

CULPA IN CONTRAHENDO IN CHINESE CONTRACT LAW

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I. INTRODUCTION

The principle of *culpa in contrahendo* has had a major influence¹ on legal systems worldwide since it was developed by Rudolph von Jhering 153 years ago.² In the People's Republic of China, *culpa in contrahendo* was first introduced as a result of theory reception.³ The former Economic Contract Law (1981)⁴ and the General Principles of Civil Law (1986)⁵ have partially accepted the idea of *culpa in contrahendo*. Provisions of the PRC Contract Law (1999) bear resemblance to *culpa in contrahendo* (arts. 42 and 43), with numerous references to foreign civil law theories and provisions of the UNIDROIT Principles of International Commercial Contracts (PICC, arts.2.1.15 and 2.1.16) and the Principles of European Contract Law (PECL, arts.2:301 and 2:302). These provisions are interpreted as precontractual obligations and the liability for *culpa in contrahendo*. Article 58 of the Contract Law on the effects of a void contract also includes some effects of the liability for *culpa in contrahendo*. Hereafter, Chinese legislation (Part II), judicial

¹ VGL. HANS DÖLLE, JURISTISCHE ENTDECKUNGEN (1958); Wang Zejian (王泽鉴), *Minfa Xueshuo yu Panli Yanjiu* (民法学说与判例研究第四册) [Theory and Case Study of Civil Law Vol.4] 1 (1991).

² Rudolf von Jhering, *Culpa in contrahendo, oder Schadenersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, in 1861 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS (Ger.).

³ See Wang Zejian (王泽鉴), *Minfa Xueshuo yu Panli Yanjiu Diyice* (民法学说与判例研究第一册) [Theory and Case Study of Civil Law Vol.1] 77 (1975); Liu Dekuan (刘得宽), *Minfa Zhu Wenti yu Xin Zhanwang* (民法诸问题与新展望) [The Problems of Civil Law and New Perspectives] 482 (2002). See also Yin Luxian (尹鲁先), *Diyueshang Guoshi Zeren Chutan* (缔约上过失责任初探) [Preliminary Study on Culpa in Contrahendo], 1 FAXUE YANJIU (法学研究) [CHINESE J. L.] 67-72 (1990); Cui Jianyuan (崔建远), *Diyueshang Guoshi Zeren Lun* (缔约上过失责任论) [Study on Culpa in Contrahendo] 3 JILIN DAXUE SHEHUI KEXUE XUEBAO (吉林大学社会科学学报) [JILIN U. J. SOC. SCI.] 23-28 (1992).

⁴ Jingji Hetong Fa (经济合同法) [Economic Contract Law] (promulgated by the Standing Comm.Nat'l People's Cong., Dec. 13, 1981, effective July 1, 1982) art.16 (Chinalawinfo)(After an economic contract has been confirmed to be void, the parties shall return to each other any property that they have acquired pursuant to the contract. If one party is at fault, it shall compensate the other party for losses incurred as a result thereof. If both parties are at fault, each party shall be commensurately liable.).

⁵ Minfa Tongze (民法通则) [General Principles of Civil Law] (promulgated by Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 61(1) (Chinalawinfo) (After a civil act has been determined to be null and void or has been rescinded, the party who acquired property as a result of the act shall return it to the party who suffered a loss. The erring party shall compensate the other party for the losses it suffered as a result of the act; if both sides are in error, they shall each bear their proper share of the liability.).

interpretations and cases (Part III) and legal theories (Part IV) will be described and analyzed.

