



# **CHINA Q&A: GENERAL TERMS & CONDITIONS (GTCS) FOR COMMERCIAL CONTRACTS**

Welcome to our new **ADVANT Beiten** edition on certain questions and answers on GTCs for commercial contracts under Chinese laws! With this publication, we aim to provide you with essential information about these topics and explain certain key legal requirements and considerations thereof.

We do this intentionally in a way which seeks to draw your attention to some important issues impacting enterprises entering into commercial contracts which contain GTCs. Hence, what we set out in this publication deals with some of the most common questions and situations we came across in our advisory services. Thus, please read this publication to get a first understanding on what aspects to look at when creating or using GTCs in relation to commercial contracts in a China legal context and for any specific questions, please contact us anytime!

## 1. What are commercial contracts and what are GTCs?

Commercial contracts are agreements regulating business relationships between individuals or businesses where they agree to perform some actions or refrain from doing others. Typical examples for commercial contracts are sales/purchase agreements, technology agreements, lease agreements, services agreements, etc. When reading on, please bear in mind that this publication only discusses GTCs for commercial contracts!

When concluding commercial contracts, it is common for contractual parties to include GTCs as part of the contract. In such cases, the individual contract/purchase order or alike will often consist of a (rather simple) document (e.g. providing details of the parties, specifics of the particular scope of deliverables (products/services), volumes/quantities, prices, delivery specifics, etc.) specifically negotiated by the parties, while the more commonly applied standard terms are contained in GTCs (e.g. terms of payment, warranty, quality, liability for breach of contract, termination, IP rights, data privacy, confidentiality, force majeure, effectiveness, governing law, dispute resolution, notice to parties, language etc.). Hence, GTCs are clauses that have been drawn up by one party in advance for repeated use and they are not a result of an individual negotiation/consultation between both parties.

## 2. Are GTCs recognized under Chinese laws and if so, how are they be effectively implemented?

Chinese laws governing commercial contracts recognize the application of GTCs in commercial contracts (see e.g. the PRC Civil Code (《中华人民共和国民法典》, “**Civil Code**”), PRC Consumer Rights and Interests Protection Law (《中华人民共和国消费者权益保护法》), PRC E-Commerce Law (《中华人民共和国电子商务法》), PRC Insurance Law (《中华人民共和国保险法》) etc.).

Chinese laws do not limit the types of entities which can use GTCs but requires that entities providing GTCs abide by the principles of voluntariness, good faith, and fairness.

Thus, at the stage of drafting GTCs, it is important that the rights and obligations between the parties are allocated based on the principles and that in general the GTCs are reasonable and lawful. The party introducing GTCs shall not take undue advantage of its (dominant) position to formulate GTCs that are unreasonably beneficial only to itself while not being conducive to the other party.

Further, at the stage of introducing GTCs, it is important that the party provides them to the other party (e.g. sending by email, attaching them as an annex to the contract of alike), and requests the other party to read and acknowledge them and to offer explanations on any requests the other party may have in regard to the GTC. The party that provides GTCs shall take care to remind in an express, reasonable and appropriate manner the other party to pay attention to the fact that it intends to conclude the contract with the GTCs being applicable. Chinese laws also compel the party offering GTCs to draw the other party’s attention to particularly sensitive clause in a reasonable manner and explain them clearly, e.g. clauses that exempt or restrict liabilities of the offering party or that otherwise materially impact on the other party’s legal standing. Prominent methods for highlighting critical clauses can be particular fonts, font sizes, symbols, bold content, etc. to highlight provisions that need to be reminded. Also, the necessary explanations shall be given if requested and evidence for such explanations (e.g. emails) shall be kept. If the party providing GTCs fails to do so (or in case of dispute fails to be able to prove do have done so), it risks that its GTCs are ruled not to be applicable to the individual contract.

Whether these calls for attention have been made in a sufficient manner is judged on a case-by-case basis, taking e.g. into consideration the appearance of notice, the method of drawing attention, the level of clarity, the nature/maturity of the business partners, etc. and must stand the test of proof is challenged.

A mere internet link as reference to GTCs in an individual contract document is in our view not ideal. As a minimum, the individual contract document shall state the exact title, date (actual date, not just “latest version”) and access method to the GTCs so that they are clearly definable and obtainable. We also generally advise to deliver the GTCs to the other party (e.g. by email) and to seek an active consent/agreement of the other party that it has received, read and understood the GTCs and that any questions it had in regard thereto were explained to it prior to entering into the contract to which the GTCs apply. For e-commerce businesses, GTCs can be made available online in a manner that the customers can read and download/save them (or that the GTCs are sent to them electronically/by post).

