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Introduction

The new Chinese Civil Code (the "**Code**") has been passed by the 13th National People's Congress on 28 May 2020 and is due to come into force on 1 January 2021. The Code has maintained the structure and main concepts of existing PRC laws, but seeks to enhance existing PRC laws by providing further clarification by way of the detailed articles drafted. The Code consists of 1,260 articles and seeks to regulate the various aspects of civil society, including contracts, torts, private property, etc.

The purpose of this article is to provide a (non-exhaustive) general overview to the key aspects regulated by the Code with a focus on the laws relating to (1) contracts (2) guarantees on debts, and (3) storage contracts for foreign companies carrying on businesses in China. We aim to highlight some key provisions foreign businesses operating in China should pay attention to when conducting their businesses in China under the enhanced civil law regime.

Article 495: Defining the validity of preliminary agreements

Previously contained within the Judicial Interpretations on Sale Contracts, the Code has now included the definition of a preliminary agreement or pre-contract. It further expands on the scope of 'preliminary agreements', and clarifies what is deemed a legal relationship between parties.

It is not uncommon for parties to enter into some form of a preliminary agreement prior to entering into a formal agreement. As a matter of common law, these preliminary agreements are frequently understood to be non-binding in nature. This may not be the case as a matter of PRC law. Accordingly and prior to signing these preliminary agreements in China or with a Chinese counter party, one should first clarify with one's counter party whether these agreements are meant to be non-binding in nature, or whether these agreements may be regarded as valid preliminary agreements as defined by Article 495 of the Code. As a matter of PRC law, a breach of a preliminary agreement which falls within the scope of Article 495 will yield civil liabilities for the party who has dishonoured the preliminary agreement.

Article 496: Description obligations for party providing standard terms

Where standard terms are incorporated into a contract, the party providing the standard terms should define the rights and obligations between the parties clearly and abide by the principle of fairness so as to ensure the other party is fully aware of its' rights and obligations under such terms. The obligation of the party providing the standard terms to explain to its counter party is crucial. Under article 496, where the party furnishing the standard terms fails to adequately discharge its' obligation to inform and/or explain the terms to the other party seeking the explanation, the misinformed party is entitled to argue that the terms in question do not form part of the contract between the parties.

The Code seeks to protect the interests of the party accepting such standard terms. The party seeking to incorporate its standard terms should ensure that its counter party is fully informed of its terms to avoid any disputes as to the validity and/or enforceability of the standard terms in the contract so concluded.

Article 563: Termination of contracts

The existing PRC law on contract does not provide for the termination of contracts where the contract is not fixed in duration or is 'evergreen' in nature. Termination under the existing PRC law is only possible where the underlying contract provides for this expressly. Article 563 addresses this flaw to provide that as regards the termination of non-fixed term or evergreen contracts, such contracts may be terminated "provided [a] party notifies the other in advance [with] a reasonable period in advance".

This constitutes a remarkable change and is in our view to be regarded as a positive development. It remains to be seen however, what a "reasonable period in advance" would be. Our view is that it would most likely be determined on a case by case basis once the Code becomes effective on 1 January 2021.

Article 686: Presumption of ordinary guarantee under guarantee agreements

Under the PRC Guarantee Law, there are two forms of guarantees, ordinary guarantee and joint and several guarantee. The default position under article 19 of the PRC Guarantee Law where parties have not agreed on the form of a guarantee or where the agreement is unclear, is a presumption that the guarantee is one which assumes joint and several liability.

Article 686 of the Code has reversed this presumption. It now provides that where parties have not agreed on the form of guarantee or where the agreement is unclear, the default position is that the guarantor will only be subject to an ordinary guarantee commitment as opposed to a joint and several liability.

This means that where any guarantee is silent as to its form, as a matter of PRC law, such guarantee will take the form of an ordinary guarantee. This effectively means that a creditor may only claim for debt repayment against the guarantor after it has exhausted all remedies against the original debtor. The purpose of this new presumption is to prevent the spreading of debt risks and is meant to be more guarantor-friendly.

Articles 905 – 918: Law relating to storage contracts

Articles 905 – 918 of the Code regulate storage contracts. In short, these provisions largely mirror that of the previous PRC law of contract.

The following are some comments on what would be considered 'good practice' when dealing with storage contracts in PRC:

1. The warehouse operator must be certified and approved by a government organisation. They should obtain and maintain the requisite official documents from the relevant government entities, such as the business licence and/or the dangerous cargo operator licence and these should be available for inspection as and when required. Similarly, parties wishing to deposit their goods with a particular warehouse should exercise due diligence and request to inspect the aforementioned warehouse licenses ideally before they enter into a storage agreement with the warehouse operator or before they proceed with the actual storage arrangements with the warehouse operator.

2. In the event an agent is appointed as the warehouse operator, parties are advised to check the agents' authorisation letter and its scope of agency.

3. The warehouse operator should maintain in-house records which clearly identify the cargoes it holds, along with all cargo specifications and details relating to quantity, quality and package description of the cargoes.

4. The warehouse operator is also encouraged to carry out regular cargo inspections and in particular prior to the entry of the cargo and also the exit of the cargo from the storage facilities and have in place procedures for the receipt and/or delivery of cargo, specifying its mode of transportation to and from the warehousing facility.

We also note that article 916 is no different to that stipulated under the previous law. Article 916 provides that upon the expiration of the storage contract, should the cargo owner with title refuse or fail to take delivery of the cargo, the warehouse operator may notify the cargo owner to take delivery of their cargo within a reasonable period of time, failing which the storage operator may be entitled to deposit the said cargo at another location and/or dispose of the cargo.

Whilst there is no prescribed time and/or guidance as to what would constitute a reasonable period for the cargo owner to collect its goods, a reasonable period of time as a matter of standard industry practice could be 3 months from the date on which the warehouse operator notifies the cargo owner to take delivery of its cargo.

What would constitute a reasonable period will also depend on other factors, such as (1) the type of cargo involved; (2) whether there are any storage fees outstanding under the relevant storage contract; (3) the suitability and costs of relocating the cargo to another deposit facility and (4) the reputation of

the cargo owner. All these factors may further impact the warehouse operator's decision as to whether they wish to deposit elsewhere or dispose of the cargo by way of a private or public auction.

In theory, parties are free to contract out of this provision and agree expressly by way of contract on how a cargo should be treated where a cargo owner fails to take delivery of the cargo after the storage operator has given notice (and after a reasonable period of time). Article 916 is the default provision which would govern where parties fail to contract specifically on this issue.

This provision makes it all the more important to contract specifically and be clear on the storage period and the various remedies available to parties in the event of a cargo owner's failure to take delivery of its cargo for whatever reasons, so as to safeguard the proprietary rights of a cargo owner vis-a-vis the warehouse operator.

Conclusion

The Code is to date, the most consolidated piece of legislation in China. It remains to be seen how this Code will work in practice. We expect there will be further guidance on the Code as and when the Code comes into force, and when it is implemented.

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