

CISG-online 4803	
Jurisdiction	China
Tribunal	厦门市中级人民法院 (Intermediate People's Court Xiamen, Fujian Province)
Date of the decision	17 December 2018
Case no./docket no.	(2018) Min 02 Min Zhong No. 261
Case name	<i>Hummer Shoe Industry Co., Ltd. v. Specialty Fashion Group Ltd.</i>

*Translation by Bingyan Zan\**

**Petitioner (petitioner of first instance):**

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Hummer Shoe Industry Co., Address is Room 2, Building no.11,1-77# Zhonghua Road, Zhongzheng District, Taibei City, Taiwan

Legal person: Shuli He, Director of Hummer Shoe Industry Co

Attorney: Qingdong Hong, Lawyer of Fujian Quanzhong Law Firm

**Defendant (defendant of first instance):**

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Specialty Fashion Group Ltd

Address is 151-163 Wyndham St Alexandria NSW2015 AUSTRALIA

Legal person: Gary Perlstein, Director of Specialty Fashion Group Ltd

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**Third party of first instance:**

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Heguang international transportation (China) Co., Address is Room 507, 501# Floor 4, Building no.3, 8 Wangjing Street, Chaoyang District, Beijing

Legal person: Clinton, Director of Heguang international transportation (China) Co.

Attorney: Fen Fang, Lawyer of Shanghai Hengtai Law firm

Attorney: Chengfang Wang, Lawyer of Shanghai Hengtai Law firm

**Third party of first instance:**

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Xiamen Subsidiary Co., Professional Heguang transportation (China) Co., Address is No. 56, Floor2, Baoshui market Palza, 88 Xiangyu Road, Moden Logistics Area,Xiamen City, Fujian Province

Person in charge: Li Jiang, Manager of Xiamen Subsidiary Co

Attorney: Fen Fang, Lawyer of Shanghai Hengtai Law firm

Attorney: Chengfang Wang, Lawyer of Shanghai Hengtai Law firm

**Third party of first instance:**

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Xiamen Jialianheng International Import and Export Co., Address is No.28D, Bilida Plaza, 185 Lianxiuli, Siming District, Xiamen City, Fujian Province

Legal person: Donglin Wen, Manager of Xiamen Jialianheng International Import and Export Co.

Attorney: Achuang Chen, Staff of Xiamen Jialianheng International Import and Export Co.

Referring the sales contract dispute case of petitioner Hummer Shoe Industry Co.(hereinafter referred to as Hummer) and defendant Specialty Fashion Group Ltd(hereinafter referred to as SFG), third party of first instance Heguang international transportation (China) Co. (hereinafter referred to as Heguang China), Xiamen Subsidiary Co.of Heguang international transportation (China) Co. (hereinafter referred to as Heguang Xiamen), Xiamen Jialianheng International Import and Export Co. (hereinafter referred to as Jialianheng), Hummer didn't accept the civil

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judgement of Cangqu people's court Xiamen (2015) Min 0205 Min Chu No.4012 and made an appeal to our court. After putting on record of the case, the court formed a collegial panel to hear the case. This case is now closed.

Hummer 's appeal request: rescission of the original judgment, change of sentence in support of the Hummer's claim; the costs for the first and second instance of the case are borne by SFG.

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The reasons are following:

1. The facts in the first instance are unclear and the evidence is insufficient, and the law application is wrong, which should be corrected according to law. (1) The first instance finds a serious disagreement between Hummer and SFG over whether to pay first or deliver first, SFG refuses to pay on the grounds that it has not received the goods, this is no factual or legal basis. The only argument between two parties is whether Hummer agrees to the pending claim policy of SFG and accepts the issue of telex release bill of lading without paying for the time being. The practice of both parties regarding the trading custom is to pay first and then to telex release bill of lading is clear. (2) SFG violated Contract Law of the People's Republic of China, United Nations Convention on Contracts for the International Sale of Goods, Incoterms 2010, failed to meet payment obligations for receiving goods, Hummer has fulfilled its delivery obligations under FOB in accordance with the relevant legal provisions. As for the fact that the terms of payment and the release of the bill of lading only affect the transfer of ownership of the final goods, it can't be denied that the company has fulfilled its obligation to deliver the goods. 2. Hummer has repeatedly reiterated in its e-mails that the long-standing practice of co-operation between the two parties is the principle of delivery only upon receipt of payment. 3. The first instance held that the parties had failed to prove the final whereabouts of the goods in the case, but this is wrong. The evidence in the case shows that the SFG controls the disposal of the goods in this case. 4. Jialianheng provided its previous transaction payment practices with SFG, also proved the fact that Specialty should pay the price before receiving the bill of lading. 5. Specialty refused to appear in court, no objections to the Hummer's claims and the facts stated, no evidence to the contrary be provided to refute, these are sufficient to confirm its refusal of payment.

