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the United Nations Convention on
Contracts for the International Sale of Goods
in Chinese Arbitration

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The China International Economic and Trade Arbitration Commission (CIETAC) is one of the major permanent arbitration institutions in the world. CIETAC independently and impartially resolves economic and trade disputes, as well as investment disputes by means of arbitration.

Headquartered in Beijing, CIETAC has so far established South China Sub-Commission, Shanghai Sub-Commission, Tianjin International Economic and Financial Arbitration Center (Tianjin Sub-Commission), Southwest Sub-Commission, Zhejiang Sub-Commission, Hubei Sub-Commission, Fujian Sub-Commission, Silk Road Arbitration Center, Jiangsu Arbitration Center, Sichuan Sub-Commission, Shandong Sub-Commission, Hainan Arbitration Centerand Xiongan Sub-Commission. CIETAC also set up its Hong Kong Arbitration Center in Hong Kong, European Arbitration Centre in Vienna and North America Arbitration Center in Vancouver. CIETAC and its sub-commissions/arbitration centers constitute a single arbitration institution.

CIETAC's current arbitration rules are effective as from January 1,2015. The latest renewal of its Panel of Arbitrators is in 2021, engaging 1,698 arbitrators.Among them, 1,215 arbitrators are from mainland China, covering all provinces, regions and cities; and 483 arbitrators are from Hong Kong, Macao, Taiwan and foreign countries.

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China International Economic and Trade Arbitration Commission

Editorial Committee

Foreword

The United Nations Commission on International Trade Law (UNCITRAL) and the China International Economic and Trade Arbitration Commission (CIETAC) share the goal of promoting international trade through modern, efficient and effective dispute resolution methods, such as international arbitration or mediation. It is therefore not surprising that UNCITRAL and CIETAC have cooperated in a number of successful joint initiatives, notably celebrating the two flagship treaties of UNCITRAL in the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (also known as the "New York Convention") and the United Nations Convention on International Settlement Agreements Resulting from Mediation of 2018 (also known as the "Singapore Mediation Convention").

Beyond this cooperation on harmonized dispute resolution, it was only logical tocooperate to promoteyet another flagship treaty of UNCITRAL,the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), which sets forth unified rules on international sales contracts, and to celebrate together thefortieth anniversary of that treaty. Indeed, this publication marks another high point of their cooperation and comes in the framework of the celebrations organised by the UNCITRAL Secretariat under the banner "CISG@40", which pursue several goals.

One goalisto promotebroader adoption of the CISG by States. The CISG is approaching the symbolic number of 100 States parties. Reaching that milestonewillsend a clear message on the central role of the CISG in global contract law.

In particular, this book highlights the importance of the CISG inoperationalising the Belt and Road Initiative. Becoming a party to the CISG triggers the application of

the CISG as the default legal regime of international sale contracts, thus increasing clarity and predictability on the applicable law and reducing transaction costs. This,in turn,willclearly help to materialisethe Belt and Road benefits for cross-border traders. As fewer than 50% of Belt and Road participating States are already a party to the CISG, the opportunities for further expanding the CISG membership are evident.

The CISG is complemented by the Convention on the Limitation Period in the International Sale of Goods and the United Nations Convention on the Use of Electronic Communications in International Contracts. Both treaties are functionally a part of the CISG and their adoption and applicationis also promoted by the CISG@40 initiative.

In particular, the Electronic Communications Convention is the enabler of the use of the CISG in the digital economy, an issue whose practical importance is evidentand reflected in the cases discussed in the book. China has already signed theElectronic Communications Convention, and its ratification of that treaty would provide additional certainty on the legal status of electronic communications exchanged across borders and further expand the already significant body of uniform electronic transactions law, namely in support of the Belt and Road Initiative.

Moreover, the CISG@40 initiative provides an opportunity for States to review the declarations that they have made under the CISG – some more than 30 years ago – and to withdraw those no longer needed. Several States have already carried out significant work in this field, includingChina, which has withdrawn the declaration requiring the use of the written form in contracts falling under the scope of the CISG.Support has been expressed also for China withdrawing its declaration excluding the application of the CISG by virtue of the rules of private international law. Such withdrawal would

contribute to harmonising and expanding the scope of application of the CISG.

Yet another goalof the CISG@40 initiative isto raise awareness of the CISG among the business community and judiciary. While adoption of the CISG is evidence of success,its knowledge bytraders and use in businesspractice is necessary forall the benefits of the CISG to become concrete.

One key element in this regard is understanding the application of the CISG through case law. Some 5,000 cases applying the CISG have been reported so far. Bycompilingmore than 100 arbitral awards, this book is a treasure trove for CISG scholars.

The use of the CISG as a blueprint for national legislation is also a matter consideredin the framework of the CISG@40 initiative. The recent adoption of the Chinese Civil Code has provided further evidence of the role of the CISG, together with other influential uniform texts such as the Unidroit Principles of International Commercial Contracts, as a model for domestic law reform.

In short, the various lines of action selected for the CISG@40 initiative have proven to be timely and relevant and have contributed to further consolidate the CISG as the most widely adopted and used uniform substantive law treaty.

But there is more than that to evidence the role of the CISG in international trade. As we all know, the year2020 has been exceptional. The COVID-19 pandemic hit at a time whenthe volume of global trade was at unprecedented levels. The challenges and disruptions to global tradebrought on by the pandemic have likewise been unprecedented.

The United Nations have been asked to assist incontaining and responding to the effects of the pandemic. UNCITRAL has been no exception, and the CISG has been at the forefront of that response.

Right after the outbreak of the pandemic, article 79 CISG has been identified as the referenceuniform lawprovision toaddress temporary exemptions from performance, thus harmonising risk allocation along global supply chains. Parties to a sales contractmay wish to complement that provision with other uniform texts such as the Force Majeure and Hardship Clause prepared by the International Chamber of Commerceto bring additional clarity on the contractual agreements.

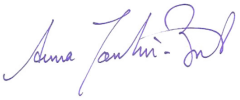
As the world is rolling out mass vaccination programmes and billions of vital doses are being purchased, the CISG is the applicable lawtodetermine the contractual obligations arising from procurement contracts.

The pandemic has broughtabout some changes in our lives that may not be easily reversed. One of them is the even broader recourse to contracts in electronic form. As mentioned above, the CISG, complemented by the Electronic Communications Convention, is fully equipped for that challenge. And the provisions of these two treatiesare being used as steppingstones for UNCITRAL's work on legal aspects of the digital economy such as smart contracts and artificial intelligence that will underpin digital trade in the decades to come.

China has been a steady friend of the CISG in its first 40 years. It was one of the countries that triggered its entry into force and has incorporated many of the CISG provisions in domestic contract law. At the same time, the CISG has accompanied China's economic development by providing a fair, equitable and predictable legal framework for international sale contracts, which are the backbone of the global

economy.

This book provides a remarkable contribution to better understanding both Chinese and global trends in applying the CISG. CIETAC's support in promoting the broader application of the CISG is a promising sign of the next 40 years of CISG success.



Anna Joubin-Bret
Secretary of UNCITRAL
Vienna, March 2021

Preface

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was developed by the United Nations, adopted at the Diplomatic Conference of the United Nations General Assembly in Vienna on April 11, 1980, and entered into force on January 1, 1988. The CISG aims to establish a modern, unified, and fair system for the international sale of goods, thereby promoting legal certainty in trade, reducing transaction costs, and providing a legal foundation for international trade in all countries.

After decades of development, the CISG is regarded as one of the core international commercial law conventions and has achieved great success worldwide. The purpose of the convention is to promote legal certainty in the international sale of goods and to establish a globally unified legal text for all countries. Therefore, when drafting the CISG, special attention was paid to avoid using legal concepts with traditional characteristics specific to a certain legal system. These traditional legal concepts are often based on a large number of well-recognized case laws and related Statutory laws which are not easy to be transplanted under different legal systems. The CISG approach and drafting style encourages as many countries as possible to coordinate substantive laws disregarding domestic-specific legal traditions in an attempt to promote the harmonization of international trade laws. However, this approach also increases the necessity for a unified interpretation of CISG provisions in the different jurisdictions where CISG is promulgated. Therefore, it becomes particularly important to study the case laws of different jurisdictions to unify CISG interpretations.

China submitted its ratification for the official accession in the CISG to the Secretary-

General of the United Nations on November 12, 1986, The CISG was entered into force in China on January 1, 1988. The CISG has had a profound impact on the development of China's market economy and contract laws and has become a legal basis which is directly applied by Chinese courts and arbitration commissions. The China International Economic and Trade Arbitration Commission (CIETAC), as China's Leading permanent international arbitral institution, has accumulated rich experience in Administering CISG-related cases since 1988 and has been actively contributing to the preparation of the United Nations Commission on International Trade Law (UNCITRAL) Digest of Case Law. The year 2020 coincides with CISG's 40th anniversary of its founding. On this momentous occasion, and to promote the continuous progress of CISG related research and the uniform implementation thereof, and to help other member States better understand CIETAC's relevant practice, CIETAC constructed this report covering 109 cases involving CISG applications from 2002 to 2019 with the purpose of analyzing and studying CISG application and interpretation in CIETAC's practice over the last two decades, to share its experience, and to discuss improvement to practice with adjudicating institution in other member states,reflecting on the latest international developments and trends.

This report is based entirely on the CIETAC tribunals' original awards from which the facts, opinions, and awards were compiled, organized and analyzed by the research team. In accordance with the confidential nature of arbitration proceedings, we refer only to the award dates, the subject matters, or the parties' nationalities of these cases instead of the specific case numbers, the award numbers, the names of the parties, or the arbitrators and other specific information.

This report contains five parts besides the preface.

Part I. CISG and the Relevant Development of China's commercial Arbitration

Introduction to the CISG and its relevancy with China's commercial laws, commercial arbitration and international sale of goods, including: 1) the status and significance of the CISG; 2) China's accession to the CISG and the CISG's impact on Chinese contract laws; 3) the CISG and the development of arbitration in China; 4) the CISG and the relevant practice of CIETAC; 5) the CISG and the development of China's sale of goods; and 6) the CISG and China's Belt and Road Initiative.

Part II. CIETAC Case Data Analysis

Summation of the basic aspects of relevant CIETAC cases through data analysis of the parties' nationalities, the types of goods, the dispute types, the application of the CISG, the main issues of disputes, the application of Chinese laws, the case results, and other pertinent factors. This part aims to present the style and main features of CIETAC awards in the relevant cases involving CISG application from 2002 to 2019.

Part III. CIETAC Tribunals' Understanding and Application of the CISG

Following the CISG's provisions, this part is dedicated to the issues concerning the application of the CISG in CIETAC's practice and the respective tribunals' rulings. This part emphasizes on the consensus and disagreement in applying the CISG between CIETAC tribunals and the adjudicators in other member states.

The issues in this part include: 1) application of the CISG; 2) interpretation of contracts and parties' intentions; 3) contract conclusion and amendments; 4) fundamental breach of contract; 5) notice of the declaration of avoidance; 6) effects of avoidance; 7) seller's obligations; 8) buyer's relief when the seller breaches; 9) buyer's obligations; 10) seller's

relief when the buyer breaches; 11) passing of risk; 12) examination of the goods; 13) damages; 14) liquidated damages; 15) anticipatory breach; and 16) disclaimer.

The research in this part is presented as a systematic and objective compilation of relevant CIETAC cases involving CISG application, showing how CIETAC tribunals specifically apply and understand CISG provisions, to discuss with other member states' courts and tribunals the meaning and specific application of certain CISG provisions, and to achieve the goal of promoting the uniform interpretation of CISG.

Part IV. CIETAC's Experience Sharing and Suggestions.

Based on the selected CIETAC cases, we summarize experiences from the application of the CISG in CIETAC's practice for exchange and discussion, and concurrently provide suggestions for future CISG amendments and supplements.

The issues discussed in this part include: 1) the application of the principle of good faith; 2) resolution for the Battle of the Forms; 3) the application of Article 40; 5) the relationship between the right of termination under Article 49 and the right of remedy of the breaching party under Article 48; 6) the relationship between damages under Article 75 and contract termination; 7) lost volume profit; 8) hardship; 9) the application of CISG Article 79in light of COVID-19; 10) authentication of electronic evidence; and 11) interest and interest rates.

Part V. Selected CIETAC Cases.

We excerpted certain original texts from the tribunals' opinions in CISG-related awards made by CIETAC (subject to the arbitration confidentiality requirement), aiming to provide the factual background, the parties' claims, the tribunals' views and

the case results, to present the original CIETAC awards as much as we could, and to facilitate CISG teaching and research without violating the arbitration confidentiality requirement.

Associate Professor Liu Tong from the University of International Business and Economics ("UIBE") School of Law, and Director Li Bing from the Arbitration Research Institute of CIETAC are in charge of this project. The members of the research team are: Associate Professor Chen Jianling from UIBE School of Law; Ms. Su Sa, Ms. Xu Tianshu, and Ms. Zhang Bei, Ms. Jin Xin from the Arbitration Research Institute of CIETAC; and Post Doctorate Ms. Liang Yi from Renmin University of China. We would like to extend our gratitude to Professor Arthur Chiu of the UIBE School of Law who edited and proofread the English version of this report, and Ms. Su Sa, Ms. Xu Tianshu, and Ms. Zhang Bei, Ms. Jin Xin from the Arbitration Research Institute of CIETAC, and Post Doctorate Ms. Liang Yi from Renmin University of China for their great efforts in the coordination, data collection, redacting, editing, typesetting, and printing of this report.

The Research Team for CIETAC's Application of the CISG

June 2020

Table of Contents

Part I CISG and the Relevant Development of China's Commercial Arbitration

I The Status and Significance of CISG

The laws regulating sales contracts are the foundation for international trade in all countries, regardless of their legal tradition or economic development. Consequently, a unified supervision of sales contracts is extremely important for the development of international trade. Concurrently, the existence of different legal systems increases the transaction costs of transnational commerce. The lack of a uniformed dispute resolution mechanism inevitably results in supervision uncertainty which may turn into serious trade obstacles. The establishment of the CISG is the product of the twentieth century international legislation, inspiring contract law reforms in various countries.

The Preamble of CISG states that: '[B]eing 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'. Article 7 of the CISG also stipulates, '[I]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. In Article 7, CISG applies the notion of 'unification', indicating that the international sale of goods should operate under a set of unified rules, thereby showing its aim to unify the substantive rules of contracts for the sale of international goods.

CISG had 94 Contracting Partiesat the end of November, 2020. These countries represent different legal traditions with diverse economic systems. Together, these 93 states account for more than two-thirds of global trade, and basically represent the major trading powers in the world.[1] According to the latest statistics from the World Trade Organization, the top five countries by total exports in 2019 are: China, the United States, Germany, Japan, and the Netherlands; the top five countries by total imports in 2019 are: the United States, China, Germany, Japan, and the United Kingdom. All these countries, except the United Kingdom, are CISG Contracting Parties.

CISG has attracted many Contracting Parties to join its convention by establishing a modern, unified, and impartial system for contracts on the international sale of goods, thereby promoting the legal certainty in international trade, reducing transaction costs, and providing legal guidance for business entities of the Contracting Parties. Article 1 of the CISG provides that: '[T]his Convention applies to contracts of sale of goods between parties whose places of business are in different States'. Therefore, it is unnecessary to determine the applicable laws following the rules of private international law due to the direct application of CISG under such circumstances, which would greatly improve the certainty and predictability of international sales contracts.

CISG emphasizes balance in the design of rules and has broad representation. First, CISG carefully balances the interest between the buyers and the sellers. At the same time, it attaches great importance to integration, inclusiveness, fairness, and efficiency in the design of rules, and has been widely recognized and used by business entities in various countries. Moreover, CISG has extensively absorbed the mature legislative experience on sales and contract laws of the two major legal systems. Therefore, CISG represents global legislative experience in this regard. CISG drafters have taken into account the different

1 The UNCITRAL's introduction on the 40th Anniversary of the CISG, https://uncitral.un.org/zh/cisg40, last visited on April 2, 2020.

interests and requests of various countries, resulting in the reconciliation between different legal systems, countries, or groups of countries.[2]

CISG plays an important role which is to bridge different countries and legal traditions. It connects the unified substantive laws with international business practice, channels common law and civil law, and, in a broader sense, communicates different legal cultures, concepts, and languages. CISG has become the blueprint for a number of regional and national legislation, and it has been regarded as one of the most monumental achievements in harmonizing private international law to date.

II CISG and China's Contract Law

The CISG entered into force in China on January 1, 1988. China acceded to the CISG at the early stage of its 'reform and opening-up' and became one of the earliest Contracting Parties, which reflects China's determination to open to and connect with the international community. The Contract Law of the People's Republic of China ("China's Contract Law" or "Contract Law") was promulgated in 1999. Prior to this, China had enacted three sets of contract laws, namely the 1981 Economic Contract Law, the 1985 Foreign Economic Contract Law, and the 1987 Technical Contract Law. Among these three sets of laws, the 1985 Foreign Economic Contract Law which regulated international trade had included some of the CISG's provisions. For example, it adopted the CISG's strict liability principle for breach of contract and established rule for fundamental breach of contract. In 1999, these three sets of contract laws merged into the current Contract Law and became the legal pillar of China's market economy. CISG profoundly influenced the drafting of the Contract Law. Professor Liang Huixing once elaborated on one of the guidelines for drafting China's unified contract

2 Zhang Yuqin, Uniform Law on International Sale of Goods: The Interpretation of the United Nations Convention on Contracts for The International Sale of Goods, the third version, the Commercial Press, 2009,p.1.

law: 'considering the status quo of China's "reform and opening-up" dedicated to the development of a socialist market economy, the establishment of a unified national market, and the integration with the international market, this law shall reflect our experience in China's contract law legislation and judicial practice, take into account the development in the academia, absorb the successful legislation experience, case laws, and theories of countries and regions with developed market economy, adopt common legal rules that reflect the objective laws of modern market economy, and intergrade with international conventions and practices.'[3] Said 'international conventions' mainly refers to the CISG.

As pointed out by Professor Wang Liming, a CIETAC arbitrator, in the 48th UNCITRAL Session "the 35th Anniversary of the CISG, Trends and Prospects" on July 6, 2015, China believes CISG has established a number of modern advanced contract rules which facilitate the construction of market economy. Therefore, China took inspiration from the CISG and the UNIDROIT Principles on International Commercial Contracts ("UNIDROIT Principles") to draft an independent contract law. Our drafters also actively included CISG's specific provisions in China's Contract Law, which is not only reflected in the Contract Law provisions on sales contracts, but also in the general provisions applicable to all types of contract. Professor Wang summarized the Contract Law's absorption of the CISG in his article *The CISG and the Promulgation and Perfection of China's Contract Law* as follows:

First, concerning the contract formation, China's Contract Law adopts the offer-acceptance system of the CISG, especially the CISG provisions that 'an offer becomes effective when it reaches the offeree,' 'an offer may be revoked', an acceptance shall be of the same terms as the offer, and an acceptance becomes effective when it reaches the

3 Liang Huixing, From the Co-existence of Three Laws to a Unified Contract Law, Chinese Legal Science, Issue 3, 1995.

offeror.

Second, concerning the contract form, China's Contract Law shares the CISG's liberal stance regarding the formal requirement of the contracts, allowing the parties to conclude contracts in written, oral, and other forms. China withdrew its reservation on Article 11 of the CISG in 2013.

Third, as for the rules on quality discrepancy, China's Contract Law, while acknowledging the seller's quality guarantee obligation in Article 153 of the chapter on sales contracts, provides no separate defect liability but opts for the single nonconformity legislative model in accordance with the CISG.

Fourth, the legislators of China's Contract Law followed the CISG when there was a dispute as to whether to adopt the rule of performance impossibility in the German laws. The Contract Law does not outright invalidate the contracts that are impossible to perform upon formation. On the contrary, the Contract Law, taking the CISG's position, founds obligor's liability upon 'breach of contractual duty', thereby converting impossible to perform into breach of contract and integrating with CISG's provisions on liability for breach of contract.

Fifth, China's Contract Law adopts the rule of fundamental breach by learning from the CISG provision on fundamental breach during the drafting process. Article 94 of ChinaśContract Law stipulates that '[T]he parties may dissolve the contract under any of the following circumstances… (4) either party delays the discharge of debts or is engaged in other illegal activities and thus makes realization of the aim of the contract impossible …' Clause (4) deems impossibility as a basis of contract termination.

Sixth, China's Contract Law contains provisions regarding the anticipatory breach.

CISG's provision on anticipatory breach has an important impact thereon. The CISG clearly influences the explicit expression of nonperformance constituting anticipatory breach under Article 108 of China'sContract Law.

Seventh, China's Contract Law accepts the principle of contractual strict liability. The CISG has established strict liability principle on the basis of common law experience. Article 107 of the Contract Law clearly follows the CISG in stipulating that '[E]ither party that fails to perform its obligations under the contract or fails to perform them as contracted shall bear the liability for breach of contract by continuing to perform the obligations, taking remedial measures, or compensating for losses'.

Eighth, the chapter on sales contracts in China's Contract Law draws heavily on the relevant provisions of the CISG, including the time of delivery, the determination of the delivery place, the inspection of goods, and the long-term supply contracts, etcetera.

Ninth, concerning the passing of risk, Article 144 of China's Contract Law follows the CISG, providing that '[W]hen the seller consigns its sold targeted matter to a carrier for transport, unless the parties stipulate otherwise, the risks of damage and loss of the targeted matter en route shall be borne by the buyer from the time when the contract is made'. The risk of damage and loss of the goods en route is passed on to the buyer upon contract formation.[4]

Therefore, Chinese lawmakers chose to follow the CISG is because the CISG provisions are reasonable, and the CISG is the collective wisdom of many legal experts and scholars.[5] China's extensive reference to the CISG has also promoted the modernization

4 This part concerning Chinese Contract Law and the CISG is quoted from Prof. Wang Liming, the CISG and the Promulgation and Perfection of Chinese Contract Law, Global Law Review, Issue 5, 2013.

5 Han Shiyuan, Chinese Contract Law and the CISG, Journal of Jinan University (Philosophy and Social Science Edition), Issue 2, 2011.

of China's Contract Law as a whole and had a profound impact on China's market opening and rule of law construction.

Notably, on May 28, 2020, Chinese lawmakers voted to adopt the Civil Code of the People's Repulic of China ("Civil Code of PRC") at the third session of the 13th National People's Congress. The Civil Code of PRCwill take effect on Jan. 1, 2021. Upon effect, it will abolish the 1999 Contract law. However, the above-mentioned rules relating to the Contract Law's absorption of the CISG will remain in the Civil Codeof PRC.

The CISG, after China's ratification, has become a legal basis that can be directly applied by Chinese arbitration commissions and courts in handling disputes related to contracts for the international sale of goods. Article 1(1)(a) of the CISG provides '[T]his Convention applies to contracts of sale of sale of goods between parties whose places of business are in different States: when the States are Contracting Parties…'. According to this provision, the CISG should take precedence over the application of private international law, and adjudicators can determine the application of the CISG without a two-step approach based on the rules of private international law. The 1987 Circular of the Supreme People's Court on Transmitting Certain Issues of the MOFTEC in Connection with the Implementation of United Nations Convention on Contracts for the International Sale of Goods confirmed the automatic application of the CISG, pointing out 'as of January 1, 1988, the Convention shall be automatically applied to contracts for the sale of goods between Chinese companies and companies from the above countries (except Hungary) and related disputes or litigation cases, unless otherwise agreed by the parties'. Therefore, Chinese courts and arbitration commissions can directly apply the CISG without referring to the conflict rules in domestic laws when the parties agree thereto, or the application condition is met since China is a CISG

Contracting State.

III CISG and the Development of Arbitration in China

Commercial arbitration, as a mechanism for resolving commercial disputes, is a professional service. The parties to commercial disputes select the professional service of commercial arbitration by executing an arbitration agreement, which is the core principle of party autonomy. Parties freely execute an arbitration agreement, agreeing on their own terms such as the arbitration institution, the tribunal formation, the applicable rules and laws, the place of arbitration, etc., which fully reflects the contractual nature of commercial arbitration. As a professional service, commercial arbitration is essentially a voluntary dispute resolution and alternative method to adjudication if chosen by the parties to a commercial dispute. Compared with the strict legal procedures in judicial proceedings, commercial arbitration based on arbitration agreements has greater flexibility.

Arbitration, with party autonomy as the basic principle, connects naturally with the CISG which is also based on this principle. Meanwhile, arbitration, as a method of dispute resolution, is more independent and neutral than litigation, so it is more trusted by parties to international commercial transactions. The CISG, as an applicable law, is also neutral and balanced. The UNCITRAL, while being committed to promote the uniform laws on the international sale of goods represented by the CISG, has always attached great importance to promoting international commercial arbitration as an important solution to international commercial disputes primarily through its promotion of the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") and the Arbitration Rules of the United Nations Commission on International Trade Law. In international commercial activities, it is very fair and safe

for the parties to choose international commercial arbitration and the CISG as the applicable law to resolve cross-border trade disputes. Therefore, the CISG is commonly used in international commercial arbitration. As such, the development of arbitration is closely related to the application of the CISG.

Arbitration is a dispute resolution system stipulated by law in China since the 1994 Arbitration Law of the People's Republic of China ("Arbitration Law") was promulgated and implemented. After more than 20 years of development, through continuous expansion and internationalization, China has now become one of the top countries in the use of arbitration to resolve civil and commercial disputes.

The 2019 National Arbitration Work Conference reported that as of the end of 2018, a total of 255 arbitration commissions have been operating nationwide, with more than 60,000 staff members. All aspects of social economic development such as trade, construction, real estate, finance, agricultural production and operation, and property management are involved in arbitration. China's commercial arbitration legal system has continuously developed since the promulgation and implementation of the 1994 Arbitration Law. The Supreme People's Court has also continuously improved the legal system of commercial arbitration by issuing judicial interpretations for the Arbitration Law, the Civil Procedure Law, and the Law on Choice of Law for Foreign-related Civil Relationships. Meanwhile, the wide choice of arbitration rules and other rules formulated by Chinese arbitration commissions have enriched China's commercial arbitration system.

At the international commercial arbitration level, the international obligations of countries to recognize and enforce arbitral awards made in other countries have been stipulated under the 1958 Convention on the Recognition and Enforcement of Foreign

Arbitral Awards ("New York Convention"), allowing foreign arbitration awards to be widely recognized and enforced. The New York Convention has been a positive force on the theory and practice of recognizing and enforcing foreign arbitration awards. As of the end of November 2020, the New York Convention had a total of 166member states.[6] Under the New York Convention, a Contracting State is obliged to recognize and enforce an arbitration award made in another Contracting State, unless a ground of refusal is provided. Therefore, arbitral awards have a greater advantage in being enforced overseas comparing to court judgements.

The 18th session of the Standing Committee of the 6th National People's Congress on December 2, 1986, decided that China should enter the New York Convention. Thereafter, the Ministry of Foreign Affairs formally deposited a letter of accession to the UN Secretariat. The New York Convention formally entered into force in China on April 22, 1987. Since then, China has been a member of the New York Convention.

Even before the New York Convention came into force in China, the Supreme People's Court issued the Notice on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China on April 10, 1987, requesting people's courts at all levels across the country to assemble judges, enforcement agents, and other relevant staff to study this important international convention and effectively implement it in accordance with the requirements of the Convention. Thereafter, the Supreme People's Court also issued the Notice on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by People's Courts (28 August 1995), establishing the reporting system for the recognition and enforcement of foreign arbitration awards, i.e. if the local court accepting a party's application for recognition and enforcement of a foreign arbitral award intends to refuse recognition and

6 See the introduction of the status of the New York Convention, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2, last visited on June 22, 2020.

enforcement, it must first report to the high court; if the high court agrees with the local court, it must report to the Supreme People's Court; therefore, the decision or ruling to refuse the recognition and enforcement of the foreign arbitral award can only be made with the approval of the Supreme People's Court.

Looking at over 30 years of China's judicial practice regarding the recognition and enforcement of foreign arbitration awards, Chinese courts favor the validity of arbitration agreement when interpreting it, and are reluctant to set aside the awards.[7] This attitude of Chinese courts is consistent with the goals of the New York Convention and encourages parties in international transactions to resolve disputes by arbitration and through CISG application.

IV CISG and CIETAC

Formerly known as the Foreign Trade Arbitration Commission, CIETAC was set up in April 1956 under the China Council for the Promotion of International Trade. It changed to its current name in 1988. CIETAC has also been operating under the name of Arbitration Institute of the China Chamber of International Commerce since 2000. CIETAC resolves international and domestic economic and trade disputes and international investment disputes independently and impartially by arbitration. CIETAC is headquartered in Beijing and has branches or centers in 11 cities in China as well as the Hong Kong Arbitration Center in the Hong Kong Special Administrative Region, the North American Arbitration Center in Vancouver, Canada, and the European Arbitration Center in Vienna, Austria.

As China's most historical international arbitration institution, CIETAC has long been

7 Gao Xiaoli, Keynote Speech at 60th Anniversary of New York Convention & One Belt One Road, http://cicc.court.gov.cn/html/1/218/62/164/1054.html, last visited on April 2, 2020.

committed to promoting the development of international commercial arbitration and creating a good international commercial transaction environment. CIETAC has unique advantages and rich experience in foreign-related arbitration. As early as 1988, the first year that CISG entered into force for China, CIETAC began hearing cases applying CISG. Since then, CIETAC has concluded hundreds of cases involving the application of CISG. A total of 338 CIETAC cases from 1988 to 2008 have been included in the CISG database of Pace University alone.[8] CIETAC has accumulated plenty of practical experience in applying and interpreting the CISG in past decades. As one of the earliest Contracting Partiesof CISG, China has attracted much attention in the world for its application and interpretation thereof. Since CIETAC is the only Chinese arbitration institution that contributes cases to the CISG database, its practice has positively influenced the application and development of the CISG. Most of the arbitration cases in China applying the CISG are administered by CIETAC given its historical status and its registered arbitrators' well-recognized diversity, professionalism, and impartiality. Therefore, CIETAC arbitration awards are highly exemplary and valuable for studying the application of the CISG in China.

Disputes over the sale of goods have long been one of the main types of disputes handled by CIETAC. Latest statistics show there were 583 cases related to the sale of goods in 2019, and 452 of this type in 2018. Over the years, CIETAC has maintained a vigorous momentum and continuous increase in the total number of cases accepted, the total sum of disputed amount, and the variety of parties' nationalities. In 2019, CIETAC accepted a total of 3,333 cases (a year-on-year increase of 12.53%), including 2,716 domestic cases (a year-on-year increase of 11.31%) and 617 foreign-related cases (a year-on-year increase of 18.20%), among which 66 international cases involved only foreign parties (a year-on-year increase of 83.33%). The total disputed amount reached RMB 122.04345

8 See Cloud database, http://www.cisg.law.pace.edu/cisg/text/casecit.html#china, last visited on March 16, 2020.

billion (a year-on-year increase of 20.13%) while that of the foreign-related cases reached RMB 38.07889 billion (a year-on-year increase of 30.79%). There were 211 cases with disputed amount over RMB 100 million (a year-on-year increase of 23.39%) including 19 cases with more than RMB 1 billion. The parties were from 72 countries and regions (an increase of 12 from the year of 2018 and a year-on-year increase of 20%). There were 2,347 on-going cases (a year-on-year increase of 16.07%) and 3,146 concluded cases (a year-on-year increase of 24.64%). 106 cases had been or are going to be held in English or both English and Chinese. A total of 78 foreign arbitrators heard 75 cases.

The above statistics show the fast increase of internationality of CIETAC cases in recent years. The number of foreign-related cases and international cases where all participants were foreign parties has increased significantly. More parties chose international treaties such as CISG as well as foreign laws of countries and regions such as Laos, Australia, Cayman Islands, Italy, South Korea, and Hong Kong SAR. This also shows to a large extent that CIETAC's ability to provide high-quality and efficient arbitration legal services to global commercial entities has continuously improved, and its internationalization has further strengthened.

The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016 ("2016 UNCITRAL Digest") Introduction points out that the CISG's flexibility contributes to its wide application. The CISG drafters adopted different techniques to reflect this flexibility. In particular, the flexibility is exemplified by using neutral terminology to promote universal adherence to good faith in international trade, stipulating a gap-filling rule which allows supplementation to the CISG using 'general principles on which it (CISG) is based', and enforcing agreed and customary practices. Therefore, CISG emphasizes the necessity of a unified interpretation based on the consideration of its international nature, the promotion of a

unified application, and the need of good faith in international trade. Correspondingly, it is particularly important how adjudicators from different Contracting Partiesinterpret the concepts of the CISG which are opened for interpretation or left undefined. In achieving the goal of a unified interpretation of the CISG, it helps to fully introduce cases compiled in a systematic and objective manner, which is the reason that the UNCITRAL had established a case law reporting system since 1988, so that judges, arbitrators, lawyers, and parties to commercial transactions can understand how different courts and arbitral tribunals interpret the CISG in their decisions. In this way, the interpretation and application of the CISG provisions will be further unified.

Additionally, it is worth noting that to further promote the development of international commercial laws such as the CISG and international commercial arbitration, UNCITRAL, Pace University, University of Vienna, and other institutions jointly hold the Annual Willem C. Vis International Commercial Arbitration Moot ("Vis Moot") which will be the 28th one in 2020. As one of the most historical and prestigious moot competitions in the world, Vis Moot has extensive influence in the international commercial arbitration and legal education community, annually attracting participants from more than 300 colleges and universities around the world. To further expand the impact of Vis Moot and strengthen Chinese law students' understanding of international commercial legislation including the CISG and the international commercial arbitration system, CIETAC organizes the CIETAC Cup International Commercial Arbitration Moot every November. CIETAC sponsors the champions to participate in the Vis Moot in Vienna and the silver medal winners to participate in the Willem C. Vis (East) International Commercial Arbitration Moot in Hong Kong SAR. As of 2020, 18CIETAC Cup Moots have been successfully held, attracting more than 2,000 participants representing nearly a hundred well-known colleges and universities in China

with hundreds of senior CIETAC arbitrators and reputable lawyers from home and abroad serving as tribunal members. The CIETAC Cup Moot not only gives Chinese law students' a glimpse of the international commercial law practice, but also help the practitioners and the Chinese law schools to gain a better understanding of the CISG. The CIETAC Cup Moot has now become an influential legal event in China. It serves as an important platform for CIETAC and the Chinese legal community to jointly cultivate international commercial legal talents and promote communication between domestic and foreign legal communities. A large number of these participants have immersed themselves into the backbone of China's international commercial legal industry, effectively and further promoting the influence of international commercial laws such as CISG and UNCITRAL Model Law in China.

V CISG and the Development of China's Sale of Goods

China trade has grown significantly in recent years. The overall development of China's foreign trade in 2019 shows the trend of stable growth with enhanced quality. Specifically, the trade growth has the following six characteristics:

First, the volume of both imports and exports increased quarter by quarter. In 2019, China's total import and export value was RMB31.54 trillion, an increase of 3.4% over that in 2018, among which the export value was RMB17.23 trillion, an increase of 5% and the import value was RMB14.31 trillion, an increase of 1.6% with the trade surplus of RMB2.92 trillion, an increase of 25.4%.

Second, the ranking of major trading partners changed, and ASEAN became China's second largest trading partner. In 2019, China's largest trading partner was still the EU with the import and export value of RMB4.86 trillion, an increase of 8%. The second largest was ASEAN with the import and export value of RMB4.43 trillion, an increase

of 14.1%. The US was the third largest with the import and export value of RMB3.73 trillion, a decrease of 10.7%. Japan was the fourth largest with the import and export value of RMB2.17 trillion, an increase of 0.4%. In addition, the value of China's imports and exports to the Belt and Road countries reached RMB9.27 trillion, an increase of 10.8%, 7.4% higher than the overall growth rate.

Third, private enterprises surpassed foreign-invested enterprises and became China's largest foreign trade entity for the first time. In 2019, the import and export value of private enterprises was RMB13.48 trillion, an increase of 11.4%, accounting for 42.7% of China's total foreign trade value, an increase of 3.1% from 2018.

Fourth, the structure of trade mode was further optimized, and the proportion of general trade increased.

Fifth, the export commodities were mainly electromechanical products (which accounted for about 60% of the total amount) and labor-intensive products. In 2019, the value of China's exports of mechanical and electrical products reached RMB10.06 trillion, an increase of 4.4%, accounting for 58.4% of the total export value. Among them, the export value of electrical appliances and electronic products was RMB4.63 trillion (increased by 5.4%), and that of the mechanical equipment was RMB2.87 trillion, showing an increase of 1.4%. In the same period, the value of exports of seven major categories of labor-intensive products, such as textiles and clothing, reached RMB3.31 trillion, showing an increase of 6.1%.

Sixth, imports of bulk commodities such as iron ore, crude oil, natural gas, and soybeans increased. Additionally, the import of meat products showed rapid growth.[9]

9 The news report about China's import and export in. 2019 provided by the News Office State Coucil, http://www.gov.cn/xinwen/2020-01/14/content_5468996.htm, last visited on April 2, 2020.

The above characteristics indicate that China's foreign trade is developing rapidly, with the total volume of trade continuously rising, and the number of sales contracts increasing substantially. China is a major trading country. Chinese companies involve in international sale of goods on a daily basis. Accordingly, Chinese trading entities eagerly demand modern, unified, and fairly-applied laws applicable to their businesses. In addition, the participation of Chinese private enterprises in trade activities has further increased. As noted by UNCITRAL, small and medium-sized enterprises usually have fewer opportunities to obtain legal advice when negotiating contracts. Such companies and traders may be weak contract parties for whom it is difficult to ensure that contract balance is maintained. The CISG, which has the advantages of both the common law and civil law systems, provides a fair and unified legal platform for China's commercial entities participating in international trade. The CISG not only meets the current need of China's trade growth, but also pushes the expansion of international transactions beyond the current volume.

VI CISG and China's Belt and Road Initiative

China's "Belt and Road Initiative" which was originally proposed in 2013, refers to the Silk Road Economic Belt and the 21st Century Maritime Silk Road. The Silk Road Economic Belt is a new regional economic development zone inspired by the historical Silk Road. It covers five northwestern provinces of China (Shaanxi, Gansu, Qinghai, Ningxia, and Xinjiang) and four southwestern provinces (Chongqing, Sichuan, Yunnan, and Guangxi). The New Silk Road Economic Belt, with the Asia-Pacific economic zone on the east and the developed European economic zone on the west, is considered to be the longest economic corridor with the most development potential in the world. The Maritime Silk Road, since its opening in the Qin and Han Dynasties, has been an important bridge for economic and cultural exchanges between the East and the West.

Southeast Asia has been an important hub and component of the Maritime Silk Road since ancient times. At the same time, the strategic international partners of the 21st Century Maritime Silk Road include: ASEAN, South Asia, West Asia, North Africa, and Europe to form the market chains of various major economic sectors with enhanced exchanges among neighboring countries and regions, to develop the strategic cooperation economic belt facing the South China Sea, the Pacific Ocean, and the Indian Ocean, and finally achieve the long-term goal of integrating trade and economy in Asia, Europe, and Africa.

As of February 1, 2020, there were 144 participating countries in the Belt and Road Initiative, 66 of which are CISG Contracting Parties, accounting for 45.8%. The CISG entered into force in 15 of these countries in the past decade, namely: Albania, Armenia, Azerbaijan, Bahrain, Benin, Cameroon, Congo, Costa Rica, Dominican Republic, Fiji, Guyana, Madagascar, Palestine, Turkey, and Vietnam, and entered into force in 27 Belt and Road countries in the past two decades, including: Cyprus, El Salvador, Gabon, Israel, South Korea, Kyrgyzstan, Lebanon, Libya, Mauritania, Montenegro, Peru, and Uruguay besides the above-named 15 countries.

Since the Belt and Road Initiative was first announced in 2013, 9 Belt and Road countries have become CISG Contracting Parties, namely: Bahrain, Cameroon, Congo, Costa Rica, Fiji, Guyana, Madagascar, Palestine, and Vietnam.

There may be more Belt and Road countries becoming CISG Contracting Parties as the current trend indicates, thus attracting more countries to adopt the CISG.

The Belt and Road countries' accession to the CISG is closely related to China's trade development. CISG, being automatically applied among all Contracting Parties, will govern most transactions among the Belt and Road countries with unified rules

and avoid the potential difficulties caused by different legal systems, cultures, and backgrounds.

Further, trading parties will reduce their transaction costs and possible dispute resolution costs since they can avoid the negotiation and research on the applicable laws by applying the CISG. Concurrently, there will be less legal barriers for cross-border trade under the CISG, thus efficiency and further global economic growth can be achieved.

Part II CIETAC Case Data Analysis

I Distribution of Cases over the Years

109 awards were made from 2002 to 2019, including 7 awards in 2002, 7 awards in 2003, 12 awards in 2004, 15 awards in 2005, 12 awards in 2006, 7 awards in 2007, 1 award in 2008, 7 awards in 2009, 2 awards in 2010, 11 awards in 2012, 2 awards in 2013, 5 awards in 2014, 6 awards in 2016, 5 awards in 2018, and 5 awards in 2019.

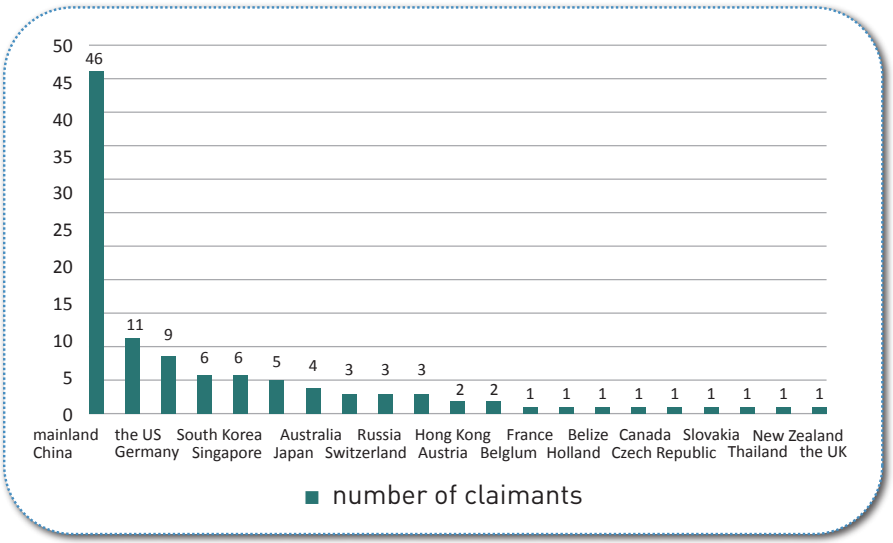
II Types of Goods Involved in the Awards

The 109 cases involved a wide range of goods, mainly: chemicals, fertilizers, industrial wax, food, machinery and equipment, instruments, metals and alloy products, textile raw materials, agricultural products, wood, paper products, floppy disk core, farm tools, cattle, et cetera.

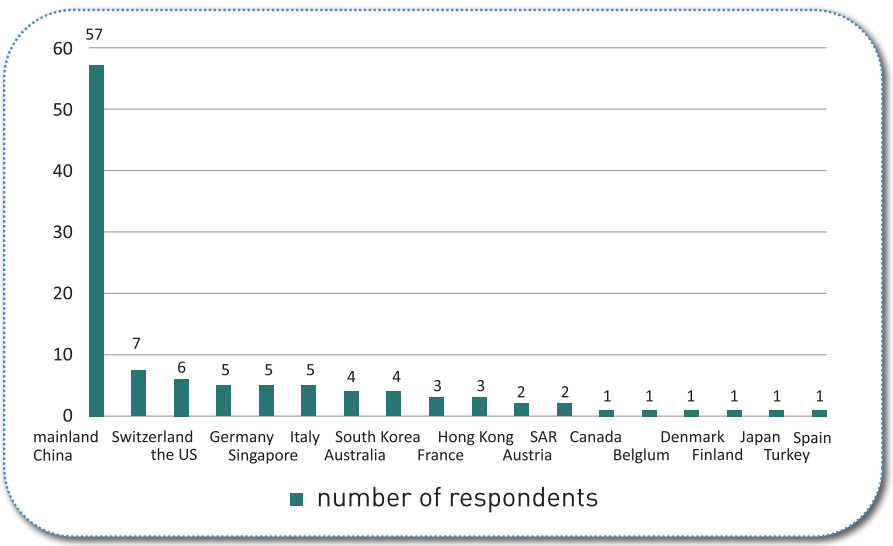
The above-named goods include not only the usual finished products, but also goods to be manufactured or produced. Some are ordinary brand-new goods, some are used equipment. The contracts in dispute are not just contracts involving the sale of goods, but also comprehensive contracts involving services and training.

III Countries and Regions the Parties Involved in the Awards Are Located

The country and region locations of the claimants in the 109 cases are as follows:



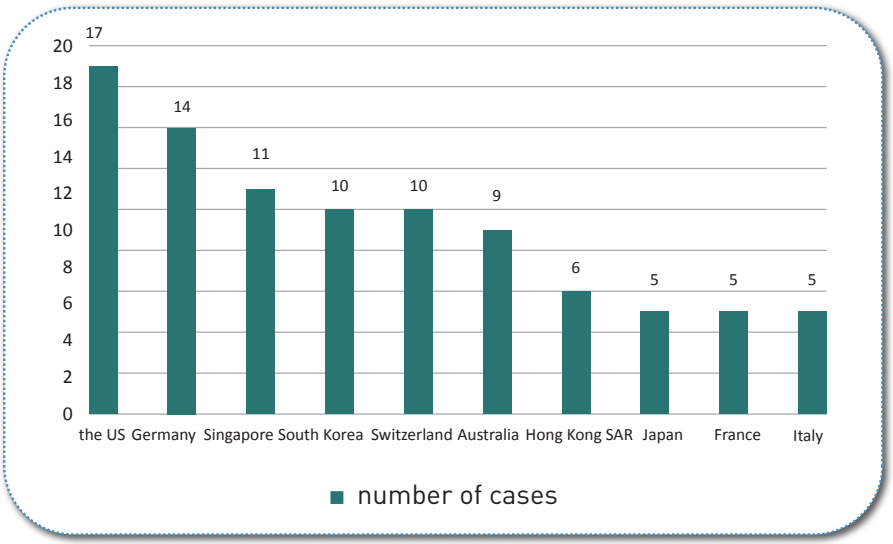
The country and region locations of the respondents are as follows:



Among the above countries and regions, Belize and Thailand are not CISG Contracting Parties, and Hong Kong SAR has not joined the CISG. In these cases, the parties agreed on the application of the CISG.

As the above charts show, most of the parties in these 109 cases are from mainland China. The claimants in 46 cases and the respondents in 57 cases are from mainland China. There are 99 cases involving one Chinese party and a foreign party, 4 cases involving one party from mainland China and the other from Hong Kong SAR, 2 cases involving a party from Hong Kong SAR and a foreign party, and 4 cases involving both foreign parties.

The top 10 country and region locations (besides mainland China) of the parties are as follows:



To some degree, the above data reflects that the application of CISG is compatible with China's foreign trade volume—the frequency of CISG application is directly related to the trade volume. Other than parties from mainland China, US parties are most frequently observed amongst all the parties to these 109 cases. It makes sense since the United States has long been one of China's top three foreign trade partners. Following the US paries are the German parties, which can also be explained by the close trade relationship between Germany and China. According to the German foreign trade statistics by Federal Statistical Office of Germany (Statistisches Bundesamt), China has been Germany's largest supplier and trading partner for three consecutive years.[1]

IV Length of the Tribunals' Opinions

A typical CIETAC award includes the case background, the tribunal's opinions, and the award. Among them, the part where the tribunal provides its opinions is the most critical as it directly reflects the tribunal's determination of key factual issues and its understanding of the core legal rules. It is also the logical basis of the award as it can tell whether the tribunal's reasoning is sufficient, what think pattern the tribunal has gone through in making the award, and what is the tribunal's adjudicating style. To show the overall form and style of the CIETAC awards, we have selected tribunal opinions and factual backgrounds in 10 awards of different styles from the 109 awards (see Part V of this report).

This report focuses on the tribunals' opinions in the 109 awards. Statistically, the minimum number of words in these opinions is 998 while the maximum one is 38,137 with the average word count of 6,555.

1 Germany economic news provided by Department of Commerce of China. http://de.mofcom.gov.cn/article/jjzx/201905/20190502863605.shtml, last visited on May 16, 2020.

According to an empirical study of the 81 CIETAC awards related to the CISG from 2008 to 2015 by Professor Han Shiyuan from Tsinghua University School of Law in the Annual Report on International Commercial Arbitration in China (2015), the number of words in each award is about 12,000, and his conclusion is that CIETAC awards are stylistically complicated. This report shares Professor Han's abovementioned findings. Generally, CIETAC tribunals give sufficient reasoning in the awards, reflecting a stylistic tendency to provide complete argumentation and detailed reasoning.

V Applicable Laws

CIETAC tribunal gives great importance to the first issue that needs to be addressed by every tribunal looking at an international sales contract dispute: What are the applicable laws? We can see all 109 awards have specified the applicable laws at the beginning of the opinions.

VI The Validity of Contracts

When dealing with contract disputes, the traditional practice of CIETAC tribunals is to clarify whether the contract is legal and valid. Based on the applicable laws and the parties' recognition and performance of the contract, the tribunals will determine whether the contract is legal and valid as a basis for further discussion.

90 tribunals among the 109 specifically addressed the validity of the disputed contract, regardless of whether the parties questioned the validity.

VII Citing CISG Provisions

Justice should be seen to be done.[2] Justice requires citing to and eleborating on the

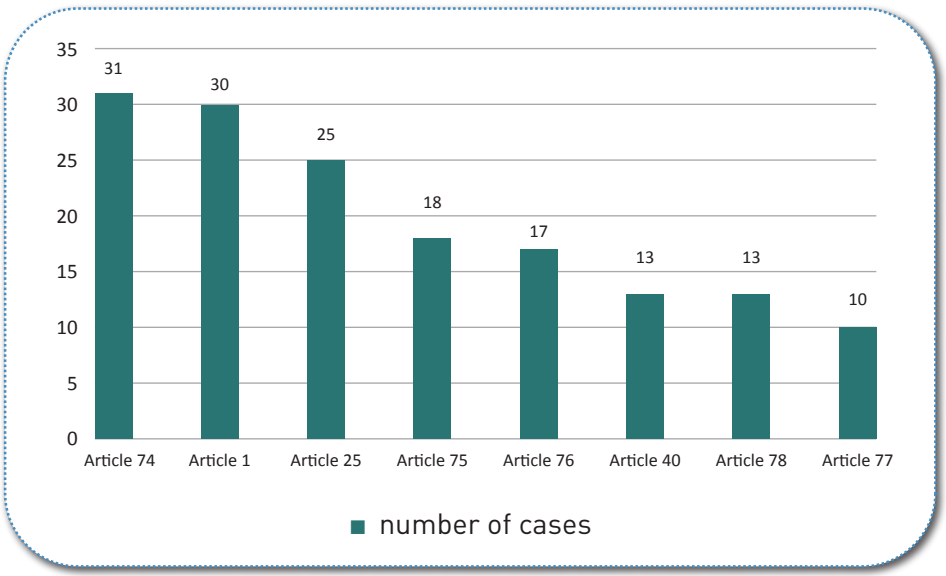
2 R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256, 259 ('R v Sussex Justices').

legal provisions. Among the 109 awards studied in this report, only 12 contain no clear citation of the CISG provisions.

Considering how the CISG provisions are cited in the CIETAC awards and the length of the tribunals' opinions mentioned above, CIETAC tribunals have clearly parted with the award style in which final ruling immediately follows a simple citation to the legal provisions. They carefully consider the interpretation of each CISG provision, providing detailed analysis of the CISG provisions in light of the facts in the cases.

The 10 most frequently cited CISG provisions in the 109 awards are Article 1, Article 25, Article 74, Article 75, Article 76, Article 77, Article 49, Articles 78, and Article 77.

The 10 Most Frequently Cited CISG Provisions in the Awards



These frequently cited CISG provisions indicate that certain issues frequently arises in these CIETAC cases that applied the CISG, namely: the application of CISG (including automatic application, application through the parties' agreements, and the circumstances for non-application); whether the general requirements for fundamental breach are met; if the seller's fundamental breach can give rise to the buyer's right to declare the contract voided; the basic principles of damages and computation thereof; and the determination of interest rates and the calculation of interest, et cetera.

VIII Citing Domestic Laws

As a unified international substantive law, CISG can be directly adopted by the parties and automatically applied under certain conditions. Although the CISG overcomes the indirectness and uncertainty of determining applicable laws according to the rule of conflict of laws, it does not address all the legal issues related to the international sale of goods. The CISG stipulates that it does not apply to certain contract disputes, and it only covers some major issues within the scope of sales contract laws. For example, Article 4 of the CISG stipulates '[T]his Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract'. Other legal issues such as the validity of the contract are not within the scope of the CISG and left to be resolved by the corresponding domestic laws. Thus, the tribunals may determine the applicable domestic laws according to the parties' agreements or through the conflict rules of private international law.

Of the 109 awards, 1 tribunal applied both CISG and US laws, 1 tribunal applied both CISG and the Hong Kong Sale of Goods Ordinance, 77 tribunals applied both CISG and Chinese laws according to the parties' agreements or private international law rules, and 30 tribunals applied CISG only.

Among the tribunals applying both CISG and Chinese laws, 38 tribunals applied Chinese laws because CISG was silent on those issues, such as: the validity of contracts, the parties' qualifications or civil capacity, determination of the agents' behavior, and statute of limitation. The other 39 tribunals cited the provisions of the 1999 China's Contract Law mainly to further discuss or compare with what has been addressed under the CISG. The top 10 Contract Law provisions cited in the awards are: Article 94, Legally Prescribed Conditions Giving Rise to Termination Right; Article 60, Full Performance and Performance in Good Faith; Article 107, Liabilities for Breach (including but not limited to continued performance, taking remedial measures, or paying damages); Article 113, Calculation of Damages; Article 119, Non-Breaching Party's Duty to Mitigate Loss in Case of Breach; Article 111, Liabilities in Case of Quality Non-compliance; Article 158, Buyer's Notification Obligation within the Inspection Period; Article 97, Remedies in Case of Termination; Article 117, Force Majeure; and Article 96, Termination by Notification.

IX Ratio of Winning Chinese Parties to Winning Foreign Parties

One sensitive issue in the arbitration of international commercial cases is the ratio of winning domestic parties to winning foreign parties. If an international arbitration institution of a certain nation tends to protect its own nationals, its credibility and influence as an international arbitration institution will be severely affected. CISG contains a lot of provisions that are flexible in nature or rely on the arbitrators' discretion, which can make it hard to tell if an arbitrator has been impartial in adjudicating an arbitration case. At the outset, the adjudication of international commercial dispute is influenced by various complex factors such as the facts, applicable laws, absence of a party, and so on. The award is rendered through comprehensive judgement and

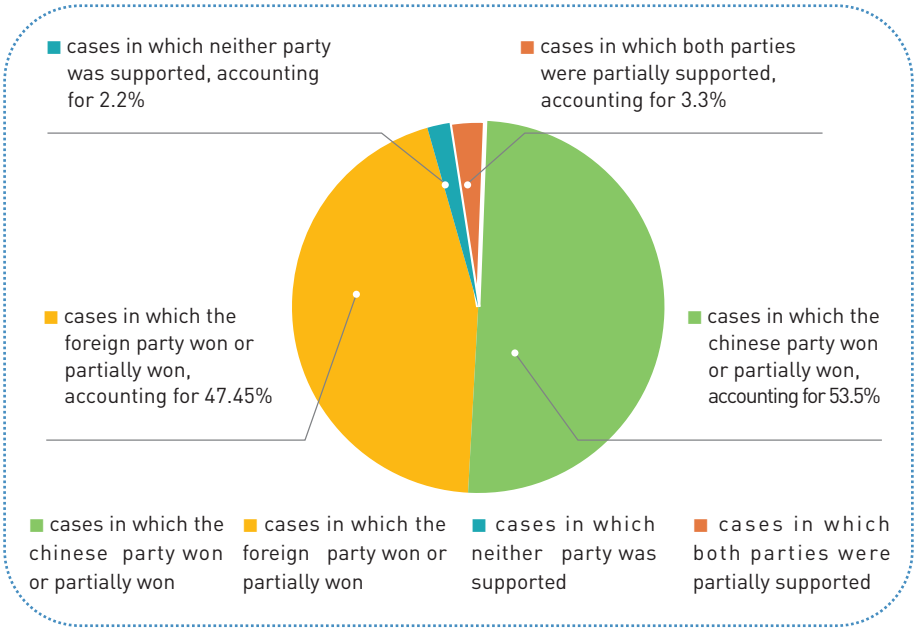
assessment of a case. In other words, the outcome of a case cannot directly prove the arbitrators' bias towards a party. However, we may ascertain to some extent if an institution is biased through the ratio analysis of winning domestic parties to winning foreign parties in the long term.

Of the 109 CIETAC cases studied in this report, there are 4 cases involving only foreign parties; 4 cases involving one party from mainland China and the other from Hong Kong SAR; 2 cases involving one party from Hong Kong SAR and a foreign party; and 99 cases between a Chinese party and a foreign party.

Setting aside the 4 cases between foreign parties, in those cases between a Chinese party and a foreign party (including parties from Hong Kong SAR), the Chinese side won or partially won in 53 cases, accounting for 50% of the total case volume, while the foreign side won or partially won in 47 cases, accounting for 45%. Furthermore, in 3 cases, both parties were partially supported; and in 2 cases, neither was supported. As the statistics have shown, in CIETAC practice, the ratio of winning Chinese parties to winning foreign parties is basically 1: 1.

After studying 81 arbitration awards applying the CISG between 2008 and 2015, Professor Han Shiyuan concluded in CIETAC's Annual Report on International Commercial Arbitration in China (2015) '[T]he ratio of winning Chinese parties to foreign ones is 1.68:1 which is not the 'theoretically ideal model' of 1:1, but the current ratio is still within the reasonable range considering the complicated factors in reality. However, emphasis on no 'political interpretation' of the Convention is never too much in order to achieve uniformity in the application and interpretation of the Convention'. Thus, from the above conclusion and the results of this study, the ratio of winning Chinese parties to winning foreign parties in long-term CIETAC practice is basically 1:1,

showing no visible bias of CIETAC tribunals.



Part III CIETAC Tribunals' Understanding and Application of the CISG

I CIETAC's Application of the CISG

Section 1 Automatic Application of the CISG and Related Issues

1. The Automatic Application of the CISG

The CISG, as per Article 1(1)(a) thereof, shall apply 'directly' or 'automatically' if the parties' places of business are in different Contracting States. According to this provision, the CISG should prevail over private international law while adjudicators can determine the application thereof without a two-step approach based on the rules of private international law.

The 1987 Circular of the Supreme People's Court on Transmitting Certain Issues of the MOFTEC in Connection with the Implementation of United Nations Convention on Contracts for the International Sale of Goods confirmed the principle of automatic application of the CISG, pointing out 'as of January 1, 1988, the Convention shall apply automatically to contracts for the sale of goods between Chinese companies and companies from the above countries (except Hungary) and related disputes or litigation cases, unless otherwise agreed by the parties'.

The CIETAC tribunals would automatically apply the CISG if the parties' places of business are in different Contracting States and the parties have not ruled out the application thereof, and determine the relevant applicable laws according to the rules

of private international law only regarding issues not covered or clearly stipulated in the CISG. There are more and more CIETAC cases involving the application of the CISG due to the increase in the number of the Contracting States. 89 of the 109 selected cases involved the automatic application of the CISG as per Article 1(1)(a) thereof, accounting for about 82%. The typical wording of such automatic application in the CIETAC awards is '[T]he CISG shall apply to the contract signed by and between the claimant, whose place of business is in country X, and the respondent, whose place of business is in China, as per Article 1 thereof since both countries are the CISG Contracting States while the parties have not excluded such application in the contract'.[1]

2. Parties' Derogation of the Effect of the CISG under the Premise of Automatic Application

Article 6 of the CISG provides, '[T]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions'. Accordingly, the CISG is only to supplement and explain the matters which have not been specified by the parties since the contract terms shall prevail if they are inconsistent with CISG provisions.

For example, in the 2006 grain sales case,[2] Article 9 of the contract of the case states that 'GOVERNING CONTRACT: Latest Incograin 12[3] , including Arbitration rules, not conflicting with above terms. If any arbitrage, to be organized in Beijing by the China International Economic and Trade Arbitration Commission, in conformity of the rules of the Incograin 12…'. The respondent accordingly claimed that INCOGRAIN 12 was the governing contract in this case and excluded the application of the CISG. Regarding

1 The CIETAC Award on July 15, 2019.

2 The CIETAC Award on March 19, 2006.

3 Incograin 12 is a standard contract provided by Paris Grain Trade Association.

the concept of the 'GOVERNING CONTRACT', the tribunal held that the it did not refer to the substantive law applicable to the dispute resolution. INCOGRAIN 12 is an industry-wide model contract for parties to adopt when the CIF price term is used. In the present case, the parties, with full knowledge, adopted INCOGRAIN 12 but changed some articles by mutual agreement. For example, the parties changed the chosen arbitration institution from CHAMBRE ARBITRLE DE PARIS as per Article 17 of INCOGRAIN 12 to CIETAC in Article 9 of the contract. Therefore, the tribunal determined that INCOGRAIN 12 was the parties' clear agreement on the relevant matters through negotiation. Except for those provisions otherwise agreed upon by the parties, the rest of the INCOGRAIN 12 should apply in this case and prevail over the CISG.

Furthermore, in the 2016 corn sales case,[4] the tribunal first determined the CISG should apply since the parties had not agreed on the applicable law in the sales contract while the parties' places of business (China and Singapore) are the Contracting Partiesand the parties had not clearly excluded the application of the CISG. The tribunal also noted that the parties had merged the GAFTA No.88[5] contract which applies English laws in the 'Others' clause of the disputed contract. The tribunal, after carefully examining the wording of the contract, concluded that the GAFTA No.88 contract, being invoked in item 6 'Others' under the 'Others' clause, could only be applied within the scope of this clause, that is, to other similar matters not stipulated in items 1-5 of the 'Others' clause (disposal of the goods upon arrival and cost-sharing). Thus, the invoked GAFTA No.88 contract was not at the same level as the other main clauses of the contract. Concerning the applicable law, the tribunal finally concluded that English laws should be applied to the matters stipulated in the 'Others' clause of the contract in accordance with the

4 The CIETAC Award on May 6, 2016.

5 GAFTA No.88 is a model contract provided by The Grain and Feed Trade Association (GAFTA).

GAFTA No.88 contract while the CISG should apply to the main body of the contract since there is no clear stipulation on the applicable law thereof.

The above-mentioned awards reflect the CIETAC tribunals' understanding of the characteristics of the CISG as a non-compulsory private law and their full respect for party autonomy and freedom of contract. At the same time, the CIETAC tribunals maintain the automatic application mechanism unique to the CISG as much as possible, so as to ensure that the CISG is applied as the unified law in the widest scope.

3. Standard Contracts and the CISG

The CIETAC tribunals notice some industry associations or other organizations have published standard contracts or model contracts for the sale of goods which contain detailed provisions on all aspects of the parties' rights and obligations due to the prevalence of international transactions.

One CIETAC tribunal discussed the relationship between standard or model contracts and the CISG.[6] In the case involving a Chinese company and an Australian company, the claimant alleged the CISG should apply to the contract while the respondent argued the tribunal should respect the parties' true intent and arbitrate the case according to the applicable law agreed by the parties in the Chinatex's General Terms and Conditions Governing Purchase of Wool and Wool Tops dated July 1, 1990 ("Chinatex's General Terms and Conditions"). The tribunal noticed that the 'Special Clauses' in the three Order Confirmation Sheets provided that '[A]ll other terms and conditions as per Chinatex's general terms and conditions governing purchase of wool and wool tops dated 1/7/90'. According to the above agreement, the tribunal determined that the parties had expressly incorporated

6 The CIETAC Compilation of Arbitration Awards, the Law Press, August 2009, pp306-322.

the Chinatex's General Termsand Conditions in the contracts as the transaction terms and conditions in addition to those stated therein. However, the Chinatex's General Termsand Conditions was neither a bilateral treaty between the two nations involved, nor a law formulated or recognized by the Chinese legislature. Obviously, the parties had not agreed on the applicable law while there was no provision on the applicable law in the Chinatex's General Termsand Conditions. The tribunal found through investigation that Australia and China, the parties places of business, were both CISG Contracting States. Therefore, the tribunal held that, in accordance with the CISG obligations assumed by the two countries, CISG should apply to the dispute resolution of this case when the parties had not precluded its application. As to matters not covered by the CISG, the law of the People's Republic of China should apply in accordance with the most significant connection principle since the buyer's location and the arbitration place were both in China.

4.Trade Terms

In the 2012 equipment sales case,[7] the CIETAC tribunal pointed out that the Incoterms 2000 issued by the International Chamber of Commerce as stipulated in the contract was only a unified interpretation of some common trade terms and did not constitute a complete legal system. Therefore, such stipulation should not be taken as the agreement on the applicable law and the Incoterms agreed on by the parties could not exclude the application of the CISG.

Section 2 Application of the CISG through the Parties' Agreement

Where the parties expressly choose the CISG as the governing law, the CIETAC

7 The CIETAC Award on July 24,2012.

tribunals strictly abide by the parties' choice to apply the CISG in either the situation when one party's place of business is not in a Contracting State[8] or the situation when both parties' places of business are in the Contracting States.[9] The form of agreement between the parties may be a clear stipulation in the sales contract in advance, or clear expression on the application of the CISG in the arbitration process, or directly citing the CISG provisions for their legal claims.[10]

1. Grounds for the Determination of the Validity of the Parties' Agreement

The parties can choose the applicable law of the contract since party autonomy is a basic contract law principle, but there are certain limits on such principle. The CIETAC tribunals, when determining the validity of a Chinese party's choice of law clause, would normally rely on the following rules and regulations.

