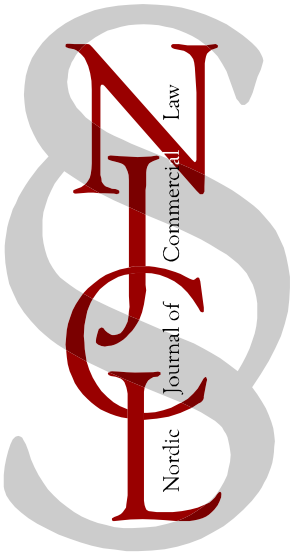

CIETAC'S PRACTICE ON THE CISG[1*]

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I. INTRODUCTION

1. *China and CISG*

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the "CISG") has been regarded as the most important uniform international law for the sale of goods so far. China signed the CISG on 30 September 1981 and deposited its instrument of ratification on 11 December 1986. As of 1 January 1988, the CISG became effective in relation to China.

According to the statistics of the World Trade Organization (hereinafter referred to as the "WTO") issued in April 2005,[1] China's exports and imports of merchandise ranked the fourth and third respectively in the world in year 2003. China's shares in the world total merchandise exports and imports of 2003 were 5.8% and 5.3%, respectively. According to the WTO news,[2] in 2004 China became the largest merchandise trader in Asia, and the third largest exporter and importer in world merchandise trade. China's shares in the world total merchandise exports and imports of 2004 respectively reached 6.5% and 5.9%. Evidently, China has been playing a role of increasing importance in the world trade including the trade of goods. Considering that the Contracting States of the CISG include other leading trading states, especially U.S., Germany and the Republic of Korea, which are also the main trade partners of China, the CISG accordingly deserves increasing attention in China from the Chinese side.[3]

Chinese governmental and judicial bodies have been aware of the importance and the potential influence of the CISG ever since 1987. Before the CISG came into force, the then Ministry of Foreign Trade and Economic Cooperation (the predecessor of the Ministry of Commerce, hereinafter referred to as "MOFTEC") issued a notice on 22 January 1987[4] requesting relevant governmental agencies and companies to make preparation for the forthcoming CISG's entry into force in relation to China, including but not limited to, to comply with the CISG, to study the CISG, to modify and complete the standard contracts then in use, and to keep aware of the developments of the number of the Contracting States of the CISG. On 4 December 1987, the then MOFTEC further circulated a notice on certain issues meriting attention regarding implementation of the CISG,[5] which was shortly endorsed by the Supreme People's Court on 10

1 The website of the WTO, URL at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN>.

2 The website of the WTO, URL at <http://www.wto.org/english/news_e/pres05_e/pr401_e.htm>.

3 Some foreign researchers have also done relevant research on China and the CISG, such as: ZELLER, Bruno [Australia], CISG and China, in: Michael R. Will ed., Rudolf Meyer zum Abschied: Dialog Deutschland-Schweiz VII, Faculté de droit, Université de Genève (1999) 7-22, at <http://www.cisg.law.pace.edu/cisg/biblio/zeller.html>.

4 *Notice on Making Preparation for Enforcing the CISG* ([87] Waijingmaofazi No.2) (Guanyu zuohao zhixing xiaoshou hetong gongyue zhunbei gongzuo de tongzhi – in Chinese), issued by MOFTEC.

5 *Notice on Certain Probrems to be Noticed when Enforcing the CISG* (Guanyu zhixing lianheguo guoji huowu xiaoshou hetong gongyue ying zhuyi de jige wenti – in Chinese), issued by MOFTEC.

December 1987.[6] Since the CISG entered into force, more and more courts and arbitral rulings in which the CISG has been applied have been reported in the past years.[7]

2. *CIETAC and CIETAC Awards*

According to the information provided on its official website,[8] China International Economic and Trade Arbitration Commission (hereinafter referred to as "CIETAC", also known as the Court of Arbitration of China Chamber of International Commerce as from 1 October 2000) is a permanent international commercial arbitration institution which independently and impartially resolves, by means of arbitration, contractual or non-contractual, international economic and trade disputes. CIETAC may also arbitrate any other domestic disputes submitted to it by agreement between parties. CIETAC, formerly known as the Foreign Trade Arbitration Commission, was set up in April 1956 within the China Council for the Promotion of International Trade in accordance with the Decision of 6 May 1954 by the former Government Administration Council of the Central People's Government of China. At the same time, the Provisional Rules of the Arbitration Procedure were formulated by the China Council for the Promotion of International Trade. To meet the needs of the continuing development of China's economic and trade relations with foreign countries after the adoption of the reform and opening-up policy, the Foreign Trade Arbitration Commission was restructured into the Foreign Economic and Trade Arbitration Commission in 1980 and renamed CIETAC in 1988.

CIETAC has its headquarters in Beijing and a sub-commission in Shenzhen and Shanghai each. In the past few years, CIETAC has become the first world arbitration forum in terms of caseload. Its awards are recognized and enforced in more than 140 countries and regions. Its arbitration rules were revised respectively in 1988, 1994, 1995, 1998, 2000 and 2005.

Chinese arbitral awards involving the CISG were mainly made by CIETAC. Since 1988, nearly 200 CIETAC awards involving the CISG have been reported and published in various sources. The most important publication so far is the *Compilation of CIETAC Arbitration Awards* (Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui Caijueshu Huibian – in Chinese *pinyin*) published by the Law Press in May 2004, which includes the full texts of almost all of the awards rendered by the CIETAC until 2000. In its foreword, the editors forecast that the awards made after 2000 would be published later.[9] These reported cases are in the process of being translated into English and will be available in the online CISG Database of Pace Law School.[10] Thanks to the Queen

6 *Notice of Forwarding the Certain Problems to be Noticed when Enforcing the CISG of MOFTEC* (Fa [jing]fa [1987] No.34) (Zhuanfa duiwai jingji maoyibu guanyu zhixing lianheguo guoji huowu xiaoshou hetong gongyue ying zhuyi de jige wenti de tongzhi – in Chinese), issued by the Supreme People's Court.

7 See the Chinese cases involving the CISG reported at the online CISG database of Pace Law School, URL at <http://www.cisg.law.pace.edu/cisg/text/casecit.html#china>. In addition, a number of Chinese writings on the CISG have also been reported. See the bibliography listed at the CISG database of Pace Law School at <http://www.cisg.law.pace.edu/cisg/biblio/biblio-chi.html >.

8 For the introduction of the CIETAC, see its official website, URL at <http://www.cietac.org.cn/english/introduction/intro_1.htm#2>.

9 The foreword published online is at <http://www.rit.cn/whxs/guo/shownews.asp?newsid=2755>.

10 For the awards translated into English and uploaded, please see the webpage at the database of Pace Law School, at <http://www.cisg.law.pace.edu/cisg/text/casecit.html#china>.

Since all the CIETAC awards reported will be accessible to researchers at the database of Pace Law School, in this essay the author will quote the identification labels of cases provided in the aforesaid database when referring to relevant cases, such as "Award of 27 February 1996 [CISG/1996/11] (*Wool case*)". In the cases translated, their original online links

Mary Case Translation Program and the work of Pace Law School and the participants, non-Chinese speaking researchers will have access to the latest development of China's practice relating to the CISG.

Based on the published CIETAC awards involving the CISG, the author of this essay will carry out a survey of these cases and provide certain comments on some critical issues in the Chinese legal context with a view to providing a source of information for further study on China's practice on the CISG. Due to the limited availability of awards, this essay is not intended to be an exhaustive research, but a stepping-stone for more elaborated study.

II. CISG ISSUES THAT HAVE EMERGED FROM CIETAC AWARDS

1. Application of the CISG

1.1. By virtue of Article 1(1)(a)

Pursuant to Article 1(1)(a), the CISG shall apply to cases if contracts of sale of goods are entered into between parties whose relevant places of business are in different Contracting States. In the CIETAC awards, most cases to which the CISG applied fall in this category.

Since the principle of "Autonomy of the Parties" is recognized under Article 6 of the CISG as well as the PRC laws[11], the tribunals have been willing to check the sales contracts to confirm that the parties have not excluded the application of the CISG. When applying Article 1(1)(a), the tribunals frequently stated that the parties had not stipulated the applicable law in their contracts.

It is easy to understand that in most CIETAC awards the place of business of one party is in China. The Contracting States of the other parties' places of business included most of the Contracting States which have trading connections with China, e.g., U.S., Germany, France, Italy, Switzerland, Australia, Austria, New Zealand and Singapore. Nevertheless, in a small proportion of cases, the two parties are located in two different States, with neither located in China.[12]

When Article 1(1)(a) applied, Article 2 was rarely referred to as in most cases there generally was no need for the tribunals to discuss the term "goods". Article 3 was also seldom invoked in most cases. In one case, a Chinese seller manufactured and sold the goods (axles) to a U.S. buyer according to the technical drawings provided by the buyer.[13] Though Article 3 was not explicitly invoked, the tribunal held that this scenario falls in the category of sales of goods. In another case, a U.S. buyer claimed that the agreement concluded by the two parties was of the form of a "cooperative sale of goods" and that the U.S. firm did nothing more than act as the "cooperator" of the Chinese seller to assist the latter in selling the goods in U.S. However, based on the

or pages in books in Chinese, if available, are and will be provided at the online database. Considering the accessibility and for convenience, this essay will not quote the original pages in the Chinese books of the cases again in the footnotes. For more information, please see the addendum of this essay.

11 Such as: Article 145 paragraph 1 of the *General Principles of the Civil Law of the People's Republic of China*; Article 5 of the Law of the *People's Republic of China on Economic Contracts involving Foreign Interest*; Article 126 of the *Contract Law of the People's Republic of China*. With regard to introduction of the aforesaid laws, please see part II.1.3 in the text of this essay.

12 E.g., Award of 28 December 1994 [CISG/1994/15] (*Round steel case*). In this case, the business place of one party was in Singapore, the other in Germany.

13 Award of 31 July 1997 [CISG/1997/24] (*Axle sleeves case*).

evidence presented, the tribunal found that the transaction involved a contract for the sale of goods.[14]

One noteworthy phenomenon was that some tribunals applied solely the CISG in the awards, while some applied both the PRC laws and the CISG in parallel in their awards.[15]

As a substantive law convention, the CISG shall prevail over the domestic laws, no matter the private international law or the substantive law of the forum, except in the case of application of the limited reference to the law applicable by virtue of the rules of private international law in Article 7(2). It seemed that in some cases the CIETAC tribunal disregarded the limitations to the authorization provided in Article 7(2) of the CISG and referred to the rules of private international law directly regardless of whether the issues were governed by the CISG or not. In these cases, faced with a situation in which a contract concluded between two parties in two Contracting States contains no applicable law clause, some tribunals held that, according to the principle of the "Closest Connection" provided for in relevant Chinese laws, the Chinese domestic laws[16] should apply after setting out the facts found. In addition, considering that the two parties are located in two Contracting States of the CISG, they held that the CISG might apply in parallel.[17] From the viewpoint of the author, this approach might have been taken by arbitrators more familiar with the domestic laws who may have regarded such laws as easier to apply, an approach that can impair the international character of the CISG and its uniformity in application. Article 142 of *General Principles of the Civil Law of the People's Republic of China* (hereinafter referred to as the "GPCL")[18] also to some extent contributes to the parallel application of the CISG and PRC laws, which will be further discussed in part II.1.3.

1.2. By virtue of the principle of "Autonomy of the Parties"

The principle of autonomy of the parties is recognized in a number of PRC civil and commercial laws.[19] The tribunal would respect the choice of laws made by the parties, whether explicitly indicated in their contracts or subsequently during the arbitration process. If they chose the CISG as the governing law, the tribunals would also apply the CISG, even if Article 1(1)(a) was not applicable, i.e., either or both parties were in Non-Contracting State.

For instance, in one case, the dispute arose between a Chinese seller and a Japanese buyer. Though they did not stipulate their choice of law in the contract, both of them invoked the PRC laws and the CISG during the arbitration. Therefore, the tribunal applied the PRC laws and the CISG regardless of the fact that Japan is not a Contracting State of the CISG.[20] The same

14 Award of 26 September 1994 [CISG/1994/12] (*Umbrella case*).

15 Bruno Zeller has also noticed that the CISG was often not deemed as overriding or prevailing over the PRC laws in China's practice, and the CISG and PRC laws were applied in parallel in many cases. See, Bruno Zeller, *supra* note 3.

16 Such as: Article 145 paragraph 2 of the *General Principles of the Civil Law of the People's Republic of China*; Article 5 of the Law of the *People's Republic of China on Economic Contracts involving Foreign Interest*; Article 126 of the *Contract Law of the People's Republic of China*.

17 Such as: Award of 7 July 1997 [CISG/1997/20] (*Isobutyl alcohol case*).

18 The GPCL was adopted by the 4th meeting of the Sixth National People's Congress on 12 April 1986 and came into force as of 1 January 1987. The GPCL so far has played as law at the highest hierarchy in the field of civil laws before the civil code is promulgated in the future.

19 See *supra* note 11.

20 Award of 23 July 1997 [CISG/1997/23] (*Polypropylene case*).

situation repeated in a case between a Chinese buyer and a Korean seller in 1996, at a time when the Republic of Korea had not yet acceded to the CISG.[21] Given that before 1 July 1997 Hong Kong was under the jurisdiction of the Great Britain which has not yet acceded to the CISG and after 1 July 1997 Hong Kong still reserves certain freedom of applying of the treaties concluded by the PRC,[22] Hong Kong may not be autonomously deemed as a region under the jurisdiction of a Contracting State of the CISG.. However, there have been some cases between parties from Mainland China and Hong Kong, even between two parties both from Hong Kong, in which the CISG was also applied if both parties chose it as the applicable law.[23]

In the event that the CISG is applied based on the parties' choice of the CISG during the arbitration, the PRC laws are frequently applied as well since the parties would generally refer to both the CISG and domestic laws.[24]

The CISG itself does not touch upon the application problem when either or both parties are from a Non-Contracting State but choose it as applicable law. This issue, judging upon the validity of the choice of law made by the parties, is left to the different states, including Non-Contracting States. From the practice of CIETAC, it can be found that the CIETAC tribunals are likely to respect the autonomy of the parties and accept the application of CISG under such circumstances. The present author is of the view that this positive attitude would help to enhance the application as well as the influence of the CISG, and the merchants from Non-Contracting States may therefore have increased opportunities to get to know the CISG and become familiar with it.

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21 Award of 16 August 1996 [CISG/1996/39] (*Dioctyl phthalate case*). See, also Award of 17 October 1996 [CISG/1996/47] (*Tinplate case*); Award of 26 June 1997 [CISG/1997/17] (*Monohydrate zinc sulfate case*); Award of 8 September 1997 [CISG/1997/27] (*BOPP film case*); Award of 21 May 1999 [CISG/1999/26] (*Excavating machine case*).

22 Article 153 paragraph 1 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* provides that:

"The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region."

Therefore, as United Kingdom is not a Contracting State of the CISG, the CISG as a convention conceded by China is subject to Article 153 paragraph 1 with regard to its effectiveness in Hong Kong. At present, no decisions by the Central People's Government on the application of CISG in Hong Kong have been made. For further reference, see the list of international treaties applicable to Hong Kong provided by the Department of Justice of Hong Kong, at < http://www.legislation.gov.hk/interlaw.htm>. The case of Macau, discussed *infra* at note 30, is similar to that of Hong Kong.

From the viewpoint of the author, except that the parties choose the CISG as governing law of the contract or the CISG is applied according to the relevant provisions in the PRC laws as discussed in Part II.1.3, when judges or arbitrators of Mainland China hear the cases between the parties from Hong Kong (or Macau) and Mainland China, the CISG in principle is not applicable. However, when judges or arbitrators of other countries hear cases between parties from these two regions and other Contracting States, the CISG might be applied according to their understanding of the status of Hong Kong and Macau under the CISG. See discussion of this subject by Ulrich Schroeter in "The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods" (December 2003), at <http://cisgw3.law.pace.edu/cisg/biblio/schroeter4.html>.

23 Such as: Award of 28 April 1995 [CISG/1995/08] (*Rolled wire rod coil case*); Award of 5 February 1996 [CISG/1996/07] (*Stibium case*); Award of 29 March 1996 [CISG/1996/15] (*Caffeine case*); Award of 4 April 1996 [CISG/1996/18] (*Veneer wood case*); Award of 15 November 1996 [CISG/1996/52] (*Oxytetracycline HCL case*); Award of 11 April 1997 [CISG/1997/05] (*Silicon metal case*); Award of 27 June 1997 [CISG/1997/18] (*Kidney beans case*); Award of 20 November 1997 [CISG/1997/32] (*Rebar coil case*); Award of 28 January 1999 [CISG/1999/06] (*Refrigerating machine case*); Award of 2 April 1999 [CISG/1999/18] (*Grey cloths case*); Award of 11 February 2000 [CISG/2000/02] (*Silicon metal case*).

24 Such as: Award of 4 April 1996 [CISG/1996/18] (*Veneer wood case*); Award of 27 June 1997 [CISG/1997/18] (*Kidney beans case*); Award of 23 July 1997 [CISG/1997/23] (*Polypropylene case*); Award of 21 May 1999 [CISG/1999/26] (*Excavating machine case*).

