

Published in *International Uniform Law in Practice* [ISBN 0-379-20972-1], Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (UNIDROIT), Rome, 7-10 September 1987 at pages 399-410. Reproduced with the permission of Oxford University Press, Inc.

## THE EXPERIENCE OF ECONOMIC OPERATORS FROM DEVELOPING COUNTRIES: UNIFORM LAW AND THE CHINESE FOREIGN ECONOMIC AND TRADE CORPORATIONS

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In this report, Uniform law is to be taken as referring to that in the area of international trade. It should moreover be understood in a broad sense, including international conventions and similar international instruments, international usages, general conditions for the delivery of goods and standard form contracts and standard contract provisions, etc. In this connection I would pay tribute to the distinguished contribution to the establishment and existence of uniform law in the field of international trade which has been made by Unidroit over the years.

### I. INTRODUCTION

China has since 1979 adopted a policy of opening to the outside world and of stimulating the home economy. China's foreign economic relations and trade are developing vigorously in a correct manner, and the value of its two-way trade for 1986 amounted to 59,756 billion U.S. dollars, an increase of 103% over that of 1979, which was 29,333 billion U.S. dollars. In addition, China has developed its economic relations with other countries in various ways such as joint ventures, cooperative operation, cooperative production, the establishment of wholly foreign owned enterprises in China, counter-trade, material processing, international leasing, cooperative exploration and exploitation of natural resources and project contracting, and has achieved highly satisfactory results.

China has, at the same time, speeded up the implementation of legislation in respect of foreign economic relations and trade. Since 1979, China has, according to my calculations, published 253 laws, regulations and rules governing or related to foreign economic relations and trade. Most important among these are the General Principles of Civil Law of the People's Republic of China, the Law on Chinese-Foreign Joint Ventures of the People's Republic of China, the Patent Law of the People's Republic of China, the Trademark Law of the People's Republic of China, the Law on Wholly Foreign Owned Enterprises of the People's Republic of China, the Customs Law of the People's Republic of China, the Rules for the Inspection of Imports and Exports of the People's Repub-

lic of China, etc. China is thus taking important steps towards the completion of its legal system.

While completing its national legislation, China has been active in becoming a Contracting Party to many international conventions by way of approval, ratification, accession, acceptance and recognition. Up to now, China has become a party to some 145 international conventions in various areas (public law and private law), including the United Nations Convention on Contracts for the International Sale of Goods, 1980; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958; the Convention for the Protection of Industrial Property, 1883; the Convention for the Unification of Certain Rules relating to International Carriage by Air, 1929 and the Protocols relating to its amendment; the Convention on International Civil Aviation, 1944; the International Load Line Convention, 1966; the International Convention on Civil Liability for Oil Pollution Damage, 1969; the Convention on a Code of Conduct for Liner Conferences, 1974; the International Convention for Safe Containers, 1972; the International Regulations for preventing Collisions at Sea, 1972, etc. At the same time, China has joined more and more international organisations and participates in their efforts towards the establishment of uniform laws such as the Convention on Agency in the International Sale of Goods and the Convention on the Law Applicable to Contracts for the International Sale of Goods. The fact that China has taken an active part in activities sponsored by Unidroit in recent years and has become a member of that organisation is a good example in this respect.

Since its founding, the People's Republic of China has concluded bilateral economic and trade treaties and agreements with 103 countries (including trade treaties, treaties of trade and navigation, trade agreements, payment agreements, trade and payment agreements and protocols on general conditions for delivery of goods), agreements concerning the encouragement and reciprocal protection of investment with eighteen countries and agreements relating to the avoidance of double taxation with sixteen countries. These bilateral treaties and agreements contain substantive rules governing trade and other foreign civil legal relations. A few of them also contain conflicts rules and procedural rules in the event of litigation.

China endorses the principles of "respecting national sovereignty" and "equality and mutual benefit" when framing its foreign economic laws and when concluding or becoming a Party to international treaties. These are also the basic principles to be respected by Chinese corporations in their foreign economic and trade activities. I am glad to see that these principles have been incorporated in a number of recently adopted international conventions and legal instruments. For example, the United Nations Convention on Contracts for the International Sale of Goods which has expressly incorporated the principles of "the establish-

ment of a new economic order", "the development of international trade on the basis of equality and mutual benefit" and "taking into account the different social, economic and legal systems". In the view of the Chinese foreign economic and trade corporations, these are the basic principles to be respected in the elaboration, interpretation and application of uniform law. If these principles are followed, uniform law could be acceptable to more countries, especially the developing countries, contribute to the removal of legal barriers in international trade and promote the development of international trade.

