

APPLICATIONAL AMBIGUITY? TAIWAN'S STATUS IN INTERNATIONAL SALES LAW

BEN KÖHLER* 

Abstract The discussion on Taiwan's status under the United Nations Convention on Contracts for the International Sale of Goods (CISG) has picked up steam. After providing some historical background, it is argued that neither doctrinal nor policy arguments can support the application of the Convention to Taiwanese parties. Drawing on case law in the context of other uniform law treaties, the article concludes that the approbation of the CISG by the People's Republic of China should not bind Taiwan and that, as a consequence, Taiwanese parties should be treated as parties from non-Contracting States.

Keywords: Convention on Contracts for the International Sale of Goods, CISG, Taiwan, China, Article 93 of the CISG, Contracting States, territorial units, reservations.

I. INTRODUCTION

Taiwan has recently re-emerged as a focal point of international political debate and tensions between the United States of America and the People's Republic of China (PRC) have increased significantly.¹ At the same time, the shortage of semi-conductors, of which Taiwan is an important exporter, has served as a reminder of the vulnerability of globally integrated supply chains.² Given the attention Taiwan is currently attracting, it is timely to consider its status under the United Nations (UN) Convention on Contracts for the International Sale of Goods (CISG).³

* Senior Research Fellow, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany, koehler@mpipriv.de. I am very grateful to Elizabeth Dakash, Michael Friedman, Rishi Gulati and Knut Benjamin Pißler for their comments on earlier drafts. I would also like to thank the reviewers and editors for their suggestions.

¹ 'How to Prevent a War between America and China over Taiwan' (*The Economist*, 11 August 2022) <<https://www.economist.com/leaders/2022/08/11/how-to-prevent-a-war-between-america-and-china-over-taiwan>>; A Stevenson, 'China Threatens to Take Countermeasures to Sale of US Arms to Taiwan' (*New York Times*, 4 September 2022) <<https://www.nytimes.com/2022/09/04/world/asia/taiwan-china-arms.html>>; see also The People's Republic of China, 'White Paper—The Taiwan Question and China's Reunification in the New Era' (August 2022).

² A Crawford et al, 'The World Is Dangerously Dependent on Taiwan for Semiconductors' (*Bloomberg*, 25 January 2021) <<https://www.bloomberg.com/news/features/2021-01-25/the-world-is-dangerously-dependent-on-taiwan-for-semiconductors>>; P Mozur, J Liu and R Zhong, "'The Eye of the Storm': Taiwan Is Caught in a Great Game Over Microchips' (*New York Times*, 29 August 2022) <<https://www.nytimes.com/2022/08/29/technology/taiwan-chips.html>>.

³ UN Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG).

The CISG has not lost its pull: with the recent accessions of Portugal and Turkmenistan, the Convention now has 95 Contracting States.⁴ The much debated controversy over the application of the Convention to parties established in Hong Kong⁵ is now settled: the PRC (or ‘China’) has deposited a declaration with the UN to the effect that the CISG should apply to the Special Administrative Region of Hong Kong.⁶ The extension of the Convention to Hong Kong has now shifted attention to the less discussed yet by no means less delicate question of its application to Taiwanese parties. Compared to the controversy over Hong Kong, the application of the CISG to Taiwanese parties raises questions that are more fraught politically and more intricate legally.

The issues concerning the application of the CISG to parties established in Hong Kong were mainly a function of diverging interpretations of Article 93 of the CISG: pursuant to this provision, the Convention applies to all territorial units of a Contracting State, unless this State has deposited a declaration excluding some of its territories from the application of the Convention.⁷ After the ‘handover’ of Hong Kong from the United Kingdom to the PRC, the PRC did not make such a reservation in respect of either Hong Kong or Macao.⁸ At the same time, it deposited with the Secretary-General of the UN two lists of treaties that should extend to Hong Kong and Macao, respectively, in each case without mentioning the CISG.⁹ As a consequence, courts and scholars were divided on whether the omission of the CISG from these lists sufficed to exclude the application of the Convention,¹⁰ or whether, absent any express declaration, the CISG also

⁴ See UN Commission On International Trade Law (UNCITRAL), Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status>.

⁵ For detailed background on this debate, see W Long, ‘The Reach of the CISG in China: Declarations and Applicability to Hong Kong and Macao’ in I Schwenzer and L Spagnolo (eds), *Towards Uniformity, The 2nd Annual MAA Peter Schlechtriem CISG Conference* (Eleven International 2011) 83; U Magnus, ‘CISG Applicable in Hong Kong and Macao’ in Collectif d’auteurs, *Mélanges en l’honneur du Professeur Claude Witz* (LexisNexis 2018); UG Schroeter, ‘The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods’ (2004) 16 PaceIntlLRev 307; UG Schroeter, ‘Article 93’ in I Schwenzer and UG Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) paras 46–54.

⁶ UN, Depository Notification C.N.124.2022.TREATIES-X.10 of 5 May 2022.

⁷ See CISG (n 3) art 93(1), (4).

⁸ See Magnus (n 5).

⁹ ‘Letter of Notification of Treaties Applicable to Hong Kong after July 1, 1997 (20 June 1997)’ (1997) 36(6) ILM 1676; ‘Letter of Notification of Treaties Applicable to Macau after 20 December 1999’ (13 December 1999), available at UN, Multilateral Treaties Deposited with the Secretary-General, Historical Information, ‘China’, Note 3 <<https://treaties.un.org/pages/historicalinfo.aspx>>.

¹⁰ *Logicom v CCT Marketing Ltd.*, Cass civ (1) 2 April 2008, CISG-online No 1651; *Hannaford v Australian Farmlink Pty Ltd* [2008] FCA 1591 / ACN 087 011 541, CISG-online No 1782; *Innotex Precision Ltd. v Horei Image Products, Inc.*, U.S. District Court for the Northern District of Georgia 17 December 2009, CISG-online No 2044; *Ipsa Facto S.A.S. v Win System Int’l Ltd.*, Cour d’appel de Bordeaux 6 October 2020, CISG-online No 5570; M Bridge, ‘A Law for International Sale of Goods’ (2007) 37 HKLJ 17, 18; JS Mo, ‘Transfer of Sovereignty and Application of an International Convention:

applied to Hong Kong and Macao.¹¹ In May 2022 the PRC deposited its declaration with the Secretary-General of the UN, clarifying that the CISG should apply to the Special Administrative Region of Hong Kong without, however, addressing the situation of Macao.¹² Pursuant to Article 97(3) of the CISG, the declaration took effect 'on the first day of the month following the expiration of six months after the date of its receipt by the depositary', ie 1 December 2022.¹³ The controversy thus remains relevant for contracts involving parties from Hong Kong concluded before that date and, generally, for those involving parties from Macao.¹⁴

With respect to Taiwan the situation is more complicated as its status under public international law is complex. The application of the Convention depends not only on the interpretation of Article 93 of the CISG but also on Taiwan's status under public international law, as well as on the interaction between Article 93 of the CISG and public international law more generally. Given Taiwan's importance to international trade relations, it is surprising how little its status under the Convention is discussed in case law and scholarship.¹⁵ However, the issue has been raised recently in what appears to be the first judicial decision that has thoroughly discussed the status of Taiwan under the Convention: in *Pulse Electronics, Inc. v U.D. Electronic Corp.*, the US District Court for the Southern District of California (the 'District Court' or the 'Court') found that parties located in Taiwan have their place of business in a Contracting State.¹⁶ It is thus timely to discuss Taiwan's status under the

CISG in China in the Context of One Country, Two Systems' (2015) 2 *JIntl&CompL* 61, 85; Y Xiao and W Long, 'Selected Topics on the Application of the CISG in China' (2008) 20 *PaceIntlLRev* 61, fn 2.