II. CHINESE LEGISLATION

The Contract Law contains some general provisions on *culpa in contrahendo*:

Article 42 In the course of negotiations, the party that falls under any of the following circumstances, thus causing losses to the other party, shall be liable for the losses:

(1) pretending to conclude a contract and negotiating in bad faith;

(2) deliberately concealing important facts relating to the contract conclusion or providing false information; or

(3) taking any other act contrary to the principle of good faith.⁶

Article 43 Neither party may disclose or improperly use business secrets obtained in the course of concluding a contract, no matter if the contract is established or not. The party that discloses or improperly uses such business secrets, thus causing loss to the other party shall be liable for the loss.⁷

Article 58 The property acquired as a result of a contract shall be returned after the contract is confirmed to be null and void or has been revoked. Where the property cannot be returned or return is unnecessary, it shall be reimbursed at its estimated price. The party at fault shall compensate the other party for losses incurred as a result of the fault. If both parties are at fault, both shall bear their respective liabilities.⁸

The Contract Law bears some resemblance to the PICC, but also has some differences. Both the PICC and the Contract Law regulate “negotiations in bad faith” and the “duty of confidentiality” in two different articles. Articles 42 and 43 of the Contract Law are totally new things compared with previous Chinese laws.

⁶ Hetong Fa (合同法) [Contract Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) art.42 (Chinalawinfo).

⁷ *Id.* art. 43.

⁸ *Id.* art. 58.

Article 42 of the Contract Law regulates not only negotiation in bad faith and breaking off negotiations in bad faith, but also “deliberately concealing important facts relating to the conclusion of the contract or providing false information”. The drafter of Article 42(2) was inspired by Article 1338 of the Italian Civil Code.⁹ It may be said that under Article 42(2) there exists a precontractual duty of disclosure. But here the law merely offers vague formulas with little or no operational power. How people can determine more precise criteria for applying the rule is still a question.¹⁰

A number of interesting observations also arise out of comparing Article 43 of the Contract Law with Article 2.1.16 of the PICC. First, Article 43 uses the term “business secrets” (Shangye Mimi, 商业秘密), which is very different from the term “confidential information” used by Article 2.1.16 of the PICC. In practice, “business secrets” is interpreted according to a definition in Article 10(2) of the Anti-Unfair Competition Law of the People’s Republic of China (1993):

Business secrecy, in this Article, means the utilized technical and business information which is unknown by the public, which may create business interests or profit for its legal owners, and also is maintained in secrecy by its legal owners.¹¹

However, this difference between the Contract Law and PICC has brought unnecessary trouble in practice. In one case, for example, a Chinese plaintiff Mr. Fen discovered some errors in Microsoft Pinyin Input Method versions 1.5, 2.0 and 3.0 while using Microsoft Windows software. He then faxed a part of his findings to Microsoft, expecting to reach an agreement with Microsoft to obtain some reimbursement for his findings, and clearly warned Microsoft to beware of tort action. Microsoft sent someone to contact the plaintiff, but unfortunately they did not reach any agreement. Later the plaintiff found out that Microsoft had corrected the errors he had pointed out. He sued Microsoft, claiming damages according to Article 43 of the Contract Law. The court of first instance did not support Mr. Fen’s claim, reasoning that his findings were not

⁹ See Hu Kangsheng (胡康生), *Zhonghua Renmin Gongheguo Hetong Fa Shiyi* (中华人民共和国合同法释义) [Interpretation of the Contract Law of the PRC] 72–73 (1999).

¹⁰ See Hein Kötz, *Precontractual Duties of Disclosure: A Comparative and Economic Perspective*, 9 EUR. J. L. & ECON. 5–19 (2000).

¹¹ Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Sep. 2, 1993) art.10 (Chinalawinfo).

“business secrecy” as defined by Article 10(2) of the Anti-Unfair Competition Law, so he could not claim damages according to Article 43 of the Contract Law.¹² But according to the comment to Article 2.1.16 of the PICC, “[a]s long as that party expressly declares that such information is to be considered confidential, the situation is clear. For by receiving the information, the other party implicitly agrees to treat it as confidential.”¹³ So if this case were litigated according to the PICC Article 2.1.16, the result might be different.

