Selected Chinese Cases on the CISG

Peng Guo · Haicong Zuo · Shu Zhang *Editors*

Selected Chinese Cases on the UN Sales Convention (CISG) Vol. 2

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.

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Foreword

During the last four decades, China has become a manufacturing power house and the world largest exporter of goods. China is a major actor in global supply chains, accounting for 20% of global manufacturing trade and an even greater share of many intermediate inputs that are essential for production of finished goods. This has been the result of many factors, including domestic government policies, luck and timing industrial development in the 1980s and 1990s (that coincided with the IT revolution), the reduction in international transport costs (which led to globalization of outsourcing), helpful geographical location in Asia (next to the Asian tigers, like Japan and Korea), and China's comparative advantage of low cost, well-educated, healthy, and massive workforce.

But China's deeply integration into global supply chains is also due to the market liberalization implemented, *inter alia*, through the country's accession to the WTO and the adoption of different free trade agreements. Likewise, liberalization of trade was supported by the ratification of international private law instruments such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1987 and the CISG in 1988. The contribution of international private law treaties to China's achievement of supply chain dominance cannot be undervalued. The CISG was conceived to improve the legal certainty and reduce transaction cost for international trade actors. It also aimed to build a modern, uniformed, and fair system for international sale of goods contracts. The CISG has achieved its goals worldwide but in particular helped China to consolidate as the place of business for important international sellers and buyers. A large number of sales of goods disputes involving Chinese parties and the rest of the world (including the 95 current Contracting States) have been fairly and reasonably resolved under the CISG. Mutually, China's extensive application of the CISG has accumulated rich experience for the future development of the CISG and, thus, attracted much attention in the world.

For instance, many publicly known Chinese CISG cases have been reported by over 200 arbitral institutions in the country and in particular from CIETAC; which only in 2020 stated that it handled 3615 cases, of which 508 were sale of goods

disputes, accounting for 14% of its caseload.[1] Many of the arbitral awards reported by CIETAC and similar arbitral institutions were originally written in English—which made them more accessible to the public through different international databases.

This second volume of selected Chinese CISG cases, however, reports and comments on judgments and precedents from China's Appeal Courts or Provincial High Courts originally made in Chinese language. The editors and authors of this work have engaged in the important task of translating these decisions into English; breaking through the linguistic barrier that in the past had hindered their access by the rest of the world. As Peng Guo and his team intended, this work has been able to guarantee access to a comprehensive collection of Chinese CISG cases that had remained unexplored until now.

In addition, this second volume of *Selected Chinese Cases on the CISG* constitutes a welcome reflection on the arguably specific understanding, interpretation, and application of the CISG by Chinese courts. In that regard, it may serve as a guide to businesses in their legal planning of contracts for the international sale of goods subject to the jurisdiction of Chinese courts and arbitral tribunals.

Finally, the systematic study of Chinese CISG cases will surely enrich the debate about the global and uniformed application of the CISG at the academic and practical level. The assessment of similarities and differences between the Chinese approach and the approaches adopted in other jurisdictions is necessary to achieve the mandate of Article 7 CISG. In that regard, this second volume of *Selected Chinese Cases on the CISG* is a welcome endeavor to develop the CISG's interpretation having due regard to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

This second volume of *Selected Chinese Cases on the CISG* can, undoubtedly, be accorded the most favorable recommendation to anyone interested in the interpretation and application of the CISG.

Guadalajara, Mexico
November 2022

Prof. Dr. Edgardo Muñoz

[1] See Wang, C. J. The Application of the CISG in Chinese Arbitration—Special Report on CISG@40 Celebration Conference. (June 25, 2021, Beijing, China), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/the_application_of_the_cisg_in_chinese_arbitrationspecial_report_by_wang_chengjie_english_version.pdf.

Preface

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[2] has now 95 signatories.[3] It is one of the most successful texts prepared by the United Nations Commission on International Trade Law (UNCITRAL). It represents a landmark in the course of the unification of international trade law and has a significant 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, even though 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 existence of a large number of Chinese cases and realized their potential value in the promotion of the uniform interpretation and application of the CISG; however, the language barrier has hindered access to the cases and subsequently their potential influence on and contribution to the global jurisprudence of the CISG. All this 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 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, the Unilex 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 comprehensive collection of Chinese CISG cases.

The second aim is to track down the development of court practice about the CISG in China. It is of great importance to perceive how Chinese courts understand, interpret, and apply the CISG, which will provide a guidance to domestic and international businessmen to predict and avoid potential problems or resolve emerging disputes regarding the CISG in a proper and effective manner.