Firstly, Article 126 of the China's Contract Law provides, '[T]he parties to a foreign-related contract may choose those laws applicable to the settlement of contract disputes, unless stipulated otherwise by law'. Secondly, Article 3 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships provides, '[T]he parties may explicitly choose the laws applicable to foreign-related civil relations in accordance with the provisions of law'. Article 41 stipulates that '[T]he parties may agree on the law applicable to the contract'.[11] Thirdly, Article 47(2) of the CIETAC Arbitration Rules provides, '[W]here the parties have agreed on the law applicable to the merits of their dispute, the parties' agreement shall prevail'. Based on the aforementioned articles, CIETAC tribunals will only support a Chinese party's choice of law if the contract

8 The CIETAC Award on June 28, 2018.
9 The CIETAC Award on January 15, 2009.
10 The CIETAC Award on August 25, 2015.
11 The CIETAC Award on June 28, 2018.

is 'foreign-related'. Only after this condition is met can the party's choice of law be recognized by the CIETAC tribunals.

2. Parties' Agreement on the Application of both CISG and Chinese Laws

One common situation we have seen in CIETAC practice is when the parties agree to apply both Chinese laws and the CISG in their contract. For example, in a CIETAC case, the parties agreed '[T]he formation of this contract, its validity, interpretation, execution and settlement of disputes are all subject to related laws of the People's Republic of China and the United Nations Convention on International Goods Sales Contract'. [12]

This type of term creates the issue that which governing law shall prevail since the Contract Law is not a verbatim adoption of the CISG. Article 142(2) of the General Principles of the Civil Law of the People's Republic of China ("General Principles of the Civil Law") stipulates that '[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'. As such, international treaties to which China has acceded take precedence over Chinese domestic laws. Therefore, the CIETAC tribunals generally turn first to the CISG in cases involving a choice of law clause like the one mentioned above. As for issues not addressed by the CISG, the tribunal will apply the Chinese laws.[13] Such approach shows the CIETAC tribunal's respect and support of the CISG.

12 The CIETAC Award on September 29, 2015.

13 Ibid.

Section 3 Applying the CISG When the Parties Have Agreed on the Application of Chinese Laws

1.The Priority Application of the CISG

In practice, some parties whose places of business are in different Contracting States only stipulate in the contract that '[T]he Chinese laws shall apply to this contract'. It is noticeable that Article 142 of the General Principles of the Civil Law stipulates that '[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. 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.' When dealing with choice of law clauses like the one mentioned above, CIETAC tribunals normally take the position that the chosen Chinese laws encompass the entire Chinese law system, including the General Principles of the Civil Law and Contract Law, et cetera. The General Principles of the Civil Law places higher in the hierarchy of laws than the Contract Law, thus the CISG should take precedence over the Contract Law. Meanwhile, since the parties have chosen the Chinese laws, issues on which the CISG is silent, such as contract validity, should be determined applying the Chinese laws. This line of reasoning shows the respect of Chinese law for international treaties, pushing for a wider application of the CISG.

In the 2012 cold rolled coil sales case,[14] the parties agreed in the contract to subject future dispute to the PRC laws and also stated accordingly to the tribunal in the hearing.

14 The CIETAC Award on July 18, 2012.

The claimant alleged in a post-hearing statement that the CISG should apply to this case since the parties' places of business were in South Korea and China respectively which are both Contracting Partiesof the CISG. The tribunal deemed that the CISG had integrated with China's domestic laws since China had acceded to the CISG and Article 142(2) of the General Principles of the Civil Law provided that the effect of international treaties acceded to by China should be take precedence over China's domestic laws. The tribunal held that the CISG should prevail and Chinese laws and relevant international practice should apply to matters not stipulated in the CISG.

In the 2009 printing press case,[15] the parties agreed in the contract, '[I]f the dispute cannot be resolved through negotiation, it shall be submitted to CIETAC for arbitration in accordance with relevant Chinese laws', without specifying whether it referred to procedural or substantive laws. The claimant did not address the applicable law issue in its application for arbitration, and yet the it argued its legal positions under both the Chinese laws and the CISG in various written statements and oral statements during the hearing. The respondent argued in its defence that 'Article 17 of the contract stipulates the CIETAC shall render the award in accordance with Chinese laws. Article 142 (2) of the General Principles of the Civil Law stipulates that '[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...'. Considering China and the U.S. where the parties are located are both the CISG Contracting Parties, the CISG shall apply to this case… As to matters not stipulated in the CISG, the Contract Law shall apply if the relevant provisions are not inconsistent with the CISG'. The tribunal, based on the contract provision and the parties' intent to apply the CISG which was shown in their clear

15 The CIETAC Award on June 5, 2009.

claims and actual actions, found that the substantive law applicable to the dispute should be the CISG and the relevant laws of China of which the former should prevail in the event of any conflict.

The above-mentioned attitude of the CIETAC tribunals reflects the respect of Chinese laws for international treaties. This attitude in fact achieves a wider application of the CISG, and is in line with international mainstream opinions, that is, the parties' general reference to a Contracting State's laws is considered to include the CISG unless the parties specifically refer to the sales law of such State. At the same time, this view of the CIETAC is consistent with the opinion of the CISG Advisory Council.

2. The Respect of the Parties' Choice of China's Contract Law

In practice, CIETAC tribunals usually understand that contract parties are not legal professionals who perhaps do not have deep understanding concerning the relevant legal rules. The parties may intend to apply the substantive laws of China instead of the CISG when they agree on the application of Chinese laws in the contract. In this case, the tribunal would first let the parties confirm whether the choice of law clause refers to the substantive laws of China such as the Contract Law during the oral hearing. If the parties cannot reach an agreement during the oral hearing or one party claims that the parties' true intent is to apply the substantive laws of China while the other party argues the CISG shall apply or in the case one party is absent from the oral hearing, the tribunal would determine whether the parties have reached true consensus and the content thereof according to the rule of interpreting a party's conduct under CISG, Article 8(3) which provides '[I]n 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'.

For example, in a case involving a Chinese buyer and a Japanese seller, where both parties' places of business are in CISG Contracting Parties, the tribunal found the applicable law chosen by the parties should be the Contract Law of China since the respondent was absent from the hearing while the claimant had only cited the provisions in the Contract Law of China in its correspondence, claim for damages, and contract termination notice.[16] Professor Peter Schlechtriem once pointed out that the parties usually had reasons for their choice of law in the contract. For example, the CISG only stipulated the special matters of sales contracts without mentioning other matters such as set-off, debt assignment, and contract validity. Therefore, it was always recommended to insert a choice of law clause in sales contracts. Even when the CISG was applicable according to Article 1 (1) (a) thereof, the applicable law for matters not covered by the CISG should be determined through the rules of private international law. In this regard, it is very important for the parties to choose the law.[17]

3. The Application of Both the CISG and the Contract Law of China under Special Circumstances

Under special circumstances when certain matters are not stipulated in the CISG while the parties intend to apply both the CISG and Chinese laws, the CIETAC tribunals may consider applying both. In this case, if the provisions under both laws are consistent, one can be used to interpret the other.

In the 2018 equipment sales case,[18] the tribunal noted that both parties had clearly

16 The CIETAC Award on September 7, 2016.

17 P. Schlechtriem and P. Butler, UN Law on International Sales, p.16.

18 The CIETAC Award on March 8, 2018.

agreed on the applicable law in Article 12.1 of the contract, that 'the substantive laws of the People's Republic of China and the United Nations Convention on International Sales of Goods (1980) shall apply in arbitration'. Therefore, the tribunal respected such agreement and settled the contract dispute in this case by applying the substantive laws of China and the CISG.

In the 2005 elevator sales case,[19] the parties agreed in the contract that 'this contract shall be interpreted in accordance with the laws of the People's Republic of China'. The tribunal found both the PRC laws and the CISG should apply since the parties' places of business, i.e., China and Switzerland, are both CISG Contracting Parties while the parties had not explicitly excluded the application of the CISG when agreeing on the applicable law in the contract. The parties' agreement that 'this contract shall be interpreted in accordance with the laws of the People's Republic of China' did not constitute an exclusion of the CISG. As such, the tribunal applied the relevant provisions in both the CISG and the Contract Law of China to the same issue. For example, the CIETAC tribunal applied both Article 161 of the Contract Law and Article 59 of the CISG regarding the buyer's payment obligations.

Section 4 The Referential Application of the CISG

In the 2012 fleece production equipment case,[20] the applicable law was the Chinese laws. The equipment involved was used to finalize the design of thick fabrics. Article 8 of Annex I Main Technical Parameters of the contract provided that '[T]he speed of finalizing the design of 350 g thick fabrics shall not be less than 28 m / min'. The claimant claimed that the respondent should not only guarantee the speed of finalizing

19 The CIETAC Award on July 20, 2005.

20 The CIETAC Award on July 18, 2002.

the design of non-fleece 350 g thick fabric be 28 m / min, but also guarantee the same for fleece. In this regard, the respondent provided expert opinion that the above provision could not apply to fleece which was not thick fabric but a kind of thick and high-moisture product.

The tribunal noted Article 62(1) of the Contract Law of China provided 'if quality requirement is not clear, performance shall be in accordance with the state standard or industry standard; absent any state or industry standard, performance shall be in accordance with the customary standard or any particular standard consistent with the purpose of the contract'. Concerning 'the customary standard', the tribunal referred to the CISG citing Article 35(2)(a) which stipulates '[E]xcept where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used'.

The tribunal deemed that the above provision of Article 62(1) of the Contract Law of China was consistent with the above provision of the CISG, i.e., the goods delivered by the seller should be fit for the purposes for which goods of the same description would ordinarily be used since the parties had made no explicit agreement thereon. In this case, the claimant failed to prove the equipment involved could not reach the agreed speed of finalising the design of general non-fleece fabric. Therefore, the tribunal concluded the equipment could reach the agreed speed of finalising the design of 350 g thick fabrics. According to the expert opinion, hot air heating equipment was more suitable for fleece design. Therefore, fleece was not within the scope of the general purpose of the equipment in this case. Based on these facts, the tribunal held that the equipment in this case was fit for the purposes for which goods of the same description would ordinarily be used, and it rejected the claimant's claim that the respondent had breached the contract by delivering equipment that failed to reach the agreed speed.

It can be seen from the above case that the CIETAC tribunals may refer to the CISG provisions to resolve issues even when the parties have chosen Chinese laws as the applicable law. This approach is also reflected in Article 49 of the CEITAC Arbitration Rules (2015) , which clearly stipulates that '[T]he arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices'.

Section 5 China's Reservation to Article 1(1)(b) of the CISG

According to Article 95 of the CISG, a Contracting State may declare a reservation to Article 1(1)(b) to prevent the expanded application thereof. China has made the reservation accordingly. Therefore, in the Chinese version of the CISG, when only one party's place of business is in a Contracting State while that of the other one is not, the law of that Contracting State ,as oppose to the CISG, shall apply if the application thereof is consistent with the rules of private international law.

In the 2010 cold-rolled steel strip sales case,[21] the parties had not agreed on the applicable law in the contract while the CISG could not apply automatically since Indonesia was not a Contracting State. The parties could not agree on the applicable law during the hearing. The tribunal deemed the applicable law should be determined according to China's private international law rule (the rule of conflict) since the place of arbitration was in China. The tribunal noticed that the seller-claimant, a South Korean company, purchased the goods for the contract (cold-rolled steel strip) from a Chinese company, and resold the goods to the buyer in Indonesia. The goods were manufactured in China and exported from China. The seller-claimant in the contract was only a middleman

21 The CIETAC Award on October 26, 2010.

and most of the contract performance was in China. Therefore, the tribunal relied on the principle of the closest connection under Article 5 of the Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-related Contractual Dispute Cases in Civil and Commercial Matters, finding that the substantive laws of China should apply since the contract was more closely connected with China than South Korea or Indonesia. The tribunal, after determining the substantive laws of China as the applicable law, cited Article 1 of the CISG providing '[T]his Convention applies to contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State' and further discussed the application of the CISG when Chinese laws were applicable under China's private international law rule. The tribunal pointed out that the CISG should not apply under such circumstance while Chinese laws should apply directly since China had made its reservation to Article 1(1)(b) of the CISG according to Article 95 thereof when depositing the instrument of ratification on December 11, 1986. Thus, when the application of the Chinese laws is justified by the rules of private international law, China's Contract Law should be applied, excluding the CISG. As a result, the tribunal decided that the substantive law applicable to the dispute in this case should be Chinese law.

Section 6 CISG and Hong Kong SAR

Regarding the application of the CISG between Mainland China and Hong Kong SAR parties, the CIETAC tribunals hold the basic view that the CISG shall not apply to disputes between Mainland China and Hong Kong SAR parties unless the parties have clearly chosen the CISG as the applicable law for the two reasons below.

Firstly, the CISG does not apply to Hong Kong SAR since Hong Kong SAR had

not acceded to the CISG before the handover, and the Chinese government has not declared the CISG applicable to Hong Kong SAR after the handover. After the return of Hong Kong and Macau in 1999, the Chinese government deposited a statement with the Secretary-General of the United Nations, attaching a list of 127 international conventions to which China had acceded, and stated that these international conventions would subsequently apply to Hong Kong SAR, but the CISG was not in the list. For example, in the 2016 Supreme People's Court Min Zai No. 373 case involving the dispute arising out of the sales contract between Lianzhong Enterprises (Resources) Co., Ltd. and Xiamen International Trade Group Co., Ltd., the Supreme People's Court pointed out that 'the CISG which is applicable to sales contracts between parties whose places of business are in different Contracting Partiesshould not apply in this case even if the fact that the dispute had occurred before the return of Hong Kong SAR since the UK is not a Contracting State. If the parties agree to apply the CISG, it would constitute the content of the contract between the parties'. It can be seen that the Supreme People's Court does not support the application of the CISG between Mainland China and Hong Kong SAR parties either before or after the return of Hong Kong SAR, unless the parties expressly agree to apply the CISG.

Secondly, the CISG shall not apply to disputes between Mainland China and Hong Kong SAR parties since it does not apply to disputes between parties of the same sovereign state as per Article 1(1) thereof while Mainland China and Hong Kong SAR are both within Chinese territory. For example, in the 2010 Zhe Shang Wai Zhong Zi No.99 case involving disputes arising out of the sales contract between Yingshun Development Hong Kong Co., Ltd. and Zhejiang Zhongda Technology Export Co., Ltd., Zhejiang Higher People's Court held that the CISG should not apply to the sales contract between Mainland China and Hongkong SAR parties since Hong Kong SAR

was not an independent country but an administrative region of the People's Republic of China.

The CIETAC tribunals shared the same view with Chinese courts. For example, in the 2009 sulfur sales case,[22] the tribunal rejected the respondent's claim that the CISG should apply since the parties had not agreed on the applicable law in the sales contract (which was regarded as a foreign-related one) while the CISG was not applicable to Hong Kong SAR.

As for the application of the CISG to disputes between Hong Kong SAR and foreign parties, the Department of Justice of Hong Kong SAR conducted special consultation and research on the proposal that the CISG be applied to the Hong Kong SAR in July 2019. It was advocated to extend the application of the CISG to Hong Kong so as to promote trade growth, prevent enterprises from being subject to unfamiliar foreign laws when entering into cross-border transactions, and enhance Hong Kong SAR's ability to resolve disputes under the CISG, and its status as an international trade and financial center.

Section 7 Place of Business

According to Article 1(1) of the CISG, a sales contract is international if the parties' places of business are in different countries when signing the contract. Therefore, the CISG adopts the place of business standard to determine whether a sales contract is international. The CISG contains no definition of the place of business though it is very important in the application thereof. Although the fundamental view embodied in the drafting process was that there should be a permanent enterprise instead of a temporary or indirect business structure (e.g., warehouse or agency) as determinative of the place

22 The CIETAC Award on September 21, 2009.

of business, the representatives of various countries had different understandings of the place of business. Finally, the CISG drafters left it for adjudicators to make case-by-case decisions based on the relevant factors such as the authority and operation of enterprises.

For example, in the 2018 equipment sales case,[23] the CIETAC tribunal pointed out that a company's domicile should be its place of business unless there was evidence to the contrary. In this case, the tribunal found the claimant's place of business be the same as the domicile, i.e., Belize, since the respondent failed to prove that Belize was not the claimant's place of business. In addition, the respondent had not proved Hong Kong SAR was the place where the claimant normally carried out its operation, i.e., the place of business, although the respondent claimed Hong Kong SAR as the claimant's place of business on the grounds that the claimant had stated its Hong Kong SAR address in the application for arbitration, the contract, the power of attorney, and the agreement for the return of goods as the contact address.

Section 8 Types of Contracts to Which the CISG Applies

In CIETAC practice, the tribunals determine the nature of contracts through analysis of their titles, contents, and the parties' rights and obligations.

For example, in the 2005 equipment case,[24] the seller claimed that the contract should be a contract for processing since the equipment under the contract was designed, tested, and manufactured according to the buyer's special requirements. Disagreeing with the seller, the buyer believed that the contract should be a sales contract since the seller had sold the same kind of equipment which was general before signing the contract. The tribunal held that the contract should be determined according to its contents: the

23 The CIETAC Award on June 28, 2018.

24 The CIETAC Award on June 13, 2005.

disputed contract was entitled 'PURCHASE CONTRACT'; and the parties clearly agreed in their contract for the buyer to purchase the automatic chip mounter from the seller. Looking at the process from tender to finally signing the contract, the fact that the buyer had requested the equipment to meet certain parameters alone was insufficient to prove the equipment was custom-made or the disputed contract was a contract for processing. The tribunal found the disputed contract was a sales contract governed by the CISG because the disputed contract lacked stipulations essential to a processing contract such as those specifying the way of processing but rather contained stipulations on the parties' rights and obligations in the sales relationship.

Section 9 Choice of Law for Matters Not Stipulated in the CISG

In CIETAC practice, the tribunals would first consider the parties' voluntary choice of laws to govern the matters not covered by the CISG, i.e., the parties' special agreement on the applicable laws and regulations. For example, in the 2014 equipment case, the respondent claimed that Chinese laws should apply to matters not covered by the CISG while the claimant, though initially alleging the application of Japanese laws in its application for arbitration, relied on the Contract Law of China for its oral presentation during the hearing.[25] The tribunal thus determined Chinese laws should apply to matters unresolved in the CISG since the claimant had agreed to such application.

The tribunals will determine the applicable law adhering private international law rules when the parties have not agreed to a specific governing law. Unless otherwise agreed by the parties, the tribunal will apply the CIETAC Arbitration Rules which provides that, where the parties have not agreed on the place of arbitration or their agreement is ambiguous, the place of arbitration shall be the domicile of CIETAC or its sub-

25 The CIETAC Award on December 16, 2014.

commission/arbitration center administering the case. Therefore, in most of the cases, the place of arbitration determined according to the CIETAC Arbitration Rules is China. Accordingly, unless otherwise agreed by the parties or there exist special circumstances of the case, the tribunals will determine the applicable law under the private international law rules under the Chinese law.

The principle of the closest connection has always been the center of the conflict rules under Chinese laws. Article 145 of the General Principles of the Civil Law provides '[T]he parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied'. Article 2 of the Law on Choice of Law for Foreign-related Civil Relationships stipulates '…If there are no provisions in this Law or other laws on the application of any laws concerning foreign-related civil relations, the laws which have the closest relation with this foreign-related civil relation shall apply'. Article 5 of the Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-related Contractual Dispute Cases in Civil and Commercial Matters provides '[W]here the parties fail to choose a law governing a contractual dispute, the law of the country or region having the most significant relationship with the contract shall be the governing law. When the people's court determines the law applicable to the contract dispute according to the principle of most significant relationship, it shall find the laws of the country or region which has the most significant relationship with the contract as the applicable law based on the special nature of the contract and the factors such as one party's performance best reflects the essential characteristics of the contract. (1) A sales contract shall be governed by the laws of the seller's domicile at the time of

contract conclusion; or the laws of the buyer's domicile if the contract is negotiated and concluded at the buyer's domicile, or the contract clearly stipulates that the seller must perform the delivery obligation at the buyer's domicile...' and further stipulates '[I]f the above contract clearly has a closer relationship with another country or region, the laws of such country or region shall apply'.

For example, in the 2012 drive pipe sales case,[26] the CIETAC tribunal pointed out the fundamental criterion for the determination of the applicable law according to the Chinese conflict rules is whether the contract has the closest relationship with a country or region while not the laws of any country or region related to the contract can be regarded as the applicable law. Due to the essential attributes and characteristics of international sales of goods, international sales contracts will inevitably be related with multiple countries or regions, but not all the related countries and regions may be considered to have the closest relationship with the contract. According to the characteristics of international sales contracts, the most essential and most legally important link in international sales of goods is neither the issuance of an order, the acceptance of goods at the destination, nor the static fact of the parties' places of business or registration, but the seller's performance such as the delivery of goods at the port of shipment. It is this key step of delivery that determines the fulfillment of the legal obligations and the transfer of risks for the parties, which best reflects the essential characteristics of the contract. Therefore, the place of delivery should of course be regarded as the place most closely related to the contract.

In addition, the CIETAC tribunals will also consider the following factors to determine the most significant relationship: the place where the goods under the contract are

26 The CIETAC Award on July 17, 2012.

produced,[27] the place where the contract is signed,[28] the place where the contract is performed,[29] the parties' places of business,[30] the parties' domiciles,[31] the parties' habitual residence,[32] the place where the equipment failure occurs,[33] the destination of the goods,[34] the place where the equipment is installed and accepted,[35] the place where the equipment is adjusted,[36] the place where the arbitration commission is located,[37] the place of arbitration,[38] and whether the parties have actively cited the laws of a certain country during the dispute settlement process.[39]

Section 10 Determination of Matters Not Stipulated in the CISG

The CISG, as a unified international substantive law, can be directly adopted by the parties and automatically apply under certain conditions. It overcomes the indirectness and uncertainty of determining the applicable law through the conflict of law rules, but the CISG cannot solve all the legal issues related to international sales of goods. The CISG not only stipulates that it does not apply to certain contract disputes in Article 2, but also makes it clear in Article 4 that '[T]his Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract'.

27 The CIETAC Award on July 17, 2012; the CIETAC Award on July 13, 2004.
28 The CIETAC Award on August 9, 2007; the CIETAC Award on September 30, 2006.
29 The CIETAC Award on July 24, 2012; the CIETAC Award on September 30, 2006.
30 The CIETAC Award on July 13, 2004.
31 The CIETAC Award on December 26, 2005; the CIETAC Award on September 30, 2006.
32 The CIETAC Award on February 6, 2012.
33 The CIETAC Award on July 24, 2012.
34 The CIETAC Award on December 16, 2014.
35 The CIETAC Award on November 6, 2002.
36 The CIETAC Award on December 26, 2005.
37 The CIETAC Award on July 16, 2019; the CIETAC Award on September 30, 2006.
38 The CIETAC Award on December 26, 2005.
39 The CIETAC Award on September 19, 2019.

In the CIETAC practice, the tribunals tend to make strict determinations on such matters. For example, in the 2009 children's tents case,[40] the tribunal pointed out two steps must be taken to resort to domestic laws in accordance with Article 7 (2) of the CISG. In the first step, matters with no clear stipulation but within the scope of the CISG should be solved in accordance with general principles on which the CISG was based. In the second step, only when such general principles could not be found in the first step, should the matters be resolved in accordance with the applicable law determined through private international law. Therefore, the tribunal, considering the clear provision in Article 8 regarding the interpretation of the parties' declarations and other acts, rejected the seller's claim on the application of Article 7(2) of the CISG since it could not pass the first step test.

In the CIETAC practice, the types of typical matters deemed to be outside the scope of the CISG are relatively uniform and limited, mainly including:

1. The Parties' Qualification and Civil Capacity

The CIETAC tribunals believe that the parties' qualification and capability should be governed by their national laws. In the 2002 floppy disk core equipment case,[41] the respondent's national law was the US laws. The claimant alleging the application of the US laws should provide evidence to explain the content of the US laws.

2.The Determination of the Parties' Acts of Agency

In the 2006 air purifier sales case,[42] the buyer claimed that it was only the real buyer's foreign trade agent and should not bear any responsibility under the contract. Since the

40 The CIETAC Award on September 9, 2009.

41 The CIETAC Award on July 15, 2002.

42 The CIETAC Award on September 30, 2006.

CISG had no provision on foreign trade agency, the relevant Chinese laws should apply. The tribunal held that such situation fell within the scope of Article 402 of China's Contract Law stipulating '[W]here the agent, acting within the scope of authority granted by the principal, enter into a contract in its own name with a third party who is aware of the agency relationship between the principal and agent, the contract is directly binding upon the principal and such third party…' and the respondent should not undertake the buyer's responsibilities under the contract. Moreover, Article 20 Special Terms of the contract also stipulated that the respondent 'sign and execute this contract on behalf of the end user in the name of the buyer. The buyer's rights and obligations in this contract will be directly enjoyed and assumed by the end user', 'the seller and the end user agree that the buyer shall not be held responsible for any delay in the aforementioned delivery period of this contract'. Therefore, the respondent should not bear the buyer's liability under the contract accordingly.

3. Statue of Limitation

In the 2012 drive pipe sales case,[43] the tribunal held that the CISG and relevant Chinese laws should be the governing law for the contract in this case. Since the CISG had no provision on the statute of limitation and Chinese laws were applicable, the statute of limitation on this case should be found under the relevant provisions of Chinese laws. Article 129 of China's Contract Law provides '[F]or a dispute arising from a contract for the international sale of goods or a technology import or export contract, the time limit for bringing a suit or applying for arbitration is four years, calculating from the date on which the party knows or ought to know the infringement on its rights'. Therefore, the statute of limitation on this case should be 4 years.

43 The CIETAC Award on July 17, 2012.

II Interpretation of the Contract and the Parties' Conduct

Section 1 The Consideration of the Principle of Good Faith

The general provisions of the CISG applicable to the full text thereof can guide adjudicators to better grasp it in practice. Article 7(1) of the CISG stipulates the general principles for its interpretation, emphasizing the importance of paying special attention to the nature and purpose of the CISG, that is, its international attributes, the Contracting Parties' obligation to promote the unified application, and the need of good faith in international trade. Such provision may seem very unspecific, but it plays an important guiding role in the interpretation and application of the CISG by the judiciary or arbitrators of the Contracting Parties, and can urge adjudicators from different legal systems not to be subject to the way of thinking, the knowledge system, and interpretation skills under their domestic laws, so to avoid the random interpretation of the CISG and different decisions for the same circumstance. At the same time, this provision also aims to avoid the parties' forum-shopping for their own benefits.

Article 7(1) of the CISG clearly stipulates the need of good faith in international trade be considered in the interpretation of the CISG. The principle of good faith means that the parties should be honest and trustworthy in the transaction, be loyal to the facts, cooperate in good faith, abide by the principles of fair trading and trade practices, and have no malicious intention to obtain illegal benefits.[44] Since the principle of good faith is one of the important basic principles of Chinese civil and commercial laws, the CIETAC tribunals generally attach importance to the principle of good faith in the adjudication process and apply this principle to determine the rights and obligations of the parties.

44 Zhang Yuqin, Interpretation of the United Nations Convention on the International Sale of Goods (the third edition), China Commercial Publishing House, 2009,p60.

If one party's performance lacks an explanation consistent with common sense and practice, it may constitute a violation of the principle of good faith. Some courts have pointed out that 'the interpretation of the parties' declarations and actions should be based on the literal meaning, the context of the contract and the principle of good faith. Of course, we still hope to find the parties' true intention through interpreting the contract, thus we need to consider the perspective of the other party'.[45] Article 125 of China's Contract Law also expressly adopts the same point of view, stipulating, '[I]f any disputes arise between the parties over the understanding of any clause of the contract, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions in the contract, the purpose of the contract, the transaction practices and the principle of good faith'. Similarly, Art. 142 of the Civil Code of PRC provides that The meaning of a manifestation of intent that is made to a counterparty shall beinterpreted according to the literal meaning of words used and in combination with the relevant articles, nature and purpose of the act, usual practices, and the principle of good faith.

For example, in the sulfur sales case,[46] the parties argued severely over the quality discrepancy of the goods under the contract. The parties raised no quality discrepancy regarding the inspection results of the goods at the loading port, but the claimant alleged the quality discrepancy based on the five damage appraisal reports issued by Company C upon re-inspection at the destination. The tribunal noted that the contract stipulated that the re-inspection at the unloading port should be carried out by an independent commodity inspection institution jointly appointed by the buyer and the seller. The respondent argued the five damage appraisal reports issued by Company C could not be taken as the ground for damage claims since Company C was entrusted by the claimant

45 Handelsgericht Aargau, Switzerland, 26 November 2008.

46 The CIETAC Award on September 21, 2009.

unilaterally instead of by both parties.

In this case, the tribunal noted the fact that the claimant sent a written notice to the respondent when the goods arrived at the destination port, requesting to re-inspect the goods according to the contract. However, the respondent went against the principle of good faith to ignore the claimant's request to appoint the independent inspection institution jointly, including the request to entrust Company C to re-inspect the goods at the destination. The respondent also ignored the claimant's request to negotiate at the claimant's place, but unilaterally engaged another company to issue an inspection report. Based on these facts, the tribunal found the respondent should bear the unfavorable legal consequences.

Section 2 Principle for the Interpretation of the Parties' Conduct

Article 8 of the Convention specifies the principle for courts and tribunals to follow when interpreting a party's statements or conduct. The provision states, '[F]or the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent' reflects the principle of subjective standards under an important additional condition 'where the other party knew or could not have been unaware what that intent was', which means the parties' consensus is essentially needed. [47]The consequence of Article 8(1) is that if the parties have a common understanding of the meaning of statements or conduct, their common understanding will serve as the standard of interpretation, regardless of what a reasonable person would understand in this situation. If Article 8(1) is not applicable,

47 U.S. District Court, Southern District of New York, United States, 18 January 2011, available on the Internet at www.cisg.law.pace.edu; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 844 [U.S. District Court, Kansas, United States, 28 September 2007].

then Article 8(2) applies providing, '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'. Accordingly, one party's conduct should be interpreted based on the understanding of a reasonable person who is in a similar position to the other party in the same situation. Article 8(3) sets out the evidence that can be considered when interpreting the parties' intentions, providing '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'. It is worth noting that the CISG does not use any rule similar to the US parol evidence rule to restrict the use of evidence outside the contract.

According to the CISG legislative documents and relevant cases, the interpretation rule of Article 8 can be applied not only to the interpretation of contract terms for the determination of the meaning of the contract, but also to the interpretation of the parties' statements and other conduct in negotiation and performance.[48] Generally speaking, Article 8 has a very broad scope of application, not only for the interpretation of the parties' statements and conduct at the negotiation stage (such as an offer, withdrawal of an offer, and rejection of an offer, etc.) for the determination of contract conclusion, but also for the interpretation of the parties' statements and conduct during the performance after the contract is concluded so as to explain the terms or wording of the contract.[49] Since Article 8 stipulates the rule for the interpretation of the parties' conduct and the contract, it is generally considered that contract interpretation rules

48 CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006]; Appellate Court Helsinki, Finland, 31 May 2004.

49 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p54.

under domestic laws should be excluded.[50] CIETAC tribunals have expressed the same view in some awards.

1. Interpretation through the Context and the Performance Purpose

In the 2004 urea sales case,[51] the two contracts involved contained no provision on the responsibilities and obligations regarding the seller's preparation of goods and the buyer's nomination of vessel while the parties only agreed in the shipping clause that 'Shipment time: The Buyer shall have the goods shipped in July 2012, latest date of shipment July 31'.

The respondent, based on the claimant's two emails in May, claimed that the claimant had repeatedly confirmed the goods would be ready for shipment in the last 10 days of June 2012, so the claimant breached the contract first due to its failure to get the goods ready. However, the claimant argued the respondent lacked factual or contractual ground for its claim since there was no contractual provision on the time for the claimant to get the goods ready while the dates mentioned in the two emails in May only referred to the supplier's delivery plan.

In the case, the meaning of the claimant's emails needs to be interpreted. The tribunal deemed, in the process of performing the FOB T contracts, the parties should further communicate and negotiate on issues such as the time for the seller to get the goods ready, the time for the seller to transport the goods to the loading port, the time for the seller to notify the buyer that the goods were ready, the time for the buyer to send the vessel nomination notice and the buyer's notification of the vessel name, the loading

50 CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006]; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

51 The CIETAC Award on December 26, 2014.

place, and the delivery time fixed within the agreed period (if necessary), so as to make up the unclear contractual provisions.

The tribunal, after checking the parties' emails after signing the contract, found that the parties accomplished the above-mentioned communication and negotiation in several rounds of emails during May and June 2012. As to whether such emails constitute the claimant's commitment to get the goods ready at a certain time, the tribunal held that:

(1)Under the two FOB T contracts involved in this case, the seller's obligation to deliver the goods and the buyer's obligation to nominate the vessel were separate and equivalent. The parties should make timely communication on the vessel nomination and goods preparation during the performance so as to ensure the smooth performance of the contracts since there was no contractual provision on such issues.

(2) It could be seen from the emails that the claimant had made consistent and positive answers to the respondent's question regarding the delivery plan, i.e., 'The factory delivery the Urea to domestic market and now our delivery plan is from the last ten days of June'. However, the above expression was ambiguous. The claimant's argument that the delivery plan was of the factory, i.e., the supplier of the claimant, instead of the claimant seemed logical based on the context. However, it was reasonable for the respondent to believe that the claimant had repeatedly confirmed the time to get the goods ready in the emails since 'our delivery plan' mentioned in the emails from the claimant to the respondent must be the claimant's commitment to the respondent.

The tribunal, considering the shipping clause in the contracts and the facts found during the hearing, deemed that the interpretation of the claimant's emails as the claimant would get the goods ready in the last ten days of June 2012 was reasonable and consistent with the contractual provision 'The Buyer shall have the goods shipped in July

2012, latest date of shipment July 31'. Legally, the shipping period under the contracts was clear. The claimant, as the FOB seller, should get the goods ready before the start of the shipping period since its obligation to prepare the goods was fixed according to the shipping period specified in the contracts. The claimant should have ready the goods before July 1 since the shipping period was July during which the Respondent should nominate the vessel for shipment. Thus, the claimant should be liable for its delay since it had not prepared the goods until July 20.

2. Interpretation according to Article 8(1) of the CISG

Under Article 8 of the CISG, the subjective standard should be adopted first in the interpretation of a party's conduct so as to find its true intent. However, Article 8(1) sets the premise for such true intent, i.e., the other party knew or could not have been unaware what that intent was, and the party could prove such claim.[52]

In the 2012 steel tube case,[53] there were multiple contracts between the buyer and the seller. The parties had no dispute over the total amount of arrears claimed by the seller. However, they argued over how the arrears should be allocated or distributed to various contracts. The seller claimed that the arrears were calculated on a rolling basis, so the buyer should clear the arrears under the contract in arbitration. The buyer argued that the so-called 'rolling delivery and rolling payment' was the seller's unilateral understanding. What happened was that due to a series of damage of goods disputes, the buyer started to pay for each shipment separately after negotiating with the seller the specific damage to each shipment. In order to differentiate these payments, the buyer specified the invoice to which the payment is paying in its payment instruction to Company D (a payment platform). These invoices all have their corresponding order or

52 CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997].

53 The CIETAC Award on July 17, 2012.

contract.

The tribunal noticed there was statement of the corresponding contract in the large amount of payment invoices submitted by the buyer, in other words, the buyer had truly intended to correspond its payment to each contract. However, the tribunal found such statement was handwritten and remarked by the buyer unilaterally. The buyer had not communicated to the seller such allocation of payment to a specific contract or invoice, so the seller had no way of knowing how the buyer allocated its payments. What the seller did know was only that it received a payment. Therefore, the tribunal held that it was reasonable for the seller to adopt the rolling bookkeeping method to calculate the payment in arrears in such circumstance.

Though we may infer that Article 8(1) should prevail from the wording, '[I]f the preceding paragraph is not applicable' in Article 8(2), it has been pointed out in many cases that the precondition for apply Article 8(1) is to find the parties' true consensus.[54] We cannot rely solely on one party's claim to explain the parties' true intent at the contract conclusion when the parties disagree on the meaning of a contractual provision. A purely subjective interpretation may undermine the other party's reasonable expectation of the contract.[55]

Section 3 Interpretation according to Article 8(3) of the CISG

Article 8(3) provides, '[I]n 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

54 MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A., 26 April 1999 U.S. Supreme Court [certiorari denied] 526 U.S. 1087 [1999].

55 John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed. (1999), p 115-123.

have established between themselves, usages and any subsequent conduct of the parties'. Accordingly, we can determine the meaning of the contract after considering the relevant situation at, before, or after the contract conclusion when the parties have different interpretations on the meaning of the contract after the contract is concluded.

Since CISG does not adopt the common law parol evidence rule,[56] tribunals, when trying to determine the parties' true intent during hearing, are not limited to the contract itself but will fully consider all the relevant situation in contract conclusion and performance and all the relevant evidence according to the spirit of Article 8 (3) of the CISG.[57] We have also noticed that the way of determining the parties' true intent according to the relevant evidence before and after contract conclusion and during contract performance is widely adopted by courts and arbitral tribunals in various countries.[58] An Austrian court exemplified that the parties' conduct may involve the acceptance of the goods, payment of the goods, and the issuance of signed invoices.[59] Additionally, we have noticed that courts may also consider various actions such as preparing for contract performance, stocking, applying for a letter of credit, making advance payment, and receiving goods without complaint.[60]

1. The Situation before Contract Conclusion

In the 2004 production line sales case,[61] the contract was signed as the result of a bidding process in which the seller won the bid. In the bidding process, the buyer clearly stated

56 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p56.

57 CLOUT case No. 413 [U.S. District Court, Southern District of New York, United States, 6 April 1998].

58 CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006].

59 8 Oberlandesgericht Linz, Austria, 23 March 2005.

60 Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005.

61 The CIETAC Award on July 13, 2004.

in the tender document that 'the entire production line shall meet GMP requirements, including equipment cleaning, equipment sterilization and equipment lubrication system' and the seller stated in the Technical Specification Response Form bidding document that it would 'meet the requirements' under the corresponding Bidding Specifications. Furthermore, the buyer stated in the Specifications and Technical Parameters Deviation Table tender document that 'the entire line meets GMP requirements ...' and the seller stated it would 'meet the requirements' under the corresponding Specifications. The tribunal noted that item 1.12 regarding the equipment sterilization requirement in the Technical Specifications bidding document was marked with the sign of '*' while it was stated in the remarks of the list of bidding documents that those marked with '*' in the technical specifications were the key technical parameters of which any deviation would result in cancellation of bid.

The buyer and the seller signed the contract of this case in which the parties agreed 'the equipment and the entire production line shall meet GMP requirements' after the bidding company had issued the bid winning notification to the seller on behalf of the buyer, but the original expression 'including equipment cleaning, equipment sterilization, and equipment lubrication system' in the tender document was missing. The parties agreed that the seller's contractual obligation should include equipment cleaning and lubrication system but argued over whether it should cover equipment sterilization.

The arbitral tribunal noted that the seller had agreed in the bidding documents that it 'shall perform the contractual responsibilities and obligations in accordance with the bidding documents' and 'the bidder has reviewed all bidding documents in detail' although it was not provided in the contract that the bidding documents and the parties' correspondent should form part of the contract.

The tribunal deemed that the statement in the bidding documents that the equipment should meet GMP requirements including the cleaning, sterilization, and lubrication system was unambiguous, and the parties clearly knew any deviation from such key technical parameters would cancel the bid. The seller clearly stated in the bidding documents that it would 'perform the contractual responsibilities and obligations in accordance with the bidding documents' and 'meet the requirements'. Therefore, the key technical parameters including the equipment sterilization should be the substantive content of the contract. Moreover, Articles 46 and 59 of China's Tendering and Bidding Law which was applicable to this case provides that the bid inviting party and the bidder, when entering into a contract based on the bidding documents, should not enter into any other agreement contrary to the substantive content of the contract. Otherwise, they would be ordered to correct such mistake.

In view of the above, the tribunal determined that the contract equipment provided by the seller should meet GMP requirements, including equipment cleaning, sterilization, and lubrication system, and the seller should have delivered the equipment with the function of sterilization.

2. The Performance Process

A considerable number of courts believe that the parties' conduct after contract conclusion can better reflect the meaning of the parties' declaration or specific provisions in the contract. For example, a court confirmed the parties had reached a valid agreement and determined the specific quantity of goods under the contract according to the parties' conduct after the contract conclusion. The court held that in the absence of evidence to the contrary, the parties' conduct after the contract conclusion could reflect their intentions. In one case, the court held the buyer's request for the seller's issuance of

relevant invoice was sufficient to prove that the buyer confirmed the parties had reached a valid agreement and the seller had delivered the goods in the quantity specified in the agreement since the buyer made no claim for discrepancy in quantity until two months later.[62] In some cases, the courts find one party's silence may constitute acceptance of the offer under Article 8(3) of the CISG.

In the 2004 paraffin wax sales case,[63] the parties had agreed in the contract the name of the commodity as 'Semi-refined Paraffin Wax, Yellow Grade' and the specification as 'Melting Point: 58 / 60C, Oil Content: 2% Max, Color: Yellow'. However, the parties disputed over the commodity specified in the contract. The buyer claimed that the seller should deliver the 'semi-refined paraffin wax' as stated in the contract while the seller argued the parties had agreed on 'chemical wax' instead of 'semi-refined paraffin wax'.

The tribunal found that the buyer sent an email to the seller on July 7, 2002 after signing the contract, stating 'concerning 2070 MT 58/60 chemical wax, our company confirms and has booked the ship'. The buyer restated in its email on July 9, 2002 that '58/60 chemical wax in two batches (2010+60) MT, please apply for permits of the two batches. The payment method may be CNF: USD410/MT, we have negotiated with the shipowner, you pay USD60/MT freight to the shipowner, the shipowner will give you the formal invoice'. The content of the two emails from the buyer to the seller clearly indicated the commodity under the contract in this case was 58/60 chemical wax. Even after the dispute occurred, the buyer's representative still stated in his correspondence to the manager of the seller on November 4, 2002 '[A]ccording to laboratory tests in the US, this batch of chemical wax has been severely oxidized'.

The seller alleged 'before signing the contract, the representative of the buyer's office

62 CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997].

63 The CIETAC Award on January 15, 2004.

in China went to check the goods in the factory producing this batch of wax. They knew it then the wax was chemical wax instead of semi-refined paraffin wax'. The buyer did not deny the fact that its representative checked the goods on site in its statement but pointed out the goods delivered was not the batch of chemical wax produced in December 2001 checked by its representative but those produced in April 2002. Furthermore, the buyer should have known the goods was chemical wax since it was shown in the photo attached to the SGS Inspection Certificate submitted by the buyer in which each packaging bag was clearly marked with 'chemical wax'.

It could be found through the parties' expression during performance that 'semi-refined paraffin wax (yellow grade) stated in the contract was not the parties' true intent. Instead, it was supported by lots of facts after the contract conclusion that the actual commodity in the transaction was 'chemical wax'. Therefore, the tribunal rejected the buyer's claim that the commodity involved in this case should be 'semi-refined paraffin wax (yellow grade)'.

3. Due Consideration of All the Relevant Facts

In the 2009 children's tent sales case,[64] the respondent received an order from Company D to purchase children's tents at the end of May 2008. Company D ordered the tents for Thanksgiving and Christmas in 2008 and had obtained permission from relevant intellectual property owners. The respondent remitted 20% advance payment of the order to the claimant on June 24, 2008 for the preparation of goods and signed the order with the claimant on June 25, 2008. On June 26, 2008, the claimant signed the purchase contract with Company C, a third party, which was completely consistent with the specifications and quantity of the ordered goods, to purchase the contracted goods

64 The CIETAC Award on September 9, 2009.

from the third party. On August 1, 2008, the claimant and the respondent signed the sales contract.

On September 5, 2008, the respondent called the claimant to negotiate the payment, requesting the claimant to deliver all the goods after the respondent made the further payment. On September 6, the respondent sent an email to the claimant, stating, 'according to last phone call, we agree to make additional down payment and T/T 30 for the rest of the balance. The payment will be arranged in the middle of the next week, please cooperate with us for the shipment'. The respondent remitted USD 80,000 to the claimant on September 9, 2008. The seller replied in the email on September 10, 2008 that '…after receiving the bank bill, I may ask the accountant to check the account so as to arrange the shipment'. On September 16, 2008, the claimant notified the respondent that it had received the payment but the factory refused to deliver the goods because the factory could not reach an agreement with the processing factory on the payment of goods. On September 19, 2008, the claimant sent the amended sales contract to the respondent by email, stating 'we have amended the payment clause of the contract and specified the paid amount, we guarantee to ship the goods immediately after receiving all the balance'. Thereafter, the respondent made no further payment while the claimant delivered no goods.

The difference between the parties' interpretation was that the claimant alleged that the September 6 email could only be regarded as a new offer, while the respondent argued that the September 6 email was the confirmation of the agreement reached on September 5. The tribunal held that there was no written form requirement for contract amendment under the CISG. The key issue was not how the contract was amended. It does not matter if the September 6 and 10 emails were the confirmation of what was agreed in the September 5 email, or the September 6 email constituted an offer to which

the September 10 email accepted. What matters here is whether the contract had been amended and the content thereof.

The tribunal held that 'we' in the e-mail on September 6, though being plural, only referred to the respondent because when used later, 'we' refer to the respondent who was the only party under the payment obligation. However, the tribunal still needed to consider various factors to determine whether 'we agree' which only referred to the unilateral agreement of the respondent, constituted the parties' consensus because the tribunal should determine the meaning of the respondent's expression in the email on September 6 according to Article 8, especially paragraph (3), of the CISG. Therefore, the tribunal should take the claimant's email on September 10 into consideration as 'subsequent conduct of the parties' to further determine the parties' true intent though this email was not a direct reply to the email on September 6.

It could be found from the content of the email on September 10 that the claimant had obviously agreed to the respondent's further payment. In the meantime, the claimant's objection to the starting point of '30 days' for T/T 30 showed its consent to the payment of balance by T/T within 30 days. Therefore, the parties had reached consensus to amend the contract while the tribunal only needed to determine the specific scope and content of such consensus.

The claimant alleged that it had accepted the respondent's email on September 6, 2008 and amended the payment method specified in the contract on September 18, 2008 at the request of the respondent, stating 'specified the paid amount, we guarantee to ship the goods immediately after receiving all the balance'. The respondent replied in writing to thank the claimant for the amendment on September 20. So far, the parties had reached agreement on the amendment of the contract. The tribunal held that the

amendment was just 'specifying the paid amount' since the claimant had never changed the request of shipment upon full payment. However, the claimant's inquiry about the payment on September 10 was sufficient to show the parties' consensus on the further payment, so the conduct of specifying the paid amount on September 18 could only be regarded as the post confirmation in the form of a contract.

The key issue of this case was whether the sequence of performance had been changed. The parties debated over the sequence of performance, focusing on the starting point of '30 days' for 'T/T 30' and the meaning of 'arranging the shipment'.

Concerning the starting point of '30 days', the claimant alleged that there was no clear expression for the starting point of '30 days' in the email. The parties had never agreed on the definition or interpretation of 'T/T within 30 days' in the emails or had the usage of 'T/T within 30 days' for 'T/T within 30 days before shipment' or 'T/T within 30 days after shipment'. According to common linguistic logic, if a statement of period does not specify its starting point, then the starting point shall be the time when the statement is made or the time most approximate to that stated period. The respondent argued that the claimant had never set October 5, 2008 as the payment deadline. The claimant set the deadline on September 23 for the respondent to pay the balance after the factory had refused to deliver the goods. If the content of the supplementary agreement reached by the parties on September 5, 2008 was as alleged by the claimant, the deadline for the respondent's payment should have been October 5, 2008. However, such date or similar dates had never been mentioned in the various evidence submitted by the claimant.

The tribunal noted that the parties' use of the term 'T/T' was associated with shipping in the contract on August 1, 2008. The claimant also used the term along with shipping in its proposal at the end of August 2008. The tribunal, considering the above, found that

the starting point for the '30 days' should be the day the goods were shipped.

Concerning the meaning of 'arrange the shipment', the claimant alleged that the expression '…after receiving the bank bill, I may ask the accountant to check the account so as to arrange the shipment' did not mean that the respondent would be exempted the obligation of paying the balance before shipment after the claimant received its additional down payment. 'Arrange the shipment' referred to the claimant's cooperation with the respondent's Shanghai company to make advance shipping schedule, so that the goods could be shipped immediately after the claimant received the full payment. The respondent argued that the claimant, in its reply on September 10, 2008, only mentioned it would 'arrange the shipment' after the accountant confirmed the receipt of the additional payment but never mentioned the shipment could only be made after full payment.

The tribunal held that the meaning of 'arrange the shipment' was ambiguous. Regard should be given to the original contract before amendment, since the phrase above concerned the amendment of August 1 contract. The parties had agreed in the August 1 contract the price term should be 'FOB Shanghai', so the seller was obliged to deliver the goods to the vessel nominated by the buyer on the specified day or within the specified period at the designated loading port and in accordance with the normal practice at the port. 'Arrange the shipment' should be regarded as the performance of such obligation when the parties had not changed the price term unless otherwise specified. According to Article 8(1) of the CISG, 'arrange the shipment' stated in the emails on September 6 and 10 could only be interpreted according to the claimant's understanding when the respondent 'knew or could not have been unaware what that intent was'. In this case, there was no reason that the respondent 'knew or could not have been unaware' of the claimant's understanding thereof. Therefore, 'arrange the shipment' should refer to the

shipment of goods instead of the claimant's cooperation with the respondent's shanghai company for the advance schedule of the shipment. The expression '…after receiving the bank bill, I may ask the accountant to check the account so as to arrange the shipment' should be interpreted as the claimant should have shipped the goods after receiving additional down payment.

4. Usages and Practices

International trade originates from the businessperson's practice, so there are lots of usages and practices in international sales of goods. Usages and practices can solve the problem of unclear agreement between the parties as supplements and interpretation of contractual provisions. The consideration of usages and practices would help the awards be in line with trade practices and tribunals better understand the parties' true intent. Based on the above, Article 9 of the CISG stipulates the circumstances under which the parties should be bound by usages and practices. Firstly, Article 9 (1) provides '[T] he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves'. Secondly, Article 9(2) sets the condition for implied application of usages as 'the parties knew or ought to have'.

Some courts have pointed out usages and practices should be regarded as part of the contract implicitly agreed by the parties and have the same effect as the contract itself.[65] One court held that the parties, if intended to exclude the usages and practices, should have explicitly done so in the contract.[66] Another court stated that usages and practices should be automatically merged as part of the agreement between the parties unless the

65 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p63.

66 CLOUT case No. 579 [U.S. District Court for the Southern District of New York, United States, 10 May 2002].

parties had specifically excluded them.[67] The 2016 UNIDROIT Principles clearly shows the respect of usages and practices in modern commercial laws, stipulating in Article 1.9(1) '[T]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves'.[68]

Some courts have pointed out the usage mentioned in Article 9(1) is not necessarily an international usage but can be a regional one to which the parties know or can agree.[69] However, courts and adjudicators need to further interpret 'usage' in the application of the CISG because, as pointed out in the 2016 UNCITRAL Digest, Article 9 is about the applicability of usage while the validity and constitution of usage are up to domestic laws.[70]

According to the 2016 UNCITRAL Digest, at the heart of the respect for usage and practices in Article 9 is the respect for party autonomy and parties' consensus.Generally speaking, usage and practices shall prevail if the CISG has different provisions.[71] The contract terms should take precedence over usage and the parties' practices prevail over normal usage.[72]

In the 2004 urea sales case,[73] when determining whether the seller had prepared the goods, the tribunal considered that the subject matter of the contract (urea) was bulk

67 CLOUT case No. 579 [U.S. District Court, Southern District of New York, 10 May 2002], also available on the Internet at www.cisg.law. pace.edu.

68 The 2016 UNIDROIT Principles, Article 1.9 (1).

69 CLOUT case No. 579 [U.S. District Court for the Southern District of New York, United States, 10 May 2002].

70 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p63.

71 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p64.

72 CLOUT case No. 777 [U.S. Court of Appeals (11th Circuit), United States, 12 September 2006].

73 The CIETAC Award on December 26, 2014.

goods which has fluctuating market price. Therefore, the way of 'basing purchase on sales prospect', i.e., purchasing a batch of goods after obtaining an order, was not necessarily adopted in the transaction of such goods, meaning that the seller could purchase goods from time to time and store them in a port warehouse. Once the buyer had determined the shipment date, the seller could make temporary adjustment and deliver the goods stored at the loading port at any time. Therefore, the tribunal found the seller had specific goods with which it could have performed the contract around the shipment date specified in the contract and thus, performed its contractual obligation of preparing the goods when the seller provided sufficient evidence that it had signed the purchase contract with the supplier. In this case, the tribunal took into account the practical situation in international transaction of bulk goods and made an accurate determination of the parties' obligations.

In the 2003 steel pick sales case,[74] the subject matter under the contract, the steel pick, was a dumped product determined by the US Department of Commerce. The seller, after having responded to the anti-dumping review of the product, was finally exempted from the anti-dumping tax at the rate of 98.77%. However, it must declare the relevant documents for each import of steel picks according to the time limit and procedures prescribed by the US Department of Commerce. The steel picks imported into the United States under the contract of this case should have been submitted for review in the ninth round, but the seller had not done so, resulting in the US Customs recovering 98.77% anti-dumping tax and interest from the importer (the buyer). After the buyer had paid the anti-dumping tax and interest to the US Customs, the buyer claimed for compensation of the loss ($12,636.99) due to the seller's mistake.

The tribunal, through investigating the long-term transactions between two parties,

74 The CIETAC Award on December 10, 2003.

found that when the dispute in this case occurred, the seller had declared 10 times for the review of the exemption of 98.77% anti-dumping tax on picks exported to the United States according to the requirements of the US Department of Commerce. This practice had become a long-standing practice between the seller and its trading partner (the US importer). The tribunal rejected the seller's argument that the declaration for review by the US government was not a prerequisite for the parties' conclusion of the contract and it had the right to choose whether to participate in the subsequent annual review because any businessman in international trade knew that if the seller did not give the buyer a relative guarantee to declare for anti-dumping tax exemption review, no one would buy the products with such high anti-dumping tax.

Therefore, the tribunal supported the buyer's claim according to Article 9 of the CISG mainly because the parties knew or should have known the practice of declaring for review when exporting steel picks to the United States which was also widely known and observed by practitioners in the industry. This practice had constituted an implied condition of the contract in this case and turned into the seller's contractual obligation instead of an obligation of assistance as argued by the seller.

On the other hand, the tribunal also relied on Article 9 (1) and (2) of the CISG to reject the seller's argument that the buyer should have provided the ship's arrival date because it was not a practice binding the parties. Firstly, the respondent alleged its failure to file the annual review in the ninth round was due to the claimant's failure to provide the ship's arrival date. The tribunal held that, under the CFR (CNF) price term in this case, the buyer was not obliged to notify the seller of the ship's arrival date as per Incoterms 2000. Secondly, there was neither contractual provision nor usage that the buyer should notify the seller of the ship's arrival date. Finally, the seller could not prove it was a common practice only with several faxes in which the importers notified the seller of the ship's

arrival dates. Obviously, the buyer's notification of the ship's arrival date alleged by the seller could meet neither the conditions in Article 9(1), i.e., 'the parties have agreed', nor that in Article 9(2), i.e., 'the parties knew or ought to have known'.

5. Determination of the Effect of External Evidence in Contract Interpretation

We have noticed that in the absence of parol evidence rule in the CISG, Article 8(3) allows courts or arbitral tribunals to interpret the parties' consensus according to external evidence such as usage, practices of the parties, and negotiation situations. In practice, if there are various kinds of evidence at the same time or the parties to the dispute present contradictory evidence, tribunals need to choose among them. Tribunals should generally give priority to the clear provisions of the contract and the meaning embodied in the context, then consider the parties' expressions in the performance and contract conclusion process, and finally consider usage and the parties' practices because the purpose of interpreting the contract or the parties' conduct is to discover the parties' true consensus while the clear contractual provisions and the parties' expressions during performance are more likely to reflect the parties' true intent than usage or the parties' practices.

In the 2006 fluorite sales case,[75] after signing the three contracts involved, the respondent buyer entrusted Company C and CIQ Shanghai to conduct the first preliminary sample inspection of the goods delivered by the claimant on November 18 and 19. The inspection report showed that the quality of the goods did not meet the contract requirements, i.e., the CAF2 content was lower and the SIO2 content was higher than the contractual specifications. The parties agreed through negotiation to conduct a second inspection by CIQ Shanghai and Company C whom took samples together but

75 The CIETAC Award on February 16, 2006.

made separate tests. The second inspection report also showed a quality discrepancy. The respondent entrusted Company C to conduct the third sample inspection of the goods during the loading process on December 10 and 11, which showed a quality discrepancy. The claimant could not submit the negotiation documents before the L/C expired mainly because it had failed to obtain the quality certificate and weight certificate issued by China CIQ as one of the negotiation documents in time. The respondent entrusted company C to conduct the sample inspection while unloading the goods after the goods arrived at the destination port on January 17 of the following year. Company C issued the final inspection report, again showing the quality discrepancy.

The claimant, during the negotiation process after CIQ Shanghai issued the inspection report in December, unilaterally entrusted CIQ to inspect the goods and got the inspection report showing the CAF2 content was about 88% which was in accordance with the contract. The claimant alleged the quality of goods should be determined according to the CIQ inspection certificate since Article 10 of the three contracts stipulated the negotiation documents should include 'the quality certificate and weight certificate issued by China CIQ' and such practice had been adopted by the parties.

In this regard, the tribunal noted that Article 12 of the three contracts stipulated 'any quality of quantity discrepancy shall be claimed within 15 days after the goods arrive at the destination port'. Meanwhile, the tribunal noticed that the respondent stated in its email on November 26, 2004, that the respondent and the supplier-claimant would conduct joint sampling inspection, and the test result issued by Company C and CIQ should be the final determination of the goods' quality. After the claimant informed the respondent the result of its unilateral testing (showing the CAF2 content was around 88%), the respondent expressed its disappointment in its email dated December 3, 2004. The respondent further stated that it would need to see if the unilateral test

result would conform to the result of testing conducted upon loading and unloading. Subsequently, loading test and unloading test were conducted. Additionally, before the shipment arrived at the destination port, the respondent stated in its email dated January 13, 2005, that it would take the unloading test result issued by Company C as the final determination of the quality of the goods under the disputed contract. Claimant did not object to the respondent's above request throughout the performance of the contract.

The tribunal, considering the above, deemed the reasonable interpretation of Article 12 of the three contracts as that the buyer should claim any quality or quantity discrepancy of the goods according to the result of the inspection by company C within 15 days after the goods arrived at the destination port except for the specified circumstances under which the insurance company or other institutions should be liable. In other words, the inspection result at the destination port had priority over the CIQ inspection result at the loading port. Even if the parties had formed the practice of using the CIQ quality certificate to determine the quality of goods in previous transactions, the effect of such practice was lesser than that of the parties' agreement in the contracts or the parties' true consensus shown in the performance of the contracts.

III Contract Formation and Amendments

Section 1 Contract Form Requirement

Article 11 of the CISG stipulates, '[A] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses'.When acceding to the CISG, China made reservation on Article 11 since it had required all foreign-related economic contracts be in written form in accordance with the Foreign-related Economic Contract Law in its early stage of reform and opening up. Although the validity of oral contracts was

recognized in China's Contract Law coming into effect in 1999, China, considering the complexity of foreign-related economic contracts and the certainty of contracts, did not immediately withdraw such reservation thereafter. China finally withdrew its reservation to Article 11 in 2013, thus the parties would no longer be required to use written form when entering into contracts for the international sale of goods.

At the same time, the Chinese courts and tribunals have noticed the wide use of emails and WeChat in contract negotiation and conclusion. For example, Article 116(2) of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China provides that electronic data refers to e-mail, electronic data exchange, online chat records, blogs, weblog, mobile phone messages, electronic signatures, domain names, and other information formed or stored in electronic media. As shown in the awards, the CIETAC tribunals generally respect the common practice of contract conclusion and evidence preservation through electronic data exchange.

Section 2 Contract Formation

Modern contract laws generally confirm contract conclusion by way of offer and acceptance without the need of the parties signing the same written document, which guarantees a smoother transaction so that the parties can cope with the rapid changes in international market. However, forming a contract by way of offer and acceptance poses a challenge to the adjudicators: how to determine whether the parties have concluded a valid contract through written or verbal communication regarding the transaction? In practice, those who are in the international sale of goods business communicate on a daily basis with others concerning entering into a contract, during which parties frequently send to each other proposals on contract conclusion and replies thereto.

The tribunal needs to investigate when and how the parties have reached the binding agreement.

1. The Determination of an Offer

When determining contract conclusion by way of offer and acceptance, adjudicators need to find a valid offer in the parties' communication first because negotiation only could not constitute a valid offer either under the CISG or the contract laws of most countries. The precondition for the contract conclusion by way of offer and acceptance is one party sends an offer to the other party. Article 14 of the CISG provides three elements of an offer, i.e., (1) a proposal for concluding a contract addressed to one or more specific persons, (2) it is sufficiently definite, and (3) it indicates the intention of the offeror to be bound in case of acceptance, of which the last one is the most important and the hardest to determine.

In practice, the courts of various countries may judge whether the parties have such intentions based on various factors. For example, in one case, the court held that the buyer's statement of 'we order' and request for 'immediate delivery' in the order showed its intent to be bound by acceptance because the buyer had paid for the goods delivered by the seller.[76] In another case, the court held the order did not constitute an offer because the party that issued the order had reserved the right to refuse the contract conclusion.[77]

Therefore, tribunals, when determining the constitution of an offer, normally need to comprehensively consider the factual background and various factors such as negotiation situation and the parties' usage and practices according to Article 8(3) of the CISG.

76 CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995].

77 Kantonsgericht Zug, Switzerland, 2 December 2004.

In the 2014 monoamine phosphate sales case (2),[78] the parties disagreed on the existence of a valid contract. The main controversy focused on the interpretation of an email from the claimant to the respondent, stating '[D]ear Paul, Sorry to reply this email late Regarding our contract due to the price adjustment of Railway transporting Last week, the Factory delayed transporting our Cargo to the port. Hope you can understand this unforeseen situation.Transporting work would continue and according to the new delivery schedule, we suggest the end of Jun 25th-30th Jun...Sorry to bring you inconvenience. If any update, we will note you in time. If you have any question feel free to contact us...'. The tribunal, based on Article 14(1) of the CISG, rejected the claimant's claim that the above email constituted an offer and deemed it as an offer invitation since the expression '[I]f any update, we will note you in time, if you have any question feel free to contact us…' was 'not quite certain' and showed no intent of being bound by the acceptance.

Further, in the 2012 zircon sand sales case,[79] the claimant sent the email on May 26, stating '…Now we clearly understand the difficulties on your side about our contract and L/C carrying out. Actually we can get even cheaper price here from China, which is more convenient to manage either the transportation or quality control etc. So we prefer to buy from local market. So we still hope you can make the compensation for our fund problem only. My manager is checking with our bank about our interest and calculating the loss because of fund problem. She will get an exact number tonight (we are really very busy in exhibition today), and will inform you tomorrow morning…' which showed the claimant (1) euphemistically rejected the price requested by the respondent for its purchase of goods and indicated it could purchase the goods at a cheaper price from China, and (2) only hoped that the respondent would compensate for the loss

78 The CIETAC Award on January 9, 2014.

79 The CIETAC Award on May 21, 2012.

of the L/C fund and indicated it would notify the respondent of the exact amount of compensation after checking with the bank. The tribunal held that the claimant's email could not constitute an offer since it was only an uncertain suggestion on the respondent's compensation.

Then, the claimant sent the second email in the evening of May 26, 2011, stating 'Let's help each other to overcome this difficulty, and move up to try next time cooperation. After calculation on our side, the total loss because of L/C is nearly 30,000 USD'.

The tribunal deemed that the claimant made it clear in the above email that compensation amount should be nearly 30,000 USDthough the email was quite short. Therefore, the claimant's second email in the evening of May 26 should be taken as a valid offer that met legal requirements since it was quite certain and showed the claimant's intent to be bound by the respondent's acceptance. It can be seen that, an offer, unlike an offer invitation, must contain the offeror's explicit intent to be bound by the other party's acceptance. The parties' concern in this case was the amount of compensation, so an offer must contain the key factor in the compensation agreement, i.e., the amount of compensation.

2. Formation of the Contract

Chapter II of the CISG contains a whole set of legal provisions on formation of the contract by way of offer and acceptance, including the definition of an offer or acceptance, the way of making an offer or acceptance, and the time an offer or acceptance becomes effective. CIETAC tribunals, in cases to which the CISG is applicable, would follow the rule system in Chapter II to determine if a contract was formed and how. In the 2014 urea case,[80] the claimant stated in Article 5 of the offer that the goods should

80 The CIETAC Award on December 26, 2014.

be ready by the end of June and 'The offer shall be kept strictly confidential and remains valid until 17PM of April 17th'.The respondent, after receiving the offer, responded with the contract containing supplementary conditions on April 18, 2012 which omitted the 'CARGO READY' clause and changed the unit price in the offer. The claimant, after receiving the contract sent by the respondent on April 18, signed and stamped the contract.

The tribunal, considering the parties' above conduct, held that the respondent's reply to the offer with the contract was beyond the time limit specified in Article 9 of the offer. Article 18(2) stipulates, '[A]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time…'. Accordingly, the claimant should not be bound by the offer since the respondent's acceptance did not reach the claimant within the specified time. Article 19(1) of the CISG provides, '[A] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer' and Article 19(3) stipulates, '[A]dditional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially'. The contract containing the main and general transaction conditions sent by the respondent on April 18 was essentially a new offer from the respondent in the form of a contract. The claimant's signature and seal on the contract constituted its acceptance of the respondent's new offer, thus the parties should use the conditions and terms stated in the contract as the basis for their rights and obligations.

In the 2017 chromite ore sale case,[81] the parties negotiated on the price of chromite ore through WeChat. The claimant received the respondent's email with the standard contract attached at 10:57am one day, stating, 'our current best offer is USD228 / ton CFR Tianjin. The contract is attached, hope we can complete the offer and acceptance today'. The claimant, after receiving the email, responded by email at 2:55pm on the same day, stating 'We accept your offer, pls arrange contract. Tks!'. The claimant sent another email to the respondent at 4:17pm on the same day, stating 'please check the attachment' while the attachment was clauses supplementary to the respondent's standard contract, clarifying whether transshipment was allowed and the payment time. The respondent informed the claimant there could be no more progress due to the problem of container freight. Then, the parties reached no agreement on the further performance of the transaction.

