# A Comparative Case Study of the Interpretation Methodology of Article 14 of the CISG

*– A Global Jurisconsultorium Perspective –*

Fan Yang*

## A. Introduction

A global jurisconsultorium on uniform international sales law is the proper setting for the analysis of foreign jurisprudence.
– Vikki Rogers and Albert Kritzer
in *A Uniform International Sales Law Terminology*

In her new book, *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*,[1] Camilla Baasch Andersen demonstrates the considerable value of the global use of CISG precedents and analyses, in particular the idea of the "jurisconsultorium" – the harmonisation of court and arbitral decisions with well-reasoned scholarly precedents from other countries – as the heart of a new discipline of uniform law. Although there are well-acknowledged concerns that the concept of a global jurisconsultorium may raise numerous issues of comparative law and legal theory, concerning such things as reconciliation of legal traditions in drafting, the comparative use of precedents, sources of law, and the discipline of uniform law as such,[2] the present article demonstrates how a national court or an international arbitral tribunal can effectively engage in the exercise of global jurisconsultorium and the advantages of doing so to achieve a

* Fan Yang, Research Fellow (MCIArb) LCIA (YIAG); PRC Representative of the Practice & Standards Committee, Arbitration Sub-Committee, Chartered Institute of Arbitrators; PhD Researcher (London) LL.M. (Birmingham) LL.B. (Shanghai) Certificate in International & Comparative Law (Cornell University (USA) & Universite Paris I – Sorbonne); Barrister (England & Wales, non-practising).

1 *See* C. Baasch Andersen, Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG (2007).

2 *See* C. Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 Journal of Law and Commerce 159-179 (2005), also available at: http://cisgw3.law.pace.edu/cisg/biblio/andersen3.html

*European Journal of Law Reform*, Vol. X, no. 1, pp 3-20.

uniform interpretation of international sales law. In particular, this article advocates for the participation of the People's Republic of China (PRC), and particularly CIETAC (China International Economic and Trade Arbitration Commission), in the global jurisconsultorium exercise.

The application of CISG in international arbitration differs from how it is applied in a State court. Unlike a State court, arbitral tribunals enjoy more freedom in deciding applicable law and the application of an international convention such as CISG.[3] An arbitrator need not be concerned so much with conflict of law rules or territoriality.[4] Rather, the arbitrator can consider whether parties explicitly or implicitly agreed on applying CISG, or find that no choice of law has been made and then apply CISG if appropriate.[5]

In 2000, CIETAC dealt with 543 arbitrations, compared to 500 by the AAA (American Arbitration Association), 541 by the ICC International Court of Arbitration, and 294 by the Hong Kong International Arbitration Centre.[6] From January 2000 until 2005, CIETAC's caseload was respectively: 543, 731, 684, 709, 850, and 979 cases. CIETAC has become the world arbitration forum with the largest caseload,[7] and the majority of Chinese arbitral awards involving CISG were made by CIETAC. Thus it would be useful to review and critically analyze the interpretation methodology of CISG in CIETAC.

## B. Interpretation Methodology of Article 14 CISG

When examining how national courts and international arbitral tribunals interpret CISG, national notions or language differences may or may not be evident.[8] But what really counts is substance, the comprehension, application, and elaboration of terms in actual cases instead of simply how those terms appear in the particular CISG foreign language text. The fundamental issue is not which Chinese words or characters have been adopted to translate or refer to their English counterparts, but whether those concepts and provisions in fact have been interpreted and applied by the PRC tribunals differently. By way of example, this article compares the interpretation methodology of Article 14 in the CIETAC *Pig Iron case* (25 December 1998)[9] and some other selected cases in the following contracting states: Austria, Belgium, Canada, France, Germany, Hungary, Russia, Switzerland

---

[3] *See* A. Mourre, *Application of the Vienna International Sales Convention in Arbitration*, 17 (1) ICC International Court of Arbitration Bulletin (2006).

[4] *Id.*

[5] *Id.*

[6] *See* http://www.hkiac.org/HKIAC/HKIAC_English/en_statistics.html.

[7] *See* Dong Wu, *CIETAC's Practice on CISG*, 2 Nordic Journal of Commercial Law (2005), available at http://www.njcl.utu.fi/2_2005/article2.htm and http://cisgw3.law.pace.edu/cisg/biblio/wu.html, at para. 2 CIETAC and CIETAC Awards.

[8] For a discussion on the Chinese text of the CISG, *see* Fan Yang, The Sales Law in China, the CISG and the UNIDROIT Principles, (PhD Dissertation Chapter 1, not yet published).

[9] *See* China, 25 December 1998, CIETAC Arbitration proceeding (*Pig Iron case*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/981225c1.html.

and the United States, and explores whether the *Pig Iron case* would be decided differently in other CISG contracting states.

By comparing various approaches of tribunals in selected cases in ten contracting states, we can observe useful patterns, trends, and differences in interpretation methodology, contributing to an understanding of whether principles of uniformity are, in practice, prevailing over, or losing to, local preferences.

## I. Austria

The Austrian courts in the *Chinchilla furs case*,[10] were called upon to determine whether an order for "a larger number of furs" was sufficiently definite as to quantity to make an enforceable contract. Relying on the wording of Article 14 (1), the courts recognised that this called for an "implicit determination" of the quantity of the specified goods. The courts then referred to CISG Article 8(2) and determined that something would be "sufficiently definite" if it would be so understood by "a reasonable person of the same kind" as the other party (offeree) would have had "in the same circumstances."[11] The Austrian courts, albeit without explicitly referring to Article 9, referred to CISG Article 8(3) in determining

[10] *See* Austria, 10 November 1994, Supreme Court (*Chinchilla furs case*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/941110a3.html.

