Selected Chinese Cases on the CISG

Peng Guo
Haicong Zuo
Shu Zhang *Editors*

Selected Chinese Cases on the UN Sales Convention (CISG) Vol. 1

Springer

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This book series intends to provide a comprehensive and systemic analysis of Chinese cases on the CISG to show international legal scholars and practitioners not only the judicial interpretation and application of the CISG in China but also the scholastic understandings of and approaches to it. This series will fill the gaps relating to the lack of understanding of Chinese cases on the CISG and complement the discussion and analysis of the CISG in leading commentaries on the CISG, which is already endorsed by world renowned scholars in this filed.

Another aim of the series is to identify whether there is a special Chinese approach to the interpretation and application of the CISG. If the answer is in the affirmative, it will examines whether Chinese courts prefer to apply the CISG, whether Chinese parties prefer to choose the CISG as the governing law, whether the application of the CISG in China promotes its wider adoption and application by other countries and whether the Chinese approach will contribute to the uniform interpretation and application of the CISG at the international level.

In addition, the series will highlight the similarities and differences between the Chinese approach to the interpretation and application of the CISG and the approaches adopted by courts in other jurisdictions and discuss which approach is more preferable and valuable to the further development of a uniform sales law. It will also compare the similarities and differences of the understanding and interpretation of the CISG between Chinese and foreign scholars which may affect the approach to be adopted by a court. Both will prompt foreign legal practitioners and companies to reconsider whether they should choose the CISG as the governing law of the contract when doing business with companies the place of business of which is in China.

Peng Guo · Haicong Zuo · Shu Zhang
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Foreword

In 1988, China was among the first 11 countries where the CISG entered into force. In fact, joining forces with the United States in ratifying the Convention fulfilled the prerequisites for this coming into force. Since then, the CISG has proven to be a worldwide success. This is not only demonstrated by 94 member states and the fact that nowadays more than 80% of world trade are potentially governed by the CISG. It is most remarkable that since the coming into force of the CISG almost all legislators on the international as well as on the domestic level took the CISG as blueprint when revising contract and sales law. This is also especially true for China where already the Chinese Contract 1999 heavily relied on the CISG; an influence that was carried on in the Chinese Civil Code 2021.

Having regard to the role of the CISG in Chinese domestic law and China's role in the world economy the importance of its contribution to the application and interpretation of the CISG does not need any further explanation. Although some select Chinese cases have been translated into English, the bulk of Chinese case law up to now remained inaccessible to the international CISG community due to language barriers.

It is the great merit of Peng Guo and his team to have undertaken to gather, to translate and, last but not least, to comment Chinese case law on the CISG thus making it available to a greater public. Not only academics will welcome this new source of interpretation of the CISG; practitioners throughout the world who expect to litigate and maybe arbitrate in China will rely on this valuable tool in order to attain more predictability with regard to possible outcomes of legal disputes.

The present book can, therefore, be highly recommended to anyone interested in and dealing with the application and interpretation of the CISG.

Muellheim, Germany
2022

Prof. Dr. Ingeborg Schwenzer
LL.M.

Preface

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] has now 94 signatories.[2] It is one of the most successful texts prepared by the United Nations Commission on International Trade Law (UNCITRAL) and represents a landmark in the course of the unification of international trade law and has a huge impact on domestic law reforms in many countries, such as China.

Cases are considered a crucial source of learning, however, so far, no serial Chinese casebooks on the CISG have been published. Also, despite the fact that there are many Chinese cases on the CISG, there is no comprehensive and systematic analysis of these cases. In addition, scholars from different countries have noticed the large number of Chinese cases and realised their potential value in the promotion of the uniform interpretation and application of the CISG, however, the language barrier has hindered the access to the cases and subsequently of their potential influence on and contribution to the global jurisprudence of the CISG. All this, in our opinion, guarantees the high value and usefulness of the publication of a series of selected Chinese cases on the CISG to make them assessable to the rest of the world.

The primary aim of this series is to, for the first time, provide the academics, judges, legal practitioners, and law students with an important source to locate Chinese CISG cases. Although existing databases on CISG cases, such as the CISG-Online database and the Albert H. Kritzer Pace CISG database, have some Chinese cases, the coverage is relatively limited. This series, therefore, intends to provide a collection of Chinese CISG cases as comprehensive as possible.