An amicable settlement was reached at the second instance trial of this case. But one question may be raised, namely if the plaintiff won the case, how would the damages be measured according to Article 43 of the Contract Law? Article 43 does not provide concrete criteria to calculate damages for the breach of a precontractual duty of confidentiality. On the contrary, Article 2.1.16 of the PICC provides an interesting criterion for the damages in its last sentence. “Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.” It is not clear why Chinese lawmakers did not clearly adopt this criterion. Regardless, though damages cannot be claimed if the plaintiff is not able to prove his own loss suffered, it is still possible for him to claim unjustified enrichment if the other party has received some benefit from disclosing the secrets or from using them for its own purposes¹⁴.

III. JUDICIAL INTERPRETATIONS AND CASES¹⁵

As to the case stipulated in Article 42(3), “taking any other act contrary to the principle of good faith”, there are noticeably some new developments in practice.

In 2009 the 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 was promulgated (hereafter “Interpretation II of the Contract Law”). Article 8 of the

¹² Fengyong Su Weiruan (Zhongguo) Youxian Gongsi Qinfan Shangye Mimi Jiufen An (冯勇诉微软(中国)有限公司侵犯商业秘密纠纷案) [Fengyong v. Microsoft (China) Co. Ltd.] (Wuhan Interm. People’s Ct. Feb. 9, 2004) (Chinalawinfo).

¹³ UNIDROIT, UNIDROIT Principles of International Commercial Contract 2010, Art. 1.6(2) UNIDROIT Principles 2010, Art. 2.1.16, Comment 2 (Confidential information).

¹⁴ See *infra* Section IV D 2 (c).

¹⁵ In China, judicial interpretations made by the Supreme People’s Court are a source of law, which are cited by judges in judgments. Till now there has been no case law system in China. The Supreme People’s Court has recently begun initiating a “Guiding Case System”, which is intended to play a similar role as case law. But guiding-cases, such as those published in the Gazette of the Supreme People’s Court, only provide some guidance to judges. It is difficult to say whether judges have a duty to follow the guiding-cases. In this sense, the “Guiding Case System” remains different from the case law system of many western countries.

Interpretation II of the Contract Law is relevant to the topic at hand. It states:

After the formation of a contract which does not become effective until it is approved or registered under a relevant law or administrative regulation, if the party which has the obligation to apply to go through the approval or registration formalities fails to do so under the relevant law or contractual provisions, such failure shall fall within the scope of ‘taking any other act contrary to the principle of good faith’, and the people’s court may, as the case may be, and upon the request of the opposite party, rule that the opposite party shall go through the relevant formalities by itself. However, the other party shall be liable for compensating the opposite party for the expenses incurred thereof and the losses actually caused to the opposite party.¹⁶

In a case named *Guangzhou Shi Xianyuan Fangdichan Gufen Youxian Gongsiyu Guangdong Zhongda Zhongxin Touzi Cehua Youxian Gongsi Deng* (*Guangzhou Xianyuan Real Estate Co. vs. Guangdong Zhongda Zhongxin Investment Planning Co. etc.*),¹⁷ A and B (a Hong Kong company) signed a contract with C (a Chinese-foreign contractual joint venture) to buy 100% of C’s shares. Afterwards, A signed another contract with D (the plaintiff of the case), to resell 28.5% of C’s shares to D, because A did not have enough money at the time. In A and D’s contract, it was agreed that A would process the change of shareholder registration with the Administration of Industry and Commerce within three days of C’s transferring its shares to A and B. After the conclusion of the contract, D paid the agreed money to A, but A did not follow through on its promise to change the shareholder registration with the Administration of Industry and Commerce, as A did not transfer the agreed shares to D. So D brought a suit against A and others,

¹⁶ Zuigao Renmin Fayuan guanyu Shiyong Zhonghua Renmin Gongheguo Hetong Faruogan Wenti de Jieshi Er (最高人民法院关于适用《中华人民共和国合同法》若干问题的解释(二)) [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] (promulgated by Sup. People’s Ct. Apr. 4, 2009, effective May 13, 2009) art. 8 (Chinalawinfo).