[11] *See* J. O. Honnold, Uniform Law for International Sales (1999), at 157 [Art. 14 (goods received in spite of failure to agree on price)], at 360 [Art. 57]; M. P. Van Alstine, *Dynamic Treaty Interpretation*, 146 University of Pennsylvania Law Review 687, at 772, n. 354 (1998), also available at http://cisgw3.law.pace.edu/cisg/biblio/alstine2.html:

> finding an enforceable contract where a reasonable person would have been able to determine the price under the given circumstances, although avoiding the specific interaction of articles 14(1) and 55;

M. J. Bonell & F. Liguori, *The U.N. Convention on the International Sale of Goods: a Critical Analysis of Current International Case Law*, 1 Uniform Law Review 147, at 159, n. 62 (1996); T. S. Simons, *Commentary*, 1 The International Legal Forum, 89-90 (1996); M. Karollus, *Judicial Interpretation and Application of The CISG in Germany 1988-1994*, Cornell Review of the Convention on Contracts for the International Sale of Goods 51, at 60 (1995) [brief comments on open-price issues], also available at http://cisgw3.law.pace.edu/cisg/wais/db/editorial/karollus910917g1.html; J. A. Spanogle & P. Winship, International Sales Law: A Problem Oriented Coursebook (2000), [formation of contract: the price, at 110-114 (case at 111-112), buyer's performance paying the price, at 213-216 (case at 214)]; C. A. Gabuardi, Open Price Terms in the CISG, the UCC and Mexican Commercial Law (June 2001), available at http://cisgw3.law.pace.edu/cisg/biblio/gabuardi.html#C; W. Posch & T. Petz, an English translation of the Posch & Terlitza German commentary cited below that has been published *in* 6 Vindobona Journal of International Commercial Law and Arbitration 1-24, at nn. 15-17, 53-55 and 97 (2002) [Go to this commentary in either its English or German text for an excellent comprehensive analysis of Austrian case law on the CISG.]; H. Bernstein & J. Lookofsky, Understanding the CISG in Europe (2003), at §: 3-2 n.20; §: 3-3 n.31; L. A. DiMatteo *et al.*, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 Northwestern Journal of International Law & Business 299-440, at nn.207, 219-222, 227 (2004); P. Schlechtriem & I. Schwenzer (Ed.), Commentary on UN Convention on International Sale of Goods (2005), Art. 8, paras. 47, 51; Art. 14, paras. 3, 5; Art. 55, para. 7; Art. 57, para. 3; R. F. Henschel, The Conformity of Goods in International Sales (2005), at 27, 151, 157.

the understanding a reasonable person would have had, and considered that due consideration is to be given to *all relevant circumstances* of the case including the negotiations, any *practices* the parties established between themselves, *usages* and any subsequent *conduct* of the parties.[12]

Applying these factors, the Austrian Supreme Court held that the buyer's later conduct of selling on the delivered goods apart from a small number, without raising any objection as to the quantity of the goods delivered, established that the order of "a larger number of furs" was sufficiently definite.[13]

## II. Belgium

The Belgian court in the *Scaforn International BV & Orion Metal BVBA v. Exma CPI SA* case[14] appeared to rely largely on CISG textual language with a modest cross-reference to Article 23. The Belgian court correctly identified three conditions of a valid offer under Article 14 of the CISG, but in applying Article 14 to the facts, the reasoning for how the so-called "purchase orders" should be considered as an offer appeared to be rather thin. There appeared to be a lack of analysis of the parties' intent. The court's reference to Article 23 may be relevant,[15] but some other perhaps more relevant and important articles, such as Article 8, which provides methodology for analysing intent in determining whether a term is sufficiently definite under Article 14,[16] were not considered.

---

[12] *See* an analysis of Austrian case law by W. Posch & T. Petz, *Austrian Cases on the UN Convention on Contracts for the International Sale of Goods*, 6 Vindobna Journal of International and Commercial Law and Arbitration 1-24 (2002), also available at http://www.maa.net/vindobonajournal/. The ruling of 10 November 1994 of the Oberster Gerichtshof [Supreme Court] of Austria is analyzed by Posch & Petz at pages 4, 11 and 19 of this commentary. The commentary also contains other analyses of Austrian case law on CISG issues addressed. Also available at: http://cisgw3.law.pace.edu/cases/941110a3.html#ce.

[13] *See* original language (German): CISG-Austria website http://www.cisg.at/2_54793.htm; CISG online.ch website http://www.cisg-online.ch/cisg/urteile/117.htm; [österreichische] Juristische Blätter (JBl) 1995, 253-254; Praxis des internationalen Privat- und Verfahrensrecht (IPRax) 1996, 137-139; [1995] Österreichische Juristen Zeitung (ÖJZ) 422-423 EvBI 87; Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht (ZfRV) 36 (1995) 79-81; 67 Sammlung zivilrechtlicher Entscheidungen (SZ) No. 197; ecolex (1995) 94, at page 150-151; *see also* Unilex database http://www.unilex.info/case.cfm?pid=1&do=case&id=110&step=FullText.

[14] *See* Belgium, 25 January 2005, Commercial Court Tongeren (*Scaforn International BV & Orion Metal BVBA v. Exma CPI SA*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/050125b1.html.

[15] *See* Article 23 of the CISG: A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention. Available at: http://www.cisg.law.pace.edu/cisg/text/e-text-23.html.

[16] *See* DiMatteo *et al.*, *supra* note 11, at 336.

## III. Canada

The Canadian court in *Cherry Stix Ltd. v. President of the Canada Borders Services Agency*[17] concluded that interpreting the offer under the CISG should be no different from interpreting it under the common law. The court's rationale is not convincing. One commentator wrote that "[t]he Convention is meant to be interpreted based upon its uniqueness and not its similarities to any one of the legal systems from which it was created."[18] The CISG provides a *self-contained* methodology for interpreting and applying its rules.[19] The spirit of this methodology is to exclude recourse to domestic legal methodologies.[20] Professor Michael Bridge pointed out that "it is immensely difficult to coin *anational* uniform law that is free from national bias. Indeed, since the process of uniformity often entails selecting the best from a range of competing solutions and ideas, it is impossible to efface national experience. *The skill lies in being able to stand outside one's national legal culture.*"[21] Professor Franco Ferrari also observes that the CISG directs decision-makers to develop *autonomous interpretations* of CISG provisions.[22] While a comparative and analogy approach could be used to find interpretations consistent with the purposes and policies of the Convention,[23] the comparisons and analogies should be confined within the CISG provisions and the general principles underlying those provisions to fill gaps or resolve ambiguities in the CISG itself. Reasoning by analogy, particularly when a solution

---

[17] *See* Canada, 6 October 2005, Canadian International Trade Tribunal (*Cherry Stix Ltd. v. President of the Canada Borders Services Agency*). Cite as: http://cisgw3.law.pace.edu/cases/051006c4.html.

