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I. INTRODUCTION

As of January 1, 1988, the United Nations Convention on Contracts for the International Sale of Goods[1] (hereinafter "CISG" or "Convention") came into force in the People's Republic of China (hereinafter "PRC" or "China"), with two reservations under Article 95 and Article 96.[2] Over the past 20 years,

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

[2] As of the time of publication of this article, the People's Republic of China had not filed with the United Nations Secretary-General a suitable depositary notification pertaining to the status of the CISG in Hong Kong. *See* CISG: Participating Countries – China (PRC), http://cisgw3.law.pace.edu/ cisg/countries/cntries-China.html (last visited Sept. 7, 2007). Therefore, the courts of China and Hong Kong are generally unlikely to regard the CISG as being in effect in the Hong Kong Special Administrative Region. *Id.* The same conclusion applies with respect to Macau and Taiwan. *Id.* Courts of other jurisdictions may, however, rule otherwise for Hong Kong and Macau. *Id.*; Ulrich G. Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT'L L. REV. 307, 307-32 (2004).

the CISG has received increasing attention in China, the reasons for which may be twofold.

Firstly, the CISG has not only witnessed, but has also greatly influenced, the evolution of Chinese domestic contract law. Before the Chinese delegation attended the 1980 Diplomatic Conference in Vienna, there was no PRC domestic legislation on the subject of contract law, for the PRC was under a strictly planned economy until the Reform and Opening-up in 1978. However, to some extent, the rationales learned by the PRC delegation at the Vienna Conference have triggered the enactment of Chinese domestic contract law and a special regulation for international trade.[3] Around the time of China's approval of the CISG on December 11, 1986, several sets of private law rules were promulgated, i.e., the Economic Contract Law 1981, the Foreign-Related Economic Contract Law 1985 (hereinafter "FECL"), the General Principles of Civil Law 1986 (hereinafter "GPCL") and the Technology Contract Law 1987. On October 1, 1999, China took a further step towards the unification of domestic contract law by enacting the Contract Law of the People's Republic of China (hereinafter "CL"), which simultaneously repealed the Economic Contract Law, the FECL and the Technology Contract Law.[4] During the drafting of both the

[3] *See infra* note 20 and the accompanying text.

[4] *See* Zhonghua Renmin Gongheguo Hetong Fa [Contract Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) art. 428, *translation available at* http://www.lawinfochina.com/law/display.asp?db=1&id=6145&keyword=contract%20law%20of%20china [hereinafter "CL"]. *See also* Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of the Civil Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) *translation available at* http://www.lawinfochina.com/law/display.asp?db=1&id=1165&keyword= [hereinafter "GPCL"]. Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa [Foreign Economic Contract Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 21, 1985, effective July 1, 1985), *translation available at* http://www.lawinfochina.com/law/display.asp?db=1&id=55&keyword= [hereinafter "FECL"]. Thus, between July 1, 1985 and September 30, 1999, the basic applicable laws for international sales in the Chinese legal system were the GPCL and FECL, and from October 1, 1999 to the present, they are the GPCL and CL. The GPCL embodies general rules, while the FECL and CL set forth more specific provisions. *See generally* GPCL, FECL *and* CL, *supra*. With respect to a given matter on which both the GPCL and the FECL/CL apply, the FECL/CL shall prevail. For a more detailed account of the Chinese legal framework regarding international trade, *see generally* Fan Yang, *The Application of the CISG in the Current PRC Law & CIETAC Arbitration Practice*, NORDIC J. COM. L., Issue 2, at 2-28 (2006), *available at* http://www.njcl.fi/2_2006/article4.pdf. Considering that

FECL and the CL, the CISG was one of the most important sources of reference.[5]

A second reason lies in the significance of the CISG to both international trade and legal practice in China. Indeed, if one looks at the role of the CISG in the unification of international trade law, one may well recognize the importance of a good understanding of this uniform law. Moreover, with China's active participation in international trade, a great many cases have been decided under the CISG in China. Not surprisingly, the CISG is increasingly engaging the attention of Chinese courts and tribunals.

In terms of China and the CISG,[6] writers have largely been concerned with China's reservations under the CISG,[7] the influence of the CISG on Chinese domestic law,[8] comparisons between the CISG and Chinese contract law,[9] and the CISG in

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the cases decided under the FECL fall within the scope of the present paper, the provisions of the FECL will be discussed where necessary, although they ceased to be in effect in 1999.

[5] *See* Ding Ding, *China and CISG, in* CISG AND CHINA: THEORY AND PRACTICE 25, at 33 (Michael R. Will ed., 1999), *available at* http://cisgw3.law.pace.edu/cisg/biblio/dingding.html (last visited Dec. 15, 2007). The legislators of the CL endeavored to develop a new contract law which would reflect the recent contractual exploration and demand taking place in real life. To this end, they have cooperated with the academic circle more closely than ever before, and referred extensively to international and foreign experience. They have also conducted detailed comparisons and discussions of many foreign contract laws and international uniform laws, the CISG and the UNIDORIT Principles being the main references. *See id.*

[6] Many Chinese commentators have written on a wide range of topics on the CISG to date. *See* Bibliography of CISG Materials in Chinese, http://cisgw3.law.pace.edu/cisg/biblio/biblio-chi.html (last visited Feb. 7, 2008). Since this article deals with the application of the CISG in China, the following summarization focuses only on writings on China and the CISG.

[7] *See, e.g.,* Xiaolin Wang & Camilla Baasch Andersen, *The Chinese Declaration Against Oral Contracts Under the CISG,* 8 VINDOBONA J. INT'L COM. L. & ARB. 145, 145-64 (2004), *available at* http://cisgw3.law.pace.edu/cisg/biblio/andersen4.html (last visited Sept. 7, 2007).

[8] *See, e.g.,* Ding, *supra* note 5, at 25-37; Bruno Zeller, *CISG and China, in* CISG AND CHINA: DIALOG DEUTSCHLAND-SCHWEIZ VII 7, 7-22, (Michael R. Will ed., 1999), *available at* http://cisgw3.law.pace.edu/cisg/biblio/zeller.html (last visited Dec. 15, 2007).

[9] *See, e.g.*, Wang Chengbin, *A Comparison Between the CISG and the FECL (Part I)*, CHINESE LEGAL SCIENCE, Issue 3, 106-16 (1989); Wang Chengbin, *A Comparison Between the CISG and the FECL (Part II)*, CHINESE LEGAL SCIENCE, Issue 4, 114-16 (1989); Wang Chengbin, *A Comparison Between the CISG and the FECL (Part III)*, CHINESE LEGAL SCIENCE, Issue 5, 115-19 (1989); Jianming Shen, *Declaring the Contract Avoided: The U.N. Sales Convention in the Chinese Context,* 10 N.Y. INT'L L. REV. 7, 7-57 (1997); Yinghao Yang, *Suspension Rules under Chinese*

arbitration practice.[10] Owing to the absence of a regular case reporting system in China, there has been little discussion of the application of the CISG in Chinese courts, thereby making the picture of Chinese experience with the CISG incomplete. To close this gap and provide an up-to-date analysis of recently reported arbitral awards,[11] this article seeks to explore the CISG in both Chinese courts and arbitration practice, with a view to shedding some light on the underlying problems. Part II of this article, concentrating on the general problems in the application of the CISG, will first examine the territorial and material spheres of the CISG. The impact of party autonomy on the application of the CISG will then be discussed, followed by a brief analysis of the relationship between trade usages and the CISG. Four specific contractual issues under the CISG, viz., formal validity, lack of conformity of the goods and notice thereof, damages and recovery of interest, will be dealt with in Part III. These seven issues were selected by the authors either

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Contract Law, the UCC, and the CISG: Some Comparative Perspectives, CHINA LAW & PRACTICE 23-27 (Sept. 2008), *available at* http://cisgw3.law.pace.edu/cisg/biblio/yang.html (last visited Dec. 15, 2007); Adam M. Giuliano, *Nonconformity in the Sale of Goods Between the United States and China: the New Chinese Contract Law, the Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods,* 18 FLA. J. INT'L L. 331, 331-58 (2006), *available at* http://cisgw3.law.pace.edu/cisg/biblio/giuliano.html (last visited June 27, 2007).

[10] *See, e.g.,* Marcus S. Jacobs & Yanming Huang, *An Arbitrator's Power and Duties Under Art. 114 of Chinese Contract Law in Awarding Damages in China in Respect of a Dispute under a Contract Governed by CISG,* [May] 20 Mealey's Int'l Arb. Rep. 39, 39-43 (2005), *available at* http://cisgw3.law.pace.edu/cisg/biblio/jacobs1.html# (last visited Dec. 15, 2007); Dong Wu, *CIETAC's Practice on the CISG,* NORDIC J. COM. L. Issue 2. 1-46 (2005), *available at* http://www.njcl.fi/2_2005/article2.pdf (last visited Feb. 8, 2008); Florian Mohs & Bruno Zeller, *Penalty and Liquidated Damages Clauses in CISG Contracts Revisited,* [June] 21 Mealey's Int'l Arb. Rep. 1, 1-5 (2006), *available at* http://cisgw3.law.pace.edu/cisg/biblio/zeller-mohs.html (last visited Dec. 2, 2007); Yang, *supra* note 4, at 1-28; Allison E. Butler, *Contracts for the International Sale of Goods in China,* 21(3) INT'L LITIG. Q. 3, 3-7 (2006), *available at* http://cisgw3.law.pace.edu/cisg/biblio/butler5.html (last visited Dec. 15, 2007).

[11] All the arbitration awards reviewed in this article are reported by the China International Economic and Trade Arbitration Commission (hereinafter "CIETAC"). The English versions of these awards are available online through the Pace Law School CISG Database (hereinafter "Database") at http://www.cisg.law.pace.edu/cisg/text/casecit.html#china. The CIETAC cases cited below were last visited around December 2, 2007 at the Database. In addition, as of December 2, 2007, around 30 more CIETAC cases have been reported since the publication of the two articles concerning arbitral practice on the CISG, i.e., Wu, *supra* note 10, and Yang, *supra* note 4.

because they warrant special analysis in the current Chinese context, or because they have attracted particular attention from the courts and arbitral tribunals. Finally, we shall provide some evaluations and suggestions as concluding remarks in Part IV.

II. General Problems

1. *Sphere of Application*

1.1 *Territorial Sphere of Application*

1.1.1 Direct Application

According to Article 1(1)(a),[12] the CISG applies where contracts of sale are entered into between parties whose *places of business* are in different Contracting States. Most of the cases examined by this article fall within this category. Usually, and not surprisingly, in these cases one party's place of business is in China. The places of business of the other Contracting States include, *inter alia*, Australia, Austria, France, Germany, Hungary, Italy, New Zealand, Norway, Russia, Singapore, Switzerland and the United States. Nevertheless, in a small proportion of cases, the parties are located in two States other than China.[13]

For present purposes, one problem regarding direct application of the CISG warrants discussion. In *Lianhe Enterprise (US) Ltd. v. Yantai Branch of Shandong Foreign Trade Co.*, disputes arose between a Chinese buyer and a U.S. seller.[14] The Supreme People's Court reasoned that absent an agreement by the parties on the choice of law, the CISG applied under Article 1(1)(a) because the parties were *incorporated* in China and the United States, respectively, both of which are Contracting States. It can be seen that the Supreme People's Court centered on the place of incorporation rather than the place of business as prescribed in Article 1(1)(a). The same reasoning existed in

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[12] Unless indicated otherwise, all "articles" cited in this paper refer to articles of the CISG.

[13] Round Steel (Sing. v. F.R.G.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/941228c1.html (where the parties' places of business were in Singapore and Germany, respectively).

[14] Lianhe Enterprise (US) Ltd. v. Yantai Branch of Shandung Foreign Trade Co., Sup. People's Ct. Gaz. No. 358 (Sup. People's Ct., Aug. 8, 2000), *available at* http://cisgw3.law.pace.edu/cases/000808c1.html.

the *Agricultural Products* case,[15] the *Manganese* case,[16] and *Minermet S.p.A Milan (Italy) v. China Metallurgical Import & Export Dalian Co. and China Shipping Development Co., Ltd Tramp Co.*[17] This problem could have been avoided had more attention been paid to the place of business requirement under the CISG.

1.1.2 Indirect Application

Pursuant to Article 1(1)(b), the CISG applies indirectly where the parties do not have their places of business in different Contracting States as required by Article 1(1)(a), but conflicts rules refer to the law of a Contracting State, and the parties have their places of business in different states (though not different Contracting States). The PRC filed a reservation pursuant to Article 95, which is designed to exclude this indirect application.[18] The effect of this reservation is controversial. At present, we will limit this discussion to a general introduction to this issue. The impact of the reservation on party autonomy will be discussed later in this article.