In this case, the respondent believed that the contract containing the arbitration agreement had not been effectively concluded, and therefore CIETAC tribunal had no jurisdiction. The reasons mainly included: (1) the parties had not reached the final consensus on the contract since the standard contract attached to the offer from the respondent at 10:57am contained no shipment clause and other important clauses; (2) the claimant's reply at 2:55pm was only an acceptance to the main body of the respondent's email received at 10:57am excluding the attached contract while the contractual clauses attached to the claimant's email at 4:17pm constituted a withdrawal of acceptance and a counter offer; (3) the contractual clauses attached to the claimant's email at 4:17pm constituted a withdrawal of offer and a counter offer due to the substantial modifications on the clauses in the respondent's offer, including the transport clause; and (4) The parties never signed a formal contract.

81 The Decision on Jurisdictional Objection in the ore sales case, April 2017.

In this case, the tribunal held that the requirement for contract formation in the CISG was by way of offer and acceptance instead of the parties' signature on the same contract. The tribunal noted both parties admitted that the respondent's email and the attached contract reaching the claimant at 10:57am constituted a formal offer in their written statements and oral presentations during the hearing. Therefore, the key issue of this jurisdictional dispute was whether the claimant made a timely and valid acceptance.

The respondent stated in its offer the price of the goods and '[A]ttached pls find the contract terms'. Both parties admitted in the hearing that the respondent's email and the attached contract constituted an offer as a whole. As a large commercial company engaged in international trade for many years, the claimant should have fully noticed the contract terms attached to the mail mentioned by the respondent in the offer, and should have fully understood the legal consequences of the contract formation as soon as it accepted the offer. The offeree's assent to an offer constituted an acceptance according to Article 18 of the CISG while the contract formation would not be influenced even if the offeree had not fully examined the attached contract terms and the offeree should bear any consequence thereof.

Considering the above, the tribunal held that the claimant's email with the modifications on contract terms reaching the respondent at 4:17pm should not influence the contract formation. Article 18(2) of the CISG stipulates, '[A]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror', so the contract had been formed with the respondent's offer including the email and the attached contract terms as the content of the contract. The different terms attached to the claimant's email at 4:17pm could only constitute the modification suggestion on the formed contract while the contract formation should not be influenced if the respondent refused to accept such suggestion and thus, no modification was made to the contract.

As for the claimant's claim that the contract was not effectively formed since the parties had not reached an agreement on the important terms, the tribunal held that 'goods', 'quantity', and 'price' were the essential components of an offer. The contract was formed upon the offeree's acceptance since Article 14 of the CISG stipulates '[A] proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price'. The CISG provisions or usage can supplement the contract when the parties fail to agree on certain terms.

The tribunal respected the basic legal principle of contract formation by way of offer and acceptance adopted by the CISG in the award and did not determine the contract formation according to the parties' signing the contract jointly, which alsoembodied the basic spirit of modern contract laws and the CISG that a contract was formed upon the offeree's acceptance so as to facilitate contract formation and transactions.[82]

The above view is consistent with the basic concept of the UNCITRAL and the view shown in the precedents of some Contracting Parties. In practice, the parties may not specify the quality, quantity, and price in the proposal for contract conclusion. Article 14 of the CISG does not require an offer to include all the contract terms. If the parties have not agreed on the place of delivery, delivery period, or mode of transport, the CISG can fill the gap.[83] The 2016 UNCITRAL Digest also mentioned that Article 14 of the CISG

82 The Contract Establishment Criteria under the CISG-From the Perspective of an Award, https://mp.weixin.qq.com/s/Lntn7QnZuVHsRS3Smm9pAA, last visited on May 8, 2010.

83 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p86-87.

See CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995], English translation available on the Internet at www.cisg. law.pace.edu. (Contract for purchase of software enforceable even if parties intended further

does not require an offer to include all the contract terms. Even if the parties had not yet agreed on the place of delivery, the time of shipment, or the method of transportation, the CISG would serve as the supplement to fill in the gap.[84] In practice, adjudicators can still determine whether the parties have the intention to conclude a contract or confirm matters not specified in the contract in accordance with Article 8 of the CISG as the CISG does not require the offeror to specify all the matters to constitute a valid offer. It is widely recognized that even if the parties have not agreed on the important contract terms, the contract can still be formed. For example, a Swiss court held that the contract conclusion should not be influenced by the fact that the parties had not agreed on the mode of transport.[85] A German court held that the contract formation should not be hindered by the parties' failure to agree on the place of delivery.[86] In some other precedents, the adjudicators held that the contract could still be formed even if the parties had not agreed on the price required by Article 14 when the price could be determined according to usage or by other ways.[87]

In fact, with regard to contract formation, Chinese law basically adopts the same legal rule as the CISG. Article 13 of the Contract Law states that '[T]he parties shall conclude a contract in the form of an offer and an acceptance' and a contract shall be formed when the acceptance takes effect. Similarly, Article 1 of the Interpretation II of the Supreme People's Court on Several Issues Concerning the Application of the Contract Law of

agreement with respect to use of software); CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (article 31 (a) applies when buyer was unable to establish parties agreed on different place).

84 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p8.

85 SWITZERLAND: Bezirksgericht der Saane (Zivilgericht) 20 February 1997, Case law on UNCITRAL texts (CLOUT) abstract No. 261.

86 GERMANY: Amtsgericht Duisburg 13 April 2000, Case law on UNCITRAL texts (CLOUT) abstract No. 360.

87 SWITZERLAND: Handelsgericht des Kantons St. Gallen 5 December 1995, Case law on UNCITRAL texts (CLOUT) abstract No. 330.

the People's Republic of China provides, '[W]here there is any dispute over whether a contract has been formed between the parties, if the people's court is able to determine the names of the parties, subject matter, and quantity, generally, it shall determine the contract as having been formed, unless it is otherwise provided for by law or agreed on by the parties. Where the parties fail to reach an agreement on any missing content of a contract other than that as mentioned in the preceding paragraph, the people's court shall determine it in accordance with the relevant provisions of Articles 61, 62 and 125 of the Contract Law'. Similar rules with Article 13 of the Contract Law about contract formation have been adopted by the Civil Code of PRC, of which Article 471 provides that the parties may conclude a contract through the use of an offer, acceptance or other methods.

3. Factors Constituting Substantial Changes under Article 19 (2) of the CISG

Article 18 of the CISG provides that '[A] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance'. Article 19(1) stipulates, '[A] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer'. Furthermore, Article 19(3) provides, '[A]dditional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially'. Accordingly, the CIETAC tribunals generally consider the modifications on price, payment, quality and quantity of goods, place and time of delivery, scope of liability, or dispute resolution clauses as substantial changes. The CIETAC tribunals have also determined that, as long as these matters are involved, the modification, no matter of the contract itself or of the supplementary agreement, should

be regarded as a substantial modification.

In the 2002 goods sales case,[88] the tribunal deemed the claimant's sending the signed and sealed contract and supplementary agreement to the respondent by express mail on May 24, 2001 constituted an offer in the legal sense. The respondent, in response to the above offer, made four amendments to the contract and supplementary agreement, signed and sealed the amendments, and sent them back to the claimant on May 28, 2001, attaching the 'reply letter' stating it had raised four questions by fax and to 'please consider'. The claimant repeatedly emphasized during the hearing that the contract and the supplementary agreement were two documents while the claimant had no objection to the contract terms but could not accept '…must be resolved before July 1, 2001' which was added by the respondent in the supplementary agreement. The tribunal held that: (1) the supplementary agreement specified the method of payment; and (2) the two documents are inseparable since the supplementary agreement stated that 'it is an integral part of the contract'. Therefore, the refusal to amend the supplementary agreement was the refusal to amend the contract while the modifications to the supplementary agreement should be regarded as substantial. Thus, the tribunal held that the contract was not formed since the parties had not reached consensus and the respondent's conduct on May 28, 2001 constituted a counter-offer.

We have noticed that the too broad scope of substantial changes under Article 19(3) of the CISG may result in substantial changes easily occurred in the negotiation process. However, one party may try to avoid a bad deal through strict interpretation of substantial changes in Article 19(3) of the CISG when the original conditions become unfavorable due to rapid market changes. Thus, tribunals need to consider comprehensively on whether the relevant terms would obstruct the contract formation

88 The CIETAC Award on July 16, 2002.

based on the background of the entire negotiation and transaction, referring to the interpretation rule in Article 8 of the ISG and relying on basic legal principles such as good faith and estoppel when necessary.

For example, in the 2003 Australian cotton sales case,[89] the seller faxed the buyer the latest offer for 2001 Australian cotton on February 7, 2001, and the buyer informed the seller on February 13 of its purchase decision. On February 14, the parties signed the sales confirmation by fax. The seller claimed the sales confirmation was legally binding since the offer and acceptance procedure had been completed and the basic content had been fixed while the buyer argued the confirmation was a new offer and the contract was not formed. The buyer's main argument was that it had modified the contents of the sales confirmation faxed by the seller regarding the quantity, the performance period, and the liability for breach of contract, and such substantial changes constituted a new offer. The main issue in this case was whether the buyer's modifications constituted 'substantial change of the offer'. The tribunal noted that the buyer modified or deleted the following three contents of the sales confirmation: (1) the quantity of each shipment was adjusted from three shipments of 500 tons, 700 tons, and 800 tons respectively to four shipments of 500 tons each; (2) the shipment time was changed from April, May, and June 2001 to April, May, June, and July, and the word '2001' was deleted; and (3) Item 2 in Special Conditions was deleted. The buyer alleged Item 2 was about the liability for breach of contract, which the seller never denied.

The tribunal held that the above-mentioned three changes could not be regarded as substantial changes as provided in Article 19(3) of the CISG because the total amount in the sales confirmation was not changed, the delivery time starting from April 2001 was not changed, the change from three shipments to four shipments could not be

89 The CIETAC Award on September 17, 2003.

mechanically understood as a significant change of the delivery time, the omission of '2001' could be reasonably interpreted as the performance should be in 2001 since the goods to be purchased was the 2001 Australian cotton, and the deletion of the clause on liability for breach of contract could not be taken as relating to the 'extent of one party's liability to the other' as stipulated in Article 19(3) of the CISG.

Of course, this case is a relatively special one. When determining whether the buyer's changes were substantial and regarding the contract formation, the tribunal gave more consideration to the fact that the parties had reached consensus instead of the application of legal provisions. The tribunal paid special attention to all relevant facts of contract negotiation besides considering the buyer's changes had not substantially changed the total amount of goods and the delivery period. In particular, the buyer had stamped the sales confirmation before sending it on February 14 and never claimed the non-establishment of the sales confirmation even in the pre-arbitration negotiation for settlement. Therefore, the tribunal, taking into account all relevant facts and the basic legal principles of good faith, fairness and reasonableness, determined that the buyer's changes were not substantial, and the sales confirmation had been formally established.

We also note that courts of various countries consider that the terms constituting substantial changes listed in Article 19(3) of the CISG are not exhaustive.[90] Adjudicators, when handling specific cases, should also consider the parties' practices in respect to the parties' consensus. For example, even amendments listed in Article 19(3) may not be considered obstruction to the contract formation by certain parties.[91] Such view has been generally adopted in CIETAC practice.

90 U.S. District Court, Alabama, United States, 31 March 2010 (Belcher-Robinson, LLC v. Linamar Corporation, et al.).

91 CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997].

4. Whether Silence Amounts to Acceptance

Article 18(1) of the CISG provides '[A] statement made by or other conduct of the offeree indicating ¬assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance'. Similarly, Article 66 of the Opinion of the Supreme People's Court Opinions on Several Issues on Questions concerning the Implementation of the General Principles of Civil Law states, '[W]here one party claims a civil right against another party, the claim is deemed accepted by acquiescence if the other party fails to express his intention orally or in writing but his failure to act indicates acceptance. Otherwise, acquiescence by failure to act is considered an expression of intention only when the law so provides or the parties mutually agree'. Article 140 of the Civil Code of PRC also provides that a person may make a manifestation of intent explicitly or impliedly and the implication shall be deemed a manifestation of intent only when it is stipulated by the law or agreed by the parties, or conforms to the trade usage.

Therefore, the CISG and Chinese laws basically deny acceptance by silence or inaction unless the parties have reached a special agreement or there are applicable practices or usages.

In the 2004 goods sales case,[92] both parties admitted that the contract had been drafted by the claimant and sent to the respondent by fax and the respondent sent the signed and stamped contract back to the claimant by fax. The respondent made the following three amendments to the contract drafted by the claimant: (1) changed the date for the buyer, i.e. the respondent, to issue the L/C from no later than March 17 to no later than April 5; (2) changed the more or less amount of each type of goods and all the goods from not exceeding 10% to not exceeding 5%; and (3) changed the retention

92 The CIETAC Award on September 23, 2004.

rate for weight in the B/L from 0.5% to 0.3%. The Claimant made no response to the respondent's amendments after receiving the fax.

The tribunal pointed out that the content of the respondent's acceptance was obviously inconsistent with the claimant's offer, but the key issue was whether such changes were substantial. Among the three changes made by the respondent, the change of the time for the issuance of L/C should be taken as the change of payment conditions (including payment method and time) specified in the CISG and constitute a substantial change of the offer, thus became a new offer. Under such circumstance, the contract could only be established after the claimant accepted the offer. Article 18 (1) of the CISG stipulated '[A] statement made by or other conduct of the offeree indicating ¬assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance'. The tribunal held that there was no evidence showing the claimant had accepted the new offer by declaration or other conduct. The claimant alleged the letter on April 8, 2003 urging the respondent to open the L/C after it had failed to do so before April 5 should be regarded as the declaration to accept the new offer. However, the tribunal deemed that the claimant's conduct of urging the respondent to issue the L/C should be taken as an act of performing the contract under the precondition that the contract had been effectively established, but the contract had not been formed due to the claimant's failure to accept the respondent's reply within a reasonable time which constituted a counter-offer in accordance with the CISG.

The 2016 UNCITRAL Digest also pointed out the precondition for silence amounting to acceptance was the existence of usage defined in Article 9 of the CISG or the parties' practices. For example, a court ruled that if the parties' practice was immediate objection to an offer, the delayed objection might constitute an acceptance.[93] Therefore, silence

93 CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992].

normally could not amount to acceptance when the parties had no such special practice.

Section 3 Contract Amendments

1. Amendments by Agreement

Contracts for the international sale of goods often involve long delivery cycles and complex transaction processes, so it is common for parties to amend contracts due to changes in objective conditions. According to the 2016 UNCITRAL Digest and precedents of some countries,[94] the provision on acceptance in Article 21 of the CISG also applies to amendment agreements.[95] Accordingly, CIETAC tribunals, when determining whether the parties have agreed to amend the contract, would still rely on the rule of contract formation, i.e., offer and acceptance, under the CISG.

For example, in the 2012 timber sales case,[96] it was specified in the letter of credit issued by a Chinese bank on May 19, 2009 after the contract conclusion that the latest shipment date was July 10, 2009. The tribunal noted that the claimant, as shown in the evidence, had applied to this Chinese bank on July 14, 2009 to extend the latest shipment date from July 10, 2009 to August 15, 2009, and to extend the validity of the letter of credit from August 15, 2009 to September 15, 2009 while other conditions remained unchanged, and sent a copy of such application to the respondent. The tribunal held that such conduct should be regarded as an offer to amend the original contract or sign a new contract. On July 16, 2009, the respondent sent an e-mail with the subject of

94 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p94.

95 CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998], CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995].

96 The CIETAC Award on April 25, 2012.

'Signed Contract' to the claimant, proposing that the delivery time be changed to before September 10, attaching a copy of the contract signed by the respondent and requesting the claimant to send back the signed and stamped contract. Such conduct should be regarded as a counter-offer to amending the original contract or signing a new contract.

The tribunal, noticing the delivery date proposed by the claimant was before August 15, 2009 while that proposed by the respondent was before September 10, 2009, held that the parties had not reached agreement on amending the original contract or signing a new contract since they failed to reach consensus on the important condition, i.e. the delivery date, in July 2009. Furthermore, the parties failed to reach consensus in September 2009 when the respondent changed the delivery date to November 30, 2009 and the unit price to USD 121/cubic meter in its email with the subject 'new contract' on September 12, 2009 while the claimant cancelled the letter of credit on September 23, 2009.

In the 2010 urea sales case,[97] the shipment period stipulated in the two contracts was July 2012, which had been agreed by the parties and needed the parties' consensus to change. The tribunal relied on the provision on acceptance in Article 18 of the CISG to determine whether the parties had reached consensus in their emails. The tribunal, noticing the seller stated in the email at 5:54pm on June 28 '[A]s per telecom, cargo in transported to the port continuously, The p'urea and g'urea under contracts would be ready on about 20th July 2012 …' and the buyer replied to the seller at 6:06pm, stating 'Thanks for your kind reply. How much granular urea and prilled urea is already in the port?', held that the parties had not reached consensus since the seller's email at 5:54pm was equivalent to an offer to amend the contract while the buyer's email at 6:06pm could not be taken as the parties' consensus on changing the shipment time or the delivery time to around July 20, 2012, as alleged by the seller, or the buyer's confirmation that the new delivery time should

97 The CIETAC Award on December 26, 2014.

be to around July 20, 2012 because the unclear expression from the party receiving the amendment proposal could not be regarded as an effective acceptance.

2. Determination of Contract Amendments through Parties' Conducts in Performance according to Article 29(2) of the CISG

Article 29(2) of the CISG governs the validity of the parties' agreement that the relevant contract terms should be amended or terminated in writing. Such agreement receives different treatment under different legal systems. Some allow amendment and termination by oral agreement despite such a formal requirement clause.[98] Article 29(2) is based on the principle of estoppel, stipulating 'a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct'. In practice, the parties, in exchanges during contract performance, and in discussion on contract amendments or negotiation when the contract could not be performed as scheduled, may not make clear objection to some amendment requests or deviation from the contract terms in performance or immediately claim the breach of contract to keep a good cooperative relationship. Under such circumstances, adjudicators should consider the relevant factual background and the interpretation rule in Article 8 of the CISG to determine whether the other party has relied on that conduct or whether the contract has been amended. It has been pointed out in some cases that the parties' friendly negotiation on contract amendments could not be taken as the consensus to amend the contract.[99]

In the 2003 glass fiber sales case,[100] the quantity and price of the goods shipped by the

98 Comments on Article 29 by Samuel K. Date-Bah [Ghana] in 1987 Bianca-Bonell Commentary on the International Sales Law, http://www.cisg.law.pace.edu/cisg/biblio/date-bah-bb29.html, last visited on June 22, 2020.

99 CLOUT case No. 153 [Cour d'appel, Grenoble, France, 29 March 1995]

100 The CIETAC Award on November 6, 2003.

claimant were inconsistent with the contract. The claimant argued that it had notified the respondent of the actual delivery time and quantity before each shipment, but the respondent never made any objection and paid 50% of the first two containers according to the actual quantity. The claimant submitted the remittance notices of a Chinese bank dated June 10, 2002 and July 11, 2002, showing that the respondent had made partial payment, to which the respondent made no objection. Therefore, the tribunal held that the parties had amended the contract terms regarding the quantity and price of the goods in contract performance and the claimant had performed its obligation of delivering the goods accordingly.

3. Transaction Documents and Contract Amendments

In the international sale of goods, the parties, after signing the contract, may exchange a large number of commercial documents in the trade process, such as invoices, letters of credit, etc., to complete the specific performance of the contract. These documents often involve the parties' further specifications of their rights and obligations.

CIETAC tribunals, when dealing with inconsistencies between the letter of credit and the contract, can make different determinations according to the specific situation. In the first scenario, when the seller receives a letter of credit inconsistent with the contract and explicitly objects to such inconsistency by asking the buyer to amend the letter of credit, contract terms shall prevail, and parties shall adhere to the contract terms. In the second scenario, if the seller does not object to the inconsistency, performs the terms set forth in the letter of credit, and submits relevant documents to the bank, the seller has impliedly accepted the amendment to the original contract, the amended terms shall become part of a new contract replacing the old terms. The legal basis for the aforementioned scenarios is Article 29(2) of the CISG stipulating, '[A] contract in writing which contains

a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct'.

For example, in the 2002 steel sales case,[101] the respondent, after signing the contract, requested to amend the specifications, quantity of the goods, and the delivery time from March 5, 1999 to March 11, 1999 besides some spelling errors on February 22, 1999. The claimant filed an amendment application with the issuing bank on February 23. Then on February 25 the issuing bank specified the specifications and quantity of the goods and changed the delivery date to March 10, 1999.

The tribunal held that it was common for the parties of international sales of goods to make certain amendments to the contract by modifying the letter of credit. If one party requested for an amendment, the other party could: (1) refuse such amendment; (2) negotiate with the other party and agree with the amendment with certain compensation; (3) agree to the amendment but reserve the right to claim for compensation; or (4) unconditionally agree to the amendment. The claimant unconditionally agreed to the amendment in the 4 days from February 22 to 25, 1999. Thus, the tribunal determined that the notice of amending the letter of credit issued by the issuing bank on February 25, 1999 should be the result of the parties' agreement on the specified specifications, quantity of the goods, and the change of the shipping date.

In the 2010 rebar sales case,[102] the parties had agreed on the sale of high-strength rebar under KSD3504SD400 quality standard. The respondent, after signing the contract, issued the letter of credit on June 27, 2008, stating the Korean HS commodity code

101 The CIETAC Award on February 4, 2002.

102 The CIETAC Award on January 27, 2010.

as 7214201000, which was accepted by the claimant. The invoice sent by the claimant to the respondent by fax on August 25, 2008, also showed that the Korean HS code of the goods under the contract was 7214201000. The respondent alleged the claimant had breached the contract since the Korean HS code 7214201000 shown in the letter of credit and invoice referred to non-alloyed steel while the code used for customs declaration was 72283000 which referred to alloy steel.

The arbitration tribunal noted that the specifications of the goods in the contract did not include the code for customs declaration. Therefore, the key issue was whether the parties had amended the contract to request the claimant to deliver non-alloy steel under code 7214201000 when the goods agreed by both parties were any rebar meeting the agreed quality standard.

The tribunal held that although Korean HS code 7214201000 mentioned in the letter of credit and invoice referred to non-alloy steel, the inconsistent term in the letter of credit, i.e., the HS code of the goods, should not be taken as the parties' agreement since the letter of credit was an agreement between the respondent and its issuing bank. According to the independence principle of the letter of credit, the claimant's acceptance of the letter of credit issued by the respondent should not be taken as a changed acceptance unless the parties had agreed to amend the contract with the inconsistent term therein or the parties expressly indicated otherwise. In other words, the claimant's acceptance of the letter of credit containing the Korean HS code should not be regarded as the parties' agreement to replace or supplement the specifications of goods in the contract. The possible consequence of the non-negotiable L/C or any delay was beyond the scope of the case. The tribunal deemed that the invoice issued by the claimant which was only the instruction for the buyer to make payments should not be taken as the proof for contract amendments or the claimant's confirmation that the goods must have the

HS code mentioned in the letter of credit when there was no evidence showing that the claimant had agreed to the amendment. It was indirectly shown in the facts that the respondent issued the letter of credit on June 28, 2008, while the claimant produced and shipped the goods to a Chinese port on July 3, 2008, and issued and sent the invoice to the respondent on August 25, 2008, that the claimant could not have accepted the requirement in the letter of credit to produce and deliver non-alloy steel rebar according to the HS code. Therefore, the respondent's argument that the contract had been amended by the letter of credit and the invoice was unsustainable.

As we can see, courts of various countries have expressed the view there is no strict formal requirement on proposals for contract amendments under Article 29 of the CISG. The key issue is whether the other party has reasonably relied thereon. Such standard should also be adopted to determine whether the parties' exchange of documents in contract performance amounts to contract amendments. For example, a German court held in its judgment that the payment date in the contract had been changed to the expiry date of the bank draft to which the seller had not objected since the date on such draft obviously indicated the intention of specifying the payment date.[103] As pointed out by the US court in Solae, LLC v. Hershey Canada, Inc., when determining whether the seller's forum selection clause attached to the invoice constituted the parties' consensus to modify the contract, the standard for determining whether the parties' exchange of documents during contract performance would result in contract amendments was whether the party sending the document intended to amend the contract and whether the other party's continuous performance with or without objection should be taken as agreement to the amendment or continuous performance of the original contract with no regard thereof.[104]

103 GERMANY: LG Hamburg 26 September 1990, Case law on UNCITRAL texts (CLOUT) abstract no. 5.

104 Solae, LLC v. Hershey Canada, Inc. 557 F.Supp.2d 452 (D. Del. 2008).

4. Technical Drawings and Contract Amendments

In disputes related to machinery and equipment or other products of which the parties need to negotiate about the design, a frequent situation is the parties have agreed in the contract and the technical agreement attached thereto that any amendment should be signed by the parties' legal representatives, but the parties, after signing the contract and in the production process, make continuous exchange on the drawing design and further adjustments according to the actual production situation or the buyer's special need. The design may be inconsistent with the original contract or technical agreement, adding or deleting something according to the actual need, resulting in the change of costs. Then one party claims after disputes have occurred that the technical drawings signed by the parties' technical or production staff in charge of the production and design, or even an unsigned one, could not constitute contract amendments based on the contract provision that any contract amendment including the technical agreement modification should be signed by the representatives of both parties to take effect. Conversely, the other party will argue that the design drawings for the specific and detailed performance of the contract confirmed by the parties' technical staff should constitute contract amendments since the parties, when signing the contract, could only agree roughly on the relevant technical parameters because the production of goods has not started and the design drawings has not been made while the design could not have been started before the contract conclusion since it is under the obligation of the seller or the manufacturer. In practice, tribunals need to determine whether the relevant drawings should be taken as the refinement of the original contract or substantial amendments thereto, of which the most important factor is the parties' true consensus.

In the 2006 water tank production line sales case,[105] the contract containing specific

105 The CIETAC Award on April 12, 2006.

basic capacity requirement, processing system operation and production capacity of the 'production line of water tanks for solar water heating system' was signed after the respondent had won the bidding.

The tribunal noted that the respondent, after signing the contract, provided the claimant with drawings of a series of products with different specifications on August 8, 2002. The respondent alleged it completed the final production line design in October 2002 based on the claimant's inner tank product drawing on August 8, adjusting the equipment and process flow specified in the contract, and sent the adjusted list of products to the claimant's general manager, requesting a further payment due to additional equipment as a result of three major changes.

The respondent alleged 'the water tank product drawing on August 8, being an important document of technical changes, should be taken as an essential legal document regarding the changes of the parties' rights and obligations'. The respondent also alleged 'the design made in October 2002 is the ultimate one to determine the specification and quality of the production line'. Conversely, the claimant argued 'the drawing on August 8 showing the technical requirements in the contract with graphs is consistent with the contract' and the respondent had never requested further payment for the so-called additional equipment before the claimant applied for arbitration while 'contract amendments could only be made with both parties' agreement through negotiation'. The document submitted by the respondent was neither signed or stamped by the issuing personnel, nor signed by the respondent's general manager. Furthermore, the parties had never signed the supplementary agreement for the so-called further payment for additional equipment. Last, the claimant had paid for the goods according to the contract and claimed was under no obligation to pay the further payment requested by the respondent for equipment added without consent.

The tribunal deemed that the technical status of the production line was fixed at the contract conclusion with specifications of the production line, component equipment and quality standards specified in the technical description attached to the contract. The contract instead of the drawings as alleged by the seller was the basis for the production line design and the selection of equipment. The adjustment of certain data in the drawings was within the scope of the production line under the contract, constituting no amendment to the technical description attached. Any contract amendment should be made with both parties' agreement through negotiation. The buyer, after receiving the production drawing from the buyer on August 8, might have considered the drawing as substantial technical amendments to the contract. If so, it should have timely informed the buyer thereof and tried to reach agreement with the buyer regarding the amendments. However, the seller had neither raised the issue nor requested further payment before the buyer applied for arbitration. Therefore, the tribunal found the parties had not reached an effective agreement on technical amendments.

IV Fundamental Breach

In international trade, defects in performance are quite common due to unstable factors, high market risks, and inconvenience in the parties' communication. Too much freedom for the observing party to terminate the contract would result in a waste of social wealth because more costs incur in the return or resale of the contract goods. The CISG restricts the parties' right to terminate a contract due to minor flaws in performance through special provision on fundamental breach of contract to encourage the development of international trade and stabilize the security of transactions.

Article 25 of the CISG provides 'A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive

him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'. Accordingly, one party's breach can only be deemed as fundamental when the other party suffers from 'detriment' and is substantially deprived of what he is entitled to expect under the contract, i.e., when the contract purpose is impossible to achieve. The CISG does not define 'detriment' but it must not be understood only as the material loss of the other party during the performance of the contract. The term should have a broader meaning to include non-material losses such as loss of customers or business opportunities or being involved in disputes. The CISG also provides no definition of 'expected benefits'. The ambiguity of these concepts is the reason for the difficulty in distinguishing normal breach from fundamental breach. Furthermore, the other party need to prove the breaching party has foreseen the detriment. Adjudicators normally have certain discretion in determining the breaching party's subjective foreseeability and make case-by-case analysis under complicated circumstances in the international sale of goods.

Section 1 'What he is entitled to Expect'/Impossibility of Achieving Contract Purpose

In the 2006 equipment sales case,[106] the tribunal pointed out that the so-called contract purpose could only be analyzed and understood according to the content of the contract, especially the parties' agreement and commitment, with no arbitrary expansion. The buyer could not allege the seller's fundamental breach just because of one unsatisfactory commissioning result while further analysis should be made to determine whether the result showed the impossibility of achieving contract purpose. The tribunal further stated that it was necessary to clarify the reasons why the buyer could not get what he was

106 The CIETAC Award on February 15, 2006.

entitled to expect to see whether it was caused by or mainly caused by the seller's breach.

The goods involved in the case was a microwave meat defrosting device. The tribunal believed that further analysis on whether the commissioning result showed the impossibility of achieving contract purpose was needed. Any commissioning result was the result of the interaction of the three aspects including equipment, process and materials, so further analysis and investigation on the status of these three aspects was necessary.

The tribunal, considering the above analysis and the parties' statements and evidence, found that: (1) the parties had no dispute over the selection process, especially the microwave power and the belt speed; (2) the buyer, besides the speculation on the uneven distribution of microwave power due to the higher thawing temperature in odd number cases than that in even number cases, had no disagreement or suspicion of the equipment itself; and (3)the seller had repeatedly raised the problem of unevenness of the material, i.e., the meat pieces to be thawed. The tribunal found through investigation that the meat pieces supplied by the buyer for the 7 month 'five stage commissioning' as called by the buyer or the 'three commissioning' as called by the seller, were uneven and similar to those used in natural thawing, which was admitted by the claimant. The seller, based on scientific principles, made a detailed analysis of the influence of uneven meat pieces on the thawing effect and submitted expert opinions while the buyer made no rebuttals or objections from the scientific aspect. Furthermore, no commissioning was conducted with reasonably even meat pieces in the so-called three commissioning or the five-stage commissioning in 7 months.

Therefore, the unevenness of meat pieces remained an unresolved issue in the commissioning. The tribunal held that it could be assumed according to the scientific

principles of microwave heating that a better thawing temperature or a solution to overheated spots could be achieved through improvement of the evenness of meat pieces. Such improvement could only be made by the buyer since the adjustment of subsequent process after replacing the original natural thawing used by the buyer with microwave thawing was beyond the contract scope of this case and should be made by the buyer. The tribunal inferred from the above that the unevenness of meat pieces was a key factor in the failure to meet the contract standard and the existence of overheated spots in the process of the interaction of the three aspects.

The tribunal, considering the circumstance, decided that the purpose of the contract had not been fully realized instead of could not have been achieved. Meat pieces could be thawed and used in the subsequent process, so the condition constituting the contract purpose had been realized. The unsatisfactory thawing effect showed the performance defect, i.e., the seller's guarantee had certain defects or flaws, so the seller had not fully completed its technical services such as installing and commissioning. Such defects or flaws constituted breach but not fundamental breach because the contract purpose was not impossible to achieve.

Therefore, CIETAC tribunals adopt a rather cautious attitude when handling contract avoidance or termination, which is also shared by the courts of various countries. For example, in a case decided by a Swiss court, the parties had agreed in the contract that the seller should ship frozen meat to Egypt and Jordan. Upon the arrival of the goods, the buyer declared the contract avoided and refused to pay after having found the fat content and moisture were higher than those specified in the contract. The court, noticing the buyer sent an offer to resell the goods at a low price after declaring the contract avoided, held that even if the discrepancy resulted in the depreciation of about 25%, the buyer was still able to resell the goods at a low price through its network in Egypt though it

stated in the offer that the resale was to mitigate loss. The buyer also alleged that in the German food trade, the buyer had the right to not only claim damages but also declare the contract avoided when the quality discrepancy amounted to 10%. The court denied such view, deeming it necessary to consider not only the quality discrepancy proportion but also the type of discrepancy as well as the possibility and reasonableness of disposal and resale in specific cases. The excessive fat and moisture in the products would result in the need to remove more parts during the process and the reduction of weight in the final products, but could not constitute fundamental breach, so the buyer could not declare the contract avoided.[107]

In the New Zealand Mussel case, the cadmium content of the mussels exceeded limit in relevant German food safety recommendations. The German Supreme Court held that the cadmium content standard for fish products was different from that of ordinary meat products and was only an administrative guideline with no binding force. Even mussels exceeding the standard 100% were still edible because such excess would not cause harm to human health since unlike basic foods, no one would consume mussels in large amounts in a short period of time. Therefore, the court determined that despite the potential toxicity, the mussels were still marketable and edible. The seller had not fundamentally breached the contract and the buyer had no right to terminate the contract.[108]

Section 2 Possibility of Remedies for Defective Performance

In the 2002 floppy disk core equipment sales case,[109] the equipment under the contract was a set of high-tech equipment used to produce floppy disk cores which

107 Swiss Federal Supreme Court (Bundesgericht), 28 October 1998 [4 C. 197/1998/odi].

108 fish case: Supreme Court (Bundesgerichtshof) 8 March 1995.

109 The CIETAC Award on July 15, 2002.

was complicated to manufacture, install, commission, and operate. The production of said equipment had a high demand in the manufacturing process, the technical level of installation and commissioning, the environment, and maintenance. The tribunal deemed it not surprising that some problems had occurred during the installation and commissioning of the equipment while commissioning itself was a process of constantly discovering and solving problems. The key issue was not the problem that occurred during the installation and commissioning of the equipment, but whether the quality and functions of the equipment met the contractual requirements during the specified or guaranteed period.

The tribunal also considered the parties' actual reactions, especially the other party's acceptance of the breach, to determine whether the breach was fundamental. During the performance, both parties were generally satisfied with the quality of the equipment though there were certain defects. For example, the respondent submitted the report of J Inspection Center, showing the inspected product was '90mm2HD floppy disk', the method was 'sampling', the manufacturer was Company A in China, i.e., the first claimant, and the conclusion was 'the inspection on the 90mm2HD floppy disk produced by Company A in China showed all the items met the GB/T15130.1 national standard, among which the threshold for leaks and pulses was higher than the national standard. The products are qualified'. As for the parties' communication, the tribunal noted that: (1) the fax on November 9, 1996, stated 'with the efforts of both American and Chinese parties, we finally finished the coating line very successfully'; (2) the comments on the equipment quality in the Decision of the Board of Directors on March 7, 1997 stated 'the overall evaluation is: A. the coating production line equipment has rather good quality and is advanced with good functions, some technologies are quite advanced...'; and (3) the first claimant held the formal 'commencement ceremony' for

the production line equipment on November 2, 1996, which showed both parties were generally satisfied with the equipment quality at that time, or the buyer would accept the set of equipment despite certain defects. Therefore, the tribunal, considering the characteristics of the goods under the comprehensive contract and the parties' reactions to the defects, held that the seller had not fundamentally breached the contract.

In the 2007 caprolactam sales case,[110] the parties had agreed the latest time for issuing the letter of credit should be January 20, 2006, but the buyer issued the letter of credit on January 24, 2006. The seller relied on Article 7 of the contract stipulating that the buyer must provide an acceptable and fully operational letter of credit before January 20, 2006, while the seller was entitled to reject the letter of credit issued later than that or with defects. The seller terminated the contract on February 10, 2006, 18 days after the deadline, and alleged the consequence of rejecting the letter of credit was the same as contract termination.

The arbitral tribunal firstly reviewed the conditions for contract termination specified in the contract and found that there was no clear contractual provision on the right to terminate the contract. Accordingly, the tribunal held that the seller had no factual basis for the above argument. Secondly, the tribunal referred to the conditions for contract termination in the CISG. The tribunal, based on the above facts, held that there was no force majeure, delayed performance, or other reasons for contract termination under the CISG involved in this case while the parties only disputed over the existence of 'fundamental breach' as stipulated in the CISG.

The seller alleged the letter of credit should have been issued no later than January 20, 2006, must be free of any defects and could be accepted by the seller according to Article

110 The CIETAC Award on April 18, 2007.

7 of the contract while Article 17 of the agreement clearly stipulated that the contract was different from ordinary sales contracts with the purpose of resolving disputes under the contract in September 2005 according to the Settlement Agreement, and the seller should be compensated immediately according to the agreement since Article 17 of the agreement also provided the buyer should pay the compensation, i.e., the price difference between the settlement agreement and the original contract, within 4 days after receiving the breach notice if there was any performance defect, including the failure to issue a flawless letter of credit before January 20, 2006. Based on the above, the seller claimed the buyer had fundamentally breached the contract since the contract purpose could not be realized due to the delayed and non-complying letter of credit.

The tribunal deemed that the full meaning and ultimate purpose of the contract was the performance thereof. As mentioned above, the tribunal only found that the buyer had breached the contract in respect of the second letter of credit. The tribunal noted that the second letter of credit was a 90-day forward letter of credit while the latest shipment date should be February 10, 2006. The tribunal also noted that the specified time for issuing the second letter of credit should be no later than January 20, 2006. In fact, the letter of credit was issued on January 24, 2006, while the seller terminated the contract on February 10, 2006, 18 days after the specified deadline. According to the above facts, the tribunal held that although the letter of credit issued by the respondent on January 24, 2006, was delayed and defective, the defects could have been fixed timely and the contract could have been performed. The respondent's performance was improper and defective but could have been remedied through amendments or other ways. However, the seller made the arbitrary decision to unilaterally terminate the contract just 18 days later. According to the CISG, fundamental breach is different from general breach and should be premised on the failure of the contract purpose. In this case, the respondent's

breach should be general instead of fundamental. Therefore, the tribunal held that the condition for contract termination in the CISG was not met.

We can see that contract termination is the most serious remedy under the CISG. Therefore, the breach must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract or fundamentally reduce the value. The reasonableness of the other party's expectations is up to the risk allocation envisaged in specific contracts or contract terms and the CISG.[111] In the application of the CISG, we should consider the CISG tends to limit the use of contract termination and take other remedies, especially price reduction or damages. The other party's declaring the contract avoided should be the last resort.[112] Furthermore, defects which can be remedied or losses that the observing party can mitigate and claim damages cannot constitute fundamental breach.

Section 3 Incidental Breach

It should be noted the CISG does not adopt the traditional English law way of determining fundamental breach according to the importance of contract terms. Under traditional English law, the constitution of fundamental breach is based on the importance of contract terms, i.e., the violation of condition terms is fundamental breach while that of guarantee terms is not. The CISG abandons such method, adopting the way of determining fundamental breach according to the seriousness of breach consequences, under which even the violation of incidental obligations or non-critical contract terms may still constitute fundamental breach. For example, the violation of minor terms or incidental obligations such as packaging, shipping in batches, or exclusive

111 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p114.

112 GERMANY: Bundesgerichtshof 3 April 1996.

distribution may still constitute fundamental breach. The key is whether such violation deprives the observing party of what he is entitled to expect under the contract. In other words, the loss of the other party's expected benefits is the core criterion for determining the damage caused by one party's breach. For example, some courts have pointed out that even the violation of incidental obligations such as exclusive distribution might constitute grounds for contract termination.[113]

In the 2016 equipment sales case,[114] the seller had breached the contract and shipped the goods in batches while the buyer alleged it as fundamental breach. The tribunal pointed out the consequence of fundamental breach under the CISG was 'deprive him of what he is entitled to expect under the contract' while what the other party had the right to expect under the contract was not the same as the subject of the contract but had a broader meaning, including what the other party could reasonably expect under the contract such as the performance time and method. Therefore, only the delivery of goods could not mean the other party had not been deprived of what he was entitled to expect under the contract.

In this case, the buyer proved that the shipment of the equipment in one batch was what he was entitled to expect under the contract. Firstly, the contract clearly stipulated the goods should not be shipped in batches. Secondly, during the performance of the contract, the buyer had repeatedly emphasized that the goods should not be shipped in batches and the consequence of shipment in batches. The respondent informed the claimant by email on July 30, 2013, stating, 'we just got the news that if the plate rollers were delivered by air in October, our company would not get the national tax refund, so our financial staff disagree with shipment in batches. In addition, the contract

113 Court of Appeal (Oberlandesgericht) of Koblenz, 31 January 1997 [2 U 31/96].

114 The CIETAC Award on August 31, 2016.

states that partial shipments are not allowed'. The respondent further informed the claimant by email on August 13, 2013 that 'it will be hard for us to get the tax refund if the equipment is shipped in batches (the plate rollers is delivered separately by air), our supervisor asked me to tell you that the equipment could never be shipped in batches and the plate rollers should arrive at the port together with the equipment'. Last, the respondent sent an email on August 22, 2013, stating, 'Hello! Our supervisor asked about the shipment again today, and once again said that the goods could not delivered in batches…'. Considering the contract terms and the buyer's emails repeatedly emphasizing the equipment should not be delivered in batches, the tribunal held that the shipment of the equipment in one batch was very important to the buyer and such way of performing the contract was what the buyer was entitled to expect under the contract while the seller's breach had deprived the buyer thereof.

As for the predictability of the consequences of breach, the tribunal held there were two standards: (1) the subjective standard, that is, whether the breaching party could have foreseen the result of depriving the other party of what he was entitled to expect under the contract; and (2) the objective standard, that is, whether a reasonable person of the same kind in the same circumstances would have foreseen such a result.

The burden of proof should be borne by the breaching party. The breaching party should prove the unpredictability of the consequence of the breach, that is, the party had not foreseen and a reasonable person of the same kind in the same circumstances would not have foreseen under the same circumstances that the serious consequence of the breach was to deprive the other party of what he was entitled to expect under the contract. If the breaching party failed to prove the unpredictability, the tribunal would determine that it had foreseen such severe consequence.

The tribunal held that the seller had fundamentally breached the contract for delivering the goods in batches. The main reason was that the seller failed to prove that he could not have foreseen the consequence of such breach, i.e., the buyer was deprived of his expectation on the shipment in one batch, under either the subjective or objective standard. The evidence submitted by the seller showed that the seller was aware of the buyer's clear request of shipment in one batch and promised 'as requested by your company, we will organize the delivery in one lot'.

V Notice of Declaration of Avoidance

'Notice' is an important requirement throughout the entire process of contract conclusion, performance, declaring avoidance, and claiming damages. The CISG provides notice requirements for offer and acceptance, as well as the withdrawal and revocation thereof (Article 15 to Article 22), declaring the contract avoided (Article 26), specialization of goods (Article 32), inspection of goods (Article 39), suspending performance obligations (Article 71), etc.

Article 26 of the CISG is the general principle for declaring the contract avoided, providing, '[A] declaration of avoidance of the contract is effective only if made by notice to the other party', which means 'notice' is one factor in determining whether the party has successfully declared the contract avoided. Since the CISG contains no provision on automatic termination, it is necessary for the party to make the declaration of avoidance by notice to mitigate losses.[115] However, courts usually hold that a notice to declare the contract avoided is not necessary if the seller has 'clearly and unambiguously' declared that it will not perform the contract because a notice under such circumstance becomes a mere formality. The day when the obligor expresses his intent of non-performance can

115 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p118.

be taken as the declaration day. Thus, the request for a notice in avoidance is inconsistent with Article 7(1) in promoting the interpretation of the CISG in a manner that enhances good faith in international trade.[116]

An effective notice of avoidance declaration needs to be made within a reasonable time according to the conditions set forth in Article 49 and Article 64 of the CISG. Similarly, Article 96 of the Contract Law of China states, 'A party demanding termination of a contract in accordance with the provisions of Paragraph 2 of Article 93 and Article 94 of this Law shall notify the other party. The contract shall be terminated upon the receipt of the notice by the other party'. The first paragraph of Article 565 of the Civil Code of PRC also contains the same rule providing, 'A party which lawfully claims that a contract be terminated shall notify the other party. The contract shall be terminated when the notice reaches the other party'.

Section 1 The Form of Notification

The CISG sets no limitation on the form of notification while the written form is not necessarily required in practice.[117] Even the complaint submitted to a court is sufficient.[118] If the parties have agreed on the form of notification in the contract, such agreement shall prevail, but adjudicators may decide otherwise according to Article 29(2) of the CISG.

In the 2016 equipment sales case,[119] the seller alleged that the notice of avoidance declaration was against the contract requirements and not binding since the buyer had

116 CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

117 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p118.

118 CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

119 The CIETAC Award on August 31, 2016.

sent the notice by email which was not the specified way of contact in the contract while the email address of the recipient was not the specified email address for formal notices. The tribunal, noticing the parties had negotiated the performance by email and phone and most of the emails were in Chinese or English except for a few in both while neither party had sent the so-called 'official documents' by registered airmail in duplicate in writing as required by the contract, did not support the seller's claim that the buyer's notice of contract avoidance declaration was against the contract requirements and not binding, because the parties had changed the way of contact by conduct as per Article 29(2) of the CISG, trusting communication in Chinese or English by email.

Section 2 The Content of Notification

One common issue is whether the content of notification is clear enough to indicate the party's intent to declare the contract avoided. In practice, the CIETAC tribunals generally believe that it is not necessary to clearly state 'terminate the contract' or 'declare the contract avoided'[120]. The 2016 UNCITRAL Digest also concluded that neither the expression 'declare the contract avoided' nor citing the CISG provision was necessary, just one party notifying the other party the contract would be terminated due to its breach was enough,[121] but the party should make it clear that it would not be bound by the contract and deem the contract terminated.[122]

It is shown that courts around the world, when applying CISG, are more concerned about the content than the form of contract termination notification. For example,

120 The CIETAC Award on March 5, 2005.

121 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p118.

122 Oberster Gerichtshof, Austria, 6 February 1996, Zeitschrift für Rechtsvergleichung 1996, 248, CISG-online No. 224; Court of Arbitration of the International Chamber of Commerce, France, 1 March 1999.

filing a lawsuit for damages was regarded as a notice to declare the contract avoided.[123] The buyer's refusal to receive the goods or request for refund was the same.[124] A Swiss court deemed the buyer's clear expression that it would declare the contract avoided if the buyer failed to perform within the additional time as an effective notice.[125] Similarly, CIETAC tribunals pay more attention to the content of expressions and the actual performance status than the form of notification.

1. Effective Notification by Indicating No Intention to Perform the Contract and Claiming Damages

In the 2007 CD burning equipment sales case,[126] the respondent stated in its Lawyer's Letter on April 12, 2006 that the respondent had taken measures to mitigate losses and claimed damages for the claimant's breach since the claimant had shown its intent of non-performance. The tribunal found the respondent had declared the contract avoided through this letter.

2. Effective Notification by Indicating Non-performance and Seeking Dispute Resolution

In the 2013 steel pipe sales case,[127] the claimant, after having received the respondent's email on June 29, 2012 (through its agent, company D), which indicated its non-performance of the contract, tried to get in touch with the respondent through the respondent's agent, company D, by email on July 3, 13, 19, 20, and 24, 2012, but got no

123 CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001]; CLOUT case No. 535 [Oberster Gerichtshof, Austria, 5 July 2001].

124 CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008].

125 CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004].

126 The CIETAC Award on October 30, 2007.

127 The CIETAC Award on April 16, 2013.

clear response from the respondent. Finally, the claimant sent an email to the respondent on July 24, 2012, in which the claimant requested the Respondent to provide a solution by July 25, 2012, otherwise the claimant would apply for arbitration. The tribunal held that the claimant's last email on July 24, 2012, should be regarded as the notice to declare the contract avoided though the claimant had not expressly declared so, since the respondent had clearly indicated it would not perform the contract.

In the 2014 monoammonium phosphate sales case,[128] the seller alleged it had declared the contract avoided due to the buyer's delay in nominating a vessel for shipment under the FOB condition while the buyer argued that there was no effective notification since the seller had not stated 'declare the contract avoided' in its email. The tribunal, noticing the claimant sent an email to the respondent on August 14, reviewing the transaction process and stating it would stop all the negotiations and dispose the goods at the loading port since the respondent had not nominated the vessel as requested, held that August 15 should be taken as the day the claimant declared the contract avoided, i.e., terminated since the August 14 email showed the claimant's intent to terminate the contract if the respondent could not send a vessel to the loading port to perform its obligation of receiving the goods on August 15.

3. Effective Notification by Refund or Return Requests

In the 2009 printing press sales case,[129] the buyer made the 'return or exchange' request via fax on April 24 and June 8, 2004. The tribunal held that the buyer's claim was clear and there should be no misunderstanding of 'return' which was a common term among businessmen to declare the contract terminated or avoided while the claim of 'return or

128 The CIETAC Award on January 9, 2014.

129 The CIETAC Award on June 5, 2009.

exchange' just showed the claiming party leaving the option with the other party because the legal consequence was clear if the other party disagreed with exchange which needed the other party's active cooperation and 'return' would be the only option. It was also common sense that 'make up for the shortage of spare parts' could only occur in 'exchange' since there would be no such issue in 'return', so there should be no misunderstanding. Therefore, the tribunal found the buyer's fax on April 24 and June 8, 2004, should be taken as effective notification since the 'return or exchange' request contained the clear claim to return the goods when the seller disagreed with the 'exchange' request.

4. Effective Notification by Letter of Claim

In the 2006 pulp sales case,[130] the seller sent a letter to the buyer, stating 'according to the coniferous pulp sales contract signed by us ... to maintain our long-term friendly cooperative relationship and common interests, please issue the letter of credit specified in the contract before November 30, 2005. Otherwise, our company will terminate the contract in accordance with the relevant laws and regulations of the People's Republic of China and claim for damages including but not limited to the expected benefits, etc.'. The tribunal held that the contract should be regarded as having been effectively terminated though the seller had not sent a written notice to the buyer for contract termination thereafter since the letter of claim had been effectively sent to the buyer's domicile but the buyer failed to issue the letter of credit before November 30, 2005, as requested.

Section 3 Time/Time Limit of Notification

Article 49(2)(b) of the CISG provides, 'in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so in

130 The CIETAC Award on July 25, 2006.

respect of any breach other than late delivery, within a ¬reasonable time'. Article 64(2)(b) stipulates, 'in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so in respect of any breach other than late performance by the buyer, within a reasonable time'. However, the above provisions contain no specific scope of 'reasonable time'. In practice, tribunals need to consider the nature of transactions, contract terms, the particularity of goods, and the situation of contract performance to determine the 'reasonable time' case-by-case.

In the 2010 equipment sales case,[131] the tribunal, considering the specific circumstance, held that even though the respondent may have breached the contract, the claimant had lost its right to request restitution due to its negligence and declaration beyond reasonable time. The claimant had not clearly declared the contract avoided until two years after it knew or should have known the quality discrepancy of the respondent's equipment. Even if the indirect declaration were taken as effective, the delay would be over 14 months. However, the claimant neither explained why it had declared the contract avoided two years or at least 14 months later, nor provided any evidence therefor, nor explained to the tribunal such delay would not expand or increase the damages. Therefore, the tribunal held that the claimant did not avoid the contract within a reasonable time. In this case, even when the facts may substantiate the allowance of avoiding the contract, the necessary and additional element of 'reasonable time' used in declaring said avoidance has to be additionally met.

Section 4 Burden of Proof

The party declaring the contract avoided needs to submit evidence for its notification thereof. In the 2006 pulp sales case,[132] the tribunal accepted the seller's evidence on

131 The CIETAC Award on August 6, 2010.

132 The CIETAC Award on July 25, 2006.

the notification which was the certificate issued by Shanghai Post Office, stating 'we hereby certify that the No. E06********CN courier was delivered by Shanghai Post on November 28 and not returned' though the seller could not get the buyer's receipt thereof due to the expiry of the tracking time.

VI The Effect of Avoidance Declaration

Section 1 The Effect of Avoidance Declaration on the Parties' Obligations

Article 81 of the CISG provides, '(1) Avoidance of the contract releases both parties from their ¬obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract. (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make ¬restitution, they must do so concurrently'.

According to this provision, the parties will be exempted from their contractual obligations after the contract is declared avoided but still be liable for damages occurred before the declaration while the dispute resolution clause in the contract and their rights and obligations thereafter are not affected. Moreover, each party has the right to request restitution for obligations performed before the declaration so that the effect of restoration can be achieved, and the social costs of breach can be reduced. The 2016 UNCITRAL Digest described Articles 81-83 as the 'contract termination framework' containing a 'risk allocation mechanism' which transformed contract performance into settlement of problems when the contract was declared avoided.[133]

133 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale

In the 2018 PVC equipment sales case,[134] the claimant paid the total price in July 2015. Thereafter, the respondent delivered the production line equipment according to the contract and the claimant received the goods. The production line malfunctioned frequently during commissioning and could not achieve the expected production output. The respondent sent its staff to adjust and change parts but could not solve the problem. The parties made the following arrangement in the Memorandum on December 19, 2016: the respondent confirmed March 15, 2017, as the takeover date for the production line and guaranteed successful commissioning therebefore so that PVC boards meeting the specified technical standard would be produced. The parties agreed the respondent should accept the returned goods and refund the claimant the total price no later than one month after the unsuccessful commissioning if the respondent could not commission successfully before March 15, 2017.

In this case, the buyer's first claim was the contract termination should be confirmed. The tribunal, deeming the respondent had fundamentally breached the contract, and the condition for return and refund in the Memorandum had been met, found that the claimant was entitled to terminate the contract while the termination date should be the day when the Notice of Arbitration of this case reached the respondent, i.e., October 16, 2017.

The buyer's second claim was the respondent should refund the total price paid and interest thereon. The tribunal supported this claim according to Article 81(2) of the CISG since the claimant had paid the total price for the goods and the contract was terminated.

The claimant's third claim was the respondent should pay the liquidated damages and

of Goods 2016, p390.

134 The CIETAC Award on August 22, 2008.

interest thereon as agreed by the parties in the Memorandum. The tribunal supported this claim since the buyer had suffered economic losses due to the malfunction of the production line delivered by the respondent. The parties' agreement in the Memorandum on such compensation should be respected. The respondent should pay the liquidated damages as agreed and interest thereon.

The claimant's fourth claim was the respondent should compensate the claimant for the cost of introducing the production line (including the equipment import value-added tax, the transportation fees, the agency fees, the installation and commissioning fees, the electricity fees during the commissioning, the construction and installation fees for the plumbing and electrical systems, etc.) and the arbitration costs (including the lawyers' fees, the notary fee, and travel expenses).

The tribunal, considering its support of the claimant's third claim and the law of compensation, deemed it unnecessary to fully support the fourth claim on the cost of introducing the production line (including the equipment import value-added tax, the transportation fees, the agency fees, the installation and commissioning fees, the electricity fees during the commissioning, the construction and installation fees for the plumbing and electrical systems, etc.) and supported part thereof based on the compensation amount agreed by the parties in the Memorandum and the reasonableness of the claim.

In practice, there is another situation where the contract is terminated through the parties' agreement. For example, while Article 94 of China's Contract Law provides on the observing party's right to terminate the contract when the other party breaches, Article 93 provides, '[T]he parties may terminate a contract if they reach a consensus through consultation. The parties may agree upon conditions under which either party

may terminate the contract. Upon satisfaction of the conditions, the party who has the right to terminate may terminate the contract'. Artile 562 of the Civil Code of PRC also provides, 'A contract may be rescinded if the parties reach a consensus through consultation. The parties may agree upon causes for termination of the contract by either party. When a cause fortermination of the contract occurs, the party who has the right to terminate may rescind the contract'.

Article 81 of the CISG does not make it clear whether this article is applicable to termination through the parties' agreement because it only states, '[A]voidance of the contract releases both parties from their ¬obligations under it' at the beginning thereof while different adjudicators may have different understandings. It was clearly stated in one award that the parties' right to terminate the contract through agreement should be respected and Article 81 of the CISG should not apply when the parties had agreed to terminate the contract.[135] However, an Austrian court held in its judgment that Article 81 should still apply when the parties had agreed on the return of goods under the 'Ex Work' condition but the goods were damaged in transportation back to the seller and the buyer should be obliged to restore the goods to the original status.[136]

Section 2 Consequence of the Buyer's Failure to Return the Goods in the Original Status

Article 82 of the CISG stipulates, '[T]he buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. (2) The preceding paragraph does not apply: (a) if the impossibility of making restitution

135 Russian Federation arbitration proceeding 82/1996 of 3 March 1997,http://cisgw3.law.pace.edu/cases/970303r1.html, last visited on May 31, 2020.

136 AUSTRIA: Oberster Gerichtshof, lOb 74/99k, 29 June 1999,CLOUT case no. 422.

of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity'.

1. Resale as the Typical Situation of the Buyer's Failure to Return the Goods

Article 82(1) is the basic principle on the buyer's failure to return the goods in the original status, i.e., the buyer loses the right to declare the contract avoided or require the seller to deliver substitute goods if it is impossible for him to return the goods.

In the 2009 rebar sales case,[137] the parties signed the contract on April 26, 2007, agreeing that the claimant should sell rebar to the respondent under CFR FO CQD term. Then the seller delayed shipping and the parties argued over whether the rust marked on the bill of lading was consistent with the contract and the letter of credit. The respondent requested to terminate the contract, return the goods, and get the refund on November 12. The claimant requested the respondent to pay the balance by fax on November 14. The respondent signed the resale contract on November 30 and notified the claimant the goods had been resold on December 3. The respondent sent the contract termination notice to the claimant on December 5, requesting the refund to be made within 48 hours. Then, the claimant initiated the arbitration process on January 29, 2008.

The tribunal pointed out Article 82(1) of the CISG stipulated, '[T]he buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in

137 The CIETAC Award on January 15, 2009.

which he received them'. According to the UN Secretariat's interpretation of the relevant provision in the CISG draft, the above provision contained the basic principle that the natural consequence of declaring the contract avoided was the return of goods, otherwise the buyer would lose the right to declare the contract avoided according to Article 49 of the CISG. In this case, the respondent lost the right to declare the contract avoided even though it had made the declaration before the resale since it could not return the goods in fact. Return and refund were closely related, so the tribunal could not support its claim for return and refund after it had lost the right to declare the contract avoided due to the impossibility of return.

It can be seen that Article 82(1) aims to protect the seller's rights after the contract is declared avoided and ensure the buyer 'return the goods in the condition in which he received them'. According to the 2016 UNCITRAL Digest, all the courts of various countries could deny the buyer's right to declare the contract avoided for his failure to meet such requirement.[138] A typical example is an ICC award under which the buyer lost the right to declare the contract avoided since he had used the goods (a machine) for five years and could not return the machine in the condition in which he received it.[139]

2. Application of Article 82(2) of the CISG

The buyer's using contract termination as a way of relief would be frustrated if he cannot return the goods. However, the CISG does not require the buyer to return the goods in 100% of the original status because it is impossible in most cases. The buyer's obligation to return the goods under Article 81 of the CISG is not intended to place the seller in a position where he should have been if the contract was fully performed or not

138 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p395.

139 Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887).

concluded, but to require the return of the goods actually delivered, even if the goods were damaged during the return process.[140] Article 82(2) of the CISG provides the right to declare the contract avoided is not lost, 'if the goods or part of the goods have been consumed or transformed by the buyer in the course of normal use' while the standard therefor is whether 'the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is due to his act or omission'.

In the 2009 printing press sales case,[141] the buyer alleged the quality discrepancy since the equipment delivered by the seller had malfunctioned for long, resulting in the frustration of the contract purpose, and the seller had fundamentally breached the contract. The parties had no dispute over the quality discrepancy but argued whether the buyer had lost the right to declare the contract avoided for other reasons.

The seller argued that the buyer had lost the right to declare the contract avoided under Article 82 of the CISG, stating, 'the buyer has been in possession of the goods for over four years and started its printing business with the goods. The tribunal found through its on-site investigation that the goods had been seriously damaged such as a large amount of stains due to the use of ink, scratches on the surface and two die-cutting rolls discarded without any protection measures. The timing showed the goods had been used for almost 900 hours, proving the seller's use thereof. The almost 900 hours also far exceeded the reasonable commissioning time. It is obvious that the buyer has used the equipment and "could not return the goods in the condition in which he received them", so the buyer has lost its right to declare the contract avoided.'

The tribunal noted the buyer has raised no objection to the stated nearly 900 hours

140 CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999].

141 The CIETAC Award on June 5, 2009.

operating time of the equipment. However, if calculated as 8 hours of operation per day, 900hours are equivalent to nearly 111 days of operation. It was impossible for the seller's technical staff to have worked on-site for 111 days according to the parties' faxes while most of the time was spent on partial improvement of the equipment. Therefore, the tribunal deemed the buyer's explanation on the almost 900 hours unpersuasive. The tribunal also noted that the on-site protection of the equipment was not thoughtful, and stains and rust could be found easily, which showed the buyer had taken no active measures or clearly requested the seller to take the goods back and taken no appropriate maintenance measures when the equipment was unused for long.

Based on the above, the tribunal held the buyer should be mainly responsible for the equipment being left unused for long with no proper protection. The tribunal found the buyer had lost the right to declare the contract avoided and the right to claim full refund according to Article 82 of the CISG since the buyer could not return the goods in the condition in which he received it.

As for the buyer's another claim that the seller should refund the payment of approximately US$ 330,000 made for the goods, the tribunal held that the buyer should retain other remedies though he had lost the right to declare the contract avoided since Article 83 of the CISG stipulates, '[A] buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention'.

The tribunal pointed out that Article 50 of the CISG provides, '[I]f the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had

at that time'. The tribunal deemed the buyer's claim for full refund should include the claim for partial refund, so the tribunal had the power to consider such claim. According to Article 83 of the CISG, the tribunal held that the seller should refund the rest after the 40% reduction of the total price, according to the specific situation of the seller's performance of the delivery obligation and the fact of the equipment's malfunction.

The buyer also claimed for the economic losses caused by the quality discrepancy including the capital interest and the foreign exchange loss.

The tribunal, considering the seller had raised no objection to the buyer's way of calculating interest, supported the claim for capital interest according to Article 84(1) of the CISG stipulating, '[I]f the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid' which should be applicable to the situation of partial refund though it was for the case when the contract was declared avoided. The tribunal rejected the claim for exchange loss since the fluctuations in exchange rates were normal commercial risks and no party could have foreseen the abrupt adjustment of the exchange rate between USD and RMB when they agreed to the contract price in USD.

As for the buyer's claim for other expenses, the tribunal held the buyer should bear the import agency fees, the letter of credit opening fees, the handling fees, the customs declaration fees, the D/O fee, the freight and the insurance fees arising for the import of the equipment since the buyer had lost the right to return the goods along with the right to declare the contract avoided. The tribunal, noting the quality discrepancy and the shortage of parts, determined the seller should pay the entry inspection and quarantine fees. Considering that the buyer's claims were partially supported, the tribunal determined the seller should compensate the buyer for part of the travel expenses, notary

fee, and lawyers' fees incurred for this case.

VII The Seller's Obligations

Section 1 The Determination of the Seller's Delivery Obligation

1. The Determination of the Delivery Period

Article 30 of the CISG provides, '[T]he seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention'.The seller's obligation under the contract is a systematic process, including but not limited to: delivering goods, handing over documents, and transferring ownership. The shipping clause of the sales contract is one of the main conditions with the purpose of specifying the delivery date or period and the seller's violation thereof constitutes breach of the contract. Article 33 of the CISG stipulates, '[T]he seller must deliver the goods: (a) if a date is fixed by or determinable from the contract, on that date; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract', of which (b) is about the situation when the parties have only agreed on the delivery period with no specific date. Such situation is quite common in the international sale of goods and is convenient for the seller to make flexible delivery schedules, arranging the delivery on any day during the delivery period, while the seller cannot object thereto as long as the delivery is before the end of such period.[142] Similarly, Article 138 of China's Contract Law stipulates, '[T]he seller shall deliver the subject matter by the time limit agreed upon. Where a time period for delivery is agreed upon,

142 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p133.

the seller may deliver at any time within the said time period'. CIETAC tribunals have handled many disputes related to the delivery period in accordance with the CISG. Article 601 of the Civil Code of PRC also provides, '[T]he seller shall deliver the subject matter at the agreed time. Where a period of time for delivery is agreed upon, the seller may deliver at any time within the said time period'.

2. The Right to Choose Delivery Time

CIETAC tribunals have decided on delivery time in many disputes.In the 2004 urea sales case,[143] the two contracts involved were under FOB condition with the specified shipping period as 'The Buyer shall have the goods shipped in July 2012, latest date of shipment July 31' of which the parties had different understandings. The buyer alleged that the 'Time of shipment' specified in the contracts was an exception to Article 33 of the CISG, leaving the buyer the right to choose the specific date and ship the goods at any time between July 1 and July 31, 2012. The seller's obligation was to get the goods ready before June 30, 2012, for the buyer to nominate the vessel for shipment at any time. The seller argued that it had the right to determine the specific delivery date during the shipment period stipulated in the contracts according to Article 33(b) of the CISG. But even if the buyer had the option, the buyer had never expressed or notified the specific delivery date from the contract conclusion until June 30, 2012.

In consideration of the above, the tribunal pointed out the seller should be entitled to delivery on any day during the delivery period according to the CISG and the contracts when the parties had agreed to clauses such as 'delivery before [a certain date]', 'delivery between [a certain date] and [a certain date]' or 'delivery no later than [a certain date]' since the seller usually preferred such provisions in contracts under CFR, CIF, or CPT

143 The CIETAC Award on December 26, 2014.

condition under which the seller should arrange the delivery and transportation.