[18] *See* L. A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 Yale J. Int'l L. 111, at 133 (1997), available at http://cisgw3.law.pace.edu/cisg/biblio/dimatteo.html.

[19] For discussion on whether the CISG mandates or should mandate absolute uniformity of application, *see generally*, Van Alstine, *supra* note 11; F. Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 Pace Int'l L. Rev. 303 (1996), available at http://cisgw3.law.pace.edu/cisg/biblio/Diedrich.html; F. Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga. J. Int'l & Comp. L. 183 (1994), available at http://cisgw3.law.pace.edu/cisg/biblio/franco.html; M. N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling – An Analysis and Application*, 20 Austl. Bus. L. Rev. 442 (1992), available at http://cisgw3.law.pace.edu/cisg/biblio/rosenberg.html; A. H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 Nw. J. Int'l L. & Bus. 574 (1988), available at http://cisgw3.law.pace.edu/cisg/biblio/kastely.html; M. F. Sturley, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 Tex. Int'l L.J. 540 (1986).

[20] *See* DiMatteo *et al.*, *supra* note 11, at 314.

[21] *See* M. Bridge, *The UK Sale of Goods Act, the CISG and the Unidroit Principles*, *in* P. Šarčević & P. Volken (Eds.), The International Sale of Goods Revisited (2001) at 130. (Emphasis added).

[22] *See* Ferrari, *supra* note 9, at 198-201.

[23] Professor Scott defines a 1code as "a pre-emptive, systematic, and comprehensive enactment of a whole field of law." Thus, problems of interpretation such as gaps in the code are to be solved by means internal to the code. A court or arbitral panel is given the duty "to use the processes of analogy and extrapolation to find a solution consistent with the purposes and policy of the codifying law. In this way, the code itself provides the best evidence of what it means." *See* R. E. Scott, *The Uniformity Norm in Commercial Law*, *in* J. S. Kraus & S. D. Walt (Eds.), The Jurisprudential Foundations of Corporate and Commercial Law 149, at 171 (2000).

provided in one provision is analogous to an issue presented under another,[24] should be encouraged and promoted. But analogising to or applying domestic principles to interpret CISG provisions[25] should not done, for this poses the threat of a homeward bias,[26] which is contradictory to CISG's uniformity goal.

## IV. France

In its first decision under the CISG, France's Court of Cassation in *Fauba v. Fujitsulaw*[27] rightly held that a term specifying revision of price according to market trends was sufficiently definite,[28] but did not indicate whether the price was found determinable pursuant to French national law or to CISG Article 14.[29]

---

[24] "If the Convention failed to anticipate and thus provide a specific solution to an issue, an analogical extension from the existing provisions to the new situation is then appropriate." *See* P. Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minn. J. Global Trade 105, at 122 (1997), available at http://cisgw3.law.pace.edu/cisg/biblio/koneru.html, citing J. O. Honnold, Uniform Law For International Sales 3 (1991); *see also* M. N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling – An Analysis and Application*, 20 Austl. Bus. L. Rev. 442 (1992), available at http://cisgw3.law.pace.edu/cisg/biblio/rosenberg.html.

[25] The use of domestic law

> represents under the ... uniform law a last resort to be used only if and to the extent a solution cannot be found either by analogical application of specific provisions or by the application of general principles underlying the uniform law as such.

*See* M. J. Bonell, *Introduction to the Convention*, *in* C. M. Bianca & M. J. Bonell (Eds.), Commentary On The International Sales Law 79, at 83 (1987), *cited in* Ferrari, *supra* note 20, at 228.

[26] Professor Miller states the importance of deterring interpreters from acting on such temptation. Uniformity is especially important "where the uniform provision perhaps represents a less desirable position but nonetheless forms an important part of a compromise reflecting a desirable, overall balance and where, if one provision is altered by non-uniformity, significant threat to the overall consensus is posed." *See* F. H. Miller, *Realism not Idealism in Uniform Laws – Observations from the Revision of the UCC*, 39 So. Tex. L. Rev. 707, at 722-723 (1998).

[27] *See* France, 22 April 1992, Appellate Court Paris (*Fauba v. Fujitsu*). Cite as: http://cisgw3.law.pace.edu/cases/920422f1.html; *See also* France, 4 January 1995, Supreme Court (*Fauba v. Fujitsu*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/950104f1.html.

[28] *See Fauba v. Fujitsu Microelectronik*, Cour de Cassation, Paris, 92-16.993, 22 April 1992 (Fr.) (term specifying revision of price according to market trends was sufficiently definite), available at http://cisgw3.law.pace.edu/cases/920422f1.html.

[29] *See* Case commentary (English translation), C. Witz, *The First Decision of France's Court of Cassation Applying the U.N. Convention on Contracts for the International Sale of Goods*, available at: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950104f1.html#ta; F. Ferrari, *Applicability and Applications of the Vienna Sales Convention (CISG)*, 4 International Legal Forum 138, at 158, n. 177 (1998) (liaison office not "place of business"); Honnold, *supra* note 24, at 33 [Arts. 1(1), 10 (place of business)], 185 [Art. 19 (materiality of answer that deviates from offer)], 357 [Art. 55]; Bonell & Liguori, *supra* note 11, at 163, n. 75, n. 76; V. G. Curran, *The Interpretive Challenge to Uniformity – Excerpts From Review of "Les Premières Applications Jurisprudentielles du Droit Uniforme de la Vente Internationale" by Claude Witz (L.G.D.J. Paris 1995)*, 15 Journal of Law and Commerce 175, at 179-180 & 187-192 (1995), available at http://cisgw3.law.pace.edu/cisg/wais/db/editorial/curran920422f1.html, summary translation of comments on this case and related cases by Claude Witz; J. Lookofsky, Understanding the CISG in Scandinavia (1996),

