

China Insight



China extends statute of limitation through new General Rules for Civil Law

Dear Sir or Madam,

Please find below our update on the latest developments relating to the Chinese civil law.

Kind regards,

CMS, China

On 15 March 2017, at the 5th session of the 12th National People's Congress of the People's Republic of China (the "PRC"), the long-expected *PRC General Rules of Civil Law* (中华人民共和国民法总则) ("GRCL") have been adopted and promulgated. The GRCL will enter into effect on 1 October 2017.

The GRCL are intended to be the first section of a codified PRC civil code which, according to the National People's Congress, shall be finalized by 2020. Similar as for codified civil codes of other jurisdiction (e.g. the German Civil Code, *Bürgerliches Gesetzbuch, BGB*), the GRCL contain general legal principles which shall be applicable also for the other sections of the planned PRC civil code, i.e. sections regarding contract law, property law, torts law, matrimonial and family law as well as the law of succession.

The GRCL are divided into 11 chapters, i.e.

- (1) General Provisions,
- (2) Natural Persons,
- (3) Legal Persons,
- (4) Non-incorporated Organizations,
- (5) Civil Rights,
- (6) Civil Juristic Acts,
- (7) Agency,
- (8) Civil Liability,
- (9) Statute of Limitation,
- (10) Calculation of Duration, and
- (11) Supplementary Provisions.

Most of these topics are currently subject to the *PRC General Principles of the Civil Law* (中华人民共和国民法通则) ("GPCL") which have been promulgated on 12 April 1986 and entered into effect on 1 January 1987.

Remarkably, the GRCL will not replace the GPCL when they enter into effect on 1 October 2017. The GPCL will remain effective to the extent that their stipulations do not conflict with the GRCL. In case of such a conflict, the stipulations of the newer GRCL prevail.

In the following, we summarize some of the most important stipulations of the GRCL and the differences to the GPCL having the most impact.

Statute of Limitation

- One of the most remarkable changes compared to the GPCL likely is the **extension of the general limitation of action from 2 to 3 years**. This will have a major impact in practice and on all contractual claims which are governed by PRC law. The former 1-year period for claims for compensation in case of bodily injuries, the sales of substandard goods without proper notice to that effect, delays in paying rent or refusal to pay rent and the loss of or damage to property left in the care of another person as stipulated in Article 136 of GPCL has not been reiterated in the GRCL and, in the authors' view, this likely means that it shall be abolished. This former 1-year period was practically applied only in rare cases anyway.
- According to Article 188 of the GRCL, such newly introduced 3-year period generally applies, unless otherwise provided by law.
 - In this regard, it is to be emphasized that according to Article 129 of the *PRC Contract Law*, a 4-year period applies for disputes arising in relation to a contract for the international sale of goods and for contracts regarding the import and export of technology. We understand that the 4-year period stipulated in Article 129 of the *PRC Contract Law* refers to the exemption "otherwise provided by law" in Article 188 of the GRCL and remains applicable after the entry into effect of the GRCL.
 - According to Article 196 of the GRCL, the statute of limitation does not apply in the following cases: (i) claims for ceasing infringements, removing obstacles, or eliminating danger, (ii) claims of the creditor for returning real estate property and registered rights in rem, (iii) claims for the payment of alimonies, support money or maintenance fees and other claims for which the institute of statute of limitation is not applicable.
- Of major practical importance in connection with the above is the question on how cases are dealt with during the transition period, i.e. for contracts which have been concluded before the entry into effect of the GRCL, i.e. before 1 October 2017, and out of which claims have been arisen before 1 October 2017 but after 1 October 2015, i.e. the current 2-year period according to the GPCL has not yet expired on 1 October 2017.

Some practical guidance for this situation:

| Type of claims | Consequences |
|---|---|
| Claims for which the current 2-year statute of limitation period will already be completed by 1 October 2017. | Are time-barred. |
| Contracts concluded before 1 October 2017 out of which claims have arisen before 1 October 2017 but after 1 October 2015, i.e. the current 2-year period has not yet expired on 1 October 2017. | In the authors' view and in accordance with the general principle of non-retroactivity, such claims should be subject to the old 2-year period. However, the issue is not entirely clear and some authors stated the opinion that there would be different possibilities for interpretation. |
| Contracts concluded before 1 October 2017 out of which claims will arise after 1 October 2017. | Are subject to the new 3-year period. |
| Claims from contracts concluded after 1 October 2017. | Are subject to the new 3-year period. |

- It is further noteworthy that, as already now according to the respective provisions of the PRC Supreme People's Court, the stipulations regarding a limitation of action are mandatory and not subject to an agreement between the parties. Also a prior waiver of the benefits derived from a limitation of action is invalid.

General Provisions

- In addition to the principles of equality, voluntariness, good faith and honesty which were already included in the GPCL, Article 9 of the GRCL now rather vaguely stipulates the general principle that all civil subjects engaging in civil activities shall help to save the resources and to protect the ecological environment. The GRCL do not contain further stipulations in this regard and details are to be set out in special laws and regulations.
- According to Article 10 of the GRCL, civil disputes shall, in the absence of relevant legal provisions, be solved according to customs while the public order and good morals must not be violated.