¹¹ *CNA Int'l, Inc. v Guangdong Kelon Electrical Holdings et al*, US Dist. Ct. North. Dist. Illinois 3 September 2008, CISG-online No 2043; *Electrocraft Arkansas, Inc. v Super Electric Motors, Ltd*, US Dist. Ct. Ark. 19 August 2010, CISG-online No 2149; for a detailed explanation, see Long (n 5) 103–13; Schroeter, 'The Status of Hong Kong and Macao' (n 5); Magnus (n 5); accord: F Ferrari, 'Artikel 93' in P Schlechtriem, IH Schwenzer and UG Schroeter (eds), *Kommentar zum UN-Kaufrecht (CISG). Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf* (7th edn, CH Beck 2019) para 4; T Lutz, 'Artikel 93' in W Huck (eds), *Soergel Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Band 11* (Kohlhammer 2020) para 3; C Threlkeld, 'Are You In or Out?: Hong Kong and the Applicability of the United Nations Convention on Contracts for the International Sale of Goods' (2021) 49 *GaJIntl&CompL* 679, 695; C Witz, B Köhler and F Limbach, 'Droit uniforme de la vente internationale de marchandises' (2021) 197 (39) *RecDal* 2017, 2018.

¹² UN, Depositary Notification (n 6).

¹³ U Magnus and B Piltz, 'Neuerungen zum CISG' (2022) 22(4) *IntlHandelsrecht* 176.

¹⁴ See CISG (n 3) art 100(2); on the effect of CISG, art 100 on the withdrawal of reservations, see UG Schroeter, 'The Withdrawal of Reservations under Uniform Private Law Conventions' (2015) 20 *UnifLRev* 1, 13; on the remaining relevance of the controversy for Macao, see Schroeter, 'Article 93' (n 5) paras 53ff; M Sonntag, 'CISG Artikel 93' in B Gsell et al (eds), *beck-online. Großkommentar zum Zivilrecht* (CH Beck 2022) para 17; C Witz and B Köhler, 'Droit uniforme de la vente internationale de marchandises' (2022) 198(42) *RecDal* 2193ff.

¹⁵ But see F Yang, 'A Uniform Sales Law for the Mainland China, Hong Kong SAR, Macao SAR and Taiwan—The CISG' (2011) 15 *VindobonaJIntlComL&Arb* 345, 362, arguing that the Convention should apply to Taiwanese parties.

¹⁶ *Pulse Electronics, Inc. v U.D. Electronic Corp.* [2021] SD Cal 3:18-cv-00373-BEN-MSB, CISG-online No 5547 (*Pulse Electronics*); for a short commentary, see Witz, Köhler and Limbach (n 11) 2019.

Convention more thoroughly. Section II of this article starts by providing some background concerning Taiwan's history and its status under public international law before Section III explores the discussions on Taiwan's status under the CISG in both case law and scholarship prior to and as a result of *Pulse Electronics*. Section IV argues that, contrary to the District Court's decision, an analysis of Article 93 of the CISG suggests that the CISG cannot be extended to Taiwan. Section V concludes with some observations on future prospects.

II. TAIWAN'S STATUS UNDER PUBLIC INTERNATIONAL LAW

Taiwan's status has been described as one of the most 'enduring problems of public international law'.¹⁷ The historical origins of the dispute are complex, and what follows offers only a very brief summary.¹⁸ Taiwan had been a part of the Chinese Empire since 1683,¹⁹ which was at that time ruled by the Qing Manchu dynasty. It became a Japanese colony after the First Sino-Japanese War in 1895.²⁰ In accordance with the Instrument of Surrender of 2 September 1945, Japanese forces surrendered Taiwan to the Republic of China (ROC).²¹ After its defeat in the Chinese civil war, the *Kuomintang* retreated to Taiwan, to which location it also moved the government of the ROC.²² Despite its defeat, the Taiwan-based ROC upheld its claim to sovereignty over mainland China and was recognised by the UN and most Western States as the sole legitimate government of China, excluding the PRC from the UN and other international fora.²³ In 1971, a UN resolution effected the replacement of the ROC's representatives with representatives of the PRC.²⁴ Shortly thereafter, the United States of America recognised the PRC, acknowledged its 'One-China-Policy' and severed official diplomatic relations with the Taiwan-based ROC.²⁵ However, the United States also

¹⁷ B Ahl, 'Taiwan' in A Peters and R Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (OUP 2020) para 1.

¹⁸ For a more detailed historical background, see J Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 198–200; D Roy, *Taiwan. A Political History* (Cornell University Press 2003).

¹⁹ JD Spence, 'The K'ang-hsi Reign' in WJ Peterson (ed), *The Cambridge History of China, Volume 9, Part One: The Ch'ing Empire to 1800* (CUP 2002) 146–7.

²⁰ Crawford (n 18) 198–9; ICY Hsü, *The Rise of Modern China* (6th edn, OUP 2000) 342; D Wang, *Taiwan under Japanese Colonial Rule, 1895–1945. History, Culture and Memory* (Columbia University Press 2006) 2.

²¹ Crawford (n 18) 198–9; for more details on this period, see Roy (n 18) 60–75. Taiwan's status remained doubtful. Japan 'renounce[d] all right, title and claim to Formosa and the Pescadores' in the Treaty of Peace with Japan (adopted 8 September 1951, entered into force 28 April 1952) 136 UNTS 45, art 2(b). It remained, however, unclear to whom this title was ceded and what the consequences of the renunciation were, see Ahl (n 17) paras 14–16.

²² Crawford (n 18) 199; Hsü (n 20) 744–6.

²⁴ UNGA Res 2758 (25 October 1971) UN Doc A/RES/2758(XXVI).

²⁵ Ahl (n 17) para 7; RC Bush, *Untying the Knot: Making Peace in the Taiwan Strait* (Brookings Institution Press) 18–22; FY Chiang, 'One-China Policy and Taiwan' (2004) 28 *FordhamIntLJ* 1, 43–65.

²³ Ahl (n 17) para 7.

announced, in its 1979 Taiwan Relations Act,²⁶ that its policy was 'to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland'.²⁷

Today, the status of Taiwan remains controversial.²⁸ According to the PRC's official 'One-China-Policy', Taiwan forms part of the PRC under international law.²⁹ On the international level, it is, for the most part, acknowledged that Taiwan is not a State in its own right as a matter of public international law.³⁰ It is not a member of the UN³¹ and it is prevented from becoming a State Party to international treaties requiring statehood, such as the CISG,³² in its own capacity.³³ However, contrary to the Chinese position, the internationally prevalent opinion considers that Taiwan enjoys a certain State-like autonomy, or describes Taiwan as a *de facto* regime.³⁴ In this capacity, Taiwan can conclude international agreements and participate in international organisations to the extent that they do not require statehood for membership.³⁵

For the purposes of the CISG, this lack of statehood prevents Taiwan from acceding to the Convention, Article 91(3) of which expressly restricts accession to States.³⁶ Even the most flexible interpretations of this provision, as advanced by some scholars,³⁷ would not include a *de facto* regime like

²⁶ Taiwan Relations Act (enacted 10 April 1979), reproduced at (1979) 18 ILM 873.

