The Reach of the CISG in China: Declarations and Applicability to Hong Kong and Macao

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1 Introduction

The aim of the United Nations Convention on Contracts for the International Sale of Goods[1] (hereinafter 'CISG' or 'Convention') is to promote worldwide uniformity in dealing with disputes arising from international sales.[2] To date, the CISG has gained worldwide acceptance,[3] and its story has been one of worldwide success.[4] Yet its success is still a fragile one.[5] Indeed, uniformity does not follow automatically from uniform rules.[6] Homeward trends and '*lex forism*' are in the way.[7] Automatic opt outs have led to under utilisation of the CISG in some jurisdictions.[8] Apparently, many of these contributing

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1 United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, 11 April 1980, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/ 1980CISG.html>.

2 P. Schlechtriem, 'The Borderland of Tort and Contract: Opening a New Frontier?', 21 *Cornell Int'l L.J.* 467, at 472 (1988).

3 P. Schlechtriem & I. Schwenzer, in: I. Schwenzer (Ed.), Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG) Introduction* (3rd ed., 2010) (cited as: *Commentary on the CISG* (3rd ed.)).

4 I. Schwenzer & P. Hachem, 'The CISG - Successes and Pitfalls', (Spring) 57 *Am. J. Comp. L.* 457, at 478 (2009).

5 *Id.*, at 458.

6 B. Zeller, *CISG and the Unification of International Trade Law 4-5* (2007). See also C. Andersen, 'Furthering the Uniform Application of the CISG Sources of Law on the Internet', 10 *Pace Int'l L. Rev.* 403, at 404 (1998).

7 See generally F. Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law', 13 *Vindobona Journal of International Commercial Law & Arbitration* 15-42 (2009) (cited as: *Homeward Trend)*.

8 See L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers', 10 *Melbourne Journal of International Law* 141 (2009) (cited as: *Last Outpost*); L. Spagnolo, 'A Glimpse Through the Kaleidoscope: Choice of Law and the CISG (Kaleidoscope Part I)', 13 *Vindobona Journal of International Commercial Law and Arbitration* 135 (2009)

factors to the fragility of its success are external. Yet there are reasons from within the CISG as well.[9] These include, *inter alia*, the declarations authorized by the Convention,[10] to which this chapter is addressed. To explore this part of the CISG story in a specific context, the chapter takes a 'field trip' to China, a significant territory in the map of the CISG where both the successes and (perhaps minor) pitfalls go hand in hand.

On 11 December 1986, the People's Republic of China (hereinafter 'P.R. China' or 'China') approved the CISG with two declarations under Article 95 and Article 96 CISG. As of 1 January 1988, the CISG came into force in China.[11] Over the past 20 years, the CISG has had phenomenal impact in China, proof of which is twofold.

First, the CISG has greatly influenced the evolution of Chinese domestic contract law. Before the Chinese delegation attended the 1980 Diplomatic Conference in Vienna (hereinafter 'Vienna Conference'), China did not have domestic legislation on the subject of contract law, for the country was under a strictly planned economy until the Reform and Opening-up in 1978. However, to some extent, the rationales learnt by the Chinese delegation at the Vienna Conference triggered the enactment of Chinese domestic contract law and special regulation for international trade. Around the time of China's approval of the CISG, several sets of private law rules were promulgated, *i.e.*, the 1981 Economic Contract Law, the 1985 Foreign-Related Economic Contract Law (hereinafter '1985 FECL'), the 1986 General Principles of Civil Law (hereinafter '1986 GPCL') and the 1987 Technology Contract Law.[12] On 1 October 1999, China took a further step towards the unification of

(cited as: *Kaleidoscope Part I*); L. Spagnolo, 'Rats in the Kaleidoscope: Rationality, Irrationality, and the Economics and Psychology of Opting In and Out of the CISG (Kaleidoscope Part II)', 13 *Vindobona Journal of International Commercial Law and Arbitration* 157 (2009) (cited as: *Kaleidoscope Part II*); L. Spagnolo, 'Green Eggs and Ham: The CISG, Path Dependence, and Behavioural Economics of Lawyers' Choices of Law in International Sales Contracts', 6 *Journal of Private International Law* 417 (2010) (cited as: *Green Eggs and Ham*).

9 See generally H.M. 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)', 17 *Journal of Law and Commerce* 187 (1998) (cited as: Several Texts of the CISG).

10 For discussion on the declarations under the CISG, see generally U.G. Schroeter, 'Backbone or Backyard of the Convention?: The CISG's Final Provisions', in: C. Andersen & U. Schroeter (Eds.), *Sharing International Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (cited as: *Kritzer Festschrift*), 428 (2008) (cited as: *Backbone or Backyard*).

11 See CISG: Participating Countries – China (PRC), <http://cisgw3.law.pace.edu/cisg/countries/cntries-China.html>.

12 Thus, between 1 July 1985 and 30 September 1999, the basic applicable laws for international sales in the Chinese legal system were the 1986 General Principles of Civil Law (cited as: GPCL) and 1985 Foreign-Related Economic Contract Law (cited as: FECL), and from 1 October 1999 to the present, they are the 1986 GPCL and 1999 Contract Law. The 1986 GPCL embodies general rules, while the 1985 FECL and 1999 Contract Law set forth more specific provisions. With respect to a given matter on which both the 1986 GPCL and the 1985 FECL/1999 Contract Law apply, the 1985 FECL/1999 Contract Law shall prevail. The

domestic contract law by enacting the Contract Law of the P.R. China (hereinafter '1999 Contract Law'), which repealed the 1981 Economic Contract Law, the 1985 FECL and the 1987 Technology Contract Law. During the drafting of both the 1985 FECL and the 1999 Contract Law, the CISG was one of the most important sources of reference.[13]

Second, with China's active participation in international trade, a great many Chinese cases have been decided under the CISG. To date, the CISG has been applied in one way or another in around 60 Chinese court decisions, and more than 320 arbitrations organized by the China International Economic and Trade Arbitration Commission (hereinafter 'CIETAC').[14] But this is only the count of cases that have been reported thus far. In view of the absence of a regular case reporting system in China,[15] the striking number of Chinese cases reported still appears to be a fraction of the total.[16] Not surprisingly, the application of the CISG in China has been engaging increasing attention from Chinese courts, arbitral tribunals and commentators.[17]

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texts of these statutes are available at <http://www.lawyee.net>. For a more detailed account of the Chinese legal framework regarding international trade, see generally F. Yang, 'The Application of the CISG in the Current PRC Law & CIETAC Arbitration Practice', 2006 *Nordic Journal of CommercialLaw* 2, available at <http://www.njcl.fi/2_2006/article4.pdf>. Considering that the cases decided under the 1985 FECL fall within the scope of the present paper, the provisions of the 1985 FECL will be discussed where necessary, although they ceased to be in effect in 1999.

13 See S. Han, 'The CISG and Its Impact on China', in: F. Ferrari (Ed.), *The CISG and Its Impact on National Legal Systems*, 71 (2008). The legislators of the 1999 Contract Law endeavoured to develop a new contract law which would reflect the recent contractual developments and demands taking place in commercial practice. To this end, they cooperated with the academic circle more closely than ever before, and referred extensively to international and foreign experience. They have also conducted detailed comparisons and discussions of many foreign contract laws and international uniform laws, the CISG and the UNIDORIT Principles being the main references. See D. Ding, 'China and CISG', in: M.R. Will (Ed.), *CISG and China: Theory and Practice*, 25, at 33 (1999).

14 This is the count according to the Pace CISG Database, available at <http://cisgw3.law.pace.edu> and CISG-China Database, available at <http://aff.whu.edu.cn/cisgchina/en>.

15 So far, only selected Chinese court decisions have been reported. Han, *supra* note 13, at 73. In terms of arbitral awards, the CIETAC awards released so far are not as current as commentators would like them to be. In fact, CIETAC releases awards on the CISG three years after they were rendered, see P. Mitchard, 'Is CIETAC Leading Arbitration in Asia into a New Era of Transparency?', 2009 *Asia Pacific Arbitration Review*, at note 27 and accompanying text, available at <http://www.GlobalArbitrationReview.com>.

16 Spagnolo, *Kaleidoscope Part I*, *supra* note 8, note 35-37, observing the safe assertion would be that the number of Chinese CISG cases is enormous. It is speculated that CIETAC will soon overtake all other international arbitral institutions in terms of CISG case numbers, see F. Yang, 'CISG, CIETAC Arbitration and the Rule of Law in the PR of China: A Global Jurisconsultorium Perspective', in: *Kritzer Festschrift*, *supra* note 10, 600, at 601.

17 For an interesting discussion on how the increasing involvement of China in the application of the CISG may force CISG exposure on other (reluctant) jurisdictions, see Spagnolo, *Kaleidoscope Part I*, *supra* note 8, at 138 *et seq*; Spagnolo, *Kaleidoscope Part II*, *supra* note 8, at 172 *et seq*; Spagnolo, *Green Eggs and Ham*, *supra* note 8, at 420 *et seq*.

So far, there has been a wealth of literature on China and the CISG,[18] covering a wide range of topics including the impact of CISG on Chinese domestic law,[19] comparisons between CISG and Chinese contract law,[20] and the application of CISG in Chinese courts and CIETAC arbitration.[21] Among them, China's declarations under the CISG have come under the spotlight.[22] The declarations by China under Articles 95 and 96 CISG have long been causing confusion in theory and in practice. More recently, two purported Article 93 CISG declarations by China, respectively regarding Hong Kong and Macao Special Administrative Regions (hereinafter 'SARs'), have led to remarkably divergent decisions on the applicability of the CISG to SARs, further adding to the current uncertainty in practice.

This chapter will examine the diverse approaches to the effect of China's declarations in theory and in practice.[23] In so doing, it seeks to identify the underlying problems, and explore what can be done to improve the *status quo*. Part 2 of this chapter will examine the effect of China's Article 95 CISG declaration, followed by a proposition to eliminate

18 See Bibliography of CISG, Materials in Chinese, <http://cisgw3.law.pace.edu/cisg/biblio/biblio-chi.html>.

19 See, *e.g.,* Ding, *supra* note 13, at 25-37; B. Zeller, 'CISG and China', in: M.R. Will (Ed.), *CISG and China: Theory and Practice*, 7 (1999); Han, *supra* note 13.

20 See, *e.g.*, C. Wang, 'A Comparison Between the CISG and the FECL (Part I)', 3 *Chinese Legal Science* 106 (1989); C. Wang, 'A Comparison Between the CISG and the FECL (Part II)', 4 *Chinese Legal Science* 114 (1989); C. Wang, 'A Comparison Between the CISG and the FECL (Part III)', 5 *Chinese Legal Science* 115 (1989); J. Shen, 'Declaring the Contract Avoided: The U.N. Sales Convention in the Chinese Context', 10 *N.Y. Int'l L. Rev.* 7 (1997) (cited as: *Declaring the Contract Avoided*); Y. Yang, 'Suspension Rules under Chinese Contract Law, the UCC, and the CISG: Some Comparative Perspectives', 2008 *China Law & Practice* 23, at 23-27, available at <http://cisgw3.law.pace.edu/cisg/biblio/yang.html>.

21 See, *e.g.,* M.S. Jacobs & Y. Huang, 'An Arbitrator's Power and Duties Under Art. 114 of Chinese Contract Law in Awarding Damages in China in Respect of a Dispute under a Contract Governed by CISG', 20 *Mealey's International Arbitration Report* 39 (2005); D. Wu, 'CIETAC's Practice on the CISG', *Nordic Journal Commercial Law* 1 (2005); F. Mohs & B. Zeller, 'Penalty and Liquidated Damages Clauses in CISG Contracts Revisited', 21 *Mealey's International Arbitration Report* 1 (2006); Yang, *supra* note 12; A.E. Butler, 'Contracts for the International Sale of Goods in China', 21 *International Litigation Quarterly* 3 (2006); M. Koehler & Y. Guo, 'The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems: An International Comparison of Three Surveys on the Exclusion of the CISG's Application Conducted in the United States, Germany and China', (Spring) 20 *Pace Int'l L. Rev.* 45 (2008); Y. Xiao & W. Long, 'Selected Topics on the Application of the CISG in China', 20 *Pace Int' L. Rev.* 61 (2008) (cited as: *Selected Topics)*.

22 See, *e.g.,* X. Wang & C.B. Andersen, 'The Chinese Declaration Against Oral Contracts Under the CISG', 8 *Vindobona Journal International Commercial Law & Arbitration* 145 (2004); U.G. Schroeter, 'The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods', 16 *Pace Int'l L. Rev.* 307 (2004) (cited as: *Hong Kong and Macao*); Yang, *supra* note 12.

23 All the arbitration awards reviewed in this chapter are reported by the China International Economic and Trade Arbitration Commission (cited as: CIETAC). The English versions of these awards are available online through the Pace Law School CISG Database at <http://www.cisg.law.pace.edu/cisg/text/casecit.html#china>. In addition, as of 2 December 2007, around 30 further CIETAC cases have been reported since the publication of the two articles concerning arbitral practice on the CISG, *i.e.* Wu, *supra* note 21, and Yang, *supra* note 12.

the confusion. The effect of China's Article 96 CISG declaration will then be dealt with in Part 3, leading up to a similar solution to the problems hitherto encountered. The respective status of Hong Kong and Macao will be treated from a historical perspective in Part 4, based on which possible improvements relative to the current situation will be suggested. Illustrations follow in Part 5, in which the application of the CISG to SARs will be analyzed in typical scenarios. Finally, some evaluations and suggestions will be given as concluding remarks in Part 6.

2 Indirect Application: The Article 95 Declaration

Pursuant to Article 1(1)(b) CISG, the CISG applies 'indirectly' where the parties do not have their places of business in different Contracting States as required by Article 1(1)(a) CISG, but conflicts rules refer to the law of a Contracting State, and the parties have their places of business in different states (though not different Contracting States). China filed a declaration pursuant to Article 95 CISG, which is designed to exclude such 'indirect' application.[24] In general, the effects of Article 95 CISG declarations are controversial.[25] Yet in China, it is even more so than in other jurisdictions.[26] The following discussion is confined to the effect of the declaration on the courts of Mainland China. The extension of this declaration to SARs, as well as its effect on the courts of other Contracting States, will be examined in Part 5.[27]

2.1 Effect of the Declaration

At the time of its declaration, China had envisaged separate legislation on international trade (of which the 1985 FECL later formed part), so as to protect the immature domestic market and to buffer the impact of the rapid Reform and Opening-up.[28] China's declaration

24 China's declaration pursuant to Art. 95 CISG states: 'The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of article 1 […]' CISG: Participating Countries – China (PRC), available at <http://cisgw3.law.pace.edu/cisg/countries/cntries-China.html>. Art. 95 CISG provides: 'Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.'

25 For a synopsis of the pros and cons on the subject, see Spagnolo, *Last Outpost, supra* note 8, at 143-144.

26 So far, the Contracting States that have made Art. 95 CISG declarations are Armenia, China, Canada, the Czech Republic, Singapore, Slovakia, St Vincent and the Grenadines, and the U.S. Canada withdrew its declaration on 31 July 1992. *See* Status of the CISG, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en#10>. It is believed that despite the general controversy regarding the effects of Art. 95 CISG, the 'core principle […] is clear'. See I. Schwenzer & P. Hachem, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 1 para. 37.

27 See *infra* notes 229, 233-243 and accompanying text.

28 It is believed that the Chinese delegation became aware of this idea at the Vienna Conference, see Yang, *supra* note 12, at 7.

may also have been influenced by the fact that the U.S. had made its own Article 95 CISG declaration to protect U.S. traders from being deprived of the use of their familiar domestic law, without the countervailing gain of supplanting the foreign law of trading partners in non-contracting states.[29]

Against this background, some commentators believe that the declaration is intended to prevent the application of the CISG to contracts where one of the parties has its place of business in China and the other in a non-contracting state.[30] Other scholars observe that its purpose is to ensure the application of Chinese domestic law, where selected by conflicts rules, in cases involving a party in China. According to the latter understanding, where parties have their places of business in China and a non-contracting state, respectively, the CISG may still apply under Article 1(1)(b) CISG if conflicts rules point to the law of a Contracting State other than China.[31] True, in that case, it would be perverse to apply the Contracting State's domestic law, especially when that state has not entered an Article 95 CISG declaration.[32] Nevertheless, to interpret Article 95 CISG in a uniform manner, one must stay true to the wording of this provision. Since China has declared under Article 95 CISG that 'it will not be bound by' Article 1(1)(b) CISG, this declaration discharges China from the obligation to apply CISG whether conflicts rules refer to the law of China or any other Contracting State, irrespective of whether Chinese parties are involved. This being said, it should be stressed that the declaration does not by any means prohibit application of the CISG. Nevertheless, the effect of this declaration is indeed undermined by several cases within the scope of Article 1(1)(b) CISG in which the CISG was applied by virtue of Chinese domestic law or as evidence of international usages.[33]

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29 Other states shared China's concern that domestic traders be protected by a declaration excluding Art. 1(1)(b) CISG. For example, representatives from Czechoslovakia were concerned about the impact of Art. 1(1)(b) CISG in denying their traders the benefit of domestic codes for international trade, *see id.*

30 Z. Chen & J. Wu, 'On the Application of the CISG in China: With Comment on Article 142 of the GPCL', 2004 *Legal Science* 112, at 116.