1.3. Application of the CISG as PRC laws permit

In some contracts between two parties, where either one or both are from Non-Contracting States, the PRC laws were chosen as the applicable law of the contracts. Also, in some other cases, the tribunals applied the PRC laws according to the principle of the closest connection in some cases where no laws had been chosen by the parties either of whom was from a Non-Contracting State. In these two categories of cases, when applying the PRC laws, the tribunals may also apply the CISG as a convention or international practice pursuant to the provisions in the PRC laws.

Article 5 of the *Law of the People's Republic of China on Economic Contracts involving Foreign Interest* (hereinafter referred to as the "LECFI")[25] provided:

> "For matters that are not covered in the law of the People's Republic of China, international practice shall be followed."

Article 6 of the LECFI provided:

> "Where an international treaty which is relevant to a contract, and to which the People's Republic of China is a contracting party or a signatory, has provided differently from the law of the People's Republic of China, the provisions of the international treaty shall prevail, with the exception of those clauses on which the People's Republic of China has declared reservation."

Article 142 paragraphs 2 and 3 of the GPCL respectively provide:

> "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."

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> "International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions."

Article 6 of the LECFI provided slightly different requirements from Article 142 of the GPCL, which required the international treaty "relevant to a contract". Whereas the GPCL was promulgated later than the LECFI, after the GPCL coming into force, the Supreme People's Court took the same approach as Article 142 of the GPCL in its judicial interpretation of the LECFI.[26]

Article 142 paragraph 2 of the GPCL does not clearly state whether the scope of application provisions in the treaty itself should be taken into consideration in applying such international

25 The LECFI was adopted by the 10th meeting of the Standing Committee of the Sixth National People's Congress on 21 March 1985, came into force on 1 July 1985 and was overruled by the *Contract Law of the People's Republic of China* (the "Contract Law") as of 1 October 1999. Probably because of the existence of Article 142 of the GPCL, the Contract Law has no corresponding articles as Article 5 and 6 in the LECFI.

26 Article 2.8 of the *Notice of Replies by the Supreme People's Court to Certain Questions in Application of the LECFI* provided the same contents as that of Article 142 paragraph 2 of the GPCL.

treaty. Nevertheless, from the practice of CIETAC, it can be found that in the tribunals' approaches, the main preconditions for applying Article 142 paragraph 2 of the GPCL are: (i) the PRC laws including the GPCL are applicable; (ii) the international treaty is concluded or acceded to by China. Therefore, in cases in which the PRC laws apply, the provisions in the CISG differing from those in the PRC laws will prevail, except for those on which China has announced reservations. Whether the parties are located in Contracting States is not considered as a precondition by the tribunals.

For example, in a case between a Mainland seller and a Hong Kong buyer, the PRC laws applied according to the clause of choice of law in the contract and the relevant facts. The tribunal then applied the CISG as an "international treaty" based on the aforesaid provisions in the PRC laws.[27]

In other cases, the CISG may apply as "international practice" as well according to the aforesaid provisions. For example, this attitude was taken by a tribunal dealing with a dispute arose between a Chinese seller and an English buyer. According to the principle of the closest connection, the PRC laws were applied by the tribunal. Though Great Britain is not a Contracting State of the CISG, the tribunal held the CISG could also be applied as international practice pursuant to Article 5 of the LECFI on the ground that the CISG had been recognized widely at international level.[28] This also happened in a case between a Mainland seller and a Hong Kong buyer.[29]

As of 1 October 1999, the *Contract Law of the People's Republic of China* (hereinafter referred to as the "Contract Law")[30] came into force and superseded the LECFI and the Supreme People's Court's judicial interpretation thereof. However, in the Contract Law, there is no such clause as Article 142 of the GPCL. Therefore, at present, Article 142 of the GPCL reflects China's attitude toward the international treaties it has concluded or acceded to and the relationship between the domestic laws and the international treaties, at least in the fields of civil matters.

From the viewpoint of the author, Article 142 of the GPCL in effect enhances the possibilities of the application of the CISG to parties from Non-Contracting States. Some tribunals' approaches under which the CISG was applied as international practice or custom reflect the influence of the CISG and also provide opportunities for the CISG to be accepted by more and more international merchants.

However, when dealing with disputes between two parties from different Contracting States as mentioned in part II.1.1 above, the CISG shall apply according to its articles *per se* and exclude the application of domestic laws in principle as aforesaid, no matter whether relevant provisions in domestic laws are the same as those in the CISG or not. In regarding the application of the CISG as resting upon relevant provisions in PRC laws being different from those of the CISG, Article

27 Award of 11 April 1997 [CISG/1997/05] (*Silicon metal case*).

28 Award of 30 June 1999 [CISG/1999/30] (*Peppermint oil case*).

29 Award of 26 March 1993 [CISG/1993/06] (*Cement case*).

30 The Contract Law as the uniform contract law was adopted by the 2nd meeting of the Ninth National People's Congress on 15 March 1999 and superseded the LECFI, the *Economic Contract Law of the People's Republic of China* and the *Law of the People's Republic of China on Technology Contracts* as of 1 October 1999, thus ending the situation that there were three contract laws in China in different fields.

142 in the GPCL in effect adds in an additional precondition for applying the CISG, which to certain extent impairs the international character of the CISG.[31]

In the cases under the category discussed in Part II.1.3, an additional issue deserving certain attention is CIETAC's approach in relation to Article 1(1)(b) and China's reservation on it. In such cases, the tribunals applied the PRC laws by virtue of the principle of the closest connection and then applied the CISG according to the aforesaid provisions in the PRC laws. Since the principle of the closest connection is regarded as a rule of private international law provided by the PRC laws, though the tribunals apparently based the application of the CISG on the aforesaid provisions in the PRC laws other than Article 1(1)(b) directly, this in effect complied with Article 1(1)(b) of the CISG when the rules of private international law lead to the application of the PRC laws.[32] However, China has made a reservation on this article, thus excluding its application in China. The PRC laws do not clearly regard the CISG as part of the domestic law so that when the PRC laws apply, the CISG may not naturally apply as part of the PRC laws; but the aforesaid provisions show that the PRC laws *per se* permit the application of the CISG and other international treaties or international practice in certain cases. China's reservation on Article 1(1)(b) in effect mainly excludes the application of the CISG when the rules of private international law lead to the application of the law of the Contracting States except China.

A case between two Chinese parties fell in this category as well.[33] Because the goods sold were floating goods transited from Peru to China, the contract was deemed as contract involving foreign elements under Article 178 of the *Interpretation by the Supreme People's Court on Several Issues Regarding the Application of the GPCL*.[34] The tribunal applied the LECFI according to the closest connection principle, and further the CISG and international practice based on Article 5 and 6 of the LECFI.

1.4. Application in error

There also several cases in which the CISG was applied by error. For example, the tribunal hearing a case between a Chinese seller and a Japanese buyer applied the CISG by mistakenly believing

31 See, CHEN Zhidong / WU Guihua [China], *Lianheguo guoji huowu xiaoshou hetong gongyue shiyong yuanze jingxi – jian ping woguo minfatongze di 142 tiao* [Analysis of the Principles of Application of the CISG – Comments on Article 142 of the Chinese General Principle of Civil Law – in Chinese], in: Dangdai faxue yanjiu [Contemporary Legal Science Research], Shanghai (2002.3), Total No.37, 10-19. Also see, CHEN Zhidong, WU Jiahua [China], *Lun lianheguo guoji huowu xiaoshou hetong gongyue zai zhongguo de shiyong – jian ping woguo minfa tongze di 142 tiao* [On the Application of the CISG in China – Commentary on Article 142 of the General Principles of Civil Law of the PRC – in Chinese], in: Faxue [Law Science], Beijing (2004.10), 107-118; and DING Wei [China], *Shiji zhi jiao zhongguo guoji sifa lifa huigu yu zhanwang* [Review and Expectation on the Legislation of the International Private Law in China at the end of 20th Century – in Chinese], in: Zhengfa luntan [Forum of Laws and Politics], Beijing (2001.3), 127-134.

However, some PRC researchers held that the PRC laws did not provide that treaties should prevail over the domestic laws. See, CHEN Hanfeng / ZHOU Weiguo / JIANG Hao [China], *Guoji tiaoyue yu guoneifa de guanxi ji zhongguo de shijian* [The Relationship of International Treaties and Domestic Laws and China's Relevant Practice – in Chinese], in: Faxue luntan [Legal Forum], Jinan (2000.2), 117-123.

32 E.g., Award of 23 October 1996 [CISG/1996/48] (*Channel steel case*).

33 Award of 1 April 1997 [CISG/1997/02] (*Fishmeal case*).

34 This judicial interpretation was adopted on 26 January 1988 by the Supreme People's Court. According to Article 178, if the subject matter of a civil relation is located in the territory of a foreign country, the relation in question shall be considered a foreign-related civil relation.

Japan had acceded to the CISG.[35] Another case is Macau. In several CIETAC cases, the tribunals deemed that Portugal was a Contracting State of the CISG by mistake. Since Macau was under the jurisdiction of Portugal before it was handed over by Portugal to China on 20 December 1999, such tribunals held that the CISG applied to the cases between the parties from the Mainland of China and Macau.[36] Following China's resumption of sovereignty over Macau, one tribunal held that Macau was under the jurisdiction of China and the CISG continued to be effective in Macau when hearing the disputes between the parties from Macau and other Contracting States, which was also an example of applying the CISG in error.[37]

2. *Methodology of Interpretation*

2.1. Good faith

Article 7(1) of the CISG provides for the principle of "Autonomous Interpretation", which requires that regard be given to the international character of the CISG and to the need to promote uniformity in its application. Regretfully, however, the tribunals seldom referred to Article 7(1).

Article 7(1) of the CISG also requires regard for the observance of good faith in international trade in the interpretation of the CISG, which gives rise to certain different understandings of good faith under the CISG.[38]

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35 Award of 7 November 1996 [CISG/1996/50] (*Stone products case*). Other examples as: Award of 2 April 1997 [CISG/1997/03] (*Wakame case*); Award of 15 December 1997 [CISG/1997/34] (*Hot-rolled coils case*).

36 E.g., Award of 27 February 1996 [CISG/1996/11] (*Wool case*), Award of 4 September 1996 [CISG/1996/41] (*Natural rubber case*) and Award of 18 November 1996 [CISG/1996/53] (*Channel steel case*).

37 See, Award of 1 February 2000 [CISG/2000/01] (*Silicon and manganese alloy case*).In effect, the case of Macau is similar as that of Hong Kong as discussed in *supra* note 22.

Article 138 of the *Basic Law of the Macau Special Administrative Region of the People's Republic of China* provides that: "The application to the Macao Special Administrative Region of international agreements to which the People's Republic of China is a member or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region."International agreements to which the People's Republic of China is not a party but which are implemented in Macao may continue to be implemented in the Macao Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements."At present, the list of international treaties applicable to Macau provided by the official website of Macau does not include the CISG. See the list at <http://www.gov.mo/egi/Portal/s/treaty/rights-of-child/treaty_en.htm >.

However, see Ulrich Schroeter's paper on the status of Macau under the CISG, *supra* note 22.

38 John O. Honnold held that according to Article 7(1), good faith should be applied when interpreting the CISG. See, John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed), Kluwer Law International, 1999, p.100.

Moreover, the view that good faith is one of the "general principles" in Article 7(2) has been held by many researchers, the Secretariat of the UNCITRAL and domestic judges and arbitrators. See, Bonell, C. M. Bianca & M. J. Bonell (ed), *Commentary on the International Sales Law the 1980 Vienna Sales Convention*, Giuffrè·Milan, 1987, at 85. See also Henry Mather [U.S.], "Choice of Law for International Sales Issues Not Resolved by the CISG", 20 Journal of Law and Commerce (Spring 2001), pp.155-208; online version at < http://www.cisg.law.pace.edu/cisg/biblio/mather1.html>, Part I, A. Nives Povrzenic [Croatia], "Interpretation and Gap-filling under the United Nations Convention on Contracts for the International Sale of Goods" (1997 Pace essay), online version at < http://www.cisg.law.pace.edu/cisg/text/gap-fill.html>. The foreign cases supporting such viewpoint include: ICCÆäËû¹ú¼ÊÊÂ»á/ICC Arbitration Case No. 7331 of 1994, at <http://cisgw3.law.pace.edu/cases/947331i1.html> ("[G]eneral principles of international commercial practice, including the principle of good faith, should govern the dispute. . . [F]or the present dispute, such principles and accepted usages are most aptly contained in the [CISG]. . . ."); Germany 5 October 1998 Oberlandesgericht Hamburg, [English translation available at <http://cisgw3.law.pace.edu/cases/981005g1.html>].

In some CIETAC awards, good faith was just generally mentioned as a requirement for parties to comply with.[39] For example, in one case, a U.S. buyer rejected the documents and requested a Chinese seller to reduce the price because of a clerical error made by the carrier on the bill of lading (hereinafter referred to as "B/L"). The tribunal held that the error was not so substantial as to make this breach fundamental and that the buyer should accept the goods according to the principle of good faith.[40] In another case, the tribunal treated good faith as an interpreting criterion for the tribunal to apply. It was a case between a Mainland seller and a Hong Kong buyer, in which the tribunal was of the view that under the term CFR the buyer's obligation to establish the letter of credit (hereinafter referred to as "L/C") should not be rigidly interpreted as conduct to be completed before he received the notification of preparation of the goods from the seller, otherwise it would go against the requirements to observe good faith in international trade in Article 7(1) of the CISG.[41]

2.2. Gap filling

According to the aforesaid Article 142 paragraphs 2 and 3 of the GPCL, the CISG itself is regarded as a source of law for filling gaps in the PRC laws. However, the gap filling to be discussed here is to fill the gaps in the CISG according to Article 7(2).

Article 7(2) provides that questions concerning matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. However, the tribunals tended to jump directly to the law applicable by virtue of the rules of private international law, and eventually the PRC laws.[42]

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39 For example, see: Award of 26 March 1993 [CISG/1993/06] (*Cement case*); Award of 20 May 1999 [CISG/1999/24] (*Red tiles case*).

40 Award of 4 June 1999 [CISG/1999/28] (*Industrial raw material case*).Many researchers have also held that good faith is a principle directly binding upon the parties. See, Bonell, C. M. Bianca & M. J. Bonell (ed), *supra* note 38, at 84; John Klein [U.S.], "Good Faith in International Transactions", 15 Liverpool Law Review (1993), pp.115-141; online version at <http://www.cisg.law.pace.edu/cisg/biblio/Klein.html >; Phanesh Koneru [India and the United States], "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles", 6 Minnesota Journal of Global Trade (1997), pp.105-152, online version at < http://www.cisg.law.pace.edu/cisg/biblio/koneru.html>; Franco Ferrari [Italy], "Uniform Interpretation of the 1980 Uniform Sales Law", Part IV, 24 Georgia Journal of International and Comparative Law (1994) 183-228, online version at <http://www.cisg.law.pace.edu/cisg/biblio/franco.html>; Paul J. Powers [U.S.], "Defining the Indefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods", 18 Journal of Law and Commerce (1999), pp.333-353, online version at < http://www.cisg.law.pace.edu/cisg/text/e-text-07.html >; Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Published by Manz, Vienna: 1986, Commentary on Article 7, online version at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-7.html>& Peter Schlechtriem [Germany], "Good faith in German Law and in International Uniform Laws", in: Centro di studi e ricerche di diritto comparato e straniero - diretto da M. J. Bonell, Saggi, Conferenze e Seminari No. 24 (February 1997); online version at < http://soi.cnr.it/~crdcs/crdcs/schlechtriem.htm >; Troy Keily [Australia], "Good Faith and the Vienna Convention on Contracts for the International Sale of Goods", in: Vindobona Journal of International Law and Arbitration, Issue 1 (1999), pp.15-40, online version at <http://www.cisg.law.pace.edu/cisg/biblio/keily.html >.

John Felemegas held that the roles of good faith under Article 7(1) and 7(2) should be distinguished. See, John Felemegas [Australia], "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation", *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)*, Kluwer Law International (2000-2001), pp.115-265; online version at <http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html>. Chapter 3, 5.

41 Award of 11 February 2000 [CISG/2000/02] (*Silicon metal case*).

42 E.g., Award of 8 April [CISG/1999/21] (*Wool case*); Award of 7 January 2000 [CISG/2000/06] (*Cysteine case*); Award of 7 March 2002 [CISG/2002/01] (*Lube oil case*).

2.3. Usage and practices

Practices established between the parties would be binding upon the parties when they had been found established.[43] Uncommonly, in one case the tribunal held that the written contract should prevail over the practice when the provisions in the contract differed from their practice.[44]

With regard to the usages in international trade, such as Incoterms and UCP 500, the tribunals would normally apply them when applicable, however, in most case relying upon Article 142 of the GPCL or Article 5 in the LECFI instead of Article 9 of CISG.[45] Sometimes the usage of a particular industry might also be invoked by one party to support his claims, and the tribunal would require the party to prove the said usage to meet the requirements under Article 9(2) of the CISG that the usage was "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned".[46]

3. Formality, Conclusion and Alteration of the Contract

3.1. China's reservation on Article 11

China has declared a reservation on Article 11 according to Article 96 of the CISG. Pursuant to Article 12, Article 11, Article 29 or Part II of the CISG that allow a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply when one party is in China. China's aforesaid reservation was consistent with Article 7 of the LECFI, which provided that the contract is concluded by the parties when they have reached a written agreement on the terms and have signed the contract. This position reflected the attitude of Chinese legislators at that time toward contracts involving foreign elements, possibly because there were not many such contracts and they were often concerned with material economic interests.