²⁷ *ibid.*, art 2(b)(1). For more details on the Taiwan Relations Act, see SM Goldstein and R Schriver, 'An Uncertain Relationship: The United States, Taiwan and the Taiwan Relations Act' (2001) *ChinaQ* 147.

²⁸ Ahl (n 17); Crawford (n 18) 198–221; BR Roth, 'The Entity that Dare not Speak its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order' (2009) 4 *EAsiaLRev* 91; see, monographically, C Petzold, *Die Völkerrechtliche Stellung Taiwans* (Nomos 2007); H Lin, *Der völkerrechtliche Status der Republik China (Taiwan) nach dem Ausschluss der nationalchinesischen Regierung aus den Vereinten Nationen. Dargestellt im Licht der internationalen Praxis* (Rolf Gremer 1986).

²⁹ The People's Republic of China, 'White Paper—The One-China Principle and the Taiwan Issue' (2000); The People's Republic of China, 'White Paper—The Taiwan Question and Reunification of China' (2004); The People's Republic of China (n 1), stating that '... Taiwan is part of China. This is an undisputable fact supported by history and the law'; Chiang (n 25) 40–3.

³⁰ Crawford (n 18) 206–19; accord: Ahl (n 17) para 20.

³¹ PL Tsai, PL Hsieh and CY Wang, 'International & Regional Organisations, Taiwan' in S Lee (ed), *Encyclopedia of Public International Law in Asia Online* (Brill 2021).

³² See CISG (n 3) art 91(3), restricting accession to the Convention to States; see also Yang (n 15) 351–2; accord: *Pulse Electronics* (n 16) para 41.

³³ For more detail on Taiwan's membership in international and regional organisations, see Ahl (n 17) paras 33–36; Crawford (n 18) 203–4.

³⁴ Ahl (n 17) paras 23–24; Crawford (n 18) 219–20; JA Frowein, 'De Facto Regime' in A Peters and R Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (OUP 2013) para 1.

³⁵ Ahl (n 17) paras 33–36, noting Taiwan's membership in the World Trade Organization (WTO) as a 'Separate Customs Territory' and in the Asian Development Bank; see also Frowein, *ibid.*, para 8.

³⁶ U Magnus, *Staudinger-BGB, CISG* (De Gruyter 2018) art 91, para 5; but see Yang (n 15).

³⁷ UG Schroeter, 'Backbone or Backyard of the Convention? The CISG's Final Provisions' in CB Andersen and UG Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy,

Taiwan.³⁸ The decisive issue for the determination of Taiwan's status under the Convention is therefore whether parties established in Taiwan can be considered as having their place of business in the PRC and, thus, in a Contracting State to the Convention.

III. THE STATUS OF TAIWAN UNDER THE CISG IN CASE LAW AND IN THE LITERATURE

This section gives a brief overview of the discussions concerning the status of Taiwan prior to the recent decision in *Pulse Electronics*, before moving to a presentation of the District Court's reasoning in that case.

A. *The (Lack of) Discussion Prior to Pulse Electronics*

The application of the CISG to parties in Taiwan received surprisingly little attention in case law and academic writing prior to the US District Court's decision in *Pulse Electronics*.³⁹ There are relatively few published cases involving parties with their place of business in Taiwan.⁴⁰ In those few decisions, there is no consistent approach to the application or non-application of the CISG. Some of the cases apply the CISG by virtue of Article 1(1)(a) of the CISG, that requires both parties to have their respective places of business in different Contracting States,⁴¹ without reflecting on the status of Taiwan.⁴² In *Ideal Bike Corp. v IMPEXO spol. s.r.o.*, for instance, the Supreme Court of the Czech Republic relied on Article 1(1)(a) of the

Simmonds & Hill 2008) 467; but see, for a more restrictive interpretation, J Basedow, 'Die Europäische Gemeinschaft als Partei von Übereinkommen des einheitlichen Privatrechts' in I Schwenzer and G Hager (eds), *Festschrift für Peter Schlechtriem zum 70. Geburtstag* (Mohr Siebeck 2003) 180–1; Magnus (n 36) art 93, para 5.

³⁸ UG Schroeter, 'Article 91' in Schwenzer and Schroeter (n 5) para 11; albeit almost certainly theoretical in the case of Taiwan, the question of whether courts of Contracting States could consider the validity of an accession to the Convention is more complicated. On the limits of the International Criminal Court in the control of statehood as required under the Rome Statute, see *Situation in the State of Palestine* (Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', Pre-Trial Chamber I) ICC-01/18 (5 February 2021) paras 104–113. On the situation on Palestine under the CISG, see Schroeter, *ibid*, paras 8ff. For a discussion of Taiwan's status in the context of the Rome Statute, see SH Lam, 'Should the ICC Accept Taiwan's Delegation of Ad Hoc Criminal Jurisdiction? A Debate on Taiwan's Functional Statehood in the Context of Article 12(3) of the Rome Statute' (2022) 11(1) CILJ 51.

³⁹ F Yang, 'The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice' (2006) NordJCommL 1, 19; Yang (n 15) 358–61, for short descriptions of the problem; see also VD Do, 'La Convention de Vienne du 11 avril 1980 et la pratique arbitrale: experience dans un nouvel État adhérent' (2020) 25 UnifLRev 256, 264; K Grbie, 'Putting the CISG Where It Belongs: In the Uniform Commercial Code' (2012) 29 TouroLRev 173, 182.

⁴⁰ The most comprehensive database (CISG-online) counts only 23 decisions in which one of the parties had its place of business in Taiwan <<https://cisg-online.org>>.

⁴¹ See CISG, art 1(1)(a): '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 ...'.

⁴² Intermediate People's Court Xiamen, Fujian Province, *Hummer Shoe Industry Co., Ltd. v Specialty Fashion Group Ltd.* [2018] Min 02 Min Zhong No 261, 17 December 2018, CISG-online No 4803, although it is unclear whether the place of business was in Taiwan or the PRC;

CISG to apply the Convention to a contract between a Taiwanese seller and a Czech buyer. The case turned on whether the contract had been validly concluded via email communications, despite the PRC's reservation under Articles 12 and 96 of the CISG.⁴³ Without mentioning the special situation of Taiwan, the Supreme Court noted that Article 11 of the CISG, pursuant to which a contract 'need not be concluded in or evidenced by writing', was not applicable as one of the parties had its place of business in a reserving State, ie the PRC.⁴⁴ Resorting to the applicable rules of private international law, it held that 'Chinese law should be applied as regards the assessment of form'.⁴⁵ On that basis, the Supreme Court reversed the decision of the Prague High Court that had relied on Czech law as the *lex fori* on the basis that it had been unable to establish the content of Chinese law.⁴⁶ Given express reference to the address of the seller in 'Taiwan, R.O.C.',⁴⁷ it is surprising that the Supreme Court failed to address the issue of Taiwan's status in respect to both the application of the CISG and the applicable domestic law. Although the decision was given by the highest court of a Contracting State, this failure to discuss the status of Taiwan for the purposes of the CISG significantly reduces its precedential value for the question at hand.