¹⁷ See *Guangzhou Shi Xianyuan Fangdichan Gufen Youxian Gongsi yu Guangdong Zhongda Zhongxin Touzi Cehua Youxian Gongsi, Guangzhou Yuanxin Fangdichan Youxian Gongsi, Zhongguo Touzi Jituan Guoji Licai Youxian Gongsi Guquan Zhuanrang Jiufen An* (广州市仙源房地产股份有限公司与广东中大中鑫投资策划有限公司、广州远兴房产有限公司、中国投资集团国际理财有限公司股权转让纠纷案) [*Guangzhou Xianyuan Real Estate Ltd. v. Guangdong Zhongda Zhongxin Investment Planning Ltd. et. al.*], 8 Sup. People’s Ct. Gaz. 27 (2010) (Sup. People’s Ct. Dec. 30, 2009).

requesting that A, B and C be ordered to transfer 28.5% of C's shares to D, and agree to make payments for the default.

According to Article 10 of the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, if a Chinese or foreign party wishes to make an assignment of all or part of its rights and obligations prescribed in the contractual joint venture contract, it must obtain the consent of the other party or parties and report to the examination and approval authority for approval.¹⁸ In this case, C was a Chinese-foreign contractual joint venture, so it was necessary for the parties to obtain an approval from the examination and approval authority.

In the third trial of the case, the Supreme People's Court gave its opinion on the validity of the contract as follows:

Article 10 of the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures contains no explicit provision on the effect of not obtaining an approval from a relevant authority. But according to Article 44 of the Contract Law, even though the contract has been concluded, it has not become effective like a normal or common contract. It is just concluded but ineffective. ... The contract did not go into effect because it was never approved by the relevant authority. The precondition for such an approval is an application by the party or parties. A duty to apply to bring the contract into effect is present as of the conclusion of the contract. Otherwise, it is easy for a party to prevent the contract from becoming effective by willfully not handling or assisting with what is needed for the approval application, in apparent contrast to the principle of good faith. According to Article 8 of the Interpretation II of the Supreme People's Court on Several Issues concerning the Application of the Contract Law of the People's Republic of China, the people's court may, as the case may be, and upon request of the opposite party, rule that the opposite party shall go through the relevant formalities by itself. However, the other party shall be liable for compensating the opposite party for the expenses incurred thereof and the losses actually caused to the opposite party. Since "the opposite party" may go through the relevant formalities by itself, and "the other party" shall be liable for compensating the opposite party for the expenses incurred thereof, it will be natural that "the opposite party" may request

¹⁸ Zhongwai Hezuo Jingying Qiye Fa (中外合作经营企业法) [Chinese-Foreign Contractual Joint Ventures] (promulgated by the Nat'l People's Cong., Apr. 13, 1988, effective Apr. 13, 1988) (2000) art. 10 (Chinalawinfo).

that “the other party” go through the relevant formalities. So it was correct that in the second instance the relevant court ordered A to fulfill its duty to go through the relevant formalities to apply for approval.¹⁹

Both in the Interpretation II of the Contract Law and the above case, the duty to apply for approval or registration to make a contract effective (Baopi Yiwu, 报批义务) is treated as a precontractual duty. If a party breaches such a precontractual duty, the normal remedy is damages for negative interests. But Article 8 of the Interpretation II of the Contract Law shows that the other party may claim specific performance of the precontractual duty, a key point that will be discussed later on in this paper.²⁰

On August 16, 2010 a new Judicial Interpretation by the Supreme People's Court, the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Disputes Involving Foreign-Funded Enterprises (I), came into force. Article 1 of this Judicial Interpretation must be mentioned here:

Where a contract concluded during the formation, modification, etc. of a foreign-funded enterprise does not take effect until it is approved by the foreign-funded enterprise examination and approval organ in accordance with the laws and administrative regulations, it shall become effective upon the date of approval. If the contract is not approved, the people's court shall determine the contract as ineffective. If any party concerned requests the court to determine the contract as invalid, it shall not be upheld by the people's court.²¹

If a contract as mentioned in the preceding paragraph is not approved, this does not impact the effectiveness of the clause requiring and the clauses concerned with the parties' obligation to obtain approval.