Natural Persons

- Article 16 of the GRCL now stipulates that a nasciturus, i.e. an already conceived but not yet born fetus, shall be deemed to have the capacity for civil rights for certain matters regarding the protection of the nasciturus' interests, such as inheritance and accepting gifts. However, in case the fetus is not alive at birth, it shall be deemed as non-existing *ab initio*.
- The age for minors having limited capacity for civil conduct is lowered from 10 to 8 years (however, not to 6 years as it was discussed before). Such minors may independently perform civil juristic acts which are purely to the (legal) benefit of the minors or the performance of which is compatible with their age and cognitive faculty. For other civil juristic acts, such minors must either be represented by or obtain their legal representative's consent or acknowledgment.
- The stipulations regarding guardianship have been reformed and are more detailed than under the GPCL. Inter alia, it is now emphasized that parents are obligated to foster, educate and protect their minor children and that, vice versa, adult children are obligated to support, assist and protect their parents.
- Adults with full capacity for civil conduct may negotiate in advance with close relatives or other individuals or organizations which are willing to act as a guardian and determine a respective guardian in writing. In case such an adult loses or partly loses his capacity for civil conduct, the guardian so determined shall become such adult's guardian. This strengthens the self-determination of people (partly) losing their capacity for civil conduct.
- Article 36 of the GRCL sets out the circumstances under which a people's court may disqualify a guardian, i.e. in case the guardian seriously damages the physical and mental health of the ward, in case the guardian delays or becomes unable to fulfill its guardianship responsibilities which causes distress to the ward or in case the guardian otherwise seriously damages the lawful rights and interests of the ward.

Legal Persons

- Legal persons are classified into 3 categories, i.e. profit-oriented legal persons, non-profit-oriented legal persons and special legal persons. Profit-oriented legal persons are defined as legal persons established for the purpose of making profits and distributing the same to their shareholders and other investors. Non-profit-oriented legal persons are established for public welfare or other non-profit-oriented purposes and do not distribute profits to its investors, founders or members. Special legal persons refer to organs, rural collective economic organizations, urban and rural cooperative economic organizations and grass-roots self-governing mass organizations, such as neighborhood committees or village committees.
- Sole proprietorship enterprises, partnership enterprises and professional service organizations not qualified as a legal person are so-called unincorporated associations. Unincorporated associations are no legal persons but able to engage in civil activities in their own name. The investors or founders of unincorporated associations shall generally assume unlimited liability for the liabilities and debts of an unincorporated association. The latter is a major divergence to limited liability companies, where the liability of the investors or founders is generally limited to the amount of their contribution to the registered capital of the limited liability company.
- Article 62 of the GRCL stipulates that where the legal representative of a legal person causes any damage to others while performing its duties, the legal person shall assume the corresponding civil liability. Interestingly, reference is only made to the legal representative and not to other employees causing damages in the course of their work. However, with regard to the *PRC Tort Law*, the latter case is dealt with by Article 34 of the *PRC Tort Law* according to which the employer shall bear tortious liability in case an employee causes damage to another party in the course of performing the employment duty.

Civil Rights

- Similar as according to chapter V of the GPCL, Article 110 of the GRCL stipulates that natural persons enjoy the rights to life, body, health, personal name, portrait, reputation, honor, privacy, and marry by choice, and other rights. The right to body has been newly added into the GRCL and was not contained in the GPCL.

A legal person or an unincorporated association enjoys the rights to name, reputation and honor, and other rights.

- Article 111 of the GRCL now expressly deals with the protection of the personal data of individuals and stipulates that the personal information of a natural person shall be protected by the law. Any organization or individual which obtains the personal information of others shall ensure the safety of such personal information, and shall not illegally collect, use, process or transmit the personal information of others, or illegally buy or sell, provide or make public the personal information of others. The GRCL also refer to general data protection and "online

virtual property”, however, details in this regard are left to special laws and regulations.

Civil Juristic Acts

- Article 133 of the GRCL defines a civil juristic act as an act of a civil subject to establish, change or terminate a civil juristic relationship through the expression of intent. The wording “through the expression of intent” has been newly added compared to the definition contained in the GPCL. Articles 133 et seq. of the GRCL deal with the effectiveness, the forms, the withdrawal and the interpretation of expressions of intent.
- According to Article 143 of the GRCL, in order to be valid, a civil juristic act must meet the following requirements: (i) the actor has the relevant capacity for civil conduct, (ii) the intent expressed is genuine and (iii) such act does not violate the mandatory provisions of laws and administrative regulations or the public order and good morals. Item (iii) above has been amended compared to the respective stipulation of the GPCL according to which a juristic act shall “not violate the law or the public interest”. It appears not entirely clear whether any substantial changes are intended with respect to such amended wording.
- According to the stipulations of the GRCL, civil juristic acts can be null and void, provisionally invalid, i.e. their validity depends on the consent or acknowledgment of the respective agent ad litem, and revocable.
 - While Article 59 of the GPCL provided that a party may request a people's court or an arbitration institution to *alter or revoke* civil acts which are obviously unfair, according to Article 151 of the GRCL, a people's court or an arbitration institution shall now only be entitled to *revoke* such an act.
 - While according to Article 55 of the *PRC Contract Law*, a contract which was entered into under substantial misunderstanding of the parties or by means of coercion can be revoked for a period of 1 year from the date on which the relevant party was aware or ought to be aware of the matter for the revocation, the GRCL shorten such period in case of a substantial misunderstanding of the parties. According to Article 152 of the GRCL, in case of a substantial misunderstanding, the party concerned must exercise its right of revocation 3 months from the date when it knew or should have known the cause for revocation. In case of coercion, the revocation must be exercised within 1 year from the date when the coercion ceases.