Other cases, again without offering specific reasoning, treat Taiwanese parties as if they were parties from non-Contracting States.⁴⁸ In these cases, the Convention is either not applied at all⁴⁹ or is applied by virtue of Article 1(1)(b) of the CISG on the basis that the conflict-of-laws rules of the forum lead to the law of a Contracting State.⁵⁰ Despite the prominence of the controversy over the application of the Convention to parties in Hong Kong,

Supreme Court of the Czech Republic, *Ideal Bike Corp. v IMPEXO spol. s.r.o.*, 17 December 2013, CISG-online No 2749, with English translation.

⁴³ States which make a reservation under CISG, arts 12 and 96 will not be bound by the principle of freedom of form enshrined in CISG, arts 11 and 29. See CISG (n 3) art 12: '[a]ny provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention.'

⁴⁴ *Ideal Bike Corp.* (n 42).

⁴⁵ *ibid.*

⁴⁶ Prague High Court, *Ideal Bike Corp. v IMPEXO spol. s.r.o.*, 19 November 2010, CISG-online No 3572.

⁴⁷ *Ideal Bike Corp.* (n 42).

⁴⁸ Seoul High Court, *Taiwanese manufactured goods case*, 2012Na59871, 19 July 2013, CISG-online No 2831, CLOUT Case No 1642, with English abstract; Bundesgericht (Federal Supreme Court of Switzerland), *Ecole Polytechnique Fédérale de Lausanne v Y. SA*, 4A_326/2008, 4A_406/2008, 16 December 2008, CISG-online No 1800; Bundesgericht, *Kickboards case*, 4C.94/2006, 17 July 2007, CISG-online No 1515; *Golden-Legion Automotive Corp. et al. v LUSA Industries, Inc.* [2010] U.S. District Court for the Central District of California CV 09-05962 MMM (CWx) CISG-online No 5498, para 16.

⁴⁹ *Golden-Legion Automotive Corp. et al. v LUSA Industries, Inc.*, *ibid.*, para 16: 'Taiwan is not a signatory, and there is no provision providing for discretionary application of the treaty where only one party is a national of a signatory state.'

⁵⁰ Bundesgericht, *Ecole Polytechnique Fédérale de Lausanne* (n 48); Bundesgericht, *Kickboards case* (n 48) para 8, applying the CISG as part of Swiss law; Higher People's Court, Jiangsu Province, *Changzhou Kairui Weaving and Printing Comp. v Junlong Machinery Comp.* [2004] Su Min San Zhong Zi No 056, CISG-online No 4343.

the issue of Taiwan is also only very rarely addressed in academic literature concerning the CISG⁵¹ and has even been labelled ‘a mystery’.⁵² If the issue is mentioned at all, most commentators limit themselves to short statements for or against the application of the Convention to Taiwanese parties.⁵³ In practice, the issue is often solved by a choice-of-law agreement that may lead to the application of the Convention by virtue of Article 1(1)(b) of the CISG if the law of a Contracting State is chosen.⁵⁴ This may explain why the most relevant decisions concerning Taiwan’s status under the Convention stem from States that have deposited a reservation under Article 95 of the CISG and are thus not bound by Article 1(1)(b) of the CISG.⁵⁵

B. The Reasoning in *Pulse Electronics*.

The first court to have extensively addressed the application of the Convention to Taiwan seems to have been the District Court for the Southern District of California in *Pulse Electronics*.⁵⁶ *Pulse Electronics* is hardly a typical CISG case: at the core of the dispute was a claim of patent infringement brought by a Delaware corporation against a Taiwanese manufacturer of communications equipment.⁵⁷ To determine whether such an infringement had in fact occurred, the Court analysed multiple international sales made by the defendant. The CISG became relevant as regards the question of the law potentially governing the place of the sale.⁵⁸ The Court thus asked the parties to submit briefs on the applicability of the CISG. While the plaintiff did not address the issue, the defendant argued that the CISG was applicable to its contracts with buyers established in the United States.⁵⁹

⁵¹ Yang (n 39) 19; Yang (n 15) 358–61; Do (n 39) 264.

⁵² Yang (n 39) 19; see also Do (n 39) 264: ‘Face à cette position incertaine de Taïwan, nous avons des difficultés à savoir si la partie ayant son établissement à Taïwan est considérée comme ayant l’établissement dans un État contractant.’ (Author translation: ‘Faced with this uncertain position of Taiwan, it is difficult to know whether a party having its place of business in Taiwan is considered to have its place of business in a Contracting State.’)

⁵³ In favour of the application: Yang (n 15) 362; contra: JE Bailey, ‘Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales’ (1999) 32 CornellIntlLJ 273, 283; W Li, ‘On China’s Withdrawal of its Reservation to CISG Article 1(b)’ (2014) 2 RenminChinLRev 300, 317; Xiao and Long (n 10) fn 2.

⁵⁴ For cases involving Taiwanese parties in which the choice of law led to the application of the CISG, see Bundesgericht, *Kickboards case* (n 48) para 8; Seoul High Court (n 48); for a case in which the Convention was excluded, see Rechtbank Utrecht, *Chikara Nederland B.V. v Great Sun Europe et al.*, 227339/ HA ZA 07-486, 18 June 2008, CISG-online No 5249.

⁵⁵ USA: *Golden-Legion Automotive Corp. et al. v LUSA Industries, Inc.* (n 48); *Pulse Electronics* (n 16); Czech Republic: *Ideal Bike Corp.* (n 42). For a list of the current reservations, see UNCITRAL (n 4). The Czech Republic has withdrawn its reservation under CISG, art 95, see UN, Depository Notification C.N.740.2017.TREATIES-X.10 of 24 November 2017. I am grateful to the reviewer for drawing my attention to this correlation.

⁵⁶ *Pulse Electronics* (n 16).

⁵⁷ *ibid.*, paras 1–9.

⁵⁸ *ibid.*, paras 32–46.

⁵⁹ *ibid.*, paras 36–37.

The Court adopted the arguments of the defendant and held the CISG to be applicable to sales contracts between the Taiwanese seller and buyers in the United States and other Contracting States.⁶⁰ The court ruling starts with the observation that there is 'no binding or even persuasive case law on whether the CISG applies to a contract with a Taiwanese party'.⁶¹ In its reasoning to extend the Convention's application to Taiwan, the Court pursued two independent lines of argument. First, the Court observed that Taiwan was not recognised as a State by the US government.⁶² It then goes on to note, without further explanation, that Taiwan's legal status was 'confusing'.⁶³

To overcome this confusion, the Court had resort to Article 93 of the CISG, pursuant to which a Contracting State with two or more territorial units may declare that the Convention should not extend to certain territorial units. Noting that China has not submitted such a declaration in respect of Taiwan, the Court applied the default rule found in Article 93(4) of the CISG, which provides for the application of the Convention to all of the PRC's territories, including Taiwan.⁶⁴ Secondly, at the invitation of the defendant, the Court gave policy reasons for the application of the Convention to Taiwan, noting that the extension of the CISG to Taiwan served the Convention's purpose of creating uniformity at the international level.⁶⁵ More specifically, the Court cited Chinese case law treating sales contracts involving parties from Taiwan as 'foreign-related cases' to which the CISG may be applied.⁶⁶ This led the Court to conclude that the application of the CISG to Taiwanese parties 'is not in direct contravention of either China or Taiwan's desires'.⁶⁷

This first reasoned judicial exploration of the issue led the District Court to extend the application of the Convention to Taiwanese parties, thus confirming some of the few existing statements in the literature concerning the CISG.⁶⁸ However, and contrary to that reasoning, the following section will argue that the application of the Convention can neither be justified on the basis of Article 93 of the CISG nor on the basis of policy arguments.