## II. THE ATTITUDE OF CHINA TOWARDS THE UNIFICATION OF LAW

China welcomes, supports and actively participates in the establishment of uniform laws in the field of international trade and appreciates the efforts deployed by the relevant international organisations in this respect. The general attitude of the Chinese economic and trade corporations is in conformity with that taken by the Chinese delegations on relevant international occasions. In fact, they participate in discussions on the establishment of uniform laws in the area of international trade in different ways. On some occasions, when authorised by the Chinese Government, they participate in international conferences as experts or delegations, while on others they participate in international conferences as members of the Chinese delegation. Sometimes, they do not themselves participate in an international conference but their opinions and interests are fully considered by the Chinese delegation. It can be said that the speeches or interventions made by Chinese delegations on relevant international occasions have fully taken into account and reflected the opinions of Chinese economic circles. What is necessary to mention in particular is that the economic circles are consulted or heard in different ways in the course of the legislative procedures which will decide whether China will become a Party to international economic or trade conventions.

The attitude of China towards uniform law in the field of international trade is guided by the following considerations:

(1) The existence of different legal systems worldwide and the difficulty of determining the applicable law in the event of conflicts of law leads China to the strong conviction that it is necessary to establish uniform laws. It has often been the case that the parties have lost the opportunity to conclude a contract because of the lack of understanding of each other's law and similarly that lack of understanding of each other's law has led to difficulties in the performance of the contract, even resulting in disputes. Uniform law contributes to the removal of such problems and thus to the development of international economic relations and trade.

(2) The system of international trade is an important part of the international economic order. The existing international trade system is, to a certain extent, based on the old international economic order which was shaped at a time when most developing countries were weak politically and economically, some of them still even under the domination of the great powers, and they were only with difficulty able to meet the need to develop their international trade in the modern world. The elaboration of new uniform laws in conformity with the spirit of the establishment of the new international economic order will assist not only the development of international trade but also that of mutual understanding between nations and friendship between peoples.

(3) China will retain for a long time the policy of opening to foreign countries and will steadily expand and develop economic relations, trade and technological exchange and cooperation with other countries on the basis of equality and mutual benefit. China's open policy is geared to countries all over the world, capitalist and socialist countries, developed and developing countries alike. It can be said that China's open policy and independent and peaceful foreign policies encourage the unification of international trade law.

(4) Most foreign economic and trade corporations from the developing countries are of small or medium size and practically speaking it is difficult for them to be familiar with all of the different legal systems. Uniform law could alleviate difficulties in this respect, while at the same time it is evident that uniform laws could help to alleviate the language problem.

It is necessary to make a further point here, namely that the major difficulties in the preparation of uniform laws do not come from the developing countries. On many occasions, we have witnessed a fierce struggle between the two major legal systems. On many occasions, we have also witnessed the joint efforts made by the developed countries to preserve the traditional legal system and situation against the developing countries. It is the experience of the Chinese foreign economic and trade corporations that small and medium sized corporations from the developing countries are often, for various reasons, in an unfavourable position from the legal standpoint in international trade and it can be stated that companies from a developing country such as China have a stronger desire for the establishment of uniform law conforming to the principle of the establishment of the new international economic order and conducive to the development of international trade.

### III. THE ROLE OF UNIFORM LAW IN THE ACTIVITIES OF THE CHINESE FOREIGN ECONOMIC AND TRADE CORPORATIONS

It is natural in international trade that each of the parties seeks to obtain more favourable terms and conditions in the contract, including those relating

to the applicable law. Nevertheless, given that China adheres to the principles of sovereignty and equality and mutual benefit in its legislation, that Chinese foreign economic and trade corporations implement the foreign trade policy of equality and mutual benefit and that China's legal system is not yet complete, uniform law plays a very important role in the activities of Chinese foreign economic and trade corporations.

(a) Conventions and other international instruments

It is well known that China respects its international obligations. This can also be seen in Chinese law. The General Principles of the Civil Law of the People's Republic of China provide: "Where an international treaty that the People's Republic of China has concluded or participates in contains a provision which differs from the civil law of the People's Republic of China, the provision in the international treaty applies, except for an article to which the People's Republic of China has declared a reservation." The Law on Civil Procedure of the People's Republic of China (for Trial Implementation) provides: "When an international treaty which the People's Republic of China has signed or participates in contains provisions different from those found in this Law, the provisions of such international treaty shall apply, except for those provisions with respect to which China has announced its reservation." The Law on Foreign Economic Contracts of the People's Republic of China provides: "In the event of conflict between an international treaty concluded by the People's Republic of China or in which the People's Republic of China participates which relates to the contract and the law of the People's Republic of China, the international treaty shall be applicable, except for those provisions with respect to which China has declared a reservation."

