



TianTong Dispute Resolution Review



天同律师事务所
Tiantong Law Firm

About Tiantong

TianTong Law Firm was founded in 2002. As one of the leading Chinese law firms, it is solely dedicated to complex civil and commercial dispute resolution. Headquartered in Beijing, Tiantong has approximately 150 people nationwide, many of whom had served as senior judges for years at different levels of Chinese courts, including the Supreme People's Court and high courts of China. In the recent years, it has established 6 branch offices in Shenzhen, Nanjing, Chongqing, Shenyang, Xi'an and Zhengzhou, where the 6 circuit courts and 2 international commercial courts under the auspice of the Supreme People's Court are seated.

In the past decade, Tiantong has been keeping one of the highest winning rates among all Chinese law firms before the Supreme People's Court and various high courts of China. Over 30 cases won by Tiantong have been publicized as landmark guiding cases for national trial work on some of the most authoritative law journals in China.

Tiantong advises on all types of commercial disputes, including but not limited to litigation, arbitration, contentious bankruptcy and enforcement proceedings with its most impressive achievements in banking and finance, construction and engineering, corporate and M&A disputes etc. Its clients range from foreign governments such as the US Department of Justice, multinational corporations such as RBS to large Chinese companies such as Bank of China, China Construction Bank, Agriculture Bank of China, Sinopec, Sinochem, China Datang Corporation and Ping An Insurance etc.

In addition to its traditional advantages in litigation before Chinese courts, Tiantong has extensive experience in representing clients before domestic and international commercial arbitration proceedings. Tiantong lawyers previously worked for leading arbitration institutions as case manager (e.g. the Permanent Court of Arbitration in Hague, Netherland and Hong Kong International Arbitration Centre in Hong Kong) or clerked with the Justice of the UN International Court of Justice in Hague, Netherland. Some of them once worked at leading international law firms on international arbitration matters conducted before CIETAC, HKIAC, SIAC, ICC, SCC and LCIA, where the seats of arbitration include Beijing, Shanghai, Hong Kong, Singapore, Stockholm and London.

Tiantong is also specialized in advising clients for recognition and enforcement of foreign arbitral awards and judgments before Chinese courts, and is capable of effectively working together with leading international law firms and local counsel overseas to handle multi-jurisdiction disputes.

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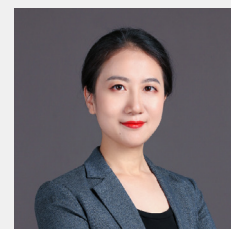
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Featured Article

Evolution of Standard Terms under Chinese Law

1. Introduction

With industrialisation and mass production spreading across the world, modern market participants have extensively adopted standard terms when contracting with different counterparties to save transaction costs in drafting bespoke contracts and managing common legal and commercial risks anticipated in the same industry. Questions arise as to how to balance interests between one party who makes and proposes standard terms in a strong bargain position and its counterparty who is keen to enter into transactions but has not been afforded an opportunity to bargain on such standard terms.

In the People's Republic of China, legal rules of “standard terms” scatter in different laws, including but not limiting to *Contract Law of the People's Republic of China* (“**Contract Law**”), *Law of the People's Republic of China on the Protection of Consumer Rights and Interests*, *Social Insurance Law of the People's Republic of China*, *Maritime Law of the People's Republic of China*, *Civil Aviation Law of People's Republic of China* *Postal Law of People's Republic of China*, etc..^[1]

[1] See, e.g. Art. 26 of the *Law of the People's Republic of China on the Protection of Consumer Right and Interests*; Art. 17 of the *Social Insurance Law of the People's Republic of China*; Art. 22 of *Postal Law of People's Republic of China*.

After the promulgation of *Civil Code of the People's Republic of China* (“**Civil Code**”), which will come into effect on 1 January 2021, rules on standard terms will have become unified and integrated in Articles 496 to 498, which respectively concern the definition and incorporation, the validity, and the interpretation of standard terms.

II. Definition of Standard Terms

“Standard terms” under Chinese law refers to “contractual clauses which are prepared by one party in advance for repeated use without consultation with the other party at the entering of the contract” under Article 496 of *Civil Code*, which resembles Article 39 (2) of *Contract Law*.^[2] Standard terms have the following features: (i) they are made by the proposing party for the purpose of repeated use in transactions of the same kind^[3]; (ii) the counterparty may either accept or object to such standard terms without further exchange of views between the parties.

Such definition is elaborated in a case concerning a dispute arising from a contract of legal services. In this case, although the contractual terms were unilaterally prepared by the law firm as one party, given that the client as the other party failed to prove that the law firm had repeatedly used the said terms and that such terms had been disregarded by itself at the time of the conclusion of the contract, the court held that such contractual terms did not constitute standard terms.^[4]

[2] Art. 496 of *Civil Code*, which resembles Art. 39 (2) of *Contract Law*.

