Selected Chinese Cases on the CISG

Peng Guo
Haicong Zuo
Shu Zhang *Editors*

Selected Chinese Cases on the UN Sales Convention (CISG) Vol. 3

Springer

Selected Chinese Cases on the CISG

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

This volume is an essential resource in understanding how China and its courts regulate international sales, including under the Convention for the International Sales of Goods [CISG]. Much of China's case law on international sales is difficult to identify, comprehend and synthesise in English, given language, cultural and legal barriers. This volume provides a detailed compendium of Chinese judicial decisions. It also offers an invaluable synthesis of how Chinese courts construe international sales laws not limited to the CISG. The beneficiaries are both those who are trained and untrained in the Chinese civil law tradition and who seek access to finely synthesised resources on sales law.

Accentuating this volume's importance is China's centrality as a participant in international trade and investment. Impelled by its ever-expanding Belt and Road Initiative [BRI], China has ascended into a salutary leader in international commerce within several decades. It is now the largest inbound and second largest outbound investor state globally. Once a struggling developing state, it is both the origin and destination of multiple import and export transactions that traverse the global economy today and most likely, tomorrow.

This volume addresses these fast-growing developments both expertly and comprehensively. It details cases in which Chinese courts apply the CISG in diverse contexts. It does so by highlighting key applicability issues as well as the interpretation of specific CISG articles in Chinese civil law. In so doing, it encapsulates the insights embodied in multiple Chinese judgments, along with the capacity of Chinese courts to identify and express them. In doing so, it demonstrates the significance of those judgments to the regulation of international sales.

It is a pleasure to know that Peng Guo and Shu Zhang who both completed their Ph.Ds. under my supervision are making this essential contribution to the global importance of China in relation to the CISG. Their collection, translation and publication of the Chinese jurisprudence surrounding the Convention add enormous value as a legal resource to comprehending the significance of the existing literature on the subject.

I highly recommend this volume to all readers interested in China's salient contributions to the law governing international sales.

Sydney, Australia
June 2023

Emeritus Professor, Dr. Leon Trakman,
LLM, S.J.D. (Harvard)

Preface

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] has now 95 signatories.[2] 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 realised 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,[3] the Unilex database,[4] the Albert H. Kritzer Pace CISG database[5] and the UNCITRAL CLOUT database,[6] have some Chinese cases, the coverage is relatively limited. This series, therefore, intends to provide a comprehensive collection of Chinese CISG cases.

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[1] *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).

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

[3] https://cisg-online.org/home.

[4] https://www.unilex.info.

[5] https://iicl.law.pace.edu/cisg/cisg.

[6] http://www.uncitral.org/clout/index.jspx.

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

The third aim is to conduct a systematic study of 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.

Hawthorn, Australia — Peng Guo
Beijing, China — Haicong Zuo
Geelong, Australia — Shu Zhang
July 2023

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About the Editors

Dr. Peng Guo (Editor-in-Chief) is a Lecturer in Law at the Swinburne University of Technology. He has worked across several Australian universities and has held visiting positions at different European universities. He has received scholarships and fellowships awarded by renowned research institutions and international organisations, including the Max Planck Institute for Comparative and International Private Law, the International Institute for the Unification of Private Law (UNIDROIT), the Swiss Institute of Comparative Law and the European Union. His research interests lie in comparative contract law, international sale of goods, international commercial arbitration and technology and legal education.

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JiedongXian Yuequn Aquatic Products Development Ltd. v. Inland Sea Inc.