It is my understanding that all these provisions are general provisions which turn international laws into domestic laws. These provisions show that: (1) an international treaty concluded by China or to which China has become a Contracting Party constitutes part of China's national law and has the effect of national law; (2) an international treaty has priority over national law, i.e. in the event of there being provisions in the civil law of the People's Republic of China which are incompatible with those of an international treaty concluded by China or to which China has become a Contracting Party, the international treaty will be applicable, except for those provisions in respect of which China has made reservations.

In some cases moreover China introduces international treaties into national law by national legislation, *viz.*, when China is formulating its national law, it takes into consideration the international obligations undertaken by it and brings national law into conformity with the provisions of the relevant international convention. For example, in the statement to the Standing Committee of the

National People's Congress on the draft Regulations on Diplomatic Privileges and Immunities of the People's Republic of China, Mr Qian Qishen, Deputy Minister of Foreign Affairs, authorised by the State Council, indicated on 16 June, 1986: "The principles for the preparation of the Regulations are, firstly, compliance with the Vienna Convention on Diplomatic Relations, and, secondly, consideration of the actual condition of China and the relevant regulations of China. China is a State Party to the Vienna Convention. Therefore, the Regulations to be made by China should not be in contradiction with it. But, where there is no provision, or where the provision in the Convention is not explicit, the necessary addition is made in accordance with the actual conditions of China and with reference to the relevant laws and regulations of China so to make it more precise and explicit."

It will thus be seen that all treaties concluded by China or to which China becomes a Contracting Party have legal effects on the Chinese foreign economic and trade corporations in a particular area and manner. The Chinese foreign economic and trade corporations must respect, consult or take into consideration the relevant provisions of these treaties in their foreign economic and trade activities. In this sense, uniform laws have a direct impact on the activities of Chinese foreign economic and trade corporations.

When framing its own laws, China takes as its starting point the actual conditions in China and, at the same time, studies and uses foreign laws as a point of reference. The Chinese foreign economic and trade laws and regulations not only reflect the actual conditions in China but also incorporate legal rules widely adopted by other countries. For example, the General Principles of the Civil Law of the People's Republic of China provide: "Civil activities must be carried out in accordance with principles of voluntariness, fairness, exchange of equivalent values, honesty and good faith"; the Law on Foreign Economic Contracts of the People's Republic of China provides: "Contracts shall be based on the principles of equality and mutual benefit and consensus"; the same Law also provides: "The parties to a contract may choose the law applicable to the settlement of disputes arising out of the contract. Where the parties have made no choice, the law of the country to which the contract is most closely related shall be applicable." In this sense, some international conventions which have not come into force, or not come into force for China, also have some impact — indirect impact as I call it for the time being — on the activities of the Chinese foreign economic and trade corporations.

Another point should be mentioned, namely that some model laws and even draft conventions which are still under discussion exert an influence in Chinese economic circles which should not be overlooked. The Chinese legal system is not complete and the Chinese foreign economic and trade corporations are not fully familiar with many foreign legal systems. They need to learn from "ex-

perts” and consult “dictionaries”. Legal instruments such as those mentioned above may, on some occasions, fulfil the functions of “experts” and “dictionaries”. They have no legal effect, but are of significance as guides and of great value as points of reference. For example, in the area of carriage of goods by sea, China is not a Contracting Party to the Hague Rules of 1924, but taking into consideration the actual situation of ocean transportation and proceeding from the principle of equality and mutual benefit, China has, in practice, adopted the provisions of the Hague Rules governing the rights and obligations of the parties. The standard bills of lading adopted by the China Ocean Shipping Company and the China National Foreign Trade Transportation Corporation incorporate the “Paramount Clause”, providing that the rights and obligations of the carrier and consignor shall be governed by the Hague Rules. In the area of international trade payments, China has not become a Contracting Party to either the 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes or to the Convention for the Settlement of certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes; nor has it enacted any law in this respect. In practice, however, the Chinese foreign economic and trade corporations refer to practices and rules which are widely adopted in international payments, including the relevant provisions of the above-mentioned Geneva Conventions.