However, more than one decade later, the LECFI was superseded by the Contract Law, of which Article 10 provides that a contract may be entered into by parties in writing, oral or other forms unless the relevant laws and regulations require or the parties agree to employ written form. Article 36 of the Contract Law further provides that, notwithstanding that written form is required under relevant laws and regulations, or agreed on by parties, if one party has implemented its major obligations and the other party has accepted its performance, the contract has been concluded even though no written form is used. The Chinese legislators' attitude towards the formality of contracts has changed to give parties more freedom of choice and meet the ever-changing needs in practice.

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43 E.g., Award of post-1989 [CISG/1990/01] (Cloth wind coats case); Award of 23 December 1996 [CISG/1996/57] (*Carbazole case*); Award of 31 July 1997 [CISG/1997/24] (*Axle sleeves case*).

44 See, Award of June 1999 [CISG/1999/03] (*Peanut kernel case*).

In this case, a Dutch buyer argued that the practice between the two parties was that the buyer might establish the L/C after he and the Chinese seller inspected the goods together and agreed on the quality of the goods. However, their written contract required the buyer to issue the L/C without these preconditions. The tribunal finally held: "Even if, during their long term cooperation, both parties have followed the practice of inspecting goods first and applying for a L/C later, the written provisions contrary to that practice that are set forth in the Contract shall prevail over a default inference of practice."

45 E.g., Award of 18 December 1996 [CISG/1996/56] (*Lentils case*); Award of 8 April [CISG/1999/21] (*Wool case*).

46 E.g., Award 23 April 1995 [CISG/1995/07] (*Australian raw wool case*).

China, however, has not withdrawn its reservation on Article 11 of the CISG after the Contract Law came into force. Although the CISG may be interpreted as "law" for the purpose of Article 36 of the Contract Law and thus regarded as reconciling Article 36 of the Contract Law and China's reservation under the CISG, an inconsistency still exists and there seems to be no uniform opinion and practices on it. Accordingly, some Chinese researchers suggest that this reservation should be withdrawn,[47] while some other researchers maintain that there is no need withdrawing the reservation.[48]

In a CIETAC case, the tribunal held that, according to China's reservation on Article 11 the modification of the contract proposed by one party via fax did not become effective because the other party did not respond to the proposal.[49] Similarly, the tribunal in another case accepted only the written materials evidencing the parties' original agreements in respect of the disputed parts of goods (subassemblies of engines) and declined the non-written evidences, based on China's reservation on Article 11 of the CISG.[50] However, no CIETAC cases have been reported since the entry into force of the Contract Law in which mere non-written agreements are recognized under the CISG by the tribunals.[51]

3.2. Offer and acceptance

According to Article 14(1) of the CISG, a proposal must be sufficiently definite to constitute an offer, which requires it to indicate the goods and expressly or implicitly fix or makes provision for determining the quantity and the price.

In an interesting case between a Chinese seller and a Swiss buyer,[52] the contract provided that, after a specific date agreed on, the seller should deliver 20,000 tons of pig iron with the price to be negotiated by the parties, of which 10,000 tons of the goods were specified to be basic pig iron and the other 10,000 tons of goods "either basic pig iron or foundry pig iron". The dispute over

47 LIU Chao [China] *Baoliu, or chehui? – ping woguo dui lianheguo guoji huowu xiaoshou hetong gongyue di 11 tiao de baoliu* [Maintenance, or Withdrawal? – Comments on China's reservation for article 11 of the CISG – in Chinese], in: Nanjing jingji xueyuan xuebao [Journal of Nanjing University of Economics], Nanjing (2001.3), 63-65. Also see, DING Wei, in *CISG di 11 tiao de baoliu ying fou chehui* [Should China's Reservation for Article 11 of CISG be withdrawn? - in Chinese], in: Faxue [Law Science], Beijing (1999.7), 22-27. WANG Jiwen [China], *Woguo dui lianheguo guoji huowu xiaoshou hetong gongyue de baoliu wenti* [On the China's Reservation of the CISG – in Chinese], in: Jiangxi caijing daxue xuebao [Journal of Jiangxi University of Finance and Economics], Nanchang (2004.2), No.32, 79-82.

48 In a discussion published as *CISG di 11 tiao de baoliu ying fou chehui* [Should China's Reservation for Article 11 of CISG be withdrawn? - in Chinese], in: Faxue [Law Science], Beijing (1999.7), 22-27, SI Pingping was of the view that reservation on Article 11 excluded the obligation to accept contracts not concluded by writing but the reservation *per se* did not obligate China to exclude the validity of contract not concluded by writing. Therefore, if the Contract Law employed the new attitude, the PRC courts might replied on it to admit the non-written contracts without withdrawing the reservation on Article 11. ZHU Lanye also opined that there was no need to withdraw the reservation because the reservation excluded Article 11 of the CISG and made the formality of contracts determined by the applicable law.

DING Wei's viewpoint was that under the existing reservation international sales contracts are still required to be concluded by writing unless China withdraws its reservation.

49 Award of 17 October 1996 [CISG/1996/47] (*Tinplate case*). See, also: Award of 29 September 1997 [CISG/1997/28] (*Oxidized aluminum case*); Award of 31 December 1997 [CISG/1997/37] (*Lindane case*).

50 Award of 6 September 1996 [CISG/1996/42] (*Engines case*).

51 In Award of 30 June 1999 [CISG/1999/30] (*Peppermint oil case*), the two parties disputed on the conclusion of contract. The buyer provided a contract with his signature, but the seller alleged that such signature was later added in by the buyer merely for the arbitration. The tribunal dismissed the seller's allegation because he did not provide persuasive evidences and ruled that the contract concluded. However, to make its decision better established, the tribunal in addition listed the facts that both parties had implemented their obligations under the contract as further proof.

52 Award of 25 December 1998 [CISG/1998/11] (*Basic pig iron case*).

whether the contract had been concluded with regard to the second 10,000 tons of goods was one of the key issues of this case. Though not explicitly stated, the parties maintained and the tribunal held that the contract might be divided. To analyze whether the part of contract on the second 10,000 tons of goods had been concluded, by referring to Article 14(1), the tribunal decided that since the goods had not been specified, the proposal with regard to the second 10,000 tons of goods was not sufficiently definite; this meant that this part of the contract was not concluded. As regards the first 10,000 tons of goods, the tribunal held that the part of the contract pertaining to them had been concluded, and the way to determine the price had also been expressly stipulated, i.e., "price to be mutually agreed between the parties", so as to exclude the application of Article 55 of the CISG.

Article 19 of the CISG sets forth how to determine whether a reply to an offer constitutes an acceptance or a counter-offer. In one case between a Chinese seller and a Swedish buyer under the term FOB,[53] the buyer in his reply to the seller modified certain provisions in respect of the shipment, e.g., the requirement of the age of ship, to which the seller did not object in time but later argued this had materially altered the offer and refused to implement the contract. The tribunal held that, this modification was not material because under FOB it was the buyer's obligation to arrange the shipment. As the seller objected with undue delay, the reply was deemed a valid acceptance and the contract was concluded.

3.3. Modification and termination of the contract

The parties may reach agreement to modify or terminate a contract under Article 29 of the CISG. Considering China's reservation on Article 11, only written modification and termination are permitted. Fax as one of the forms of writing is frequently employed during the negotiation process; therefore, the tribunal may find the parties' intention from faxes to each other. Without a written response, a receiver's mere silence is not deemed as acceptance of the sender's proposal of modification or termination.[54]

With regard to the meeting of minds during the negotiation between the parties on the modification or termination of the contract, one tribunal held that Article 19 should apply.[55]

The parties may modify a contract by way of entering into a supplemental agreement. A Chinese seller and a U.S. buyer reached a compensation agreement specifying the amount and forms of compensations.[56] The tribunal decided that the CISG applied to the whole case and made relevant adjustment to the compensation agreed in the compensation agreement according to the CISG.

53 Award of 10 June 2002 [CISG/2002/02] (*Rice agricultural products case*).

54 E.g., Award of 26 June 1997 [CISG/1997/17] (*Monohydrate zinc sulfate case*); Award of 29 September 1997 [CISG/1997/28] (*Oxidized aluminum case*); Award of 16 December 1997 [CISG/1997/35] (*Hot dipped galvanized steel coils case*); Award of 19 December 1997 [CISG/1997/36] (*Steel case*).

55 Award of 1 April 1993 [CISG/1993/02] (*Steel products case*).

56 Award of 23 February 1995 [CISG/1995/01] (*Jasmine aldehyde case*).

4. Obligations of the Seller and Remedies of the Buyer (except for Damages)

4.1. Obligations of the seller

4.1.1. Delivery of the goods

Under Article 30 of the CISG, which summarizes the seller's obligations, the seller's essential obligation is to deliver the goods. This is one major topic of disputes before the CIETAC tribunals. Obviously, when the seller did not deliver the goods at all, the tribunal would easily find that he had breached the contract,[57] sometimes explicitly indicating such failure constituted a fundamental breach.[58] However, in some cases, when foreign trade agents or other third parties are involved, the situation might become a little complicated.[59]

4.1.2. Handing over the documents relating to the goods

In international trade, documents relating to the goods, especially the B/L which is normally deemed as representing the title to the goods, are essential to the buyer. To hand over the documents in some cases may substitute for the specific delivery of the actual goods, therefore constituting another main obligation of the seller.

Such documents shall conform to the stipulations in the contract. In one case where the term CIF was selected by the parties, the seller handed over the B/L for some installments of goods with the freight unpaid, which was found by the tribunal as a breach of contract.[60]

As the L/C and B/L are frequently used in international trade, the obligation of seller to hand over a B/L conforming to the requirements set out in the L/C is always connected with whether the seller has fulfilled his obligations and whether the buyer shall pay. The arrangement of the L/C itself constitutes an independent legal relationship between parties thereto. When the tribunal is hearing a dispute between the buyer and seller arising from the sales contract, whether the documents presented by the seller and alleged by the bank as non-conforming are non-conforming or not, is still subject to the stipulations of the sales contract. For instance, a Chinese buyer refused to pay the price by alleging that an Austrian seller did not provide a set of conforming B/Ls under the arrangement of the L/C, but the tribunal held that the non-conformity in the B/L was not fundamental in the context of the sales contact and the buyer had

57 For examples, see: Award of 18 April 1991 [CISG/1991/01] (*Silicate-iron case*); Award of 4 September 1996 [CISG/1996/41] (*Natural rubber case*); Award of 10 October 1996 [CISG/1996/45] (*Petroleum coke case*); Award of 15 November 1996 [CISG/1996/52] (*Oxytetracycline HCL case*); Award of 23 April 1997 [CISG/1997/07] (*Groundnut case*); Award of 24 April 1997 [CISG/1997/09] (*Oxidized aluminum case*); Award of 10 July 1997 [CISG/1997/21] (*Carbamide case*); Award of 30 November 1997 [CISG/1997/33] (*Canned oranges case*); Award of 1 February 2000 [CISG/2000/01] (*Silicon and manganese alloy case*).

58 E.g., Award of 5 September 1994 [CISG/1994/10] (*Equipment case*); Award of 22 January 1996 [CISG/1996/04] (*Palm oil case*); Award of 4 April 1997 [CISG/1997/04] (*Black melon seeds case*); Award of 18 August 1997 [CISG/1997/26] (*Vitamin C case*); Award of 27 July 2000 [CISG/2000/03] (*Steel scraps case*); Award of 10 August 2000 [CISG/2000/04] (*Silicon metal case*).

59 E.g., Award of 2 April 1999 [CISG/1999/18] (*Grey cloths case*).

In this case, the buyer claimed that the seller did not deliver the goods (grey cloths) according to the contract, and the seller alleged that he had delivered to a third party for dyeing as instructed by the buyer. The tribunal supported the seller's position based on relevant evidences.

60 Award of 11 April 1994 [CISG/1994/06] (*Old paper case*).

no basis to declare the contract avoided.[61] A similar case between a Chinese buyer and a Korean seller was also reported.[62]

4.1.3. Conformity of the goods

In addition to non-delivery of goods, another frequently-seen breach is the delivery of non-conforming goods by the seller.

Under Article 35 of the CISG, the goods delivered by the seller shall conform with the contract in quantity, quality, description, package and other aspects. The CIETAC tribunals in different cases have found various situations in which the goods delivered did not conform with the contract, the quality of the goods not conforming to the contractual requirements being an oft-found example.[63] If a sample of goods had been accepted and confirmed by the parties, the goods should possess the qualities of the sample.[64] If, however, no sample had been considered by the parties, the tribunal would be inclined to employ other criteria, such as those set out in Article 35(2)(a) of the CISG.[65] If the contract provided for special descriptions of goods, such as the origin or the manufacture time, the goods should conform with such descriptions.[66]

Though not explicitly stated, Article 35(2)(a) may be used by the tribunal as the basis to pronounce certain quality standards, which was also found in other Contracting States.[67] In one case decided in 1993,[68] the tribunal held that the qualities of goods should conform with not only the contract, but also the national or industrial standards of the origin of goods, and the qualities published or declared by the manufacturer.[69] In another case, the tribunal tried to refer to international quality standards when examining the validity of the inspection report.[70]

Special packaging and shipment might be required according to the chemical characteristics of the goods. In one case of a Chinese seller selling heliotropin (jasmine aldehyde) to a U.S. firm under the term CIF, the seller needed to package the goods under a certain temperature and ship them as soon as practical. However, the seller did not comply with the contract, resulting in the loss of

61 Award of 15 February 1996 [CISG/1996/10] (*Hot-rolled plates case*).

62 Award of 25 June 1997 [CISG/1997/16] (*Art paper case*).

63 Such as: Award of 22 May 1996 [CISG/1996/25] (*Broadcasting equipments case*); Award of 25 November 1996 [CISG/1996/02] (*Chromium ore case*).

64 Such as: Award of 18 September 1996 [CISG/1996/43] (*Agricultural products case*).

65 See, Award of 26 October 1996 [CISG/1996/49] (*Cotton bath towel case*).

In this case, because no sample was sealed up by the parties together, the tribunal eventually found the goods (cotton bath towels) non-conforming for not fitting for purposes for the goods of the same description ordinarily used according to Article 25(2)(a).

See, also: Award of 22 March 1995 [CISG/1995/05] (*Costumes case*).

66 E.g., Award of 5 September 1994 [CISG/1994/10] (*Equipment case*).

67 See, UNCITRAL Digest of case law on the CISG, Article 35, A/CN.9/SER.C/DIGEST/CISG/35, paragraph 9, at <http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html>.

68 Award of 10 July 1993 [CISG/1993/09] (*Heliotropin case*).

69 Article 62(2) of the Contract Law may to some extent be of reference. It provides that the national or industrial standards for qualities of goods shall apply, where the contract does not provide the qualities of goods, the parties cannot reach supplementary agreement and the relevant article in the contract and their trade practice cannot help to specify the requirements of qualities.

70 Award of 8 March 1996 [CISG/1996/12] (*Old boxwood corrugated carton case*).

goods. The tribunal decided that the goods did not conform to the contract and the seller was in breach.[71]

When the buyer has known or could not have been unaware of the lack of conformity of goods at the time of the conclusion of the contract, the seller under Article 35(3) is not liable for such lack of conformity. In one case, a Chinese buyer had bought before from an Italian seller the same type of machine with the same defects.[72] As in the present case the buyer did not specify in the sales contract that such defects should be excluded, the tribunal therefore decided that, according to Article 35(3), the buyer should have known of such defects and the seller was not liable for this.

The seller, under Article 36 of the CISG, is liable for any lack of conformity existing at the time the risk passes to the buyer.[73] In one case, the tribunal distinguished between evident superficial defects and latent defects of goods.[74] The tribunal was of the view that with regard to the evident superficial defects, the buyer should raise his objection within a reasonable period of time according to Article 38 and Article 39(1); with regard to the latent defects, the buyer was entitled to raise his objection according to Article 39(2).

4.1.4. Buyer's duty to examine the goods and give timely notice

The duty of buyer to examine the goods and give a timely notice of lack of conformity of the goods under Article 38 and 39 of the CISG is related to the non-conformity of goods discussed.

According to Article 38(1) of the CISG, the buyer shall examine the goods within as short a period as is practical in the circumstances. When no examination had been carried out within a practicable period of time according to Article 38 and the goods had been taken, the buyer would be deemed by the tribunal as having waived his right of examination.[75] When examination had been made, it should be done within as short a period as is practical. In one case, considering that the distance between the unloading place and the examination place was about one day's ride, the tribunal accepted the examination report completed within three to four days after unloading.[76] Within the period provided by the contract or deemed reasonable according to Article 39(1), the buyer may have raised certain defects of goods, but it is not clear whether the buyer is required to notify the seller of all of the defects. On this point, in one case the tribunal has held that this is a gap of the CISG. By referring to Article 41 of the Contract Law[77] and Article 4.6 of the

71 Award of 23 February 1995 [CISG/1995/01] (*Jasmine aldehyde case*).

72 Award of 20 January 1994 [CISG/1994/02] (*Hydraulic press machine case*).

73 Award of 16 July 1996 [CISG/1996/31] (*Hot-rolled steel plates case*).

74 Award of 29 March 1999 [CISG/1999/14] (*Flanges case*). Also see, Award of 30 March 1999 [CISG/1999/16] (*Flanges case*).

