

The Recent Amendment to China's Consumer Law: An Imperfect Improvement and Proposal for Future Changes

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Abstract

Recently, an Amendment Act (“the Amendment”) was made to China’s core legislation on consumer protection—the Consumers’ Rights and Interests Protection Law (“Consumer Protection Act 1993”). The Amendment comes into force on China’s “Consumers’ Day” of 2014. The Amendment brings some great and significant changes to the principal Act in response to the need of China’s changed and changing market and society. This paper analyses the most significant changes and argues that the Amendment is far from being satisfactory, in that some important issues/problems including, *inter alia*, the want of a clear legal definition of “consumer”, are left unaddressed. It also articulates the rationale for special protection to consumer and proposes further amendments including a “good” definition of “consumer” that shall be adopted in the future as soon as practical.

Keywords

Consumer, Improvement, Amendment, Law, China

1. Introduction

Recently, 20 years after the enactment of China’s core legislation on consumer protection, the Consumer Rights and Interests Protection Law (“Consumer Protection Act 1993”), the National People’s Congress (NPC) Standing Committee, China’s top law-making body, passed the “Decision on Amendments to the Consumer Protection Act 1993” (“the Amendment” hereafter) on 25 October 2013. The Amendment came into force on the so-called “Consumers’ Day” (15 March) of 2014. The Amendment brings some great and significant changes to the principal Act in response to the need of China’s changed and changing market and society. The Amendment

is a great improvement of the principal Act and it is conceivable that consumer protection in China will be improved. Unfortunately, however, the Amendment is somewhat unsatisfactory and far from being perfect, in that some important issues/problems are left unaddressed, including, *inter alia*, the most obvious problem of the want of a clear legal definition of “consumer”. This paper briefly analyses the most significant improvements and tries to articulate why the Amendment is unsatisfactory. It adopts an “economic law” approach to analyse the rationale why consumer should be specifically protected by consumer protection law, in addition to general fair trading law and contract/tort law. On such bases, this paper argues that further changes that should be made to the principal Act in the further amendments and the utmost important in need is a clear legal definition of “consumer” to be included in the Act. A model definition of “consumer” is proposed accordingly, and hopefully the adoption of which would significantly alleviate some fundamental controversies and problems lingering China’s consumer law and practice in the past two decades.

2. Key Improvements Brought by the Amendment

Chinese government officially adopted a “market-oriented economy” in 1992 and the Consumer Protection Act 1993 was enacted almost immediately after that. In the past 20 years since then, it is evident that China’s economy and society has undergone considerable changes, for example, the wide use of Internet and the rapid growth of electronic commerce, the emerging and new ways/patterns/approaches of business operation, the escalated and escalating categories of products and services available to consumers, and the change of consumers’ notion and expectation of consumption. Those changes rendered the 1993 Act left behind. As Zheng and Liao (2013) pointed out, prior to the Amendment, there had been some significant problems with the status quo of China’s consumer protection law and practice. Those problems include, *inter alia*, a) the lack of a clear legal definition of “consumer”, which causes or contributes to many other problems, b) the limited role/function of Consumer Associations, c) the considerable costs for a consumer to seek a judicial relief, d) the overlapping roles/functions of the relevant administrative agencies of the government, e) the gap between administrative agencies and courts in taking actions against consumer law violators, f) general arbitration as an impractical avenue for an aggrieved consumer to seek relieves, and g) the problems with the application of the general civil procedure to consumer disputes. There have been vast controversies and criticisms surrounding the 1993 Act and its application in practice.

Partially in response to the problems and criticisms, amendments were made to the Consumer Protection Act 1993, with a purpose of “strengthening consumer protection”, “coping with new situations in consumption”, and “making consumer protection law workable”.¹ Some of the problems were coped with by the recent Amendment, but some others are not. Overall, the Amendment brings important improvement in many aspects, which is hailed by the consumers and worth detailed discussion below.

2.1. Consumers’ Rights to Personal Information and Freedom from Junk-Information Nuisance

One of the most hailed changes is that the Amendment lays down some detailed rules for a strong protection of consumers’ personal information and consumers’ freedom from “junk-information nuisance”. Before the Amendment, the Consumer Protection Act 1993 was completely silent in this regard.