The second aim is to track down the development of the court practice in relation to the CISG. It is of great importance to perceive how Chinese courts understand, interpret, and apply the CISG, which will help domestic and international businessmen predict and avoid the potential problems or resolve the emerging disputes regarding the CISG properly.

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[1] *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) (CISG).

[2] https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

The third aim is to conduct a systematic study of the selected Chinese CISG cases. Both Chinese and international scholars and practitioners will provide comments to the cases. They will provide a scholarly and practical analysis of the CISG from different perspectives and identify the similarities and differences between the Chinese approach and the approaches adopted in other jurisdictions when appropriate.

We hope that this series will add China's contribution to the uniform interpretation and application of the CISG globally.

Melbourne, Australia — Peng Guo
Beijing, China — Haicong Zuo
Burwood, Australia — Shu Zhang
February 2022

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Chapter 1
Novelact (Resources) Limited v Xiamen Special Economic Zone International Trade Trust Company

Geng Wang, Shu Zhang, and Peng Guo

Case Information

Case name: *Novelact (Resources) Limited v Xiamen Special Economic Zone International Trade Trust Company*

Seller: Novelact (Resources) Limited (hereinafter referred to as "Novelact Company").

Place of business: Hong Kong, China

Buyer: Xiamen Special Economic Zone International Trade Trust Company (hereinafter referred to as "Xiamen International Trade Company")

Place of Business: Mainland, China

Details of First Instance:

Court: Xiamen Intermediate People's Court, Fujian

Date of Decision: 19 April 1993

Case No: (1990) Xia Zhong Fa Jing Min Zi No 40

Judges: Yong Hao (Judge), Jinqing Chen (Judge), Hongyan Zhou (Judge)

CISG applied: Yes

Key CISG provisions interpreted and applied: Articles 74 and 78

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Abstract

On April 6, 1989, the seller, Novelact Company, and the buyer, Xiamen International Trade Company, concluded a contract for the purchase of fishmeal (F89GDTD/9261031CK). According to the contract, Novelact Company should provide 5,000 tons of Peruvian or Chilean fishmeal, which must meet the required quality standards, to Xiamen International Trade Company in two batches, and Xiamen International Trade Company should issue an irrevocable, at sight, documentary letter of credit in favor of Novelact Company. Xiamen International Trade Company only issued a letter of credit of US$1,519,500 for 3,000 tons of fishmeal (LC710890310), but did not issue a letter of credit for the remaining 2,000 tons of fishmeal. On May 31, 1989, Novelact Company loaded 3,150 tons of Chilean fishmeal onto the "Challenger" vessel, acquired the marine bill of lading issued by the captain and subsequently submitted one set of negotiable documents to Po Sang Bank (Hong Kong). However, these documents were rejected due to five discrepancies. Xiamen International Trade Company agreed to pay 80% of the purchase price to accept these documents, on the condition that the remaining 2,000 tons of fishmeal would no longer trade, and the fishmeal must be quality inspected. Novelact Company disagreed. On July 20, 1989, the "Challenger" vessel carrying 3,150 tons of Chilean fishmeal arrived at Xiamen Port, and soon after, the goods were detected with live insects. The relevant authorities required fumigation and insecticide treatment of the goods. Xiamen International Trade Company then consulted with Novelact Company and Novelact Company insisted that Xiamen International Trade Company should pay 20% of the purchase price first, and later file a claim against the responsible party for compensation. As the negotiation between the two companies remained inconclusive, Novelact Company brought a suit to the court.

The court agreed to apply Chinese law, the CISG and relevant international practices to hear this case, and held that the buyer and seller had concluded a valid contract pursuant to such rules. Xiamen International Trade Company constituted a breach of contract by only paying 80% of the purchase price and failed to issue a letter of credit for 2,000 tons of the fishmeal on time. For this reason, the court stated that Xiamen International Trade Company should compensate Novelact Company for the losses caused by its breach of contract.

Commentary on the Key Issues Related to the CISG

Issues

Issue 1: The Applicability of International Treaties and International Practice
Issue 2: Determination of the Breach of Contract
Issue 3: Consequences of Breach

Comments

Issue 1: The Applicability of International Treaties and International Practice

This case was between Novelact Company, whose place of business was located in Hong Kong, and Xiamen International Trade Company, whose place of business was located in Mainland China. In this case, the parties agreed to choose the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest,[1] the CISG and relevant international practices applicable to such contracts.