[3] See Judgement by the Supreme People’s Court in Case Jiangsu Gangzheng Sheet Technology Co., Ltd. and Sales Branch of Neimenggu Baotou Steel Union Co., Ltd. and Neimenggu Baotou Steel Union Co., Ltd. (2013) Min Ti Zi No.216.

[4] See Case concerning the Legal Service Contract between Hainan New Concept Law Firm and the Haikou Development and Construction Commission of Changliu New Area, and Haikou Development and Construction Corporation of Changliu New Area. (2013) Hai Zhong Fa Min Er Zhong Zi No.303.





III. The Duty to Inform and Explain

As provided in both the *Contract Law* and *Civil Code*, if one party proposes to adopt standard terms and some of these terms appear to have placed the counterparty's interests at stake, the proposing party is required to take all reasonable steps to draw the counterparty's attention to such terms in accordance with the principle of fairness. However, the consequences of failing to observe such obligation are split in the relevant provisions in *Contract Law*^[5] and *Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China* (“**Judicial Interpretation II of the Contract Law**”).^[6]

The *Civil Code* brings an end to the ambiguity of the proposing party's “obligation to inform and explain” the counterparty of standard terms.^[7] According to Article 496 (2) of *Civil Code*, if the proposing party fails to draw the counterparty's attention to standard terms so that the counterparty fails to attend to or understand the terms that have placed its interests at stake, the counterparty is entitled to exclude the said standard terms from the contract to the extent of those the proposing party fails to inform and explain.

The proposing party may alert the counterparty to the significant standard terms by marking the terms with color, symbols or using different fonts, etc. in accordance with the relevant provisions in *Judicial Interpretation II of the Contract Law*.^[8] However, whether such efforts to alert suffice depends on a totality of circumstances. With regard to the dispute arising from the membership clause of iQiYi (a well-known video platform in China), the Beijing Internet Court reasoned that although the VIP member agreement was marked with underlines, considering that two thirds of the agreement had been marked, such marks could not draw the customers' attention to the standard terms let alone to make them fully understand the terms to avoid impairment of their interests. As such, the Court held that the video platform failed to give the

[5] Art. 39, 40 of *Contract Law of the People's Republic of China*.

[6] Art. 9 of *Judicial Interpretation II of the Contract Law*.

[7] *Ibid.*

[8] *Ibid.*, Art. 6.

consumers proper prior notice of the standard terms.^[9]

It can be inferred from the current judicial practice that in the context of *Civil Code*, the scope of obligation for the proposing party to inform the counterparty of standard terms will be broadened so that the market participants shall pay more attention to fairly giving the counterparty prior notice of standard terms which may put their interests at stake.

IV. Invalidation of Standard Terms

Even though the proposing party has drawn the counterparty's attention to standard terms, such terms shall be deemed invalid if (i) the counterparty's intention to agree on the standard terms is imperfect pursuant to *the General Provisions of the Civil Code*; or (ii) the proposing party unreasonably excludes or limits its liability, burdens the counterparty, or restricts on the counterparty's primary contractual interests, or the proposing party deprives the counterparty of its entire contractual interests.^[10] Such grounds of invalidation are elaborated as follows:

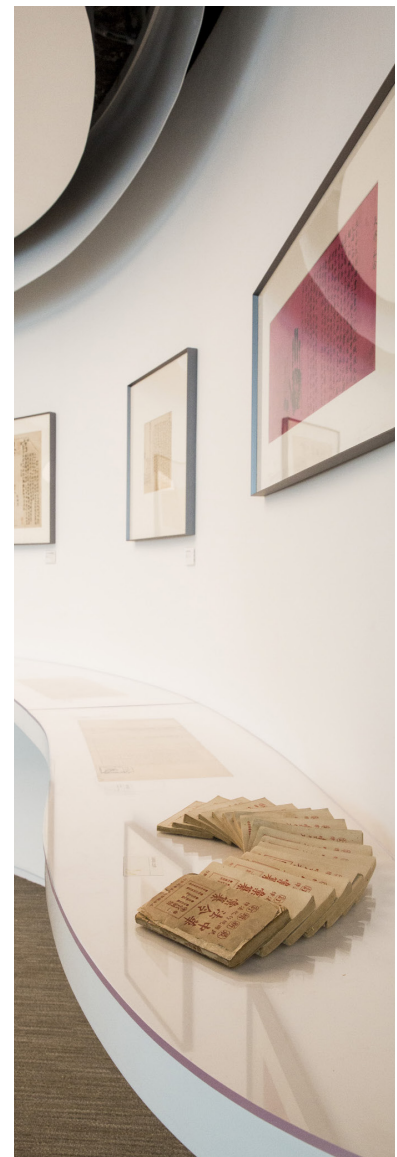
First, “imperfect intention”. Benefited from the structure of *Civil Code*, general grounds for invalidity of “legal transactions”^[11] provided in *the General Provisions of the Civil Code* may apply to invalidate standard terms once *Civil Code* becomes effective. Such grounds include legal incapacity (Articles 144 and 145), false expression of intent (Article 146), violation of mandatory rules or/and public order and good morals (Article 153) and conspiracy (Article 154).