SFG did not provide any further evidence.

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Heguang China and Heguang Xiamen stated: As the shipper is Jialianheng , the shipper did not specify how to dispose of the goods, and the consignee did not made it clear that the goods had been abandoned, in the circumstances, the goods could not be processed and the goods were still under customs control and could not be handled.

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Jialianheng stated: Agreed with Hummer.

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Facts found in the first instance:

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I. Contractual relation for the International Sale of Goods 1. On March 24, 2014 and June 23, 2014, an e-mail offer, a promise, a change of offer and a re-commitment between Hummer and SFG resulted in a contract to purchase and sell shoes 2. Order content : order no. 2002273; item no.6593MJ0G; product description, shoes with "DAHE" trademark; qty(pair) 12800; ship method, FOB Xiamen; total amount,USD 115968; date of manufacture, August 20, 2014; freight agent, Huguang; If the goods are returned for quality reasons, the "DAHE" trademark should be removed from the product. 3. No agreement about the payment method between the two parties; 4. No agreement about application of law between the two parties.

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II. Legal nexus with other parties. A proxy agreement was signed between Jialianheng and Hummer on January 15, 2014, it is agreed that Jialianheng shall be the international business service of Hummer. If Hummer requests an external claim, Jialianheng shall actively assist Hummer Company in its external claim under its export contract. Huguang China is the designated carrier (shipless carrier) by SFG, three bills of lading for registered multimodal transportation were issued to Jialianheng, the actual carrier is COSCO (China Ocean Shipping Company), the consignee and the notifying party as stated in the bill of lading are SFG. As the shipper of the disputed three containers, Jialianheng has held three original bills of lading and presented them in court.

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III. Goods flow and destination. Hummer purchased these disputed 12800 pairs of shoes in this case from Jinjiangkang shoes co. On September 1, 2014, Hummer express delivered 6593Mjog's sample to SFG, On September 8, SFG approved the sample, approved the shoe model for shipment and continued production. On September 7, 2014 Huguang Xiamen picked three containers of shoes up from Jinjiangkang shoes co. and send the bill of lading information to Jialianheng the next day, and request to provide customs clearance information as soon as possible. On September 19, 2014, Huguang Xiamen Company shipped the goods of the three containers of shoes at Xiamen Port and issued three bills of lading of multimodal transportation by Huguang China. The shipment arrived at Port Melbourne, Australia, on 7 October 2014. According to Hummer, the goods were loaded on September 17, 2014, arrived at Port Melbourne on October 7, and unloaded at the dock on October 10. According to Bill from OOCL (The Orient Overseas Container Line) to Huguang Xiamen, last recorded on May 19, 2015, it should be the date of final return of containers, total overdue days are 202 days and no further billing after that. The parties have failed to prove the final destination of the disputed goods. Total amount of the 202 days container charge is AUS \$68810 (already deducted 21 days free period).

