

The Application of the CISG in Chinese Arbitration

--- Special Report on CISG@40 Celebration Conference

Wang Chengjie, Vice Chairman and Secretary General of CIETAC

(25 June 2021, Beijing)

Distinguished Secretary Anna Joubin-bret,
Distinguished Vice Chairman Lu Pengqi,
Distinguished Ambassador Palitha Kohona,
Distinguished Director Li Yongjie,

Dear guests,

Ladies and gentlemen, dear friends,

Good morning!

It is my great honor to gather in Beijing with experts and colleagues from all walks of life, and meet friends from all over the world through the Internet to commemorate the 40th anniversary of the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG). On behalf of China International Economic and Trade Arbitration Commission (CIETAC), I would like to extend my heartfelt thanks to all of you.

As pointed out by Secretary Anna and Vice Chairman Lu Pengqi in their speeches, the CISG formulated by the United Nations Commission on International Trade Law (UNCITRAL) has aimed to build a modern, uniformed and fair system for international sale of goods contracts ever since its adoption, in order to improve the legal certainty and reduce transaction cost. After 40 years of development, the CISG has become one of the core conventions of international commercial law and has achieved great success worldwide.

In 1986, China submitted its ratification for the official accession to the CISG to the Secretary-General of the United Nations, which has entered into force in China since 1988.

On the one hand, the CISG has become a legal basis that can be directly applied by Chinese courts and arbitration institutions. Over the past 30 years, China has changed from a major trading country to a trade power. A large number of disputes related to international trade have benefited from the CISG and have been fairly and reasonably resolved. On the other hand, the CISG has had a far-reaching impact on the development of China's market economy and contract law. At the same time, China's extensive application and research of the CISG has also accumulated rich experience for the further development of the CISG. As one of the first group of contracting states where the CISG entered into force, China's interpretation and application of the CISG have attracted much attention in the world.

As an important part of the dispute settlement mechanism, commercial arbitration takes contractuality as its core and has a high degree of professionalism and flexibility. This has a natural harmonious connection with the CISG, which also takes the party autonomy as its cornerstone and is characterized by neutrality and balance. While the UNCITRAL is committed to promoting the uniform law on the international sale of goods dominated by the CISG, it has always attached great importance to promoting international commercial arbitration as an important way to resolve international commercial disputes. The CISG is frequently applied in international commercial arbitration, and there is a close relationship between the development of arbitration and the application of the CISG.

Commercial arbitration in China started in 1956 when CIETAC was established. After 65 years of development, commercial arbitration in China is showing a trend of growing scale and accelerating pace of internationalization. Nowadays, the number of cases using arbitration to resolve civil and commercial disputes in China has been among the highest in the world. In 2020 alone, China's 259 arbitration institutions handled about 400,000 cases, with a total disputed amount of approximately RMB 720 billion. In 2020, CIETAC accepted 3,615 cases, with the disputed amount reaching RMB112.1 billion, 508 of which were sale of goods disputes, accounting for 14% of its caseload.

As the most long-standing permanent international arbitration institution in China, CIETAC has unique advantages and rich experience in the field of foreign-related arbitration. The internationalism, professionalism and independence of its arbitrators and awards are widely recognized at home

and abroad. CIETAC is not only a witness to the global development of the CISG, but also a practitioner to promote the application of the CISG in China. Most arbitration cases in China to which the CISG applied are managed by CIETAC.

As early as 1988, the year when the CISG entered into force in China, CIETAC began to arbitrate CISG-related cases. Since 1988, CIETAC has concluded hundreds of cases concerning the application of the CISG. Because of its valuable practice and strong representativeness for the study of the application of the CISG, CIETAC has been actively reporting the case law to the UNCITRAL for a long time, and is the only Chinese arbitration institution that provides cases to the CISG database of the Pace University.

The CISG database have included 224 CIETAC awards rendered from 1988 to 2001 concerning the CISG. From 2002 to 2020, there were 553 awards relating to the CISG according to the database of CIETAC. Over the past 30 years, CIETAC has accumulated significant practical experience in the application and interpretation of the CISG, which also contributed to the development of the CISG.

From our long-term experience in case management, we noticed that the arbitral tribunals in CIETAC arbitrations have encountered the following key issues in hearing the cases involving the CISG. I hereby report to you for further discussion:

The first issue is the application of the CISG. First of all, the principle of automatic application of the CISG has been upheld and implemented in CIETAC awards. According to incomplete statistics, more than 90% of cases involving the application of the CISG automatically applied the CISG in accordance with the “place of business” criteria provided in article 1 (1) (a) of the CISG. Secondly, when the parties agreed to apply the Chinese law, the vast majority of arbitral tribunals also gave priority to the application of the CISG in accordance with Article 142 of China’s General Principles of Civil Law, reflecting China's respect for the legislative and judicial spirit of international treaties, achieving a wider application of the CISG in practice. Thirdly, when the CISG is not the applicable law of a dispute, the arbitral tribunals may also make reference to the provisions of the CISG according to the specific circumstances of the case. Article 49 of the CIETAC Arbitration Rules (2015) clearly provides a basis for this practice, which stipulates that the arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with

reference to international practices. Finally, CIETAC's practice also fully reflects the respect for party autonomy. The parties' agreements on the application, exclusion or partial exclusion of the application of the CISG have been well and properly reflected in the awards. This coincides with Secretary Anna's summary of the spirit of the CISG in her speech.