In any case, if the party concerned has not exercised his or her right of revocation within 5 years from the date when the civil juristic act was performed, the right of revocation shall be forfeited.

Agency

The GRCL differ between entrusted and statutory agents. Agents appointed by a people's court or an appointing unit, as referred to in the GPCL, are not dealt with anymore in the GRCL.

- Article 168 of the GRCL deals with self-dealings of an agent. It is stipulated that an agent shall not perform a civil juristic act in the name of the principal with himself or herself, unless such act is consented or acknowledged by the principal. Further, an agent shall not perform a civil juristic act in the name of the principal with any other party who entrusted such agent simultaneously, unless this is consented or acknowledged by both principals. In practice, the representative of an entity should obtain the prior written consent of such entity's competent authority in case the representative intends to perform a civil legal act with himself or herself or with another principle he or she acts for.
- According to Article 170 of the GRCL, where a person performing work tasks for a legal person or an unincorporated association performs civil juristic acts related to matters within his or her scope of functions and powers in the name of the legal person or the unincorporated association, such acts shall have binding force on such legal person or unincorporated association. Any restrictions imposed by the legal person or unincorporated association on the scope of functions and powers of the person performing work tasks for the legal person or unincorporated association shall not be a valid defense against any bona fide other party.
- Article 172 of the GRCL deals with apparent agency. Nearly identical to Article 49 of the *PRC Contract Law*, it is stipulated that if any acts of agency continually performed by an actor without the power of agency, beyond the scope of his or her power of agency or after his or her power of agency has expired, such acts of agency shall be valid if the other party has reasons to believe that the actor has the power of agency. In order to avoid cases of apparent agency, companies should implement respective corporate governance rules, such as management by-laws and rules on the use of company seals, and make sure that powers of attorneys are appropriately limited and revoked, if necessary with notification of customers or publicly. Further, companies should make sure that the respective information on their directors and managers as visible from the online database of the company's registration authority are always correct and up-to-date.

Civil Liability

- Articles 177 et seq. of the GRCL contain general stipulations on civil liability, liability of more than 1 person and the different ways of civil liability, i.e. (i) cessation of infringements, (ii) removal of obstacles, (iii) elimination of dangers, (iv) return of property, (v) restoration to the original condition; (vi) repair, reworking or replacement, (vii) continuous performance, (viii) compensation for losses, (ix) payment of damages for breach of contract, (x) elimination of ill effects and rehabilitation of reputation and (xi) extension of an apology. Compared to the respective stipulation of the GPCL, item (vii) has been added. It is further explicitly stated in the GRCL that punitive compensation shall apply if so provided by applicable law.
- Article 181 of the GRCL stipulates that a person who causes harm in exercising a justifiable defense shall not bear civil liability. If such justifiable defense exceeds the limit of necessity and undue harm is caused, the person exercising such justifiable defense shall bear civil liability on a reasonable basis.
- Article 184 of the GRCL which is sometimes referred to as the *Good Samaritan Provision*, provides that a person who causes harm to any recipient in volunteering to provide emergency assistance shall not bear any civil liability. This stipulation obviously has the purpose to strengthen civil courage in the PRC. There have been numerous incidents in the past years where by-standers did not assist in emergency situations due to their fear of being held responsible and being sued by the victims they had helped. Previous draft versions of this clause contained the reservation that the helper could be liable for gross negligence. However, such reservation has not made it into the final version of the GRCL. Whether this means that helpers shall indeed not be liable even for (obvious) cases of gross negligence or even intent is doubtful. It is to be expected that future judicial practice or guidance brings clarity in this regard.
- Article 185 of the GRCL now stipulates that a person who damages the social and public interests by infringing the name, portrait, reputation and honor of a hero or a martyr shall bear civil liability. Maybe the vagueness of this stipulation is deliberate in order to have a general, rather political, statement in the GRCL and a wide catch-it-all clause. However, several aspects here are unclear. Who are heroes or martyrs? Under which circumstances are the social and public interests damaged? How are damages measured and who shall be entitled to sue?

In conclusion, the GRCL are an important step for the goal of having a codified PRC civil code in the near future and they bring certain important novelties compared to the GPCL, any company operating or engaging in business activities in the PRC should be aware of.

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