

The Difficulties and Relief Ways of the Application of CISG in Chinese Courts under the Perspective of Choice of Law Agreement—Take Articles 1 and 6 as Examples

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Abstract: Based on the case analysis, there are controversies and misunderstandings in the application of Articles 1 and 6 of the CISG when Chinese courts hear disputes over the application of the law to disputes over international contracts for the sale of goods, especially in terms of the doubtful implied exclusion of the CISG, and the uncertainty of the order of the application of the CISG and the parties' consensual choices of law, which are urgently in need of consideration. Based on the scope of application of the treaty itself, the legal status of the CISG as a unified international substantive law, and China's obligations as a contracting party, Chinese courts should apply the CISG directly and give priority to the CISG; meanwhile, according to the negotiation history of the CISG, the foreign judicial practice, and the main points of the decision of the Guiding Case No. 107, there is a possibility of the application of the implied exclusion of Article 6 of the CISG, but both parties must have the intention of not applying the Convention. With regard to the design of rules, the exclusion of application under Article 6 of CISG should be analysed on the basis of satisfying the conditions for application of Article 1(1)(a) of CISG, and the applicable law should be established ultimately. The parties may expressly exclude the application of CISG while agreeing on the applicable law and establish that the judge takes the initiative to ask the parties what they mean by excluding the application of CISG.

Keywords: CISG, Choice-of-Law Clause, Judicial Application Sequence, Implied Exclusion of CISG

1. Introduction

In the era of economic globalization and the increasing frequency of international trade exchanges, CISG, as a unified international substantive law in the field of international economic and trade, has an important practical value in the world. Using the keywords of "CISG" and "civil cases" as indexes, the author has screened out the cases in which the parties agreed to choose the law other than CISG as the applicable law in the international sale of goods contract during the period of 1 January 2013 to 21 October 2023 in the China Judicial Instruments Network. The court documents of 15 cases in which the parties agreed to choose laws other than CISG as the governing law were analysed. The study found that there are two main ways of excluding the application of CISG in practice, namely express exclusion and implied exclusion. There are three types of law chosen by agreement of the parties to the contract, namely, the law of a CISG Contracting Party, the law of a CISG Contracting State on the sale of specific goods, and the law of a non-Contracting State. The following are the main controversies in determining the question of the applicable law in such cases:

Firstly, Article 6 of the CISG is an article of authority, granting the parties to the contract the right to refuse to apply the CISG, but Article 6 of the CISG does not specify the method of exclusion, but only adopts the vague and ambiguous expression "may exclude". Based on this, it is controversial whether China recognizes that Article 6 of the CISG includes implied exclusion, and whether the recognition of implied exclusion of the CISG is affected by the attributes or type of law chosen by agreement of the parties.

Secondly, in cases where the parties' choice of law by agreement does not constitute an exclusion of the application of CISG, some judges have argued that CISG should be applied in preference to the law chosen by the parties if CISG does not provide for it. However, some judges have directly avoided the issue of the competing application of CISG and the law applicable by agreement, and have simply ruled that both are the law applicable to the case.

There are two main views in the academic community on whether CISG can be excluded by implication: the affirmative and the negative. Scholars with a positive attitude suggest that if CISG does not make clear and specific provisions on the way to exclude the application of CISG, then implied exclusion may exist. Scholars with a negative attitude hold that express exclusion can guarantee the clarity and uniformity of the application of the Convention and make it more convenient for the courts of the Contracting States to make judgement and reach more uniform conclusions, but implied exclusion has obvious shortcomings in this respect.

However, the vast majority of scholars are based on criticisms and reflections on the existing cases, trying to solve the problems of different judgments in the same case in the past judicial practice from a doctrinal point of view. On 25 February 2019, the Supreme People's Court of the People's Republic of China issued the 21st batch of guiding cases, of which the guiding case No. 107, "Sinochem International (Overseas) Pte. Ltd v. ThyssenKrupp Metallurgical Products GmbH (dispute over a contract for the international sale of goods)" provides guidance on the application of CISG. Based on this, this paper attempts to solve the difficulties in judicial practice according to the key points of judgement of the guiding case No. 107, and to clarify the relief path of China's courts on the issue of the applicable law.

2. The Sequence of Judicial Application among CISG, Rules of Private International Law and Domestic Laws

2.1. Direct Application of CISG

The implementation of the provisions of an international treaty within each State presupposes its acceptance under the domestic law of each State. According to the practice of countries around the world, these can be categorized into two ways: "transformation" and "incorporation". Prior to the implementation of the *Civil Code of the People's Republic of China*, article 142, paragraph 2, of the *General Principles of the Civil Law of the People's Republic of China* stipulated that, if any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. Similar provisions are also found in Trademark Law of People's Republic of China, Maritime Code of The People's Republic of China, Civil Aviation Law of the People's Republic of China and other specialized laws and regulations. Therefore, China has adopted the principle of incorporation and the exception of transformation in its acceptance of the international treaties on substantive private law. In other word, with the exception of those international treaties that have been or should be transformed into domestic law, the rest of the international treaties on substantive private law, like CISG have been directly incorporated into domestic law, and may be applied by the courts of China when they are in conformity with the scope of application of the treaties.