The true meaning of the shipping clause should be determined according to the wording, the relevant contract terms, the contract purpose, practices, and the principle of good faith when the parties have different understandings of the 'shipping period'. In this case, the specification of the shipping period in the two contracts was different from the normal wording in FOB contracts. Normally, FOB contracts would specify the buyer's delivery date or period and the seller has the right to deliver on any day during the specified shipping period. However, the two contracts in this case were different from the normal ones. It could be seen from the wording regarding the shipping period that the shipping clause which was normally used to bind the seller to deliver the goods on time turned to be the one binding the buyer to nominate the vessel/receive the goods on time, i.e., the buyer could nominate the vessel for shipment/receive the goods on any day between July 1 and July 31, 2012, but no later than July 31. Under such circumstance, as long as the buyer sent the vessel nomination notification, informing the seller of the vessel information, the seller should get the goods ready before the arrival of the nominated vessel and load the goods on the vessel. Therefore, the tribunal, considering the wording of the shipping period in the contracts, rejected the seller's argument that it had the right to get the goods ready on any day in July 2012 under Article 33(b) of the CISG.

However, the tribunal also pointed out that Article 1 of the contracts clearly stated the FOB T term under which the buyer should sign the transportation contract and the seller should deliver the goods to the nominated vessel at the specified port and within the specified shipping period while the buyer should fully notify the seller of the vessel name, the loading place, and the chosen delivery time within the shipping period (if necessary) according to the stipulations on FOB term (A4 and B3) in Incoterms 2010.

Therefore, though the buyer had the right to choose any time between July 1 and July 31 to nominate the vessel as stipulated in the shipping clause, the buyer should perform its B7 obligation, i.e. send the vessel nomination notice. The seller was not the only party liable for the failure to get the goods ready within the specified period since the buyer had not performed its obligation of notification.

It is clear that the tribunal in this case has taken into account the particularity of the contracts and interpreted the shipping period and the buyer's options in accordance with international trade practices. Courts of various countries basically adopt the same view.[144]

3. The Delivery Period and LAYCAN

In the 2014 monoammonium phosphate sales[145] , the contract stipulated 'The sellers have all the goods gathered at the loading port latest on June 25, 2012, enabling the buyers to find a performing vessel, with LAYCAN around June 25-30, 2012. The buyers shall have the goods shipped in July 2012'. The tribunal deemed the shipping period and LAYCAN are two different terms with different meanings. The shipping period referred to the dates when the seller should load the goods on the nominated vessel or deliver the goods to the carrier. Under FOB conditions, the seller should load the goods on the nominated vessel at the specified date, or during the specified period, at the specified place (if any), in the specified loading port, and the date on the bill of lading should be taken as the delivery date according to A4 of Incoterms 2010. LAYCAN referred to the date or period for the loading of goods agreed by the shipowner and the charterer. The shipowner should send the nominated vessel to the loading port before the specified date

144 Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), ICC International Court of Arbitration Bulletin 2000; Court of Arbitration of the International Chamber of Commerce, France, March 1998 (Arbitral award No. 9117), ICC International Court of Arbitration Bulletin 2000.

145 The CIETAC Award on January 9, 2014.

or period, get ready for the loading, and issue the Notice of Readiness (NOR) as proof.

Since the parties had agreed on LAYCAN in the contracts, the buyer was obliged to charter a vessel with June 25-30, 2012, as the LAYCAN, i.e. the buyer had the contractual obligation to send the vessel to the loading port on June 25-30. The specified shipping period was July 2012, so the buyer should load and ship the goods no later than the end of July.

4. The Buyer's Opening of Letter of Credit and the Seller's Delivery of Goods

Letter of credit is widely used in modern international trade. The seller's opening of letter of credit and the seller's delivery of goods are processes of which there is required coordination between parties. One common situation is that the seller's delivery period is specified in the contract but the time for the buyer's opening of letter of credit is not fixed. During the performance, if the buyer fails to timely open the letter of credit, the seller will suspend its performance according to Article 71 of the CISG because it would suffer greater losses if the performance were continued but the buyer refused to pay. The buyer may argue that it has not breached the contract since there is no specific time for the opening of letter of credit but is entitled to suspend its performance since the seller has unilaterally suspended the preparation of goods in accordance with Article 71, i.e., suspending its application for the bank's issuance of letter of credit, on the grounds of mitigating losses. CIETAC tribunals have pointed out in many cases that if the specified payment method is by letter of credit, the buyer's opening of the letter of credit should be the precondition for the seller's performance of its delivery obligations. If the parties have agreed on the specific date of opening letter of credit, the buyer should open the letter of credit as agreed. If not, the buyer should open the letter of credit within a reasonable time before the start of the shipping period stipulated in the contract, or no

later than the first day of the shipping period. Otherwise, the seller is entitled to refuse the delivery and claim for damages, or request to extend the shipping period accordingly.

For example, in the 2009 machinery equipment sales case,[146] the tribunal made it very clear that the letter of credit, as a payment method in international trade, had the main role of using bank credit to ensure the seller that it will receive payment after delivering the goods. If the buyer was not obliged to open the letter of credit until the seller has delivered the goods, the letter of credit would lose such role. In this case, the request for the seller to deliver goods before the opening of the letter of credit in an international sales contract with the letter of credit as the payment method was not in line with the above stated letter of credit customary role and practice. Therefore, the tribunal held that the respondent was not obliged to deliver the goods before the claimant's opening of letter of credit even if there was no contractual provision on the delivery date according to the letter of credit customary role and practice.

In the 2018 equipment sales case,[147] the contract stated the delivery and shipping time as early October 2014 while also provided, 'the seller shall deliver the goods within 3.5 months after signing the contract'. The contract was signed on July 6, 2014, so the seller should have delivered the goods before October 21, 2014. Accordingly, the seller should have shipped the goods in early October 2014 and no later than October 21, 2014. However, the seller loaded the goods on November 15, 2014, which was later than the specified shipping period. The tribunal noted Article 4 stipulated the buyer's payment method of which Article 4.1 was regarding the down payment, stating the buyer should make the down payment in the amount of 20% of the total price by T/T within 20 days after receiving the letter of guarantee and the proforma invoice, Article 4.2 was about

146 The CIETAC Award on June 5, 2009.

147 The CIETAC Award on January 9, 2014.

the letter of credit payment, i.e., the buyer should pay 70% of the contract price by L/C after receiving and reviewing the documents, and Article 4.3 was about the balance, i.e., 10% of the contract price, stipulating the buyer should pay by T/T after receiving and reviewing the documents 6 months after the final acceptance. The clause directly related to the delivery time among the above contract terms on payment conditions was Article 4.2, i.e., the provision on the L/C payment. The tribunal held that the buyer should apply to the issuing bank for the issuance of the letter of credit first, and the seller should deliver the goods according to the L/C terms and documents after receiving the L/C notice according to the L/C payment process. The two letters of credit submitted by the seller and confirmed by the buyer through examination both stated the time for the issuance of the L/C was November 12, 2014, and the respondent received the notice thereof on November 13, 2014, which were later than the shipping period stipulated in the contract.

Therefore, considering the practice of letter of credit, the tribunal deeming that the buyer should perform its obligation to open the L/C first and the seller should perform the delivery obligation thereafter, found that the buyer had the right to suspend the delivery when it had not received the letter of credit.

In the 2005 wool sales case,[148] the Hong Kong company alleging itself as the claimant's agent signed three Order Confirmation Sheets with the respondent of which the main clauses were the same, stating 'specifications: Australian raw wool FNF, type 55, unit price: USD 7.22/kg, CIF Shanghai, Quantity:×× kg, total price: USD××, shipping time: before June 30, 2003, from an Australian port to Shanghai, payment method: irrevocable documentary L/C issued by telex one month before shipment'.

148 The CIETAC Award on September 16, 2005.

The claimant alleged that it sent a fax to the respondent on June 18, 2003, stating 'we hereby notify you that the above-mentioned contract goods are ready for shipment. However, it is quite a pity that we have not received the L/C as stipulated in the contract to arrange the shipment'. The claimant submitted the receipt of the local telecommunication office showing the fax was sent to the respondent's fax number at 2:46pm with the duration of 31 seconds. The claimant sent another fax to the respondent on August 21, 2003, stating 'After our notification on June 18, 2003, our Shanghai Office, after having repeatedly urged the issuance of the L/C, notified us that no L/C for the arrangement of shipping had been issued according to the contract. We hereby notify you that our company will hire a lawyer to conduct arbitration procedure or other related legal procedures on our behalf unless the L/C can arrive at our office before August 30, 2003. Look forward to your positive reply'. The claimant submitted the receipt of the local telecommunications office showing the fax was sent to the Respondent's fax number at 9:47am with the duration of 40 seconds, but the respondent denied its receipt thereof.

The tribunal noted that the parties had clearly agreed in the contract the payment method should be an 'irrevocable documentary L/C issued by telex one month before shipment' while the respondent signed under the statement 'we have accepted', showing the respondent had explicitly agreed to be bound by the contract provision on opening the L/C within one month before shipment and other contract terms. Thus, the tribunal rejected the respondent's argument that it could not perform the contract in the lack of import and export operation right, and deemed that the respondent had breached the contract for its failure to open the L/C as agreed and could have performed its obligation of opening the L/C in an appropriate way.

As for the respondent's argument that it had never received the claimant's fax urging it

to open the L/C, the tribunal, considering the telecommunication receipts, the fax time, the fax number, and the duration, found the claimant's evidence on its faxes on June 18 and August 21, 2003, admissible.

In the performance of the international sales contract, the buyer's obligation to open the L/C should not be conditional on the seller's urging thereof. In this case, the buyer's failure to open the L/C as agreed constituted a fundamental breach. The price term of the contract was CIF under which the claimant was obliged to fully notify the respondent the goods had been delivered so that the respondent could take necessary measures to receive the goods according to international trade practices. Furthermore, Article 7 of Chinatex's General Terms and Conditions governing purchase of wool and wooltops dated July 1, 1990, adopted by the parties provided, 'the seller under C & F or CIF shall notify the buyer by telegram or telex 15 days before shipment of the vessel name, nationality, age, shipment date and can only load onboard after obtaining the buyer's permission'. However, the respondent had breached the contract first, the claimant, as the buyer, could choose to urge the respondent to open the L/C and rearrange the shipping after receiving it or terminate the contract. It was impossible for the claimant to arrange the shipping as stipulated in the contract after the respondent's failure to open the L/C had constituted anticipatory repudiation. Therefore, the claimant's failure and impossibility to notify the respondent of the shipping schedule and vessel name within the specified shipping period did not constitute a breach and the claimant should not be liable for breach of contract.

5. The Delivery Obligation and Risk Transfer

The delivery obligation under Article 30 of the CISG and risk transfer are two different concepts and independent from each other in the parties' transactions under trade terms.

In the 2005 heat transfer oil furnace sales case,[149] the parties disputed whether the seller had fulfilled its delivery obligation. The trade term in the contract was CIF while the respondent alleged it had fulfilled the delivery obligation when the goods crossed the ship's rail at the loading port. The claimant argued that the fact 'the goods crossed the ship's rail at the loading port' could only indicate the transfer of risk of loss of damage to the goods. The determination on whether the seller had fulfilled the delivery obligation should be made according to the contractual provisions on the parties' rights and obligations.

The tribunal held that the goods crossing the ship's rail at the loading port should be the dividing line for the transfer of risks of loss or damage to the goods instead of the symbol for the seller's fulfillment of the delivery obligation since A5 Risk Transfer for CIF term under the Incoterms 2000 stipulated, '[T]he seller must bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the port of shipment'. After the goods 'have passed the ship's rail at the port of shipment', the seller should also perform its obligation to 'hand over any documents relating to them and transfer the property in the goods' according to the CISG and other obligations agreed by the parties in the contract including the technical quality requirements.

Section 2 The Seller's Obligation to Hand over Documents

It is one of the main obligations of the seller to hand over documents. Such obligation mainly depends on the express provisions of the contract, the L/C, or the parties' practices and usage. In modern international trade, most delivery of goods is symbolic, i.e., the seller fulfils the delivery obligation by completing the loading at the specified place on time and submitting the stipulated documents including the documents of title.

149 The CIETAC Award on December 26, 2005.

However, with the rise of electronic transactions and e-commerce, many transaction documents are in electronic form, which means higher requirements for tribunals' examination of evidence. In particular, tribunals need to make the final determination after reviewing certain evidence or checking whether there is any defect in the relevant documents if the buyer denies receipt of the goods or the relevant documents.

In the 2006 goods sales case,[150] the seller submitted evidence including the digital air waybill, the invoice, the packing list, and the copies of special customs bills of payment for import tax and import value-added tax, to prove its fulfillment of the obligation and requested the buyer to pay for the goods. The buyer objected to such request, alleging the seller's evidence among which only the original contract reflected the buyer, while all the rest were unilaterally produced by the seller without any trace of the buyer therefore could not prove the buyer had received the goods since there was a great lack of proof and the authenticity thereof was questionable. The tribunal found the air waybill provided by the seller was 'Digital Copy For Fax Or Email' instead of the original air waybill or its copy and was not stamped by the carrier, the invoice and the packing list were produced by the seller unilaterally, and the payer shown in the copies of special customs bills of payment for import tax and import value-added tax was the buyer instead of the seller.

The tribunal noted that the seller should deliver the contract goods to the carrier at any U.S. airport within 45 days after receiving the buyer's shipment notice to be transported to Shanghai airport according to the contract terms and Articles 30 and 31(a) of the CISG, and should hand over all documents related to the goods including the air waybill and transfer the title of the goods according to Article 10 of the contract. Therefore, handing over documents should be an integral part of the seller's delivery obligation.

150 The CIETAC Award on September 7, 2006.

Considering the actual performance of the above stated obligations, the tribunal determined firstly, the documents handed over by the seller should generally be the original ones and be able to effectively prove the seller had fulfilled the delivery obligation so that the buyer could exercise the corresponding rights on the goods with these documents. Therefore, if the documents were just copies or lack of probative value due to other defects, the seller could not be deemed as having fulfilled the delivery obligation.

Secondly, the documents handed over by the seller should have the general elements of evidence, i.e. authenticity, effectiveness, objectivity, lawfulness, and relevance. In this case, the digital copy of the air waybill submitted by the seller should not be taken as the air waybill since it was not the official document issued by the carrier and was not stamped. Meanwhile, the consignee (the buyer) objected to the authenticity of the digital copy while the seller had no other evidence to prove its authenticity, lawfulness, and relevance. The invoice and the packing list were also issued unilaterally by the seller and could not prove the seller had delivered the goods. Therefore, the tribunal found the seller had not submitted evidence to prove it had performed the obligation of handing over the documents according to the contract and legal provisions.

In the 2016 agricultural product sales case,[151] the seller submitted several inspection reports regarding the quality of the goods. The seller's obligations under the sales contract included both the delivery of goods and handing over the documents stipulated in the contract such as inspection reports which turned to be the most important basis for determination when disputes occurred since the purpose thereof was to prove the quality of the goods. The inspection reports in this case had the following defects: 1.The container numbers and quantities shown in the inspection reports of the first

151 The CIETAC Award on May 6, 2016.

three batches of goods could not correspond to those in the bill of lading; and 2.The inspection time shown in the reports could not match the actual shipping time and the name of applicant in the reports was not the party's name in the contract. Considering the above, the tribunal found the seller's inspection reports defective and that the seller had not fulfilled its obligation under the contract.

Section 3 The Conformity of Goods

Article 35(1) of the CISG provides, '[T]he seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or ¬packaged in the manner required by the contract'. In CIETAC practice, quality disputes are quite common because it is hard to make very accurate description of the goods at contract conclusion while the specifications and features of goods in international trade normally involve many details. Therefore, adjudicators should make determination according to contract terms, interpret specific contractual provisions through the interpretation rules of the CISG, or find whether there is quality discrepancy in the absence of the parties' clear agreement.

1. Contractual Provisions

Generally, the determination of the conformity of goods should be based on contractual provisions. The seller should deliver goods in strict accordance with the contract when there are clear provisions on the quality, quantity and specifications of the goods or the packaging. Otherwise, tribunals need to make case-by-case determination in the lack of clear contractual provisions.

In the 2014 monoammonium phosphate sales case,[152] the contract provided many

152 The CIETAC Award on January 9, 2014.

specifications including size and moisture, but not the colour of the goods. The respondent, after signing the contract, found the claimant had monoammonium phosphate of two different colours in stock when inspecting the goods and requested the claimant to deliver goods of the same colour, but the parties reached no agreement thereon. The tribunal held the parties had not agreed on the colour of the goods in the contract or the amendments to the quality specifications. Under such circumstance, the claimant's preparation of goods in accordance with the contract did not breach the contract. It was normal for the respondent to request the goods in the same colour, but legally the parties should have reached consensus thereon and amended the specifications. Only when the parties agreed on the amendments of specifications could the claimant be requested to deliver goods in the same colour. The tribunal rejected the respondent's claim that the claimant had breached the contract due to the preparation of goods in two colours since the parties had reached no consensus on the colour of the goods.

In the 2010 rebar sales case,[153] the tribunal found that the parties had agreed in the goods under the contract should be: (1) commodity: High Tensile Rebar Deformed Bars; (2) quality standards: KS D3504SD400. Meanwhile, the respondent clearly stated the Korean HS commodity code as 7214201000 in the letter of credit opened on June 27, 2008, which was accepted by the claimant. The invoice sent by the claimant to the respondent by fax on August 25, 2008, also showed the Korean HS code of the goods as 7214201000. The parties' main dispute was whether the subject matter of the contract should be 'carbon rebar' or 'non-alloy steel rebar', or any rebar conforming to the Korean KS D3504 SD400 quality standard.

The tribunal, noting the parties' evidence on the classification of steel and rebar, deemed steel or rebar, like other goods, could be classified in different ways with overlapping

153 The CIETAC Award on January 27, 2010.

connotations and extensions. There was no evidence showing the physical properties of rebar would be changed if certain alloying elements were added or exceeded a certain proportion in carbon steel and such rebar could no longer be called 'high tensile rebar deformed bars' as specified in the contract. There was also no evidence showing 'high tensile rebar deformed bars' agreed by the parties was the product name under the classification of alloy steel or non-alloy steel. Therefore, the tribunal needed to comprehensively consider the actual situation to determine the goods agreed by the parties, and whether the goods produced and specialized by the claimant were in conformity with the contract.

The tribunal, considering the parties' evidence, deemed the goods agreed by the parties should be high tensile rebar deformed bard meeting the KS D3504 SD400 quality standard with specifications stated in the contract. The tribunal found no clear provision specifically on alloy steel or non-alloy steel in the quality standard or other contract terms and/or the parties' correspondence before signing the contract.

In this case, the respondent tried to prove the KS D3504 SD400 quality standard was for non-alloy steel with the testimony from the relevant South Korea technical department. In this regard, the tribunal held that the evidence did not meet requirements and was inadmissible, even if the respondent's argument were sustainable, the respondent's argument that there was an essential difference between alloy steel and non-alloy steel would be meaningless since they might both meet the agreed quality standard when there was no contractual provision on whether the goods should be non-alloy steel or carbon steel. The claimant could produce and deliver any kind meeting the quality standard to fulfil its delivery obligation. In other words, the claimant's obligation under Article 60 of the Contract Law cited by the respondent and Article 35 of the CISG was to 'deliver goods which are of the quantity, quality and description required by the contract'.

Furthermore, in the performance of the contract, the respondent made no immediate claim of the claimant's breach after finding out the goods were alloy rebar, but stated, 'we suspect the material and performance of the goods may be different from the products of the Chinese company A' while the claimant never denied the goods were not alloy rebar (or low alloy steel). The respondent, after receiving the clear reply, never claimed the goods produced, and prepared by the claimant were in non-conformity with the contract, but instead, the respondent reached agreement with the claimant by phone on the delayed shipment and the amendment of L/C on August 28. Thereafter, the respondent only repeatedly asked the claimant to reduce the price of goods under the contract of this case and other contracts.

The tribunal held the goods agreed by the parties should be any rebar conforming to the KSD3504 standard with the stipulated specifications and the respondent lacked evidence for claiming the discrepancy of goods since there was no evidence showing the delivered goods could not be used for the intended purpose or the contract purpose could not be achieved at all even if it was assumed that the respondent's true intention when signing the contract was to purchase carbon steel or non-alloy steel.

The respondent also tried to prove the discrepancy of goods by stating the customs HS code stated in the L/C was 7214201000 used for non-alloy steel while the actual customs declaration code was 7228.3000 used for alloy steel. In this regard, the tribunal pointed out HS code, i.e., the Harmonized Commodity Description and Coding System, was an internationally standardized system of names and numbers to classify traded products based on the Classification of Goods by Customs Cooperation Council and Standard International Trade Classification. The parties' evidence showed no mandatory adoption of the HS code as the 'sole identification code' for goods under any law or international treaty. Therefore, even the seller's violation of the HS provisions or using the wrong

code for customs declaration could not be taken as the seller's breach of contract unless the parties had expressly agreed to use the HS code to identify the contract goods. The tribunal found the respondent's claim unsustainable since it had never explicitly requested the goods be delivered under the HS code while there was no such practice in previous transactions.

The respondent further argued alloy steel and non-alloy steel had different properties and were of different types with specific features and usage. The claimant had breached the contract as long as the goods, no matter conforming to the KSD3504 SD400 quality standard or not, were not the non-alloy steel stipulated in the contract. It was hard for the tribunal to believe that the buyer, as a large-scale professional steel trader, would have forgotten to inform the seller of the basic attributes of the goods expected by it when signing the sales contract if there were such fundamental distinction between alloy steel and non-alloy steel as alleged by the respondent. In any event, if the respondent really expected to purchase non-alloy steel instead of alloy steel, the respondent should bear the consequence of not stipulating the specific feature of the goods (alloy or non-alloy steel) or requesting the claimant confirm thereof during or after the contract conclusion since the parties had only agreed on the quality standard. Therefore, the tribunal found the respondent's claim on the non-conformity of goods unsubstantiated.

2. Determination According to the Contract Interpretation Rule in Article 8 of the CISG

Article 35(1) of the CISG provides, '[T]he seller must deliver goods which are of the quantity, quality and description required by the contract…'. However, in practice, tribunals need to rely on Article 8 of the CISG to interpret the contract based on comprehensive consideration of the parties' consent on the quality shown in contract conclusion and performance due to the parties' unclear agreement or different

understanding of contract terms.

In the 2013 medicine sales case,[154] the parties had not agreed in the contract that the effective component of the goods should not be less than 98.5% while the Certificate of Analysis provided by the respondent stated that the effective component of the goods was not less than 98.5%. The claimant resold the goods to Company C, which then sold the goods to end user company D. The inspection report issued by Company D indicated that Company D, after receiving the goods on December 14, 2011, and inspecting the goods on January 17, 2012, found only 6 of the 18 packages were qualified while the other 12 packages were unqualified. The tribunal held the goods delivered by the respondent should meet the requirement of containing no less than 98.5% effective component as stated in the Certificate of Analysis.

Similarly, in the 2015 MSG sales case,[155] the parties had reached no clear agreement on the quality requirements in the contract. However, the tribunal held that the inspection certificate and quality statement made by the seller on March 11, 2014, should be taken as the parties' supplementary agreement on the quality issue under which the MSG delivered by the seller should have over 99% purity with no other substance added.

3. Determination under Special Circumstances

A tribunal may find the seller has not breached the contract by delivering substitute product which has different specification but was more advanced and valuable and can achieve the functions of the contract goods without inconveniencing the buyer. The tribunal may also consider the buyer's reaction when receiving the substitute product besides the above. The buyer, if having not strongly objected thereto, cannot refuse to

154 The CIETAC Award on June 28, 2013.

155 The CIETAC Award on August 25, 2015.

accept the substitute product after receiving it.

In the 2009 equipment sales case,[156] the tribunal noted the parties had no substantive dispute over the quantity of goods. The seller admitted that it had delivered one set of tenon roller cutters combined with flexible blade cutters instead of three sets of mortise and tenon crimping roller and three sets of roller die cutters stipulated in the contract, but argued that the substitute product was more advanced and valuable than the contract goods and could achieve all the functions. The buyer had received the substitute product and conducted the installation and commissioning under the seller's guidance. The tribunal further noted the parties had no dispute over the fact that the specification of the pressure line and film cutting device of the delivered goods was different from the contract specification.

In consideration of the above, the tribunal held the buyer did not breach the contract, when proving the delivered goods could actually replace the three sets of mortise and tenon crimping roller and three sets of roller die cutters stipulated in the contract with more advanced technology and no inconvenience to the buyer. However, the buyer, when receiving the substitute product, could not be regarded as accepting it unconditionally. Instead, the condition for such acceptance should be the seller proving the delivered goods could actually replace the contract goods.

It is also found in the judgments of other national courts that the seller's delivery of goods which are inconsistent with the contract but has the same value and function may not constitute a breach of contract.[157] In such circumstances, the tribunal also considered whether the buyer had suffered any inconvenience or unreasonable loss therefor. Some courts further pointed out such inconsistency should reach a certain severity to constitute

156 The CIETAC Award on June 5, 2009.

157 5 CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

a breach of contract.[158]

Section 4 Goods Fit for the Purposes of General Use

Article 35(2)(a) of the CISG stipulates, '[E]xcept where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used' while the purposes of general use are regarded as an integral part of the sales contract. In other words, the purposes of general use shall be taken as implied terms binding the seller even if the parties have not agreed thereon. Article 35(2)(a) of the CISG gives the seller a substantive obligation, i.e., the seller shall provide goods fit for the purposes of general use unless the parties have agreed otherwise. However, as fully discussed in a Dutch arbitration award, a prominent issue arising from Article 35(2)(a) of the CISG is that the provision itself sets no clear objective standard for such purposes while adjudicators, when interpreting the provision, may use the relevant concepts in domestic laws, i.e., merchantability in common law and average quality requirement in civil law.[159] The former considers whether the buyer is willing to accept the goods without requiring a price reduction after it has fully understand the situation of the goods,[160] while the latter considers whether the goods have reached the average quality in the same market at the same time.[161] Though the same conclusion may be drawn from the two, there are still differences. The CIETAC tribunals may consider both in practice since the CISG makes no clear choice between the two.

In the 2009 rebar sales case,[162] the inspection report showed that the goods had the

158 Oberlandesgericht Düsseldorf, Germany, 21 April 2004.

159 NETHERLANDS: Netherlands Arbitration Institute, October 15, 2002.

160 Henry Kendall & Sons v. William Lillico & Sons Ltd, [1969] 2 AC 31.

161 NETHERLANDS: Netherlands Arbitration Institute, October 15, 2002.

162 The CIETAC Award dated January 15, 2009.

following problems: firstly, there was slight corrosion on the surface of the goods; secondly, there was a considerable amount of bending at one end or other places of the goods; thirdly, a certain number of metal bands for tying rebar were damaged but the carrier had replaced them; fourthly, there were metal impurities attached to the surface of 10% goods; and finally, some labels of the goods were missing or inconsistent.

The tribunal, considering the parties' agreement in the contract as the most important basis for determining whether the goods were in conformity, could not determine through the inspection report whether the quality discrepancy the parties had been concerned about in the supplementary contract existed. The parties had agreed in both the contract and the supplementary contract the quality inspection should be carried out in accordance with the quality standard stipulated in the contract, i.e. BS4449 / 1997 460B standard, and had agreed on inspection by company D at the destination port. However, the inspection report by company D did not show any inspection result according to the BS4449 / 1997 460B standard or whether the goods, with slight corrosion on the surface, met the standard.

The tribunal held that the goods should be fit for the purposes for which goods of the same description would ordinarily be used according to Article 35(2) of the CISG when there was no clear stipulation in the contract, otherwise they would be inconsistent with the contract. Concerning purposes for which the goods would ordinarily be used, the parties unanimously confirmed they were used for the production of reinforced concrete in construction projects. The tribunal deemed slight corrosion of the surface of rebar would not affect its use in construction projects, i.e., would not hinder its purposes of general use. Of course, the goods fit for purposes of general use should be traded normally. The goods in this case had been resold to a third party, which indicated that they were merchantable. Therefore, the tribunal rejected the buyer's claim that the goods

were not fit for purposes of general use.

In the 2004 paraffin sales case,[163] the quality requirements of the 58/60 chemical wax as the subject matter of the transaction were: melting point: 58 / 60C, oil content: not more than 2%, color: yellow. The Quality Certificate issued by the manufacturer showed the factory inspection results of the batch of goods were: 'Melting Point 59.1 DEG.C.; Oil Content: 0.32%; Color: 20'. The parties had not agreed on the quality indexes of chroma and smell in the contract but simply agreed on 'color: yellow'.

The tribunal rejected the claimant's claim that the goods should be fit for the purpose of being used for candle production because the parties had not agreed in the contract that the goods would be used for candle production while the parties had submitted no agreement or unilateral request or declaration of the purposes of the goods during the negotiation or contract conclusion showing the goods would be used for candle production.

Though the tribunal determines that the respondent has delivered the goods with the stipulated specifications, and the parties has reached no agreement on the quality indexes of chroma and smell,this does not mean that the respondent may deliver goods of any chroma or smell or could claim the indexes of chroma and smell should not be within its 'scope of guarantee', because the respondent had not expressly indicated in the contract or in any other form that it would not guarantee for the chroma and smell indexes or the oxidation degree of the goods. Therefore, the tribunal determined the respondent should deliver the goods with the indexes of chroma and smell fit for purposes of general use and should not have delivered the severely oxidized chemical wax. As shown in the Quality Certificate, most of the chemical wax delivered by the respondent had been

163 The CIETAC Award on January 15, 2004.

severely oxidized. The claimant's evidence including the letter from company D to the respondent on December 16, 2002 and two expert opinions showed severely oxidized paraffin would deteriorate the quality and affect the purposes of general use. The above facts showed that the severely oxidized chemical wax delivered by the respondent must be processed to be fit for the purposes of general use so as to achieve the contract purpose. Therefore, it was obviously necessary and reasonable for the respondent to bear a certain amount of the processing costs.

Regarding the determination for goods fit for general use, it is shown that the typical analytical process adopted by the CIETAC tribunals is: firstly, the tribunals will carefully review the contractual provision on quality and purposes of use; secondly, the tribunals will consider whether the buyer has notified the seller of the specific use of the goods when concluding the contract if there is no clear contractual provision; and lastly, the goods should be fit for the purposes for which goods of the same description would ordinarily be used according to Article 35(2)(a) of the CISG if there is no clear contractual provision or notification of the specific use. Most courts and tribunals of various countries follow this same analytical process.[164] Due to the abstract standard for purposes of general use in Article 35(2)(a) of the CISG, tribunals need to consider the merchantability, industry standards and general industrial customs .

Section 5 Goods Fit for Particular Purpose under Article 35(2)(b) of the CISG

In the international sale of goods, the buyer and the seller are in different countries which may have different sales laws, industry standards and hygiene standards. Goods merchantable in the exporting country may not be merchantable or usable in the importing country due to mandatory standards or relevant laws. Disputes may arise

164 NETHERLANDS: Netherlands Arbitration Institute, October 15, 2002.

therefrom. The buyer will refuse the goods and claim the seller has fundamentally breached the contract since he believes the goods delivered by the seller should be usable or merchantable in his own country so that the contract purpose could be achieved but the delivered goods are not fit for such purposes. We have noted that the application of the CISG under such circumstances is usually classified as concerning the particular purpose under Article 35(2)(b) of the CISG. The relevant international treaties, conventions or industry standards, if any, would constitute the parties' practices or be classified as the purposes of general use under Article 35(2)(a) of the CISG. If there is no international ones or common law or industry standards in the countries of the buyer and the seller, the specific law or industry standard in the buyer's country would constitute the buyer's particular purpose. Under such circumstances, the precondition for the goods to meet such law or industry standard is that the seller were aware of the buyer's particular purpose at the conclusion of the contract.[165] It was pointed by the German Supreme Court that Article 35(2) of the CISG does not require the seller to deliver goods in conformity with the specific public standards of the buyer's country unless the seller were aware of such standards due to the following special circumstances at the conclusion of the contract: (1) there are same standards in the seller's country; (2) the buyer has notified the seller of the relevant standards; (3) the seller has branches in the buyer's country; or (4) the parties has long-term trade relationship.[166]

CIETAC tribunals have dealt with such issues. In the 2016 corn sales case,[167] the parties had agreed on the import of genetically modified corn from the United States and specified Shanghai Waigaoqiao as the destination port. The seller confirmed it had been aware the goods would be used in mainland China and resold to a Chinese factory.

165 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p142.

166 Supreme Court (Bundesgerichtshof) 8 March 1995.

167 The CIETAC Award dated May 6, 2016.

Article 33 of the Regulations on Administration of Agricultural Genetically Modified Organisms ("GMOs") Safety by the State Council provided that the seller, as the foreign company exporting agricultural GMOs to China, should apply to the State Council's Agricultural Administrative Department and obtain the biosafety certificate. In this case, the goods could not be imported and were disposed according to law since the seller had not obtained the biosafety certificate issued by the Chinese government to approve the MIR162 genetically modified component.[168]

Considering the seller's long-term experience in agricultural product trade in China and around the world, its status in the industry and its involvement in similar litigation cases, the tribunal held that the buyer, when signing and performing the contract, knew and should have known that Chinese government had not approved the import of corn containing MIR162 genetically modified component and the goods containing such component were at the risk of being destroyed or returned. Therefore, the seller could not use its alleged unawareness of Chinese laws on genetic modification or the prohibition of corns with MIR162 genetically modified component by Chinese government as the excuse for its delivery of goods in violation of China's mandatory laws.

In the 2016 iron ore sales case,[169] the goods could not be imported into China and were returned due to the content of oxide scale and the parties disputed over whether the seller had breached the contract. The seller argued it was not its contractual or conventional obligation to 'guarantee the goods to pass the inspection of Chinese customs and be sold and used in China'. Firstly, there was no contractual provision on the seller's obligation to 'guarantee the goods to pass the inspection of Chinese customs and be sold and used in China'. Secondly, the seller had not violated any obligation under the CISG in that:

168 MIR162 is a type of genetically modified maize.

169 The CIETAC Award dated July 13, 2016.

(1) the claimed obligation to 'guarantee the goods to pass the inspection of Chinese customs and be sold and used in China' did not constitute the 'particular purpose' under Article 35(2) of the CISG or other purposes of use; (2) the buyer had never informed the seller it should 'guarantee the goods to pass the inspection of Chinese customs and be sold and used in China' in any way and the seller had no such obligation without being notified thereof; (3) the buyer had not relied on the seller's skills and judgment to determine whether the goods could pass the inspection of Chinese customs and be sold and used in China while such reliance was unreasonable as well. The buyer, as a Chinese trader engaged in international iron ore sand transactions for long, should have clearly informed the seller of the practice of China Entry-Exit Inspection and Quarantine Bureau to prohibit the import of iron ore sand containing oxide scale, otherwise it would be impossible for the seller to consider and handle the related issues.

The buyer alleged that the seller had been fully aware that the contract goods would be finally used and sold in China. Furthermore, the parties had conducted another iron ore transaction before the transaction in this case. It could be found from the transaction history and practices that the seller had been fully aware the contract goods of this case would be finally sold to China and should meet China's entry requirements.

The tribunal noted there was no contractual provision on whether the goods were allowed to contain oxide scale while the seller had conducted no inspection on whether the goods contained oxide scale at the loading port. Furthermore, the tribunal also noted the seller had submitted the Basel Convention and the list of its Contracting Parties. Article 1(1)(b) of the Convention stipulated, '[T]he following wastes are subject to transboundary movement shall be 'hazardous wastes' for the purposes of this Convention: Wastes… are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit' while Libya where the

goods were shipped , Switzerland where the seller had place of business, South Korea where the buyer had place of business and China where the goods were to be discharged were all Contracting Parties of the Convention.

The tribunal held that the seller should pay due attention to whether the goods were hazardous wastes or contained hazardous wastes under the Basel Convention while it was the seller's implied quality warranty to ensurethat the goods were not hazardous wastes or contained hazardous wastesunless otherwise stipulated in the contract, since the countries of the parties' places of business and the countries of departure and destination were all Contracting Parties of the Basel Convention.

The buyer had reason to expect the contracted goods to meet China's entry requirements since the stipulated discharging port was in China and the parties had agreed on inspection by China Entry-Exit Inspection and Quarantine Bureau or by a Chinese Company at the discharging port in China.

We can see that courts of various countries have basically reached a consensus on such issues, i.e., the seller should not be required to deliver goods in accordance with the laws and regulations or industry standards of the buyer's country when the seller has not been aware thereof at contract conclusion, unless there are same requirements in the seller's country[170] . However, if the seller has reason to know of such requirements in the buyer's country under certain circumstances, the seller should meet the corresponding requirements to comply with the obligations under Article 35(2) of the CISG. For example, a French court pointed out in its judgment that the seller should meet the corresponding conditions because the seller had reason to know the requirements of the relevant food standards of the buyer's country from the previous transactions between

170 GERMANY: Bundesgerichtshof March 8, 1995, Case Law on UNCITRAL texts (CLOUT), abstract No. 123.

the two parties.[171] AU.S. court made the same judgment that the goods did not meet the relevant safety standard in the United States when enforcing the arbitral award on the dispute arising out of equipment export from Italy to the United States.[172]

Section 6 Sale by Sample

Article 35(2)(c) is about sale by sample in which the seller is normally obliged to deliver the same goods as the sample. Analagously, sale by sample is equivalent to an express warranty by the seller, i.e., the sample itself shows an express agreement on the quality of the goods similar to that provided in Article 35(1) of the CISG. However, if there are some potential defects in the sample which makes it unable to meet the requirements of Article 35(2)(a) of the CISG, i.e, the purpose of general use, even though it is impossible for the buyer to find such defects through the sample, the seller shall still be responsible for such defects.

In the 2009 apparel sales case,[173] the parties signed the sales contract on July 31, 2018. An inspection institution in the claimant's country accepted the claimant's inspection application on July 30, 2018 and issued the inspection report on August 2, 2018, showing three colors qualified in the GB item and one color qualified in the fabric inspection with two others unqualified. The inspection institution accepted the second inspection application by the claimant on August 3, 2018 and issued the inspection report on August 6, 2018, showing three colors qualified in the GB item and three colors qualified in the fabric inspection.

171 FRANCE: Grenoble Court of Appeal, September 13, 1995, Case law on UNCITRAL texts (CLOUT) abstract No. 202.

172 United States: U.S. District Court, May 17, 1999, Case Law on UNCITRAL texts (CLOUT) abstract No. 418.

173 The CIETAC Award dated September 19, 2019.

The respondent sent the sample to the claimant on August 3, 2018 and shipped the goods on August 7, 2018. Thereafter, the finished clothing delivered by the claimant to its clients were returned due to discoloration. The key issue was whether the respondent should be liable for the quality problems of the goods. The respondent argued it should not be liable therefor since the contract only required the defects to be 'in reasonable range' while the delivery was made after the claimant had confirmed the sample while the claimant alleged the quality of the goods should be determined according to the final inspection report.

Noting the quality standard briefly stipulated in Article 1 of the contract as, 'patterns and colors are allowed to be reasonably different. Claims for differences within a reasonable range will not be accepted', the tribunal pointed out there was no contractual, conventional or legal standard for the quality problems of this case since Article 35(2)(c) of the CISG was on sale by sample while there was no contractual provision or the parties' explanation based on laws and facts on whether the sale involved in this case was sale by sample. The inspection report on September 5 after the return of clothing by the claimant's final clients showed 'fabric inspection qualified (1 color) unqualified (2 colors)' but also stated 'GB item qualified (3 colors)'. However, the parties had never explained the standard for such determination.

Considering there was no contractual provision on specific claim process or sample retention, the tribunal found that: (1) the claimant had submitted no explanation of the standard for the inspection reports; (2) the respondent had not recognized the sample for inspection provided by the claimant; and (3) the parties had not jointly applied for inspection and provided sample for inspection after getting two different inspection results before shipment and after arrival of the goods. Thus, the tribunal held that the claimant could not prove the goods delivered by the respondent were inconsistent with

the contract or relevant laws. However, the claimant had received a large number of returns from the final sales stores and visible discoloration might have occurred in the actual sales process. Furthermore, the respondent had agreed to the return of goods in negotiation either out of good faith or other considerations but the parties could not reach agreement on full or partial return. The tribunal deemed it necessary to analyze the parties' transaction process and the claim period before determining the respondent's responsibilities.

The respondent alleged, in the transaction process, the claimant had provided quality samples first, the respondent had produced the fabric and then provided the bulky fabric and ship samples to the claimant, and arranged the shipment after getting the claimant's confirmation. The reason for the difference between the two inspection reports was that the respondent had adjusted the color fastness after the first inspection and the goods were qualified thereafter.

The tribunal held that the respondent had made the goods meeting the qualification standards of the inspection institution recognized by both parties and delivered the goods sufficiently before the shipping date (August 7th) and the claimant had made the full payment. Neither party had submitted evidence to prove whether the discoloration problem was caused by the color fastness adjustment by the respondent or the defects in the fabric. The claimant submitted no explanation or evidence on whether the defects were because of the low quality of the claimant's sample if it was caused by the defects in the fabric while sample submitted by the respondent as evidence was not sufficient to get favorable determination. For lack of sufficient evidence, the tribunal could not support the claimant's claim that the respondent should be liable for discoloration.

The cases in the 2016 UNCITRAL Digest showed there were different views on whether the buyer or the seller should bear the burden of proof to prove discrepancy of goods in various countries.[174] Generally speaking, the seller was obliged to prove that the goods were in conformity with the contract before the transfer of risks while the buyer had the obligation to prove it had sent the notice and evidence of discrepancy timely according to Articles 38 and 39 of the CISG after having received the goods.[175] As pointed out by the CIETAC tribunal in the above-mentioned 2009 apparel sales case, the parties should provide further evidence on the reason for the different inspection results and whether the goods were in conformity with the contract under the circumstance of the case and when there was inconsistency in the parties' evidence. Basically, the CIETAC tribunals adopt the principle of 'He who claims shall bear the burden of proof'.

Section 7 Packaging

Packaging, used to retain and protect goods, is of great significance in international trade due to long-distance transportation. Defective packaging will result in defects in goods. Article 35(1) of the CISG provides that goods shall be ¬packaged in the manner required by the contract. If there is no contractual provision on packaging, the seller shall package goods in a manner adequate to preserve and protect the goods according to Article 35(2)

174 U.S. Court of Appeals (7th Circuit), United States, May 23, 2005 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Köln, Germany, January 12, 2007, English translation available on the Internet at www.cisg.law.pace.edu; Chambre Arbitrale de Paris, France, 2007 (Arbitral award No. 9926), available on the Internet at www.cisg.law. pace.edu. CLOUT case No. 103 [Court of Arbitration of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, April 27, 2007] (see full text of the decision); CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, February 8, 2006]; CLOUT case No. 894 [Bundesgericht, Switzerland, July 7, 2004] (see full text of the decision); CLOUT case No. 885 [Bundesgericht, Switzerland, November 13, 2003].

175 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p143.

of the CISG.

In the 2015 steel coil sales case,[176] the buyer alleged that the contract goods should have been packaged in standard export packaging suitable for ocean transportation according to the contract but company F, the manufacturer, used paper cores for packaging which was in non-conformity with the international trade practice and had serious defects. Article 35(2) of the CISG provided that the seller should package goods in a manner adequate to preserve and protect the goods. The damage to the goods showed the packaging was neither in line with the contract nor the CISG. The seller argued the contract only required the factory standard export packaging while the packaging of the goods in this case was in deed company F's standard export packaging. Furthermore, such standard was in accordance with the national standard which required no steel core packaging.

The tribunal noted the parties had agreed to package the goods according to the requirements of the manufacturer's standard export packaging and required the outer packaging to 'use PP protective pater, steel shielding and corner protection'. The buyer alleged serious defects in company F's export packaging standard since the use of paper cores was against the international trade practice and such standard should not be applied in this case.

Noting there was no corresponding stipulation in the CISG and in accordance with the Standardization Law of the People's Republic of China and the Regulations for the Implementation of the Standardization Law of the People's Republic of China, the tribunal held that the manufacturer's export packaging standard should not be lower than the mandatory national standard or industry standard of China. Furthermore, the tribunal found the packaging of the goods in this case conformed to the factory export

176 The CIETAC Award dated June 11, 2015.

packaging standard of company F as stipulated in the contract according to the seller's evidence including the manufacturer's packaging details, quality certificate and packaging specifications and the fact that the inner, outer and sides of the goods were wrapped with steel shields, covered with steel corners and fixed with four steel belts horizontally and one steel belt longitudinally with anti-caving paper rolls inside the belts.

CIETAC tribunals, in their application of Article 35(1) of the CISG, rely not only on the parties' express agreement in the contract but also other contractual provisions or the parties' usage to interpret the parties' agreement on packaging. If the contractual provision is too simple, the CIETAC tribunals would refer to Article 35(2)(d) of the CISG and consider the needs of transportation and the parties' true intent. CIETAC tribunals also refer to Article 9 of the CISG stipulating, '[T]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known' and also consider Article 35(2) of the CISG providing the goods shall be 'contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods' unless other agreed by the parties. This depends on the type and quality of the relevant goods and other factors such as the transportation type and duration, process and the weather in the destination country.

In the 2012 steel pipe sales case,[177] the contract stipulated the package of steel pipes as 'naked'. The seller alleged 'naked' meant the pipes should be directly loaded into the container with no individual package and there should be no special meaning, and pointed out naked package was the standard way and industry practice for the packaging of export petroleum pipes and the parties' usage in multiple pipe transactions which had been recognized and accepted by the buyer while there was

177 The CIETAC Award dated July 17, 2012.

no evidence showing the buyer had requested for other packaging ways before the dispute occurred.

The buyer argued 'naked package' only meant no need of packaging when the pipes left the factory but did not mean no need of packaging when they were loaded in the container. The seller's witness admitted during the oral hearing that the pipes should have been properly packaged before being loaded in the container at the Tianjin Port, otherwise the carrier would have refused the loading. The buyer claimed the seller should be responsible for damages either occurred during transportation due to improper packaging of the pipes before loading or occurred when the goods were loaded into the container because of improper way of loading. Furthermore, the buyer claimed the goods should have been contained or packaged according to the general standard in North America, i.e., the mandatory containing and packaging standard in North America (including Canada) issued by Damage Prevention and Freight Claim Committee Association of American Railroads which had been adopted as the general standard and usage in North America, which the seller, as a company registered in Texas, should have known. The seller also knew that the pipes under the contract would be exported to Canada, so the packaging should meet the standard and requirements in Canada as same in North America.

The tribunal held that the goods delivered by the seller should be contained or packaged in the stipulated way as per Article 35(1) of the CISG. However, the tribunal noted the packaging clause in the contract was too simple, only stating 'naked'. In practice, necessary protective measures must be taken for transporting pipes in containers, which was recognized by both parties. Article 35(2) of the CISG provided goods should be 'contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods'. Accordingly, the

tribunal held that the seller should have packaged the pipes 'in a manner adequate to preserve and protect the goods' to avoid any damage during transportation no matter whether there is an industry standard internationally or regionally, no matter whether the general way of naked packaging in Tianjin Port alleged by the seller or the North American standard claimed by the buyer was adopted, no matter whether the parties had the usage of packaging pipes in the same way, and no matter whether the parties had different understanding of 'the manner usual for such goods' for the packaging of the goods. The inspection report showed that the pipes had been damaged due to improper fixing in the container, moving back and forth during transportation and hitting the side of the container without protection lining.

In consideration of the long-distance transportation of goods in international sales and the need of transportation or sale in the buyer's country, it is shown that many courts or tribunals set higher requirements for packaging of goods in international trade. Some courts deemed Article 35(2)(d) of the CISG applicable to the situation when the parties had not agreed on packaging requirements and generally referred to the current packaging standard in the seller's country.[178] A French court held in the cheese sales case that the seller failed to comply with Article 35(2)(d) of the CISGsince he had not packaged the cheese in accordance with the food labeling requirements of the buyer's country though he knew the goods would be resold there.[179] As a general principle, the seller shall be responsible for damages occurred during transportation if he fails to perform the obligation of fully packaging the goods though the risks are transferred to the buyer according to the contract.[180]

178 CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007].

179 CLOUT case No. 202 [Cour d'appel, Grenoble, France, 13 September 1995].

180 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p143.

VIII Remedies for Breach of Contract by the Seller

Article 45 of the CISG specifies the remedies for the seller's breach of contract, including actual performance, avoidance of contract, damages and price reduction. All the remedies except price reduction may involve the seller's obligations, especially the obligation to hand over documents. Article 45(2) clearly stipulates, '[T]he buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies' including the right to declare the contract avoided, which is mainly related to Articles 46-52, and applicable to different types of breach. Article 46(2), Article 49(1)(a) and Article 51(2) require a fundamental breach, Article 49(1)(b) is applicable to non-delivery of goods, Article 51 involves partial non-performance, and Article 52 concerns delivery ahead of schedule and in excess amount.[181] Unlike many domestic laws, the CISG sets the failure to perform contractual obligations as the precondition for damages disregard of the breaching party's negligence of any kind.[182]

Section 1 The Buyer's Option

In the 2004 Food Sales case,[183] the buyer requested to avoid the contract due to quality discrepancy after finding defects in the goods through inspection. The seller rejected the request on the excuse that the overall quality was fine despite the defects.

Noting the buyer's rejection of the seller's proposal of price reduction and the final proposal of 10% reduction, the tribunal held that price reduction, as one remedy for the seller's breach, should be decided by the buyer and the buyer had the right to choose

181 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p218.

182 Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.81.IV.3), 37.

183 The CIETAC Award dated June 24, 2004.

other remedies, such as returning the goods. One reason for the seller to claim price reduction as a remedy was the limited sales channel and difficulty in selling the goods returned by the buyer. However, the tribunal deemed the seller could not force the buyer to accept price reduction as the remedy for the unacceptable goods.

Another reason for the seller to request price reduction was to maintain the parties' long-term friendship and expand the parties' business. However, the tribunal pointed out the seller should have paid more attention to the quality of the goods for such reason since quality problems would influence the parties' fame and future business and lead to unfavorable consequences if not settled properly, so this reason was unsustainable as well.

Section 2 The Buyer's Request for the Seller's Performance

Generally, when choosing no other remedies conflicting with the request for the seller's performance of the contract and not losing other rights due to delay in issuing the defect notice, the buyer can request the seller to perform the contract. However, specific performance may not be enforceable because of Article 28 of the CISG or may be excluded due to the buyer's effective avoidance of the contract. The relief scope of specific performance is one of the most difficult problems in the drafting of the CISG. In the drafting process, Article 28 was accepted as the counterpart of Article 7(1) and Article 16 of the 1964 Hague Conventions and Uniform Laws on the International Sale of Goods. Ultimately, Article 28 of the CISG is for the interests of common law courts but can also be applied by civil law courts.[184] As such, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale and the court is also willing to do so.

184 Commentary on Article 28 by Senior Legal Officer, International Trade Law Branch, United Nations, http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-28.html, last visited on May 31, 2020.

Furthermore, the buyer may give the seller a grace period in accordance with Article 47 of the CISG stipulating, '(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations. (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not ¬deprived thereby of any right he may have to claim damages for delay in performance'. Article 47(1) is similar to the Nachfrist system in German law, supplementing the right to request for performance under Article 46. The practical significance of Article 47 is that the buyer is entitled to declare the contract avoided if the sellers fails to deliver the goods in the additional time specified according to Article 47 under Article 49(1)(b). Similarly, Article 94 of China's Contract Law stipulates, '[T]he parties to a contract may terminate the contract under any of the following circumstances:... (3) the other party delayed performance of its main obligation after such performance has been demand, and fails to perform within a reasonable period'. Article 563 of the Civil Code of PRC also contains the same rule which provides, '[T]he parties to a contract may terminate the contract under any of the following circumstances…(III) Any party expressly states, or indicates through its conduct, that it will not perform its principal debts prior to the expiration of the performance period…'.

In the 2005 ferro-molybdenum sales case,[185] the seller claimed it could not perform the contract since the raw materials needed for production could not be purchased due to the closure of mines and continuous heavy rain in the area and the raw material supplier had been ordered to stop production. The buyer immediately purchased substitute goods and claimed for damages. However, the seller alleged the buyer should have given additional time and adjusted the price so that the seller could continue the performance

185 The CIETAC Award dated February 22, 2005.

because all the buyer need to do was to pay damages to its client while the claimant considered the purchase of substitute goods within a reasonable time as the measure to mitigate losses.

The CIETAC tribunal held that the seller should bear the liability for breach of contract when the excuse of force majeure was unsustainable. The buyer had the right to choose the way for the seller to bear the liability for breach, while the buyer could instead request the seller to continue the performance and give reasonable additional time when the seller had breached the contract according to Articles 46 and 47 of the CISG. In this case, it was appropriate for the buyer, as the non-defaulting party, to take the remedy of purchasing goods in replacement.

There is no time limit for the request of performance under Article 46(1) of the CISG, which is different from the specific requirements in Article 46(2) and (3). One court has held that this gap should be fulfilled by resorting to Article 7.2.2 of the 2016 UNIDROIT Principles of International Commercial Contracts under which such request should be made within a reasonable time.[186]

Section 3 The Buyer's Right to Declare the Contract Avoided

Article 49 of the CISG provides, '[T]he buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed'. The buyer must send a notification to declare the contract

186 2 International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, January 30, 2007, Unilex.

avoided, otherwise no such consequence could be reached. This provision is closely related to several articles of the CISG such as: Article 25, setting fundamental breach as the precondition for declaration of avoidance; Article 26, regarding the avoidance notification; and Articles 81-84, on the effects of declaration of avoidance.

The seller's breach may occur during the whole performance process, such as non-delivery, delayed delivery or defective delivery. Defective delivery may involve quantities, quality, specifications, performance time or method in non-conformity with the contract. Due to the complexity and variety of contractual provisions, adjudicators need to determine the seller's breach in accordance with contractual provisions and decide whether the buyer is entitled to declare the contract avoided.

The principle of declaration of avoidance is material in application with the parties' obligation to be prudent and to re-dispose of the goods during the performance of the contract. If the contract is declared to be avoided due to the seller's delay, demurrage and storage fee may occur and the goods may face the unnecessary risk of being damaged or lost. It is also likely that the market price may decrease causing additional harm. The buyer's delay to declare the avoidance of the contract may lead to the delay in seller's repairing or re-disposing of the goods which may also increase the fees and risks.

Article 49(2)(b) applies to any breach other than late delivery. The basic rule is that the buyer has to declare the contract avoided within a reasonable time after he knew or ought to have known of the breach. Meanwhile, the buyer shall understand that his right may be effected by Article 28. However, there are some decisions that held, under special circumstances, it is not necessary for the buyer to provide an explicit declaration of avoidance since to insist on such a declaration would be contrary to the principle of

good faith.[187]

1. Delayed Delivery

The seller's failure to perform the delivery obligation within a reasonable additional time given by the buyer constitutes fundamental breach and the buyer is entitled to declare the contract avoided. For seasonable goods or goods with high requirement of timeliness, delayed performance is of no use and the buyer has lost what he expects under the contract, thus the seller has fundamentally breached the contract and the buyer is entitled to declare the contract avoided.

In the 2006 amphibious vehicle sales case,[188] the amphibious vehicle delivered by the seller failed the commissioning twice due to defects in design and quality. The amphibious vehicle could not be put into use on time, especially since the buyer, as a company engaged in business operation, had expected to exhibit the vehicle and the contract purpose would not be fulfilled if the exhibition period were missed, which the seller had known at the contract conclusion and the parties had greed on the delivery period accordingly. The seller's delayed delivery was in non-conformity with the contract and the buyer's expectation under the contract could not be achieved. Therefore, the seller's delayed delivery would constitute fundamental breach when the delivery date was of special significance and receiving the goods on certain date was the buyer's contract purpose.

2. Defective Performance

It is hard to define defective performance and determine the buyer's right to declare

187 GERMANY: Oberlandesgericht Hamburg February 28, 1997 , CLOUT case No. 277.

188 The CIETAC Award dated December 26, 2006.

the contract avoided which is also one of the main causes leading to disputes over international sales contracts. Article 25 of the CISG is inherently abstract in which 'what he is entitled to expect' and 'foresee' are subjective factors, so adjudicators need to interpret or define them in specific cases according to the CISG.

It can be found from real cases that the CIETAC tribunals, when determining the relationship between defective performance and avoidance declaration, would consider the consequences of substantial damages suffered by the buyer and determine the buyer has been deprived of what he is entitled to expect under the contract and the seller has fundamentally breached the contract when the defects could not be fixed or sold with lower price or when there is no reasonable remedy with relatively low costs. In CIETAC practice, the following circumstances have been considered as typical substantive damage consequences of fundamental breach:

(1) Goods Returned or Destroyed due to Violation of Mandatory Regulations in the Buyer's Country

In the 2015 corn sales case,[189] the seller failed to fulfill its statutory obligations, violating the mandatory provisions of the laws of China which the seller knew or should have known and the goods under the sales contract were returned or destroyed due to the prohibited genetically modified component. The tribunal held the seller had fundamentally breached the contract and the buyer was entitled to declare the contract avoided in accordance with Article 49 of the CISG.

If the non-compliance with the contract is caused by the seller adding substances in the goods and such substances are illegal in both the seller's and the buyer's countries, the buyer is entitled to declare the contract avoided. We can find similar judgments in

189 The CIETAC Award dated September 29, 2015.

Germany and France.[190]

(2) Impossibility for the Buyer to Achieve the Contract Purposes

In the 2006 water pump sales case,[191] the claimant alleged the water pump supplied by the respondent had different specifications from the contract stipulation. The contract stated GG25 gray cast iron should be used for the pump case, the generator casing, the guide vane and the inlet chamber but the respondent had used Q235 ordinary carbon steel instead which basically could not meet the anti-corrosion requirement. The respondent had no objection to the discrepancy but argued Q235 steel had the same anti-corrosion function as GG25 iron and such function could be improved with various surface anti-corrosion treatments.

In this regard, the tribunal held that the material of the goods supplied by the respondent was different from the contract stipulation, which constituted a breach. As for whether such discrepancy constituted fundamental breach, the extent of the non-conformity and the importance of such provision for the realization of contract purposes would be considered. The tribunal could not draw the conclusion that the non-conformity of the goods supplied by the respondent had no influence on the realization of the claimant's contract purpose from the expert opinions.

The parties acknowledged the fact that the end user had rejected the goods. Before such rejection, the parties had tried to settle their disputes over the contract performance through negotiation during which the respondent had proposed remedies but turned down the claimant's proposal of replacing all the goods in non-conformity and

190 8 CLOUT case No. 150 [Cour de cassation, France, 23 January 1996]; CLOUT case No. 170 [Landgericht Trier, Germany, October 12, 1995].

191 The CIETAC Award dated August 3, 2006.

compensating for the loss. Finally, the parties failed to reach any agreement due to the end of rain season and large gap between the parties. The tribunal deemed the claimant's contract purpose or expected benefits under the contract was the seller's delivery of goods in accordance with the contract, so that company D, the claimant's partner, could perform the contract with company G, the end user, in China, which the respondent had known at contract conclusion. The non-conformity of the goods delivered by the respondent directly resulted in the end user's rejecting goods and claiming for damages through litigation, thus made it impossible for the claimant to realize the contract purpose or deprived him of what he was entitled to expect under the contract. Therefore, the non-compliance of goods supplied by the respondent constituted fundamental breach in accordance with Article 25 of the CISG.

We can see that many courts have found the seller's non-performance of contractual obligations other than the delivery of goods in non-conformity with the contract may also constitute fundamental breach.[192] Therefore, the main factor in the determination thereof is the same as the CIETAC award mentioned above, i.e., the impact of the breach on the buyer's contract purpose. The main disputes involved in such determination are over the delivery of defective goods. According to the 2016 UNCITRAL Digest, the standard adopted in many judgments was whether the buyer could use or resell the goods without unreasonable inconvenience, and if so, such delivery would not constitute fundamental breach.[193] On the other hand, if the goods could not be used or resold with reasonable efforts, such delivery would constitute fundamental breach and

192 CLOUT case No. 282 [Oberlandes gericht Koblenz, Germany, January 31, 1997]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, September 26, 1997]; CLOUT case No. 154 [Cour d'appel, Grenoble, France, February 22, 1995] ; CLOUT case No. 123 District of Louisiana, United States, May 17, 1999] (citing CLOUT case No. 123); CLOUT case No. 752 [Oberster Gerichtshof, Austria, January 25, 2006].

193 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p232.

the buyer was entitled to declare the contract avoided.[194] Additionally, it is necessary to consider whether the disposing of defective goods is beyond the buyer's normal business scope, and if so, the buyer should not be obliged to accept the goods and can declare the contract avoided.[195]

(3) Unsuccessful Remedies

In the 2002 equipment production line sales case,[196] the tribunal held the seller had fundamentally breached the contract for its failure to deliver the goods on time, missing parts in the delivered production line and the severe quality problem leading to unsuccessful commissioning and impossibility of normal production and operation.

In the 2004 equipment sales case,[197] the buyer alleged the equipment under the contract was specific and unreplaceable since the parties had agreed on the specifications and process requirements of the equipment in the contract and related annexes according to the special requirements of the end user. In this case, the equipment delivered by the seller was in non-conformity with the contract standard and could not be put into normal production and operation after various inspections and maintenance while no qualified parts could be produced with the equipment. Therefore, the tribunal held the seller had fundamentally breached the contract due to the delivery of unqualified equipment which could not be replaced or repaired while the buyer's contract purpose could not be achieved.

194 Cour d'appel de Paris, France, January 25, 2012, available in French on the Internet at www.cisg-france.org and, on appeal; CLOUT case No. 79 [Oberlandes gericht Frankfurt a.M., Germany, January 18, 1994]; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, January 27, 2004].

195 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p232.

196 The CIETAC Award dated November 6, 2002.

197 The CIETAC Award dated April 23, 2004.

(4) Situation and Severity of Breach

In the 2007 equipment sales case,[198] the hammer head was a key part in the fine crusher while the one delivered by the respondent was inconsistent with the contract provision. Such inconsistency was over 10% higher than the equipment weight tolerance of ±2% under the contract. In view of the situation, the tribunal held the respondent had fundamentally breached the contract under the CISG.

In the 2019 steel pipe sales case,[199] most of the 104 steel pipes delivered by the respondent (at least 67 steel pipes) did not meet the quality standard in the contract. The inspection report also showed the test results with multiple indicators of some steel pipes were in non-conformity with the contract. Furthermore, the goods resold by the claimant was rejected by the third party. Therefore, the tribunal deemed the respondent's breach actually deprived the claimant of what he was entitled to expect under the contract and constituted a fundamental breach.

IX The Buyer's Obligations

Section 1 The Buyer's Payment Obligation

Article 53 of the CISG provides, '[T]he buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention'. Accordingly, the CIETAC tribunals deem the payment obligation as one of the most basic obligations of the buyer. The buyer cannot find an excuse not to perform this absolute obligation and shall try to find a solution to perform it when the stipulated payment method cannot be realized.

198 The CIETAC Award dated May 22, 2007.

199 The CIETAC Award dated March 29, 2019.

In the 2002 rebar sales case,[200] the buyer should remit USD 80,000 which was calculated as USD10/ton to the bank account designated by the seller before February 9, 1999. The seller informed the buyer of the bank account on February 6, 1999, but the buyer had not handed over USD 80,000 to the Industrial and Commercial Bank of China till February 26 and the seller received it on March 3. The parties had no dispute over the fact that the buyer had delayed the payment of USD 80,000 but disputed over whether the buyer had breached the contract. The buyer argued the original invoice from the seller must be submitted according to China's foreign exchange control regulations but the buyer had not received the original invoice posted by the seller till February 12 and could only remitted the money on February 26 due to the Chinese Spring Festival, so the buyer should not be liable therefor.

The tribunal held the buyer had breached the contract and should be liable for the delayed remittance of USD 80,000. There was no contractual provision on the seller's submission of the original copy of invoice before the payment of USD 80,000 which was calculated as USD10/ton while the buyer, instead of the seller, should have known the requirement of such invoice under China's foreign exchange control regulations (the buyer had not submitted any evidence to prove the seller should have known it). Therefore, the delayed remittance involving the original copy of invoice was the buyer's fault of not having clearly stipulated it in the contract and had nothing to do with the seller. The coincidence of the Spring Festival was not the seller's fault either.

In the 2005 wool sales case,[201] it was stated in the payment term of the contract that the buyer should issue an irrevocable documentary letter of credit with the seller as the beneficiary one month before shipment. The seller sent a fax to the buyer, informing it

200 The CIETAC Award on February 4, 2002.

201 The CIETAC Award on September 16, 2005.

the goods were ready for shipment and requesting the buyer to open the letter of credit on June 18, 2003. The seller sent another fax on August 21, 2003, stating it had not received any letter of credit according to the contract so that the shipment could be arranged and urged the claimant to open the letter of credit. The buyer alleged it could not perform the contract since it could not open a letter of credit without the import and export operation authority and it had never received the seller's earlier fax urging it to open the letter of credit.

The tribunal rejected the claimant's excuse that it could not perform the contract without the import and export operation authority, after it had breached the contract for its failure to perform the contractual obligation of issuing the letter of credit one month before shipment, which had been accepted by the claimant when signing the contract stipulating the buyer should open an irrevocable documentary letter of credit by telex one month before shipment and stating 'our party has accepted'. The tribunal held the buyer should find a suitable way to perform such obligation and emphasized the buyer's obligation to open a letter of credit in the performance of an international sales contract should not be conditional on whether the seller had sent a reminder letter and the buyer's failure to do so constituted a serious breach of contract.

In the 2005 sales case,[202] the claimant admitted it had not fully fulfilled the payment obligation but insisted the reason for such failure was the respondent had not submitted the customs declaration form for export goods in accordance with the contract, which was against the relevant regulations on foreign exchange administration in bonded areas by the state administration authority. The tribunal noted that the provision setting the receipt of the customs declaration form for export goods as the condition of paying the balance was contained in the agreement signed by the respondent and company C

202 The CIETAC Award dated February 24, 2005.

in China on April 15, 2003, stating: company C, as the claimant's sole agent, should be responsible for all business of exporting goods under the contract in this case; the respondent agreed company C to make payment according to the contract and settle the balance on behalf of the claimant; company C should pay 10% advance payment within 5 working days after the contract conclusion and pay the rest after receiving the customs declaration form for export goods from the respondent; and 'this agreement shall be an integral part of the contract'.

The tribunal deemed the agreement should be taken as the parties' specific arrangement of the payment method under the contract and pointed out that though the agreement had stated that company C should make the relevant payments under the contract on behalf of the claimant, the claimant should not be exempted from the payment obligation under the contract when its agent could not perform the payment obligation directly as per the agreement. The parties should fulfill their contractual obligations actively and in good faith. In this case, even if the seller had not submitted the customs declaration form, the buyer and its agent should have urged the seller to do so instead of ignoring it to mitigate losses.