Max Siying Wu

Case Information

Case Name: *JiedongXian Yuequn Aquatic Products Development Ltd. v Inland Sea Inc.*

Seller: Inland Sea Incorporated
Place of Business: United States of America

Buyer: JiedongXian Yuequn Aquatic Products Development Ltd.
Place of Business: China

Details of First Instance:
Court: Jieyang Intermediate People's Court
Date of Decision: N/A
Case No.: (1999) Jie Zhong Fa Jing Chu Zi No. 65
Judges: N/A

Details of Second Instance:
Court: Guangdong High People's Court
Date of Decision: 10 October 2004
Case No.: (2004) Yue Gao Fa Min Si Zhong Zi No.84
Judges: Yuyu WANG (Justice), Ji LI (Deputy Justice), Haibin HAN (Deputy Justice)

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CISG Applied: Yes
Key CISG Provisions Interpreted and Applied: Articles 1(1), 18(1), 23

Case Abstract

The buyer and seller entered into a one-year term Sole Agency Contract in 1996, for the exclusive agency of sale of artemia cysts in China, under which the buyer would purchase from the seller, and sell as the seller's agent, at least 40 tons of artemia cysts. The price of the artemia cysts was left to be determined upon negotiation according to market conditions prior to the shipment of each batch of goods. One third of the price was to be paid before shipment and the rest within 60 days upon receipt of each batch of goods. Yuequn Hong was the legal representative of the buyer when executing the contract, and was also the legal representative of JiedongXian Yuequn Aquatic Products Development Ltd. ('Yuequn Ltd.') during the execution and performance of the contract. Immediately after the conclusion of the contract, Yuequn Hing sent purchase orders to the seller in the name of the buyer and Yuequn Ltd. respectively. Yuequn Hong corresponded with the seller via letters and facsimile, with his signature on each, for placing orders and business transactions.

After the shipment of the goods, there was one statement of account issued by the seller to the buyer's agent, who then translated and forwarded it to Yuequn Hong, stating the amount of the outstanding payment for 12,100 cases of artemia cysts. While the invoices and air consignment notes for the goods were all issued to the buyer, the seller considered it was Yuequn Ltd. that had failed to pay the amount due. The seller then filed to the court of first instance, claiming the unpaid value and interest from Yuequn Ltd., and that Yuequn Ltd., the buyer, and Yuequn Hong should be held jointly liable.

Yuequn Hing replied that he was acting as the legal representative of the buyer instead of himself to execute the contract with the seller. Yuequn Ltd. stated in defence that it was not the contracting party of the contract, had not established any contractual relationship with the seller, and had not received any goods from the seller. The buyer argued that it had made full payment to the seller for all the goods delivered but did not receive the other 12,100 cases of goods. The three defendants all requested the Court to dismiss the seller's claims. The disputing parties had not agreed on any governing law in their contract or during the course of their dispute.

The court of first instance held that it was an arrearage dispute under the sales agency contract, and as the contracting parties had not agreed on the governing law, the laws of the People's Republic of China should be applied in this case, based on the doctrine of most significant connection. The Court considered that the statement of account and the other evidence mutually confirmed, in combination with the correspondence and testimony of the sales representative of the seller, that the statement of account could prove that the buyer owed the seller payment for the goods. Regarding the contracting parties, Yuequn Hong represented the behavior of the buyer, and neither Yuequn Ltd. nor Yuequn Hong took the role as buyer according

to the evidential materials. For these reasons, the court of first instance ruled that only the buyer should pay the seller.

The buyer appealed. The court of appeal held that notwithstanding the name of the contract, the rights and obligations of the parties match the characteristics of the sales contract, thus the nature of the contract should be sales instead of an agency contract. Hence, the court of appeal rectified the view of the court of first instance and determined that this was a contract dispute relating to the international sale of goods. In regard to the governing law of this dispute, art 142(2) of *the General Principles of Civil Law of the People's Republic of China* ('GPCL'), released in 1986, stipulated that '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.' Article 1(a) of the CISG provides that '[t]his Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States'. Since the parties in the dispute have their places of business in China and the USA respectively, both of which are Contracting States to the CISG, the CISG should be applied. Thus, the court of appeal held that the court of first instance was incorrect in applying the domestic law of China in this case.