IV. THE LIMITED ROLE OF THE CISG IN DETERMINING THE STATUS OF TAIWAN

This section shows that, contrary to the District Court's conclusions, Article 93 of the CISG does not address the issue of Taiwan's status, which should be determined on the basis of public international law. It will then consider existing case law concerning other international conventions, before refuting the policy arguments raised by the District Court in *Pulse Electronics*.

⁶⁰ *ibid.*, paras 37–46.

⁶¹ *ibid.*, para 37.

⁶² *ibid.*, para 41, citing *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 US 1, 27 (2015).

⁶³ *ibid.*, para 42.

⁶⁴ *ibid.*

⁶⁵ *ibid.*, para 43.

⁶⁶ *ibid.*, para 44, citing F Yang, 'CISG in China and Beyond', 40 No. 3 UCC L. J. Art. 5 (Winter 2008) and also the 'Chemical cleaning product equipment case', an arbitral award under the auspices of CIETAC: CIETAC, 20 April 1999, CISG/1999/23, CISG-online No 1807.

⁶⁷ *ibid.*, para 44.

⁶⁸ Yang (n 15) 362.

Finally, it will suggest a way forward for courts of Contracting States that are confronted with the potential application of the Convention to Taiwanese parties.

A. The Inconclusiveness of Article 93 of the CISG

As noted by the District Court, the Convention seems, at first sight, to contain a provision which addresses the situation of China and Taiwan: pursuant to Article 93(1) of the CISG, a Contracting State that has two or more territorial units may declare to which of these units the application of the Convention should extend. Absent such declaration, the Convention applies to all of the State's territorial units.⁶⁹ There is therefore a presumption that the Convention applies to all territories of a Contracting State, but Article 93(1) of the CISG, as a 'federal-State-clause',⁷⁰ permits States to exclude the application of the Convention to some of its territories. As a general matter, the PRC falls within the scope of Article 93(1) of the CISG since it is a Contracting State with two or more territorial units, at least with respect to Hong Kong and Macao.⁷¹ Accordingly, the provision was at the core of the controversy over the application of the CISG to these territories.⁷²

However, as regards Hong Kong and Macao, it was undisputed that they formed parts of the PRC under international law.⁷³ Conversely, the question with respect to Taiwan is precisely whether it does in fact constitute a territorial unit of China for the purposes of Article 93(1) of the CISG. Despite its extensive discussion of Article 93 of the CISG, the District Court spends very little time on this question.⁷⁴ In light of the importance of this provision in the Court's reasoning, it is worth taking a closer look at it in order to determine whether Taiwan can be considered a territorial unit of the PRC under the Convention.

Article 93 of the CISG provides for one of the few permissible reservations under the Convention.⁷⁵ Contrary to the default rule in Article 19 of the Vienna Convention of the Law of Treaties,⁷⁶ the CISG prohibits any reservations other

⁶⁹ See CISG (n 3) art 93(4).

⁷⁰ HM Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)' (1998) 17 *JL&Com* 187, 194; Lutz (n 11) 1; Schroeter (n 37) 432; but see also S Karagiannis, 'The Territorial Application of Treaties' in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 315: 'territorial clause'.

⁷¹ Schroeter, 'Article 93'(n 5) para 4; Magnus (n 5) 590; Schroeter, 'The Status of Hong Kong and Macao' (n 5) 320–6.

⁷² For a detailed analysis of the provision in this context, see Magnus (n 5) 587–92; Schroeter, 'The Status of Hong Kong and Macao' (n 5) 320–6.

⁷⁴ *Pulse Electronics* (n 16) paras 41–42.

⁷⁵ For a detailed discussion of the status of the declaration under CISG, art 93 as a reservation, see UG Schroeter, 'Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After Thirty-Five Years' (2015) 41 *BrookJIntL* 203, 218–20.

⁷⁶ For more detail on this default rule, see T Giegerich, 'Treaties, Multilateral, Reservations to' in A Peters and R Wolfrum (n 17) paras 16–19; C Walter, 'Article 19' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2018).

than those expressly provided for in its Articles 92–96.⁷⁷ The purpose of this is to prevent the fragmentation of the Convention and to preserve its uniformity of application, as mandated by Article 7(1) of the CISG.⁷⁸ As exceptions to this general prohibition, the reservations in Articles 92–96 are tailored to address very specific situations. They contain objective requirements which need to be fulfilled in order for the reservation to be permissible.⁷⁹ In the case of Article 93 of the CISG, the requirement is that the ‘Contracting State has two or more units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention’.

On the face of it, Article 93 of the CISG does not provide much guidance concerning what can be considered a territorial unit of a Contracting State. As regards Taiwan, the requirement can be broken down into three elements: the entity in question must be a ‘territorial unit’, different systems of law must be applicable in the different territorial units of the Contracting State, and the unit must belong to the Contracting State in question. Although less explicit in the text, the third criterion clearly emerges from a close reading of Article 93(1) of the CISG. The English version uses the verb ‘have’ in its possessive function (‘If a Contracting State has’)⁸⁰ while the French and Spanish versions use verbs that reference the composition of the State (‘*comprend*’, ‘*integrado*’).⁸¹ This is reinforced by the use of possessive pronouns in the course of the sentence.⁸² This choice of language, although not specifically tailored to the problem of contested territories, was deliberately used to identify a particular State and *its* territories clearly.⁸³

Legal scholars have developed criteria for the first two of these three elements: in order to be considered a territorial unit under Article 93 of the CISG, an entity needs to have a certain degree of autonomy.⁸⁴ Depending on the constitution of the Contracting State, various types of territories are considered to be covered by the provision, provided that different systems of law apply to the issues governed by the CISG.⁸⁵ It is the third question that seems particularly difficult to answer. Judging by the *travaux préparatoires*, the drafters of the Convention did not anticipate that it would

⁷⁷ See CISG (n 3) art 98.

⁷⁸ UN Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records (United Nations 1981) 459; M Torsello, ‘Reservations to International Uniform Commercial Law Conventions’ (2000) 5 *UnifLRev* 85, 90.

⁷⁹ UG Schroeter, ‘Introduction to Articles 89–101’ in Schwenzler and Schroeter (n 5) para 7; F Ferrari, ‘Vorbemerkungen zu Artt. 89–101’ in Schlechtriem, Schwenzler and Schroeter (n 11) para 9.

⁸⁰ CISG (n 3) art 93(1) stipulates ‘If a Contracting State has...’.

⁸¹ See the French version of CISG, art 93(1): ‘Tout État contractant qui *comprend* deux ou plusieurs unités territoriales ...’ (emphasis added) as well as the Spanish one: ‘Todo Estado Contratante *integrado* por dos o más unidades territoriales ...’ (emphasis added).

⁸² CISG (n 3) art 93(1): ‘... all of *its* territorial units ...’; ‘... toutes *ses* unités territoriales ...’; ‘... todas *sus* unidades territoriales ...’ (emphasis added).

⁸³ See the intervention of the Russian delegate: Official Records (n 78) 446, para 41.

⁸⁴ Ferrari (n 11) para 2; Schroeter (n 37) 432.

