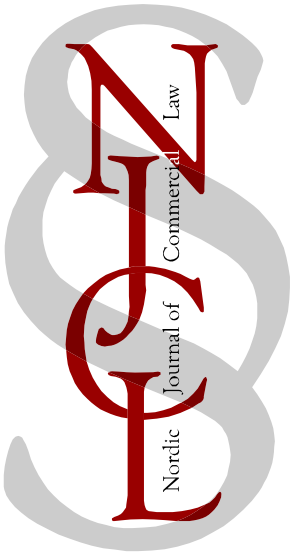


# The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice*

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## INTRODUCTION

It is generally acknowledged that the CISG has influenced the legislation of the People's Republic of China (PRC), but what and where exactly are the influences? How and to what extent has the CISG influenced the PRC legislations and/or legislators? A careful study of the interaction between the CISG and the legislation history and development of the PRC Law is needed. This chapter will address these issues before reviewing the application of the CISG in the current PRC law and practice.

It is submitted that it is impossible to examine the impacts of the CISG on the PRC legislation without first studying the incorporation history of the CISG in the country. The first task of this Chapter is therefore to explore not only the 1980 Diplomatic Conference records and texts, but also the historical, social, economic, political and cultural backgrounds for the incorporation of the CISG in the PRC. The two reservations under Article 95 and Article 96 declared by the PRC upon ratification of the CISG will be analysed in detail so as to appreciate the reasons for and the influences behind these declarations. More importantly, the second task of this Chapter is then to review the current law and practice in the PRC in applying the CISG. It is proposed to deal with this task in two parts, i.e. the Application of the CISG in current PRC Law and the Application of the CISG in current PRC Arbitration Practice. In particular, about thirty cases and arbitral awards concerning the application of the CISG in Hong Kong-Macao-Taiwan-related sales will be reviewed and discussed. Finally a conclusion will be drawn.

### 1.1. Historical Context

On the one hand, before the PRC delegation attended the 1980 Diplomatic Conference in Vienna, there was no PRC domestic legislation, at least not in the codified form, on the subject of contract law or civil law in general.[1] This was because before the Reform and Opening up started in 1978, the PRC was under a strict state-planned economy. The legislations governing private law areas, such as contract, commercial transactions, and civil activities were largely unfledged. However, surprisingly or not, by the time when the CISG was ratified in the PRC on 11 December 1986, the PRC had promulgated the PRC Economic Contract Law on 13 December 1981, the Foreign-Related Economic Contract Law on 21 March 1985 and the PRC General Principles of Civil Law on April 12, 1986. These three pieces of PRC domestic legislation were of great significance in the incorporation history of the CISG in the PRC.

On the other hand, the final text of the CISG was approved at the diplomatic conference convened by the United Nations General Assembly in Vienna in 1980.[2] But the work of the

[1] Though there had been some attempts to draft and codify the PRC Civil Law. The evolution of the PRC Civil Law will be discussed in the next Chapter.

[2] The Convention Conference was convened by General Assembly Resolution 33/93. G.A. Res. 93, 33 U.N. GAOR Supp. (No. 45) at 217, U.N. Doc. A/33/45 (1978), see *Final Act of the United Nations Conference on Contracts for the International Sale of Goods,* Apr. 10, 1980. U.N. Doc. A/Conf. 97/18, with Annex, United Nations Convention on Contracts for the International Sale of Goods, *reprinted in* 19 I.L.M. 668 (1980).

UNCITRAL, established in 1966 as a Permanent Committee of the UN, on the unification of international sales law was started as long ago as 1968.[3] By 1976 a draft convention on sales law had been prepared and was later revised by UNCITRAL in 1977 at its tenth session in Geneva.[4] In 1978, the rules on the formation of the contract were discussed by UNCITRAL at its eleventh session and merged with the substantive provisions on the sale of goods to form the "New York Draft".[5] The New York Draft was then the basis for the Vienna Conference in spring 1980. Having participated in the 1980 Vienna Diplomatic Conference, the PRC signed the CISG in 1981. It then took PRC five years to ratify the CISG in 1986. On 1 January 1988, the CISG finally came into force in the PRC.

Emphasis is put on the time of the above events because, as will be discussed below, the period of 1976 to 1989 happens to have marked a distinct phase in the history of the PRC.

Chairman Mao, the founder of the PRC died on 9 September, 1976. This was followed by a political power struggle, which was put to an end eventually by the rise of Deng Xiaoping, who travelled abroad and had a series of diplomatic meetings with western leaders. In 1979, Deng travelled to the United States to meet President Jimmy Carter at the White House. Carter finally recognized the PRC, which had replaced the Taiwan-based Republic of China (ROC) as the sole Chinese government recognized by the UN Security Council in 1971.

Before the recognition of the PRC by the United States in 1979, the PRC had mostly a very limited and passive role within the UN. Deng effectively opened a new page of PRC Diplomacy. After 1979, the Chinese leadership moved toward more pragmatic policies in almost all fields. In the domestic arena, artists, writers and journalists were encouraged to adopt more critical approaches in cultural, political and social movements. Overseas, PRC diplomats sought participation and involvement in a broader international political arena. The 1980 Vienna Diplomatic Conference certainly provided such a timely opportunity.

Mr. LI Chih-min, the PRC delegate in the 5th Meeting of the First Committee of the 1980 Vienna Diplomatic Conference, indeed expressed his delegation's gratification at its participation for the first time in a conference such as the United Nations Conference on Contracts for the International Sale of Goods.[6]

### 1.2. The Reform and Opening Up

The period between 1976 to 1989 marks the first phase of the PRC's Reform and Opening-up to the outside world. Led by Deng, the pragmatists within the Communist Party of China (CPC) emphasized economic development. At the pivotal December 1978 Third Plenum of the 11th CPC Congress, the leadership adopted economic reform policies known as the Four

[3] For a detailed account of the CISG's genesis, see principally Herber, RIW 1974, 577; RIW 1976, 125; RIW 1977, 314; Huber, RabelsZ 43 (1979), 413; see also Schlechtriem, Commentary on the CISG, (2nd edition), Oxford, 1998 at Introduction.

[4] For "Geneva draft" or "Geneva Working Group Draft" see YB VII (1976), pp 89-96; for its subsequent treatment see YB VIII (1977), pp25-56.

[5] See Schlechtriem, Commentary on the CISG, (2nd edition), Oxford, 1998 at page 2.

[6] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 5th meeting, Thursday, 13 March 1980, at 3 p.m. *Chairman*: Mr. LOEWE (Austria): http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting5.html

Modernizations: the modernization of agriculture, industry, science and technology, and military force.

The concept of "socialism with Chinese characteristics" was at the same time successfully introduced to resolve the theoretical and political conflicts,[7] at least in the eyes of the PRC leaderships at that time, between planned and liberal economic systems, between socialism and capitalism, between Marxism and non- Marxism. The notion of "Chinese Characteristics" not only won support among the people, but also has since then been widely employed and deepened into the hearts of all walks of life in the understanding and appreciation of the PRC's mixed and transitional economic, political, social, cultural, legal systems.

To develop PRC into a modern industrialized country, one of the most important aspects of the Reform and Opening up movement is to attract foreign investment and promote international trade.

Thus, the PRC participated in the drafting and the formulation of the CISG with great impetus and enthusiasm, in the concern of not only politics, but also, perhaps more importantly, the economy and social development of the PRC. The major concern for the PRC delegation in the 1980 Diplomatic Conference was therefore the removal of barriers so as to facilitate international trade on the basis of equality and mutual benefit.

### 1.3. The PRC Delegation in the 1980 Diplomatic Conference

Mr. LI Chih-min, on behalf of the PRC delegation, stated the following in the 5th meeting of the First Committee in the 1980 Vienna Diplomatic Conference:

> [His] delegation found it desirable to convene, pursuant to General Assembly resolution 33/93, an international conference on plenipotentiaries to consider the draft Convention on Contracts for the International Sale of Goods, and to formulate a convention acceptable to all, in accordance with the basic objectives and principles of equality and mutual benefit set forth in the Declaration and Programme of Action on the Establishment of a New International Economic Order adopted by the General Assembly at its Sixth Special Session. Such a convention would be of great importance in the gradual removal and final elimination of the barriers to international trade, especially as they affected the developing countries, the elimination of certain inequitable and unjust situations in international trade and its promotion on the basis of equality and mutual benefit.[8]

[7] John Gittings in *The Changing Face of China* said: "Planning and market forces are not the essential difference between socialism and capitalism. A planned economy is not the definition of socialism, because there is planning under capitalism; the market economy happens under socialism, too. Planning and market forces are both ways of controlling economic activity." See John Gittings, *The Changing Face of China*, Oxford University Press, Oxford, 2005.