I. The Applicability of the CISG

The applicability of the CISG is addressed in Chap. 1 of the CISG. There are two ways to apply the CISG according to Article 1 of the CISG. When parties whose places of business are in different Contracting States, the CISG is directly or autonomously applicable, which is called "direct applicability" or "autonomous applicability".[2] Further, when the parties whose places of business are in different states, and the rules of private international law lead to the application of the law of a Contracting State, the CISG is also applicable, which is called "indirect applicability".[3] Contracting states can make Article 95 reservations to avoid the indirect application of the CISG. Given that China has made such reservations, Chinese courts are relieved of the obligation to apply the CISG pursuant to Article 1(1)(b) of the CISG. In addition, the parties whose places of business are in non-contracting states can choose to apply the CISG based on the principle of party autonomy.

A. Hong Kong-related Contracts

In this case, one party to the contract had its place of business in Hong Kong and the other party had its place of business in Mainland China. Strictly speaking, such contracts do not fall under the CISG, because this Convention applies to contracts between parties which have their places of business in different countries in accordance with Article 1(1) of the CISG and Hong Kong is part of the territory of China. Therefore, it has been argued that the CISG is not directly applicable in contracts

[1] The Law of the People's Republic of China on Economic Contracts Involving Foreign Interest. (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 21, 1985, Effective Jul. 1, 1985, Invalid Oct. 1, 1999).

[2] United Nations Commission on International Trade Law [1], p. 5, paras 9–13.

[3] United Nations Commission on International Trade Law [1], p. 5, paras 9–13.

concluded between Mainland and Hong Kong merchants.[4] Chinese courts also hold this view. For instance, in *Hyper Extension Limited v Zhejiang Shengda Industry and Trade Co., Ltd.*, the court stated that it was a Hong Kong-related contractual dispute, and the parties' places of business were not in different countries, so the court rejected the argument by Hyper company that the CISG should apply.[5] The court in this case also did not apply the CISG directly and autonomously.

However, since Chinese courts have heard cases in which one party from the Hong Kong, the Macao or Taiwan area is involved in a manner comparable to foreign-related cases, there is only a formal difference between "area" and "country", and the courts should not reject the application of the CISG on the grounds that parties belong to the same country.[6] This view argues that the key issue is whether China has made a reservation under Article 93 of the CISG.

According to Article 93 of the CISG, a Contracting State with two or more territorial units which apply different systems of law may declare that the CISG applies to all or part of the country's territorial units at the time of signature, ratification, acceptance, approval or accession, and if a Contracting State did not make such declaration, the CISG is to extend to its all territorial units. This provision was developed at the request of federal states such as Canada and Australia and is intended to enable a state to accede to the Convention with respect to individual territorial units.[7] It is noteworthy that Article 93 of the CISG limits the time at which a reservation may be made. The reservation should be made at the time of signature, ratification, acceptance, approval or accession.

So, did China make such a reservation on the application of CISG to Hong Kong? In 1997, Hong Kong returned to China. Prior to the retrocession of Hong Kong to China, China sent the United Nations Secretary-General a letter, which contained a list of "Multilateral International Treaties applicable to the Hong Kong Special Administrative Region from July 1, 1997".[8] The CISG was not included in this list. Whether this letter can be considered as an Article 93 reservation has been controversial. Scholars who hold a strict textual interpretation of Article 93 say that this letter is only an implication, not a formal declaration, and cannot produce the corresponding effect.[9] Instead, scholars who hold a broad teleological interpretation

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[4] Schroeter [2], p. 328; Li [3], pp. 102–103.

[5] *Hyper Extension Limited v. Zhejiang Shengda Industry and Trade Co., Ltd.*, Hu 01 Min Zhong No. 5111 (Shanghai First Intermediate People's Court, June 30, 2016). Also see *Zhengwei Technology (Shenzhen) Co., Ltd.,* etc. *v. Yonglifeng Group Co., Ltd.,* etc., Yue Min Zhong No. 1552 (Guangdong Higher People's Court, November 22, 2016); *Yingshun Development Hong Kong Co., Ltd. v. Zhejiang Zhongda Technology Export Co., Ltd.*, Zhe Shang Wai Zhong Zi No. 99 (Zhejiang Higher People's Court, December 15, 2010).

[6] Han [4], p. 234.

[7] Schroeter [2], p. 321.