Section 2 The Steps and Formalities for Reasonable Performance of the Payment Obligation

Article 54 of the CISG stipulates, '[T]he buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made'. The usual view of the CIETAC tribunals is that the specific performance of the buyer's payment obligation should first be based on the contract provision and the consideration of the characteristics of the payment method, the international trade practices, and especially

its relation to the seller's delivery of goods. According to the 2016 UNCITRAL Digest, various countries have different interpretations of Article 54 and there are different views on whether Article 54 only requires the buyer to take necessary steps for the payment but does not make the buyer responsible for the consequence, i.e., whether the buyer violates the payment obligation if the measures are unsuccessful.[203] Most courts and tribunals have adopted the standard which is more stringent for the buyer, i.e., the buyer should ensure the successful payment when taking steps and complying with formalities required for the payment. One Russian tribunal deemed the buyer should take all the legally required steps and formalities to accomplish the payment under Article 54 of the CISG while the foreign exchange control could not be taken as an effective ground to exempt the payment obligation unless otherwise stipulated in the contract when the buyer had instructed the bank to transfer but could not obtain freely convertible currency.[204]

1. Parties' Practices and Performance

In the 2009 textile sales case,[205] the parties had agreed on full payment by T/T but specified no payment time. The seller claimed 'the parties' practice in long-term transaction is the seller delivers the goods to the carrier designated by the buyer and faxes the invoice to the buyer, then submits documents including the whole set of invoices and bill of lading to the buyer after receiving the payment by T/T', while the buyer argued '… under the payment by T/T, the buyer makes the payment after receiving the documents. Though there is no explicit provision, the parties have formed the practice of payment

203 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p257.

204 International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, October 17, 1995 (Arbitral award No. 123/1992).

205 The CIETAC Award dated June 9, 2009.

upon receipt of documents. So the buyer is not obliged to pay if the seller fails to submit documents…'.

In this regard, the tribunal noted payment by T/T was the settlement method with which the remitter entrusted the bank to instruct the paying bank to pay certain amount to the payee through SWIFT. In international trade, payment by T/T is different from payment by L/C. Payment by T/T is based on commercial credit and the payment time should be stipulated in the contract. If there is no contractual provision, Article 58(1) of the CISG provides, '[I]f the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents'.

In international trade, if the parties agree on payment by T/T with no specified time, the seller might submit documents first and the buyer would remit the money after receiving the documents when the seller entrusted the buyer, or the buyer might remit first and the seller would deliver the goods and submit the documents after receiving the payment when the buyer entrusted the seller. Therefore, there is no such practice as 'payment upon receipt of documents' or 'documents upon receipt of payment' when the parties have not agreed on the time for payment by T/T. As such, it is up to the parties' commercial credit.

In this case, the parties had long-term transactions between July 2007 and July 2008. The contract in this case was concluded in May 2008 and the goods were delivered in June and July 2008, which was later than the previous transactions during which the buyer had refused to pay for the goods. It was shown in the evidence that during the

performance of the contract, the buyer also refused to pay for the goods no longer under the control of the seller on the excuse of quality discrepancy in the third party's goods after the seller had delivered the goods and transferred the goods under FOB condition to the carrier designated by the buyer, which directly resulted in the seller's doubt on the buyer's credit. It was legal and reasonable for the seller to refuse totransfer documents before receiving the payment stipulated in the contract so as to protect its own rights.

According to 2016 UNCITRAL Digest, Article 58(1) stipulates the implied rule of simultaneous transfer and payment of goods under which the buyer must make payment when the seller transfers the goods or documents under its control to the buyer.[206] Many courts have the same view as the CIETAC tribunal in the above case, i.e., if the buyer fails to make proper payment in the stipulated time, the seller can refuse to transfer goods or documents under his control to the buyer. Therefore, the seller is entitled to keep the goods or the documents for the title of the goods under such circumstance. If there is no explicit contractual provision and Article 58(1) of the CISG applies, the basic legal principle is simultaneous delivery and payment of goods, but adjudicators need to consider contract terms, usage and practices comprehensively in specific cases. The seller is entitled to retain the goods or control the documents for the disposal of goods until the buyer makes full payment, unless otherwise agreed.[207]

2. Payment by L/C

Payment by L/C is the most common payment method in international trade. Once the parties have agreed on payment by L/C in the contract, the buyer is under the obligation of opening the letter of credit timely.[208] Generally, the buyer's opening of a letter of credit

206 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p271.

207 Handelsgericht Aargau, Switzerland, November 26, 2008， Tribunale di Padova, Italy, February 25, 2004.

208 Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), Yearbook

is the prerequisite for the seller's performance of its delivery obligation. If the contract specifies the date of opening the letter of credit, the buyer must issue the letter of credit by the specified date. If the contract only stipulates the seller's time of shipment without specifing the date of opening the letter of creditt, the buyer should open the letter of credit within a reasonable time before the time of shipment, or at least on the first day of such time, otherwise the seller would be entitled to refuse the delivery of goods and claim for damages or request a corresponding extension of the time of shipment. Most adjudicators have regarded the buyer's obligation of opening L/C as an absolute obligation in international sales of goods and would not allow the buyer to perform such obligation later than the specified date when the seller could not perform some incidental obligations or the buyer claims he has not received certain information.

In the 2019 equipment sales case,[209] the CIETAC tribunal pointed out the buyer's payment obligation should include the opening of the letter of credit according to the contracts and Articles 53 and 54 of the CISG. The tribunal noted Article 9 of the two contracts in this case was about the buyer's obligation to open the letter of credit and the time limit therefor. The article only required the buyer to open the irrevocable letter of credit with the seller as the beneficiary for the total price 45 days before goods delivery but didn't specify the date for the buyer to open the letter of credit. Article 5 of the two contracts stipulated the seller's delivery time, i.e., the seller should ship the goods within 6 months after signing the contract and 45 working days after receiving the letter of credit and the tax exemption certificate. In other word, the seller should deliver the goods within 6 months after signing the contract, i.e. before April 7, 2015. The precondition for the seller's delivery of goods was its receipt of the letter of credit and the tax exemption certificate. There was a sequential order of performance, i.e. the

Commercial Arbitration XXXI, 2006, 148.

209 The CIETAC Award dated July 15, 2019.

buyer's opening of the letter of credit was the precondition for the seller's performance of its delivery obligation.

According to Articles 5 and 9 of the two contracts involved, the tribunal rejected the buyer's claim that there was no contractual provision on the payment time, since the buyer should open the irrevocable letter of credit with the seller as the beneficiary within 45 working days before the end of the 6-month period starting from the contract conclusion while the buyer's failure to do so would result in the impossibility of the seller to ship the goods within 45 working days after receiving the letter of credit and 6 months after signing the contract.

3. Trade Terms and Payment Obligation

In the 2009 textile sales case,[210] the seller alleged it had fulfilled the delivery obligation by transferring the goods to the shipowner or carrier designated by the buyer and the risks had been transferred to the buyer under the FOB terms while the buyer was under the obligation to make full payment and receive the goods according to the contract and the Incoterms 2000. The tribunal deemed the seller's above allegation as a misunderstanding of the Incoterms 2000 under which the buyer should pay the price in accordance with the contract (B1 of the FOB terms). The Incoterms 2000 contained detailed provisions on the seller's and the buyer's obligations, costs, risks, etc. but only stipulated the buyer should pay in accordance with the contract, so the payment issues should be resolved according to the contractual provisions.

Section 3 The Buyer's Payment Time

In the 2005 elevator sales case,[211] the buyer admitted his delay in paying but argued such

210 The CIETAC Award dated June 9, 2009.

211 The CIETAC Award dated July 20, 2005.

delay was related to the seller's non-performance of the cooperative obligation. The buyer had repeatedly notified the seller to settle the payment when the stipulated performance period was over, but the seller ignored the buyer's request and failed to settle and collect payment from the buyer in time, resulting in delayed payment.

The tribunal deemed the buyer had no legal ground for such argument. Article 59 of the CISG provided '[T]he buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or ¬compliance with any formality on the part of the seller'. In this case, the contract has stipulated the payment time for the two 5% balance which would cause no misunderstanding resulting in unnecessary delay, and the payment method for the 5% balance by T/T and for the other remaining 5% as the returned quality guarantee deposit, both containing no special arrangement.

Article 59 of the CISG clearly stipulates the buyer must pay the price on the specified date without the need for any request or ¬compliance with any formality on the part of the seller. The reason for this provision is to distinguish it from domestic laws of certain countries under which the debt should only be paid off after the creditor has served the debtor with a notice or other formal request.[212] Therefore, many adjudicators have expressed the same view as the CIETAC tribunal in the above case, i.e., there is no need of special formalities for the payment unless otherwise agreed in the contract, the buyer should automatically pay on the date specified in the contract or in accordance with Article 59 which is frequently cited by judges and arbitrators if there is no such contractual provision,[213] except under special circumstances such as the buyer does not

212 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p276.

213 Rechtbank Rotterdam, Netherlands, 1 July 2009,; Landgericht München, Germany, May 18, 2009, Tribunal cantonal du Valais, Switzerland, January 28, 2009].

know the exact price on the due date.[214] For example, a German court held the seller was entitled to interest on delayed payment starting from the stipulated payment date when the seller had never requested payment after delivering the goods because the buyer should pay the price in accordance with the contract without any request by the seller as per Article 59 of the CISG.[215] Another German court deemed the buyer's argument that its failure to pay the price was because it had not received the seller's invoice untenable.[216]

X Remedies for Breach of Contract by the Buyer

Article 61 of the CISG, as a general principle, stipulated various remedies available to the seller when the buyer fails to perform its obligations, including not only the exercise of the rights under Articles 62-65 but also the right to claim damages under Articles 74-77.[217] Of course, the aggrieved seller's right to such remedies is not premised on the buyer's fault, which is the principle of non-fault liability in the breach system of the CISG.[218] In other cases, domestic laws of relevant countries shall apply on matters not covered by the CISG such as liquidated damages.[219]

Section 1 Grace Period Granted by the Seller

Article 63 of the CISG provides, '(1)The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations. (2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract.

214 CLOUT case No. 273 [Oberlandesgericht München, Germany, July 9, 1997].

215 Augsburg January 29, 1996 [11 C 4004/95].

216 GERMANY: Oberlandesgericht München July 9, 1997, CLOUT case No. 273.

217 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p284.

218 CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, September 17, 1993.

219 CLOUT case No. 154 [Cour d'appel, Grenoble, France, February 22,1995]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, September 26, 1997].

However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance'. CIETAC tribunals deem that Article 63 conveys the seller's right and the seller's exercise of this right will not result in contract amendments. Therefore, the grace period granted by the seller is not the same as the parties' agreement on contract amendments as there is an essential difference between the two. Once the seller gives the buyer additional time with reasonable length to perform its obligations, the buyer's failure to do so would constitute fundamental breach and the seller is entitled to declare the contract avoided and claim damages.

In the 2009 children's tent sales case,[220] the parties had reached the Amendment Agreement regarding the payment condition during the performance of the contract. The seller alleged that the seller, as the observing party, had granted the buyer, as the breaching party, the grace period but never exempted its liabilities for breach of contract under the Amendment Agreement. The time for the parties reaching the Amendment Agreement was after the buyer had breached the contract and about half a month later than the stipulated performance period. Such amendment was totally different from any amendment made before the expiry of the performing period under the purpose of ensuring the proper performance of contract. Regardless of the amendment, the fact of breach and the observing party's loss had already occurred. The Amendment Agreement was only about the grace period granted by the observing party and essentially the remedy measure taken by the observing party. According to Article 61(1)(a) and Article 63 of the CISG, the observing party's right to claim damages would not be influenced by such grace period. Therefore, the seller, under the premise that the buyer had breached the contract, recognized the parties had reached agreement on amending the payment condition in the contract, but had different views on the time, content and legal effect of the Amendment Agreement from the buyer.

220 The CIETAC Award dated September 9, 2009.

The tribunal held that remedies for breach of contract by the buyer under Articles 61 and 63 were essentially different from contract amendments. The main purpose of Article 63 is to explain what would happen when the buyer failed to perform one of its fundamental obligations, i.e., the obligation to pay or receive goods on time. If the seller, under such circumstances, gave the buyer an additional time to perform the obligation in accordance with Article 63, but the buyer failed to do so, the seller would be entitled to declare the contract avoided with no need to prove the buyer's late payment constituted fundamental breach. Article 63 is about the seller's right and the seller's exercise of this right would not result in contract amendments.

In the 2005 wool sales case,[221] the contract stipulated the buyer should open the irrevocable documentary letter of credit with the seller as the beneficiary. The seller sent a fax to the buyer on June 18, 2003, stating that 'we hereby inform that the above-mentioned contract goods are ready for shipment. However, it is quite a pity that we have not received the L/C as stipulated in the contract to arrange the shipment'. The seller sent another fax to the buyer on August 21, 2003, stating that '[A]fter our notification on June 18, 2003, our Shanghai Office, after having repeatedly urged the issuance of the L/C, notified us that no L/C for the arrangement of shipping had been issued according to the contract. We hereby notify you that our company will hire a lawyer to conduct arbitration procedure or other related legal procedures on our behalf unless the L/C can arrive at our office before August 30, 2003. Look forward to your positive reply'. The tribunal held that August 30, 2003 was the final performance date fixed by the seller, and the buyer's failure to perform its contractual obligation of opening the letter of credit within the additional time given by the seller constituted fundamental breach and the seller was entitled to claim damages.

221 The CIETAC Award dated September 16, 2005.

Article 63 allows the seller to give the buyer additional time to perform its obligations and gives the seller the same right as Article 47, i.e., the seller is entitled to declare the contract avoided after the expiry of the additional time. However, such right only exists when the buyer fails to pay the price or receive the goods.[222] The seller is entitled but not obliged to give the buyer an additional time so as to seek other remedies under the CISG such as contract termination. Tribunals can decide whether the additional time given by the seller is reasonable and in line with Article 63 of the CISG. The reasonable length of the additional time shall be determined according to circumstances of specific cases, including the parties' practices and usage.[223]

Section 2 Seller's Right to Declare the Contract Avoided

Article 64 sets conditions for the seller's right to declare the contract avoided. This article corresponds to the buyer's right to declare the contract avoided under Article 49. Of course, it is also subject to the provisions of Articles 81-84.[224]

1. Buyer's Failure to Pay

In the 2016 equipment sales case,[225] the buyer had not performed its contractual obligation of opening a letter of credit and failed to perform such obligation though the seller gave it grace period and urged it to perform the obligation by emails and lawyer letters. During the hearing, the buyer clearly indicated that it was impossible to continue the performance. In the award, the tribunal held the buyer's conduct constituted a

222 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p291.

223 Tribunal de grande instance de Strasbourg, France, December 22, 2006, available in French on the Internet at www.cisg-france.org, available in English on the Internet at www.cisg.law.pace.edu.

224 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p295.

225 The CIETAC Award dated December 21, 2016.

typical fundamental breach and the seller was entitled to declare the contract avoided.

2. L/C Discrepancy Leading to the Seller's Risk of Being Refused Payment by the Bank

In the 2007 steel sales case,[226] it was stipulated in the contract '[P]ayable 30 days after sight against presentation of the following documents. The fully workable letter of credit shall be received by the seller latest on 26th Dec., 2003… In case there is delay in L/C opening or L/C is opened unworkable, the seller is not any more obliged to deliver neither responsible for any penalty for the delay in shipment or non-shipment…' under which the seller would not be responsible for any penalty for delayed shipment or non-shipment if the seller received the L/C later than December 26, 2003 or the L/C was 'unworkable'. The buyer opened the L/C with the seller as the beneficiary on December 24, 2003. The L/C, when received by the seller, had 8 discrepancies with the contract. Thereafter, the buyer made three amendments to the L/C but there were still discrepancies. The seller, after receiving the L/C after three amendments, declared the contract avoided immediately.

The tribunal considered the main meaning of 'unworkable' to be whether there was a risk that the L/C could not be negotiated in accordance with the terms therein. In this case, the seller was under the risk of being refused payment by the bank for the L/C discrepancies if it had shipped the goods and obtained the B/L and other relevant documents. Therefore, the L/C should be in full accordance with the contract, otherwise it would be 'unworkable'. The seller's non-delivery of the goods according to the contract constituted no breach since the L/C was 'unworkable' due to the L/C discrepancies.

3. Late Opening of L/C

226 The CIETAC Award dated August 9, 2007.

In the 2008 Australian wool sales case,[227] the parties signed three Australian wool sales contracts on October 5, 2006. The buyer failed to open the L/C before November 30, 2006 according to the contracts. The tribunal noted from the parties' contract performance that the claimant had breached the contract due to its failure to open the L/C on time but never indicated it would not perform the contract. In fact, the parties had been communicating and negotiating on the opening of L/C before the seller notified the buyer of the avoidance declaration on December 13, which showed both parties' intent to perform the contract and arrangement therefor. On the afternoon of December 8, 2006, the seller specifically faxed the buyer, notifying it the shipping schedule had been arranged and urging it to issue the L/C as soon as possible, which should be regarded as the seller giving the buyer a grace period to open the L/C. The buyer submitted the application for issuance of the L/C to the bank on the afternoon of December 11 (Monday), i.e., the first working day after receiving the fax on December 8 (Friday, the bank was closed on December 9-10), and the bank issued the L/C on December 13.So the buyer performed its obligation to open the L/C within a reasonable time (3 working day) after the seller had sent the reminder. However, the seller, knowing the buyer's application for issuance of the L/C and performance of the contract, suddenly notified the buyer to avoid the contract on the afternoon of December 13, which was unreasonable and against the principle of good faith.

The tribunal pointed out both parties invoked the CISG provisions on 'fundamental breach' and 'declared the contract avoided' to support their different views on whether the seller was entitled to declare the contract avoided. According to the CISG, breaches were divided into fundamental ones and non-fundamental ones. In the latter case, the observing party could request specific performance and give the breaching party additional time for the performance or claim damages, but could not declare the contract

227 The CIETAC Award dated May 19, 2008.

avoided, i.e., terminate the contract. In the former case, the observing party could declare the contract avoided and claim damages. Article 64 of the CISG provides, '[T]he seller may declare the contract avoided: (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed'. The tribunal held that, in this case, the buyer, though it had delayed the issuance of the L/C, never indicated that it would not perform the contract and took remedial measures to issue the L/C as soon as possible within a reasonable time in the grace period given by the seller. Therefore, the buyer's delay constituted non-fundamental breach. The seller could not declare the contract avoided due to the lack of legal grounds, but could claim damages if there was any loss due to the buyer's delay in issuing the L/C.

The tribunal's view in the above case is consistent with the 2016 UNCITRAL Digest emphasizing the seller would lose the right to declare the contract avoided unless he does so within the specified period under Article 64(2) of the CISG after the buyer has already paid. This provision distinguishes between delayed performance and other breaches. For delayed performance, the seller would lose the right to declare the contract avoided unless he does so before knowing the buyer has already paid.[228] Therefore, this requirement is more strict than Article 49(2) which stipulates '[H]owever, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so within a reasonable time after he has become aware that delivery has been made'.[229]

228 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p297.

229 Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), Yearbook Commercial Arbitration, vol. 31, 2006, 148.

4. Seller's Breach of Contract

In the 2004 food sales case,[230] the seller claimed the buyer had fundamentally breached the contract due to its failure to open the L/C within the shipping period as stipulated in the contract. The tribunal noted the parties inspected the goods at the factory manufacturing the contract goods on November 13 and the seller signed each page of the 15-page inspection report which showed the non-conformity of the goods to be delivered and the report was legal and valid.

Therefore, the tribunal held that the above evidence showed the parties had signed the effective inspection report regarding the unqualified goods to which the seller had made no objection before the buyer initiated the arbitration proceeding. It was obviously unfair and against the parties' true consensus to request the buyer to continue the performance including opening the L/C when the parties had recognized the goods were in non-conformity with the contract but reached no agreement on remedial measures. In view of this, the tribunal rejected the seller's claim that the buyer had fundamentally breached the contract due to its failure to issue the L/C as stipulated in the contract.

5. Seller's Right to Declare the Contract Avoided when the Buyer's Delay in Opening L/C Constitutes Non-Fundamental Breach

In the 2006 ethylene glycol sales case,[231] the buyer had opened two of the three letters of credit one day later than the stipulated dates. The seller asserted that the buyer 's late opening of the L/C constituted a fundamental breach of contract, making the seller's contractual purpose impossible to realize.

The tribunal held it was necessary to determine whether the one-day delay in opening

230 The CIETAC Award dated June 24, 2004.

231 The CIETAC Award dated April 11, 2006.

the L/C constituted a fundamental breach according to Article 25 of the CISG, so the seller needed to prove the one-day delay 'results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract' while the buyer 'would have foreseen such a result'. However, the tribunal found there was no sufficient facts to support such conclusion.

Since the one-day delay could not be determined as a fundamental breach, the seller could only declare the contract avoided when the buyer had failed to perform the payment obligation or declared it would not do so in the reasonable additional time given by the seller according to Article 63(1) under Article 63(1) and Article 64 of the CISG. However, the seller would lose the right to declare the contract avoided unless he did so before he had known the buyer had performed the obligation.

The tribunal held the seller should perform the delivery obligation in strict accordance with the contract under which the buyer had issued the L/C on time. As for the two contracts under which the buyer had issued the L/C one day later than the stipulated dates, the seller, if finding the buyer's violation of the contract stipulation on the issuance dates unacceptable, should have informed the buyer of the avoidance declaration before receiving the notification for the L/C. The seller, though asserting it had notified the buyer it would not continue the performance, provided no evidence for such notification, so the tribunal rejected such assertion. The buyer's evidence regarding the seller's rejection of the L/C issued by F bank in South Korea showed the rejection time was June 28, 2005. The tribunal deemed it against the relevant provision of the CISG for the seller to reject the L/C over one month later than the issuance of the L/C. There was also evidence showing the seller sent a fax to the buyer on May 18, 2005 regarding the notification of shipping schedule and the parties discussed the delivery date on June 20, 2005, so the tribunal found the seller had accepted the L/C issued by the buyer by

its conduct.

XI Passing of Risk

The CISG adopts the way of separating title of goods from risk, follows the principle of risk transfer at the delivery time, and provides comprehensive rules of risk transfer in Articles 66-70 of Chapter IV, Passing of Risk, among which Article 69 stipulates when transportation of goods is not involved, 'the risk passes to the buyer when he takes over the goods'. Similarly, Article 142 of China's Contract Law states, '[T]he risk of damage to or loss of a subject matter shall be borne by the seller prior to the delivery of the subject matter and by the buyer after delivery, except as otherwise stipulated by law or agreed upon by the parties'. The same rule has been adopted by Article 604 of the Civil Code of PRC. Therefore, the Civil Code of PRC, theContract Law and the CISG all use the delivery time as the risk transfer time.

Section 1 Risk Transfer and Trade Terms

Article 6 of the CISG provides, 'T[h]e parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions'. Accordingly, the parties could agree on risk transfer. In practice, the parties normally agree on trade terms to specify the risk transfer time. The CIETAC tribunals would determine the risk transfer time through the interpretation of trade terms. It is pointed out in the 2016 UNCITRAL Digest that if the parties have specified a trade term in the contract and clearly agreed on the application of the Incoterms, the Incoterms provisions on the term would bind the parties according to Article 9(1) of the CISG. However, courts often apply the Incoterms even if the parties have not impliedly agreed thereto according to Article 9(2) of the CISG due to the wide use of the

Incoterms in international trade.[232]

For example, in the 2009 rebar sales case,[233] the tribunal noted the parties had agreed on 'CFR FO CQD, Port C, Romania' (Article 1) and 'risk as per Incoterms 2000'(Article 15) in the contract signed on April 26, 2007. Therefore, the tribunal held the parties had agreed in the contract that 'CFR…designated destination' in the Incoterms 2000 should be taken as the standard to divide risks between the parties. The A5 of CFR in the Incoterms stipulatesthat the seller must bear all risks of the loss or damage of the goods until the goods crossed the ship's rail at the loading port unless otherwise stipulated in B5. There was no circumstance stipulated in B5 in this case, so the risks of the goods should have been transferred to the buyer when the goods crossed the ship's rail at the loading port.

Section 2 Identification of Goods

The premise of risk transfer in international sales of goods is the identification of goods. No matter what delivery method is used, the seller may have goods of the same specification unsold or ready to be delivered to buyers under different contracts, so it would be hard to determine which party should bear the risk if any accident occurs. Regarding the method of identification, Article 67(2) of the CISG provides 'the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise'.

In the 2014 urea sales case,[234] the tribunal noticed that the buyer asserted the seller

232 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p304.

233 The CIETAC Award dated January 15, 2009.

234 The CIETAC Award dated December 26, 2014.

had failed to get the goods ready including identifying goods within the stipulated period, thus breaching the contract severely. The buyer alleged the seller had purchased 27,500 tons of small granular urea which was far more than 25,000 tons stipulated in the contract while the seller had no evidence to prove which part of the 27,500 tons of goods should be identified to the contract of this case. Similarly, the seller had purchased 30,000 tons of large granular urea which was far more than 25,000 tons stipulated in the contract while the seller had no evidence to prove which part of the 30,000 tons of goods should be identified to the contract of this case.

In this regard, the tribunal held the 'identification of goods' referred to the unconditional allocation of goods in stock to the contract with the basic purpose of drawing a line between the two parties for risks and costs when the goods were delivered in international trade. The seller had various simple ways to identify the goods. Packaged goods could be marked or labelled while bulk goods could be stacked separately and labelled as goods under a contract. Such conduct could be completed immediately before shipment. The buyer, if it had rejected the goods after the goods had been allocated/identified to the contract, should bear the corresponding risk of loss or damage of goods and the relevant costs with reference to the relevant provisions in the Incoterms 2010. The goods in this case were bulk ones, so the seller could have identified the goods to the contract of this case by stacking them separately or labelling them before shipment after the goods had arrived at the storage place of the loading port. The 25,000 tons of goods under No.183 Contract and the same under No.182 Contracts only needed to be stacked separately from the 30,000 tons and 27,500 tons of goods. Therefore, the tribunal rejected the buyer's assertion that the seller had not identified the goods.

Section 3 Risk Transfer and the Seller's Delivery Obligation

In international trade, the seller often proposes it would no longer be liable for non-conformity of goods after the risk transfer. Due to the use of modern international trade terms, most risks are transferred to the buyer when the goods are delivered to the first carrier or arrive at the loading port, so the seller would claim it is not responsible for discrepancies of goods after the buyer receives them.

In the 2005 heat conduction oil furnace sales case,[235] the tribunal noted the parties' dispute over whether the seller had performed its delivery obligation under the CIF term. The claimant asserted the fact of 'goods crossing the ship's rail at the loading port' only meant the risk of loss or damage of goods was transferred to the buyer under the CIF contract while the determination on the seller's fulfillment of the delivery obligation should be made according to the contractual rights and obligations. The respondent argued it had fulfilled the delivery obligation when the goods crossed the ship's rail at the loading port.

The tribunal held 'the goods crossing the ship's rail at the loading port' should be the dividing line of the parties' risks instead of the sign of the seller's fulfillment of the delivery obligation since A5 of the CIF term in the Incoterms 2000 stipulates the seller must bear all risks of loss or damage of goods till the goods crossed the ship's rail at the loading port. Thereafter, the seller should 'hand over any documents relating to them and transfer the property in the goods' according to the CISG and perform other obligations including the quality guarantee under the contract.

It is noticeable that the tribunal's view in this case is the same as most courts regarding risk transfer. If the buyer receives the damaged goods and the parties dispute over whether the damage has occurred before or after the risk transfer, most adjudicators hold the buyer should prove the damage has occurred before the risk transfer. However, if the

235 The CIETAC Award dated December 25, 2005.

buyer has notified the seller of the non-conformity according to Article 39 of the CISG or the buyer has rejected the goods immediately after the delivery, the seller should prove the goods conform to the contract at the time of risk transfer.[236] Some courts have pointed out the seller should bear the burden of proof to prove the goods were not defective when the risks were transferred to the buyer.[237] Regardless, risk transfer does not mean the fulfillment of the seller's obligation.

XII Examination of Goods

Article 38 of the CISG stipulates, '(1)The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination'. Article 39 of the CISG provides '(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of ¬conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee'. Article 40 provides '[T]he seller is not entitled to rely

236 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p304.

237 Hovioikeus/hovrätt Helsinki, Finland, May 31, 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at www.cisg.law.pace.edu.

on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer'.

There are similar provisions in China's Contract Law. Article 157 stipulates, '[U]pon receipt of the subject matter, the buyer shall inspect it within the agreed inspection period. Where no inspection period is agreed, the buyer shall timely inspect the subject matter', which corresponds to Article 38 of the CISG. Article 620 of the Civil Code of PRC exactly adopts the same rule as Article 157 of the Contract Law. Article 158 of the Contract Law provides, '[W]here the parties have agreed upon an inspection period, the buyer shall notify the seller of any non-compliance in quantity or quality of the subject matter within such inspection period. Where the buyer delayed in notifying the seller, the quantity or quality of the subject matter is deemed to comply with the contract. Where no inspection period is agreed, the buyer shall notify the seller within a reasonable period, commencing on the date when the buyer discovered or should have discovered the quantity or quality non-compliance. If the buyer fails to notify within a reasonable period or fails to notify within 2 years, commencing on the date when it received the subject matter, the quantity or quality of the subject matter is deemed to comply with the contract, except that if there is a warranty period in respect of the subject matter, the warranty period applies and supersedes such two year period. Where the seller knows or ought to know the non-compliance of the subject matter, the buyer is not subject to the time limits for notification prescribed in the preceding two paragraphs', which is a combinationof Articles 39 and 40 of the CISG. Article 158 of the Contract Law has been entirely adopted by Article 621 of the Civil Code of PRC which provides the same inspection rule.

It is found in CIETAC practice that the parties may easily dispute over the inspection of goods and claims for damages in international trade. The reason is the main dispute

in international trade is about the quality of goods while any discrepancy or the cause thereof is generally found and confirmed through inspection. In such disputes, tribunals need to balance two interests. On one hand, the CISG requires the buyer to examine the goods within as short a period as is practicable in the circumstances and notify the seller of the lack of conformity within a reasonable time under the purpose of urging the parties to examine the goods within as short a period as is practical, and to find the real causes of the lack of conformity and exclude problems caused by factors other than quality defects such as weather, time, carrier or keeper. On the other hand, from the buyer's perspective, problems may occur from the transshipment of goods or different means of inspection for goods with different natures. Therefore, tribunals need to make comprehensive determination according to the parties' agreement in the contract, the specific goods, usage, actual situation and the parties' conducts.

Section 1 Inspection

1. Understanding of 'within as Short a Period as is Practicable in the Circumstances'

The parties may agree on inspection in the contract. The parties engaging in international trade should know the relevant practices, risks and rules and should obey the clear contractual provision on the inspection period, if any. If the parties have not agreed thereon, the CISG Advisory Council Opinion No.2 states the understanding of 'within as short a period as is practicable in the circumstances' as the inspection should be carried out within practical and feasible (not just possible) time. 'Practicable' should be determined according to specific circumstances of each case. It is generally considered practicable to examine the goods immediately after receiving them. Normally perishable goods should be inspected immediately. As for other goods such as complex machinery and equipment, it may be practicable to inspect the goods when they are used for the

specific purpose unless damage or non-compliance with the contract has appeared in advance. Some courts in various nations have expressed similar views in their precedents.[238]

In the 2012 steel pipe sales case,[239] the tribunal pointed out 'within as short a period as is practicable in the circumstances' in Article 38(1) of the CISG was a reasonable period instead of accurate time. The so-called reasonable period should be determined according to the specific circumstances and the consideration of various factors. The tribunal deemed the main purpose of such provision in the CISG was to require the buyer to examine the goods as soon as possible and find out whether the goods were in compliance with the contract so that the situation of quality change or damage due to untimely inspection or delay could be avoided while the determination of liabilities therefore could be clearly made. Of course, this provision also had the purpose of notifying the seller timely so that the seller could take reasonable remedies.

As stated in the judgment of a Swiss court, 'the scope of inspection will depend not only on the goods and their intended purpose but also on the general situation of the buyer and the inspection site. Actual inspections may take several hours to several months, sometime just by naked eyes and sometimes by professionals thoroughly'.[240]

In the 2013 medicine sales case,[241] the CIETAC tribunal clearly stated the parties, being equal commercial subjects and having engaged in various transactions before the one in this case, should have fully understood the contract terms. There was a clear provision on the period for claiming quality discrepancy, so the parties should perform the obligation

238 AUSTRIA: Oberster Gerichtshof January 14, 2002.

239 The CIETAC Award on July 17, 2012.

240 Appelationshof Bern, Switzerland, February 11, 2004, English translation available on the Internet at www.cisg.law.pace.edu.

241 The CIETAC Award dated June 28, 2013.

in strict compliance with the contract. According to the contract, the buyer should claim quality discrepancy within 30 days after the goods arrived at the destination port. The goods in this case arrived at the destination port on November 25, 2011, so the buyer should have claimed quality discrepancy before December 25, 2011. However, the buyer had not done so within the stipulated period. Over one month later, the buyer claimed quality discrepancy in February 2012 after company D, the end user of company C, the buyer's client, had found certain goods were unqualified through inspection. Later, the buyer and its client company C entrusted SGS to get samples and inspect the goods, but SGS Mexico sampled the 12 packages of goods involved in this case on June 1, 2012 while SGS Shanghai issued the report on October 31, 2012. The tribunal deemed it inappropriate to determine the quality of the goods by the SGS inspection report which was issued much later than the arrival time of the goods, i.e., November 25, 2011. According to Article 38 of the CISG, the claimant should have inspected the goods or entrusted others to inspect the goods 'within as short a period as is practicable in the circumstances'. The contract stipulated the period for claiming quality discrepancy as 30 days after the arrival of the goods at the destination port which was reasonable and practicable. Furthermore, the goods were directly delivered to the claimant's client company C which could have inspected the goods within 30 days after receiving the goods, i.e. the arrival of the goods at the destination port. However, company C failed to examine the goods 'within as short a period as is practicable in the circumstances' and resold the goods to company D. From the perspective of the respondent, the claimant or company C should have examined the goods 'within as short a period as is practicable in the circumstances' or within a reasonable time. The parties had taken into account the transportation of goods and agreed on the period for claiming quality discrepancy as 30 days after the arrival of goods. There was no such situation of no reasonable opportunity for the buyer to examine the goods due to transshipment or re-delivery of goods at the

contract conclusion. During the performance, it was the claimant's fault that neither it or company C had examined the goods within 30 days after the arrival of the contract goods, so the claimant should bear the consequences. The tribunal also pointed out that Article 39(1) stipulated, '[T]he buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it'. The parties had agreed on the period for claiming quality discrepancy, so the claimant should have examined the goods within 30 days after the arrival of the goods at the destination port and informed the seller of the non-compliance, if any, timely. However, the claimant had neglected to exercise this right and should bear the consequence thereof.

In the 2018 equipment sales case,[242] Article 8 of the contract was on the inspection of goods, of which Article 8.2 was about the inspection of the appearance, specifications, quantity and weight of the goods with the inspection period of 90 days after the arrival of the goods at the discharging port/site, Article 8.3 was about the intrinsic quality inspection with the same inspection period as the guarantee period. Article 9.2 of the contract stated, 'the guarantee period of the goods shall be one year after the acceptance of the goods'. The parties had no dispute over the fact that the seller delivered the goods on November 15, 2014 and the buyer received the goods in January 2015. The tribunal deemed the inspection time for the appearance, specifications, quantity and weight of the goods should be no later than April 2015 since the goods arrived at the buyer's site in January 2015. Meanwhile, the tribunal, considering Article 8 and Article 9.2 of the contract in combination, determined the inspection of goods in Article 9.2 should not include the intrinsic quality inspection, otherwise the intrinsic quality inspection period should be included in the period for the inspection of goods instead of being one

242 The CIETAC Award dated March 8, 2018.

year later than the acceptance of the goods. Considering the parties' agreement on the intrinsic quality inspection period as within one year after the acceptance of the goods, the 'inspection of goods' herein should not include the intrinsic quality inspection but only refer to the inspection of the appearance, specifications, quantity and weight of the goods only. The tribunal held the intrinsic quality inspection period should be one year later than the inspection period for the appearance, specifications, quantity and weight of the goods, i.e., April 2016.

In addition, the CIETAC tribunal would consider the buyer's good faith and activeness in carrying out the inspection besides the quality characteristics of the goods.

For example, in the 2014 equipment sales case,[243] the buyer should send notification to the claimant for installation, commissioning, inspection and acceptance of the equipment after receiving it according to the contract and the buyer's confirmation during the hearing, but there was no clear contractual provision on the time for installation, commissioning, inspection and acceptance. The tribunal held the buyer should timely and quickly arrange the installation, commissioning, inspection and acceptance after receiving the equipment according to Article 38 of the CISG stipulating, '[T]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances'. However, the buyer had not notified the seller for the installation, commissioning, inspection and acceptance of the six sets of equipment during the 1.5 years from receiving the last set on February 18, 2013 to the time the seller initiated the arbitration proceedings, and still refused to arrange the installation, commissioning, inspection and acceptance after the seller sent the lawyer's letter on August 2, 2013, urging it to make immediate arrangement. In this case, the buyer, after receiving the six sets of equipment, had neither claimed quality discrepancy in the 1.5

243 The CIETAC Award dated December 16, 2014.

years before arbitration nor did so during the hearing of this case. The buyer had neither performed the statutory obligation of examining the goods timely nor claimed quality discrepancy within a reasonable time, so the tribunal found the quality of the six sets of equipment conforming to the contract.

Similarly, in the 2010 equipment sales case,[244] the parties had not agreed on the inspection institution or time for the quality inspection of the equipment in the contract. The buyer had not entrusted an institution for quality inspection till January 6, 2009, which was 10 months later than its discovery of the quality discrepancy on March 3, 2008. The buyer submitted no explanation or evidence that the inspection done 10 months later should be regarded as 'within a reasonable time' or 'within as short a period as is practicable in the circumstances'. Therefore, the tribunal found the inspection was not carried out within a reasonable time as stipulated in the CISG.

Adjudicators in various countries have determined the presumed time for the buyer's inspection although it is widely recognized that such time is flexible and the specific standard therefor in different cases may be different.[245] For example, a Swiss court and an Austrian court stated in the judgments that it was generally accepted that goods should be inspected within one week after the delivery[246] while some other courts may decide the reasonable time for inspection between 3 days to 1 month.[247] There is no specific principle for determining the inspection time under China's Contract Law while Chinese courts and arbitration commissions have not attempted to set one. Article 157 of the Contract Law and Article 620 of the Civil Code of PRConly stipulate in principle that '[W]here the parties have agreed upon an inspection period, the buyer shall notify the

244 The CIETAC Award dated August 6, 2010.

245 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p158.

246 Appelationshof Bern, Switzerland, 11 February 2004; AUSTRIA: Oberster Gerichtshof January 14, 2002.

247 CLOUT case No. 284 [Oberlandesgericht Köln, Germany, August 21, 1997].

seller of any non-compliance in quantity or quality of the subject matter within such inspection period. Where no inspection period is agreed, the buyer shall notify the seller within a reasonable period'.

2. Goods Inspection and Trade Terms

In the 2012 round steel sales case,[248] the tribunal noted the claimant, out of its concern over the quality of the goods, entrusted SGS Singapore, a third party, for quality inspection after receiving the goods, informed the respondent of the quality defects shown in the inspection result and claimed damages. The tribunal held though the parties had agreed on the CIF price condition in the contract under which the respondent should perform its delivery obligation by loading the goods at Lianyungang Port under the stipulated condition and at the stipulated time and obtaining the B/L, the respondent, i.e., the seller, should guarantee the quality of the goods and ensure that the delivered goods conformed to the stipulated specifications and standard in the contract when it was impossible or inconvenient for the claimant, i.e., the buyer in Singapore, to inspect the goods or exercise the inspection right at the departing port in accordance with international trade practices. The respondent doubted the qualifications of SGS Singapore and rejected the inspection result, but the parties had not agreed on the institution, method, location and time of the quality inspection in the contract. Article 38(1) of the CISG stipulated, '[T]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances'. Accordingly, the claimant should not lose the right to inspect the goods due to the CIF price condition stipulated in the contract. In international trade, inspection institutions could be national inspection and quarantine bureaus or other inspection and quarantine institutions with legal qualifications. The inspection report of these

248 The CIETAC Award dated March 15, 2012.

institutions could be used as legal basis for the seller to deliver goods, the buyer to refuse goods or the aggrieved party to claim damages. The respondent submitted no evidence against the qualification of SGS Singapore and had no grounds to deny the inspection report showing the quality defects which had existed before the delivery of goods since the claimant had notified the respondent thereof within a reasonable time and the respondent had admitted its receipt of the notification. The tribunal thus recognized the inspection report on the quality of the goods involved in this case by SGS Singapore, the independent inspection institution entrusted by the claimant.

3. Consequences of No Inspection or Untimely Inspection

The inspection obligation under the CISG is not mandatory but is related to the parties' subsequent rights and interests. CIETAC tribunals have pointed out that the buyer's non-performance of this obligation is not simply an inaction but an act of renunciation and the buyer should be liable for enlarged losses.

In the 2014 pipeline sales case,[249] the contract stipulated the buyer should inspect the goods, but the seller had to inspect the goods to ensure its performance of the delivery obligation since the buyer had refused to do so. In this regard, the tribunal held that it was an essential issue in this case to determine the party liable for inspection before loading.

The tribunal noted Article 9 of the Terms and Conditions of the contract stated, '[I] nspection: Prior to shipment of material, the buyer of the 16" pipeline shall have to furnish Third Party Inspection in the premises of manufacturer on his own cost from Company E. Third Party Inspection is included in scope of work of the manufacturer. Scope of third-Party inspection includes the following: Pipe line inspection as per

249 The CIETAC Award dated August 6, 2014.

AP15L. Review the Manufacturer Process of ordered Pipeline. Review material tracing/ tracking procedure'.

According to the above article, the tribunal held that: (1) the buyer (claimant) should have arranged the inspection of goods before loading, including appointing the inspection institution, paying the inspection fees and informing the end user to be present at the inspection, etc. so it was the buyer's obligation to arrange the pre-loading inspection. In fact, the seller sent two emails, urging the buyer to schedule and arrange the pre-loading inspection and notify the end user, company C in Pakistan, to be present at the inspection, but the buyer ignored the request and took no action. It was reasonable for the seller to arrange the inspection by company E so as to perform its delivery obligation. The buyer had no reasonable grounds or contractual basis to reject the inspection report by company E which was submitted by the seller; (2) the contractual provision on inspection had clarified the content of inspection by company E, a third party, including inspection items during the production process by the manufacturer, which was a guarantee for the buyer to obtain qualified products and extremely beneficial to the buyer. However, the buyer violated such provision and its renunciation should not be regarded as simple inaction; and (3) the buyer's renunciation of the pre-loading inspection right had in fact made the seller lose the opportunity to change or repair the goods in non-conformity for free before shipment, thus enlarging the losses.

In summary, the tribunal found the buyer's failure to perform Article 9 of the Terms and Conditions of the contract result in its liability for breach of contract and the corresponding liability for the enlarged losses. Furthermore, the buyer alleged 'since the inspection procedure of the two inspection reports submitted by the seller had not met the requirements of pre-loading inspection in the contract, the buyer and the end user rejected the reports, but the seller forcibly shipped the goods'. The tribunal held that

the seller's inspection should not be regarded as an alternative fulfillment of the buyer's obligation but be taken as the act of ensuring that the delivered goods conformed to the contract and obtaining relevant proof thereof which was lawful and legitimate, so the tribunal rejected the buyer's allegation.

4. Consideration of the Principle of Good Faith

In the performance of sales contracts, the quality inspection of goods is actually a right that both parties vigorously fight for and is also an issue over which the parties easily dispute because the inspection report directly shows whether the goods conform to the contract, so the parties, when signing the contract, would pay much attention to the provision on the inspection time and the appointment of an inspection institution. When there is no agreement on the inspection location, either at the loading port or the discharging port or the appointment of an inspection institution, the parties may agree in the contract that the first inspection shall be done at the loading port and the second inspection be done at the discharging port by the inspection institution jointly appointed by the parties. The potential risk is it would be impossible for the parties to jointly appoint an inspection institution when disputes occur where there is no specific institution stated in the contract. Under such circumstance, the contract performance or dispute resolution may fall into a deadlock because the other party may claim the inspection report by the institution unilaterally entrusted by one party invalid while the joint inspection could not be carried out since the parties have not jointly appointed an inspection institution. In CIETAC practice, tribunals will determine the parties' rights and obligations and the liabilities for non-performance of the contract under such circumstance according to the specific situation of the case, the principle of goods faith, the practices and usage.

In the 2012 food sales case,[250] the buyer claimed quality discrepancy found after the arrival at the destination port such as moldy and unusual smell and taste and submitted evidence including the three inspection reports by three Russian inspection institutions and the order issued by the Federal Service for Veterinary and Phytosanitary Surveillance of the Ministry of Agriculture of the Russian Federation on April 28, 2011. The seller argued the delivered goods had been inspected by the Entry-exit Inspection and Quarantine Bureau of a Chinese city and obtained the CIQ Quality Certificate and Plant Quarantine Certificate on December 16, 2010, showing that the goods conformed with the contract and were suitable for human consumption. Furthermore, the seller handed over the two certificates to the buyer at the time of delivery.

Noting the parties had no dispute over the authenticity of the certificates submitted by the parties as evidence but argued over the relevance thereof, the tribunal found that the key issue of this case was which certificate would be allowed to determine whether the goods delivered by the seller met the quality standard in the contract.

The tribunal found through investigation that the 'document' clause of the contract stipulated 'the seller shall submit the following documents:…4) the original English quality certificate issued by a functional authority with all specifications, quality descriptions and the exact quantity stated on the B/L; 5) the original phytosanitary quarantine certificate issued by an official authority, stating the full name and address of the seller and buyer, the destination port in Russia, cargo description, bag quantity, net production, gross weight, the date and number of the invoice. The subsequent data and information on the B/L must be consistent with those in the certificate. The certificate must indicate the goods are suitable for human consumption;6) the original fumigation certificate issued by an independent third party…'.

250 The CIETAC Award dated September 6, 2012.

The tribunal found that the above contractual provision showed the parties had agreed on the inspection by the official plant inspection and quarantine authority in China at the seller's location should be done before the delivery of goods and the inspection certificate of such authority should be taken as the standard to determine the goods quality in the contract. Therefore, the tribunal held that the CIQ Quality Certificate and Plant Quarantine Certificate should be the allowed stipulated certificate meeting the inspection requirement 'before the delivery of goods' as stipulated in the contract and also be the grounds for determining whether the seller's performance of the delivery obligation conformed to the contract and whether the delivered goods met the quality standard stipulated in the contract.

Section 2 Notice for the Lack of Conformity

The buyer, after having discovered or ought to have discovered the lack of conformity, should give notice to the seller within a reasonable time which is determined according to the specific circumstances of each case, including the nature of the goods, the nature of the lack of conformity, the parties' situation and the relevant practices, etc. Article 39(1) is to establish a flexible rule for tribunals to remain flexible in determining the circumstances of different cases, so it contained no specific provision on the content, form or time of such notices.

1. The Content of the Notice for the Lack of Conformity

CISG Advisory Council Opinion No. 2 points out that the notice should contain information the buyer could provide, which is sometimes understood as the buyer should indicate the specific situation of lack of conformity and sometimes understood as the buyer could only simply indicate the lack of conformity. In general, the notice for the lack of conformity should explicitly state the nature of the lack of conformity

and the defects in the goods and should be specific enough that the seller could take appropriate remedial measures with its professional knowledge.[251] However, as long as the buyer's information and the actual situation are enough for the seller to be clearly aware of the lack of conformity, the notification requirements under Article 39 should be deemed as having been met. The CIETAC tribunals would fully consider the parties' communication, paying more attention to the parties' awareness of the lack of conformity than the form of the notification and not being limited to one notice or claim. In fact, the parties may not be able to fully retain the relevant evidence and tribunals needed to determine whether the seller were fully aware of the lack of conformity in a timely manner based on comprehensive evidence. Regarding the content of such notices, some courts have pointed out one purpose of Article 39 of the CISG is to facilitate the clarification of lack of conformity. The request for a notice for the lack of conformity aims at providing necessary information to the seller so that the seller knows how to continue the transaction under normal situations[252] or facilitating the seller to remedy defects.[253] For example, a German court stated, the seller may have the chance 'to send a representative to inspect the goods at the buyer's site, to obtain necessary evidence for potential disputes over the lack of conformity, to provide a basis for negotiation on fixing the defects, or to recourse against a third-party supplier'.[254]

In the 2012 steel pipe sales case,[255] the seller raised doubts about the credibility of the buyer's notification letter of which one reason was the letter only stated 'extensive damage' in the goods and the B/L number but never specified 'the nature of lack

251 AUSTRIA: Oberster Gerichtshof 14 January 2002.

252 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p174.

253 Hoge Raad, the Netherlands, February 4, 2005, Unilex.

254 Landgericht Stuttgart, Germany, October 15, 2009, English translation available on the Internet at www.cisg.law.pace.edu.

255 The CIETAC Award dated July 17, 2012.

of conformity' in accordance with Article 39, the circumstances of the damage (the damaged parts or degree), or the quantity of damaged pipes. Thus, the seller argued that the buyer 'lost the right to claim the lack of conformity'.

The tribunal noted the following facts and time: the parties held a meeting to discuss the damage and payment issues on December 11, 2007 and signed the minutes of the meeting, there were various emails between the buyer's employees and the seller's employee, on October 15-31, 2005, among which the email from the buyer to the seller on October 27, 2005 stated that the buyer had paid USD 600,000 to the seller, would immediately pay USD 400,000 after the insurance company agreed to the repair of 4-1/2'' pipes, and would pay USD 810,000 for the damaged pipes after the insurance company settled the claim. Additionally, in the email from the buyer to the seller on October 31, 2005, the buyer clearly stated, besides the payment for goods, the loss rate of the four types of pipes was 25-35%, the actual number of inspected pipes was over 16,000 and a lot of time was spent, the buyer had paid over USD 300,000 for the third party inspection and the estimated cost of repairing the pipes was USD 400,000 to 500,000, etc.

The tribunal held the above evidence was sufficient to prove the buyer had notified the seller of the damage and loss of goods timely. As for the seller's assertion that the notice failed to state the nature of the lack of conformity, the tribunal deemed the evidence other than the notice proved the buyer had timely notified the seller of the damage of goods and the severity of damage. The seller, after having received various information regarding the damage (including the related insurance claim amount and the estimated loss), and making no objection to the severity of the damage, had no legal ground or sense to assert the failure of the notice to state the nature of the lack of conformity. Therefore, the tribunal recognized the buyer's notice.

Similarly, in the 2005 hydraulic winch sales case,[256] the tribunal, comprehensively considering the parties' communication, held the purpose of the buyer's notice had been achieved. The hydraulic winch involved in the case was for deep-sea exploration by the claimant and specially designed and manufactured by company C. The claimant purchased the hydraulic winch through bidding in which the respondent bid independently as the agent of company C and won the bid through bid opening and evaluation.

The contract stipulated, 'claims: if the buyer finds the quality, specification or quantity of goods in non-conformity with the contract within 90 days after the goods arrive at the destination (except those caused by the insurance company or the carrier), the buyer is entitled to request for replacement or claim for damages with the CIQ inspection certificate while all the costs (such as inspection fees, replacement costs, insurance, storage, discharging and other fees) should be borne by the seller. The seller guarantees that within 12 months after the goods arrive at the destination, the buyer can immediately notify the seller of any damage due to the quality or processing of the goods and claim damages with the CIQ inspection certificate as the base for such claim'. The buyer claimed damages based on the seller's guarantee obligation under this article, but the seller argued that the buyer, though claiming damages before initiating the arbitration proceeding on June 3, 2004, never claimed effectively with the CIQ inspection certificate as the basis of the claim. The only claim based on the CIQ certificate was filed with the arbitration application when the 12-month quality guarantee period stipulated in the contract had expired. Therefore, the seller asserted it was no longer liable for the buyer's claims due to its failure to make effective claims within the 12-month quality guarantee period stipulated in the contract.

256 The CIETAC Award dated September 12, 2005.

The tribunal focused on the performance of the contract with the purpose of determining whether the seller had actually known about the lack of conformity, i.e., whether the purpose of the buyer's notice had been achieved. In fact, the seller admitted during the hearing and in its written statement that the buyer, the seller and company C signed the Memorandum on October 5, 2002 to which the seller never raised any authenticity objection. Article 8 of the Memorandum provided, 'company C failed to complete the installation, commissioning and acceptance of the geological winch specified in the contract within the stipulated period, resulting in the impossibility of carrying out the major investigation on schedule and causing reputation and economic losses to the buyer (the direct cost of this installation project is about RMB 350,000). The buyer will claim damages in accordance with the relevant legal provisions of the People's Republic of China. If the newly-made geological winch still cannot meet the technical requirements, the buyer will return the goods and claim damages according to law. The winch supplier shall bear all the direct costs incurred for the installation of the winch including the engineering cost, design cost and port fees'. The said Memorandum showed that the seller should have known the buyer would claim damages against it no later than October 5, 2002.

The tribunal noted that the buyer, after signing the Memorandum, sent the winch into deep sea for testing in November 2002, but the winch could not meet the technical requirements stipulated into the contract and had other serious quality problems. The inspection certificate issued by inspector E on December 16, 2002 showed the quality problems were 'caused by design and manufacturing mistakes'. The tribunal also noted the CIQ inspection certificate was issued on December 16, 2002 which was within the 12-month quality guarantee period after the arrival of the goods at the destination port stipulated in the contract (the winch arrived at the port on July 6, 2002), and the

parties had no dispute over this fact but argued whether the buyer had notified the seller of the inspection result within the quality guarantee period. The buyer alleged it had faxed the certificate immediately after obtaining it and sent again by courier when the seller claimed it had not received the fax and submitted the receipt for the courier as evidence. The seller denied receiving the fax or the courier but submitted no evidence to the contrary. The tribunal found through inspecting the evidence that the buyer sent a letter to the seller on April 10, 2003, informing it E, the inspection and quarantine bureau, had formally issued the inspection certificate showing the poor design and manufacturing of the winch had caused significant adverse impacts on the buyer's implementation of major national basic research projects and economic losses, requesting it to bear the corresponding costs and retaining the right to return the goods. The seller did not deny its receipt of this letter. Considering the contract performance and the evidence including the above letter on April 10, 2003 and the receipt of the courier, the tribunal had reason to support the buyer's claim that it sent the inspection certificate dated December 16, 2002 to the seller within a reasonable time after the inspection institution issued the inspection certificate, which was within 12 months after the goods arrived at the destination port.

The tribunal rejected the seller's assertion that the buyer's claim was beyond the stipulated period and held the buyer's claim against the seller valid under Article 14 of the contract.

In fact, Article 39 stipulates no specific form of notification while the parties could agree on a specific form. The parties may determine the specific date and form of notification in accordance with Article 6 of the CISG.[257] Normally, adjudicators will first respect the parties' choice in the contract. Moreover, the buyers have lost the right to claim the lack of conformity in many cases due to their failure to comply with such contractual

257 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p172.

provisions.[258]

2. The Notification Period

1) The Period Stipulated in the Contract

In the 2013 medicine sales case,[259] the respondent, after signing the contract, shipped the goods directly to the claimant's client, company C, according to the transportation requirement of the claimant. The contract goods arrived at the destination port on November 25, 2011. The claimant notified the respondent of the quality discrepancy on February 1, 2012, because the final user, company D, inspected the goods and found 6 out of the 18 packages of goods were qualified while the rest of the 12 packages were unqualified after the claimant's client, company C sold the contract goods to company D. Later, company C entrusted SGS Mexico to conduct a sampling of the 12 packages involved in this case and sent the sample to SGS Shanghai on June 15, 2012. SGS Shanghai issued the inspection report on October 31, 2012, showing the quality discrepancy. The claimant alleged the respondent had breached the contract by providing goods with quality discrepancy.

258 Landgericht Coburg, Germany, December 12, 2006, English translation available on the Internet at http://cisgw3.law.pace.edu; CLOUT case. No. 336 [Canton of Ticino Tribunale d'appello, Switzerland, June 8, 1999]; Landgericht Gießen, Germany, July 5, 1994, Unilex; Landgericht Hannover, Germany, 1 December 1993, Unilex; CLOUT case No. 303 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331) (see full text of the decision); CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria,June 15, 1994]; CLOUT case No. 50 [Landgericht Baden Baden, Germany, August 14, 1991]. See also CLOUT case No. 305 [Oberster Gerichtshof, Austria, June 30, 1998] (remanding to determine whether contractual provision governing time for giving notice of defects had been complied with); but see Rechtbank Zwolle, the Netherlands, March 5, 1997, Unilex (the court notes that the seller's standard term setting the time for giving notice of defects was part of the contract, but the court apparently did not apply the term; its analysis of whether the buyer gave notice within a reasonable time, however, was influenced by the term).

259 The CIETAC Award dated June 28, 2013.

The tribunal noted the contract stipulated the claimant should claim any quality discrepancy within 30 days after the goods arrived at the destination port. The goods of this case arrived at the destination port on November 25, 2011, so the claimant should have claimed quality discrepancy before December 25, 2011 in accordance with the contract. However, the claimant had not claimed quality discrepancy till February 1, 2012 which was beyond the stipulated period.

The tribunal deemed the parties in this case were equal commercial subjects and had conducted multiple transactions before the transaction in this case, so both parties should have fully understood the contractual provisions. Since the contract stipulated clearly on the period for claiming quality discrepancy, the parties should perform in strict accordance with the contract. The claimant should bear the consequence of not claiming quality discrepancy within the stipulated period though he had known the contractual stipulation thereon. The claimant had not claimed quality discrepancy against the respondent till over one month later than the stipulated period. The SGS inspection report was made long after the arrival of the contract goods at the destination port (November 25, 2011), so it was understandable that the respondent had many doubts about the report and it was inappropriate to determine the quality of the goods in this case based thereon.

2) Notification within a Reasonable Time after the Buyer Has Discovered the Lack of Conformity or Ought to Have Discovered It

If the parties have agreed on the maximum time for a notification, the tribunal can easily determine whether the notification is beyond such time. When there is no clear contractual stipulation, the tribunal can only consider all the relevant factors to determine the scope of 'a reasonable time', including the parties' correspondence

frequency, any practice affecting the time, the seller's reasonable expectation on the notification time, the nature of the chosen remedial measures, the physical fragile nature of the goods, the seasonal and economic characteristics of the goods, the nature of the contract, and the buyer's obligation to mitigate losses, etc.

Based on these standards, CIETAC tribunals have determined the buyer's notification of defects for perishable goods four months after discovering the lack of conformity was beyond the reasonable time. In the 2012 roasted buckwheat case,[260] the parties confirmed the loading date was February 11, 2011 and the arrival date was April 12, 2011,so the tribunal confirmed the above facts. The tribunal noted the claimant, i.e. the buyer, after discovering the goods arriving at the destination port had odors and mold, unilaterally entrusted a Russian inspection institution to conduct the first inspection of the goods, but there was no evidence showing the buyer notified the seller timely of the quality status of the goods and the need for inspection in Russia or the buyer notified the seller of the subsequent inspections and the inspection results in a timely manner. Instead, the buyer had not notified the seller of the quality discrepancy until in the form of a lawyer's letter on August 3, 2011, which was four months later than the first unilateral inspection. The tribunal held that, in terms of the characteristics of the goods, the roasted buckwheat involved in this case were perishable goods and had rather high requirements of storage conditions and time. The buyer, after the arrival of the goods at the destination port, failed to communicate with the seller for the resolution of the quality discrepancy issue in a timely manner. Therefore, the tribunal rejected the buyer's claim of quality discrepancy in the goods delivered by the seller.

3) Quality Guarantee Period and the Period of Two Years in Article 39(2) of the CISG

260 The CIETAC Award dated September 6, 2012.

In addition to the reasonable time standard, Article 39(2) provides, 'at the latest within a period of two years unless this time limit is inconsistent with a contractual period of guarantee'. Such provision would not affect the buyer's obligation of giving notice within a reasonable time and its purpose is to provide a bottom line for the parties' dispute over the lack of conformity because the goods stored long may be changed and it is unfair for the seller to undertake unlimited liability for the quality of goods. Therefore, the buyer loses the right to rely on a lack of ¬conformity of the goods if it does not give the seller notice thereof at the latest within such period.

In the 2012 wind turbine sales case,[261] the claimant, an insurance company, filed the request for arbitration against the respondent based on its subrogation right. The basis for its claim was the sales contract signed by and between the respondent and the insured end user, company D, on May 5, 2005. The seller asserted the quality guarantee period stipulated in the contract should be 24 months after the seller and company D signed the pre-acceptance certificate and the seller should guarantee the normal and stable operation of the equipment and troubleshoot during such period. The seller completed the installation and commissioning of the equipment in this case on March 8, 2006. On the same day, the seller and company D signed the pre-acceptance certificate and the quality guarantee period started. The seller guaranteed the normal and stable operation of the equipment and provided maintenance services from March 8, 2006 to March 7, 2008. During this period, the seller provided five routine maintenance in accordance with the contract and ensured the normal and stable operation of the wind turbine involved in the case. On December 8, 2008, company D sent the first notice to the seller, suggesting there was oil leakage at the bottom of the wind turbine and requesting the seller to send its staff for investigation. At this time, the equipment had been used for 33 months which was far beyond the two-year quality guarantee period stipulated in the

261 The CIETAC Award dated July 24, 2012.

contract. Therefore, the gearbox involved had passed the pre-acceptance and operated normally during the quality guarantee period according to the contract, so the seller had performed its warranty obligations as agreed and should not be liable for any defect in the gearbox after the expiry of the quality guarantee period.

The buyer argued that Article 1.14 of the contract was about the seller's obligation of maintaining the equipment for free and to ensure the normal operation of the equipment instead of the seller's exemption ground. Article 2.6 of the contract stipulated the entire life cycle of the equipment should be 20 years and the seller should be liable for invisible or intrinsic quality defects within such life cycle in accordance with relevant legal or contractual provisions regardless of the quality guarantee period.

The tribunal pointed out that first of all, Articles 1.14 and 2.6 of the contract should be referenced. Article 1.14 defines quality guarantee period as 'two years after the pre-acceptance of the contract equipment, within such period, the seller shall ensure the normal and stable operation of the equipment and be responsible for troubleshooting'. Article 2.6 states, 'the seller shall provide spare parts necessary for the normal operation of the contract equipment at a preferential price according to the requirements of the end user within the entire life of the equipment (20 years). The parties will sign an agreement on this'. Article 1.14 was the provision on the length of the quality guarantee period, but there is no contractual provision on whether the seller should assume no responsibility for the equipment quality after the expiration of the two-year quality guarantee period. Therefore, the tribunal needed to determine the true meaning of the quality guarantee period at the contract conclusion based on the usual meaning thereof and the parties' intentions.

The intentions of the parties at the contract conclusion could normally be found in the

context of the contract. Article 2.6 quoted by the buyer was actually about the seller's obligation of providing spare parts necessary for the operation of the contract equipment at a preferential price. Though 'the entire life of the contract equipment (20 years)' was stated therein, it was obvious that the seller never guaranteed the equipment would have the 20-year life span. Instead, the seller was only obliged to provide spare parts at a preferential price within the 20-year period thereunder. In addition, 'the contract equipment' referred to the entire generating set which was defined as 'the general term for equipment, parts, devices, materials, special tools, spare parts and all kinds of items that the seller should provide according to the contract' in Article 1.4, showing the parties' understanding that the reasonable service life of the entire generating set was generally 20 years instead of that the service life of each part, device or spare part should be 20 years which was obviously unrealistic and not provided in the contract. Therefore, the tribunal rejected the buyer's claim that 'the entire life' in Article 2.6 was equal to the 'quality guarantee period'.

Similarly, in the 2012 caustic soda sales case,[262] the tribunal pointed out the goods involved in the case had expired one year after the production date, so the buyer should have notified the seller of the lack of conformity within one year after the production date to claim any quality discrepancy.

It is worth noting that the quality guarantee period may not start from the date the buyer actually receives the goods due to the specific contractual provisions, the particularity of different goods (especially those operate after commissioning), the special use of goods, the different forms of quality guarantee by the seller and the fact that intrinsic defects are harder to find than apparent ones. However, if the parties have agreed on such period, the agreement shall prevail.

262 The CIETAC Award dated February 6, 2012.

In the 2002 floppy disk core equipment sales case,[263] thequality guarantee clause of the contract stipulated, '…(4) the guarantee period shall be one year from the completion of the installation and commissioning at the buyer's site'. Accordingly, the quality guarantee period should be one year from the completion of the installation and commissioning. However, the parties had not agreed on how to determine the date of completion of commissioning in the contract or other documents. The tribunal noted it was stated in the payment method clause of the Annex of the contract that '…The final inspection need to be conducted to confirm all the contractual requirements are met and the inspection certificate need to be signed after one-month continuous and stable operation and trial production when the goods have been safely transported to the location of the joint venture plant and accepted after inspection, installation, commissioning…', which showed that commissioning, as a stage between installation and trial production, should undoubtedly be earlier than trial production. The parties confirmed that the formal production ceremony was held at the site of the buyer (first claimant) on November 2, 1996, which meant the completion of commissioning should have been no later than November 2, 1996. However, the quality guarantee period would have expired on November 2, 1997 even if calculated from November 2, 1996 as the completion date of commissioning. Article 13 of the contract provided the buyer should inspect the equipment and make a claim with the CIQ inspection certificate within the guarantee period if there was any quality discrepancy. M inspection bureau issued the inspection certificate on November 14, 1997, which was far beyond the quality guarantee period stipulated in the contract. Therefore, the tribunal held the buyer cannot rely on the inspection certificate of M inspection bureau to claim damages or request the return of goods.