[8] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 5th meeting, Thursday, 13 March 1980, at 3 p.m. *Chairman*: Mr. LOEWE (Austria): http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting5.html

Towards the end of his speech, he stated that his delegation "pledged its full co-operation in the efforts of all the participants and hoped that agreement would be reached on the text of a Convention which would attract the maximum number of ratifications by States".[9]

### *1.3.1. The Positive Attitude and Contribution*

The positive attitude reflected in the above statements had been carried along by the PRC delegation throughout the 1980 Diplomatic Conference in Vienna. The input by the PRC delegation was sincere and genuine. For instance, PRC delegation's opinions were recorded in seventeen out of the thirty-eight meetings in the First Committee proceedings,[10] four out of the nine meetings in the Second Committee proceedings,[11] and four out of the last six Plenary Conference proceedings.[12] PRC delegation was fair-minded and stressed the balance of interests between buyer and seller, for example, in the 16th and the 19th meetings when Draft Article 36 [became CISG Article 38] and Draft Article 42 [became CISG Article 46] were discussed.[13]

Articles raised interests and concerns of the PRC delegation in the First Committee meeting proceedings include Draft Article 5 [became CISG Article 6],[14] Draft Article 6, 7 [became CISG Article 7, 8],[15] Draft Article 8 [became CISG Article 9],[16] Draft Article 3 [became CISG Article 3],[17] Draft Article 17 [became CISG Article 19],[18] Draft Article 23 [became CISG Article 25],[19]

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[9] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 5th meeting, Thursday, 13 March 1980, at 3 p.m. *Chairman*: Mr. LOEWE (Austria): http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting5.html

[10] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of First Committee proceeding*: http://www.cisg.law.pace.edu/cisg/summaryfirst.html

[11] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Second Committee proceeding*: http://www.cisg.law.pace.edu/cisg/summarysecond.html

[12] There were 12 plenary conference proceedings, but the first six were organizational meetings. See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Plenary Conference proceeding*: http://www.cisg.law.pace.edu/cisg/plenary.html

[13] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 16th meeting, Thursday, 20 March 1980, at 3 p.m. *Chairman:* Mr. LOEWE (Austria): http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting16.html; LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 19th meeting, Monday, 24 March 1980, at 10 a.m. *Chairman:* Mr. LOEWE (Austria), later: Mr. MATHANJUKI (Kenya): http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting19.html

[14] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 4th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting4.html

[15] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 5th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting5.html and 6th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting6.html

[16] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 6th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting6.html and 7th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting7.html

[17] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 8th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting8.html

[18] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 10th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting10.html

[19] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 12th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting12.html and 18th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting18.html

Draft Article 34 [became CISG Article 36],[20] Draft Article 36 [became CISG Article 38],[21] Draft Article 42 [became CISG Article 46],[22] Draft Article 37 [became CISG Article 39],[23] Draft Article 61[became CISG Article 65],[24] Draft Article 69 and interest [became CISG Article 84, 78],[25] Draft Article 75 [became CISG Article 86],[26] Draft Article 62(1) [became CISG Article 71(1)],[27] Draft Article 63(2) [became CISG Article 72(2)][28].

In the Second Committee Meeting proceedings, the PRC delegation's attention was drawn to the New Article C bis [not adopted (would have affected CISG article 6)], [29] Article (X) [became CISG article 96],[30] Article E [became CISG article 100], [31] Draft Protocol to the Convention on the Limitation Period in the International Sale of Goods[32].

In the plenary conference proceedings, the PRC delegation addressed Articles 39 and 40 [became CISG article 41, CISG article 42 and CISG article 43],[33] Article 80 [became CISG article 68][34].

[20] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 15th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting15.html
[21] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 16th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting16.html
[22] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 19th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting19.html
[23] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 21st meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting21.html
[24] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 26th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting26.html
[25] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 29th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting29.html
[26] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 30th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting30.html
[27] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 38th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting38.html
[28] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 38th meeting: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting38.html
[29] See (A/CONF.97/C.2/L.3) and also see LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the Second Committee*, 1st meeting: http://www.cisg.law.pace.edu/cisg/2dcommittee/articles/meeting1.html
[30] See (A/CONF.97/C.1/L.88, L.96), and see also LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the Second Committee*, 3rd meeting: http://www.cisg.law.pace.edu/cisg/2dcommittee/articles/meeting3.html
[31] See (A/CONF.97/C.2/L.11), see also LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the Second Committee*, 4th meeting: http://www.cisg.law.pace.edu/cisg/2dcommittee/articles/meeting4.html
[32] See (A/CONF.97/7; A/CONF.97/C.2/L.14, L.18, L.18/Add.1, L.18/Add.2, L,21, L.26), see also LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the Second Committee*, 8th meeting: http://www.cisg.law.pace.edu/cisg/2dcommittee/articles/meeting8.html
[33] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of the Plenary Meetings*, 7th meeting: http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary7.html
[34] See (A/CONF.97/L.15), see also LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of the Plenary Meetings*, 8th meeting: http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary8.html

### *1.3.2. Influences favouring the PRC's Ratification*

The extensive participation and positive contribution of the PRC delegation were not only welcomed internationally, but also favoured internally. On the domestic level, the participation of the PRC delegation and the input they made in the preparation of the CISG influenced and favoured the later ratification of the Convention in the PRC. It was felt that the CISG was prepared under the participation of PRC among various other countries and regions representing to the largest extent a world-wide participation. It was felt that different opinions and voices were heard and different interests were represented and balanced in the Convention.

The acknowledgement of the world-wide participation in the preparation of the CISG and the belief that an equal and balanced outcome had been achieved through such a world-wide participation were of great significance for the PRC particularly under the domestic economic and political background at that time, when the country shortly inaugurated the Reform and Opening up Policy national wide. The reassurances that the PRC sought in the CISG were flagged up in the opening speech by the PRC delegate in the 1980 Diplomatic Conference quoted above. Emphasis was put in the quote below:

> ...to formulate a convention acceptable to all, in accordance with the basic objectives and principles of **equality and mutual benefit**[35] set forth in the Declaration and Programme of Action on the Establishment of a New International Economic Order adopted by the General Assembly at its Sixth Special Session.[36]

At the end, in the 12th plenary meeting the PRC delegation expressed satisfaction over the outcome of the Conference:

> Mr. LI-Chih-min (China) expressed his satisfaction that five weeks of intensive work had culminated in the success of the Conference. The Convention, which was a step towards the harmonization of international trade law, would permit legal obstacles to international trade to be removed, facilitate trade and promote the establishment of an economic order founded on equality and mutual interest. His Government would examine the Convention carefully and take positive action, to the extent possible. He congratulated the participants at the Conference, the Austrian Government, all the officers of the Conference and the Secretariat. In particular, he thanked the representatives for the constructive approach they had adopted.

The above "closing speech" by the PRC delegation indicated that a promising ratification of the CISG in the PRC should follow. Indeed, having been convinced of the above stated satisfactory outcome of the 1980 Diplomatic Conference, the PRC signed the Convention in 1981 and ratified it on 11 December 1986 together with the United States and Italy.

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[35] Equality and mutual benefit are the keywords that have always been and will continue to be the backbone of the PRC diplomatic principles and guidelines.

[36] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 5th meeting, Thursday, 13 March 1980, at 3 p.m. *Chairman*: Mr. LOEWE (Austria): http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting5.html

## 1.4. Application of the CISG under current PRC Law

Under current PRC law, there are limitations on the application of the CISG in the PRC, which has filed an Article 95 declaration and a declaration on the general subject of Article 96.

### *1.4.1. Article 95 Reservation*

> "The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of article 1 . . . "[37]

Pursuant to Article 95, the PRC made the above declaration. Article 1(1)(b) extended the CISG's sphere of application to sales where the parties do not have their places of business in different contracting states, but conflicts rules refer to the law of a contracting state. Article 95 relieves the reservation state from the need to have regard to Article 1(1)(b).[38]

The Legislative history of the CISG revealed that Article 95 was introduced by the Czechoslovak representative in the 11th plenary meeting of the 1980 Vienna Diplomatic Conference. It was designed to exclude the application of the CISG under Article 1(1)(b). According to the Czechoslovak representative, Article 1(1)(b) raised difficulties in countries like his own or the German Democratic Republic where special legislation had been enacted to govern transactions pertaining to international trade. Similar legislation was under preparation in Poland and Romania. For countries with such a system, Article 1(1)(b) would mean the exclusion of whole areas of the special legislation enacted to govern international trade transactions. The net result was that countries like Czechoslovakia would be unable to ratify the Convention because of the effect which CISG Article 1(1)(b) would have on the application of their special legislation on international trade.[39]

Based on the above understanding, taking into account the immature economic background, the very early stage of the Reform and Opening up, and the somewhat lack of PRC domestic legislation at that time, which will be discussed in the next Chapter, it is understandable, or at the least perhaps not surprising that PRC felt the need to make such a reservation envisaging separation legislation for international trade, so as to protect the immature domestic market and/or to buffer the impacts of the rapid Reform and Opening up.

Later PRC did implement separate legislations, the PRC Economic Contract Law 1981 applying to domestic contract and the Foreign-Related[40] Economic Contract Law 1985 applying to non-domestic contract. In this regard, special legislation enacted to govern transactions pertaining to international trade, as an idea learned from the Vienna Conferences by the PRC legislation, was perhaps an unexpected and certainly negative influence of the CISG on the Chinese legislators in the sense that it is not in favor but rather against the CISG. The fact that the United States had made the Article 95 reservation may also be a factor that influenced the PRC to follow the suit and make such a reservation as well.

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[37] See http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html

[38] See Czerwenka, RIW 1986, 293, 294; see also Schlechtriem, Commentary on the CISG, (2nd edition), Oxford, 1998 at page 27.

[39] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of the Plenary Meetings*, 11th meeting: http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary11.html

[40] PRC used the phrase foreign-related to encompass Hong Kong, Macau, Taiwan and foreign countries.

With the implementation of the PRC Contract Law 1999 (discussed in detail in the next Chapter), the Economic Contract Law 1981, the special Law on Technology Contracts and the Foreign-Related Economic Contract Law 1985 were all invalidated. Thus the PRC replaced its separate legislation for domestic and international contracts through one single body of rules - the PRC Contract Law 1999. The rapid development and the maturing economic background are the more important factors which contributed to the change of the PRC legislation model. If the purpose of the Article 95 reservation was to safeguard the separation legislation on international trade as PRC legislators once seemed to expect, the combination of domestic and international contract legislation under the PRC Contract Law 1999 perhaps has made the PRC Article 95 declaration dysfunctional.

