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Freedom of Contract in China: A Universal Concept but with Chinese Characteristics

Nadia Zayani*

Abstract

When evoking the issue of freedom[1]the concept leads and hints to liberal ideas that marked the occidental thinking and perspective towards economy and life in general this stream of liberalism had emerged during eighteenth century and all its ideas and approaches premised on a main conception deemed the backbone of the revolution of 1789 itself. Hence the revolution highlighted the issue of individualism, no matter is the area or the scope of function. Accentuating the fact that the economic field had the lion share of the influence. The renaissance is the mature ground to claim liberalism and individualism in all senses, an approach that stipulate the priority and the absolute privileges granted to individuals in order to manage their personal lives, as at work or business mainly the way they find it appropriate and convenient without any interference. There upon this was core idea that labeled the philosophy of the enlightenment which was spread from France across the whole Europe and then the whole world, an era of a long and historical battle against corruption and despotism and for the absolute respect to the human mind and choices and the total confidence and trust vis a vis his competences and abilities. From this angle, the cultural identity of the occidental world based on all this principles justify the historical development of the conception of freedom and the way it was inflicted and spread in different fields. Therefore, like China for instance, a country which had a radically different cultural identity and different history from Europe it is difficult to expect that these principles would be transplanted literally in china, because china has its own characteristics so the term freedom and individualism doesn't seem compatible with the principle of social harmony, a virtue and a strict rule deep-rooted in the Chinese logic and way of thinking, nevertheless its clearly obvious here that individuals cannot be considered out of the collective context. So from this point, I am trying to prepare a ground for the limits of freedom of the contract in china

Keywords: *Universal Contract Concept, Freedom of Contract, Concept of Chinese Contract*

I. INTRODUCTION

The notion of freedom in its broad sense is deep-rooted in the occidental culture, so in term of comparison between the two version of the concept, I'll try to provide an adequate idea about the Chinese context taking into consideration the prudence of Chinese jurist, when they decided to transplant some principles from the foreign law especially the German, the French and the Russian law, where the influence is clearly noticed.

II. EVOLUTION OF THE CHINESE CONTRACT LAW WITHIN THE ECONOMIC AND SOCIAL CONTEXT

Before 1999 it was not possible to talk about contract with proper term, it was more like a group of rules used to handle domestics problems that's why its efficiency was a subject of analysis and verification therefore these was mainly because at that period of China's history (before1999), the government was not really concerned about building a solid trade system but later on in the cadre of modernizing the socialist system and promoting an open market[2], China had to make it in a way which balance its chances in international trade vis-à-vis the foreign or international counterpart.

The author is a Ph.D. Candidate in China University of Political sciences and Law, email: nadiazayani@live.fr

[1]*the freedom of the contract is a juristic conception but its derived from the principles of the French revolution that had been spread later over around the world soIreferred the conception to its historical origins in order to justify later why the Chinese version was not identical to the western one, the idea is to underline that china doesn't share the same history and social development with the western that's why its version has to be different.*

[2]Dr Grace Li"The PRC Contract Law and Its Unique Notion of Subrogation", Journal of International Commercial Law and Technology, 2009.Page 7

In 1999[3], China promulgated the Contract Law (CL) the first unified and relatively efficacious contract law according to specialist which provided a competent contract law for China compared the other contract law, especially the western one due to the meticulous effort made by Chinese scholars to make their law consistent and coherent with international context. Before 1999, contract law in China was divided in three separate laws each handling a particular area of the law of contract. The three pillars of Chinese contract law were the Economic Contract Law (ECL) of 1981 applicable to domestic "economic" contracts, the Foreign Economic Contract Law (FECL) of 1985 applicable to "economic" contracts between domestic and foreign parties, and the Technology Contract Law (TCL) of 1987. The coexistence of these three laws resulted in a fragmentary approach to contract law and meant that the law of contract was piecemeal, often inconsistent and at times incomplete. With the entry into force of the uniform contract law in 1999, the ECL, FECL and TCL were repealed[4]. Article 1[5] CL embodies the purpose of the new, uniform law on contract law: "this is law is formulated in order to protect the lawful rights and interests of contract parties, to safeguard social and economic order".

