

China's Withdrawal of Article 96 of the CISG: A Roadmap for the United States and China to Reconsider Withdrawing the Article 95 Reservation

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The United Nations Convention on Contracts for the International Sale of Goods (CISG) was created for the purpose of providing legal neutrality and certainty, and also for the purpose of avoiding choice of law issues in international sales of goods. However, the United States and China, the two largest trading nations in the world, made the Article 95 reservation at the time they ratified the CISG, therefore restricting CISG's applicability in certain situations. In 2013, China withdrew its Article 96 reservation, which declares its non-recognition of free form of contract formation, taking one step closer to the vast majority of CISG Contracting States. The reasons behind this withdrawal suggest that China will likely withdraw the Article 95 reservation in the foreseeable future. Meanwhile, there are additional grounds convincing the U.S. to withdraw its Article 95 reservation. In order to develop uniform legal regimes governing international sales, both the U.S. and China, as major trading countries, should withdraw their respective reservation on the Article 95 (made in 1988) and promote CISG's application with full acceptance.

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I. INTRODUCTION

Nowadays, the growing trend of globalization has led to more business transactions conducted at the international level. The United Nations Commission on International Trade Law (“UNCITRAL”) had the foresight back in the 1980s to develop the United Nations Convention on Contracts for the International Sale of Goods (“CISG”),¹ for the purpose of providing a uniform regime, and introducing legal certainty in commercial exchanges so as to reduce transaction costs.² Since it became

¹ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, available at <http://cisgw3.law.pace.edu> [hereinafter “CISG”].

² United Nations Conventions on the Contracts for the International Sale of Goods (Vienna, 1980), UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last visited Aug. 14, 2016).

effective in 1988, the CISG has been accepted by most major trading nations in the world.³ As of May 2016, eighty-five countries have ratified the CISG,⁴ demonstrating worldwide recognition of its applicability to contract disputes in international goods transactions. The United States (“U.S.”) and the People’s Republic of China (“China”), the two largest trading nations,⁵ ratified the CISG immediately when the treaty came into force in 1988.⁶ However, both countries made the Article 95 reservation,⁷ prohibiting the application of the CISG where at least one party to the contract does not have its place of business in a country that has ratified the CISG (“CISG State” or “Contracting State”).⁸ Unfortunately, the effect of this reservation turns out to be problematic. Not only has the reservation impeded the development of the CISG, but it has also raised controversies among both national and foreign courts and tribunals about its enforcement.⁹

In addition to the Article 95 reservation, China also made a reservation essentially equivalent to the Article 96 reservation at the time it ratified the CISG.¹⁰ The effect of this reservation is that the reserving State will

³ A total of ten countries, including the United States, China, France, and Italy, ratified the CISG by its effective date, January 1, 1988. Germany, Spain, Switzerland, Canada, and Singapore, among others, adopted the CISG in the 1990s. Recently, Japan and Brazil ratified the Convention in 2009 and 2014, respectively. Status—United Nations Conventions on the Contracts for the International Sale of Goods (Vienna, 1980), UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Aug. 14, 2016); *See Top 20 export countries worldwide in 2015 (in billion U.S. dollars)*, STATISTA, <http://www.statista.com/statistics/264623/leading-export-countries-worldwide/>.

⁴ Status—United Nations Conventions on the Contracts for the International Sale of Goods (Vienna, 1980).

⁵ *Top 20 export countries worldwide in 2015 (in billion U.S. dollars)*, STATISTA, <http://www.statista.com/statistics/264623/leading-export-countries-worldwide/>.

⁶ *See Table of Contracting States*, ELECTRONIC LIBRARY ON CISG DATABASE—CISG BY STATE, available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited Aug. 14, 2016) (providing a computer generated list of cases for each contracting state in the convention).

⁷ *China (PRC)*, ELECTRONIC LIBRARY ON CISG DATABASE—TABLE OF CONTRACTING STATES, available at <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html>; *United States*, ELECTRONIC LIBRARY ON CISG DATABASE—TABLE OF CONTRACTING STATES, available at <http://www.cisg.law.pace.edu/cisg/countries/cntries-United.html>.

⁸ *See discussion infra* Part III.1.b, III.2.

⁹ Asa Markel, *American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?*, 21 PACE INT’L L. REV. 163, 173 (2009).

¹⁰ *Declarations and State interpretations*, ELECTRONIC LIBRARY ON CISG DATABASE - TABLE OF CONTRACTING STATES, available at <http://www.cisg.law.pace.edu/cisg/countries/contract.html> (“China (PRC) has filed a similar declaration, but it is not couched in the precise phraseology called for by Article 96.”); *see also* Xiaolin Wang & Camilla Baasch Andersen, *The Chinese Declaration Against Oral Contracts Under the*

not be bound by the free form of contract formation under Article 11, and require enforceable contracts (of international sales of goods) be concluded in or evidenced by writing.¹¹ With the great economic reform in Chinese politics and significant changes in its legal system in the late 1990s, China has been envisioning itself as an active participant in international business transactions since the twenty-first century.¹² In 2013, China withdrew its Article 96 reservation,¹³ recognizing that contracts under the CISG may be concluded in or evidenced by any means.¹⁴ This withdrawal took China one step closer to the vast majority of CISG States.

In Part II, this comment will briefly introduce the background of the CISG, including the reasons for the insertion of Article 95 and Article 96 reservations during the draft process. It will examine the grounds behind China's decision to make both reservations, in view of its conservative attitude in conducting international transactions and the old Chinese contract law in 1980s, followed by an analysis of discussions among scholars for China's withdrawal of the Article 96 reservation. Part III will delve into the suggestion that the grounds which convinced China to withdraw its Article 96 reservation may also lead China to withdraw the Article 95 reservation in the foreseeable future, therefore accepting the full text of the CISG. Part IV will explore whether, in addition to the common bases that might persuade China to withdraw the Article 95 reservation, there are unique reasons encouraging the U.S. to withdraw the same reservation so as to fully promote the application of the CISG in governing international sales. Part V will conclude that the Article 95 reservation impedes both Chinese and American traders' use of the CISG, and that the increasing recognition of the CISG by major trading countries and the development of the CISG case laws have diminished the necessity for making the Article 95 reservation. This comment argues that both China and the U.S. should promote CISG's application with full acceptance. In view of their leading roles in global trade, it will be parochial for both countries to keep this reservation.

CISG, 8 VJ 145, 164 n. 5 (2004) ("This difference in declaration language would seem to be without significance regarding the effect of the declaration.").

¹¹ CISG arts. 11, 96.

¹² See Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 459-60 (2003); see also Wang & Andersen, *supra* note 10, at 154-56.

¹³ *China (PRC)*, ELECTRONIC LIBRARY ON CISG DATABASE—TABLE OF CONTRACTING STATES, available at <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html>; *United States*, ELECTRONIC LIBRARY ON CISG DATABASE - TABLE OF CONTRACTING STATES, available at <http://www.cisg.law.pace.edu/cisg/countries/cntries-United.html>.

¹⁴ See CISG art. 11.