Regarding the substantive issue of whether the seller had established a contractual relationship with Yuequn Ltd. and Yeuqun Hong, the court of appeal held that according to art 12 of the CISG, a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the CISG. The purchase order of Yuequn Ltd. and Yuequn Hong submitted by the seller was an offer, however the seller could not prove if there was a statement or other conduct by the seller indicating assent to the offer. Hence it was insufficient to sustain the seller's claim that Yuequn Ltd. and Yuequn Hong concluded a sales contract with the seller. Furthermore, according to art 87 of the GPCL, which stipulates that '[w]hen there are two or more creditors or debtors to a deal, each of the joint creditors shall be entitled to demand that the debtor fulfill his obligations, in accordance with legal provisions or the agreement between the parties; each of the joint debtors shall be obliged to perform the entire debt, and the debtor who performs the entire debt shall be entitled to ask the other joint debtors to reimburse him for their shares of the debt', the court of appeal maintained the view that joint liability only applied when it was expressively agreed by the debtors or provided by law. Obviously, this was not the case in this dispute. Therefore, the court of appeal ruled against the seller on the claim that the buyer, Yuequn Ltd. and Yuequn Hong should bear joint and several liabilities.

Regarding another substantive issue, whether the buyer owed the seller payment for the goods, the court of appeal held that the evidence produced by the seller lacked probative force. The sales representative of the seller was not deemed to represent the buyer for agency by estoppel, and the buyer should not be responsible for the sales representative's conduct. In the end, the court of appeal ruled against the seller entirely.

Commentary to the Key Issues Related to the CISG

Issues

Issue 1 The Applicability of the CISG

Issue 2 The Applicability of Domestic Law Along with the CISG

Comments

Issue 1 the Applicability of the CISG

I. Chinese Court's Approach to Find the Law on Merits of the Dispute

Influenced by a significant civil-law tradition, when dealing with international civil and commercial cases, Chinese courts generally employ a private international law approach in finding the *lex causae*, under which they will follow the choice of law rules in *lex fori, i.e.,* the domestic law of the People's Republic of China. Typically, the court will start with the first step of classification, *i.e.,* to identify the nature of the dispute at hand. As a preliminary question to finding *lex causae*, classification of the nature of the dispute has logically no other option but to be conducted according to the domestic civil and commercial law of China. Where the dispute is identified as one arising out of a commercial contract, with international element(s) involved, the court will have to consider whether there are any international legal instruments that should be applied. If not, the court should follow the 'proper law' method in conflict of law rules, which requires the judge to first determine if there is any consented choice of law governing the merits of the dispute by the parties, in absence of which the judge shall then follow the principle of the 'most significant contact' and find the law of the jurisdiction with the maximum contact, or say, the most characteristic connections, to the enforcement of the disputed commercial contract.

II. Classification of the Dispute

In this case, classification of the dispute by the Court is definitely a key element to have determined the *lex causae*. Unlike the decision of the first-instance court, notwithstanding the name and appearance of the contract being a Sole Agency Contract, the court of appeal found that it was actually an international sale of goods contract. The deal was that the buyer should purchase from the seller and sell as the seller's agent a certain amount of goods, which contained the purchase of goods as a main part of the contract. The court of appeal relied on the relevant domestic law of China, specifically the Contract Law, and has compared the traits of the disputed contract with the definitions and descriptions by the Contract law to recognize which type of contract is at hand. It is laudable for the court of appeal to have rectified the misjudgment of the court of first instance and reached a just classification of the dispute.

III. The Application of CISG

Once dispute had been classified as one of international sales of goods, the Court will naturally look at the applicability of the CISG as the most important and frequently applied international legal instrument in the field, to which China is a Contracting State.

Regarding the pre-emptive and direct applicability of the CISG, according to art 1(1)(a) of the CISG, when the places of business of both contracting parties are in different Contracting States, the CISG shall directly or autonomously apply, irrespective of the conflict of laws rules of the forum State.