Also in order to modernize the socialist policy and adapt it into the trade strategy, this new contract law was needed to support China's transition from a centrally planned economy to a market economy and to facilitate economic growth. The CL aims to facilitate international economy, trade and technological cooperation by incorporating rules in harmony with the international practices into Chinese law. This is obviously appearing when the observer examines many provisions, which were clearly influenced by international instruments such as the CISG and the Unidroit Principles of International Commercial Contracts (UPICC). The CL also aims to provide to the contracting parties more protection, and provide them more freedom and flexibility in their contractual relations while at the same time providing legal means and grounds for the governmental regulation of contracts likewise to protect the interests of the state and the public interest.

The CL comprises two main parts: General Provisions and Specific Provision. In the first part (General Provisions), the CL lays down rules that are applicable to all contracts, such as the general principles of contract law, rules on formation of contracts, validity of contracts, performance of contracts, amendment and assignment of contracts, discharge of contractual rights and obligations, liability for breach of contract, provisions concerning the relationship between the CL and other laws, contract interpretation and choice of law. The second part (Specific Provisions) contains 15 chapters dealing with specific types of contracts, such as contracts for sales, donation, lease, financial lease, work, supply of electricity, gas and water, loan, technology, storage, warehousing carriage, construction projects, commission, brokerage and intermediation. Where a contract falls within the categorized, nominate contracts; the relevant provisions of specific provisions for that type of contract will apply. Non-categorized, in-nominate contracts are governed by the General Provisions. According to Article 124 CL[6], provisions concerning a nominate contract that is similar to the non-categorized. In nominate contract it may be applied analogically.

The CL is not the only source of legislative rules on contract law. Rules of Chinese contract law can also be found in the General Principles of Civil Law (GPCL) of 1986[7], which contains general rules for all civil juristic acts that are also applicable to contracts. The GPCL contains provisions on fundamental principles, natural persons, legal persons, civil juristic acts and agency, civil rights, civil liability, prescription, application of law in civil relations with

[3]*Nicole Kornet Maastricht"Contracting in China: Comparative Observations on Freedom of Contract, Contract Formation, Battle of Forms and Standard Form Contracts" journal of European Private Law Institute Working Paper, 2001.page 5*
[4]*Jerome A. Cohen "Understanding China's Legal System: ", New York University Press,2003.*
[5] *Article 1 CL, "Purpose This Law is formulated in order to protect the lawful rights and interests of contract parties, to safeguard social and economic order, and to promote socialist modernization".*
[6] *Article 124 CL applicability to non-categorized contracts, where there is no express provision in the Specific Provisions hereof or any other law concerning a certain contract, the provisions in the General Principles hereof apply, and reference may be made to the provisions in the Specific Provisions hereof or any other law applicable to a contract which is most similar to such contract.*
[7] *Nicole Kornet Maastricht "Contracting in China: Comparative Observations on Freedom of Contract, Contract Formation, Battle of Forms and* Standard Form Contracts" journal of European Private Law Institute Working Paper, 2001.page 5

foreigners and supplementary provisions. A number of other laws dealing with specific topics are also relevant to contract law such as advertisement law, agriculture law, construction law, consumer protection law, insurance law, copyright law against unfair competition and maritime law etc. When looking at the sources of Chinese contract law, administrative regulations, ministerial rules, local regulations and rules, and authoritative interpretations of the Standing Committee of the National People's Congress (NPC) and the Supreme People's Court (SPC) should not be overlooked.

In view of the many sources of law relevant to contracts, there is a potential for conflicting rules to exist. For this reason, the CL contains a provision that regulates the relationship between the CL and these other sources. That's why it's appropriate to notice that even still considered equivocal and ambiguous the new contract law proved in many reprises. It is eagerness and insistence to be consistent with international context in order to guarantee the desired success.