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- IV. E-mail correspondences related to payment and delivery 15
1. At 10.05 a.m. on October 10, 2014, Madel of SFG, sent an email to David (Ruhong Zhang) of Hummer, entitled " Telex release the containers on Board ", the main message: "These documents have been issued". 16
  2. At 12.58 a.m. on October 10,2014, Madel of SFG, sent an email to David (Ruhong Zhang) et al of Hummer , entitled " Telex release the containers on Board ", the main message: "I have just been informed that you have not released the telex documents for the following containers OOLU0361459OOLU7440098TCNU7467137 due to your withholding of payment". "Please understand that this is the SFG's policy on pending claims in order to withhold payment before the claims are settled, which is exactly what we have been urging you to process the claims in a timely manner. Please release these documents so that we don't delay delivery and I don't want a penalty for delay in delivery". 17
  3. On October 10,2014, at 15:04, Jialianheng sent a message to Craig of SFG, the main content of the email : "I'm very sorry to urge you, please help to confirm the payment as the container has arrived at the destination". 18
  4. At 20:20 p.m. on October 14,2014, David (Ruhong Zhang) of Hummer addressed Madel et al, the main content of the email: "Hummer is not a shipper, so we have no right to release any outstanding goods on behalf of the shipper, and both shoe factories will recover the arrears from the consignor and the consignee before the goods are paid. As for your claim, ShuaiMei factory is doubtful about the claim. Therefore, your claim has not yet been confirmed or accepted by Hummer or its factory owner. Please do not confuse it". 19
  5. At 21:23 p.m. on October 19,2014, Sally of SFG sent an email to David (Ruhong Zhang) of Hummer, entitled "Telex release the containers on Board", The main message: "invite to check on the previous shipment of moldy shoes" and "We have 3 containers still stranded at the dock and will charge the factory demurrage if not released as soon as possible and the subsequent penalties will apply ". 20
  6. At 15.49 p.m. on October 20,2014, Sally wrote to David (Ruhong Zhang) et al, The main message: "Demurrage for 3 containers is from October 27; we also place our hopes on shippers to release the goods; due to outstanding credit issues with Hummer, all payments will be withheld until the issue is resolved; container demurrage is 5 per cent of the weekly cost and sales loss is 10 per cent of retail value; no penalty will be imposed for the release of containers this week; as for moldy inventory, you have been waiting for two months for you to visit and/or resolve the problem; and the outstanding payment will be paid only after you have issued a loan of \$94730.16". 21

7. At 12:20 a.m. on October 21,2014, David (Ruhong Zhang) wrote to Sally and Madel et al. The main message: "The factory is now asking you for payment. Before you pay the above items, the shipper Jialianheng will hold the original B/L for safety reasons. You can still discuss outstanding credit with Hummer after repeat orders are completed. I hope to receive your payment of \$159,990 soon". 22
8. At 1:05 on October 21, 2014, Sally wrote to David (Ruhong Zhang) et al. The main message: "We have waited two months for you to issue a credit note for non-conforming shoes. We won't pay until the claim is settled. We will not consider sending orders until all disputes are settled. Please release the container before Friday, otherwise you will be fined ". 23
9. At 18:33 a.m. on October 23, 2014, Colin of SFG wrote to Hummer people (including David of Hummer). The main message: "Videos of moldy shoes will be sent; detention containers will begin to charge fines after tomorrow. 24
10. At 10:50 a.m. on October 24, 2014, Colin of SFG wrote to Hummer people (including David of Hummer). The main message: "Video link for the moldy shoes, it is a big file". 25
11. On October 24, 2014, at 20.19, Hummer David (Ruhong Zhang) replied to Colin, Sally, Madel and others at SFG that the video could not be opened. 26
12. At 12:16 on October 25, 2014, Hummer David (Ruhong Zhang) wrote to Colin, Sally, Madel and others of SFG, stated the claim has nothing to do with shipper or consignee, request payment, shipper continue to hold the original b/l. 27
13. At 13:16 on October 26, 2014, Sally of SFG wrote to David (Ruhong Zhang) and others of Hummer, The main message: "Since the deadline given to you has passed, we have no choice but to inform you that we plan to return the three stranded containers to the factory in China. We will not accept any goods". 28
14. At 9:42 on October 26,2014, Hummer David (Zhang Ruhong) wrote to Sally et al. of SFG, stated no accept the return of the goods you ordered and continue to demand payment of the goods as well as goods withdrawn without payment. 29
15. At 8:50 on 27 October 2014, Sally wrote to David (Ruhong Zhang) et al. The main message: "payment will be made for two types of goods that are not intended to be released; three containers will be shipped back at the expense of Hummer; and you will not be able to accommodate your unprofessional performance in business". 30
16. At 15:05 on October 28, 2014, Colin of SFG wrote to David (Ruhong Zhang) et al. The main message: "The payment for the two containers that your forwarder has no intention to release has been paid today; it is hoped that this will be the first step in the right direction; three demurrage containers are being arranged for return; the stock was as bad as I described a few months ago (as evidenced by the pictures and videos), and based on long-term cooperation, 31

you should trust my view that the claim should not be doubtful; you or your representative are welcome to visit the warehouse and look at the problems in person".

17. On October 20, 2014, Hummer wrote twice to Huguang. The first mail said: "Huguang is a freight forwarder and Jialianheng is an import and export company; Jialianheng collects payment from foreign customers by bill of lading, and after receiving the payment, it sends the original bill of lading to foreign customers or telex release to foreign consignees on its own, the previous cooperation has been in this operation; you have privately telex release the goods worth \$159,990 to the consignee on October 10, 2014; the forwarder has no right to release the goods without the consent of Jialian Heng Company". The second mail said: "Please strictly control the later three containers, you must wait for our notice to release the goods".