Historically, China’s law had been extremely inadequate in protection of personal information. An arguably better view might be that personal information, whether of a consumer or not, had never been clearly protected by law at all in the People’s Republic of China. The General Principles of Civil Law 1986, as the first statutory legislation in the communists China concerning civil rights and obligations of citizens and legal persons, protects a citizen’s right to his/her “name, reputation, honour, [and] image” (Sections 99-102, 120) but says nothing about personal information. It is hard to argue that “personal information” falls within any of the “name, reputation, honour, [and] image” of a person. The Tortious Liability Act 2009 protects “right to privacy” (Section 2) as a type of civil rights and interests but it is unclear whether or not the “privacy” includes “personal information”. The NPC Standing Committee’s Decisions on Strengthening the Protection of Network Information 2012 (NPC Decisions 2012) is a breakthrough in China regarding the legal protection of personal information, but there is

¹Explanations to the Consumer Protection Amendment Bill (Draft) and the Clauses (Standing Committee of National People’s Congress, April 28, 2013). Available at http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2013-04/28/content_1793762.htm.

an obvious limit—the protection is confined to personal information in an *electronic (online)* form.²

The Amendment to the Consumer Protection Act 1993 extends the protection to personal information in *all forms* where *consumers'* personal information is involved. A brand new section was inserted, which provides that a business operator may not collect, process, or use consumers' personal information unless for specific, clear, legitimate and reasonable purposes and with informed consent of the consumer concerned; and the operator must also take any necessary steps to safeguard such information against any damage, loss and unauthorised access.³ Arguably, the Amendment grants a new kind of rights/interest to consumers, as a (legal) right exists only where it is recognised or provided by law.

The Amendment also protects consumers' freedom from “junk-information” nuisance. An operator may not send a consumer “commercial information” unless on the request or with the consent of the consumer.⁴ Interestingly, the NPC Decisions 2012, enacted not long ago, also has a similar provision but, again, such information is limited to *electronic* information only.⁵

Comparing the similar provisions in this regard between the Amendment and the NPC Decisions 2012, it can be found that the wordings are nearly identical, which indicates the inclusion of such provisions protecting consumers right to personal information and freedom from junk-information nuisance is very likely a part of a new trend that the Chinese government is now much more serious about protection of citizen's private rights and interests including personal information.

2.2. Escalated Price for Fraudulent Conducts by Business Operators—The “Triple Compensation” and Higher Ceiling of Pecuniary Punishment

The Amendment imposes much harsher punishments than before for commercial fraud. The Amendment significantly increases the punitive damages for supplier's fraudulent conduct(s) in the supply of goods/services to a consumer. Now, where a supplier has a fraudulent conduct, on the request of the consumer, the supplier is liable to punitive damages as much as twice of the purchase price, with a statutory minimum amount, in addition to a full refund of the purchase price.⁶ Where a business operator knowingly supplies defective goods or services, which results in serious personal injury or death, the victim may claim compensative damages (including damages for mental harm) plus punitive damages as much as not exceeding twice of the compensative damages.⁷ The Amendment also significantly elevates the ceiling of fines for fraudulent and other conducts of business operators—now, the maximum amount of fines is as much as 50 times of the previous.⁸ Such changes would be helpful in deterring business operators from consumer law violations.

2.3. Brand New Rules on E-commerce

The Amendment provides “online-shopping consumers” with a “cooling down” period. A consumer purchasing via the Internet, television, telephone, or mail orders may return the goods/services within seven calendar days from the date of receiving of the goods/services and is entitled to a full refund of the purchase price, without giving any reasons, but subject to limited exceptions (e.g., where the goods purchased are of a perishable nature).⁹

There is now a special rule for the protection of the online-shopping consumers' right to information on the supplier and the goods/services supplied. Operators supplying goods/services via the Internet, television, telephone, or mail orders, as with providers of services of stock exchange, insurance and banking, must provide consumers with sufficient information as to the identity, address and other contact details of the supplier, quantity and quality of the goods/services supplied, price and/or other charges, deadline of performance and how

²Sections 1 & 2 of the NPC Decisions 2012 provide that no network service provider or any other entity is allowed to steal or sell a citizen's “personal electronic (online) information”; or to collect and/or use a citizen's “personal electronic (online) information” unless doing so for legitimate and justifiable purposes and with informed consent of the personal concerned. The Decision also imposes network service providers or other entities a positive duty to take necessary steps to ensure that the collected “personal electronic (online) information” is safeguarded against damage, loss and unauthorized access (Section 4).

