

Symposium: the Application and Interpretation of the CISG in
Member States with Emphasis on Litigation and Arbitration in the
P. R. CHINA

Celebrating and Researching the CISG
—Progress in the Rule of Law in the PRC*

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The Pace Institute of International Commercial Law has sought to identify and share with the world trade community as much information as we can obtain on court and arbitral interpretations of case law on the CISG from China and from other countries of the world on our Internet database <<http://cisgw3.law.pace.edu>>.

The reason for this sharing is to enable the establishment of an autonomous body of CISG case law. The database allows practitioners, arbitrators, jurists and scholars:

- To find and understand the all-important cases from around the world.
- To use the CISG as uniform law free from any one legal system, to enable it to be applied more uniformly.

These cases are the key to the practical application of the CISG. By influencing each other, the cases are also the key to autonomous development of the interpretation of the CISG. China is influential in this development.

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Case Law from China and Other Countries

China is a hugely important contributor to the collective body of international CISG case law and thus plays a very important role in interpreting key provisions of the uniform law. I submit as an example a case annotation of the most important remedy under the CISG, Damages.

—Article 74 contains the CISG's general rules on damages.

—The CISG database reports 634 Article 74 cases worldwide.

—China is the largest contributor to this case law; we report 173 arbitral and court awards from China that deal with CISG Article 74.

With China accounting for such a high proportion of the world total, Chinese jurisprudence can exert an important influence. To illustrate: In a recent New York American Arbitration Association proceeding, I cited thirty-six damages cases as precedents that support the buyer's position. The cases I cited are from:

—United States, Australia, Austria, France and Switzerland (one case each);

—Germany and the ICC (four cases each); and

—Twenty-three arbitral awards from China.

Jurisprudence from China is important. Chinese scholarship is also important. As an example, in my New York proceeding, the arbitrator's award contains extensive citations to treatises by Chengwei Liu, an author from Beijing—one of the speakers at today's seminar. My proceeding involved a dispute between European and American parties in which the New York arbitrator cites this Beijing author six times in his opinion.

Arbitral Awards vs. Court Decisions

Of the 172 Chinese Article 74 cases on damages that we report on our Internet database, 160 are arbitral awards, and 12 are court decisions. This suggests that, in China, international sales disputes are resolved more frequently by arbitration than by the courts. That is not surprising since worldwide, the typical negotiated international sales

contract contains an arbitration clause. ①

The History of Arbitration in China

“With its roots in Confucian philosophy, mediation” is said to have “been used for thousands of years to resolve disputes in China”②. Arbitration in China is of more recent vintage. ③

— “China formally adopted ‘arbitration’ in the early twentieth century as Western-style ‘arbitration’ was introduced into the country...”

— “The first formal arbitration system for resolving commercial disputes with foreign parties was set up shortly after P. R. China was established.”

— “That system has ultimately evolved into the China International Economic and Trade Arbitration Commission (‘CIETAC’). ...CIETAC is one of the world’s busiest arbitration forums.”④

—And China has emerged as “the world’s largest arbitration forum”⑤. “Subsequent to the Arbitration Law in 1994, more than 140...arbitral centers have been established...

① See Joseph T. McLaughlin, Kathleen M. Scanlon & Catherine X. Pan, *Planning for Commercial Dispute Resolution in Mainland China*, *American Review of International Arbitration*, Vol. 16, 2005, pp. 140-141 for a listing of special advantages of arbitration over litigation in commercial disputes between Chinese companies and foreign parties.

② Fiona D’Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People’s Republic of China*, *Fordham International Law Journal*, Vol. 30, 2007, p. 1319.

③ “Prior to the post-Mao economic reforms, little arbitration took place in China. ...The beginnings of modern Chinese arbitration can be traced to 1912, immediately after the end of the Qing Dynasty. However most of the modern system developed after 1978. Prior to that time, China conducted little foreign trade, and international arbitration was neither necessary nor important to the economy or politics of China.” Benjamin O. Kostrzewa, *China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?*, *Pacific Rim Law & Policy Journal*, Vol. 15, 2006, pp. 522-523.

④ Benjamin O. Kostrzewa, *China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?*, *Pacific Rim Law & Policy Journal*, Vol. 15, 2006, pp. 522-523; Fiona D’Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People’s Republic of China*, *Fordham International Law Journal*, Vol. 30, 2007, pp. 1320-1321.

⑤ Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, *University of Dayton Law Review*, Vol. 31, 2006, p. 423.

throughout the country. Most foreign parties ... arbitrate in China still choose CIETAC ... although the Beijing Arbitration Commission is also attracting attention for its ethical practices." ①

The successful growth acceptance of arbitration in China can partly be attributed to a distinguished member of our audience today. *

—Professor Tang Houzhi has devoted much of his professional career to the planting of the trees of arbitration in China.