According to paragraph 2 of Article 1 of this new Judicial Interpretation, the clause on a party's obligation to obtain approval is separated from the contract.²² Accordingly, the duty to apply for

¹⁹ *Id.* at 39.

²⁰ *See infra* Section IV D 2 (b).

²¹ Zuigao Renmin Fayuan guanyu Shenli Waishang Touzi Qiye Jiufen Anjian Ruogan Wenti de Guiding Yi (最高人民法院关于审理外商投资企业纠纷案件若干问题的规定(一)) [Provisions of the Supreme People's Court on Several Issues concerning the Trial of Disputes Involving Foreign-Funded Enterprises (I)] (promulgated by Sup. People's Ct. Aug. 5, 2010, effective Aug. 16, 2010) art. 1(Chinalawinfo).

²² *Id.*

approval or registration to make the contract effective is treated not as a precontractual duty, but as a contractual duty or obligation with an independent character.²³ Some scholars have even considered this an example of concurrence of liability for *culpa in contrahendo* and liability for breach of contract.²⁴

IV. LEGAL THEORIES

A. Introduction

Much discussion on the theory of *culpa in contrahendo* has been produced in China. The main questions raised include its scope of application, scope of damages, etc. As to the legal basis for liability, although there are several different theories raised by German theorists and cases,²⁵ there is less divergence in China. In the generally accepted theory in China, a party should negotiate with due care in accordance with good faith and fair dealing; otherwise there will be *culpa in contrahendo*.²⁶ It is now generally accepted by Chinese scholars that *culpa in contrahendo* is a special and independent basis for liability. This kind of liability is neither liability for breach of contract nor liability for a delict or tort.

B. Prerequisites for Liability

As is generally accepted, for one party to be compensated for liability in *culpa in contrahendo*, the following requirements must be met. First, the parties must have contacted each other with the aim of forming a contract. Second, one party must have breached a precontractual obligation. Third, the party breaching a precontractual obligation must be at fault for the matter. Fourth, some losses must have been incurred. Under Chinese law, there is no requirement that the other party have clean hands. The party at fault must compensate the other party for the loss caused by the fault. If both parties are at

²³ Wan E'xiang (万鄂湘), *Zuigao Renmin Fayuan guanyu Shenli Waishang Touzi Qiye Jiufen Anjian Ruogan Wenti de Guiding (Yi) Tiaowen Lijie yu Shiyong* (最高人民法院关于审理外商投资企业纠纷案件若干问题的规定(一)条文理解与适用) [The Interpretation and Application of the Supreme People's Court of Several Issues Concerning the Trial of Enterprises with Foreign Investment Disputes: I], 25–27 (2011).

²⁴ See Wu Guangrong (吴光荣), *Xingzheng Shenpi dui Hetong Xiaoli de Yingxiang: Lilun yu Shijian* (行政审批对合同效力的影响:理论与实践) [*The Impact of Administrative Approval on the Validity of Contracts: Theory and Practice*], 1 FAXUE JIA (法学家) [THE JURIST] 98 (2013).

²⁵ These theories at least include “delict theory” (treating *culpa in contrahendo* as a kind of delict or tort), “contract theory” (justifying liability for *culpa in contrahendo* based on aimed contracts or implied contracts) and “legal provision theory” (justifying liability for *culpa in contrahendo* on the general principle of good faith as provided for in BGB § 242).

²⁶ See Wang Jiafu (王家福), *Zhongguo Minfaxue Minfa Zhaiquan* (中国民法学·民法债权) [Chinese Civil Law·Law of Obligation] 339 (1991).

fault, they shall bear their respective responsibilities.²⁷ This may be viewed as a kind of contributory negligence.