At the time of this reservation, the PRC had envisaged separate legislation on international trade (of which the FECL later formed part) so as to protect the immature domestic market and to buffer the impact of the rapid Reform and Opening-up.[19] China's reservation may have also been influenced by the fact that the United States had made its own Article 95 reservation to protect U.S. traders from being deprived of the use of their familiar domestic law without the countervailing gain of

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[15] *See* Agricultural Products (N.Z. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960918c2.html.

[16] *See* Manganese (P.R.C. v. Lux.), CIETAC (2002), *available at* http:// cisgw3.law.pace.edu/cases/021230c1.html.

[17] *See* Minermet S.p.A. Italy v. China Metallurgical Import & Export Dalian Co., China Shipping Development Co., Ltd Tramp Co., (Dalian Mar. Ct., June 29, 2005), *available at* http://cisgw3.law.pace.edu/cases/050629c1.html.

[18] China's declaration pursuant to Article 95 states: "The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of article 1 . . . ." CISG: Participating Countries – China (PRC), *available at* http:// cisgw3.law.pace.edu/cisg/countries/cntries-China.html, (last visited Sept. 7, 2007); Article 95 CISG states "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention." CISG, art. 95.

[19] It is believed that this idea was learned by the PRC delegation at the Vienna Conference. Yang, *supra* note 4, at 7.

supplanting the foreign law of trading partners in non-Contracting States.[20] Some commentators believe that the reservation is intended to prevent the application of the CISG to contracts where one of the parties has its place of business in China and the other in a non-Contracting State.[21] Some scholars, on the other hand, observe that its purpose is to ensure the application of Chinese domestic law, selected by conflicts rules, in cases involving a party in China. According to the latter understanding, where parties have their places of business in China and a non-Contracting State, respectively, the CISG may still apply under Article 1(1)(b) if conflicts rules point to the law of a Contracting State other than China.[22] The authors' understanding, however, is that this reservation precludes the application of the CISG where conflicts rules refer to the law of China or any other Contracting State, irrespective of whether Chinese parties are involved. So far, there seem to be few Chinese cases which have clarified this issue. Nevertheless, the effect of this reservation is indeed undermined by several cases within the scope of Article 1(1)(b) in which the CISG was applied by virtue of Chinese domestic law or as evidence of international usages or customs.[23]

Recently, China's possible withdrawal of the reservation has raised concerns. It is submitted that the reservation should be withdrawn mainly for four reasons. Firstly, as mentioned, rapid economic development has contributed to the change of

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[20] *Id.* Other states shared China's concern that domestic traders be protected by a reservation excluding Article 1(1)(b). For example, representatives from Czechoslovakia were concerned about the impact of Article 1(1)(b) in denying their traders the benefit of domestic codes for international trade. *See id.* For further references in this respect, *see* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 40 (3d ed., 1999), *available at* http://cisgw3.law.pace.edu/cisg/biblio/honnold.html (last visited Dec. 15, 2007).

[21] Chen Zhidong & Wu Jiahua, *On the Application of the CISG in China: With Comment on Article 142 of the GPCL*, LEGAL SCIENCE, Issue 10, at 116 (2004).

[22] Wang Guiguo, *The Sphere of Application and Principles of Interpretation of the CISG*, ZHONGGUO GUOJIFA NIANKAN [CHINESE Y.B. INT'L L.] at 249 (1989).

[23] *See infra* note 42 and accompanying text. *See also* Channel Steel (Thailand v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961023c1.html (where it was held that in case of any contradiction between Chinese law and any international treaty adopted by China, the latter should prevail, and the CISG was subsequently applied). Moreover, the effect of the reservation may also be undermined by the use of *voie directe* in CIETAC arbitration. *See infra* notes 46-48 and accompanying text.

the PRC domestic legislation with one single body of law, i.e., the CL, replacing the separate pieces of legislation on domestic and international contracts. Legislators of the CL have made frequent references to the CISG, and the application of the two sets of rules will lead to quite similar, if not identical, results. Thus, one of the initial intended functions of the reservation, that is, to protect traders in China through domestic legislation on international trade that differs from the CISG, has been largely undermined. Further, should the CISG apply under Article 1(1)(b) where conflicts rules lead to application of Chinese law, the interests of China and Chinese parties will not be prejudiced, since the Convention provides Chinese parties with protections similar to those under the CL. Secondly, where the law of a Contracting State other than China is referred to by conflict rules, withdrawal of the reservation will enable the application of the CISG, which would not only relieve Chinese courts from proof of foreign laws, but would also protect Chinese parties from foreign laws with a body of neutral international law. Thirdly, with 70 states having adopted the CISG (and more to be expected), including most of China's major trade partners,[24] the effect of the reservation has been and will continue to be minimal in any event. Finally, withdrawal of the reservation will not only eliminate confusion as to the reservation's effect, but will also contribute to uniformity in the outcome of trade disputes by retaining the indirect application of the CISG.

1.1.3 Other Cases of Application and Non-Application

The CISG has also been applied through other approaches which may invite criticism. One noteworthy phenomenon is that the CISG was applied even though the requirements specified by Article 1 were not satisfied and the parties had not chosen the CISG to govern their contract. As evidenced by several cases, under the belief that Japan, Korea and Portugal had acceded to the CISG, the tribunals and courts applied the CISG to contracts between Chinese parties and parties whose places of

[24] *See* UNCITRAL Status 1980 – United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

business were in these countries.[25] In addition, in *Nanjing Resources Group v. Tian An Insurance Co. Ltd. Nanjing Branch*, where differences existed between a Chinese buyer and a Japanese seller, the Wuhan Maritime Court engaged in circular reasoning and concluded that the CISG should apply because contracts of international trade are to be governed by the law which regulates these contracts.[26] Equally interesting is *Sino-Add PTE Ltd. v. Karawasha Resources Ltd.*, where the CISG was somehow applied to a contract for the sale of goods between parties in Hong Kong and Singapore, respectively.[27]

Another problem concerns the inclination of Chinese courts and tribunals to consider the application of Chinese domestic law as a preliminary step before applying the CISG. For example, in the *Hydraulic Press* case,[28] although the requirements under Article 1(1)(a) were met, it was ruled that the CISG should apply only in the absence of relevant provisions of Chinese domestic law, or where the stipulations of Chinese domestic law were obscure.[29] Also, in the *Fishmeal* case, which

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[25] *See* Wool (P.R.C. v. Mac.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960227c1.html; Natural Rubber (P.R.C. v. Mac.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960904c1.html; Stone Products (P.R.C. v. Japan), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/961107c1.html; Steel Channels (Mac. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/961118c1.html; Wakame (P.R.C. v. Jap.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970402c1.html; Hot Rolled Coils (P.R.C. v. S. Korea), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/971215c1.html; Korea Hendai Gen. Trade Co. v. China Hubei Province Import & Export Co., (Wuhan Interm. People's Ct. of Hubei Province, Apr. 4, 2001) *available at* http://cisgw3.law.pace.edu/cases/010404c1.html. The *Wool* case, *Natural Rubber* case and *Steel Channels* case involved disputes between parties in mainland China and Macau, where it was mistakenly believed that Portugal was a Contracting State of the CISG. Since Macau was under the jurisdiction of Portugal before it was handed over to China in 1999, the tribunals held that the CISG applied. *See* Wool (P.R.C. v. Mac.); Natural Rubber (P.R.C. v. Mac.); Steel Channels (Mac. v. P.R.C.).

[26] *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.

[27] *See* Sino-Add (Singapore) PTE. Ltd. v. Karawasha Res. Ltd., Haishangchuzi No.119 (Guangxi Beihai Mar. Ct., Mar. 5, 2002), *available at* http://cisgw3.law.pace.edu/cases/020305c1.html.

[28] *See* Hydraulic Punching Machine (P.R.C. v. Italy), CIETAC (2002), *available at* http://cisgw3.law.pace.edu/cases/021223c1.html.

[29] *Id. See also* Printing Equipment (P.R.C. v. Den.), CIETAC (2002), *available at* http://cisgw3.law.pace.edu/cases/020712c1.html (where, despite the requirements under Article 1(1)(a) being satisfied, it was ruled that the CISG should ap-

concerned a contract between two Chinese parties,[30] the tribunal ruled that the CISG should apply, noting that the applicable FECL had no stipulations on passing of risk.[31] It can be seen that this gap-filling role of the CISG either prejudiced the applicability of the Convention (as in the former case), or, paradoxically, extended the application of the CISG to cases beyond its scope (as in the latter case).

A similar, and also improper, approach to applying the CISG relates to Article 142(2) GPCL.[32] According to this provision, if any international treaty concluded or acceded to by the PRC contains provisions differing from those in the civil laws of the PRC, the provisions of the former shall apply, unless the PRC has announced reservations to these provisions.[33] In some cases, Chinese courts and tribunals seem to have based the application of the CISG first on this domestic provision rather than on Article 1(1)(a).[34] This peculiar approach is best demonstrated by *Carl Hill v. Cixi Old Furniture Trade Co., Ltd.*, which involved a contract between a U.S buyer and a Chinese

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ply only in the absence of applicable Chinese domestic law or where there was a conflict between the CISG and Chinese domestic law).

[30] *See* Fishmeal (P.R.C. v. P.R.C.), CIETAC (1997), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970401c1.html.

[31] This decision is unjustified in that it provides no ground for such a fallback position of the CISG. *See id.* For a justified application of the CISG in similar circumstances, *see* Peppermint Oil (U.K. v. P.R.C.), CIETAC (1999), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990630c1.html (where the CISG was applied as an international usage to fill the gaps of the FECL).

[32] The problem of the cases examined in this category is similar to that discussed in the previous paragraph, the difference being that in the following cases, Article 142(2) GPCL was explicitly relied upon.

[33] *See* GPCL, art. 142(2). Similarly, Article 6 FECL provides that, where an international treaty which is relevant to a contract, and to which the PRC is a contracting party or a signatory, has provided differently from the law of the PRC, the provisions of the international treaty shall prevail, with the exception of those clauses to which the PRC has declared reservation. This provision is much less frequently cited than Article 142 GPCL in the application of the CISG. Moreover, it has been repealed together with other rules of the FECL by the CL since 1999. Nonetheless, Article 142 GPCL is still in force, on which the following discussion will concentrate.

[34] *See, e.g.,* Botry (US) Co., Ltd. v. China National Electronics Import & Export Guangdong Corp. (2004) suizhongfaminsanchuzi 297. The parties' places of business were in China and the United States respectively, whereby the CISG could have been applied under Article 1(1)(a). However, the Guangzhou Intermediate People's Court only cited Article 142(2) GPCL in ruling that the CISG should apply. *See id.*

seller.[35] The Cixi People's Court referred first to Chinese domestic law and applied the closest connection rule, noting that where there was a conflict between international conventions and Chinese domestic law, the former should prevail.[36] Thereafter, the court proceeded to cite the CISG in the decision in spite of the fact that the conditions under Article 1(1)(a) were not met.[37] Thus, by virtue of Article 142(2) GPCL, the CISG has been extended to cases outside its territorial scope.[38]

Even where the requirements for direct application are satisfied and the CISG is applied, the grounds for application may be incorrect. In the *Hot-Rolled Steel Plates* case, the parties were in China and Singapore, respectively, and therefore the CISG should have been applied via Article 1(1)(a).[39] However, the focus of the tribunal was the substantive and procedural connection between the instant case and a case formerly arbitrated between the same parties in accordance with the CISG. In light of the principles of fairness and reasonableness, it was concluded that the CISG should apply as it had been in the former case. Peculiarly, not a single word was devoted to Article 1(1)(a) in the award. Moreover, the applicability of the CISG was ignored in several cases in which the requirements of Article 1(1)(a) were fulfilled and the parties had no intent of excluding the CISG.[40]

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[35] *See* Carl Hill v. Cixi Old Furniture Trade Co., Ltd., Cijingchuzi No. 560 (Cixi People's Ct. Zhejiang Province, July 18, 2001), *available at* http://cisgw3.law.pace.edu/cases/010718c1.html.

[36] *See id.*

[37] *See id. See also* Silicon Metal (H.K. v. P.R.C.), CIETAC (1997), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970411c1.html (applying CISG to a contract between parties in Mainland China and Hong Kong); China Changzhou Kairui Weaving & Printing Co. v. Taiwan Junlong Mach. Co., (High People's Ct. of Jiangsu Province, Dec. 2, 2004), *available at* http://cisgw3.law.pace.edu/cases/041202c1.html (applying CISG to a contract between parties in mainland China and Taiwan).

[38] *See infra,* note 64 for further discussion on the problems arising out of art. 142(2) GPCL.

[39] Hot-Rolled Steel Plates (Sing. v. P.R.C.), CIETAC (1996), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960510c1.html.