⁸⁵ Ferrari (n 11) para 2; Lutzi (n 11) para 1; Schroeter (n 37) 432.

ever be controversial whether a territory belonged to a Contracting State or not.⁸⁶

Article 93 of the CISG was included at the request of Canada and Australia, both of which consist of multiple territorial units with distinct private law systems.⁸⁷ In the drafting process, the most controversial issue was whether the reservation should be restricted to federal States that lack federal authority to legislate in some of the matters covered by the Convention or whether it should enable States to choose in which of its territories the Convention should be applied.⁸⁸ In this context, there was no need for the drafters to specify further the criteria for determining whether a territory belonged to a Contracting State.⁸⁹ The Chinese delegation, which could have raised the issue of Taiwan, does not seem to have intervened.⁹⁰ Hence, neither the text nor the genesis of the provision offers guidance concerning the resolution of disputes over contested territories.

Given this lack of guidance, one solution could be simply to defer to the declarations made by the Contracting State in question. If, for instance, China were to make a declaration concerning Taiwan under Article 93 of the CISG, other Contracting States could be considered as bound by the determination set out in that declaration. Such deference would effectively lead to vesting the declaring State with a discretionary power to determine the status of contested territories under the Convention. At first glance, the reference to the Contracting State's constitution in Article 93(1) of the CISG⁹¹ could be understood to mean that the status of a contested territory should be exclusively defined by the Contracting State's constitutional law. Taiwan's status would then depend on the constitution of the PRC.

However, the mention of the State's constitution in the text of Article 93(1) of the CISG serves an entirely different function: its purpose is to restrict the eligible territories of a Contracting State under Article 93(1) of the CISG to those which are constitutionally vested with autonomy in relation to those matters governed by the Convention.⁹² More importantly, this deferential solution would be fundamentally at odds with the decision of the drafters of the Convention to restrict the permissible reservations to those enumerated in

⁸⁶ Official Records (n 78) 445, where it is emphasised that the draft article should not be misconstrued to give international status to the territorial units.

⁸⁷ On the drafting history of the provision, see M Evans, 'Article 93' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law. The Vienna 1980 Sales Convention* (Giuffrè 1987) paras 1.1.–1.5. For the current status of the reservations under CISG, art 93, see UNCITRAL (n 4). Canada has withdrawn its reservations; on the remaining importance of CISG, art 93 as an 'Island reservation', see Schroeter (n 75) 250.

⁸⁸ Official Records (n 78) 434–5, 445–7; on this debate, see Evans, *ibid.*, paras 1.3.–1.5.

⁸⁹ For the discussion, see Official Records (n 78) 434–5, 445–7. ⁹⁰ *ibid.*, 434–5, 445–7.

⁹¹ CISG (n 3) art 93(1): 'If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention...' (emphasis added).

⁹² Schroeter (n 37) 432–3; I Schwenzer and P Hachem, 'Article 93' in I Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4th edn, OUP 2016) para 3.

Articles 92–96 and to subject reservations under Article 93 of the CISG to objective criteria. States can therefore not define the status of contested territories in their declarations. If a Contracting State were to issue such a declaration concerning a territory that does not form part of that State, the declaration would contradict Articles 93 and 98 of the CISG. The legal consequences of such impermissible reservations are, in principle, governed by public international law.⁹³ For current purposes, it suffices to say that a declaration concerning Taiwan would give rise to a very different situation from that of other cases in which the requirements of Articles 92–96 of the CISG are not fulfilled, as it is doubtful whether the PRC can issue binding declarations concerning Taiwan.⁹⁴

A close reading of Article 93(1) of the CISG thus confirms that the territorial unit of the declaring State needs to belong to that State. However, neither the provision itself nor the general principles of the CISG seem to offer criteria for determining the status of contested territories. In the language of Article 7(2) of the CISG, this question is not settled in the Convention.⁹⁵ One therefore has to turn to the otherwise applicable law which is, in this case, public international law.⁹⁶ In the present context, the issue under international law is, simply put, whether international treaties to which China is a State Party also extend to Taiwan.⁹⁷

B. The Intricacies of Extending Treaties Acceded to by China to Taiwan

The question of whether the PRC's accession to international treaties also binds Taiwan has been raised with respect to a number of different treaties in US courts.⁹⁸ While the District Court for the Eastern District of Wisconsin held Taiwan to be bound by the accession of the PRC to the 1929 Warsaw Convention on Air Transport⁹⁹ (hereinafter Warsaw

⁹³ On reservations to international treaties, see arts 19–23 of the Vienna Convention on the Law of Treaties; on the consequences of impermissible reservations, see generally Giegerich (n 76) paras 27–34; ET Swaine, 'Treaty Reservations' in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 285–98.

⁹⁴ The discussion on the legal consequences of the lack of other requirements under arts 92–96 of the CISG is therefore of little relevance for a potential declaration on Taiwan. Arguing that an impermissible reservation should be effective until withdrawn under CISG, art 97(4), I Schwenzer and P Hachem, 'Introduction to Articles 89–101' in Schwenzer (n 92) para 7; Ferrari (n 79) para 9; Schroeter (n 37) 435–7; Schroeter (n 79) para 43; for the invalidity of such reservations, see Torsello (n 78) 110–17.

⁹⁵ See CISG (n 3) art 7(2): 'Questions relating to matters governed by [the] Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'⁹⁶ Magnus (n 5) 587.

⁹⁷ See on this point generally, Ahl (n 17) para 37; Crawford (n 18) 205–6.

⁹⁸ For an overview of the different cases, see AY Sun, 'Revisiting Taiwan's Legal Status in the United States: The Impact of the Taiwan Relations Act on Private Disputes' (1998–99) 17 *ChinYBIntlL&Aff* 68.

⁹⁹ Convention for the Unification of certain Rules relating to International Carriage by Air, with Additional Protocol (adopted 12 October 1929, entered into force 13 February 1933) 137 LNTS 11.

Convention),¹⁰⁰ the District Court for the Northern District of Illinois, shortly thereafter, declined to find that the 1965 Hague Service Convention¹⁰¹ was applicable to Taiwan, expressly rejecting the reasoning adopted by the Wisconsin court as ‘flawed’.¹⁰² Only a few years later, the United States Court of Appeals for the Ninth Circuit took the opportunity to address this issue thoroughly in its decision in *Mingtai Fire & Marine Insurance Co., Ltd. v United Parcel Service*.¹⁰³

The Court of Appeals was faced with the question of whether China’s accession to the Warsaw Convention should also bind Taiwan. As it noted, the PRC’s accession to the Warsaw Convention was accompanied by a declaration that the Convention ‘shall of course apply to the entire Chinese territory including Taiwan’.¹⁰⁴ This assertion led the District Court in *Atlantic Mutual Insurance* to conclude that the Warsaw Convention extended to Taiwan.¹⁰⁵ Despite this declaration, the Court of Appeals in *Mingtai Fire & Marine Insurance* held that Taiwan was not bound by China’s accession to the Warsaw Convention.¹⁰⁶

In its decision, the Ninth Circuit largely deferred to the position of the US government, noting that holding otherwise ‘would be an intrusion into the political sphere’.¹⁰⁷ In establishing the separate treatment of China and Taiwan by the US government, it cites lists of treaties published by the State Department which distinguish between ‘China’ and ‘China (Taiwan)’,¹⁰⁸ but the court also relied on amicus briefs submitted by the US government in the proceedings.¹⁰⁹ Finally, the Court of Appeals noted that it was not ‘independently determin[ing] the status of Taiwan’ but merely ‘defer[ing] to the political departments’ position’.¹¹⁰ While this important caveat certainly

¹⁰⁰ *Atlantic Mutual Insurance Co. v Northwest Airlines*, 796 F.Supp 1188 (E.D. Wis. 1992), relying on the US recognition of the PRC as the sole government of China.

