

**A UNIFORM SALES LAW FOR THE MAINLAND CHINA, HONG
KONG SAR, MACAO SAR AND TAIWAN – THE CISG**

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1 INTRODUCTION

Over the past decade, a new framework for trade and investment between the territorial units of the People’s Republic of China (**the PRC**) has emerged. These territorial units comprise the Mainland of China (**the Mainland**); Hong Kong Special Administrative Region (**Hong Kong**), returned to China by the United Kingdom in 1997; the Macao Special Administrative Region (**Macao**), returned to China by Portugal in 1999; and the Republic of China (**Taiwan**), whose political and legal status remains contentious despite its improving relationship with the PRC.

A detailed discussion of the changes in the relationship between Taiwan and the PRC is outside the scope of this article. However, it is important to note that in the years since pro-Beijing President Ma Ying-Jeou came to power trade between the two has increased dramatically as shown in Figure 1 below. The *Economic Co-operation Framework Agreement (ECFA)*¹ signed between the leaderships of both sides in June 2010 will further boost Taiwan-PRC trade, which already totals US\$110 billion a year. The PRC already had similar agreements in place with Hong Kong and Macao: the *Mainland and Hong Kong Closer Economic Partnership Arrangement*² and the

¹ *The Mainland and Taiwan Economic Cooperation Framework Agreement* (hereinafter ‘ECFA’) was signed on 29 June 2010.

² *The Mainland and Hong Kong Closer Economic Partnership Arrangement* (hereinafter ‘CEPA’) Main Text was signed on 29 June 2003 and Six Annexes were signed on 29 September 2003. Thereafter, Supplement I to CEPA (hereinafter ‘CEPA II’) was signed on 27 October 2004; Supplement II to CEPA (hereinafter ‘CEPA III’) was signed on 18 October 2005; Supplement III to CEPA was signed on 27 June 2006; Supplement IV to CEPA was signed on 29 June 2007; Supplement V to CEPA was signed

*Mainland and Macao Closer Economic Partnership Arrangement*³. Trade between Hong Kong and the Mainland totals around US\$300 billion a year.⁴ From January 2004 to January 2011, exports of CEPA goods between Macao and the Mainland totals around US\$22 million. There is also considerable trade between Taiwan and the SARs. Trade between the Mainland, Taiwan, Hong Kong and Macao has become very significant and will continue to grow. What remains both lacking and needed is a uniform and harmonious commercial law framework for the PRC and its territorial units.

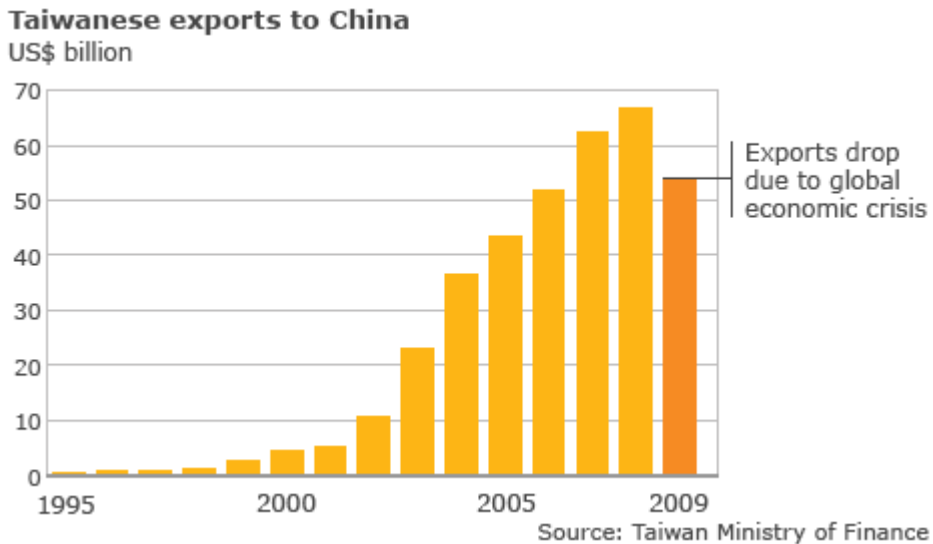


Figure 1

It is against this backdrop that the author proposes that the *United Nations Convention on Contracts for the International Sale of Goods (the CISG)* should become the default sales law governing transactions between the PRC's territorial units. By adopting a uniform sales law, such as the CISG, transaction costs associated with negotiating choice-of-law clauses can be reduced. Operating under a common sales law will enhance traders' confidence, helping to facilitate faster and more efficient commercial transactions.

Applying the CISG as a default sales law would not take away the freedom of parties to choose the laws of any particular territorial unit(s) by agreement or through the application of inter-territorial conflict of law rules. What the CISG would provide is

on 29 July 2008; Supplement VI to CEPA was signed on 9 May 2009; and Supplement VII to CEPA was signed on 27 May 2010.

³ The CEPA Main Text and Six Annexes were signed on 17 October, 2003. Thereafter, Supplement I was signed on 29 October 2004; Supplement II was signed on 21 October 2005, Supplement III was signed on 26 June 2006; Supplement IV was signed on 2 July 2007; Supplement V was signed on 30 July 2008; Supplement VI was signed on 11 May 2009 and the most recent, Supplement VII, was signed on 28 May 2010.

⁴ See trade statistics published by the Trade and Industry Department of Hong Kong SAR, available at: <<http://www.tid.gov.hk/english/aboutus/publications/tradestat/wmt08tt.html>>.

an alternative and neutral sales law framework in the event that parties fail to agree on their own governing law clauses. There would be no need to change the existing sales laws in the different territorial units. Given the substantial benefits that would result from the adoption of the CISG,⁵ there is every reason to make the CISG available to traders from all of the territorial units.

The CISG can only be acceded to by sovereign States,⁶ thus none of the territorial units can become an independent party to the CISG. The author argues that the PRC should make an unequivocal declaration that would provide a sound legal basis under international law for the application of the CISG to inter-territorial sales in China. If any of the territorial units do not want to participate in the CISG, the government of that territorial unit should request that the Central Government of the PRC file a declaration according to Art. 93 of the CISG to eliminate the application of the CISG in that territorial unit. As will be demonstrated, there is confusion as to whether the CISG currently applies to any of the territorial units.

This article examines (1) the applicability of the CISG in Hong Kong, Macao and Taiwan; (2) the CISG cases involving parties from these territorial units; and (3) the clarification needed with respect to these territorial units' status under the CISG.

2 *APPLICABILITY OF THE CISG IN HONGKONG, MACAO & TAIWAN*

Of the top ten world trade countries/territories, only the United Kingdom has not yet joined the CISG. Major trading partners of Hong Kong, Macao and Taiwan, including the Mainland of China, the United States of America, Germany, Japan, the Netherlands, the Republic of Korea (**South Korea**), Canada and Singapore are all signatories to the CISG. Trade between these territorial units and CISG jurisdictions accounts for around 70 per cent of their total imports and exports.⁷ Merchants from these territorial units have long been exposed to the CISG.⁸ However, much to their detriment, the status of these territorial units under the CISG is not clear.