The second issue is the validity of the contract. As an internationally unified contract law, the CISG does not clearly stipulate on the validity of the contract. In CIETAC's practice, the arbitral tribunals usually determine the applicable law based on the principle of the "closest connection" in private international law, and combined with the true intention of both parties, the process of the conclusion of the contract, and whether it violates the mandatory law and other elements, to determine and explain the validity of the contract. This practice better embodies the spirit of contract, adapts to China's judicial review, and improves the enforceability of the awards.

The third issue is the performance of the contract. Whether there is a fundamental breach of contract in the performance is a frequent issue in cases under the CISG. Basically speaking, CIEATC arbitral tribunals have accurate understanding and grasping of the concept of "fundamental breach of contract", and have well addressed the issues caused by the termination of the contract and its consequences. At the same time, through the general principle of damages established in Article 74 of the CISG, the calculation of loss based on the price difference of substitute transaction and market price provided by articles 75 and 76 respectively, and the derogation obligations stipulated in Article 77, the issue of damages caused by improper performance of the contract was dealt with by CIETAC tribunals fairly and properly. The elaboration on the compensation system of the CISG by the CIETAC arbitral tribunals is basically consistent with the 2016 UNCITRAL Digest of Case Law on the CISG.

The fourth issue relates to electronic data. The CISG is very open as to the form of a contract. In CIETAC's arbitration practice, the arbitral tribunals have taken note that the parties now extensively use electronic methods such as e-mails and WeChat in the negotiation and conclusion of contracts, and have generally respected the commercial practice of negotiating contracts and preserving evidence by means of electronic data exchange such as e-mails, online chat records, mobile phone text messages, WeChat, electronic signatures and domain names in the awards.

As for the authenticity of electronic evidence, the arbitral tribunals usually consider factors such as the identity of the sender, the reliability of the

source and the integrity of electronic data, and decide whether to accept it or not after considering the facts of the case and other related evidence. When it comes to this issue, as Secretary Anna mentioned, the vigorous development of the digital economy is bound to bring great changes to a series of issues, such as the form and type of electronic transactions, the conclusion and performance of contracts, the determination of evidence, the way of hearing, and so on. We need to carefully consider how to use the CISG to better solve these new problems. Of course, in today's conference, we will dedicate a session to discuss this issue, and I look forward to the experts' wonderful speeches.

Dear friends and colleagues!

There is a saying of Confucius in China: "Forty without perplexity". The general understanding is that at the age of 40, people have a more accurate grasp of the appearance and development of themselves and life, and gain a more comprehensive understanding of the laws of nature and society. In my opinion, this saying also expresses the desire and spirit of exploring and learning, and this is also the spirit that the CISG has been carrying on its way to establish a better international economic and trade order.

In the same spirit, in 2013, CIETAC entrusted the Law School of Tsinghua University to conduct a study on the application of the CISG in China's international commercial arbitration. On the occasion of the 40th anniversary of the adoption of the CISG, we have once again set up a research group with the Law School of the University of International Business and Economics to conduct a comprehensive study on the application of the CISG in China, and the research result can be found in the newly-published book on "the Application of the CISG in Chinese Arbitration" with a length of 500,000 Chinese characters.

In the future, CIETAC will continue to uphold and carry forward the international spirit of promoting legal integration and unification as well as extensive cooperation and exchanges, and carry out the relevant work related to the CISG in the following aspects:

Firstly, we will further improve the level of applying the CISG in arbitrations. On the one hand, with regard to the common issues in the arbitration cases involving the CISG, we will strengthen the training of arbitrators so as to deepen their understanding of the CISG. On the other hand, we will pay attention to the legal issues related to the import and export of related products caused by the COVID-19 pandemic, pay more attention to the new situation and development of industrial changes

brought about by the digital economy, and raise awareness of the frontier issues of the green economy such as carbon neutrality, so as to properly respond to the relevant application of the CISG in advance and maintain the healthy and steady development of the international economic order.

Secondly, we will further explore the transparency and sharing of relevant jurisprudence of the CISG. At present, the study of relevant precedents and awards is not only an effective way to promote the CISG, but also a strong call for the internationalization of arbitration. CIETAC will carry out useful exploration, trying to share typical cases and abstracts of awards by means of digital library. While adhering to the confidentiality principle of arbitration, we would also like to contribute to the transparency of arbitration and the consistency of awards at the same time.

Thirdly, we will further promote the wide application of the CISG. As Secretary Anna said, in the Belt and Road construction, there is obvious opportunity to further expand the members of the CISG. CIETAC has always been actively involved in the Belt and Road construction. In 2019, CIETAC launched an initiative and reached the "Beijing Joint Declaration of Belt and Road Arbitration Institutions" with more than 40 domestic and foreign arbitration institutions. In the future, CIETAC will also make full use of this platform to cooperate and promote the further development and application of the CISG in countries and regions along the Belt and Road.

Dear friends and colleagues!

Over the past 40 years, the CISG has existed beyond a substantive law, and it represents the hope that mankind will be closely connected and face tomorrow hand in hand. CIETAC is willing to jointly work with people from all walks of life in the world, forge ahead, jointly promote the improvement of the CISG and the progress of international arbitration, break down the remaining barriers of the international economic and trade system, and make joint efforts to realize the stability, prosperity and development of mankind.

Thank you!