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

[3] 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 on 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
Geelong, Australia — Shu Zhang
October 2022

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Dr. Haicong Zuo is Professor in the Law School at the University of International Business and Economics (UIBE). Prior to joining UIBE Law School, he was Dean and Professor at the Law School of Nankai University and Professor at the Law School of Wuhan University. His research interests include, but are not limited to international commercial law, WTO law, international economic law, and international dispute resolution. He has published on various topics in a number of books and leading journals in both Chinese and English and has chaired or co-chaired different research projects funded by various stakeholders.

Dr. Shu Zhang is Senior Lecturer in commercial law at Deakin Law School, Deakin University (Australia), and coached Deakin Law School's Vis Moot team. Prior to joining Deakin Law School, Dr. Zhang was Postdoctoral Fellow at the Chinese International Business and Economic Law Initiative, Law School, University of New South Wales (Australia). Her research interests include international commercial law, dispute resolution and international arbitration, as well as comparative contract law. She also completed internships at both the Australian Centre for International Commercial Arbitration (ACICA) and the Chinese International Economic and Trade

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Chapter 1
Shanghai Nuobo Hardware Products Co., Ltd. v Tevel International Trading Co.

Li Sun

Case Information

Case name: *Shanghai Nuobo Hardware Products Co., Ltd. v Tevel International Trading Co.*

Buyer: Shanghai Nuobo Hardware Products Co., Ltd
Place of Business: China

Seller: Tevel International Trading Co.
Place of Business: Singapore

Details of First Instance:
Court: The First Intermediate People's Court of Shanghai Municipality
Case No: (2003) Hu Yi Zhong Min Wu (Shang) Chu Zi No. 136

Details of Appeal:
Court: Shanghai High People's Court
Date of Decision: 30 August 2005
Case No: (2005) Hu Gao Fa Min Si Zhong Zi No. 14
Judges: Junhua Liu (Presiding Judge), Chenmin Su (Judge), Qian Fan (Acting Judge)

CISG applied: Yes
Key the CISG provisions interpreted and applied: Articles 1(1) and 78

Abstract:

The seller, Tevel International Trading Co. (hereinafter "Tevel Co.") and the buyer, Shanghai Nuobo Hardware Products Co., Ltd. (hereinafter "Nuobo Ltd.") had a long-term relationship through importing and exporting goods.

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On August 30, 2001, Tevel Co. sent a letter to Nuobo Ltd. regarding the purchase of goods from Tevel Co. Nuobo Ltd. responded by requesting that the invoice be issued to Nuobo Ltd., and the consignor is "J&P Company" who is the person other than involved in the case, instead of "Tevel Co. Singapore." Subsequently, the two parties had a dispute over payment.

On July 29, July 31, and August 11, 2003, the seller Tevel Co. and its directors sent several letters to Nuobo Ltd. requesting payment of arrears. On August 15, Nuobo Ltd. sent a letter to Tevel Co. and its directors seeking clarification of this correspondence and requesting cooperation between the two parties. Tevel Co. made it clear that beginning September 2003 it would arrange to pay USD $20,000 per month to offset the arrears.

Later, Tevel Co. sued Nuobo Ltd. in Shanghai First Intermediate People's Court for the arrears of payment, interest and other related expenses.

After the trial, The Shanghai No. 1 Intermediate People's Court confirmed that Nuobo Ltd. and Tevel Co. are the parties to this case. The court held that both China and Singapore, where the parties have their places of business, are contracting states to the CISG, and the CISG should apply to the dispute arising from the contract.

The defendant, Nuobo Ltd. refused to accept the first-instance judgment and filed an appeal to the Shanghai High People's Court, requesting the first-instance judgment be revoked and Tevel Co.'s lawsuit be dismissed.

Nuobo Ltd. believed that all transactions in dispute occurred between Nuobo Ltd. and J&P Company and that the debts acknowledged by Nuobo Ltd.'s legal representative in the letter dated August 15, 2003, were personal debts.

Shanghai High People's Court confirmed the fact that the buyer and seller of the disputed transaction were Tevel Co. and Nuobo Ltd. held that the facts were clearly identified and that the law was correctly applied in the judgment of the original trial, rejected the appeal and upheld the original judgment.

Commentary on the Key Issues Related to the CISG

Issues:

Issue 1 The applicability of the CISG in China
Issue 2 Determination of interest rates

Comments:

Issue 1 The applicability of the CISG in China

I. Introduction

This case involves the application of the CISG in China, an issue which is extremely controversial in China's theoretical and practical legal circles. This part first introduces the current judicial practices of applying the CISG in China; secondly, it introduces the disputes in China's theoretical circle in detail; finally, it analyzes the path of CISG application by the court in this case and presents the author's own views on the correct application of the CISG by Chinese courts.