In order to give a clearer picture of the application of law to Chinese foreign economic contracts, I would like to add some words here. According to Chinese law:

(1) the parties to a contract may choose the law to be applied to the settlement of disputes arising from the contract, which may be the law of China, the law of a foreign country, an international treaty or international usage;

(2) in the absence of choice by the parties, the court shall have discretion to decide the law applicable in accordance with the principle of the most close connection and in most cases:

(a) the law applicable to contracts for international sale of goods will be the law of the State where the seller has his place of business at the time of the conclusion of the contract, or the law of the State where the buyer has his place of business at the time of conclusion of the contract if negotiations were conducted and the contract concluded by and in the presence of the parties in that State, or the contract provides expressly that the seller must perform his obligation to deliver the goods in that State, or the contract was concluded on terms determined mainly by the buyer and in response to an invitation to bid (a call for tenders);

(b) the law applicable to insurance contracts shall be the law of the State where the insurer has his place of business;

(c) the law applicable to contracts for the transfer of technology shall be the law of the State where the recipient has his place of business;

(d) contracts for the construction of large projects shall be the law of the State where the construction takes place;

(e) the law applicable to an agency contract shall be the law of the State where the agent has his place of business;

(3) where the law of China or the international treaty concluded by China or to which China has become a Contracting Party is applicable and there is no relevant provision in them, international usages shall be applicable;

(4) the application of foreign law shall not violate the social public interest of China.

#### (b) International usages

The General Principles of the Civil Law of the People's Republic of China provide: "Where the law of the People's Republic of China or international treaties which the People's Republic of China has concluded or participates in do not contain a relevant provision, international usages may be applied". These provisions have clearly established the legal position of international usages under Chinese law.

As I understand the term "international usages" referred to here, it covers written as well as unwritten usages, practices which are widely used and respected in international trade and usages established between the parties.

In the conduct of their activities, Chinese foreign economic and trade corporations always comply with the law of China, respect international treaties concluded by China or to which China has become a Contracting Party and refer to international usages on the basis of national sovereignty and equality and mutual benefit.

Since China was in the past a Contracting Party to only a few international conventions in the area of international trade and since the Chinese foreign economic and trade legal system was far from being complete, international usages played for many years all the more important a role in the activities of the Chinese foreign economic and trade corporations. The situation has changed somewhat in recent years, but it is still one of the basic principles of Chinese economic and trade corporations that they refer to international usages in their activities.

The most frequently used trade terms in contracts signed between Chinese foreign economic and trade corporations and foreign companies for the international sale of goods are FOB, CIF and CAF. So far, China has not formulated or compiled its own rules for the interpretation of trade terms, the Chinese foreign economic and trade corporations referring to terms used in contracts signed by them to the rules of interpretation widely used in international trade such as

Incoterms or the rules established between the parties for the purpose of establishing the rights and obligations of the parties to the contract. The application of usages to the contractual relations between the parties may assist in avoiding the problem of determining the law applicable to the contract by the introduction of conflict rules, save time in the negotiation of the contract and permit experience gained in international trade to be put to better use and an easier determination of the rights and obligations of the parties to a transaction. Meanwhile, trade usages are of a voluntary nature, and therefore more flexible. For all these reasons, trade usages are widely employed in the international trade contracts signed by Chinese corporations.

As mentioned above, China is not a Contracting Party to the Hague Rules, although the relevant Chinese corporations rely on the Hague Rules for the determination of the rights and obligations of the parties as a generally accepted practice.

In the area of international trade payments, the Bank of China and the Chinese foreign economic and trade corporations have adopted or referred to the Uniform Customs and Practices for Documentary Credits. For example, some letters of credit issued by the Bank of China contain a clause to the effect that the credit is subject to the Uniform Customs and Practices for Documentary Credits (1983 Revision).

At present, there is no convention unifying the substantive law governing insurance matters in the international carriage of goods. In most cases, insurance for the international carriage of goods is governed by the national law of the country where the insurer has his place of business and many national laws permit the parties to choose the law applicable to the insurance contract. As yet, China has not promulgated a law on insurance in the international carriage of goods, although the People's Insurance Company of China has formulated its own clauses. The existing clauses are: the Ocean Marine Cargo Clauses of the People's Insurance Company of China, 1981, the Air Transportation Clauses of the People's Insurance Company of China, 1971 and the Overland Transportation Clauses of the People's Insurance Company of China, 1976. As to their content, these clauses are basically similar to the international usages which are widely employed. In addition, in the event of foreign trade partners requesting the use of the London Institute Cargo Clause, the People's Insurance Company of China may accept it on the merits of the case. To take another example, in the adjustment of general average the China Council for the Promotion of International Trade has taken over some reasonable rules from the York-Antwerp Rules in the Beijing Adjustment Rules which is has compiled. If, however, certain bills of lading stipulate that general average will be adjusted in accordance with the York-Antwerp Rules, the People's Insurance Company of China may accept them.