III. FREEDOM OF THE CONTRACT: A UNIVERSAL CONCEPT BUT WITH CHINESE CHARACTERISTICS

A contract is after all an agreement between two or more parties it is a sort of engagement gives birth to the obligations of both parties, which implies that each party is expected to respect the contract and its content whether it is written or verbal. The theory of the freedom of the contract[8] stipulates that everyone is free to contract, to determine the content of the contract and choose[9] the other party. This law assumes that everyone is free; indeed he can freely express his will through contracts. Everyone can contract with whomever he wants, when he wants, what he wants. Individuals are free and autonomous to contract or abstain guided and referring only to their personal interest and requirements. This autonomy involves actually that since a contract requires the meeting of wills, it involves that both parties are equally[10] free to decide to contract or to excuse the contract within the fixed rules and defined situations, which demonstrate that the power of freedom is an important pillar of the contract law, and strictly an irreplaceable principle even though the question of the limits of freedom of contract arises progressively forming a subject of one of the major debates in the civil law in many countries[11], where the trade is the backbone of the economy structure.

Nevertheless in China also many scholars evoked this issue since the Chinese implication to trade had substantially increased and foreign party contracting with Chinese complain often about the fact that this freedom remains incomplete vis-à-vis the international context. But, while this principle is not evoked expressly in the new contract law it was incorporated in a different way that respect the main content and principles which guaranty its consistence with the economic growth and the exigency of the social system. Thus it is important to underline the freedom of the contract as one of concrete changes that had marked the Chinese contract law after the enactment of 1999, because before everything was adjusted in the same line with the social market and the state plan economy. But since the implication for trade raised and the economic growth was the aim goal of the new stage that had adopted policy of transitions towards a market economy. The role of mandatory state plan, however, has strongly decreased in order to promote a market economy where individuals are active and independent but with measures and limits. According to rules, whereas the before1999 contract laws were strictly connected and dependent to the state plan, or to others commercial bodies which govern the domestic market including its interaction with the foreign parties. To the contrary, the new contract law granted more freedom and flexibility to individuals when managing their business without a strong interference, which might bother or impede a successful business deal. But this is surely has to be with limits which means there will be less space for the government intervention.

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[8] *Hus, CS, "Understanding China's Legal System: Essays in Honour of Jerome A. Cohen", New York University Press,2003*

[9] *MO ZHANG China contract law theory and practice , Brill Academic Publishers, 2006*

[10] *Laura Schweitzer China contract law,October 7th, 2016*

[11] *Hus, CS, "Understanding China's Legal System: Essays in Honour of Jerome A. Cohen", New York University Press,2003*

IV. FREEDOM OF THE CONTRACT IN THE PRE-1999 CONTRACT LAW

When analyzing the contract law in practice, the issue of the central plane imposes its presence.[12] It helps in somewhat to provide a definition of the law in practice with in the social and the economic background. Thus a deep understanding of the state plan is required here since it's the main door to determine area of interaction between law and social and economic context. The law pre 1999 and its strict dependence to the state plane[13]in this period of time while it is important to notice that even this law was also an imminent tentative and a manifestation of a serious will to make the Chinese legal system much more consistent with international frame. Because the law before the communist party arrives to the leadership was characterized by its particularity in a way imply that foreign party are not concerned by this law due to instable social situation in China (warlords time) and which makes a deep thinking about the trade and the implication of trade.[24]A very weak and vague idea didn't really find any support from leaders who were already preoccupied by domestic problems. So the law pre1999 was a kind of the first step towards a more liberal version of CL , even though the efforts towards its improvements remained limited this period of time is characterized mainly by the centrally planned, under which economic entities are invited to establish a plan for their actions and activities and collaborate with the government in order to be an active element in achieving an efficient outcome previously fixed by the state plan.

