

# **The United Nations Convention on Contracts for the International Sale of Goods and China's Contract Law**

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Dear Mr. Chairman, Ladies and Gentlemen,

At the thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG), I am excited to visit the city of its birth. I feel especially delighted to join this high-level panel discussion, and exchange thoughts with colleagues in this panel.

As you may know, China ratified CISG in 1986 and is one of the original contracting States of this international convention. In the past three decades, CISG has had great influence on Chinese contract law and civil law in general. I would like to give a brief talk in this regard.

## ***The history of Chinese contract law***

China's contemporary civil legal system is the fruit of China's Reform and Opening Up Project since 1978. It is composed of separate laws, including the General Principles of Civil Law, Contract Law, Property Law and Tort Liability Law.

The present Contract Law of China was enacted in 1999. Before that, China had enacted three separate contract laws between 1981 and 1987, namely the Economic Contract Law in 1981, the Foreign Economic Contract Law in 1985, and the Technology Contract Law in 1987. Later on, the three separate laws were unified by the present Contract Law.

CISG has had profound influences on Chinese contract law and the market economy of China since the beginning of 1980s. Both the Chinese government and Chinese lawyers were in support of this international convention as soon as its first draft was issued, because it embodies modern, uniform and fair institutions for contracts in both international and domestic contexts. We also recognized that the structure and content of CISG has reflected the wisdom of contract laws in both the civil law tradition and common law jurisdictions.

This explains why the Foreign Economic Contract Law of China, which regulated international trade, had widely borrowed from CISG. For example, the Foreign Economic Contract Law adopted strict liability for breach of contract. It also established the rule of fundamental breach though in a slightly different style.

In September 1993, the Standing Committee of National People's Congress made a decision to amend the Economic Contract Law. Later on in the same year, the Commission

of Legislative Affairs of the Standing Committee held an expert conference to discuss how to amend the Economic Contract Law. The participants of that conference reached two consensuses. First, the three separate contract laws ought to be unified. Second, it was necessary to form an expert team drafting a legislative proposal for the amendment of Chinese contract laws.

I was lucky to participate in the whole drafting process. I still remember that one of the major debates during the drafting process was about the model of the new Contract Law. Namely, should China follow the model of continental legal systems in which contract law is only part of the law of obligation, or should China borrow the model of CISG and the Principles of International Commercial Contracts (PICC) in which contract law is an independent legal document?

As many of you may know, the civil law systems in the Continent, especially the German Civil Code, are quite influential in China. Nonetheless, after much deliberation, it was agreed to make the Contract Law of China in the form of an independent legislation, and to learn from the experiences of the international convention and the model law.

Now, let me briefly introduce why we adopted the model of CISG.

### ***Why CISG instead of civil law traditions?***

There are three main reasons that China chose CISG as the main reference for the drafting of its Contract Law.

First, China has joined the international convention, which means China is obliged to perform its international obligations prescribed by the convention. If China reflects the rules of contract it follows in the international context in its domestic law, it helps to ensure the integrity of its legal system.

Second, CISG contains the merits of both continental legal systems and common law traditions, and reflects the most recent tendency to satisfy the institutional demands of international trade. It greatly helps to facilitate market transactions. Ever since the outset of China's Reform and Opening Up Project, China has been increasingly involved in international trade. This requires that China's contract law should be forward-looking and in line with international norms and practices.

Third, CISG is consistent with the tendency of economic globalization. The core spirits of CISG, such as contractual autonomy, good faith and *favour contractus*, meet the inherent demands of market economies. The essence of China's reform project is to shift from its highly planned economy to a market oriented economy. The legislation of China's Contract Law was accomplished in a transitional period when the market economy was not deeply rooted in China. However, it is a consensus among the draftsmen that China's Contract Law should conform to the essence of the market economy. It could not only serve to regulate economic activities during the transitional period, but also operate as a tool to accelerate the future development of a market economy in China.

These are the basic economic and social backgrounds to China's legislation of the present Contract Law. In a word, China widely borrowed from CISG because of China's understanding that CISG has established many modern and advanced rules of contract that help to facilitate the construction of a market economy.

## *CISG's impacts on China's contract law*

In 1999, the passage of China's present Contract Law ended the messy situation of the Chinese contract legal system that was composed of three separate laws. In more than a decade, the new Contract Law has proved to be successful in maintaining an efficient and healthy market economy in China. Today, China's present Contract Law is commonly regarded as a significant facilitation to China's market economy and robust economic growth.

Here I would like to give a couple of detailed illustrations of CISG's strong bearing on China's Contract Law.

First, the wide borrowing from CISG has promoted the modernization of China's Contract Law. Here are three examples.

One example is about the concepts of *Non-Conformity* adopted by CISG. Many colleagues in China suggested that China's Contract Law transplant the German's dual-track rules that distinguish *Inappropriate Performance* with *Liability for Defects Warranty*. In my view, the divide between the concept of *Inappropriate Performance* and *Liability for Defects Warranty* is unnecessary. I argued that the CISG rules work better to enforce contracts and give sufficient remedies to the innocent party in cases of inappropriate performance. In the end, the legislature adopted the CISG rule of *Non-Conformity*. I also noted that, years later, the amendment of the German law of obligation abandoned the dual-track rules, and followed the CISG rule.