II. Judicial practices of CISG application in China

China's current judicial practice of applying the CISG is not uniform. There are cases where the Convention is directly applied in accordance with Article 1(1)(a) of the CISG[1]; however, there are also cases in which the Convention is applied in accordance with Article 142(2) of the General Principles of the Civil Law of the People's Republic of China (hereinafter "General Principles of the Civil Law"), after determining Chinese law as the applicable law in accordance with private international law.[2] There are also cases where the Convention is applied in accordance with both Article 142(2) of the "General Principles of Civil Law" and Article 1(1)(a) of the CISG.[3]

III. Theoretical controversy for applying the CISG in China

Since China made reservation to item 1(b) of Article 1 of the CISG upon joining, there are two main situations in which the theoretical circle discusses the application of CISG in judicial practice. One is the application of CISG when the conditions of Article 1(1)(a) of CISG are met. The second is the application of the CISG when both parties have expressly agreed on the CISG's application.

A. When the conditions of Article 1(1)(a) of CISG are met

In this situation, legal scholars differ greatly on the specific path of applying the CISG. One view is that the CISG should be applied in this circumstance by invoking Article 142(2) of the "General Principles of the Civil Law." The proponents of this view are largely influenced by the views of Li Haopei's. In his book "Introduction to

[1] Cormac Co., Ltd. of Italy v. Shanghai Xunwei Electromechanical Equipment Co., Ltd.—Dispute of International Sales Contract of Goods, (2011) Hu Gao Min Er (Shang) Zhong Zi No. 18, Shanghai High People's Court.

[2] Global Marble Co., Ltd. v. Xiamen Chengweixin Industry & Trade Co., Ltd.—Dispute of International Sales Contract of Goods, (2013) Xia Min Chu Zi No. 277, Xiamen Intermediate People's Court; SEVITRADING, Inc. v. Jiande Dewei Plastic Products Co., Ltd.—Dispute of International Sales Contract of Goods, (2014) Zhe Hang Shang Wai Chu Zi No. 41, Hangzhou Intermediate People's Court.

[3] Bordeli Co., Ltd. v. China Electronics Import & Export Guangdong Corporation, (2004) Hui Zhong Fa Min San Chu Zi No.297, Guangzhou Intermediate People's Court.

Treaty Law," Li Haopei stated, "A treaty that has entered into force internationally, the provisions of which are implemented within each country, is subject to acceptance by the domestic law of each country. The domestic law of each country that accepts the provisions of the treaty may be constitution, parliamentary statute or case law. Acceptance itself can be divided into two categories: (1) transformation of treaty provisions into domestic law, and (2) incorporation of treaty provisions into domestic law without transformation."[4] Li Haopei, therefore, believes that the implementation of a treaty is the application of the treaty.[5] Based on this, some scholars argue that domestic courts have no obligation to apply international treaties, and treaties can only be implemented after being accepted by domestic law. Therefore, "when applying the relevant treaty, the law that accepts the treaty must be invoked; otherwise, there is no corresponding legal basis for the application of the treaty."[6]

China's Constitution does not provide for the domestic implementation or application of treaties. Before the Civil Code of the People's Republic of China (hereinafter "Civil Code") came into force, Article 142(2) of the "General Principles of the Civil Law" was the most frequently cited clause on the application of treaties in civil and commercial matters.[7] Article 142(2) of the "General Principles of the Civil Law" stipulates: "If international treaties concluded or acceded to by the People's Republic of China contain provisions different from the civil law of the People's Republic of China, the provisions of the international treaties shall apply, except for the clauses that the People's Republic of China has declared reservations about." Scholars have different understandings on the specific application of this article.

Some scholars interpret it strictly according to its content and believe that the application of international treaties in China must satisfy two conditions: Firstly, China has not declared reservations; secondly, there are "different provisions" between international treaties and China's civil laws. That means the CISG can be applied only when there are different provisions between domestic law and the CISG. If the two provisions are consistent, domestic law should still be applied, although the effect is the same as that of the CISG.

Some scholars believe that Article 142(2) of the "General Principles of Civil Law" is only a clause that expresses the position of priority applicability of international civil and commercial treaties, and the difference between civil law and the CISG should not be used as a prerequisite for CISG application. In judicial practice, there are also some cases that only take the provisions of Article 142(2) of the "General Principles of Civil Law" as a basis or threshold for the court to apply the CISG. These cases apply the CISG by invoking this article without assuming that there are different provisions between domestic civil and commercial laws and the CISG.