After the implementation of the *Civil Code of the People's Republic of China*, although the content of Article 142 of the *General Principles of the Civil Law of the People's Republic of China* has not been incorporated into the *Civil Code of the People's Republic of China*, from the point of view of legislation and judicial practice, the courts in China should still continue the legal attitude embodied in Article 142 of the *General Principles of the Civil Law of the People's Republic of China* and the judicial customs formed accordingly. Therefore, when it falls within the scope of application of CISG, the treaty should be applied directly, which was emphasized again in Article 19 of *Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts* issued by the Supreme People's Court of P.R.C. in 2021: the provisions of CISG should be applied automatically to the contracts for the international sale of goods concluded by the parties with their places of business located in different contracting states of CISG.

2.2. The Priority Application of CISG

The priority application of CISG is not only a treaty obligation that China, as a contracting party to CISG, should fulfill, but also determined by the status of CISG as an international unified substantive law. Courts of States Parties apply CISG to determine the rights and obligations between the parties in disputes over contracts for the sale of international goods, and strive to realize the value and function of unifying and regulating international trade in goods.

Specifically, in China, courts at all levels shall determine whether the contract in question is an international contract for the sale of goods under the CISG according to Article 1(1)(a) of the CISG, then

determine whether the specific matters in dispute in the contract fall within the scope of the CISG based on Articles 2-5, and lastly determine whether there is a situation in which the party's autonomy excludes the application of the Convention according to Article 6 of the CISG.^[1] If it is consistent with the scope of application of the CISG, the provisions of the treaty shall be applied directly in preference to the case. However, if it does not fall within the scope of application of the CISG or the parties have agreed to exclude the application of the CISG, *Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships* shall be applied.

2.3. Deficiencies in the Adjudicative Document of Guidance Case No. 107

The Supreme People's Court of P.R.C.'s reasoning in the 107th Guidance Case seems to be flawed in part, especially in dealing with the relationship between the application of the CISG and China's conflict of laws norms. The Supreme People's Court of P.R.C. first characterized the case as a dispute over a contract for the sale of international goods, and then did not directly analyze the applicability of the CISG, but instead ruled that the parties' choice of U.S. New York law in the contract was valid. Only then did the Supreme People's Court of P.R.C. rule that CISG was the applicable law in the case, based on the fact that the parties' places of business were located in different CISG contracting states, and that the parties' unanimous choice to apply CISG during the first instance trial did not preclude the application of the Convention.^[2] As mentioned above, the Supreme People's Court of P.R.C. should analyze the applicability of the CISG by ascertaining whether the parties' places of business were located in CISG Contracting States after determining that the case was a contract for the international sale of goods. After initially determining that the CISG prevailed, the Supreme People's Court of P.R.C. should analyze whether the law of the State of New York of the United States, which was chosen by agreement of the parties, had the legal effect of excluding the application of the CISG in accordance with Article 6 of the CISG.

3. The Implied Exclusion of CISG by the Parties' Autonomy

3.1. Feasibility of Implied Exclusion of CISG

While article 6 CISG authorizes the parties to exclude the application of CISG by consent, it does not specify the manner in which the exclusion is to take place. Some courts have adopted only a textual interpretation of Article 6, limiting the manner in which the parties may exclude the application of the CISG to an express exclusion. However, from the negotiation history of the CISG and the key points of judgement of the guiding case No. 107, it should be concluded that CISG can be implicitly excluded.

During the negotiation of the Convention, the majority of delegations were opposed to the proposal made at the Diplomatic Conference that the application of the Convention could only be excluded "expressly" in whole or in part. Moreover, the absence of an express reference to "implied exclusion" in the text of the CISG as finally adopted was intended only to avoid a situation in which a specific reference to "implied exclusion" might prompt a tribunal to find, without sufficient grounds, that the application of the CISG had been completely excluded.

In addition, According to the key points of judgement of the Guiding Case No. 107, where the parties have explicitly excluded the application of the CISG in the contract for international sale of goods, the CISG shall not apply.^[2] Therefore, even if the parties to a contract do not "expressly" exclude the application of the CISG, the application of the CISG may still be excluded if the parties' intention to exclude the application of the CISG can be explicitly and clearly interpreted.