Another example concerns whether China's Contract Law needs a general rule of contract termination, which is provided by CISG but absent in the German Civil Code. It was hotly debated whether China should take the CISG approach or the German model. We recognized that it is scientific to adopt the rule of *Fundamental Breach* included in CISG, because such a general rule sets up a clear standard for the termination of contract in the case of breach of contract. Eventually, article 94 of China's Contract Law accepted the rule of *Fundamental Breach*.

The third example relates to the written form requirement. China's contract laws used to place excessive emphasis on the written form of contracts. Thus, China made a "written form" declaration when ratifying CISG in 1986. But many written form requirements have proved to be inefficient regulations in domestic businesses in the past three decades. In the past few years, China has gradually accepted the approach taken by article 11 of CISG and withdrew its "written form" declaration in 2013.

Second, as I mentioned earlier, the legislation of China's Contract Law was accomplished before China fully constructed its socialist market economy. But China's Contract Law took a step forward by teaching the spirit of the market economy and promoting improvements to China's market environments. In a broader sense, the wide dissemination and application of China's Contract Law with the modern spirit borrowed from CISG and other sources have accelerated China's overall economic reform in the past decade.

Third, Chinese Contract Law's conformity with international norms reduces the transactional costs of Chinese enterprises when they go abroad. It is because the similarity between domestic contract law and international transactional rules, first, saves the expense of learning and conforming to different legal systems, and second, gives them the confidence to step into international trade. These benefits are equally available to foreign investors in China's market, and in effect makes China market friendly to foreign investors.

Fourth, both China's Contract Law and CISG are well enforced by the Chinese courts and arbitrators. According to the Working Report of China's Supreme People's Court in 2015, Chinese courts have resolved around eight million disputes over civil and commercial matters, nearly half of which are contract cases. The number of cases resolved through arbitration is also not small. As far as I know, both China's Contract Law and CISG are highly honoured in China. The work reports issued by the United Nations Commission on International Trade Law (UNCITRAL) also support my observation.

In addition, I am aware of the fact that CISG has also had positive impacts on other East Asian jurisdictions, such as Japan, Republic of Korea, and so forth.

### *The future of China's contract law and CISG*

When celebrating CISG's great contributions to international trade (domestic economies and the rule of law in general), it is necessary to note that the world is changing unprecedentedly fast. Especially in the age of big data, the form and volume of transactions have been experiencing profound transformations. Taking China as an example, electronic commerce has brought revolutionary changes to traditional transactions. The volume of online sales in 2014 in China was more than 100 billion dollars, while that of online finance was almost 1.6 trillion dollars.

These changes are challenging the conventional wisdom of contract law at both national and international levels. In order to respond to such issues as forms of e-contracts, e-consumer protection, the roles of third parties in e-commerce, both national laws and international conventions need to reform.

I noted that UNCITRAL has provided a model law of international e-commerce, the United Nations Convention on the Use of Electronic Communications in International Contracts. It contains many rules that aim to facilitate cross-border electronic transactions. This Convention, in my view, would greatly improve the rule of international trade law under CISG. China, already a signatory of the Convention, is also assessing and improving its domestic law on e-commerce.

Actually, China has gained much experience in the institutional design of e-commerce and e-banking. For example, according to China's Consumer Protection Law, the online buyer is entitled to return goods to the seller within seven days without reason. This seven-day-no-reason-to-return rule has proved to be very efficient in practice.

Moreover, China is codifying its civil law, aiming to unify and systemize the present, separate civil laws, which were introduced at the beginning of my talk. In 2014, the Fourth Plenum of the Eighteenth Chinese Communist Party Central Committee made a formal decision to further improve China's market legal systems by means of civil law codification. The codification project is scheduled to proceed in two steps. The first step is to enact the General Principles of Civil Code in 2017. The second step is to pass the whole Code in 2020.

In form, CISG is still a significant reference for China's civil law codification. For instance, Contract Law will become one independent part of the future Code, instead of part of an independent obligation law. Probably, China's civil code will include a small General Principles of Obligation, which sets the goal to cover non-contractual obligations.

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In substance, however, we will do our best to address the challenges coming from new technology and modern conception.

I believe Chinese experiences will be helpful to improve the rules in CISG.

Of course, it is not easy to formally amend CISG, which is after all an international convention joined by a large number of States. But as I proposed elsewhere, it may help to draft a model sales law by the United Nations Commission on International Trade Law, which would complement CISG and assist its effective use and uniform interpretation by Member States. Of course, the reform of CISG, no matter in what manner, needs to take into account the experiences of various Member States and other existing texts, such as Unidroit principles. I also believe that an effective reform of CISG in due manner will provide valuable references for domestic legal reform, as CISG has already done in the past three decades.