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# Application of the CISG in International Commercial Arbitration

- A. Background
- B. Case study
- C. Observations

# A. Background

- (a). The CISG became effective in the People's Republic of China (PRC) on 1 January 1988
  - Article 95 Reservation
  - Article 96 Reservation (withdrawn on 16 January 2013)
- (b). On 1 July 1997, Hong Kong became a "Special Administrative Region (SAR)" of the PRC
- (c). The CISG will become effective in Vietnam on 1 January 2017
  - Declarations and reservations: None

# (a) The PRC's Article 95 Reservation

- “The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of article 1.”
- Compared with Singapore's Declaration:
  - "In accordance with article 95 of the said Convention, the Government of the Republic of Singapore will not be bound by sub-paragraph (1) (b) of article 1 of the Convention and will apply the Convention to the Contracts of Sale of Goods only between those parties whose places of business are in different States when the States are Contracting States."

# Variations in the interpretation of reservations against Article 1(1)(b)

- *US/Singapore:*
  - Mere reservation against the extension of the CISG to sales where one of the parties has its place of business in a non-Contracting State but is faced with the application of the CISG by virtue of a conflict rule of the court having jurisdiction leading to the application of the law of a Contracting State;
- *German variation:*
  - German courts will not apply Article 1(1)(b) of the CISG in sales where Article 95 reservation states are involved;
- *Dutch variation:*
  - Article 2 of the Dutch Implementing CISG Act requests foreign judges in Article 95 reservation states not to apply the Dutch Civil Code provisions on sales (Book 7, Title 1 of the Civil Code) but rather the CISG, if Dutch law were to be applicable by virtue of the local conflict rule;
  - “This suggestion is of course not binding on foreign courts but enacting this Dutch solution the legislator has indicated that under Dutch law it prefers a solution which enhances uniformity rather than one that relies on local Dutch law.”

# (b) The Applicability of the CISG in Hong Kong SAR

- On 1 July 1997, Hong Kong became a "Special Administrative Region (SAR)" of the PRC
- The PRC made no declaration pursuant to Article 93 when it acceded to the CISG in 1987
- Australia's Article 93 Declaration:
  - "The Convention shall apply to all Australian States and mainland territories and to all external territories except the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands."

# Article 93 of the CISG

- (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
- (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
- (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
- (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

# (c) CISG in Vietnamese Courts

- How would/should a Vietnamese court decide on the applicability of the CISG in the following scenarios?
- Example 1:
  - Seller: Vietnam
  - Buyer: Hong Kong SAR
  - Choice of law: the laws of the PRC
- Example 2:
  - Seller: Hong Kong SAR
  - Buyer: Singapore
  - Choice of law: No agreement
- Example 3:
  - Seller: PRC
  - Buyer: Hong Kong SAR
  - Choice of law: No agreement



# B. Case Study

- PRC Court Cases:
- *Zheng Hong Li Ltd. v. Jill Bert Ltd.* (20 July 1999, SPC)
  - Seller: Switzerland / Buyer: Hong Kong
  - Parties elected to apply "the laws of the PRC"
  - PRC Courts:
    - The Court of First Instance: applied the CISG
    - The Supreme People's Court: the PRC Law on Foreign-related Economic Contracts should apply
- *China Changzhou Kairui Weaving and Printing Company v. Taiwan Junlong Machinery Company* (2 December 2004, Jiangsu High People's Court)
  - Seller: Taiwan / Buyer: PRC
  - Parties agreed to apply the PRC law
  - PRC Courts:
    - Changzhou Intermediate People's Court applied the CISG together with the Foreign-related Economic Contract Law;
    - Jiangsu High People's Court affirmed.

# PRC Court Cases

- *Sino-Add (Singapore) Pte Ltd v. Karawasha Resources Ltd* (5 March 2002, Guangxi Beihai Maritime Court)
  - Seller: Hong Kong / Buyer: Singapore
  - Parties did not choose governing law
  - PRC Courts:
    - Guangxi Beihai Maritime Court applied closest connection test and found “the PRC Contract Law and the relevant international conventions” applied.
    - The court applied Article 41 of the CISG
- *Wuhan Cable Broadcast Television Network Co. Ltd. v. Xu Ming* (2003), Hubei High People’s Court decision (19 March 2003)
  - Seller: Xu Ming (a HK resident) / Buyer: PRC companies
  - No agreement on the law governing the sale of goods contract
  - Held:
    - HKSAR is not a party to the CISG
    - Contract was signed in Wuhan (Buyer’s place of business)
    - Parties did not object to the mainland Chinese law
    - Mainland Chinese Contract Law applies