[8] Letter from Qin Huasan, Permanent Representative of the People's Republic of China to the United Nations, to Kofi Annan, Secretary General of the United Nations (June 27, 1997), Bulletin of the State Council of the People's Republic of China, 1997, No. 39, p. 1688, http://www.gov.cn/gongbao/shuju/1997/gwyb199739.pdf.

[9] Wang [5], 140; Han [6], p. 227.

of Article 93 argue that this letter indicates that Hong Kong does not intend to apply the CISG directly, and therefore it is not appropriate to extend the CISG to Hong Kong.[10] The Hong Kong Department of Justice also holds this viewpoint.[11]

The uncertainty of Hong Kong's status under the CISG has caused inconvenience to the courts when hearing the CISG-related cases, and the Hong Kong government has been actively addressing this issue in recent years. In view of the increasing popularity of the CISG worldwide, the Convention has become more attractive to Hong Kong. Therefore, the Department of Justice of Hong Kong submitted a consultation arrangement to Legislative Council to propose the application of the CISG to Hong Kong, and published a consultation paper entitled "Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region" in March 2021 for public consultation.[12] Based on the outcome of the consultation, Sales of Goods (United Nations Convention) Bill was introduced to Legislative Council on July 14, 2021, and was passed on September 29. This Bill is currently completing the necessary procedures under Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, and is expected to come into force in the next 6–9 months. The Sale of Goods (United Nations Convention) Bill is very brief, with only five articles. The fourth core Article simply states that the CISG has the force of law in Hong Kong. Thus, it remains to be determined by the central legislature and judiciary as to whether the CISG shall be directly applicable to a contract such as this case, where one party had its place of business in Mainland China and the other party had its place of business in Hong Kong.

B. Opting-in

In this case, the parties chose to apply the CISG, so the court ultimately agreed to apply the relevant provisions of the CISG. This is a non-automatic application situation.

The CISG does not expressly stipulate that the parties concerned may choose to apply the CISG. In retrospect, Article 4 of the 1964 Uniform Law on the International Sale of Goods (ULIS),[13] the predecessor of the CISG,[14] clearly provided that the parties can choose to apply this Convention, which stipulates that:

> The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, to the extent that it

[10] Liu and Ren [7], p. 887.

[11] Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region, March 2020, https://www.doj.gov.hk/sc/featured/consultation_paper.html.

[12] Department of Justice of the Hong Kong Special Administrative Region Website, https://www.doj.gov.hk/sc/featured/un_convention_on_contracts_for_the_international_sale_of_goods.html.

[13] Convention relating to a Uniform Law on the International Sale of Goods, (The Hague, 1 July 1964).

[14] Ferrari [8], p. 49.

> does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law.

However, because the representatives who participated in codifying the CISG believed that the "mandatory legal provision" in this clause would bring ambiguity; this clause did not remain.[15] This fact does not mean that the parties are not entitled to choose the CISG applicable to their contracts. The principle of party autonomy is sufficient to allow parties to apply the CISG if they reach a consensus, and there is no need for further stipulations.[16]

C. Chinese Law as Supplementary Law

Due to the limited scope of the CISG, some issues cannot be solved through provisions of the CISG. At this time, some alternative methods need to be used. Article 7(2) of the CISG takes this into account, which provides that:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Therefore, when an issue cannot be solved by virtue of provisions or general principles of the CISG, the rules of private international law can be used.

In this case, the parties also chose the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest. According to Article 145(1) of the General Principles of Civil Law,[17] the parties to a contract involving foreign interests may choose the law applicable to the settlement of their contractual disputes except as otherwise stipulated by law. Their choice was valid, so the court shall apply the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest when neither the CISG provisions nor its general principles can solve the issue.

II. The Applicability of International Practice

The parties also agreed to apply international practice in the document transactions. Therefore, the court also applied international practice. The court held that, according to international practice, a party shall pay for the goods after receiving a full set of negotiation documents, but the buyer only paid 80% of the purchase price after accepting all the documents from the seller and did not pay the remaining 20% of the purchase price even after the goods were inspected and released, which constituted a breach of contract.

Before the promulgation of the Civil Code, the provision on how to apply international practices was Article 142(3) of the General Principles of Civil Law, which provides that:

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[15] Marshall [9], p. 193; Xuan and Wang [10], p. 128.

[16] United Nations Commission on International Trade Law [1], p. 34, para 18.