Noting that "traditional French case law is very demanding with respect to the determinable character of price"[30] but that it is in the process of abandoning "this harsh position",[31] Professor Witz criticized the court's failure to take the opportunity to rule once and for all that French internal law with respect to price is inapplicable to sales governed by CISG. As Professor Witz observed, France's more stringent internal laws do not in any way vitiate the existence of a valid offer pursuant to CISG, provided that, pursuant to Article 14, the "proposal ... expressly or implicitly fixes or makes provision for determining the ... price."[32] Professor Ingeborg Schwenzer concurred that a valid offer may still be presumed to exist if the price can be determined by taking into account all the surrounding circumstances,[33] pointing out that this view is further supported by the French Supreme Court's virtual abandonment of the principle of *pretium certum*, not only under CISG but also under French domestic law.[34]

## V. Germany

The German courts in the *OLG Frankfurt Screws* case[35] held that some items in the order contained prices but, as the buyer insisted on delivery of the total order and as special screws did not contain a price, the offer was not sufficiently definite either under German Civil Code or CISG Article 14. When the German courts in this case referred to Articles 14(1) and 19(1), they also simultaneously referred to analogous provisions of the German Civil Code. This approach is problematic for the reasons discussed above. There is no dispute that CISG should apply; thus, the Court's constant recourse to the national German Civil Code cannot help in applying and interpreting CISG any further, but, on the contrary, can compromise CISG's autonomous interpretation methodology. The German courts in this case should have resorted to CISG Article 8, for example, in determining the parties' intent, rather than look to domestic law. The cases' end result may or may not be much different, but the the courts' reasoning may well reveal a lack of proper understanding of how CISG should be applied and interpreted so as to promote

---

at 12, n. 1; Bernstein & Lookofsky, *supra* note 11, at 10, n. 1; P. Schlechtriem, *Article 14*, *in* P. Schlechtriem, Commentary on the UN Convention on the International Sale of Goods (1998), 108, n. 24; G. C. Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 Revue Hellenique de Droit International 191-218 (1999), at n. 7, available at http://cisgw3.law.pace.edu/cisg/biblio/petrochilos.html; Spanogle & Winship, *supra* note 11, ,the place of business criterion 65-67 (this case at 67), buyer's performance: paying the price 110-113 (this case at 112-113); Bernstein & Lookofsky, *supra* note 11, §: 2-2 n.1; DiMatteo *et al.*, *supra* note 11, at n. 197 ("term specifying revision of price according to market trends was sufficiently definte").

[30] *See* Witz, *supra* note 29.

[31] *Id.*

[32] *Id.*

[33] *See* I. Schwenzer & F. Mohs, *Old Habits Die Hard: Traditional Contract Formation in a Modern World*, 6 Internationales Handelsrecht 239-246 (2006) also available at: http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-mohs.html.

[34] *Id.*

[35] *See* Germany, 4 March 1994, Appellate Court Frankfurt, M 10 U 80/93, (F.R.G.) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/940304g1.html.

the ultimate goal of uniformity in international sales law. Numerous scholars and experts have repeatedly emphasized the importance of deterring interpreters from acting on the temptation to resort to domestic law. For example, Professor Bonell, rightly stressed that "the use of domestic law represents under the ... uniform law a last resort to be used *only if and to the extent* a solution cannot be found either by analogical application of specific provisions or by the application of general principles underlying the uniform law as such."[36] Resort to a specific domestic law should only be used when private international law and conflict of law rules lead to the application of *that* specific domestic law. The German courts in this case should have refrained from even mentioning German domestic law, which is irrelevant in every aspect. In this regard, the German court in another case, Germany 8 February 1995 District Court München Standard Software,[37] appeared to be more rational in confining the application and interpretation of CISG within its provisions without referring or comparing to any German domestic law. The court found it "decisive ... that the parties had agreed on the necessary minimum content that they were looking to agree upon."[38] But when determining the intent of the parties, the court also should have referred to and discussed CISG Article 8 to support its determination that intent is based upon a *totality of the circumstances*[39] (prior dealings, course of performance, usage), as well as Article 9 (usage, prior dealings). By doing so, the judgement would have been more convincing.

In a more recent case, *Pitted Sour Cherries* the German District Court Neubrandenburg,[40] adopted a more laudable approach in interpreting Article 14 and discussing its relationship with Article 55. Having concluded that CISG is applicable, the court held in particular, "the fact that the parties have reached the agreement that the price was to be determined during the season does not affect the validity of the sales contract ..."[41] The court, applying the principles of interpretation of CISG Article 8, held that the wording of the contractual provision "To be fixed during the season" is to be interpreted as an implicit agreement on the season price for the year 2003, and thereby was a determination under the standards of CISG Article 55. The court rightly took into account that raw products, sour cherries in this case, are typically seasonal goods, the prices for which are determined according to the market price for sour cherries during the season. Therefore, as the parties consciously left the price provision open, the court applied CISG Article 55 to peg the contract price term at market prices.

---

[36] *See* Bonell, *Introduction to the Convention, supra* note 25, at 83; also cited in Ferrari, *supra* note 19, at 228.

[37] *See* Germany, 8 February 1995, District Court München [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/950208g4.html.

[38] *Id.*

[39] For a discussion of the "totality of the circumstances analysis" approach to contract interpretation *see generally*, L. A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. Rev. 293, at 318-24 (1997); L. A. DiMatteo, Contract Theory: The Evolution of Contractual Intent 56-60 (1998).

[40] Germany, 3 August 2005, District Court Neubrandenburg (*Pitted sour cherries case*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/050803g1.html.

[41] *Id.*

Further, the German court held that, even if the contractual term "To be fixed during the season" was to be interpreted as an agreement to reach agreement on the price at a later time, this would not affect the validity of the contract because: a) according to CISG Art. 6, the parties are entitled to exclude the requirements of CISG Art. 14(1) sentence two and to disregard the minimum requirements, without rendering the offer or the contract void (MünchKommBGB/Gruber, CISG Art. 14 para. 17); and b) if subsequent agreement does not occur, CISG Art. 55 treats the case as a contract without details as to price, with the parties having commenced performance in any case.[42]

Although the German court still considered domestic law, it also cited a decision of the International Arbitral Court of the Chamber of Industry and Commerce of the Russian Federation dated 13 March 1995, in which the arbitral court held that a condition precedent is present if the parties have agreed on a later agreement on the price. By giving greater deference to a CISG decision from another jurisdiction than to its own domestic law, the German court in the Pitted sour cherries case[43] showed a positive development toward a convergent and international uniform interpretation of CISG.