This case was a dispute over a contract for the international sale of goods. As the places of business of the parties were located within a Contracting State of CISG and the parties did not expressively exclude the application of the CISG, therefore the CISG should be applied. However, the court of first instance failed to consider the autonomous and pre-emptive application of the CISG under such circumstances. Instead, it determined that, given the parties did not choose the applicable of law, the law of the People's Republic of China should be the governing law of the case in accordance with the doctrine of most significant relationship, which was incorrect. It should also be noted that the court of first instance regarded this case as a dispute over a sales agency contract instead of a contract for the international sale of goods, which may have led to the erroneous application of law. One of the prerequisites for the application of the CISG is that the dispute is one under a contract for international sale of goods; if the court is to determine that the nature of the disputed contract is not one for international sale of goods, there is no room for application of the CISG. From this perspective, one may not draw an easy conclusion that the court of first instance did not have an accurate understanding of the pre-emptive application of the CISG.

During the appeal, the Court of Appeal rectified the Court of First Instance's view on the nature of the contract, and regarded that the contract between the parties was one for international sale of goods. When considering the governing law of the case, the Court of Appeal referred to art 142 of the General Principles of Civil Law, although it did not use it as the legal basis for applying the CISG in its reasoning. Instead, the Court of Appeal held that the CISG should be applied with priority through directly analyzing whether the application conditions of the CISG had been satisfied or not.

In judicial practice, some courts consider art 142 of the General Principles of Civil Law as the legal basis for the pre-emptive application of the CISG, such as in Judgment (2007) Lu Min Si Zhong Zi No. 6, Judgment (2004) Hui Zhong Fa Min San Chu Zi No. 297, Judgment (2013) Xia Min Chu Zi No. 277, and even Judgment (2007) Yue Gao Fa Min Si Zhong Zi No. 274 which was also made by Guangdong High Court in the same period. Some courts apply the CISG by quoting art 142 as a starting point. In this way, the courts first determine that the governing law should be Chinese the law, and then quote art 142(2) of the General Principles of Civil Law as a reference path to the CISG. In spite of applying art 142 of the General Principles

of Civil Law, some courts exclude the application of the CISG on this ground, such as in Judgment (2010) Hu Gao Min Er (Shang) Zhong Zi No. 78.[1]

During the phase of specific law application, after the governing law has been chosen, there might typically be another issue in the application of the CISG. This is the parallel application of domestic law. Even after correctly choosing the CISG as the governing law, courts are still prone to neglect the priority of the CISG and instead to apply domestic law, or apply the CISG in the same manner as the domestic law.[2]

In this case, however, after choosing the applicable law, the Court of Appeal did not overlook the priority of the CISG, but specifically analyzed and made conclusions on certain issues pursuant to the provisions of the CISG. For example, despite both the CISG and domestic laws having regulations regarding the method of contract conclusion, the Court of Appeal determined whether the contract was effective directly pursuant to art 23 of the CISG, which reads '[a] contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this CISG.' Thus, according to the principle of preemptive application of the CISG, the Court determined that a contract is concluded when the promise comes into effect, even though there is no material difference between the CISG and domestic law on this issue. It should be noted that, despite the relevant regulations of the CISG being basically adopted as the provisions of the Contract Law 1999 of China on offers and promises, perfection and supplementation have been made to some legal systems as well by combining with the practical situation of China. Therefore, with respect to the constitutive elements of effectiveness, withdrawal, and cancellation of offers and promises, as well as the mode of contract conclusion, differences still exist. Since it is not involved in this case however, no more discussion on this is made.

Issue 2 the Applicability of Domestic Law Along with the CISG

The Court of Appeal did not entirely exclude the applicability of domestic law, even though it regarded the CISG as the governing law. Since there are no express regulations on the determination of the nature of the contract, apparent authority (recognition of the representative of the company) and joint and several debts in the CISG, the Court of Appeal determined its judgment applying the respective domestic laws.