C. Types of Culpa in Contrahendo

Culpa in contrahendo may be divided into different types, according to whether the relevant contract was validly formed or not:

- (a) there is no contract;
- (b) there is a contract, but it is not yet effective;
- (c) the contract is void.

Whether there is a type (d) “the contract is valid” is very much disputed among Chinese scholars.

Many take for granted that liability in *culpa in contrahendo* can only be claimed when there is no contract concluded, or when the contract is void or voided. When there is an effective contract, liability for breach of contract will be applied. According to this kind of opinion, it is impossible to connect an effective contract with *culpa in contrahendo*.²⁸ From a comparative perspective, the problem of type (d) was first raised and discussed in 1896 by a German scholar named Franz Leonhard.²⁹ In 1910, Leonhard advocated his theory for the second time.³⁰ A German court accepted Leonhard’s theory in a case on April 26, 1912. From that time on, it has become the dominant theory (*herrschende Meinung*) in Germany and Japan that *culpa in contrahendo* may be claimed even if the relevant contract is valid.³¹ Inspired by this kind of comparative view, some Chinese scholars advocate that type (d) liability does exist. It has been pointed out that there are at least three kinds of situations which may give rise to a case of *culpa in contrahendo* in an effective contract. The first case is the breach of a duty of information or disclosure.³² The second is when a voidable

²⁷ See Minfa Tongze (民法通则) [General Principles of Civil Law] (promulgated by Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 61(1) (Chinalawinfo); Hetong Fa (合同法) [Contract Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) art. 58 (Chinalawinfo).

²⁸ See Minfa Tongze (民法通则) [General Principles of Civil Law] (promulgated by Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 61(1) (Chinalawinfo); Hetong Fa (合同法) [Contract Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) art. 58 (Chinalawinfo).

²⁹ E.g. Wang Liming (王利明), Hetong Fa Yanjiu Juanyi (合同法研究卷一) [A Study of Contract Law Vol.1] 360 (2011).

³⁰ See FRANZ LEONHARD, DIE HAFTUNG DES VERKÄUFERS FÜR SEIN VERSCHULDEN BEIM VERTRAGSSCHLUSSE (Dieterich’sche Verlags-Buchhandlung 1896) (Ger.).

³¹ See FRANZ LEONHARD, VERSCHULDEN BEIM VERTRAGSSCHLUSSE (Berlin 1910).

³² See KENZO MIYAMOTO (宮本健蔵), ANZEN HAIRYOGIMU TO KĒYAKU SEKININ NO KAKUCHŌ (安全配慮義務と契約責任の拡張) [OBLIGATION TO CARE FOR SAFETY AND THE EXPANSION OF CONTRACTUAL LIABILITIES] 58 (信山社1993) (Japan).

³³ Hetong Fa (合同法) [Contract Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) art. 42(2) (Chinalawinfo).

contract is modified by a court or arbitration institution as being requested by one party.³³ The third is when the right to revoke a contract is extinguished.³⁴

D. Remedies for Culpa in Contrahendo

1. Compensation

As the usual remedy for *culpa in contrahendo*, compensation may be interpreted from Articles 42, 43 and 58 of the Contract Law. In China, it is generally agreed that negative damages or reliance interests may be claimed as compensation. The aim is to put the injured party back in the same position it was at the eve of the negotiations.