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18. On December 24, 2014, Huguang Xiamen wrote to Jialianheng, The main message: "The three containers you shipped to Melbourne arrived at the port of destination on October 6, 2014, at your request, not to release the goods, waiting for your instructions; the consignee claimed that he did not have the property certificate and did not own the goods and was not responsible for any expenses; the demurrage of \$33,120 had been incurred; please arrange for the delivery within seven days or pay the demurrage incurred, otherwise the goods will be disposed of on its own according to law".

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19. On December 25, 2014, Jialianheng wrote to Huguang Xiamen. The main message: "Demurrage shall be borne by SFG. Your familiarity with the SFG's trading practice is 25 to 30 days after hand over date.

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The foreign customer shall make immediate payment for the three containers".

20. On December 26, 2014, Huguang Xiamen wrote to Jialianheng. The main message: "We have only the obligation to carry, under your repeated instructions to park the container at the port of so far, the related terminal charges should be borne by your company; I hope you will give us a solution to minimize the loss".

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21. On December 29, 2014, Jialianheng wrote to Huguang Xiamen. The main message: "Because foreign country do not pay, resulting in these containers stranded at the port, resulting in high costs, the responsible party should be responsible".

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22. February 13, 2015, commissioned by SFG, Law firm Jindu sent a claim for defective goods to Hummer, it is pointed out that the 4796 pairs of shoes produced by ShuaiMei Factory are moldy; because your company cannot reasonably settle the claim, our customer has withheld the payment of order number P2002273 for the necessary self-defense, and your company has refused to provide the documents required for customs clearance resulting in demurrage, so here to claim AUD 640492. The lawyer's letter also conveyed the client's proposal to resolve the problem, agreed to waive the claim for loss of profits and again requested shipping documents.

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23. On February 27, 2015, Huguang Xiamen wrote to Jialianheng, advised the latest updated demurrage, remind Jialianheng as real owner to deal with it as soon as possible; the attached demurrage is AUD 65120. 38
24. On March 9, 2015, Huguang Xiamen wrote to Jialianheng requesting a reply on the latest charges for February 27. 39
25. On 16 April 2015, Huguang Xiamen wrote to Jialianheng. The main message: "In accordance with the instructions of Jialianheng, the three containers have stagnated at the port of destination for more than half a year, resulting in demurrage charges of more than US \$80,000, and your company has not adopted any measures to help reduce the loss, we shall exercise the lien according to the relevant law. Jialianheng must settle the demurrage charges within 15 days of this notice, otherwise, we will apply to the local court for the sale of this ticket at auction without further notice". 40
26. On April 16, 2015, Hummer wrote to Huguang Xiamen. The main message: "You are the receiving party and carrier of the trade contract, and the community of interests with SFG; You are familiar with the SFG's trade practice: SFG do the payment during 25 to 30 days after the delivery of goods by the factory then you do the telex release of the bill of lading; SFG has been repeatedly urged to pay but SFG didn't pay yet, it is obviously contrary to the trading practice; After the goods left the factory and across the ship's side, we lose the actual control of the goods, the responsibility also transferred to the consignee; SFG has inspected the goods and arranged you to pick up the goods, SFG can obtain the goods as soon as the payment was done, and the terminate the cost. The letter also contains the relevant provisions of the Incoterms 2010 relating to FCA". 41
- 27.11 May 2015, Law firm Jindu, as representative of SFG, informed and Huguang that it had abandoned its order from Hummer on June 23, 2014 for 12,800 pairs of shoes, and that it was not responsible for container detention fee or storage fee. On the same day, and Huguang China FRANKCAFASSO wrote to Huguang Xiamen Molly et al, saying "we received official notification from SFG that they abandoned the three containers shipped from Hummer and forwarded the aforementioned lawyer letter". 42
28. On May 15, 2015, SFG and its next customers emailed about unpacking, unloading, returning empty containers and discussing how to dispose of the goods (destruction, continued stock, donation, re-export). 43
29. On 3 August 2015, Jialianheng wrote to Huguang Xiamen to request details of the auction of the three containers to recover the purchase price from the defaulting party. 44



30. September 18, 2017, FRANKCAFASSO of Heguang China wrote to Heguang Xiamen. The main message: "The cargo was under Australian customs control and the customer abandoned the cargo, so Heguang did not clear the customs and did not obtain permission for the shipper to release the cargo; the bonded agency tried to obtain permission to process the cargo through the Australian customs; and Heguang did not do customs clearance and no control over the cargo".

