Interpretation of *the Civil Code* on Contracts Part

❖ Overview of the Civil Code

Adopted by the third Session of the 13th National People's Congress of the People's Republic of China, *the Civil Code of the P.R.C.* was promulgated on May 28, 2020 and takes effect on January 1st, 2021. There are seven parts constituting *the Civil Code*: the General Principals, Real Rights, Contracts, Personality Rights, Marriage and Family, Succession and Tort Liability, in addition to the Supplementary Provisions. While maintaining the basic civil system set up by the previous laws, *the Civil Code* makes significant progress by further highlighting the autonomy of private law as the core idea of civil law and through providing more effective protection of the economic life of citizens and enterprises. The modification of the Contracts Part has a significant influence on the daily operation of enterprises as well as the commercial disputes resolutions. In this issue of the New Law Express, we would mainly introduce the key contents of those revision and new additions, and make a primary analysis of the impact of these revisions on the conclusion and performance of a contract.

❖ Key Content

I. Improving the regulations of the conclusion and delivery of electronic contract

With the development of the digital economy, the carrier of contracts has also changed from paper-based to electronic. *The Civil Code* stipulates the form, conclusion, delivery time, etc. of electronic contracts, providing a legal basis for resolving e-commerce contract disputes.

Firstly, in terms of contract form, electronic form of contracts was a type of written form in accordance with the Article 11 of the previous *Contract Law*. While according to the

Paragraph 2 of Article 469 of *the Civil Code*, “an agreement is in writing if it is contained in the tangible form of a document such as a contract, letter, telegram, telex, or facsimile.” To be specific, any electronic contract that can show, in material form, the contents that it specifies through electronic data exchange or email and can be accessed for reference and be used at any time shall be deemed as a written form in accordance with the Paragraph 3 of Article 469 of *the Civil Code*, which is consistent with the stipulation of Article 4 of *the Electronic Signature Law*.

Secondly, the conclusion time of electronic contract also has its distinguishing features. Where the parties conclude a contract in the form of a letter or electronic data subject to the execution of a letter of confirmation, the contract shall be concluded at the time of execution of the letter of confirmation. Where the information of any commodity or service released by one party via the Internet or any other information network meets the conditions of offer, and it indicates that it will be bound once promised, the contract shall be concluded when the other party selects such commodity or service and submits the order successfully.

Lastly, as for the contract performance, *the Civil Code* distinguishes the delivery time of electronic contracts based on the differences in the subject matter of the contract. Where the subject matter of an electronic contract concluded through information network such as the Internet is delivery of goods and delivery is made via express courier, the date of acknowledgement of receipt by the consignee shall be the date of delivery. Where the subject matter of the electronic contract is provision of services, the time specified in the generated electronic or physical voucher shall be the time of provision of services; if the time is not specified in the foregoing voucher or the time specified in the foregoing voucher is inconsistent with the time of actual provision of services, the time of actual provision of services shall prevail. Where the subject matter of an electronic contract is delivered via online transmission, the delivery time shall be the time when the subject matter enters the specific system designated by the other party and can be retrieved and

identified.

Suggestions for enterprises management:

During the prevention and control of the Covid-19, electronic contracts have been widely used, such as the signing of bulk goods purchase and sale contracts between enterprises. However, the signing of an electronic contract needs to meet the requirements of *the Civil Code* for the form of electronic contracts. The content of the contract should be presented through tangible carriers such as email, so as to avoid the difficulty in defending one's own rights and interests when disputes arise between the parties.

II. The precedence of general guarantee in a guarantee contract

The most significant difference between general guarantee and joint and several liability guarantee is whether the guarantor enjoys the secured guarantor's right of plea for preference claim. Article 687 of *the Civil Code* stipulates that "The guarantor under a general guarantee shall have the right to refuse to assume guarantee liability to the creditor before a dispute concerning the principal contract has been adjudicated or arbitrated and when such debtor has failed to perform his obligation despite enforcement against his property in accordance with the law." A guarantor with joint and several liability does not enjoy this right.