II. CHINA'S ARTICLE 96 RESERVATION AND ITS SUBSEQUENT WITHDRAWAL

1. *General History of the CISG*

In view of the differences in contract law between common law and civil law, the CISG aims at providing parties, whose places of business are in different nations, with legal neutrality and legal certainty for international sales of goods.¹⁵ The law was drafted in diplomatic working group of the United Nations to accommodate different legal systems and cultures among developed and developing countries.¹⁶ The CISG governs formation of contracts,¹⁷ obligations of sellers and buyers and pertinent remedies for breaches of contract,¹⁸ forms of contract,¹⁹ among others. The law strikes a careful balance between the interests of the buyer and the seller, avoids recourse to private international law in determining the applicable law governing global trades, and ensures reliability and predictability of international sales contracts.²⁰ Small and medium-sized enterprises benefit most from such assurance, as their lack of bargaining power makes them more vulnerable to problems caused by inadequate treatment in the contract of issues relating to applicable law.²¹ Traders agree on the CISG so that neither side has to deal with the uncertainty about the applicable law to which they are not familiar.²² The principle of having a uniform, fair legal regime governing international contracts ensures the contractual balance and reduces the burden on merchants of studying different nations' law before negotiating contracts.²³ The fact that countries ratified the CISG one after the other reflects the popularity of the CISG, showing the significance of legal importance for parties operating from different countries and legal systems.²⁴

¹⁵ United Nations Conventions on the Contracts for the International Sale of Goods (Vienna, 1980), UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last visited Aug. 14, 2016).

¹⁶ Wang & Andersen, *supra* note 10, 149.

¹⁷ CISG part II.

¹⁸ CISG part III.

¹⁹ *Id.* art. 11.

²⁰ United Nations Conventions on the Contracts for the International Sale of Goods (Vienna, 1980).

²¹ *Id.*

²² See Markel, *supra* note 9, at 164.

²³ United Nations Conventions on the Contracts for the International Sale of Goods (Vienna, 1980).

²⁴ John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387, 1439 (2003).

The CISG directly applies to contracts of sales of goods made between parties from Contracting States.²⁵ Where at least one party's place of business is from a non-Contracting State, the CISG may nevertheless govern the transaction pursuant to Article 1(1)(b) in the event the private international law "lead[s] to the application of the law of a Contracting State."²⁶ Article 95 of the CISG allows a Contracting State to restrict the applicability in the latter situation by declaring *at the time of depositing its ratification instrument* that the State will not be bound by Article 1(1)(b).²⁷ This reservation was proposed by Czechoslovakia, in representing socialist countries that were members of the Council for Mutual Economic Cooperation ("COMECON"), in order to protect their uniform trade law regime.²⁸ COMECON countries, instead of dealing with each other at arm's length, "owed one another a duty 'to obtain mutually satisfactory results,' as measured by the applicable national economic plan."²⁹ In view of this culture, the contract law among COMECON countries at that time was so comprehensively designed to ensure the predictability among trading parties, and the interest of their state-operated enterprises.³⁰ There was barely any room to incorporate provisions in the CISG into their "standard" contract.³¹ In order to avoid that the rules of private international law displace the COMECON rules with the CISG pursuant to Article 1(1)(b) where COMECON rules would otherwise apply, socialist countries demanded a reservation not to apply the CISG where at least one party to the transaction is not from a Contracting State.³² Therefore, the UNCITRAL added the Article 95 to the CISG.³³

The success of the CISG is due largely to its *wide acceptability*. The United Nations, learning from the failure of its prior conventions (e.g., the 1964 Hague conventions) because of a lack of compromise to non-Western cultures, the United Nations became aware of the importance of making the CISG flexible.³⁴ After a lengthy and diplomatic drafting process, the flexibility was achieved through reservations regarding unique public policy behind certain Contracting States.³⁵ One of the examples is Article 96. Following common law's flexible contract

²⁵ CISG art. 1(1)(a).

²⁶ *Id.* 1(1)(b).

²⁷ CISG art. 95 (emphasis added).

²⁸ Markel, *supra* note 9, at 171.

²⁹ *Id.* (internal quotations omitted).

³⁰ *See id.*

³¹ *See id.*

³² *Id.*

³³ *Id.*

³⁴ Wang & Andersen, *supra* note 10, at 146.

³⁵ *Id.*

formation,³⁶ the CISG does not require a contract of sale to be in writing, therefore permitting contracts to be formed by any means, including witnesses under Article 11.³⁷ However, this relaxed standard runs afoul of the culture of socialist countries, under which “certainty, foreseeability, and lack of surprises are deemed essential” for state-operated societies.³⁸ In furtherance of the need for socialist countries to maintain established patterns for foreign trade contracts, the Soviet Union emphasized the importance to strictly stick to written form in cross-border contracts at the 1980 Vienna Diplomatic Conference.³⁹ As a result, Article 96 came into existence, allowing a country “whose legislation *requires contracts of sale to be concluded in or evidenced by writing*” to make a reservation *at any time*, rendering Article 11 inapplicable to a party whose business place is in that country.⁴⁰ It represents a compromise between the freedom of contract formation in Article 11 and the notion of formal requirements appealing to socialist countries.⁴¹

2. *China’s Open Door Policy and Reform—from Planning Economy to Market-Oriented Economy*

Before 1978, China focused on a “planned economy,” under which the State was the sole owner of the assets of the whole country.⁴² There was no legislation on contract law, and all trade that took place in China was “subject to very exacting quantitative guidelines by the State.”⁴³ Under this approach, China experienced economic stagnation and a sharp decrease in the volume of international trade from 1.5% in 1953 to 0.6% in 1977.⁴⁴ In addressing these problems, China adopted an open door policy and committed to promoting international transactions through legal and economic reform.⁴⁵

³⁶ See generally Markel, *supra* note 9, at 164 (“the CISG, with its tolerance of oral terms and agreements, represented a major compromise for many socialist countries that preferred clear, written terms in cross-border contracts.”).

³⁷ CISG art. 11.

³⁸ Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C. J. INT’L L. & COM. REG. 109, 116 (1988).

³⁹ Xiao Yongping & Long Weidi, *Selected Topics on the Application of the CISG in China*, 20 PACE INT’L L. REV. 61, 83-84 (2008).

⁴⁰ CISG art. 96 (emphasis added).

⁴¹ Wang & Andersen, *supra* note 10, at 147.

⁴² Lee Branstetter and Nicholas Lardy, *China’s Embrace of Globalization* 4 (NBER Working Paper No. w12373, 2006), available at SSRN: <http://ssrn.com/abstract=918971>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See James C. Hitchingham, *Stepping Up to the Needs of the International Market Place: An Analysis of the 1999 “Uniform” Contract Law of the People’s Republic of China*, 1 ASIAN-PAC. L. & POL’Y J. 8, 1-2 (2000).