263 The CIETAC Award dated July 15, 2002.

In the 2015 sintering furnace sales case,[264] Article 14 of the contract stipulated, 'the buyer, if finds the quality, specification or quantity of the goods inconsistent with the contract, shall claim within 30 days after the arrival of the goods'. The seller asserted the inspection certificate submitted by the buyer had been issued over three years later than the arrival of the goods which was far beyond the 30-day period stipulated in the contract and the maximum period of 12 months for claims. The buyer argued the quality defect in the sintering furnace had not been caused by poor quality, processing or materials as stipulated in Article 14. The goods were unqualified, unacceptable and unusable due to the failure of commissioning, so the quality guarantee period had not started yet. In this regard, the tribunal held the quality defects in the equipment of this case were not apparent ones. The equipment could not be linked to other equipment or put into use due to the failed commissioning. In accordance with established practice, the quality guarantee period of the equipment should start from the day of successful commissioning and approval for use and could not start before successful commissioning. In summary, the tribunal rejected the seller's assertion that the buyer's claim was beyond the stipulated period.

4) Inspection Report

The purpose for requesting the buyer to notify the seller of the lack of conformity in a timely manner is to allow the seller to take remedial measures to mitigate losses, have opportunities to inspect the goods or collect necessary evidence to defend against the buyer's claims. Therefore, the tribunals generally would not easily deny the effectiveness of the buyer's notice as long as the buyer actively performs its obligation to notify the seller.

Firstly, the inspection report should identify the inspection sample as the contract goods.

264 The CIETAC Award dated April 22, 2005.

In the 2015 steel coil sales case,[265] the tribunal, when deciding whether to admit the inspection report submitted by the buyer, pointed out the inspection object must be clear and not to be confused with other goods. The tribunal stated, though the inspection report issued by company H at the destination port concluded the cause of the damage to the goods as improper packaging, it had mixed the goods of this case with the goods under another bill of lading without specifying the inspection result of the goods under the bill of lading in this case separately. The inspection report issued by company K did not confirm the goods in this case as the inspection object, only stating the end user had confirmed the inspection object was the goods in this case. Moreover, the inspection report did not state the cause of damage. There were also the following doubts over the inspection report: first, the inspection report stated the consignor was Chinese company I instead of Chinese company C as shown in the bill of lading in this case; and secondly, the report stated the supplier of the inspected goods was Singaporean company J while the actual supplier of the goods in this case was the respondent. Therefore, the tribunal found the inspection report inadmissible and could not prove the cause of damage in this case.

Similarly, in the 2015 MSG sales case,[266] the buyer submitted the inspection report issued by ALS and its qualifications as evidence to prove the purity of the MSG samples sent for inspection was only 12.6% which was far less than the 99% purity requirement in the contract. The seller argued that the sample, as shown in the report, was packed in a plastic trolley bag while the goods delivered by the seller were packaged in kraft paper bag and labelled with white A4 paper which was individually marked and weighed 25kg. Therefore, the inspection report by ALS could not prove the inspection sample was from the goods delivered by the seller.

265 The CIETAC Award dated June 11, 2015.

266 The CIETAC Award dated August 25, 2015.

The tribunal deemed it the key issue for the resolution of the parties' dispute over the quality discrepancy of the goods in this case whether the quality inspection report issued by ALS, a third-party inspection institution, could fully prove the severe quality defects in the goods delivered by the seller. However, the ALS inspection report could not prove the sample was from the goods delivered by the seller. During the hearing, the buyer could neither clearly explain or submit further evidence for the sampling process nor prove the sample was really from the goods delivered by the seller. Furthermore, the tribunal found through investigation that it was hard to ensure no mixture of goods occurred in the buyer's warehouse which had been used to store other food together with the contract goods. Therefore, the tribunal could not conclude from the inspection report that the sample was from the contract goods.

Secondly, proper procedure should be followed in the inspection during the arbitration process. The tribunal pointed out in the 2015 sintering furnace sales case[267] that from the perspective of international trade practice, once the party initiated arbitration proceeding after the disputes over the quality of the equipment had occurred, if one party intended to entrust a third party to inspect the goods for the resolution of disputes, the parties should negotiate and reach agreement on the inspection institution, time, method and standard. In this case, the respondent unilaterally entrusted the inspection bureau to inspect the goods after the first oral hearing, which was not a proper procedure.

Thirdly, the parties are entitled to agree on the inspection method and standard. The parties can agree on the inspection standard. Even if such standard is against common practice, arbitral tribunals usually respect the parties' agreement. In the 2015 corn sales case,[268] the tribunal pointed out: first, the inspection clause of the sales contract stated '[Q]uality final in the country of origin as per certificate issued by United States

267 The CIETAC Award dated April 22, 2015.

268 The CIETAC Award dated September 29, 2015.

Department of Agriculture Federal Grain Inspection Service and/or independent laboratory', but specified neither an American inspection institution nor the time for the issuance of the inspection report. The United States is of vast territory and the contract goods were agricultural products of which the quality might be easily affected by external conditions. It was inconsistent with the principle of good faith to only agree for an inspection report issued in "the United States"to be taken as the final basis for the quality of the goods; and second, the inspection clause of the sales contract was different from relevant trade practices. Standard contracts involving bulk grain and oil trade such as GAFTA No.100 Contract (for bulk feed, under CIF condition), GAFTA No.64 Contract (for bulk grain, under FOB condition) and FOSFA No.24 Contract (for Canadian/US soybeans, under CIF condition) all clearly stipulate the issuance time and place of the inspection certificate taken as the basis for the goods quality, for example, the goods quality shall be determined according to the inspection certificate issued at the time of loading. The inspection clause of the contract in this case did not comply with the relevant trade practices since it had not specified the time for the issuance of the inspection certificate and stated too broad a place for such issuance. However, the claimant, as a commercial subject and one party to the sales contract, should bear certain duty of care when signing the contract. Though the inspection clause in the sales contract was inconsistent with the principle of good faith performance of contract and the trade practices of bulk grain and oil products, the tribunal still respected and recognized the party autonomy and determined the quality status of the goods delivered by the seller according to the inspection clause.

XIII Damages

Section 1 The Basic Principle of Damages

1. Basic System of Damages under the CISG

The CISG provisions on damages are mainly in Articles 74-77, Section II Damages, Chapter V, Provisions Common to the Obligations of the Seller and of the Buyer, and Part III Sale of Goods. Article 45(1)(b) and Article 61(1)(b) respectively provides the other party will enjoy the right to claim damages according to Articles 74-77 when the seller or buyer fails to perform his obligations under the contract and the CISG, which lays the basis of the parties' right to claim damages.

Regarding the relationship among the above provisions, the CIETAC tribunal pointed out in the 2007 ethylene glycol sales case[269] that the four articles should be understood as a whole. The four articles in the same section systematically stipulated the general rule of damages, the method of calculating damages when the contract was declared avoided, and the other party's obligation to mitigate losses. Among them, Article 74 is the general rule of damages in case of breach of contract. In the application of the CISG to damages for breach of contract, Article 74 should be understood in conjunction with the other three articles. Article 74 stipulates the scope and limit of damages for which the breaching party is liable. The opening sentence is about the scope of the liability, i.e., 'damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach'. The word 'equal' in the first sentence and the second sentence set the maximum of damages, i.e., equal to 'the loss, including loss of profit, suffered by the other party as a consequence of the breach' and 'such 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'. For breach of contract, the CISG provides no punitive damages, so its stipulated damages is on the premise that the other party suffered losses due to the breach of contract. Some remedies,

269 The CIETAC Award dated September 10, 2007.

such as liquidated damages, are provided in domestic laws.[270] The CISG distinguishes different situations for the determination of the amount of damages when the contract was declared avoided due to breach of contract in two articles following Article 74. Article 75 stipulates the rule of calculating losses when the observing party buys goods in replacement or resells the goods. Article 76 provides the rule of calculating losses when there was no substitute transaction or resale. Article 77 is about the aggrieved party's obligation to mitigate losses, which if it failed to do, the party in breach may claim a reduction in the damages recoverable under Articles 74, 75 and 76. The CIETAC tribunal's interpretation of the damages system under the CISG is consistent with the statement in the 2016 UNCITRAL Digest.[271]

Article 75 provides, 'the party claiming damages may recover the difference between the contract price and the price in the substitute transaction', while Article 76 stipulates, 'the party claiming damages may… recover the difference between the price fixed by the ¬contract and the current price at the time of avoidance'. Regarding the choice between the two ways of damages calculation, the CIETAC tribunal pointed out in the 2007 ethylene glycol sales case[272] that the application of Article 76(1) of the CISG was subject to certain conditions. Article 76(1) stipulates that '[I]f the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the ¬contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming ¬damages has avoided the contract after taking over the goods, the current price at the time of such taking over

270 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p334.

271 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p331.

272 The CIETAC Award dated September 10, 2007.

shall be applied instead of the current price at the time of avoidance', in which two 'if's were used to limit the application, one is 'if the contract is avoided and there is a current price for the goods' and another is 'if he has not made a purchase or resale'. Only when the conditions set by the two 'if's were met, could this article be invoked for the calculation and determination of damages. Therefore, the aggrieved party could only choose either Article 75 or Article 76 according to the specific circumstance and the application thereof should be in sequence.

Furthermore, Articles 75 and 76 only apply to cases where the contract is declared avoided, and it is not compulsory for the parties to choose one of the two to calculate damages in all cases. When the application conditions of Articles 75 and 76 are not met, it is sufficient for the aggrieved party to rely on Article 74 regarding the scope of damages to calculate and determine the damages.[273]

2. The General Principles of Determining Damages

As mentioned above, Article 74 sets the scope and limits of damages, reflecting the general principles for determining damages under the CISG as follows:

1) The purpose of damages is to restore the observing party to the state when the contract is normally performed. Damages should be based on losses. Article 74 of the CISG provides damages are not only for actual losses but also for loss of profit. In the 2019 PVC production line sales case,[274] the tribunal pointed out the principle of damages under the CISG was to restore the observing party to the state when the contract was normally performed. The difference between the state of normal performance and the current status of the observing party should be the amount of damages. Such view is

273 The CIETAC Award dated December 21, 2016.

274 The CIETAC Award dated July 16, 2019.

consistent with that of UNCITRAL and many international awards.[275]

2) The limit of the predictability rule . The predictability rule refers to the limit of damages to the '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', which actually favors the breaching party. The determination on whether a kind of loss is predictable shows the tribunal's balance of the parties' rights and obligations. The time of predictability should be at the contract conclusion instead of after that. If the observing party claims damages based on the resale loss, he should prove the other party knew the possibility of resale at the contract conclusion so as to foresee the possible loss caused by the breach.

The predictability of damages does not require that the 'quantity' of the loss be foreseen but only the possibility of such loss be foreseen. Article 74 requests the predictability of the possible consequence or the type of breach instead of the details or exact amount of loss. When there is no evidence showing the breaching party knew the price in the contract signed by the observing party and the third party, the tribunal should adjust and determine the amount of expected profit loss in accordance with the principle of fairness.[276] However, some tribunals have deemed such loss unpredictable since the claimed expected profit loss and performance bond are too high.[277] The 2016

275 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, 2016 Edition, p354, CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, June 15, 1994] (deriving general principle from article 74 for purposes of filling gap in article 78, in accordance with article 7 (2)). See also CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, December 6, 1995] (article 74 is "designed to place the aggrieved party in as good a position as if the other party had properly performed the contract") (see full text of the decision). For further discussion of a general principle of full compensation, see the Digest for article 7.

276 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p337; The CIETAC Award dated March 29, 2019.

277 The CIETAC Award dated August 3, 2006.

UNCITRAL Digest lists quite a few types of predictable losses.[278]

First, predictability due to contract performance.

In the 2012 caustic soda sales case,[279] the buyer alleged the destination ports stipulated in the contract were not at the buyer's location and the consignees were not the buyer but different clients of the buyer in various destination ports, which showed the seller had known the purpose of the buyer's purchase of caustic soda was for resale. The tribunal found through investigation that the stipulated destination ports in the contract were in Ecuador, Peru, Salvador and Colombia in South America. Meanwhile, the consignees stated in the bill of ladings submitted by the seller after shipment were not the buyer. Therefore, it could be reasonably found that the seller should have known the goods purchased by the buyer were to be resold and should have foreseen the breach of contract would result in the buyer's loss of profit in the resale.

In the 2009 chemical sales case,[280] Article 9 of the contract stipulated, '[D]estination and End user : XX, China; company C'. Based on this, the tribunal held that the seller, when signing the contract, knew the buyer imported the goods for resale to 'company C' instead of for its own use. It was in line with general trade practice that the buyer expected to obtain profit from the resale. Thus, the seller foresaw or should have foreseen the buyer's expected profit if the goods were delivered according to the contract at the contract conclusion.

Second, predictability in normal market and trade.

278 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p335.

279 The CIETAC Award dated February 6, 2012.

280 The CIETAC Award dated June 4, 2009.

In the 2012 zircon sand sales case,[281] the parties had no dispute over the fact that the respondent had fundamentally breached the contract for non-delivery of the goods due to the rising market price and other reasons, and the claimant had suffered losses, but the parties had different opinions on the damages. The respondent asserted the price difference loss due to the continuous price increase after the contract conclusion was unpredictable at the conclusion of the contract.

The tribunal pointed out it was an important purpose for either party of the transaction, i.e., the manufacturer or the trader, to obtain benefits in the market economy, so the parties, no matter the seller or the buyer, would surely evaluate and predict the market price trend carefully so as to ensure profit or avoid loss. Therefore, it was predictable that either party's negligence to predict and evaluate the price fluctuation factors at the contract conclusion would result in the price difference between the rising or falling market price and the contract price. The respondent disregarded the fact and had no theoretical basis to assert the unpredictability at the contract conclusion. The tribunal rejected the respondent's assertion that the claimant's claim on the price difference was beyond the scope of Article 74 of the CISG.

Third, unforeseeable losses.

In some cases, the CIETAC tribunals have identified some losses that are generally considered unforeseeable, mainly involving the contractual and other legal relationship between the aggrieved party and a third party, especially the resale contractual one in which the buyer acted as the middleman, focusing on whether the breaching party knew the contractual relationship between the aggrieved party and the third party. One CIETAC tribunal pointed out that due to the relativity characteristics of the contract, it was generally difficult for one party to know the contractual relationship between the

281 The CIETAC Award dated May 21, 2012.

other party and a third party, thus hard to foresee the third party's loss caused by his breach. Therefore, the tribunal could not simply rely on a previous award under which the party should compensate the third party's loss to determine the respondent 'should have foreseen' the scope of damages.[282]

A. Third-party damages and relevant legal costs borne by the buyer

In the 2006 ethylene glycol sales case,[283] the buyer relied on the provision that the claimant should pay late delivery penalty to company D in the Agreement signed by the claimant's agent and company D on July 15, 2005 to claim the loss of late delivery penalty. The tribunal held the buyer submitted insufficient evidence to prove the seller knew the sales relationship between the claimant and company D and could have foreseen his breach would result in the claimant's payment of the late delivery penalty to company D while the buyer could not avoid such loss by signing substitute sales contract. Therefore, the tribunal rejected the buyer's claim on the late delivery penalty.

Similarly, in the 2006 pump sales case,[284] regarding the claimant's claim on the damages confirmed by the Tianjin Court's judgment and the first-instance litigation fee and lawyers' fees and the second-instance litigation fee borne by the claimant, the tribunal held the litigation was about the performance of the contract between the end user and the claimant's client though being related to this case, the partial breach by the claimant's client was not necessarily related to the respondent's breach of contract in this case. Therefore, the tribunal rejected this claim.

B. Capital costs arising from operating activities such as financing

282 The CIETAC Award dated February 26, 2007.
283 The CIETAC Award dated April 11, 2006.
284 The CIETAC Award dated August 3, 2006.

Fees or costs of financing and investment incurred by an enterprise in the normal course of business, even if being related to the preparation of a specific contract, are generally considered as a type of indirect loss suffered by the enterprise. The other party, unless proves the breaching party has reason to foresee such special kind of loss at the contract conclusion, normally cannot prove the sufficient causality between the breach and the loss. In the 2003 iron sales case,[285] the seller got bank loans or raised funds for the preparation of goods and claimed interest loss. In this regard, the tribunal held that fund-raising or financing in various ways for the export business was the seller's own business activities and had no necessary connection with the performance of the contract in this case. Such capital cost (such as interest or penalty interest) incurred in the seller's own business operation did not have any direct or indirect relation with the buyer. Therefore, the tribunal rejected the seller's claim.

C. The loss of deposit under the contract between the aggrieved party and a third party

In the 2003 waste paper sales case,[286] the claimant signed the sales contract with a third party on September 25, 2002, later than the date of the contract concluded between the claimant and the respondent. The claimant submitted no evidence to prove it had notified the respondent of the intention to sign a contract containing a deposit clause with a third party before signing the contract of this case. Therefore, the tribunal held the claimant's loss arising out of the double return of deposit according to the contract between the claimant and company D after the respondent had breached the contract of this case should not be damages due to the breach of the contract of this case which the respondent foresaw or could have foreseen when signing the contract of this case, so the tribunal rejected such claim.

285 The CIETAC Award dated April 12, 2003.

286 The CIETAC Award on November 25, 2003.

D. The cost of settlement between the aggrieved party and a third party

In the 2019 steel pipe sales case,[287] the tribunal held the cost of settlement between the claimant and the third party should not be the loss which the respondent foresaw or could have foreseen when signing the sales contract of this case, so the tribunal rejected this claim.

The above view of the CIETAC tribunal is consistent with that of a considerable number of courts in various countries which have not supported the observing party's liability to the third party since it is beyond the scope of predictability, for example, the breaching seller could not have known the special contract term between the buyer and its client.[288]

3. Special Circumstances in Damages

1) The Consideration of Profit Loss

Article 74 of the CISG provides the scope of damages shall include both the actual loss, i.e., the direct loss, and the expected profit loss which refers to expected net profit. Article 113(1) of China's Contract Law stipulates, '[W]here a party fails to perform its obligations under the contract or its performance fails to conform to the agreement and cause losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interests receivable after the performance of the contract, provided not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the party in breach concludes the contract', which is consistent with the CISG. Article 584 of the Civil Code of PRC adopts the same compensation rule with Article 113(1) of China's

287 The CIETAC Award on March 29, 2019.

288 CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, June 6,2000 (Arbitral award No. 406/1998)].

Contract Law.Therefore, the claim for such damages should be generally supported, but there are also special circumstances.

In the 2010 printing press sales case,[289] the tribunal found the goods had quality defects. The first claim of the claimant was the contract should be cancelled and the original condition should be restored, including the return of for the payment of the equipment and the compensation of the bank loan interest loss for the purchase of the equipment, the bank loan interest loss for the purchase of factory facilities and the depreciation loss and the second claim was the compensation of the claimant's expected profit loss.

Under the specific circumstances of this case, the tribunal determined that the various compensation requests in the first claim should be based on the determination on the claim of contract cancellation. If the claimant's claim of contract concellation could not be supported, the compensation requested under the restitution claim based thereon could not be supported as well because the various losses in the first claim were all inevitable expenses incurred in the performance of the contract and could not be compensated before the contract cancellation. On the contrary, the second claim essentially required the respondent to compensate for benefits which could have been basically achieved if the respondent had properly performed the contract but had not been achieved due to the breach, which was also known as the expected profit loss. Obviously, the various compensation requests under the restitution claim in the first claim were completely contrary to the second claim on expected profit loss. Even if the respondent had breached the contract as alleged by the claimant, the tribunal could not support both claims.

Furthermore, the tribunal noted that the expected profit loss claimed by the claimant in this case actually referred to the loss in the operation of the enterprise due to the defects

289 The CIETAC Award dated August 6, 2010.

in the respondent's product. The tribunal held no matter according to the Contract Law or the CISG, the normal damages for the non-conformity of goods could not include the operational loss or expected profit loss of the buyer due to the quality discrepancy because the buyer's prompt realization of damages under the CISG could generally reflect the compensation of expected profit loss in transaction such as the purchase of goods in replacement. Furthermore, under normal circumstances, it was hard for the seller to reasonably foresee at the contract conclusion that its sale of equipment would constitute a guarantee to the buyer's business operational profits in a certain sense. The tribunal would reject this claim according to the principle of predictability unless the parties had specifically agreed in the contract or the claimant could prove the respondent foresaw or should have foreseen at the contract conclusion that it would compensate the buyer's operational loss or profit if the equipment had quality defects.

The tribunal also noted the claimant only submitted some basic documents such as its contracts with third parties, a large number of receipts and correspondence to support its claim on the expected profit loss but never submitted any written explanation, statistics or calculations to show the way of calculating the amount of expected profit loss, to prove whether the amount was the operational loss or operational profit loss after deducting various expenses, to prove the causality between such loss and the product defects, or to prove it had not violated the provision on the aggrieved party's obligation to mitigate losses through its action after the breach or the calculation of the claimed damages. In this respect alone, the tribunal rejected the second claim due to insufficient evidence.

2) The Calculation of Damages for Special Goods

In the 2016 equipment sales case,[290] the tribunal noted the equipment was specially

290 The CIETAC Award dated December 21, 2016.

designed as requested by the claimant since the parties had negotiated and determined the details of equipment components such as the drawings and specifications. The claimant could not resell or determine the current price of the equipment due to its specialty, so the tribunal could not apply Article 75 or 76 of the CISG to determine the amount of damages but could only exercise its discretion according to Article 74 to determine the amount of damages. The claimant could not mitigate losses through resale of the special goods as well.

The tribunal held the claimant's loss of cost in the production of the equipment plus the expected profit loss were not exactly equal to the amount of payment stipulated in the contract since the production of the equipment had not 100% completed, but overall they were close. Therefore, the tribunal, considering the particularity of the case and the principle of good faith and fairness, found the respondent should compensate the claimant in the amount of the price for the equipment stipulated in the contract.

3) Reliance Interest

Generally, after one party breaches the contract, the damages claimed by the other party consist of two kinds. One is to restore the contract to the status before the contract conclusion or the original status, and another is to restore the contract to the status as if it has been performed normally. In the former situation, all the relevant expenses incurred for the performance of the contract constitute reliance interest for the performance of the contract. In the latter situation, the aggrieved party would get all the due interest if the contract has been performed normally. However, in one case, the aggrieved party cannot obtain the two kinds of damages at the same time because if the aggrieved party is restored to the status as if the contract has been normally performed, he will get what he is entitled to expect under the contract while his expenses in the normal performance of

the contract should not be compensated at the same time, otherwise he would be beyond the status when the contract has been normally performed. Under certain circumstances, the claimant may claim compensation for all the reliance interest incurred in normal performance of the contract if he has not claimed the expected benefit under the contract. The aggrieved party is generally considered to have the right to be compensated for reasonable expenses incurred for the preparation of the contract or for the breach of contract under Article 74 of the CISG. There is no stipulation that the expenses should be reasonable in the CISG, but courts of various countries have basically rejected claims for compensation of unreasonable expenses.[291]

In the 2009 sulfur sales case,[292] the tribunal supported the claimant's claims on contract avoidance and refund of payment for goods due to the quality defects. In this case, the claimant also claimed compensation for the insurance fee the buyer had paid for the goods. The tribunal noted Article 5.1 of the contract stipulated the buyer (claimant) should pay for the insurance of the sulfur under the contract in this case. The buyer submitted policy and the insurance premium invoice of which the seller had no objection to the authenticity. In view of this, the tribunal took the fact that the buyer had paid the insurance premium as the basis for its determination.

The tribunal held the insurance was purchased against the possible risks of the sulfur which should have been owned by the buyer. It would be suitable for the buyer to pay the insurance premium if he had properly obtained the sulfur and the ownership thereof and the buyer could not request compensation from the seller. However, under the precondition that the buyer had returned the goods due to the seller's fault and made no further payment, it was groundless and unfair for the buyer to bear the insurance premium, so the buyer was entitled to request compensation from the seller for the

291 CLOUT case No. 541 [Oberster Gerichtshof, Austria, January 14, 2002].

292 The CIETAC Award dated September 21, 2009.

insurance premium.

4) Legal fees such as Lawyers' Fees and Arbitration Fees

Different courts in various countries have made different judgments on whether the parties can claim compensation for lawyers' fees in litigation under Article 74.[293] Most CIETAC tribunals support the parties' claims on legal costs either according to contractual provisions, if any, or in accordance with Article 74 of the CISG or CIETAC Arbitration Rules.[294] However, some tribunals have rejected such claim since the time when the lawyers' fees had incurred was before the initiation of the arbitration proceedings while there was no direct causality between such fees and the cases, based on the application dates and the dates in the invoices therefor.[295]

Two CIETAC tribunals determined on the compensation for arbitration fees according to the CIETAC Arbitration Rules.[296] In one case, the tribunal invoked the relevant provisions on the lawyers' fees in the domestic law and considered the specific circumstances of the case including the complexity of the legal issues and technical issues involved and the amount of work required to make discretion on the amount of compensation for lawyers' fees.[297] In another case with two claimants, the tribunal made discretion on the amount of compensation for lawyers' fees according to the

293 CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, March 21, June 21, 1996]; CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)].

294 For example, Article 52(2) of the 2015 CIETAC Arbitration Rules stipulates 'The arbitral tribunal has the power to decide in the arbitral award, having regard to the circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case. In deciding whether or not the winning party's expenses incurred in pursuing the case are reasonable, the arbitral tribunal shall take into consideration various factors such as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), the amount in dispute, etc.'.

295 The CIETAC Award dated November 24, 2004.

296 The CIETAC Award dated March 5, 2005, the CIETAC Award dated July 24, 2012.

297 The CIETAC Award dated July 24, 2012.

determination of the respondent's liability for breach of contract and the portion supported of the second claimant's claims.[298]

4. The Rule of Mitigating Losses

Article 77 of the CISG provides '[A] party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated, which means the aggrieved party is obliged to mitigate losses. Furthermore, the aggrieved party can claim compensation for reasonable expenses and costs incurred for mitigating losses. Article 119 of China Contract Law provides the rule for mitigating losses as well, stating that 'Where a party breached the contract, the other party shall take the appropriate measures to prevent the losses from increasing; where the other party's failure to take appropriate measures results in additional losses, it cannot demand compensation for the additional losses. Any reasonable expense incurred by the other party in preventing additional losses shall be borne by the party in breach', which is consistent with the CISG. The same mitigation rule has also been adopted by the Civil Code of PRC, of which Article 591 is the same with Article 119 of China Contract Law. The duty of mitigating losses as expressed in the rules above, can effectively reduce the social costs for breach of contract.

In CIETAC practice, a tribunal considered the resale of goods before the tax was levied to the one with the highest quote after the seller had breached the contract for non-conformity in goods to be reasonable.[299] Another tribunal deemed the buyer had made reasonable efforts to mitigate losses by informing the seller 'to send two containers of

298 The CIETAC Award dated February 26, 2007.

299 The CIETAC Award dated March 29, 2019.

goods first and the price of the remaining goods can be negotiated' after terminating the contract due to the seller's breach of contract, settling with the client and requesting a reduction in the amount of damages and contacting other sources of supply.[300] However, the following actions have been considered as failure to fulfill the obligation to mitigate losses.

1) Failure to Purchase Good in Replacement Timely

In the 2015 sintering furnace sales case,[301] the eight sintering furnaces of two types involved were physically independent and separable. Seven of the eight sintering furnaces delivered by the seller were accepted and the parties only disputed over the quality of one sintering furnace.

The tribunal noted that the sintering furnaces were an integral part of the entire production line purchased by the buyer. From the perspective of value ratio, the value of the sintering furnaces only accounted for a small part of the value of the entire production line. The tribunal held that the buyer should be liable for the shutdown of the entire production line and enlarged losses because the buyer had neither applied for a third-party inspection nor purchased a sintering furnace in replacement.

2) Failure to Send Effective Notices Timely

In the 2016 iron ore sales case,[302] the goods were returned by customs with the Notice of Inspection and Quarantine Treatment dated May 12, 2014. The claimant sent the Notice of Inspection and Quarantine Treatment, the Quality Certificate and the Weight Certificate to Mr. F, the middleman, by email till August 25, 2014, and had not sent a

300 The CIETAC Award dated June 4, 2009.

301 The CIETAC Award dated April 22, 2015.

302 The CIETAC Award dated July 13, 2016.

written notice to the respondent until March 5, 2015.

The tribunal noted that, according to the contract in this case, the seller should have sent the Quality Certificate and the Weight Certificate to the buyer by email or fax and posted the original copies to the buyer after having received them. The tribunal held the notification standard for the return of goods should not be lower than the stipulated standard for sending the Quality Certificate and the Weight Certificate in the contract since the return of goods was a very important matter in the contract performance. The claimant should be liable, since he had neither posted the notice nor directly notified the respondent, but only sent the Notice of Inspection and Quarantine Treatment through the middleman by email, which resulted in the respondent's receipt of the Notice sent by the claimant directly by post only on March 9, 2015. Article 77 of the CISG stipulates, '[A] party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated'. Accordingly, the loss due to the falling market price of the contract goods from August 25, 2014 to March 9, 2015 and the extra expenses due to the delayed notice should be deducted from the damages claimed by the claimant.

3) Losses under Instalment Contracts

In the 2004 goods sales case,[303] the goods under the contract was 15,000 MT, delivered in three batches with 5,000 MT per batch. The contract stipulated that the first batch of goods must be shipped out by the end of May and the subsequent batches be shipped monthly. The tribunal found through investigation that the claimant, after knowing the respondent had not fulfilled its obligation to deliver the first batch of goods, had neither

303 The CIETAC Award dated April 12, 2004.

declared the contract avoided according to the CISG nor taken any measures to mitigate losses of the subsequent batches. The tribunal held the claimant had not taken measures to mitigate losses, so the tribunal rejected the claim for the damages of subsequent batches of goods.

4) Enlarged losses due to Unreasonable Substitute Transactions

In the 2006 canned mandarin sales case,[304] the overall price of canned mandarin increased after the contract conclusion due to the higher price of mandarins after the production had been affected by bad weather, as well as the higher price of iron, the raw material for cans, and white sugar as a result of market economy operation and the fluctuation of the exchange rate of USD against RMB. On November 10, 2005, the seller sent an email to the buyer, proposing that the buyer accept 10 to 15 boxes of goods with a price, but the buyer did not reply. The buyer wrote to the seller on November 25, 2005, asking the seller to fulfill its delivery obligation before November 30, 2005, otherwise, the buyer would purchase goods in replacement from other suppliers. However, the buyer signed the purchase contract with a Japanese company on November 29, 2005, earlier than November 30, 2005. In fact, the price proposed by the seller was lower than that of the Japanese company. As a businessman, the buyer should have accepted the seller's price, but the buyer neither responded nor negotiated with the seller, and signed the purchase contract with the Japanese company before the deadline for the seller's performance given by the buyer.

Accordingly, the tribunal held that the buyer's refusal of accepting the seller's goods at a lower price caused the enlarged loss, so the buyer should be responsible therefor and the corresponding price difference should be deducted from the damages.

304 The CIETAC Award dated May 20, 2006.

The Spanish Supreme Court, in one judgment, found the party failed to fulfill the obligation of mitigating losses on similar ground that the seller refused the price proposal from the buyer and sold the goods to a third party at a lower price.[305] As pointed out by the 2016 UNCITRAL Digest, there is no provision on the reasonableness of prices in substitute transactions under the CISG. Nevertheless, it is generally believed that if there is a significant difference between the contract price and the substitute transaction price, the requirement on the principle of goods faith in Article 7 of the CISG may not be met.[306] For example, a court stated in the judgment that if the buyer paid almost twice of the original contract price in the substitute transaction, such transaction would not be reasonable[307] and the certain amount should be deducted from the damages according to Article 77 since the aggrieved party had not mitigated the loss.[308]

Section 2 Damages Calculated under Article 75 of the CISG

Article 75 provided one way of calculating damages when the contract is declared avoided under which the aggrieved party may recover the difference between the contract price and the price in the substitute transaction. Article 76 measures damages with the difference between the price fixed by the contract and the current price at the time of avoidance. Article 76(1) stipulates the aggrieved party cannot calculate damages in accordance with Article 76 if it has concluded a substitute transaction.[309] However, if the quantity in the substitute transaction is less than the contract quantity, Articles 75 and 76 are both applicable. If the aggrieved party has resold part of the contract goods to a

305 Spain: Tribunal Supremo January 28, 2000, CLOUT case No. 395.

306 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p347.

307 CLOUT case No. 1029 [Cour d'appel de Rennes, France, May 27, 2008] (Brassiere cups case), English translation available on the Internet at www.cisg.law.pace.edu.

308 8 Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128).

309 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p346.

third party, he may calculate damages for the unsold ones according to Article 76.[310] In some cases, if the aggrieved party fails to meet the condition for the application of Article 75, or the party cannot prove the substitute transaction constitute the transaction under Article 75, courts may allow the calculation of damages according to Article 76.[311] The same method has been adopted in some CIETAC awards.[312] Meanwhile, some courts deemed the aggrieved party may choose to claim damages under Article 74.[313]

1. Substitute transactions should be carried out within a reasonable time after the contract is declared avoided.

Since the CISG does not specify the scope of 'reasonable time', the CIETAC tribunals make comprehensive determination based on the circumstances of the case, the characteristics of the goods and the market conditions. In practice, a CIETAC tribunal determined that the buyer's substitute transaction one month later than the last negotiation was still within the reasonable time.[314] In this case, the seller had proposed to postpone the shipping date to June 30, 2005, and the parties negotiated for the performance of the contract on June 20, but the seller still failed to deliver the goods. The buyer signed the contract for the substitute transaction with company G on July 8, 2005, which was still within the reasonable time as deemed by the tribunal.

In the 2014 monoammonium phosphate sales case, the tribunal held the resale about one year later than the contract avoidance declaration was beyond the reasonable time.[315] The claimant started the resale of monoammonium phosphate after the parties had reached

310 CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, January 14, 1994]. Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740).

311 CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, September 22, 1992].

312 The CIETAC Award dated February 11, 2000.

313 CLOUT case No. 427 [Oberster Gerichtshof, Austria, April 28, 2000].

314 The CIETAC Award dated April 11, 2006.

315 The CIETAC Award dated January 9, 2014.

no agreement in the negotiation in August 2012. The claimant signed two sales contracts with third parties on September 17 and 21, 2012 respectively. The performance of the two sales contract was completed in October and November 2012, respectively. The tribunal recognized the two transactions and deemed the resale was within a reasonable time. However, the claimant resold the rest of the goods on July 4, 2013, and claimed compensation for the difference between this price and the contract price. The tribunal held the claimant had delayed the resale and not fulfilled the obligation to mitigate losses, so the tribunal refused to take such price as the calculation basis for damages for the rest of the goods.

It can be found that most courts have the same view as the above, i.e., the seller failed to fulfill the obligation to mitigate losses under Article 77 if the resale was far beyond the reasonable time.[316] The determination of reasonable time is based on the nature of the goods and specific circumstances.[317]

2. Determination of Substitute Transactions

In the 2003 iron sales case, the tribunal held the 'contract goods' should be the goods prepared by the seller according to the contract.The seller only submitted as evidence the Settlement List of Iron Transaction with company A stating 'sell 367.77 tons of iron' and the draft in the amount of RMB 400,000 dated 'January 6, 1997' which was much earlier than the contract conclusion, so the tribunal rejected its claim on the difference between the resale price and the contract price.[318]

In the 2007 stearic acid sales case,[319] the buyer purchased 100 tons of stearic acid in

316 Hof van Beroep Antwerp, Belgium, April 24, 2006.

317 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p347.

318 The CIETAC Award dated April 12, 2003.

319 The CIETAC Award dated August 28, 2007.

replacement at the unit price 95 dollars higher than the contract price. The seller asserted that the substitute goods were not at the same level as the contract goods and the price was inconsistent with the international market price, so the substitute transaction was unreasonable and the seller should not bear the loss of the price difference. In this regard, the tribunal found through investigation that the substitute goods and the contract goods were both type 200 industrial stearic acid, except that the specifications of the contract goods were exactly the same as those under the national standard while those of the substitute goods were slightly different from the national standard but most indicators were still within the scope of type 200 standard. The tribunal, considering the above facts and the chemical characteristics of chemical products, that is, the same type products could not keep exactly the same proportion of components in production and transaction, found the substitute goods were basically consistent with the contract goods.

3. Identification of Goods in Substitute Transactions

In the 2007 cotton sales case,[320] the tribunal pointed out, when the buyer refused to perform the payment obligation, the substitute transaction referred to the seller's resale of the goods to a third party. The seller should have the intention of replacing the original transaction with the substitute transaction and the resold goods should be consistent with the goods stipulated in the contract because these goods were generally prepared for the original contract. In other words, the goods consistent with the contract should have been identified (be allocated to the specific contract) or at least be possessed by the seller and allocated to the specific contract without delay since the contract had been declared avoided. If the goods were not those stipulated in the original contract, the transaction would not be regarded as the substitute one. If the goods consistent with the original contract had been prepared for other transactions, the transaction should not be regarded

320 The CIETAC Award dated April 12, 2007.

as resale.

In this case, the tribunal could not confirm the substitute transaction based on the evidence and the parties' statements. Firstly, the seller admitted it had engaged in large and continuous cotton transactions as one of the most important cotton traders and maintained continuous cotton supply and a considerable amount of inventory. However, the seller also recognized it had not identified certain inventory to the contract of this case when the buyer breached the contract and there was no evidence showing the seller's intent of substitute transaction after it had declared the contract avoided. The seller pointed out 'it is difficult to identify which batch of cotton resold to other companies was the one to be delivered to the buyer due to the huge amount of cotton sold by the seller and the continuous transactions. The reason for the seller to submit the resale contract is to give the tribunal a clear and direct method of calculating the price difference loss'. Secondly, the buyer pointed out the evidence on resale of goods submitted by the seller showed the year of growth for the cotton was different than that stipulated in the contract. The resale contract stated the year of growth as '2004/2005' while the contract stipulated '2002/2003/2004'. Obviously the two kinds of cotton were different and could not be deemed as the same goods, so the tribunal could not confirm the resale.

Section 3 Calculation of Damages under Article 76 of the CISG

The observing party, if it has not made a purchase or resale under Article 75, can claim the difference between the price fixed by the contract and the current price at the time of avoidance.[321] Article 76 is the other way of calculating damages when the contract is declared avoided. Article 76 provides if the aggrieved party has made the substitute

321 The CIETAC Award dated June 26, 2003.

transaction, this article is generally not applicable.[322] Similar to Article 75, the contract avoidance declaration is the premise of the application of this article. If the contract has not been declared avoided, Article 76 shall not apply.[323] The CIETAC tribunals have expressed the same view in some awards.[324]

1. Time for Determining the Current Price

Tribunals, when applying Article 76 of the CISG to calculate damages, usually encounter the issue of determining the time for the current price at the time of avoidance. The parties performing the contract are not legal professionals and may not know the specific legal requirements on the contract avoidance and the calculation of damages, so there may be no clear written notice for the avoidance of the contract while the parties have no intention to continue the performance and the contract has not been performed in fact. In the calculation of damages, it is necessary for a tribunal to make reasonable determination according to the entire facts of the case. Another issue that needs to be considered in many cases is that the parties may negotiate for a while due to the consideration of maintaining business relationship and make different expressions during the negotiation. Sometimes tribunals need to determine whether and when the contract is declared avoided according to the principle of good faith.

In the 2004 hot-rolled sheet sales case,[325] the tribunal, noting the claimant had stated 'insist the L/C be issued before March 10, 2003, otherwise our company will have no choice but to rely on the contract and the applicable laws to protect our interests,

322 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p352.

323 CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, January 14, 1994]; Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, September 22, 1992].

324 The CIETAC Award dated February 11, 2000.

325 The CIETAC Award dated September 17, 2004.

and you should bear any or all of the losses incurred' and considering the parties had recognized the impossibility of the performance of the contract, held a reasonable time (about a month) after March 10, 2003 should be taken as the contract avoidance time.

In the 2007 cotton sales case,[326] the buyer had breached the contract for its failure to perform the obligation of issuing the L/C within the stipulated period. The tribunal held the seller had obtained the right to declare the contract avoided in late January 2004, but as often happened in international trade, the seller did not immediately exercise the right. Thereafter, the buyer issued the L/C for partial contract price and the seller delivered the corresponding goods, so the tribunal deemed this part of the contract had been performed. As for the balance, the seller had given several grace periods, but the buyer failed to issue the L/C. The final grace period ended on July 20, 2004 which was the last day of the 7 working days after the law firm sent the fax to the buyer on July 9, 2004, according to which July 21, 2004 should be taken as the day when the contract was declared avoided. The tribunal held the cotton price in the New York market on such avoidance day should be taken as the 'current price' for the calculation of damages.

The 2016 UNCITRAL Digest stated that the current price should be the general market price of similar goods under comparable circumstances.[327] Regarding the time for the current price, some courts have a similar view with CIETAC tribunals, i.e., if the seller has 'clearly and unambiguously' declared that it will not perform its obligations, no contract avoidance declaration notice is needed and the avoidance time stated in Article 76 should be the day the debtor declares its intention of non-performance.[328]

2. The Consideration of Good Faith

326 The CIETAC Award dated April 12, 2007.

327 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p353.

328 CLOUT case No. 595 [Oberlandesgericht München, Germany, September 15, 2004].

In the 2004 magnesium ingot sales case,[329] the parties disputed over the contract avoidance time. The seller stated in the letter on March 10, 2003, 'since the manufacturer has got no coal or silicon lamination for the production and the price has changed significantly, the rest of the goods cannot be delivered', 'if you don't confirm as soon as possible (the higher price and the issuance of L/C), we will not be able to deliver the rest of the goods, if the problem is still not resolved, please be prepared to temporarily purchase goods from other channels'. The tribunal held the seller had clearly expressed the intention of not performing the contract as agreed through this letter and explicitly requested the buyer to purchase from elsewhere, so it could be regarded as the effort to mitigate the loss of price difference. The tribunal also noted the seller was in a relatively passive state in the negotiation and had always requested the buyer to raise the price while the buyer had actively pushed forward the negotiation based on the request of continuous performance of the contract. The price of magnesium ingot continued to rise when the negotiation lasted for over one month. The tribunal, considering the above fact, deemed it unfair for the seller to bear the price difference occurred during the over one-month negotiation. Therefore, the tribunal, based on the comprehensive circumstances of the case, found it practical and in line with the principle of fairness to determine March 10, 2003 as the contract avoidance time and calculate the expected profit loss according to the difference between the price of magnesium ingot at that time and the contract price.

3. Place for Determining the Current Price

The current price refers to the current price at the place of delivery, if not, the current price at a reasonable alternative place with proper consideration of the difference in freight.

329 The CIETAC Award dated May 31, 2004.

In the 2005 lysine sales case,[330] the parties argued over the 'current price' when the contract was declared avoided but both considered the appropriate reference price being of the Chinese market. The tribunal found the price of lysine in the Chinese market on November 7, 2003 as the 'current price' since the 'current price' should be the market price of similar goods at the place of delivery stipulated in the contract when the contract was declared avoided while the stipulated price term 'FOB a Chinese port' should be understood as the delivery at the loading port (a Chinese port).

In other cases, the tribunals have considered the international nature of the sales of goods and found it reasonable to refer to the international market price.[331]

4.The Basis for Determining the Current Price

Tribunals often determine the current price according to the information provided by the parties as well as the contract performance situation and the principle of fairness. In the practice of arbitration, price information from websites or companies is often questioned for reasons such as 'unofficial' or 'unauthorized'. Tribunals normally determine the current price based on the extensive consideration of price levels and the fairness of the final results, and admit the prices provided by both parties if they are from the same source of information.[332]

1) Price Information from Information Service Companies, Industry Websites, etc.

In the 2007 ethylene glycol sales case,[333] the seller submitted the price information of PLATTS and ChemNet and statistical charts by company C to prove the current price

330 The CIETAC Award dated March 5, 2007.

331 The CIETAC Award dated April 11, 2006, the CIETAC Award dated May 21, 2012, the CIETAC Award dated April 12, 2003.

332 The CIETAC Award dated April 11, 2006.

333 The CIETAC Award dated September 10, 2007.

of the contract goods, asserting it was reasonable to determine USD 677.5/ton as the current price when the contract was declared avoided.

The buyer argued the seller's data regarding the market price of the goods lacked a true basis and could not reflect the market price of the goods in this case. The main reasons were: (1) the buyer disagreed with the source of the price information. Company C, PLATTS and ChemNet were unofficial websites and the information collected and edited by them was not authoritative; (2) the price information provided by the seller was self-contradictory. Furthermore, the price evaluation value of PLATTS contradicted with the seller's statement and the price information shown in other evidence, so the price evaluation of PLATTS could not be admitted as the market price while the seller had no sufficient ground to claim damages based thereon; and (3) the price structure of the goods was not comparable. The buyer concluded that the burden of proof was not met since the seller could neither prove that the price of the goods had been dropping after the contract conclusion nor effectively prove it had suffered the loss of market price difference for failure to provide the market price of the goods.

The tribunal held the buyer's evidence could not indicate the current price of the contract goods on May 23, 2005 since the seller, though having submitted a large amount of evidence to prove the current price of the contract goods when the contract was declared avoided, admitted during the hearing that such evidence were 'only for the claimant to see the market price trend instead of the exact market price on May 23, 2005'.

The tribunal, considering the seller's failure to provide a reliable current price while the buyer had not provided any information for the tribunal's determination of the current price and the buyer's obligation to mitigate losses after the contract was declared avoided, found it reasonable to take USD710-725/ton CFR China published by PLATTS for the

weekly evaluation price of ethylene glycol on June 3, 2005 from all the price information known by the tribunal as the reference to determine the current price.

In the 2012 zircon sand sales case,[334] the respondent argued the claimant's reference of the price of Indonesian zircon sand imported to China published on www.asianmetal.cn on May 31st as the basis for the calculation of the price difference was improper and unauthoritative since the website stated 'the copyright of all works on this website indicating asianmetal belongs to it' and 'media or websites using the above works without authorization or beyond the authorization scope shall bear the relevant legal liabilities, the publisher shall be responsible for the authenticity, completeness and legality of the information registered or released by the members of this website while the members assume no guarantee responsibility'.

In this regard, the tribunal held the price quoted by the claimant could be taken as reference for the calculation of the price difference loss since commodity prices were generally quoted on the basis of the international market price in international trade and traders can obtain transaction data through various channels. In today's modern information society, price information published on various industry websites is one of the most important sources for traders to obtain the international market price and the price data released by asianmetal had reference value in the steel ferrous metal industry. The disclaimer on the website of asianmetal cited by the respondent was mainly to prevent infringement by other websites and media instead of being irresponsible for the authenticity, completeness and legality of the information posted on the website.

In the 2003 iron sales case,[335] the seller failed to provide the tribunal with strong evidence for the calculation of price difference.The written document on August 29

334 The CIETAC Award dated May 21, 2012.

335 The CIETAC Award dated April 12, 2003.

submitted by the seller stated, '[A]s you & you supplier know well, due to recent late rush from China to Korea, the market price drop to US150 / MT FOB Level and said will drop further'. The tribunal held it reasonable to adopt the price of USD 150/ton for the calculation of price difference since the buyer had admitted the international market price had dropped and the export price from China to South Korea was USD 150/ton to which the seller made no objection while the buyer clearly agreed to take USD 150/ton, the iron price in October 1997 published by China's National Customs Information Center, as the reference for the calculation of price difference loss of the seller.

2) Expert Evidence

In the 2007 cotton sales case,[336] the seller alleged the New York Board of Trade cotton price should be taken as the 'current price' and submitted the expert evidence on the New York Board of Trade cotton price. The buyer argued against the seller's expert evidence and pointed out such evidence should not be admitted since the expert witness and the seller were both members of the International Cotton Association and had a conflict of interest.

The tribunal deemed it was reasonable for an expert or celebrity in the international cotton trade circle to be a member of certain international cotton trade organization. If he was not experienced in a certain industry, the probative force of his expert witness statement on the situation of the industry would not be strong. Secondly, the buyer had ample opportunity to prove the contrary, for example, other applicable market prices or the mistake in the seller's expert evidence on the New York Board of Trade cotton price, but the buyer submitted no evidence to prove the actual situation and his general cross-examination opinions could hardly overturn the fact of the market price proved by the seller. The place of delivery should be the United States according to the trade term

336 The CIETAC Award dated April 12, 2007.

(CFR) agreed by the parties. Therefore, the tribunal found it reasonable to take the New York Board of Trade cotton price on the day the seller declared the contract avoided as reference for the calculation of the price difference in this case.

3) Comprehensive Consideration of the Contract Performance Background and the Performance

In the 2004 magnesium ingot sales case,[337] the tribunal, when determining the current price, considered the market price published on China Magnesium recognized by both parties, the Reports on the Rising Price of Magnesium Ingot Produced in China by World-renowned Media submitted by the buyer and the following factors: (1) the price condition stipulated in the contract was CFR, i.e. cost and freight; and (2) part of the performance period was during the SARS epidemic outbreak which did cause certain difficulties for the seller's performance and increase the cost.

Furthermore, the basis for determining the current price must have timeliness due to the time requirement for such determination. In the 2005 lysine sales case,[338] the seller only submitted the price data of China Customs. The tribunal held, though the price data was credible, the customs statistics normally reflected the market price of the goods before export according to the tribunal's understanding of the lysine export transactions. The contract in this case was signed in June, but the delivery (export) period was July to September which was 1-3 months later. Therefore, the price information provided by the seller, though being objective and true export price, could not be taken as the basis for the determination of the 'current price'. The tribunal finally adopted the lysine prices in the Chinese market published in the China Feed Market Price Weekly by company C submitted by the buyer as the basis for determining the 'current price'. The tribunal

337 The CIETAC Award dated May 31, 2004.

338 The CIETAC Award dated March 5, 2005.

found through investigation there was no price on November 7, 2003 in the above list of lysine prices in the Chinese market and decided to take an appropriate average value as the 'current price', i.e., the weighted average of the three prices before the date (the last three prices in October) and the three prices after the date (the first three prices in November) shown in the list.

5. Need for Adjustment

In accordance with the CISG, the party claiming damages may recover the difference between the price fixed by the ¬contract and the current price at the time of contract avoidance as well as any further damages recoverable under Article 74. In practice, the price structure of trade terms should also be considered.

In the 2004 hot-rolled plate sales case,[339] the contract price was CFR a Chinese port while the reference for the current price provided by the claimant was FOB CIS. CFR was composed of cost, i.e., the FOB price, and freight, so the CFR price of the same goods was obviously higher than the FOB price which could not be taken as the basis for the calculation of damages. The tribunal found it reasonable to take the price of the same components as the stipulated trade term adjusted according to the price fluctuation range in different periods as the reference for the calculation of damages in this case.

The tribunal held that the price difference of USD15/ton between the median price of USD305/ton on February 17, 2003 and that of USD290/ton on April 7 or 11, 2003 should be taken as reference for the calculation of expected profit loss in this case.

In two other cases, the contract price and the current price were CIF and C&F,[340] and

339 The CIETAC Award dated September 17, 2004.

340 The CIETAC Award dated May 25, 2005.

CFR and CIF[341] respectively, so the tribunals added or deducted 1% insurance premium in the calculation to achieve a fair and reasonable result.

XIV Liquidated Damages

The CISG does not provide for liquidated damages, but it is worth noting that the legality and rationality of liquidated damages under the CISG was discussed in the CISG Advisory Council Opinion No.13 as follows: the CISG stipulated the conclusion and interpretation of the contract, including the clause on the payment of agreed amount for non-performance of the contract; while the Contracting Parties could insert other clauses to detract from the CISG provisions on damages (Articles 74-79) under the principle of party autonomy in Article 6 of the CISG. Meanwhile, CISG does not exclude the provisions on debtor protection in other applicable laws or the 2016 UNIDROIT Principles, but such provisions should be consistent with international standards.[342]

Furthermore, the UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (the Uniform Rules) expounds the basic 2016 UNIDROIT Principles for the application of liquidated damages. Article 5 provides, '[T]he obligee is not entitled to the agreed sum if the obligor is not liable for the failure of performance', which defines liquidated damages as a way for the party to assume liability for breach of contract instead of 'punitive liquidated damages' in theory. Article 6 stipulates, [I]f the contract provides that the obligee is entitled to the agreed sum upon delay in performance, he is entitled to both performance of the obligation and the agreed sum. If the contract provides that the obligee is entitled to the agreed sum upon a failure of performance other than delay, he is entitled either to performance or to the agreed

341 The CIETAC Award dated May 21, 2012.

342 CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, Rapporteur: Dr. Pascal Hachem, Bär & Karrer AG, Zurich, Switzerland. Adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand on August 3, 2012.

sum. If, however, the agreed sum cannot reasonably be regarded as compensation for that failure of performance, the obligee is entitled to both performance of the obligation and the agreed sum'. Article 7 states, '[I]f the obligee is entitled to the agreed sum, he may not claim damages to the extent of the loss covered by the agreed sum. Nevertheless, he may claim damages to the extent of the loss not covered by the agreed sum if the loss substantially exceeds the agreed sum'. Article 8 provides, '[T]he agreed sum shall not be reduced by a court or arbitral tribunal unless the agreed sum is substantially disproportionate in relation to the loss that has been suffered by the obligee'.

Regarding liquidated damages, China Contract Law has similarly consistent provisions, i.e., Article 114 which states that '[T]he parties may agree that if one party breaches the contract, it shall pay a certain sum of liquidated damages to the other party in light of the circumstances of the breach, and may also agree on a method for the calculation of the amount of compensation for the damages incurred as a result of the breach. Where the amount of liquidated damages agreed upon is lower than the damages incurred, a party may petition the People's Court or an arbitration institution to make an increase; where the amount of liquidated damages agreed upon are significantly higher than the damages incurred, a party may petition the People's Court or an arbitration institution to make an appropriate reduction. Where the parties agree upon breach of contract damages in respect to the delay in performance, the party in breach shall perform the obligations after paying the breach of contract damages'. Moreover, Article 29 of the Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China provides, 'when a party petitions the People's Court to make an appropriate reduction of the significantly high liquidated damages, the People's Court shall take the actual losses as the basis, take into account comprehensive factors such as the performance situation, the parties' faults

and the expected benefits, weigh them according to the 2016 UNIDROIT Principles of fairness and good faith and make a ruling. If the liquidated damages agreed by the parties are 30% higher than the damages incurred, the People's Court can generally regard it as 'significantly higher than the damages incurred' under Article 114(2) of the Contract Law'. Similar rule has been adopted by Article 585 of the Civil Code of PRC, which provides, '[T]he parties may agree that if one party breaches the contract, it shall pay a certain sum of liquidated damages to the other party in light of the circumstances of the breach, and may also agree on a method for the calculation of the amount of damages incurred as a result of the breach. Where the amount of liquidated damages agreed upon is lower than the losses incurred, the people's court or an arbitration institution may increase such amount upon the request of the parties; where the amount of liquidated damages agreed upon is excessively higher than the losses incurred, the people's court or the arbitration institution may appropriately reduce such amount upon the request of the parties. Where the parties agree upon the amount of liquidated damages for delayed performance, the breaching party shall perform the obligations after paying the liquidated damages'.

It can be found the Uniform Rules are basically consistent with Chinese laws, i.e., liquidated damages should not be so disproportionate to the damages incurred as to become punitive liquidated damages. Of course, the two had a slightly different focus. The Uniform Rules emphasizes respecting the parties' agreement on liquidated damages under which adjudicators should not easily intervene unless the agreed amount is extremely disproportionate to the actual losses. The Civil Code of PRC, theContract Law and itsjudicial interpretation provide more explicit restrictions on a disproportionate allowance, and are more from the perspective of compensatory damages with consideration of the principle of fairness to some degree.

It can be seen that the Civil Code of PRC, the Contract Law and its judicial interpretation and the UNCITRAL Uniform Rules are in the same spirit as a whole, both recognizing the clause on liquidated damages as within the scope of party autonomy and the parties' right to request compensation under such clause in certain conditions. In practice, CIETAC tribunals would refer to Chinese laws on liquidated damages since these are circumstances not covered by the CISG.

Section 1 The Determination of the Clause on Liquidated Damages

In practice, the clause on liquidated damages is generally stated as 'the party breaching the contract shall pay a certain amount' or the way of calculating the amount of liquidated damages. The determination of the agreed amount as the liquidated damages often depends on the substance of the content of such clause and the relationship with the actual damages instead of the use of the expression 'liquidated damages'.

In the 2009 walk-behind rice transplanter sales case,[343] the clause on liquidated damages in the contract was Article 16 Delay and Penalty, stating, 'if the seller fails to deliver in time according to the contract, the seller shall pay penalty for delayed delivery under the precondition that the buyer agrees to postpone the delivery except for force majeure events, and shall deduct the amount of liquidated damages from the invoice and indicate 'the amount of remittance is after the deduction of liquidated damages' in the cover letter and draft of the payment instruction, but the amount of penalty shall not exceed 5% of the total value of the goods. The penalty rate shall be 0.5% per week and calculated as one week if the delay is less than one week. If the seller delayed the delivery for more than 4 weeks after the stipulated shipping period, the buyer shall be entitled to declare the contract avoided while the seller shall still immediately pay the penalty as agreed'.

343 The CIETAC Award dated August 10, 2009.

Regarding the parties' expression of 'penalty', the tribunal held liquidated damages and penalty are not originally the same concept. Under China's current legal system, there is no provision on 'penalty' for a party's breach of contract but provision on compensation of losses due to breach of contract in the form of liquidated damages. It could be found through the wording of the clause that the parties had used both 'penalty' and 'liquidated damages' interchangeably. The buyer's explanation was that liquidated damages referred to the penalty stipulated in the contract to which the seller made no objection. Therefore, the tribunal found the 'penalty' in the clause was essentially liquidated damages which was one way of assuming liability for breach of contract, so the tribunal supported the buyer's claim on liquidated damages according to Article 114(1) of China's Contract Law.

Section 2 The Relationship between Liquidated Damages and Damages

In the 2010 rebar sales case,[344] the tribunal noted that the parties had agreed on the liquidated damages clause to avoid the burden of proof. In other words, if any party breached the contract, the observing party could invoke this article to request the breaching party to pay liquidated damages as agreed without providing evidence to prove the actual loss or the amount thereof. Therefore, the nature of liquidated damages and damages was the same, i.e., the way of assuming liability for breach of contract to compensate for damages caused by said breach.

Therefore, regarding the claimant's claims on both liquidated damages and actual losses and the respondent's objection thereto, the CIETAC tribunal referred to Article 114 of the Contract Law and Article 28 of the Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China' providing, 'when a party petitions the People's Court to make an appropriate

344 The CIETAC Award dated January 27, 2010.

increase of the liquidated damages according to Article 114(2), the amount of the liquidated damages after increase shall not exceed the actual losses. If the party claims from the other party again for compensation of losses after the liquidated damages has been increased, the People's Court shall not support such claim' , and found the claimant could not claim both the damages incurred and the liquidated damages according to the contract clause.

In the 2004 goods sales case,[345] Article 5 of the contract stipulated the steps for opening the performance bond L/C as: 'the buyer shall open an irrevocable L/C with the seller as the beneficiary within 10 bank working days after the seller has opened the L/C as the performance bond in the amount of 2% of the contract price with the buyer as the beneficiary. The seller shall open the performance bond L/C with the buyer as the beneficiary within 10 bank working days after signing the contract. The performance bond shall be a transferable standby L/C and work as the liquidated damages when the seller fails to deliver the goods on time. For non-shipment due to other reasons, the seller does not need to pay liquidated damages'. The parties' contract clearly stated that the seller should only bear liquidated damages when he failed to deliver the goods on time while no liquidated damages would incur for other situations. The tribunal pointed out "no liquidated damages" should not mean no damages. The claimant claimed no liquidated damages but requested the respondent to compensate the difference between the resale price and the contract price and other losses such as the lawyers' fees, travel expenses and arbitration fees. Therefore, Article 5 of the contract constituted no obstacle to the claimant's claims, but under the special circumstance of this case, the tribunal should consider the amount of liquidated damages the respondent had already paid when calculating the amount of damages.

345 The CIETAC Award dated April 12, 2004.

Section 3 Specific Amounts

As mentioned above, liquidated damages can be considered as the amount or calculation method determined by the parties at the contract conclusion based on the 'estimated' loss while such amount is inevitably different from the actual loss. In practice, the CIETAC tribunals, when applying Chinese laws, would consider the principle of fairness and the full protection of the parties' interests to make appropriate adjustments to the amount of liquidated damages or even the payment method. Specifically, if the observing party could prove the amount of liquidated damages is lower than the damages incurred, it may petition the arbitral tribunal to make an increase; similarly, if the observing party could prove the amount of liquidated damages is significantly higher than the damages incurred, it may petition the arbitral tribunal to make a reduction. In both cases, the burden of proof lies with the party requesting the adjustment and the condition is that the amount of liquidated damages is lower than the damages incurred or significantly higher than the damages incurred.[346]

In the 2018 equipment sales case,[347] the parties stated in the Memorandum that 'considering the economic loss incurred since the production line had not been put into operation on time, the respondent agrees to pay certain amount of compensation, of which half should be paid to the account designated by the claimant before December 31, 2016 and another half should be compensated with spare parts from the respondent'. The tribunal held the parties' agreement regarding the economic loss suffered by the claimant should be respected since the production line delivered by the respondent could not operate normally. The respondent had paid the first half to the claimant while the other half fell within the scope of damages after the contract was declared avoided. Since the contract was declared avoided, it would be unreasonable to request the respondent to

346 The CIETAC Award dated January 27, 2010.

347 The CIETAC Award dated August 22, 2018.

compensate the claimant with spare parts as stated in the Memorandum. Therefore, the tribunal held the respondent should compensate the claimant in cash for the second half of the compensation.

XV Anticipatory Breach of Contract

Common law applies the rule of anticipatory breach while civil law applies the rule of suspension of performance. Articles 71 and 72 of the CISG essentially adopted the anticipatory breach rule from common law but with some difference in the application of rights. Article 71 relates to the circumstances under which a party may suspend performance of his obligations and the effects thereof, while Article 72 relates to 'anticipatory fundamental breach', i.e.,if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. The right to suspend performance under Article 71 is different from the right under Article 72 to declare the avoidance of the contract. The right to declare the avoidance of the contract is based on the termination of the parties' rights and obligations while the right to suspend performance is subject to the precondition that the contract will still be effective but the parties shall make guarantees to each other for the performance of the contract. Due to the different preconditions, the parties bear different procedural obligations for timely communication and due notice. Distinguishing between these two different situations in the use of CISG is material in allowing for timely remedy for the aggrieved party, increased certainty of the transaction and avoidance of unecessary and expanded losses.

Differently from the CISG, China Contract Law adopted both anticipatory breach rule and the rule of suspension of performance. China Contract Law provides a similar rule to the anticipatory breach rule in Article 94(2) of Chapter Six 'Discharge of Contractual

Rights and Obligations', and Article 108 of Chapter Seven 'Liabilities for Breach of Contracts'. Article 94(2) of the Contract Law stipulates, 'prior to the expiration of the period of performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligation', the party anticipating the breach may terminate the contract. Article 108 of the Contract Law provides, '[W]here one party express explicitly or indicates by its conduct that it will not perform its obligations under a contract, the other party may demand it to bear the liability for the breach of contract before the expiry of the performance period'. 'Liability for the breach of the contract' as referenced in Article 108 should be interpreted similarly to the termination right provided for in Article 94. Article 94(2) of the Contract Law has been incorporated into Article 563(2) of the Civil Code of PRC and listed in Chapter Seven 'Termination of Contractual Rights and Obligations' in Part III 'Contracts' of the Civil Code of PRC.

Additionally, Article 68 of Chapter Four 'Performance of Contracts' of China Contract Law contains similar provisions to the rule of defense of unperformed contract from civil law, i.e., '[T]he party required to perform first may suspend performance if it has conclusive evidence showing that the other party is under any of the following circumstances: (1) its business has seriously deteriorated; (2) it has engaged in transfer of assets or withdrawal of funds for the purpose of evading debts; (3) it has lost its business creditworthiness; (4) it is in any other circumstance which will or may cause it to lose its ability to perform. Where a party suspends performance without conclusive evidence, it shall be liable for breach of contract'. Article 527 in Chapter Four 'Performance of Contracts" of the Civil Code of PRC adopts the same rule as Article 68 of the Contract Law.

As shown above, theContract Lawand Civil Code of PRC adopt both common law's anticipatory breach rule and civil law's rule of suspension of performance, which is

actually China's effort to develop attributes from both systems. However, since both rules are remedies provided in cases of anticipated non-performance of the contract, there are certain overlaps between the two regarding the application conditions and legal effects, which may lead to some confusions in practice.

Section 1 Conditions to Suspend the Performance

In accordance with Article 71 of the CISG, the necessary components of anticipatory breach are as follows: (1) the objective fact that a party is expected to fail to perform its obligations. For the determination of such fact, the CISG specifies three 'objective' standards, i.e., a serious deficiency in his ability to perform, a serious deficiency in his creditworthiness and his conduct in preparing to perform or in performing the contract. Once one of the three standards is met, the objective fact of anticipatory breach is formed; (2) the severity. The above circumstances need to be so severe that 'it becomes apparent that the other party will not perform a substantial part of his obligations'. The CISG uses the word 'apparent' to describe the severity of the three objective standards. On one hand, the CISG requires the existence of objective evidence. On the other hand, it also requests consideration of the severity of breach; and (3) the substantial of main part of the obligations. The CISG contains no clear provision on 'a substantial part of his obligations', but according to the context and the general standard, it should be understood as substantive obligations such as the seller's delivery obligation and the buyer's payment obligation.

The CIETAC tribunals deem Article 71 of the CISG can only be applied when the above three conditions are met. If there is no objective fact that one party is expected to fail to perform its obligations, the other party has no right to claim anticipatory breach.

In the 2005 goods sales case,[348] the seller, after signing the contract, delivered the goods to the vessel at a Chinese port on May 13, 2003 and performed its delivery obligation under the contract, over which the parties had no dispute. However, after the vessel arrived at a Russian port, the seller got the vessel with the loaded goods back to a Chinese port. It was the key issue of this case whether the seller's conduct constituted breach. The buyer asserted the seller had colluded with the shipowner and transferred the goods back to the Chinese port without the buyer's consent, thus the seller had fundamentally breached the contract. The seller argued the buyer had delayed payment and breached first, so the seller had the right to recover the goods and avoid the contract according to Article 71 of the CISG. Furthermore, the seller had notified the buyer before taking back the goods.

