			CL*1	Japan*2	Germany*3	France*4
Objects			[redacted]	399–411	241–248	1134–1145,1168–1196
Effects	Obligor's Default	Assistant	121		278	
		Others	107–120 [redacted]	412, 414–422	249–277, 279–292	1146–1155 1226–1233
	Obligee's Default	Acceptance		413	293	
		Others			294–304	
	Stabilisation	Subrogation	73	423		1166
		Right to Avoid	74–75	424–426	Special Law	1167
		Plural Parties: Joint etc.	[redacted]	427–445	420–432	1197–1225
		Plural Parties: Surety	[redacted]	446–465	765–778*7	2011–2043
		Security on Thing	[redacted]	[redacted]	[redacted]	2071–2218
Transfer	Assignment of Right		79–83	466–473	398–413	1295, 1689–1701
	Assumption of Duty		84–87		414–419	
Extinc-tion	Performance		91(i)	474–493	362–371	1235–1248, 1253–1256
	Deposit		91(iv) 101–104	494–498	372–386	1257–1264
	Subrogation by Performance			499–504		1249–1252
	Set-off		91(iii)99, 100	505–512	387–396	1289–1299
	Novation			513–518		1271–1281
	Release		91(v)105	519	397	1282–1288
	Merger		91(vi) 106	520		1300–1301
	Loss of the Thing Owing					1302–1303
	Rescission					1304–1314
	Termination of Contract		91(ii)			
	Discharge by Statute or Agreement		91(vii)			

*1 The Contract Law of the PRC
*2 Book III of Japanese Civil Code, unless otherwise described.
*3 Book II of German Civil Code, unless otherwise described or shadowed.
*4 Chapter 3 of Book II of French Civil Code, unless shadowed.
*5 G means the GPCL of the PRC. [redacted] indicates the General Provisions of the whole civil law regime.
*6 [redacted] indicates the law of property.
*7 The lighter shadow indicates the law of specific contracts.

Table IV: GENERAL PROVISIONS OF CONTRACT

		CL*1		Japan*3	Germany*4	France*5
			CISG*2			
Creation		1–43	11–25	521–532		
Effects	Simultaneous Performance	66		533	320,322	1612
	Passage of Risk	142–149*6	66–69	534–536	323,324, 446,447,450, 451,615,651	1138, 1182, 1611
	Contract for Third Person	64		537–539	328–335	1121
	Transfer of Contractual Position	88–89				
	Liability from Formation Procedure	42				
	Trade Secret	43				
	Positive Violation of Contract	122				
	Indemnity Clause	53				
	Anticipatory Repudiation	68	71		321	
	Modification	77–78	29			
	Force Majeure	117–118	79			
Termination	Requisite	93–98		540–548	346–361	1658–1685
	Liability after Discharge	92				

*1 The Contract Law of the PRC

*2 Articles of CISG which are correspondent to the provisions of the Contract Law of the PRC

*3 Book III of Japanese Civil Code, unless otherwise described.

*4 Book II of German Civil Code, unless otherwise described or shadowed.

*5 Chapter 3 of Book II of French Civil Code, unless shadowed.

*6 The lighter shadow indicates the law of property.

*7 indicates the general provisions of the whole civil law regime.

*8 G means the GPCL of the PRC.

Attachment I : THE PRC CONTRACT LAW

Chapter	Section	Subsection	Articles
1 General Provisions	1 General Stipulations		1 to 8
	2 Formation of Contracts		9 to 43
	3 Validity of Contracts		44to59
	4 Performance of Contracts		60 to 76
	5 Modification and Assignment of Contracts		77 to 90
	6 Discharge of Contractual Rights and Obligations		91 to 106
	7 Liability for Breach of Contract		107 to 122
	8 Miscellaneous Stipulations		123 to 129
2 Special Provisions	9 Sales and Purchase Contracts		130 to 175
	10 Contracts for the Supply and Consumption of Electricity, Water, Gas and Heat		176 to 184
	11 Gift Contracts		185 to 195
	12 Loan Contracts		196 to 211
	13 Lease Contracts		212 to 236
	14 Lease-Finance Contracts		237 to 250
	15 Contracts for Work		251 to 268
	16 Construction Project Contracts		269 to 287
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			6 Obligation with Penalty Clauses		1226 to 1233
		5 Extinction of Obligations			1234
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				4 Offers of Payment and Consignment	1257 to 1264
			2 Novation		1271 to 1281
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			4 Extinguishment		1289 to 1299
			5 Merger		1300 to 1301
			6 Loss of the Thing Owing		1302 to 1303

			7 Action in Nullity or Rescission		1304 to 1314
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			1 Documentary Evidence	1 Certified Instruments	1317 to 1321
				2 Instruments under Private Signature	1322 to 1332
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5 Contract of Marriage and Matrimonial Regimes		1 General Provisions			1387 to 1399
		2 Regime of Community	First Part-Legal Community		1400
			1 Composition in Credits and Debits	1 Credits of the Community	1402 to 1408
				2 Debits of the Community	1409 to 1420
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			6 Universal Community		1526
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	6 Sales	1 Nature and Form of Sales			1582 to 1593
		2 Who Can Buy or Sell			1594 to 1597
		3 Things Which May Be Sold			1598 to 1601
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			2 Delivery		1604 to 1624
			3 Guaranty		1625
				1 In Case of Dispossession	1626 to 1640
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		5 Obligation of the Buyer			1650 to 1657
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	7 Auction			1686 to 1688
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		1 Hire of Domestics and Workers		1780 to 1781
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	4 Lease of Livestock	1 General Provisions		1800 to 1803
		2 Simple Lease		1804 to 1817
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			2 To the Sharecropper	1827 to 1830
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			7 Withdrawal or Death of a Partner		1869 to 1871–1
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			3 Engagements of Lender for Use		1888 to 1891
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			2 Obligation of Lender		1898 to 1901
			3 Engagements of Borrower		1902 to 1904
		3 Loan at Interest			1905 to 1914
	11 Bailment and Sequestration	1 Bailment in General and Kinds			1915 to 1916
		2 Bailment Strictly Speaking	1 Nature and Essence		1917 to 1920
			2 Voluntary Bailment		1921 to 1926
			3 Obligation of Bailee		1927 to 1946
			4 Obligation of Bailor		1947 to 1954
			5 Bailment of Necessity		1949 to 1954
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			2 By Agreement		1956 to 1960
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		2 Effects between Parties		1977 to 1983
13 Agency	1 Nature and Form			1984 to 1990
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	3 Obligation of the Principal			1998 to 2002
	4 Termination			2003 to 2010
14 Suretyship	1 Nature and Extent			2011 to 2020
	2 Effect	1 Between Creditor and Surety		2021 to 2027
		2 Between Debtor and Surety		2028 to 2032
		3 Between Co-sureties		2033
	3 Extinction			2034 to 2039
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17 Pledges				2071 to 2072
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