Article 7(2) of the CISG is the basis for the domestic law to fill the blank in a situation where the CISG is preemptively applicable. Article 7(2) concerns the issue of filling loopholes, i.e., how to deal with a matter of international sale of goods which falls within the jurisdiction of the CISG, but no express regulation can be found in it. However, art 7(2) does not directly provide that the domestic law of the country where the court is located should be directly applied in dealing with any matter for which there is no express provisions in the CISG, instead it provides that '[q]uestions concerning matters governed by this CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in

[1] He [1], p. 21–22.

[2] Yang [2], p. 63–64.

the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law', which means, in filling the gaps in the CISG, judges and arbitrators are required to solve issues following the general principles on which the CISG is based. Only where no such general principles can be found does art 7(2) permit reference to the applicable national law, i.e., the law applicable by virtue of the rules of private international law, to solve these questions.

The so-called general principles, however, are quite general, vague and difficult for every party to explore and infer the possible results. That leaves ample scope for applying domestic laws. Law practitioners with a background of the civil law system are familiar with applying the general principles, e.g., the principle of good faith stipulated by law, and specific provisions of domestic law to fill in the blanks of the CISG. For example, in dealing with the deposit issue in Civil Judgment (2019) Min Min Zhong No. 578, the Fujian High People's Court held that 'Given that CISG does not stipulate any deposit system, or define the punitive general principle for default, pursuant to Article 41 of the Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China, which read 'parties may agree on the law applicable to the contract. Otherwise, the laws of the place frequently resided by the party whose performance of obligations best reflects the characters of the contract or other laws most closely related to the contract shall apply', which means the laws of the place where the contract is performed, i.e. the People's Republic of China, can be applied in solving the issues.'; The same wording was used in the reasoning of the Tianjin High Court in its Civil Judgment (2019) Jin Min Zhong No. 90. In this case, the internal logic of the court of appeal should be so, although the Court did not state the reasons for directly applying the domestic law.

In summary, in the application of the CISG, the Court of Appeal adhered to the principle of preemptive application of the CSIG, and in the application of domestic law, it followed the principle of 'indirect application dominates while direct application supplements', which deserves credit.

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2. Yang, M. S. (2020). *Research on the Preemptive Application of United Nation CISG on Contracts For The International Sale Of Goods*. Law Press

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Beijing Chenguang Huilong Electronic Technology Development Co., Ltd. v. Thales Communications & Security S.A

Max Siying Wu

Case Information

Case Name: *Beijing Chenguang huilong Electronic Technology Development Co., Ltd. v Thales Communications & Security SA*

Seller: Thales Communications & Security SA
Place of Business: France

Buyer: Beijing Chenguanghuilong Electronic Technology Development Co., Ltd.
Place of Business: China

Details of First Instance:
Court: Beijing No.2 Intermediate People's Court
Date of Decision: 2004
Case No.: (2003) er Zhong min Chu Zi No.07936
Judges: N/A

Details of Second Instance:
Court: Shanghai High People's Court
Date of Decision: 18 March 2005
Case No.: (2004) Gao Ming Zhong Zi No. 576
Judges: Fengju Jin (Presiding Justice), Li Zhang (Justice), Hong Rong (Justice)

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CISG Applied: No
Key CISG Provisions Interpreted and Applied: No

Case Abstract

On 7 November 2002, the Shandong Provincial Government invited tenders for a radio equipment project. In order to participate in the tender, Beijing Chenguanghuilong Electronic Technology Development Co., Ltd. ('BCETD') contacted the Project Manager of Thales Communications & Security SA ('Thales') and requested Thales to provide BCETD with the antenna needed for the tender. On 18 November 2002, the Project Manager of Thales signed a Letter of Authorization, in which Thales authorized BCETD to act as its agent to handle matters in connection with the tender. On 26 November 2002, the Project Manager of Thales sent an email to BCETD concerning 'ANT194A and ANT184A' (the subject of the email), informing BCETD that the antenna price could be CIF €54,600, and introducing considerations such as the warranty period and delivery terms. BCETD later submitted the Letter of Authorization and won the tender. On 3 March 2003, BCETD entered into a Procurement Contract with the relevant government agency of Shandong Provincial Government. However, Thales had so far failed to deliver the antenna to BCETD, resulting in a breach of contract by BCETD under the Procurement Contract and liability to pay the liquidated damages. BCETD sued Thales to assume liability for breach of contract.