2.1 *DID THE RE-UNIFICATION RESULT IN THE HONG KONG & MACAO SARS BECOMING 'PARTIES' TO THE CISG?*

On 20 June 1997, shortly before Hong Kong's reunification with the PRC, the PRC Government deposited a diplomatic note (the 1997 PRC Diplomatic Note) with the Secretary General of the United Nations. This note declared that the treaties in Annex

⁵ See, e.g. Schwenzer I. and Hachem P., "The CISG - Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law*, at pp. 457-478.

⁶ See e.g. the Preamble, Arts. 1 and 91 of the CISG.

⁷ See statistics *supra* fn 4.

⁸ Yang F., "CISG in China and Beyond" (2008) 40(3) *UCCLJ* 373.

I to the note would be applied to the Hong Kong SAR⁹. However, Annex I did not include any reference to the CISG despite the fact that the PRC was a party to the Convention. Furthermore, prior to the reunification, the CISG had not been applied in Hong Kong, as the United Kingdom was not a party to the Convention¹⁰. As a result, courts seated throughout the world have taken inconsistent positions with respect to the CISG's applicability to the Hong Kong SAR. For example, the Supreme Court of France (Cour de cassation) has decided that the CISG does not apply to the Hong Kong SAR¹¹. On the other hand, some courts in the United States have found that the CISG is applicable to the Hong Kong SAR, while still others have found it inapplicable.¹²

The PRC also submitted a diplomatic note (the 1999 PRC Diplomatic Note) to the Secretary-General of the United Nations prior to Macao's return to the PRC's sovereignty on 13 December 1999. This note also had an Annex I, which listed the treaties to which the PRC was a Party and which would be applied to Macao SAR as of 20 December 1999. Like Annex I of the 1997 PRC Diplomatic Note, Annex I to the 1999 PRC Diplomatic Note did not include any reference to the CISG.

2.1.1 THE TELECOMMUNICATIONS PRODUCTS CASE AND THE INNOTEX CASE

In the Telecommunications Products case, the Supreme Court of France paid special attention to the 1997 PRC Diplomatic Note and, more specifically, Annex I. The Court found that because the CISG was not included in Annex I, this served as a declaration by the PRC that the CISG would not apply to the Hong Kong SAR after the handover in 1997.¹³ The Court further found that such a declaration by the PRC was in keeping with Art. 93 of the CISG. Thus the Court held that, "the People's

⁹ See Letter of Notification of Treaties Applicable to Hong Kong after 1 July 1997, deposited by the Government of the People's Republic of China with the Secretary-General of the United Nations on 20 June 1997, Annex I, 36 International Legal Materials, vol. XXXVI, No 6, November 1997, para. 1675.

¹⁰ See the List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region, available at: <<http://www.legislation.gov.hk/interlaw.htm>>.

¹¹ Supreme Court of France, 2 April 2008, CISG-online 1651, translation available at: <<http://cisgw3.law.pace.edu/cases/080402f1.html>>, (hereinafter: '*Telecommunications products case*').

¹² *Innotex Precision Limited v Horei, Inc., et al.*, 2009 U.S. Dist. LEXIS 117992 (United States District Court for the Northern District of Georgia), 17 December 2009, CISG-online 2044, available at: <<http://cisgw3.law.pace.edu/cases/091217u1.html>>, (hereinafter '*Innotex case*'). For a contrary conclusion, see *Electrocraft Arkansas, Inc. v Electric Motors, Ltd., et al.*, 2009 U.S. Dist. LEXIS 120183 (United States District Court for the Northern District of Illinois), 23 December 2009, CISG-online 2045, available at: <<http://cisgw3.law.pace.edu/cases/091223u1.html>>. See also *CNA International, Inc. v Guangdong Kelon Electronical Holdings, et al.*, 2008 U.S. Dist. LEXIS 113433 (United States District Court for the Northern District of Illinois), 3 September 2008, available at: <<http://cisgw3.law.pace.edu/cases/080903u1.html>>, (hereinafter '*CNA case*').

¹³ See *Telecommunications products case*, *supra* fn 11, at para. B.

Republic of China has effectuated with the depositary of the Convention a formality equivalent to what is provided for in Art. 93 of the CISG”¹⁴.

More recently, the United States District Court for the Northern District of Georgia also found that the CISG is inapplicable to the Hong Kong SAR. In *Innotex case*¹⁵ the Court based its decision on the fact that the Hong Kong SAR was not a ‘Contracting State’. In support of its conclusion, the Court highlighted the fact that its position was consistent with the position taken by the PRC Government, the Hong Kong Department of Justice, the Supreme Court of France, and numerous commentators.¹⁶

Thus, the two main arguments against the applicability of the CISG to the Hong Kong SAR appear to be: (1) the 1997 PRC Diplomatic Note and more specifically Annex I, which constitutes the equivalent of a CISG Art. 93 declaration; and (2) the PRC Central Government and the Hong Kong SAR Government have taken the position that the CISG does not apply to the Hong Kong SAR.

As to the Macao SAR, s. VI of the 1999 PRC Diplomatic Note, in particular, states that:

With respect to treaties that are not listed in the Annexes to the Note, to which the People's Republic of China is or will become a Party, the Government of the People's Republic of China will go through separately the necessary formalities for their application to the Macao Special Administrative Region if it so decided.
(emphasis added)

Thus, the question of the status of the Macao SAR under the CISG after 20 December 1999 turns to whether the PRC has separately gone through the necessary formalities for the application of the CISG to the Macao SAR. In order to ascertain the answer to this question, the first question that must be addressed is what exactly are the necessary formalities for the application of the CISG to the Macao SAR?

2.1.2 DID THE PRC DIPLOMATIC NOTES SATISFY THE REQUIREMENTS OF ART. 39 OF THE CISG?

Without question, the PRC did not “at the time of signature, ratification, acceptance, approval or accession” declare that the CISG is to extend to all of its territorial units or to only one or more of them.¹⁷ The issue then is whether the 1997 PRC Diplomatic Note, and in particular Annex I, can be seen as a new declaration made by the PRC after the PRC’s adoption of the CISG. More specifically, did Annex I satisfy the requirements set forth by Art. 93(2) of the CISG that any such declaration “state[s] expressly the territorial units to which the Convention extends?” Rather than adopting a textual interpretative approach, both the Supreme Court of France and the *Innotex*

¹⁴ *Ibid.*

¹⁵ See *Innotex case*, *supra* fn 12.

¹⁶ *Ibid.*

¹⁷ See Art. 93 (1) of the CISG.

Court focused on the ‘fact’¹⁸ that both the PRC Central Government and the Hong Kong SAR Government had taken the position that the CISG did not apply to the Hong Kong SAR.