Contrary to the view that treaties can only be applied by invoking the domestic laws that accept them, other scholars maintain that international civil and commercial

[4] Li [1], p. 380.

[5] Li [1], p. 379.

[6] Liu [2], p. 81.

[7] On January 1, 2021, the Civil Code came into force and the General Principles of the Civil Law was abolished simultaneously.

treaties can generally be directly and preferentially applied in Chinese courts.[8] Based on this view, the CISG has direct and preferential applicability in Chinese courts. As long as the applicable conditions stipulated by the CISG are met, the court does not need to follow the guidance of conflict norms including Article 142(2) of the "General Principles of Civil Law" and may directly apply the CISG to adjudicate disputes over contracts for the international sales of goods.

Such scholars argue for the CISG's direct and preferential applicability for the following reasons. Firstly, they consider the goals pursued by UNCITRAL and its member states when drafting the CISG. Secondly, they point to the purposes and principles of uniform application stipulated by the CISG. Thirdly, they consider the relevance of the principle of *pacta sunt servanda* ("agreements must be kept"). These scholars believe that from the perspective of historical interpretation, the provision of Article 142(2) of the "General Principles of Civil Law" is intended to express that "treaties take precedence over domestic law." Its purpose is not to emphasize the prerequisite requirement of the application of the treaty; that is, the CISG should be first applied regardless of whether domestic law is consistent with the CISG; therefore, it should not be cited as the legal basis for the application of the CISG by Chinese courts. If the application conditions of Article 1(1)(a) of the CISG are met, and the parties have not excluded the application of the CISG, then the CISG shall be directly applied, based not on the provisions of Article 142(2) of the "General Principles of the Civil Law," but on the compliance of the Contracting State with its treaty obligations.[9] Fourthly, they examine the provisions of the CISG itself. Article 1(1) of the CISG affirms the precedence of the Convention over the provisions of conflict law among the different Contracting States. The reason is that the international condition is the most contentious application premise in conflicts of law. In the pre-CISG time, parties which became involved in a private law relationship international in nature, there was no choice but to turn to conflict of laws. However, Article1(1) of the CISG is divided into two subparagraphs, placing subparagraph (b), which requires recourse to the conflict of laws in order to make the Convention applicable, subordinate to subparagraph (a), which applies the Convention without applying the conflict of laws.[10] Thus, according to Article 1(1) of CISG, the CISG is applied without the guidance of conflict of laws or the choice of the parties. Fifthly, the *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* confirms the direct application of the CISG. The 2008 *Digest* provides a more specific and detailed explanation of the "Convention taking precedence over the rules of private International Law": "According to case law, the courts of a contracting state must determine whether the Convention applies before resorting to the rules of private international law in the place of the forum."[11] This means that recourse to the CISG takes precedence over recourse to the rules of private international law forum. Additionally, there is a special reason to support this view in China.

[8] Zuo [3], pp. 95–96; Tian [4], pp. 40–41.

[9] Lin [5], p. 119.

[10] Shi [6], p. 83.

[11] Xuan and Wang [7], p. 126.

In 1987, the Supreme People's Court promulgated the notice of the former Ministry of Foreign Economic Relations and Trade titled "On Several Issues Concerning the Implementation of the United Nations Convention on Contracts for the International Sale of Goods that should be paid attention to," indicating the direct applicability of the CISG and stipulating that Chinese courts at all levels should apply it directly.

The theoretical controversy over the application of CISG outlined above essentially reflects two different ideas of applying the CISG. One is the application idea of "rules of private international law take precedence." Scholars holding this view believe that when the court tries disputes over contracts for the international sale of goods it should first use the rules of domestic conflict of laws, confirming whether the two parties have chosen the applicable law. If the CISG has been chosen by the parties, it will be invoked according to Article 41 of Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China. If the parties do not choose the applicable law, according to the principle of closest relationships, the Chinese Law shall be applied and the application of the CISG shall be accepted through Article 142(2) of the "General Principles of Civil Law." The other view is the application of the idea that "CISG applicable rules take precedence." Scholars holding this view believe that the CISG itself provides applicable rules, which take precedence over the rules of private international law, and there is no need to refer to the provisions of "General Principles of Civil Law." The first consideration of the courts in cases of international sales contracts is the applicable rules of the CISG rather than the rules of domestic private international law.