Second, “onerous terms”. Under *Contract Law*, standard terms that “exclude the proposing party's liability and/or burden the counterparty” shall be deemed invalid. Such position has been altered in *Civil Code*, where the scope of standard terms subject to invalidation limit to onerous terms that are “unreasonable”. As such, broad discretion was granted to Chinese courts to determine whether standard terms are “reasonable” in accordance with the principle of fairness set forth in Article 6 of *Civil Code*. Reference can be made to a case concerning a service contract, where the court found that the underlying terms deprived the consumer of its right to the refund of balance to

[9] See Case concerning network service contract between Wu and Beijing iQiyi Technology Co., Ltd. (2020) Jing 0491 Min Chu No. 3106.

[10] Art. 497 of *Civil Code*.

[11] “Legal transaction” is a civil law concept which refers to “the means by which legal subjects can change the legal positions of themselves or other persons intentionally.”



have unreasonably burdened the consumer. As such, the court held in favour of the consumer quoting the principle of fairness and denied the validity of the underlying terms in the service contract.^[12]

V. Interpretation of Standard Terms

Article 498 of *Civil Code*, resembling Article 41 of *Contract Law*, provides that the interpretation of standard terms: (1) shall adopt its natural and ordinary meaning; (2) shall favour the counterparty if there could be several different understandings; and (3) shall adopt non-standard terms in case there are inconsistent standard terms.^[13]

As such, where standard terms constitute part of the contract and are deemed valid under the relevant provision, the interpretation of such terms follows the principle of favouring the offered party to make up for its weaker bargaining power.

VI. Summary

The newly-promulgated *Civil Code* specifies the proposing party's obligation and the status of standard

[12] Case concerning Service Contract between Sun Baojing and Shanghai Yidingde Beauty Co., LTD. (2012) Hu Er Zhong Min Yi (Min) Zhong Zi No.879, the Gazette of the Supreme People's Court [2014] No. 11 (total No. 217).

[13] See Art. 498 of *Civil Code*; See also Art. 41 of the *Contract Law*.



terms. In particular, the scope of standard terms that the proposing party is required to inform and explain extends from those that “exclude or limit the proposing party’s liability” to those that “have a substantial interest on the counterparty.” If the proposing party fails to comply with such duty, the counterparty is entitled to exclude the said standard terms from the contract.^[14]

Moreover, the statutory grounds for invalidating standard terms incorporate several instances where the offered party’s intention to agree on the standard terms is imperfect. Nevertheless, the onerous terms that exclude or limit the proposing party’s liability or burden the counterparty are no longer automatically invalid. The courts are vested with the discretion to invalidate those onerous terms that are so unreasonable to have created disproportion between parties in violation of the principle of fairness.

Accordingly, the new regime provided in *Civil Code* further affords some protection to the party with less bargain power, who has to make a choice between entering into a contract with standard terms and losing the transaction.



[14] Art. 496 of *Civil Code*.



China Law Updates

1. On 1 June 2020, the Civil Code of the People's Republic of China is promulgated and becomes effective on 1 January 2021.

On 28 May 2020, the National People's Congress of the People's Republic of China passed its first-ever *Civil Code of the People's Republic of China* (“**Civil Code**”). The *Civil Code*, which will come into force on 1 January 2021, consists of 7 chapters and 1,260 articles covering a wide spectrum of civil rights, including Chapter I “General Rules”, Chapter II “Property Rights”, Chapter III “Contracts”, Chapter IV “Rights of Personality”, Chapter V “Marriage and Family”, Chapter VI “Inheritance”, Chapter VII “Tort Liabilities”, and “Supplementary Provision”. The promulgation of *Civil Code* marks the milestone of China's decades of efforts to formulate a comprehensive and unified civil code since 1954.

The *Civil Code* combines the existing laws regarding civil and commercial matters. Upon the implementation of the *Civil Code*, the *General Principles of the Civil Law* currently in force, *Contract Law*, the *Property Law*, the *Securities Law*, the *Marriage Law*, the *Adoption Law*, the *Law of Succession* and the *Torts Liability Law of the People's Republic of China* will be repealed.

The implementation of the *Civil Code* will undoubtedly bring a profound impact on the current legal system of the



People's Republic of China, and key improvements worth special attention are the introduction of personality right and the protection on privacy and personal information.