75 See, Award of 4 August 1988 [CISG/1988/01] (*Calculator assembly parts case*); Award of 12 December 1994 [CISG/1994/14] (*Sunflower seeds and groundnut case*); Award of 16 May 1995 [CISG/1995/10] (*Leather suitcases case*); Award of 31 July 1996 [CISG/1996/34] (*Sport shoes case*); Award of 18 September 1996 [CISG/1996/43] (*Agricultural products case*); Award of 26 June 1997 [CISG/1997/17] (*Monohydrate zinc sulfate case*); Award of 13 October 1997 [CISG/1997/30] (*Printing machine case*); Award of 5 April 1999 [CISG/1999/19] (*Air conditioner equipments case*).

76 Award of 28 September 1996 [CISG/1996/44] (*Gloves case*).

77 Article 41 provides: "If a dispute over the understanding of the standard terms occurs, it shall be interpreted according to general understanding. Where there are two or more kinds of interpretation, an interpretation unfavorable to the party supplying the standard terms shall be preferred. Where the standard terms are inconsistent with non-standard terms, the latter shall be adopted."

UNIDROIT Principles of International Commercial Contracts,[78] the tribunal decided that the clause in the contract should be interpreted against the seller who prepared the contract and recognized the buyer's additional allegations of defects of goods after the period provided for in the contract had expired.[79]

When the buyer resold the goods without examination, some tribunals held that the buyer had given up the right to examine the goods and had accepted the goods.[80] However, in other cases in which the goods at the destination were directly delivered to the end user or sub-buyer, some tribunals decided that the buyer might still be entitled to raise his objection in respect of the qualities of goods if the examination was done according to Article 38.[81] In some cases, the sub-buyer's right of examination might be directly provided for in the contract and thus supported by the tribunal.[82]

Articles 38(2) and 38(3) of the CISG were also frequently invoked by the CIETAC tribunals, especially in cases in which the goods after arriving at the ports of China would be further transported to some inland destination.[83]

4.2. Remedies of the buyer (except for damages)

As damages is the remedy most frequently claimed and ruled on in the CIETAC awards, this essay will discuss it separately in the following part II.6. Therefore, the remedies of the buyer discussed here and of the seller discussed in part II.5.2 will be those provided in the CISG except for damages.

4.2.1. Specific performance

In the case of the seller in breach and the buyer claiming specific performance according to Article 46(1), Article 28 of the CISG allows judges or arbitrators to order specific performance according to the *lex fori*. Article 18 of the LECFI[84] did not explicitly provide for the remedy of specific

78 Article 4.6 "Contra Proferentem Rule" provides: "If contract terms supplied by one party are unclear, an interpretation against that party is preferred."

79 Award of 7 January 2000 [CISG/2000/06] (*Cysteine case*).

80 E.g., Award of 20 February 1994 [CISG/1994/03] (*Cysteine case*); Award of 31 July 1997 [CISG/1997/24] (*Axle sleeves case*).

81 E.g., Award of 23 February 1995 [CISG/1995/01] (*Jasmine aldehyde case*).

82 E.g., Award of 7 May 1997 [CISG/1997/12] (*Horsebean case*).

83 See, Award of 5 July 1993 [CISG/1993/08] (*Copperized steel pipes case*); Award of 6 September 1996 [CISG/1996/42] (*Engines case*); Award of 23 July 1997 [CISG/1997/23] (*Polypropylene case*); Award of 30 March 1999 [CISG/1999/17] (*Electric heater case*); Award of 20 April 1999 [CISG/1999/23] (*Filling machine case*).

84 Article 18 of the LECFI provides: "If a party fails to perform the contract or its performance of the contractual obligations does not conform to the agreed terms. Which constitutes a breach of contract, the other party is entitled to claim damages or demand other reasonable remedial measures. If the losses suffered by the other party cannot be completely made up after the adoption of such remedial measures, the other party shall still have the right to claim damages."

performance but only the "damages and other reasonable remedial measures".[85] However, the Contract Law in its Article 110[86] provides for the remedy of specific performance.

Nevertheless, maybe because of the international character of international sales contracts and the relevant obstacles for specific performance, there are only a few CIETAC awards in which specific performance as a remedy had been granted to the buyer. One case was reported in which the tribunal decided that the contract should continue to be performed and the seller should deliver the goods.[87]

4.2.2. To require repair

Under Article 46(3), the buyer may require the seller to remedy the lack of conformity by repair. In the aforesaid case between the Chinese buyer and the Italian seller in part II.4.1.3, the seller was found not liable for the defects of goods under Article 35(3); however, the tribunal required the seller to repair the machine by replacing a new part at his own cost, while dismissing the other claims of buyer.[88]

4.2.3. To declare the contract avoided

The buyer under Article 49 of the CISG may declare the contract avoided. If the contract is declared avoided, the parties shall perform their obligations under Articles 81 to 84. Especially if both parties have performed the contract, in principle the seller shall reimburse the price to the buyer and the buyer shall return the goods to the seller.[89]

The typical circumstance is that the seller is in fundamental breach so that the buyer is entitled to declare the contract avoided under Article 49(1)(a).[90] In such cases, Article 25 was frequently invoked to check whether the seller was in fundamental breach.[91]

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85 For the comparative study on specific performance under the CISG and GPCL, LECFL and Economic Contract Law of the People's Republic of China, see: SHEN, Jianming [China]: The Remedy of Requiring Performance Under the CISG and the Relevance of Domestic Rules, in: 13 Arizona Journal of International and Comparative Law (1996), pp. 253-306, online version at < http://www.cisg.law.pace.edu/cisg/biblio/shen1.html#a1 >.

86 Article 110 of the Contract Law provides: "Where one party to a contract fails to perform the non-monetary debt or its performance of non-monetary debt fails to satisfy the terms of the contract, the other party may request it to perform it except under any of the following circumstances: It is unable to be performed in law or in fact;

The object of the debt is unfit for compulsory performance or the performance expenses are excessively high; or The creditor fails to request for the performance within a reasonable time period."

87 Award of 30 October 1991 [CISG/1991/04] (*Roll aluminum case*).

88 Award of 20 January 1994 [CISG/1994/02] (*Hydraulic press machine case*).

89 For the comparative study on avoidance of contract under the CISG and GPCL, LECFL and Economic Contract Law of the People's Republic of China, see: SHEN, Jianming [China]: Declaring the Contract Avoided: The U.N. Sales Convention in the Chinese Context, in: 10 New York International Law Review (1997), pp. 7-57, online version at < http://www.cisg.law.pace.edu/cisg/biblio/shen.html >.

90 Such as: Award of 25 February 1993 [CISG/1993/05] (*Terylene draw-texturing machine case*); Award of 20 July 1993 [CISG/1993/10] (*Shaping machine case*); Award of 25 October 1994 [CISG/1994/13] (*High tensile steel bars case*); Award of 22 January 1996 [CISG/1996/04] (*Palm oil case*); Award of 23 December 1996 [CISG/1996/57] (*Carbazole case*); Award of 5 August 1997 [CISG/1997/25] (*Cold-rolled coils case*); Award of 29 January 2000 [CISG/2000/08] (*Steel bottle case*).

91 See, Award of 6 April 1994 [CISG/1994/05] (*Printing machine case*); Award of 22 May 1996 [CISG/1996/25] (*Broadcasting equipments case*); Award of 18 August 1997 [CISG/1997/26] (*Vitamin C case*); Award of 19 December 1997 [CISG/1997/36] (*Steel case*).

In one case in which a Chinese seller sold down wear to a Czech buyer at a comparatively low price, the tribunal held what the buyer was entitled to expect under Article 25 should be goods conforming with the contract or the profits the buyer might get by resale.[92] If the qualities of goods, especially the percentage of the down wadded in, conformed to the standards as claimed by the buyer, the price would have been several times higher than that in the contract. Considering the level of price, the tribunal decided that the goods that the buyer was entitled to expect were just those consistent with such price. To weigh the extent of the seller's breach, the tribunal further interpreted the word "substantially" ("*Shizhixing de*" – in Chinese *pinyin*) in Article 25 as "mostly" ("*Dabufen de*" – in Chinese *pinyin*) or "Basically" ("*Jibenshang*" – in Chinese *pinyin*). However, in another case, the tribunal when analyzing whether the seller was in fundamental breach relied more upon the provision in Article 29(1)[93] of the LECFI than Article 25 of the CISG, which to some extent is not in accordance with the autonomous interpretation required by Article 7(1) of the CISG.[94]

In addition, pursuant to Article 26 of the CISG, a declaration of avoidance of the contract may not be effective without notice to the other party, which was also decided in some CIETAC cases.[95]

When the seller wrongly deemed the buyer in fundamental breach and declared the contract avoided so as to reject the delivery of the goods, the seller himself might be exposed to the risk of being found in fundamental breach by the tribunal.[96] Correspondingly, the buyer is also at his own risk to judge whether the seller is in fundamental breach when the buyer declines to perform his obligation to pay the price.[97]

When the seller has delivered the goods, the buyer would lose his right to declare the goods avoided, but the buyer might still have opportunities to do so under the exceptions provided for under Article 49(2)(b)(i), especially if the goods have defects.[98] The buyer may also according to Article 47(1) fix an additional grace period for the seller to perform his obligations, at the

92 Award of 22 March 1995 [CISG/1995/05] (*Costumes case*).

93 Article 29 of the LECFI provided: "A party shall have the right to notify the other party that a contract is rescinded in any of the following situations: (1) if the other party has breached the contract, thus adversely affecting the economic benefits they expected to receive at the time of the conclusion of the contract…"For readers' reference, Article 94 of the Contract Law is cited as follows:

"The parties to a contract may rescind the contract under any of the following circumstances:

(1) The purpose of the contract is not able to be realized because of force majeure;

(2) One party to the contract expresses explicitly or indicates through its acts, before the expiry of the performance period, that it will not perform the principal debt obligations;

(3) One party to the contract delays in performing the principal debt obligations and fails, after being urged, to perform them within a reasonable time period;

(4) One party to the contract delays in performing the debt obligations or commits other acts in breach of the contract so that the purpose of the contract is not able to be realized; or

(5) Other circumstances as stipulated by law."

Though no "fundamental breach" is explicitly used, its item (4) is deemed as similar to Article 25 of the CISG to certain extent.

94 Award of 25 June 1997 [CISG/1997/16] (*Art paper case*).

95 See, Award of 22 March 1995 [CISG/1995/05] (*Costumes case*); Award of 24 April 1997 [CISG/1997/09] (*Oxidized aluminum case*).

96 E.g., Award 23 April 1995 [CISG/1995/07] (*Australian raw wool case*); Award of 10 October 1996 [CISG/1996/45] (*Petroleum coke case*); Award of 1 February 2000 [CISG/2000/01] (*Silicon and manganese alloy case*).

97 E.g., Award of 15 February 1996 [CISG/1996/10] (*Hot-rolled plates case*); Award of 30 April 1997 [CISG/1997/10] (*Ferro-Molybdenum alloy case*).

98 E.g., Award of 17 April 1996 [CISG/1996/19] (*Gas purifiers case*).

expiration of which the buyer may further declare the contract avoided under Article 49(1)(b) or 49(2)(b)(ii) when applicable.[99] In a case, a Swiss seller only delivered parts of goods at the expiration of the additional period fixed by the buyer, and the tribunal decided that the buyer might declare the contract avoided.[100] A similar case was reported with respect to a contract for sale of steel between a Chinese buyer and an Italian seller.[101] In considering whether the buyer had to send a notice to the seller to declare the contract avoided at the expiration of the additional period of time, one tribunal was of the view that it was not necessary as the buyer had explicitly indicated his intention when he granted the seller such additional period.[102]

If the buyer has successfully declared the contract avoided, under Article 81(2) and Article 84 of the CISG, when the parties have performed the contract, the buyer is obligated to return the goods to the seller with accounting to the seller for benefits it has derived from the goods[103] and the seller is obligated to return the price to the buyer with the payment of certain interest.[104] The seller's obligation to pay interest on the refundable price under Article 84 is to some extent different from the duty of the seller to pay interest under Article 78.[105] The buyer may in addition according to Article 45(2) claim damages according to Articles 74 to 77, which will be discussed separately in following part II.6.

4.2.4. To reduce the price

The buyer's right to reduce the price when the goods did not conform with the contract under Article 50 of the CISG has been supported by the tribunals in a number of CIETAC awards.[106] In one case, the buyer claimed damages, but the tribunal found that the evidence and basis provided by the buyer for his claim for damages were not sufficient and voluntarily pursuant to Article 50 decided on the reduction of price as the reasonable remedy in such circumstances.[107]

99 Such as: Award of 15 November 1996 [CISG/1996/52] (*Oxytetracycline HCL case*).

100 Award of 5 September 1994 [CISG/1994/10] (*Equipment case*).

101 Award of 19 September 1994 [CISG/1994/11] (*Steel case*).

102 Award of 25 December 1998 [CISG/1998/10] (*Basic pig iron case*).

103 E.g., Award of 23 December 1996 [CISG/1996/57] (*Carbazole case*).

104 E.g., Award of 22 May 1996 [CISG/1996/25] (*Broadcasting equipments case*); Award of 27 July 2000 [CISG/2000/03] (*Steel scraps case*).

105 E.g., Award of 30 October 1991 [CISG/1991/04] (*Roll aluminum case*); Award of 30 November 1998 [CISG/1998/08] (*Glassware case*); Award of 27 July 2000 [CISG/2000/03] (*Steel scraps case*).Also see, Award of 30 March 1999 [CISG/1999/17] (*Electric heater case*). In this case, the seller was not found in fundamental breach. The tribunal decided that the reduction of price should be adopted. When the seller refunded the reduced part of price, the tribunal held that he under Article 84(1) should pay relevant interests.

106 Such as: Award of 8 August 1996 [CISG/1996/36] (*Diaper machine case*); Award of 9 August 1996 [CISG/1996/37] (*Shirts case*); Award of 18 September 1996 [CISG/1996/43] (*Agricultural products case*); Award of 28 September 1996 [CISG/1996/44] (*Gloves case*); Award of 20 April 1999 [CISG/1999/23] (*Filling machine case*); Award of 21 May 1999 [CISG/1999/26] (*Excavating machine case*).

107 Award of 30 March 1999 [CISG/1999/17] (*Electric heater case*).

5. Obligations of the Buyer and Remedies of the Seller (except for Damages)

5.1. Obligations of the buyer

5.1.1. Payment of the price

Under Articles 53 and 54 of the CISG, one of the buyer's main obligations is to pay the price for the goods.

In international trade, the L/C is one of the most frequently used payment methods. When the contract provides a L/C as the payment method, the buyer is obligated to establish the L/C as required by the contract. If the buyer fails to issue the L/C, he will be found in breach by the tribunal.[108]

However, the issuance of the L/C is not the end of the buyer's obligation to pay. According to the relevant international practice for an L/C, especially UCP 500 of the International Chamber of Commerce, the L/C agreement itself constitutes a legal relation that is separate from the sales contract between the seller and buyer. The reasons for which a bank declines to pay the seller, especially the non-conformity of the documents presented by the seller with the L/C, might not be directly relied on by the buyer, unless such non-conformity constitutes a breach of contract under the sales contract itself. Therefore, when the buyer does not fulfill the obligation of payment eventually, even if the L/C has been issued, the buyer under the sales contract shall still pay the seller by means of the L/C or by substitute methods.[109] For instance, in one case, the tribunal held that the non-conformity of documents with the L/C was not fundamental under the sales contract so that the buyer might not declare the contract avoided and the buyer should still pay the price when the method of payment by L/C became void.[110] In another interesting case,[111] even after the buyer had paid the money to the issuing bank, the buyer might still be obligated to pay the seller directly under the sales contract when the issuing bank was in insolvency to pay the seller. The tribunal in addition implied that it was the buyer's duty to choose a reliable and solvent issuing bank.

In general, the L/C shall arrive at the seller by the time of shipment. This obligation of the buyer was indicated in one case, in which on the expiration day of the issued L/C the buyer promised he would modify the L/C in the following days and requested the seller to ship the goods first, but the seller rejected shipment of the goods unless the L/C had been duly extended. The tribunal, referring to relevant international practice, works of some Chinese and U.S. scholars and Sections 2-325(1) and 5-106 of the *Uniform Commercial Code* of U.S., decided that the seller was entitled to receive the formal L/C or formal notice from the issuing bank before shipment and had no duties

108 Such as: Award of 23 April 1997 [CISG/1997/07] (*Groundnut case*); Award of 30 April 1997 [CISG/1997/10] (*Ferro-Molybdenum alloy case*); Award of 22 May 1997 [CISG/1997/13] (*Soybean oil case*); Award of 26 June 1997 [CISG/1997/17] (*Monohydrate zinc sulfate case*); Award of 21 July 1997 [CISG/1997/22] (*Yam-dyed fabric case*); Award of 16 December 1997 [CISG/1997/35] (*Hot dipped galvanized steel coils case*); Award of 6 January 1999 [CISG/1999/04] (*Wool case*); Award of 12 February 1999 [CISG/1999/08] (*Chrome plating machine case*); Award of 12 February 1999 [CISG/1999/09] (*Nickel plating machine case*); Award of 1 March 1999 [CISG/1999/12] (*Canned oranges case*); Award of 8 April [CISG/1999/21] (*Wool case*); Award of 31 December 1999 [CISG/1999/32] (*Steel coil case*).

109 E.g., Award of 15 February 1996 [CISG/1996/10] (*Hot-rolled plates case*); Award of 16 June 1997 [CISG/1997/15] (*Leather case*); Award of 1 April 1997 [CISG/1997/02] (*Fishmeal case*).