As soon as these conditions are met, the applicability of GTCs to a contract can be generally established.

Even if effectively adopted into a contract, GTCs can in certain cases still be invalid in whole or in part, e.g. in cases of false expression of intention, violation of mandatory PRC laws, administrative regulations, public order or moral, malicious collusions, etc. Also (same as individual contracts), GTCs shall neither exempt liabilities for bodily injuries/death nor for property losses caused by gross negligence/intent and shall not unreasonably exempt/limit liabilities of the offering party or unreasonably aggravate the liability or restrict/exclude the main rights of the other party. Hence, so-called “overlord clauses” (= unequal forms of contracts, notices, statements, store notices or industry practices unilaterally formulated by some business operators to evade statutory obligations and reduce their own responsibilities, restricting consumers’ rights and seriously infringing on the interests of the customers) are invalid.

### 3. What are advantages/disadvantages of using GTCs?

**From the perspective of the applying party** and presuming GTCs have been properly drafted, are regularly reviewed and updated and – if necessary – adapted to different jurisdictions when applied in more than one country/region, the use of GTCs can significantly reduce the time/cost of contract negotiations, facilitate the efficiency of transactions and support compliance of contracts terms with the governance requirements of enterprises.

GTCs can however become a disadvantage/risk if they are not from the beginning properly drafted or if – once applied for a longer period of time – they are not regularly checked/updated to continuously consider the latest legal and operational

requirements. Also, in most cases where GTCs are applied cross-border transactions and/or across various affiliated companies in different jurisdictions, it will not suffice to follow a one-size-fits-all approach: GTCs must be carefully checked to comply with the legal requirements of each different jurisdiction (classic mistakes: not considering requirements on language, applicable law, forum of dispute settlement, enforceability, etc.).

When formulating GTCs, clauses shall be reasonable and fair, to avoid invalidity thereof due to inappropriate content. Formulations shall be clear and concise (also across various language versions, hence formulate as simple as reasonably possible) and ambiguous provisions must be avoided to prevent diverging interpretations. If any provisions in GTCs are open to interpretation, courts/arbitration tribunals will interpret them based on the objective common understanding thereof and if several interpretations avail themselves, the final interpretation shall be made in a manner unfavorable to the party that provided the GTCs.

**Also from the perspective of the party being requested to accept GTCs of another party**, the use thereof can significantly ease the contract process. Yet, often the party providing GTCs holds a more dominant position over the other party and may take advantage of this dominant position to formulate terms beneficial to itself and maximize the protection of its own interests, potentially resulting in an exploitation of an unequal status of the parties.

Thus, given that the providing party formulated GTCs without participation of the receiving party, great care shall be taken by the receiving party to review such GTCs, request explanations in case of any uncertainties and insist on deviating individual contract terms in case of unwillingness to accept any particular part of the GTCs. Any individually agreed clauses will always take precedence over GTCs.

If a dispute over GTCs arises after the contract to which they apply has been executed, the first step will usually be to negotiate with the party that provided them to resolve the dispute. Should that attempt fail and should one find that the disputed GTCs provisions have a material impact on one’s own rights/risk exposure without the party having offered the GTC having duly alerted and explained that to the other party, such clause can be requested to be excluded from the content of the contract. Likewise, any clauses violating mandatory PRC laws, administrative regulations, public order or moral can be requested to be ruled invalid.

#### 4. Me and my business partner both apply our own GTCs for the same transaction, how can this issue be resolved (“Battle of Forms”)?

In such situation and provided there are (as will likely be the case) conflicts between the two sets of GTCs, Chinese laws do unfortunately not provide a clear solution.

Thus, ideally in case both contractual parties have their own set of GTCs, the individual contract/purchase order would stipulate which of the two would prevail.

If no such individual agreement is made and a dispute over the validity/prevalence of one of the several sets of GTCs arises, we find that thus far in case of dispute governed under PRC laws most likely (but not with certainty) the contradicting parts of the GTCs would be considered invalid and be replaced by the provisions of the individual contract (if any) or – failing any provisions on the matter in dispute – the applicable PRC laws and regulations.

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