31 G. Wang, 'The Sphere of Application and Principles of Interpretation of the CISG', in: *Chinese Yearbook of International Law*, 239 at 249 (1989). But see P. Schlechtriem, in: P. Schlechtriem & I. Schwenzer (Eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 1 para. 41 (2nd ed., 2005) (cited as: *Commentary on the CISG* (2nd ed.)). Schlechtriem seemed to indicate that in the present scenario, the CISG will apply only if the Contracting State whose law is determined by conflict rules has not made a declaration under Art. 95 CISG.

32 M. Bridge, *The International Sale of Goods* 543 (2007) (cited as: *International Sale of Goods*). Similarly J. Honnold & H. Flechtner (Eds.), *Uniform Law for International Sales under the 1980 United Nations Convention* (2009). Bridge correctly pointed out that Honnold's conclusion is based on conflict-of-laws considerations, but not on the forum's treaty obligations under the CISG. Bridge, *id.*, at note 216.

33 For further references in this respect, see Xiao & Long, Selected Topics, *supra* note 21, at 68-72.

China's Article 95 CISG declaration has also been regarded as having influence on parties' rights to opt in to the CISG at the level of conflict of laws.[34] In a sales case submitted to the Shanghai Commission of CIETAC involving differences between a Chinese seller and Korean buyer, decided before South Korea's accession to the CISG, it was held the CISG could not apply under Article 1(1)(a) CISG. The Tribunal ruled that the parties had chosen the CISG by basing their claims and defences on it in the hearings. However, under the belief that the declaration by China against Article 1(1)(b) CISG precluded application of the CISG to contracts between parties from China and non-contracting states, the Tribunal concluded that party autonomy should be restricted in the instant case and the CISG should not apply.[35] The reasoning of this award derives from the above view,[36] *i.e.*, China's Article 95 CISG declaration prohibits the application of the CISG to contracts where the parties are in China and a non-Contracting State respectively. Accordingly, the declaration is considered as creating a mandatory rule which prohibits parties from opting in to the CISG in the present scenario.[37] In the present author's opinion, however, the Article CISG 95 declaration only releases China from the obligation to apply the CISG in cases described under Article 1(1)(b) CISG,[38] but does not prohibit its application. Thus, in Mainland courts and CIETAC arbitrations (seated in the Mainland and applying Mainland conflict rules), opting-in to the CISG at the conflict-of-laws level should be allowed insofar as it is permissible under the Mainland conflict of laws.[39]

2.2 Potential Withdrawal of the Declaration

Recently, China's potential withdrawal of the declaration has raised concerns. It is submitted that the declaration should be withdrawn mainly for four reasons. First and foremost, as mentioned, rapid economic development has contributed to the change of China's

34 For the permissibility of opting-in to CISG in Mainland courts and CIETAC arbitrations, see *infra* notes 252-266 and accompanying text.

35 See Chen & Wu, *supra* note 30, at 115. However, a contrary position was taken in another similar case where the parties also intended their choice of the CISG to operate at the level of conflict of laws. In that case, a dispute arose between a Chinese seller and a Japanese buyer who designated 'Chinese law, international conventions and international usages' as the applicable law. Manifestly, the CISG could not apply under Art. 1(1)(a) CISG because Japan was not a Contracting State. Nevertheless, the Xiamen Intermediate People's Court deferred to the parties' choice and applied the CISG. See *Sanming Tsusho (Japan) Corp. v. Fujian Zhangzhou Metals & Minerals Import & Export Co.*, Xiamen Intermediate People's Court, August 1994 (Xiajing Chuzi No. 124).

36 See Chen & Wu, *supra* note 30, at 116.

37 *Id.*

38 Similarly Honnold & Flechtner (Eds.), *supra* note 32, at 44, para. 47.6 (observing that Art. 95 CISG merely frees the declaration state from Art. 1(1)(b) CISG).

39 But see Schlechtriem, in: *Commentary on the CISG* (2nd ed.), *supra* note 31, Art. 95 para. 3 ('As a rule, […] a reservation state will not apply the CISG in such a situation […]'). For the permissibility of choosing the CISG in its own right under Mainland conflicts law, see *infra* notes 252-266 and accompanying text.

domestic legislation with one single body of law, *i.e.*, the 1999 Contract Law, replacing the separate pieces of legislation on domestic and international contracts. Legislators of the 1999 Contract Law have made frequent references to the CISG, and the application of the two sets of rules will lead to quite similar, if not identical, results. Thus, one of the initial intended functions of the declaration, that is, to protect traders in China through domestic legislation on international trade that differs from the CISG, has been largely undermined. Further, should the CISG apply under Article 1(1)(b) CISG where conflicts rules lead to Chinese law, the interests of China and Chinese parties would not be prejudiced, since the CISG provides Chinese parties with protections similar to those under the 1999 Contract Law.[40]

Second, where the law of a contracting state other than China is referred to by conflict rules, withdrawal of the declaration will enable the application of the CISG, which would not only relieve Chinese courts from proof of foreign laws, but would also protect Chinese parties from foreign laws with a body of neutral international law. Third, with 76 states having adopted the CISG (and more to be expected),[41] including most of China's major trade partners, the effect of the declaration has been and will continue to be minimal in any event.[42] Last but not least, withdrawal of the declaration will not only eliminate confusion as to the declaration's effects, but will also contribute to uniformity in the outcome of trade disputes by retaining the application of the CISG.[43]

If the Chinese government wishes to withdraw the declaration, it may do so, pursuant to Article 97(4) CISG, at any time by a formal notification in writing addressed to the depositary, *i.e.*, Secretary-General of the UN. This procedure worked well for Canada, the only country so far which has withdrawn its Article 95 CISG declaration.[44] In accordance with Article 97(4) CISG, such withdrawal will take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the depositary.

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40 Xiao & Long, *Selected Topics*, *supra* note 21, at 68.

41 So far, the CISG has not entered into force in Ghana and the Bolivarian Republic of Venezuela, see UNCITRAL Status 1980 – United Nations Convention on Contracts for the International Sale of Goods, <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.

42 See similarly Bridge, *International Sale of Goods*, *supra* note 32, at 545.

43 Other good reasons have been given for a possible withdrawal of Singapore's Art. 95 CISG declaration. See G.F. Bell, 'Why Singapore Should Withdraw Its [Article 95] Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)', 9 *Singapore Yearbook of International Law* 55, at 61-70 (2005) (cited as: *Singapore*). Some of these reasons hold good for the case of China as well.

44 For more details on the Canadian withdrawal, see *id.,* at 71.

The withdrawal will also have to be effectuated in Chinese domestic law. The Constitution of the P.R. China (hereinafter 'Chinese Constitution') is silent on the approaches to the implementation of treaties in China. Nevertheless, it is generally believed that China adopts a monist approach to the implementation of treaties on civil and commercial matters in internal law.[45] In this respect, attention is drawn to Article 142(2) 1986 GPCL, which provides:

> If any treaty concluded or acceded to by the P.R. China contains provisions differing from those in the civil laws of the P.R. China, the provisions of the former shall apply, unless the P.R. China has announced reservations to these provisions.[46]

This provision enforces the principle of *pacta sunt servanda* in Chinese domestic law. Notwithstanding its misleading wording which is open to criticism,[47] the provision manifestly incorporates treaties on substantive civil and commercial matters into Chinese internal law. Yet under Chinese law, it is unclear whether a certain procedure must be fulfilled for a given treaty to be implemented.[48] In the case of CISG, before and after the Convention entered into force on 1 January 1988, a number of administrative directives,[49] judicial interpretations[50] and other official documents[51] were issued. These instruments either notified the Chinese stakeholders of China's approval of the CISG and its entry into force, or directed Mainland courts to apply the CISG when its basic requirements were

45 See Y. Xiao, *Principles of Private International Law*, 291-300 (2007); W. Zhu & Q. Li, *The Law of Treaties*, 223-224 (2008).

46 This provision concerns treaties on substantive civil and commercial matters. Similarly, Art. 236 1982 Civil Procedure Law of P.R. China (amended 2007) provides: 'If any treaty concluded or acceded to by the P.R. China contains provisions differing from those in this Law, the provisions of the former shall apply, unless the P.R. China has announced reservations to these provisions.' This provision deals with treaties on procedural civil and commercial matters.

47 The wording of this provision has directed Chinese courts to base the application of CISG on the condition that the CISG 'contains provisions differing from those in the civil laws of the P.R. China', rather than on the conditions set forth by Art. 1 CISG. For further references, see Xiao & Long, *Selected Topics*, *supra* note 21, at 70-71.

48 According to the Law of the P.R. China on the Procedure of Conclusion of Treaties, Arts. 15 and 16, treaties to which China is a contracting party should be officially published. Yet it is unclear whether this is the precondition for the effectuation of treaties in China. See Xiao, *supra* note 45, at 292.

49 See, *e.g.*, Notice of the Implementation of CISG, 87 Waijingmao Fazi No. 2, issued by the then Ministry of Foreign Trade and Economic Cooperation on 22 January 1987; Notice on Several Issues Regarding the Implementation of the CISG, issued by the then Ministry of Foreign Trade and Economic Cooperation on 4 December 1987, available at <http://www.lawyee.net>.

50 See, *e.g.*, Notice on Circulation of the Notice of the Implementation of CISG, Fa (Jing) Fa (1987) No. 34, issued by the Supreme People's Court on 10 December 1987.

51 See, *e.g.,* Memorandum of the National Working Meeting on Adjudication of Economic Cases Involving Foreign, Hong Kong and Macao Elements in Coastal Regions, Fa (Jing) Fa (1989) No. 12, issued by the Supreme People's Court on 12 June 1989.

met. Although it is unclear whether these instruments *de iure* effectuated the CISG in China, they indeed *de facto* facilitated its implementation in China. Thus, if China withdraws the Article 95 CISG declaration, it seems advisable, and necessary in practice, that similar directive instruments be issued to realize the effect of the withdrawal.

If directive instruments are needed in the event of withdrawal, they should ensure withdrawal is (*de facto*) effectuated internally on the same day as it takes effect internationally.[52] Moreover, another two issues need to be addressed in the directive instruments: the applicability of the CISG to offers made before the withdrawal, and its applicability to contracts concluded before the withdrawal. In this regard, an agreeable formula has been advanced for the potential withdrawal by Singapore.[53] This formula derives from analogy to Article 100 CISG, which deals with the entry into force of the Convention in a Contracting State.[54] The present author proposes that the same formula be adopted by China in the event of withdrawal. Thus, the directive instrument(s) may contain the following guidelines:

> (1) When, under Article 1(1)(b) CISG, the rules of private international law lead to the application of the law of a Contracting State, the CISG applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when China's withdrawal is to take effect.
>
> (2) When, under Article 1(1)(b) CISG, the rules of private international law lead to the application of the law of a Contracting State, the CISG applies only to contracts concluded on or after the date when China's withdrawal is to take effect.

52 This proposal also draws on the experience of Canada. When Canada withdrew its Art. 95 CISG declaration, it made sure that its internal legislation and the withdrawal came into force on the same day. A similar proposal was also advanced for Singapore. See Bell, *Singapore*, *supra* note 43, at 71-72.

53 The proposed transitional measures for Singapore are as follows: '(1) When, under Article 1(1)(b), the rules of private international law lead to the application of Singapore law, the CISG applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when Singapore's withdrawal is to take effect. (2) When, under Article 1(1)(b), the rules of private international law lead to the application of Singapore law, the CISG applies only to contracts concluded on or after the date when Singapore's withdrawal is to take effect.' See Bell, *Singapore*, *supra* note 43, at 70-71.

54 Art. 100 CISG provides: '(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1. (2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.'

3 Formal Validity: The Article 96 CISG Declaration

3.1 Wording of the Declaration

Upon approval of the CISG, China made the following declaration:

> The People's Republic of China does not consider itself to be bound by…article 11 as well as *the provisions in the Convention relating to the content of article 11*.[55]

The wording of this declaration has given rise to doubts as to its qualification as an Article 96 CISG declaration.[56] Indeed, unlike the declarations made by other countries under Article 96 CISG, this declaration is not couched in the precise phraseology called for by Article 96 CISG.[57] It only expressly refers to Article 11 CISG, and does not directly mention Article 29 or Part II of the CISG. Nor does it declare that the cited provisions do not apply where a party's place of business is in China, and hence it is unclear under what circumstances China intends to exclude the application of these provisions. Moreover, it fails to identify the CISG provision pursuant to which the declaration was made. Yet it is premature to conclude that the unclear wording renders the declaration ineffective. Here, it is worth noting that the position of Articles 12 and 96 CISG is 'take it or leave it'. Thus, if any 'non-written form' provision of Article 11, Article 29 CISG or Part II is to be excluded, they are to be excluded altogether. Further, Article 98 CISG stipulates that no reservations are permitted except those expressly authorized in the CISG. Therefore, to determine the effect of China's declaration, it is necessary to examine whether the declaration can be located within the wording of Articles 12 and 96 CISG.

In this respect, regard is to be had to the intention of China. First, at the time of China's declaration, China had already promulgated the 1985 FECL, a regulation specifically relating to international contracts involving Chinese parties. Under the 1985 FECL, written

55 See Status of the CISG, *supra* note 26 (emphasis added).

56 See Schroeter, *Backbone or Backyard, supra* note 10, at 450.

57 Art. 96 CISG provides: 'A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any 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 that State.' So far, apart from China, Argentina, Armenia, Belarus, Chile, Estonia, Hungary, Latvia, Lithuania, Paraguay, Russian Federation and Ukraine have also made use of Art. 96 CISG. Estonia withdrew its declaration on 9 March 2004. All the declarations, except for the one by China, resemble the wording of Art. 96 CISG. See CISG: Table of Contracting States, available at <http://www.cisg.law.pace.edu/cisg/countries>.

form was required for a contract, its modification, termination by agreement, any offer, acceptance, and other indication of intention.[58] Given this requirement for written form concerning all aspects of a contract, it stands to reason that the declaration's wording 'the provisions in the Convention relating to the content of article 11' refers to Article 29 CISG and the relevant provisions of Part II.[59] Thus, the declaration fits within the pigeonhole of Articles 12 and 96 CISG.

Second, the 1985 FECL made it clear that the written form requirement under the statute was aimed at international contracts involving Chinese parties.[60] China's need for protection of Chinese (state-owned in particular) entities against claims unsupported by a written agreement, and the rationale it learned from the U.S.S.R. at the Vienna Conference,[61] would naturally lead to China's intention to exclude the application of the 'non-written form' provisions of the CISG to contracts involving parties whose places of business were in China. Such an exclusion is expressly authorized by Articles 12 and 96 CISG. Indeed, there is no reason why China's declaration should be treated differently from the Article 96 CISG declarations filed by other countries which share(d) the same concerns and needs.

3.2 Effect of the Declaration

The effect of China's Article 96 CISG declaration is a matter of dispute. The following discussion centres upon the effect of the declaration on Mainland courts. The extension of this declaration to SARs, as well as its effect on the courts of other Contracting States, will be examined in Part 5.[62]

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58 See, *e.g.,* Art. 7 1985 FECL provides: '[A] contract shall be formed as soon as the parties to it have reached a written agreement on the terms and have signed the contract. If an agreement is reached merely by means of letters, telegrams or telex and one party requests a signed letter of confirmation, the contract shall be formed only after the letter of confirmation is signed . . . . '. Written form was also required under Art. 32 1985 FECL, regarding modification and termination by agreement.

59 See Y. Zhang, *Uniform Law for International Sales: Commentary on the United Nations Convention on Contracts for the International Sale of Goods* 103 (2009) (stating that China has declared under Art. 96 CISG against the relevant provisions of Art. 11, Art. 29 and Part II of the CISG). Note that the cited author was former Director, Department of Treaty and Law, Ministry of Commerce of the P.R. China.