## VI. Hungary

In *Pratt & Whitney v. Malev*,[44] a Hungarian lower court decided that the parties had a valid contract, referring to CISG Article 23, which provides that "[a] contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention". Though generally supportive of the lower court's analysis, Professor Witz expressed concern over the lower court's failure[45] to refer to Article 8 when analyzing a clause requiring approval of the Hungarian and United States governments.[46] Professor Witz pointed out

---

[42] *Id.*

[43] Germany, 3 August 2005, District Court Neubrandenburg (*Pitted sour cherries case*) [translation available] . Cite as: http://cisgw3.law.pace.edu/cases/050803g1.html.

[44] *See* Hungary, 25 September 1992, Supreme Court (*Pratt & Whitney v. Malev*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/920925h1.html; Hungary, 10 January 1992, Metropolitan Court (*Pratt & Whitney v. Malev*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/920110h1.html.

[45] The lower court appears to have noticed correctly the distinction between the insertion of a material additional term, "a simple request" for a material modification, an unambiguous acceptance, and an amendment, restriction, or other change that would amount to a rejection under 19(1). *See* DiMatteo *et al.*, *supra* note 11, at 356, also available at: http://cisgw3.law.pace.edu/cisg/biblio/dimatteo3.html.

[46] *See* CISG Article 8: (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiation, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

that Article 23 was irrelevant in this context, as the court later referred to the Hungarian Civil Code with respect to conditions, stating that CISG has similar provisions.[47] Professor Witz further noted that Article 23's irrelevance in this context was confirmed by the interpretation of the Hungarian judges relative to identifying the plaintiff's intent, *i.e.*, that Pratt & Whitney had foreseen the need for the Hungarian government's approval, not to conclude the making of the contract, but rather to avoid a possible violation of Hungarian law.[48] However, in a much criticized decision, the Supreme Court reversed the lower court, reasoning that there was no offer; or, if there were an offer, there was no acceptance, but only a statement of intent to conclude a contract at a later date. Professor Witz criticized the Hungarian Supreme Court for making no reference to Article 8, pursuant to which the parties' intent should have been examined, and questioned whether the Hungarian Supreme Court might have been primarily motivated to find in favour of the Hungarian defendant, and only secondarily motivated to articulate some supporting connectionto CISG.[49] Curran commented that the paradoxes of the Supreme Court's opinion are more salient when viewed against the different mode of reasoning of the lower court, and in light of CISG Article 65, which, as Professor Witz pointed out, explicitly envisages valid contracts that call for the buyer "to specify the form, measurement or other feature of the goods ..."[50] In contrast, the decision of another Hungarian case, *Adamfi Video v. Alkotók Studiósa Kisszövetkezet*,[51] appears more faithful to CISG principles in that the court rightly relied upon a sales contract that had previously been concluded between the parties when determining the price of the goods and other elements of the contract pursuant to CISG Articles 9(1) and 53.

---

[47] *See*, Hungary, 10 January 1992, Metropolitan Court (*Pratt & Whitney v. Malev*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/920110h1.html.

[48] *See* V. C. Curran, *Case commentary*, 16 Journal of Law & Commerce 347-356 (1997) [translation of commentary by Claude Witz in Recueil Dalloz Sirey]; *See also* Curran, *supra* note 29, at 191-192 [summary translation of comments on this case and related cases by Claude Witz in "Les premières applications"], also available at: http://www.cisg.law.pace.edu/cisg/wais/db/editorial/curran950104f1.html.

[49] *Id.*

[50] CISG Article 65 states: (1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him. (2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

[51] *See*, Hungary, 24 March 1992, Metropolitan Court (*Adamfi Video v. Alkotók Studiósa Kisszövetkezet*). Cite as: http://cisgw3.law.pace.edu/cases/920324h1.html.

## VII. Russia

The most interesting issue in the Russian case of 3 March 1995 Arbitration proceeding 304/1993[52] concerns how the Russian Tribunal of International Commercial Arbitration applied and interpreted CISG Article 55. The parties had agreed to fix the price 'ten days prior to the beginning of the New Year' but were unable to do so.[53] The tribunal considered CISG Article 55 but decided it was inapplicable because the parties deemed it necessary to reach an agreement on price in the future. In the tribunal's opinion, the parties' later failure to reach agreement on price went to the heart of the transaction and defeated the formation of a contract.[54] The decision in effect rejected Article 55's gap-filling role.[55]

Whether the failure of the parties to state a price prevents contract formation is controversial. Professor Farnsworth maintains that some method of determining the price must be included in the offer for a valid contract to be concluded.[56] Professor Honnold, however, maintains that Article 55 allows "the price generally charged at the time of the conclusion of the contract" to cure the lack of a price or a method for determining the price,[57] and that as long as the parties' intention to make a contract is clear, the Convention allows the parties to vary the effect of any of the Convention's provisions, including Article 14's price provision.[58] Professor Schlechtriem comments that "a contradiction remains between [this] requirement ... on the one hand and the possibility of fixing the price after the contract is concluded on the other,"[59] and concludes that, although most likely unacceptable to many states, this contradiction may be resolved by interpreting the term "validity" in Article 55 to relate to all contractual requirements other than price; if such an interpretation is adopted, "[a]n offer that is indefinite with

---

[52] *See* Russia, 3 March 1995, Arbitration proceeding 304/1993 [translation available] Cite as: http://cisgw3.law.pace.edu/cases/950303r2.html.

[53] *See* Honnold, *supra* note 24, at 156 [Art. 14: definiteness and price (prior to delivery and acceptance)]; Spanogle & Winship, *supra* note 11 [formation of the sales contract: the price 110-114 (this case at 113-114)]; Gabuardi, *supra* note 11; M. del Pilar Perales Viscasillas, *Comments on the Draft Digest Relating to Articles 14-24 and 66-70*, *in* F. Ferrari, H. Flechtner & R. A. Brand (Eds.), The Draft UNCITRAL Digest and Beyond (2004), at 277-279 [Art. 55 issues].