[40] *See, e.g.,* Metal Silicon (U.S. v. P.R.C.), CIETAC (1991), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910419c1.html; XM Int'l Inc. v. Jiangsu Metals & Minerals Import & Export Corp., Su Jing Zhong Zi No. 380 (Higher People's Ct. of Jiangsu Province, Feb. 28, 2000), *available at* http://cisgw3.law.pace.edu/cases/000228c1.html; Gammatex Int'l SRL v. Shangai Eastern Crocodile Apparels Co., Ltd., Hu Yi Zhong Min Wu (Shang) Chu Zi Di No. 32 (Shanghai First

Finally, as evidenced by the *Peppermint Oil* case, to the extent that Article 6 FECL or Article 142 GPCL is invoked,[41] the CISG may be applied as evidence of international usages or customs.[42] Indeed, this approach can be employed where the applicable law or arbitration rules provide for reference to international usages or customs. Further, the approaches of applying the CISG in arbitrations may be more flexible than that in Chinese courts. Unlike Chinese courts, when determining the applicable law, China International Economic and Trade Arbitration Commission (hereinafter "CIETAC") tribunals are bound by the arbitration rules of the CIETAC, but not necessarily by Chinese conflicts rules. Since their initial promulgation in 1988, the CIETAC Arbitration Rules (hereinafter "CIETAC Rules") have been revised six times, most recently in 2005.[43] Except for the 1988 CIETAC Rules, which had no stipulations on the law applicable to the merits of a case, the revised versions of the CIETAC Rules all provide that an arbitral tribunal shall make its arbitral award "*in accordance with the law* and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness"[44](emphasis added).

Apparently, the CIETAC Rules have not elaborated on the methods of choice of law. Further, it is unlikely that the drafters of the CIETAC Rules intended to draw a distinction between the word "law," which was traditionally considered as referring to domestic law, and the term "rules of law," which is broad enough to cover international rules.[45] As evidenced by the *Tex-*

Interm. People's Ct., Aug. 21, 2001), *available at* http://cisgw3.law.pace.edu/cases/010821c1.html.

[41] *See supra* note 33 and accompanying text.

[42] Peppermint Oil (U.K. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990630c1.html.

[43] China International Economic and Trade Arbitration Commission, *Introduction*, http://www.cietac.org.cn/english/introduction/intro_1.htm (last visited Feb. 27, 2008).

[44] CIETAC ARBITRATION RULES, art. 43(1) (effective May 1, 2005), available at *http://www.cietac.org.cn/english/rules/rules.htm* [hereinafter "CIETAC Rules"].

[45] In the authors' view, "law" and "rules of law" are not as clearly distinguished in the Chinese context as they are in the arbitration rules of foreign arbitral institutions, foreign statutes or international conventions such as the 1980 Convention on the Law Applicable to Contractual Obligations.

tile Equipment case, the unlimited *voie directe*,[46] allowing a tribunal to apply any appropriate rules or standards, is possible under the CIETAC Rules,[47] and hence the rules can be read as permitting tribunals to apply the CISG in a way which they consider appropriate.[48] In comparison, the application of the CISG on the court's motion in cases beyond the territorial scope of the Convention is not permitted under the current Chinese domestic law.

1.2 *Material Sphere of Application*

Chinese courts and tribunals often pay little attention to the CISG itself in defining its material scope. For instance, the tribunal in the *Sesame / Urea Barter* case applied the CISG to a barter transaction without regard to the text or legislative history of the Convention.[49] In effect, the CISG was considered

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[46] This flexible method is adopted by other institutional arbitration rules. *See, e.g.,* INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION, art. 17(1) (effective Jan 1, 2008), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf; LONDON COURT OF INTERNATIONAL ARBITRATION RULES, art. 22(3) (effective Jan. 1, 1998), *available at* http://www.lcia-arbitration.com/ (follow "Arbitration" hyperlink; then follow "English" hyperlink); ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER COMMERCE, art. 22(1) (effective Jan. 1, 2007), *available at* http://www.sccinstitute.com/_upload/shared_files/regler/2007_Arbitration_Rules_eng.pdf. The authors' interpretation above would bring the CIETAC Rules in line with these renowned arbitration rules at this point. *See* JULIAN D.M. LEW et al., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 434-36 (Kluwer L. Int'l 2003) for a further discussion on *voie directe* and its limited and unlimited expressions.

[47] Textile Equipment (P.R.C. v. H.K.), CIETAC (2002), *available at* http://cisgw3.law.pace.edu/cases/020718c1.html. This case falls outside the scope of the CISG and the parties did not elect the CISG to govern their contract. Although the tribunal ruled that Chinese domestic law was applicable, references were made to the CISG. *See id.*

[48] In this context, some writers argue that the application of the CISG could perhaps more comfortably be justified as the application of a set of general principles of international trade law rather than that of usages. *See, e.g.,* Georgios C. Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 REVUE HELLENIQUE DE DROIT INT'L 191, 191-218 (1999), *available at* http://www.cisg.law.pace.edu/cisg/biblio/petrochilos.html.

[49] *See* Sesame/Urea Barter (P.R.C. v. Jordan), CIETAC (1989), *available at* http://cisgw3.law.pace.edu/cases/890613c1.html. According to some commentators, UNCITRAL's interest in barter and barter-like transactions indicates that they are regarded as outside the scope of the Convention. *See* Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts, in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1-1, at n. 49 (Galston & Smite ed., 1984), *available at* www.cisg.law.pace.edu/cisg/biblio/ winship5.html. Other writers, however, by

only as a reference in applying the FECL in this case. Nor has sufficient attention been paid to the CISG itself in deciding that a distribution agreement could not fit within the Convention's scope in *Panda S.r.l. v. Shunde Westband Furnitures Co., Ltd.*[50] Equally, in some cases, the tribunals applied Chinese domestic law to penalty clauses[51] and *contra proferentem* interpretation[52] without closely examining whether these issues were excluded from the CISG.

Moreover, Articles 2 and 3 have rarely been invoked in discussing the types of contracts encompassed by the CISG, even where it is necessary to do so.[53] In the *Axle Sleeves* case and the *Umbrellas* case, both concerning contracts for supply of goods as

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reading between the lines of the CISG, advocate that the exchange of goods is not excluded unless the parties so choose. *See* HONNOLD, *supra* note 20, at 53. It is submitted that the courts should first examine whether issues are external gaps of the CISG before simply applying domestic law. For detailed and comprehensive argument for this position, *see* Lisa Spagnolo, *Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG*, 21 TEMP. INT'L & COMP. L.J. 261, 261-310 (2007). Although this article deals specifically with pre-contractual issues, the point made therein applies more broadly.

[50] *See* (2000) fozhongfajingchuzi 281. *See also* Panda S.r.l. v. Shunde Westband Furnitures Co., Ltd. (2nd Instance), (2000) yuefagaojingerzhongzi 591 Shunde Westband Furnitures Co., Ltd. v. Panda SRL (Retrial), (2002) yuegaofashenjianminzaizi 27; Shunde Westband Furnitures Co., Ltd. v. Panda SRL (2d Retrial), Min Si Ti Zi No. 4 (Sup. Ct. PRC Sept. 21, 2005), *available at* http://cisgw3.law.pace.edu/ cases/050921c1.html.

[51] *See* DVD Machines (Austl. v. P.R.C.), CIETAC (2005), *available at* http://cisgw3.law.pace.edu/cases/051109c1.html; Heaters (P.R.C. v. F.R.G.), CIETAC (2005), *available at* http://cisgw3.law.pace.edu/cases/051207c1.html; Welding Machine (P.R.C. v. Belg.), CIETAC (2006), *available at* http://cisgw3.law.pace.edu/cases/060920c1.html. In these cases, Article 4 was the only article of the CISG invoked in this respect, and the tribunals referred to it merely in passing. Furthermore, in two other cases, not a single mention of the CISG was made before applying Chinese domestic law to penalty clauses. *See* Silicon-Carbide (U.S. v. P.R.C.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970206c1.html; Medicine Mfg. Equip., (P.R.C. v. Swed.), CIETAC (2002), *available at* http://cisgw3.law.pace.edu/cases/021227c1.html. These cases should be viewed critically, especially in light of the fact that the applicability of the CISG to penalty clauses is a matter of controversy. For pros and cons on this issue, *see* Jacobs & Huang, *supra* note 10, at 39-43; Mohs & Zeller, *supra* note 10, at 1-5.

[52] *See* Cysteine (F.R.G. v. P.R.C.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000107c1.html.

[53] For the small portion of cases containing references to Articles 2 and 3 *see, e.g.,* Minterrnet S.A. v. He'nan Local Product Import and Export Co., (Higher People's Ct. of He'nan Province July 17, 2000) *available at* http://cisgw3.law.pace.edu/cases/000717c1.html; Botry (US) Co., Ltd. v. China National Electronics Import & Export Guangdong Corp., (2004) suizhongfaminsanchuzi 297.

well as services, without even a passing mention of Article 3, the tribunals ruled that the CISG should apply.[54] A third case in point involves the sale of souvenir coins. The sale of money is excluded from the sphere of the CISG by Article 2. As a prerequisite to the application of the CISG, it should have been clarified in the instant case whether the souvenir coins constituted "money" for purposes of Article 2. However, the tribunal overlooked this preliminary step and jumped directly to the conclusion that the CISG applied.[55]

Chinese courts and tribunals have correctly referred to Article 4 not only in ruling that a certain scenario falls within the sphere of the CISG,[56] but also in dealing with issues excluded from the CISG explicitly and implicitly. The Shanghai No. 1 Intermediate People's Court in the matter of *Singapore Co. v. Dongling Trade Co., Shanghai Xuyang Trade Co., Xi Jingfang & Luo Yunli*, and the tribunal in the matter of the *False Hair* case left the issue of validity of the contract to domestic law, noting that this issue is beyond the scope of the CISG pursuant to Article 4.[57] In the *Steel* case, the limitation period was also deemed excluded under the CISG and, hence, was decided in accordance with domestic law.[58] However, the application of Article 4 is not unproblematic. In two cases, the tribunals failed to invoke Article 4 in determining whether the validity of the contract was governed by the CISG.[59]

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[54] *See* Axle Sleeves (P.R.C. v. U.S.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970731c1.html; Umbrellas (P.R.C. v. U.S.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940929c1.html.

[55] *See* Silver Coins (P.R.C. v. H.K.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000000c1.html.

[56] *See* Skandinaviska v. Hunan Co., Chang Zhongjingchuzi No. 89 (Chansha Interm. People's Ct., Sept. 18, 1995), *available at* http://cisgw3.law.pace.edu/cases/950918c1.html.

[57] *See* Singapore Co. v. Dongling Trade Co., (Shanghai No. 1 Interm. People's Ct. Mar. 23, 2004), *available at* http://cisgw3.law.pace.edu/cases/040323c1.html; False Hair (P.R.C. v. U.S.), CIETAC (2003), *available at* http://cisgw3.law.pace.edu/cases/031203c1.html.

[58] *See* Steel (P.R.C. v. Aus.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/971219c1.html.

[59] *See* White Cardboard Scrap Paper (H.K. v. P.R.C.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/930000c2.html; Moly-oxide (P.R.C. v. U.S.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961128c1.html.

More often than not, the CISG has applied *exclusively* to matters which fall within its material sphere.[60] In a few cases, however, the CISG and Chinese domestic law were applied *concurrently* to the same matters. A case in point is *Shenzhen Fengshen Industrial Development Co. v. Inter Service Internation (France)*.[61] Seeing that the parties' places of business were in two different Contracting States, the court held that the CISG was applicable pursuant to Article 1(1)(a). However, the FECL was applied in conjunction with the CISG without any explanation. It should be noted that the relevant rules of the CISG and the FECL in this case are almost the same. Again, this parallel application is, to some extent, attributable to the wording of Article 142(2) GPCL.[62] It has been well established that, with respect to a given matter, uniform substantive laws shall always prevail over and exclude domestic laws, if and insofar as the requirements specified by the former are satisfied. Regrettably, Article 142(2) GPCL fails to reflect this methodological perspective clearly. The ambiguous wording may also lead to the misunderstanding that an international treaty applies *only* where the relevant provisions of the treaty and those of the PRC domestic law differ from each other. Furthermore, this Article seems to leave open the question of whether international treaties are applicable if the rules thereof are the same as those embodied in Chinese domestic law.

2. *The CISG and Party Autonomy*

2.1 *Opting Out*

Article 6 establishes the primacy of party autonomy over the CISG. Accordingly, the parties are free to vary the effect of the CISG or to exclude it in whole or in part. In *Y.L.F. Inc. v.*

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[60] *See, e.g.,* Skandinaviska v. Hunan Co., Chang Zhongjingchuzi No. 89 (Chansha Interm. People's Ct. Sept. 18, 1995), *available at* http://cisgw3.law.pace.edu/cases/950918c1.html; Minterrnet S.A. v. He'nan Local Product Import & Export Co., (Higher People's Ct. of He'nan Province July 17, 2000), *available at* http://cisgw3.law.pace.edu/cases/000717c1.html; China Shanghai Dongda Import & Export Corp. v. Germany Laubholz-Meyer Corp., (Shanghai Yangpu Dist. People's Ct., 2002), *available at* www.cisg.law.pace.edu/cisg/ wais/db/cases2/020000c1.html.

