Chapter IV
Formation of Contracts

Under Article 13 of the Contract Law, when making a contract, the parties shall take the form of offer and acceptance. As we discussed in Chapter II, a contract in China need not to be supported by a consideration and what really matters is the mutual assent of the parties. In order to achieve the mutual assent, it is essential that the parties have a meeting of minds through the negotiations on a voluntary basis. And the meeting of minds, as represented by an agreement between the parties, is to be realized in the form of offer and acceptance.

It is interesting to note that although the Contract Law is not the first contract legislation in the modern China, it is the first time that offer and acceptance are provided in the law. However, it is important to remind that for certain types of contracts in China government approval is required, and in these cases, the contract, though being formed, would not take effect prior to obtaining the approval from the government. Article 44 of the Contract Law contains the provisions that specifically deal with the formation and legal effect of a contract. According to Article 44, a contract legally formed shall take effect upon the formation of the contract. But if government approval or registration is required, the contract will become effective only after the completion of the approval or registration.¹

¹ The Contract Law, art. 44.
1. Offer

In Article 14 of the Contract Law, an offer is defined as “a manifestation of an intent showing the desire to enter into a contract with others.” Thus, there are two elements that an offer must contain: a manifestation of intent and desire to make a contact with others. In addition, to constitute an offer, the intent so manifested must meet the two requirements set forth in Article 14: (a) the contents shall be concrete and definite and (b) the offeror shall be bound by his manifestation of the intent upon acceptance by an offeree.2

For purposes of making an offer, the intent of offeror may be expressed either orally or in writing. It is unclear under the Contract Law whether the intent could also be inferred from the conduct of the offeror, but according to the scholarly interpretation, in the absence of express intent, such intent could be presumed though the offeror’s conduct in light of the usage of transactions.3 In other words, if it could be reasonably believed from the offeror’s conduct that the offeror has the intent to make a contract, a contractual obligation may arise upon effective acceptance by the other party.

In the west, there exist both subjective and objective tests for determining the intent. The subjective test focuses on the actual intent of the parties, while the objective test relies on the outward manifestation of a party’s intent. Simply put, the difference between the two tests is that under the subjective test, what really matters is what was intended rather than what a party reasonably believed was said and done.4 Literally, there are no such tests in China, but it seems that the Contract Law has made the actual intent an essential element of an offer because it stresses the “desire to enter into a contract with others.”

Chinese scholars have been debating on to whom the offer should be made. The center of the debate is whether the offer must be made to a specific (or identified) person. One opinion is that since an offer indicates the offeror’s intent to make a contract, the offer should be made to the specific person with whom the offeror wishes to deal, or otherwise it should not be deemed as an offer. The opposite opinion takes the view that the offeree may not have to be specific because in a market economy where the fair competition is the goal to achieve, an offer should not necessarily be limited to the specific person.5

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2 See id., art. 14.
4 See Robert Scott and Jody Kraus, Contract Law and Theory (3rd Ed), 238–239 (LexisNexis, 2002).
5 See Wang Liming, supra note 3, at p. 208.