How to define the scope of damages in a case of *culpa in contrahendo*? The Contract Law does not provide a clear standard or guide. Article 113(1) adopted the rule of foreseeability, but that rule is just for damages for breach of contract. In practice, courts usually calculate damages following an “item-plus-item” approach. Theoretically, it is still necessary to adopt a general method, either foreseeability or adequacy, to define the scope of damages. And sometimes it may be found in Chinese legal literature that the foreseeability rule is preferred.³⁵

Should performance interests limit recovery for reliance interests? In other words, may the scope of compensation for reliance interests exceed those of performance interests? Some Chinese scholars, inspired by the former Article 307 of the German Civil Code (BGB), advocate that compensation for reliance interests cannot exceed performance interest.³⁶ Some other scholars disagree with this view.³⁷ Here Lon L. Fuller and William R. Perdue, Jr.’s opinion may give us some guidance:

A claim based upon ‘essential reliance’ should normally be limited by the expectation interest measured ‘objectively’, because an excess of the reliance interest over the reasonable value of the thing promised by the defendant would indicate that the plaintiff had entered a losing bargain. To permit a

³³ In Chinese Contract Law, one party may also request a court or an arbitration institution to modify a voidable contract. See Hetong Fa (合同法) [Contract Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) art. 54 (Chinalawinfo).

³⁴ *Id.* art. 55; See Han Shiyuan (韩世远), Hetong Faxue (合同法学) [Contract Law] 72–73 (2010).

³⁵ E.g. Zhang Guangxing (张广兴), Zhaifa Zonglun (债法总论) [Law of Obligation] art. 56 (1997); Han, *supra* note 23, at 78.

³⁶ See Wang Liming (王利明), Weiyue Zeren Lun (违约责任论) [A Study on Liabilities for Breach of Contract] 743 (2000).

³⁷ See Cui Jianyuan (崔建远), Hetong Fa Zonglun (合同法总论) [A General Discussion on the Law of Contracts] 372–373 (2008).

recovery beyond the 'full contract price' would be to permit the plaintiff to shift his contractual losses to the defendant. Where 'incidental reliance' is involved there is no reason to limit recovery by 'the full contract price', that is, the 'objective' expectancy.³⁸

When a precontractual duty of protection is breached, it will be the usual result that the other party's inherent interests will be harmed. It is generally accepted in China that compensation for inherent interests should not be limited by performance interests. What is disputed between Chinese scholars is whether or not harm to life, health or other personal rights during negotiations should be covered by *culpa in contrahendo*. Some scholars advocate that these cases can only be claimed on the basis of delict.³⁹ Article 37 of the Chinese Tortious Liability Law (2009) has given a basis for a duty of safety protection.⁴⁰ Some other scholars disagree with this idea, pointing out that it is too complicated and not convenient to the victim.⁴¹ This question involves a basic issue, namely what is the relation and borderline between contract law and tort law? It may also be said that this is a question of legal policy. When there is no hint that the legislature distributes the task of protection of life, health or other personal rights only to tort law, perhaps it is natural to reason that there is a concurrence of claims and the victim may choose either a claim based on a tort law provision or a claim based on *culpa in contrahendo*.

2. Other Possible Remedies

(a) Termination

As we have seen, type (d) liability in *culpa in contrahendo* has not been universally accepted by the general civil law theory of China. So according to this kind of thinking, it is illogical for a right to termination to exist in *culpa in contrahendo*. However, some legal provisions suggest the possibility of termination as a remedy for *culpa in contrahendo*. One example is Article 16(1–2) of the

³⁸ L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 Yale L. J. 52 (1936).

³⁹ See e.g., Wang, *supra* note 18, at 368–69.

⁴⁰ Qinquan Zeren Fa (侵权责任法) [Tort Law] (promulgated by the Standing Comm. of Nat'l People's Cong., Dec. 26, 2009, effective Jul. 1, 2010) art. 37(1) (Chinalawinfo) (The manager of a public venue such as hotel, shopping center, bank, station or entertainment place or the organizer of a mass activity shall assume the tort liability for any harm caused to another person as a result of his failure to fulfill the duty of safety protection.).

⁴¹ See Cui, *supra* note 26, at 373.

Insurance Law of the PRC (2009).⁴² Where the insurer makes any inquiry about the subject matter insured or about the insurant when entering into an insurance contract, the insurance applicant is required to tell the truth. Where the insurance applicant fails to tell the truth intentionally or in gross negligence, if this failure is enough to affect the insurer's decision on whether to underwrite the insurance or raise the insurance premium, the insurer will have the right to rescind the insurance contract.

