Chapter III
Enforceability of Contracts

As discussed, a contract in China refers to an agreement made by the parties, which is deemed to be something more than just a promise. The Contract Law, therefore, is purposed to enforce the agreement, and the focus is on the voluntary undertakings of the two parties who make the contract, not simply on the promise made by one party or the other. From this point of view, the Contract Law premises the contract on the mutual assent of the parties.

In Chinese contract literature, attempt has been made to draw a line between promise and contract albeit similarities between these two. In one respect, a contract represents social institution of agreement making, while a promise is seen as a social institution of a more informal kind. In other respect, a contract, once made, is backed by the coercive power of the state. A promise, however, is supported by moral argument and the enforceability of it is based on “an artificial virtue” or morality.\(^1\)

To say that a contract is an agreement should not imply that every agreement could be enforced as a contract. Take a closer look at the definition of contract in the Contract Law, it is not difficult to conclude that a contract shall contain at least two requirements: first, it is a voluntary undertaking by parties of equal status, and second, it is purposed to create, modify or terminate relations of

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civil rights and obligations. Therefore, for an agreement to be enforced as a contract, the agreement must meet these requirements. To be more specific, the agreement shall not involve any improper activity such as criminal offences and shall not be used to serve any illegal purpose. In addition, for purposes of the Contract Law, the agreement shall not be the one that deals with relationship concerning personal status such as marriage, adoption or guardianship.²

With regard to the enforceability of a contract, Article 8 specifically provides that when a contract is established in accordance with the law, it shall be legally binding on the parties. Article 8 further provides that the parties shall perform their perspective obligations in accordance with the terms of the contract and neither party may unilaterally modify or rescind the contract without the other party’s consent. It is stressed under Article 8 that the contract established according to law shall be under the protection of law.

For an agreement to be enforceable, there are several factors that are addressed in the Contract Law. First of all, an agreement is enforceable if it is made by mutual assent of the parties. As noted, the mutuality between the parties is considered as the essence of a contract in China. Under the Contract Law, it is required that a contract be made on the basis of equality and voluntariness. Article 13 of the Contract Law explicitly provides that the parties shall conclude a contract in the form of an offer and acceptance. Article 25 further provides that a contract is concluded when the acceptance becomes effective. It is important to bear in mind that in China to be enforceable a contract need not be supported by consideration.

Secondly, an agreement may be enforced if one party has performed its principal contractual obligations and the other party has accepted the performance. The doctrine of performance of principal obligations is adopted in the Contract Law to apply to the situation where there is defect in contract formality. In accordance with the Contract Law, in order for a contract to be valid, the required formality must be observed. Under Article 10, a contract may be formed in written, oral or other forms. If the laws and administrative regulations require a contract to be concluded in written form, or the parties agree to use written form, the contract shall be made in writing. Article 32 provides that if the contract is made in writing, it shall be concluded when both parties sign or affix a seal on it. However, according to Articles 36 and 37, if a contract is not made in writing as required by law, regulation or the parties, nor is the written form singed or affixed with a seal, but one party has performed its principal obligations and the other party has accepted the performance, the contract shall be deemed concluded and enforceable.

² Under Article 2 of the Contract Law, agreements involving marriage, adoption and guardianship shall apply the provisions of other laws.