The economic bodies under this law don't have any autonomous characteristics. It cannot be considered out of the state plane in another way. It's a just a tool to achieve the goals fixed and determined by the government. But incited by the non-efficient results of this system, especially after proving it's in compatibility with the international challenges through an aptitude to provide acceptable productivity in the collective agriculture[25] and planned industry and even commerce. Since that time this deception towards this limited or unexpected outcome, boosted China's implication to improvement and amelioration and started to conceive a launching of a major program of economic reform deemed to be practical and more efficient but still performing within the frame of the state plan. So contracts in this state was barely an administrative dispositive rule without any effect out of the management of the government, which takes the burden then putting it in practice by bringing suppliers and customers together. This involves that parties didn't have the right to move freely within the contract area because they are totally controlled by the government. Thus according to these system, people are involved while according to the government, they will be in an artificial transaction already fabricated by the state, which accentuates the non-spontaneity of the contractual act and the non-authenticity. In other word, in this stage contracts were plainly oriented to guarantee achievement of the state plan whereby governmental entities almost of the time ministries are charged in determining contracting parties and matching them, which moreover influence the terms of the resulting agreement.

V. THE CHINESE VERSION OF THE FREEDOM OF THE CONTRACT BOUNDED BY THE GOOD FAITH

It is worth to notice or remind that the CL didn't recognize explicitly the freedom of the contract as it was explained previously instead of that the CL fragmentized it in many principles refers mainly to the original version of the notion, which is a sort of recognition of the legitimacy of the autonomy of and individuals within the law. But China, as a social regime, had to manage and balance all notions, which are relatively or mainly inconsistent with the social road. That's why the transition to a market economy didn't really banish the state role of control and regulation. The state intervention in the new CL was with measures and according to rules determined by the state that we can see clearly that there are a lot of room for more flexibility and freedom. I site areas whereby this principle (freedom of the contract) appears clearly, starting by the article 4 of the Contract Law where it provides the principle of voluntariness that represents the substantial meaning "freedom of the contract". Further, the binding character of contract and the

[12] *See Jun Zhao, "The puzzle of freedom of contract in Chinese contract law, 2010,page 6*
[13]*See Jun Zhao, "The puzzle of freedom of contract in Chinese contract law, 2010,page 8*

principle of the sanctity of contracts, principles to which the recognition was sustained by the Article 8 of the 1999 Act provide that "contract formed legally protected by law". Noticing that the principle is not an absolutely rigid in particular vis-à-vis parties: a party may suspend performance of its obligations or terminate the contract if the other party suffers a serious deterioration of his business. He is dealing with fraudulent activity, or in case he has lost all credibility or any other circumstances evidencing his inability to perform his or will not perform his obligations. I would insist to point out here that there is a sort of vagueness, which explains why jurisprudence has a huge space to exercise interpretation. Therefore the judge is not bounded as by agreement of the parties he may interfere whenever the chance and the circumstance suggest it, which involves that he has a wide disposition to intervene and interpret the contract. As parties have many rights protected by law, they have some duties towards each other as well. Others are toward the state for some areas where the state has the absolute power to regulate and manage. Also parties are expected maintain the duty of confidentiality between each other and prohibiting the use of any trade secrets learned during the negotiation of a contract. The ethical aspect manifest here and show the presence of the moral rules as the Chinese society was accustomed in the ancient time where there was conceived to keep people in the same line with morality. There is a kind of fine string of continuity between the past and the current law characterized by its modernity from this point. I want to evoke the idea of being consistent with international law system but with Chinese characteristics may be this part doesn't show really the particularity of the CL. But what I wanted to accentuate is if these principles in other law system exist as well, that doesn't imply that background and impulses are the same. So the degree of influence and the understanding won't be the same. Maybe within the Chinese society where individuals were expected for millennia to be obedient and don't infringe social order stipulates, the sanctity of the law itself and areas where morality and ethics are viewed with more modernism and universal aspect.