The interpretation and the effects of reservation under Article 95 have proven to be controversial. De Ly cites three variations in the interpretation of such reservations:[41]

> "The first variation is the mere reservation against the extension of CISG to sales where one of the parties has its place of business in a non-contracting state but is faced with the application of CISG by virtue of a conflict rule of the court having jurisdiction leading to the application of the law of a contracting state. For instance, the US, the People's Republic of China, Singapore, the Czech Republic and Slovakia have used this mere reservation variation.
>
> "A second variation is the German variation where German courts will not apply Article 1(1)(b) CISG in sales where Article 95 reservation states are involved.
>
> "A third one is the Dutch variation. Article 2 of the Dutch Implementing CISG Act dated December 18, 1991 request foreign judges in Article 95 reservation states not to apply the Dutch Civil Code provisions on sales (Book 7, Title 1 of the Civil Code) but rather CISG, if Dutch law were to be applicable by virtue of the local conflict rule. This suggestion is of course not binding on foreign courts but by enacting this Dutch solution the legislator has indicated that under Dutch law it prefers a solution which enhances uniformity rather than one that relies on local Dutch law."[42]

Concerning the PRC, if, for example, a seller in the PRC sells to a buyer in State X, a non-Contracting State, Article 95 means that the PRC courts are not bound to apply the Convention rules even if the relevant rules of private international law lead to the application of PRC law (i.e. the law of a CISG Contracting State). In this situation, if the relevant conflict-of-laws rule points to the seller's law, a PRC court would apply domestic PRC law, i.e. the PRC Contract Law and the PRC General Principles of Civil Law. The PRC General Principles of Civil Law could be relevant because of their co-relation with the PRC Contract Law and the fact that these two legislations overlap and interact to some extent. Where there is ambiguity or a gap in the application and interpretation of the PRC Contract Law, the PRC General Principles of Civil Law will apply. In particular, Chapter VI Civil Liability, Section 2 Civil Liability for Breach of Contract, and Chapter VIII Application of Law in Foreign-related Civil Relations, could be relevant for international sales contract. Where there are overlaps and

[41] See http://www.cisg.law.pace.edu/cisg/text/e-text-95.html

[42] Philip De Ly, "Sources of International Sales Law: An Eclectic Model", at UNCITRAL – SIAC Conference on 25 Years United Nations Convention on Contracts for the International Sale of Goods, Singapore (22 September 2005)

conflicts between these two legislations, the Contract Law, as a special legislation, shall prevail over the General Principles of Civil Law, as a general legislation.

Another relevant concern of the Article 95 reservation would be that courts in Contracting States which have *not* made an Article 95 declaration would sometimes need to consider the effect of that declaration when deciding cases involving a party who resides in an Article 95 declaration State. Upon ratifying the Convention the government of Germany declared that it would not apply Article l(l)(b) in respect of any State that had made an Article 95 declaration.[43] This German 'declaration,' while not expressly authorized by CISG Part IV; can be viewed as the second variation of the Article 95 reservation, as stated above. Therefore, German Courts in a Contracting State which has *not* made an Article 95 declaration would *not* apply Article 1(1)(b) in respect of any Contracting State that *has* made an Article 95 declaration (e.g. PRC) when the conflict of law rules of the forum point to the law of the declaring State (e.g. the PRC). Here it is a different scenario from the one discussed in para **1.24**, where the parties autonomously choose the PRC Law as governing law.

Again the starting point is the PRC General Principles of Civil Law, in particular, Chapter VIII Application of Law in Foreign-related Civil Relations, Article 142, which stipulates:

> 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 to 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.

The first sentence of the above Article 142 has made it clear that because of the CISG Article 95 Reservation, the PRC is not obliged to apply Article 1(1)(b) according to its own domestic PRC Law. The second sentence then suggests that "International practice" ***may be applied*** to 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.

It is submitted that the following three questions may arise from the second sentence of the Article 142 of the PRC General Principles of Civil Law. Firstly, whether the CISG, although a convention, can be applied as "International practice" under the second sentence of Article 142?

There is no legislative definition of "International practice" ("Guo Ji Guan Li" in Chinese Pinyin) in PRC law. The author is aware that the word "practice" used in a legal context tends to connect to "procedure", particularly for English Lawyers perhaps, for example, it may denote informal rules of procedure as distinct from those derived from rules of court.[44] Yet in the context of PRC law, the translation "international practice" refers to international customs and

[43] See: Schlechtriem. P., *'Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany,'* Juridisk Tidsskrift vid Stockholms Universitet (1992) pp. 6-7, see http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html

[44] See Oxford Dictionary of Law, 5th edition, 2002, where it states " a book on practice and procedure, such as the Civil Procedure Rules."

practices, not in the sense of international public law, but in the areas of private and/or commercial law, with a more general and loose meaning as you can find, for instance, in the "UCP": the Uniform Customs and Practices for Documentary Credits. In this sense, the PRC "International Practice" may have similar meanings to "lex mercatoria"[45], as a body of "spontaneous" law – law created by standard commercial practices.

It is important to point out that the PRC legislations, from 1978 onward, since the Reform and Opening up, have been amazingly positive and respectful to "international practice", particularly in the areas of private law. Besides Article 142 of the PRC General Principles of Civil Law, the PRC Foreign-Related Economic Contract Law 1985 stipulates in Article 5: "International practice may be applied to matters for which the PRC law has no provisions." The PRC Maritime Code Article 268, the PRC Civilian Aviation Law Article 184, and the PRC Negotiable Instruments Law Article 96 all stipulated that "International practice may be applied."

Furthermore, the "new" (from 1978 onward, since the Reform and Opening up) PRC legislations have widely employed a comparative approach. The PRC Contract Law 1999 is a good example showing the PRC's comparative technique in modern PRC law drafting. Ding Ding points out that "Many foreign contract laws and civil laws and international unification laws had been under thorough comparison and discussion. The CISG and the Unidroit Principles [of International Commercial Contracts] were the main references."[46]

Having compared the advantages and disadvantages of various foreign laws and/or international legal instruments, the PRC law drafter has the opportunity to consider the advantages in some to make up for the shortcomings in others. By doing this compare- and-select exercise, the PRC law drafters often find themselves in a better position to decide what suits the PRC the best in the law that is being drafted. Such a comparative and selective approach as reflected in the provisions of the PRC laws then guides the PRC courts to be open-minded and international/foreign laws minded when applying and interpreting the law.

With regard to the CISG, given its importance as the world's most successful and pre-eminent international uniform sales law, the "international" and "practical" character of the CISG is beyond doubt. The positive and respectful attitude towards international customs and practice in general and the willingness to compare laws of foreign countries and different international instruments, including the CISG in particular, as shown in the PRC contract law and civil law drafting, have convinced that the CISG is highly applicable as "International Practice" under the PRC law in appropriate circumstances.

Then the next question is in what circumstances can the CISG be applied as "International Practice" under PRC law?

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[45] For this topic, see Bernard Audit, "The Vienna Sales Convention and the Lex Mercatoria", *Lex Mercatoria and Arbitration*, Thomas E. Carbonneau ed., rev. ed. a chapter of the 1990 edition, (Juris Publishing 1998) pages 173-194; also available in the PACE database: http://www.cisg.law.pace.edu/cisg/biblio/audit.html

[46] See "CISG and China - An Intercontinental Exchange," edited by Michael Will, with contributions by Bruno Zeller and Ding Ding, Geneva 1999. Another good example of how the PRC legislation has made good use of the comparative approach in law drafting can be found in the PRC Maritime Code. Although the PRC has not yet acceded to any of the Hague Rules 1924, or the Visby Rules 1968, or the Hamburg Rules 1978, the PRC Maritime Code in fact selected those suit the PRC the best from three of the rules.

Focus is on the second sentence of Article 142 of the PRC General Principles of Civil Law: "International practice may be applied to 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".

Today the ambit, within which neither the law of the PRC nor any international treaty concluded or acceded to by the PRC has any provisions, has to be very narrow, given the fact that numerous legislations have been implemented in the PRC in the last twenty to twenty-five years and the number of treaties entered by the PRC has not been small. Therefore, the scope, to which the CISG can be applied as international practice under the PRC law, has ***seemingly*** been limited to perhaps an almost negligible extent in theory.

Surprisingly or not, in practice, however, numerous cases and arbitral awards have evidenced contrary to the above textual theory. As a matter of fact, the CISG has been widely applied by the PRC courts and arbitral tribunals even in some cases in which the CISG would not seem to apply in theory. The application of the CISG in current PRC Arbitration Practice will be dealt with in section V. below.

Furthermore, it is submitted that the CISG has long been rooted into the PRC law, as early as at the drafting stage . The fingerprint it has placed on the drafting of the PRC legislation has made the CISG highly relevant to the PRC law from the very beginning. The compare-and-select approach employed in the PRC law drafting has woven the essence, e.g. the principle of good faith, the balance of interests of buyer and seller, the principle of equality and equity, and the concept of reasonableness etc, into the PRC subsequent legislations. Believe it or not, ask any judge or practitioner in the PRC, the general perception is that the current PRC legislations have indeed learned a great deal from foreign laws and international uniform law instruments, such as the CISG. The PRC legislators have endeavoured to make the PRC legislations to reflect international practice as much as possible. Thus it is believed that the PRC Contract law 1999 was drafted in line with the CISG, under which the PRC's treaty obligation has been taken seriously. A closer comparative study of the contents, the individual provisions of the PRC General Principles of Civil Law, the PRC Contract Law 1999 and the CISG will be dealt with in the next Chapter.