³Consumer Protection Act 1993 (as amended on 25 October 2013), s 29.

⁴Ibid.

⁵The NPC Decisions 2012, s 7.

⁶Consumer Protection Act 1993 (as amended on 25 October 2013), s 55(1).

⁷S 55(2).

⁸S 56.

⁹S 25.

goods/services are to be delivered, warning as to safety and risks, warranties, liabilities and etc.¹⁰

The Amendment also imposes a “guarantor’s liability” or “joint liability” on e-trade “platform” providers. Where the goods/services are supplied via a platform (e.g., a trading website such as the widely used Taobao in China—similar to the TradeMe in New Zealand, where different suppliers may open “online shops” and put items on the website for sale and interested purchaser may bid or choose “buy now” directly via the website) a grieved consumer may claim compensation against the supplier, or against the e-trade platform provider where the platform provider fails to provide the consumer with the true identity, address and other contact details of the goods/services provider, or where the terms promised by the platform provider is more favourable to the consumer than the terms promised by the supplier of the goods/services.¹¹ An e-trade platform provider will be jointly liable to the grieved consumers where it knowingly allows the goods/services provider to use the platform to infringe consumers’ rights and interests.¹²

2.4. Shifting of Burden of Proof in Certain Circumstances

The Amendment shifts the burden of proof to the suppliers where there is a dispute over a defect of durable consumer goods (such as vehicles, computers, televisions, refrigerators, air-conditioning units and washers) and particular types of services (such as decoration of houses) and the defect is discovered and raised by a consumer within six months of the supply.¹³ The defect raised will be deemed to exist unless and until the supplier successfully discharges the burden of proof that the defect does not exist. This rule has only a narrow application, that is, it applies only where defects of durable consumer goods and limited types of services are involved. In any other circumstances, the general rule regarding the burden of proof in civil litigations remains applicable to consumer cases, and hence a plaintiff consumer is required to prove by evidence, on balance of probabilities, the alleged defect of the goods/services and/or fault of the supplier.

2.5. More Onerous Obligations on Operators Regarding Defective Goods/Services

The Amendment imposes on business operators more onerous obligations where the goods/services supplied are discovered defective. Where the defective goods/services supplied may cause harm to human’s health and/or safety or property, the operator must immediately report to the relevant government agencies and take necessary steps (and bear the costs of such steps) to stop the manufacturing and/or supply, issue a warning and recall the defective products.¹⁴ The Amendment offers much stronger protection of consumers’ rights to return, replacement and repair. Now a consumer who purchases substandard goods may return the goods within seven calendar days even if in the circumstance where there is no specific provision of law or agreement on the return; and after the seven days the consumer may still cancel the contract within a reasonable time if the general legal requirements for the cancellation of a contract are met, and the rights to repair and replacement exist whether or not the cancellation requirements are met.¹⁵

2.6. New Liabilities on Advertisers and Other Related Persons

The Amendment imposes on advertisers and other related persons liabilities where false advertisement is involved. A consumer may request the relevant government agencies to punish the advertiser where false or misleading advertisement is discovered; and the advertiser is liable to compensate the consumer if the advertiser is unable or unwilling to provide the true identity, address and other valid contact details of the supplier.¹⁶ Where the false advertisement is about food, drugs or other goods/services related to consumers’ health or safety and harm is actually caused to a consumer, the advertiser will be “jointly liable” with the supplier of the goods/services to the consumer.¹⁷ Such a “joint liability” is also imposed on other organisations or persons who recommend/endorse the goods/services to consumers via the false advertisement,¹⁸ which means a movie or sport star re-

¹⁰S 28.

¹¹S 44.

¹²S 44.

¹³S 23.

¹⁴S 19.

¹⁵S 24.

¹⁶S 45.

¹⁷S 45.

¹⁸S 45.

commending/endorsing the goods/services would now be “jointly liable” with the supplier of the goods/services and the advertiser of the false advertisement.¹⁹

2.7. Improvements Regarding Functions of Consumer Associations and Regulation Bodies

The Amendment, among others, grants a greater role of consumer associations. Consumer associations are now clarified as statutory bodies for consumers, which is required and entitled to act for “public interest”.²⁰ Consumer associations now have a new function to participate in the process of “making” consumer-protection-related laws, regulations and mandatory standards.²¹ A breakthrough is that consumer associations now may have a standing at court as a plaintiff where the rights of (presumably a large group of) consumers have been infringed upon.²² The introduction of such a new type of public interest proceeding in consumer law may address problems with the current general civil procedure on class actions.