Conversely, in *CNA case*¹⁹ the United States District Court for the Northern District of Illinois relied upon the plain language of Art. 93 of the CISG in reaching its conclusion that the CISG did, in fact, apply to the Hong Kong SAR.²⁰ The Court first found that, pursuant to the language set forth in Art. 93(1), the PRC had the right, when it resumed sovereignty over Hong Kong, to declare that the CISG did not apply to the Hong Kong SAR²¹. Next, it found that Art.93(2) required a signatory state to do the following when making a declaration pursuant to this provision: first, the declaration must be notified to the Secretary-General of the United Nations who is the depositary for the CISG; and second, the declaration must expressly identify the territorial units to which the CISG extends. Although the Court held that the Diplomatic Note satisfied the first requirement, it found that the Diplomatic Note failed the second requirement, because Annex I was silent as to the CISG, and more importantly, it did not “state expressly the territorial units to which the Convention extends”.

The author submits that Art. 93 has two main implications for any Contracting State whose territory increases to include territory not formerly subject to the CISG. First, Art. 93(1) should be interpreted to allow a Contracting State to make a declaration as well as to amend its declaration at any time instead of only making the declaration “at the time of signature, ratification, acceptance, approval or accession”. Second, Art. 93(4) suggests that in the absence of a declaration under Art. 93(1), the Convention is to extend to ‘all’ territorial units of that State including any new territory that is not formerly subject to the CISG. Thus, unless the Diplomatic Note constituted a declaration pursuant to Art. 93(1), the CISG should automatically apply to the Hong Kong SAR after the handover in 1997.

If the above is the logical effect and consequence of the absence of a declaration of the PRC pursuant to Art. 93, then there are in fact no necessary formalities for the application of the CISG to the Macao SAR. Thus, the CISG should apply to the

¹⁸ See *Innotex case, supra* fn 12 . The author questions whether it is a ‘fact’ that both the PRC Central Government and the Hong Kong SAR Government had taken the position that the CISG did not apply to the Hong Kong SAR. As will be discussed below, the fact that Annex I did not include the CISG does not necessarily suggest that the PRC Central Government had decided against the application of the CISG to the Hong Kong SAR. Furthermore, cases discussed above show that some PRC courts and many CIETAC arbitral tribunals have actually applied the CISG to Hong Kong SAR parties.

¹⁹ See *CNA case, supra* fn12.

²⁰ The Court cited *Chicago Prime Packers, Inc. v Northam Food Trading Co.*, 408 F. 3d 894 (United States Court of Appeals for the Seventh Circuit), 2005, CISG-online 1026, available at: <<http://cisgw3.law.pace.edu/cases/050523u1.html>>, citing Art. 7(2) CISG.

²¹ See generally Schroeter, U., “The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods” (2004) 16 *Pace Int’l L. Rev.* 307, at p. 323 et seq., available at: <http://www.schroeter.li/pdf/Schroeter_16_Pace_Intl_L_Rev_2004_307.pdf>.

Macao SAR automatically and immediately upon the resumption of sovereignty over Macao with effect from 20 December 1999.

2.1.3 WHAT WERE THE INTENTIONS OF THE PRC CENTRAL GOVERNMENT & THE HONG KONG SAR GOVERNMENT?

In deciding whether the Diplomatic Note constituted a declaration pursuant to Art. 93 of the CISG, the Supreme Court of France and the *Innotex* Court took the view that it was the intention of the PRC Central Government and the Hong Kong SAR Government to exclude the CISG's application in the Hong Kong SAR. The author submits that (1) the intentions of the PRC Central Government and the Hong Kong SAR Government are not directly relevant to the analysis and interpretation of Art. 93 of the CISG; and (2) even if the intentions of the PRC Central Government and the Hong Kong SAR Government are relevant in deciding whether the Diplomatic Note constituted a declaration pursuant to Art. 93 of the CISG, those intentions are still subject to debate. The author is of the opinion that the Diplomatic Note did not deal with the application of the CISG in the Hong Kong SAR at all and was not a declaration pursuant to Art. 93 of the CISG.

Since the application of the CISG in the Hong Kong SAR is a matter that has not been specifically dealt with by the PRC Central Government and the Hong Kong SAR Government, according to s. XI of Annex I to the Sino-British Joint Declaration (1984)²² and its mirror provision, Art. 153 of the Basic Law of the Hong Kong SAR,²³ the application of international agreements to which the PRC is or becomes a party to the Hong Kong SAR shall be decided by the Central People's Government, in accordance with the circumstances and needs of the SAR, and after seeking the views of the Government of the SAR.

2.2 WHAT IS THE STATUS OF TAIWAN UNDER THE CISG?

The UN General Assembly Resolution 2758 (XXVI) of 25 October 1971, declared that the UN General Assembly had decided “to recognize the representatives of the People's Republic of China are the only legitimate representatives of China to the United Nations”. Given that the CISG is only open for accession by sovereign

²² See the section available on the website of the Constitutional and Mainland Affairs Bureau of the Government of the Hong Kong SAR, available at: <<http://www.cmab.gov.hk/en/issues/jd3b.htm#foreign>>.

²³ Article 153 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 4 April 1990, which states: “The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region. International agreements to which the People's Republic of China is not a party, but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements”.

States,²⁴ Taiwan cannot become an independent party to the CISG. If, however, Taiwan is considered to be a territorial unit of the PRC, the status of Taiwan under the CISG could be clarified. Since the PRC has made no declaration under paragraph (1) of Art. 93 of the CISG, the Convention extends to all territorial units of the PRC, including Taiwan.

The above analysis is sound in theory. In practice, sovereignty over Taiwan has been exercised by the Republic of China (ROC or Taiwan), since the end of Chinese Civil War in 1949. Although the PRC considers Taiwan to be part of its territory and has offered a 'one country, two systems' solution similar to that which applies to Hong Kong and Macao, but this has not been accepted and Taiwan's status remains 'unsettled'.

3 CISG CASES INVOLVING PARTIES FROM HONG KONG, MACAO & TAIWAN

As will be shown in this section, in addition to the Supreme Court of France and American courts, the PRC courts and many arbitral tribunals have already had to decide upon the applicability of the CISG to Hong Kong, Macao and Taiwan.

3.1 WHAT IS THE STATUS OF TAIWAN UNDER THE CISG?

The Pace CISG database²⁵ has published fifty-six cases in which the CISG has been applied to international sales involving a Hong Kong seller, buyer or both. Among them, twenty-nine cases were decided by CIETAC arbitration, twelve by the People's Court in the Mainland of China, five in the United States, four in Austria, two in Belgium, and one each in France, Italy, Australia and Germany. Among these cases, the Hong Kong party was the plaintiff in twenty-nine cases, the respondent in twenty-five cases, and in two cases both the respondent and plaintiff. In addition, there are another fifty or so cases where Hong Kong was connected to the international sales contract in issue, either as the port of delivery or the place of payment, negotiation or conclusion of the sales contract to which the CISG applied. These identified and published cases probably represent only a small fraction of the cases involving Hong Kong parties in one way or another. The importance of the CISG for the Hong Kong SAR can no longer be ignored.

There have been at least four types of fact patterns that have resulted in the application of the CISG to Hong Kong parties. First, the CISG can apply to Hong Kong parties pursuant to Art. 1(1)(b) of the CISG, "when the rules of private international law lead to the application of the law of a Contracting State". The following case between a Hong Kong seller and a German buyer illustrates this point.²⁶

²⁴ See the Preamble and Art. 91(3) of the CISG.