¹⁰¹ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (adopted 15 November 1965, entered into force 10 February 1969) 658 UNTS 163. ¹⁰² *In re Schwinn Bicycle Co., et al. v AFS Cycle & Co., Ltd., et al.*, 190 B.R. 599 (Bankr. N.D. Ill. 1995) para 13.

¹⁰³ *Mingtai Fire & Marine Insurance Co., Ltd. v United Parcel Service* [1999] US Court of Appeals for the Ninth Circuit D.C. No CV-97-20211-JW (1999) 38 ILM 1274; on this decision, see Crawford (n 18) 205ff; Sun (n 98).

¹⁰⁴ Contracting Parties to the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 and the Protocol modifying the Convention signed at the Hague on 28 September 1955 <https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf>.

¹⁰⁵ *Atlantic Mutual Insurance* (n 100).
¹⁰⁶ *Mingtai Fire & Marine Insurance* (n 103); cited with approval by *Allianz Global Risks US Insurance Co. v Latam Cargo USA, LLC*, United States District Court, 31 March 2018, 16-CV-6217 (NGG) (ST) (E.D. New York), as regarding the Warsaw Convention; *In re Air Crash at Taipei, Taiwan on October 31, 2000*, 211 FRD 374, 380 (CD Cal 2002) as regarding the Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention).

¹⁰⁷ *Mingtai Fire & Marine Insurance* (n 103) 1277.
¹⁰⁸ *ibid* 1276–7; for a similar argument in a German court based on the practice of the German government, see S Talmon, *Kollektive Nichtanerkennung illegaler Staaten. Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der türkischen Republik Nord-Zypern* (Mohr Siebeck 2006) 423.

¹⁰⁹ *Mingtai Fire & Marine Insurance* (n 103) 1276–7.
¹¹⁰ *ibid* 1277.

reduces the precedential value of the decision at the international level, it is striking that the District Court in *Pulse Electronics* addresses neither this landmark decision from its own circuit court nor the legal intricacies raised in both that opinion and in the previous and subsequent judgments given by various other District Courts.¹¹¹

Looking beyond the US case law, courts from other jurisdictions have also considered Taiwan not bound by international treaties signed by the PRC.¹¹² This separate treatment of the PRC and the ROC can also be seen in the practice of international organisations.¹¹³ For instance, under the name of Chinese Taipei, Taiwan joined the World Trade Organization (WTO) in 2002 as a 'separate customs territory'.¹¹⁴ It also remained a member of the Asian Development Bank after the accession of the PRC in 1986, albeit being listed from then on as 'Taipei, China'.¹¹⁵

The Ninth Circuit's decision in *Mingtai Fire & Marine Insurance* and the subsequent decisions from different jurisdictions, as well as the practice in international organisations, seem to suggest that the case for generally extending the application of treaties to which the PRC has acceded is difficult to make. The question therefore becomes whether, as the District Court suggests, there are indeed specific policy arguments in the context of the CISG that justify the extension of the Convention to Taiwanese parties.

C. The Fallacy of the Policy Arguments in *Pulse Electronics*

Mindful of the 'confusing' nature of Taiwan's status, the District Court was more comfortable focusing on the policy implications of an extension of the CISG to Taiwan. It noted that the CISG was meant to create worldwide uniformity in sales law. On its own, this argument is a *non sequitur*, as the purpose of the Convention cannot justify its extension beyond its Contracting

¹¹¹ *Allianz Global Risks US Insurance Co. v Latam Cargo USA, LLC* (n 106); *Atlantic Mutual Insurance* (n 100); *In re Air Crash at Taipei, Taiwan on October 31, 2000* (n 106) 380; *In re Schwinn Bicycle Co., et al. v AFS Cycle & Co., Ltd., et al.* (n 102).

¹¹² Oberlandesgericht Düsseldorf, Urt. v. 30 September 2015 – I-18 U 53/18 [2017] RdTW 22, 24, as regarding the Convention for the Unification of Certain Rules for International Carriage by Air (1999 Montreal Convention); Oberlandesgericht Düsseldorf, Urt. v. 17 January 2007 – I-18 U 98/05 [2007] VersR 1147; Oberlandesgericht Köln, Urt. v. 16 January 2007 – 3 U 157/04 [2007] VersR 1149, as regarding the Warsaw Convention; for the Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309, see C Förster, 'Montrealer Übereinkommen, Artikel 1' in M Henssler (ed), *beck-online Großkommentar Handels- und Gesellschaftsrecht* (CH Beck 2022) para 61; for an Italian case, see Tribunale di Napoli, *Fratelli Martinez v Thai Airways*, 23 March 1983, (1989) Air L 213, as cited by A Kadletz, 'Taiwan, China, and the Warsaw Convention: A Comment and Case Note' (1998) 23 *AnnAir&SpaceL* 143, 143–4.

¹¹³ Ahl (n 17) para 33.
¹¹⁴ For detailed information on the status of Taiwan within the WTO, see WTO, 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) and the WTO' <https://www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm>.

¹¹⁵ 'Asian Development Bank and Taipei, China: Fact Sheet' <<https://www.adb.org/publications/taipei-china-fact-sheet>>.

States. A more charitable understanding of the argument could be that the Convention's aim of creating worldwide uniformity of sales law for the benefit of private parties justifies being more generous when determining the Convention's territorial reach than in the case of other international treaties.¹¹⁶ In other words, in instances of doubt, the goal of promoting uniformity in international sales law might tip the balance in favour of the application of the Convention.¹¹⁷ This argument, however, overstretches the underlying reasoning: while the purpose of the Convention may favour a generous construction of its sphere of application in certain cases, it cannot justify its application when, as in the case of Taiwan, it is already doubtful whether the accession of a Contracting State is binding on the territory in question.¹¹⁸

The second policy argument advanced in *Pulse Electronics* is that the CISG has been applied by Chinese courts in cases involving Taiwanese parties. This led the District Court to conclude that the application of the Convention was not against the wish of either China or Taiwan.¹¹⁹ As set out by the Court, it is difficult to find this argument persuasive. First, the court cited an arbitral award rendered under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC) in which the application of the Convention had been agreed upon by the parties.¹²⁰ It is thus of very little value when considering the more general question concerning the application of the Convention absent a choice-of-law clause. Secondly, it is difficult to see how the application of the Convention to a contract between a Chinese and a Taiwanese party advances the argument for extending the scope of the Convention: if Taiwan formed part of the PRC, such a sales contract would not be international for the purposes of Article 1(1) of the CISG.¹²¹ This is confirmed by other Chinese decisions that, in the absence of a choice-of-law clause, expressly reject the application of the CISG on the grounds that the

¹¹⁶ Of course, the CISG also creates obligations under international law for Contracting States, most notably that they will transpose the Convention into domestic law, if necessary under their legal system, and that their adjudicative bodies will properly apply the Convention to the cases it is meant to govern.

¹¹⁷ In other contexts, scholars have coined the Latinised adage '*in dubio pro conventione*': P Perales Viscasillas, 'Article 7' in S Kröll, LA Mistelis and P Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG): Commentary* (2nd edn, CH Beck Hart Nomos 2018) para 65; for a nuanced view with respect to different problems, see J Lookofsky, 'In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)' (2003) 13 *DukeJComp&IntL* 263.