2. On 3 July 2020, the Draft Law of Data Security of The People's Republic of China Is Released for Public Opinions

On 3 July 2020, the Standing Committee of China's National People's Congress circulated the draft of the Data Security Law of the People's Republic of China (the "**Draft Law**") for public comments until 16 August 2020. The Draft Law is expected to be promulgated in the near future.

The Draft Law consists of 15 articles in 7 chapters, namely: (i) General Provisions; (ii) Data Security and Development; (iii) Data Security System; (iv) Data Security Protection Obligations; (v) Security and Release of Government Data; (vi) Legal Liabilities and (vii) Miscellaneous. The Draft Law focuses on perspectives of national security, extra-territorial application, the tiered system for data security, the scope of data subject to protection, data security assessment and specific obligations of data protection.

The existing *Cybersecurity Law* and the *National Security Law of the People's Republic of China* touch upon the issue of data protection but remain general. The Draft Law will establish a more comprehensive legal framework in the area of data security.

3. The Mainland Court for the First Time Recognises the Asymmetric Jurisdiction Clause Relating to Hong Kong

On 8 July 2020, the Maritime Court of Xiamen (the "**Court**") made an order confirming the validity of an asymmetric jurisdiction clause under *the Civil Procedure Law of the People's Republic of China*. This is the first case in Mainland China confirming the validity of asymmetric jurisdiction clauses.^[15]

The underlying dispute arose from the security contract subordinate to the bareboat charter party adopting BIMCO's BARECON 2001 Standard Charter Party. A number of third parties from Mainland China provided security for the charter's liability under the bareboat charter party between two Hong Kong entities. The security contract incorporated an asymmetric jurisdiction clause, stipulating that the chargors might only bring lawsuits in Hong Kong whilst the shipowner/chargee did not subject to such limitation. Therefore, the shipowner chose to bring actions against the third-party chargors before

[15] (2020) Fujian No. 72 Civil First Instance, Civil Order No. 239. The Order has not been published to preserve the parties' confidential information.

the instant Court located in the chargors' domicile, i.e. the Mainland Court.

The Court affirmed the validity of the said asymmetric jurisdiction clause and its jurisdiction over the case, determining that there were no contrary rules provided in the *Civil Procedure Law of the People's Republic of China* that would deny the validity of such asymmetric jurisdiction clause. As such, the shipowner was entitled to resort to the Mainland Court to seek enforcement against the chargors in Mainland China.

4. On 8 July 2020, the US Second Circuit Court of Appeals Dismisses the Motion for Discovery in aid of a CIETAC Arbitration

On 8 July 2020, the US Second Circuit Court of Appeals (the “**Second Circuit Court**”) upheld the decision made by the New York Southern District Court dated 25 February 2019 and rejected the motion for discovery under 28 U.S.C. § 1782 (“**Section 1782**”) with respect to an international arbitration administered by the China International Economic and Trade Arbitration Commission (the “**CIETAC**”).

The Second Circuit Court held that a “foreign or international tribunal” was intended to reach “intergovernmental arbitration and other state-sponsored dispute resolution mechanisms”, but not “private arbitrations.” The international arbitration administered by the CIETAC is not under the auspice of the government so that it should be deemed as a private arbitration. Therefore, the Second Circuit Court denied the motion for discovery in aid of the CIETAC proceedings.

So far, the Fourth, Sixth and Ninth Circuit Courts held in favour of Section 1782 discovery for private arbitrations^[16]

[16] See *Abdul Latif Jameel Transportation Co. v. FedEx Corp.*, 939 F.3d 710, 726, 731 (6th Cir. 2019); See also *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020).





whilst the Second and Fifth Circuit Courts held the contrary.^[17] Nevertheless, the decision of the California Northern District Court on 25 February 2020 remains to be the first and only decision granting Section 1782 discovery in aid of Chinese arbitrations.

5. The 2020 Revision of Regulations on Negative List for Foreign Investment will come into effect on 23 July 2020

On 23 June 2020, the National Development and Reform Commission and the Ministry of Commerce of the People's Republic of China published the latest revisions of the *Negative List for the Foreign Direct Investment (2020)* (the “**2020 Negative List**”) and the *Negative List for the Foreign Direct Investment in Pilot Free Trade Zones (2020)* (the “**2020 FTZ Negative List**”). These two instruments will be implemented from 23 July 2020.

The revisions have continued to curtail the negative lists for foreign investment. The latest 2020 update of Negative List removed seven items from the previous version, bringing the total from 40 to 33, whilst the total restrictions in 2020 FTZ Negative List was also cut from 37 to 30. The 2020 Negative List removes some restrictions on the industries of finance, infrastructure, manufacturing and agriculture. The 2020 FTZ Negative List further shortened the limits in the fields of pharmaceutical industry and setting up educational institutions.

[17] See *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999); See also *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 190-91 (2d Cir. 1999).