[54] *See* DiMatteo *et al.*, *supra* note 11, at 342.

[55] *Supra* note 53.

[56] *See* E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 Int'l Law. 17 (1984).

[57] *See* Honnold, *supra* note 11.

[58] *See* J. E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & Com. 11, at 14-17 (1988), available at http://cisgw3.law.pace.edu/cisg/biblio/murray.html; H. M. Fletchner, *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More*, 18 J.L. & Com. 191, at 202-06 (1999), available at http://cisgw3.law.pace.edu/cisg/biblio/workshop.html. Professor Farnsworth disagrees with this interpretation because Article 55 allows this method of determining a price only when "a contract has been validly concluded." *Id.*

[59] *See* P. Schlechtriem, Uniform Sales Law – The U.N. Convention on Contracts for the International Sale of Goods 45 (1986) available at http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html, at 80.

respect to the price could then be interpreted ... as an implied reference to the price generally charged for such goods."[60]

Professor Schlechtriem hopes that, in practice, the problem of the definite price – *pretium certum* – will be of no importance.[61] While Professor Schlechtriem recognises the apparent contradiction between CISG Article 14 and Article 55, some scholars deny there is a contradiction between these two provisions.[62] Professor Hiroo Sono is of the view Article 14(1) can be read literally to suggest that fixing the price or making the price determinable is a "sufficient condition" for a proposal to be an offer, but not a "necessary condition".[63] Professor DiMatteo reads the Secretariat's Commentary to Article 14 as supporting the view that, as long as there is intent to be bound, the law of sales can supply missing terms.[64] But the Secretariat's Commentary to Article 55 seems to suggest that this might depend, at least in part, on the location of the parties and domestic law.

The Secretariat's Commentary to Article 55 states:

> 1. Article 51 [draft counterpart of CISG article 55] provides a means for the determination of the price of contract has been validly concluded but the contract does not state a price or expressly or impliedly make provision for its determination.
>
> 2. Article 12(1) [draft counterpart of CISG article 14(1)] provides that the proposal for concluding a contract is sufficiently definite so as to constitute an offer if, inter alia, "it ... expressly or impliedly fixes or makes provisions for determining ... the price". *Therefore, article 51 [draft counterpart of CISG article 55] has effect only if one of the parties has his place of business in a Contracting State which has ratified or accepted this Convention as to Part III (Sales of goods) but not as to Part II (Formation of the contract) and if the law of the State provides that a contract can be validly concluded even though it does not expressly or impliedly fix or make provisions for determining the price.* [Emphasis added]
>
> Time of calculation of price
>
> 3. The price to be determined by the application of article 51 [draft counterpart of CISG article 55] is that charged at the time of the conclusion of the contract. It is the price which would presumably have been agreed upon by the parties at

---

[60] *Id.*

[61] *See* P. Schlechtriem [Germany], *excerpt Uniform Sales Law: The Experience with Uniform Sales Laws in the Federal Republic of Germany*, Juridisk Tidskrift 1-28 (1991/92) [comments on the conflict between Articles 14 and 55], available at: http://cisgw3.law.pace.edu/cisg/text/schlechtriem14,55.html; Professor Kazuaki Sono also expressed a similar view in his article *Formation of International Contracts under the Vienna Convention: A Shift above the Comparative Law*, *in* P. Sarcevic & P. Volken (Eds.), International Sale of Goods: Dubrovnik Lectures 111-131 (1986), available at http://www.cisg.law.pace.edu/cisg/biblio/sono2.html.

[62] *See* E. Bucher, Preisvereinbarung als Voraussetzung der Vertragsgültigkeit beim Kauf-Zum angeblichen Widerspruch zwischen Art. 14 und Art. 55 des "Wiener Kaufrechts", *in* F. Sturm (Ed.) Festschrift Piotet 371 (1990), who denies that there is a contradiction by pointing out that Art. 55 has its own field of application, e.g., in cases where a contract is formed without offer and acceptance. For an extensive analysis of the problems of pretium certum *see* C. Witz, Der unbestimmte Kaufpreis (1989).

[63] Professor Kazuaki Sono expressed the same view in a workshop that is transcribed in the Journal of Law and Commerce, available at: http://cisgw3.law.pace.edu/cisg/biblio/workshop.html.

[64] *See* Secretariat Commentary to Art. 14, available at http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-14.html; *see also* DiMatteo *et al.*, *supra* note 11, at 341.

> the time of contracting if they had agreed upon a price at that time. Moreover, if a contract had been validly concluded even without specification of the price, the article recognizes that the seller should not later be able to claim that the price was that prevailing at the time of the delivery of the goods, if that price was higher than the one the seller was charging at the time of the conclusion of the contract."

Returning to the Russian case, one asks whether the Secretariat's Commentary raises a critical and interesting question that the tribunal should have considered, namely whether Russian domestic law actually requires the setting of a specific price for an enforceable contract to be formed? If Russian domestic law indeed so requires, would it be easier to understand the decision of the Russian tribunal that Article 55 could only be used to set a price after an enforceable contract had been determined?

However, the Secretariat's Commentary to Article 55 seems to suggest that Article 14 and Article 55 should be used as an alternative, in particular for parties in those contracting states that have partly ratified or accepted CISG as to Part III (Sales of goods) but not as to Part II (Formation of the contract), yet it provides no answer for parties in the majority of contracting states that have wholly ratified and accepted the convention as to both Part III (Sales of goods) and Part II (Formation of the contract), such as Russia.

On balance, the approach suggested by Professor Schlechtriem and Professor Honnold should be adopted in the application and interpretation of Articles 14 and 55, in particular, for the benefit of parties in those majority contracting states that have adopted CISG as a whole. In reconciling the contradictions between two CISG provisions, the approach and methodology should be the same as in filling gaps in CISG, i.e. an autonomous interpretation. To reconcile conflicts within CISG itself, regard should be given to both the meaning of those provisions themselves and the general principles underlying those provisions. Professor Schlechtriem's interpretation is most convincing in that it puts emphasis on the provisions themselves, suggesting that the contradiction should be resolved by interpreting the term "validity" in Article 55 to relate to all contractual requirements other than the price. It follows "[a]n offer that is indefinite with respect to the price could then be interpreted ... as an implied reference to the price generally charged for such goods."[65] This interpretation is also supported by the general principles[66] underlying these provisions, including the principle of

---

[65] *Id.*

[66] For general principles, *see, for example*, A. Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, *in* Pace Int'l Law Review (Ed.), Review of the Convention on Contracts for the International Sale of Goods: 1999-2000 (2000), at 172 (reference to the Review of the Convention on Contracts for the International Sale of Goods: 1999-2000), available at http://cisgw3.law.pace.edu/cisg/biblio/kazimierska.html; *see also* H. Gabriel, Practitioner's Guide To CISG And UCC (1994).