In the early years of its experimental reform, the State still controlled foreign trade in an attempt to maintain stability through gradual political democratization.⁴⁶ International businesses were conducted solely through State-owned foreign trade corporations, which acted as agents on behalf of the country, and did not own rights or obligations to share the profits and risks resulting from any transactions.⁴⁷ Because the staff in charge of such businesses at that time were generally not experienced, skilled traders, nor were they sensitive to merchant customs, in view of those veteran foreign parties, it was essential for the State to pay close attention over the process of contract formation, its modification, and termination to prevent any potential loophole.⁴⁸

Recognizing the need to enact contract laws in supporting such economic modernization, China promulgated the Foreign-Related Economic Contract Law ("FECL") in 1985.⁴⁹ With a similar ground to the Soviet Union in protecting State-owned entities,⁵⁰ the law explicitly mandated that the formation, modification, or rescission of contracts at global levels be evidenced in writing,⁵¹ in contrast to the relaxed formation requirement that recognizes oral contracts for domestic trade.⁵² The requirement of formal formation of contracts was somehow an extension of State control of contracts.⁵³

As a result, when China ratified the CISG in 1988, the Chinese contract law at that time was in contrast with Article 11 of the CISG. Therefore, China made the Article 96 reservation so as not to enforce oral contracts under Article 11.⁵⁴ In view of the short transition period from closed-market policies of a socialist regime to market-oriented economy, China was not sophisticated enough to deal with contract rules for international sales of good, or to identify what forms of communication

⁴⁶ Wang & Andersen, *supra* note 10, at 154.

⁴⁷ *See id.* at 156.

⁴⁸ *See id.*

⁴⁹ *See* Hitchingham, *supra* note 45, at 1-2.

⁵⁰ Xiao & Long, *supra* note 39, at 83-84.

⁵¹ Foreign Economic Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 21, 1985, effective Jul. 1, 1985), translation available at <http://www.lawinfochina.com/display.aspx?id=55&lib=law&SearchKeyword=&SearchCKeyword=> [hereinafter "FECL"] art.7 ("A contract shall be formed as soon as the parties to it have reached a written agreement on the terms and have signed the contract. If an agreement is reached merely by means of letters, telegrams or telex and one party requests a signed letter of confirmation, the contract shall be formed only after the letter of confirmation is signed"); art 32 ("Notices or agreements on the modification or rescission of contracts shall be made in writing.").

⁵² Hitchingham, *supra* note 45, at 1-2.

⁵³ Wang & Andersen, *supra* note 10, at 56.

⁵⁴ CISG art. 96.

might constitute forms of contracts apart from writing.⁵⁵ As such skills could not be mastered overnight, it was logical and understandable for China to make the reservation to protect its traders from falling into the traps of oral contract formation.⁵⁶

3. *The Aggravation of the Ambiguous Effect of the Article 96 Reservation by UCL*

The effect of the Article 96 reservation generated considerable debates among scholars. Some held the view that merely because one of the contracting parties is from a State that reserved the Article 96, it does not necessarily require contracts entered into by that party be concluded only in writing.⁵⁷ Instead, the private international law governs: when there is an exclusion of any provisions of the CISG,⁵⁸ the rules of conflicts law of the forum shall come into play in determining which formalities will apply.⁵⁹ If the private international law leads to the law of a country which does not require writing to enforce a contract, written form is not mandatory.⁶⁰ In other words, a contract need not be evidenced by writing to have it enforceable, unless the private international law selects the law of an Article 96-reserving State.⁶¹ This is reportedly considered as the “prevailing view.”⁶² On the other hand, some argued that the Article 96 reservation imposed on the declaring State an obligation to only enforce written contracts.⁶³ While such interpretation appears to be in line with a declaring State’s purpose in making the reservation, this argument is not convincing in that a proposal to phrase the reservation in this way was rejected.⁶⁴ Thus, the effect of the Article 96 reservation should be construed only as a relief of the declaring State from an obligation to recognize contracts in all forms under its national law, rather than imposing additional obligation on its courts and tribunals to only enforce written contracts.

⁵⁵ See Wang & Andersen, *supra* note 10, at 154.

⁵⁶ *Id.*

⁵⁷ See Xiao & Long, *supra* note 39, at 84.

⁵⁸ See *infra* notes 113-15 and accompanying text.

⁵⁹ Xiao & Long, *supra* note 39, at 84.

⁶⁰ *Id.*

⁶¹ Zhao Yuyi (赵玉意), Ping Zhongguo dui CISG Feishumian Xingshi Guiding Baoliu de Lilun he Shijian (评中国对CISG非书面形式规定保留的理论和实践) [Comments on the Theories and Practice of China’s Reservation of Written Form of Contracts under the CISG], 2, Henan University of Economics and Law Journal, 173, 175 (2014) (China).

⁶² See Xiao & Long, *supra* note 39, at 84 n. 93.

⁶³ Wang & Andersen, *supra* note 10, at 162.

⁶⁴ *Id.*

The application of the Article 96 reservation became more questionable after China's enactment of its new contract law, Uniform Contract Law ("UCL"), in 1999.⁶⁵ The opening of the Chinese markets to trade and foreign investment produced outstanding results, with an average annual growth rate of gross domestic product (GDP) of over ten percent (or 10%) from 1980 to 1990.⁶⁶ In anticipation of its admission to the World Trade Organization ("WTO") and its active role in global transactions in the twenty-first century, China promulgated the UCL to bring its business practice into conformity and coherence with the general Western practices.⁶⁷ By doing so, the UCL repeals a certain number of its old contract laws, including the FECL, and unifies the rest of the contract laws to govern both domestic trade and international transactions. In representing the modernization of trade in China, the UCL provides freedom and flexibility in contract formation.⁶⁸ Article 10 of the UCL explicitly provides that a contract may be formed orally.⁶⁹ Consequently, a problem arose because the relaxed standard on contract formation under the UCL contradicted the Article 96 reservation China made.

Before China's withdrawal of its Article 96 reservation in 2013, confusion existed over the choice of law in determining the formation of the contract.⁷⁰ Some scholars advocated that the enactment of the UCL did not invalidate the Article 96 reservation in that where a domestic provision is conflict with a provision in the treaty, the treaty prevails.⁷¹ Under this theory, when a Chinese party deals with a party from a CISG state, the CISG would govern the dispute under Article 1(1)(a),⁷² and Chinese judges would more likely, in applying the reservation, require contract formation to be reduced in writing. As discussed above, such construction seemed to be more in keeping with the original concern for the reservation.⁷³ On the other hand, if the judge adopted the prevailing view under the private international law rules in deciding the validity of contract formation, assuming the rules of conflicts law led Chinese law to apply, a contract would not be subject to only written form under the UCL. Therefore, without a uniform application, different approaches applied by

⁶⁵ Contract Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), translation *available at* <http://www.lawinfochina.com/display.aspx?lib=law&id=6145&CGid=> [hereinafter "UCL"].

⁶⁶ Wang & Andersen, *supra* note 10, at 154 n. 28.

⁶⁷ Pattison & Herron, *supra* note 12, at 460.

⁶⁸ Hitchingham, *supra* note 45, at 2-3.

⁶⁹ UCL art. 10.

⁷⁰ *Cf.* Wang & Andersen, *supra* note 10, at 161.

⁷¹ E.g., Zhao, *supra* note 61, at 175.

⁷² CISG art. 1(1)(a) (The CISG applies to contracts between parties from different States "when the States are Contracting States").

⁷³ *See* Xiao & Long, *supra* note 39, at 85; *see also* Zhao, *supra* note 61, at 176.