110 Award of 25 June 1997 [CISG/1997/16] (*Art paper case*).

111 Award of 28 January 1999 [CISG/1999/06] (*Refrigerating machine case*).

to accept the buyer's oral commitments.[112] The buyer's obligation to issue the L/C before shipment was stated in another case as well.[113] However, how long before the shipment that the buyer should issue the L/C might differ in different cases. The tribunal once in one case decided that twelve days before the shipment was sufficient even if the seller alleged the practice to be at least fifteen days.[114]

Moreover, the buyer might need to modify the L/C as to enable the seller to submit conforming documents and arrange the shipment, if the parties reached new agreements while implementing the contract, or under Article 47 of the CISG, the buyer granted the seller an additional period of time to perform his obligations.[115] However, the duty of seller to send notice of shipment was correspondingly deemed to be required under certain terms selected. For instance, in one case, the tribunal held that under the term CFR, the buyer might not modify the L/C until the seller notified the buyer of the shipment.[116]

With regard to the time of payment, Article 58 of the CISG was invoked by the tribunal in one case to support the buyer's claim for getting the documents for the goods and an opportunity to examine the goods before he paid the price.[117]

Other payment methods, e.g., D/A (Document against acceptance)[118] and T/T (Telegraphic transfer)[119] may also be employed. In such cases, the buyer was also bound by Article 54 of the CISG to pay the price in due manner.

5.1.2. Taking delivery

Under Articles 53 and 60 of the CISG, the buyer shall take all reasonable acts in order to enable the seller to make delivery and for the buyer to take delivery of the goods.

The term FOB is often used in international trade. According to Incoterms 1990 and 2000 which were applied frequently in the CIETAC awards reported, under the term FOB, the buyer shall contract at his own expense for the carriage of the goods from the named port of shipment to enable the seller to deliver the goods on board the vessel nominated by the buyer. When the buyer failed to nominate the vessel as required by the contract, he would be found in breach by the tribunal.[120]

The buyer's failure to take delivery may also occur in other circumstances. In one case, a U.S. buyer refused to take delivery because he could not procure the necessary approvals of relevant

112 Award of 18 December 1996 [CISG/1996/56] (*Lentils case*).
113 Award of 21 July 1997 [CISG/1997/22] (*Yam-dyed fabric case*).
114 Award 23 April 1995 [CISG/1995/07] (*Australian raw wool case*).
115 E.g., Award of 5 September 1994 [CISG/1994/10] (*Equipment case*); Award of 16 December 1997 [CISG/1997/35] (*Hot dipped galvanized steel coils case*); Award of 10 October 1996 [CISG/1996/45] (*Petroleum coke case*).
116 Award of 11 February 2000 [CISG/2000/02] (*Silicon metal case*).
117 E.g., Award of 30 March 1994 [CISG/1994/04] (*Boletus edulis case*).
118 Such as Award of 14 February 1996 [CISG/1996/09] (*Bicycle case*).
119 Such as Award of 26 November 1998 [CISG/1998/07] (*Old paper case*).
120 E.g., Award of 8 March 1996 [CISG/1996/13] (*Horsebean case*); Award of 16 August 1996 [CISG/1996/39] (*Dioctyl phthalate case*); Award of 25 November 1996 [CISG/1996/02] (*Chromium ore case*); Award of 18 December 1996 [CISG/1996/56] (*Lentils case*).

U.S. government agencies. After dismissing the buyer's allegation of force majeure, the tribunal decided that the buyer was in fundamental breach of contract because of his failure to take delivery.[121]

5.2. Remedies of the seller (except for damages)

As mentioned above, the remedy of damages will be separately discussed in the following part II.6 and only the other remedies of the seller decided in the CIETAC awards will be discussed here.

5.2.1. Specific performance

Pursuant to Article 62 of the CISG, the seller may require the buyer to perform the contract, with Article 28 being taken into consideration as well. If the buyer had accepted the goods, the tribunals in many cases decided that the buyer should perform his obligations to pay the price when he was in breach.[122] When the buyer was obligated to pay the price in arrears, besides the price, according to Article 78 the tribunal would normally require the buyer to pay relevant interest to the seller at an annual rate ranging from 5% to 8%.[123]

5.2.2. To declare the contract avoided

The seller may also declare the contract avoided according to Article 64 of the CISG . When the buyer is in fundamental breach, e.g., refusing to pay the price, the seller may declare the contract avoided under Article 64(1)(a)[124]. When the seller has granted the buyer an additional period of time to perform his obligations and the buyer does not do so at the expiration of such time, the seller may also declare the contract avoided pursuant to Article 64(1)(b).[125] In one case, after issuing the L/C, the buyer denied to accept the goods and the corresponding documents and requested a reduction of price by alleging that the documents did not conform with the L/C. The tribunal found the non-conformity in the documents was just a minor clerical error, and therefore decided that the buyer was in fundamental breach for denying the goods and allowed the seller to

121 Award of 7 May 1997 [CISG/1997/11] (*Sanguinarine case*).

122 Such as: Award of 12 December 1994 [CISG/1994/14] (*Sunflower seeds and groundnut case*); Award of 16 May 1996 [CISG/1996/24] (*Cashmere sweaters case*); Award of 31 May 1996 [CISG/1996/27] (*Children's jackets case*); Award of 15 October 1996 [CISG/1996/46] (*Canned chufa case*); Award of 13 January 1999 [CISG/1999/05] (*Latex gloves case*).

123 E.g., Award of 30 August 1996 [CISG/1996/40] (*Brake pads case*); Award of 15 October 1996 [CISG/1996/46] (*Canned chufa case*); Award of 15 December 1998 [CISG/1998/09] (*Shirts case*); Award of 28 January 1999 [CISG/1999/06] (*Refrigerating machine case*); Award of 25 February 1999 [CISG/1999/10] (*Cotton vest case*); Award of 25 February 1999 [CISG/1999/11] (*Women's trousers case*); Award of 25 March 1999 [CISG/1999/13] (*Women's trousers case*); Award of 28 May 1999 [CISG/1999/02] (*Veneer import case*); Award of 31 May 1999 [CISG/1999/27] (*Indium ingots case*); Award of 11 June 1999 [CISG/1999/29] (*Agricultural chemical products case*); Award of 30 June 1999 [CISG/1999/31] (*Axletree case*); Award of 16 May 1996 [CISG/1996/24] (*Cashmere sweaters case*).

124 E.g., Award of 18 December 1996 [CISG/1996/56] (*Lentils case*); Award of 28 November 1996 [CISG/1996/54] (*Moly-oxide case*).

125 Such as: Award of 1 March 1999 [CISG/1999/12] (*Canned oranges case*). However, in this case, the tribunal invoked Article 64(1)(a), which actually should be Article 64(1)(b).

declare the contract avoided.[126] In such cases, when declaring the contract avoided the seller often at the same time claimed damages.[127]

Article 26 of the CISG applies when the seller intends to declare the contract avoided. In one case, a fax notice sent by the seller to the buyer was deemed enough.[128] And in an exceptional case, the tribunal held that when the buyer had apparently repudiated the contract, the seller need not send the notice to the buyer.[129]

6. Damages

Of all the remedies available to the parties in the CISG, the remedy of damages is the most popular one claimed and ruled on by the CIETAC tribunals.

Under Article 45(1)(b) of the CISG, the buyer may claim damages as provided in Articles 74 to 77, and such right will not be excluded when he claims other remedies according to Article 45(2). Similar rights are provided for the seller in Article 61(1)(b) and 61(2).

6.1. Types of losses

Article 74 of the CISG generally provides an aggrieved party with damages consisting of "a sum equal to the loss, including loss of profit, suffered ... as a consequence of the breach." According to some commentators, Article 74 covers two main categories of losses to be compensated, i.e., the diminution of the aggrieved party's property and his loss of profit.[130] In the CIETAC awards reported, the losses of the aggrieved party for which damages awarded have also fallen into these two main categories.

6.1.1. Diminution of the aggrieved party's property

In this category of losses, "actual losses" or "direct losses", by which the tribunals used to describe certain losses already incurred, were awarded in a number of the CIETAC cases. Price difference, as particularly provided for in Articles 75 and 76 of the CISG, often appeared in the CIETAC cases reported, though with certain exceptional cases to be elaborated in the following sections. In addition, the author will also discuss the expenditures for arbitration as a separate type of loss since the damages for them were frequently awarded according to the Arbitration Rules of CIETAC.

– *"Actual losses" and "Direct losses"*

126 Award of 4 June 1999 [CISG/1999/28] (*Industrial raw material case*).
127 E.g., Award of 6 January 1999 [CISG/1999/04] (*Wool case*).
128 Award of 8 April [CISG/1999/21] (*Wool case*).
129 Award of 4 June 1999 [CISG/1999/28] (*Industrial raw material case*).
130 V. Knapp, C. M. Bianca & M. J. Bonell (ed), *supra* note 38, at 543.

In some CIETAC awards, when describing relevant losses of the aggrieved party, some tribunals used two concepts, i.e., the "actual losses" ("*Shiji sunshi*" – in Chinese *pinyin*) and "direct losses" ("*Zhijie sunshi*" – in Chinese *pinyin*).

The "actual losses" that the tribunals ever awarded included: the compensation paid by the aggrieved party to his sub-buyer supported by the court's judgment,[131] the storage fees paid,[132] freight[133] and transshipment freight,[134] fees for loading and unloading,[135] price difference,[136] fees for issuing the L/C, inspection fees,[137] and import fees.[138] On the contrary, the lost profit was not deemed by some tribunals as actual losses.[139]

The "direct losses" decided in the CIETAC awards included: the compensation paid by the buyer to his sub-buyer,[140] price difference,[141] and fees for issuing and modifying the L/C.[142] Lost profit was clearly regarded as an indirect loss in one case.[143]

From the aforesaid types of losses covered by the "actual losses" or "direct losses", it can be concluded that these two concepts seemed to refer to the diminishment or impairment that the aggrieved party's existing properties actually incurred, especially the expenditures by the aggrieved party. However, lost profit, as the damages to the expected or future interests of the aggrieved party, has not actually resulted in the losses of the aggrieved party's existing properties, thus regarded as non-actual or indirect losses.

Meanwhile, in many cases the tribunals did not use the terms "actual losses" or "direct losses". In respect of most types of losses mentioned above and other expenditures by the aggrieved party, they stated the expenditures the aggrieved party had been incurred item by item.[144]

When the loss of profits had been awarded by the tribunals, the tribunal in some cases would deny recovery of some expenditures, because the tribunal held that such expenditures were normal costs which would still have occurred even if the contract had been duly performed. The viewpoint of

131 E.g., Award of 25 October 1994 [CISG/1994/13] (*High tensile steel bars case*).
132 E.g., Award of 10 May 1996 [CISG/1996/22] (*Hot-rolled coils case*).
133 E.g., Award of 6 March 1997 [CISG/1997/01] (*Men's shirts case*).
134 E.g., Award of 16 August 1996 [CISG/1996/39] (*Dioctyl phthalate case*).
135 E.g., Award of 16 August 1996 [CISG/1996/39] (*Dioctyl phthalate case*).
136 E.g., Award of 6 March 1997 [CISG/1997/01] (*Men's shirts case*).
137 E.g., Award of 7 July 1997 [CISG/1997/20] (*Isobutyl alcohol case*).
138 E.g., Award of 7 January 2000 [CISG/2000/06] (*Cysteine case*).
139 E.g., Award of 10 October 1996 [CISG/1996/45] (*Petroleum coke case*).
140 E.g., Award of 18 September 1996 [CISG/1996/01] (*Lanthanide compound case*); Award of 17 October 1996 [CISG/1996/47] (*Tinplate case*); Award of 31 December 1997 [CISG/1997/37] (*Lindane case*).
141 E.g., Award of 2 June 1997 [CISG/1997/14] (*Graphite electrodes scraps case*).
142 E.g., Award of 31 December 1997 [CISG/1997/37] (*Lindane case*).
143 E.g., Award of 18 September 1996 [CISG/1996/01] (*Lanthanide compound case*)"Direct losses" and "Indirect losses" were discussed in Joseph Lookofsky's commentary on Article 74 of the CISG at <http://www.cisg.law.pace.edu/cisg/biblio/loo74.html>. (Published in J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000)) He stated that these two terms described different damages measured by the promisee's expectation. However, in the CIETAC awards, when the tribunals used these two terms, it was hard to say they were measured by the expectation of aggrieved party.
144 Such as: Award of 12 February 1996 [CISG/1996/08] (*Coated art paper case*); Award of 2 May 1996 [CISG/1996/21] (*Ferro-Molybdenum alloy case*); Award of 28 November 1996 [CISG/1996/54] (*Moly-oxide case*); Award of 7 May 1997 [CISG/1997/12] (*Horsebean case*); Award of 23 July 1997 [CISG/1997/23] (*Polypropylene case*).

the tribunal was that, besides the lost profit, only the additional expenditures incurred due to the breach should be recovered.[145]

– *Price difference*

The price difference claimed under Articles 75 and 76 of the CISG was often awarded in the CIETAC awards. The price difference has covered so many types of losses that it is not appropriate to be deemed as a separate type of loss. It sometimes was equal to loss of profit in some circumstances to be discussed in Part II.6.1.2. However, in other cases, the price difference might cover the losses already incurred. In addition, in some CIETAC awards, the methods to calculate price difference provided for in Articles 75 and 76 might be used by the tribunals, even if Articles 75 and 76 *per se* could not be applied since their preconditions were not met. Therefore, the author hereby would like to discuss the price difference as a separate issue.

When the buyer had bought or the seller had resold the substitute goods, the tribunal would decide the price difference to be recovered according to Article 75.[146] Under Article 75, the tribunal often needed to decide whether the goods were bought or resold in a reasonable manner and within a reasonable time.[147] For example, in one case a seller resold the goods to a third party before he sent the notice of avoidance to the buyer.[148] Considering the current price was falling, the tribunal held that the resale was a measure to mitigate losses under Article 77, but it also held that the seller should resell the goods only after the declaration of avoidance of the contract. In such circumstances, the tribunal further held that either Article 75 or 76 might still apply to this case, and adopted the resale price at last.

When the reasonableness required by Article 75 was not proved by the party, the tribunal would turn to Article 76.[149] For instance, the tribunal once held that the buyer bought the substitute

145 Such as: Award of 2 May 1996 [CISG/1996/21] (*Ferro-Molybdenum alloy case*). In this case, the tribunal awarded the buyer his losses of profit in form of the price difference. With regard to the fees for issuing the L/C, the tribunal held that they were normal costs and should not be recovered. However, the additional fees for handling the L/C were awarded. Also see, Award of 26 October 1996 [CISG/1996/49] (*Cotton bath towel case*). In this case, the freight and customs fees were considered as normal costs not to be recovered when the losses of profit were awarded.

For other similar examples, see: Award of 11 April 1997 [CISG/1997/05] (*Silicon metal case*); Award of 2 June 1997 [CISG/1997/14] (*Graphite electrodes scraps case*); Award of 30 November 1997 [CISG/1997/33] (*Canned oranges case*); Award of 31 December 1997 [CISG/1997/37] (*Lindane case*); Award of 25 December 1998 [CISG/1998/10] (*Basic pig iron case*); Award of 12 February 1996 [CISG/1996/08] (*Coated art paper case*).

146 Such as: Award of 15 February 1996 [CISG/1996/10] (*Hot-rolled plates case*); Award of 12 July 1996 [CISG/1996/28] (*Chrome-plating machines production-line equipment case*); Award of 12 July 1996 [CISG/1996/29] (*Chromeplating machines production-line case*); Award of 10 October 1996 [CISG/1996/45] (*Petroleum coke case*); Award of 7 May 1997 [CISG/1997/12] (*Horsebean case*); Award of 22 May 1997 [CISG/1997/13] (*Soybean oil case*); Award of 8 October 1997 [CISG/1997/29] (*Industrial tallow case*); Award of 16 December 1997 [CISG/1997/35] (*Hot dipped galvanized steel coils case*); Award of 12 February 1999 [CISG/1999/08] (*Chrome plating machine case*); Award of 12 April 1999 [CISG/1999/22] (*Bud rice dregs case*); Award of 20 May 1999 [CISG/1999/25] (*Waste aluminum ingots case*); Award of 4 June 1999 [CISG/1999/28] (*Industrial raw material case*); Award of 10 August 2000 [CISG/2000/04] (*Silicon metal case*); Award of 10 June 2002 [CISG/2002/02](*Rice agricultural products case*).

147 Such as: Award of 30 April 1997 [CISG/1997/10] (*Ferro-Molybdenum alloy case*). The tribunal held that it was reasonable that the seller resold the goods one month after the avoidance considering the relevant facts. See also: Award of 18 August 1997 [CISG/1997/26] (*Vitamin C case*). In this case, the buyer bought the substitute goods via its sister company, which was regarded as in reasonable manner by the tribunal considering the current price.

For other examples, see Award of 25 December 1998 [CISG/1998/11] (*Basic pig iron case*); Award of 7 January 2000 [CISG/2000/06] (*Cysteine case*).