[61] *See* Zhengengshen Industry Development Co. v. Inter Service Internation France, (Wuhan Economic and Technology Development Zone People's Ct, June 30, 2000), *available at* http://cisgw3.law.pace.edu/cases/000630c1.html.

[62] For the wording of Article 142(2), *see* GPCL, art. 142(2).

Jiangsu Overseas Group Haitong International Trade Co., Ltd. and *Bang-Bangsamo International (Finland) Ltd. v. Beijing Yinfuli Import and Export Ltd.*, Chinese domestic law was applied in lieu of the CISG on the basis of the parties' choice of "Chinese Law."[63] This reasoning is against the dominant opinion that a reference to the law of a Contracting State ("Chinese law" in the present cases) does not *in itself* amount to an exclusion of the CISG because the CISG is part of the national legal system of the Contracting State.[64] The authors of this article suggest that, where clauses refer to the law of a Contracting State without more, courts or tribunals should conduct oral hearings to ascertain whether the parties truly intend an exclusion to that effect.

Another unsatisfactory result comes from *Beijing Chen Guang Hui Long Electronic Technology Development Ltd. v. Thales (France) Co.*[65] There, the plaintiff argued for the application of Chinese law and the CISG, while the defendant asserted that only Chinese law applied, arguing that "Chinese law" referred to Chinese domestic law. The Beijing High People's Court ruled that the parties had chosen "Chinese law," thereby excluding the CISG. This decision is unpersuasive because the plaintiff had manifestly relied on the CISG to support its claims, and it could hardly be concluded that the parties had agreed to exclude the Convention.

Finally, a few lines should be devoted to the interplay between trade terms and the CISG at this point. Trade terms articulate the parties' obligations as to loading the goods, risk of loss and related matters, but ordinarily do not set forth the legal consequences of breach. The CISG and trade terms are com-

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[63] *See Y.L.F. Inc. v. Jiangsu Overseas Group Haitong International Trade Co., Ltd.*, tongzhongminsanchuzi 0070 (Jiangsu Nantong Intermediate People's Court, January 26, 2006); *Bang-Bangsamo International (Finland) Ltd. v. Beijing Yinfuli Import and Export Ltd.*, erzhongminzhuzi 01764 (Beijing No.2 Intermediate People's Court, July 26, 2002).

[64] This view has found expression in many cases from Austria, Belgium, France, Germany, the Netherlands, the United States and the ICC. *See* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 90 n. 56 (Peter Schlechtriem and Ingeborg Schwenzer eds., 2d ed., Oxford University Press, 2005).

[65] *See* Beijing Chen Guang Hui Long Elec. Tech. Dev. Ltd. v. Thales (France) Co., (Beijing Higher People's Court, 2005), *available at* http://cisgw3.law.pace.edu/cases/050318c1.html.

plementary; each performs a function that cannot be well served by the other.[66] This understanding is reflected in a number of cases, where references in contracts to Incoterms were not taken as exclusions of the CISG.[67]

2.2 *Opting In*

Although sometimes incorporated into contracts by reference,[68] the CISG is often designated as the applicable law in Chinese cases involving opting in. The legal framework in terms of opting in before Chinese courts and in arbitration calls for separate treatment.[69] For Chinese courts, the validity of choosing the CISG in cases beyond the territorial scope of the Convention is a question of private international law subject to the applicable Chinese conflicts rules. In this connection, specific rules are embodied in the judicial interpretation of the FECL, i.e., the 1987 Supreme People's Court's Reply to Inquiry about the Problems in the Application of the FECL (hereinafter "Interpretation I"),[70] of which there are three noteworthy points.

Firstly, according to Article 2(1) of Interpretation I, the parties have the freedom to choose Chinese law, Hong Kong law, Macau law or foreign law. It is not clear whether choice of in-

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[66] *See* HONNOLD, *supra* note 20, at 78.

[67] *See, e.g.*, Xiamen Trade Co. v. Lian Zhong (Hong Kong) Co., xiazhongfajingminzi 39 (Xiamen Interm. People's Ct., Sept. 5, 1994), *available at* http://cisgw3.law.pace.edu/cases/940905c1.html; Horsebean (Fr. v. P.R.C.), CIETAC (1996) *available at* http://cisgw3.law.pace.edu/cases/960308c2.html; PVC Suspension Resin (P.R.C. v. U.S.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990407c1.html; Japanese Xinsheng Trade Co. v. Ningxia Hui Autonomous Region Nihong Metallurgic Prod. Co., Ningminshangzhongzi No. 36 (Higher People's Ct, Ningxia Hui Autonomous Region, Nov. 27, 2002), *available at* http://cisgw3.law.pace.edu/cases/021127c1.html .

[68] *See, e.g.*, Alumina (H.K. v. P.R.C.), CIETAC (2003), *available at* http://cisgw3.law.pace.edu/cases/030626c1.html. The parties incorporated by reference the provisions of Parts II and III of the CISG, except to the extent that these are inconsistent with the express provisions of their contract or contrary to the law of Hong Kong as the applicable law. Thus, the provisions of the CISG were merely contract terms which were subject to the law of Hong Kong.

[69] The following discussion will not touch upon cases beyond the *material* scope of the CISG, but will consider cases falling outside the *territorial* sphere of the Convention.

[70] With the repeal of the FECL in 1999, Interpretation I has since lost effect. However, the cases in the next paragraph were decided when Interpretation I was still in force.

ternational rules, such as the CISG, is acceptable and hence it is a matter of judicial discretion.[71] Secondly, choice of law can only be made explicitly under Article 2(1) Interpretation I. In *Sanming Tsusho (Japan) Corp. v. Fujian Zhangzhou Metals & Minerals Import & Export Co.*, a dispute arose between a Chinese seller and a Japanese buyer who designated "Chinese law, international conventions and international usages" as the applicable law. It is manifest that the CISG could not apply under Article 1(1)(a) because Japan was not a Contracting State.[72] Nevertheless, the Xiamen Intermediate People's Court deferred to the parties' choice and applied the CISG. Thus, in the eyes of the court, the general wording "international conventions" sufficed for the purpose of opting in to the CISG. It is doubtful whether such an understanding is in line with the "express" requirement above. Thirdly, under Article 2(4) of Interpretation I, the designation of the governing law, if any, should be made *before the commencement of hearings*. However, in *Xiamen Trade Co. v. Lian Zhong (Hong Kong) Co.*, it was concluded that the parties had agreed on the application of the CISG because they both relied on it to support their respective positions *in the hearings*.[73]

The tension between the text of Interpretation I and its actual application is well noted in the drafting of the 2007 Supreme People's Court's Interpretation Regarding the Choice of Law Problems in International Civil and Commercial Contractual Disputes 2007 (hereinafter "Interpretation II"), which came into effect on August 8, 2007. Under Article 4(1) of Interpretation II, the parties are entitled to choose the applicable law prior to *the conclusion of the oral hearings at first instance*. In addition, where the parties both rely upon the same body of law without any objection to its application, they are deemed to have chosen that very law. However, as prescribed by Articles 1

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[71] For cases dealing with party autonomy in this regard, *see* Sanming Tsusho (Japan) Corp. v. Fujian Zhangzhou Metals & Minerals Import & Export Co., xiajingchuzi 124 (Xiamen Intermediate People's Court, August 1994); *Xiamen Trade Co. v. Lian Zhong (Hong Kong) Co.*

[72] *See Sanming Tsusho (Japan) Corp. v. Fujian Zhangzhou Metals & Minerals Import & Export Co.*

[73] *Xiamen Trade Co. v. Lian Zhong (Hong Kong) Co.* Moreover, one may question whether it is accurate to conclude that the parties *explicitly* elected application of the CISG in the case at hand.

and 4(2) of Interpretation II, the applicable law governing international commercial contracts should be the "substantive law of a given *country or region*," which seems to reject supranational rules such as the CISG. Since the enactment of Interpretation II, no cases have yet been reported on this issue. Therefore, the actual validity of a choice of the CISG in Chinese courts is still a matter for speculation. Finally, the requirement of an express choice under Interpretation I is retained in Interpretation II. It remains to be seen whether this requirement will be strictly adhered to by Chinese courts.

On the other hand, the parties may enjoy more freedom to opt in to the CISG in CIETAC arbitrations. When dealing with cases involving opting in, the tribunals are bound by the CIETAC Rules, but not necessarily by Chinese conflicts rules. As noted, all that is required under the CIETAC Rules with respect to the law applicable to the substance of a case is the tribunal's adherence to "the law." Moreover, there are no stipulations on how a particular body of law is to be chosen, let alone the application of such restrictions as an express choice by the parties made before the hearings. Furthermore, the wording "law" may well be liberally interpreted so as to embrace transnational rules of law.[74] Indeed, in CIETAC arbitrations, opting in to the CISG in various forms is often accepted. The CISG has been applied as a result of the parties' choice to contracts between parties in mainland China and Hong Kong,[75] as well as between two parties, both doing business Hong Kong.[76] In addition, choice of the CISG has been respected, whether explicitly stated in contracts or subsequently indicated during the judicial or arbitration proceedings.[77] In the latter scenario, the

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[74] *See supra* note 45 and accompanying text.

[75] *See, e.g.,* Caffeine (H.K. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960329c1.html; AOE and PECVD Machines (H.K. v. P.R.C.), CIETAC (2003), *available at* http://cisgw3.law.pace.edu/cases/031218c1.html.

[76] *See, e.g.,* Rolled Wire Rod Coil (H.K. v. H.K.), (CEITAC 1995), *available at* http://cisgw3.law.pace.edu/cases/950428c1.html.

[77] *See id. See also* Antimony Ingot (P.R.C. v. H.K.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960205c2.html; Caffeine (H.K. v. P.R.C.), CIETAC (1996); Polypropylene (P.R.C. v. Japan), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970723c1.html; Excavators (S. Korea v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990521c1.html;

parties were deemed to have such consensus usually because they cited the CISG in their pleadings and defenses.

However, in a few CIETAC cases, party autonomy was denied. For example, in a sales case submitted to the Shanghai Commission of CIETAC, differences arose between a Chinese seller and a Korean buyer. Since Korea had not acceded to the CISG at the time, the CISG could not apply under Article 1(1)(a). The tribunal ruled that the parties had chosen the CISG by basing their claims and defenses on it in the hearings. However, under the belief that the reservation by the PRC on Article 1(1)(b) was to exclude the application of the CISG to contracts between Chinese parties and parties in non-Contracting States, the tribunal concluded that party autonomy should be restricted in the instant case and the CISG should not apply.[78] This decision reflects the opinion introduced above, i.e., the PRC's declaration under Article 95 constitutes a mandatory rule which prohibits parties from opting in to the CISG where one of the parties to the contract is in China and the other in a non-Contracting State.[79] Nonetheless, one may well question whether this view is consistent with the uniform interpretation of the effect of an Article 95 reservation.

Finally, two issues regarding the relationship between the CISG and Chinese domestic law in both Chinese courts and CIETAC arbitration deserve attention. First, the CISG has often been chosen in conjunction with Chinese domestic law.[80] With a concurrent designation of the CISG and Chinese domes-

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BOPP Film (P.R.C. v. S: Korea), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970908c1.html.

[78] *See* Chen & Wu, *supra* note 21, at 115. For a contrary position in a similar case, *see supra* note 72 and accompanying text.

[79] *See supra* note 21 and accompanying text.

[80] *Sanming Tsusho (Japan) Corp. v. Fujian Zhangzhou Metals & Minerals Import & Export Co.*,; *Xiamen Trade Co. v. Lian Zhong (Hong Kong) Co.*; Dioctyl Phthalate (P.R.C. v. S. Korea), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960816c1.html; Tinplate (P.R.C. v. S. Korea), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961017c1.html; BOPP Film (P.R.C. v. S: Korea), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970908c1.html; Excavators (S. Korea v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990521c1.html; Pharmaceutical Products (H.K. v. U.S.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/001206c1.html; WS China Import GmbH v. Longkou Guanyuan Food Co., (Higher People's Ct. of Shadong Province Sept. 10, 2004), *available at* http://cisgw3.law.pace.edu/cases/040910c1.html.

tic law in general terms (such as "the PRC law and the CISG should apply"), a problem may arise as to whether the CISG will be given priority where there are differences between the two sets of rules.[81] Again, the authors propose that an inquiry should be conducted by courts and tribunals to see whether the parties have a solution in mind to this problem. Absent the parties' agreement on such a solution, it is advisable to give preference to the CISG. This approach was followed by the tribunal in the *Elevators* case, where it was ruled that according to the principle that international conventions should prevail over domestic laws, the CISG should apply if there was a conflict between the Convention and Chinese domestic law.[82] Second, the CISG has sometimes acted as gap-filler for Chinese domestic law, either because the parties so intended[83] or because of the odd approaches employed by the tribunals. In the *Air Conditioner Equipment* case, concerning a contract where the parties were in mainland China and Hong Kong, the buyer chose to apply the FECL and CISG, while the seller only accepted the application of the latter.[84] Peculiarly enough, the tribunal first ruled that Chinese law should apply under the closest connection rule. In addition, possibly due to the parties' choice of the CISG, the tribunal decided that the CISG might also apply where there was no applicable stipulation in Chinese law.