Chinese courts and tribunal would cause completely opposite results under the same facts.

In the event that a Chinese party dealt with another from a non-CISG State, the disparate treatment would be much more obvious. Under Article 1(1)(b), the CISG will govern the dispute when the rules of private international law lead to the application of the law of a Contracting State, despite that one of the contracting parties is from a non-CISG State.⁷⁴ Because of China's reservation under Article 95, Article 1(1)(b) is inapplicable.⁷⁵ As a result, if the private international law leads Chinese law to apply, the UCL, rather the CISG, will govern the dispute. Due to the fact that under this new law, contracts may be concluded in any form, such different requirement of contract enforcement between the Article 96 reservation and the UCL would somehow provide a preferential treatment, i.e., freedom of contract form, to parties from non-CISG States; ridiculously imposing a harsher standard to CISG allies by mandating contracts be formed only in writing.

4. *Reasons for China's Withdrawal*

The enormous changes took that place in China's legal system and foreign policy provides grounds for China to withdraw its Article 96 reservation. Firstly, the reservation had no independent significance, given China's rapid economic development of decades since it made the reservation in 1988. The conservative position was gone, in view of China's open attitude towards international trade by joining the WTO. The fact that China's new contract law, the UCL, was drafted with great influence from the CISG also demonstrates China's policy favoring international commerce and the evolution of Chinese contract law getting closer to the mainstream of the world.⁷⁶ Additionally, because the Article 96 reservation was incompatible with the UCL and against the concept of flexible contract formation under the CISG, withdrawal of Article 96 reservation eliminates confusion caused by different treatments of the reservation due to lack of uniform application by Chinese courts and tribunals, ensures legal coherence in the determination of contract formation, and enhances confidence of foreign parties in Sino-foreign sales of goods contracts with Chinese merchants. Further, withdrawal avoids the uncertainty as to China's entitlement to an Article 96 reservation, given the replacement of the FECL by the UCL renders contract formation subject to any form. Article 96 starts with the

⁷⁴ CISG art. 1(1)(b).

⁷⁵ See discussion *infra* Part III.2.

⁷⁶ See Xiao & Long, *supra* note 39, at 62 ("the CISG has not only witnessed, but has also greatly influenced, the evolution of Chinese domestic contract law.").

requirement that “[a] Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration”⁷⁷ It is clear that Article 10 of the UCL renders China disqualified for the requirements embodied in the Article 96 reservation. Thus, on a legal technicality, China was no longer eligible for an Article 96 reservation since the UCL brought into force.

III. ARTICLE 95—A RESERVATION ON THE APPLICATION OF THE CISG

1. *Broad Application under Article 1*

a. Direct Application

To remove any legal barriers among merchants doing businesses at an international level, the main goals of the CISG are to provide legal certainty and promote the development of international trade through a broad application of uniform law.⁷⁸ Two paths of application, direct and indirect, have been adopted under the CISG. By virtue of Article 1(1)(a), the CISG directly applies where contracts are between parties from CISG States.⁷⁹ There are three strict conditions of applying the CISG under this subsection: (1) as the provision demonstrates, by the time a contract is concluded the places of business of each party must have joined the CISG;⁸⁰ (2) the parties have not expressly or implicitly excluded the CISG pursuant to Article 6;⁸¹ and (3) the forum must locate in a CISG State, otherwise it will not be obligated to observe Article 1(1)(a) or apply the CISG, even if Article 1(1)(a) is satisfied.⁸² Thus, the direct application of the CISG can be summarized as:

⁷⁷ CISG art. 96.

⁷⁸ See United Nations Conventions on the Contracts for the International Sale of Goods (Vienna, 1980), UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

⁷⁹ CISG art. 1(1)(a).

⁸⁰ *Id.* art. 1(2).

⁸¹ Article 6 provides that parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

⁸² Li Wei, *On China's Withdrawal of its Reservation to CISG Article 1(b)*, 2 RENMIN CHINESE L. REV., 300, 305 (2014).

Chart A – Direct Application				
Scenario	Forum	Party 1	Party 2	Application of the CISG
1	K	K	K	Yes
2	K	K	NK	No
3	NK	K	K	No
K – Contracting/CISG State; NK- Non-Contracting/CISG State				

b. Indirect Application

Where at least one party to the contract is not from a CISG State, CISG may nevertheless govern parties' contract by way of the indirect application pursuant to Article 1(1)(b), in the event the rules of private international law points to the law of a CISG State.⁸³ The "private international law," in other words, is the conflict of laws of the forum.⁸⁴ Under this approach, the only condition on the application of the CISG is the choice of law under private international laws. It does not mandate the forum be in a CISG State because the authority to apply the CISG under this situation is not the result of performing any obligation under Article 1(1)(b), but instead is the result of following its national private international law.⁸⁵ Because the CISG is part of the law of the selected State, the forum should apply CISG regardless of its "status." Therefore, Article 1(1)(b) practically broadens the scope of CISG's applicability.

⁸³ CISG art. 1(1)(b).

⁸⁴ The CISG's Application under Article 1(1)(b), UN Convention on Contracts for the International Sale of Goods: Practice and Theory, § 2.03.

⁸⁵ Li, *supra* note 82, at 305.

The application under Article 1(1)(b) can be summarized in the below chart:

Chart B – Indirect Application					
Scenario	Forum	Party 1	Party 2	PIL	Application of the CISG
1	K	K	NK	K*	Yes
2				NK	No
3	K	NK	NK	K	Yes
4				NK	No
5	NK	K	NK	K	Yes
6				NK	No
7	NK	NK	NK	K	Yes
8				NK	No
K - Contracting/CISG State; NK - Non-Contracting/CISG State *Note: the applicable national law determined by the rules of private international law might be the law of a third country, different from the nation of Party 1.					

2. Article 95 Reservation—Exclusion the Applicability of the CISG under Article 1(1)(b)

Where a party from a CISG State deals with a party from a non-CISG State, Scenario 1, 2, 5, and 6 of Chart B illustrate that the indirect application has an asymmetrical effect on the domestic law of the parties to the dispute: if the application is the national law of a CISG State, the CISG will displace the use of such national law, while the application of the law of the non-CISG State is unaffected, if it is chosen. This asymmetry seems to be unacceptable to some countries, as they might be willing to subordinate their domestic law to the CISG when their residents deal with traders from similarly situated countries that had ratified the CISG, but not while contracting with those who have yet to adopt the CISG. Meanwhile, socialist countries at that time had special laws specifically designed to govern international trade.⁸⁶ Agreeing to Article 1(1)(b) would deprive these countries of applying its own law specifically designed for foreign-trade when it is otherwise applicable. As a result, Article 95 allows any country to declare, *at the time of ratification*, not to be bound by Article 1(1)(b).⁸⁷ Both China and the U.S. made the

⁸⁶ See *supra* note 28-33 and accompanying text.

⁸⁷ CISG art. 95 (emphasis added).

reservation, therefore restricting CISG's application only to Article 1(1)(a).