> [I]f the express words of a particular article fails to resolve a conflict, the CISG requires the conflict to be resolved by the underlying principles that led to the adoption of the provision in question.

*See also* DiMatteo *et al.*, *supra* note 12, at 313:

reasonableness under Article 8.[67] Article 8(2) emphasizes the reasonable person's interpretation of statements and conduct while Article 8(3) brings in subsequent conduct that can be used to determine what a reasonable person must have understood as to the price for the goods. This apparent contradiction thus can be resolved autonomously within the CISG without difficulty. This interpretation has also been favoured by several national courts, which have shown general flexibility in applying and interpreting Articles 14 and 55 in practice,[68] consistent with the prevailing view that agreement on the price is not as important as the parties' intention to be contractually bound.

## VIII. Switzerland

The Swiss District Court in the Switzerland 3 July 1997 *St. Gallen Textile* case[69] rightly considered Article 11 and applied Article 8(2) and (3) to determine the intent of the offer or to be bound upon acceptance, taking into account all relevant statements and conduct according to the understanding of a reasonable person of the same kind as the other party in the same circumstances. The court also used Article 55 to interpret the price stated in a seller's corrected invoice to be

---

General principles cover all CISG provisions and can be utilized to uncover implied principles that underlie specific provisions. These principles – express or implied – are to be used for guidance in the interpretation of specific CISG provisions. This entails analogical reasoning in order to ensure that article-specific interpretations fit within the framework of the CISG as a whole.

[67] *See* Article 8: (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. Available at: http://www.cisg.law.pace.edu/cisg/text/e-text-08.html

[68] *See, for example, Fauba v. Fujitsu Microelectronik*, Cour de Cassation, Paris, 92-16.993, 22 Apr. 1992 (Fr.) (term specifying revision of price according to market trends was sufficiently definite), available at http://cisgw3.law.pace.edu/cases/920422f1.html; *See also* OGH Ob 547/93, 10 Nov. 1994 (Aus.), available at http://cisgw3.law.pace.edu/cases/941110a3.html. [English translation by Martin Eimer, translation edited by Ruth M. Janal], in which the Austrian Supreme Court concluded that the agreement of the parties setting a price range for the pelts depending upon quality did not defeat the formation of a contract. In reaching this conclusion, the court held that pursuant to Article 55 if the parties' agreement failed explicitly or implicitly to establish a specific price, then the court could imply an agreement based upon the "usual market price." The court specifically noted that the parties did not object to the price of fifty German marks per pelt established by the court of first instance in its initial review of the case. As such, the court concluded that the price was sufficiently definite as to constitute a contract and make the application of Article 55 unnecessary. *See also* DiMatteo *et al.*, *supra* note 11, at 341.

[69] *See* Switzerland, 3 July 1997, District Court St. Gallen, *Textile case*. Cite as: http://cisgw3.law.pace.edu/cases/970703s1.html.

the price generally charged under comparable circumstances in the trade.[70] The lack of definiteness of the price term was therefore not fatal but determinable because the court was convinced that the parties had manifested their intent to be bound.[71] The only shortcoming in the court's opinion, perhaps, is that, when the court decided there were no relevant circumstances or practices existing between the parties before or at the time the contract was concluded, the court could have also referred to CISG Article 9 for relevant authority, thereby completing the whole picture of cross-reference and interrelation among Articles 8, 9, 11, 14 and 55. Nonetheless, the overall reasoning of the Swiss court is not only logical, coherent and precise but also, and perhaps more important, it demonstrates the court's comprehensive understanding of the subject matter and its willingness to align the decision with CISG's uniformity/harmonisation goal. The Swiss court's decision offers a model approach and methodology in applying and interpreting CISG.

## IX. United States

The US court in *Geneva Pharmaceutical Tech. Corp. v. Barr Labs., Inc.*,[72] in deciding an issue concerning CISG Article 14, avoided citing Article 8 but nonetheless considered Article 7 in interpreting CISG in a liberal manner. The court also considered Article 9 on trade usages and practices of the parties or the industry and Article 11 on recognition of a contract that may be proven by a document, oral representations, conduct, or some combination of the three. The US court's approach in this case seems fairly complete, and it gratifyingly respects industry practice and custom.[73]

## X. PRC CIETAC

The CIETAC tribunal in the Pig Iron case[74] concerns the interpretation of a contract term between the parties, namely "From September 1996 onward the Seller will deliver 20,000 MT Basic Pig Iron and to be mutually agreed 10,000 MT either basic or foundry pig iron in lots of min 5,000 MT per month, price to be mutually agreed between parties, other terms and conditions as per this contract."

---

[70] *See* Bezirksgericht [BG] St. Gallen [District Court], 3PZ 97/18, 3 Jul 1997 (Switz), available at http://cisgw3.law.pace.edu/cases/970703s1.html.

[71] *See* Bezirksgericht [BG] St. Gallen [District Court], 3PZ 97/18, 3 Jul 1997 (Switz), available at http://cisgw3.law.pace.edu/cases/970703s1.html; *see also* DiMatteo *et al.*, *supra* note 11, at 341.

[72] *See Geneva Pharm.*, 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002). "Prior Proceedings", also available at: http://cisgw3.law.pace.edu/cases/020510u1.html#cx; *see also* subsequent Motion for Reconsideration proceeding of 21 August 2002, available at: http://cisgw3.law.pace.edu/cases/020821u1.html#cx; *see also* subsequent ruling of U.S. District Court, at 2003 WL 1345136 (S.D.N.Y. 19 March 2003).