Article 19 of *the Guarantee Law* stipulates that in the absence of agreement or if the agreement is not clear on the guarantee mode in a guarantee contract, the guarantor shall bear the joint and several liability guarantee, which obviously tends to protect the interests of creditors, and to put heavier responsibilities to the guarantor.

Article 686 of *the Civil Code* has made a subversive amendment to this provision, which stipulates that in the absence of agreement or if the agreement is not clear on the guarantee mode in a guarantee contract, the parties shall bear the guarantee liability according to the general guarantee. Article 688 of *the Civil Code* further stipulates that a

guarantee with joint and several liability is a guarantee whereby the parties agree in a guarantee contract that the guarantor and the debtor are jointly and severally liable for the obligation. According to the provisions of this article, the joint and several liability shall be assumed only if it is expressly agreed in the contract.

Suggestions for enterprises management:

There is a significant difference between the creditors' rights over general guarantee and joint and several liability guarantee. In the case of joint and several liability guarantee, as long as there is the fact that the debtor does not perform the debt at the end of the performance period, the guarantor shall be liable for the guarantee. The creditor can either require the debtor to perform the debt, or require the guarantor to assume the guarantee liability within the agreed scope on the contract.

In the course of business operations, the debtor is often required to provide corresponding guarantees. Based on the changes in *the Civil Code* regarding the guarantee liability in the absence of agreement or if the agreement is not clear on the guarantee mode in a guarantee contract, we recommend that the company clarifies the guarantee liability mode in business operations. If as a creditor, it should clearly require the guarantor to assume joint and several liability for the debt, so as to protect the creditor's rights of one's own in the event of default by the debtor.

III Rules of standard contract terms have been revised

In order to improve the transaction efficiency further, it is increasingly frequent to adopt standard form contract in business activities. Hence, for the purpose of further polishing the provisions of the law on standard terms in contracts, the Civil Code stipulates the rules for the conclusion, effectiveness and interpretation of standard terms in articles 496, 497 and 498 respectively. Among them, the most prominent change is setting forth the standard terms: if one party violates its duty of reminding or explanation, causing that the other party fails to pay attention to or to understand the clauses which are of major

concern, the other party is justified to claim that such standard terms shall not be included in the contract. The reason is that if the provider of the standard terms lacks effective reminding or explanations for the standard terms, and the other party does not fully aware of or understand the actual meaning of the terms, then both parties have not really reached a genuine consensus on the content of the standard terms. Therefore, the standard terms should not be part of the contract.

Suggestions for enterprises management:

When the company is the provider of the standard terms, and there are standard terms in the contract that involve the actual interests of both parties (including the dispute resolution clause regarding relevant agreements on litigation, arbitration, and competent court), the obligation of reminding or explanation can be fulfilled by bolding the content or emphasizing at the end of the content, to avoid the other party claiming that the terms do not form the contents of the contract.

When the company is the recipient of the standard terms, and the other party failed to fulfill the obligation of reminding or explanation of the standard terms, the company shall require the other party to do so, and save these related materials. When a dispute arises, relevant materials can be provided as evidence whereby the company can apply for exemption from the liability.

JunZeJun (Shanghai) Law Offices

Zhengyang Wang (Mr.) **Senior Partner**
Direct Line: +86 21-61060889 Email: wangzhengyang@junzejun.com
Tel: 13816677991

Yiruo Zhou (Ms.) **Head of International Department**
Direct Line: +86 21 61060889-1096 Email: zhouyiruo@junzejun.com
Tel: 17317854719

Qiuyin Hu (Ms.) **Doctor of Law**
Direct Line: +86 21 61060889-1085 Email: huqiuyin@junzejun.com
Tel: 13817861429

Yun Yang (Ms.) **Client manager of International Department**
Direct Line: +86 21 61060889-8072 Email: yangyun@junzejun.com
Tel: 15301603919