²⁵ Pace University CISG Database, available at: <<http://www.cisg.law.pace.edu/cisg/text/case-annotations.html>>. See also CISG-online Database, available at: <<http://www.cisg-online.ch>>.

²⁶ See similarly Austrian Supreme Court, 31 August 2005, CISG-online 1093, 2006 Internationales Handelsrecht 31, translation available at: <<http://cisgw3.law.pace.edu/cases/050831a3.html>>.

In a 1996 German arbitration proceeding (*Chinese goods case*)²⁷, a dispute arose under a sales agreement. The German buyer terminated the contract, whereupon the Hong Kong seller commenced arbitration proceedings under the Arbitration Rules of the Hamburg Chamber of Commerce. Concerning the applicable law issue, the Tribunal decided that:

*[t]he applicable law must be determined according to German private international law. A choice of German law can be inferred, according to Art. 27 of the Introductory Law to the Civil Code (EGBGB), [28] from the agreement to refer disputes to a German arbitral tribunal.*²⁹

The Tribunal continued:

*[u]ndoubtedly, where the rules of private international law lead, as here, to German law, the [...] CISG [...], in force in Germany in 1990/1991, applies to sales contracts between parties in different States, by virtue of its Art. 1(1)(b) [CISG]. According to this provision, it suffices that the rules of private international law lead to the application of the law of one Contracting State – here: Germany. It is irrelevant whether the State where the other party has his seat is also a Contracting State to the CISG.*³⁰

As a result, the arbitral tribunal applied the CISG as the relevant German law pursuant to Art. 1(1)(b) of the CISG to this dispute, to which the Hong Kong seller was a party.³¹

(hereinafter '*Tantalum case*'), in which the Austrian Supreme Court applied CISG to a dispute between a Hong Kong seller and Austrian buyer.

²⁷ See Court of Arbitration of the Hamburg Chamber of Commerce, 21 March 1996, CISG-online 187, 1996 Neue Juristische Wochenschrift 3329, translation available at: <<http://cisgw3.law.pace.edu/cases/960321g1.html>>, (hereinafter '*Chinese goods case*').

²⁸ Introductory Law to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB)*), 18 August 1896, available at: <<http://www.gesetze-im-internet.de/bgbeg/BJNR006049896.html>>.

²⁹ See *Chinese goods case supra* fn 27, citing Palandt-Heldrich, BGB, 55th ed., no 6 to Art. 27 Introductory Law to the Civil Code, *supra* fn 28. In relation to German private international law, the tribunal cited German Federal Supreme Court, 21 September 1995, VII ZR 248/94, BB 1995, 2472. With regards to the Introductory Law to the Civil Code, the Tribunal cited Art. 27 of the Introductory Law to the Civil Code, *supra* fn 28, which reads in its translation in the relevant part: "1. The contract is subject to the law chosen by the parties. The choice of law must be explicit or must be determined with sufficient certainty from the provisions of the contract or the circumstances of the case". See the English translation of the *Chinese goods case, supra* fn 27.

³⁰ See *Chinese goods case, supra* fn 27, citing OLG Koblenz, 17 September 1993, 2 U 1230/91 RIW 1993, 934; Herber, R. in von Caemmerer, E. and Schlechtriem, P. (eds), *Kommentar zum Einheitlichen UN-Kaufrecht*, 1995, at Art. 1 nos. 37-40; Martiny, D. in *Münchener Kommentar BGB*, Art. 28 EGBGB App. II no 27; references in Will, M., "The First 150 or So Decisions" in *CISG The UN Convention on Contracts for the International Sale of Goods, International Bibliography 1980-1995*, 1995.

³¹ Unlike Germany, the PRC made a reservation on Art. 1(1)(b) CISG pursuant to Art. 95 CISG, therefore, CISG shall not apply to PRC and Hong Kong parties according to Art. 1(1)(b) CISG. For a discussion about the PRC's two reservations, see Yang F., "PRC's Two Reservations and the Application of CISG in CIETAC Arbitration Practice" (2008) 8 *International Law Review of Wuhan University* 307 [*in Chinese*], English version available at: <<http://www.cisg.law.pace.edu/cisg/biblio/yang2.html>>.

The second way in which the CISG can apply to Hong Kong parties is when the CISG is used to fill existing gaps within PRC contract law. An example of this scenario is the 2002 Guangxi Beihai Maritime Court case *Sino-Add (Singapore) PTE. Ltd. v Karawasha Resources Ltd.*³² which involved a Hong Kong seller and a Singaporean buyer. The parties concluded a sales contract for 60,000 tons of Indian iron ore. The dispute concerned the underlying voyage charter for shipping the goods. The parties did not choose the applicable law and the destination of the carriage of goods contract was located in the Mainland of China. The Guangxi Beihai Maritime Court accepted jurisdiction and, in deciding the applicable law issue, the Court held:

*[...] pursuant to Article 269 of the Maritime Law of the People's Republic of China, which stipulates that where the parties do not choose the applicable law, the law of the country having the closest connection with the contract shall be applied, the Maritime Law of the People's Republic of China, the Contract Law of the People's Republic of China and the relevant international conventions shall be applied to this case.*³³

In deciding the buyer's claim for interest, the Court rejected the claimed interest calculated at the London Interbank Offered Rate (**LIBOR**), but held that, to be fair, the interest should be calculated at the contemporary lending rate of liquid capital issued by the People's Bank of China.³⁴ Although the Court did not refer to any specific provision of the CISG, it is submitted that the Court in fact applied Art. 78 of the CISG to fill a gap in the PRC's *Contract Law 1999 (CL1999)*, which did not provide any specific rules on parties' entitlement to interest.³⁵

Similar to Art. 74 of the CISG, Art. 113 of the CL1999 stipulates that the amount of damages shall be equal to the loss caused by the breach, including loss of profit, but shall not exceed the loss which the party in breach foresaw or ought to have foreseen, as a possible consequence of the breach of contract.³⁶ Unlike Art. 78 of the CISG

³² *Sino-Add (Singapore) PTE. Ltd v Karawasha Resources Ltd.*, Guangxi Beihai Maritime Court, 5 March 2002, CISG-online 1383, translation available at: <<http://cisgw3.law.pace.edu/cases/020305c1.html>> , (hereinafter '*Sino-Add case*')

³³ See *Sino-Add case*, *supra* fn 32. Article 269 *PRC Maritime Law*: The parties to a contract may choose the law applicable to their contract, unless the law provides otherwise. Where the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply.

³⁴ *Ibid.*; For a discussion on the interest rate under CISG, see Mazzotta, F., "Endless Disagreement Among Commentators, Much Less Among Courts" (2003 - 2004) in *Pace Review of the Convention on Contracts for the International Sale of Goods*, at p. 123, available at: <<http://cisgw3.law.pace.edu/cisg/biblio/mazzotta78.html>>, citing this case and 275 other court and arbitral rulings.