60 See Art. 2 1985 FECL.

61 The law of the U.S.S.R. imposed strict formal requirements for the making of foreign trade contracts. In the UNCITRAL proceedings, representatives of the U.S.S.R. indicated that the preservation of these requirements was of great importance to protect established patterns for creation of foreign trade contracts. See Honnold & Flechtner (Eds.), *supra* note 32, at 186, para. 128. The fact that the State was responsible for international trade in the U.S.S.R. may have led to such concerns. A similar situation also existed in China in the 1980s, where state-owned entities were actively taking part in international trade on behalf of the PRC. See Wang & Andersen, *supra* note 22, at 155.

62 See *infra* notes 229-232 and accompanying text.

In the Chinese literature, opinions are divergent as to whether the Article 96 CISG declaration *per se* imposes a requirement of written form in cases involving Chinese parties. Some commentators advocate that, in cases concerning parties from China and another Contracting State, contracts must be concluded in written form.[63] This position has found support not only in numerous CIETAC arbitrations,[64] but also in foreign court decisions.[65] This view is unconvincing in that the Article 96 CISG declaration only relieves China from the obligation to recognize contracts in all forms, but imposes no obligation to enforce only written contracts.[66] Moreover, in view of the *erga omnes* effect of the declaration, this understanding would result in universal applicability of the (then) written form requirement under Chinese law.[67] Further, it may even encourage other states to make an Article 96 CISG declaration in order to extend the influence of its own law, which would undermine the goal of establishing uniform sales law.[68]

Other writers rely upon Article 21 of the Vienna Convention on the Law of Treaties (hereinafter 'Vienna Treaty Convention'),[69] which deals with legal effects of reservations and of objections to reservations, in interpreting the effect of China's Article 96 CISG declaration. According to this view, in cases involving parties from China and another Contracting State, the effect of the declaration depends on whether the other state has made an Article 96 CISG declaration. If it has not, the effect of the declaration depends on whether that other state raised an objection to the declaration.[70] This understanding is flawed in that the Vienna Treaty Convention itself indicates that its application is only residuary,[71] let alone the doubtful applicability of its Article 21 to declarations under the

63 Z. Chen, 'Comments on the Formality of Contracts for International Sale of Goods' (in Chinese), 1997 *Legal Science* 25-26. This is nowadays the minority view in other jurisdictions. For a synopsis of the literature holding this view in other jurisdictions, see P. Schlechtriem & M. Schmidt-Kessel, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 12 para. 2.

64 See, *e.g.,* CIETAC Arbitration proceeding, China, 6 September 1996, available at <http://cisgw3.law.pace.edu/cases/960906c1.html>; CIETAC Arbitration proceeding, China, 31 December 1997, available at <http://cisgw3.law.pace.edu/cases/971231c1.html>. See similarly CIETAC Arbitration proceeding, China, 17 October 1996, available at <http://cisgw3.law.pace.edu/cases/961017c1.html>.

65 See, *e.g.,* Supreme Court, Austria, 31 August 2005 (7 Ob 175/05v), available at <http://cisgw3.law.pace.edu/cases/050831a3.html>, (cited as: *Tantalum case*). In that case, the court of first instance seemingly considered that China's Art. 96 CISG declaration mandates the application of Chinese law. Interestingly, although at the time China had already adopted the 1999 Contract Law permitting oral contracts, the court of first instance deemed that written form was still required under Chinese law.

66 See P. Si, 'The Nature of Declarations', 1997 *Legal Science* 23.

67 Schroeter, *Backbone or Backyard, supra* note 10, at 442.

68 Honnold & Flechtner (Eds.), *supra* note 32, at 189.

69 United Nations, Treaty Series, Vol. 1155, at 331 (2005).

70 See W. Ding, 'Two Viewpoints on the Formality of Chinese Contracts for International Sale of Goods' (in Chinese), 1997 *Legal Science* 24, at 24-25.

71 Art. 20(a) Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> (cited as: Vienna Treaty

CISG.[72] Since Articles 12 and 96 CISG contain sufficiently clear rules on the effect of the declaration, there is simply no room for the Vienna Treaty Convention to come into play.

When determining the effect of the declaration, regard is to be had to the text of Article 12 CISG, which clearly provides the effect of the declaration is merely that 'any provision of article 11 [and other provisions of the CISG permitting non-written form] does not apply'. No contrary indications concerning the meaning of the wording of Article 12 CISG can be found from the legislative history of the CISG.[73] Accordingly, the declaration only excludes the application of relevant provisions of the CISG, but leaves the matter of formal validity to the applicable law determined by the forum's conflicts rules. Currently, this seems to be the prevailing view across the globe,[74] and has gained worldwide support in practice.[75] Yet even within this school of thought, opinions remain divided on whether, if the forum's conflict rules lead to the law of a non-declaration state, Article 11 CISG or the domestic rules as to form of that state should prevail.[76]

Convention), provides: '[A]cceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States'. See also Schroeter, *Backbone or Backyard, supra* note 10, at 4-7.

72 It has been argued that 'the reservations addressed by Article 21 [Vienna Treaty Convention] are selective and not general. Reservations declared under private law conventions are, however, general in nature… They have a general character and therefore are not subject to Article 21': J. Basedow, 'Uniform Private Law Conventions and the Law of Treaties', *U. L. Rev*. 731, at 741 (2006-4).

73 See Honnold & Flechtner (Eds.), *supra* note 32, at 191; J. Rajski, in: C.M. Bianca and M.J. Bonell (Eds.) *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (cited as: *Bianca & Bonell Commentary*), Art. 96 para. 1.2 (1987).

74 See, *e.g.*, Honnold & Flechtner (Eds.), *supra* note 32 at 188-189; Schlechtriem & Schmidt-Kessel, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 12 para. 2; Bridge, *International Sale of Goods*, *supra* note 32, at 559; Rajski, *ibid*, Art. 12 para. 2.3.

75 *Adamfi Video v. Alkotók Studiósa Kisszövetkezet*, Metropolitan Court, Hungary, 24 March 1992 (12.G.41.471/1991/21), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920324h1.html>; *Vital Berry Marketing NV v. Dira-Frost NV*, Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995 (A.R. 1849/94, 4205/94), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950502b1.html>; *J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij*, Supreme Court, Netherlands, 7 November 1997 (16.436), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971107n1.html>; Supreme Court, Austria, 22 October 2001 (1 Ob 77/01g), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011022a3.html>; Presidium of the Supreme Arbitration Court of the Russian Federation, Russia, 20 March 2002 (Resolution No. 6134/01), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020320r1.html>; *Forestal Guarani S.A. v. Daros International, Inc.*, 613 F.3d 395, (3rd Cir.), United States, 21 July 2010, available at <http://cisgw3.law.pace.edu/cases/100721u1.html>.

76 For positions in favour of the domestic rules as to form of the non-declaration state, see Honnold & Flechtner (Eds.), *supra* note 32, at 189-191; Bridge, *International Sale of Goods*, *supra* note 32, at 559-560; Flechtner, *Several Texts of the CISG*, *supra* note 9, at 196-197. For arguments in favour of Art. 11 CISG, see P. Schlechtriem & M. Schmidt-Kessel, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 12 para. 3; Schroeter, *Backbone or Backyard, supra* note 10, at 443-444.

Nonetheless, at the time when the writing requirement under the 1985 FECL was in force, the intense debate on the above issue would not be of practical significance in Chinese courts and CIETAC arbitrations. Given China's need at the time for protection of Chinese entities against claims unsupported by written agreements, the rule as to written form under the 1985 FECL would be qualified as an expression of overriding mandatory rules or *lois d'application immediate*, which served China's crucial interests that must be preserved.[77] In fact, as evidenced by the Argentine court decision on *Qûilmes Combustibles v. Vigan*,[78] other declaration states – which consider their declarations under Article 96 CISG to be essential – would probably, for reasons of (positive) public policy, also apply their own rules of form.[79] Thus, in cases involving parties from China before Mainland courts, the writing requirement under the 1985 FECL would claim application to the contract regardless of the law which may otherwise apply. In fact, in a number of Chinese cases involving a Chinese party, the 1985 FECL rules on written form were directly applied for reasons which were unclear from the record.[80] These decisions would have been justified had the tribunals expressly applied the rules in the name of overriding mandatory rules. The overriding application of these rules would also be possible in foreign courts, if the forum state's conflict of laws dictated respect for a third country's mandatory rules.[81]

At the present time, however, the divergent approaches to the effect of China's declaration may be of practical relevance in Chinese courts and CIETAC arbitrations. Since the 1999 Contract Law – which repealed the 1985 FECL – recognizes contracts in any form,[82] the

77 W. Li, 'Discussion on Several Cases Concerning the Formation of Contracts for International Sale of Goods: A Comparison Between the CISG, UCC and Chinese Contract Law', 3 *Study of Comparative Law* 117, at 121 (2004) (expressly advocating such a qualification).

78 Appellate Court, Argentina, 15 March 1991, available at <http://cisgw3.law.pace.edu/cases/910315a1.html>. Abstract available at <http://www.unilex.info>. The suit was filed by an Argentine buyer against a Belgian seller. The Court observed that the agreement was not contrary to the Argentinian public policy rule which provides that international contracts for the sale of goods must be made in writing. Note that Argentina was and is still an Art. 96 CISG declaration state.

79 See also F. Enderlein & D. Maskow, *International Sales Law* 383 (1992).

80 See, *e.g.*, CIETAC Arbitration proceeding, China, 29 March 1999, available at <http://cisgw3.law.pace.edu/cases/990329c1.html> (*Caffeine case*); CIETAC Arbitration proceeding, China, 29 September 1997, available at <http://cisgw3.law.pace.edu/cases/970929c1.html>; CIETAC Arbitration proceeding, China, 8 October 1997, available at <http://cisgw3.law.pace.edu/cases/971008c1.html>.

81 Similarly Bridge, *International Sale of Goods*, *supra* note 32, at 559 ('A court in a non-declaring State should therefore apply its own choice of law rules on formal validity, taking account of the mandatory rules of another State to whatever extent is consistent with the provisions of the Rome Convention as enacted in the Contracts (Law Applicable) Act 1990').

82 In regard to formal validity, contracts in all forms are permitted, the only exception being that the relevant laws and regulations require, or the parties agree to employ, written form: Art. 10 1999 Contract Law. Art. 36 1999 Contract Law further provides that, notwithstanding the requirement of written form under relevant laws and regulations or as agreed by parties, if one party has fulfilled its major obligations and the other party has accepted performance, the contract has been concluded even though no written form is used.

Chinese rules as to form can no longer be considered as internationally mandatory rules. Thus, the matter of formal validity should be determined by the law applicable pursuant to conflict rules. Interestingly, in the more recent *Carl Hill v. Cixi Old Furniture Trade Co., Ltd.*,[83] where the CISG was considered applicable, the Court, without any choice of law process, held that an oral contract was valid. The scenario was repeated in *Zhuhai Zhongyue New Communication Technology Ltd. v. Theaterlight Electronic Control & Audio System Ltd.*[84] It is unclear from the record whether the effect of China's Article 96 CISG declaration was ever considered by these courts.[85] Nevertheless, given Chinese courts' comfort for direct application of the *lex fori* (which is *pro* freedom as to form in nature), the practical relevance of the above-mentioned approaches might regrettably turn out to be insignificant.

Recently, doubts have been raised as to whether, since current Chinese domestic law no longer requires written form for contracts,[86] China is still entitled to an Article 96 CISG declaration.[87] Here, it is irrelevant whether the legislation of the SAR requires contracts to be concluded in or evidenced by writing. The 'writing' requirement in domestic law is only a precondition for filing an Article 96 CISG declaration.[88] It has no bearing on the effect of the declaration. Therefore, the force of the declaration remains unaffected. The only way to remove the effect of the declaration is to withdraw it in accordance with Article 97(4) CISG.[89] This is not only out of respect for the provisions of the CISG, but is also in the interest of certainty and predictability in international transactions.[90] Having said that, the current inconsistency between China's declaration and Chinese domestic law would easily lead to doubts in practice.[91]

Apparently, the Chinese legislators' attitude towards the formality of contracts has changed to give parties more freedom of choice and meet the ever-changing needs in practice.

83 Cixi People's Court, China, 18 July 2001 ((2001) Cijing Chuzi No. 560), available at <http://cisgw3.law.pace.edu/cases/010718c1.html>.

84 Guangdong High People's Court, China, 11 January 2005 ((2004) Yue Gaofa Minsi Zhongzi No. 274), available at <http://cisgw3.law.pace.edu/cases/050111c1.html>.

85 Interestingly, recent discussion on *Carl Hill v. Cixi Old Furniture Trade Co., Ltd.* poses the question as to whether the Art. 96 CISG declaration should be invoked *sua sponte* by Chinese courts. See J. Huang, 'Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation', 5 *Manchester Journal of International Economic Law* 105, at 111-113 (3/2008).

86 For the prerequisites to an Art. 96 CISG declaration, see *supra* note 57.

87 See Xiao & Long, *Selected Topics*, *supra* note 21, at 86; Wang & Andersen, *supra* note 22, at 152; Yang, *supra* note 12, at 15.

88 See Flechtner, *Several Texts of the CISG*, *supra* note 9, at 196.

89 Schroeter, *Backbone or Backyard, supra* note 10, at 436.

90 Wang & Andersen, *supra* note 22, at 163-164.

91 Similarly Yang, *supra* note 12, at 15.

3.3 Possible Withdrawal of the Declaration

Notwithstanding the disagreement in Chinese scholarship and jurisprudence regarding the effect of the declaration, the major concern in China has been the possible withdrawal of the declaration. The dominant view, that the declaration should be withdrawn,[92] is preferable for two main reasons.

First, the rapid socio-economic developments of recent decades have led to a much more open attitude of China towards international trade, which is well manifested by the replacement of the 1985 FECL by the 1999 Contract Law. The conservative position reflected by an Article 96 CISG declaration seems contradictory to this attitude. The inconsistency between the declaration and China's policy favoring international commerce is especially apparent in view of the fact that China has signed the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts,[93] which applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States. Further, the declaration may also sap the confidence of the foreign parties in Sino-foreign sale of goods.[94] Second, withdrawal of the declaration would eliminate all the confusion in practice concerning the effect of the declaration, and promote certainty and predictability in the international sale of goods.[95]

If China wishes to withdraw the Article 96 CISG declaration, what has been proposed above for the possible withdrawal of China's Article 95 CISG declaration applies *mutatis mutandis* here. In particular, if directive instruments are needed in the event of withdrawal, they should ensure that the withdrawal is effectuated internally on the same day as it takes effect internationally. Moreover, the directive instrument(s) may contain the following guidelines:

> (1) The provisions of Article 11, Article 29, and Part II of this Convention, that allow a contract of sale and its modification and termination by agreement and

92 See Zhang, *supra* note 59, at 572; Y. Xiao, 'On the Application of Rules of Private International Law Treaties in China', in: L. Zeng, *et al.* (Eds.), *Wuhan University Collections of Lectures on International Law*, 80, at 87 (2006); Yang, *supra* note 12, at 13-16; Wang & Andersen, *supra* note 22; Ding, *supra* note 70, at 25. For the contrary minority view, see, *e.g.*, L. Zhu, 'No Conflict Between Chinese Contract Law and the Declaration by the PRC', 1997 *Legal Science* 23, at 24.

93 United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (9 December 2005). For discussion on China's experience with the Convention, see*, generally,* Q. He, *The Latest Developments of Uniform Contract Law*, 338-350 (2007).

94 Wang & Andersen, *supra* note 22, at 163.

95 Xiao & Long, *Selected Topics*, *supra* note 21, at 86.

> any offer, acceptance, and other indication of intention to be made in any form other than in writing, apply to the formation of a contract only when the proposal for concluding the contract is made on or after the date when China's withdrawal is to take effect.
>
> (2) The provisions of Article 11, Article 29, and Part II of this Convention, that allow a contract of sale and its modification and termination by agreement and any offer, acceptance, and other indication of intention to be made in any form other than in writing, apply only to contracts concluded on or after the date when China's withdrawal is to take effect.

4 The Status of SARs: Article 93 Declarations?

On 1 July 1997, Hong Kong was returned to China. Macao followed suit on 20 December 1999. Ever since, the respective status of the two SARs under the CISG has continuously generated confusion in practice. This undesirable situation has engaged the increasing attention of commentators who are split on the issue.[96] At the outset, two issues should be distinguished; the implementation of the CISG within SARs, and the applicability of the CISG to SARs. The former is cast in an intranational setting, focusing on the implementation of treaties in domestic law. In comparison, the latter is to be addressed from an international perspective, as it centres upon the question whether, according to the CISG, SARs fall within the territorial scope of the Convention. Thus, for example, the opinion that 'the courts in Hong Kong are unlikely to apply the CISG'[97] should not be taken as contrary to the argument that the CISG is applicable to Hong Kong.[98] For present purposes, 'the status of SARs' is concerned with the question whether the CISG is applicable to SARs or, in other words, whether SARs fall within the territorial scope of the CISG.