Yet here perhaps there is a third concern in Article 142 of the PRC General Principles of Civil Law. The phrase "**may be applied**" seems to suggest that a wide discretion has been left to the PRC courts. Again, paragraphs 1.39 to 1.42 are repeated. It is submitted that the PRC courts' discretion is most likely to be tipped in the favour of the application of the CISG. The application of the CISG by PRC arbitrators could only be easier and more likely, for the even wider and freer discretion they have in deciding the applicable law in arbitration proceedings.

Thus, the PRC Article 95 reservation does not seem to have achieved its effects in limiting the application of the CISG in PRC law as much as the PRC legislators perhaps originally expected or those critics tended to or used to believe. Given the fact that the CISG has been widely adopted by 68 States that account for over three-quarters of all world trade,[47] the effect of the Article 95 Reservation has been minimal in any case.

[47] As of 17 July 2006, the United Nations reports that 68 States have adopted the CISG. See PACE database: http://www.cisg.law.pace.edu/cisg/countries/cntries.html

### *1.4.2. Article 96 Reservation*

> "The People's Republic of China does not consider itself bound by . . . article 11 as well as the provision of the Convention relating to the content of article 11."[48]

This is the other declaration made by PRC under Article 96,[49] which allows a contracting state to declare that any provision of Article 11, Article 29, or Part II of the CISG, 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 Reservation State. It may be declared only by a state which itself requires written form for contracts of sale under its domestic law.[50]

Interestingly enough, at the time when the PRC delegation attended the 1980 Diplomatic Conference in Vienna, there was no PRC domestic legislation, at least not in the codified form, on the subject of contract or civil law in general, although there had been some attempts to draft and codify the PRC Civil Law.[51]

By 11 December 1986 when the PRC ratified the CISG and declared the two reservations, three important PRC domestic legislations had been adopted. From 1980 to 1986, within six years, the PRC had finished the drafting and implementation of the PRC Economic Contract Law promulgated on 13 December 1981, the Foreign-Related Economic Contract Law promulgated on 21 March 1985 and the PRC General Principles of Civil Law promulgated on April 12, 1986.[52]

To a large extent, these three pieces of PRC domestic legislation were in fact adopted to prepare the PRC for the ratification of the CISG. Having attended the 1980 Diplomatic Conference and observed the debates on all the relevant subjects and issues, the PRC delegation returned to the PRC with a clear goal in mind: that is to ratify the CISG, to participate in international trade, to modernise the PRC domestic laws and its legal system Thus, the impact and influence of the CISG on the PRC legislation in general and on the PRC Contract Law in specific, which was almost from scratch at that time, are self-evident.

The structure and contents of the Foreign-Related Economic Contract Law 1985 had significant reference to the CISG.[53] Although the CISG had less influence on the PRC Economic Contract Law 1981, which was largely influenced by the Soviet Union Law, it is submitted that without the insights, the experience gained from the 1980 Diplomatic Conference on the CISG and the aim to ratify the CISG, the PRC would perhaps have no separation of legislation for domestic and international trade in the first place.

What exactly had been prescribed regarding to the requirements as to form in these "purpose-made" pieces of legislation?

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[48] See http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html

[49] See Xiaolin Wang and Camilla Baasch Andersen, *The Chinese Declaration against Oral Contracts under the CISG*, available at: <http://cisgw3.law.pace.edu/cisg/biblio/andersen4.html>

[50] See Schlechtriem, Commentary on the CISG, (2nd edition), Oxford, 1998 at page 699.

[51] The evolution of the PRC Civil Law will be discussed in the next Chapter.

[52] The PRC Technology Contract Law came into force on 1 November 1987.

[53] See discussion in details in the next Chapter.

Article 3 of the PRC Economic Contract Law 1981 stipulated: "Economic contract, ***except*** when payment is made immediately, shall be in ***writing***; document, telegram or telex on alteration of the contract by mutual agreement between parties form part of the contract." [54]

Article 7 of the Foreign-Related Economic Contract Law 1985 provided:

> 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 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***.

Article 31 of the PRC General Principles of Civil Law Article 31 states: "Partners shall make a ***written*** agreement covering the funds each is to provide, the distribution of profits, the responsibility for debts, the entering into and withdrawal from partnership, the ending of partnership and other such matters."

Having said that these PRC domestic pieces of legislation were adopted to prepare the PRC for the ratification of the CISG, the contents of the above provisions, however, reveal that they were made for the reservations of the CISG rather than in favor of the CISG. The PRC could have made those provisions in line with Article 11 of the CISG instead.

It is submitted that apart from the cultural tradition that Chinese merchants tend to feel more secure with written deeds, the attitudes and positions taken by the Union of Soviet Socialist Republics (USSR) were the main influence for the PRC to make the Article 96 reservation. The U.S. delegate, Mr Farnsworth, in the 8th meeting of the First Committee in the 1980 Vienna Diplomatic Conference pointed out that at the tenth session of UNCITRAL at Vienna, it had been decided that the written form would not be compulsory:

> "...The intention was not to allow too many countries to make reservations, either partial or total. The aim was merely to remove the difficulties which might be encountered by the USSR or perhaps by other countries where the State was responsible for international trade."[55]

In the early 1980s, the Reform and Opening up was still at a very early stage. The PRC legislators were not decisive at the beginning as to whether to follow the USSR pattern or the western, the U.S. pattern. The mainstream at that time inclined to the USSR. For example, the term "Economic Contract" was translated and borrowed from the USSR. It was used in the PRC Economic Contract Law 1981 and later was largely retained in the Foreign-Related Economic Contract Law 1985. The concept of "Foreign-Related Economic Contract" itself evidenced the USSR's influence on the PRC legislation at that time.

The impression and observation gained in the 1980 Diplomatic Conference, that the Article 96 Reservation was designed for the USSR, in which the State was responsible for international trade, convinced the PRC to follow the USSR suit, because not until recently, after the PRC

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[54] Translated by the Author.
《中华人民共和国经济合同法》（已失效） 第三条： 经济合同，除即时清结者外，应当采用书面形式，当事人协商同意的有关修改合同的文书、电报和图表，也是合同的组成部分。

[55] See LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee*, 8th meeting at para 43: http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting8.html

entered into the WTO, was the right to international trade centrally controlled by the PRC government. At the beginning of the Reform and Opening up, it was then not unreasonable to believe that the PRC governmental organizations, the State-owned Entities, would be dominant in representing the PRC in international trade. Again it was an unexpected experience learned by the PRC in the Diplomatic Conference and a somewhat negative influence of the CISG on PRC legislation.

Besides it is a general perception that the Chinese culture embraces the idea that anything formal and anything important should be done in written forms, so as to avoid the difficulties in evidence and proof if later disputes arise. As beginners, learners in the international trade, the PRC naturally inclined to treat the forms of contracts for international sale with greater attentions and preferred them to be done in formal and written forms.

Nonetheless the Reform and Opening up is a gradually and constantly evolving process in the PRC. The PRC Contract Law 1999 has changed the PRC's position on the requirements as to form of contracts. Article 10 Forms of Contract prescribes:

> Writing Requirement
>
> A contract may be made in a writing, in an oral conversation, as well as in any other form.
>
> A contract shall be in writing if a relevant law or administrative regulation so requires. A contract shall be in writing if the parties have so agreed.

Article 11 Definition of Writing

> A writing means a memorandum of contract, letter or electronic message (including telegram, telex, facsimile, electronic data exchange and electronic mail), etc. which is capable of expressing its contents in a tangible form.

The language of the above English translation of the PRC Contract Law 1999 may perhaps have left some room for improvement, but these are the PRC official translations as they stand.[56] The point here is that the above provisions clearly embraced the freedom of requirements as to form of contracts. Moreover, a step further than the stipulations of the CISG was taken to encompass not only the conventional forms, e.g. letter, telegram, telex, but also modern electronic data exchange and electronic communications. Again the comparative and selective approach adopted in the PRC law drafting was evident on the one hand; the intent to make the PRC law compatible with the rapid economic development on the other.

Thus the PRC Contract Law 1999, the current contract law in the PRC, has adopted the original position under Article 11 of the CISG. The evolution, from the PRC Economic Contract Law 1981 and the Foreign-Related Economic Contract Law 1985, to the PRC Contract Law 1999, reflects not only the internal need of the PRC legislation to back up the fast economic and social development undergoing in the PRC, but also the willingness of the PRC legislators to harmonise the PRC legislation with the international law and practice. The PRC's contributions in the harmonisation and unification of the international sales law have been evidently significant.

[56] These are official PRC translations published by: http://www.chinalaw.gov.cn

Yet the PRC has not filed a withdrawal of the Article 96 declaration. Under Article 97 (4) of the CISG, a declaration may be withdrawn. The wording of the Article 97 (4) seems to suggest no obligation to file a withdrawal. But the CISG is silent as to the effects of the absence of a withdrawal when the declaration is no longer valid or does not make practical sense any more.

Article 96 Reservation is only available for a contracting state whose domestic legislation requires the form of contracts. Since the current PRC domestic law does no longer require the form, Article 96 Reservation should have ceased to be available for the PRC. Would the change of domestic law invalidate the declaration under the Article 96? What are the effects of the absence of a withdrawal under these circumstances? The CISG is silent and provides no answer. Technically speaking, the absence of the PRC's withdrawal of its Article 96 Reservation caused a dilemma. If a contract concluded verbally between two parties, one of which has its place of business in PRC, a reservation state and the other in the United States, a non reservation state, gave rise to litigation and the litigation in question came under the jurisdiction of the U.S., should and could the judge consider whether Article 96 is still applicable to the PRC? Although the end result may be very different, if the judge simply considers in the absence of a withdrawal the PRC Reservation is still valid, and then goes ahead applying the conflict rules to decide the applicable law to the form. But the question in the first place should be whether the PRC's Reservation is still valid? Could the reservation cease to be valid automatically or as a default upon change of circumstances in domestic law? These questions do leave uncertainties in law and practice. It is hoped that the PRC shall duly file a declaration to withdraw the Article 96 Reservation.

