Chinese Case Law Collection Adds to the CISG's Jurisconsultorium: Reflections on the United Nations Convention on Contracts for the International Sale of Goods and its Domestic Implementations

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The *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*'), currently adopted by 95 States, is a treaty intended to harmonise the laws governing cross-border goods trade: and thereby promote trade itself. So much is made clear in its Preamble:

> *The States Parties to this Convention, …*
>
> *Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,*
>
> *Have agreed as follows: …*

Art. 7(1) *CISG's* instruction for interpreters to have regard 'to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade' establishes a requirement of autonomous interpretation. This, in turn, facilitates the *CISG's* global jurisconsultorium: whereby courts, arbitrators, lawyers, academics, and other interested stakeholders can influence and receive influence in relation to the *CISG's* uniform interpretation. A recent publication edited by Peng Guo, Haicong Zuo and Shu Zhang, titled *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 1*, makes an important contribution to this interpretative framework: presenting abstracts and commentaries addressing 48 Chinese *CISG* cases

spanning 1993 to 2005, that may previously have been less accessible to wider international audiences.

A review of this case law collection discloses an interesting phenomenon affecting the *CISG's* Chinese application: at least, until very recently. Pursuant to Art. 142(2) *General Principles of the Civil Law* (which was effective in the People's Republic of China until repealed as of 1 January 2021):

> *[I]f 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.*

(Translation via Jie Luo.)

Numerous contributions to Guo, Zuo and Zhang's volume – including by Wang, Guo and Zhang; Luo; Luo again; Wang; and Xu and Li – observe that some Chinese courts have interpreted this provision to require the *CISG's* application only where it is inconsistent with non-harmonised Chinese law. Whilst this approach to the *CISG's* application is noteworthy for its inconsistency with international understandings of the treaty, it is arguably more noteworthy for highlighting that national law itself is often 'where the relationship between the convention and national law is regulated'.[1] Scholarship has given much attention to the success (or otherwise) of Art. 7(1) *CISG* in securing the treaty's autonomous interpretation. However, machinery provisions giving the *CISG* local effect in any given legal system (themselves being matters of 'local legislative judgment') have an apparently-underappreciated role to play, too.

Wang's contribution quotes Han as writing that the Chinese inconsistency concept's effective implementation of a reverse burden of proof in establishing the *CISG's* application is a situation that 'I am afraid … is unique in the world'. On the contrary, and not unlike China's former Art. 142(2) *General Principles of the Civil Law*, Australia's *CISG* implementing Acts still ostensibly frame the treaty's local application in terms of inconsistency. The *Sale of Goods (Vienna Convention) Act 1986* (NSW) s 6 is representative of provisions found across the Australian state and territory jurisdictions: '[t]he provisions of the *Convention* prevail over any other law in force in New South Wales to the extent of any

inconsistency'. Case law from Victoria and from Western Australia has read those jurisdictions' equivalent inconsistency provisions as implying the *CISG's* piecemeal application, only where particular provisions are inconsistent with local law. Looking even further afield, Australia's own use of the *inconsistency* device is far from unique. Singaporean and Canadian legislation make use of the inconsistency concept, as does Hong Kong's recently-promulgated *CISG* Ordinance. In the latter case, the statutory interpretation risks associated with the adoption of an inconsistency provision were drawn to the Hong Kong Department of Justice's attention. However, Australia's statutory model prevailed, perhaps in part because it has previously been put forward as a model for Commonwealth jurisdictions looking to implement the *CISG*.

At the risk of being slightly controversial, at least some scholarship addressing the failings of national *CISG* interpretations may have been asking the wrong question: or at least, missing an important additional question. Instead of asking why any given court has failed to apply and respect Art. 7(1) *CISG's* interpretative directive, we might instead (or also) usefully ask whether that given State's *CISG* implementation legislation has been drafted so as to invite the local law comparisons that have then been made. Some responsibility for problematic *CISG* interpretations might lie with the legislature, in addition to the judiciary.

In Australia, the *Playcorp* decision – Victoria's inconsistency case referred to above – has been taken by subsequent cases in both the Federal Court and in the Full Federal Court of Australia as authority for the proposition that Art. 35 *CISG's* conformity requirements equate to the implied terms contained in the non-harmonised *Goods Act 1958* (Vic) s 19. The Federal Court's first-instance decision was itself then cited in New South Wales for that same proposition: leading to a problematic *CISG* interpretation that is now entrenched under multiple layers of precedent. Whilst the equation being made here is rightly criticised in itself, it has Australia's inconsistency provisions – *in addition to* our courts' failures to apply Art. 7(1) *CISG* – resting at its core.

Guo, Zuo and Zhang's *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 1* thereby makes a valuable contribution to the *Convention's* jurisconsultorium: first, by virtue of its very existence, but secondly, by its additional disclosure of China's former inconsistency struggles to the wider scholarly community.

[1] Bruno Zeller, 'The *CISG* in Australasia: An Overview' in Franco Ferrari (ed), *Quo Vadis CISG? Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* (Bruylant, 2005) 293, 299.

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Disclosure: The author is a confirmed contributor to the forthcoming *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 3*.