3. *The CISG and Trade Usages*

Where applicable, trade usages such as Incoterms,[85] UCP 500,[86] or usages of a particular industry[87] are normally given

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[81] The test for "differences" between the two sets of rules is also a pending question. For discussions on the differences with regard to several specific matters, *see* Shen, *supra* note 9; Yang, *supra* note 9, 23-27; Giuliano, *supra* note 9.

[82] *See* Elevators (XXX v. P.R.C.), CIETAC (2002), *available at* http://cisgw3.law.pace.edu/cases/020909c1.html.

[83] *See, e.g.,* Chemical Cleaning Product Equipment (P.R.C. v. Taiwan), CIETAC (1999), (during the court session, the parties explicitly agreed to apply P.R.C. law, stating that absent any applicable regulation in P.R.C. law, the CISG should be applied). *See also* Silicon Metal (H.K. v. P.R.C.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970411c1.html.

[84] *See* Air Conditioner Equipment (H.K. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990405c1.html.

[85] *Sanming Tsusho (Japan) Corp. v. Fujian Zhangzhou Metals & Minerals Import & Export Co.*; *Xiamen Trade Co. v. Lian Zhong (Hong Kong) Co.*.

[86] *See, e.g.,* Lentils (P.R.C. v. U.S.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961218c1.html; Nanjing Res. Group v. Tian An Ins. Co.

priority over the CISG. Moreover, the party who relies upon usages to support its claims has to bear the burden of proving that the requirements under Article 9(2) are fulfilled, i.e., that the usages are "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."[88]

In several cases, trade usages were applied not by virtue of Article 9, but under Article 142 GPCL or Article 5 FECL,[89] to matters governed by the CISG. This approach might have been taken by courts or arbitrators familiar with Chinese domestic law who felt more comfortable with the application of this body of law. Given that the priority of trade usages is expressly prescribed by the CISG, with respect to matters within the sphere of the Convention, there is no reason why the GPCL or FECL should be the path to relevant trade usages. In the authors' opinion, if and only if the GPCL or FECL is applicable (to matters falling outside the scope of the CISG) should Article 142 GPCL or Article 5 FECL be invoked to apply the relevant usages.

III. Specific Contractual Issues

1. *Formal Validity*

With the rationale learned from the Union of Soviet Socialist Republic (hereinafter "the USSR") at the 1980 Vienna Diplo-

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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.

[87] *See, e.g.,* Australian Raw Wool (P.R.C. v. Austl.), CIETAC (1995), *available at* http://cisgw3.law.pace.edu/cases/950423c1.html.

[88] CISG, *supra* note 1, art. 9(2).

[89] *See, e.g,* Cysteine (XXX v. P.R.C.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940220c1.html (concluding that the laws of the P.R.C. should apply according to the principle of greatest relevance principle set forth in Article 5 FECL); Lentils (P.R.C. v. U.S.) (applying international trade practice to conclude that the letter of credit must reach the seller before shipment of the goods), *available at* http://cisgw3.law.pace.edu/cases/961218c1.html (applying international trade practice to conclude that the letter of credit must reach the seller before shipment of the goods); New Zealand Raw Wool (N.Z. v. P.R.C), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990408c1.html. *See also* FECL, art. 5(3) (providing that for matters not covered under the law of the P.R.C., international usages should be followed); GPCL, art. 142 ("International practice may be applied on matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.").

matic Conference, and driven by the need for protection (of state-owned entities in particular) against claims unsupported by a written agreement,[90] the PRC made a declaration pursuant to Article 96 rejecting Article 11.[91] The effect of this reservation is a matter of dispute.[92]

Some writers are of the opinion that the answer turns on the conflicts rules of the forum: if they point to the law of a non-writing State, no writing will be necessary despite the existence of an Article 96 declaration.[93] To our knowledge, no Chinese cases have thus far adopted this approach.

On the other hand, some commentators advocate that, in cases concerning a Chinese party and a party in another Contracting State, contracts can be concluded only in written form.[94] This argument may be deemed unconvincing in that the

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[90] The law of the USSR imposed strict formal requirements for the making of foreign trade contracts. *See generally* PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 46 n.142 (1986). In the UNCITRAL proceedings, representatives of the USSR indicated that preserving these requirements were of great importance to protect established patterns for the making of foreign trade contracts. The fact that the State was responsible for international trade in the USSR may have led to such concerns. A similar situation also existed in China in the 1980's, where state-owned entities were actively taking part in international trade on behalf of the PRC. *See* Wang & Andersen, *supra* note 7, at 155. Moreover, Chinese cultural tradition may be an influencing factor with respect to the Article 96 reservation. For a more detailed account of the background to the reservation, *see generally* Wang & Andersen, *supra* note 7.

[91] According to Article 96, this reservation can be made only by a Contracting State whose legislation requires a contract of sale to be made or evidenced in writing. *See* CISG art. 96. As the FECL contained such a writing requirement, China was entitled to a reservation under Article 96. *See* 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 . . . . ").

[92] For present purposes, the discussion is devoted mainly to two positions in this respect. For more divergent opinions on this problem, *see* Zhu Lanye, *No Conflict Between Chinese Contract Law and the Reservation by the PRC*, 7 LEGAL SCIENCE 23 (1997); Wang & Andersen, *supra* note 7.

[93] This is considered to be the prevailing view throughout the world. SCHLECTREIM & SCHWENZER, *supra* note 64, at 170.

[94] *See* HONNOLD, *supra* note 20, at 139 (also suggesting that this position may be reversed depending on the circumstances of the case); Ding Wei, *Two Viewpoints on the Formality of Chinese Contracts for International Sale of Goods*, 7 LEGAL SCIENCE 24-5 (1997); Chen Zhidong, *Comment on the Formality of Contracts for International Sale of Goods*, 7 LEGAL SCIENCE 25-26 (1997); Li Wei, *Discussion on Several Cases Concerning the Formation of Contracts for International Sale of*

Article 96 reservation only relieves China from the obligation to recognize contracts in all forms, and it imposes no obligation to enforce only written contracts.[95] Nevertheless, this position has found support in the *Engines* case and *Lindane case*, where the tribunals held that contracts between a Chinese party and a party in another Contracting State must be concluded in writing.[96]

It should be noted that the aforementioned cases were decided at the time when the FECL, which contained a writing requirement, was in force. The more recent case of *Zhuhai Zhongyue New Communication Technology Ltd. et al. v. Theaterlight Electronic Control & Audio System Ltd.*, decided after the CL – which recognizes contracts in any form – took effect, demonstrated a different attitude towards the writing requirement.[97] Having recognized the applicability of the CISG, the Guangdong Superior People's Court, without any choice of law process, held that a non-written contract was valid, but failed to provide any legal grounds for this conclusion.

Notwithstanding the disagreement in scholarship and jurisprudence regarding the effect of the reservation, the major concern in this regard has been the possible withdrawal of the reservation. Some commentators support the reservation,[98] whereas the dominant view strongly proposes the withdrawal of the reservation.[99] The authors of this article prefer this prevailing opinion for two basic reasons.

Goods: A Comparison Between the CISG, UCC and Chinese Contract Law, 3 STUDY COMP. L. 121 (2004).

[95] *See* Si Pingping, *The Nature of Reservations*, 7 LEGAL SCIENCE 23 (1997).

[96] *See* Engines (P.R.C. v. U.S.), CIETAC (1996); Lindane (Fr. v. P.R.C), (Fr. v. P.R.C.), CIETAC (1997). This argument is similar to the view that where one of the parties conducts business in a reservation state, that state's rules as to contract formation shall always prevail. This view is accepted in Chinese cases and is sometimes expressly stipulated in contracts. *See, e.g.*, Industrial Tallow (Austl. v. P.R.C.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/971008c1.html.

[97] *See* Zhuhai Zhongyue New Communication Technology Ltd. et al. v. Theaterlight Electronic Control & Audio System Ltd., yuegaofaminsizhongzi 274 (2004).

[98] *See* CHEN AN, INTERNATIONAL ECONOMIC LAW (Peking Univ. Press) (1994); Zhu Lanye, *supra* note 94, at 24.

[99] *See* Ding, *supra* note 96, at 25; Xiao Yongping, *On the Application of Rules of Private International Law Treaties in Chine*, *in* WUHAN UNIV. COLLECTIONS OF LECTURES ON INT'L L. 87 (Zeng Lingliang, Xiao Yongping, Zuo Haicong & Huang

Firstly, the rapid socio-economic development of recent decades has led to a much more open attitude of the PRC towards international trade, which is well manifested by the replacement of the FECL by the CL in 1999.[100] The conservative position reflected by an Article 96 reservation would seem contradictory to this attitude. The inconsistency between the reservation and China's policy favoring international commerce is more apparent in view of the fact that China has signed the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts,[101] which applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States. The reservation not only contradicts the principle of freedom as to contract form, embodied in the GPCL and recognized by the CL focusing on a market economy, but will fetter the hands of the Chinese traders or sap the confidence of the foreign parties in Sino-foreign sale of goods contracts.[102] Secondly, in addition to confusion concerning the effect of reservation in practice and scholarship noted above, uncertainty also exists as to whether China is still entitled to an Article 96 reservation[103] because, with the implementation of the CL, China is no longer a writing requirement state. Withdrawal of the reservation would eliminate all this confusion and provide certainty and predictability for the international sale of goods.

Zhixiong eds., Wuhan University Press 2006); Yang, *supra* note 4, at 13-16; Wang & Andersen, *supra* note 7.

[100] In regard to formal validity, contracts in all forms are permitted, the only exception being that the relevant laws and regulations require or the parties agree to employ written form. CL, *supra* note 4, art. 10. CL art. 36 further provides that, notwithstanding the requirement of written form under relevant laws and regulations or agreed on by parties, if one party has fulfilled its major obligations which the other party has accepted, the contract has been concluded even though no written form is used. Apparently, the Chinese legislators' attitude towards the formality of contracts has changed to give parties more freedom of choice and meet the ever-changing needs in practice.

[101] CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS, G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (Dec. 9, 2005).

[102] Wang & Andersen, *supra* note 7.

[103] For the prerequisites to an Article 96 reservation, *see supra* note 93.

3. *Lack of Conformity of the Goods and Notice thereof*

3.1 *Conformity of the Goods*

Conformity of the goods is required under the CISG.[104] The area embraced by this concept, as defined in Article 35(1), includes quantity, quality, description, and packaging. Therefore, if provided for in a contract, such descriptions of goods as the date and place of manufacture may be a matter for conformity under Article 35.[105] In addition, the goods should be fit for the purposes for which goods of the same description would ordinarily be used.[106] Thus, the assessment of the quality of the goods is subject to international quality standards,[107] industrial standards of the origin of goods,[108] or national standards of the country where the buyer has its place of business. As for sample sales, the goods do not conform with the contract unless they possess the qualities of goods which the seller held out to the buyer as a sample.[109] Moreover, packaging in a manner adequate to preserve and protect the goods is necessary. Otherwise, they will be deemed to be non-conforming.[110] Finally, the seller is liable in accordance with Article 36 for a lack of conformity which existed at the time the risk passed to the buyer.[111]

Pursuant to Article 35(3), the seller is not liable for any non-conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity. In the *Hydraulic Press Machine* case, a Chinese buyer purchased from an Italian seller machines with the same

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[104] *See* CISG art. 35.

[105] *See* Equipment (P.R.C. v. Switz.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940905c2.html.

[106] *See* Cotton Bath Towel (Austl. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961026c1.html.

[107] *See* Old Boxwood Corrugated Carton (P.R.C. v. Neth.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960308c1.html.

[108] *See* Heliotropin (U.S. v. P.R.C.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/930710c1.html.

[109] *See* Agricultural Products (N.Z. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960918c2.html.

[110] *See, e.g.,* Jasmine Aldehyde (U.S. v. P.R.C.), CIETAC (1995), *available at* http://cisgw3.law.pace.edu/cases/950223c1.html.