The differences between these two viewpoints or applicable ideas in the theoretical circle have always existed, and there are also different judicial practice cases adhering to them. However, after the promulgation of the "Civil Code," the balance between these theoretical viewpoints has to a certain extent been broken. After the "Civil Code" came into force, the "General Principles of Civil Law" was abolished. The current "Civil Code" does not mention anything about the implementation of treaties, which challenged the theory that domestic law that accepted the treaties should be invoked in cases of treaty application.

B. When both parties have expressly agreed on the application of the CISG

In addition to meeting the conditions stipulated in Article 1(1)(a) of the CISG, the theoretical legal circles in China also discuss the application of the CISG in the following situation: where the parties have expressly agreed on the application of the CISG. There is still some debate on whether the CISG is applicable in this circumstance.

Some scholars believe that the scope of application listed in Article 1 of the CISG is exhaustive. There are only two situations mentioned in Article 1(1), and there is no third option; that is, the choice of application is not allowed.[12] According to this point of view, if the countries where the parties have their places of business do not fall under Article 1(1) of the CISG, the CISG cannot be applied even if the parties expressly choose to do so.

[12] Mo [8], p. 672.

However, the vast majority of scholars in China do not agree with the above point of view and believe that if both parties directly choose to apply the CISG as the applicable law of the contract the CISG can be applied. In this case, these scholars have different understandings of the effective basis of applying the CISG. One view holds that the recognition of the validity of the parties' direct choice to apply the CISG is based on the principle of "Party Autonomy" in the domestic private international law rules, which is also reflected in Article 6 of the CISG. However, in a specific case, whether the court recognizes the validity of the direct selection of the CISG by the parties (especially the parties whose place of business is located in a non-contracting state) ultimately depends on the provisions of the private international law of the forum country and the court's understanding and interpretation of private international law. Some countries have a strict interpretation of the "law chosen by the parties by agreement" in private international law and consider that it is limited to domestic law or foreign law and do not recognize the validity of international law such as the parties' choice of the CISG.[13] In other words, if the parties directly choose to apply the CISG, based on the conflict of laws rule in domestic law which is "Party Autonomy," this choice should be recognized and the CISG will be applied. Article 41 of Law of the Application of Laws for Foreign-related Civil Relations of the People's Republic of China stipulates: "The parties concerned may choose the laws applicable to the contracts by agreement…", which is a concrete manifestation of the conflict norms of "Party Autonomy" in the field of contract law in China. Moreover, according to Chinese judicial practice, when the parties choose to apply the CISG, the choice of the parties is generally respected and the CISG is applied. Moreover, the general practice of the courts is to first consider the law chosen by the parties' autonomy without examining whether it conforms to the scope of application of the CISG. On the one hand, China's judicial practice interprets the "law" in Article 41 of the Law of the Application of Laws for Foreign-related Civil Relations of the People's Republic of China to include international conventions to which China is a party. On the other hand, this is essentially the embodiment of the "conflict laws priority idea," that is, giving priority to the choice of law with or without parties.

On the contrary, scholars who implement the "convention priority idea" believe that if the parties explicitly choose to apply the CISG, the most important significance of this choice is not to use the guidance function of the applicable law to provide an effective basis for the application of the CISG, but to presume that the parties did not intend to exclude the CISG, confirming the application of the CISG.[14] That is to say, the choice of the parties does not provide a direct source of effectiveness for the application of the CISG, but merely satisfies the relevant provisions of the application of the CISG.

IV. The court's application of the CISG in this case

The author agrees with the view that the CISG has direct and preferential applicability. As some scholars have pointed out, whether based on the purpose, text,

[13] Li [9], p. 94.

[14] Shi [6], p. 86.

structure of the convention or the general principle of international law that "*pacta sunt servanda*," the direct and preferential applicability of the CISG is a more preferable view. Therefore, when considering the application of the CISG, the idea of "the application rules of the convention shall take precedence" should be adhered to. As long as the provision of Article 1(1)(a) of the CISG are met, the CISG should be directly applied, without invoking the domestic law rules that accept the convention. As for the case where the parties clearly choose to apply the CISG, the idea of "the application of the convention take precedence" should be adhered to. That is to say, the question of whether the case can directly apply the CISG in accordance with the provisions of Article 1(1)(a) should be considered firstly, and if the provision of the paragraph is not met, then the question of whether the parties had directly chosen the convention can be considered.

In this case, the court correctly applied the CISG directly. The court held that "China and Singapore, where both parties have their places of business, are both contracting parties to the CISG, and the CISG should be applicable to disputes arising from this contract." That is, the court directly applied the CISG after determining that the case complied with the provision of Article 1(1)(a) of the CISG, without invoking rule of domestic law accepting the convention. This approach is worthy of reference for other courts in China in cases concerning the application of the CISG.