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The court of first instance held that, the case was a dispute over the international contract for the sale of goods, and that the dispute over the contract stipulated the terms of FOB Xiamen, so the place of performance of the contract was in Xiamen; the Hummer was an enterprise legal person registered in Taiwan, so the case was a case concerning the Taiwan-related commercial dispute designated by the court of first instance by the Xiamen Intermediate People's Court. According to the above two factors, the court of first instance had jurisdiction over the case.

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The confirmation of the applicable law of the dispute over a contract for the international sale of goods. In view of the fact that the international business agent of the case, Jialianheng, is located in China, SFG is an Australian company, while China and Australia are parties to the United Nations Convention on Contracts for the International Sale of Goods, and the buyer and seller have not unanimously excluded the application of the United Nations Convention on Contracts for the International Sale of Goods, the court of first instance has applied the United Nations Convention on Contracts for the International Sale of Goods to settle the dispute in this case. As the case is closely related to China, the relevant provisions of the Contract Law of the People's Republic of China which are not in contradiction with the Convention may also apply. In addition, the two parties have used the term FOB Xiamen in the contract, so the Incoterms 2010 also apply to the handling of the case.

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An international contract for the purchase and sale of goods was reached between Hummer and SFG by accepting an order sent by e-mail, which reflects the true meaning of both parties and is binding on both parties. Hummer export of disputed three-container shoes through agency Jialianheng. Heguang Xiamen loaded the disputed goods to the ship of COSCO at Xiamen port, and the goods arrived at Melbourne port, Australia.

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There was a serious disagreement between the two parties for whether pay first or deliver first, and they had been unable to reach a solution to the problem, resulting in a large demurrage of 202 days of detention of the goods at the port. After 19 May 2015, the destination of the disputed goods was unknown. Hummer considers it to have fulfilled its delivery obligations and has the right to collect payment from SFG. SFG refused to pay on the grounds that it had not received the goods. The dispute stems from a dispute between the buyer and seller over the quality of the goods of previous order, SFG has requested a deduction for the purchase

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price under the order in this case. Hummer denies that there was a quality problem with the goods before and does not agree to deduct the purchase price under the order in this case. Article 130 of the People's Republic of China Contract Law stipulates that "A contract of sale is a contract in which the seller transfers ownership of the subject matter to the buyer and the buyer pays the price." Article 135 states: "The seller shall fulfil its obligation to deliver the subject matter to the buyer or to deliver the documents for the taking of the subject matter and to transfer ownership of the subject matter." Article 136 states: "The seller shall deliver to the buyer relevant documents and materials other than the documentary evidence of the subject matter collecting in accordance with the agreement or trading practice." Article 30 of the United Nations Convention on Contracts for the International Sale of Goods states: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention." The seller's basic obligations under our law and the foregoing conventions have similar provisions, that is, if there is no special agreement, the seller shall deliver the goods to the buyer, deliver the documents and transfer the ownership of the goods. As there are no payment terms written in the contract, according to Article 58 of the United Nations Convention on Contracts for the International Sale of Goods: (1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents. (2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price. (3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity. Accordingly, the court of first instance held that the seller should deliver the goods or documents first and the buyer was obliged to pay after receiving the goods or documents.

According to the terms of Incoterms 2010 relating to FOB, Hummer considers that it has fulfilled its obligations to deliver the goods. The court of first instance held that the Hummer had misunderstood the concept of delivery of Incoterms 2010. It is common sense to separate risk transfer from ownership transfer in international trade, it was also expressly stated in the Incoterms 2010 and so there should have been no dispute here. In the "use interpretation" section of Incoterms 2010, the term "delivery" is interpreted as follows: "the concept has multiple meanings in trade law and practice, but in Incoterms 2010 it is used to indicate when the risk of loss or damage of goods is transferred from the seller to the buyer." Incoterms 2010 FOB term A8 states: The seller must provide the buyer, at the seller's expense, with the usual proof that the goods have been delivered in accordance with A4. Unless such proof is a transport document, the seller must provide assistance to the buyer, at the buyer's request, risk and expense, in obtaining a transport document. Therefore, crossing the ship's side at the port of shipment is only a dividing line for the risk of loss or damage of goods and does not prove that the seller has properly fulfilled its obligation to deliver.