[111] *See* CISG, art. 36. *See also* Hot-Rolled Steel Plates (P.R.C. v. Austria), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960716c1.html.

descriptions and defects.[112] Seeing that the buyer did not specify in the contract that such defects should be avoided, the tribunal concluded that the buyer could not have been unaware of such defects and, accordingly, the seller was to be exempted.[113]

3.2 *Examination of the Goods*

Under Article 38(1), the buyer must examine the goods, or cause them to be examined[114] within as short a period as is practicable in the circumstances. According to Article 38(2), if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination,[115] especially when the parties have so stipulated in their contracts.[116] In cases involving re-dispatch, absent the parties' agreement to the contrary, inspection may be deferred in accordance with Article 38(3) until after the goods have arrived at the new destination.[117] Under these circumstances, the requirement that the buyer does not have a reasonable opportunity for examination before re-dispatch was at times expressly dealt with,[118] while at other times not.[119] In addition, the seller's actual or constructive knowledge of the possibility of such re-dispatch was not always examined.[120]

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[112] *See* Hydraulic Press (P.R.C. v. Italy), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940120c1.html.

[113] *Id.*

[114] *See* Air Conditioner Equipment (H.K. v. P.R.C.), CIETAC (1999).

[115] *See* Cysteine (F.R.G. v. P.R.C.), CIETAC (2000).

[116] *See* Axle Sleeves (P.R.C. v. U.S.), CIETAC (1997).

[117] *See* Jasmine Aldehyde (U.S. v. P.R.C.), CIETAC (1995).

[118] *See* Engines (P.R.C. v. U.S.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960906c1.html (where the difficulties in opening the packages and repackaging at the initial destination were noted before redispatch).

[119] *See* Copperized Steel Pipes (P.R.C. v. U.S.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/930705c1.html; Polypropylene (P.R.C. v. Den.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990330c1.html. *See also* Electric Heater (P.R.C. v. Switz.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990330c3.html.

[120] For cases in which the seller's knowledge in this connection was examined *see, e.g.,* Cold-Rolled Steel Plates (P.R.C. v. F.R.G.), CIETAC (1991), *available at* http://cisgw3.law.pace.edu/cases/911216c1.html; Akefamu (Netherlands) Ltd. v. Sinochem Hainan Ltd. hugaojingzhongzi 53 (Shanghai Interm. People's Ct., 1997), *available at* http://cisgw3.law.pace.edu/cases/970000c1.html; Chemical Cleaning Product Equipment (P.R.C. v. Taiwan), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990420c1.html.

All the above points of Article 38, as noted in the *Gloves* case, are subject to the "practicability standard" set forth in paragraph (1) of the Article.[121] Accordingly, the time limit for examination of the goods may vary from case to case, depending on such factors as the individual contract, trade usages, the type of goods and the nature of the parties. More often than not, the parties agree on a fixed period or a latest date for inspection, to which courts and tribunals will usually defer to.[122] In addition, there is no settled scope of examination, and the buyer is not always required to make an inspection that would reveal every possible defect.[123]

As mentioned, where carriage of the goods is involved, inspection may be deferred until after the arrival of the goods at their destination because the buyer is normally not in a physical position to examine the goods until then.[124] Nevertheless, inspection before shipment is to be permitted since it meets the requirement of timely inspection under Article 38 as a necessary step towards the timely notification of defects required by Article 39. However, the tribunal in the *Mung Bean* case endorsed a different view.[125] Although the key issue of the case should have been the validity of two differing inspection results, the tribunal erroneously based its award on the conclusion that, absent any agreement between the parties, the buyer was not entitled to inspect the goods prior to the shipment of the goods.

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[121] *See* Gloves (F.R.G. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960928c1.html.

[122] *See, e.g.,* Horsebean (Fr. V. P.R.C.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970507c1.html; DVD HiFi (Austl. v. P.R.C.), CIETAC (2001), *available at* http://cisgw3.law.pace.edu/cases/011225c1.html; DVD HiFi (Austl. v. P.R.C.), CIETAC (2002), *available at* http://cisgw3.law.pace.edu/cases/020723c1.html.

[123] *See* Cysteine (F.R.G. v. P.R.C.), CIETAC (2000).

[124] *See Guide to CISG Article 38*, Secretariat Commentary, *available at* http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-38.html (last visited Apr. 9, 2008).

[125] *See* Mung Beans (P.R.C. v. Switz.), CIETAC (2001), *available at* http://cisgw3.law.pace.edu/cases/010322c1.html. The Chinese seller and the Swiss buyer adopted the FOB term. Additionally, they agreed that the conformity of the goods should be based on the inspection report issued by the China Import and Export Commodity Inspection Bureau. Later, the goods were inspected and confirmed by CCIB at the loading port. However, based on an inspection report from another agency, the buyer alleged that the goods were non-conforming and refused to send a ship. *See id.*

If the goods are not timely inspected, as required by Article 38, the buyer may be deemed to have waived the right to rely on the lack of conformity. In two cases in which the buyers directly resold the goods to their clients without examination, the tribunals held that, according to international trade usages, the resale which constituted a disposal of the goods indicated that the buyers had accepted the goods, and hence lost the right to rely on the non-conformity of the goods.[126] Here, it should be noted that the tribunals relied upon "international trade usages" rather than Article 39.

3.3 *Notice of Lack of Conformity*

According to Article 39, for the buyer to rely on a lack of conformity of the goods, he must give notice to the seller specifying the nature of the non-conformity within a reasonable time after he has discovered it. Therefore, to be proper, notice must satisfy both the requirement of timeliness and of precision. Seeing that the latter issue has rarely been raised, if at all, before Chinese courts or CIETAC tribunals, this discussion will focus on the issue of a timely notice and the consequences of failure to dispatch such a notice.

The period within which the buyer must examine the goods is closely related to the buyer's obligation to notify the seller of non-conformity. Where the buyer fails to make a timely examination, the period for notice may be calculated from the point when the buyer ought to have discovered the lack of conformity, i.e., often when the buyer should have inspected the goods.[127] Moreover, the length of the period depends on the circumstances of the case. Thus, the period for notifying latent defects

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[126] *See* Cysteine (F.R.G. v. P.R.C.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940220c1.html; Axle Sleeves (P.R.C. v. U.S.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970731c1.html.

[127] *See* Piperonal Aldehyde (U.S.A. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990000c1.html. After the goods arrived at the destination port, the buyer immediately resold and delivered the goods to its client without any inspection. The claim for damages based on lack of conformity was raised until after the buyer's client declined to take the goods. Noting that there were only 8 days between the date when the goods were unloaded (when inspection should have been conducted) and that when the buyer raised its claims, the tribunal held that that the buyer's notice was given within a reasonable time.

may be more generous than that for evident superficial ones.[128] Moreover, the time limit for notice under Article 39 should be distinguished from that for bringing legal proceedings, i.e., statute of limitations or prescriptions.[129]

In many cases, the parties had an agreement on the period for notice of non-conformity, which was often respected.[130] Where the agreed period is considered unjust, it may be adjusted by virtue of interpretation. In the *Cysteine* case, the contract provided for a period of 30 days after arrival of the goods for raising quality issues.[131] Later, the issue over blocking was raised within the period, while the problem of transmissibility and gradation were raised after the expiration of the period. The seller alleged that the two issues should be distinguished as one being external and the other internal. The seller further alleged that the buyer had failed to raise the latter issue in time and had consequently lost the right to damages. On the other hand, the buyer asserted that the two types of quality issues could not be separated. Hence, by noticing the external

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[128] *See* Flanges [I] (U.S.A. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990329c1.html. *See also* Flanges [II] (U.S.A. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990330c2.html. Though not expressly provided for in the CISG, it is often acknowledged that in cases involving apparent defects which could have been detected on examination, the period of notice starts to run after the examination of the goods should have been conducted. As for latent defects, the period begins on the actual discovery of the defect.

[129] Some Chinese courts, however, incorrectly consider the time limit under Article 39 as a limitation period for filing actions. *See* Guangzhou Intermediate People's Court: The Limitation Period Under the CISG Differs From That Under the Chinese Contract Law, *available at* http://www.ccmt.org.cn/news/show.php?cId=7325 (last visited Apr. 9, 2008).

[130] *See, e.g.,* Talcum Block (P.R.C. v. H.K.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/930330c1.html; Agricultural Products (N.Z. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960918c2.html; Axle Sleeves (P.R.C. v. U.S.A.), CIETAC (1997); Chemical Cleaning Product Equipment (P.R.C. v. Taiwan), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990420c1.html; DVD HiFi (Austl. v. P.R.C.), CIETAC (2002), *available at* http://cisgw3.law.pace.edu/cases/020723c1.html. Some periods are quite delicate. *See, e.g.,* DVD HiFi (Austl. v. P.R.C.), CIETAC (2001), *available at* http://cisgw3.law.pace.edu/cases/011225c1.html. It was provided in the contract that the buyer should inspect the goods within 45 days after the goods arrive at the destination port, and raise any quality objections within 15 days after the inspection period expires. There was also a 60-day quality objection period, a 45-day quantity and weight objection period and 1-year guarantee period for repair services.

[131] *See* Cysteine (F.R.G. v. P.R.C.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000107c1.html.

problems, it had already indicated the internal defects of the goods. In addition, the contract did not mandate that the inspection certificate must be submitted within that 30 days, and the internal issues could only be clarified after inspection of the goods. By resorting to the principle of *contra proferentem* interpretation, the tribunal decided against the seller who had provided the draft of the contract.[132]

Moreover, the buyer may bear the burden of proving that the notice of lack of conformity is timely and properly dispatched.[133] In *Royal Supreme Seafoods (Norway) v. China Rizhao Jixiang Ocean Food Company et al.*, the Norwegian buyer and the Chinese Seller were in dispute about the timeliness of the notice of lack of conformity. The Shandong High People's Court ruled that, as the party who had taken delivery of the goods, Royal Aquatic Co. should prove that the seller was notified of the defective goods within a reasonable time.[134] In particular, the court held that the buyer would be in a position to supply evidence of the precise date on which the goods were handed over.[135]

If the buyer fails to notify the seller within a reasonable time, it loses the right to rely on a lack of conformity. However, the situation would be the converse if the seller acknowledges the non-conformity. In *Akefamu (Netherlands) Ltd. v. Sinochem Hainan Ltd. (2nd Instance)*, although the buyer had unduly delayed sending a notice to the seller specifying the defects of the goods, the court ruled that the buyer was nonetheless entitled to the delivery of substitute goods for two reasons.[136] First, the seller unequivocally had admitted the non-conformity of the goods upon the receipt of the delayed notice, and second, because the parties had subsequently agreed on such substitute.[137] Furthermore, it was held that restitution of the price, lost profits and interest might also be granted to the aggrieved

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132 *See id.*

133 For further discussion on the issue of burden of proof under Article 39, *see* Schlechtriem and Schwenzer, *supra* note 64, at 476 .

134 *See id.*

135 *See id.*

136 Akefamu (Netherlands) Ltd. v. Sinochem Hainan Ltd., hugaojingzhongzi 53 (Shanghai Interm. People's Ct., 1997), *available at* http://cisgw3.law.pace.edu/cases/970000c1.html.

137 *See id.*

party.[138] It is interesting to see that these remedies are those to which the buyer was no longer entitled under Article 39 and to which the seller had not conceded.

4. *Damages*

4.1 *Types of Damages*

Articles 74 to 77 entitle an aggrieved party to claim damages. So far, damages have been the most frequently sought remedies offered by the CISG in China. The basic principle of damages is set forth in Article 74, i.e., to place the injured party in the same economic position it would have been in had there been no breach of contract.[139] The cases reported in this regard reveal that this "full compensation principle" is typically followed. Indeed, not only have actual losses been awarded as damages, but lost profits may be recovered as well.

Generally, recoverable actual losses include any price difference arising out of a substitute purchase under Article 75,[140] complaints made to the aggrieved party by its client supported by arbitral awards[141] including arbitration expenditures incurred by this party in the resolution of disputes with its own client,[142] storage fees,[143] freight,[144] loading and unloading fees,[145] fees for issuing a letter of credit (hereinafter "L/C"),[146]

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[138] *See id.*

[139] *See Guide to CISG Article 74*, Secretariat Commentary, *available at* http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-74.html (last visited Apr. 9, 2008).

[140] Skandinaviska Metemo AB v. Hunan Co. for Int'l Economy & Trade, (Chansha Interm. People's Court, 1995), *available at* http://cisgw3.law.pace.edu/cases/950918c1.html; Minterrnet SA v. He'nan Local Product Import & Export Co. Corp., (Higher People's Court of He'nan Provine, July 17, 2000), *available at* http://cisgw3.law.pace.edu/cases/000717c1.html. In these cases, the requirements of a reasonable manner and a reasonable time were not sufficiently noted.