It may be seen from the foregoing that international usages occupy a prominent position in the activities of the Chinese foreign economic and trade corporations. However, owing to the fact that international usages exist in various areas, that the parties may understand them differently and that the legal position of international usages under national law may differ, problems can arise in their interpretation and application in the performance of the contract and when disputes are referred to the courts. It is the opinion of the Chinese foreign economic and trade corporations that it would be most desirable if there were to be conventions or agreements acceptable to the parties to the contract and applicable by the courts seized of the case.

(c) General conditions for delivery of goods

General conditions for delivery of goods (hereinafter referred to as general conditions) constitute another manner of unifying the law applicable to the international sale of goods. They may be classified in different groups, depending on the subject matter. Here, I would base my introduction on the general conditions concluded between States on the Chinese practice.

Since 1950, China has concluded general conditions in the form of bilateral treaties with the USSR, Poland, Czechoslovakia, the German Democratic Republic, Hungary, Romania, the Democratic People's Republic of Korea, Mongolia and Cuba, etc. Contracts for the sale of goods between foreign trade organisations of China and the countries mentioned above are still governed by the general conditions concluded by China with those countries.

Since the general conditions take the form of treaties concluded between States, they constitute rules of law, the contents of which mainly consist of substantive rules, of procedural rules for the settlement of disputes and of conflicts rules for the determination of the applicable law. In consequence:

(1) they are, by nature, different from general conditions compiled by international institutions. The latter are of a voluntary character which are effective together with the contract only when they are invoked by the parties and become part of the contract;

(2) the relationship between general conditions and a contract is one between a law and a contract, the former prevailing over the latter;

(3) the general conditions govern all kinds of contract within its scope of application and must be respected by the parties.

General conditions assist in the simplification of contracts, save time in their negotiation and are helpful in the performance of contracts and the settlement of disputes. They play an important role in bilateral trade relations between China and other countries.

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(d) Standard form contracts and standard contract provisions

Standard form contracts and standard contract provisions have been widely used by Chinese foreign economic and trade corporations. Take for example the international sale of goods. Most Chinese import and export corporations such as the China National Light Industrial Products Import and Export Corporation, the China National Cereals, Oils and Foodstuffs Import and Export Corporation and the China National Minerals and Metals Import and Export Corporation have compiled and printed their own standard form contracts or standard contract provisions. In most cases, the parties to a transaction focus their negotiations on special questions such as the description of the goods, quantity, price, time of delivery, etc. Once agreement is reached on these questions, the parties need only fill in the standard form contracts and leave other clauses of a general nature such as *force majeure*, settlement of disputes etc. unaltered. This contributes greatly to the saving of time in negotiating and typing the contract. Since these standard form contracts or standard contract provisions embody the principle of equality and mutual benefit adopted by the Chinese foreign economic and trade corporations, they are easily acceptable to the other party, especially those old trade partners who know the Chinese foreign economic and trade corporations. But it is necessary to point out that these standard form contracts or standard contract provisions only provide a basis for the negotiation of contracts between the parties. Revisions or additions may be made by the parties through negotiation. For example, there is no choice of law clause in most of the standard form contracts for the sale of goods. If the parties think it necessary, they may agree to the inclusion of a clause in the contract in this respect.

#### IV. CONCLUSIONS

When talking about uniform law, people tend to think of parliaments, lawyers and academics and that uniform law is their affair, to the exclusion of economic operators. As a matter of fact, economic operators are the most active and creative elements in the establishment and development of uniform law. Many legal problems frequently crop up in the context of international economic and trade activities to which the law provides no solution or to which it provides a solution only with difficulty. On the other hand, there are many legal problems

to which the economic circles have found satisfactory solutions and which have even been widely accepted in international economic and trade activities, although legal circles may still be in the process of studying or discussing them. It often happens that some rules of law or regulations have for a long time failed to correspond to the development of the international situation and of international trade and have been condemned or criticised by international economic circles, even though such rules or regulations are still in existence. The law is indeed a superstructure determined by the economic base and which must serve the economic base. It is therefore appropriate and indeed necessary to pay sufficient attention to the views, attitudes and experience of the economic circles in the discussion of "Uniform Law in Practice". I feel honoured to have had this opportunity to present my views on this occasion as a rapporteur from a developing country such as China, and would like to express my sincere thanks to Unidroit, as well as to you all.