[17] General Principles of the Civil Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 12, 1986, Effective Jan. 1, 1987, Invalid Jan. 1, 2021).

> International practice may be applied on matters for which neither the Law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.

It is generally believed that the role of international practice is only complementary, and international practices are only applicable where there are no provisions in Chinese law and international treaties concluded by China.[18] The buyer also emphasized it in the statement of defense. Since neither Chinese domestic law nor international treaties lack relevant provisions on the document transactions under the letter of credit, the court did not comment on the issue of whether Chinese domestic law or international treaties are applicable in preference to international practice. Many scholars believe that Article 142(3) is inappropriate. It has been argued that Article 142(3) is contrary to Article 6 and Article 9 of the CISG, under which international practices shall take precedence over international treaties.[19] On January 1, 2021, the Civil Code came into effect, which replaced the General Principles of Civil Law. The Civil Code separates substantive law and conflict law and removes the applicable norms of law like most countries,[20] so there is no general provision on the application of international practice in Chinese law nowadays.

Issue 2: Determination of the Breach of Contract

I. The Buyer's Obligation to Issue Letter of Credit

The core issue in this case is whether the buyer breached the contract during the performance of the contract, and whether the seller can apply for compensation. Apart from failing to pay the full price, the buyer was also deemed in default of his obligation to issue a letter of credits as agreed upon.

Issuing a letter of credit is an important obligation. In Trans Trust S P R L v Danubian Trading Co. Ltd., Lord Denning pointed out that the letter of credit was an essential condition for the performance of the contract and the buyer's failure to open a letter of credit led to a breach of contract, so the seller is discharged from any further performance and had the right to demand compensation from the buyer.[21] Failure to open a letter of credit within the specified time as agreed in the contract is usually deemed to be a violation of Article 54 of the CISG, and even breach the contract fundamentally if the buyer does not make the payment in the end. Unless the buyer can prove that the seller has an anticipatory breach of contract, the buyer cannot be relieved of his duty to open a letter of credit.

As the buyer in this case only issued a letter of credit for 3,000 tons of fishmeal, and did not issue a letter of credit for the remaining 2,000 tons of fishmeal on time even though the seller extended the deadline to May 20, 1989, the court found that the buyer breached the contract. What's more, in light of Article 32 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest,

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[18] Chen and Wu [11], p. 111.

[19] Liu and Ren [7], p. 914; Chen [12], p. 161.

[20] Ding [13], p. 33.

[21] *Trans Trust S. P. R. L. v. Danubian Trading Co. Ltd.* [1952] 1 Lloyd's Rep. 348.

the court rejected the buyer's argument that the issuance of a letter of credit for 2,000 tons of fishmeal should be carried out in accordance with their oral agreement. According to Chinese law, notices or agreements on the modification or rescission of contracts shall be made in writing. Oral agreement cannot modify the contract. In fact, judging from the facts and evidence found by the court in the judgment, the buyer and the seller did not reach any oral agreement on the issuance of a letter of credit for 2,000 tons of fishmeal. Both parties hold opposite views.

II. Responsibility for Live Insect Infestation

Furthermore, the buyer argued that, as the fishmeal was materially nonconforming at the time of discharge because of live insect infestation, the seller should bear the responsibility. By contrast, the seller stated that the responsibilities for insect infestation need to be clarified as insect infestation can also be due to natural factors. There are rules in the CISG to determine whether the buyer or seller bears the risk of loss in the absence of a breach, but the contract included a C&F FO clause, which has priority over the CISG rules pursuant to Article 9 of the CISG. Under a C&F FO clause, the risk of loss of infested fishmeal is passed to the buyer when the goods crossed the ship's rail, and the seller would be relieved of his duty.[22] The court did not respond to the buyer's such an argument. The breach of the contract by the seller cannot exempt the buyer from liability for issuing a letter of credits and paying for 3,000 tons of fishmeal. The buyer's argument is not a rebuttal to the seller's statements, but a new and independent litigation request. The court dealt with the buyer's above-mentioned argument in another judgment, (1990) Xia Zhong Fa Jing Min Zi No 39.[23] To make the judgment more persuasive and complete, the court still needs to explain why the buyer's argument was not discussed in this judgment.

Issue 3: Consequences of Breach

In light of the buyer's breach of contract, the court ruled that the seller was entitled to the expected profit of 2,000 tons of fishmeal of US$21,000 as well as the interest on the profit, and the remaining 20% of the purchase price plus interest for late payment.