³⁵ See the Supreme People's Court's Interpretation II of Contract Law which has seemingly filled this gap. Article 21 of the Interpretation states: "The debtor shall pay interest and expenses in addition to the primary debt". See also this article in Chinese: '...第二十一条 债务人除主债务之外还应当支付利息和费用.'

³⁶ Although some may argue that Art. 113 of PRC Contract Law 1999 provides for the recovery of interest, the Chinese word '利益' (profit) in Art. 113 was in fact misinterpreted in some English translations to

however, which provides that interest is recoverable; the CL1999 was silent on this issue. Although the Supreme People's Court's Interpretation II of the CL1999, issued in February 2009, officially filled this gap of awarding interest, the Guangxi Beihai Maritime Court, sitting in May 2002, could not at that time have applied the domestic PRC contract law, the CL1999, in its decision to award interest, but must have relied upon the 'relevant international convention', i.e. the CISG, to grant interest.

The similarities between the CISG and the CL1999 cannot be overemphasised in this context. Many commentators have pointed out that the CL1999 has closely followed the CISG and the UPICC³⁷ and in some areas, the CISG and the UPICC have been reproduced in the CL1999 article by article.³⁸ The CISG, a treaty to which the PRC is a party, is a formal source of law for PRC domestic law.³⁹ The CISG has often been applied to fill in the gaps in or between the PRC domestic laws, even when it does not apply according to its own provisions under Art. 1 of the CISG. Sales with Hong Kong parties have long been treated as foreign-related transactions under current PRC law and practice.⁴⁰ Therefore, it is only natural that the CISG would come into play.

'interest' (利息). Article 113 of PRC Contract Law 1999 in its original Chinese language: 第一百一十三条 【损害赔偿的范围】当事人一方不履行合同义务或者履行合同义务不符合约定,给对方造成损失的,损失赔偿额应当相当于因违约所造成的损失,包括合同履行后可以获得的利益,但不得超过违反合同一方订立合同时预见到或者应当预见到的因违反合同可能造成的损失。

³⁷ UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (2004), Rome, April 2004, available at: <<http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>>.

³⁸ See Huixing, L., "On the Third Draft of the Uniform Contract Law of China", (1999) 13 *Columbia Journal of Asian Law* 1, available at: <<http://www.cisg.law.pace.edu/cisg/biblio/liming-chuanxi.html>>; Chen, J., *Chinese Law: Context and Transformation*, 2008, Martinus Nijhoff, Leiden, at p. 450; Yuejiao, Z., *Harmonization of Contract Law and its Impacts on China's Contract Law*, presentation at the Modern Law for Global Commerce: Congress to Celebrate the Fortieth Annual Season of UNCITRAL (9-12 July 2007), available at: <<http://www.uncitral.org/pdf/english/congress/Zhang.pdf>>; Zhang, M., *Chinese Contract Law, Theory and Practice*, 2006, Brill, Leiden; Ling, B., *Contract Law in Chi*, 2002, Sweet & Maxwell, Hong Kong.

³⁹ Article 142 PRC General Principles of Civil Law: "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. International practice may be applied on matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions".

⁴⁰ According to the Official Reply of the Supreme People's Court on Several Questions in Dealing with Economic Dispute Cases Involving the Hong Kong-Macao-Taiwan Regions 19 October 1987, and more recently, in 2002, the Supreme People's Court issued the Provisions on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements (《最高人民法院关于涉外民事案件诉讼管辖若干问题的规定》), effective on 1 March 2002. Article 5 of the Provisions stipulates: "The jurisdiction of cases on civil and commercial disputes involving parties from Hong Kong or Macao Special Administrative Region or Taiwan Region shall be handled by the courts with reference to these Provisions [...]" (第五条 涉及香港、澳门特别行政区和台湾地区当事人的民事纠纷案件的管辖,参照本规定处理).

Even though it may not be the governing law, the CISG would still be highly relevant and persuasive.⁴¹

Third, the CISG can be applied to Hong Kong parties by the parties' explicit agreement on the choice of PRC laws as governing law⁴². In the 1999 CIETAC *Gray cloths case*⁴³ between a Mainland seller and a Hong Kong buyer, the parties explicitly agreed in their sales contract that the PRC law and the CISG should apply to any disputes arising between them. Arbitral tribunals would respect the parties' mutual agreement in such cases⁴⁴.

Fourth, the CISG can be applied to Hong Kong parties by the parties' implicit agreement. In the *Kidney beans case*⁴⁵, the Mainland seller and Hong Kong buyer did not stipulate the applicable law in the contract. However, in the course of the arbitral proceedings, the parties referred to PRC law and the CISG to support their arguments.⁴⁶ Therefore, the tribunal deemed that the two parties had implicitly agreed that PRC law and the CISG should apply⁴⁷. In particular, the Tribunal decided that "the [Seller] has fundamentally breached the Contract and caused the non-performance of the Contract [...]". The concept of 'fundamental breach' is not contained in any provision of the CL1999. Thus, the Tribunal was, in fact, applying Art. 25 of the CISG.⁴⁸ Alternatively, the Tribunal assimilated Art. 94(4) of the

⁴¹ See *Hong Kong Topway Trading Co. Ltd v Dongying Hongyu Import & Export Co. Ltd*, Dongyang Intermediate People's Court of Shandong, 12 May 2008, CISG-online 2108, translation available at: <<http://cisgw3.law.pace.edu/cases/080512c1.html>>, in which although the Hong Kong seller (plaintiff) pleaded on the basis of CISG as a standard for performance of international sales contracts, the Court applied PRC Contract Law on the ground that the parties selected Mainland Chinese law as governing law. The Court did not discuss the applicability of CISG in the case.

⁴² Note that some courts have taken a different view due to the PRC Art. 95 declaration regarding application of Art. 1(1)(b).

⁴³ CIETAC, 2 April 1999, CISG-online 1282, translation available at: <<http://cisgw3.law.pace.edu/cases/990402c1.html>> (hereinafter '*Gray cloths case*').

⁴⁴ See also CIETAC, 4 April 1996, CISG-online 2106, translation available at: <<http://cisgw3.law.pace.edu/cases/960404c1.html>> (hereinafter '*Three-ply board case*'); CIETAC, 28 January 1999, CISG-online 1206, translation available at: <<http://cisgw3.law.pace.edu/cases/990128c1.html>> (hereinafter '*Refrigeration equipment case*').

⁴⁵ CIETAC, 27 June 1997, CISG-online 1069, translation available at: <<http://cisgw3.law.pace.edu/cases/970627c1.html>> (hereinafter '*Kidney beans case*').

⁴⁶ Although this case did not touch upon the question of whether parties can choose non-state based instruments, such as the UPICC, as alternatives to state-law as governing law, the PRC Law of the Application of Law for Foreign-related Civil Relations (which will come into force in April 2011) uses the term 'law' throughout. Thus, it seems to suggest that the PRC courts will only recognise state-law as governing law. As to arbitration, the CIETAC Rules do, however, recognise 'rules of law' as governing law. Therefore, it can be argued that in CIETAC arbitration, the parties can choose instruments other than state-laws as governing law.