[141] *See* High Tensile Steel Bars (P.R.C. v. U.S.A.), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases941025c1.html.

[142] *See* Beijing Chen Guang Hui Long Elec. Tech. Dev. Ltd. v. Thales (France) Co., (Beijing Higher People's Court, Mar. 18, 2005) *available at* http://cisgw3.law.pace.edu/cases/050318c1.html.

[143] *See* Hot-Rolled Steel Plates (Sing. v. P.R.C.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960510c1.html.

[144] *See* Men's Shirts (P.R.C. v. Italy), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970306c1.html. Moreover, transshipment freight was also granted. *See* Dioctyl Phthalate (P.R.C. v. S. Korea), CIETAC (1996).

[145] *See* Dioctyl Phthalate (P.R.C. v. S. Korea), CIETAC (1996).

[146] *See* Lindane (Fr. v. P.R.C.), CIETAC (1997).

inspection fees,[147] import fees,[148] fees for cleaning containers,[149] and insurance fees incurred in the course of delivery of substitute goods.[150] On the other hand, loss of profits may take the form of the difference between the contract price and the actual production cost of the goods,[151] or the gross profit from which such normal costs as customs duties and value added taxes were deducted.[152] Also, loss of tax preferential treatments has been awarded as damages.[153]

Moreover, some Chinese courts that have resolved contract disputes governed by the CISG have allowed the successful plaintiff to recover litigation expenses as damages. In view of the autonomous interpretation of the CISG, this approach may be open to criticism.[154] In some of these decisions, the source of authority for awarding such fees and costs to the prevailing party is either unclear,[155] or based on grounds other than those

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147 *See* Isobutyl Alcohol (P.R.C. v. U.S.A.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970707c1.html.

148 *See* Cysteine (F.R.G. v. P.R.C.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000107c1.html.

149 *See* WS China Import Ltd. v. Longkou Guangyuan Food Ltd., (Higher People's Court of Shadong Province, 2004) *available at* http://cisgw3.law.pace.edu/cases/040910c1.html.

150 *See* Akefamu (Netherlands) Ltd. v. Sinochem Hainan Ltd., (Shanghai Higher People's Court, 1997), *available at* http://cisgw3.law.pace.edu/cases/970000c1.html.

151 *See* Semiautomatic Weapons (P.R.C. v. U.S.A.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/930807c1.html; Frozen Beef (P.R.C. v. U.S.A.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/931026c1.html.

152 *See* Compound Fertilizer (P.R.C. v. Austl.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960130c1.html; Tinplate (P.R.C. v. Korea), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961017c1.html; Carbamide (P.R.C. v. U.S.A.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970710c1.html.

153 *See* Dioctyl Phthalate (P.R.C. v. S. Korea), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960816c1.html.

154 For a critical analysis of grant of attorneys' fees and costs as damages, *see* John Y. Gotanda, *Awarding Damages under the United Nations Convention on the Int'l Sale of Goods: A Matter of Interpretation*, 37 GEO. J. INT'L. L. 95, 129-34 (2005), *available at* http://cisgw3.law.pace.edu/cisg/biblio/gotanda3.html.

155 *See, e.g.,* Minterrnet SA v. He'nan Local Product Import & Export Co. Corp., (Higher People's Court of He'nan Province, 2000), Minterrnet S.A. v. He'nan Local Product Import and Export Co., (Higher People's Ct. of He'nan Province July 17, 2000), *available at* http://cisgw3.law.pace.edu/cases/ 000717c1.html; Sino-Add (Singapore) PTE Ltd. v. Karawasha Res. Ltd., Haishangchuzi No.119 (Guangxi Beihai Maritime Court, Mar. 5, 2002), *available at* http://cisgw3.law.pace.edu/cases/020305c1.html.

in Article 74. For example, in *Minterrnet S.A. v. Henan Local Product Import and Export Company Corp.*, recovery of attorneys' fees by the plaintiff who had won the case was considered as a worldwide general practice.[156] In addition, arbitration expenses may be granted as damages as well.[157] In this context, the tribunals often rely upon the CIETAC Rules as grounds for the recovery of such expenditures,[158] while only in a small portion of cases was Article 74 invoked.[159]

4.2 *Prerequisites to Damages*

It has been established that there are three essential prerequisites for a loss to be recovered under Article 74, i.e., foreseeability, avoidability and causation.[160] Each element will be

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[156] *Minterrnet S.A. v. Henan Local Product Import and Export Company Corp.*, yujingerzhongzi 256 (Henan High People's Court, July 17, 2000).

[157] *See* Chrome Plating Production Line Equipment (Switz v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990212c1.html; Nickel Plating Machine Production Line (F.R.G. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990212c2.html.

[158] *See* Chromium Ore (P.R.C. v. Switz.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961125c1.html; Kidney Beans (P.R.C. v. H.K.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/980123c1.html; Shirts (P.R.C. v. Italy), CIETAC (1998), *available at* http://cisgw3.law.pace.edu/cases/981215c1.html; PVC Suspension Resin (P.R.C. v. U.S.A.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990407c1.html; Steel Cylinder (P.R.C. v. N.Z.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000119c1.html. Article 46 CIETAC Rules 2005 provides:

> 1. The arbitral tribunal has the power to determine in the arbitral award the arbitration fee and other expenses to be paid by the parties to the CIETAC.
> 2. The arbitral tribunal has the power to decide in the award, according to the specific circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing its case. In deciding whether the winning party's expenses incurred in pursuing its case are reasonable, the arbitral tribunal shall consider such factors as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in dispute, etc.

Article 46 CIETAC ARBITRATION RULES, *supra* note 44. For similar provisions, *see* Article 59 CIETAC Rules 1994, Article 59 CIETAC Rules 1995, Article 59 CIETAC Rules 1998, and Article 59 CIETAC Rules 2000.

[159] *See* Chrome Plating Production Line Equipment (Switz v. P.R.C.), CIETAC (1999); Nickel Plating Machine Production Line (F.R.G. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990212c2.html.

[160] *See* Gotanda, *supra* note 157, at 102.

dealt with in turn below, followed by a brief discussion on the burden of proof in establishing damages.

Firstly, "damages 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, in light of the facts and matters of which it then knew or ought to have known, as a possible consequence of the breach of contract."[161] Where the seller is notified of a possible resale,[162] or the sub-purchaser (e.g., the buyer's client) has signed the contract between the disputing parties,[163] or a L/C had been issued by the end user for the seller,[164] foreseeability will be deemed established. Additionally, normal situations or practices in international trade, such as fluctuation of the market prices,[165] resale of the goods,[166] or a certain profit margin,[167] are taken into account when determining the existence of foreseeability. In these cases, it is well noted that foreseeability does not refer to a certain sum of money equal to the loss, but to the possibility of a loss as a consequence of the breach of contract and the extent of the possible loss.

Secondly, damages can only be recovered to the extent to which the loss could not have been mitigated by measures that would have been reasonable in the circumstances. Examples of such measures would be those which, in light of the individual case, could have been expected in good faith, e.g., a kind preservation of the goods,[168] cooperative reparation,[169] a prompt resale,[170] or a timely substitute purchase,[171] or destroying the

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[161] CISG, art. 74.

[162] *See* Old Boxwood Corrugated Carton (P.R.C. v. Neth.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960308c1.html.

[163] *See* Steel (P.R.C. v. Italy), CIETAC (1994), *available at* http://cisgw3.law.pace.edu/cases/940919c1.html.

[164] *See* Rolled Wire Rod Coil (H.K. v. H.K.), CIETAC (1995), *available at* http://cisgw3.law.pace.edu/cases/950428c1.html.

[165] *See* Scrap Copper (P.R.C. v. U.S.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960112c1.html.

[166] *See* Lindane (Fr. v. P.R.C.), CIETAC (1997).

[167] *See* Equipment (U.S. v. P.R.C.), CIETAC (1993), *available at* http://cisgw3.law.pace.edu/cases/931220c1.html.

[168] *See* Cysteine Monohydrate (XXX v. P.R.C.), CIETAC (1991), *available at* http://cisgw3.law.pace.edu/cases/910606c1.html.

[169] *See* Clothes (P.R.C. v. Germany), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000131c1.html. However, in this case, the tribunal held that the buyer should have notified the seller before the buyer repaired the goods.

[170] *See* Chromium Ore (P.R.C. v. Switz.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961125c1.html; Antimony Ingots (P.R.C. v. H.K.),

perished goods by melting or burning in order to prevent further storage fees,[172] or other measures taken within a reasonable time and manner.[173] In contrast, resale with undue delay[174] or negligence in preserving the goods[175] would be treated as a violation of the duty to mitigate.

Thirdly, a causal link must exist between the breach and the loss suffered in order to recover damages. Although sometimes noted, the causation test was only mentioned in passing.[176] By contrast, despite the fact that it was not expressly required by the CISG,[177] the certainty of damages was discussed in *Carl Hill v. Cixi Old Furniture Trade Co., Ltd.*[178] Confronted with the multiple transport options available to the plaintiff and the plaintiff's failure to prove the amount of freight with certainty, the court held that the plaintiff was not entitled to damages equivalent to freight costs.[179]

CIETAC (1996) *available at* http://cisgw3.law.pace.edu/cases/960205c2.html; Raw Wool (Austl. v. P.R.C.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000427c1.html; Cysteine (F.R.G. v. P.R.C.), CIETAC (2000).

[171] *See* Cold Rolled Coils (P.R.C. v. F.R.G.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970805c1.html; Vitamin C (F.R.G. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/970818c1.html; Polyester Thread (U.S. v. P.R.C.), CIETAC (1998), *available at* http://cisgw3.law.pace.edu/cases/980120c1.html; Silicon Metal (XXX v. P.R.C.), CIETAC (2000), *available at* http://cisgw3.law.pace.edu/cases/000810c1.html.

[172] *See* WS China Import GmbH v. Longkou Guanyuan Food Co., Lu Min Si Zhongzi 50 (Higher People's Court of Shadong Province, Sept. 10, 2004), *available at* http://cisgw3.law.pace.edu/cases/040910c1.html.

[173] *See* Molyoxide (P.R.C. v. U.S.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/961128c1.html.

[174] *See* BOPP Film (P.R.C. v. S. Korea), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970908c1.html.

[175] *See* Hang Tat Foods USA Inc. vs. Rizhao Aquatic Products Group, Ri jing chu zi 29 (Rizhao Intermediate People's Court, Dec. 17, 1999), *available at* http://cisgw3.law.pace.edu/cases/991217c1.html.

[176] *See* Beijing Chen Guang Hui Long Elec. Tech. Dev. Ltd. v. Thales Co., Gao Min Zhong Zi No. 576, 2006 (Beijing Higher People's Court, Mar. 18, 2005), *available at* http://cisgw3.law.pace.edu/cases/050318c1.html; America Inland Sea Inc. v. Jiedong Country Yuequn Fishery, Yue gao fa min si zhong zi 84 (Higher People's Court of Guangdong Province, Oct. 10, 2004), *available at* http://cisgw3.law.pace.edu/cases/041010c1.html.

[177] *See* Djakhongir Saidov, *Methods on Limiting Contract Damages Under the Vienna Convention on Contracts for the Sale of Goods*, 14 PACE INT'L L. REV. 307, 368 (2002).

[178] *See* Carl Hill v. Cixi Old Furniture Trade Co., Ltd., Cijingchuzi 560 (Cixi People's Court, July 18, 2001), *available at* http://cisgw3.law.pace.edu/cases/010718c1.html.

[179] *See id.*

Finally, in establishing damages, the burden is imposed upon the claimant to prove the fulfillment of the three prerequisites.[180] Where the parties have agreed on a method for calculation of a certain part of the damages, this method will be adopted.[181]

5. *Interest*

The right to interest is explicitly provided for by Articles 78 and 84. The discussion here is confined to interest under Article 78, which has long been a matter of controversy. Under Article 78, the aggrieved party is entitled to interest on the price or any other sum that is in arrears. Where interest was granted, Article 78 was not always specifically mentioned.[182] Sometimes, interest on sums in arrears was not permitted even though it was expressly pleaded.[183] In general, parties are entitled to interest on such amounts as purchase price,[184] price difference,[185] actual loss[186] and lost profit.[187] A "liquidated sum"

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[180] *Id.*; Pig Iron (P.R.C. v. Sing.), CIETAC (2003), *available at* http://cisgw3.law.pace.edu/cases/030412c1.html; Beijing Chen Guang Hui Long Elec. Tech. Dev. Ltd. v. Thales Co., Gao Min Zhong Zi No. 576, 2006 (Beijing Higher People's Court, Mar. 18, 2005), *available at* http://cisgw3.law.pace.edu/cases/050318c1.html; America Inland Sea Inc. v. Jiedong Country Yuequn Fishery, yue gao fa min si zhong Zi 84 (Higher People's Court of Guangdong Province, Oct. 10, 2004), *available at* http://cisgw3.law.pace.edu/cases/041010c1.html.