Under Article 1 CISG, Hong Kong may fall within the sphere of the CISG only if it is (part of) a Contracting State. A region's status as (part of) a Contracting State is important in

96 G.F. Bell, 'Harmonisation of Contract Law in Asia - Harmonising Regionally or Adopting Global Harmonisations - The Example of the CISG', 2005 *Singapore Journal of Legal Studies* 362, at 364, note 10 ('[T]he government of the People's Republic of China has not filed a notification with the Secretary General of the UN and therefore one would assume that the CISG does not apply in Hong Kong'); Chen & Wu, *supra* note 30, note 36. *Contra*: Schroeter, *Hong Kong and Macao*, *supra* note 22.

97 This view was shared by Xiao & Long, *Selected Topics*, *supra* note 21, at 61, note 2.

98 The two issues were appropriately distinguished by L. Wolff, 'Hong Kong's Conflict of Contract Laws: Quo Vadis', 6 *Journal of Private International Law* 465, at 480 (2010). See *Innotex Precision Limited v. Horei Image Products, Inc.*, 679 F. Supp. 2d 1356, (N.D. Ga.), United States, 17 December 2009, available at <http://cisgw3.law.pace.edu/cases/091217u1.html>.

determining the applicability of the CISG,[99] not only in the normal cases described under Article 1 CISG, but also in other somewhat special scenarios.[100] Thus, if the status of SARs is unclear, this will lead to divergent decisions on the applicability of the CISG, which will in turn undermine the uniformity of CISG's application. The following discussion will in turn examine the respective status of Hong Kong and Macao under the CISG. Where necessary, the implementation of the Convention in the regions will also be treated briefly.

4.1 The Case of Hong Kong

4.1.1 Before the Handover

In 1842, Hong Kong Island was ceded to the United Kingdom under the Treaty of Nanking. Subsequently, the ceded region extended to part of the Kowloon Peninsula and Stonecutter's Island under the Convention of Peking in 1860. In 1898, the Convention for the Extension of Hong Kong Territory granted to the United Kingdom a 99-year lease of Lantau Island and the adjacent northern lands, which became known as the New Territories.[101] Due to their unequal character, these treaties are not recognized by China. Accordingly, it is China's position that sovereignty over the region was never transferred to the U.K.[102] Nevertheless, until the 'handover' of Hong Kong, China was not in possession of the power to conclude international treaties for the region.[103] Consequently, although the CISG was approved by China in 1986 and entered into force in 1988, this had no legal effect for Hong Kong. On the other hand, since the U.K. – which was responsible for the international

99 For an elaboration on the significance of the status as a 'Contracting State', see Schroeter, *Hong Kong and Macao*, *supra* note 22, at 309-311.

100 See, *e.g.,* a trilateral transaction with the seller in China, the broker in Hong Kong, and the buyer in Germany. This was the scenario in the *Vitamin C case*, CIETAC Arbitration proceeding, China, 18 August 1997, available at <http://cisgw3.law.pace.edu/cases/970818c1.html>. There could also be contracts with multiple parties with one of them from Hong Kong. See, *e.g.*, *Hannaford v. Australian Farmlink Pty Ltd.* Federal Court, Australia, 24 October 2008 (SAD 251 of 2005), available at <http://cisgw3.law.pace.edu/cases/081024a2.html>. For comments on this case, see Spagnolo, *Last Outpost*, *supra* note 8, at 203-204.

101 X. Zhang (Ed.), *Hong Kong Law in a Nutshell*, 1 (2006).

102 For this reason, it is China's contention that no 'transfer' of sovereignty took place upon the handover on 1 July 1997, since China merely 'resumed the exercise of sovereignty over Hong Kong'. The quoted wording was employed in section 1 of the Sino-British Joint Declaration, full text available at <http://www.hkbu.edu.hk/~pchksar/JD/jd-full2.htm>. Similar position was shared by O. Dörr, 'Cession', in: R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, para. 4 (online ed., 2008), available at <http://www.mpepil.com>. According to Dörr, the so-called New Territories 'always remained under Chinese territorial sovereignty, while their administration was granted to the British for 99 years'.

103 According to Section 4 of the Sino-British Joint Declaration, during the period from 27 May 1985 to 1 July 1997, the U.K. was responsible for the administration of Hong Kong.

relations of Hong Kong at the time – was not a party to the CISG,[104] the Convention was not applicable to Hong Kong.[105]

This status of Hong Kong under the CISG at the time was noted in the Italian decision on *Italdecor s.a.s. v. Yiu's Industries (H.K.) Ltd*,[106] where the performance of a contract between a Hong Kong seller and an Italian buyer was disputed, and the conflict rules led to the application of the law of Italy as a Contracting State.[107] The Milan Court of Appeals correctly based its application of the CISG on Article 1(1)(b) CISG, rather than on Article 1(1)(a) CISG which requires that parties have their places of business in two different Contracting States.[108] Indeed, although the CISG was not in force in Hong Kong, it would still apply if a court of a Contracting State[109] was seized of the case and the requirements under Article 1(1)(b) CISG were satisfied.

In addition to Article 1(1)(b) CISG, there were other grounds on which the CISG was applied to contracts involving parties from Hong Kong. In the Chinese decision on *Xiamen Trade Co. v. Lian Zhong (Hong Kong) Co.*,[110] concerning a contract between parties from Mainland and Hong Kong, the CISG was applied based on agreement by the parties during

104 To date, the U.K. remains a non-contracting state to the CISG. See Status of the CISG, *supra* note 26.

105 Accordingly, the Hong Kong courts would not be bound to apply the CISG, see D.J. Lewis, 'The UN Convention for the International Sale of Goods: Implications for Hong Kong and China', in: 1988 *Law Lectures for Practitioners* 243, at 248.

106 *Italdecor v. Yiu's Industries*, Appellate Court Milan, Italy, 20 March 1998, available at <http://cisgw3.law.pace.edu/cases/980320i3.html>.

107 Initially, the law of Hong Kong was applicable pursuant to conflict rules. However, Hong Kong law could not be ascertained in that case. Consequently, the Court ruled that the Italian law applied.

108 See similarly *Chinese goods case*, Hamburg Arbitration proceeding, Germany, 21 March 1996, available at <http://cisgw3.law.pace.edu/cases/960321g1.html>. Probably also *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, U.S. District Court, (S.D.N.Y.), 1997 WL 458785, 6 August 1997, available at <http://cisgw3.law.pace.edu/cases/970806u1.html>. But see *Zheng Hong Li Ltd. (Hong Kong) v. Jill Bert (Switzerland) Ltd.*, Supreme People's Court, China, 20 July 1999 ((1998) Jing Zhongzi No. 208), available at <http://cisgw3.law.pace.edu/cases/990720c1.html>. In that case, the CISG was somehow applied at first instance to a contract concluded in 1996 by parties from Hong Kong and Switzerland respectively. On appeal, the Supreme People's Court ruled that the CISG should not apply, because the parties had chosen to apply Chinese law. The Court did not touch upon the issue as to whether the requirements under Art. 1(1)(a) CISG had been satisfied.

109 Since the CISG was not applicable to Hong Kong, the Hong Kong courts would not be bound to apply the CISG. Rather, the courts would employ their own conflict rules to determine the applicable law of the contract. Nevertheless, if the conflict rules led to the application of the law of a Contracting State, the CISG would apply (as foreign law). See Lewis, *supra* note 105, at 248.

110 Xiamen Intermediate People's Court, China, 5 September 1994, available at <http://cisgw3.law.pace.edu/cases/940905c1.html>. See also *Lianzhong Enterprise Resources (Hong Kong) Ltd. v. Xiamen International Trade & Trust Co.*, Xiamen Intermediate People's Court, China, 20 April 1993, available at <http://cisgw3.law.pace.edu/cases/930420c1.html>.

the hearings.[111] Similarly, in a number of CIETAC arbitrations involving parties from Mainland and Hong Kong, the CISG was applied via the parties' designation during the arbitral proceedings.[112] Moreover, the CISG was somehow referenced in the *Cement case*[113] and *White cardboard scrap paper case*,[114] where Chinese law was the *lex causae*. In these cases, it was unclear whether the CISG merely had persuasive value in the application of Chinese law, or the Convention *per se* was considered as the (jointly) applicable law. Finally, in some other cases, the CISG was applied to contracts involving Hong Kong parties, but the reasons for such application were missing in the decisions.[115] Although these approaches are diverse and sometimes inappropriate, they usually had no bearing on the judges' or arbitrators' opinion on the status of Hong Kong under the CISG. Indeed, the status of Hong Kong seldom gave rise to confusion prior to the handover.

4.1.2 After the Handover

After Hong Kong as a whole was returned to China on 1 July 1997 in accordance with the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong

111 The approaches taken by these cases may invite criticism for two reasons. First, according to the Chinese conflict rules, the parties have the freedom to choose Chinese law, Hong Kong law, Macao law or foreign law. It may well be argued that choice of international rules such as the CISG in their own right was not permitted. Second, under the Chinese conflict rules then, the designation of the governing law should be made *before* (but *not during*) the hearings. See also L. Spagnolo, '*Iura Novit Curia* and the CISG: Resolution of the Faux Procedural Black Hole', in this volume.

112 See, *e.g.*, CIETAC Arbitration proceeding, China, 5 February 1996, available at <http://cisgw3.law.pace.edu/cases/960205c2.html> (cited as: *Antimony ingot case*); *Caffeine case, supra* note 80; CIETAC Arbitration proceeding, China, 4 April 1996, available at <http://cisgw3.law.pace.edu/cases/960404c1.html>; CIETAC Arbitration proceeding, China, 15 November 1996, available at <http://cisgw3.law.pace.edu/cases/961115c1.html>; CIETAC Arbitration proceeding, China, 4 April 1997, available at <http://cisgw3.law.pace.edu/cases/970404c1.html> (cited as: *Black melon seeds case*); CIETAC Arbitration proceeding, China, 20 November 1997, available at <http://cisgw3.law.pace.edu/cases/971120c1.html>.

113 CIETAC Arbitration proceeding, China, 26 March 1993, available at <http://cisgw3.law.pace.edu/cases/930326c1.html> (noting that 'the applicable law is the Law of China referring to the International Convention').

114 CIETAC Arbitration proceeding, China, post-1992, available at <http://cisgw3.law.pace.edu/cases/930000c2.html> (referencing the CISG in the absence of provisions in Chinese law on a particular issue at stake).

115 See, *e.g.*, CIETAC Arbitration proceeding, China, 27 February 1993, available at <http://cisgw3.law.pace.edu/cases/930227c1.html>; *Lian Zhong (Hong Kong) Co. v. Xiamen Trade Co.*, Xiamen Intermediate People's Court, China, 31 December 1992, available at <http://cisgw3.law.pace.edu/cases/921231c1.html>; *Hong Kong International Industrial C Co. v. Hardware Machinery, Industrial Chemicals and Chinese Medicine Import-Export Co.*, People's Court (court's name unknown), China, 1993 (date unknown), available at <http://cisgw3.law.pace.edu/cases/930000c1.html>; *Zhanjiang Textiles v. Xian Da Fashion*, Guangdong High People's Court, China, 7 March 1994, available at <http://cisgw3.law.pace.edu/cases/940307c1.html>; CIETAC Arbitration Proceeding, China, 30 July 1998, available at <http://cisgw3.law.pace.edu/cases/980730c1.html> (cited as: *Cold rolled steel plates case*).

Kong (hereinafter 'Sino–British Joint Declaration'),[116] confusion arose in practice regarding the status of Hong Kong under the CISG. In effect, the practices in this regard are diverse.

The CISG has been applied to a number of cases involving parties from Hong Kong and a Contracting State, under Article 1(1)(a) CISG. In *CNA Int'l, Inc. v. Guangdon Kelon Electronical Holdings*,[117] the U.S. District Court for the Northern District of Illinois conducted a detailed analysis of the SAR's status in the light of Article 93 CISG. The Court concluded that since China had not made an Article 93 CISG declaration, the CISG was extended to Hong Kong, and hence the Convention should apply. The reasoning of that decision was followed by the U.S. District Court for the Western District of Arkansas in the more recent *Electrocraft Arkansas, Inc. v. Electric Motors, Ltd*[118] . Moreover, the status issue was discussed in passing in the Austrian *Tantalum powder case*,[119] where the Court of Appeal ruled that the CISG should apply to Hong Kong 'due to the restricted autonomy of [the region] in international and foreign affairs'. In a few other cases, however, the courts jumped to the conclusion that the CISG applied (under Art. 1(1)(a) CISG) without touching upon the Convention's applicability to Hong Kong.[120]

The CISG has also been applied in numerous Chinese interregional cases, involving parties from Hong Kong and the Mainland, on grounds other than Article 1(1)(a) CISG. In numerous cases, the Convention was applied based on parties' designation,[121] either by

116 Full text available at <http://www.hkbu.edu.hk/~pchksar/JD/jd-full2.htm>.

117 *CNA Int'l, Inc. v. Guangdong Kelon Electronical Holdings*, 2008 U.S. Dist. LEXIS 113433 (N.D. Ill.), 3 September 2008, available at <http://cisgw3.law.pace.edu/cases/080903u1.html>.

118 *Electrocraft Arkansas, Inc. v. Electric Motors, Ltd.*, 70 UCC Rep.Serv.2d 716, U.S. District Court (W.D. Ark.), 23 December 2009, available at <http://cisgw3.law.pace.edu/cases/091223u1.html>.

119 For a synopsis of the ruling of the Court, see Supreme Court, Austria, 17 December 2003 (7 Ob 275/03x), available at <http://cisgw3.law.pace.edu/cases/031217a3.html>.

120 See, *e.g.*, *Tantalum case*, *supra* note 65; *Index Syndicate Ltd. v. NV Carta Mundi, District Court Turnhout*, Belgium, 18 January 2001 (A/00/691), available at <http://cisgw3.law.pace.edu/cases/010118b1.html; *NV Carta Mundi v. Index Syndicate Ltd.*, Appellate Court Antwerpen, Belgium, 14 February 2002 (2001/AR/551), available at <http://cisgw3.law.pace.edu/cases/020214b1.html>.

121 Sometimes the CISG was also incorporated in the contract by reference. See, *e.g.*, CIETAC Arbitration proceeding, China, 14 February 2002, available at <http://cisgw3.law.pace.edu/cases/030626c1.html>. In that event, the CISG would be taken as contract terms. For further discussion in this respect, see Y. Xiao & W. Long, 'Contractual Party Autonomy in Chinese Private International Law' (cited as: *Contractual Party Autonomy*), in: A. Bonomi, *et al.* (Eds.), *Yearbook of Private International Law*, Vol. 11, 193, at 201 (2009).

choice within the underlying contracts,[122] or during the arbitral proceedings.[123] As demonstrated by the *Wool case*,[124] this approach could also be adopted in international cases involving Hong Kong parties. Equally interesting is the *Ink cartridge case*,[125] where a provision of the CISG was considered as 'a commonly observed international usage' applicable to the issue at stake. Yet in some other Chinese interregional cases where the CISG was applied, the reasons for its application were missing.[126]

By contrast, the applicability of the CISG to Hong Kong was determined in other cases in the negative. In the recent French *Telecommunications products case*,[127] the *Cour de Cassation* concluded that the CISG was not applicable to Hong Kong. In so doing, it ruled that China had made a declaration under Article 93 CISG, thereby precluding Hong Kong from the scope of the CISG. This line of reasoning was followed in the more recent Australian decision on *Hannaford v. Australian Farmlink Pty Ltd.*[128] The applicability issue was also treated in a less extensive manner in *Innotex Precision Limited v. Horei Image Products, Inc.*,[129] in which the U.S. District Court for Georgia also recognized the purported existence of China's Article 93 CISG declaration regarding Hong Kong. The same stance was taken by the Austrian Supreme Court in the *Tantalum powder case*.[130] Finally, in a number of Chinese cases, where the court did not apply the CISG to Hong Kong, the courts

122 See, *e.g.,* CIETAC Arbitration proceeding, China, 2 April 1999, available at <http://cisgw3.law.pace.edu/cases/990402c1.html> (cited as: *Gray cloths case*); CIETAC Arbitration proceeding, China, 10 August 1999, available at <http://cisgw3.law.pace.edu/cases/990810c1.html> (cited as: *Raincoat case*); CIETAC Arbitration proceeding, China, 2000, available at <http://cisgw3.law.pace.edu/cases/000000c1.html>; CIETAC Arbitration proceeding, China, 14 January 2004, available at <http://cisgw3.law.pace.edu/cases/040114c1.html> (the parties agreed that 'the CISG could be referenced').