⁴⁷ CIETAC, 15 November 1996, CISG-online 1148, translation available at: <<http://cisgw3.law.pace.edu/cases/961115c1.html>> (hereinafter '*Oxytetrycline case*'). See also CIETAC, 4 April 1997, CISG-online 1660, translation available at: <<http://cisgw3.law.pace.edu/cases/970404c1.html>> (hereinafter '*Black melon seeds case*').

⁴⁸ Article 94 of the PRC Contract Law 1999 stipulates in its translation that the parties to a contract may terminate the contract under any of the following circumstances: "(4) the other party delays performance

CL1999 to Art. 25 of the CISG, using the approach of ‘applying the CL1999 with reference to the CISG’⁴⁹.

Nonetheless, in *Zheng Hong Li Ltd Hong Kong v Jill Bert Ltd. Swiss*⁵⁰, the PRC Supreme Court decided that because the parties elected to apply the ‘laws of the PRC’ during the proceedings in the first instance, the Foreign-related Economic Contract Law (FECL) (since repealed)⁵¹ should apply. Thus, the Court of First Instance erred when it inappropriately applied the CISG to the dispute. It is submitted that this is a case decided under the old pre-1999 ‘three-pillar’ contract law regime.⁵² It is not clear whether the outcome would remain the same under the current CL1999 regime.⁵³ Given the fact that the pre-1999 separate ‘foreign-related’ regime no longer exists, there would be problems in applying the CL1999 without reference to the CISG in dealing with international/foreign-related sales contracts. This further reinforces the fact that the CL1999 and the CISG are both supplementary and complementary to each other.

3.2 CISG CASES INVOLVING MACAO PARTIES

There are currently three CIETAC arbitral awards involving Macao parties available on the PACE CISG database. All of them were decided before the PRC resumed its exercise of sovereignty over Macao in 1999.

of its obligations, or breaches the contract in such a manner that renders it impossible to achieve the purpose of the contract”. The author is of the view that Art. 94 of PRC Contract Law 1999 is the provision which most closely resembles fundamental breach in Art. 25 of CISG. See Art. 94(4) of the PRC Contract Law 1999 in its original Chinese language: ‘第九十四条 【合同的法定解除】有下列情形之一的，当事人可以解除合同：（四）当事人一方迟延履行债务或者有其他违约行为致使不能实现合同目的。’

⁴⁹ See *Kidney beans case*, *supra* fn 44; *Lianzhong Enterprise Resources (Hong Kong) Ltd v Xiamen International Trade & Trust Co.*, Xiamen Intermediate People’s Court, 20 April 1993, CISG-online 1604, translation available at: <<http://cisgw3.law.pace.edu/cases/930420c1.html>>, (hereinafter ‘*Fish powder case*’).

⁵⁰ *Zheng Hong Li Ltd Hong Kong v Jill Bert Ltd Swiss*, Supreme Court of the People’s Republic of China, 20 July 1999, CISG-online 1605, translation available at: <<http://cisgw3.law.pace.edu/cases/990720c1.html>>.

⁵¹ It was repealed and replaced by the current *PRC Contract Law 1999*.

⁵² See similarly *Hong Kong [...] Co. Ltd v Shanxi Yanquan Import & Export Corp*, Shanghai New Pudong District People’s Court, 24 November 1997, CISG-online 2109, available at: <<http://cisgw3.law.pace.edu/cases/971124c1.html>>; *Fish powder case*, *supra* fn 49, in which the Xiamen Intermediate People’s Court permitted the Law of the People’s Republic of China on Contracts Involving Foreign Interest to apply, and therefore allowed CISG and international customs to apply to this case as the parties agreed during the court proceedings.

⁵³ Shanghai Huangpu District People’s Court, 30 August 2000, CISG-online 2107, available at: <<http://cisgw3.law.pace.edu/cases/000830c1.html>>, in which the Court applied the General Principles of Civil Law without deciding whether CISG applied in this case between the Mainland seller and Hong Kong buyer.

In the *Natural rubber case*⁵⁴, the parties (one a Mainland Chinese company and the other a Macao Company) did not stipulate the governing law in their contract. The Tribunal erroneously believed that Portugal, which exercised sovereignty over Macao at that time, was a Contracting State of the CISG. Thus, the Tribunal held that both parties were from the Contracting States of the CISG and because the parties did not exclude the CISG, the CISG was applied.

Similarly, in the *Wool case*⁵⁵, the PRC buyer and Macao seller did not stipulate the governing law of their contract. The Tribunal once more erroneously held that the PRC and Portugal, which exercised sovereignty over Macao at that time, were both Contracting States of the CISG. The Tribunal therefore ruled that the CISG applied.

The same scenario repeated itself in the *Steel channels case*⁵⁶. The PRC buyer and Macao seller did not stipulate the applicable law in their contract. The Tribunal again erroneously identified Portugal as a CISG Contracting State and, because the parties did not exclude the application of the CISG, the Tribunal held that the Convention applied.

These arbitral awards do not by any means clarify the status of Macao under the CISG, either before or after the PRC resumed its exercise of sovereignty over Macao. It is hoped that CIETAC will correct its mistake in regarding Portugal as a Contracting State of the CISG. It would be interesting to see whether CIETAC Tribunals would apply the CISG to Macao SAR parties now that the PRC has resumed the exercise of sovereignty over Macao. Although the number of available cases or arbitral awards involving Macao parties is much smaller than those involving Hong Kong parties, this does not make the clarification of the status of the Macao SAR under the CISG any less important. The status of the Macao SAR under the CISG needs to be clarified.

3.3 CISG CASES INVOLVING TAIWAN PARTIES

There are four CISG cases involving Taiwan parties available on the PACE CISG database. One was decided by the Taiwan Business Arbitration Association in 1998.⁵⁷ The other was decided by CIETAC in 1999. The third one was decided by the High People's Court of Jiangsu Province in 2004 and the last one was decided by the Supreme Court of Switzerland in 2008.

⁵⁴ See CIETAC Arbitration Proceeding (hereinafter '*Natural rubber case*'), 4 September 1996, translation available at: <<http://cisgw3.law.pace.edu/cases/960904c1.html>>.

⁵⁵ See CIETAC Arbitration proceeding (hereinafter '*Wool case*'), 27 February 1996, translation available at: <<http://cisgw3.law.pace.edu/cases/960227c1.html>>.

⁵⁶ See CIETAC Arbitration proceeding (hereinafter '*Steel channels case*'), 18 November 1996, translation available at: <<http://cisgw3.law.pace.edu/cases/961118c1.html>>.

⁵⁷ See Business Arbitration Association (hereinafter '*Paper case*'), Shangwu zhongcai xiehui, Taiwan, 15 May 1998, available at: <<http://cisgw3.law.pace.edu/cases/980515t1.html>>. Full details of this case are not available in the PACE CISG Database, except the title of the case.