—In recognition, the King of Sweden has presented him with his country's medal of honor.

As a member of an academic institution, I am not empowered to award such medals. Books, however, go hand-in-hand with academic institutions and I am empowered to award a book to Professor Tang. I do so now.

Professor Tang, I award you the book, *The Man Who Planted Trees*. ② This is a book that tells the story of an extraordinary individual whose tireless efforts revitalize his community. It teaches us about hope, humanity, and our ability to better the world we live in.

Case Law Reporting

The typical arbitral institute does not report or rarely reports its awards. CIETAC takes a different approach and, in so doing, has become a world leader in transparency of awards—particularly in uniform international sales law, the subject of our seminar. CIETAC has shared with the world trade community the full texts of more uniform international sales law awards than any other arbitral institute of any country. ③

The Institute of International Commercial Law of the Pace University School of Law has set in place an arbitration case translation project. In honor of a preeminent planter of

① Fiona D'Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, Fordham International Law Journal, Vol. 30, 2007, pp. 1321-1322.

② Jean Giono, *The Man Who Planted Trees*, twentieth anniversary edition, Chelsea Green Publishing Company, White River Junction, 2005.

③ In keeping with the principle of confidentiality that is a basic feature of commercial arbitration, all of the awards that CIETAC has published have been redacted to avoid identification of parties, etc.

the trees of arbitration in China, we name this project.

The Professor Tang Houzhi Program

To earn the seal of this program, each translation of a CISG award must be processed through three iterations:

- The translator's text;
- A review by a person fluent in English and the CISG; and
- A final edit by a person fluent in English and Chinese, and knowledgeable in the CISG.

To date, we report over 200 uniform law arbitration case translations that have earned the seal of the Professor Tang Houzhi Program.

The Importance of Case Law Reporting

The importance of case law reporting is:

- It “helps promote rigorous legal reasoning and standards of legal interpretation.”
- It “serves as a useful guide for judges [and arbitrators] to encourage consistency and ... predictability.”^①

In the common law world, Sir Edward Coke highlighted the importance of case law reporting, stating:

“The reporting of particular Cases or Examples is the most perspicuous course of teaching the right rule and reason of the law.”^②

China recognized the importance of case law reporting at an earlier date.

The *Collected Models of Clarity and Lucidity* was published in China with a preface that dates back to 1261. *Clarity and Lucidity* is a casebook that reproduces the texts of decisions. It is said to provide “unparalleled insight into how contract law was understood ...”^③

① Fiona D'Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, *Fordham International Law Journal*, Vol. 30, 2007, pp. 1350-1351.

② Reported in Bernadette Meyler, *Towards a Common Law Originalism*, *Stanford Law Review*, Vol. 59, 2006, pp. 551, 588.

③ Valerie Hansen, *Negotiating Daily Life in Traditional China: How Ordinary People Used Contracts* 600-1400, Yale University Press, 1995, pp. 95-96.

The Rule of Law in China

In China, the rule of law has gone through different periods.

"In 618 ... the first Tang Emperor established a dynasty that was to rule China for the next three centuries. The Tang was a time of extensive contact with the foreign peoples who traveled along the Silk Road from India and Central Asia. ... One of the lasting accomplishments ... was The Tang Code, promulgated in 653 ... It contains a clear statement of how things should be according to Confucian principles."^① The Tang Code had a long lasting influence on the rule of law in China, and it was emulated by trading partners of China.^②

Subsequently, "Portuguese merchants and Spanish missionaries ... noted in the latter half of the sixteenth century that the Chinese judges were much better and fairer than their European counterparts. Over time, the depiction evolved so that by the mid-eighteenth century, Chinese justice was understood as a product of the Son of Heaven guided by Confucian morals"^③.

However, analysts have regarded the Planed-economic era after the proclamation of the People's Republic of China as "less conducive to the establishment of a modern form of rule of law"^④.

A period of reform was initiated in the late 1970s. It has continued.^⑤

① Valerie Hansen, *Negotiating Daily Life in Traditional China: How Ordinary People Used Contracts 600-1400*, Yale University Press, 1995, p. 17.

② Limin Wong, *The Tang Code and the Early Social Development of the Tang Dynasty*, *US-China Law Review* Vol. 2, No. 7, 2005.

③ Jonas Grimhalden, *The Reform Path of the Chinese Judiciary: Progress or Stand-Still?*, *Fordham International Law Journal*, Vol. 30, 2007, pp. 1003-1004.