123 The parties were deemed to designate the CISG usually because they cited the CISG in their pleadings and defenses. See, *e.g.*, CIETAC Arbitration proceeding, China, 29 September 2000, available at <http://cisgw3.law.pace.edu/cases/000929c1.html>; CIETAC Arbitration proceeding, China, 11 February 2000, available at <http://cisgw3.law.pace.edu/cases/000211c1.html>. Probably also CIETAC Arbitration proceeding, China, 5 April 1999, available at <http://cisgw3.law.pace.edu/cases/990405c1.html>.

124 CIETAC Arbitration proceeding, China, 28 February 2005, available at <http://cisgw3.law.pace.edu/cases/050228c1.html>.

125 CIETAC Arbitration proceeding, China, 30 January 2000, available at <http://cisgw3.law.pace.edu/cases/000130c1.html>.

126 See, *e.g.*, CIETAC Arbitration proceeding, China, 23 January 1998, available at <http://cisgw3.law.pace.edu/cases/980123c1.html>.

127 Supreme Court, France, 2 April 2008 (Pourvoi no. 04-17726), available at <http://cisgw3.law.pace.edu/cases/080402f1.html>.

128 See *supra* note 100. For comments on this case, see Spagnolo, *Last Outpost, supra* note 8, at 203-204.

129 See *Innotex Precision Limited v. Horei Image Products, Inc.*, 679 F.Supp.2d 1356, U.S. District Court (N.D. Ga.), 17 December 2009, available at <http://cisgw3.law.pace.edu/cases/091217u1.html>.

130 See *supra* note 119.

either mentioned in passing that Hong Kong was not a Contracting State to the CISG,[131] or simply ignored the status issue before reaching their decisions.[132]

Although the approaches employed by judges and arbitrators diverge as to the applicability of CISG to Hong Kong, many of the above-mentioned cases are unhelpful in determining the status of Hong Kong under the CISG.[133] As shown above, in cases where the court did not apply the CISG, the status of Hong Kong was often ignored or left open. Only a few cases have addressed the matter in detail. To further clarify the status of Hong Kong under the CISG, the following discussion will briefly examine two main issues in this respect.

Disqualification as a Contracting State

The first issue that requires clarification is whether Hong Kong can be regarded as a Contracting State. In this respect, the governing provision is Article 91(3) CISG,[134] which provides that a territorial entity may become a Contracting State by way of accession. Under Article 151 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter 'Hong Kong Basic Law'),[135] Hong Kong may on its own conclude agreements in appropriate fields notably including international trade. Apparently, the CISG falls within such fields. However, it should be noted that Article 91(3) CISG is open for accession by *states* only. Although Hong Kong enjoys a high degree of autonomy, it lacks sovereignty over its own territory, and does not have a government

131 See, *e.g.*, *Wuhan Yinfeng Data Network Co. Ltd. and Wuhan Cable Broadcast Television Network Co. Ltd. v. Xu Ming, et al.*, Hubei High People's Court, China, 19 March 2003, available at <http://cisgw3.law.pace.edu/cases/030319c1.html>; *Possehl (HK) Limited v. China Metals & Minerals Import & Export (Shenshen) Corp.*, Guangdong Higher People's Court, China, 2005, available at <http://cisgw3.law.pace.edu/cases/050000c2.html>. See also *Raincoat case*, *supra* note 122 (noting that the CISG could not apply under Article 1(1)(a) CISG, but applying the CISG based on the parties' choice).

132 *Sino-Add (Singapore) PTE. Ltd. v. Karawasha Resources Ltd.*, Guangxi Beihai Maritime Court, China, 5 March 2002, available at <http://cisgw3.law.pace.edu/cases/020305c1.html>.

133 Also noted in *Innotex Precision Limited v. Horei Image Products, Inc.*, *supra* note 129.

134 The CISG is applied as the putative applicable law here. This approach is similar to that employed in conflict of laws situations, such that one must interpret the law that might apply (in the form in which it would apply, presumably as modified by agreement) in order to determine whether and to what extent there is a conflict which needs to be resolved. The same scenario arises for arbitration clauses and determination of their validity. Schlechtriem makes this point in the workshop transcript published by H.M. Flechtner, 'Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more', 18 *J. L. & Com.* 191, at 223 (1999). In other words, in order to work out whether the CISG applies, it can arguably be treated as the putative law and its own terms will determine whether it applies in a particular case. For a similar argument for this position, see L. Spagnolo, 'Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG', 21 *Temp. Int'l & Comp. L.J.* 261, at 261-310 (2007).

135 Full text available at <http://www.basiclaw.gov.hk/en/basiclawtext/index.html>.

capable of independently entering into relations of all types with other States.[136] Therefore, Hong Kong cannot meet the criteria for statehood.

Indeed, within the framework of 'One Country, Two Systems', Hong Kong is an SAR of China. This position is not only stipulated by the Chinese Constitution,[137] the Sino-British Joint Declaration[138] and the Hong Kong Basic Law,[139] but is also in line with the practice of the Secretary-General of the United Nations,[140] the depositary for more than 500 multilateral treaties including the CISG. Accordingly, Hong Kong cannot accede to the CISG, and hence cannot become a Contracting State to the Convention in its own right.[141] For this reason, statements such as 'Hong Kong is a Contracting State under the CISG', as made in the *Electrocraft Arkansas, Inc. v. Electric Motors, Ltd*,[142] are to be regarded as inaccurate.

Qualification as Part of a Contracting State

Since Hong Kong cannot become a Contracting State in its own right, the Convention's territorial scope within the meaning of Article 1 may only extend to the region if Hong Kong is part of a 'Contracting State'. To answer the question as to whether Hong Kong meets this criterion, the rules applicable to the issue should be determined.

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136 Hong Kong only possesses a limited treaty making power. The SAR may on its own enter into international treaties in limited fields. See Arts. 116, 133–34 and 155 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 4 April 1990, available at <http://www.basiclaw.gov.hk/en/basiclawtext/images/Basic_Law.pdf> (cited as: Basic Law). For elaboration on the capacity of Hong Kong to conclude treaties, see A. Aust, *Modern Treaty Law and Practice*, 67-71 (2007). Also A. Peters, 'Treaty Making Power', in: R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, para. 30 (online ed., 2008), available at <www.mpepil.com>. In addition, Art. 152 Basic Law provides that Hong Kong 'may participate in international organizations and conferences *not limited to states*' (emphasis added).

137 See Art. 31 Constitution of the People's Republic of China (cited as: Chinese Constitution). Full text of the Constitution is available at <http://www.lawyee.net>.

138 See Section 2 Sino-British Joint Declaration.

139 See Preamble and Art. 1 Basic Law.

140 See Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, United Nations Treaty Collection, ST/LEG/7/Rev. 1 (1999), para. 97, available at <http://untreaty.un.org/English/Summary.asp>.

141 Also expressly making this point, J. Shen, 'Cross-Strait Trade and Investment and the Role of Hong Kong' (cited as: *Cross-Strait Trade*), 16 *Wis. Int'l L.J.* 661, at 668 (1998). Similarly M. Bridge, 'A Law for International Sales', 37 *Hong Kong Law Journal* 17, at 17-40 (2007) (observing that Hong Kong is not a Contracting State).

142 *Electrocraft Arkansas, Inc. v. Electric Motors, Ltd*, U.S. District Court (E.D. Ark.), 2010 WL 3307461, 19 August 2010. The contract at issue was between parties from Hong Kong and the U.S. During the proceedings, the parties submitted a joint statement stating that 'Hong Kong is a Contracting State under the CISG'. Based on the statement, the Court held that since 'Hong Kong is a Contracting State', the CISG applied to that action (under Art. 1(1)(a) CISG). For prior proceeding, see *supra* note 118.

In this regard, the Chinese domestic rules are not to be taken as a starting point. True, pursuant to the Sino-British Joint Declaration[143] and the Hong Kong Basic Law,[144] the application to the Hong Kong SAR of international agreements to which China is a party shall be decided by China's Central People's Government, in accordance with the circumstances and needs of the SAR, and after seeking the views of the SAR Government. However, unless permitted by the treaty or consented to by other treaty members, intranational arrangements regarding treaty applicability normally have no binding effect on third parties.[145] Indeed, for conventions which *per se* provide for automatic extension of application to a newly recovered territory, their extension does not depend solely on a decision to that effect by the state concerned.[146] In fact, this position is also endorsed by China. Before the handover of Hong Kong, China had made it clear that it would accept such automatic extension, if any, to Hong Kong of treaties to which China was a party.[147]

Having noted that the extension of the CISG to Hong Kong is to be determined multilaterally, it is then necessary to identify the applicable international rules. In this respect, the public international law rules on succession of states, especially the rule of 'moving treaty boundaries' embodied in Articles 15(b) and 31(1) Vienna Convention on Succession of States in Respect of Treaties (hereinafter the '1978 Succession Convention'),[148] need not be consulted at all. Indeed, neither China nor the U.K. is a party to the 1978 Succession Convention. Moreover, whether or not the 1978 Succession Convention represents established customary norms, and articulates law grounded in consistent State practice, judicial precedent or juristic opinion' is a matter of some controversy.[149] Even if such customary rules exist, one may well question their applicability to the succession of treaties regarding Hong Kong, given that Hong Kong's special case defies easy categorization.[150]

143 See Ann. I, Section XI Sino-British Joint Declaration.

144 See Art. 153 Basic Law.

145 Similarly R. Mushkat, 'Hong Kong and Succession of Treaties', 46 *Int'l & Comp. L.Q.* 181, at 194 (1997). Thus, in terms of the application of a multilateral treaty to Hong Kong, a decision made by the Chinese Central People's Government can only have legal effect on third parties if it conforms to the relevant provisions of the treaty, or, in the absence of such provisions, if the decision is not objected to by the parties to that treaty. For detailed discussions in this respect, see Aust, *supra* note 136, at 391.

146 Shen, *Cross-Strait Trade*, *supra* note 141, at 666-667.

147 See *infra* notes 173, 180 and accompanying text.

148 Vienna Convention on Succession of States in Respect of Treaties, Vienna, 23 August 1978, United Nations Treaty Series, Vol. 1946, p. 3. The Convention entered into force on 6 November 1996.

149 Mushkat, *supra* note 145, at 181 (strongly challenging this). But see Aust, *supra* note 136, at 369-371 ('[c]ertain general (customary law) principles can be deduced with reasonable confidence'); Schroeter, *Hong Kong and Macao*, *supra* note 22, at 319 (observing that for practical reasons, the 1978 Succession Convention may be considered as codification of customary public international law).

150 Mushkat, *supra* note 145, at 45-46. According to the author, the originality of the 'One Country, Two Systems' configuration and Hong Kong's highly autonomous status make it questionable to locate 'the instant discourse within the subject known as "state succession"'. The author also observed that the 'moving treaty frontiers'

Even if these rules are considered applicable to the case of Hong Kong, owing to their supplementary nature, they apply only in the absence of an applicable rule in the treaty concerned,[151] that is, in the present case, the CISG. Therefore, one should first look to the CISG to see if it contains any applicable rule.

Within the CISG, Article 93 CISG is relevant to the case of Hong Kong. This Article deals with the applicability of CISG to the territorial units of a Contracting State in which, 'according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention'. The provision entitles a contracting state to declare that the CISG is to extend to all of its territorial units or only to some of them.[152] Absent such a declaration, the CISG extends to all of the state's territorial units.[153] Article 93 CISG only explicitly permits declarations by states which, 'at the time of signature, ratification, acceptance, approval or accession', already have a constitutional division of power among their constituent units.[154] Yet the Article is silent on the admissibility of a declaration filed by a contracting state when, as in the case of Hong Kong, its power becomes constitutionally divided upon acquisition of a territory after its approval of the CISG.[155] Nevertheless, as cogently argued by Schroeter, Article 93 CISG expresses a general principle of the CISG within the meaning of Article 7(2) CISG,[156] that is, Contracting States described in Article 93 CISG should be given the chance to decide the applicability of the Convention to their particular territorial units. The implementation of this general principle requires a declaration to be admissible only if made at the time when a state, by acquiring sovereignty over a territory after its approval of the CISG, becomes one with a constitutional division of

rule is inapplicable to the succession of treaties regarding Hong Kong. The originality of the 'One Country, Two Systems' regime is also noted by Shen, *Cross-Strait Trade*, *supra* note 141, at 663.

151 Arts. 15(b) and 31(1) 1978 Succession Convention make it clear that the 'moving treaty boundaries' rule does not apply unless the respective treaty does not contain an applicable rule. See Schroeter, *Hong Kong and Macao*, *supra* note 22, at 320 (also pointing out the supplementary nature of the public international law rules).

152 See Art. 93(1) CISG.

153 See Art. 93(4) CISG.

154 See Art. 93(1) CISG.

155 Arguably, this is a matter governed by the CISG but not expressly settled in it, and hence an internal gap of the Convention. See Schroeter, *Hong Kong and Macao*, *supra* note 22, at 323.

156 It is controversial whether Art. 7 CISG governs the interpretation of Art. 93 and other final provisions of the Convention. For authorities arguing for the application of Arts. 31-33 Vienna Treaty Convention, in lieu of Art. 7 CISG, as the governing rules of the final provisions of CISG, see, *e.g.*, Enderlein & Maskow, *supra* note 79, at 54. Other writers have more convincingly advocated the priority of Art. 7 CISG over Arts. 31-33 of the Vienna Treaty Convention. See, *e.g.*, U. Schroeter, *Backbone or Backyard*, *supra* note 10, at 428.

power.[157] This interpretation has been followed by the court in *CNA Int'l, Inc. v. Guangdon Kelon Electronical Holdings*.[158]

China did not have constitutionally autonomous units until Hong Kong was returned in 1997, years after China's approval of the CISG. Since then, China has become a Contracting State in which, according to its constitution,[159] different systems of law are applicable to international sales issues covered by the CISG,[160] thereby falling within the scope of the above-mentioned principle underlying Article 93 CISG. Here, it should be noted that some commentators consider Article 93 CISG of interest only in relation to states with federal systems.[161] True, Article 93 CISG is often labelled a 'federation clause'[162] or 'federal state clause'.[163] However, this label alone 'carries no significance for the interpretation of the clause'.[164] Nor should the fact that Article 93 CISG was requested and has since been utilised by federal states[165] prejudice the applicability of the provision to China, a non-federal state[166] with constitutional division of power. Accordingly, Article 93 CISG applies *mutatis mutandis* to the question whether the CISG extends to Hong Kong.[167]

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157 Schroeter, *Hong Kong and Macao*, *supra* note 22, at 323-324. According to Schroeter, the same conclusion can be reached 'when relying on the general law on the succession of States, which accepts that a newly independent State may formulate a reservation when making a notification of succession establishing its status as a Contracting State to a multilateral treaty'. *Id.*, at 324. To the present author, Schroeter's interpretation of Art. 93 CISG is desirable in that it enables the CISG to adapt to future legal developments in the Contracting States.

158 See *supra* note 117 (expressly citing Schroeter, *ibid*).

159 Art. 31 Chinese Constitution.

160 For a general discussion on Chinese interregional conflict of laws arising from the 'One Country, Two System' under the Constitution, see J. Huang & A.X. Qian, 'One Country, Two Systems, Three Law Families, and Four Legal Regions', (Spring) 5 *Duke Journal Comparative and International Law* 289, at 303-307 (1995).

161 See Honnold & Flechtner (Eds.), *supra* note 32, at 700, para. 468; Bridge, *International Sale of Goods*, *supra* note 32, at 542, n. 207. Probably also P. Schlechtriem, I. Schwenzer & P. Hachem, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 93 para. 1.

162 See Enderlein & Maskow, *supra* note 79, at 375, para. 2.

163 See P. Winship, 'The Scope of the Vienna Convention on International Sales Contracts', in: N. Galston & H. Smit (Eds)., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Matthew Bender (1984), Ch. 1, at 1-1 to 1-53; Flechtner, *Several Texts of the CISG*, *supra* note 9, at 194 *et seq*. But see Aust, *supra* note 136, at 210-211 (categorizing Art. 93 CISG as a 'territorial clause').

164 Schroeter, *Hong Kong and Macao*, *supra* note 22, at 320. See also M. Torsello, 'Reservations to International Uniform Commercial Law Conventions', *Uniform Law Review*, 85 at 94 (2000-1).

165 Art. 93 CISG was included at the request of Canada and Australia. See Enderlein & Maskow, *supra* note 79, Art. 93 para. 1. So far, Australia, Canada, Denmark, the Netherlands and New Zealand have made use of Art. 93 CISG. See Status of the CISG, *supra* note 26.

166 In China, it is generally believed that China has a unitary government. See Y. Zhou (Ed.), *Constitution*, 245-254 (2000). But see Schroeter, *Hong Kong and Macao*, *supra* note 22, at 324 (seemingly regarding China as 'a non-unitary state').