148 Award of 8 April [CISG/1999/21] (*Wool case*).

149 E.g., Award of 30 July 1996 [CISG/1996/33] (*Ferro-Molybdenum alloy case*); Award of 25 December 1998 [CISG/1998/10] (*Basic pig iron case*); Award of 11 February 2000 [CISG/2000/02] (*Silicon metal case*).

goods not within a reasonable time and selected the current price at the end of two months after avoidance to be compared with the contract price.[150] In other cases, Article 76 was also applied directly when no substitute goods were bought or resold.[151]

Moreover, when calculating the price difference to be recovered under Article 75 and 76, the tribunal would take freight, fees, taxes or other cost into consideration.[152]

In respect of the recovery of price difference, some interesting CIETAC awards are noteworthy. In one case, the buyer did not purchase substitute goods or declare the contract avoided. However, the tribunal held that the method provided in Article 76 still might be employed to calculate the damages. Eventually, it required the seller to compensate the buyer for the difference between the contract price and the current price at the time and place of delivery that would have been the case if the contract had been implemented.[153] In another case, though neither party expressly declared the contract avoided, the tribunal took the date that the seller informed the buyer of his intention not to ship the goods as the date of avoidance on which the current price was fixed.[154]

Under Article 76(2), the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute. The place of delivery in many cases was determined in accordance with the term used.[155] However, the tribunals sometimes would adopt certain substitute methods to determine the price as reasonable based on relevant facts or circumstances of the particular cases.[156]

– *Expenditures for arbitration*

In most cases, the applicant claimed recovery of expenditures for the arbitration, including attorneys' fees, traveling fees and fees for applying properties preservation if incurred. Article 74 of the CISG may also be interpreted as covering such expenses.[157] However, when dealing with

150 Award of 4 September 1996 [CISG/1996/41] (*Natural rubber case*).

151 Such as: Award 23 April 1995 [CISG/1995/07] (*Australian raw wool case*); Award of 12 January 1996 [CISG/1996/03] (*Scrap copper case*); Award of 29 March 1996 [CISG/1996/15] (*Caffeine case*); Award of 30 July 1996 [CISG/1996/32] (*Ferro-Molybdenum alloy case*).

152 Such as Award of 14 March 1996 [CISG/1996/14] (*Dried sweet potatoes case*). In this case, the CIF price was turned into FOB price to be compared.

Also see Award of 2 May 1996 [CISG/1996/21] (*Ferro-Molybdenum alloy case*). In this case, the issuing fees of the L/C were deemed as cost to be deducted when calculating the price difference.

For other examples, see: Award of 16 August 1996 [CISG/1996/39] (*Dioctyl phthalate case*); Award of 15 November 1996 [CISG/1996/52] (*Oxytetracycline HCL case*); Award of 6 January 1999 [CISG/1999/04] (*Wool case*).

153 Award of 24 April 1997 [CISG/1997/09] (*Oxidized aluminum case*).

154 Award of 1 February 2000 [CISG/2000/01] (*Silicon and manganese alloy case*).

155 Such as Award of 18 April 1991 [CISG/1991/01] (*Silicate-iron case*). In this case, FOB was used and the uploading port was deemed as the place of delivery. For other examples, see: Award of 19 September 1994 [CISG/1994/11] (*Steel case*).

156 Such as Award of 18 April 1991 [CISG/1991/01] (*Silicate-iron case*). In this case, the current price of the delivery port was the main basis to be compared; meanwhile, the tribunal also referred to the price offered by a third party under the same conditions.

Also see Award of 30 November 1997 [CISG/1997/33] (*Canned oranges case*). In this case, the buyer's intention ever made to the seller was considered by the tribunal when no current price was found.

For other examples, see Award of 1 March 1999 [CISG/1999/12] (*Canned oranges case*); Award of 30 June 1999 [CISG/1999/30] (*Peppermint oil case*).

157 Such as: Award of 12 February 1999 [CISG/1999/08] (*Chrome plating machine case*); Award of 12 February 1999 [CISG/1999/09] (*Nickel plating machine case*). In these cases, the tribunals directly invoked Article 74 as the basis to decide the party in breach to compensate the aggrieved party for expenditures for arbitration (including attorney's fees, traveling fees and investigation fees).

such claims, the tribunals would more often invoke the Arbitration Rules of CIETAC, which clearly provided its power to decide such expenses.[158]

In the CIETAC cases reported, Article 59 of the relevant versions (1994, 1995, 1998 and 2000) of the Arbitration Rules was frequently invoked as such a basis for awarding the aforesaid expenditures for arbitration, which provided:

> "The arbitration tribunal has the power to decide in the arbitral award that the losing party shall compensate a proportion of the expenses reasonably incurred by the winning party in dealing with the case. The amount of such compensation shall not in any case exceed 10% of the total amount awarded to the winning party."[159]

When applying this article, the tribunal would comply with the limit set out in it, i.e., 10% of the total amount awarded to the winning party, which sometimes might not lead to recovery of the winning party's expenses in full.

In addition, the tribunal would request the applicant to provide concrete amounts and evidence of such expenses, without which it would dismiss such claims.[160] If the party did not win the arbitration, i.e., not all of his claims were being supported, the tribunal would not allow full recovery of his expenses.[161]

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158 Such as: Award of 25 November 1996 [CISG/1996/02] (*Chromium ore case*); Award of 6 March 1997 [CISG/1997/01] (*Men's shirts case*); Award of 1 April 1997 [CISG/1997/02] (*Fishmeal case*); Award of 11 April 1997 [CISG/1997/05] (*Silicon metal case*); Award of 27 June 1997 [CISG/1997/18] (*Kidney beans case*); Award of 10 July 1997 [CISG/1997/21] (*Carbamide case*); Award of 5 August 1997 [CISG/1997/25] (*Cold-rolled coils case*); Award of 29 September 1997 [CISG/1997/28] (*Oxidized aluminum case*); Award of 31 December 1997 [CISG/1997/37] (*Lindane case*); Award of 15 December 1998 [CISG/1998/09] (*Shirts case*); Award of 28 January 1999 [CISG/1999/06] (*Refrigerating machine case*); Award of 1 March 1999 [CISG/1999/12] (*Canned oranges case*); Award of 29 March 1999 [CISG/1999/14] (*Flanges case*); Award of 30 March 1999 [CISG/1999/16] (*Flanges case*); Award of 7 April [CISG/1999/20] (*PVC suspension resin case*); Award of 8 April [CISG/1999/21] (*Wool case*); Award of 12 April 1999 [CISG/1999/22] (*Bud rice dregs case*); Award of 20 May 1999 [CISG/1999/25] (*Waste aluminum ingots case*); Award of 11 June 1999 [CISG/1999/29] (*Agricultural chemical products case*); Award of 30 June 1999 [CISG/1999/30] (*Peppermint oil case*); Award of 31 December 1999 [CISG/1999/32] (*Steel coil case*); Award of 29 January 2000 [CISG/2000/08] (*Steel bottle case*); Award of 27 July 2000 [CISG/2000/03] (*Steel scraps case*); Award of 10 August 2000 [CISG/2000/04] (*Silicon metal case*).

159 Chinese versions of 1994, 1995 and 1998 versions at the official website of the CIETAC at < http://www.cietac.org.cn/shiwu/zhongcaishiwu.asp?type=sw5 >, and English version of 2000 version at < http://www.cietac.org.cn/english/rules/rules_3.htm >. There was no article providing for the expenses for the arbitration in the 1988 version of the Arbitration Rules of CIETAC.

In the recently revised 2005 version of Arbitration Rules of CIETAC, this article has been amended and renumbered as Article 46(2) as follows:

"The arbitral tribunal has the power to decide in the award, according to the specific circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing its case. In deciding whether the winning party's expenses incurred in pursuing its case are reasonable, the arbitral tribunal shall consider such factors as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in dispute, etc."(From the CIETAC's official website; English version at < http://www.cietac.org.cn/english/rules/rules.htm >.)

The latest amendment does not limit the recovery of expenses by 10% of the total amount awarded to the winning party, but replaces it with criterion of reasonableness weighed by more flexible factors subject to the discretion of the tribunal.

160 Such as: Award of 6 February 1997 [CISG/1997/38] (*Silicon-carbide case*); Award of 2 June 1997 [CISG/1997/14] (*Graphite electrodes scraps case*); Award of 16 June 1997 [CISG/1997/15] (*Leather case*); Award of 25 June 1997 [CISG/1997/16] (*Art paper case*); Award of 8 October 1997 [CISG/1997/29] (*Industrial tallow case*); Award of 13 January 1999 [CISG/1999/05] (*Latex gloves case*); Award of 20 April 1999 [CISG/1999/23] (*Filling machine case*); Award of 10 June 2002 [CISG/2002/02](*Rice agricultural products case*).

161 E.g., Award of 25 December 1998 [CISG/1998/10] (*Basic pig iron case*); Award of 6 January 1999 [CISG/1999/04] (*Wool case*).

6.1.2. Loss of profit

Under Article 74 of the CISG, damages for lost profits are expressly provided to be compensated. Considering the foreseeability of such lost profit to the party in breach, the tribunal has in a number of cases awarded the aggrieved party the corresponding compensation.

How to calculate the lost profits was an outstanding question the tribunal often had to deal with.

In some cases, the seller claimed for the difference between the contract price and the actual production cost of the goods,[162] or the gross profit from which was deducted the costs to be paid (namely the net profit),[163] which was supported by the tribunal. A certain margin rate deemed as reasonable has also been adopted by the tribunal in some cases,[164] while the tribunal once denied adopting a fixed profit rate in one case since no evidence was provided.[165]

In addition, different types of price difference might also be held by the tribunal as lost profit of the aggrieved party and ruled recoverable from the party in breach.

For instance, in some cases, the difference between the prices of the contract of the supplier with the seller and the sales contract of the seller and buyer was decided as the lost profit of the seller.[166] In such cases, the price of the supply contract was equal to the cost of the seller in effect.

Moreover, the price difference between the contract price and the lower price of resale actually made by the party was also calculated as lost profit.[167] In some cases reported, the lost profit under Article 74 was deemed to be covered by the price difference under Article 76, and the latter was awarded to the aggrieved buyer as lost profit.[168]

In other cases, the price difference between the contract price and the price of the intended resale to sub-buyer which could not be realized due to the breach was held to be lost profit,[169] while in some of the cases relevant customs duties, value added taxes or other fees were deducted from the gross profit as normal costs.[170] For instance, in one case, the buyer resold the goods at discounted prices due to the quality defects.[171] The tribunal awarded him the difference between the contract price and the resale price. In addition, the buyer claimed a lost profit on the difference he would

162 E.g., Award of 7 August 1993 [CISG/1993/11] (*Semi-automatic weapons case*); Award of 26 October 1993 [CISG/1993/12] (*Frozen beef case*).

163 E.g., Award of 30 January 1996 [CISG/1996/05] (*Compound fertilizer case*).

164 E.g., Award of 29 March 1999 [CISG/1999/14] (*Flanges case*). The tribunal adopted 15% as the margin rate of the aggrieved buyer might get. See also, Award of 31 January 2000 [CISG/2000/09] (*Clothes case*). In this case, the tribunal awarded the lost profit as 20% of the total price to the buyer.

165 Award of 27 July 2000 [CISG/2000/03] (*Steel scraps case*).

166 Award of 10 May 1996 [CISG/1996/22] (*Hot-rolled coils case*). Also see, Award of 31 December 1999 [CISG/1999/32] (*Steel coil case*).

167 E.g., Award of 26 October 1993 [CISG/1993/12] (*Frozen beef case*); Award of 11 April 1997 [CISG/1997/05] (*Silicon metal case*).

168 E.g., Award of 2 May 1996 [CISG/1996/21] (*Ferro-Molybdenum alloy case*).
In some cases, the party might only claim price difference under Article 75 or 76, but not expressly indicated his lost profit. Such as: Award of 25 December 1998 [CISG/1998/10] (*Basic pig iron case*).

169 Such as: Award of 12 February 1996 [CISG/1996/08] (*Coated art paper case*); Award of 14 March 1996 [CISG/1996/14] (*Dried sweet potatoes case*); Award of 26 October 1996 [CISG/1996/49] (*Cotton bath towel case*); Award of 4 April 1997 [CISG/1997/04] (*Black melon seeds case*).

170 Such as: Award of 17 October 1996 [CISG/1996/47] (*Tinplate case*); Award of 10 July 1997 [CISG/1997/21] (*Carbamide case*).

171 Award of 26 October 1996 [CISG/1996/49] (*Cotton bath towel case*).

have obtained by reselling to the sub-buyer with whom he had concluded a sales contract. The tribunal also decided to have the seller compensate the buyer for such losses. When the intended resale was not proved by the aggrieved party, the tribunal in one case directly took 10% of the contract price as the buyer's lost profit, which it deemed reasonable.[172] In another case, the difference between the prices of the intended resale to sub-buyer and the actual resale made was deemed as damages including the lost profits, while the normal costs that would still have occurred if the contract had been performed, such as inspection fees, unloading fees and so on, were not compensated.[173] In addition, in some cases, if the aggrieved party was also found in breach of contract and found partly reliable for the losses, the tribunal overruled his claim for lost profit.[174]

There are some cases in which the price difference under Article 75 or 76 and the lost profit under Article 74 were both awarded by the tribunal. However, under Article 74, the aggrieved party should not be placed in a better economic position than he would have been in if the contract had been performed by being compensated via damages.[175] This principle has also been accepted by CIETAC awards.[176] For instance, in one case, the buyer's price difference under Article 76 and lost profits of the margin he would have obtained from the resale to sub-buyer were both adopted by the tribunal.[177]

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172 Award of 27 June 1997 [CISG/1997/18] (*Kidney beans case*).

173 Award of 8 March 1996 [CISG/1996/12] (*Old boxwood corrugated carton case*). See also, Award of 2 June 1997 [CISG/1997/14] (*Graphite electrodes scraps case*).

174 E.g., Award of 18 September 1996 [CISG/1996/01] (*Lanthanide compound case*); Award of 30 March 1999 [CISG/1999/16] (*Flanges case*).

175 See, the Secretariat commentary on Article 74 of the CISG, online version at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html>.

176 This may also be supported by the tribunals' attitudes on the liquidated damages in the contracts to some extent. Such attitudes have their basis in relevant PRC laws as well.

Article 20 of the LECFI provided that:

"The parties may agree in a contract that, if one party breaches the contract, it shall pay a certain amount of liquidated damages to the other party; they may also agree upon a method for calculating the damages resulting from such a breach. The liquidated damages as stipulated in the contract shall be regarded as compensation for the losses resulting from breach of contract. However, if the contractually agreed liquidated damages are far more or far less than is necessary to compensate for the losses resulting from the breach, the party concerned may request an arbitration body or a court to reduce or increase them appropriately."In several CIETAC cases, the applicant's claim for the punitive damages provided in the contract was not supported by the tribunal, because the tribunal held that he had been recovered for his losses. See, Award of 22 January 1996 [CISG/1996/04] (*Palm oil case*).

Also see, Award of 6 February 1997 [CISG/1997/38] (*Silicon-carbide case*). In this case, the tribunal, according to the aforesaid Article 20 of the LECFI, reduced the liquidated damages stipulated in the contract considering the actual amount of the buyer's losses.However, the Contract Law makes minor adjustment. Article 114 of the Contract Law provides that:

"The parties to a contract may agree that one party shall, when violating the contract, pay liquidated damages of certain amount in light of the breach, or may agree upon the calculating method of compensation for losses resulting from the breach of contract. "If the agreed liquidated damages are lower than the losses caused, any party may request the people's court or an arbitration institution to increase them; if they are excessively higher than the losses caused, any party may request the people's court or an arbitration institution to make an appropriate reduction."Therefore, if the agreed liquidated damages are higher that the actual losses, but not "excessively higher than" the latter, they will be awarded to the aggrieved party by the tribunals. However, if they are lower than the losses caused, the aggrieved party may claim for full compensation regardless of the amount of liquidated damages stipulated in the contact.

177 Award of 30 November 1997 [CISG/1997/33] (*Canned oranges case*). In this case, a German buyer bought cans of oranges from a Chinese seller. When the seller did not deliver the goods and committed a fundamental breach, the buyer bought goods from Spain as substitute goods and claimed for the price difference under Article 75. However the tribunal held that the Spanish goods the buyer bought were different from the goods under the contract in specification, origins, production time and volumes so that they were not goods in replacement. As no current price in Chinese market was proved by the parties, the tribunal adopted the price the parties ever agreed on during their negotiation as the substitute price of the current price. In addition, the difference between the contract price in the resale contract and the contract price with relevant fees deducted was deemed as lost profit.

However, in one case, the tribunal, when deciding to require the buyer to compensate the seller his price difference under Articles 75 and 76, denied the seller's claim for lost profit by holding that the price difference awarded had covered his lost profit.[178] In another case, the tribunal held that the awarded price difference indicated that the tribunal actually maintained "the performance of the original contract" so that the buyer's claim for lost profit was dismissed.[179]

6.2. Interest

Under Article 78 of the CISG, if one party fails to pay the price or any other sum that is in arrears, he is obligated to pay interest to the other party.