The Amendment also clarifies administrative agencies’ regulatory responsibilities. The “relevant administrative departments” are now required to collect and test samples of (consumer) goods/services and publish the results from time to time, and to order the operator to stop the sale, to warn the consumers and to recall any defective goods/services that might endanger the safety of human or property.²³ Further, an administrative agency is now required to handle a consumer complaint within seven days from its receipt of the letter of complaint.²⁴

3. Problems Left Unaddressed

The Amendment brings a substantial progress in consumer protection law in China. Some changes are revolutionary, for example, giving consumer associations standing at court where the rights of a large group of consumers are infringed upon and the shifting of the burden of proof to business operators in certain circumstances. The emphasis on the protection of consumers’ personal information and freedom from junk-information, and the brand new rules on e-commerce also respond well to the rapid growth of use of the Internet by business operators and consumers in China. It can be found, however, that the Amendment did not touch at all some problems identified. For example, a low-cost forum for most consumer cases is still not available. A more obvious disappointment is that the most fundamental defect in consumer law and practice in China—the lack of a clear legal definition of “consumer”—remains untouched. As the core statute of consumer law, it is an undeniable defect where the key concept of “consumer” is not legally defined.

3.1. Consumer Disputes Arbitration Issue

As discussed in *Zheng and Liao (2013)*, although arbitration could be one of the avenues that an aggrieved consumer may seek relief, it is impractical for a consumer to invoke this process for the lack of a binding arbitration agreement/clause which is required by Section 4 of the Arbitration Act 1994. There are also considerable costs for a grieved consumer to go to a court for a relief. In disputes where the defective goods/services concerned are not durable consumer goods/services consumers still have the burden of proof which is presumably costly taking into account the value of the goods/services involved and the complicated procedural rules on evidence. Furthermore, in some circumstances, it is particularly hard for the consumer to prove he or she is a “consumer” that should be protected by the Act. Such a difficulty is largely connected to the fundamental defect of the Act—the lack of a clear definition of “consumer”.

3.2. Unclear Definition of “Consumer” in Law

The Consumer Protection Act 1993 does not provide a definition or interpretation of “consumer”. Section 2 of the Act provides that “[w]here a consumer purchases or uses goods or accepts services for the need of living consumption, [his/her] rights and interests are protected by this Act”. In other words, the literal meaning of Section 2 is only as this: “a consumer’s rights and interests are protected by this Act where he/she purchases...for living consumption”. It only lays down a general principle as to in what circumstances a consumer’s rights and

¹⁹S 45.

²⁰Ss 36 & 37.

²¹S 37(2).

²²S 37(7).

²³S 33.

²⁴S 46.

interests would be protected by the Act. It is by no means a definition of consumer. If it is argued that this is a definition of consumer, then it is at most a circular “definition”, in such a form—“a consumer is a consumer [note, not a ‘person’] who purchases...for the need of living consumption”. Furthermore, nothing in the Act interprets the meaning of “the need of living consumption”. To date, 20 years after the enactment of the Consumer Protection Act 1993, there is not yet consensus as to whether “the need of living consumption” includes the circumstances where a person purchases a house or a multifunction vehicle, or accepts medical treatments, education, brokerage or telecommunication services; and whether “consumer” includes a person who purchases goods knowing the goods are fake but doing so merely for the purpose of claiming punitive damages which is available whether before or after the Amendment.²⁵

Another unsettled issue is whether “consumer” is limited to a natural person. This is because Section 2 of the Consumer Protection Act 1993 provides “a consumer (rather than a person) where... are protected by this Act”. Many academics argue that a consumer in China does not include a legal person or an organisation, because an organisation is presumed to be in an equal position to a business operator (Yin, 2012). Some by-laws or regulations made after the 1993 Act, however, indicate that “consumer” includes a legal person and other organisations.²⁶ Other by-laws or regulations simply “copy” Section 2 of the Consumer Protection Act 1993, which does not help at all in clarification of the legal meaning of “consumer”.