### *1.4.3. The CISG forms part of current PRC Law*

Having established the impacts and influence of the CISG in the PRC legislation and having examined the two reservations and their implications on the current PRC law, it is now perhaps more important to review and study how exactly the CISG has been applied in the current PRC law and practice. How does the CISG fit in the overall PRC legislation structure? Whether the CISG stands on its own, being separated or outside of the PRC domestic law, or whether it becomes part of the PRC law?

First of all, although being named as a convention, the "United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]" is in fact a treaty. Generally speaking, international treaties are called by several names: treaties, international agreements, protocols, covenants, conventions, exchanges of letters, exchanges of notes, etc. There may be different connotations and/or denotations regarding different terms used. However, under international law these are equally treaties and the rules applied to them shall be the same.

According to the PRC General Principles of Civil Law, Chapter VIII Application of Law in Foreign-related Civil Relations, Article 142 stipulates:

> 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 to 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.[57]

It is submitted that a correct reading of the above Article reveals that the right position should be that the CISG is superior to the PRC domestic legislation, i.e. the first hierarchy of the PRC law, as a treaty concluded and acceded to by the PRC. The PRC domestic legislation then follows as the second hierarchy in the middle. The international practice[58] contributes as the third hierarchy. Although the CISG is above the PRC domestic legislation, it is within the broader picture of the three-tier hierarchy of the source of the PRC law.

Therefore, if the parties of international sales have chosen the law of the PRC, a Contracting State of the CISG, it is submitted that the CISG should apply as having been incorporated and become part of the PRC Law. If the court then finds that the CISG contains provisions differing from those in the PRC domestic legislations, the provisions of the CISG shall prevail.

#### 1.4.3.1. Can the CISG apply to the PRC domestic sales?

A further interesting question following the above submission that the CISG shall be regarded as part of the PRC law is whether the CISG can also apply to PRC domestic sales. Under current PRC law, it is generally perceived that in PRC domestic sales, parties do not have the right to choose applicable law. However, it is submitted that a careful examination of current PRC law reveals that it is literally an arguably open question as to whether parties of PRC domestic contract can legally choose the applicable law.

Although there is no direct provision under the current PRC law "positively" granting parties of domestic contracts[59] the power and/or the freedom to choose applicable law, parties of domestic sales have not been prohibited from the freedom to choose the applicable law either. According to the universally acknowledged legal principle, this is also generally accepted by the PRC legal academic and practice, that "an act is permissible unless forbidden by law". Based on this legal principle and the fact that the current PRC law does not after all forbid parties of contracts from choosing the applicable law, it is therefore argued that, in principle, parties of domestic sales in the PRC should be free to choose applicable law.

Moreover, there are no stipulations under current PRC law that require, for example that the PRC Contract Law 1999 (Current) shall apply to all domestic contracts. The purpose of the PRC legislators and/or the current trend in the development of the PRC law is indeed to merge the differences that used to exist in distinguishing domestic contracts from contracts involving foreign interests. The unification of the Economic Contract Law 1981 applying to domestic contract and the Foreign-Related Economic Contract Law 1985 applying to non-domestic contract, and the special Law on Technology Contracts evidenced the purpose of the

[57] This is official PRC translations published by: http://www.chinalaw.gov.cn
[58] See later a further discussion on the "international practice" in paragraphs 1.38 and 1.39.
[59] Bear in mind that the concept of contract includes not only the contact of sales.

PRC legislations and the current trend of PRC law of practice.[60] Thus it is argued that the power to choose the applicable law expressly available under the PRC General Principles of Civil Law (1986) to parties of foreign-related contracts should also be available to parties of domestic sales as well. Otherwise parties of domestic sales have not been given an equal treatment under the current PRC Contract Law.

Taking into account the fast economic development in the PRC, the above policy reason for the PRC legislators and the current development of the PRC law and practice, it is an unjustifiable inequality for parties of domestic sales not to have the right to choose the applicable law. Therefore it is submitted that parties of PRC domestic sales should also be able to choose the applicable of law for their contracts. Should this submission hold water, there is no reason why the CISG could not be chosen by the parties and applied to PRC domestic sales as well.[61]

#### 1.4.3.2. "Foreign-related" under current PRC law and practice

According to the PRC General Principles of Civil Law, Chapter VIII Application of Law in Foreign-related Civil Relations, Article 145 stipulates:

> "The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied."

Although the above English version translated by the Brueau of Legislative Affairs of the State Council of the PRC, published by the China Legal System Publishing House uses the phrase "involving foreign interests", it is submitted that "foreign-related" would be literally more precise to the original Chinese text.[62]

According to the Opinions of the Supreme People's Court on Several Questions on the Implementation of the PRC General Principles of Civil Law, Section 7 Opinion No. 178 subparagraph 1 states:

> "Foreign-related civil relation includes when one party or bother parties of a civil relationship is foreign person or a person with no nationality or a foreign legal entity; or the subject matter of the civil relationship locates abroad; or the legal event creates, alters or terminates the rights and obligations of the civil relation happens abroad."

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[60] See further discussion in para 1.30-1.31.

[61] This issue of Opting-in was expressly dealt with by the 1964 Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, which contained a provision, article 4 expressly providing the parties with the possibility of "opting in". The fact that the Convention does not contain a provision comparable to the opting-in article does not necessarily mean that the parties are not allowed to "opt in". This view is supported by the fact that a proposal made by the former German Democratic Republic during the diplomatic conference. See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 86, 252-253.

[62] It is importantly noticed in the English version translated by the Brueau of Legislative Affairs of the State Council of the PRC, published by the China Legal System Publishing House that In case of discrepancy, the original version in Chinese shall prevail.

The above opinion has defined the scope and the concept of "foreign-related" and/or "involving foreign interests" in a very flexible and broad way. It clearly encompasses not only "involving foreign interests", but also foreign person, person with no nationality, foreign entity, and foreign subject matter and relevant events happened abroad.

Further, according to some PRC judiciary interpretations, in specific, the Official Reply of the Supreme People's Court on Several Questions in dealing with economic dispute cases involving the Hong Kong-Macau-Taiwan Regions (1987.10.19)[63], and the current PRC law and practice, court cases and arbitral awards have decided uncontroversially that cases related to Hong Kong, Macao and Taiwan Regions have also been treated as foreign-related cases. It is also for this reason that the phrase of "foreign-related" is arguably more accurate to reflect the current law and practice than that of "involving foreign interests". Another good example of treating Hong Kong-Macao-Taiwan-related cases in accordance with rules applying to Foreign-related can be found in the Official Notice of the Supreme People's Court on Several Questions in dealing with foreign-related arbitration and foreign arbitral awards (1995.08.28).[64]

### 1.5. Application of the CISG in CIETAC Arbitration Practice

With the PRC's entry into WTO and the emergence of PRC as a market economy and its fast development and boom in international trade, the China International Economic and Trade Arbitration Commission (CIETAC) has become one of the most active international commercial arbitration institutions in the world.[65]

#### *1.5.1. CIETAC Arbitration Practice in general*

CIETAC's history dates back to 1956, well before the CISG has been ratified. The China Council for the Promotion of International Trade (CCPIT) inaugurated the Foreign Trade Arbitration Commission (FTAC).[66] In 1979-1980 FTAC became known as the Foreign Economic and Trade Arbitration Commission (FETAC) upon the inclusion of settlement of disputes among Chinese and foreign joint venture partners.[67] In 2000, CIETAC dealt with 543 arbitration cases, compared to 500 by the AAA (American Arbitration Association), 541 by the ICC International Court of Arbitration, and 294 by the Hong Kong International Arbitration Centre.[68] From January 2000 until 2005, CIETAC caseload was respectively: 543, 731, 684, 709, 850, 979. Headquartered in Beijing with two sub-commissions, South China Sub-Commission in Shenzhen and Shanghai Sub-Commission, CIETAC has become the first world arbitration forum in terms of caseload.[69]

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[63] See最高人民法院关于审理涉港澳经济纠纷案件若干问题的解答 （１９８７年１０月１９日）

[64] See关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知(1995年8月28日法发(1995)18号)

[65] See Zhang L. "The Enforcement of CIETAC Arbitration Awards", Hong Kong Lawyer, February 2002, accessed via http://www.hk-lawyer.com/2002-2/Feb02-china.htm

[66] See Hobbs, B., O'Melveny & Myers, *CIETAC Arbitration Rules and Procedures: Recent Developments and Practical Guidelines*, April 1999, p2.

[67] For the introduction of the CIETAC, see its official website, URL at <http://www.cietac.org.cn/english/introduction/intro_1.htm#2>.

[68] See http://www.hkiac.org/HKIAC/HKIAC_English/en_statistics.html

[69] See WU, Dong: *2005. CIETAC's Practice on the CISG*, presentation at UNCITRAL-SIAC Seminar on Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods,

Given that the majority of Chinese arbitral awards involving the CISG were mainly made by CIETAC, and considering that the issue of the application of the CISG is in a rather different light in arbitration than before a State court, a review and critical analysis of CIETAC awards on the methods employed in determining the application of the CISG in PRC is required.