The CISG provides rules for the calculation of damages. According to Article 74 of the CISG, damages consist of a sum equal to the loss, including loss of profit, which generates a general principle of full compensation.[24] However, such damages should not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. The limitation of foreseeability is similar to the common law requirement derived from the old English case of *Hadley v Baxendale*.[25] In this case, the buyer and seller agreed to trade 5,000 tons of fishmeal, but in the end only 3,000 tons were traded. The profit of the remaining 2,000 tons of fishmeal was foreseeable by the buyer, so the seller is entitled to such profit.

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[22] International Chamber of Commerce, INCOTERMS 1980.

[23] English abstract of this case is available at: https://iicl.law.pace.edu/cisg/case/china-september-5-1994-intermediate-peoples-court-xiamen-trade-v-lian-zhong.

[24] United Nations Commission on International Trade Law [1], p. 334, para 3.

[25] Gabriel [14], p. 301.

Nevertheless, whether damages include interest on the expected profit remains controversial. As can be derived from the text of Article 78, a party is entitled to interest on sums in arrears, and interest on expected profits should not be included. This is in line with Article 23 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest that contain a similar provision. There is no legal basis for the court to demand that the buyer pay interest on the expected profit to the seller.

Another issue is the calculation of interest. The CISG does not stipulate a point in time from which interest may be calculated. It is too difficult to reach an agreement on this issue. A view was expressed that interest should be calculated from the time when the party is obliged to pay and return the amount.[26] The court in this case did not hold this view. The court calculated the interest from the date when the seller was aware that the buyer refused to pay all the purchase price and sent a fax to claim payment on August 1, 1989, that is, the date when the right holder made a claim for payment. A similar argument succeeded in *Xi'an Yunchang Trading Co., Ltd. v Yuan Wentong and others*,[27] while the dissident argued that payment is due when the seller places the goods at the buyer's disposal and the court did not follow the "full compensation principle".[28] As for the interest on the expected profit, the court held that it should be calculated from September 1, 1989, but from the facts of the case recorded in the judgment, it is unclear why it was calculated from this date.

In general, the line of thoughts in ruling this case is relatively clear. The court respected the intention of the parties to apply the Chinese law, the CISG and international practices, and decided that the buyer should pay compensation to the seller for not paying in full after receiving the full set of documents and not opening a letter of credit as agreed upon. However, when calculating the actual amount of compensation, the court over-calculated the interest on the expected profit, which is inconsistent with the relevant provisions of the CISG and Chinese law. The reasoning here is simple as the judgment was made in the late 1990s, when analyses about the provisions of the CISG were still incomplete. The court invoked Article 74 and Article 78 but did not explain the meaning of such provisions combined with the facts of the case. This was also a common problem in many early judgments involving the CISG.

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[26] Li [15], pp. 335–336.

[27] *Xi'an Yunchang Trading Co., Ltd. v. Yuan Wentong and others*, Pu Min Er (Shang) Chu Zi No. 3221 (Shanghai Pudong New District People's Court, September 23, 2005).

[28] Xiao and Long [16], pp. 99–100.

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Chapter 2
Sanmei (Japan) Trading Co., Ltd v Fujian Zhangzhou Metals & Minerals Import and Export Co., Ltd

Chaolin Zhang, Shu Zhang, and Peng Guo

Case Information

Case name: *Sanmei (Japan) Trading Co., Ltd v Fujian Zhangzhou Metals & Minerals Import and Export Co., Ltd*

Seller: Fujian Zhangzhou Metals & Minerals Import and Export Co., Ltd
Place of business: China

Buyer: Sanmei Trading Co., Ltd
Place of Business: Japan

Details of First Instance:
Court: Xiamen Intermediate People's Court, Fujian
Date of Decision: August 1994
Case No: (1993) Xia Jing Chu Zi No 124; (1994) Xia Jing Chu Zi No 24
Judges: Zongjie Chen (Presiding Judge), Dongsheng Zhang (Judge), Yaling Ke (Acting Judge)

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Details of Appeal:

Court: Fujian High People's Court

Date of Decision: December 1994

Case No: (1994) Min Jing Zhong Zi No 123

Judges: Renzhe Lin (Presiding Judge), Guangyu Wei (Judge), Yimin Sun (Acting Judge)