The slight shortcoming is that when analyzing the application of the convention, the judgment did not reflect the complete path of application of the convention based on Chapter I (sphere of application) of the convention. Of course, for the sake of expressing the court's decision succinctly, this lack of detailed description of the application is negligible.

With the view of "the application of the convention takes precedence," based on the provisions of the six articles of Chapter I of the CISG, and in view of China's reservation to Article 1(1)(b), the author believes that the complete and appropriate application path of Chinese courts in the application of the CISG is as follows:

The first step is to classify the dispute according to *lex fori*. Through classification, if the dispute belongs to a sales contract relationship, it will go to the second step.

The second step is to judge whether the countries where both parties have their places of business are contracting states according to the standard of Article 1(1)(a) of the CISG. If the answer is yes, then proceed to the third step.

The third step is whether the contract or matter involved belongs to the sales contract or matter excluded in Articles 2, 3 and 4 of the CISG. If the answer is no, then go to the fourth step.

The fourth step is to examine whether the parties have explicitly excluded the application of the Convention. If the answer is no, proceed to the fifth step.

The fifth step is to resolve the dispute by applying the specific provisions of the CISG based on the facts of the case.

Issue 2 Determination of interest rates

I. Introduction

According to Article 78 of the CISG, the court of first instance supported the plaintiff's request for the defendant to pay the corresponding interest. The specific calculation of the interest, that is, how to determine the interest rate, is also an issue worthy of attention in this case.

In practice, Article 78 is almost always used when adjudicating bodies apply the CISG. This is because when one party claims rights against the other party according to the provisions of the Convention it is always required to repay a certain amount of money and pay the delayed interest to the party, so the issue of interest rate has become one of the most practical issues related to CISG.

Outside of China, there is some controversy over the determination of interest rates under the CISG in the theoretical circle, and the practices in the practical circle in determining interest rates are also varied. The same situation exists in China.

The following part introduces how to determine the interest rate under CISG in litigation and arbitration practices in China, then focuses on the understanding of the Chinese theoretical circle on the determination of the interest rate under the CISG and finally analyzes how to determine the interest rate in this case and explain the author's own views.

II. Litigation and arbitration practices of determining interest rates under the CISG in China

Both the Chinese courts and arbitral tribunals have different practices on how to determine the interest rate in accordance with Article 78 of the CISG. This is particularly evident in arbitration practice. Some courts and tribunals treat the interest rate as an issue outside the jurisdiction of the CISG and apply the interest rate through the applicable law determined by the rules of private international law.[15] Others are inclined to seek reasonable interest rates in international business and believe that the calculation of interest should be based on the amount owed as the principal, and the interest rate is the short-term bank loan interest rate available to borrowers who enjoy preferential interest rates, which is the three-month LIBOR rate on that day.[16] Some combine the request of the parties and take into account the past interest rate levels, exercise discretion and adopt different standards: for example the loan interest rate of Chinese commercial banks, the fixed deposit interest rate of Chinese commercial banks, the annual loan interest rate of the People's Bank of China for the same period or directly determine the specific interest rate among other approaches.[17]

[15] CIETAC's case of Equipment Sales Contract in 2016, China International Economic and Trade Arbitration Commission Award dated December 21, 2016, see CIETAC [10], p. 244.

[16] CIETAC's case of Rebar Sales Contract in 2009, China International Economic and Trade Arbitration Commission Award dated January 15, 2009, see CIETAC [10], p. 244.

[17] CIETAC [10], p. 244.

III. The understanding of the theoretical circle on the determination of interest rate under the CISG in China

The inconsistency of practice reflects the inconsistency of theory. Chinese scholars also have disputes over the determination of interest rates under Article 78 of the CISG.

A. "Gap *intra legem* " and "Gap *praeter legem* "

Scholars in China generally agree that there are two types of pending matters after it is determined that an international contract for the sale of goods is subject to the CISG: External Convention gap and internal Convention gap which are referred to by Ferrari[18] as gap *intra legem* and gap *praeter legem.*

Gap *intra legem* or external Convention gap refers to matters that are excluded from the scope of regulation of the Convention (such as the validity of the contract, the validity of any clause and product liability in accordance with the provisions of Articles 4 and 5 of the Convention). Gap *praeter legem* or internal Convention gap refers to the matters which are not expressly settled by the convention, but still fall within the scope of regulation of the Convention. This distinction is directly related to the use of the gap-filling method. According to Article 7(2) of the Convention, if a certain omission is a matter within the scope of the Convention, it must be settled in conformity with the general principles on which the Convention is based, and only in the absence of such principles, can it be settled in conformity with the applicable law by virtue of the rules of private international law. If the omission is not within the regulation scope of the Convention, it shall be settled directly in conformity with the applicable law by virtue of the rules of private international law, without invoking the provisions of the general principles of the CISG.