3. *China's Reservation*

There is no official statement explaining the reasons behind China's reservation. Based on the situation in China in the 1980s, several factors laid the grounds of China's reservation. First, the main reason of excluding Article 1(1)(b) was attributed to China's separate legislation on international trade. In 1985, parallel to the concern presented by those socialist countries in Europe, China enacted the FECL to specifically govern foreign businesses.⁸⁸ The FECL was drafted based on the prospect economic reform from a planned economy to a market-based to protect immature traders, and to buffer the impact of the rapid change.⁸⁹ Enforcing CISG's indirect application would deprive China of the use of its just-enacted domestic codes for international sales. The CISG, essentially representing the product of the laws of Western market economy countries, was very new to Chinese traders. Without the countervailing gain of supplanting the foreign law of their partners with the CISG, China acted prudently to reserve the application of the CISG for the purpose of protecting its residents whose trading partners are from non-CISG States from being deprived of the use of Chinese law.⁹⁰ In addition, unlike Article 96 reservation that can be made at any time, a country cannot reserve the application of Article 1(1)(b) after ratifying the CISG; thus effectively waiving the right to make the reservation if it does not file the reservation at the time of ratification.⁹¹ As China just started its legal and political reform and enacted specific law governing international transactions in early 1980s, it was understandable for China to make the Article 95 reservation so as to ensure the use of its own law to protect its inexperienced traders in dealing with parties from non-CISG States. On the other hand, reversing the Article 95 was a conservative and prudent decision, i.e., if one is not entirely sure whether the asymmetrical treatment of the applicable law between CISG parties and non-CISG parties under Article 1(1)(b) was problematic, one should make the reservation in light of its right to withdraw at any time.⁹²

⁸⁸ Wang & Andersen, *supra* note 10, at 155.

⁸⁹ Xiao & Long, *supra* note 39, at 66.

⁹⁰ *Id.*

⁹¹ CISG art. 95.

⁹² Li, *supra* note 82, at 310-11.

4. *Confusion Over the Effect of the Article 95 Reservation*

The effect of the Article 95 reservation has also caused controversy. Apparently, when the rules of private international law appoint Chinese law to govern disputes between its residents and any party from non-Contracting State, the reserving States want their national courts to apply its own law instead of the CISG. For example, when facing a case between a Chinese party and an English party (U.K. is a non-CISG State), assuming that the private international law leads Chinese law to apply, Chinese courts will apply Chinese law by virtue of the Article 95 reservation not to be bound by Article 1(1)(b). Such a goal is understandable, as countries prefer to apply their own law. However, arguments remain as to whether the effect of this reservation limits only to the reserving State, or whether it extends to courts and tribunals in foreign States. In order to discern the controversy, various scenarios should be compared.

For the first scenario, assume that the forum is in Japan, a CISG State, that the dispute is between a Chinese party and an English party, and that the private international law leads Chinese law to apply. It is unclear whether the reservation China made in fact imposes any Japanese courts an obligation to apply Chinese law, rather than the CISG.⁹³ Because Japan did not make the Article 95 reservation at the time of ratification, and because under Article 1(1)(b) the CISG comes into play when the rules of private international law lead to the application of the law of a Contracting State, Japanese courts have legitimate reasons to disregard the reservation China made.

Germany has taken a step to avoid such confusion by filing an official “remark,” presenting its view that “parties to the CISG that have made a reservation under Article 95 are not considered Contracting States within the meaning of subparagraph (1)(b) of article 1 of the CISG.”⁹⁴ Therefore, when facing the scenario discussed above, German courts will apply Chinese law, not the CISG. Some scholars believe that such interpretation of Article 95 reservation is plausible, and should be followed by tribunals of all countries.⁹⁵ Others hold the opposite that a CISG State, which did not make an Article 95 reservation, is obliged to apply the CISG pursuant to its full acceptance, despite the fact that a party to the dispute is from a

⁹³ See Du Tao (杜涛), *Lun Woguo Chexiao dui <Lianheguo Guoji Huowu Xiaoshou Hetong Gongyue> Diyitiao Diyikuan Dierxiang zhi Baoliu de Biyaoxing* (论我国撤销对《联合国国际货物销售合同公约》第1条第1款第2项之保留的必要性) [The Necessity for China to Withdraw its Reservation of Article 1(1)(b) of the CISG], 1 INT'L ECON. L. J. 87, 98 (2008) (China).

⁹⁴ Germany, ELECTRONIC LIBRARY ON CISG DATABASE - TABLE OF CONTRACTING STATES, available at CISG database, <http://www.cisg.law.pace.edu/cisg/countries/entries-Germany.html>.

⁹⁵ Du, *supra* note 93, at 98-99.

Contracting State made the reservation.⁹⁶ The underlying grounds for the latter view are that the fact that just because a country made an Article 95 reservation, it does not change its status of being CISG State, and that the CISG is a treaty ratified by the forum State.⁹⁷ This may also be supported by the CISG itself.⁹⁸ A related provision, Article 92, which contemplates the effect of reservation in respect of Part II or Part III of the CISG, provides that “[a] Contracting State which makes a reservation . . . of Part II or Part III of this Convention *is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention* in respect of matters governed by the Part to which the declaration applies.”⁹⁹ The different wording may reasonably infer that the drafters, by not putting such similar language in Article 95, intended to continue to treat Article 95 reserving States as a CISG State.

Nevertheless, the remark Germany made is merely an interpretation from its perspective.¹⁰⁰ It lacks authority to bind other countries, and is not “authorized by the CISG.”¹⁰¹ The uncertainty as to whether a CISG State is required to give effect to Article 95 reservation made by another continues to exist. Therefore, a Japanese court in this scenario has the discretion to decide whether it will respect China’s reservation. The potential different treatment among CISG States may cause cases with the same fact pattern to be subject to different applicable law based on the forum, leading to forum-shopping for dispute settlement in international trade.

Additionally, domestic courts of the reserving Contracting State also have difficulty determining the scope of Article 95 reservation. Assume that a Chinese court is facing a case between a Chinese party and an English party, but the governing law under private international law appoints Japanese law. Given the reservation not to be bound by Article 1(1)(b), should the Chinese court apply Japanese law, instead of the CISG?¹⁰² Scholars have developed two views to analyze such scenario.¹⁰³ First, under the “forum reservation view,” the reservation has the effect on the courts of the reserving State.¹⁰⁴ The CISG will not apply even if the forum’s private international law leads to the law of another CISG state.

⁹⁶ See Markel, *supra* note 9, at 173.

⁹⁷ See *id.*

⁹⁸ See Du, *supra* note 93, at 99.

⁹⁹ CISG art. 92.

¹⁰⁰ Cmt. Germany, ELECTRONIC LIBRARY ON CISG DATABASE—TABLE OF CONTRACTING STATES.

¹⁰¹ See Markel, *supra* note 9, at 173.

¹⁰² See Du, *supra* note 93, at 100.

¹⁰³ The CISG’s Application under Article 1(1)(b), UN Convention on Contracts for the International Sale of Goods: Practice and Theory, § 2.03.