167 For an elaboration on the applicability of Art. 93 CISG to the case of Hong Kong, see Schroeter, *Hong Kong and Macao*, *supra* note 22, at 320-322.

So far, there is only one document that might serve as China's Article 93 CISG declaration regarding Hong Kong, *i.e.*, the Note Regarding Multilateral Treaties Applicable to Hong Kong SAR as of 1 July 1997 (hereinafter 'Note Regarding Hong Kong'), sent from the Permanent Representative of the P.R. China to the Secretary-General of the UN, on 20 June 1997.[168] In fact, most cases that have directly addressed the status of Hong Kong have focused on this Note. It is therefore important to examine whether the Note Regarding Hong Kong qualifies as a declaration under Article 93 CISG.

To be a valid Article 93 CISG declaration, the Note Regarding Hong Kong must satisfy three requirements. The first two were noted in *Innotex Precision Limited v. Horei Image Products, Inc.*[169] First, pursuant to Article 97(2) CISG, a declaration under the CISG should be in writing; second, under Article 93(2) CISG, the declaration must be notified to the Secretary-General of the UN, the depositary for the CISG. As mentioned, the Note Regarding Hong Kong, obviously made in writing, was deposited with the Secretary-General on 20 June 1997. It therefore satisfies both requirements. However, there is a third requirement. Article 93(2) CISG requires that a declaration expressly state the territorial units to which the CISG extends. In this regard, a list of treaties applicable to Hong Kong as of 1 July 1997 was annexed to the Note Regarding Hong Kong.[170] The CISG was not explicitly mentioned therein. For this reason, the *Cour de Cassation* held in the *Telecommunications products case*[171] that China had effectuated a declaration under Article 93 CISG. To the present author, however, the court's ruling is hardly convincing,[172] since the Note Regarding Hong Kong also stated:

> With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will be a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application. *For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within the category of foreign affairs or*

168 The Note Regarding Hong Kong was sent to the Secretary General of the UN in Chinese and English. The English version of the Note Regarding Hong Kong was a translation from the Chinese original. For the Chinese original, see Gazette of the State Council (in Chinese), 1997, Issue 39, at 1688-1701. For the English translation, see 36 *International Law Materials* 1675 (1997).

169 See *supra* note 129. Also noted by Schroeter, *Hong Kong and Macao, supra* note 22, at 324.

170 See *supra* note 168, Ann. I & II, at 1676-1683.

171 See *supra* note 127.

172 See also Wolff, *supra* note 98, at 480.

> *defence or which, owing to their nature and provisions, must apply to the entire territory of a State*.[173]

Accordingly, as correctly noted in *CNA Int'l, Inc. v. Guangdon Kelon Electronical Holdings*,[174] the list of treaties annexed to the Note Regarding Hong Kong is not exhaustive. In determining whether the CISG falls within the category of treaties which, 'owing to their nature and provisions, must apply to the entire territory of a State', one must look to Article 93 CISG which in turn points back to the clause cited above. This 'chicken and egg' situation demonstrates that the Note Regarding Hong Kong is far from an express statement as required by Article 93(2) CISG.[175] Therefore the Note Regarding Hong Kong does not constitute an Article 93 CISG declaration.

According to Article 93(4) CISG, in the absence of an Article 93 CISG declaration by a Contracting State, the CISG is to extend to all territorial units of that State. Since China has not filed an Article 93 CISG declaration regarding Hong Kong, the CISG extended *ipso iure* to the SAR on 1 July 1997. Driven by compelling policy considerations,[176] this interpretation is aimed at providing a better legal environment for international transactions involving Hong Kong.

It is worth mentioning that the Hong Kong Department of Justice publishes an online list of treaties that are currently in force and applicable to Hong Kong,[177] but the list does not include the CISG. In line with this position, there is a lack of implementing legislation for the CISG in Hong Kong. Since Hong Kong follows a dualist approach to effectuating treaties in domestic law,[178] the CISG has not taken effect in Hong Kong. Nevertheless, bearing in mind that Article 93 is the applicable provision for present purposes, it can be said with confidence that the position hitherto taken by the Hong Kong Department of Justice has no binding effect on third parties, and hence does not affect Hong Kong's status as part of a 'Contracting State' within the meaning of Article 1 CISG.[179] The automatic

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173 *Supra* note 168 at IV (emphasis added).

174 See *supra* note 117.

175 Similarly Schroeter, *Hong Kong and Macao*, *supra* note 22, at 324 (observing that the Note Regarding Hong Kong 'is silent on the issue of UN Sales Convention').

176 For further discussion, see *infra* notes 222-226 and accompanying text. The policy considerations articulated there apply here as well.

177 See Hong Kong Department of Justice, International Law Division, List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region, available at <http://www.legislation.gov.hk/interlaw.htm>.

178 See Aust, *supra* note 136, at 234.

179 This was also noted by the court in *CNA Int'l, Inc. v. Guangdon Kelon Electronical Holdings*, *supra* note 117, which made a fine point that the absence of CISG on the list of Hong Kong Department of Justice 'is not determinative' to the status of Hong Kong under the CISG. Similarly Schroeter, *Hong Kong and Macao, supra* note 22, at 325; Wolff, *supra* note 98, at 479-480.

extension of the CISG to Hong Kong, it is submitted, is also in line with the Chinese central government's express intention to recognize in general the automatic extension of treaties which, 'owing to their nature and provisions, must apply to the entire territory of a State'.[180]

4.2 The Case of Macao

4.2.1 Before the Handover

In the past four centuries until 20 December 1999, Macao was separated from China and connected with Portugal. Contrary to some commentators' view that Macao was once a colonized territory of Portugal,[181] China took the position that Macao was not a Portuguese colony.[182] This position was not only recognized by the UN General Assembly,[183] but was also accepted by Portugal when China and Portugal established diplomatic relations in 1979.[184] Nevertheless, until the handover of Macao, China did not possess the power to conclude international treaties for the region.[185] Thus, although China approved the CISG in 1986, this had no legal effect for Macao. On the other hand, since Portugal – which at the time was responsible for the international relations of Macao – was not a party to the CISG,[186] the Convention was not applicable to Macao.

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180 See the emphasized clause in the Note Regarding Hong Kong, *supra* note 173.

181 For a brief account of the development of Macao's historical status from a colony with special capacities, later to a territory artificially lumped with other Portuguese possessions in Asia, then to a territory leased from China, and ultimately to a territory under (transitional) Portuguese administration until 20 December 1999, see P. Cardinal, 'Macao: The Internationalization of an Historical Autonomy', XLI (122) *Boletin Mexicano de Derecho Comparado* 637, at 638-644 (2008). See also D. Kugelmann, 'Macau', in: R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, paras. 2-5 (online ed., 2008), available at <www.mpepil.com>.

182 For this reason, it is China's contention that no 'transfer' of sovereignty took place upon the handover on 20 December 1999, since China merely 'resumed the exercise of sovereignty over Macao'. The quoted wording was employed in section 1 of the Sino-Portuguese Joint Declaration, full text available at <http://bo.io.gov.mo/bo/i/88/23/dc/en/>. See also W. Deng, 'On the Basic Law of Macao', *SAR* 18-31 (in Chinese, 2007).

183 According to a memorandum dated 8 March 1972, China formally stated this position at the United Nations. At its 27th session held on 8 November 1972, the UN General Assembly adopted a resolution containing a list of colonized territories. Macao was not included on the list. See Cardinal, *supra* note 181, at 642, note 14.

184 On 8 February 1979, the Joint Communique of the People's Republic of China and the Republic of Portugal was issued, thereby establishing the diplomatic relations of the two countries. On that occasion, China and Portugal reached the consensus that Macao is a Chinese territory.

185 According to Section 3 Sino-Portuguese Joint Declaration, during the period from 15 January 1988, on which the Declaration entered into force, to 20 December 1999, Portugal was responsible for the administration of Macao.

186 To date, Portugal remains a non-contracting state to the CISG. See Status of the CISG, *supra* note 26.

Interestingly, the CISG was negligently applied to Macao in a number of CIETAC arbitrations. In the *Wool case,*[187] involving parties from Mainland China and Macao, the CISG was held applicable under Article 1(1)(a) CISG because Portugal, to which Macao 'belonged', was mistaken for a Contracting State to the CISG. The same problem existed in the *Natural rubber case*[188] and the *Steel channels case*.[189] Nonetheless, the inappropriate application of the CISG in these cases mainly derived from the courts' unfamiliarity with the contracting status of the Convention, and hence is insignificant in determining the status of Macao under the CISG.

4.2.2 After the Handover

Since China's resumption of sovereignty over Macao on 20 December 1999 in accordance with the Joint declaration of the Government of the People's Republic of China and The Government of the Republic of Portugal on the question of Macao (hereinafter 'Sino-Portuguese Joint Declaration'),[190] the status of Macao under the CISG has been engaging increasing attention. So far, no reported cases have applied the CISG to Macao after the handover. This fact alone is unimportant in exploring the status of Macao, as none of the cases that failed to apply the CISG to Macao has made even passing mention of the issue. In fact, at many points, the case of Macao is similar and sometimes even identical to that of Hong Kong. This means that in regard to Macao, the current situation is not at all unproblematic. The following discussion will seek to clarify the situation by addressing the same two main issues discussed above in relation to Hong Kong.

Disqualification for a Contracting State

The first issue is whether Macao can be considered a Contracting State to the CISG. Again, the governing provision is Article 91(3) CISG,[191] according to which a territorial entity may become a Contracting State by way of accession. Under Article 136 Basic Law of the Macao Special Administrative Region of the People's Republic of China (hereinafter 'Macao Basic Law'),[192] Macao may independently, using the name 'Macao, China,' conclude agreements on international trade. However, Article 91(3) CISG is open for accession by *states* only. Similar to Hong Kong, Macao enjoys a high degree of autonomy but lacks

187 CIETAC Arbitration proceeding, China, 27 February 1996, available at <http://cisgw3.law.pace.edu/cases/960227c1.html>.

188 CIETAC Arbitration proceeding, China, 4 September 1996, available at <http://cisgw3.law.pace.edu/cases/960904c1.html>.

189 CIETAC Arbitration proceeding, China, 18 November 1996, available at <http://cisgw3.law.pace.edu/cases/961118c1.html>.

190 Full text available at <http://bo.io.gov.mo/bo/i/88/23/dc/en/>.

191 See *supra* note 134.

192 Basic Law of the Macao Special Administrative Region of the People's Republic of China (cited as: Macao Basic Law), full text available at <http://www.mfa.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/t15467.htm>.

sovereignty, and its government is incapable of independently entering into all types of relations with other States.[193] Therefore, Macao lacks the required statehood. Like Hong Kong, Macao is an SAR of China, a position not only stipulated by the Chinese Constitution,[194] the Sino-Portuguese Joint Declaration[195] and the Macao Basic Law,[196] but also in line with the practice of the Secretary-General of the UN, depositary for the CISG. Thus, Macao cannot accede to the CISG, and hence cannot become a Contracting State to the Convention in its own right.

Qualification as Part of a Contracting State

The second, and more important, question is whether Macao is part of a 'Contracting State' within the meaning of Article 1 CISG. Given the fact that Macao cannot become a Contracting State to the CISG in its own name, its qualification as part of a Contracting State is the only way by which the Convention's territorial scope may extend to the region. The governing rules of the issue should be first identified.

With respect to the application to Macao of international agreements to which China is a party, the mechanism is similar to that for Hong Kong. According to the Sino-Portuguese Joint Declaration[197] and the Macao Basic Law,[198] the matter is to be decided by China's Central People's Government, in accordance with the circumstances and needs of the SAR, and after seeking the views of the SAR Government. As has been articulated above,[199] since the CISG *per se* provides for automatic extension of application to a newly acquired territory, its extension does not depend solely on a decision to that effect by China. Therefore, China's domestic arrangement is not determinative for present purposes, but rather the applicable multilateral rules. The lines of reasoning given in the case of Hong Kong[200] make sense here as well. Thus, the public international law rules on succession of states need not be referenced in the first place, as they are supplementary to and supplanted by Article 93 CISG which contains applicable rules on the issue.

193 Macao only possesses a limited treaty making power. The SAR may on its own enter into international treaties in limited fields. See Arts. 112, 136 and 140 Basic Law of Macao. See *supra* note 192. For elaboration on its limited capacity to conclude treaties, see Aust, *supra* note 136. In addition, Art. 137 Macao Basic Law provides that Macao 'may participate in international organizations and conferences *not limited to states*' (emphasis added).

194 See Art. 31 Chinese Constitution.

195 See Section 2 Sino-Portuguese Joint Declaration.

196 See Preamble and Art. 1 Macao Basic Law.

197 See Ann. I, Section VIII Sino-Portuguese Joint Declaration.

198 See Art. 138 Macao Basic Law.

199 See *supra* note 145-147 and accompanying text.

200 See *supra* notes 148-167 and accompanying text.

Also similar to the case of Hong Kong, so far there is only one document that might serve as China's Article 93 CISG declaration regarding Macao, *i.e.*, the Note Regarding International Treaties Applicable to Macao SAR as of 20 December 1999 (hereinafter 'Note Regarding Macao')[201] sent from the Permanent Representative of the P.R. China to the UN Secretary-General on 13 December 1999. Obviously, the Note Regarding Macao was made in writing, and notified to the UN Secretary-General, the depositary for the CISG, thereby satisfying the first two requirements for a valid Article 93 CISG declaration.[202] With respect to the third requirement, that is, that a declaration should expressly state the territorial units to which the CISG extends, a list of treaties applicable to Macao as of 20 December 1999 was annexed to the Note Regarding Macao.[203] The CISG was not mentioned therein. Furthermore, the Note also stated:

> With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will be a party, in the event that it is decided to apply such treaty to the Macao Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application.[204]

The Note Regarding Macao was modelled on the Note Regarding Hong Kong in many respects but excepting one: unlike its Hong Kong counterpart, the clause cited above did *not* stipulate that

> *[f]or the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State.*[205]

One might infer from this omission that China intended to preclude the automatic extension to Macao of any treaties not mentioned in the annexed list. However, this omission may not be as significant as it first appears. Over the years, China has demonstrated to the international community its commitment to fulfil international treaty obligations. Thus, to the extent that the CISG – to which China is a Contracting State – extends

201 Full text available at <http://www.people.com.cn/GB/42272/42280/43266/43268/3134018.html>.
202 For the three requirements for a valid declaration under Art. 93 CISG, see *supra* notes 169-170 and accompanying text.
203 Ann. I & II Note Regarding Macao.
204 Clause IV Note Regarding Macao.
205 See *supra* note 173 (emphasis added).

to Macao according to its own provisions, it goes without saying that China would not object to such extension without justification.

Nonetheless, if we assume for the moment that the above-mentioned inference from the omission is correct, it would still be premature to conclude that by annexation of an apparently exhaustive list of treaties, China made a declaration under Article 93 CISG. In this regard, attention is drawn to Article 93(2) CISG, which requires that a declaration 'state *expressly* the territorial units to which the CISG extends'. This means that a declaration must (a) directly mention the territorial units to which the CISG extends; or (b) less desirably but nevertheless 'expressly', directly specify the territorial units to which the CISG does not apply; or (c) both positively and negatively identify the territorial units to which the CISG applies. The first formula was followed by Canada[206] and the Netherlands,[207] the second formula by Denmark[208] and New Zealand,[209] and the third by Australia.[210] If one compares the declarations by these states with the Note Regarding Macao, one may well reach the conclusion that the Note is far from an express statement regarding the CISG and Macao. Furthermore, even if the Note was intended as an Article 93 CISG declaration, the existence of such a declaration does not appear to have been noticed by the depositary for the CISG.[211] Arguably, therefore, the Note did not even make 'a *prima facie* case' for qualification as an Article 93 CISG declaration. Thus, for the sake of legal certainty,[212] the Note Regarding Macao should not be treated as an Article 93 CISG declaration.

Again, under Article 93(4) CISG, in the absence of an Article 93 CISG declaration by a Contracting State, the Convention is to extend to all territorial units of that state. Since China has not filed an Article 93 CISG declaration regarding Macao, the CISG extended

206 Canada filed an Art. 93 CISG declaration upon accession to the CISG, stating that the CISG would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. With two subsequent declarations received on 9 April and 29 June 1992 respectively, Canada extended the application of the CISG first to Quebec and Saskatchewan, and then to Yukon. In a notification received on 18 June 2003, Canada extended the application of the Convention to Nunavut. See Status of the CISG, *supra* note 26.