### *1.5.2. CISG has been applied to contract between two PRC parties*

Based on the above analysis of the definition and scope of the concept of "foreign-related", parties of foreign-related contract has the power to select applicable law, even if both parties are from the PRC. This result further advances the above argument that parties of pure domestic contracts should not be prevented from the freedom of choosing applicable law, so as to avoid unjustifiable different treatment under the current PRC contract law.

Indeed in the Fishmeal case,[70] the CISG was applied to a contract between two PRC parties. The contract of sale in that case involved an international shipment of goods. Therefore, the contract fell into the category of "foreign-related" under current PRC law, although it was signed by two PRC companies which have the power to enter into foreign trade. In deciding the applicable law, the Arbitration Tribunal holds that according to the theory of closest connection, the Law of the PRC on Economic Contracts Involving Foreign Interest should be applied. However, interestingly, the tribunal goes on to state that when the PRC law does not stipulate, the CISG and international customs shall be applied. Therefore, the tribunal first applies Article 7 of the Law of the PRC on Economic Contract Involving Foreign Interest to deal with the issue of contract formation; then applies Article 68 of CISG when dealing with the issue of passage of risk; hence, the CISG has been applied as gap-filling of the PRC domestic contract law in relation to foreign-related contract between two PRC parties.

### *1.5.3. CISG has been applied to contracts between parties from Hong Kong and the PRC, Hong Kong and Hong Kong, Macao and PRC, Taiwan and PRC*

When the PRC ratified the CISG in 1986, the PRC lacked the power to enter into international conventions for Hong Kong and Macao. After the return of Hong Kong in 1997 and Macao in 1999, pending the filing with the Secretary-General of the United Nations of a suitable CISG-related depositary notification by the People's Republic of China, it is uncertain whether the CISG shall be in effect in Hong Kong and Macao. Some commentators suggested that the courts of China and Hong Kong are unlikely to regard the CISG as in effect in the Hong Kong Special Administrative Region.[71] But some others suggested otherwise.[72] Whether the CISG is applicable in Taiwan is another mystery.

Nonetheless, in fact, a number of decisions by the PRC courts have been reported where the CISG has been applied to sales contracts between parties from PRC and Hong Kong dated

Singapore (22 September 2005) 43 p. at para 2 CIETAC and CIETAC Awards; see also Nordic Journal of Commercial Law <http://www.njcl.utu.fi/2_2005/article2.htm>

[70] See China 1 April 1997 CIETAC Arbitration proceeding (*Fishmeal case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/970401c1.html]

[71] See e.g. http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html

[72] See e.g. Ulrich Schroeter, *"The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods"*: http://www.schroeter.li/pdf/Schroeter_16_Pace_Intl_L_Rev_2004_307.pdf

both prior to and after the return in 1997.[73] There are also numerous CIETAC arbitral awards applying the CISG to contracts between parties from Hong Kong and the PRC, Hong Kong and Hong Kong, Macao and PRC, Taiwan and PRC.

### *1.5.4. Rationales for applying the CISG to contracts between parties from Hong Kong and the PRC, Hong Kong and Hong Kong*

The following rationales have been used for applying the CISG to contracts between parties from Hong Kong and the PRC, Hong Kong and Hong Kong:

#### 1.5.4.1. PRC Law "referring to" or "in light of" the CISG as an International Convention

In a Cement case between a PRC seller and a Hong Kong buyer,[74] having decided the applicable law is the Law of PRC referring to the International Convention, the tribunal in its opinion only apply the relevant article of CISG (Article 53) without actually referring to any relevant PRC domestic law instead.

#### 1.5.4.2. Parties' explicit agreement

In a Rolled wire rod coil case between two Hong Kong parties,[75] The Arbitration Tribunal noted that the parties reached consensus regarding the applicable law during the oral hearing that the CISG shall apply. Accordingly, the Tribunal decided that CISG should be the applicable law in this case.

In the Rebar coil case,[76] the two parties both from Hong Kong agreed in the contract attachment that the applicable law of the contract is the CISG; therefore, the Tribunal held that the CISG should be applied to the dispute.

Also in the Caffeine case between a Hong Kong buyer and a PRC seller,[77] the Tribunal was of the opinion that the parties did not stipulate the applicable law in the contract. However, when the application for arbitration was filed, the parties agreed that the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) should be applied to this case.

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[73] China 31 December 1992 Xiamen Intermediate People's Court (Lian Zhong v. Xiamen Trade) [Cite as: http://cisgw3.law.pace.edu/cases/921231c1.html]; China 1993 People's Court (*International Industrial Company C of Hong Kong v. Five Mines Machinery Industrial Chemicals and Chinese Medicine Import-Export Company*) [Cite as: http://cisgw3.law.pace.edu/cases/930000c1.html]; China 7 March 1994 Guandong Higher People's Court (*Zhanjiang Textiles v. Xian Da Fashion*) [Cite as: http://cisgw3.law.pace.edu/cases/940307c1.html]; China 5 September 1994 Xiamen Intermediate People's Court (*Xiamen Trade v. Lian Zhong*) [Cite as: http://cisgw3.law.pace.edu/cases/940905c1.html];

[74] China 26 March 1993 CIETAC Arbitration proceeding (*Cement case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/930326c1.html]

[75] See China 15 May 1995 CIETAC Arbitration proceeding (*Copper cable case*) [translation available][Cite as: http://cisgw3.law.pace.edu/cases/950515c1.html]

[76] China 20 November 1997 CIETAC Arbitration proceeding (*Rebar coil case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/971120c1.html]

[77] China 29 March 1996 CIETAC Arbitration proceeding (*Caffeine case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/960329c1.html]

According to the facts, the court session and the parties' intention, the CISG was applied in this case.

Another interesting case is the Three-ply board case between a PRC buyer and a Hong Kong seller. Article 21 of the Export Contract signed by the parties on 21 June 1993 stipulates that, "if the contracting place or the place of residence of the goods at the time of dispute is within the People's Republic of China, or the respondent is Chinese legal person, the laws of the People's Republic of China should apply, otherwise, the CISG should apply". The Arbitration Tribunal holds that the choice of applicable laws by the parties should be respected and therefore the aforesaid laws should be applied to the settlement of the dispute.

#### 1.5.4.3. Parties' implicit agreement

In the Antimony ingot case between a PRC seller and a Hong Kong buyer,[78] the Arbitration Tribunal noted that the parties did not stipulate the applicable law in the Contract. However, in the Seller's arbitration application and the Buyer's defenses, the CISG was mentioned as a basis for each party's assertion. Therefore, the Arbitration Tribunal deems that the parties have reached an agreement on the applicable law during the arbitration process; therefore, the CISG should be applied.

In the Oxetrecycline case,[79] the PRC seller stated in its contract form that the PRC law and Incoterms 1990 should be applied, but the Hong Kong buyer stated in its contract confirmation that the law of Hong Kong should be applied. The tribunal took the view that the two parties did not reach an agreement on the applicable law. However, during the arbitration, the PRC seller applied the CISG to support its defense, and later the Hong Kong buyer replied the defense applying the CISG as well. The Arbitration Tribunal is of the view that two parties applied the CISG during the arbitration process; therefore it should be deemed that both parties have reached an agreement on applying the CISG, thus, the CISG is the applicable law.

In the Black melon seeds case[80] between a Hong Kong buyer and a PRC seller, there was no agreement on the applicable law in the relevant contract, however, both parties applied the CISG and the PRC Economic Contract Law to establish their cases in the arbitration. Therefore, the Tribunal held that it can be regarded that the parties have impliedly agreed on the applicable law, i.e., PRC law and the CISG.

#### 1.5.4.4. CISG applied as "filling gaps" of the PRC Law

In addition to the Fishmeal case[81] discussed above, where the CISG was applied as a gap-filler to the PRC domestic contract law in relation to foreign-related contract between two PRC parties,

[78] See China 5 February 1996 CIETAC Arbitration proceeding (*Antimony ingot case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/960205c2.html]

[79] See China 15 November 1996 CIETAC Arbitration proceeding (*Oxtetrecycline case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/961115c1.html]

[80] China 4 April 1997 CIETAC Arbitration proceeding (*Black melon seeds case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/970404c1.html]

[81] See China 1 April 1997 CIETAC Arbitration proceeding (*Fishmeal case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/970401c1.html]

in the Silicon metal case[82] between a Hong Kong buyer and a PRC seller, the Tribunal reached its conclusion that the PRC law is applicable. The Tribunal noted that both parties also agreed that the CISG shall apply when there is no certain regulation in PRC law; hence, the CISG was applied as gap-filler for the PRC law.

In the Kidney Bean case,[83] the parties did not stipulate the applicable law in the contract, but both referred to the PRC law and the CISG to support their cases. The Tribunal held that it should be deemed that parties agree that PRC law should be the applicable law and the CISG should be applied as a gap-filling reference.

Again in the Air Conditioner Equipment case[84] between a Hong Kong seller and a PRC buyer, the Tribunal delivered the opinion that because the contract was formed in Shenzhen, and the place of business of the buyer and the seat of arbitration were in the PRC; pursuant to the proximate connection principle, the PRC law was applicable. Lacking an applicable stipulation in the PRC law, the Tribunal hed that the CISG is then applied.