The lack of a clear legal definition of “consumer” results in uncertainty in consumer law enforcement. The situation is worse off because of the lack of *stare decisis* in China’s Civil Law system. Without any binding judicial interpretation of the concepts of “consumer” or “the need of living consumption”, Judges and administrative officials may only rely on their personal views of these concepts and thus determine materially similar cases differently. This unfettered discretion results in great uncertainty and hence contradicts the “rule of law” which requires “like cases should be treated alike”. It has been long expected that the Supreme Court of China should provide lower courts with some guidelines or explanations on these issues but unfortunately nothing has been done in this regard to date.

A problem in relation to, and as a consequence of, the lack of a clear legal definition of “consumer” is the inadequate protection for new or emerging types of consumption. For, example, if a person registers an online-communication account with an Internet Service Provider (ISP), is the person using the ISP’s service for “the need of living consumption”? What if the person also uses that account for business communications? Commonly, you may not register an account unless you accept the ISP’s disclaimer excluding its liability. Is such an exclusion of liability effective in law? As a general principle of consumer law, operators’ liability to consumers cannot be contracted out²⁷, but under the current consumer law in China, it is unclear whether in this circumstance the user of that accounts is a consumer and consequently whether or not such an exclusion clause is effective remains a mystery.

4. Proposals for Future Amendments

4.1. Consumer Disputes Arbitration Tribunal

It is first submitted that an arbitration tribunal should be set up under consumer associations, for the hearing and determination of simple and small consumer-related cases, without the need of an arbitration clause or agreement as a prerequisite. This will help most minor consumer-supplier disputes be determined quickly without the incurrance of substantial costs. Setting up consumer arbitration tribunals is an ideal way of response to the problems with the impractical application of the Arbitration Act 1994 in most consumer disputes, and the application of the costly general civil procedure in consumer disputes, both of which have not been addressed by the Amendment (except for the shifts of burden of proof to business operations where defects of durable consumer goods/services are involved). Special rules can be designed for consumer tribunals, in order to lower the costs and to make (quasi) judicial reliefs more readily available to grieved consumers. For example, no legal representative should be allowed to represent either party in a tribunal hearing; there should be less strict rules on the

²⁵S 55(1); see also the pre-Amendment principal Act, s 49.

²⁶For example, the Measures on Implementation of Consumer Protection Law in Guangdong Province (Standing Committee of Guangdong People’s Congress, 1999, available at http://www.law-lib.com/law/law_view.asp?id=34665), Article 2 of which specifically provides that “Consumer ... refers to individuals and units who/that purchase/accept or use goods/services for living consumption” (emphasis added; and “units” in China includes all kinds of organisations, whether incorporated or not).

²⁷e.g. the Consumer Protection Act 1993 (as amended on 25 October 2013), s 26 (similar to Section 24 of the Pre-Amendment Principal Act) See also Consumer Guarantees Act 1993 (NZ), s 43.

admission of evidence and shorter period of time for a decision to be handed down. Ideally, there should be a list of what kind of cases should be heard by a consumer tribunal in the first instance. The factors that should be taken into account in determining such a list include the amount in dispute, the nature and the simplicity of the dispute, the type/nature of the goods/services involved, and the possible amount of compensation awarded. A party should be able to appeal to a District Court against a decision of a consumer tribunal within a short period of time, but a non-appealed decision of a consumer tribunal should be legally binding and enforceable by courts.

4.2. Clear Legal Definition of “Consumer”

It is further submitted that a legal definition of “consumer” should be introduced into the Act. It is true that it is difficult to define “consumer”, which is originally an economic/social term rather than a legal concept. Notwithstanding such a difficulty, to date many jurisdictions have already legally defined “consumer”.²⁸ Difficult questions arise then—how “consumer” should be legally defined and what elements a “consumer” definition should contain?

In order to address the uncertainty issue, an objective standard should be included in the definition. Taking into account the difficulty of defining “the need of living consumption” (as in the current Section 2 of the Act) and the difficulty of ascertaining intention, the subjective standard should be stated in a negative manner so that the burden of proof shifts to the supplier generally. Therefore, it is submitted that “consumer” should be defined as “a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and does not acquire the goods or services for the purpose of resupplying them in trade, or consuming them in the course of production or repairing in trade other goods”.