207 The Netherlands declared that the CISG applied to the Kingdom in Europe and Aruba, *id.*

208 Upon signature, Denmark declared '…under paragraph 1 of article 93 that the Convention shall not apply to the Faroe Islands and Greenland…'. The declaration was subsequently confirmed upon ratification, *id.*

209 New Zealand expressly declared the non-application of the CISG to the Cook Islands, Niue and Tokelau. See Status of the CISG, *supra* note 26.

210 Upon accession to the CISG, Australia declared: 'The Convention shall apply to all Australian States and mainland territories and to all external territories except the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands.' *Ibid.*

211 So far, no Art. 93 CISG declaration by China has been mentioned on the UN's webpage concerning the status of the CISG. See Status of the CISG, *supra* note 26.

212 P. Schlechtriem, *et al.*, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 93 para. 4 (also emphasizing the need for legal certainty).

to Macao on the date of the handover. Yet like Hong Kong, the Macao government publishes an online list of treaties that are currently in force and applicable to Macao, but fails to include the CISG on that list.[213] Apart from the question as to whether implementing legislation is needed for the application of CISG in Macao,[214] this situation alone would affect its implementation in Macao. Nevertheless, for the same reasons given in relation to Hong Kong,[215] this does not undermine Macao's status as part of a 'Contracting State' within the meaning of Article 1 CISG.

4.2.3 Possible Improvements from the *Status Quo*

The foregoing discussion sheds some light on the underlying problems in practice regarding the status of SARs under the CISG. The contributing factors to the current uncertainty are multifold. In the increasing number of cases explicitly addressing the issue, the respective Notes regarding Hong Kong and Macao have led to divided decisions on the status of SARs. To some extent, this divergence is also attributable to the courts' and arbitrators' varying acquaintance with the CISG as well as their interpretations of the Notes. However, the divergence seems also to be due to differences in how well parties were represented.[216]

Moreover, in view of the cases where no reasons were given for holding that the CISG applied to Hong Kong,[217] one may well suspect that in practice, courts and arbitrators ignore the doubt surrounding the applicability of the CISG to SARs. Thus, if neither party challenges the applicability of the CISG, it is not inconceivable that courts and arbitrators may jump to the conclusion that the CISG applies to SARs. In particular, this may occur when the issue is litigated or arbitrated outside of China, in the absence of Hong Kong counsel and Hong Kong arbitrators. By contrast, if the matter is brought before the courts in Hong Kong, due to the lack of implementing legislation of the CISG in the SAR, the courts will simply hold the CISG inapplicable. Consequently, this situation not only undermines the uniformity of the application of CISG, but also encourages forum shopping. Indeed, the current uncertainty is highly undesirable to say the least.

213 The list is available at <http://en.io.gov.mo/Legis/International/1.aspx>.

214 For a synopsis of the pros and cons concerning the approaches to the implementation of treaties in Macao after the handover, see A.M. de Magalhães, 'The Validity of the International Agreements of the Human Rights in the Juridical Order of the Special Administrative Region of Macau', in: J.C. Oliveira & P. Cardinal (Eds.), *One Country, Two Systems, Three Legal Orders - Perspectives of Evolution*, 608, at 608-612 (2009).

215 See *supra* notes 177-180 and accompanying text.

216 See *supra* notes 119, 127, 142 and accompanying text.

217 See *supra* notes 113, 114, 115, 120, 126 and accompanying text.

Whatever the reason for not filing declarations for the two SARs,[218] something must be done in order to clarify the current situation. First and foremost, the matter must be brought to the attention of the Chinese central government and the SAR governments. It is noteworthy that the lists of treaties annexed to the Notes regarding SARs were arrangements jointly made by the parties to the respective Joint Declarations.[219] Since neither the U.K. nor Portugal was a Contracting State, they are unlikely to have taken the CISG into account. On the other hand, China may have overlooked the legal effect of Article 93 CISG. In either case, attention is drawn to China's statement that 'no separate formalities will need to be carried out with respect to treaties which […] owing to their nature and provisions, must apply to the entire territory of a State'.[220] This statement stands in line with China's commitment to honour its international treaty obligations,[221] including the CISG to which China is a Contracting State.

Currently, there are compelling reasons to apply the CISG to SARs and to implement it in the regions. Extension of the CISG to SARs will not only further the goals of the CISG, *i.e.*, to promote worldwide uniformity and enhance legal certainty in international trade, but is also in the very interests of the SARs themselves. To date, Hong Kong is one of the world's largest trading entities.[222] Most of Hong Kong's major trading partners, including Australia, Germany, Japan, Korea, Singapore, The Netherlands, and the U.S.,[223] are Con-

218 For further discussion on the desirability of clarification, see F. Yang, 'Hong Kong's Adoption of the CISG: Why do we need it now?', in this volume.
Wolff observed that 'one may speculate if this is because a Hong Kong-related declaration may lead to the politically sensitive question as to whether a similar declaration is required in relation to Taiwan, which is currently not a CISG member […]', see Wolff, *supra* note 98, at 480.

219 In the case of Hong Kong, a Sino-British Joint Liaison Group was set up to ensure a smooth transfer of government in 1997. The Group considered, *inter alia*, actions to be taken by the two Governments to ensure the continued application of international rights and obligations affecting Hong Kong. See Sino-British Joint Declaration, *supra* note 116, Ann. II, Section 5(b). In respect of Macao, a Sino-Portuguese Joint Group was set up to conduct consultations on actions to be taken by China and Portugal, to enable the Macao SAR to maintain and develop external economic, cultural and other relations. See Sino-Portuguese Joint Declaration, *supra* note 190, Ann. II, Part I, Section 2(c).

220 See *supra* note 173.

221 At the UN Security Council Summit dated 23 September 2010, Chinese Premier Wen Jiabao stated that China 'will earnestly fulfil [its] international obligations and shoulder [its] due responsibilities'. See Statement by Chinese Premier Wen Jiabao at the UN Security Council Summit, available at <http://www.china-un.org/eng/hyyfy/t757366.htm>.

222 In 2009, Hong Kong ranked 11th among leading world traders accounting for 2.7% of overall world trade. See Hong Kong SAR's Position in World Merchandise Trade in terms of Total Trade, available at <http://www.tid.gov.hk/english/aboutus/publications/tradestat/tradestat_maincontent.html>. In 2008, Hong Kong ranked 13th among the leading world merchandise traders. See World Trade Organization, Leading Exporters and Importers in World Merchandise Trade (2008), at 12, Table I.8, available at <http://www.wto.org/english/res_e/statis_e/statis_e.htm>.

223 For a list of Hong Kong's major trading partners, see Hong Kong's Domestic Exports in 2009 by Main Destination, available at <http://www.tid.gov.hk/english/abou tus/publications/tradestat/ex09des.html>;

tracting States to the CISG.[224] Thus, extending the CISG to Hong Kong would mean a substantial part of Hong Kong's merchandise trade would be covered by the CISG, thereby removing legal barriers in Hong Kong-related international trade to a considerable extent. It should be kept in mind that it is China's aspiration to maintain 'the prosperity and stability of Hong Kong'.[225] The accomplishment of this goal would not be possible without a transparent and stimulating legal environment for international transactions involving Hong Kong.[226] Many of these reasons hold good for Macao as well.

Given these reasons, it is advisable that the SAR governments petition the Chinese central government to take action to improve the *status quo*. Alternatively, the Chinese central government can take the initiative, and seek the views of the SAR governments before taking further steps. Actions to be taken may include, *inter alia*, communications to the depositary of the CISG, clarification of the wording of the two Notes, and, in the event that China reaches the fortunate decision to implement the CISG in SARs, enactment of implementing legislation of the Convention, if necessary.[227]

5 Application of the CISG to SARs in Typical Scenarios

Since at this stage no action has been taken to officially clarify the status of SARs, it is important that judges and arbitrators, when making their decisions on the applicability of the CISG to SARs, accord sufficient attention to the text of the CISG and to the policy considerations articulated above. To illustrate how this could be done, the following discussion will explore the application of the CISG to SARs in four typical scenarios.

Hong Kong's Re-exports in 2009 by Main Destination, available at <http://www.tid.gov.hk/english/aboutus/publications/tradestat/rx09des.html>; Hong Kong's Imports in 2009 by Suppliers, available at <http://www.tid.gov.hk/english/aboutus/publications/tradestat/im09sup.html>.

224 See Status of the CISG, *supra* note 26.

225 See the Sino-British Joint Declaration, first paragraph, *supra* note 116. Similar statement regarding Macao was made in the Sino-Portugese Joint Declaration, first paragraph.

226 Similarly C. Xu, 'On the Continued Application of Economic Treaties to Hong Kong After 1997', 1996 *Legal Science* 56, at 59.

227 As mentioned, implementing legislation is definitely needed in the case of Hong Kong. In the event that the implementing legislation is promulgated in Hong Kong, for the sake of legal certainty, the legislation should require that courts in the region apply the CISG only to contracts concluded after the legislation enters into force. Yet such legislation would only be binding in Hong Kong. Courts in foreign countries may nevertheless hold otherwise.

5.1 *Parties: SAR versus Contracting State (other than China), Forum: Contracting State*

As has been explained, the CISG has internationally extended to Hong Kong and Macao under Article 93 CISG. Thus, if the present suit is filed before a court in a Contracting State, *e.g.* the U.S., the court should apply the CISG through Article 1(1)(a) CISG, provided that the parties have not opted out of the Convention. If, however, a Hong Kong court is seized of such a case, it is unlikely to apply the CISG on the same ground. This is because of Hong Kong's dualist approach to the implementation of international law, and there is no implementing legislation for the CISG. Similarly, given the fact that the CISG is not included in the official list of treaties applicable to Macao, it is unlikely that a Macao court will apply the CISG should it be seized of the case.[228]

It is worth mentioning that since Hong Kong and Macao have become part of China, a Contracting State, China's declarations under Article 95 and Article 96 CISG respectively should also extend to the two SARs.[229] This conclusion conforms to the principle of continuity. In the present scenario, the Article 96 CISG declaration is relevant. When the present suit is brought to an SAR court, there is no doubt – putting aside for the moment the lack of implementing legislation– that the declaration is binding.[230]

On the other hand, if the case is before a U.S. court, doubts may arise as to whether the Chinese Article 96 CISG declaration has the same effect, for the U.S. has not made a declaration under Article 96 CISG. Indeed, opinions are divided on whether an Article 96 CISG declaration by one Contracting State should also be observed by other Contracting States which themselves have not filed a similar declaration.[231] In the present author's view, the effect of an Article 96 CISG declaration derives from the provisions of the CISG which are part of the law of a Contracting State, regardless of whether that state is a declaration state. Thus, in the present example, China's Article 96 CISG declaration is foreign to the U.S. court, but its effect is not,[232] because the effect derives from Articles 12 and 96 CISG which is part of the U.S. law. Accordingly, the court should observe the wording of Articles

228 Similarly Wu, *supra* note 21, at note 22.

229 See Schroeter, *Hong Kong and Macao*, *supra* note 22, at 328.

230 Here, it is irrelevant whether the legislation of the SAR requires contracts to be concluded in or evidenced by writing. See *supra* note 88 and accompanying text.

231 For opinions in the affirmative, see Flechtner, *ibid*, at 197; Schroeter, *Backbone or Backyard, supra* note 10, at 447. *Contra*: M. Bridge, 'Harmonized Sales Law: Choice of Law Issues', in: J.J. Fawcett, *et al.* (Eds.), *International Sale of Goods in the Conflict of Laws* (cited as: *Uniform and Harmonized Sales Law*), para. 16.140 (2005); Torsello, *supra* note 164, at 105-106. Probably also Basedow, *supra* note 72, at 740-741.

232 But see Torsello, *supra* note 164, at 105: '[T]he adoption of a reservation by a single State is to be regarded as the enactment of a purely domestic provision addressed by the national legislator to the national courts of the reserving State, and hence producing its effects only within the reserving State'.

12 and 96 CISG that 'any provision […] does not apply'. Therefore, China's Article 96 CISG declaration indeed has an *erga omnes* effect.

5.2 Parties: SAR versus Non-Contracting State, Applicable Law under Conflict Rules: Non-Article 95 CISG Declaration State, Forum: SAR

Owing to China's Article 95 CISG declaration which also applies to SARs, a SAR court under this circumstance – again, leaving to one side the lack of implementing legislation – is free from applying the CISG. Nonetheless, as has been argued above, the Article 95 CISG declaration only discharges the obligation to apply CISG, but by no means prohibits application of the Convention where appropriate. There is a general consensus that once effected in a Contracting State, the CISG constitutes part of the law of that State. Therefore, if the court's own conflict rules lead to the law of a Contracting State, it may apply the CISG as part of that national law.[233] In that event, although the CISG has not been implemented in Hong Kong, the CISG can be applied as non-Hong Kong law.[234] The same holds true of Macao.

5.3 Parties: SAR versus Non-Contracting State, Applicable Law under Conflict Rules: SAR, Forum: Non-Article 95 CISG Declaration State

In such a case, since the forum State does not declare that it 'will not be bound by' 1(1)(b) CISG, the court should apply the CISG through Article 1(1)(b) CISG.[235] Here, China's Article 95 CISG declaration, which extends to SARs, is irrelevant.[236] In this respect, com-

233 See also Bell, *Singapore*, *supra* note 43, at 64. See M. Evans, *Bianca & Bonell Commentary*, *supra* note 73, Art. 95 para. 3.4 (indicating that in the present scenario, the CISG may apply only when the court's own conflict rules lead to the law of a Contracting State which has not made a declaration under Art. 95 CISG).

234 Note that the CISG is not 'foreign' to Hong Kong, as it is part of the law of Mainland China. For general discussion on commercial law conventions as part of Mainland law, see Y. Xiao, *Conflict of Laws from a Jurisprudence Perspective*, 227 (2008).

235 See Bridge, *Uniform and Harmonized Sales Law*, *supra* note 231, at 980–981 (for an excellent discussion on the issue); Schwenzer & Hachem, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 1 para. 38; F. Ferrari, 'The CISG's Sphere of Application: Articles 1–3 and 10', in: F. Ferrari, H.M. Flechtner & R.A. Brand (Eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention*, 1, at 21, 52 (2004); B. Zeller, *CISG and the Unification of International Trade Law*, 38-40 (2007); F. Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG, 25 *International Review of Law and Economics* 314, at 322, note 64, 328 (2005); Bell, *Singapore*, *supra* note 43, at 63-65.

236 But see Honnold & Flechtner (Eds.), *supra* note 32, at 42-46; Schlechtriem, in: *Commentary on the CISG* (2nd ed.), *supra* note 31, Art. 1 para. 43; Schlechtriem, in: *Commentary on the CISG* (2nd ed.), *supra* note 31, Art. 95 para. 4; J. Ziegel, 'The Scope of the Convention: Reaching Out to Article One and Beyond', 25 *J.L. & Com.* 59, at 66 (2005). The cited authors argue that forums in non-reserving Contracting States should still respect an Art. 95 CISG reservation by the Contracting State whose law is found to govern the contract.

parison can be made to Articles 92 and 93 CISG. Article 92(1) CISG allows a State to opt out of Part II or Part III of the CISG. Article 92(2) CISG then provides that a State that opts out of a Part is not considered to be a Contracting State in respect of matters governed by that Part. Similarly, suppose that by virtue of a declaration under Article 93 CISG, the CISG does not apply to a territorial unit of the declaration state. Under Article 93(3) CISG, that unit is not considered to be a Contracting State for the purposes of Article 1(1) CISG. In contrast to these two articles, no similar provision is made regarding Article 95 CISG, and the omission is striking. Therefore, an Article 95 CISG declaration state (*i.e.*, China in our example) remains a Contracting State within the meaning of Article 1(1)(b) CISG.[237]

Accordingly, if the case at hand is heard by a court of Australia, the court should apply the CISG. This is because its conflict rules lead to the law of a Contracting State, thereby triggering Article 1(1)(b) CISG, which is binding on Australia. This is so even if the court's conflict rules lead to Hong Kong law. In this regard, the lack of implementing legislation in Hong Kong is an incidental matter as far as this court is concerned. Article 1(1)(b) CISG is not a conflict rule *per se*.[238] It only provides categorically that the CISG applies when the rules of private international law lead to the law of a Contracting State. It does not say that the CISG applies as part of the State law.[239] Therefore, in the instant example, the CISG shall apply regardless of whether it constitutes part of Hong Kong law.

The situation will be different, however, if the matter is litigated in a German court. When acceding to the CISG, the then Federal Republic of Germany declared, contrary to the understanding above, that it would not consider an Article 95 CISG declaration state to be a Contracting State within the meaning of Article 1(1)(b) CISG, and that it therefore assumed no obligation to apply the CISG when conflict rules lead to the application of the law of a declaration state.[240] Accordingly, a German court would not be bound to apply the CISG in this case. Nevertheless, the German declaration, like any other interpretive

237 See Bridge, *International Sale of Goods*, *supra* note 32, at 544, para. 11.46; Schroeter, *Backbone or Backyard, supra* note 10, at 446-447.

