



HAN KUN LAW OFFICES

Legal Commentary



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Brief Comment on the General Provisions of the Civil Law

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As a prelude to the civil code of the People's Republic of China, the General Provisions of the Civil Law of the People's Republic of China (the “**General Provisions**”) was adopted with votes at the Fifth Session of the 12th National People's Congress on March 15, 2017 and will enter into force on October 1, 2017. This marks an important first step of China on its path to compiling a civil code.

The General Provisions, together with the Supplementary Provisions, comprise a total of 11 chapters and 206 articles. The General Provisions are nearly the same structurally to the General Principles of Civil Law of the People's Republic of China (the “**General Principles**”), which are still in force and have not been expressly abolished. However, the contents of General Provisions see remarkable changes compared to the General Principles, and some of these changes are noteworthy for the professional legal operators.

This article will briefly comment on several provisions of the General Provisions by analyzing the influence of those provisions on business and commercial activities.

Important changes to sources of law

Article 10. *Civil relations shall be dealt with in accordance with the laws and regulations; where no relevant provision is prescribed by the laws or regulations, customs may apply, provided the application of customs shall not violate public order and good morals.* (Translation quoted from Lexiscn.com.)

This article clearly stipulates "customs" as a source of law and deletes the old provision of the General Principles that provided for “policy” as a source of law. This provision is considered to have great significance, not only because it will help to reduce the “uncertainty caused by the instability of policy,” but it will also aid in resolving disputes involving local customs, such as disputes related to betrothal gifts. What will need to be further clarified in judicial practice is whether business practices (trade practices) will be accepted as a source of law. Article 61

of the Contract Law of the People's Republic of China provides that: “[f]or a contract that has become valid, where the parties have not stipulated the contents regarding quality, price or remuneration or the place of performance, or have stipulated them unclearly, the parties may supplement them by agreement; if they are unable to reach a supplementary agreement, the problem shall be determined in accordance with the related clauses of the contract or with trade practices.” This means that trade practices have, to some extent, been identified as a source of law in judicial practice. We will wait and see whether the legal status of business practices (trade practices) will be further improved in the future.

Provisions on voluntary guardianship

Article 33. *For an adult with full capacity for civil conduct, he or she may negotiate with his or her close relatives or other individuals or relevant organizations which are willing to act as the guardian in advance and determine his or her guardian in writing. When such adult loses or partly loses the capacity for civil conduct, the guardian determined through negotiations shall then assume the guardianship responsibility.* . (Translation quoted from Lexiscn.com.)

This article relates to voluntary guardianship, which gives a person the right to choose a legal guardian outside of statutory guardianship. The General Provisions expand on the applicable scope of guardianship since a similar provision exists in the Law on the Protection of Rights and Interests of the Elderly. Although voluntary guardianship appears to be a term found in the practice of family law, it has great economic significance in practice by helping enterprises to prevent unexpected losses. Natural person shareholders who become partially or fully lose the capacity for civil conduct due to serious illness, becoming comatose or for other reasons, where the person has not designated a guardian, his or her spouses or other family members shall act as his or her legal guardian. However, the legal guardian may not be able to exercise the rights of shareholders properly. Under voluntary guardianship, a natural person shareholder may appoint as his or her guardian someone who is trustworthy and who has the requisite professional knowledge. The natural person can clearly identify the powers and duties of the guardian in advance, and if the natural person loses or partially loses the capacity for civil conduct due to an unexpected event, the appointed guardian may exercise those rights on behalf of the natural person. This will help to protect the interests of enterprises and prevent internal family disputes from affecting the development of the enterprise.

Provisions on agency duties

Article 170. *Where a person who performs work tasks for a legal person or an unincorporated association performs civil juristic acts related to matters within his or her scope of functions and powers in the name of the legal person or the unincorporated association, such acts shall have binding force on such legal person or unincorporated association.* (Translation quoted from Lexiscn.com.)

Any restrictions imposed by the legal person or unincorporated association on the scope of functions and powers of the person performing work tasks for the legal person or unincorporated association shall not be a valid defense against any bona fide other party. (Translation quoted from Lexiscn.com.)

This provision on agency duties represents a new provision compared to the General Principles. From the perspective of legislative intent, Article 170, particularly paragraph 2, is clearly intended to protect the interests of counterparties, particularly bona fide counterparties. From a business perspective, this increases the risk that employees or executives may engage in unauthorized representations. Enterprises should therefore take appropriate measures to reduce such risks.

Provisions on the termination of entrusted agency

Article 174. *The acts of agency performed by an entrusted agent after the principal dies shall be valid under any of the following circumstances ... (3) the power of attorney explicitly states that the power of agency shall terminate upon completion of the matters entrusted. .* (Translation quoted from Lexiscn.com.)

Similar entrusted agency provisions can be found in earlier lower-hierarchy judicial interpretations, and the inclusion of this provision in the General Provisions greatly elevates the legal status and acceptance of entrusted agency upon the death of a principal. In complex business structure arrangements, such as VIE arrangements, it is often necessary to entrust all or part of the shareholders' rights to a designated person. The greatest risk in such trust arrangements is that it is uncertain whether the successor to the principal will accept the trust arrangement after the principal dies. This provision provides a clear legal basis for the duration of the entrustment stipulated under the power of attorney and clearly provides that such entrustment may survive the principal.

Provisions on the limitation of action

Article 188. *The limitation of actions regarding applications to a people's court for protection of civil rights shall be three years. Where there are other provisions in the law, such provisions shall apply.* (Translation quoted from Lexiscn.com.)

The provision on the limitation of actions is one of the least controversial provisions of the General Provisions. The General Provisions extend the limitation of action to three years from the previous two years. In addition, Article 179 clearly stipulates that the periods, calculation methods, and the reasons for a suspension or interruption with respect to the limitation of action must be prescribed by the law; additional reasons to which parties may otherwise agree are null and void.

In addition, the General Provisions also contain some untested clauses, whose degree of application and impact are still unclear and are awaiting investigation and evaluation in judicial practice. For example, Article 111 prescribes that the personal information of natural persons is subject to legal protection. Whether this provision will impact relevant industries and enterprises remains to be observed. In the past, personal information has been protected mainly through criminal means, that is, punishing criminally the conduct of “selling, illegally providing citizens’ personal information.” Civil claims were rarely raised for improperly using personal information. Under the General Provisions, personal information is to be protected as an individual right and interest. Therefore, we expect to see civil claims to be filed in future litigation for improperly using personal information collected through commercial activities, for the failing to fulfill notice obligations, etc.

The General Provisions are not only a summation of past legislation and judicial trial practice, but is also a response to new societal needs, and a reflection of China’s standing internationally. The promulgation of the General Provisions marks the beginning of compiling a civil code in China. According to the legislative plan, specific subparts of the General Provisions are scheduled to be released in the next three years. Under the background of integrating civil and commercial law, the Chinese legislative system is expected to undergo fine adjustments over the next three years. Therefore, we recommend researchers, practitioners and civil and commercial entities to consistently pay attention to the legislative process and to be fully prepared for relevant changes. Interested parties should express their reasonable requests by submitting opinions during the invitations for public comment or through other channels.

● **Important Announcement**

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