The tribunal found through investigating the parties' evidence that the B/L date for shipping the goods from the Russian port back to the Chinese port was July 12, 2003 and the arrival date was July 21, 2003, which was recognized by both parties. The tribunal also noted the parties had negotiated many times on the payment of the balance in their correspondence. The buyer's agent had promised to pay the balance in full amount to the seller's account before July 31, 2003. It was obvious the parties had changed the payment term of the balance and reached agreement thereon. Therefore, July 31, 2003 should be regarded as the deadline for the buyer to pay the balance.

The tribunal deemed the condition of applying Article 71 of the CISG was not met in this case since the seller had taken the goods back to the Chinese port before the deadline for the buyer to pay the balance. The CISG clearly stipulates three objective standards for the determination of anticipatory breach, i.e., (1) the severe lack of capacity to perform the contract; (2) the severe defects in the credibility of performance; and (3) the obligor's

348 The CIETAC Award dated February 24, 2005.

objective behavior indicated the non-performance, none of which existed in this case.

Therefore, instead of applying Article 71 of the CISG, the tribunal applied Article 63(2) stating, '[U]nless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance'. The tribunal deemed the seller had not submitted relevant evidence that it had informed the buyer and/or its agent and obtained their express consent before taking the goods back or that it had received the buyer and/or its agent's notice that the latter would not perform the payment obligation before July 31, 2003. Therefore, the tribunal found it improper for the seller to take the goods back and avoid the contract before July 31, 2003, i.e., the deadline for the buyer to pay the balance, and held the seller should be liable for breach of the contract.

According to the 2016 UNCITRAL Digest, the non-performance required under Article 71 of the CISG does not necessarily refer to fundamental breach of contract. Normally, the performance obligations involved must be under the same contract, but if the non-performance was under another contract that is sufficiently close to the contract involved, the other party has the right to suspend the performance of the contract involved.[349] Such non-performance includes delaying payment under a previous transaction or various transactions or the seller's failure to deliver the goods in conformity in previous transactions.[350]

Section 2 The Notification Obligation of the Party Suspending the Performance

349 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p320.

350 CLOUT case No. 1255 [Rechtbank van Koophandel Hasselt, Belgium, March 1, 1995] (J.P.S. BVBA v. Kabri Mode BV); Doolim Corp. v. R Doll, LLC, 2009 WL 1514913 (2009).

Regarding the remedial measures for anticipatory non-fundamental breach, Article 71 of the CISG provides the following three situations: first, suspending the performance and notifying the other party; second, requesting the other party to provide adequate assurance of his performance and resuming the performance if the other party does so in time; and third, the seller's right to suspend shipment. If the seller has already dispatched the goods before the grounds for the buyer's anticipatory non-fundamental breach become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a ¬document which entitles him to obtain them. According to Article 71 (1), the party suspending the performance must give notice without delay. Article 71 (3) does not clearly stipulate the consequences of failure to immediately give notice of suspending performance. However, according to the 2016 UNCITRAL Digest, it can be concluded from relevant precedents that without proper notification, the aggrieved party shall not exercise its right to suspend performance of its obligations.[351] One court even held that the observing party, when failing to fulfill its notification obligation, might turn to be the defaulting party due to failure to perform the contract.[352]

The aggrieved party's right to declare the contract avoided under Article 72 shall be distinguished from the right to suspend performance of the obligations under Article 71(3). The two notification requirements under the two articles are also different. Article 72 only requires 'reasonable' advance notice if time allows, and such requirement shall not apply if the other party has declared that he will not perform his obligation; on the contrary, Article 71 requires a party suspending performance must immediately give notice of the suspension to the other party, without exception.

351 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p321.

352 CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, January 31, 1991].

In the 2012 zircon sand sales case,[353] the contract involved a specified CFR term, March to May, 2011 as the delivery period with 500 metric tons for each batch, and the payment condition was the buyer should issue three L/Cs at sight from March to May 2011 with 500 metric tons under each L/C. Accordingly, the buyer's issuance of 3 L/Cs at sight from March to May 2011 was the prerequisite for the seller's performance. However, during the performance, the buyer only issued one L/C at sight for 500 metric tons, i.e., the first batch of goods, from March to May 2011. Though it was shown in the evidence that the buyer asked the seller about the time for the issuance of the second L/C in early April 2011, but the seller gave no clear answer. The tribunal deemed that in legal sense, the above inquiry by the buyer could neither be taken as the legal basis for the buyer to be exempted from opening the second and the third L/Cs nor change the performance prerequisite under the CFR contract with L/C as the payment method.

The tribunal noted that during the delivery of the first batch of goods, the delivery period had been postponed to May 31, 2011 as required by the seller. Thereafter, the seller began to demand price increase on May 12, 2011 and the parties had negotiated thereon but failed to reach an agreement while the seller had not delivered the first batch of goods. According to Article 71 (1),(2) and (3), the buyer should have immediately informed the seller it would suspend the performance of the obligation to issue the L/Cs if it believed there were severe defects in the seller's capability to deliver the subsequent two batches or the seller's credibility, but the buyer had not done so and there was no evidence showing the parties' intention to suspend the performance during March to May 2011, i.e., the period for the buyer to open the second and third L/Cs. Therefore, the buyer should have performed its obligation to issue the L/Cs for the second and third batches of goods.

353 The CIETAC Award dated May 21, 2012.

The tribunal deemed even if the condition for suspension under Article 71 was met in this case, the buyer should have sent the suspension notice. The buyer was not entitled to suspend the performance due to the failure to prove it had sent any effective suspension notice, so the buyer had insufficient legal basis to claim damages for the price difference of the subsequent two batches of goods when it had failed to perform its obligation first.

Section 3 Anticipatory Fundamental Breach

According to Article 72 of the CISG and in line with Article 71, the elements of anticipatory fundamental breach should include: (1) the objective fact that one party is expected to be unable or unwilling to perform his obligations or the oral or written declaration by the party that he will not perform his obligations. In implied anticipatory fundamental breach, there are severe defects in the party's capability to perform his obligations or his credibility or the party has indicated he will not perform most of his important obligations in the preparation or performance of the contract by conduct. In explicit anticipatory fundamental breach, the party shall have declared that he will not perform his obligations orally or in writing; (2) the above facts must be 'clear', showing the party will 'obviously' not perform his obligations and the above declaration must indicate the clear and affirmative attitude of no performance at all; and (3) the fact showing the party will not perform or the declaration that the party will not perform the fundamental obligations of the contract, which will make the other party suffer losses, deprive him of what he is entitled under the contract and makes his contractual interests unachievable.

Article 72 of the CISG stipulates that the remedy for anticipatory fundamental breach is the avoidance of contract, under which: (1) the party may declare the contract avoided and claim damages; and (2) if time allows, the party intending to declare the contract

avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance. The right to declare the contract avoided is a very severe remedy for anticipatory breach, so the applicable condition is quite strict as well, i.e., it must be clear that the other party will commit a fundamental breach of contract. In practice, the buyer's failure to pay for the previous goods or to open a letter of credit may constitute such circumstance for the application of Article 72 of the CISG.[354] It is shown in precedents of various countries that one party's clear indication that he will not perform his obligations, such as the seller declares 'he no longer feels obligated to perform the contract', he will sell the goods to other buyers or he will not continue the performance unless the buyer accepts his suggestion on contract amendments, meets the condition for the application of Article 72.[355]

Article 73 of the CISG provides '(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment. (2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time. (3) A buyer who declares the contract avoided in respect of any -delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the ¬parties at the time of the conclusion of the contract'. This article is about the circumstance under instalment contracts that when one party breaches, the other party may declare one

354 CLOUT case No. 631 , Supreme Court of Queensland, Australia, November 17, 2000

355 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p324.

instalment or even the entire contract avoided, i.e., the problem of when the buyer or seller is entitled to declare one instalment, the future instalments or the entire contract avoided. Article 73(2) actually incorporates the concept of anticipatory fundamental breach under which the aggrieved party may declare the future instalments avoided under the precondition that: (1) the other party fails to perform any of his obligations in respect of any instalment; and (2) the aggrieved party has good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments. Such circumstance often occurs in international trade under instalment contracts.

In the 2012 caustic soda sales case,[356] the respondent, after signing the contract, had shipped 7 batches of goods from September 18, 2009 to December 1, 2009, while the claimant had paid the full price of USD167,849.50. It was shown in the effective inspection report that the purity of delivered caustic soda was between 17.9% and 37.87%, far less than the minimum purity of 98% stipulated in the contract. Thereafter, the respondent had delivered another two batches of goods. It was shown in the parties' emails that though the two batches had been shipped, the claimant, after finding the quality of the previously delivered goods in non-conformity with the contract, requested the respondent to stop the shipment on December 29, 2009. Then, the respondent agreed in writing to ship back the two batches. The claimant had made the payment for the two batches and asserted the respondent had fundamentally breached the contract since the purity of the previously delivered caustic soda was only 20-30%, far less than the stipulated standard in the contract, and such products were fake and had no value while the claimant had suffered serious losses.

In this case, the tribunal deemed it necessary to analyze whether the non-conformity of the goods delivered by the respondent constituted a fundamental breach according to the

356 The CIETAC Award dated February 6, 2012.

CISG and the shipment situation of the goods under the contract citing Article 25 of the CISG.

The tribunal supported the claimant's claim that the respondent had fundamentally breached the contract for the previously delivered goods since it was shown in the effective inspection report that the purity of caustic soda was between 17.9% and 37.87%, far less than the minimum purity of 98% stipulated in the contract. Meanwhile, the tribunal noted that most of the inspection results in the effective inspection report showed the proportion of sodium chloride in the previously delivered goods was higher than 50%. It could be concluded reasonably that the previously delivered goods were not the caustic soda with high purity under the contract. Furthermore, the respondent, as the supplier of acoustic soda, should have known such consequence.

The claimant has sufficient grounds to expect the quality discrepancy of the two batches of goods which had not actually arrived at the destination port though no inspection report had been made thereon due to the severe non-conformity of the previously delivered seven batches of goods which had arrived at the destination port. In this regard, the tribunal cited the rule of anticipatory breach, i.e., the CISG provision that '[I]f prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided' and referred to Article 73 stating, '[I]f one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time'.

When finding the claimant had sufficient grounds, The tribunal fully considered the

respondent's successive breaches of the contract and the severity of such breaches (the difference in the purity of caustic soda). Further, of particularly importance was the issue of whether the obligor could provide adequate assurance for the performance of his obligations which was considered in the determination of anticipatory breach. In this case, the respondent, when being requested to stop the shipment of the two batches of goods, provided no assurance or commitment regarding the quality of these goods. Therefore, the tribunal supported the claimant's claim that the respondent had fundamentally breached the contract for the two batches of goods which had not arrived at the destination port.

As shown in this case, Article 72 provides for the observing party's right to declare the contract avoided in the circumstance of anticipatory fundamental breach, while Article 73 is a special rule for the party to declare the contract avoided for future instalments under instalment contracts, from which the parties under instalment contracts may choose one to apply.[357] Article 73 itself does not exclude co-application with other articles of the CISG. According to the 2016 UNCITRAL Digest, it has been recognized in several precedents that the aggrieved party under an instalment contract could exercise his right regarding the future instalments under any one of these provisions.[358]

XVI Exemptions

Impediments beyond the parties' control often occur in the performance of international sales contracts, resulting in one party's non-performance and the legal consequence of exemption. In this regard, civil law countries have the system of force majeure and rebus sic sicutibus (changed circumstances) while common law countries have the doctrine of

357 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016,p324.

358 Helsinki Court of Appeal, Finland, 30 June 1998 (EP S.A.v. FP Oy), Unilex; Zürich Handelskammer, Switzerland, May 31, 1996 (Arbitration award No. 273/95), Unilex.

frustration. Article 79 of the CISG adopts the unique expression 'impediment' to avoid confusion with these domestic law concepts. Article 79 uses 'an impediment beyond his control' to replace the force majeure or frustration in domestic laws instead of directly adopting the civil law or common law system. As stated in the 2016 UNCITRAL Digest, the application condition of Article 79 is different from that of domestic law systems.[359] Article 79(1) stipulates the condition for exemption as 'due to an impediment' which is 'beyond his control' and 'that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences'.

Under Chinese laws, Article 117(1) of the Contract Law clearly stipulates the liability of the party under force majeure, stating, '[A] party who is unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the event of force majeure, except otherwise provided by law. Where an event of force majeure occurs after the party's delay in performance, it is not exempted from such liability'. Article 117(2) provides the concept of force majeure in the legal sense, stating, '[F]or purposes of this Law, force majeure means any objective circumstances which are unforeseeable, unavoidable and insurmountable'. Article 118 also stipulates the obligations of the party under force majeure, stating, '[I]f a party is unable to perform a contract due to an event of force majeure, it shall timely notify the other party so as to mitigate the losses that may be caused to the other party, and shall provide evidence of such event of force majeure within a reasonable period'.Article 180 of the Civil Code of PRC adopts the same concept of force majeure as that in Article 117(2) of the Contract Law, stating, '[F]orce majeure means any objective circumstances which are unforeseeable, unavoidable and insurmountable'. Article 590 of the Civil Code of PRC

359 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p375.

combines Article 117 and Article 118 of the Contract Law, stating, 'Where any party is unable to perform the contract due to force majeure, it shall be partially or wholly exempted from liability in light of the impact of the force majeure, except otherwise provided for by law. Where the contract cannot be performed due to force majeure, a notice shall be given to the other party in time so as to reduce the losses possibly caused to the other party, and the proof shall be provided within a reasonable time limit. If force majeure occurs after any party has delayed its performance, such party's liability for breach of contract shall not be exempted'.

Article 79(5) of the CISG stipulates, '[N]othing in this article prevents either party from exercising any right other than to claim damages under this Convention', which includes the right to declare the contract avoided. Article 94(1) of China's Contract Lawand Article 563 1 both provide that the parties to a contract may terminate the contract if it is rendered impossible to achieve the purpose of contract due to an event of force majeure. The consequence and impact of the two provisions are the same.

The CIETAC tribunals, when applying the CISG, would first determine whether there are exemptions according to Articles 79 and 80 of the CISG. In this application, the CIETAC tribunals tend to interpret Article 79 according to the legislative intent, the meaning of the text and Article 7 of the CISG. In practice, most parties agree on the exemption due to force majeure in international sales contracts. If the parties have clearly stated 'force majeure' in the contract, the CIETAC tribunals would analyze such issue according to the contract and the elements in Article 79 of the CISG.

Section 1 The Basis for the Determination of Exemptions

In CIETAC practice, there are two types of criteria for identifying exemptions. One is the exemptions listed by the parties in the contract and another is the general legal

standard for such determination.[360]

1. The Contractual Provision

Article 79 of the CISG is an arbitrary and supplemental provision. The CISG only plays the regulatory role under the premise of respecting party autonomy. The parties' assertion of exemptions for impediments beyond their control or other similar reasons should be determined according to the contract first. No matter whether the parties have agreed on conditions higher, lower or beyond Article 79, the contractual provision and the interpretation thereof shall prevail. Article 79 is nothing more than a supplementary rule applicable when the parties have reached no agreement or no clear agreement thereon and only works as a reference for adjudicators. At least within the scope of the CISG, an 'impediment beyond control' is not a compulsory exemption. The parties may have agreed on a contractual provision in their own interest or even agreed to exclude exemptions, with which the CISG does not interfere. For example, the force majeure clause in a contract may state "force majeure' refers to events beyond the parties' control, including but not limited to: (a) war and state of war (whether or not declared); and (b) severe fire, flood, typhoon, earthquakes, quarantine, restrictions and embargoes'.[361] The CIETAC tribunals would first consider the contractual provision when determining the exemptions. However, even if there is a force majeure clause in the contract, a common problem in practice is that the parties have not agreed or have not clearly agreed on the scope of force majeure, then the tribunals still need to determine exemptions according to application laws.

2. The Determination according to Article 79

360 The CIETAC Award on June 4, 2009.

361 The CIETAC Award on August 31, 2016.

If the CISG is applicable while the parties have not clearly agreed on exemptions, the CIETAC tribunals would determine exemptions according to Article 79. The CIETAC tribunals deem there are usually two kinds of exemptions according to the international trade practices, i.e. natural impediments, such as typhoons, tsunamis, earthquakes, floods and fires, and government actions such as embargoes, expropriations, import and export bans and foreign exchange control.[362] It is stated in a CIETAC award that impediments must be 'uncontrollable risks or completely unexpected events, such as force majeure, economical impossibility, or over burden'.[363]

However, the tribunals tend to consider that only the occurrence of either natural disasters or government actions is not enough for the constitution of exemptions and a series of conditions stipulated in the CISG should be met. A CIETAC tribunal pointed out that 'Article 79(1) of the CISG is about the exemptions for a party who cannot perform his obligations due to unexpected accidents, the party should prove the co-existence of three elements: firstly, the non-performance is due to 'an impediment beyond his control'; secondly, he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; and thirdly, he could not reasonably be expected to have avoided or overcome it, or its consequences. In short, this event must be uncontrollable, unforeseeable and unavoidable and the party cannot overcome the consequence thereof and should have no fault in the occurrence and development of this event. In general, the CIETAC practice reflects an attitude of strict and objective interpretation of Articles 79 and 80 of the CISG to ensure the party cannot easily escape the performance of his obligations. It is pointed out in the 2016 UNCITRAL Digest that Article 79 has been frequently invoked in litigation but the

362 Ibid.

363 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation,27 July 1999 (Arbitral award No. 302/1996), English translation available on the Internet at www.cisg.law.pace.edu.

parties' claim on exemptions has only been supported in limited cases. The seller's claim on exemption was supported in five cases but rejected in at least 27 cases. The buyer's claim on exemption was supported in four cases but rejected in at least 14 cases. This is similar to the overall situation of the CIETAC practice involving the application of Article 79.[364]

Section 2 The Conditions for Exemptions

1. 'beyond his control'

The 'beyond his control' standard in Article 79 of the CISG emphasizes the objectivity of impediments. Impediments should be due to objective situations the parties cannot control and have nothing to do with the parties' insufficient subjective efforts. The objective impediments should be the only cause of non-performance.

In the 2009 chemical sales case,[365] the seller asserted it had failed to deliver the goods due to the force majeure event, i.e., China's control over imported dangerous chemicals during the 2008 Olympic Games. The tribunal held the primary condition for the determination of 'force majeure' was the event should be an objective situation. The so-called 'objective situation' should first be a fact and secondly be objective. Since 'force majeure' should first be a fact, there should be corresponding evidence to prove the fact and the party claiming exemptions should bear the burden of proof.

The seller asserted 'China's control over imported dangerous chemicals during the 2008 Olympic Games' and submitted the notice from the shipowner as evidence. The buyer argued that although it had heard about the corresponding import control at 'a Chinese

364 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p375.

365 The CIETAC Award on June 4, 2009.

port', it still imported two batches of 'dangerous chemicals' similar to the contract goods from this Chinese port in mid-July 2008, which proved there was no impediment to the seller's performance of the delivery obligation. The seller submitted the evidence to prove 'it had received the notice from the logistics company, clearly indicating the port was among those banned ones due to the Olympic Games'. From the perspective of evidence admission, such evidence was not the formal notice issued by the relevant port authority, i.e., was indirect evidence, so the tribunal could not determine the fact that the Chinese port had prohibited the import of the contract goods directly based on this evidence. Furthermore, the tribunal noted the statement in the seller's evidence that it 'is working on each shipment for arrival during the period' which means the seller had expressly indicated to the buyer that it was working on each shipment for arrival during the Olympic Games in its evidence on 'force majeure' instead of stating it could not deliver the goods due to force majeure.

The buyer submitted evidence to prove that in mid-July 2008, two batches of 'dangerous chemicals' similar to the contract goods had been imported to the Chinese port while the seller did not submit any contrary evidence sufficient to deny the authenticity of the buyer's evidence. Therefore, the tribunal determined the fact asserted by the buyer and further found the 'port control during the Olympic Games' that had worried the parties was just 'a possibility' and not a fact proved by evidence in this case.

Furthermore, in the 2003 Australian wool sales case,[366] the buyer asserted obtaining the quota was the prerequisite for the performance of his obligations, which the seller had known. The seller also clearly stated in the cotton transaction process published on its website that it only had transactions with companies which had obtained the import quotas, so the buyer's failure to obtain the quota should constitute an exemption

366 The CIETAC Award on September 17, 2003.

under Article 79 of the CISG. The seller argued it was the buyer's risk to obtain the quota, which had nothing to do with the legality and validity of the contract and the performance. The tribunal deemed quotas and licenses, unless specified in the foreign trade contract as force majeure or the precondition of contract performance, could generally constitute no exemption for the non-performance. The buyer's statement that it only had transactions with Chinese textile enterprises and companies that had obtained import licenses on its website just indicated that the seller had made it clear that enterprises or companies intended to have further negotiations with seller should have corresponding qualifications. The buyer, as a professional Chinese company long engaged in foreign trade of textiles, knew or should have known the current import of Australian wool was under foreign trade control in China and the corresponding quotas and import licenses should have been obtained. It can be seen that the tribunal held the issue of quotas and licenses as an impediment the buyer should have known instead of an unpredictable one at the contract conclusion, so the buyer understood such obligation and risk when signing the contract. It was neither an objective situation which could be regarded as an exemption nor the precondition for the performance of the contract, so the buyer should not be exempted from his obligations.

We note that in the application of the CISG, such grounds for defense is usually rejected by national courts. For example, when the seller requested an exemption because it could not purchase milk powder in line with the import regulations of the buyer's country, the court held that the seller knew these regulations when signing the contract and undertook the risk of finding suitable goods.[367] Similarly, the seller's exemption request based on the prohibition of coal export was rejected by the court.[368]

367 CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

368 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p378.

2. The 'Unpredictability' of Exemptions

The 'unpredictability' in Article 79 emphasizes not only that the parties cannot foresee the occurrence but also a third party with the same status as the parties cannot reasonably foresee the occurrence of impediments. The reasonable predictability is a factual issue to be determined according to the all the situations related to the contract or the contract conclusion and there is no uniform standard applicable to all cases. Meanwhile, the predictability does not depend on whether the parties involved have really considered the occurrence of impediments but should be determined by adjudicators under the reasonable third-party standard.

In the 2005 lysine sales case,[369] the seller asserted the flood and SARS in 2003 had seriously affected his performance of the contract and constituted force majeure, so the seller should be exempted or relieved of his responsibility for non-performance. However, the tribunal deemed the seller should have known and could have foreseen the impact of SARS at the contract conclusion since SARS had occurred in China over two months before the conclusion. Furthermore, SARS was under control in China in June 2003. The seller, when signing the contract on June 20, 2003, had opportunities to fully consider the impact of SARS on his performance and should have foreseen the impact. Therefore, SARS should not constitute an 'impediment' under Article 79 of the CISG.

Similarly, in the 2005 tomato sauce sales case,[370] the seller asserted the high temperature and heavy rain in 2003 caused serious diseases in the crops such as fruit rot, early blight and spots, affecting the quality of tomato, resulting in the significant reduction in tomato yield and decreasing the quality and quantity of tomato sauce. The seller further asserted abnormal climate change should be taken as force majeure. The contract goods

369 The CIETAC Award on March 5, 2005.

370 The CIETAC Award on June 30, 2005.

were processed agricultural products of which the raw material had been greatly affected by the climate. The insufficient supply and quality discrepancy due to the abnormal climate were beyond the seller's control and could not be solved through the seller's production management. The mold index of tomato sauce stipulated in the contract was no more than 40%, but the mold index of tomato sauce produced in 2003 generally exceeded 40%. The buyer argued the seller should have reasonably assessed and expected the products it supplied and should assume corresponding risks.

The tribunal pointed out that during the performance of the contract, the seller, as the main supplier of tomato sauce in China, should have known the raw material would be greatly affected by climate changes. In addition, the contract was concluded on July 29, 2003 when the tomato harvest season had already started, so the impact of abnormal climate on tomato growth and harvest should was have been shown or have started and was not unforeseeable. In other words, if the seller claimed exemption on the ground of force majeure, the force majeure event should have occurred before the contract conclusion rather than a process that had already begun and continued before the contract conclusion.

In the above awards, the CIETAC tribunals adopted the same approach as that indicated in the 2016 UNCITRAL Digest, i.e. as shown by many national judgments, the proper application of Article 79 must focus on assessing the risk assumed by the party requesting exemption at the contract conclusion.[371] In other words, these judgments indicate that the key issue is to determine whether the party requesting exemption bears the risk of the event causing the non-performance.[372] If the impediment to the performance has

371 CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex; CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

372 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p375.

existed before the contract conclusion, it cannot be taken as the ground for exemption. For example, in a Dutch precedent, the seller could not claim exemption for failing to meet the food safety regulations in the buyer's country because the parties had known the existence of such regulations at the contract conclusion of the contract.[373]

3. The Impossibility to 'have avoided or overcome' Impediments

The impossibility to 'have avoided or overcome' impediments stipulated in Article 79 emphasizes the impossibility of preventing the occurrence or consequences of impediments with all reasonable measures, which means the parties, if intent to be exempted, should not only prove they have not foreseen the occurrence of impediments at the contract conclusion of the contract, but also prove the impossibility to 'have avoided or overcome' impediments and the consequences thereof. The CISG provides no uniform standard for such determination, so CIETAC tribunals make case-by-case analysis based on the evidence submitted by the party claiming exemptions to decide whether such claim is sustainable.

In the 2009 chemical sales case,[374] the buyer pointed out that it had informed the seller on May 8, 2008 that 'the buyer received official information from the Chinese port that import of hazardous chemicals would be prohibited during the Olympic Games, so the buyer could not import NDCL from the port and requests the destination port be changed to another port…'. The 'destination port' stated in the L/C issued by the buyer on May 19, 2008 was another port. The buyer also submitted the parties' emails to prove 'the buyer had set the destination port of the first batch of goods as another port and negotiated with the seller on the destination port of the second and third batches'.

373 Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV, Rb 's-Hertogenbosch, 2 October 1998, http://cisgw3.law.pace.edu/cases/981002n1.html, last visited on March 16, 2020.

374 The CIETAC Award on June 4, 2009.

The tribunal held the 'force majeure' event asserted by the seller was not impossible 'to have overcome' since the seller had suggested to 'overcome' the possible 'port control during the Olympic Games'. The seller submitted no direct evidence, such as an announcement issued by the port authority, to prove that 'another port' suggested by the buyer also had 'port control during the Olympic Games' (against the contract goods) or it was impossible to send the goods to another port. Furthermore, none of the seller's evidence could prove that the seller had expressly objected to the buyer's proposal of another port or suggested other alternative delivery plans.

In the 2003 alumina sales case,[375] the buyer asserted exemption on the ground that it could not perform the contract since the Chinese government had changed the alumina import policy during the performance. The seller argued the buyer had no factual basis to assert the impossibility to perform the contract due to the change of the national import policy and the seller could not rely on such change to avoid the issuance of L/C.

The tribunal noted that the State Economic and Trade Commission, the Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs jointly issued the special announcement on 'Temporary Automatic Registration Administration of Alumina Imports' on September 29, 2001 and the Ministry of Foreign Trade and Economic Cooperation issued the Emergency Notice on Relevant Issues Concerning the Strengthening of Administration of Examination and Approval of Alumina Processing Trade' on September 30, 2001. However the tribunal held these changes in the relevant import policy were not a total ban on alumina import but some new requirements on the approval administration and registration of alumina import under which the buyer could have performed the contract and the buyer could have overcome such impediment.

375 The CIETAC Award on June 26, 2003.

Furthermore, the tribunal noted the buyer asserted that 'the Chinese government's restrictive regulations on alumina imports…had the direct impact that it was impossible for enterprises to obtain the import registration permit with a short period during October and November 2001. The buyer would suffer great losses if he cannot obtain the alumina import registration permit (the demurrage fee for arrived goods arriving is calculated as 0.05% of the total value per day)'. The tribunal deemed the buyer could have still received the goods delivered by the seller after the Chinese government had changed the alumina import policy but needed to obtain the import registration permit for the customs declaration after receiving the goods. The buyer would have paid a certain amount of fees if the goods were detained by the customs since the customs declaration could not be made within a short period of time during this period. The tribunal held such loss should be assumed by the buyer in international trade and could not be regarded as an impediment which could not have been overcome, so the buyer could not refuse to perform the contract because it had not intended to assume the trade risk.

In summary, when determining the impossibility to 'have avoided or overcome' impediments stipulated in Article 79, CIETAC tribunals emphasize that the parties are required to have taken all reasonable measures to prevent the occurrence of impediments or consequences thereof. During the contract performance, the parties are obliged to avoid or overcome the impediments for contract performance. If an impediment is an ordinary commercial risk and puts no extra burden for the party who could not have foreseen it at the conclusion of contract conclusion, the CIETAC tribunals tend to deny it as an exemption which the party could not 'have avoided or overcome'.

The above view of the CIETAC tribunals is shown in the following cases: (1) the 2005

ferro-molybdenum sales case[376] in which the seller asserted it could not deliver the goods because the mine producing the raw material for the contract goods had been closed due to environment protection, taxation and continuous rain; (2) the 2006 canned mandarin sales case[377] in which the seller asserted it had failed partial delivery due to the relevant price-limiting documents issued by China Chamber of Commerce of Import and Export of Foodstuffs, Native Produce and Animal By-products (an industry association); and (3) the 2004 magnesium ingot sales case[378] in which the seller claimed the raw material for the contract goods had been affected by three coal mine explosions that occurred in a certain area of China from February to March 2003. In these cases, the tribunals all held that these events were not impediments the seller could not 'have avoided or overcome' since the impact on raw materials due to environment protection, taxation and continuous rain should have been foreseeable and avoidable, the documents issued by an industry association were not national compulsory regulations and the explosion accidents could not have substantially affected the coal production and price in the region.

In fact, courts in various countries generally consider the influence on the original methods of contract performance, such as the seller's failure in producing the goods due to the emergency shutdown of the supplier's factory,[379] cannot be regarded as an impediment which the party could not 'have avoided or overcome' under Article 79 if the party could have chosen another way of performance. For example, a German court ruled that the seller could not be exempted from the delivery obligation after heavy rain had damaged tomato plants in the seller's area. It was still possible for the seller to

376 The CIETAC Award on February 22, 2005.

377 The CIETAC Award on May 20, 2006.

378 The CIETAC Award on May 31, 2004.

379 CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)].

perform the obligation though the market price had increased since not all the tomato plants had been destroyed during the heavy rain while the decreased tomato supply and the increased cost were impediments the buyer could have overcome.[380]

4. Causality between Non-performance and Impediments

In the 2004 magnesium ingot sales case,[381] the seller asserted its failure to deliver the remaining 400 tons of magnesium ingot was due to the force majeure event, i.e., the coal mine explosions in a certain area of China in February and March 2003 and the subsequent suspension of production and rectification by the local government and the State Council. The tribunal noted it was shown in the seller's evidence that the seller, after signing the contract of this case, had signed the Industrial and Mineral Products Purchase Contracts with several factories to purchase magnesium ingots for the performance of the contract of this case, under which 560 tons of magnesium ingots, far more than those stipulated in the contract of this case, should have been delivered before March 24, 2003, i.e., before the local government and the State Council issued the suspension and rectification decisions. Therefore, the contract performance should not be affected by the government's decisions on suspension and rectification.

The tribunal also noted that the seller had clearly stated in his letter to the buyer on March 10, 2003 that 'since the manufacturer has got no coal or silicon lamination for the production and the price has changed significantly, the rest of the goods cannot be delivered', which could be taken as a clear expression of refusal to continue the performance. Such statement had also been made before the government's decisions on suspension and rectification.

380 Oberlandesgericht Hamburg, Germany, 4 July 1997.

381 The CIETAC Award on February 16, 2004.

The tribunal rejected the seller's assertion that its failure to perform the contract due to the mine explosions and government decisions since there was no causality between the two, i.e., the seller's performance capability and refusal to continue the performance had not been affected by the government decisions. The seller had the ability to perform the contract in this case before the local government and the State Council issued the suspension and rectification decisions and signed contracts with other parties thereafter. The seller had clearly expressed his intention of non-performance of the contract though other parties promised to deliver the goods.

Similarly, in the 2005 ferro-molybdenum sales case,[382] the seller claimed the continuous heavy rain as a natural disaster. The tribunal pointed out there was no direct causality between non-performance and the natural disaster since the seller admitted in its defense that 'after the factory resumed production, the respondent(seller) used the inventory to process ...', which showed the seller had got stocks of raw materials.

It can be seen that in CIETAC practice, tribunals require the causality between the impediment, either a natural disaster or a political event, and non-performance, and only support such causality when the impediment is a major or even fundamental obstacle to contract performance. Such causality is also emphasized in the 2016 UNCITRAL Digest and has been accepted as a basis for exemption in a considerable number of precedents.[383]

There is an obvious lack of causality if the asserted impediment has not occurred during the contract performance period. For example, in the 2014 alloy steel sales case,[384] the seller asserted the delay in loading the goods was due to heavy rain at the loading port. However, the tribunal found through the tally records and other evidence that, based

382 The CIETAC Award on February 22, 2005.

383 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p378.

384 The CIETAC Award on June 9, 2014.

on the time the seller had started tally and the normal loading time, the seller could not have finished the loading within the stipulated period even if there were no rain at the loading. Therefore, the tribunal determined that there was no causality between the delayed loading and the asserted exemption.

Section 3 The Notice of Impediments

1. The Party's Obligation to Send the Notice of Impediments

Article 79(4) of the CISG provides, '[T]he party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt'. Therefore, the party who fails to perform is obliged to notify the other party of the impediment and the doctrine of receipt is adopted for such notification. If the parties have agreed on the obligation of giving the notice of impediments in the contract besides the CISG requirement thereon, then CIETAC tribunals would rely on the contractual provision for such obligation.

In the 2014 alloy steel sales case,[385] the seller asserted the delay in loading the goods was due to heavy rain at the loading port. The tribunal noted Article 14 of the contract stipulated 'the buyer shall not assume liabilities for his failure to deliver the goods within the stipulated period or non-delivery of the goods due to force majeure events, but the seller shall immediately notify the buyer by telex or fax…'. However, the seller submitted neither evidence of the loading port weather condition on that day nor evidence to prove the seller had immediately notified the buyer of the delay by telex, fax or any other method not stipulated in the contract the day when there was heavy rain as asserted

385 The CIETAC Award on June 9, 2014.

by the seller or the next day. As such, the tribunal held that the seller could not assert exemption on the excuse of bad weather.

2. The Reasonable Time of Notification

The notice of impediment must be given within a reasonable time. In CIETAC practice, tribunals would determine the reasonable time according to the contractual provision on such time, the period between the impediment and the notification and the actual situation of the party facing the impediment.

In the 2005 tomato sauce sales case,[386] the seller refused to perform the delivery obligation on the excuse that the raw material for the production had been affected by the natural disaster in 2003. The tribunal deemed the seller should have timely notified the other party once the force majeure event occurred and provided proof thereof. If the force majeure was eliminated within a period, the seller should have continued the performance. If the force majeure eventually resulted in non-performance of the contract, the party claiming so should have promptly requested the termination of the contract.

The tribunal rejected the seller's assertion since it had only made a proposal to amend the contract instead of postponing or exempting the delivery obligation on the excuse of climate changes nearly three months later than the stipulated delivery period.

3. The Proof of Impediments

Unlike domestic transactions, the parties, the place of performance, the occurrence of force majeure events under an international sales contract may not be in the same country. Under such circumstance, the party claiming force majeure should not only give

386 The CIETAC Award on June 30, 2005.

a notice on time but also provide proof of impediments. If an arbitration proceeding is initiated, the parties need to submit evidence thereon as well.

If the parties have explicitly agreed on such proof in the contract, the party claiming exemption is obliged to prove the proof as agreed. In the 2009 chemical sales case,[387] the contract stipulated 'within 15 days after the occurrence of the force majeure event, the seller shall obtain the force majeure certificate issued by the local chamber of commerce and post it to the buyer'. The tribunal deemed such provision as a necessary condition in determining the force majeure event as agreed by the parties as well as the seller's obligation. If the seller had obtained such certificate, at least the tribunal could rely on it to determine the three elements of 'objectivity', 'unpredictability' and impossibility 'to have avoided' the force majeure event which was up to the content of the certificate. Since the seller had not provided the certificate as agreed, the tribunal could not support the claim on exemption.

The CISG makes no specific requirement on the proof of impediments. However, the subject of proving force majeure and its influence is the party claiming exemption in no matter the parties' negotiations or the legal proceedings. Therefore, the general evidence rules can apply to such notice. A reasonable proof should prove the occurrence and impact of force majeure events as well as the causality between such events and the contract performance. The specific extent of proof mainly depends on the contractual provisions, the laws applicable to the contract and the laws applicable to the procedural issues related to evidence.

In practice, the parties may entrust the chamber of commerce to issue the force majeure certificate according to the regulations in the relevant countries or regions and commercial practices. In China, such certificate is normally issued by China Council for

387 The CIETAC Award on June 4, 2009.

the Promotion of International Trade and China International Chamber of Commerce. In other countries, it is usually issued by the local chamber of commerce. For example, China Council for the Promotion of International Trade issued a considerable number of force majeure certificates for Chinese enterprises which could not perform international sales contracts due to the impact on goods supply and delivery of covidCOVID-19 in early 2020.

Section 4 Exemption Due to a Third Party

According to Article 79(2) of the CISG, 'if the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him'.

In the 2009 walk-behind rice transplanter sales case,[388] the seller acknowledged its failure to fulfill the delivery obligation, but argued its non-performance was due to the failure of Party B, the supplier, after the technical cooperation contract among the seller, as Party A, company H, as Party B, and the buyer, as party C, had been signed on October 20, 2006.

The tribunal pointed out that even if the reason for non-performance of the contract in this case was company H, the supplier, had not fulfilled the delivery obligation, the seller should not be exempted. The seller could have solved its dispute with the third party in accordance with legal or contractual provisions. The non-performance due to the third party's breach was not within the scope of Article 79(1) and (2) of the CISG.

388 The CIETAC Award on August 10, 2009.

In the 2002 yellow phosphorus sales case,[389] the seller claimed that the reason for its partial performance of the contract was the shutdown of its supplier due to force majeure events such as the substation damage and the railway interruption by typhoon and flood. The tribunal held the seller could have purchased yellow phosphorus from other suppliers and fulfilled the delivery obligation timely after the railway operation had been resumed since the contract had not stipulated the manufacture of yellow phosphorus which was non-specific goods. Therefore, the tribunal found the substation damage and railway interruption by typhoon and flood constituted no exemption.

It can be seen from the 2016 UNCITRAL Digest that the seller will generally not be exempted if his failure to fulfill the delivery obligation is due to his supplier's breach of contract.[390] On the one hand, as the tribunal pointed out in the above case, the third-party supplier's breach of contract normally cannot be regarded as an impediment which the seller could not have overcome. On the other hand, as a German court pointed out, the seller, when signing the contract, should assume the risk for his supplier's failure to deliver the goods timely, unless the parties have agreed on different risk allocation in the contract.[391] In such case, it will not affect the result whether the breaching party has a subjective fault. For example, in a German case, the seller delivered the goods from other suppliers directly to the buyer and was not aware of the non-conformity since the seller, as the middleman, had never controlled or inspected the goods. The court pointed out that such circumstance should not change the seller's obligation to provide qualified goods and because no impediment under Article 79 had occurred, the court rejected the seller's claim on exemption.[392]

389 The CIETAC Award on August 9, 2002.

390 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, 376.

391 CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

392 GERMANY: Oberlandesgericht Zweibrücken 31 March 1998, CLOUT case no. 272.

Section 5 Commercial Risks and Changed Circumstances

Article 79 of the CISG uses its own unique set of terms without adopting the existing terms under domestic laws. Under most domestic laws, adjudicators would determine whether a party's obligation should be exempted or adjusted due to the difficulties in performance or the increased costs caused by changed market situation after the contract conclusion of the contract based on the theory of changed circumstances. Article 79 does not explicitly accept or exclude the 'changed circumstances' system in civil law countries. Therefore, adjudicators in different countries may have different views in its application thereof.

Generally, financial difficulties caused by market changes after the contract conclusion are not regarded as an exemption in most cases.[393] Some courts have clearly pointed out, either when the seller claims exemption from the delivery obligation due to increased costs[394] or when the buyer asserts exemption from the liability of rejecting the goods due to a sharp drop in the market price,[395] the parties should bear the risk of market fluctuations and other cost factors affecting the financial situation.[396] Price fluctuations or changes in costs are generally regarded as foreseeable risks in international trade, and the losses caused by them are part of the 'normal risk in business activities'.[397]

Article 26 of the Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China is

393 CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281). See also CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

394 Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)].

395 Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995.

396 CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

397 Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995.

the earliest rule of changed circumstances under Chinese law. Article 533 of the Civil Code of PRC formally adopts this rule which provides, '[A]fter a contract has been concluded, if the basic conditions of the contract have undergone a significant change which is unforeseeable by the parties at the time it was concluded and which does not belong to commercial risks, and it is clearly unfair for the party concerned to continue to perform the contract, the party adversely affected may renegotiate with the other party. If negotiation fails within a reasonable period of time, the parties may request a people's court or an arbitration institution to modify or rescind the contract'.

CIETAC tribunals have the same view as most courts and tribunals all over the world, i.e., impediments within the scope of commercial risks cannot be regarded as exemptions.

For example, in the 2014 equipment sales case,[398] the respondent stated 'international ship market that the respondent relied on was hit hard by the financial crisis, the international ship market was in its downturn, many domestic and foreign ship builders suffered large losses or even closed down. The respondent, as a newly started ship accessories manufacturer, struggled under such a difficult situation, basically lost the capability of paying large sum for the goods and accepting the equipment. The respondent would face the great life or death risk if it had continued the performance, which is extremely unfair to the respondent'. Thus, the respondent asserted the application of the doctrine of changed circumstances regarding the payment of the remaining 90% of the contract price for the undelivered four sets of equipment.

The tribunal held the doctrine of changed circumstances should not be applied in this case. Firstly, the respondent failed to submit evidence to prove the occurrence of the above facts and circumstances during the performance of the three contracts involved in this case. Secondly, even if the financial crisis had occurred during the contract

398 The CIETAC Award on August 9, 2002.

performance, either the financial crisis or the change of macroeconomic situation in China should not be a completely sudden process which catches all market players by surprise but a gradually changing process. During such process, market entities should have a certain degree of foresight and judgment on market risks. The circumstance involved was within the scope of normal business risks instead of changed circumstances the parties could not have foreseen which would fundamentally shake the basis of the contracts involved in this case.

Section 6 Exemptions under Article 80

Article 80 of the CISG stipulates, '[A] party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission'. This article is aimed at the situation that both parties have failed to perform their obligations but the other party's non-performance was caused by the first party's act or omission. Due to the complicated transaction process and multiple links in international trade, the application of this article is quite common. The CIETAC tribunals usually rely on this article to determine that one party shall neither be regarded as having breached the contract or failed to perform the contract nor make remedies if the non-performance was due to the other party's fault.

In the 2014 equipment sales case,[399] the buyer's main defense for his failure to pay the 10% balance of the six sets of equipment delivered by the seller was the condition for such payment was not met since the final installation, commissioning and acceptance had not been accomplished yet.

However, the tribunal found that the buyer had failed to notify the seller of the installation, commissioning and acceptance of the six sets of equipment in one and half

399 The CIETAC Award on December 16, 2014.

years after February 18, 2013 when the buyer received the last set, and refused to arrange the installation, commissioning and acceptance after the seller sent the Lawyer's Letter, urging him to make such arrangement immediately. Therefore, the buyer's failure to fulfill the statutory obligation of 'timely acceptance' was the reason why the installation, commissioning and acceptance of the six sets of equipment delivered by the seller had not been accomplished, which had nothing to do with the seller and could not be used as the buyer's ground to refuse the payment.

Part IV CIETAC's Experience Sharing and Suggestions

Since its enactment, CISG has greatly promoted the uniformity of the application of laws in international trade and is regarded as one of the most successful international treaties in international economy and trade. CIETAC summarizes its experiences from its own CISG applications for exchange and discussion and makes suggestions on future modifications and supplements to the CISG as follows.

I Experiences in the Application of the Good Faith Principle

We note that the connotation of the principle of good faith is actually reflected in a considerable number of specific CISG provisions though it is not a compulsory principle or obligation under CISG due to the consideration of the differences between the common law and civil law systems. For example, an offer cannot be revoked 'if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer' as per Article 16(2)(b); '[I]f a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect' in Article 21(2); '[A] contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct' in Article 29(2); '[T]he seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of

conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer' in Article 40; 'if the goods or part of the goods have perished or deteriorated as a result of the examination' in Article 82; the observing party's obligation to preserve the goods when the contract is terminated under Articles 85 and 86; and '(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an ¬unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party. (2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell. (3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance' under Article 88'.

The principle of good faith, as a basic principle in China's civil and commercial laws, has essential practical significance in China's trial practice. Good faith applies throughout the entire contract process from conclusion to termination in Chinese laws. For example, Article 7 of the General Principles of the Civil Law of the People's Republic of China sets good faith as a general rule for all civil activities, stating,'[C]ivil partiesshall conduct civil activities under the principle of good faith, adhere to honesty, and fulfill their promises'. Article 7 of the Civil Code of PRC adopts the same attitude and includes the principle of good faith in its Chapter One 'Basic Provisions'.

For contract formation rule, Article 42 (1)(iii) of the Contract Law provides, '[W]here in the course of concluding a contract, a party engaged in any of the following conducts,

thereby causing loss to the other party, it shall be liable for damages: … (iii) any other conduct which violates the principle of good faith'. The same rule has been adopted in Article 500 of the Civil Code of PRC.

For contract interpretation principle, Article 125 of the Contract Law provides, '[I]n case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith'. Article 142 of the Civil Code of PRC also provides, , '[T]he meaning of a manifestation of intent that is made to a counterparty shall be interpreted according to the literal meaning of words used and in combination with the relevant articles, nature and purpose of the act, usual practices, and the principle of good faith. In the interpretation of a manifestation of intent that is made not to a specific party, the real intention of the person shall be sought rather than the literal meaning of words used and also by considering the relevant articles, nature and purpose of the act, usual practices, and the principle of good faith'.

For specific performance obligations, Article 60(2) of the Contract Law provides, '[T] he parties shall abide by the principle of good faith, and perform obligations such as notification, assistance, and confidentiality, etc. in light of the nature and purpose of the contract and in accordance with the relevant usage'. The same rule has been adopted in Article 509 of the Civil Code of PRC.

Furthermore, the arbitration institutions may apply the basic principle of good faith to achieve a reasonable balance of the parties' interests where there is no specific legal provision. The principle of good faith has been widely used in CIETAC cases due to its fundamental position in the Contract Law of the People's Republic of China. From

the perspective of adjudication, the understanding of the principle of good faith is not limited to the literal meaning thereof but based on the specific facts of the cases.

The principle of good faith, as a basic principle of international commercial transactions, also exists as a basic principle of civil and commercial legal relations in quite a few domestic laws of various countries. We note that the 2016 UNCITRAL Digest listed some countries' specific application of the principle of good faith mainly involving the contract conclusioncontracting process in a considerable number of cases. For example, in a case, the court held that the contract terms and conditions the drafting party intended to quote but had not provided to the other party during the contract conclusion process should not be taken as part of the contract.[1] In another Spanish court 's judgment, the forum selection clause on the back of the contract without the expressed consent of the other party could not be part of the contract since such an important contract term should have been clearly stated in the contract.[2]

Similar views can be found in CIETAC cases. In the 2005 wool sales case,[3] the buyer alleged that there was no contractual relationship between the buyer and the seller because the buyer had only signed incomplete Order Confirmation Sheets with the seller's agent, a Hong Kong company, which had not informed the buyer of the contents on the back thereof while the three Order Confirmation Sheets were only an intent to order. The seller argued that the three Order Confirmation Sheets had clearly set out the terms of quantity, price, shipping period and payment method, constituting a valid offer. The buyer's legal representative's signing of the three Order Confirmation Sheets constituted an effective acceptance.

1 CLOUT case No. 1189 [Tribunale di Rovereto, Italy, 21 November 2007];] Oberlandesgericht Köln, Germany.

2 Audiencia Provincial de Navarra, Spain, 27 December 2007, English translation available on the Internet at www.cisg.law.pace.edu.

3 The CIETAC Award on 16 September 2005.

The tribunal found the following facts through investigation: The Hong Kong company, as the seller's agent, had signed the three Order Confirmation Sheets concerning the wool sale, i.e., the disputed contracts of the case, with the buyer by fax, stating in the remarks '[P]lease note that in this transaction, we are acting as Agent for the Seller on the general terms and conditions as specified on the back of this Order Confirmation Sheet'. Additionally, the signature section of the contracts contained the agent's representative's signature and the buyer's representative's signature below the statement '[W]e have accepted'.

The tribunal held that the three Order Confirmation Sheets signed by the seller's agent had clearly stated the name, specification, quantity, price, shipping and payment arrangements of the goods and constituted a valid offer after being signed in accordance with Article 14(1) of the CISG. The signature by the general manager of the buyer as the buyer's representative on the three Order Confirmation Sheets constituted a valid offer and the clear statement '[W]e have accepted' constituted an acceptance.

As for the issue that the buyer had not been informed of the contents on the back of the Sheets, the tribunal deemed that the seller should have notified the buyer of such contents regarding the agent's responsibilities, the force majeure and other terms by fax or other ways when signing the contracts and should be liable for not having done so. Conversely, it was clearly stated at the beginning of the Sheets '…the sales contract has been consummated between the buyer and the seller on the terms and conditions on the face and back of this order confirmation sheet'. Obviously, the terms and conditions on the back of the Sheets had been mentioned on the face. The buyer could have requested the seller to notify it of the contents on the back by fax or other ways before deciding to sign the Sheets if it thought such contents important. However, there was no evidence that the buyer had ever requested so, showing the buyer's negligence. Nevertheless, the

contracts of the case had been effectively concluded disregarding the seller's or the buyer's fault. However, the terms on the back of the Sheets should not be part of the contract since the seller, as the drafting party, had not sent such terms to the buyer.

In contract interpretation, the arbitral tribunal usually needs to find the parties' consensus at the time of the contract conclusion under the principle of good faith. It is stipulated in the contract of a case that '[T]he seller guarantees that the goods under this contract have no material or manufacturing defects, and fully comply with the specifications stipulated in this contract. The quality guarantee period of this contract shall be 12 months starting from the date the maintenance service report is signed, and shall not exceed 18 months after the goods leave the factory unless the seller is responsible for the delay in the installation, commissioning and acceptance of the equipment under this contract. Such quality guarantee shall be limited to the repair and free replacement of defective parts, and only for defects that occur under the normal use and maintenance of the goods .... In any case, the seller shall not be liable for any actual or expected loss of profits or indirect loss'. The respondent seller, alleged that the claimant's claim on the expected loss of profits should be rejected since such provision had fully excluded its liability for the expected loss of profits caused by the delivered equipment.

The tribunal deemed that the true meaning of the provision exempting the respondent's liability should be determined as a whole and in accordance with the principle of good faith. Such provision, from the overall wording, should be understood as a restrictive provision on the scope and liability of the quality guarantee obligation within the guarantee period after the installation, commissioning and normal operation of the equipment under the contract. Thus, the exemption provision meant the buyer's liability within the quality guarantee period should be limited to free replacement of

defective parts and maintenance while the buyer should not be liable for any actual or expected loss of profits or indirect loss. However, the respondent went against the principle of good faith, trying to interpret such provision to cover the exemption of the seller's liability for any damages caused by the quality of the equipment under the contract. Since the equipment in this case failed to pass the acceptance or achieve normal operation even after the initiation of the arbitration procedure, the guarantee period stipulated in the contract had not started yet. The respondent's attempt to evade the basic quality responsibility as the equipment provider through such interpretation should not be supported due to its clear violation of the principle of good faith.[4]

In addition, a characteristic of Chinese laws is that not only they adopt the principle of good faith as an abstract principle to interpret the meaning of specific legal or contractual provisions, China Contract Law also stipulates clear substantive obligations for the principle of good faith. Therefore, the good faith principle may be directly applicable in cases involving the application of CISG. For example, in the equipment sales case,[5] the claimant, as the buyer, alleged it had repeatedly requested the respondent to provide intellectual property information on the relevant technology under the contract, but said requests had been ignored by the respondent. This case involved two equipment procurement and technical service package contracts covering 77 sets of second-hand equipment of which the oldest one was manufactured in 1996 and most were manufactured from 1996 to 1999. The claimant sent a letter to the respondent requesting the provision of the legal documents concerning the ownership of intellectual property rights and related matters involved in the List of the Overall Technical Data but got no reasonable response from the respondent.

The arbitral tribunal held that manufacturers of the second-hand equipment under the

4 The CIETAC Award on 6 August 2010.

5 The CIETAC Award on 28 December 2015.

contracts were not only the respondent but some other companies and it was obvious that the equipment manufactured by a third party might contain technical data and intellectual property owned by such party. The respondent claimed that it had obtained the technical data and could deliver it to the claimant but had made no response to the claimant's reasonable inquiry about the intellectual property rights of third parties. The tribunal, relying on Article 60(2) of the Contract Law of China, stipulated '[T]he parties shall abide by the principle of good faith, and perform obligations such as notification, assistance, and confidentiality, etc. in light of the nature and purpose of the contract and in accordance with the relevant usage'. Accordingly, the tribunal found the respondent in breach of contract due to its non-compliance with the principle of good faith and the due assistance obligation. Consistently, we note other member states' courts had similarly pointed out in CISG applications that a party should be obliged to cooperate and provide information with the other party during the contract performance.[6]

The application of the principle of good faith may also be reflected in the necessary mutual cooperation obligations during contract performance. Practically, a contract cannot cover all matters, so the parties neessarily need to cooperate with each other under the principle of good faith regarding those matters not stipulated in the contract for the smooth performance of the contract. For example, in a case, the claimant buyer and the respondent seller, signed a sales contract on 18 May 2016, agreeing to payment by letter of credit.[7] Under Article 7 of the contract, the respondent should prepare the goods and notify the claimant of the quality level and quantity of the goods while the claimant should open a 90-day forward letter of credit with the respondent as the beneficiary after receiving the notice. On 8 June 2016, the respondent emailed the claimant's employee and requested to be informed when the letter of credit could be issued. On 16 June

6 Oberlandesgericht Celle, Germany, 24 July 2009.

7 The CIETAC Award on 25 October 2019.

2016, the respondent emailed the claimant's employee again regarding its urgent need of the letter of credit under the contract.

The arbitral tribunal deemed that the respondent's urgency to the claimant to open the letter of credit in the above emails showed the respondent should have prepared the goods under the contract as stipulated therein and could have arranged the shipping. However, the tribunal noticed that the respondent had not mentioned the goods information including the quality level, quantity and price thereof in said emails so the claimant could not have opened the letter of credit without such necessary information.

The tribunal found that the respondent's information for the opening of the letter of credit should have met the basic requirement for completeness and accuracy according to Article 65(2) of the CISG stipulating, '[I]f the seller makes the specification himself, he must inform the buyer of the details thereof …' and Article 7 of the contract requesting the respondent to prepare the goods and notify the claimant of the quality level and quantity. It was understandable that the claimant could not have opened the letter of credit since the respondent had failed to provide the necessary information in a timely manner and the respondent should be liable therefor. However, the tribunal also noticed there was no evidence showing the claimant had requested the necessary goods information for the opening of the letter of credit or taken any measure for the continuous performance of the contract after receiving the respondent's emails. The claimant, after being urged repeatedly by the respondent, had adopted an indifferent attitude, which lasted for two years and four months and eventually resulted in the non-performance of the contract. Thus, the tribunal found the claimant's co-responsibility contributed to the non-performance of the contract instead of only the respondent's unilateral breach.

The principle of good faith, as an abstract principle, has both advantages and disadvantages in its application as shown in CIETAC examples. An advantage is that specific disputes can be resolved through the flexible application of the principle of good faith according to social values and commercial transaction needs when there are gaps in the legal norms or the modern development of transactions cannot be reflected therein. A disadvantage brought by the abstractness of the principle of good faith is also obvious. The adjudicators may have too much discretion since it is hard to determine the parties' obligations in specific cases due to such abstractness, making laws lack stability and predictability with the certainty of laws being one of the most important functions. Such certainty is reflected on one hand in giving a clear guidance to people engaged in business transactions and on the other hand in achieving the uniformity of adjudications to show fairness. Therefore, the arbitrators' discretion in the application of the principle of good faith should be restricted and limited to the application of specific legal provisions as much as possible, and as a fill-in measure or supporting guidance in the interpretation of existing legal rules. Except under special circumstances, the arbitrators' abstract application of the principle of good faith as the reason for determining specific cases should be limited, especially in arbitration, as the dispute resolution method through which a final award is made.

II Resolution for the Battle of the Forms

We note that the parties of modern international transactions prefer a faster pace in contract conclusion and the reduction of negotiation time and more efficient methods to cope with the rapidly changing market conditions. The result is in many international transactions, both parties create their own standard contract terms to meet these above objectives. For example, one party sends an order and the other party sends back the confirmation with its own standard terms. Under certain circumstances, the parties

may start the contract performance without the formal conclusion of the contract being signed by both parties after their continuous exchange of offers and acceptances. Most transactions of this nature, can be carried out smoothly when the parties have no dispute. However, the parties may find inconsistency in their standard contract terms when disputes occur and would argue over whose terms should prevail if such inconsistency is a key issue or involves material terms. This results in a dilemma in the litigation or arbitration proceeding initiated after the failed negotiation, i.e., there is currently no clear legal provision for resolving such inconsistency in the CISG. This also leads to the application of domestic laws to solve the battle of the forms in certain countries' judgements.[8]

As a traditional resolution method, Article 19 of the CISG provides that '(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially' of which item (3) specifies the scope of material modifications. Accordingly, a reply to an offer with materially inconsistent terms constitutes a counteroffer under Article 19(1) and the offer made by the offeror previously is invalidated. Each reply with

8 (CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000]; CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]; U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.).

material modifications constitutes such counteroffer while the last reply with contract terms constitutes a counteroffer and all the previous offers are invalidated. If the other party performs the contract thereafter, the contract terms in the last reply shall prevail according to Article 18 of the CISG stipulating '[A] statement made by or other conduct of the offeree indicating ¬assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance', which is traditionally called the 'last shot rule'.

CIETAC follows the last shot rule in most of its practices. The Contract Law of China basically adopts the legal provisions consistent with CISG concerning the contract conclusion among which Article 22 provides that '[A]n acceptance shall be manifested by notification, except where it may be manifested by conduct in accordance with the relevant usage or as indicated in the offer', Article 30 stipulates that '[T]he terms of the acceptance shall be identical to those of the offer. A purported acceptance dispatched by the offeree which materially alters the terms of the offer constitutes a new offer. A change in the subject matter, quantity, quality, price or remuneration, time, place and method of performance, liabilities for breach of contract or method of dispute resolution is a material change to the terms of the offer', and Article 31provides that '[A]n acceptance containing nonmaterial changes to the terms of the offer is nevertheless valid and the terms thereof prevail as the terms of the contract, unless the offeror timely objects to such changes or the offer indicated that acceptance may not contain any change to the terms thereof'. We may find the logic order of 'offer-counteroffer-acceptance by conduct' through the combination of Article 30 and Article 22 of the Contract Law for the resolution of standard term disputes. That is, when the offeree's standard terms in the reply substantially change the content of the offer, the offeree becomes the new offeror and its reply constitutes a new offer, and the original offeror accepts the offer by its performance or acceptance of the other party's performance while the contract is

established on the content of the final offeror's standard terms. It can be seen from the above legal provisions that the last shot rule is adopted by the Contract Law of China for the resolution of standard term disputes. Said rule adoption may also be the reason why Chinese tribunals generally apply the last shot rule to resolve standard term disputes.

The last shot rule has its rationality. Firstly, it is based on legal provisions, i.e., Articles 19 and 18 of the CISG. Secondly, it gives certainty to contract terms and encourages each party to confirm the accuracy of its contract terms or to whether a consensus has been actually reached when concluding the contract, so as to avoid the determination of the parties' consensus by adjudicators after disputes occur and to protect the transaction stability.

Additionally, it is noted that the 'knock out rule' originating from the United States has been gradually accepted by civil law countries. In a case with two sets of standard contract terms, the court would take those terms the parties have agreed on through the exchange of documents as the contract terms and apply CISG provisions to supplement the rest according to the default rule. The decision of the Federal Supreme Court (Bundesgerichtshof) in 2002 is quite typical.[9] In said decision, the court held that the conflict between clauses on general conditions exchanged by the parties did not lead to the failure of the sales contract since neither party had taken such conflict as impediment to the contract performance. The parties had shown through their performance of the contract that none of them denied the existence of a valid agreement between the two parties. The court pointed out, 'there are divergent point of views in the legal circle on the extent the conflicting clauses on general terms and conditions could be taken as an integral part of the contract when CISG is applied. According to the (possibly) prevailing view, only partial clauses on general terms and conditions can be taken as an integral part

9 Federal Supreme Court (Bundesgerichtshof), Civil Panel VIII , January 9, 2002 [VIII ZR 304/00].

of the contract as long as there is no conflict while the legal provisions shall apply to the rest (the so-called 'rest validity theory'). The determination of the existence of unsolvable conflict between the clauses shall not be made through the interpretation of the wording of individual clauses but be made on the basis of a full evaluation of all relevant'.

The 2016 UNIDROIT Principles also follows the knock out rule. Article 2.1.11 of the Principles is basically the same as the CISG provision, stipulating that '(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance'. Article 2.1.22 of the 2016 UNIDROIT Principles provides that 'Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract'. Article 2.1.22 essentially follows the knock out rule to avoid one party being bound by the unnoticed different standard terms from the other party and also entitles the party to object thereto.

Besides these provisions, some courts and scholars deem that the parties' expressions other than the standard contract terms should be considered. For example, one party or both parties may consciously or unconsciously quote the content of the standard contract terms in the performance. Under such circumstances, the arbitrators are actually allowed to further determine the parties' acceptance of the standard contract terms according to

their stated quotation, which is based on the internal logic of the knock out rule that the reason for the exclusion of the binding force of certain contract terms is the parties may neither notice the existence of such terms nor intend to include them in the contract during the contract conclusionwhen entering into the contract. However, if one or both parties clearly quote certain part of such terms during the performance, the unilateral contract terms may become part of the contract. Furthermore, it is generally considered that the inclusion of such blanket expressions as 'this contract shall prevail' or 'the provisions of this contract shall prevail' in the standard contract terms is not sufficient since the parties may also fail to notice the existence of referenced specific terms.

The advantage of the knock out rule is that it recognizes that in modern business practice the parties to a transaction may not have the time to fully consider the content of a contract when signing it, so the content of the transaction documents cannot reflect the parties' true consensus, especially when each party adopts its own standard contract terms. The different clauses contained in the two different transaction documents show that the parties have not reached a true agreement on the relevant issues. Therefore, it is reasonable to supplement the contract with legal rules from the perspective of fairness. But there is also unreasonableness. Firstly, the knock out rule lacks a clear legal basis because it does not originate from any CISG provisions, which may result in uncertainty due to the different determination standards of different countries. Secondly, the knock out rule may go against the parties' choice or autonomy because it may not respect the parties choice but apply the legal provisions mandatorily under certain circumstances while the expressed clauses included in the parties' standard contract may be of material significance.

Above all, we suggest that UNCITRAL introduce a clear provision as to the resolution of the battle of the forms in future amendments to the CISG due to its lack thereof. The

battle of the forms has been a gradually apparent issue mostly after the drafting of the CISG, i.e., the 1980s. It is inappropriate to apply Articles 18 and 19 of the CISG as the legal basis to solve the relevant disputes under the last shot principle since these articles are not legal rules for resolving the battle of the forms and sometimes cannot solve all the relevant issues because one party's performance does not fully show that it has accepted the other party's 'conflicting terms'. Thus, there is an obvious lack of clear legal support to apply the knock out rule under the current CISG provisions.

III Implied Acceptance and Waivers

'Waiver', in contract law context, refers to a party's explicit relinquishment of its contract rights. Specifically, one party's non-objection or even agreement by a certain act when it clearly knows that the other party has breached the contract or intends to breach the contract may constitute a legal waiver, resulting in the temporary or final loss of its original contractual rights. The UK Sale of Goods Act 1979 provides that 'The buyer is deemed to have accepted the goods when …he does any act in relation to them which is inconsistent with the ownership of the seller (such as dealing with, disposal or resale of goods)… or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them' and cannot reject or return the goods later. Conversely to waiver by act, one party's negative act, i.e., failure to perform a certain act in accordance with the requirements of contractual or legal provisions, may also constitute a waiver, which is mainly manifested in the party's negligence of the rights granted by the contract or laws. Civil law countries generally rely on the theory of declaration of will which emphasizes more on the mutual consent but reflects the connotation of waiver and estoppel in its role to protect the parties' interests instead of directly adopting the system of waiver or estoppel.

The waiver doctrine has applied to many CIETAC cases on international sales of goods. One party may not object to the other party's breach during the performance due to its unawareness of the relevant legal provisions or legal rights or for the sake of maintaining a good business relationship. From the perspective of contract law theory, one party's tolerance or concession at the request of the other party for its convenience does not constitute an amendment but a waiver. Such tolerance or concession does not need to be supported by consideration while the waiver could be made verbally or by behavior.

Article 29(2) of the CISG refers to the principle of estoppel and the principle of good faith, stipulating that a contract may be modified if the other party has relied on a party's conduct under certain circumstances. However, the standard for the application of the estoppel principle is relatively high. In practice, we have found a large number of cases where the parties argue after disputes arise over one party's deviation from the original contract while the other party has neither agreed nor opposed the performance. The actuality is that the waiver theory exists in a considerable number of domestic legal systems in relation to contract modifications. For example, Section 2-209 of the U.S. Uniform Commercial Code covers both modification and waiver of which the first three subsections are about modification, providing '(1) An agreement modifying a contract within this Article needs no consideration to be binding. (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party. (3) The requirements of the Statute of Frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provision'. The subsequent subsection is on waiver, stipulating '(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver'. Subsection

5 provides that '[A] party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver'.[10]

There are many disputes regarding waiver in practice. One example is one party has breached but the other party raises no objection and continues to perform the contract. Another example is Article 39 of the CISG providing '(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of ¬conformity of the goods if he does not give the seller notice thereof' within a reasonable period.[11] Furthermore, Article 49 of the CISG provides the party entitled to declare the contract avoided shall send the notification within a reasonable time as per Article 26 and will lose the right to declare the contract avoided if the observing party continues to request the breaching party to perform or raises no objection to the breaching party's continuous performance after having known its fundamental breach.