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Hummer also tried to prove that it had a trade usage of receiving payment first and then delivering to SFG. SFG's refusal to pay was a violation of the special custom between the two parties basing on the e-mail correspondences. The court of first instance held that the existence of special trading usages among the parties should be unanimously agreed by the parties, or that the facts of the past transactions should be used to prove. E-mails between the two parties urging payment and release of the goods have been detailed in the fact-finding section, from which it cannot be seen that the special trading usages advocated by Hummer have gained SFG's approval, only that Hummer unilaterally claims, and that SFG's recognition of the so-called trading usages of Hummer is not analyzed. Hummer did not prove that there was a convention for its claims in past transactions. Where the order is not agreed upon and the seller fails to prove the existence of special usages, the parties to the transaction shall seek the basis for the settlement of the problem in the relevant laws and international business practices.

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Hummer worried that it would not be able to receive the payment if they release the goods first, but it turned out that SFG had paid for the two types of goods that the carrier had accidentally released. In the absence of agreement in the quality dispute, SFG has not unilaterally decided to deduct the corresponding amount from the accounts payable. In order to solve the problem of mutual trust between payment first and delivery first, international trade is usually settled by L/C. The parties in this case have cooperation before and have a trust base, so they do not use L/C settlement to reduce the transaction cost, but they are the root of the dispute.

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In summary, Hummer claims to have delivered to SFG, and there is no evidence to support its claim, so the claim that SFG should pay to it cannot be established and not upheld. In accordance with Article 64, paragraph 1, of the Civil Procedure Law of the People's Republic of China, the judgment rejects the claim of Hummer. Case acceptance fee of RMB 11802 was borne by Hummer.

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During our second instance trial, Hummer submitted an e-mail from Jialianheng certifying that Jialianheng informed SFG to arrange the payment for the bill of lading, and that the long-term transaction payment practice between Jialianheng and SFG was the payment first and only then the bill of lading. Jialianheng confirmed the authenticity of e-mail. Heguang China and Heguang Xiamen cannot confirm the authenticity of e-mail. The Court finds that the e-mail provided by Hummer was from Craig Big-gin Production Office Rivers Australia. It is not sufficient to establish a relationship between the email and SFG, and the Court does not confirm the relevance of the evidence.

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Upon trial, the facts found in the first instance were reconfirmed.

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The Court considers that the agency of the case, Jialianheng is located in China, and SFG is an Australian company, while China and Australia are parties to the United Nations Convention on Contracts for the International Sale of Goods, and the buyer and seller have not unanimously excluded the application of the United Nations Convention on Contracts for the International Sale of Goods. Therefore, the United Nations Convention on Contracts for the International Sale of Goods is applicable to the case. This case is closely related to China, so the relevant provisions of the Contract Law of the People's Republic of China which do not contradict the Convention can also be applied. In addition, the two parties have used the term FOB Xiamen in the contract, so the Incoterms 2010 also apply to the handling of the case.

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In this case, Hummer and SFG entered into an international contract for the purchase and sale of goods by way of an order sent by e-mail, reflecting the true intention of both parties and binding on both parties. Hummer claims that a trade usage exists between the parties of paying first and then delivering. Hummer should bear the burden of proof in this regard. E-mails provided by Hummer between the parties urging payment and release of goods could not prove that the special trading usages of first payment and then delivery were recognized SFG. In the absence of an agreement of payment method in the order, and the failure of Hummer to provide evidence of special usages in the transaction, both parties shall seek the basis for resolving the problem in the relevant laws and international business practices. The court of first instance found that the seller should deliver the goods or documents first and then the buyer has the obligation to pay was not improper. Hummer failed to provide evidence that it had delivered the goods to SFG, and now required to pay for the goods. Hummer's appeal cannot be supported by our court. To sum up, the facts are clear, and the applicable law is correct and the judgment of first instance should be upheld. In accordance with paragraph 1(1) of Article 170 of the Civil Procedure Law of the People's Republic of China, the judgment reads as follows: dismiss the appeal and uphold the original judgment.

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The cost of handling the second instance case in this case is 11802RMB, which is borne by Hummer.

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This judgment is final.

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Chief Judge: Wei Jiang

Judge: Wenya Zheng

Judge: Hui Long

December 17, 2008

Engrossment clerk: Yuefeng Wu