④ Jonas Grimhalden, *The Reform Path of the Chinese Judiciary: Progress or Stand-Still?*, *Fordham International Law Journal*, Vol. 30, 2007, p. 1006.

⑤ Jonas Grimhalden, *The Reform Path of the Chinese Judiciary: Progress or Stand-Still?*, *Fordham International Law Journal*, Vol. 30, 2007, p. 1006. See also Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, *University of Dayton Law Review*, Vol. 31, 2006, pp. 421-422 ("The role of law ... has ... expanded significantly since the end of the Cultural Revolution in the late 1970s. ... Many legal norms have been codified and publicized ... The establishment of arbitration law and development of a more robust legal system supporting domestic and international arbitration in China is an important aspect of these changes in the legal and economic systems.").

The reform is a work in progress. ① One still encounters expressions of the need for further implementation of the rule of law in China and more transparency. However, there can be no dispute that in the field of law that we address in today's seminar, there has been dramatic progress in the PRC in both the rule of law and transparency of awards.

And we predict much further progress thanks to ongoing sharing of awards with the world trade community by CIETAC and a Wuhan Law School innovation:

—A CISG-China Internet database that will make an abundance of case law and commentary on uniform international sales law in the PRC and globally freely and readily available to Chinese traders and persons who trade with China.

The Wuhan database material is available in Chinese and in English. It will be a great boon to all who research the CISG. The free availability on this site of the complete text of a new 2007 Chinese edition of an 825-page case law annotated treatise on the CISG by Chengwei Liu will be an added dividend.

I Have a Vision

An honored American has said, "I have a vision". I also have a vision.

The People's Republic of China has demonstrated that it is well on the road to world leadership in volume of case law on uniform international sales law.

I have a vision of a PRC whose case law is also cited by scholars of all countries as a model for all arbitrators and judges to emulate.

Is this realistic? Absolutely! —particularly considering the rapidity and extent to which China has absorbed the concept of uniform international sales law under the United Nations Uniform International Sales Law. ② China is already a world leader in this respect. My expanded vision can become a reality thanks to:

—The presence in China of persons of the caliber of Professor Tang, the support provided by organizations such as CIETAC and the Wuhan University School of Law, and

① Support for such progress comes from many quarters. See, e.g., the statement by Alan Greenspan that "short of a few ambiguous incidents, I can think of no circumstances where the expanded rule of law and enhanced property rights failed to increase material prosperity", in his newest text, *The Age of Turbulence: Adventures in a New World*, Penguin Press, 2007, p. 16.

② See Yang Fan, *The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice*, available at <http://cisgw3.law.pace.edu/cisg/bibliography/yang2.html>, last visited December 1, 2007.

the fact that:

—We are at the dawning of The Information Age; every attorney and arbitrator and jurist of China has access to a computer.

—And there is an abundance of helpful uniform-law information freely and readily available to all on the Internet.

China has an ancient tradition of respect for precedent. The precedents that are freely and readily available on the Internet;

—Can help all counsel improve the caliber of their service to clients.

—Can help all arbitrators and judges stand on the shoulders of giants of China and of other countries.

—By considering commentaries and awards of others in their recommendations to clients and in their rulings on the disputes they are called upon to resolve.

From the CISC-China website of the Wuhan University School of Law and the Pace website, which are linked together, you can draw upon:

—Giants of China: in a bibliography of over forty pages of citations to commentaries on uniform international sales law in Mandarin Chinese and the texts of hundreds of uniform international sales law decisions of arbitrators and judges of China; and

—Giants of all countries: in a bibliography of over 8,000 citations, in archives of over 1,000 texts of commentaries, monographs and books on uniform international sales law, in over 2,000 rulings by arbitrators and judges of over 30 countries.

The spirit of the Collected Models of Clarity and Lucidity of ancient China lives on in today's Information Age. "Divided topically, the book was easily consulted by anyone who had to write a decision on a related issue."^① So too it is with the Information Age material on uniform international sales law that you have at your disposal today. And it comes to you with the added enrichment of computer search engines.

The Proper Setting for Uniform International Sales Law

A global jurisconsultorium, or a comity of nations, is the proper setting for uniform

^① Valerie Hansen, *Negotiating Daily Life in Traditional China: How Ordinary People Used Contracts* 600-1400, Yale University Press, 1995, p. 96.

international sales law. ①

I have a vision of China in a global consultiorium of prominent nations,
—each showing respect for one another, in concert with one another;
—while striving to improve trade in its own country and with others.
Share this vision with me. Make it your vision as well ...

① For elaboration on this theme, see Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, *Journal of Law and Commerce*, Vol. 24, 2005, pp. 159-179.