In the *Chemical cleaning product equipment case*⁵⁸, a CIETAC Arbitration proceeding between a Taiwan seller and a PRC buyer, the arbitral tribunal held, inter alia:

*[T]he parties did not provide in the Contract for the applicable law to resolve the disputes in this case. In the court session, the parties explicitly agreed to apply laws of the People's Republic of China [hereinafter: PRC] to resolve the disputes under the Contract, stating that where there is no applicable regulation in PRC laws, the CISG should be applied. Therefore, when resolving the disputes under the Contract, the Arbitration Tribunal adopts PRC laws and the CISG.*⁵⁹

This case was decided before the current CL1999 came into effect on 1 October 1999. Notably, both the Taiwan and PRC parties agreed to apply the PRC laws and the CISG. In the arbitral award, the Tribunal only cited Arts. 38 and 39 of the CISG, and no PRC law provisions were cited or referred to at all.

In *China Changzhou Kairui Weaving and Printing Company v Taiwan Junlong Machinery Company*⁶⁰, a case involving a Taiwan seller and PRC buyer, the Court of First Instance, Changzhou Intermediate People's Court of Jiangsu Province, did not address the applicable law issue. In deciding the validity of the sales contract, the Court of First Instance applied the FECL, because the contract was concluded before the CL1999 came into effect⁶¹. In deciding other issues involved, the Court of First Instance cited simultaneously Arts. 4, 142 and 146 of the *General Principles of Civil Law* (GPCL), Arts. 8(3) and 9(1) of the CISG and Arts. 18 and 26 of the FECL.

Although the Court of First Instance did not explicitly explain the basis for its application of the CISG, it cited Art. 142 of the GPCL in its judgment.⁶² The Court seems to have taken the position that under Art. 142 of the GPCL, the CISG, a treaty to which the PRC is a party, automatically applies as part of the PRC laws. The Court

⁵⁸ See CIETAC Arbitration proceeding (hereinafter '*Chemical cleaning product equipment case*') 20 April 1999, available at: <<http://cisgw3.law.pace.edu/cases/990420c1.html>>.

⁵⁹ *Ibid.*

⁶⁰ See *China Changzhou Kairui Weaving and Printing Company v Taiwan Junlong Machinery Company*, 2 December 2004, High People's Court [Appellate Court] of Jiangsu Province, China, abstract available at: <<http://cisgw3.law.pace.edu/cases/041202c1.html>>, Chinese text available at: <http://aff.whu.edu.cn/cisgchina/en/news_view.asp?newsid=86>.

⁶¹ See *Supreme People's Court's Interpretation I on Several Issues concerning the Application of the Contract Law of the People's Republic of China Article 3*: The People's Court shall, when deciding the validity of a contract, apply this Contract Law if the contract formed before the implementation of the Contract Law is void under the law at that time but valid under this Contract Law. Article 3 in Chinese text: 第三条 人民法院确认合同效力时,对合同法实施以前成立的合同,适用当时的法律合同无效而适用合同法合同有效的,则适用合同法。

⁶² See GPCL Art. 142: The application of law in civil relations with foreigners shall be determined by the provisions in this Chapter. If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. International practice may be applied on matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.

did not otherwise explain whether and why the CISG applies to Taiwan. What was clear from this decision however was that a sales contract, or indeed any commercial transactions, between Taiwan and PRC parties are treated as foreign-related; thus Chapter VIII of the GPCL (Arts. 142 to 150) on applicable law issues in foreign-related civil relations applies.

Moreover, having decided that the FECL applies, the Court of First Instance then decided that the CISG would be applicable as well pursuant to Art. 142 of the GPCL. However, the Court failed to explain when to apply FECL and when to apply the CISG. If the intention is to apply both FECL and the CISG in parallel, as opposed to using the CISG to fill gaps of FECL⁶³, the Court should have cited Art. 23 of the FECL instead of Art. 18 of the FECL in reaching its decision to award interest.⁶⁴ The court seems to have picked some provisions from the FECL and others from the CISG without giving any rationale or justifications for doing so. This approach was not only confusing, but also likely to invite criticism.

Nevertheless, the decision of the Court of First Instance was upheld by the appellate court, the High People's Court of Jiangsu Province, which did deal with the applicable law issue specifically and held, *inter alia*:

[A]lthough the parties did not choose the governing law of the contract, they did not dispute the application of PRC laws in the court of the first instance. During the proceedings in the appellate court, parties explicitly choose the law of the PRC as governing law. Therefore, according to Article 145 of the PRC General Principles of Civil Law, PRC laws apply to the current case.

Thus, the appellate court seemingly took the position that the CISG would be applicable because the parties chose the laws of the PRC to govern the contract. The appellate court did not otherwise consider whether the CISG applied to Taiwan as a territorial unit of the PRC under the CISG Art. 93.

In the *Laser Microjet case*⁶⁵, the Swiss Federal Supreme Court held, *inter alia*:

[T]he contracting parties have their places of business in different States. As a result of their failure to choose the applicable law, Swiss law applies because the characteristic performance was undertaken by the seller, Defendant Y S.A.,

⁶³ See for example: CIETAC Arbitration proceeding (hereinafter '*Chemical cleaning product equipment case*'), 20 April 1999, available at: <<http://cisgw3.law.pace.edu/cases/990420c1.html>>.

⁶⁴ FECL Art. 18: If a party fails to perform the contract or its performance of the contractual obligations does not conform to the agreed terms, which constitutes a breach of contract, the other party is entitled to claim damages or demand other reasonable remedial measures. If the losses suffered by the other party cannot be completely made up after the adoption of such remedial measures, the other party shall still have the right to claim damages. FECL Art. 23: If a party fails to pay on time any amount stipulated as payable in the contract or any other amount related to the contract that is payable, the other party is entitled to interest on the amount in arrears. The method for calculating the interest may be specified in the contract.

⁶⁵ See the Supreme Court of Switzerland, 16 December 2008, (hereinafter '*Laser microjet case*'), available at: <<http://cisgw3.law.pace.edu/cases/081216s1.html>>.

whose place of business is in Switzerland (cf. Art. 117 LDIP). The UN Convention on Contracts for the International Sale of Goods adopted in Vienna on 11 April 1980 (CISG; RS 0.221.211.1) is part of Swiss law. It is applicable in this case because the contract involved a machine not for personal, family or household use, and the buyer did not furnish any material necessary for manufacturing the goods (cf. Art. 1(1)(b), Art. 2(a) and Art. 3(1) CISG). CISG provides for the passing of risk (cf. Art. 66 et seq. CISG); if the contract involves carriage of goods, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer (cf. Art. 67 CISG). This stage was not reached in this case.⁶⁶

Therefore, the Swiss Federal Supreme Court applied the CISG as part of Swiss law pursuant to Art. 1(1)(b). In this case, it is irrelevant whether Taiwan should be regarded as a territorial unit of the PRC, and therefore a party to the CISG, by way of Art. 93 or not.

These cases and awards do not clarify the status of Taiwan under the CISG. Although the number of available cases or arbitral awards involving Taiwan parties is much smaller than that of those involving Hong Kong parties as discussed above, this does not make the clarification of the status of Taiwan under the CISG less important in any way. The status of Taiwan under the CISG needs clarification.