From a comparative perspective, some Japanese scholars advocate that, as a measure to protect consumers, a right to termination should be one kind of remedy for *culpa in contrahendo*.⁴³ Following the development of a market economy in China, this kind of issue will be increasingly common. As a response, the consumer may claim that the contract is voided because of deceit. Whether or not there should be a right to termination for the consumer is still a question in need of further research.

(b) Specific Performance

According to Article 8 of the Interpretation II of the Contract Law, after the formation of a contract which does not become effective until it is approved or registered under a relevant law or administrative regulation, if the party which has the obligation to apply for approval or registration fails to do so under the relevant laws or contractual provisions, a court may allow the opposite party to go through the relevant formalities by itself. The other party shall be liable for compensating the opposite party for the expenses incurred thereof and the losses actually caused to the opposite party. Here the remedy may be called specific performance of the precontractual duty, even though it is not a direct enforcement but a substituted one.⁴⁴

(c) Unjustified Enrichment

Neither party may disclose or improperly use business secrets obtained in the course of concluding a contract, no matter if the contract is established or not. The disclosure or improper use of such business secrets by one party may lead to not only damages for the

⁴² Baoxian Fa (保險法) [Insurance Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 30, 1995, effective Oct. 1, 1995) (2009) art. 16 (Chinalawinfo).

⁴³ See ZENTARŌ KITAGAWA (北川善太郎), KEYAKU SEKININ NO KENKYŪ (契約責任の研究) [STUDIES ON CONTRACTUAL LIABILITIES] 287 (Tokyo: Yūhikaku (有斐閣) 1963) (Japan); Jun'ichi Honda (本田純一), "Keyaku Teketujo no Kashitu" Rironni Tuite (『契約締結上の過失』理論について) [On the Theory of "Culpa in Contrahendo"], in GENDAI KEYAKUHŌ TAIKĒ (現代契約法大系) [MODERN CONTRACT LAW SERIES] vol. 1 207 (Tokyo: Yūhikaku (有斐閣) 1983) (Japan); OBLIGATION TO CARE FOR SAFETY AND THE EXPANSION OF CONTRACTUAL LIABILITIES, *supra* note 21, at 63.

⁴⁴ See Han, *supra* note 23, at 78.

loss suffered by the other party according to Article 43 of the Contract Law, but also unjustified enrichment according to Article 92 of the General Principles of Civil Law.⁴⁵ The injured party may be entitled to recover the benefit which the party in breach has received by disclosing the secrets or using the secrets for its own purposes, even if the injured party has not suffered any loss.⁴⁶

V. CONCLUDING REMARKS

This paper provides a brief description of the characteristics of *culpa in contrahendo* under Chinese contract law, and both relevant practical and theoretical issues that have arisen in China. A general provision on *culpa in contrahendo* is still missing in both the Korean Civil Code and Japanese Civil Code. Both civil codes are now in the process of being amended⁴⁷ and *culpa in contrahendo* will be regulated. There is an old Chinese saying, “stones from other hills may serve to polish the jade from this one” (他山之石，可以攻玉). Maybe the Chinese experiences in regulating *culpa in contrahendo* can provide some inspiration to the legal amendments being undergone in East Asia.

⁴⁵ Minfa Tongze (民法通则) [General Principles of Civil Law] (promulgated by Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 92 (Chinalawinfo) (If enrichment is acquired improperly and without a lawful basis, resulting in another person's impoverishment, the illegal enrichment shall be returned to the person who suffered the impoverishment.).

⁴⁶ See COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II, Article 2:302, Comments C (Ole Lando & Hugh Beale eds., 2000).

⁴⁷ See TAKASHI UCHIDA (内田貴), MINHŌ KAISE (民法改正) [AMENDMENT OF CIVIL CODE] (Chikumashobō (筑摩書房) 2011).