¹⁰⁴ *Id.*

Applying this view to the scenario, the CISG would be inapplicable, and the Chinese court would be obligated to apply Japanese law. This view appears to be in line with the argument the U.S. government made by reserving Article 95.¹⁰⁵ In order to achieve “maximum clarity” in international sales transactions, the applicability of the CISG should be simplified in so that it applies when both parties are Contracting States, and does not apply when parties from the reserving State contract with a party from a non-CISG State.¹⁰⁶ However, do courts in the reserving State indeed prefer to apply the law of other CISG State over the CISG, when they could simply displace it with the CISG? Apparently, national courts should be more comfortable applying the CISG than the law of other CISG States. Not only will the latter case cause a significant burden on courts in translating the statutes of a foreign country, but it will also increase the likelihood of making mistakes in the application or construction of foreign law due to lack of expertise.

The alternative view holds that the reservation applies if, and only if, the private international law leads to the applicability of the law of the State that has reserved Article 95.¹⁰⁷ Under this “selected State reservation view,” if the selected applicable law is of a CISG State that did not reserve Article 95, even if the forum State has reserved Article 95, the CISG will nevertheless apply under Article 1(1)(b). Applying this to the scenario, because the application of the law is Japanese law, and because Japan did not reserve the Article 95, the effect of China’s reservation is not triggered. Pursuant to Article 1(1)(b), the CISG will displace Japanese law in deciding the dispute. Although this approach, to some extent, helps courts in the reserving States avoid applying foreign law, it might be criticized for cherry picking. Under the general belief that the reservation is aimed to exclude the application of the CISG when a party from non-CISG State is involved, the “selected State reservation view” will cause confusion to domestic courts of the reserving State in view of the “bifurcated application” to bring the CISG back to govern disputes not involving its own residents.

¹⁰⁵ See *infra* notes 133-137 and accompanying text.

¹⁰⁶ Markel, *supra* note 9, at 172.

¹⁰⁷ The CISG’s Application under Article 1(1)(b), UN Convention on Contracts for the International Sale of Goods: Practice and Theory, § 2.03.

Overall, the uncertain effect of the Article 95 reservation can be summarized as:

Scenario	Forum	Party 1	Party 2	PIL	Application of the CISG	Applicable Law
1	K	R	NK	K	?	K/CISG
2	K	R	NK	R	?	Forum Reservation View: CISG Selected State View: R
3	K	R	NK	NK	No	NK (pursuant to PIL)
4	R	R	NK	K	?	Forum Reservation View: K Selected State View: CISG
5	R	R	NK	R	No	R
6	R	K	NK	K	?	Forum Reservation View: K Selected State View: CISG
7	R	K	NK	NK	No	NK
K–Contracting State; R–Reserving Contracting State; NK – Non-Contracting State; PIL–Private International Law; ? – Unclear Whether the CISG is Applicable;						

5. *Against Party Autonomy*

Due to lack of a regular case reporting system in China, it is difficult to explore whether the interpretation of the Article 95 reservation has received uniform and predictable application in Chinese judicial system.

Imaginably, the CISG has been applied through different approaches in Chinese courts and tribunals.¹⁰⁸ Professor Xiao Yongping, in his survey of China's experience with the CISG, identifies problems manifested by the mistaken interpretation of the Article 95 reservation under Chinese legal rationale and the "homeward trend" of resorting to Chinese domestic law, despite the applicability of the CISG.¹⁰⁹ For example, in a case between a Chinese buyer and a Japanese seller,¹¹⁰ the Chinese court concluded in circular reasoning that the CISG should apply because contracts of international trade were to be governed by the law that regulated these contracts.¹¹¹ In another case where Article 1(1)(a) was met, the court held that the CISG should apply only in the absence of relevant provisions of Chinese domestic law.¹¹²

In addition to those inconsistent interpretations, a more severe problem caused by the Article 95 reservation, is its impairment on party autonomy. UNCITRAL upheld the primacy of party autonomy over the CISG at the time of drafting the CISG. Delegations from common law countries first proposed the "opting-in" approach: the CISG will apply only when parties incorporate it into contracts by reference.¹¹³ This proposal was objected by civil law country delegations.¹¹⁴ After hearing heated debates, Article 6 was enacted to establish party autonomy under an "opting-out" means,¹¹⁵ under which parties are free to exclude the application of the CISG or vary the effect of any its provisions.¹¹⁶ Therefore, even if both sides are from CISG States, the parties have the right to exclude the "default" application of the CISG under Article 1(1)(a) if they do not wish to be governed by the CISG.

On the other hand, no other Article of the CISG specifically addresses the issue of whether parties may make the Convention applicable when it

¹⁰⁸ Xiao & Long, *supra* note 39, at 68.

¹⁰⁹ *Id.* at 101.

¹¹⁰ At the time of this case Japan had not ratified the CISG. See *Japan*, ELECTRONIC LIBRARY ON CISG DATABASE—TABLE OF CONTRACTING STATES, available at <http://www.cisg.law.pace.edu/cisg/countries/cntries-Japan.html>.

¹¹¹ See *Nanjing Res. Group v. Tian An Ins. Co. Ltd., Nanjing Branch, Wu Hai Fa Shang Zi No. 91 (Wuhan Mar. Ct., Sept. 10, 2002)*, available at <http://cisgw3.law.pace.edu/cases/020910c1.html>.

¹¹² See *Hydraulic Punching Machine (P.R.C. v. Italy)*, CIETAC (2002), available at <http://cisgw3.law.pace.edu/cases/021223c1.html>. Note that all CISG arbitration awards are reported by the CIETAC, China International Economic and Trade Arbitration Commission.

¹¹³ See Du, *supra* note 93, at 105.

¹¹⁴ See *id.* at 108.

¹¹⁵ See *id.*

¹¹⁶ CISG art. 6; see also UNCITRAL Digest of CISG Article 6 Case Law, ELECTRONIC LIBRARY ON CISG DATABASE—CISG BY STATE, available at <http://www.cisg.law.pace.edu/cisg/digest/art06.html>.

would not otherwise apply. Assuming that a transaction is between a CISG party and a non-CISG party, or between two non-CISG parties, and that both sides wish the CISG to apply; how can they achieve this goal? Because at least one of the parties in such situations is from a non-CISG State, Article 1(1)(a) is inapplicable. Given there is no provision in the CISG expressly granting parties the right to incorporate the Convention to their contracts, how will the “opting-in” the CISG? Perhaps Article 1(1)(b) is the only means to accomplish this effect.¹¹⁷ The parties can include a governing law clause in their contract, and choose the national law of a CISG State. When the private international law lead to the law chosen by the parties,¹¹⁸ the CISG will displace the national law and govern any disputes. Thus, assuming that China did not reserve the application of Article 1(1)(a), in the event a Chinese party in dealing with an English party wishes to have the CISG govern their transaction, they could accomplish this goal by referring to any law of a CISG State in their agreement. Or in the event an English party conducts businesses with an Indian party¹¹⁹ in China and both agree to the CISG, they could achieve the ends simply by include Chinese law as the governing law. However, the Article 95 reservation China made changes the whole story. The Chinese party in this scenario could not accomplish its goal because of the Article 95 reservation. Indeed, party autonomy was denied in a case between a Chinese party and a Korean party.¹²⁰ At the time of this case Korea had not ratified the CISG. The tribunal ruled, after it found that both parties had agreed to the CISG, that party autonomy should be restricted in this case because the reservation on Article 1(1)(b) was “to exclude the application of the CISG to contracts between Chinese parties and parties in non-Contracting States.”¹²¹ Therefore, we can see that the Article 95 reservation might close the door for applying the CISG where at least a party from a non-CISG State is involved. Traders from non-CISG States have to resort to other forum in order to opt in the CISG.