4 CLARIFICATIONS TO THE STATUS OF HONG KONG, MACAO & TAIWAN UNDER THE CISG

4.1 APPLYING THE CISG TO HONG KONG & TAIWAN

There can be no doubt that lawyers and businessmen from these territorial units are already well exposed to the CISG. When they leave their shores to do business, it is not always possible as it once was to take their own laws with them. With the growth of new economies and trading blocs, bargaining power has changed and parties cannot always guarantee that they will be able to contract for their own law, let alone their own jurisdictions. Lawyers and businessmen from these territorial units are increasingly involved in cases to which the CISG applies. Inevitably, much business is being done with the PRC, a contracting state of the CISG. The influence of the CISG on the laws of the PRC and the cases applying the CISG to parties from these territorial units unveiled in this article⁶⁷, when considered against the continuing growth in trade with the Mainland of China and Asia at large, should not deter these territorial units from ‘joining’ the CISG.

Moreover, the adoption of the CISG by these territorial units would not lead to the disappearance of Hong Kong or Macao or Taiwan law, or any national or regional

⁶⁶ *Ibid.*

⁶⁷ See also Yang, F. see *supra* fn 8; Yang, F., “The Application of CISG in the Current PRC Law and CIETAC Arbitration Practice” (2006) 2 *Nordic Journal of Commercial Law* 1, at p. 1, available at: <http://www.njcl.fi/2_2006/article4.pdf>.

law. An international uniform sales contract law, as reflected in the CISG, both embraces and nurtures the continued development of national and regional laws. The question is not how long can these territorial units wait to ‘join’ the CISG, but how long can they afford not to? In any event, as the above analysis of Art. 93 of the CISG has shown, without a declaration by the PRC to the contrary, the CISG shall apply to Hong Kong, Macao and Taiwan automatically pursuant to Art. 93(4) of the CISG in particular.

When the status of these territorial units under the CISG is officially clarified and once these regions openly join the family of the CISG, the law of these regions may well assume greater influence over the development of national laws of other Contracting States including the PRC. By respecting and following, where possible, decisions in the CISG cases, all CISG and non-CISG jurisdictions will be assisting informally in the continuing process of harmonisation of international commercial law to which the CISG has made such a significant contribution. This is especially so, given how increasingly easy it is to access CISG cases⁶⁸. Perhaps one day, a case decided by the courts of these territorial units will be cited in the People’s courts or PRC arbitral tribunals and vice versa. International and inter-regional exchange should be a two-way street, not only in trade but also in the law.

As shown in the discussion above, there is no real reason why the CISG should not be made available to Hong Kong, Macao and Taiwan parties. At present, there is confusion as to the CISG’s applicability to these territorial units as illustrated by the discussion above and elsewhere⁶⁹ and in particular the conflicting decisions among different courts and arbitral tribunals. Even if the PRC decided not to make the CISG available to all these territorial units, it should make the requisite communication and file a declaration according to Art. 93 of the CISG to eliminate any confusion. So far, there is no evidence to show that there is any real opposition to the application of the CISG to these territorial units. Since only sovereign States can become parties to the CISG, Taiwan, the Hong Kong SAR or the Macao SAR cannot become a party to the CISG independently. The only way these territorial units can become parties to the CISG is by way of Art. 93 of the CISG. The author is of the view that the PRC did not and has not made any reservations according to Art. 93 of the CISG. Accordingly, the CISG should automatically apply to all the PRC territorial units.

4.2 APPLYING THE CISG TO INTER-TERRITORIAL SALES IN THE PRC

Putting aside the controversies involved in the status of Hong Kong, Macao and Taiwan under the CISG, this section proposes that the PRC should declare the

⁶⁸ Thanks to international comparative law and uniform law scholars and institutes, such as the PACE University CISG Database, see *supra* fn 25. See also CISG-online Database, available at: <<http://www.cisg-online.ch>> and the webpage of the Global Sales Law Project, available at: <<http://www.globalsaleslaw.com/index.cfm?pageID=2>>.

⁶⁹ Schroeter, U., *supra* fn 21.

application of the CISG to sales between the Mainland, Taiwan, the Hong Kong SAR and the Macao SAR.

Art. 93 of the CISG does not and cannot extend the scope of the CISG to cover sales between different territorial units. To do so, the PRC would need to make a declaration to that effect. Alternatively, the PRC needs to deal with this issue via its domestic law or internal cross-territorial arrangements among all its territorial units. The author argues that the former is preferable because it avoids the complication and uncertainties involved in the PRC's inter-territorial conflict of law rules.

It is proposed that the PRC should deposit the following notification to the United Nations:

The People's Republic of China declares that the Convention applies to sales between all its territorial units. Other than this declaration, the PRC has not made any other reservation under Article 93 of the CISG.

The first part of this proposed declaration deals with the extension of the CISG to the PRC's inter-territorial sales. It will extend the sphere of application of the CISG in China to cover potentially six types of inter-territorial sales between (1) the Mainland and the Hong Kong SAR; (2) the Mainland and the Macao SAR; (3) the Mainland and Taiwan; (4) the Hong Kong SAR and the Macao SAR; (5) the Hong Kong SAR and Taiwan; and (6) the Macao SAR and Taiwan.

The second part of this proposed declaration clarifies the PRC's position on Art. 93 of the CISG. By declaring that no other reservation has been made under Art. 93, this second part of the proposed declaration will affirm that the CISG applies to all PRC territorial units, including the Hong Kong SAR, the Macao SAR and Taiwan. Thus, the declaration will eliminate any uncertainty or confusion as to the application of the CISG to these territorial units.

5 CONCLUSION

As explained in this article, at the moment, it is unclear whether the CISG applies to the Hong Kong SAR, the Macao SAR and Taiwan. This article calls on the PRC, the Hong Kong SAR, the Macao SAR and Taiwan to work together to clarify the status of these PRC territorial units under the CISG.

Those court cases and arbitral awards uncovered in this article have demonstrated that the CISG can be, and in fact, has been applied to parties from the Hong Kong SAR, the Macao SAR and Taiwan. Despite the lack of sound legal reasoning or any expressed provisions to support the application of the CISG beyond its own scope of application pursuant to Art. 1 of the CISG within a domestic law context in the PRC, there are strong policy reasons to support such an extension. The PRC should make an unequivocal declaration to this effect. An unequivocal declaration, such as the one proposed in this article will provide a sound legal basis under international law for the application of the CISG to inter-territorial sales in China.

A need for the adoption of a uniform sales law among all the PRC territorial units is clearly indicated by the development of closer economic ties and the very considerable amount of trade between the PRC territorial units. The CISG is ‘the’ uniform sales law that is readily available to fulfil this mission. Irrational and inconsistent decisions on the application of the CISG to the PRC territorial units result in uncertainty and unpredictability. This observation supports the proposal set out in this article regarding the need for a PRC declaration not only to clarify the status of its territorial units under the CISG but also to extend the application of the CISG to inter-territorial sales in today’s China.