[181] Hang Tat Foods USA Inc. vs. Rizhao Aquatic Products Group, Ri Jing chu zi 29 (Rizhao Interm. People's Court, Shandong Province, Dec. 17, 1999), *available at* http://cisgw3.law.pace.edu/cases/991217c1.html.

[182] For cases not specifically referring to Article 78, *see, e.g.*, Skandinaviska Meterno AB v. Hunan Co. for Int'l Econ. and Trade, Chang Zhong jing chu zi 89 (Chansha Interm. People's Court, Hunan Province Sept. 18, 1995), *available at* http://cisgw3.law.pace.edu/cases/950918c1.html; America Inland Sea Inc. v. Jiedong Country Yuequn Fishery, Yue Gao Fa Min Si Zhong Zi 84 (Higher People's Court of Guangdong Province, Oct. 10, 2004), *available at* http://cisgw3.law.pace.edu/cases/041010c1.html.

[183] *See* Meridian Success International (Hong Kong) Ltd. v. Ji'erbote Finance (Swizterland) Ltd., xinjingchuzi 15 (Xinjiang Weiwuer Autonomous Region High People's Court, 1996).

[184] *See* Bicycles (P.R.C. v. U.S.), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/960214c1.html; Hang Tat Foods USA Inc. v. Rizhao Aquatic Products Group, Ri Jingchuzi 29 (Rizhao Interm. People's Court, Dec. 17, 1999), *available at* http://cisgw3.law.pace.edu/cases/991217c1.html; Wuhan Zhongou Clothes Factory v. Hungary Wanlong Int'l Trade Co, Wu Jing Chu Si 116 (Wuhan Interm. People's Court of Hubei Province, May 11, 2004), *available at* http://cisgw3.law.pace.edu/cases/040511c1.html.

[185] *See* Scrap Copper (P.R.C. v. U.S.), CIETAC (1996), *available at* http://cisgw3.law.pace.edu/cases/960112c1.html; Caffeine (H.K. v. P.R.C.), CIETAC

is only seldom required.[188] Basically, the main issues concerning Article 78 are the day of accrual of interest and the interest rate.

5.1 *Due Date of Interest*

Article 78 only sets forth the general right to interest, but it does not prescribe a point in time from which interest may be calculated. In *Youli Business Corporation v. Hungarian Goldstar International Business Corporation*, interest on the purchase price was deemed due on the date of payment as agreed by the parties.[189] This decision is in line with the full compensation principle that the starting point of interest on price is the due date of payment.[190] On the other hand, in cases where the contract lacks an agreement as to the time of payment, the courts' opinions diverge. In its decision on *Xi'an Yunchang Trading Co., Ltd. v. Yuan Wentong and Enterprex International (US) Corp.*, the Shanghai Pudong People's Court ruled that the interest accrued on the day when the seller requested payment for the goods.[191] Here, regard is to be had to Article 58(1) of the CISG, according to which absent an agree-

(1996); China Yituo Group Co. v. F.R.G. Gerhard Freyso LTD GmbH & Co. KG, huer zhong jing chu zi 161 (Second Interm. People's Ct. Shanghai, 1998), *available at* http://cisgw3.law.pace.edu/cases/980622c1.html.

[186] *See* Dioctyl Phthalate (P.R.C v. S. Korea), CIETAC (1996).

[187] *See* Lianzhong Enterprise Resources (Hong Kong) Ltd. v. Xiamen International Trade & Trust Co., (Xiamen Interm. People's Court, Apr. 20, 1993), *available at* http://cisgw3.law.pace.edu/cases/930420c1.html; *but see* Hang Tat Foods USA Inc. v. Rizhao Aquatic Products Group, Ri jing chu zi 29 (Rizhao Interm. People's Court, 1999), *available at* http://cisgw3.law.pace.edu/cases/991217c1.html.

[188] Interest was granted even where the sum in arrears was not "liquidated" in many cases. *See, e.g.*, Panda SRL v. Shunde Westband Furnitures Co., Ltd. (2nd Instance), (2000) yuefagaojingerzhongzi 591; Zhuhai Zhongyue New Communications Technology Ltd. et al v. Theaterlight Electronic Control & Audio Systems Ltd., (2003) zhuzhongfaminsichuzi 94.

[189] Youli Bus. Corp. v. Hungarian Goldstar Int'l Bus. Corp, (Xiamen Interm. People's Court Economic Chamber, Dec. 31, 1996), *available at* http://cisgw3.law.pace.edu/cases/961231c1.html. *See also* Wuhan Zhongou Clothes Factory v. Hungary Wanlong Int'l Trade Co, Wu Jing Chu Si 116 (Wuhan Interm. People's Court of Hubei Province, May 11, 2004), *available at* http://cisgw3.law.pace.edu/cases/040511c1.html.

[190] For further discussion on the "full compensation" principle vis-à-vis the full restitution principle, *see* Liu Chengwei, *Recovery of Interest*, NORDIC J. COM. L. Issue 1. 1, 7 (2003), http://www.njcl.fi/1_2003/article1.pdf.

[191] *See Xi'an Yunchang Trading Co., Ltd. v. Yuan Wentong and Enterprex International (US) Corp.*, puminer(shang)chuzi 3221 (Shanghai Pudong New District

ment on the time of payment, payment is due when the seller places the goods at the buyer's disposal. Apparently, the full compensation approach is not followed by the Court. Moreover, in *Zhuhai Zhongyue New Communication Technology Ltd. et al v. Theaterlight Electronic Control & Audio System Ltd.*, although payment was held to be due when the seller requested payment on November 3, 2002, January 1, 2003 was chosen as the starting point of interest in light of the relevant circumstances.[192]

With respect to price difference in cases involving substitute transactions, interest was calculated from the date of resale of the goods,[193] or from such date after the resale as considered appropriate by the court.[194] Moreover, the tribunal in the *Molyoxide* case correctly distinguished between two types of interest, i.e., the interest on the total price calculated from the original payment date to the date of resale, and that on the price difference from the resale date to the date of the award rendered.[195]

5.2 *Interest Rate*

The issue of the interest rate is not even touched upon by the CISG, thereby producing divergent results in litigation and arbitration. Despite the various propositions advanced by foreign authorities,[196] the choice of law approach has been rarely,

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People's Court, September 23, 2005). *See also* Moly-Oxide (P.R.C. v. U.S.), CIETAC (1996).

[192] *See* Zhuhai Zhongyue New Communication Technology Ltd. et al v. Theaterlight Electronic Control & Audio System Ltd.,, Yue Gao Fa Min Si Zhong Zi No. 274 (Guangdong Province Higher Court, Jan. 11, 2005), *available at* http://cisgw3.law.pace.edu/cases/050111c1.html. In *Xi'an Yunchang Trading Co., Ltd.*, the lower court based its ruling on Article 62 (4) CL, which provides that, if the time of performance is fixed by the parties, the obligee may require performance at any time, provided that the other party has been given the time required for preparation. *See id.* This reasoning is peculiar in that there is no room for the application of domestic law to this issue, and the applicable rule should be Article 58(1) CISG, according to which the goods were to be paid for upon delivery. *See* CISG art. 58(1).

[193] *See* Waste Aluminum Ingots (P.R.C. v. Belgium), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990520c1.html.

[194] Minterrnet SA v. He'nan Local Product Import and Export Company Corp. zhengjingminchuzi 386 (Zhengzhou Intermediate People's Court, 1999).

[195] *See Moly*-Oxide (P.R.C. v. U.S.), CIETAC (1996).

[196] *See* Franco Ferrari, *Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention,* CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR

if ever, employed in Chinese cases in determining the interest rate. Hence, a statutory interest rate has received little attention in practice, and interest is usually granted at the commercial rate. No cases reported thus far appear to involve a rate fixed by the parties. To the extent that the interest rate is fixed by courts or tribunals, a relevant deposit rate[197] or loan rate[198] has been employed, depending on the circumstances of the case. In this connection, it is interesting to see that in some cases, reference is made only to the rate adopted by the banks in China, even though the interest creditor is from a foreign country.[199] Also, interest is often charged at a certain annual rate or monthly rate directly determined by courts or tribunals.[200]

IV. CONCLUDING REMARKS

The foregoing discussion has cast light on at least three problems which require further comments in conclusion. Firstly, the Chinese courts and CIETAC arbitrators have demonstrated a homeward trend in applying the CISG, which is well manifested by the parallel application of the CISG and Chinese domestic law to the same matters, the reliance upon Chinese legal rationale in the interpretation of the CISG, the fallback role of the CISG to fill the gaps of Chinese domestic law, and the exclusive resort to Chinese domestic law despite the applicability of the CISG. Further, except in only a few cases, the provisions of the CISG are either regrettably dis-

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THE INTERNATIONAL SALE OF GOODS 3-19 (1995), *available at* http://www.cisg.law.pace.edu/cisg/biblio/1ferrari.html; Francesco G. Mazzotta, *CISG Article 78: Endless Disagreement Among Commentators, Much Less Among the Courts, in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE SALE OF GOODS (CISG) 2003-2004, 123-61 (PACE INT'L L. REV., ed., 2005), *available at* http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html.

[197] *See* Cotton Vests (P.R.C. v. Fr.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990225c2.html.

[198] *See* Men's Shirts (P.R.C. v. Italy), CIETAC (1997), *available at* http://cisgw3.law.pace.edu/cases/970306c1.html.

[199] *See, e.g.*, Panda S.r.l v. Shunde Westband Furnitures Co., Ltd. (2d Instance), yuefagaojingerzhongzi 591 (Guangdong High People's Court, 2000).

[200] Jasmine Aldehyde (U.S. v. P.R.C.), CIETAC (1995) (where interest was granted at the rate of 5%); Leather Bags (P.R.C. v. U.S.), CIETAC (1995), *available at* http://cisgw3.law.pace.edu/cases/950516c1.html (rate of 8%); Bud Rice Dregs (Switz. v. P.R.C.), CIETAC (1999), *available at* http://cisgw3.law.pace.edu/cases/990412c1.html (rate of 7%); Medical Laser Machines (U.S. v. P.R.C.), CIETAC (2002), *available at* http://cisgw3.law.pace.edu/cases/021025c1.html (rate of 6%).

torted or invoked without close examination. In effect, the analysis of the CISG in most decisions and awards is so rough that it is difficult to explore whether this Convention has received uniform interpretation in China. Apparently, the Chinese courts and CIETAC arbitrators are familiar with Chinese domestic law and, hence, feel more confident when dealing with this body of law, while they are not well equipped with a comprehensive understanding of the CISG. Also, the ambiguous wording of Article 142 GPCL has, to some extent, contributed to these problems. However, it should be noted that these erroneous applications actually have led to the spill-over effect of the CISG in cases beyond its sphere of application. Nevertheless, it is strongly suggested that more attention be paid by Chinese courts and CIETAC arbitrators to the text of the CISG as well as foreign authorities when applying the Convention, so as to secure uniformity and predictability in the application of the CISG.

Secondly, the approaches to applying the CISG in Chinese courts and CIETAC arbitration can be more flexible than those employed in the decisions and awards reported thus far. Where the applicable law or arbitration rules refer to international trade usages or customs, the CISG may be applied as evidence of such usages or customs, even though the given scenario falls outside its territorial scope. Since Article 142 GPCL with reference to international usages may be frequently invoked by Chinese courts and CIETAC tribunals, this method can be adopted in both litigation and arbitration. In addition, unlike in Chinese courts, the CISG can be applied on more open-ended grounds in CIETAC arbitration. On the one hand, the parties enjoy a broad range of freedom to opt in to the CISG either explicitly or impliedly, and there are no such limitations as an express choice or choice of a law of a country or region under CIETAC Rules 2005 as those under Interpretation II. On the other hand, absent the parties' designation of the governing law, CIETAC tribunals are entrusted with the power directly to choose the CISG as the applicable law. By contrast, this unlimited *voie directe* is not permitted under the current Chinese domestic law by which the Chinese courts are necessarily bound.

Last but not least, the two reservations filed by the PRC under Article 95 and Article 96 respectively should be with-

drawn. During the past 20 years, great changes have taken place in regard to the Chinese legal system and its underpinning rationale. International trade is well received in China, with party autonomy fully respected under the contemporary Chinese legal framework. Maintenance of the reservations will not only contradict China's attitude favoring a market economy and international transactions, but produce confusion as to their effect in practice. Withdrawal of the reservations will eliminate all of these inconsistencies and uncertainties, thereby bringing the enforcement of the CISG in line with China's current policies, promoting uniform application of the CISG with its full acceptance in China, and contributing to the predictability of transnational trade dispute resolutions.