Chapter VIII
Modification of Contracts and Assignment

On the notion that the contract is a product of free and voluntary negotiations of the parties to carry out their business goals, the parties who are capable to make the contract are capable to modify the contract. Of course, like creation of the contract, the modification of the contract is subject to certain conditions or limitations. In China, by definition, the contract modification has two meanings: modification in a narrow sense and modification in a broad sense. The modification in a narrow sense means the changes in the contents of the contract, including the amendment, supplement as well as limitation made to the terms of the contract. The modification in a broad sense includes in addition the change of the obligee and obligor of the contract, which generally means assignment and delegation.¹

1. Modification

The contract modifications may result from the agreement of the parties or a court order. In the context of the Contract Law, the modifications are primarily made through the parties’ agreement. Article 77 of the Contract Law provides

¹ In China, there seems no such a concept as novation. Although the change of parties is discussed in the contract law literature, the discussion is more associated with modification or assignment. In the U.S., A novation means to substitute a new party and discharges one of the original parties to a contract by agreement of all parties. See Restatement of Contracts (2nd), § 280.
that a contract may be modified if the parties reach a consensus through consultation.\(^2\) The provision of Article 77 has several implications. First of all, the parties are free to modify the contract between them. Secondly, the modification shall be made by the agreement of the parties. And thirdly, the agreement for modifying the contract shall be reached by consensus of the parties on a voluntary basis through consultation. Again, consideration is not required in China to support the modification.

Generally, the validity of modification is governed by the same rules that determine the validity of the contract. Thus, although the parties may modify the contract as they wish, the modification is subject to certain restrictions. One restriction is the approval or registration requirement. Under Article 77 of the Contract Law, if the law or administrative regulations require that the modification to a contract shall obtain approval or registration, the requirement must be satisfied before the modification becomes valid. The approval or registration requirement for the modification is normally consistent with the contract itself. If a contact needs to be approved, the approval would be required for modification of the contract.

Another restriction concerns the writing requirement. The Contract Law is unclear about whether writing is required for the modification. But pursuant to the “consistence” approach, the modification may have to be made in writing if the contract is made in writing in order to be consistent as between the contract and its modification. As a commonly accepted principle, the formality requirements that apply to the formation of a contract will generally be applied to the modification of the contract. However, since the Contract Law does not mandate the writing for modification, the court may uphold an oral modification if the parties admit. But as a practical matter, to modify a contract, writing is critical and desirable because the writing will serve as the best evidence to prove that the contract is being modified.

The legality is also a restriction on the modification. A modification may not violate the legality requirement of the contract. That is to say that a modification shall not make the contract to contain any illegal contents. This restriction is entirely based on the public policy concerns against excessive pursuit of individual self-interest of the parties or in a more general sense abuse of right by the parties. Conversely, the legality requirement for the modification as applied to the contract is to ensure that the contract is not undertaken in any way in which the State or social public interests might be harmed.

There are two doctrines advocated in China concerning the modification of the contract. One doctrine is “non-substantial change”. Under this doctrine,