In the CIETAC awards, besides the price that should be paid by the buyer,[180] the "other sum" to be paid by the party in arrears under Article 78 has included: the price difference,[181] "actual losses" (mainly transportation fees and other expenditures paid).[182] In one case, when the seller did not deliver the goods, the buyer bought part of goods from a third party. With regard to the part of substitute goods bought, the tribunal decided the price difference was that between the prices of the two contracts; and with regard to the remaining part not replaced, the price difference was that between the contract price and the current price at the time of avoidance. The tribunal further decided the former price difference was sum in arrears and relevant interest should be paid, however, the latter part of price difference was not in arrears and no interest was to be awarded.[183]

The CISG does not expressly provide for how to determine the interest rate, which is left to the tribunals to decide. In the CIETAC awards reported, the tribunal has adopted the relevant deposit rates,[184] and the relevant loan rates in different cases.[185] More frequently, it has directly determined a fixed annual rate it deemed reasonable, e.g., 5%[186], 6%,[187] 7%,[188] 8%,[189] 9%,[190]

178 Award of 1 March 1999 [CISG/1999/12] (*Canned oranges case*). See also, Award of 7 January 2000 [CISG/2000/06] (*Cysteine case*).

179 Award of 10 August 2000 [CISG/2000/04] (*Silicon metal case*). In this case, the seller was found in fundamental breach, and the buyer's claim for price difference after the contract was avoided was adopted by the tribunal according to Article 75. Therefore, the tribunal's reason of denying the buyer's claim for lost profit seemed in contradiction with its own awards to certain extent.

180 Such as: Award of 14 February 1996 [CISG/1996/09] (*Bicycle case*); Award of 27 February 1996 [CISG/1996/11] (*Wool case*); Award of 30 April 1996 [CISG/1996/20] (*Jacks and bearing brackets case*); Award of 16 May 1996 [CISG/1996/24] (*Cashmere sweaters case*).

181 E.g., Award of 12 January 1996 [CISG/1996/03] (*Scrap copper case*); Award of 29 March 1996 [CISG/1996/15] (*Caffeine case*); Award of 10 May 1996 [CISG/1996/22] (*Hot-rolled coils case*).

182 E.g., Award of 16 August 1996 [CISG/1996/39] (*Dioctyl phthalate case*).

183 Award of 18 August 1997 [CISG/1997/26] (*Vitamin C case*).

184 Such as: Award of 9 January 1993 [CISG/1993/03] (*Sesame seed cake case*); Award of 25 February 1999 [CISG/1999/10] (*Cotton vest case*); Award of 25 February 1999 [CISG/1999/11] (*Women's trousers case*).

185 E.g., Award of 6 March 1997 [CISG/1997/01] (*Men's shirts case*).

186 E.g., Award of 23 February 1995 [CISG/1995/01] (*Jasmine aldehyde case*).

187 E.g., Award of 23 December 1996 [CISG/1996/57] (*Carbazole case*).

188 E.g., Award of 12 April 1999 [CISG/1999/22] (*Bud rice dregs case*).

189 E.g., Award of 16 May 1995 [CISG/1995/10] (*Leather suitcases case*).

190 E.g., Award of 15 February 1996 [CISG/1996/10] (*Hot-rolled plates case*); Award of 29 March 1996 [CISG/1996/15] (*Caffeine case*).

10%[191] and other rates. The tribunal would also consider the currency to be paid as different rates applied to Chinese currency, U.S. Dollars and other foreign currencies.[192]

In respect of the period of time during which the interest is to be calculated, the tribunals seemed to consider relevant facts and circumstance in particular cases, such as the interest on the price in arrears to be calculated from the date of delay,[193] the interest on the price difference to be calculated as of the resale date.[194] In one case, the buyer did not establish the L/C which constituted a fundamental breach, so the seller later resold the goods. The tribunal clearly distinguished between the interest on the total price to be calculated from the original payment date to the resale date, and the interest on the price difference from the resale date to the date of the awards made.[195]

In addition, as regards compound interest, the tribunal on one occasion denied the party's claim for compound interest by stating that no contractual or legal basis had been found.[196]

6.3. Limitation of damages

6.3.1. Foreseeability

Pursuant to Article 74 of the CISG, one main limitation of damages is that "the damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract".

If the aggrieved party was able to prove the party in breach had foreseen the damages at the time of conclusion of contract, such as the sub-buyer signed on the contract,[197] or the sub-buyer directly issued the L/C to the seller,[198] or the buyer had informed the seller of the existence of the resale or sub-buyer,[199] his claim for such losses would be adopted by the tribunal. The loss of failed resale due to breach of contract was also sometimes deemed as foreseeable because resale of goods to the sub-buyer was quite normal in international trade.[200] The fluctuation of the market price, which was quite normal and reasonable in international trade, was also decided by the tribunal as foreseeable by the party in breach.[201] The loss of tax preferential treatments was also once found

191 E.g., Award of 16 June 1997 [CISG/1997/15] (*Leather case*).
192 E.g., Award of 23 October 1996 [CISG/1996/48] (*Channel steel case*); Award of 11 November 1996 [CISG/1996/51] (*Rubber overshoes case*); Award of 20 May 1999 [CISG/1999/24] (*Red tiles case*).
193 E.g., Award of 31 May 1999 [CISG/1999/27] (*Indium ingots case*).
194 E.g., Award of 20 May 1999 [CISG/1999/25] (*Waste aluminum ingots case*).
195 Award of 28 November 1996 [CISG/1996/54] (*Moly-oxide case*).
196 Award of 11 June 1999 [CISG/1999/29] (*Agricultural chemical products case*).
197 Award of 19 September 1994 [CISG/1994/11] (*Steel case*).
198 Award of 28 April 1995 [CISG/1995/08] (*Rolled wire rod coil case*).
199 E.g., Award of 8 March 1996 [CISG/1996/12] (*Old boxwood corrugated carton case*); Award of 5 August 1997 [CISG/1997/25] (*Cold-rolled coils case*); Award of 20 May 1999 [CISG/1999/25] (*Waste aluminum ingots case*).
200 E.g., Award of 31 December 1997 [CISG/1997/37] (*Lindane case*).
201 E.g., Award of 12 January 1996 [CISG/1996/03] (*Scrap copper case*).

as foreseeable in the circumstances of some cases,[202] but in other cases the tribunal decided to the contrary in the relevant circumstances.[203]

In the CIETAC awards reported, some losses claimed by aggrieved party were found by the tribunals as not foreseeable by the party in breach at the time of conclusion of contract considering relevant facts.[204] For example, in one case, the profit margin (50% of the costs) claimed by the aggrieved party, which was found too high in comparison to the normal profits that the party would foresee, was deemed not reasonable and therefore unforeseeable by the party in breach.[205] If the compensation claimed had exceeded the total price of the contract, the tribunal might decide it was beyond the party's foreseeability considering relevant facts.[206] In some cases, the aggrieved party might claim for compensation for loan interest since he obtained a loan from relevant banks to perform the contract. Some tribunals decided that such losses were not foreseeable,[207] but there were some cases reported in which the tribunal held that the party as an international trader ought to have foreseen such loans and the interest thereon.[208] Other remote losses, such as loss of clients, were held by the tribunal as not foreseeable by the party in breach.[209]

6.3.2. Duty to mitigate the losses

In many CIETAC awards, another limitation of damages arises from Article 77 of the CISG, under which the aggrieved party has the duty to mitigate the losses. If he fails to do so, the amount of loss that should have been mitigated may be claimed by the party in breach to be deducted from damages.[210]

In some CIETAC cases reported, the aggrieved party's duty to mitigate the losses was deemed in connection with his duty to preserve the goods under Articles 85 to 88.[211] For instance, in one case, the goods were returned by the buyer to the seller according to their agreement after the goods were found non-conforming. However, the goods were stored in Hong Kong and not

202 E.g., Award of 16 August 1996 [CISG/1996/39] (*Dioctyl phthalate case*). In this case, the loss of tax rebate enjoyed by a Chinese seller was awarded by the tribunal by holding that it was foreseeable.

203 E.g., Award of 23 April 1997 [CISG/1997/07] (*Groundnut case*). In this case, an Indonesian buyer claimed the loss of tax exemption he would have got if the contract was duly performed, but the tribunal deemed that it was not foreseeable by the seller considering the relevant facts. Also see, Award of 28 November 1996 [CISG/1996/54] (*Moly-oxide case*). In this case, the tribunal decided the loss of tax rebate of a Chinese seller could not be foreseeable by a U.S. buyer at the time of conclusion of the contract.

204 Such as: Award of 4 September 1996 [CISG/1996/41] (*Natural rubber case*). In this case, the foreign exchange difference between the contract price and the price of the contract between the buyer and sub-buyer was found not foreseeable by the seller.

Other examples: Award of 30 October 1991 [CISG/1991/04] (*Roll aluminum case*); Award of 25 February 1993 [CISG/1993/05] (*Terylene draw-texturing machine case*); Award of 7 May 1997 [CISG/1997/12] (*Horsebean case*); Award of 27 June 1997 [CISG/1997/18] (*Kidney beans case*); Award of 7 July 1997 [CISG/1997/20] (*Isobutyl alcohol case*); Award of 1 February 2000 [CISG/2000/01] (*Silicon and manganese alloy case*).

205 Award of 20 December 1993 [CISG/1993/13] (*Equipment case*).

206 Award of 11 August 1994 [CISG/1994/09] (*Bicycle case*).

207 Award of 6 August 1996 [CISG/1996/35] (*Lacquer handicraft case*). See also: Award of 26 October 1996 [CISG/1996/49] (*Cotton bath towel case*); Award of 26 November 1998 [CISG/1998/06] (*Gloves case*).

208 E.g., Award of 18 December 1996 [CISG/1996/56] (*Lentils case*).

209 E.g., Award of 31 January 2000 [CISG/2000/09] (*Clothes case*).

210 Such as: Award of 10 March 1995 [CISG/1995/03] (*Polyethylene case*); Award of 11 April 1997 [CISG/1997/05] (*Silicon metal case*); Award of 5 August 1997 [CISG/1997/25] (*Cold-rolled coils case*); Award of 20 January 1998 [CISG/1998/01] (*Polyester thread case*); Award of 6 January 1999 [CISG/1999/04] (*Wool case*).

211 Such as: Award of 20 February 1994 [CISG/1994/03] (*Cysteine case*).

transported to the destination port in Shenzhen, which incurred a lot of storage fees.[212] The tribunal decided that the buyer under Article 86(1) and 88(2) was obligated to preserve and dispose the goods. His failure to do so resulted in the losses being increased; therefore, under Article 77 certain losses were decided to be borne by him.

The measures available to the aggrieved party under Article 77 shall be reasonable in the circumstances. The tribunal has decided in some cases that no such measures were available under certain circumstances,[213] e.g., the goods were made to the order of the buyer and hard to resell them.[214] The resale of goods[215] or purchasing substitute goods[216] in certain circumstances would be found as reasonable measures. In one case, considering the location of goods and the relevant transportation fees, the tribunal decided that it was reasonable that the buyer sold the goods to a sub-buyer at a discounted price.[217] Late resale, e.g., after the preservation period of goods had been expired,[218] or a long time after the contract had been repudiated by the other party,[219] would be treated as a violation of the duty to mitigate losses. Reparation of goods was also mentioned as a reasonable measure in one case.[220]

Whether the time to take such measures was reasonable or not was also considered by the tribunals. In one case, the buyer bought substitute goods three days after declaring the contract avoided when the market price was rapidly rising, which was deemed reasonable by the tribunal.[221] In another case, the tribunal accepted that the buyer took relevant measures three months after the contract was declared avoided based on relevant facts.[222]

6.4. Burden of proof

Though the burden of proof is not generally expressly allocated in the CISG, the tribunals in a number of cases requested the party making the claims to bear the burden of proof of establishing his claim.[223]

The basis for this may also be found in the Arbitration Rules of CIETAC. In the 2000, 1998, 1995 and 1994 versions of the Arbitration Rules of CIETAC which were mainly applied in the CIETAC awards reported, Article 38 provided that "the parties shall produce evidence in support of the facts on which their claim, defense or counterclaim is based," and "the arbitration tribunal

212 Award of 6 June 1991 [CISG/1991/03] (*Cysteine monohydrate case*).
213 E.g., Award of 5 September 1994 [CISG/1994/10] (*Equipment case*).
214 Award of 12 July 1996 [CISG/1996/28] (*Chrome-plating machines production-line equipment case*).
215 Such as: Award of 5 February 1996 [CISG/1996/07] (*Stibium case*); Award of 25 November 1996 [CISG/1996/02] (*Chromium ore case*); Award of 7 January 2000 [CISG/2000/06] (*Cysteine case*); Award of 8 April [CISG/1999/21] (*Wool case*).
216 Such as: Award of 5 August 1997 [CISG/1997/25] (*Cold-rolled coils case*); Award of 20 January 1998 [CISG/1998/01] (*Polyester thread case*); Award of 10 August 2000 [CISG/2000/04] (*Silicon metal case*).
217 Award of 8 March 1996 [CISG/1996/12] (*Old boxwood corrugated carton case*).
218 Award of 8 September 1997 [CISG/1997/27] (*BOPP film case*).
219 Award of June 1999 [CISG/1999/03] (*Peanut kernel case*).
220 E.g., Award of 31 January 2000 [CISG/2000/09] (*Clothes case*). However, in this case, the tribunal held that the buyer should have notified the seller before the buyer repaired the goods.
221 Award of 18 August 1997 [CISG/1997/26] (*Vitamin C case*).
222 Award of 28 November 1996 [CISG/1996/54] (*Moly-oxide case*).
223 Such as: Award of 27 July 2000 [CISG/2000/03] (*Steel scraps case*); Award of 30 March 1999 [CISG/1999/16] (*Flanges case*); Award of 22 March 1995 [CISG/1995/05] (*Costumes case*); Award of 2 April 1999 [CISG/1999/18] (*Grey cloths case*); Award of 10 May 1994 [CISG/1994/07] (*Carbamide case*); Award of 4 January 1995 [CISG/1995/02] (*Shirts case*).

may, on its own initiative, undertake investigations and collect evidence as it considers necessary."[224] Article 39 further provides that the arbitration tribunal may consult an expert or appoint an appraiser for clarification of the specific issues relating to a case.[225]

7. *Passing of Risk*

Incoterms are often adopted in contracts for the international sale of goods. Incoterms as international practice has been respected and applied by the CIETAC tribunals. For instance, in one case under the term FOB, the tribunal referred to the Incoterms applicable then and Article 67 of the CISG, and decided that the risk passed to the buyer when the goods crossed the shipboard.[226]

The buyer shall perform his obligation to pay the price if the loss of or damages to the goods occurs after the risk has passed to him under Article 66 of the CISG. For instance, in one case, the goods suffered total loss as the ship sunk during the transportation. The tribunal according to Article 66 decided the buyer was still bound to pay the price under the term CFR.[227]

Nevertheless, according to Article 66, if the loss of or damage to the goods after the risk has passed to the buyer is due to an act or omission of the seller, the seller shall be liable for such loss or damage. In one case of a Chinese firm selling heliotropin (jasmine aldehyde) to a U.S. buyer under the term CIF, the buyer specially requested the seller to be careful of the temperature requirement of the goods and requested the seller to arrange proper packaging and direct shipment. However, the seller did not pay sufficient attention to this and just reminded the carrier via phone. When the goods arrived at the destination, the buyer found the goods almost lost in total due to improper packaging and a long period of transshipment. The tribunal decided that under CIF, the risk had passed when the goods were delivered on board, however, pursuant to Article 66, the seller should still be liable for the loss as his act and omission caused such loss.[228]

It was stated as the precondition of the passage of risk by the tribunal in another case that the goods had been identified.[229] The tribunal in that case explicitly mentioned the seller's obligation to identify the goods under Article 32(1) of the CISG, but did not directly refer to Article 67(2).

The passage of risk in respect of goods sold in transit provided in Article 68 was once heard by the CIETAC tribunal. In the case Article 68 applied, the tribunal held that the risk should be accidents or natural disasters, and that non-seaworthiness and unreasonable delay should not be deemed as risks.[230]

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224 Also see: Article 26 in 1988 version of the Arbitration Rules of CIETAC, and Articles 36 and 37 in 2005 version of the Arbitration Rules of CIETAC.

225 Also see: Article 28 in 1988 version of the Arbitration Rules of CIETAC, and Article 38 in 2005 version of the Arbitration Rules of CIETAC.

In some CIETAC cases, the tribunals executed such power, such as: Award of 29 March 1999 [CISG/1999/14] (*Flanges case*); Award of 30 March 1999 [CISG/1999/16] (*Flanges case*).

226 Award of 6 September 1996 [CISG/1996/42] (*Engines case*).

227 Award of 25 June 1997 [CISG/1997/16] (*Art paper case*).

228 E.g., Award of 23 February 1995 [CISG/1995/01] (*Jasmine aldehyde case*).

229 Award of 10 May 1996 [CISG/1996/22] (*Hot-rolled coils case*).

230 Award of 1 April 1997 [CISG/1997/02] (*Fishmeal case*). In this case, after checking the evidence the tribunal found that the seller had performed his obligations and the buyer should claim for relevant damages against the carrier.

8. Anticipatory Breach of Contract and Installment Contracts

When an anticipatory breach occurs, the aggrieved party may suspend the performance of his obligations under Article 71 of the CISG. For instance, in one case the buyer did not issue the L/C under the contract and the seller sent notice to the buyer according to Article 71(3). The tribunal found that under Article 71(2), the seller was entitled to prevent the goods being handed over to the buyer by ordering the carrier to change the destination port, which was also deemed by the tribunal as a reasonable measure to preserve the goods under Article 85.[231]

Under Article 72(1) of the CISG, a party may declare the contract avoided when the other party will clearly commit a fundamental breach of contract before the date for performance. For instance, in one case that the seller explicitly presented his intention to repudiate the contract, the tribunal found this would constitute a fundamental breach under Article 72(1).[232] In such cases, the tribunal once clarified under Article 72(3) the party did not need to give notice to the party who had announced his intention not to perform the contract.[233]

Article 73 of the CISG provides for the circumstances when the aggrieved party may declare the contract avoided in case of installment contracts.