#### 1.5.4.5. CISG applied as international trade practice

In the Hot-rolled Steel Plate case,[85] the contract did not contain a choice-of-law clause. The Arbitration Tribunal held that it has the power to decide the issue of applicable law and "Given that both the conclusion and the performance of the contract had the closest connections with the PRC and the seat of arbitration was also the PRC, according to the principle of closest connection, the PRC law shall apply to the contract in this case." Furthermore, since both parties have employed the CISG to support their arguments, the Arbitration Tribunal decided that reference can also be made to the CISG as relevant international trade practice, *"so long as they are not in conflict with the PRC law"*.[86]

So far there seems to be no direct case in which the CISG was rejected on the ground that it is in conflict with the PRC law. However there is a case, Bread Improving Tablets case[87] between a Hong Kong and a PRC parties that may shed some light on the meaning and the effects of *"so long as they are not in conflict with the PRC law"*. There were two contracts in this case with identical contract number, date, goods, and quantity. The main difference was that the price of goods in the first contract was US $3,060 per ton totalling US $275,400, and in the second contract it was US $1,530 per ton for a total of US $187,000. After investigation by the Tribunal, it was clear that the second contract was made to evade PRC custom duties. Therefore by virtue of Article 9 of the Law of the People's Republic of China on Economic

[82] China 11 April 1997 CIETAC Arbitration proceeding (*Silicon metal case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/970411c1.html]
[83] China 27 June 1997 CIETAC Arbitration proceeding (*Kidney beans case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/970627c1.html]
[84] China 5 April 1999 CIETAC Arbitration proceeding (*Air conditioner equipment case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/990405c1.html]
[85] China 22 January 1998 CIETAC Arbitration Proceeding (*Hot-rolled steel plate case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/980122c1.html]
[86] Ibid
[87] China 27 February 1993 CIETAC Arbitration proceeding (*Bread improving tablets case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/930227c1.html ]

Contracts Involving Foreign Interests,[88] the second contract was void for violating PRC law and social and public interest. As the parties did not choose the applicable law, the Tribunal decided to apply the PRC law only, on the basis that the contract was signed in Harbin, China, and according to the principle of closest relation with the contract, the applicable law would be where the contract was signed, i.e. the PRC law. Obviously the Tribunal did not expressly rely on the "illegality/public interest" point to exclude the application of the CISG, but attention was drawn to the fact that this was a very rare case where the PRC law was applied in a foreign-related case without even referring to the CISG, albeit the Hong Kong seller (claimant) requested to apply the CISG.

#### 1.5.4.6. CISG applied "naturally" without reason?

In Cold-rolled Steel Plate case,[89] the Tribunal simply applied the CISG so naturally without even dealing with the issue of applicable law. In its award, it directly applied the CISG in dealing with the issue of mitigation and reduction of price. Having quoted Article 50 of the CISG in full, the Tribunal decided that the Hong Kong seller was liable for the PRC buyer for the amount of the difference between the value of the defect goods and that of the conforming goods at the time of delivery.

Again in the Talcum Block case between a PRC buyer and a Hong Kong seller, the Arbitral Tribunal did not deal with the applicable law at all, but simply applied Article 40 of the CISG and held that the seller is not entitled to rely on the provisions of Article 38 and 39 regarding the time limit for the buyer's inspection of the goods and for giving notice to the seller of the nature of the lack of conformity if the lack of conformity relates to facts of which the seller knew or could not have been unaware.

#### 1.5.4.7. CISG applied in parallel with the PRC law

In the Refrigeration Equipment case,[90] the parties, a Hong Kong seller and a PRC buyer, did not provide for the applicable law in the contract. During the court session, when the Arbitration Tribunal asked the parties for their opinions, the parties unanimously agreed that the applicable laws of this case are: (1) The laws of the People's Republic of China (PRC); and (2) Although Hong Kong is not a party that subscribed to the United Nations Convention on Contracts for the International Sale of Goods (CISG), the parties agreed to apply CISG as well; (3) Since this case relates to letters of credit, the Uniform Customs and Practice for Documentary Credits (UCP 500), the International Chamber of Commerce's No. 500 publication, is also applicable. These agreements were respected by the Arbitration Tribunal. Accordingly, the CISG has been applied in parallel with the PRC law.

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[88] Article 9 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interests stipulates that contract violating PRC law and/or made against social and public interest is void, but parties can amend the contract by agreement to cure the contract and make it valid.

[89] China 30 July 1998 CIETAC Arbitration Proceeding (*Cold rolled steel plates case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/980730c1.html]

[90] China 28 January 1999 CIETAC Arbitration proceeding (*Refrigeration equipment case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/990128c1.html]

In the Gray Cloths case,[91] the Hong Kong buyer and the PRC seller agreed in their contract that the PRC law and the CISG shall apply to disputes. The Arbitration Tribunal thus applied both the CISG and the PRC law in parallel.

### *1.5.5. CISG has been applied to contracts between parties from Taiwan and PRC*

So far there is only one Taiwan case identified and published in the PACE CISG Database. The Chemical Cleaning Product Equipment case[92] was between a Taiwan seller and a PRC buyer. Parties did not provide in the Contract for the applicable law, but during the hearing, parties explicitly agreed to apply the PRC laws to resolve the disputes under the Contract and that where there is no applicable regulation in PRC laws, the CISG should be applied. Therefore, the Arbitral Tribunal decided to apply the CISG as a gap-filling law.

### *1.5.6. CISG has been applied to contracts between parties from Macao and PRC*

In the Wool case [93] the contract did not stipulate the applicable law. The Arbitral Tribunal held:

> "China and Portugal, of which Macau is under the jurisdiction at present, are parties of the United Nations Convention on Contracts for the International Sale of Goods (CISG), and the parties did not exclude the application of CISG, so when the contract does not stipulate or not stipulate clearly the applicable law, the CISG applies to this case"

Again, in the Natural Rubber case[94] between a PRC buyer and a Macao seller, parties did not stipulate the applicable law in the contract. The Arbitral Tribunal held that China and Portugal, which Macau at that time belonged to, are parties to the CISG. Since the parties to the contract did not exclude the CISG, the Tribunal decides that CISG was applicable.

The above reasoning was also repeated in the Steel Channels case[95] between a Macao seller and a PRC buyer, who did not stipulate the applicable law in their contract. Again the Tribunal took it for granted that since Portugal is a Contracting State of the CISG, the contract should be governed by the CISG.

The above three pre-1999 Macao and PRC cases were decided when Macao was still under the jurisdiction of Portugal before it was returned to China on 20 December 1999. It is interesting that the Tribunals have made the same mistake in all the three cases in taking it for granted

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[91] China 2 April 1999 CIETAC Arbitration proceeding (*Gray cloths case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/990402c1.html]

[92] China 20 April 1999 CIETAC Arbitration proceeding (*Chemical cleaning product equipment case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/990420c1.html ]

[93] China 27 February 1996 CIETAC Arbitration proceeding (*Wool case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/960227c1.html]

[94] China 4 September 1996 CIETAC Arbitration proceeding (*Natural rubber case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/960904c1.html]

[95] China 18 November 1996 CIETAC Arbitration proceeding (*Steel channels case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/961118c1.html]

that Portugal is a Contracting State of the CISG.[96] As we know in fact Portugal has never been a contracting state of the CISG. However it is submitted that the tribunal may well correctly apply the CISG on any other valid grounds that have been applied in between Hong Kong and PRC parties, e.g. applying the CISG as international trade practice.

It would be interesting to see whether CIETAC employs a different approach in applying the CISG in Macao-PRC case after the return of Macao to PRC in 1999. So far the PACE Database has not yet published any such Macao-PRC case decided after the return in 1999. But it is submitted that the approaches in dealing with Macao-PRC cases would not and should not differ much from those that have been applied in Hong Kong-PRC pre-1997. As a matter of fact, the current PRC law and practice have always taken consistent and/or similar approaches in dealing with matters concerning the three special regions, i.e. Hong Kong, Macao and Taiwan.

### *1.5.7. Justification of the application of the CISG in arbitration*

Indeed unlike a State court, arbitration tribunal enjoys more freedom and liberty in deciding the applicable law and the application of an international private convention such as the CISG.[97] An arbitrator should concern himself or herself much less in terms of conflict law rules or territoriality.[98] Rather, the arbitrator can either consider that parties explicitly or implicitly agreed on choosing the CISG, or find that no choice of law has made and then apply the CISG as he or she considers such a choice to be appropriate.[99]

Given that arbitrators have much broader discretion in arbitration, even though the CIETAC awards are wrong in the reasoning on the ground that Portugal[100] is a contracting state of the CISG, their choice of the CISG as applicable law will not and should not be subject to review by State courts, for the review of arbitral awards on the merits is prohibited by the New York Convention and the vast majority of national arbitration legislations.

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[96] See WU, Dong 2005. CIETAC's Practice on the CISG, presentation at UNCITRAL-SIAC Seminar on Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods, Singapore (22 September 2005) 43 p. at para 1.4 Application in error; see also Nordic Journal of Commercial Law <http://www.njcl.utu.fi/2_2005/article2.htm>

[97] See Alexis Mourre, *Application of the Vienna International Sales Convention in Arbitration*, ICC International Court of Arbitration Bulletin Vol.17/No.1 - 2006

[98] Ibid

[99] Ibid

[100] Besides Portugal, Japan and Republic of Korea (before 2005) have also been mistakenly regarded as contracting states of the CISG in CIETAC arbitration. See Hot-rolled coils case of 15 December 1997 China 15 December 1997 CIETAC Arbitration proceeding (*Hot-rolled coils case*) [translation available] [Cite as: http://cisgw3.law.pace.edu/cases/971215c1.html] where Republic of Korea was mistakenly thought as contracting state of the CISG. See Award of 7 November 1996 [CISG/1996/50] (*Stone products case*). Other examples as: Award of 2 April 1997 [CISG/1997/03] (*Wakame case*); Award of 15 December 1997 [CISG/1997/34] (*Hot-rolled coils case)* where Japan was mistakenly believed to be a contracting state of the CISG.