CISG applied: Yes

Key CISG provisions interpreted and applied: Article 30

Abstract

From 13 April 1992, Sanmei Trading Co., Ltd (Sanmei) signed several "Confirmation of Transactions" numbered 92FL-001, 012, 015, 016, 020 and so on with Fujian Zhangzhou Metals & Minerals Import and Export Co., Ltd (Zhangzhou) to purchase granite stone materials. During the performance of these contracts, disputes arose between the two parties regarding the quality of the stone materials delivered, the quantity of goods, the timely payment of money and the commissions. Consequently, Sanmei litigated to the Xiamen Intermediate People's Court. Zhangzhou refused to accept the judgment of the first instance and appealed to the Fujian High People's Court. The facts established by the court of second instance regarding the disputes involved were essentially consistent with the facts of the original examination, but are not identical in their legal determination and application.

With regard to the applicable law, the court of first instance ascertained that Sanmei is a corporation based in Japan and that both parties shall be permitted to choose to apply Chinese laws, international conventions and international practices. The court confirmed the nature of several transactions were international economic contracts and "recognised their legal validity".

The first contract, 92FL-001, addresses the quality of the granite blocks (G623). When the goods arrived in Japan, the customers of Sanmei found that some of the stone materials had defects of quality such as stone urchins and decays. Sanmei immediately compensated the customer, resulting in a total loss of US$40,558.81 with lost import costs, excise taxes, profits and so on. Sanmei forthwith issued a specific list of non-conforming stone materials for compensation to Zhangzhou, and Zhangzhou promised to gradually make compensation in following trades. The above facts are well documented, and accordingly, the court of first instance ruled that the damage caused to the Sanmei by the defects of the granite quality was valued US$40,558.81 and Zhangzhou should pay for it in full. Zhangzhou appealed against the amount of compensation, but lacked the proper evidence; the court of second instance then upheld the verdict.

In the second contract, 92FL-012, it was agreed that the granite blocks (G666) would be supplied by Zhangzhou in three shipments by sight Letter of Credit (sight L/C). During the performance, Zhangzhou's trucks were involved in an accident and the company informed Sanmei of the loss of four blocks. After receiving, Sanmei corrected the loss to six pieces and Zhangzhou did not raise any objections in their

subsequent representations. Accordingly, the court of first instance held that the short amount of stone should be determined to be six pieces rather than four pieces, and awarded compensation of US$2,278.8 to Sanmei. The court of second instance upheld the judgment in this matter.

Problems arose with the delivery of the goods and the payment of the goods during the performance of the second shipment of 92FL-012, and here the decision of the court of first instance and the court of second instance diverged. Sanmei changed payment from sight L/C to wire transfer with the consent of Zhangzhou, but the parties did not agree on a time for payment. The goods were then transported to the Japanese port, but the two parties could not agree on the payment order of the bill of lading or money. Finally, Zhangzhou had to sell the goods at a reduced price, resulting in a total loss of US$15,850.385, including the reduced-price loss, the deposit fee and six months' interest. The court of first instance held that Zhangzhou's claim for payment in advance by Sanmei was manifestly unreasonable and constituted a breach of contract for non-delivery, and, in accordance with Article 30 of CISG, Zhangzhou should afford compensation in the amount of US$10,308.4 for commission losses of Sanmei caused by the breach of Zhangzhou. Notably, it is not clear from the judgment on what basis this amount was calculated. However, the court of second instance set aside this judgment and, on the basis of the principle of fairness, held that the loss of US$15,850.385 of Zhangzhou should be borne equally by the two parties.

Commentary to the Key Issues Related to the CISG

Issues

Issue 1: Determining the Admissibility and Validity of the Choice-of-Law Agreement
Issue 2: The Delivery Order of the Money and the Goods
Issue 3: Compensation for Damages

Comments

Issue 1: Determining the Admissibility and Validity of the Choice-Of-Law Agreement

As the judge in this case held, "the voluntary choice of the parties to apply the laws of the People's Republic of China, international conventions and international practice shall be permitted". According to the laws on which the judgment was based, it can be deduced that the Chinese law chosen by the parties was the Law of the People's Republic of China on Foreign Economic Contract Law (1985 FECL), and the chosen international convention is the United Nations Convention on Contracts for the International Sale of Goods (CISG). The Court granted this choice of applicable law and handed down the judgment accordingly, which indicated that the court