For instance, in one case, among the total fourteen installments of goods, the seller under the term CIF handed over the B/L with freights unpaid in respect of four installments thereof and this resulted in the goods being auctioned off by the carrier to get the delayed freights.[234] The tribunal decided that since the seller was obligated to pay the freight under CIF, he had committed a fundamental breach with regard to such four installments of goods and should return the prices to the buyer. In another case, the tribunal decided that the aggrieved party may declare the contract avoided with respect to the installments according to article 73(1).[235]

When the aggrieved party intends to invoke Article 73(2) so as to declare the contract avoided for the future, he shall be prudently confirmed that a fundamental breach will occur with respect to future installments.[236] In some cases, he might be subject to the risk of being found not to have had good grounds to so believe and be in breach himself.[237]

However, if it was apparent that a party would commit a fundamental breach with regard to future installments, the aggrieved party would be deemed not to have taken reasonable measures to mitigate the loss, if he did not declare the contract avoided timely according to Article 73(2). For example, in one case, a seller sold aluminum to a buyer in three installments and the buyer did not perform his obligation with respect to the first installment and requested to cancel the contract.[238] However, the seller still bought the second installment of goods from suppliers and shipped it to the destination port in such circumstances. The tribunal therefore held that the seller did not mitigate the loss.

231 Award of 27 February 1996 [CISG/1996/11] (*Wool case*).
232 Award of 29 March 1996 [CISG/1996/15] (*Caffeine case*).
233 Award of 30 January 1996 [CISG/1996/05] (*Compound fertilizer case*).
234 Award of 11 April 1994 [CISG/1994/06] (*Old paper case*).
235 Award of 12 December 1994 [CISG/1994/14] (*Sunflower seeds and groundnut case*).
236 E.g., Award of 29 March 1999 [CISG/1999/14] (*Flanges case*).
237 E.g., Award of 18 September 1996 [CISG/1996/01] (*Lanthanide compound case*).
238 Award of 29 September 1997 [CISG/1997/28] (*Oxidized aluminum case*).

9. Exemptions for the party in breach

Under the CISG, the party in breach may allege that he is not liable for damages for his failure to perform obligations by invoking Article 79. Although the term "force majeure" is not used in Article 79, when applying it the tribunal normally would use the term "force majeure" ("*Bukekangli*" – in Chinese *pinyin*) that was already adopted in domestic laws.[239] However, in one exceptional case, the tribunal directly used the description in Article 79,[240] which might conform to the original intention of the drafters of the CISG best so as to avoid using domestic legal concepts.

The impediment mentioned in Article 79 shall not be expected by the party at the time of the conclusion of the contract. For example, in one case, a U.S. buyer alleged that the U.S. federal environment law promulgated in 1993 requiring him to obtain approval from the U.S. Environmental Protection Agency, constituted an impediment in Article 79.[241] However, the tribunal found the law was published before the conclusion of the contract and decided that the buyer should have expected its influence. In another case, the natural disaster the seller claimed as an impediment preventing him to prepare the canned oranges occurred before the conclusion of the contract seller's claim was thus overruled by the tribunal as well.[242]

In addition, only a real impediment not expected by the party at the time of the conclusion of the contract may be deemed as an impediment under Article 79. For instance, in one case, a Chinese buyer tried to invoke a regulation adopted by the PRC government as an impediment preventing him from performing his obligation to issue the L/C.[243] The tribunal found the contract was concluded before the regulation came into force and the regulation did not apply to the contract retroactively so that the regulation would not be a real impediment to the buyer.

Under Article 79, the impediment shall at the same time be beyond the party's control and one that could not be overcome or avoided. The party's personal reasons leading to failure to perform his obligations, such as his capacity of reimbursement being doubted by the bank and his incompetence to apply for the issuing of L/C,[244] were not accepted by the tribunal as impediments under Article 79.

When a party sought to claim for exemption according to Article 79, the tribunal would request him to provide relevant persuasive proof, especially issued by certain authorities or governmental agencies in charge, which was also often stipulated in the contract.[245]

239 Such as Article 24 of the LECFI, and Article 117 of the Contract Law.
240 Award of 15 December 1998 [CISG/1998/09] (*Shirts case*).
241 Award of 7 May 1997 [CISG/1997/11] (*Sanguinarine case*).
242 Award of 30 November 1997 [CISG/1997/33] (*Canned oranges case*).
243 Award of 31 December 1996 [CISG/1996/58] (*High carbon tool steel case*).
244 E.g., Award of 29 September 1997 [CISG/1997/28] (*Oxidized aluminum case*).
245 Such as: Award of 14 March 1996 [CISG/1996/14] (*Dried sweet potatoes case*); Award of 2 May 1996 [CISG/1996/21] (*Ferro-Molybdenum alloy case*).

III. CONCLUSION

In conclusion of this survey on CIETAC awards, it can be seen that a number of provisions of the CISG have been applied in CIETAC cases. When applying such provisions, the tribunals have made certain interpretations to them. In the author's viewpoint, some of the interpretation have helped the CISG be applied to particular circumstances, and thus promoted the CISG in the aspects of its flexibility, acceptability and development. Moreover, some issues the CIETAC tribunals faced were those arising from the context of China and China's legal system, such as the application of the CISG discussed in part II.1. On such issues, the CIETAC tribunals have made beneficial explorations and contributed to the diversity of the practices and researches on the CISG. However, on such special issues, the non-exhaustive commentary in this essay only provides a preliminary research result, subject to the dynamic practices of the CIETAC tribunals and further research thereon.

However, some interpretation made by the tribunals might not comply with the international character of the CISG and to some extent even impaired the uniform application of the CISG. Nevertheless, they also provide valuable experiences for future tribunals to be cautious of the possible errors.

According to the publication plan of the CIETAC mentioned above, more CIETAC awards on the CISG will be published. The author expects more and more valuable cases to be reported, which will be good for research on the CISG and its further development.

Addendum: CIETAC Awards Cited

The CIETAC awards cited in this paper are listed below. The goods involved in the contracts and the main provisions of the CISG invoked by the tribunals are also identified. With regard to the case for which English translations are available, the corresponding links at the CISG database of Pace Law School are indicated as well (as of 31 August 2005).

For all the CIETAC awards reported, please see the webpage of the CISG database of Pace Law School at <http://www.cisg.law.pace.edu/cisg/text/casecit.html#china>.

Thanks again to the Queen Mary Case Translation Program co-held by Queen Mary, University of London and Institute of International Commercial Law at the Pace University School of Law, and all the participants thereof.

pre-1993 CIETAC awards

Award of 4 August 1988 [CISG/1988/01] (*Calculator assembly parts case*), Art. 39
English translation available at <http://cisgw3.law.pace.edu/cases/880804c1.html>
Award of post-1989 [CISG/1990/01] (*Cloth wind coats case*), Arts. 9, 53, 60, 74, 77
English translation available at <http://cisgw3.law.pace.edu/cases/900000c1.html>
Award of 18 April 1991 [CISG/1991/01] (*Silicate-iron case*). Art. 76(1)
English translation available at < http://cisgw3.law.pace.edu/cases/910418c1.html >
Award of 6 June 1991 [CISG/1991/03] (*Cysteine monohydrate case*). Arts. 9, 77, 79, 86(1), 88(2)
English translation available at < http://cisgw3.law.pace.edu/cases/910606c1.html >
Award of 30 October 1991 [CISG/1991/04] (*Roll aluminum case*). Arts. 25, 47, 49, 64, 75, 76, 77, 78, 81, 84(1) English translation available at < http://cisgw3.law.pace.edu/cases/911030c1.html >

1993 CIETAC awards

Award of 9 January 1993 [CISG/1993/03] (*Sesame seed cake case*). Arts. 35, 61(2), 63, 64, 74, 77, 78, 88 English translation available at <http://cisgw3.law.pace.edu/cases/930109c1.html>
Award of 25 February 1993 [CISG/1993/05] (*Terylene draw-texturing machine case*). Arts, 25, 74,
Award of 26 March 1993 [CISG/1993/06] (*Cement case*). Art. 53,
Award of 1 April 1993 [CISG/1993/02] (*Steel products case*). Arts. 18, 19, 74, 75, 76
English translation available at <http://cisgw3.law.pace.edu/cases/930401c1.html>
Award of 5 July 1993 [CISG/1993/08] (*Copperized steel pipes case*). Art. 38
Award of 10 July 1993 [CISG/1993/09] (*Heliotropin case*). Arts. 8, 9, 35, 74, 77
English translation available at <http://cisgw3.law.pace.edu/cases/930710c1.html>
Award of 20 July 1993 [CISG/1993/10] (*Shaping machine case*). Arts. 25, 49, 74, 81, 84
English translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930720c1.html>
Award of 7 August 1993 [CISG/1993/11] (*Semi-automatic weapons case*). Arts. 74, 78, 79
English translation available at <http://cisgw3.law.pace.edu/cases/930807c1.html>
Award of 26 October 1993 [CISG/1993/12] (*Frozen beef case*). Arts. 25, 64, 74, 75, 76, 78, 81
English translation available at <http://cisgw3.law.pace.edu/cases/931026c1.html>
Award of 20 December 1993 [CISG/1993/13] (*Equipment case*). Art. 74
English translation available at <http://cisgw3.law.pace.edu/cases/931220c1.html>

1994 CIETAC awards

Award of 20 January 1994 [CISG/1994/02] (*Hydraulic press machine case)*. Art. 35
Award of 20 February 1994 [CISG/1994/03] (*Cysteine case*). Arts. 86(1), 88(2)
Award of 30 March 1994 [CISG/1994/04] (*Boletus edulis case*). Arts. 35, 38, 58, 71, 77
English translation available at <http://cisgw3.law.pace.edu/cases/940330c1.html>
Award of 6 April 1994 [CISG/1994/05] (*Printing machine case*). Arts. 25, 46, 48, 84
English translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940406c1.html>
Award of 11 April 1994 [CISG/1994/06] (*Old paper case*). Art. 30
Award of 10 May 1994 [CISG/1994/07] (*Carbamide case*). Art. 1
Award of 11 August 1994 [CISG/1994/09] (*Bicycle case*). Art. 74
English translation available at <http://cisgw3.law.pace.edu/cases/940811c1.html>
Award of 5 September 1994 [CISG/1994/10] (*Weaving machines, tools and accessories case*). Arts. 25, 47. 74, 77, 84 English translation available at <http://cisgw3.law.pace.edu/cases/940905c1.html>
Award of 19 September 1994 [CISG/1994/11] (*Steel case*). Arts. 47, 49, 74, 76
English translation available at <http://cisgw3.law.pace.edu/cases/940919c1.html>
Award of 26 September 1994 [CISG/1994/12] (*Umbrella case*). Art. 1
Award of 25 October 1994 [CISG/1994/13] (*High tensile steel bars case*). Arts. 23, 25, 49, 74, 76
English translation available at <http://cisgw3.law.pace.edu/cases/941025c1.html>
Award of 12 December 1994 [CISG/1994/14] (*Sunflower seeds and groundnut case*). Art. 73
English translation available at <http://cisgw3.law.pace.edu/cases/941212c1.html>
Award of 28 December 1994 [CISG/1994/15] (*Round steel case*). Art. 74

1995 CIETAC awards

Award of 4 January 1995 [CISG/1995/02] (*Shirts case*). Arts. 33, 35, 38(1), 58(1), 78
English translation available at >http://cisgw3.law.pace.edu/cases/950104c1.html>
Award of 23 February 1995 [CISG/1995/01] (*Jasmine aldehyde case*). Arts. 38(2), 39(1), 66, 74, 78
English translation available at <http://cisgw3.law.pace.edu/cases/950223c1.html>
Award of 10 March 1995 [CISG/1995/03] (*Polyethylene case*). Arts. 32, 68
Award of 22 March 1995 [CISG/1995/05] (*Down jackets and winter coat case*). Arts. 8, 25, 26, 35, 49, 50, 74, 77 English translation available at <http://cisgw3.law.pace.edu/cases/950322c1.html>
Award of 23 April 1995 [CISG/1995/07] (*Australian raw wool case*). Arts. 9(2), 25, 49, 54, 64, 74, 76
English translation available at <http://cisgw3.law.pace.edu/cases/950423c1.html>
Award of 28 April 1995 [CISG/1995/08] (*Rolled wire rod coil case*). Art. 6, 74, 79
English translation available at <http://cisgw3.law.pace.edu/cases/950428c1.html>
Award of 16 May 1995 [CISG/1995/10] (*Leather suitcases case*). Art. 78,

1996 CIETAC awards

Award of 12 January 1996 [CISG/1996/03] (*Scrap copper case*). Arts. 74, 76, 78
English translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960112c1.html>
Award of 22 January 1996 [CISG/1996/04] (*Palm oil case*). Art. 75

English translation available at <http://cisgw3.law.pace.edu/cases/960122c1.html>
Award of 30 January 1996 [CISG/1996/05] (*Compound fertilizer case*). Arts. 8, 25, 26, 49(1), 51(2), 72, 74, 76, 77
English translation available at <http://cisgw3.law.pace.edu/cases/960130c1.html>
Award of 5 February 1996 [CISG/1996/07] (*Antimony ingot case*). Arts. 6, 8, 25, 52(1), 53, 54, 61, 72(1) 75, 77, 78 English translation available at <http://cisgw3.law.pace.edu/cases/960205c2.html>
Award of 12 February 1996 [CISG/1996/08] (*Coated art paper case*). Art. 74
English translation available at <http://cisgw3.law.pace.edu/cases/960212c1.html>
Award of 14 February 1996 [CISG/1996/09] (*Bicycle case*). Arts. 53, 61, 78
Award of 15 February 1996 [CISG/1996/10] (*Hot-rolled plates case*). Arts. 25, 49(1)(a), 75, 78
Award of 27 February 1996 [CISG/1996/11] (*Wool case*). Arts. 53, 71, 77, 78, 85
English translation available at <http://cisgw3.law.pace.edu/cases/960227c1.html>
Award of 8 March 1996 [CISG/1996/12] (*Old boxwood corrugated carton case*). Arts. 35, 45, 74, 77, 78, 88 English translation available at <http://cisgw3.law.pace.edu/cases/960308c1.html>
Award of 8 March 1996 [CISG/1996/13] (*Horsebean case*). Arts. 30, 60
Award of 14 March 1996 [CISG/1996/14] (*Dried sweet potatoes case*). Arts. 74, 75, 76, 78, 79(1)
English translation available at <http://cisgw3.law.pace.edu/cases/960314c1.html>
Award of 29 March 1996 [CISG/1996/15] (*Caffeine case*). Arts. 6, 47, 72, 74, 75, 76, 77, 78
English translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960329c1.html>
Award of 4 April 1996 [CISG/1996/18] (*Veneer wood case*). Art. 1
Award of 17 April 1996 [CISG/1996/19] (*Gas purifiers case*). Arts. 26, 39, 49
Award of 30 April 1996 [CISG/1996/20] (*Jacks and bearing brackets case*). Arts. 30, 53, 74, 78
English translation available at <http://cisgw3.law.pace.edu/cases/960430c1.html>
Award of 2 May 1996 [CISG/1996/21] (*Ferro-Molybdenum alloy case*). Arts. 7, 74, 76, 78, 79
English translation available at <http://cisgw3.law.pace.edu/cases/960502c1.html>
Award of 10 May 1996 [CISG/1996/22] (*Hot-rolled steel plates case*). Arts. 8, 29, 32, 74, 78
English translation available at <http://cisgw3.law.pace.edu/cases/960510c1.html>
Award of 16 May 1996 [CISG/1996/24] (*Cashmere sweaters case*). Arts. 62, 78
Award of 22 May 1996 [CISG/1996/25] (*Broadcasting equipments case*). Art. [-]
Award of 31 May 1996 [CISG/1996/27] (*Children's jackets case*). Art. 1
Award of 12 July 1996 [CISG/1996/28] (*Chrome-plating machines production-line equipment case*). Arts. 74, 75, 77, 78, 87
English translation available at <http://cisgw3.law.pace.edu/cases/960712c1.html>
Award of 12 July 1996 [CISG/1996/29] (*Chrome-plating machines production-line case*). Arts. 74, 75 English translation available at <http://cisgw3.law.pace.edu/cases/960712c3.html>
Award of 16 July 1996 [CISG/1996/31] (*Hot-rolled steel plates case*). Arts. 35, 36, 38, 39, 74, 78
English translation available at <http://cisgw3.law.pace.edu/cases/960716c1.html>
Award of 30 July 1996 [CISG/1996/32] (*Ferro-Molybdenum alloy case*). Arts. 47(2), 74
Award of 30 July 1996 [CISG/1996/33] (*Ferro-Molybdenum alloy case*). Arts. 75, 79
Award of 31 July 1996 [CISG/1996/34] (*Sport shoes case*). Arts. 38(2), 49(1)(a)
Award of 6 August 1996 [CISG/1996/35] (*Lacquer handicraft case*). Arts. 30, 53, 61, 74, 78
English translation available at <http://cisgw3.law.pace.edu/cases/960806c1.html>
Award of 8 August 1996 CIETAC Arbitration Award [CISG/1996/36] (*Diaper machine case*). Arts. 50, 78
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