## CONCLUSION

It is evident that the internal need for social, political and economic development of the PRC pushed the country to reform and open up to the outside world. The Reform and Opening up led to international exchange of not only goods in trade but also values in culture, perhaps more importantly, concepts and ideas in social, political and legal structures. The shocks and crashes involved during the process of massive international exchanges could perhaps hardly be avoided, but could also emblaze beautiful sparkles.

The CISG is one of the most glorious sparkles created by tremendous international interaction and exchange among the vast majority of nations and states which participated and contributed proactively. From having no relevant legislation in 1980 to the promulgation of three most important legislations in the areas of contract and civil law in 1986 before it rectified the CISG, the PRC had leapt to the modern and advanced theory and legislation of contract law, from scratch. The comparative and selective approach widely and wisely adopted by the PRC legislations accelerated the modernisation of PRC law and contributed to the building and modernisation of the whole legal system and structure, which can then back up the further economic development. The 1980 Diplomatic Conference was a great experience for the PRC legislators in every sense, and thanks to the CISG.

The CISG's impacts on the PRC legislation are undeniable. The three pieces of legislation, the PRC Economic Contract Law 1981, the Foreign-Related Economic Contract Law 1985 and the PRC General Principles of Civil Law 1986 were in the first place issued to accommodate the ratification of the CISG in the PRC. The deliberate separation legislation for international, or the so-called "foreign-related" contracts, and the specific prescription for mandatory written forms were evidence of this, albeit unexpectedly being on the opposite position as encouraged by the CISG.

Yet these opposite positions taken by the PRC at that time upon ratification of the CISG by way of reservations did not and could not survive the test of practice. The subsequent PRC Contract Law 1999 amalgamated domestic and foreign-related contracts and abandoned the formality requirements. This roundabout in the PRC's legislation history, on the one hand witnessed the evolution and development of the PRC, on the other hand evidenced the victory of the CISG. History reveals the truth!

It is felt that over the years the compromise character of the CISG as an outcome of political and diplomatic negotiations has been overstated and mistakenly overemphasized. All those well respected scholars, who had contributed outstandingly to unify the law on the international sale of goods since as early as the 1920s, from Ernst Rabel to Vittorio Scialoja, from Peter Schlechtriem to many others, they and their guts and courage to pursue a dream of the unification of international sales law in the first place, deserve more appraisal and emphasis. The ongoing efforts offered by the UNCITRAL, the working groups, and all the delegations of participating states deserve more acknowledgements as well.

The guts and courage, the openness, the wisdom and the intelligence crystallized in the CISG are remarkable. Soon after the success of the CISG, the unification and harmonisation movement was spread over the areas of commercial law and private law. The CISG is a milestone in the history of international uniform law and its impacts have gone far beyond any individual nation, crossed the globe and passed through time and space.

Yet we know that textual uniformity does not necessarily come hand in hand with legal uniformity. Is the application of the CISG in China different from those in other countries? Is it a serious threat or a genuine effort to the uniformity aimed at by the CISG? How compatible is Chinese doctrine and practice with international standards and principles as elaborated by the CISG? In order to answer these main concerns, large amount of cases and arbitral awards are needed to support a meaningful empirical study on this important area of law.

The bundle of about twenty CIETAC awards reviewed in this article is really merely a tip of the iceberg. There is an abundance of CIETAC awards and PRC court decisions on the CISG. The study of CIETAC awards in this article does not mean to be exhaustivel, but simply intends to be a starting point for further research and reference. A more detailed and elaborated study of the interpretation of the CISG in the PRC will be followed in the next part of this research.

Nonetheless, the above CIETAC cases have evidenced that the principle of party autonomy has been respected and observed correctly. The Tribunals will apply the CISG when parties have explicitly or implicitly chosen the CISG. It seems common for the Tribunals to apply the PRC law while at the same time with reference to the CISG, or "in light of" of the CISG. It seems somehow natural for the Tribunals to apply the CISG as gap-filling of the PRC law, with the presumption that the PRC law has gaps in dealing with international sales contracts. It also seems common to apply the CISG in parallel with the PRC law. The CISG has definitely been applied as international trade practice in some instances.

It also seems plain that the current PRC law and practice does not stress solely on the place of business, but takes into account some foreign-related elements in deciding whether to apply the CISG or not. The CISG has been applied between two PRC parties, two Hong Kong parties, parties from the PRC and Hong Kong, the PRC and Macao, the PRC and Taiwan.

From the review of the CIETAC cases above, we have already been able to sense a strong flavour of the willingness of CIETAC arbitrators in applying the CISG whenever possible, even in some situations where the application of the CISG would seem to be not so right in theory. The recognition, acceptance and appreciation of the value of the CISG as not only an international convention but also a standard, a set of rules reflecting international practice, in CIETAC arbitration practice and in PRC general legal practice at large are very encouraging indeed.

There are problems, not surprisingly. The reasoning for the application of the CISG is not always comprehensive, more often too short or even without spelling out any reason or the rationale employed to support the Tribunal's decision. On the other hand, it is submitted that a more liberal and confident approach should be taken by the arbitration tribunals in applying the CISG, bearing in mind that arbitrators enjoy much broader discretion in deciding the issue of applicable law. When parties have made no choice of law, if arbitrators consider a choice of the CISG to be appropriate, they can do so more confidently by all means. As an application of the conflict of law rules or an analysis of territoriality, place of business is not at all a prerequisite in international commercial arbitration, where party autonomy and arbitrator's discretion triumph.

More importantly, it is felt that the CIETAC arbitral awards have made too little or no reference at all to cases and/or awards decided in other jurisdictions. It is understood that unlike common law jurisdictions, cases and precedents play no significant role in the current PRC law and practice. But it is submitted that in the application and interpretation of the CISG, an international uniform law, cross-border consultation is highly desirable and needed.

In this regard, the idea of global jurisconsultorium, a term offered by Vikki Rogers and Professor Albert Kritzer in their comprehensive trade law thesaurus on terminology of international sales to denote the need for cross-border consultation in deciding issues of uniform law plays a fundamental and crucial role in achieving the harmonisation and unification of international sales law ultimately. In an article by Camilla Baasch Andersen, she examined the genesis of the CISG, the scholarly jurisconsultorium from which it sprang, and the need for practitioners (i.e. judges, arbitrators and legal counsel) to extend the jurisconsultorium in practice to ensure uniformity.

One of the most widely acknowledged CISG database, the Pace database on the CISG offered by the Institute of International Commercial Law of the Pace University School of Law, has located about 200 Chinese arbitration awards dealing with the CISG. The most recent award shared on the database was dated May 2005.[101] About 170 of these awards have been translated and published on the Internet. As indicated by Professor Albert Kritzer of the Pace Institute of International Commercial Law, if the trend during the five years preceding January 2000 continued during the five subsequent years, one could document the PRC as the world's leader in the volume of cases on peaceful resolution of international commercial disputes in reliance upon the CISG.

There is no doubt that since the CISG came into force in 1 January 1988, many cases as well as arbitral awards have been decided under the CISG during the period of about 20 years of its application in China. With China's entrance into WTO, a great deal of interest in the research and study of the application and interpretation of the CISG in China has arisen.

It is believed that the quality of CIETAC awards will be tremendously enhanced by engaging in the exercise of global jurisconsultorium, which promotes sharing and exchanging ideas and approaches in the application and interpretation of an international uniform law instrument such as the CISG. The reasoning behind the CIETAC awards will be enriched which in return will reinforce the persuasiveness of the awards and the observance of the rule of law in the CIETAC arbitration practice.

To conclude, the general willingness in the application and reference to the CISG in the PRC is very encouraging indeed. But more on-going efforts to make the application of the CISG in the PRC more consistent and predictable and the need for PRC legal profession (including lawyers, judges and arbitrators) to extend the jurisconsultorium in practice to ensure uniformity are called for. It is also hoped that PRC court cases and arbitral awards will be made available for both domestic and international scholars, practitioners and traders to exchange ideas and share expertise and benefit from the global jurisconsultorium for the sake of the harmonisation and unification of the international sales law. It is further proposed that a thorough study and review of the PRC court cases and arbitral awards on the CISG would be very useful for CIETAC, for the PRC and for the world trade community at large.

Finally, embracing the concept and method of global jurisconsultorium in the application and interpretation of the CISG in the PRC will make Chinese jurisprudence more valuable in contributing to the global modernisation and harmonisation of the international sales law so as to achieve the uniformity aim of the CISG and the ultimate goal of facilitation of international trade.

[101] See China 10 May 2005 CIETAC Arbitration proceeding (*Hat case*) [Cite as: http://cisgw3.law.pace.edu/cases/050510c1.html] accessed on 15 December 2005.

## 1. INTRODUCTION

The People's Republic of China (PRC) has long been a source of much speculation for economists and trade pundits; with its staggering population of 1,296,500,000[3] it has become a force to be reckoned with. It is with China's accession to the World Trade Organization (WTO) on December 11, 2001 that one can assess the impact and volume of trade that has taken place over the past 5 years. To put this in perspective, worldwide China is ranked third overall in merchandise import and exports in 2004.[4] Also, in 2004 in the area of merchandise trade[5] which consists of Agricultural products, Fuels and Mining products, and Manufactured products, China commanded a 6.46% share in the world's total exports and 5.88% share in the world's total imports.[6]

3 Taken from World Trade Organization database data from March 2004 http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN

4 http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN

5 The share in world total exports and imports of merchandise. Breakdown by main commodity group: Agricultural products refer to food and raw materials, Fuels and Mining products include ores and other minerals; fuels and non-ferrous metals. Manufactures refer to iron and steel, chemicals, other semi-manufactures, machinery and transport equipment, textiles, clothing and other consumer goods.

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