There was no agreement as to the governing law between the parties regarding the dispute before litigation. During the first instance proceedings, BCETD stated that it chose to apply the law of the People's Republic of China and the CISG, while Thales chose to apply the law of the People's Republic of China. The Court of First Instance therefore held that, since both parties had chosen Chinese law as the governing law, pursuant to the principle of party autonomy, the governing law in this case should be Chinese law. As to whether a contract had been established between the parties, the Court of First Instance held that with the facts that Thales issued the Letter of Authorization, sent emails to BCETD, and BCETD won the tender on the basis of these documents, it could not be concluded that a contract of sales had been established between the parties. Therefore, BCETD had no right to hold Thales liable for breach of contract, and Thales should only undertake the liability for *culpa in contrahendo* (**liability for wrongs in conclusion of contracts**).

Both BCETD and Thales appealed against the judgment of the Court of First Instance. As to whether the CISG should be applied or not, the Court of Appeal held that, although the CISG should be applied automatically and pre-emptively in accordance with art 142 of the General Principles of Civil Law, providing the parties do not exclude it, Thales made it clear during the first instance proceedings that Chinese law should be applied but not the CISG, and BCETD did not demonstrate the difference between Chinese law and the CISG. Thus, Chinese law should be the governing law of this case. As to whether a sales contract had been established between the parties, the Court of Appeal held that the Letter of Authorization only represented that Thales agreed to supply the antenna, and the email did not detail the product model, the model quoted and the specific port of CIF. Moreover, even

BCETD itself did not deem that a contract had been concluded, as it had subsequently repeatedly requested to conclude a contract with Thales.

Finally, the Court of Appeal concluded that, in accordance with the Contract Law of the People's Republic of China ('Contract Law'), the sales and purchase contract relationship between the two parties had not been established, and therefore BCETD had no right to hold Thales liable for breach of contract. Thales only had to undertake the liability for ***culpa in contrahendo***.

Commentary to the Key Issues Related to the CISG

Issues

Issue 1 The Applicability of the CISG

Issue 2 Any Difference between the CISG and the Contract Law in Regard to the Offer of contract?

Comments

Issue 1 The Applicability of the CISG

I. Legal Basis for the Automatic and Pre-emptive Application of the CISG

As to the automatic application of the CISG, in the *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* ('DOCL') which is compiled by United Nations Commission On International Trade Law ('UNCITRAL'), it is interpretated that, according to art[1] (1)(a)[2] of the CISG, if the places of business of both parties to a dispute over international contracts for sales of goods are in different countries, and both of those countries are Contracting States to the CISG, the Convention is 'directly' or 'autonomously' applicable.[3] From the perspective of Chinese law, after China formally became a Contracting State to the CISG in 1986, the Supreme People's Court issued in 1987 the Circular on Transmitting Certain Issues of the MOFTEC in Connection with the Implementation of United Nations Convention on Contracts for the International Sale of Goods.[4] Published by the Ministry of Foreign Economic Relations and Trade of People Republic of China in the same year, it states, 'the contracts for sale of goods reached between the Chinese companies and the companies in the aforementioned countries (except Hungary) will automatically apply to the provisions of the Convention and the disputes or litigations arisen should be also settled under the Convention, unless otherwise agreed.'

[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] CISG Article 1 (1): This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States.

[3] United Nations Commission on International Trade Law (UNCITRAL) [1], p. 5.

[4] Circular of the Supreme People's Court on Transmitting Certain Issues of the MOFTEC in Connection with the Implementation of United Nations Convention on Contracts for the International Sale of Goods (Fa (Jing) Fa [1987] No. 34), December 10, 1987.