# PRC Court Cases

- *Possehl (HK) Limited v. China Metals & Minerals Import & Export (Shenzhen) Corporation (2005, Guangdong High People's Court)*
  - Seller: Shenzhen, PRC / Buyer: Hong Kong
  - No agreement on choice of law
  - PRC Courts:
    - Guangdong Intermediate People's Court: applied PRC law, referring to Article 1 of the CISG found that the CISG did not apply;
    - Guangdong High People's Court: applied PRC law, relying on Article 145 of the General Principles of Civil Law and Article 126(1) of the PRC Contract Law 1999. [Parties' choice of law and closest connection test]

# Other Cases

- *Telecommunications products case (2008)*, Cour de Cassation [Supreme Court of France] decision (2 April 2008)
  - the intention of the Chinese government as reflected on the 1997 PRC Diplomatic Note, in particular Annex I;
  - The Diplomatic Note was considered satisfying Article 93 of the CISG and an equivalent declaration that the CISG shall not apply to HKSAR after 1997
- *CNA Int'l, Inc. v. Guangdong Kelon Electronic Holdings et al.* (2008), U.S. District Court, Northern District of Illinois, Eastern Division [federal court of 1st instance]
  - Seller: Hong Kong (defendant) / Buyer: United States (plaintiff)
  - Held: the PRC has not filed an Article 93 declaration thus the CISG applies to HKSAR pursuant to Article 93(4)

# Conflicting American Cases

- *Innotex Precision Limited v. Horei Image Products, Inc., et al.* (2009) U.S. District Court, Northern District of Georgia, Atlanta Division [federal court of 1st instance]
  - Seller (HK) / Buyer (USA)
  - Held: the CISG does not apply to HKSAR because Hong Kong is not a Contracting State and that conclusion is consistent with the position held by the Chinese government, the Hong Kong Department of Justice, the Supreme Court of France, and numerous commentators
- *Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd* (2009-2010) U.S. District Court, Eastern District of Arkansas, Western Division [a federal court of 1st instance]
  - Seller (US) / Buyer (HK)
  - Held (23 December 2009): Because the language of Article 93 of the CISG is clear and unambiguous, the Court concludes that the CISG applies to the Hong Kong SAR.

# Conflicting American Case

- *America's Collectibles Network, Inc., v. Timlly (HK)* (2010), U.S. District Court, Eastern District of Tennessee [a federal court of 1st instance]
  - Held: the Court finds *Innotex* far more persuasive.
  - Based upon the 1997 Declaration, foreign case law, the Hong Kong Department of Justice's interpretation, and relevant scholarship, the Court finds that Hong Kong is not a Contracting State under the CISG

# C. Observations on the application of the CISG in International Commercial Arbitration

- Vietnamese courts v. Arbitration seated in Vietnam
  - Vietnam is a contracting state of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards
  - Vietnam has NOT adopted the UNCITRAL Model Law on International Commercial Arbitration
  - Vietnam International Arbitration Centre Rules of arbitration
    - Article 22. Applicable law
      - 1. For disputes without a foreign element, the Arbitral Tribunal shall apply the law of Vietnam.
      - 2. For disputes with a foreign element, the Arbitral Tribunal shall apply **the law** agreed by the parties; if the parties do not have any agreement on the applicable law, the Arbitral Tribunal shall determine **the law** it considers the most appropriate.
      - 3. If the law of Vietnam, the law agreed by the parties or the law determined by the Arbitral Tribunal does not contain specific provisions relevant to the merits of the dispute, the Arbitral Tribunal may apply appropriate **trade usages** to resolve the dispute.

# The Application of the CISG under the HKIAC

## 2013 Administered Arbitration Rules

- Hong Kong courts v. Arbitration seated in Hong Kong
  - The New York Convention applies to Hong Kong SAR
  - Hong Kong SAR has adopted the UNCITRAL Model Law on International Commercial Arbitration
  - The HKIAC 2013 Administered Arbitration Rules
    - **Article 35 – Applicable Law, Amiable Compositeur**
    - 35.1 The arbitral tribunal shall decide the substance of the dispute in accordance with **the rules of law** agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply **the rules of law** which it determines to be appropriate.
    - 35.2 The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly agreed that the arbitral tribunal should do so.
    - 35.3 In all cases, the arbitral tribunal shall decide the case in accordance with the terms of the relevant contract(s) and may take into account the **usages of the trade** applicable to the transaction(s).



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