¹¹⁷ Du, *supra* note 93, at 104.

¹¹⁸ The CISG's Application under Article 1(1)(b), UN Convention on Contracts for the International Sale of Goods: Practice and Theory, § 2.03. (Where parties have included a governing law clause in their contract, most but not all conflicts rules give effect to the law chosen by the parties; where parties have not, the particular criteria identified by the forum's conflicts rules select the State whose law controls).

¹¹⁹ India is not a CISG State, as of May, 2016.

¹²⁰ See Xiao & Long, *supra* note 39, at 80-81.

¹²¹ Xiao & Long, *supra* note 39, at 81.

6. *China's Withdrawal of Article 96—the Foreshadow of its Possible Article 95 Withdrawal*

In order to secure uniformity and predictability in the application of the CISG and fully respect for party autonomy, it is imperative for China to withdraw its Article 95 reservation. In view of China's recent withdrawal of Article 96 reservation in 2013, its underlying reasons suggest a roadmap for China's potential withdrawal of Article 95 in the near future. Foremost, like the enactment of the UCL making the Article 96 reservation contrast to its own law, the contemporary Chinese legal framework does not have any separate legislation on international contracts. The replacement of the FECL with the UCL signified the legal reform took place in China. Thus, the concern over preservation of the FECL to govern foreign trade has gone since its repeal in 1999. Additionally, the CISG has great influence on the evolution of Chinese contract law. At the time of drafting the UCL, the legislators have made frequent reference to the CISG.¹²² As such, the need to have Chinese law govern disputes between Chinese parties and non-CISG parties has significantly diminished.

The rapid economic development that started in the late 1990s has led China to be one of the world's largest trading nations. China no longer embraces its prior conservative attitude towards global commerce.¹²³ Instead, the active role it plays in international trade, e.g., its participation in the WTO, demonstrates its positive attitude towards global transactions. Chinese traders, after experiencing economic reform, have gained experience through years of worldwide trade, become accustomed to merchant practice, been familiar with contract rules which are popular in the Western countries, and learned to avoid contract traps. Therefore, the apparent original rationale for this reservation, i.e., to protect inexperienced Chinese traders by specifically designing domestic legislation on international trade that differs from the CISG, does not exist. With such favoring attitude towards international transactions, withdrawal of the Article 95 reservation will promote the development of the CISG. Especially in East Asia, only Japan, Korea, and Singapore have joined the CISG (as of May, 2016). Since Singapore also declared the Article 95 reservation, China's withdrawal will significantly increase the use of the CISG around China's neighboring countries.

Maintenance of the reservation contradicts the idea of party autonomy, preventing parties from using the CISG even when both parties desired it.

¹²² *Id.* at 68.

¹²³ *See generally* Pattison & Herron, *supra* note 12, at 461 (“With the adoption of the ‘rule of law’ constitutional provision and with the adoption of the UCL, China was poised to enter the world of twenty-first century global transactions.”).

Withdrawal will demonstrate China's respect for party autonomy, allow parties to opt in to apply the CISG under Article 1(1)(b), and relieve Chinese judicial officers from applying foreign laws where the private international law appoints the law of a Contracting State other than China. Meanwhile, making "opting-in" available in China will encourage international traders to choose Chinese courts and tribunals as the forum. As one of the world's largest trading countries, China has attracted merchants from every corner of the world to conduct their businesses in its land. Hence, when a transaction involves a party from a non-CISG State who wants their contract to be governed by the CISG, withdrawal of the Article 95 reservation will ensure that the deal will not be spoiled solely because the reservation prohibits parties from opting in to the CISG, and discourage forum shopping for the applicability of the CISG. With a greater number of cases being decided under the CISG in Chinese courts and tribunal, Chinese judges, lawyers, and traders will enhance their understanding of the CISG and contribute the interpretation of the CISG through their published decisions.

Further, as the withdrawal of the Article 96 reservation has resolved the confusion over the requirements of written form contract, withdrawing the Article 95 reservation will eliminate the confusion over its effect, and contribute to consistent and predictable results in practice under Article 1(1)(b). The "reinstatement" of this indirect application in China will obligate its courts to apply the CISG where at least one party to contract is from a non-CISG State, and Chinese private international law selects the law of any Contracting State. Such full acceptance will contribute to a uniform dispute resolution for transnational trade.

Should the CISG supplant Chinese law pursuant to Article 1(1)(b) when Chinese law is selected, the interests of Chinese parties will not be prejudiced, since the Convention provides contracting parties with better remedy coverage than those under the UCL.¹²⁴ The principle of foreseeability of loss under Article 74 of the CISG has been completely absorbed in the Article 113 of the UCL.¹²⁵ However, the UCL does not specify how the amount the damage should be calculated. On the other hand, Article 75 and Article 76 of the CISG set forth the recovery method, under which the aggrieved party is entitled to receive the difference between the contract price and the price in the substitute transaction or the difference between the price fixed by the contract and the current price at

¹²⁴ Li, *supra* note 82, at 314.

¹²⁵ *Id.* at 315. See CISG arts. 74, 113 (Damages for breach of contract consist of a sum equal to the loss, but may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract The amount of losses not exceed the probable losses which has been foreseen or out to be foreseen when the party in breach concludes the contract).

the time of avoidance, depending on the act the party took following the breach.¹²⁶ Although the Chinese judiciaries have been following the same principles in practice,¹²⁷ the lack of express, specific regulations in the statute grants the judicial branch too much discretion in determination damages, making the measurement unclear. Thus, given the clear measurement, the CISG is more favorable than the UCL in providing guidance for remedy calculation with contracting parties.

IV. MORE CONVINCING GROUNDS FOR THE U.S. TO WITHDRAW

Unlike the absence of official reasons for China's reservation, the reasons why the U.S. made Article 95 reservation are well recorded.¹²⁸ One of the reasons was to ensure the "maximum clarity" of the applicability of the CISG.¹²⁹ The American Bar Association was concerned about the vagueness of the rules of private international law, believing it did not provide sufficient clarity compared to the straightforward test under Article(1)(1)(a) of the CISG.¹³⁰ American courts have yet to discuss the unclear effect of Article 95 reservation, despite the fact that they have generally followed the "forum reservation view" that courts of the reserving State do not apply the CISG, so long as there is at least a non-CISG party.¹³¹ As discussed above, without a uniform interpretation of its effect, the unpredictability of the Article 95 reservation is a considerable impediment to the original purpose of the U.S. to achieve "maximum clarity" in international sales transactions.¹³² Therefore, the Article 95 reservation does not fully achieve U.S.'s initial intended effect on "maximum clarity."

The other ground for the U.S. to exclude Article 1(1)(b) arose out of its concern for reciprocity.¹³³ The statement from U.S. government that

¹²⁶ CISG arts 75, 76.