Therefore, whether pursuant to the CISG, DOCL (compiled by UNCITRAL) or the Circular of the Supreme People's Court of China, when the places of business of the parties to the international contracts for sales of good are in different countries and both of those countries are Contracting States to the CISG, the CISG shall be automatically applied, with no need for the parties to agree on it specifically.

As to the preemptive application, theoretically speaking, the 'power distribution theory' developed in the 1990s holds that domestic law merely regulates the domestic civil legal relationship, and it lacks the ability to regulate the international commercial relations. Since the value embodied in domestic law is more to safeguard the sovereignty of a country, it is prone to overlooking the rightful adjustment to the interests of the parties. For this reason, compared with the domestic law of a country, international commercial conventions are more suitable for resolving international business disputes.[5] In art 1(3)[6] of the CISG, it is expressly stipulated that the CISG can be applied without considering the specific rules of conflict. When interpretating art 1 of the CISG, DOCL first mentions that 'convention prevails over recourse to private international law', that is, under the traditional mode, in the case of an international situation, courts resort to the private international law rules in force in their country to determine which substantive rules to apply. Pursuant to the provisions of the CISG, the application of the Convention prevails over the recourse to the forum's private international law rules. Hence, in those countries, however, where international uniform substantive rules are in force, such as those set forth by the Convention, courts must determine whether those substantive international uniform rules apply before resorting to private international law rules at all.[7]

From the perspective of the domestic law of China, a civil-law tradition has heavily influenced the common habit of courts of China, in that they always follow a private-international-law approach when finding the *lex causae* in international commercial cases, and always need to look at reference terms in domestic law of China as a 'doorway' to the application of international legal instruments, be it an international commercial convention that is meant to be applied directly and pre-emptively. This has provoked some controversy, since such a traditional approach would entirely ignore the direct and pre-emptive applicability of many international conventions such as CISG and the Montreal Convention. Article 142(2) of the GPOCL[8] was one such reference term, in fact the most frequently visited 'doorway', which provides '[w]here the provisions of an international treaty which the People's Republic of China has concluded or has acceded to differ from civil laws of the People's Republic of China, the provisions of the international treaty shall apply, with the exception of those articles to which the People's Republic of China has declared its reservation.'

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[5] Yang [2], pp. 18–24.

[6] CISG: Article 1 (3): Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

[7] United Nations Commission on International Trade Law (UNCITRAL) [1], p. 4.

[8] General Principles of Civil Law of the People's Republic of China (Order of the President No. 37), January 1, 1987.

According to this term, it is clear that international conventions (such as the CISG) have application priority to domestic law where any difference exists. However, as for whether a difference is a prerequisite for applying the CISG preemptively, GPOCL art 142 provides no clear answer. In the point of view of many scholars, the differences between the CISG and the domestic law of China should not be a prerequisite for the pre-emptive application of the CISG, since this contradicts the meaning of becoming a Contracting State of the CISG. This has been indicated in the preamble of the CISG as 'removal of legal barriers in international trade.' In addition, differentiating the regulations of the CISG and the domestic law of China lacks not only standard but feasibility. What constitutes the difference? The wording or the purpose of legislation? If the court has to determine a difference between the CISG and domestic law before applying the CISG, it will naturally tend to apply domestic law immediately, and will easily ignore the different regulations of the CISG. Therefore, even if ambiguity remains in art 142 of the GPOCL, the CISG should be applied pre-emptively without considering whether there is a difference.

Another outstanding issue in the application of the CISG by Chinese courts is that, even when CISG art 1(a) is satisfied, the court may still determine the governing law by the principle of party autonomy or the doctrine of the closest connection in accordance with art 145 of the GPOCL,[9] arts 3 and 41 of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations[10] and art 126(1) of the Contract Law.[11] Such errors exist in the decisions made by the court of first instance and the court of appeal in this case. The ambiguity of art 142 of the GPOCL is one reason for this. Another reason for such error is that Chinese courts are unfamiliar with the conditions under which the application of the CISG is excluded, and therefore they often arbitrarily determine that the CISG has been excluded from application.