¹¹⁸ For a forceful critique, see HM Flechtner, 'Uniformity and Politics: Interpreting and Filling Gaps in the CISG' in P Mankowski and W Wurmnest (eds), *Festschrift für Ulrich Magnus* (Otto Schmidt/De Gruyter 2014) 196, fn 10.

¹¹⁹ *Pulse Electronics* (n 16) para 46.
¹²⁰ *ibid*, para 44 refers to the 'Chemical cleaning product equipment case', as cited by Yang (n 66): CIETAC, 20 April 1999, CISG/1999/23, CISG-online No 1807, with an English abstract of the decision: 'The parties had not stipulated the applicable law in the contract. However, at the hearing, they explicitly agreed to apply Chinese law to resolve the dispute. Where there was no applicable provision in the law, the CISG should be applied.'

¹²¹ Magnus (n 36) art 93, para 2.

dispute does not involve parties from different States.¹²² Thirdly, and most importantly, it is difficult to see how the Court can construe a single arbitral award as speaking to the 'desires of China and Taiwan' under public international law.

A more generous reconstruction of the District Court's argument could lead to a more nuanced and strategic contention: the Court's statement can at least be taken to indicate that the preferences of the PRC and the ROC should be taken into account when deciding whether Taiwan should be viewed as a territorial unit of a Contracting State. Indeed, China could definitively settle the issue by declaring that the Convention should not extend to Taiwan. In this scenario, the Convention would not be applicable either because Taiwan does not form part of China in the first place, or, if it did, because China had made a reservation under Article 93 of the CISG. A statement by the Taiwanese authorities the Convention should apply to Taiwanese parties could also inform the discussion. As a result, one could understand the Court to mean that courts should apply the CISG as long as neither Taiwan nor China has expressed dissatisfaction with its being applicable. This, however, leaves the realm of legally relevant policy questions and ventures into political territory.¹²³ Declarations on the legal status of Taiwan, even if they pertain to the seemingly non-political field of international commercial law, necessarily follow a political logic and can never be severed from Taiwan's overall status and its relationship with the PRC.

D. *The Need for a Uniform Solution under the CISG*

The absence of compelling policy reasons to extend the CISG to Taiwan prompts the question of how the courts of Contracting States should approach the issue. Some domestic courts do defer to the position of their government when faced with matters of foreign policy and State recognition.¹²⁴ The decision in *Mingtai Fire & Marine Insurance* is a good example: the Court of Appeals expressly referred to the position of the US government on Taiwan, as set out in its amicus brief submitted to the court.¹²⁵ This level of deference to the executive branch may be a particular

¹²² SJ Yang, 'Application of CISG in PRC Court Practice: Tips and Pitfalls' (2014) 4, fn 16, citing *Hongye Industry Co., Ltd. vs. Renshi (Zhuhai) Industry Co., Ltd.*, Zhuhai Intermediate Court (Guandong Province) <<https://nysba.org/NYSBA/Sections/International/Seasonal%20Meetings/Vienna%202014/Coursebook/Panel%208/Juan%20Yang%20paper%208.pdf>>; C Zhang, S Zhang and P Guo, 'China Changzhou Kairui Weaving and Printing Company v Taiwan Junlong Machinery Company' in P Guo, H Zuo and S Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol. 1* (Springer 2022) 325, citing three cases in which the CISG was considered inapplicable for lack of parties in different States; for more detail on the Chinese conflicts rules for cases involving parties having their places of business in the PRC and in Taiwan, see Li (n 53) 317.

¹²³ On the political dimension of the Hong Kong controversy, see Magnus (n 5) 594.

¹²⁴ Yang (n 122) 4. ¹²⁵ *Mingtai Fire & Marine Insurance* (n 103).

characteristic of the US legal system. In other jurisdictions, courts are likely to be more willing to assess the merits of Taiwan's status independently in their judicial reasoning,¹²⁶ without, of course, ignoring the position of their governments.¹²⁷ As a result, the different positions of national governments as well as different degrees of judicial deference may present a challenge for a uniform application of the Convention, as mandated by Article 7(1) of the CISG.

In the context of the CISG, it therefore seems desirable that courts do not simply defer to the position of their governments on the question of the status of Taiwan under international law but that they also take note of international case law and CISG scholarship on the issue in order to develop an internationally uniform solution. Particularly, courts of Contracting States should take account of solutions that could be acceptable at the international level, in order to prevent a fragmentation of case law with respect to Taiwan.¹²⁸ They should, however, not rely on the decision in *Pulse Electronics*, as its reasoning is unconvincing. First, the District Court fails to consider the implications of Taiwan's complicated status and misinterprets the position of the US government. Secondly, and more importantly, the District Court then focuses on Article 93 of the CISG, which does not answer the question of what constitutes a territory of a Contracting State. Apart from these deficiencies, the decision is also an outlier in its conclusion.¹²⁹ Other courts from various jurisdictions have held that the PRC's accession to various other treaties does not result in their being applicable to Taiwan.¹³⁰ In the interests of the internationally uniform application of the Convention, it therefore seems preferable to adopt the approach taken by most courts in the context of other uniform law treaties and to consider Taiwan not bound by the PRC's accession to the CISG. This is in line with those CISG decisions that consider Taiwanese parties as not having their place of business in a Contracting State.¹³¹

V. CONCLUSION

The status of Taiwan in international law remains uncertain. The CISG is no exception in this regard: its provisions do not and cannot resolve one of the most enduring problems of the international legal order. This article has

¹²⁶ See, for instance, the German decisions cited in n 112. On this difference in the context of the Warsaw Convention, see Kadletz (n 112) 146–7. As is demonstrated by *Pulse Electronics* (n 16), some US courts may also make judicial determinations on the merits of Taiwan's status.

¹²⁷ On some common lines of arguments in US and German judgments, see Talmon (n 108) 423–4.

¹²⁸ On the criterion of acceptability as a requirement for the development of the Convention, see B Köhler, *Die Vorteils- und Gewinnherausgabe im CISG. Zugleich ein Beitrag zu Zulässigkeit und Grenzen der eigenständigen Weiterentwicklung des Übereinkommens* (Mohr Siebeck 2021) 59–83.

¹²⁹ The decision of the Czech Supreme Court in *Ideal Bike Corp.* (n 42) does not discuss the issue of Taiwan's status at all and is therefore of little precedential value. See text to nn 42–47 above.

¹³⁰ See the references in nn 102, 106 and 112.

¹³¹ See the references in n 48.

shown that this problem can be solved neither by the application of Article 93 of the CISG nor by resort to the policy goals underlying the Convention. Consequently, *Pulse Electronics* should not be relied upon as persuasive authority by other courts of Contracting States. Rather, the status of Taiwan under the CISG should be determined by public international law. In the context of the CISG as a uniform law convention, however, courts should not defer too quickly to their governments' foreign policy positions but instead should act in accordance with courts of other Contracting States so as to develop an internationally uniform solution. Case law on other uniform law treaties may serve as a model or at least a reference point that can help to build an international consensus. The existing decisions in the context of other conventions seem to suggest that the most promising way of achieving such an international consensus is to consider Taiwan not bound by the Chinese approbation of the Convention. As the process of building an international consensus on this—if it is successful at all—will take time, parties remain well advised to address this uncertainty expressly by means of choice-of-law clauses.¹³²

¹³² Do (n 39) 264.