First, only those who acquire “consumer goods/services” from a supplier in trade should be entitled to consumer protection. “Consumer goods/services” are those “ordinarily acquired for personal, household and domestic use”, which depends on the nature of goods/services rather than the actual purpose of the acquirer in the particular acquisition. That is why this is an objective test. The introduction of an objective test greatly increases certainty regarding whether a particular person is a consumer or not. For example, if a natural person purchases a second-hand jet fighter for “personal use” or for “the need of daily living”, he or she will not be a consumer, because a jet fighter is not a kind of goods/services that are “ordinarily acquired for personal, household and domestic use”, or, arguably, it would be “highly unusual” or “idiosyncratic”²⁹ to use a jet fighter for personal, household and domestic purpose.

Secondly, the subjective limb should be used as exclusion, that is, where the objective test is satisfied, the acquirer should be presumed to be a consumer unless and until the supplier/operator in trade satisfies the Court with sufficient evidence that such a presumption should be rebutted. If the supplier can prove that the actual or declared purpose of the acquisition of the consumer goods/services is for re-sale or consumption in process of making other goods/services for sale in trade, or for repairing other things in trade, the acquirer should be excluded from being a “consumer”. The rationale is that the purchaser would be in an “substantially equal” position regarding the goods/services supplied if the purchaser acquires them for re-sale or repairing other goods in trade and thus should not be specially protected by consumer law (see further discussion below).

Thirdly, a “person” should include a natural person and a legal person, and unincorporated organisations. It is true that consumer legislation in some jurisdictions confines “consumer” to “individual” or “natural person” on-

²⁸For example, the Magnuson-Moss Warranty Act 1975 (US Code—Title 15, Chapter 50, ss 2301-2312), s 2301(3); Australia Consumer Law (Schedule 2 of the Competition and Consumer Act 2010), s 3; Consumer Guarantees Act 1993 (New Zealand), s 2; Independent Consumer and Competition Commission Act 2002 (Papua New Guinea), s 103 and Consumer Protection Act 2008 (South Africa), s 1.

²⁹Such concepts have been fully discussed and decided by Justice Blanchard in *Nesbit v Poter* [2002] NZLR 465 at paras [26]-[29].

³⁰e.g., Section 1 of the Consumer Protection Act 2002 (Canada, Ontario) defines “consumer” as “an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes (‘consommateur’)”. In European Union, “consumer” is differently defined in different directives. For example, in Directive 93/13 (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts), Article 2(b) defines “consumer” as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”; whereas in Directive 90/314 (Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours), Article 2(4) defines “consumer” as “the person who ...” which does not limit to natural person. The overall conception, however, is that “consumer” in European Union refers to individuals only (Schüller, 2012). Illustrations are the judgements in ECJ, 22 November 2001, Case C-541/99, *Cape Snc v IdealserviceSrl* [2001] ECR I-9049; ECJ, 19 January 1993, Case C-89/91 *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und BeteiligungenmbH* [1993] ECR I-139.

³¹Above n 28. Another example is Denmark, where in defining “consumer sales (Forbrugerkøbøven)” the focus is on the types of the acquirer’s conducts/activities rather than the identity (whether being an individual or organisation), notwithstanding a member state of the European Union (Schüller, 2012).

ly.³⁰ There are many other jurisdictions define “consumer” as including individuals and organisations.³¹ It seems that the difference turns on the legal philosophy and legal framework of the particular jurisdiction. The argument that any organisation should be excluded from being a “consumer” is not consistent with China’s fundamental legal philosophy in “Economic Law” (essentially about in what circumstances government should intervene in *prima facie* “equal” civil relations, where consumer protection law being a branch of it) that “substantive fairness” overweighs “procedural fairness”.³² In the “information age”, the primary and most fundamental basis for special protection of consumer is the idea of imbalance of information between a supplier in trade and a consumer.³³ Where a party (very often a purchaser) primarily relies upon the skill and knowledge of the other party (very often the supplier), and the application of the general principles of civil law may not achieve “substantive fairness”, special rules should step in. The idea that an “organisational purchaser” is generally in an equal position of a “supplier” misses the point that organisational purchasers who is not in the business of the supplier still heavily rely upon the skill and knowledge of the supplier in trade. In this sense, there is no substantial difference between a natural person purchaser and an organisational purchaser, in respect of the imbalance of information between the supplier and the purchaser. On the contrary, where a natural person is purchasing the goods/services for re-supply or consumption in process of manufacturing other goods/services for supply in trade, or for repairing other goods in trade, he or she is presumed to be in the same or similar trade or business with the supplier regarding the goods/services supplied and hence the imbalance of knowledge and skill is substantially negated. This presumption, however, does not mean an aggrieved purchaser in such a circumstance will have no protection by law. He/she may seek remedies under fair trading law or general contract/tort law regarding misrepresentation or misleading/deceptive conducts.