The issues brought about by the problematic art 142 of the GPOCL have currently been eliminated thanks to the coming into effect of the Civil Code of People's Republic of China (Civil Code) on January 1, 2021, and the abolition of the GPOCL

[9] General Principles of Civil Law of the People's Republic of China (Order of the President No. 37), January 1, 1987, Article 145: Unless otherwise stipulated by law, the parties to a contract involving foreigners may choose the law applicable to the handling of disputes arising from the contract. If the parties to a contract involving foreigners have not made a choice, the law of the country of closest connection to the contract shall be applied.

[10] Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (Order of the President No. 36), April 1, 2011, Article 3: The parties concerned can explicitly choose the laws applicable to civil relations involving foreigners in accordance with what the laws. Article 41: The parties concerned shall negotiate and choose the applicable laws for the contracts. If the parties concerned have not made a choice, for the party whose fulfilment of obligations can best realize the contract features, the laws of his regular residence or other laws which have the closest relationship to the contract shall apply.

[11] Contract Law of the People's Republic of China (Order of the President No. 15), October 1, 1999, first paragraph of Article 126: Parties to a contract with a foreign element may nominate the law to be applied in the handling of contractual disputes, except where laws provide otherwise. Where the parties to a contract with a foreign element fail to nominate the law of the contract, the law of the country with the closest connection to the contract shall be applied.

at the same time. The Civil Code contains no reference term similar to art 142 of the GPOCL, and the Judicial Interpretations to the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations has also removed its former art 4 which played the same role of 'doorway' as art 142 of the GPOCL. Consequently, there is presently no longer any such 'doorway either existing or needed in the law of China for the direct and pre-emptive application of CISG.

II. Whether a Unilateral Objection Constitutes Effective Exclusion of the CISG

The CISG stipulates the exclusion of its application in art 6[12]; however, it does not define the point of time and form of exclusion. Both the court of first instance and the court of appeal in this case held that the CISG has been excluded on the basis that no agreement was reached between the parties on the application of the CISG during the trial. The court of first instance held that Thales' choice to apply Chinese law constituted an effective exclusion of the CISG, and therefore the CISG should not be applied according to the principle of party autonomy. The court of appeal held the same view that the CISG has been effectively excluded. The opinions of the courts in this case are obviously erroneous, but the same opinions are commonly held by Chinese courts in judicial practice. For example, in Civil Judgment (2007) Hu Gao Min Si (Shang) Zhong Zi No. 6, the High People's Court of Shanghai Municipality also held that the objection of one party to the application of the CISG alone constituted the effective exclusion of the CISG.

According to the provisions of the CISG, it can only be excluded by 'the parties', which means excluding the application of the CISG requires mutual agreement of both parties. UNCITRAL also clearly indicates in the DOCL that 'opting out requires a clear, unequivocal and affirmative agreement of the parties'.[13] In addition, regarding the point of time of express exclusion, UNCITRAL does not state in the DOCL that the exclusion mutually agreed upon by both parties during the trial is invalid. On the contrary, UNCITRAL cites relevant German cases holding similar views, including CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994], CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993], CLOUT case No. 331 [Handelsgericht Kanton Zürich, Switzerland, 10 February 1999], and Schweizerische Zeitschrift für Internationales und Europäisches Recht, 2000, 111.[14] Therefore, regarding the issue of point of time of express exclusion, UNCITRAL to a large extent respects the autonomy of both parties, however, the exclusion should be subject to the mutual agreement of both parties.

The opinion of the courts in this case apparently deviates from the legislative purpose of the CISG to allow excluding its application merely by the unilateral expression of exclusion intent by one party. The most important purpose and significance of the CISG as an international commercial convention is to unify the legal

[12] CISG: Article 6: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

[13] United Nations Commission on International Trade Law (UNCITRAL) [1], p. 33.

[14] United Nations Commission on International Trade Law (UNCITRAL) [1], p. 36.