Chinese scholars generally believe that both the legislative history and wording of Article 7(2) of the CISG indicate that invoking domestic law is a last resort, which can only be applied when a solution cannot be found by analogy or invoking general principles.[19] Some scholars even suggest that the introduction of the Convention into domestic law as a method of interpretation is just an illusion, because the interpretation of the Convention by domestic law determined by the rules of private international law has only formal meaning and does not have a substantive effect. This gap-filling method of interpretation by domestic law has been digested by the general principles on which the Convention is based, which takes precedence over domestic law.[20] In other words, the stipulation of "invoking general principles" makes it impossible to apply the "ultimate invocation of rules of private international law rules."[21]

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[18] Ferrari [11], p.86.

[19] Liu [12], p. 96.

[20] Liu [12], p. 96.

[21] Zhang and Zhu [13], p. 83.

B. How to judge "gap intra legem" or "gap praeter legem"

Since the CISG does not provide a method to distinguish between gap *intra legem* and gap *praeter legem*, Chinese scholars generally agree with the distinction standard proposed by Professor Bonell. According to Professor Bonell, an omission within the meaning of Article 7(2) must satisfy two conditions[22]: First, the matter is within the scope of adjustment of the Convention. Those matters that are not within the scope of the Convention have been deliberately left to unincorporated domestic laws, and the provisions of the Convention do not constitute an omission, which is merely the logical consequence of prior decisions. Second, the matter is not explicitly settled by the Convention. That is, to confirm whether a certain matter falls within the jurisdiction of the Convention, it is necessary to comprehensively examine the background and purpose of the drafting of the Convention and confirm whether a certain matter is an issue that the Convention intends to leave to domestic law to settle. If the Convention does not have such clear intention, it shall be deemed to be a pending matter governed by the Convention.[23]

C. Is the interest rate issue a "gap intra legem" or "gap praeter legem"?

Article 78 of the CISG clearly stipulates the right of the parties to be awarded interest. However, this clause does not cover the standard or method for calculating interest, nor do other clauses in the CISG stipulate the interest rate for calculating interest. Foreign scholars have different views on whether the interest rate is a "gap *intra legem*" or a "gap *praeter legem.*" However, Chinese scholars generally believe that the interest rate is a "gap *praeter legem.*"[24] Their reasons are as follows: First, it can be seen from the legislative history of the Convention that although the drafting process of Article 78 was disputed, and the final article was the product of compromise, the drafters of the Convention did not want the interest rate issue to be completely excluded from the scope of the Convention. Second, Article 7 of the Convention has clearly stated the objective of the Convention—promoting the uniformity in the application of laws. The practice of direct reference to non-uniform domestic laws is obviously contradictory to the objective of the Convention, and it should be regarded as a last resort. As a result, when identifying the nature of the omissions in the Convention, the scope of "gap *intra legem*" should be limited as far as possible to ensure the uniform application of the Convention. Taking into account the drafting background and purpose of the Convention, the determination of the interest rate should be an unsettled issue within the jurisdiction of the Convention, that is, a "gap *praeter legem.*"[25]

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[22] Bianaca and Bonell [14], pp.75–81.

[23] Zeng [15], p. 38.

[24] Liu [16], pp. 78–80; Zhang and Zhu [13], p. 82; Sun [17], p. 125; Zeng [15], p. 38.

[25] Sun [17], p. 125.

D. How should the interest rate issue apply to Article 7(2) of the CISG

Although Chinese scholars generally believe that the matter of interest rate is "gap *praeter legem*," they have different views on how to apply Article 7(2) of the CISG to determine the interest rate.