238 Ferrari, *Homeward Trend*, *supra* note 7, at 16.

239 Bridge, *Uniform and Harmonized Sales Law*, *supra* note 231, at 905, 908, 922; Bridge, *International Sale of Goods*, *supra* note 32, at 544, para. 11.46.

240 The declaration reads: 'The Government of the Federal Republic of Germany holds the view that Parties to the Convention that have made a declaration under article 95 of the Convention are not considered Contracting States within the meaning of subparagraph (a) (b) of article 1 of the Convention. Accordingly, there is no obligation to apply – and the Federal Republic of Germany assumes no obligation to apply – this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1) (b) of article 1 of the Convention. Subject to this observation the Government of the Federal Republic of Germany makes no declaration under article 95 of the Convention.' See *supra* note 26.

declaration,[241] is incompatible with Article 7(1) CISG and hence prohibited by the Article.[242] Thus, although this declaration (by virtue of domestic legislation) is binding in Germany, it produces no international legal effect under the CISG.[243] Therefore, to courts in other Contracting States, not only the declaration itself, but also its effect, is foreign.[244]

5.4 Parties: SAR versus Mainland, Forum/Seat of Arbitration: Mainland

Since the respective handovers, Hong Kong and Macao have become parts of China, a Contracting State to the CISG. Thus, unlike in cases before the handovers,[245] the CISG cannot apply through Article 1 CISG to post-handover contracts between parties from SARs and Mainland. This is because Article 1 CISG requires the parties to have their places of business in *different* Contracting States. Nevertheless, the CISG may be applied by other means. Although the instant scenario is purely domestic, it is of interregional character. Under the law of Mainland China, international cases[246] and interregional cases, *i.e.*, cases involving Hong Kong or Macao elements, are in principle treated equally in terms of choice of law, unless otherwise provided by international conventions and interregional arrangements.[247] The requirement for equal treatment of international and interregional cases applies to both litigation and arbitration in the Mainland. Accordingly, approaches (other than Art. 1 CISG) by which the CISG are applied in international cases may also be adopted in the present scenario.

5.4.1 CISG Chosen by the Parties

The first, and most frequently employed, approach is to apply the CISG via the parties' agreement. As shown above,[248] in cases involving parties from SARs and Mainland China, the CISG is often chosen by the parties to govern their contracts. These cases are to be

241 For a discussion on the qualification of this declaration as an interpretive declaration, see Schroeter, *Backbone or Backyard, supra* note 10, at 454.

242 For further elaboration, see *id.*, at 455.

243 Similarly Torsello, *supra* note 164, a 117.

244 See *supra* note 232 and accompanying text.

245 See *supra* notes 106-109 and accompanying text.

246 In Chinese conflict of laws, the term 'disputes involving foreign elements' instead of 'international disputes' are employed. According to Supreme People's Court's Interpretation on the General Principles of Civil Law of P.R. China, Art. 178, a dispute involves foreign elements if (a) at least one of the parties is a foreign or stateless natural person, or a foreign corporation; or (b) the subject matter is located in a jurisdiction other than Mainland China; or (c) the event giving rise to, altering or terminating the legal relationship takes place in a jurisdiction other than Mainland China.

247 See Art. 2(5) Supreme People's Court's Interpretation on Trials of Disputes Involving Hong Kong or Macao Elements, (1987) Fa(Jing)fa No. 28. For a case expressly noting this point, see CIETAC Arbitration Proceeding, China, 30 July 1998, available at <http://cisgw3.law.pace.edu/cases/980730c1.html>.

248 See *supra* notes 121-124 and accompanying text.

distinguished from the situation where, when incorporated into contracts by reference, the CISG is treated as contract terms.[249] Indeed, the CISG may come into play as the applicable law when opted into by the parties at the level of conflict of laws.[250] The permissibility of such opting-in must be determined in light of the applicable conflict rules of the forum or the applicable arbitration rules, respectively.[251] The legal framework regarding such opting-in before Mainland courts and in arbitration calls for separate treatment.

Litigation

For Mainland courts, the validity of a choice of the CISG in cases beyond the territorial scope of the Convention is a question of conflict of laws. Under Mainland conflicts law, the reference to the parties' choice of the applicable law is generally limited to choice of national laws.[252] This stance reflects the civil law reasoning that 'in principle State courts cannot avoid the application of State law'.[253] However, this 'State law requirement' has not been strictly adhered to in practice.[254]

Currently, China is envisaging a new statute on the conflict of laws. The first draft of this statute broke new ground by providing that parties to international contracts may designate international conventions as the applicable law of their contracts.[255] Accordingly, choice of the CISG *in its own right*, *i.e.*, not as part of the law of a Contracting State, was permitted under this draft. Yet the second draft of this statute stands by the position under the

249 See, *e.g.*, CIETAC Arbitration proceeding, China, 26 June 2003, available at <http://cisgw3.law.pace.edu/cases/030626c1.html>. The parties incorporated by reference the provisions of Parts II and III of the CISG, except to the extent that these provisions were inconsistent with the express provisions of their contract or contrary to the law of Hong Kong as the applicable law. Thus, the provisions of the CISG were merely contract terms which were subject to the law of Hong Kong.

250 For general discussion on opting-in at the conflict-of-laws level *vis-à-vis* that at the substantive law level, see Schwenzer & Hachem, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 6 paras. 29-36.

251 Schlechtriem, in: *Commentary on the CISG* (2nd ed.), *supra* note 31, Art. 6 para. 11.

252 Art. 145 1986 GPCL provides: 'Unless otherwise provided by law, parties to a contract involving foreign elements may choose the applicable law of their contractual disputes.' Art. 126 1999 Contract Law provides: 'Unless otherwise provided by law, parties to a contract involving foreign elements may choose the applicable law of their contractual disputes.' For detailed analyses on the requirements for a valid choice of law by the parties under Chinese law, see Xiao & Long, *Selected Topics*, *supra* note 21, at 78-80; Xiao & Long, *Contractual Party Autonomy*, *supra* note 121, at 194 *et seq*.

253 See F. Vischer, 'General Course on Private International Law', in: *Recueil des Cours* 1 at 136 (1996).

254 For instance, in *Fayau v. Wujin International Trade Co.*, the Uniform Rules for Collections, ICC Publication No. 322 (1978) were applied as the applicable law chosen by the parties. See Jiangsu High People's Court, China, 2002 ((2002) Su Minsan Zhongzi No. 019). Similarly *Shanghai Lansheng Corp. v. Shanghai Branch of OCBC Bank and Citibank China*, Shanghai High People's Court, China, 2000 ((2000) Hu Gao Jing Zhongzi No. 335). These decisions on choice of law may be challenged, not only because of the State law requirement, but also because according to Art. 142(3) 1986 GPCL, international usages can only act as gap-fillers in the absence of relevant provisions in Chinese law on the issues at stake.

255 See Art. 50(1) of the first draft. For further discussion on the provision, see Xiao & Long, *Contractual Party Autonomy*, *supra* note 121, at 200-203.

existing Mainland law, *i.e.*, the parties may only choose 'law' rather than 'rules of law'.[256] Since the second draft will probably be approved by the Chinese legislature without substantial amendment, one may speculate that under future Mainland conflicts law, direct choice of the CISG as the governing law will not be sanctioned. This being said, it remains to be seen whether this state law limitation will be adhered to in future practice. Moreover, in cases between parties from SARs and Mainland, direct choices of the CISG may not be considered by Mainland courts as choices of a-national rules of law at all, since the CISG is in force in Mainland as part of Mainland law. Even if a choice of the CISG is considered as choice of a-national rules in the present scenario, the court, bearing in mind the principle of *favor negotii*, may well interpret the parties' choice as incorporating the CISG into the contract. Thus, as far as the CISG is concerned, distinction between opting-in at the substantive law level and that at the conflict-of-laws level may not be so significant in practice.[257]

CIETAC Arbitration

Under the arbitration rules of CIETAC (hereinafter 'CIETAC Arbitration Rules'), an arbitral tribunal shall make its arbitral award 'in accordance with law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness'.[258] Similarly, the 1994 Arbitration Law of P.R. China (hereinafter '1994 Arbitration Law') requires arbitrators to render their awards 'in accordance with law'.[259] In light of the wording 'law', some commentators deem that when the seat of CIETAC arbitration is in the Mainland, arbitrators hardly have any discretion in applying rules of law.[260] According to this view, parties' choice of the CISG *in its own right* in the instant scenario is presumably not permissible.

Yet, in CIETAC arbitrations seated in the Mainland and applying Mainland conflict of laws, direct choices of the CISG may not be considered as choices of a-national rules of law at all, on the basis that Mainland courts may take the view that the CISG is in force in

256 See Arts. 4 & 43 of the second draft of the statute, available at <http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm>.

257 See Schwenzer & Hachem, in: *Commentary on the CISG* (3rd ed.), *supra* note 3, Art. 6 para. 36.

258 Since their initial promulgation in 1988, the CIETAC Arbitration Rules have been revised six times, most recently in 2005. See China International Economic and Trade Arbitration Commission (CIETAC), <http://www.cietac.org/index.cms>. Except for the 1988 CIETAC Arbitration Rules, which had no stipulations on the law applicable to the merits of a case, the revised versions of the CIETAC Arbitration Rules all provide: 'The arbitral tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness.' See, *e.g.*, Art. 43(1) CIETAC Arbitration Rules.

259 See Art. 7 1994 Arbitration Law, People's Republic of China.

260 See M. Chi, 'Application of the UNIDROIT Principles in China: Successes, Shortcomings and Implications', 2010 *Uniform Law Review* 5, at 30-33. In particular, the author pointed out that 'Chinese arbitration law does […] require that arbitrators must base their decisions on laws.' *Id.*, note 102.

Mainland as part of Mainland law. In effect, the CISG has been applied as the governing law via parties' agreement in cases between parties from the Mainland and Hong Kong, regardless of whether the choice was explicitly stated in contracts, or subsequently indicated during the arbitration proceedings.[261] In the latter situation, the parties were deemed to have such consensus usually because they cited the CISG in their pleadings and defences.[262] To the present author's knowledge, of all the CIETAC arbitration awards applying the CISG via parties' agreement, none has been set aside or denied recognition by Mainland courts on the ground that the CISG was erroneously applied. Moreover, it does not seem implausible to adopt a more liberal interpretation of the wording 'law' under Article 43(1) CIETAC Arbitration Rules and Article 7 1994 Arbitration Law.[263] Thus, in CIETAC arbitrations involving parties from Mainland and SARs, the parties may have ample freedom to opt into the CISG.

Finally, it is not infrequent for the CISG to be chosen in conjunction with Chinese domestic law in CIETAC arbitrations.[264] For this concurrent designation, a problem may arise as to which set of rules should be given priority in the event of differences between the two.[265] The present author proposes that arbitrators should enquire whether the parties have a solution in mind. Failing the parties' agreement on such a solution, it is advisable to prefer the CISG since it is presumably more suited to international transactions.[266]

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261 See, *e.g.*, *Antimony ingot case*, *supra* note 112; *Caffeine case, supra* note 112.

262 In effect, direct designation of the CISG has also been allowed in cases involving parties both doing business in Hong Kong. See, *e.g.*, CIETAC Arbitration proceeding, China, 28 April 1995, available at <http://cisgw3.law.pace.edu/cases/950428c1.html>, and also international cases involving parties from China and (the then) non-contracting states to the CISG. See, *e.g.*, CIETAC Arbitration proceeding, China, 23 July 1997, available at <http://cisgw3.law.pace.edu/cases/970723c1.html>; CIETAC Arbitration proceeding, China, 21 May 1999, available at <http://cisgw3.law.pace.edu/cases/990521c1.html>; CIETAC Arbitration proceeding, China, 8 September 1997, available at <http://cisgw3.law.pace.edu/cases/970908c1.html>.

263 For elaboration on a more liberal interpretation in this respect, see Xiao & Long, *Selected Topics*, *supra* note 21, at 80-82.

264 See, *e.g.*, *Black melon seeds case*, *supra* note 112; *Gray cloths case*, *supra* note 122; *Raincoat case*, *supra* note 122. Concurrent designation of CISG and Chinese domestic law also occurred in Mainland courts. See, *e.g.*, *Lianzhong Enterprise Resources (Hong Kong) Ltd. v. Xiamen International Trade & Trust Co.*, *supra* note 110.

265 The test for 'differences' between the two sets of rules is also a pending question. For discussions on the differences with regard to several specific matters, see Shen, *Declaring the Contract Avoided*, *supra* note 20, at 7 *et seq.*; Yang, *supra* note 20, at 23-27.

266 This approach was followed by the tribunal in the *Elevators case*, where it was ruled that according to the principle that international conventions should prevail over domestic laws, the CISG should apply if there was a conflict between the Convention and Chinese domestic law, see *Elevators case*, CIETAC Arbitration proceeding, China, 9 September 2002, available at <http://cisgw3.law.pace.edu/cases/020909c1.html>. See also CIETAC Arbitration proceeding, China, 23 October 1996, available at <http://cisgw3.law.pace.edu/cases/961023c1.html> (where it was held that in case of any contradiction between Chinese law and any international treaty adopted by China, the latter should prevail, and the CISG was subsequently applied).

5.4.2 CISG as Evidence of Usages

According to Article 142(3) GPCL, in the absence of relevant provisions in Chinese law and in treaties concluded or acceded to by China, international usages may apply. Again, this provision applies to both international and interregional cases. Thus, in cases involving parties from SARs and the Mainland, the CISG may be applied by Mainland courts if (a) Chinese law is designated by conflict rules as the *lex causae*; and (b) relevant rules on the issue at stake are absent in Chinese law; and (c) relevant rules of the CISG are qualified as evidence of international usages. Here, rules of the CISG act as the gap-fillers for Chinese law.

In CIETAC arbitration, to the extent that Chinese law is deemed applicable, the CISG may apply in the same justified manner under Article 142(3) GPCL as in Mainland courts. For instance, in the *Peppermint oil case*,[267] involving parties from the U.K. and China, the Tribunal seemingly considered the CISG as evidence of usages which should apply to matters not covered by Chinese law.[268] The reasoning in this international case may also apply to interregional cases concerning parties from SARs and China. Yet somewhat differently, in the *Ink cartridge case*[269] between parties from Hong Kong and Mainland, where Chinese law was held applicable, a provision of the CISG was treated as 'an international trade usage adopted commonly'. Thus, the CISG applied in parallel with Chinese law, rather than in the absence of relevant provisions in Chinese law. This concurrent application might be justified under Article 43(1) CIETAC Arbitration Rules, according to which a tribunal shall make its award 'in accordance with law […] *with reference to international practices*'.[270]

6 Concluding Remarks

It is hoped that the foregoing discussion has shown that there are many good reasons to withdraw the two declarations by China under Article 95 and Article 96 CISG. During the past 20 years, great changes have taken place in regard to the Chinese legal system and its underpinning rationale. International trade is well received in China, with party autonomy

267 CIETAC Arbitration proceeding, China, 30 June 1999, available at <http://cisgw3.law.pace.edu/cases/990630c1.html>.

268 In so ruling, the Tribunal referred to Art. 5(2) 1985 FECL. The FECL has now been repealed by the 1999 Contract Law. Note that Art. 5(2) 1985 FECL is almost identical to Art. 142(3) GPCL. Therefore, the reasoning employed in this case may be followed in future cases under Art. 142(3) GPCL.

269 See *supra* note 125.

270 See *supra* note 258 (emphasis added). The emphasized wording is considered as mandating international practices as 'only secondary or auxiliary sources of law in CIETAC arbitration'. See Chi, *supra* note 260, at 32.

fully respected under contemporary Chinese law. Maintenance of the reservations will not only contradict China's attitude favoring a market economy and international transactions, but also create confusion in practice. Withdrawal of the reservations will eliminate all these inconsistencies and uncertainties, thereby bringing enforcement of the CISG into line with China's current policies, and promoting uniform application of the CISG with its full acceptance in China.

There are also compelling reasons to implement the CISG in Hong Kong and Macao. Implementation of the CISG in SARs accords with China's long-standing commitment to honour its international treaty obligations, including the CISG, to which China is a Contracting State. Implementing the CISG in Hong Kong and Macao will help to remove legal barriers in SARs-related international trade, thereby creating a suitable legal environment for international transactions involving the SARs. Therefore, implementation is also in the very interests of SARs themselves, and conforms to China's aspiration to maintain the prosperity and stability of Hong Kong and Macao. Finally, in the long run, implementation of the CISG in SARs will also further the goals of the CISG, that is, to promote worldwide uniformity and enhance legal certainty in international trade.