[73] *See* DiMatteo *et al.*, *supra* note 11, at nn.118, 128-129, 169, 202-203, 231, 233-234.

[74] *See* China 25 December 1998, CIETAC Arbitration proceeding (*Pig Iron case*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/981225c1.html.

The CIETAC Tribunal held that given these words and the statements by both parties respectively, there are two possible interpretations: 20,000 MT plus 10,000 MT, or 10,000 MT out of 20,000 MT. Upon questioning by the Arbitral Tribunal during the hearing, both parties replied orally that it should be interpreted as 10,000 MT out of 20,000 MT. Accordingly, the Arbitral Tribunal held that the true intention of both parties under [the April Contract] is that the total amount of 20,000 MT pig iron should be supplied after September 1996, including:

> (1) 10,000 MT basic pig iron, price to be mutually agreed;
> (2) 10,000 MT basic pig iron or foundry pig iron as to be mutually agreed, price to be mutually agreed as well.

The CIETAC Tribunal in this case rightly identified "sufficiently definite" as a key criterion for a valid offer under Article 14(1) of the CISG; however, the tribunal did not touch upon the indispensable issue of "intention". According to the Secretariat Commentary on Article 12 [*draft counterpart of CISG Article 14*], for a proposal to constitute an offer, it must indicate "the intention of the offeror to be bound in case of acceptance."[75]

The Secretariat Commentary further stated that whether there is the requisite intention to be bound in the case of acceptance will be established in accordance with the rules of interpretation contained in Article 7 [*draft counterpart of CISG Article 8*].[76] Therefore, the intention of the parties under CISG Article 14 should have been examined pursuant to CISG Article 8. The tribunal held that "... according to Article 14(1) of the CISG, this ["10,000 MT basic pig iron, price to be mutually agreed"] is a "sufficiently definite" "proposal" and constitutes an offer."[77] But the tribunal did not attempt to explain why this was so, other than stating that it was.[78] The tribunal could have pointed out that, under Article 8, the expression "price to be mutually agreed" shows the parties' intention to be bound and therefore the missing price term does not impair the formation of the contract.

Having found that the contract concerning the "(1) 10,000 MT basic pig iron, price to be mutually agreed" was validly concluded, the tribunal puzzlingly refused to apply Article 55, holding that Article 55 could not apply unless there was no express or implied fixed price and no provision for determining the price.[79] Apparently, the tribunal believed that the expression "price to be mutually agreed upon" defeated the application of Article 55, and therefore the price could only be determined by the parties' later negotiation after the contract was formed.[80]

---

[75] *See* Secretariat Commentary to Art. 14, available at http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-14.html.

[76] *See* Secretariat Commentary to Art. 14, available at http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-14.html; *see also* Secretariat Commentary to Art. 8, available at http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-08.html.

[77] *See* English translation of the case in full text: China, 25 December 1998, CIETAC Arbitration proceeding (*Pig Iron case*) [translation available]. Cite as: http://cisgw3.law.pace.edu/cases/981225c1.html.

[78] *Id.*

[79] *Id.*

[80] *Id.*, *see also* Wu, *supra* note 7.

Unlike the Russian Tribunal of International Commercial Arbitration in the Russian case of 3 March 1995 Arbitration proceeding 304/1993,[81] in which the tribunal rejected the application of Article 55 on the ground that the subsequent failure of the parties to reach an agreement with respect to price went to the heart of the transaction and specifically defeated the formation of a contract,[82] the CIETAC tribunal rejected the application of Article 55 based on a strictly literal reading of its text, which states: "Where a contract has been validly concluded *but does not expressly or implicitly fix or make provision for determining the price*, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." A more desirable result would have been to accept Article 55's gap-filling role, in which would have reflected the legislative spirit of CISG as a uniform sales law convention. In so doing, the CIETAC decision could have brought the PRC interpretation of Article 55 into line with those of several other contracting states, which have shown general flexibility in applying and interpreting Articles 14 and 55 in practice,[83] thus supporting CISG's uniformity goal as well.

As to the tribunal's decision that the "(2) 10,000 MT basic pig iron or foundry pig iron as to be mutually agreed, price also to be mutually agreed"[84] should not be regarded as a "sufficiently definite" "proposal" under Article 14 of the CISG, there appears to be a lack of substance in the reasoning of the tribunal's decision. Again, it was unfortunate that there was no analysis of the parties' intentions, nor any reference to CISG Articles 7, 8, 9 and 11, which could have been highly relevant to the analysis.

## C. Conclusion

By comparing cases decided under Article 14 CISG in 10 contracting states, one sees the importance of cross-referencing among CISG's different provisions. To achieve a uniform interpretation of CISG, the interpretation of a specific provision should be confined within the convention itself, i.e. the CISG should be interpreted autonomously, rather than by resort to domestic sales law. Global jurisconsultorium as an interpretation methodology should be vigorously employed to promote the autonomous and uniform interpretation of CISG. Tribunals in all contracting states should cite cases decided in other contracting states. By comparing different views and analyses, tribunals should reconcile divergence views and promote consensus to produce a harmonious global law on international sales contracts.

---

[81] *See* Russia, 3 March 1995, Arbitration proceeding 304/1993 [translation available] . Cite as: http://cisgw3.law.pace.edu/cases/950303r2.html.

[82] *See* DiMatteo *et al.*, *supra* note 11, at 342.

[83] *See, supra* note 68.

[84] This was referred to as "the third 10,000 MT pig iron" by the tribunal. *See id.*

The quality of court decisions and arbitral awards in a particular contracting state can be enhanced by engaging national courts and international arbitral tribunals in the exercise of global jurisconsultorium. By comparing cases and awards of other contracting states, and by sharing and exchanging ideas, approaches and interpretation methodologies of an international uniform law instrument such as the CISG, courts and arbitration panels can enrich their decisions and awards, which in turn will reinforce the persuasiveness of the decisions and awards and the observance of the rule of law in international commercial law practice.

Finally, by embracing and promoting the concept and methodology of "Global Jurisconsultorium" in the application and interpretation of CISG in the PRC, Chinese jurisprudence can make a more meaningful contribution toward global modernisation and harmonisation of international sales law so as to achieve uniformity and promote the ultimate goal of facilitating international trade.