¹²⁷ Han Shiyuan (韩世远), Chinese Contract Law and the CISG (中国合同法与 CISG), 33(2) Jinan Journal 7, 10-11 (2011) (China).

¹²⁸ *Appendix B, Proposed United States Declaration Under Article 95 Excluding Applicability of the Convention Based On Article 1(1)(b)*, ELECTRONIC LIBRARY ON CISG DATABASE – MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, available at <http://www.cisg.law.pace.edu/cisg/biblio/reagan.html> (last visited August 14, 2016).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ The CISG's Application under Article 1(1)(b), UN Convention on Contracts for the International Sale of Goods: Practice and Theory, § 2.03.

¹³² Markel, *supra* note 9, at 174.

¹³³ *See Appendix B, Proposed United States Declaration Under Article 95 Excluding Applicability of the Convention Based On Article 1(1)(b)*, ELECTRONIC LIBRARY ON CISG DATABASE – MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, available at <http://www.cisg.law.pace.edu/cisg/biblio/reagan.html> (last visited Aug. 14, 2016).

subparagraph (1)(b) “would displace [U.S.] domestic law more frequently than foreign law” illustrates its unwillingness and discomfort with CISG’s replacement of its own domestic law, but not the law of foreign non-CISG States. Scholars uniformly find that such concern is unwarranted.¹³⁴ The CISG, rather than regulating relations between different countries where the acknowledgment of *reciprocity is significant, governs relations between private parties, i.e., individual traders*.¹³⁵ Similarly, rules of private international law deal only with an optional choice of law, in which traders are mostly interested.¹³⁶ It may lead to the application of the law of the seller’s country, or the one of the buyer’s. If contracting parties do not wish the CISG to govern their contract, they may simply exclude the application of the CISG under Article 6 and include any national law as the applicable law. As parties should have the right to choose the most favorable law protecting their relations, the reciprocity rationale significantly prevents the use of the CISG in the U.S. when at least a party from a non-CISG State is involved. Although Secretary George P. Shultz added that “parties who wish to apply the Convention to international sales contracts not covered by Article 1(1)(a) may provide by their contract that the Convention will apply,” this option is realistically difficult as analyzed in the problems China faces due to the reservation. Hence, in order to have the CISG applicable American parties when dealing with traders from non-CISG States have to resort to foreign courts. Indeed, a substantial number of international commercial disputes involving American concerns have been resolved abroad.¹³⁷

Some common law practitioners criticize the fact that the CISG jurisprudence lacks binding authority, i.e., *stare decisis*, on national courts.¹³⁸ In their opinion, only when the interpretation of the CISG is absolute uniform, will the desired “natural” function be fulfilled.¹³⁹ Otherwise, the inconsistency in application would encourage traders to choose the national court that has favorable rulings.¹⁴⁰ Facing this argument, Asa Markel, in his advocate for the U.S. to withdraw the Article 95 reservation, opines that it is not necessary to require the applications for the CISG be completely uniform and that “discrepancies between judicial systems do not represent any concerted effort to subvert the

¹³⁴ See e.g., Gary F. Bell, *Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 9 SING. Y.B. INT’L L. 55, 59 (2005); Li, *supra* note 82, at 312-13.

¹³⁵ Bell, *supra* note 134, at 59.

¹³⁶ *Id.*

¹³⁷ Markel, *supra* note 9, at 202.

¹³⁸ *Id.* at 196.

¹³⁹ *Id.* at 194.

¹⁴⁰ *Id.*

CISG's uniformity."¹⁴¹ Especially in the U.S., the UCC continues to function even it fails to perform absolute uniformity.¹⁴² In addition, Markel, along with scholars from all over the world, believes that the evolution of CISG case law and tribunal decisions, since its enactment in 1988, contributes to a harmonious interpretation of CISG provisions.¹⁴³ The availability of electronic databases provides judicial officers with access to foreign CISG decisions before rendering judgments.¹⁴⁴ Though CISG jurisprudence lacks binding authority, the increasing acknowledgement of survey decisions from other national courts establish a framework for consistent rulings.¹⁴⁵

V. CONCLUSION

There is a need for certainty and predictability regarding parties' relative rights in international sales of goods. After striking balance between the common law and civil law approaches to contract law, the CISG was drafted to satisfy the need. Major countries ratifying this Convention one after the other demonstrate its popularity among international traders and its acceptance by the world. The development and acknowledgement of case law interpreting the CISG promotes a harmonious jurisprudence. Thus, allowing contracting parties to use the CISG as the governing law will not only facilitate and benefit transactions, in view of traders' increasing familiarity with the CISG, but it also better addresses the problems caused by application of foreign law. In addition to expenditures on translation, it is highly likely that foreign law might be construed in an unpredictable fashion.

UNCITRAL intends to promote the CISG through its indirect application under Article 1(1)(b) in the event at least one party is from a non-CISG State. However, the Article 95 reservation closes the door for this approach. Although some may argue that additional signees of the CISG would make the effect of withdrawal of Article 95 less significant because the greater number of CISG States will result the application of the CISG under Article 1(1)(a), this reservation can be viewed as an unnecessary obstacle against the interest of legal coherence. It is against parties' intent to use the CISG governing their contract, and diverges from the fundamental idea of CISG drafters in providing uniform law for international sales of goods.

¹⁴¹ *Id.* at 198.

¹⁴² *Id.* at 198-99.

¹⁴³ *See e.g., id.* at 194; Li, *supra* note 82, at 305.

¹⁴⁴ Markel, *supra* note 9, at 194.

¹⁴⁵ *Id.* at 196-97.

China made the reservation more out of its prudence than resistance, given the cultural background of its conservative attitude towards international transactions. Since its ratification of the CISG, China has experienced enormous changes in its legal system and political reform. The new contract law was drafted with great reference to the CISG. Considering its current active role in global trade, it would be parochialism for China to still hold the reservation. Given sustained growth of international trade, withdrawal of the Article 95 reservation will facilitate the development of CISG case law and eliminate its uncertain effect on the obligation of foreign courts to recognize China's reservation when they decide disputes between a Chinese party and a non-CISG party, as well as on its national courts as to whether the reservation obligates them to displace the national law of a non-reserving CISG State with the CISG when no Chinese party is involved. After realizing that the enforcement of the Article 96 was no longer in line with its modern international trade policy, China withdrew this reservation in 2013. Hopefully, after being aware of the unpredictable and inconsistent effect caused by the Article 95 reservation, China will withdraw it in the foreseeable future to fully promote uniform CISG application.

Sharing with those similar grounds that potentially persuade China to withdraw, the U.S. should also withdraw its reservation, taking a step further to lead other reserving countries to consider doing the same. The original intention of providing "maximum clarity" ends up with causing the opposite outcome, and the reciprocity concern actually deprives its own traders from using the CISG. Withdrawal does not automatically require all parties be bound by the CISG but will provide traders with the choice of utilizing this uniform legal regime in dealing with international counterparts. As such, the "benefits" under the Article 95 reservation are superficial, and withdrawal will contribute to uniform dispute resolutions under the CISG.