This appears to be more concrete in the area where the question of good faith arises, the freedom of the contract like it is based on many practical principles guarantee to parties' better management and more flexibility for their interests and business within a context of freedom and autonomy. They are at the same time strictly invited to perform within in the good faith cadre, so implicitly the good faith here even a tool to protect parties from a potential abuse. It is practically one of the limitation of the freedom of the contract because contracting parties are not in fact absolutely free to perform out of the moral context .So except from the limitations traced by the government to regulate and balance the principle freedom according to its standards and requirement, there is the ethical part which stipulates that parties has to act in good faith plus their not allowed to operate in areas where an infringement of moral ethics and rules might occur. A balanced equation between parties' rights to protects their interests and to act in framework characterized by the freedom and the flexibility and autonomy granted by the principle of freedom of the contract and bounded by the government regulations and the respect of the principle of the good faith

The principles of equality, voluntariness and the binding character of the contract are actually oriented to simplify and facilitate the contractual process in order to provide more rooms for contracting parties' freedom of contract. This freedom is not, however, unrestricted and this is to be viewed in many provisions of the CL, which shows clearly that Chinese contract law carry more favour to the collective interest, to the detriment of the individual rights and interests of contracting parties. This has the effect of restricting individual's freedom of contract when it's about offending social order, mentioned in this context. For example, the first provisions of the CL, which stipulates that the objective of the CL is to keep the social, order intact from potential harm caused by parties or others. Article 1[14] CL provides that the CL is formulated in order to protect the lawful rights and interests of contracting parties, to safeguard social and economic order, and to promote socialist modernization. The exercise of the freedom of contract provided by the principles discussed above is thus always subject to the promotion of collective goal safeguarding the Chinese social and economic order which explains why in my opinion the term freedom was not evoked expressly because it bind the state by a responsibility of promoting such boundless term, which might disrupt the social order. Therefore the principle of freedom of the contract is the core of the contract law itself. Here the goal is to touch concretely sensitive organs in the CL body, which is mainly the freedom of the contract because it is in fact the outcome of a pivotal reform.

[14] *Jun Zhao, "The puzzle of freedom of contract in Chinese contract law, 2010,page 8*

Hence, this is certifying the authenticity of this principle from the angle that it is newly transplanted. So this is the main addition to the contract law. Other parts are evident already existent before the enactment of the new law or just spontaneously existent because even in the ancient time the contract is an agreement where parties are evidently expected to form the contract and evidently perform or breach if the occasion arises. But there was no regulations draw the civic feature of these principles so these elements of the contract law even also modernized and regulated, they don't really take a big share from the enactment just in the area where its interaction with the freedom of the contract emerge. So in other words, the goal of the study is to make an inventory of the limitation of principle of the freedom of the contract in different elements of CL and stressing upon the good faith as main limitation dispersed within all the components of CL which are nested delicately in many reprises with principles of the freedom of the contract. So the paper proposes an analysis of the metamorphosis point in the CL and its borders drawn by the Chinese law in order to promote its own version and perspective of modernity. So the good faith here as one of the limitation of the principle of the freedom repeated in many reprises and in deferent stages of the contract is deemed to be a constant limitation, which is not influenced by the regime or political regulations due to its deep-rooted aspect inflicted within the Chinese culture which foster the social harmony with the respect of morality and ethical rules[15].

VI. CONCLUSION

The principle of freedom of contract is based on the premise that individuals should be free to define themselves in terms of their own contracts without any interference from other party, which doesn't belong to the contractual process. Thus, everyone is free to conclude or not to conclude a deal, selecting the contractor and the contents of the contract. Contractual freedom in contract law involves that parties has the freedom to establish whether or not a company organize and adhere to a social pact. Partners are free to establish or not to establish contractual partnership. Insert special clauses in the statutes entering into agreements such as extra-statutory protocol. In Chinese law the freedom of the contract was not expressively evoked but it was embodied through a set of principles which doesn't differ much in the meaning from the universal conception but worthy to notice that the difference actually consist in different levels of accentuation or mitigation of principles within the practice field not in theory.

[15]*ChunlinLeonhard"A Legal Chameleon: AnExamination of the Doctrine of Good Faith in Chinese and American Contract Law", 2004.Page 5 "Chinese scholars embraced the doctrine of good faith with a lot of expectations they thought that it may balances forces and forbids many illicitactivity and enhance the Chinese culture that stipulate that the law has to guide people in same line with morality "Chinesescholars overwhelmingly expect the doctrine of good faith to contribute much tothe establishment of a normal transactional"*