In conclusion, although article 6 of the CISG does not specify the manner of exclusion, implied exclusion is included and the intent to exclude must be clear and unambiguous. Specifically, if both parties to a contract intend to exclude the application of CISG, but do not agree on the law to be used in place of CISG, it should be deemed that there is no exclusion agreement. On the contrary, if both parties expressly state in the contract that CISG is excluded, even if there is no agreement on the choice of applicable law, the exclusion itself meets the requirement of "clarity", and the court may choose the applicable law based on the principle of the closest connection in the trial. Besides, an objective stance should be taken in analyzing the "clear and certain" requirement, envisioning whether a rational judge looking at the contract, taking into account the evidence and the statements of the plaintiff and defendant, could unambiguously and confidently interpret that the parties to the contract intended to exclude the application of CISG.

3.2. Competition and Cooperation between CISG and Choice of Law by Party Agreement

In practice, the parties to a contract for the international sale of goods usually choose the law by agreement in one of three ways: firstly, the parties generally choose the law of a Contracting State of the CISG, such as the law of the State of New York in the United States. A review of the China Judgments Online shows that the vast majority of court decisions indicate that the CISG is part of the law of the Contracting State chosen by the parties. Therefore, a general choice of the law of a Contracting State to the CISG does not prevent the application of the CISG, and the Convention is not excluded even when the chosen law is the law of a state of a federal country. On this issue, Guiding Case No. 107 held that since the United States had joined CISG, the parties' agreement in the contract to choose the law of the State of New York of the United States as the governing law did not implicitly exclude the application of CISG. Secondly, if the parties choose the law of sale of goods of a CISG Contracting State, such as the Contract Chapter of *Civil Code of the People's Republic of China*, such a situation is sufficient to implicitly exclude the application of the CISG, as the intention not to be governed by the Convention is more clearly manifested when both parties clearly stipulate a specific law to regulate their behavior. Thirdly, where the parties have chosen the law of a non-Contracting State, it should be recognized that this is a more explicit way for the parties to exclude the application of the CISG.

It should be emphasized that the above conclusion does not mean that the parties' choice of a Contracting State's law on the sale of specific goods or a non-Contracting State's law necessarily precludes the application of the Convention. In other words, the attributes or type of law chosen by the parties is not the only factor determining the applicability of the CISG. This is because the parties are not legal experts, and it is indeed possible in trade practice for the parties to have never realized the applicability of the CISG or to have intended to exclude the application of the Convention, but to have agreed in the contract to apply the law of a Contracting State to the contractual dispute. Therefore, it is of utmost importance whether the unequivocal intention of the parties regarding the application of the Convention can be inferred from this choice of law.

4. Conclusions

Since becoming a party to the CISG, China has actively explored the application of the international treaty and has accumulated some useful experience. However, at the same time, it is acknowledged that the ability of Chinese courts to apply the CISG still needs to be improved. The Guiding Case No. 107 is of great significance for the application of CISG under the perspective of the parties' agreement to choose the law. Chinese judicial authorities responding to disputes over international contracts for the sale of goods must first make a judgment on the application of the law to them in accordance with Article 1 of the CISG, testing whether the parties' places of business are located in different CISG Contracting States. This is a well-established fact, and the official website of the United Nations Commission on International Trade Law (UNCITRAL) has a complete and up-to-date list of CISG Contracting States in Chinese. However, judges need to proactively fulfill their obligation to identify the CISG Contracting States, and to strengthen their ability to identify the CISG Contracting States. After checking, if a party's place of business is in a non-CISG Contracting State, the court shall not apply the CISG based on the reservation in item b, and the law that the parties have agreed to apply shall prevail in accordance with Article 41 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships.

Only after a preliminary conclusion of CISG application has been reached according to the foregoing steps is it necessary to further examine whether the parties have excluded the application of CISG on the basis of article 6. This is because from the point of view of the position of Article 6 in the CISG, Article 6 is located in the last article of the first part of the CISG, which means that the priority of application of the CISG is the principle and the exclusion of application is the exception. In other words, when a Chinese court is considering the application of law to a dispute over a contract for the international sale of goods, if the parties to the contract in question do not all have their places of business in a Contracting State of the CISG, the CISG cannot be applied, and there is no need to continue to make a judgment under Article 6.

If the parties' consensual choice of law does not constitute an express or implied exclusion of the application of the Convention, the judge shall adhere to the direct and preferential application of CISG. It is worth noting that whether the parties' agreed choice of law other than CISG can exclude the application of CISG, although this depends to some extent on the type of law chosen by the parties, it is the explicit declaration of intention to exclude application that is the fundamental criterion. In addition,

since the judge is the final interpreter of the parties' meaning, even under the same judgment standard, different judges may differ to some extent in judging the parties' exclusionary meaning of the Convention, which may result in different judgments in similar cases. ^[3] Therefore, if the issue of implied exclusion occurs in court, the most secure and direct way for the judge is to let the parties make an express choice, which can improve the efficiency of the trial and reduce the cost of the litigation. In addition, it is suggested that the Ministry of Commerce of the People's Republic of China, the Supreme People's Court of P.R.C. and other subjects issue model texts for international contracts for the sale of goods, providing model provisions or guidance cases that exclude the application of CISG.

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