Most scholars believe that the general principle of the CISG should be adopted first and foremost to settle this matter according to the provisions of Article 7(2) of the CISG. Some scholars believe that the "principle of rationality" explicitly involved in 37 clauses in the CISG should be used to settle the vacancy of interest rate. Therefore, in the process of calculating the interest rate, the judge or arbitrator should adjudicate it according to the agreement of both parties, and if there is no such agreement, then it is decided according to the principle of rationality.[26] Many scholars believe that the "sufficient compensation" principle embodied in Article 74 of CISG should be used to settle the vacancy of interest rate, so the determination of interest rate should be based on the credit cost of the injured party. Some scholars believe that the balance between the interests of creditors and debtors will be broken if sufficient compensation is taken as the basis for determining the interest rate. The interest rate of the Convention should be determined on the basis of the return of interests, that is, focusing on the unjust enrichment of the defaulting party, so that it not only gives reasonable compensation to the creditors, but also properly limits the liability of the debtor, therefore achieving a balance between the interests of the two. Based on this, the interest rate should be determined by the method of softening the conflict norms. First of all, it needs to be clear that the purpose of paying interest is to deprive the debtor of unjust enrichment, which is the basis and attribution for determining the interest rate. Secondly, with regard to the point of contact of country, it should generally be pointed toward the country where the debtor has its place of business. If the debtor's relevant financial activities are located in another country, it should point to that country. Furthermore, with regard to the type of interest rates, the average commercial rate should be applied rather than the statutory rate, because the former can better reflect the interests of the parties. Finally, the choice of lending rate or deposit rate should depend on the specific circumstances of the debtor: Generally speaking, the lending rate is applied, and if the debtor can prove that he has sufficient funds and does not need to borrow, or if the delay in payment is caused by an exculpable "obstacle," the deposit rate applies.[27]

Some scholars believe that the reasonable calculation of interest should not only clarify the compensatory nature of the loss of interest, but also take into account the uniform nature of the international sales of goods. On this basis, a fair and reasonable calculation method should be sought from facts. As far as interest rates are concerned, the generally accepted world interest rates should still be regarded as "fair and reasonable" interest rates (for example, the LIBOR). Based on this understanding, Wang Zhuilin believes that a comprehensive calculation based on the interest rates used for international commercial credit, or a fixed and recognized

[26] Mo [18], p. 174.

[27] Zhang and Zhu [13], pp. 85–87.

percentage such as the International Chamber of Commerce's formulation of the cargo insurance premium rate, will be a major breakthrough in the interest rate problem.[28]

Some scholars advocate that the relevant provisions on interest rates in the UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL) should be taken as the general principles of the CISG to settle the interest rate vacancy. That is, the interest rate in the case is determined by the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place for payment as specified in Article 7.4.9 of the PICC and Article 9:508 of the PECL.[29]

In addition, some scholars believe that although the interest rate is "gap *praeter legem*" of the CISG, and Article 7(2) should be applied to settle the interest rate issue, it is in fact difficult to determine the interest rate through general principles, and the rules of private international law are ultimately applicable.

IV. The interest rate determined by the court in this case and the author's point of view

In this case, the court supported the plaintiff's interest claim according to Article 78 of the CISG, but did not give any explanation of the calculation of the interest, and directly applied the US dollar loan interest rate for the same period stipulated by the Bank of China, calculated from October 1, 2003, to the actual repayment date.

When the judgment was delivered, the valid Chinese legal document related to interest was the Reply of the Supreme People's Court on the Question of What Standard Should Be Used to Calculate the Liquidated Damages for Overdue Payments, which came into force on February 16, 1999. This legal document provides that if the parties to a contract have not agreed on the standard of liquidated damages for overdue payments, the court may calculate liquidated damages for overdue payments by referring to the standards set by the People's Bank of China for financial institutions to calculate interest on overdue loans. It is unclear whether the court in this case referred to this provision in determining the interest. Regardless of whether it is appropriate to directly apply the relevant laws and regulations of China, the court should fully explain the interest calculation standard determined in its judgment.

The author believes that the interest rate is a "gap *praeter legem*" of the CISG and should be determined through the general principles of the CISG wherever possible. Although there are reasonable principles, or sufficient compensation principles, in the CISG provisions, as other scholars have said, the court has certain discretion to apply these principles to determine the interest rate, which is not a better choice than referring to the specific provisions in PICC. The author believes that when determining the interest rate under Article 78 of the CISG, it would be better practice to refer to Article 7.4.9 of the PICC. The PICC is a better choice for the following reasons: First, the PICC itself is authored by UNIDROIT based on commercial practices, which reflects

[28] Wang [19], p. 43.

[29] Liu [16], p. 80.

the specific practices of business and the general practices or principles in international commercial contracts. As the PICC's preamble states, the principles may be used to interpret or supplement international uniform law instruments. Second, the interest rate determined in the PICC is the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place for payment, which is essentially a type of "sufficient compensation" to the aggrieved party, and embodies the general principles of the CISG. Third, the method for determining the interest rate in the PICC is specific and clear. The use of this interest rate can not only solve the problem that the general principles of the CISG are not operable, but also minimize the differences in practice, promote the unified use of the CISG and reduce legal obstacles in international trade.

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