Therefore, regarding whether specific consumer protection should be available to a class or classes of person, the key point to be considered should not be on whether the acquirer or purchaser is a natural persona or an organisation, but whether the acquirer is in a “substantially equal” position of the supplier regarding information/skill/knowledge on the goods/services supplied. It is “substantive fairness” rather than the form or nominal identity or outer appearance of the acquirer that should be focused on.

Fourthly, in connection to the above point, “business consumer” should be allowed but they should be treated slightly different from other consumers. For example, a law firm purchasing a coffee machine for its general business use (for clients and employees to have a cup of coffee in the working place) should be a consumer. The coffee machine is a kind of goods/services that are ordinarily acquired for personal, household or domestic use so the objective test of the “consumer” definition is satisfied. Further, the actual or declared purpose is not for re-sale or consumption in process of manufacturing other goods/services for sale in trade, or for repairing other goods in trade, so the subjective limb is also satisfied. The law firm could be a sole trader, a partnership or an incorporated company, but such difference in form does not affect its entitlement to consumer protection. It is a total misconception that a legal personal should not be protected by consumer law. Consumer law should not interfere with the freedom in choosing an appropriate form of business. The focus should remain on the substantial imbalance of information regarding the goods/services supplied. In this case, whether the law firm is a sole trader, a partnership or an incorporated company, the substantial imbalance of information regarding the coffee machine between the law firm and the supplier remains the same, hence the law firm should be consumer regardless of the form of organisation. Similarly, the coffee machine supplier may be a consumer when it comes to the law firm for legal advices.

It is true, however, that business purchasers may presumably have more resources in obtaining information when acquiring consumer goods/services and in seeking reliefs where a dispute arises. It could also be more economically effective where the parties may deal with each other in contractual terms freely negotiated and agreed by them, by which the parties may freely determine how precaution and risks are to be allocated between them. It is argued that courts should not strike down (consumer) “contracts with harsh terms when there is no evidence of fraud or serious information asymmetry” (Posner, 2002: p. 15). It is conceivable that the unevenness

³²For a thorough discussion on principles of “economic law”, see Shi & Deng (2008).

³³The traditional justification for consumer protection, however, was largely based on the notion of plain disproportion in size and resources between market actors on the supply side and those on the demand side (Trebilcock, 2003), which primarily focus on the imbalance of bargaining power. Such a notion is now highly questionable (Haupt, 2003) and it has been observed that many consumer protection issues arise in markets where many producers and suppliers are small in size (Schäfer & Ott, 2000: pp. 321-322). Information (discrepancy/deficiency) as fundamentally important consideration in formulating consumer protection policy is forcefully argued by Hadfield, Howse and Trebilcock (1998). Information deficiency, where it is sufficiently difficult for enough consumers to engage in comparison shopping, justifies judicial intervention (Schwartz & Wilde, 1979).

of information between business consumer and a supplier should be less serious than that between a non-business consumer and a supplier. The economic resources possessed by a business consumer may also help in obtaining information. Furthermore, a purchaser for “business” purposes is generally more sophisticated than a “non-business purchaser”. Lack of sophistication on the purchaser’s part is another factor, in addition to the asymmetry of information, in considering judicial intervention in consumer transactions (Posner, 2002: p. 14). All of these justify a slightly different treatment to business consumers to some extent, that is, suppliers may by written contract with a business consumer to exclude the application of the special protection offered by consumer protection law.

If such a clear definition of “consumer”, as proposed above by this paper, is adopted in the future amendment of the Consumer Protection Act 1993, many controversial issues and difficulties lingering in China’s consumer protection law and practice will disappear.

5. Conclusion

The recent Amendment brings some great changes to the core consumer legislation in China—the Consumer Protection Act 1993. Some changes are significant or even revolutionary, which presumably will improve the consumer law and practice in China. The Amendment, however, is far from satisfactory, in that some important issues have not been touched. It is submitted that the most fundamental defect of the Act remained is the lack of a clear definition of “consumer”, which has caused or contributed to, and will continue to cause or contribute to, some persistent problems and controversies in consumer protection law and practice in China. This paper analyses the rationale for special protection to consumer and proposes a model definition of “consumer” accordingly, hoping the adoption of which in future amendments will substantially improve the situation.

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