10 § 2-209. Modification, Rescission and Waiver.
(1) An agreement modifying a contract within this Article needs no consideration to be binding.
(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchantmust be separately signed by the other party.
(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contractas modified is within its provisions.
(4)Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
(5) A party who has made a waiver affecting an executory portion of the contractmay retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

11 CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009].

For example, in the 2014 CIETAC alloyed round bar sales case,[12] the claimant buyer and the respondent seller, signed a contract on 13 April 2012, agreeing that the claimant purchase 1,250 tons of alloyed round bar (quantity: 10% more or less allowed) at the price of USD 693.00 per ton CFR Busan, South Korea, totaling USD 866,250.00 with a letter of credit payment method before 30 June 2012 as the shipping date. The respondent claimed that the claimant knew of the delayed loading around the shipping date but continued to receive the goods. The arbitral tribunal noted that it was shown in the chat records submitted by the respondent as evidence that the respondent had not notified the claimant of the delayed loading due to rain in Lianyungang by email till 5 July 2012. Thus, there was no evidence that the claimant knew about the delayed loading around the shipping date.

Concerning the respondent's argument that the claimant had actually accepted the goods by conduct and impliedly consented to the late loading, the tribunal noted that the claimant's reply to the respondent's email on 5 July 2012 regarding the delay in loading the goods and inquiry about the specific loading time and notification was that it would reply on the following Monday, i.e., 9 July 2012, since the person in charge was on a business trip. Said inquiry reply contained no indication of recognition of the respondent's loading time or agreement to accept the goods, and thereafter, the claimant notified the respondent on 9 July 2012, refusing the request to issue a letter of guarantee for the backdated bill of lading and expressing its intent to reject and return the goods.

The tribunal found that the respondent had not notified the claimant of the delay in loading until the goods arrived at the unloading port, which resulted in insufficient time for the claimant to make the commercial decision whether to accept the goods while huge demurrage charges may have occurred if the goods were not unloaded, thus

12 The CIETAC Award on 9 June 2014.

deeming that even though the claimant had unloaded the goods after having known the delay in loading, it could not be regarded as accepting the goods by conduct. In fact, the claimant expressly rejected the goods by email on 9 July 2012 as mentioned in the email on 5 July 2012. Though the claimant made no immediate response to the respondent's email regarding the backdated bill of lading in its communication, its reply on 9 July 2012 was a clear response regarding the delay in loading within a reasonable time since 7 and 8 July 2012 were not working days. The tribunal found no evidence showing the claimant's expression of intent to accept the delayed goods by conduct. Since there is no direct provision on waiver in the CISG, the tribunal cited Article 66 of the Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China stipulating, '[W]hen a party claims a civil right to the other party while the other party makes no clear expression orally or in writing but accepts by its action, the other party may be regarded as consent thereto impliedly. Implied consent by no action can only be deemed as an expression of intent when it is provided by law or agreed by both parties'. Accordingly, the tribunal deemed that the claimant's implied consent to the respondent's late shipment by no action could not stand unless it was provided by law or agreed by the parties. However, the tribunal could find neither parties' agreement when signing and performing the contract nor such legal provisions. Thus, the claimant should not be regarded as having consented to the late shipment impliedly. The respondent's argument that the claimant had accepted the goods by conduct and impliedly consented to the late loading was untenable and its delay in delivery constituted breach of the contract. We may find through this case that implied acceptance in Chinese laws are not completely consistent with waiver in common law and that the determination standards are also different.

In the 2007 cotton sales case,[13] the arbitral tribunal found the respondent in breach of the contract since it issued the letter of credit with the claimant as the beneficiary on 10 February 2004 which was later than the time stipulated in the contract with the amount less than the contract price. However, the claimant accepted the letter of credit and shipped 4,998 metric tons of contracted goods to the respondent, making no claim against the respondent for the letter of credit. The arbitral tribunal deemed the respondent had performed its payment obligation within the amount of the letter of credit since the claimant accepted the respondent's delayed performance of paying partial contract price by its act of delivering corresponding goods and waived the right to claim damages against such delayed performance.

Additionally, we note various opinions in waiver-related court judgments of different nations. One court held that the seller's non-objection to the buyer's notification regarding the lack of conformity of the goods beyond the reasonable time and agreement to reduce the price might constitute the waiver of the time limit on the right to rely on a lack of conformity of the goods under Article 39 of the CISG.[14] Another German court deemed the seller's acceptance of the returned goods for inspection after the buyer had delayed the non-conformity notification should not constitute a waiver since the parties should be allowed to negotiate for a period of time under the policy of encouraging friendly negotiation and settlement. This court held that the standard of implied waiver should be so high that only the seller's explicit acceptance of the returned goods or clear expression of the intent of waiver by other ways could constitute a waiver while negotiation could not meet such standard.[15] In one extreme case, the seller, who never waived its right to object to the timeliness of the notification of non-conformity, instead had negotiated with the buyer for 15 months for the settlement of the non-conformity

13 The CIETAC Award on 12 April 2007.

14 CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

15 CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993].

and proposed a considerable amount of compensation during the negotiation. This court deemed that the seller's willingness to negotiate and the negotiation time (15 months) constituted an implied waiver of the right to object under Article 39.[16] In another case, the court held the seller would lose its right under Article 39 if it had acknowledged its breach and expressed the intent to provide replacing goods in conformity with the contract.[17] However, the seller would not be regarded as waiving said right if it had only negotiated a settlement but never acknowledged the delivery of goods in non-conformity with the contract nor expressed the intent to compensate.[18]

We note that the constitution and handling of waiver is different from the contract modifications under the CISG or the estoppel principle based on Article 29(2). Article 29(2) is about contract modifications of which the requirements may be more than those of a simple waiver since the parties much reach consensus on such modifications while a simple waiver only involves unilateral relinquishment of rights, which is clearly shown in the U.S. Uniform Commercial Code. Waiver is not the same as the estoppel principle based on CISG's Article 29 or Article 7. For example, one court pointed out in its judgment that the seller's waiver of the right against delayed notification should be realized by the party's clear expression of such intent while the seller's failure to immediately reject the delayed notification was not sufficient to prove its waiver; on the other hand, estoppel might be applied if the seller kept communication with the buyer to follow up complaints from its clients and expressed the intent of no claim against the delayed notification while the buyer believed so.[19] It can be seen that the constitution of waiver is more about the waiving party's expression of the intent to give up a certain right

16 CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

17 Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004 (Steinbock-Bjonustan EHF v. N.V. Duma).

18 Landgericht Aschaffenburg, Germany, 20 April 2006.

19 CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, Austria, 15 June 1994].

no matter whether this expression is made explicitly or implicitly. However, the estoppel principle is more about whether the other party has reasonable trust and whether the status has been changed due to this trust, so that the non-enforcement of the party's intention would result in unfairness. In addition, the consequences of waiver are not the same as contract modifications. In the case of contract modifications, neither party can make a claim according to the original contract terms because the contract terms have been modified. However, a unilateral waiver may be withdrawn under certain domestic laws, which is derived from the theory of consideration in common law since a party's unilateral waiver is not supported by the other party's consideration.

The CISG currently does not apply the waiver theory, but in practice, quite a few courts or arbitral tribunals have applied rules similar to waiver. It is difficult to determine the constitution of waiver during contract performance and there may be no certain answer. Arbitrators from various legal systems may come to different conclusions on related issues according to their domestic laws. Above all, we suggest a specific provision on waiver be included in future CISG amendments to ensure the uniformity of arbitral awards and give the parties clearer guidance.

IV Application of Article 40 of the CISG

Article 40 of the CISG provides, '[T]he seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer'. There is a similar provision in China Contract Law. Article 158 of the Contract Law stipulates, 'Where the parties have agreed upon an inspection period, the buyer shall notify the seller of any non-compliance in quantity or quality of the subject matter within such inspection period. Where the buyer delayed in notifying the seller, the quantity or quality of the

subject matter is deemed to comply with the contract…Where the seller knows or ought to know the non-compliance of the subject matter, the buyer is not subject to the time limits for notification prescribed in the preceding two paragraphs'.The same rule has been accepted by the Civil Code of PRC, of which Article 621 follows Article 158 of the Contract Law.

In the interpretation of Article 40, the widely accepted view, based on the principle of good faith and fair trade, is Article 40 should be used as a 'safety valve' to provide protection for the buyer when the seller is not entitled to rely on the provisions of Articles 38 and 39 of the CISG.[20] In the Stockholm arbitral award involving material deliberation on the application of Article 40, the tribunal pointed out that too broad of an application of the Article 40 would lead to significant weakening of the seller's position and make the seller lose the general absolute defense based on the buyer's negligence neglect of inspection and notification for the lack of conformity, so the application should be limited to 'special circumstances'.[21] In some precedents, the courts proposed that in the application of said Article, more attention should be paid to the buyer maliciously concealing the fact that he knew or could not have unknown the lack of conformity.[22]

CIETAC tribunals have pointed out that the premise for the application of Article 40 is 'if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer', i.e., the seller intentionally hides the fact from the buyer that there is a lack of conformity in the goods.

20 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p198.

21 CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

22 Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at www.cisg.law.pace.edu.

In the 2012 steel coil sales case,[23] Article 11 of the contract stipulated the claim period as follows: 'the buyer, if found any quality and/or quantity and/or weight discrepancy after the goods had arrived at the destination port, except those caused by the insurance company and/or shipping company, could claim damages with the inspection report issued by the inspection institution jointly appointed by the parties. Claims for quality discrepancy should be made within 60 days after the arrival of the goods at the destination port and those for quantity/weight discrepancy should be made within 30 days. The buyer admitted it made the claim beyond the stipulated period since the goods had arrived at Pecem, the destination port, on July 18, 2010, it had received the Brazilian client's claims on October 8, 2010 and the inspection time by SGS Brazil was November 10-13, 2010'. However, in this case, the seller issued the letter of guarantee when delivering the goods, admitting it had requested the carrier to issue a clean bill of lading though there were some problems with the packaging of the loaded goods and agreed to compensate the carrier therefor.

The tribunal pointed out that it could be seen from the provisions of Article 40 of the CISG and China Contract Law that the seller had no right to invoke the relevant provisions if the delivered goods were in non-conformity while the seller knew or should have known the non-conformity but had not informed the buyer thereof, i.e., the buyer's right to claim quality discrepancy should not be limited by the above period. The tribunal held that the buyer's right to claim damages due to the defects in the packaging of the goods should not be restricted by the inspection period or the notification time since the seller had issued the letter of guarantee to the carrier for the defects in the packaging of the loaded goods so as to obtain the clean bill of lading and had not informed the buyer of such defects.

23 The CIETAC Award on July 18, 2012.

On the contrary, if the parties only dispute over the existence of the lack of conformity while the buyer seller has not intentionally concealed the fact of such non-conformity, the buyer cannot rely on Article 40 to be exempted from the stipulated claim period. In the 2019 apparel sales case between a Japanese company and a Chinese company, the buyer alleged it should be exempted from the stipulated claim period since the seller had known the quality defects. However, the tribunal noted there was no contractual provision on the specific quality standard. Though the seller carried out the color fastening treatment after the goods had failed the first inspection, such treatment was not the circumstance of knowing the non-conformity of goods under the Contract Law and was only a process to make the goods qualified. The seller, before the shipment, finally obtained the inspection report showing the goods were qualified. Therefore, the tribunal rejected the buyer's claim.

It can be seen from the CIETAC practice that adjudicators, when applying Article 40, are in a very delicate situation and need to further clarify the standard for 'knew or should have known'. Normally, the seller's deliberate concealment of the lack of conformity can definitely constitute the circumstance for the application of Article 40 of the CISG, but Article 40 should not be easily applied when the parties only dispute over the existence of the non-conformity or a clear conclusion cannot be reached.

Problems in the application of the CISG are as follows: firstly, it is commonly recognized that the seller should be aware of the conditions of goods, so the seller should know or have known any non-conformity which is found out later. Under such circumstance, any non-conformity which is found out later constitutes the situation for the application of Article 40, which would make the requirement on the inspection or notification of non-conformity in Articles 38 and 39 of the CISG exist in namea nominal existence only. Secondly, if the seller can prove he did not know the non-conformity, for example,

he sold the goods not under his control but purchased or ordered from a third party, there are different views in judgments of various countries mentioned in the 2016 UNCITRAL Digest regarding whether he should have known.[24] Thirdly, a material issue is which party should bear the burden of proof. On the one hand, the buyer should prove the seller knew or should have known the non-conformity according to the principle of 'who alleges, adduces evidence'. However, the buyer may assert the seller, as the party selling the goods, should be aware of the non-conformity, so there is no more burden of proof. On the other hand, it is actually hard for the buyer to prove the subjective awareness of the seller or how much the seller is aware of the non-conformity.[25] Fourthly, as pointed out by the arbitral award, though the article does not make it clear how much the seller should be aware of the non-conformity, but obviously some merely general knowledge, for example the seller knows the delivered goods are not of the best quality, is not enough obviously. It is requited that f the seller negligentlywas fully aware or overconfidently should not have been unaware believes that the goods are in conformity with the contract. and deliver the goods, for example, it is not enough that the seller knows the delivered goods are not of the best quality when more knowledge is required. As such, said award stated, 'the general consensus is fraud and similar malice or non-conformity easy to be seen or found meet the requirement of Article 40'.[26] However, there are different views about whether the seller's unawareness of the factual non-conformity meets the requirement. Therefore, it is uncertain whether the requirement of Article 40 is met when the seller is in a status between negligence and intentional negligence and judgments in various countries are quite different. We have seen differences and disputes regarding the judgements mentioned in the 2016 UNCITRAL

24 CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998]; CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004].

25 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p199.

26 CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

Digest in both the academic and practical circles. Therefore, we believe that the above issues should be further discussed in the future CISG amendments to provide unified guidance on the matter.

V Relationship between the Right to Declare the Contract Avoided under Article 49 and the Defaulting Party's Right to Remedy under Article 48

In international trade, when a breach of contract occurs, the defaulting party usually prefers to avoid the observing party's termination of the contract by providing remedies including repair, replacement, adjustment, etc. We note that Article 48 of the CISG gives the seller a 'right to remedy' in cases of breach of contract, which allows the seller to make up for any breach under the contract even after the performance time specified in the contract with the condition that the exercise of this right does not cause unreasonable inconvenience to the buyer. Article 37 allows the seller to remedy before the specified date for delivery if he has delivered goods in non-conformity.

However, the seller's right to remedy would be excluded by the buyer's declaration to avoid the contract under the precondition in Article 48(1) of the CISG, i.e., 'Subject to article 49'. The 2016 UNCITRAL Digest clearly stated that the buyer could exercise the right to declare the contract avoided without being restricted by the seller 's right to remedy. The reason for such interpretation is the seller can ask the buyer if he will accept a remedy according to Article 48 (2) while the buyer does not have to accept the seller's remedy under Article 49 (2) (b) (iii).[27] Such view was also shown in the drafting documents of the CISG. Article 41:5 of the Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11

27 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016 p228.

April 1980 (United Nations publication, Sales No. E.81.IV.3) which states, '[I]f there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any prior notice of his intention to declare the contract avoided or any opportunity to remedy the breach under Article 44'.[28]

Under such circumstances, tribunals may consider for the possibility of remedy, the seller's willingness to remedy and the impact of the remedy on the buyer. A special issue may arise out of the fundamental breach standard when the goods are defective or even severely defective because one consideration in the determination of fundamental breach is the possibility of remedy for defective performance and the breaching parties' intent to do so. As for the impact on the observing party, more consideration is given to the reasonableness of the observing party's refusal of such remedy. Some courts have determined that if the defect was easy to fix, such non-conformity would not constitute fundamental breach. At least when the seller proposes and implements rapid remedy, courts would not find the non-conformity as fundamental breach.[29] For example, it was clearly pointed out in one ICC award that the seller had not fundamentally breached the contract though there were apparent defects in the goods since the buyer had refused the seller's prompt proposal to remedy at its expenses and given no reasonable opportunities for the seller to remedy the goods defects.[30] Regarding the reasonableness of the remedy request, a CIETAC tribunal mentioned in the award that adjudicators should weigh the cost and effort of the remedy against the loss.[31]

28 Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.81.IV.3)

29 CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]; CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; CLOUT no. 882, SWITZERLAND: Commercial Court of the Canton of Aargau (Inflatable triumphal arch case) 5 November 2002 [OR.2001.00029].

30 ICC Arbitration Case No. 7754 of January 1995, http://cisgw3.law.pace.edu/cases/957754i1.html, last visited: May 31, 2020.

31 China International Economic and Trade Arbitration Commission, People's Republic of China, 11 November

In the 2006 amphibious vehicle sales case,[32] the buyer fulfilled its payment obligation in accordance with the contract and the amphibious vehicle delivered by the seller arrived at the buyer's location on September 21, 2005. The seller sent technicians to the buyer's site to commission the vehicle on October 8, but the commissioning failed due to broken parts of the vehicle. The commissioning was conducted again from November 20th-27th but unsuccessful. The seller notified the buyer on December 5th that there were defects in the vehicle and suggested the buyer transport it back to Australia for repair.

The buyer agreed to send the non-confirming vehicle in non-conformity with the contract back to Australia for inspection and repair with one condition, i.e. to avoid transaction risks, the seller should remit AUD58,500 which had been paid by the buyer for the vehicle to a third party in China or to the buyer's account as a security deposit which would be returned once the vehicle was repaired and sent to the buyer's site with quality, specification and operation in line with the contract requirements. The seller refused such condition due to the excessive cost occurred in manufacturing the vehicle. As a result, the parties reached no agreement on the return and repair of the vehicle.

The tribunal noticed that though the seller had repeatedly stated that it could repair the vehicle, the buyer stated 'it is shown in the seller's correspondence that the vehicle had been manufactured by another company entrusted by the seller while the seller had no finished product. The manufacture's professional engineers failed in the two repair attempts, so the buyer has reason to doubt the seller's performance ability. At the same time, the vehicle cannot be used in tourism projects when the security is not guaranteed'. The buyer also pointed out that 'it is unrealistic to send the vehicle back to Australia for repair whenever there is a problem. It is a fact that the contract goods delivered by the seller can neither operate nor be repaired on site. It is also a fact that the seller's remedy

2002, English translation available on the Internet at www.cisg.law.pace.edu.

32 The CIETAC Award on December 26, 2006.

for the breach is meaningless for the buyer. The seller's re-delivery of the returned goods can only enlarge the loss'.

The tribunal held the buyer had factual grounds to refuse the seller's continuous performance while its claim for refund and return was in accordance with not only the contract but also Article 25 and Article 51(2) on fundamental breach in the CISG since the contract purpose could not be achieved. Therefore, the tribunal supported the buyer's claims of contract termination, returning the goods and full refund of the payment for the goods.

We have also noticed that some courts deemed the buyer must allow the seller to remedy any breach of contract (even a fundamental one) before declaring the contract avoided void and that a fundamental breach could not be constituted if the buyer had not given the seller the opportunity to remedy.[33] In a German case in which the buyer rejected the seller's proposal to provide goods meeting the standard through its manufacturer after the breach of contract, the court pointed out that the buyer's right to declare the contract avoided void should take precedence over the seller's right to remedy according to Article 48 of the CISG. However, this only applies if the delivery of defective goods constitutes a fundamental breach of contract under Article 25 of the CISG. The related determination depends not only on the severity of the defect, but also on whether the seller is willing to remedy the defect without causing unreasonable delay or inconvenience to the buyer. Even serious defects may not lead to a fundamental breach under Article 25 if the seller can and is willing to remedy without causing unreasonable inconvenience to the buyer.[34] Such view was also shown in the CISG drafting documents. Article 41:6 of the Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.81.

33 CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998].

34 Court of Appeal (Oberlandesgericht) of Koblenz 31 January 1997 [2 U 31/96].

IV.3) states, 'in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time'.[35] In accordance with this rule, it is certain and should not be misunderstood that the buyer, before declaring the contract avoidedvoid, must give the seller an opportunity to remedy under any circumstances.

We can understand the CISG drafters' consideration of the observing party's right to declare the contract avoided void because it would put the observing party in a difficult situation if the breaching party were given too broad opportunities through remedies to prevent the observing party from exercising its right to declare the contract avoidedvoid. Most breaching parties would not let observing parties declare the contract avoided void easily after the breach but wish to find a resolution through negotiation or remedies, but the broad right to remedy may result in unreasonable restrictions of the observing parties' right to declare the contract avoided void and cause delays. Undeniably, contract termination is still the most severe means of remedies and should be the last resort of observing parties as confirmed in many cases. Especially when the goods of international trade arrive at the buyer's country after long transportation or are specially manufactured according to the buyer's request, the observing party's termination of the contract may cause a greater waste of social costs. It is also necessary to consider that the observing party may inappropriately attempt to use changes in the market condition to avoid a bad deal.

Therefore, in the development of modern contract law development , there is a tend to give a breaching party more rights to resolve through remedies. For example, Section 2-508 of the U.S. Uniform Commercial Code, Cure by Seller of Improper Tender or

35 Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.81.IV.3)

Delivery; Replacement stipulates, '(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may reasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he reasonably notifies the buyer have a further reasonable time to substitute a conforming tender'. It is further provided in Article 7.1.4 of the 2016 UNIDROIT Principles that '[T]he non-performing party may, at its own expense, cure any non-performance, provided that (a) without undue delay, it gives notice indicating the proposed manner and timing of the cure; (b) cure is appropriate in the circumstances; (c) the aggrieved party has no legitimate interest in refusing cure; and (d) cure is effected promptly'. Meanwhile, the right to remedy should not be excluded by the contract termination notification. It is stated in Remark 8 thereof, 'Effect of a notice of termination if the aggrieved party has rightfully terminated the contract …the effects of termination are also suspended by an effective notice of cure. If the non-performance is cured, the notice of termination is inoperative. Conversely, termination takes effect if the time for cure has expired and any fundamental non-performance has not been cured'. It can be found through the above provisions that the 2016 UNIDROIT Principles gives priority to the breaching party's right to remedy over the contract termination right.

Considering that modern contract laws respect the breaching party's right to remedy and the existing provisions may cause inconsistencies in application, we suggest further clarification on the relationship between the contract termination right and the breaching party's right to remedy in future CISG amendments. The contradiction between the two can be reconciled through the application of the principle of good faith because even those provisions or cases recognizing the breaching party's sufficient remedy right admit

that the precondition for the existence of such right of the non-conforming performance can be reasonably fixed and the remedy would not cause unreasonable inconvenience or delays. The observing party, when deciding whether to accept the proposal to remedy, should comprehensively consider the relevant situation based on the principle of good faith, including the breaching party's intention to remedy, the feasibility thereof, the possibility of further losses and its own conditions, etc.

VI Relationship between Damages under Article 75 of the CISG and Contract Termination

Article 75 of the CISG stipulates, '[I]f the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74'. This Article allows the observing party to mitigate losses through purchasing goods in replacement and claiming damages to cover the difference between the contract price and that in the substitute transaction. Therefore, it can be interpreted that the party can mitigate its losses through substitute transaction when the contract is terminated.

The method of calculating damages in Article 75 is a relatively common and very reasonable method of calculating damages in international trade transactions and can be found in many domestic laws. There are two reasons for such provision. One is to reduce the waste of unnecessary costs since the goods in replacement may be wasted if the aggrieved party has engaged in the substitute transaction ahead of the contract termination when the breaching party may still perform the contract at any time. Another is to prove the causal link between the substitute transaction and the breach.

The aggrieved party, when claiming damages, shall prove the causal link between the breach and its losses besides the existence thereof. Such linkage can be normally found in post-termination transactions, but it is doubtful whether there is a direct causal link between the pre-termination transaction and the breach since the breaching party may still perform the contract before the termination, especially when the observing party has similar transactions in its business operation.

The 2016 UNCITRAL Digest also mentioned the damages specified in Article 75 could only be obtained after the aggrieved party had effectively terminated the contract while pre-termination substitute transactions are not covered by Article 75.[36] CIETAC has followed the same rule in its awards, i.e., only post-termination substitute transactions meet the requirement for damages under Article 75.

For example, in the 2005 wool sales case,[37] the parties agreed in the contract that the shipping time should be late March 2003 and the payment should be made by letter of credit. The claimant urged the respondent to open the letter of credit in its email on 27 March 2003, but the respondent's agent replied 'I have submitted the L/C application to the Hong Kong headquarters and am waiting for the reply. Please give me more time'. The claimant sent another email to the agent on 14 April 2003 to which the agent replied that he was still waiting and had no idea when the problem could be resolved, stating 'I am very sorry for the delay in issuing the letter of credit. Please give me more time to solve the problem'. The claimant signed the resale contract on 24 May 2003 and resold the goods under the contract.

The tribunal cited CISG Articles 63, 64 and 75 in the case, pointing out the contract

36 The 2016 CISG Digest, p.346, Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574).

37 The CIETAC Award on 28 February 2005.

termination or the declaration to avoid the contract should be the precondition for the seller to sign the resale contract according to these provisions. However, the claimant had not sent a written notice to the respondent to 'fix an additional period of time of reasonable length for performance by the buyer of his obligations' while the respondent had not declared 'that he will not perform within the period so fixed'. The claimant seller, had not declared the contract avoided or terminated in writing. Under such circumstances, the respondent should not be liable for any consequences of the claimant's signing the resale contract with a third party even if there were price difference losses due to the claimant's failure in exercising its right according to the contract and to CISG.

In practice, it may not be suitable for rigid compliance with the above provisions. For example, in a German case, the court found the aggrieved party could claim damages according to Article 75 without proving it had declared the contract avoided before the substitute transaction considering the necessity of promoting good faith in international trade.[38] In another case, the court deemed one party's refusal to perform its obligations entitled the other party to purchase goods in replacement without declaring the contract avoided.[39] We note the existence of special circumstances in these cases where the courts did not deviate from the requirement under Article 75 but had special considerations such as the need of observing good faith. However, the question arose in some other cases is whether the observing party's clear notification of the intent to purchase goods in replacement meets the contract termination requirement.

In fact, the CIETAC tribunals would consider the specific circumstances in certain cases.

38 CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]. See also Oberlandesgericht Graz, Austria, 29 July 2004 (Construction equipment case), English translation available on the Internet at www.cisg.law.pace.edu.

39 Landgericht Hamburg, Germany, 26 November 2003 (Phtalic anhydride case), English translation available on the Internet at www.cisg. law.pace.edu. 22 CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002].

For example, in the 2007 stearic acid sales case,[40] the claimant buyer purchased 100 tons of stearic acid from the respondent seller at the unit price of USD 580/ton with the total price of USD 58,000 with L/C at sight as the payment method. The shipping condition was FOB STOWEDD Port and the shipping period was from late December 2006 to early January 2007.

The claimant issued the L/C through the issuing bank on 28 November 28 2006, after which the respondent requested to adjust the unit price to USD 615/ton due to the rising price of the goods and to amend the contract on 5 December 2006. The claimant agreed and the parties re-signed the Sales Contract on 8 December 2006, changing the payment method to USD 58,000 by L/C at sight and USD3,500 balance by T/T after the buyer received the copy of the bill of lading. The respondent requested again on 8 January 2007 to change the documents to be presented to the negotiation bank for the L/C payment from a full set of original bill of lading to a copy of the agent's certificate for receiving the goods and required the claimant to make the advance payment on 11 January 2007. The claimant refused the above requests and formally notified the respondent of the place of delivery and the nominated vessel on 11 January 2007, but the respondent failed to deliver the goods within the specified period. The claimant purchased the goods from another supplier on 8 February 2007 and initiated arbitration proceedings on 7 March 2007.

The tribunal held the claimant was entitled to declare the contract avoided, take corresponding remedial measures including purchasing goods in replacement and claiming for damages according to CISG Articles 45, 49 and 75 since the respondent had fundamentally breached the contract. The tribunal also noted CISG Article 26 provided, '[A] declaration of avoidance of the contract is effective only if made by notice to the

40 The CIETAC Award on 28 August 2007.

other party' and Article 75 set the precondition for the purchase of goods in replacement as 'the contract is avoided'. In this case, the respondent argued the claimant had never effectively declared the contract avoided and one key issue of the parties' dispute was whether the claimant was entitled to take remedial measures including purchasing goods in replacement when the respondent had fundamentally breached the contract but the claimant had not effectively declared the contract avoided.

The tribunal mentioned that Article 26 of the CISG was a new article inserted therein when the 1964 Hague Convention, i.e., the Uniform Law on the International Sale of Goods (ULIS), was amended. Under the original Hague Convention, as long as one party breached the contract, the contract would be terminated automatically with no need of the other party declaring the contract avoided, which may result in the breaching party's continuous performance of the contract without noticing the other party's termination of the contract. Article 26 was inserted in the CISG providing, '[A] declaration of avoidance of the contract is effective only if made by notice to the other party'. Article 26 avoided the uncertainty of the continuous performance of the contract resulting from automatic contract termination under the original Hague Convention. The obvious purpose of such provision was to protect the breaching party and make it aware of the performance status of the contract so as to decide whether to continue the performance or take other remedial measures such as stopping the shipment or taking back the delivered goods to mitigate the losses caused by its default.

Considering the relevant CISG provisions and the facts of the case, the tribunal held that the respondent needed no Article 26 protection due to its default. The respondent made it clear that it would deliver the goods only if on the condition that the claimant agreed to the advance payment. Furthermore, the respondent, after receiving the delivery notice from the claimant, showed no intention to deliver the goods when the vessel stayed in

the port. Factually, even though tSince the respondent's non-delivery was factually very clear, the non-performance status of the contract would not be affected no matter if the claimant sent the notice to declare the contract avoided or not. So, it was unnecessary for the claimant to send such notice. The tribunal further considered the purchasing of replacement goods was the only remedial measure for the claimant to avoid further losses when the respondent refused to deliver the goods, since the claimant, as a middleman in stearic acid trade, could was to resell the goods to a third party after obtaining them. If the claimant's right to purchase replacement goods was denied only because the claimant had not met the formative requirement of 'notification', the claimant would have been deprived of the right to effective remedy for its losses under the contract, which was against the CISG's purpose of relief for observing parties in good faith. Above all, the tribunal held that, despite the claimant's flaw in declaring the contract terminated, the claimant should enjoy all the rights stipulated by the CISG under the circumstance that the seller had fundamentally breached the contract, including the right to purchase goods in replacement from a third party based on the legislative purpose of the CISG and the fact of the respondent's fundamental breach.

Another situation in practice is when an observing party claims that it tried to mitigate its loss by replacing the undelivered goods due to the breaching party's fault with raw materials or similar goods purchased before the contract is terminated out of good faith since it has many related business transactions at the same time, such as purchasing the same raw materials from different sources for production. In this situation, the material question is whether the observing party has lost its grounds for damages under Article 75. Therefore, we suggest adding the relevant provision in Article 75, or supplementing this Article by further interpretation such as adding language like, 'unless the observing party can prove that the transaction it has carried out before the termination of the

contract is necessary'. The purpose of said language is to entitle the observing party to make up the vacancy caused by the breaching party's default with goods purchased before the contract termination under certain reasonable circumstances, which is quite necessary from the perspective of mitigating losses.

VII The Lost Volume Profit

A basic principle of modern international contract laws in respect of damages in the case of a breach of contract is that the aggrieved party should be restored to the state as if the contract were normally performed. Therefore, from this perspective, the aggrieved party's loss of profit due to the decrease in sales should be taken as a kind of damages. The CISG Advisory Council has taken this into consideration, pointing out in its Opinion No.6 that the aggrieved party should be entitled to damages caused by the non-performance of the other party, which was usually the loss of profits based on the market price, or the breaching party's compensation should restore the aggrieved party to the same status as the contract were normally performed. It specifically stated that '[L]ost profits include those arising from lost volume sales'.

For example, in a CIETAC case, the claimant purchased ten sets of CD-R production system equipment (hereinafter referred to as the CD-R equipment) and five sets of DVD-R production system equipment (hereinafter referred to as the DVD-R equipment) from the respondent. The total price of the former was EUR 7,470,000 and the total price of the latter was EUR 4,135,000. After the claimant had issued the letter of credit in February 2004, making partial payment to the respondent, the respondent delivered six sets of the CD-R equipment with the value of EUR 4,482,000 in March 2004. The claimant, after having received the 6 sets of the CD-R equipment, failed to issue the letter of credit for the balance or to make a reasonable explanation therefor,

thus breaching the contract as the buyer.

The arbitral tribunal supported the respondent's counterclaim on the price difference loss in reselling the rest of the four sets of the CD-R equipment. In addition, due to the claimant's default, the five sets of the DVD-R equipment had never been delivered or resold. The respondent counterclaimed on the loss of profit based on the cost calculation since it could have gained EUR 1,033,750, i.e., 25% of the contract price EUR 4,135,000 as the profit if the five sets were sold at the contract price. The tribunal pointed out that the respondent's expected profit loss could be supported according to Article 74 of the CISG, but the estimated 25% profit should be adjusted based on the parties' evidence and opinions. The tribunal found it reasonable to calculate the profit as 6% of the contract price EUR 4,135,000. That is, if the respondent had sold the five sets of DVD-R equipment at the contract price, its profit should be EUR 248,100. The claimant should compensate the respondent for such loss.[41]

The 2016 UNCITRAL Digest addressed this type of issue and pointed out that in principle, when an aggrieved seller had the ability and market to sell similar goods to others, said seller could claim for the loss of profit if he proved the transactions could have been accomplished if the buyer had not breached the contract.[42] The Digest also pointed out several courts had recognized the seller 's right to claim the loss of profits in unrealized sales. For example, the Supreme Court of Justice (Austria, Oberster Gerichtshof) stated in a judgment that the aggrieved seller could claim for the loss of profit assuming it could have sold the goods at the market prices.[43] Switzerland Handelsgericht des Kantons Aargau ruled that the seller could claim for 10% of the

41 The CIETAC Award on 30 October 2007.

42 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, p337.

43 CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000].

resale price as the loss of profit since the buyer in default could have expected such loss.[44] In a US judgment, the court extended the aggrieved party to the buyer who could claim for similar damages by ruling that the buyer could claim that the goods delivered by the seller could not meet the market demand and recover the loss of profit therefor.[45]

The trouble is such damage is for a relatively abstract loss of which Article 74 of the CISG offers a theoretical basis for the calculation but there is still no practical guidance. In practice, it is hard for the party claiming such damage to prove the actual amount of loss while the certainty of the claimed amount is an important prerequisite for the support of the claim. Furthermore, it should also be considered whether such support of the 'lost volume seller' would weaken the seller's obligation to actively mitigate losses. The seller may not be motivated to resell the goods and mitigate the loss after the buyer has breached the contract when the 'lost volume seller' is supported while he is normally obliged to try his best to make up the price difference loss through resale under Article 77 of the CISG.

For example, in a. CIETAC case, the claimant and the respondent signed the printing press sales contract with main technical data attached thereto.[46] The claimant, after signing the contract, paid RMB 16,800,000 to the import agent who then paid 95% of the total contract price, i.e., EUR 1,651,100, to the respondent with a 5% unpaid balance which was acknowledged by the respondent. The parties started the installation and adjustment of the equipment in December 2006 after it had arrived at the claimant's factory, but it could not pass the three inspections on 2 February 2007, 9 April 2007 and 3 March 2008 due to the quality discrepancy. On 6 August 2008, a municipal inspection and quarantine bureau inspected the equipment and issued the quality inspection

44 CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

45 CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994].

46 The CIETAC Award on 6 August 2010.

certificate, stating that the equipment could not meet the mandatory standards of the People's Republic of China due to the seller's fault and should not be installed, adjusted or operated before meeting such standards. The claimant alleged the respondent had fundamentally breached the contract due to the discrepancy and had taken no effective remedy measures. The claimant made the following two claims: 1. the respondent should return the payment of RMB 16,751,838.92, the bank loan interest for the same period in the amount of RMB 3,505,322 and the exchange loss of RMB 1,540,805.82; and 2. the respondent should compensate the claimant for losses of RMB 18,812,053.30, including the loss of interest on loans for the purchase of ancillary facilities in the amount of RMB 535,995.75, the loss of depreciation in the factory buildings and ancillary facilities in the amount of RMB 302,813.45, the loss of rent in the three years from 2006 to 2009 in the amount of RMB 342,000, the loss of materials for testing the equipment in the amount of RMB 210,728.10, the loss of travel expenses in the amount of RMB 19,600 and the loss of expected profits in the amount of RMB 17,400,916.

The tribunal, considering the circumstances of this case, held that the determination on the first claim should be based on the decision whether the contract could be terminated as requested by the claimant. If not, all the compensation requests under the restitution claim should not be supported because all the costs involved therein were inevitable expenses during the contract performance for which the claimant could not claim compensation when the contract was not terminated. In contrast, the second claim was essentially for the expected profit loss which could have been realized if the contract were properly performed but could not be realized due to the respondent's breach of contract. Obviously, the restitution requests in the first claim and the second claim on the expected profit loss could not be supported together.

Then the tribunal determined whether which one of the two claims could be supported.

The tribunal rejected the first claim since it found the claimant could not terminate the contract under the circumstances and then considered the second claim. The tribunal noted the claimed loss of expected profit was actually the claimant's operation loss due to the equipment discrepancy. The tribunal deemed the aggrieved party might, by reasonable election in light of the nature of the subject matter and the degree of loss, require the other party to assume liabilities for breach by way of repair, replacement, remaking, acceptance of returned goods, or reduction in price or remuneration, etc. Article 50 of the CISG provides '[I]f the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time…' This means that the normal compensation for damages under common circumstances excludes operational loss or expected profit loss of the buyer when the seller had delivered goods in non-conformity. Under normal circumstances, it is often difficult for a seller to reasonably foresee that his sale of equipment to the buyer would constitute a guarantee, in a sense, for the operational profit of the buyer. The tribunal found the claim for expected profit loss unsustainable according to the limitation on predictability of liability under Article 25 and the obligation to mitigate losses under Article 77 of the CISG unless the parties had specially agreed to such in the contract or the claimant could prove the respondent had known or ought to have foreseen it would be liable for the buyer's operational loss or expected profit loss when executing the contract.

Additionally, the tribunal noted the claimant had only submitted some basic documents such as contracts with third parties, a large number of receipts and correspondence to support its claim for expected profit loss during the hearing but never submitted any inductive written explanation, statistic or calculation to prove the calculation of its

claimed amount of expected profit loss, to prove whether the claimed amount was for the operation loss with deduction of various expenses, to prove such loss was caused by the qualify quality defects in the equipment delivered by the respondent, or to prove its efforts to mitigate losses after the respondent's default. Therefore, the tribunal rejected the second claim due to insufficient evidence.

One question arising out of the above case is how we could determine the loss of profits as a result of losing trade opportunities that the buyer may suffer due to the non-conformity of the equipment or goods delivered by the seller. The arbitral tribunal pointed out in the case that the current damages system under the CISG could restore the aggrieved buyer to the state if the contract were normally performed or before the contract was concluded in most cases. The ways of restitution include: repairs, replacements, returns, purchase of alternative goods and price reductions. Therefore, the observing party need to prove, firstly, that it could not obtain sufficient compensation for its claimed loss of expected profits or the loss of profits as a result of lost trade opportunities under the current CISG so as to further claim damages for trade profits because the remedies for lost trade opportunities and future profits are mutually exclusive in most cases. Secondly, the observing party need to further prove it is truly possible to gain the corresponding profits sought. Finally, the observing party need to prove the certainty and specific amount of such damages.

One typical case for the application of the provision on the 'lost volume seller' in the application of the U.S. Uniform Commercial Code is R.E. Davis Chem. Corp. ("Davis") v. Diasonics, Inc. ("Diasonics") (collectively, the "R.E. Davis Case")[47] in which Davissigned the contract with Diasonics for the purchase of a medical diagnostic equipment.[48] Davis, after having paid a deposit to Diasonics, failed to make the

47 R.E. Davis Chem. Corp. v. Diasonics, Inc., 826 F.2d 678, 681 (7th Cir. 1987).

48 826 F.2d 678 (7th Cir. 1977).

subsequent payment. Diasonics eventually resold the equipment to a third party at the same price, which seemed to result in no damages, but Diasonics alleged it was entitled to the loss of profit as the 'lost volume seller' under Section 2-708(2).[49] The Court of Appeal, 7th Circuit proposed three key elements test which were later broadly adopted: (1) the seller should prove that it was capable of conducting another transaction; (2) in the second transaction it could also gain profits; and 3) the seller would have the other transaction even if the buyer had not breached.[50] Some other American cases have followed such standard.[51]

The 7th Circuit Court of Appeals also discussed a frequent question in cases involving lost volume sellers, i.e., whether the seller was still a lost volume seller if he had directly sold the goods produced for the buyer to a third party or whether such sale was just a necessary transaction to mitigate losses. In the R.E. Davis Case, the court held that such situation would not affect the seller 's claim for a 'lost volume' loss because the seller was able to produce another batch of goods at any time to gain corresponding profits.

Furthermore, the Court of Appeal, 7th Circuit referred to a more specific issue in the R.E. Davis Case, i.e., 'the economic law of diminishing returns or increasing marginal costs[,] ... as a seller's volume increases, then a point will inevitably be reached where the cost of selling each additional item diminishes the incremental return to the seller and eventually makes it entirely unprofitable to conclude the next sale… Thus, under some conditions, awarding a lost volume seller its presumed lost profit will result in overcompensating the

49 (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710).

50 R.E. Davis Chem. Corp. v. Diasonics, Inc., 826 F.2d 678, 681 (7th Cir. 1987).

51 Diasonics test in Rodriguez v. Learjet, Inc.946 P.2d 1010 (Kan. Ct. App. 1997); Gianetti v. Norwalk Hospital 833 A.2d 891 (Conn. 2003).

seller'. Therefore, the court found that the seller claiming the loss of 'lost volume' must establish, not only that it had the capacity to produce the breached unit in addition to the unit resold, but also that it would have been profitable for it to have produced and sold both. But in reality, it is too hard to prove such marginal cost which seems to exist in economic theory only. Alternatively, it may be more feasible to use the average variable cost since the variable cost of a manufacturer is almost always the same in volume sales as shown in general enterprise accounting.

We can see that the R.E. Davis case provides a useful range of consideration for the determination of related losses, but there is no uniform conclusion under CISG. In some cases, the courts also considered the subjective factors of the observing party. An Italian court dismissed a claim for the 'lost volume sale' because it deemed the seller had not planned a second sale at the time of breach while claims under such circumstances would conflict with the provision on damages under Article 75.[52]

In Article 7.4.2, the 2016 UNIDROIT Principles traces back to the general principle of damages in Article 74 of CISG, pointing out the loss of sale should be understood in a broad sense and the aggrieved party's loss of profit is normally uncertain and may appear in the form of lost opportunities. The 2016 UNIDROIT Principles raises specific requirements for damages in Article 7.4.3, including damages are 'is established with a reasonable degree of certainty', 'compensation may be due for the loss of a chance in proportion to the probability of its occurrence' and 'where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court'. However, such method may be too abstract to offer practical guidance.

We suggest the UNCITRAL provide clear guidance on the specific conditions for the

52 Tribunale di Milano, Italy, 26 January 1995 (Bielloni Castello v. EGO).

application of the 'lost volume seller' provisions due to the lack of certainty or insert relevant provisions in future CISG modifications, offering a specific way of calculating damages as those in CISG Articles 75 and 76.

VIII Hardship

A party to a contract is obliged to perform its contractual obligations, even if some post-conclusion events make the performance more burdensome or more costly than it can reasonably expect when concluding the contract. Under the hardship principle, if an event that cannot be reasonably expected at the contract conclusion and beyond the contracting parties' reasonable control makes it difficult for one or both parties to continue to perform their contractual obligations and to reasonably avoid or overcome the event or its consequences, both parties are obliged to negotiate alternative contract terms within a reasonable time. The hardship clause has been more and more popular in some long-term contracts, such as: long-term supply contracts, machinery and equipment sales contracts with long-term performance, energy commodity sales contracts, sales contracts affiliated with large-scale infrastructure construction, etc. Both parties may suffer great losses if a partially performed contract is abandoned or terminated at which point the cost is quite high due to the rapid changes in market prices.

There is no specific CISG provision on hardship. Great controversy arose in the process of drafting the CISG over whether economic situation changes, market turmoil and economic crisies could constitute the exemption grounds under Article 79.[53] Some courts and tribunals have recognized that Article 79 could cover hardship.[54] It is pointed out in

53 [Germany] Ingeborg Schwenzer, translated by Yang Juan, Force Majeure and Hardship in International Sales Contracts, volume 3 of Tsinghua Law 2010 (2010).

54 Bulgarian Chamberof Commerceand Industry, 12 Feb 1998, CISG-online 436.

the CISG Advisory Council Opinion No.7 that '[A] change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an 'impediment' under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79'. Article 3.2 of the Opinion states '[I]n a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based'. In practice, arbitrators could only refer to the Principles as a general principle of international law and apply the hardship provision therein to adjust the parties' contract terms since Article 79 of the CISG does not cover the relief of renegotiation, which still leaves the following issues unresolved.

Firstly, the application scope. The expanded interpretation of 'impediment' under Article 79 to cover 'hardship' is mainly due to the need to maintain the uniformed application of international laws.[55] However, in practice, Article 79 itself is not completely consistent with the hardship principle from the perspective of definitions. For example, the Principle's division of the two systems in different chapters reflects its different attitudes towards the two. The provision on hardship is in Chapter 6, Performance as an exception to the parties' performance of their contractual obligations under the purpose of ensuring the continuous performance and with no exemptions. In hardship, the parties can make adjustments to the contract on their own or by court application, and the legal relationship shall still be subject to other provisions of Chapter 6. Article 6.2.2 provides the definition of hardship as '[T]here is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's

55 Larry A. DiMatteo, Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines, 27 Pace Int'l L. Rev. 258 (2015), P281.

performance has increased or because the value of the performance a party receives has diminished'.[56] Article 6.2.3 is on the effects of hardship, allowing parties to adjust the contract terms through renegotiation or by the court.[57] The provision on force majeure is in Chapter 7, Non-performance, which emphasizes the legal consequences of the parties' exemption from non-performance which is the balance of responsibilities in non-performance.

The CISG Advisory Council Opinion No.7 distinguished an exceptional hard case of hardship from normal hardship concerning the application of Article 79 to apply hardship and regarded the former as an impediment thereunder. In terms of relief, the Council opined that the right to adjust the price was consistent with CISG basic principles and could be accepted by courts or tribunals.However, different relief methods should correspond to different thresholds for determination even if an exceptional hard case of hardship could be taken as an 'impediment' under Article 79. The determination on the relief to expemt from performance is in nature fundamentally denying the binding force of the contract, thus should be made cautiously. While the price adjustment is contract binding force may be denied fundamentally by the exemption from performance obligations but only partially by the price adjustment right of which the determination standard is relatively low since it aims to maintain the contract

56 UPICC Article 6.2.2 'There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminishes, and (1) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party'.

57 UPICC Article 6.2.3 'Effects of hardship (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium'.

through adjustment instead of denying its enforceability, it requires a relatively low standard to determine. For example, the minimum standard of 50% was proposed in the official remarks of the Principles. However, it is hard to establish this distinction within the current framework of Article 79 due to the inconsistency.

Secondly, the relief. Noticeably, the Principles stipulates, 'the request for negotiation does not in itself entitle the disadvantaged party to withhold performance' though it is entitled to request renegotiations in case of hardship and '[U]pon failure to reach agreement within a reasonable time either party may resort to the court'. Such failure may due to the other party's refusal to renegotiate or the parties' failure to reach agreement through renegotiation.

However, a problem lies in that Article 79 itself only entitles a disadvantaged party to temporary or permanent non-performance of the contract but offers no relief such as renegotiation or resort to court for reasonable adjustment of the contract terms. Legal scholars have tried to deduce the remedy of price adjustment in the application of such principles as good faith, reasonableness or cooperation obligations under CISG or international laws,[58] or to deduce the other party's obligation to accept the adjustment proposal by the disadvantaged party on the principles of good faith and mitigating losses.[59] But so far, scholars have not agreed with each others varying opinions and cannot find a common solution for the legal uncertainty caused by the expanded interpretation of Article 79 through the basic principles of CISG or international laws.

Without common understanding, chaos can arise out of the application of the CISG regarding hardship due to the overlapping relationship between impediment under

58 Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3rd Ed., Brill Nijhoff (2009), page 867

59 Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contract*, 39 VUWLR(2008), page 720.

Article 79 and hardship and the ambiguous attitude towards the price adjustment right under CISG basic principles. The stability in CISG application would be undone if the excessively expanded interpretation of Article 79 leaves too much discretion for courts and arbitration institutions.[60] In practice, the adjustment right under hardship has been barely used in CIETAC cases. Therefore, we suggest the insertion of provisions on hardship and adjustment rights in future CISG modifications with consideration of practical needs.

IX Discussion on the Application of CISG Article 79 under the Covid-19 Situation

The application of CISG Article 79 under the continuous Covid-19 situation will be an important issue involved in the resolution of international trade disputes in the coming years, so we discuss this issue as follows. On 20 January 2020, the National Health Commission of the PRC issued an announcement to include Covid-19 in the Class-B infectious diseases under the Law of the PRC on Prevention and Treatment of Infectious Diseases and take the preventive and control measures for Class-A infectious diseases. On January 30, the World Health Organization (WHO) declared Covid-19 as a public health emergency of international concern (PHEIC). A considerable number of countries have declared a state of emergency and taken various anti-pandemic measures, which along with the social economic changes caused by the pandemic, has and will continue to greatly affect the performance of international sales contracts.

The current Covid-19 situation directly relates to the application of Article 79 of the CISG, i.e. exemptions under which 'a party is not liable for a failure to perform any of his obligations'. As mentioned above, Article 79 uses the concepts of unpredictability

60 Daniel Girsberger, Paulius Zapolskis, *Fundamental Change of the Contractual Equilibrium under Hardship Exemption*, 19(1) Jurisprudencija Jurisprudence (2012), p134.

and impossibility 'to have avoided or overcome' the direct adoption of the concepts and principles of frustration of contracts, changed situations, impossibility of performance and force majeure under domestic laws. The following issues regarding the application conditions of Article 79 of the CISG are discussed below.

1. Unpredictability

Application of CISG Article 79 requires the element of an 'impediment' which is defined as an uncontrollable risk or a completely unexpected event. As such, a pandemic such as Covid-19 which has been unknown to humans can generally be considered unpredictable. Covid-19 is similar to the previous SARS epidemic or H1N1 pandemic but has its unique particularities. The Covid-19 pandemic is more severe due to the wide range of influence, quick spread, lethality and impact on the world economy and people's life. Therefore, Covid-19 can reasonably constitute an unforeseeable impediment under Article 79. However, it is still uncertain from the CISG perspective whether Covid-19 can be interpreted as a causal effect and therefore, an impediment to the performance of a specific contract. For example, in the determination of the dangerousness in contract performance during the Covid-19 situation, the choice, extent and way of performing the contract or continuing the operation by a specific company or party will vary from case to case. Furthermore, each government has its own way of handling Covid-19, such as adopting different bans and isolation measures. Therefore, it is hard to form a unified standard among various countries regarding the extent and duration of the Covid-19 situation that could be judged as a contrat impediment.

In this regard, we should first consider the factors of government orders since a government ban on production, transportation or movement of people generally constitutes a clear impediment. For example, a Russian arbitral tribunal determined

if a government regulation or official's action prevented a party from fulfilling his obligations, such impediment should be considered as beyond the party's control.[61] As for the party's own shutdown or performance difficulties during Covid-19, the reasonable person standard shall apply and the determination shall be made according to the measures taken by a reasonable third party in the same regard.

Concurrently, the time for the conclusion of the contract and the occurrence of the impediment should be considered. For example, in the 2005 lysine sales case,[62] the CIETAC tribunal pointed out SARS had broken out in China over two months earlier than the contract conclusion, so the seller should have known and foreseen it at the contract conclusion. In the 2005 tomato sauce sales case,[63] the seller alleged the abnormal climate change was force majeure. The tribunal pointed out the contract was signed at the end of July 2003 when the harvest season had begun, so the influence on the growth and harvest of tomato by the abnormal climate change should have already formed or started and the seller should have foreseen it at the contract conclusion. Similarly, in an ICC case, the tribunal rejected the buyer's exemption claim based on the national regulations on suspending payment of foreign debts since such regulations had existed before the contract conclusion.[64]

2. Impossibility 'to have avoided or overcome' an Impediment

Courts in various countries generally consider that when the original performance is affected, if there is an objective choice of other means, even if the alternative performance

61 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996).

62 The CIETAC Award on March 5, 2005.

63 The CIETAC Award on June 30, 2005.

64 CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)].

method may cause a certain increase in the performance cost, the requirement on the impossibility 'to have avoided or overcome' an impediment under Article 79 is not met. As pointed out in the CISG Secretariat Commentary, 'Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was required under the contract'.[65]

The CIETAC tribunals also emphasized in some cases that the parties should take all reasonable measures to prevent the occurrence of impediments or the consequences since it was the parties' obligation during the performance to avoid or overcome impediments, which has been reflected in various CIETAC awards. In the 1997 canned mandarin sales case,[66] the tribunal pointed out the flood in one province could not have prevented the seller to buy raw materials from other provinces. In the 2003 alumina sales case,[67] the tribunal held that the new regulations issued by Chinese authority was not a total ban on the import of alumina, and butwhichthat the buyer could have receivedstill receive the goods delivered by the seller, but must have obtained the import permit for the customs declaration after receiving the goods and might have paid a certain amount of fees for the customs' detainment of said goods, so the regulations should not be regarded

65 Secretariat Commentary, Guide to CISG Article 79.

66 China, 30 November 1997 CIETAC Arbitration proceeding (Canned oranges case), http://cisgw3.law.pace.edu/cases/971130c1.html, last visited: May 31, 2020.

67 The CIETAC Award on June 26, 2003.

as an impediment beyond his control. In the 2009 chemical sales case,[68] the buyer had requested and negotiated with the seller to change the destination port to another port due to the ban on the import of hazardous chemicals through the original destination port during the Olympic Games. The tribunal found the seller had submitted no evidence to prove there was the same ban for 'another port' proposed by the buyer, so the impediment asserted by the seller could have been overcome. Similarly, in an AAA case,[69] the buyer had suggested the seller to ship the goods to the designated port in a neighboring country since the buyer's country had imposed a ban on the import of chicken products due to the occurrence of avian influenza while in fact other suppliers had done so to fulfill their delivery obligations. The tribunal pointed out the seller's refusal to ship the goods to the designated port in a neighboring country meant the conditions for exemptions under Article 79 had not been met since the impediment could have been overcome by the way of delivering the goods to such port.

Additionally, it is shown in the 2016 UNCITRAL Digest of Case Law on the CISG that arbitrators in various countries generally consider the party should not be exempted from the payment obligation due to the occurrence of force majeure events since such events have not prevented the buyer from paying for the goods.[70]

3. The Causality between Non-performance and Impediments

It is also emphasized in the 2016 UNCITRAL Digest of Case Law on the CISG that there should be causality between non-performance and impediments and such request have been adopted in many precedents.[71]

68 The CIETAC Award on June 4, 2009.

69 American Arbitration Association 23 October 2007 (Macromex Srl. v. Globex International Inc.)

70 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, p376.

71 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of

For example, in the 2004 magnesium ingot sales case,[72] the CIETAC tribunal pointed out the contract performance should not have been affected by the government shutdown and rectification decision since the seller had purchased more than enough goods for the performance of the contract of this case by signing contracts with the suppliers before the government made such a decision. Similarly, in the 2005 ferro-molybdenum sales case,[73] the tribunal held there was no direct causality between the seller's failure to perform the contract and the natural disaster occurred after the contract conclusion since the seller had stocked raw materials.

4. Notice of Impediments

Article 79(4) of the CISG provides '[T]he party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt'. Accordingly, the party who should perform is obliged to inform the other party that he cannot perform the contract due to impediments.

5. Current Chinese Judicial Opinions and Practices regarding the Application of the Force Majeure Rule

In response to the current Covid-19 situation, the Supreme People's Court of China has published some typical cases related thereto and the Guiding Opinion on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in Accordance with the Law (1) and (2), putting forward specific judicial opinions and reference cases for Chinese courts' application of the force majeure rule in contract dispute cases due to

Goods, p378.

72 The CIETAC Award on February 16, 2004.

73 The CIETAC Award on February 22, 2005.

Covid-19. These opinions are of important reference value and influence for Chinese arbitration tribunals as well.

The Supreme People's Court of China Guiding Opinion on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in Accordance with the Law (1) clearly stipulates, '[F]or civil disputes directly affected by the epidemic situation or the epidemic prevention and control measures that meet the statutory requirements of force majeure, Article 180 of the General Rules of Civil Law of the People's Republic of China and Article 117 and Article 118 of the Contract Law of the People's Republic of China and related provisions shall apply' and '[U]nless the parties agree otherwise, when applying the law in contractual disputes directly affected by the epidemic situation or epidemic prevention and control measures, (the people's court) should comprehensively consider the impact of the epidemic situation on different regions, different industries, and different cases to accurately grasp the causal relationship and the degree of causality between the epidemic situation or epidemic prevention and control measures and the party's failure to perform the contract'.

The Supreme People's Court of China Guiding Opinion on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in Accordance with the Law (2) further clarifies that the people's courts shall not support a party's request to terminate the contract when the party cannot fulfill his performance within the specified period or more costs would incur due to the epidemic or the prevention and control measures, and continuing performance will not frustrate the purpose of the contract. *

6.The Principle of Changed Circumstances

The provision on exemptions in Article 79 of the CISG, though overlapping the principle of changed circumstances in many aspects, has different application conditions,

means of expression, legal consequences and remedial measures of which some related considerations and applications are discussed below. Therefore, it is necessary to insert stipulations on changed circumstances or hardship in future CISG amendments for proper resolution of contract disputes.

Firstly, concerning the impediments involved, Article 79 of the CISG or the rule of force majeure normally involves natural disasters and political events such as wars, strikes, riots, etc. while changed circumstances may include performance difficulties due to the drastic changes in society, economy or market conditions.

Secondly, concerning the application conditions, the general condition for the application of Article 79 or the force majeure rule is non-performance due to unexpected events while the increase in the performance cost or the loss of the contract purpose can not constitute impediments under Article 79. The most prominent feature of hardship or changed circumstances is the consideration of the non-performance or unfair result due to increase in the performance cost.

Third, concerning the legal consequences and remedial measures, we suggest to add remedial measures such as the renegotiation of price and the price adjustment right under the system of hardship or changed circumstances in the future CISG amendments. As mentioned in the previous section, it is overreaching to expand Article 79 to cover remedial measures such as price adjustment or renegotiation under the hardship system through the interpretation of the principles of private international law though there are quite a number of views thereon. Article 79, relating to 'exemptions', may be more suitable for the occurrence of unexpected events resulting in non-performance of the contract and the affected party being exempted from the corresponding obligations. The application of hardship is more concerned with the unfair result due to the difficulties in

the performance than the non-performance.

Comment 2 of Article 6.2.2 of the 2016 UNIDROIT Principles states that the application of hardship includes the increase in the performance cost and the decrease in the performance value of one party. Modern contract laws attach great importance to ensuring the validity of a contract since for the parties or for society, the exemption of contractual obligations or the contract termination would result in great waste of social resources and costs. In quite a few cases, the occurrence of an unexpected events, such as the increase of price of goods or raw materials, delay or difficulties in performance due to Covid-19, may not necessarily result in non-performance. Under such circumstances, it may be a better solution to set the obligation for the parties to negotiate in good faith, or to agree on new contract terms, or to give arbitrators the final adjustment power when necessary.

For example, the impact of Covid-19 on international sales contracts can be argued as an indirect but material impact relating to the actual impediment such as the increase of certain raw material prices, the decrease in cash flow, the reduction in demand, the lack of labor and even the turbulence in commodities or financial market. While the indirect impact of Covid-19 may not be the actual impediment, it may still have indirectly but materially affected the performance costs. In this such case, it is difficult to directly apply the force majeure rule, but the application of the principle of changed circumstances may be considered.

For the relationship between force majeure and the adjustment right under hardship, the expression used for the definition of force majeure in Article 7.1.7 of the 2016 UNIDROIT Principles is basically the same as the provision on 'impediments' in Article 79 of the CISG, so the application conditions can be regarded as basically the same. It

is pointed out in Comment 3 of Article 7.1.7 that the application of the force majeure clause shall be interpreted in conjunction with the relevant stipulations on hardship in Chapter 6. Comment 6 thereof indicates hardship and the force majeure as defined in Article 7 may co-exist in practice, and under such circumstance, the affected party may decide to choose whichever remedial measure. If the party intends to terminate the contract, the force majeure clause in Article 7.1.7 shall apply. If the party intends to renegotiate or amend the contract, the contract remains valid and the hardship clause may apply. Similarly, there are both force majeure clause and hardship clause in the newly issued Civil Code of PRC, allowing parties to choose the application of either force majeure or hardship when unexpected events occur.[74]

It has been difficult to distinguish between hardship and commercial risks in practice. Professor Wang Liming proposed we should consider the following in the application of hardship: the predictability of the risk, the breadth of impact, the externality of the risk and the risk taking in advance.[75] Based on the above considerations, the drastic market changes and performance difficulties due to Covid-19 may fall within the scope of changed circumstances.

Firstly, from the perspective of predictability, if the parties have concluded the contract before Covid-19, they obviously could not have considered the outbreak of Covid-19 at the contract completion. A related and material issue worth debating is how to determine

74 The hardship system is formally introduced in the Contract Section of the Civil Code of PRC that will take effect in 2021. Article 533 stipulates '[Changed Circumstances] After the contract conclusion, if there is a substantial change in the fundamental contract conditions which the parties cannot have foreseen and is not a commercial risk, and it is obviously unfair for a party to continue the performance, the affected party may renegotiate with the other party, and may petition the people's court or an arbitration commission to change or terminate the contract if the renegotiation fails within a reasonable time, the people's court or the arbitration commission shall consider the actual situation and change or terminate the contract according to the principle of fairness'.

75 Wang Liming, Discussion on Various Issues regarding the System of Changed Circumstances-Comment on Article 323 of the Contract Section of the Civil Code (Draft for Second Review), Studies on Law and Business, Issue 3, 2019, p.5.

whether the parties have concluded the contract 'before' the outbreak of Covid-19. The specific determination needs to be made based on the complex factors such as the outbreak time at the contract conclusion place or the contract performance place, etc.

Secondly, from the perspective of the externality of risks, the outbreak of Covid-19 is obviously not part of the commercial risks inherent in a certain transaction or a sales contract, such as normal raw material price fluctuations in the international market and rising freight rates. From the aspect of risk allocation, it is unreasonable to request any party to take precautions against such risk or allocate such risk to one party since the parties could not have foreseen such risk at the contract conclusion.

It should be noted that the increase or decrease in the price of goods or raw materials, though being unpredictable, usually does not constitute an impediment under Article 79, but is regarded as part of the market risks. The seller bears the risk of the rising price of goods while the buyer assumes the risk of the falling price. For example, a Belgium court held the party should not be exempted on the excuse that the market price of the goods had sharply dropped.[76] An Italian court pointed out that the unpredictable sharp rise of international market price, though having broken the balance of the contract, had not made it impossible for the seller to perform the contract.[77] A German court pointed out, though heavy rain had destroyed the tomato crops in the seller's country and caused the increase in market price, the seller was not exempted from its delivery obligation because it was still possible for the seller to fulfill the obligation when the rain had not destroyed all the tomato crops. Therefore, the reduced supply of tomato and the increased price of tomato were impediments the seller could have overcome.[78]

76 Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex.

77 CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

78 The UNCITRAL Digest of Case Law on the CISG, p.377.

However, the market fluctuation and rising costs caused by Covid-19 are different from the above situations. Are the transaction risks caused by Covid-19 unexpected events beyond the contract or events possibly caused by the contract itself? For example, the reduction in production caused by natural disasters, is a kind of risk possible to occur under crop sales contracts, so the parties should have agreed on the allocation of such risk in the contract. Thus, the seller shall assume such risk if it has not explicitly excluded such risk as force majeure in the contract. However, Covid-19 is different from the above example. It is completely beyond the contract and could not have been taken into consideration at the contract conclusion. The externality of risks or of its source, is one of the conditions for the application of the rule of changed circumstances.

Thirdly, the breadth of impact. This is a factor that needs particular consideration in the determination of impediments with uncertain impacts such as Covid-19. A party may claim exemption on the excuse of force majeure or changed circumstances when he has refused to perform or delayed the performance due to his fear of infection. Under such circumstance, arbitrators need to investigate whether enterprises of the same kind at the same area have performed contracts during the same period. If the non-performance is due to the party's own fault, the rule of changed circumstances shall not apply.

Finally, arbitrators need to consider other factors in the application of the principle of changed circumstances, such as the degree of unfairness if the affected party is required to continue the performance according to the original contract terms when a major change has occurred and significantly changed the parties' responsibilities. Under such circumstance, arbitrators shall adjust the contract or decide the termination of the contract according to the principle of fairness. As pointed out in Comment 2 of hardship in the 2016 UNIDROIT Principles, the alleged hardship should have reached the level of 'a fundamental change in the parties' rights and obligations'.

We can see the Supreme People's Court of China has pointed out in the Guiding Opinion on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in Accordance with the Law (2) that 'if the affected party petitions for price adjustment when it is obviously unfair for the party to continue the performance since Covid-19 or the prevention and control measures have caused significant increase in the performance costs such as labor, raw materials and logistics, or a significant price reduction of the product though the party could continue the performance, the people's court shall adjust the price according to the principle of fairness and in light of the actual situation of the case. If the seller cannot deliver the goods or the buyer cannot pay for the goods within the agreed period due to Covid-19 or the prevention and control measures and petitions to change the performance period, the people's court shall change the performance period in accordance with the principle of fairness and in light of the actual situation of the case'.

X. Discussion on the Application of the CISG in Vaccines and Related Products Purchase Agreement

As of March 1, 2021, there have been 114,660,000 confirmed cases of COVID-19 reported globally. In the pandemic, vaccination is a safer way of protecting people from infections. According to the statistics published by the World Health Organization (WHO), the first mass COVID-19 vaccination plan was launched at the beginning of 2020 December and as of February 15, 2021, a total of 175,300,000 vaccine doses were administered.

Therefore, it is foreseeable that a large number of purchase agreements for vaccines and related products will be signed on a global scale. If any dispute arises from such purchase agreements, similar to any commercial dispute, the applicable law shall be the first issue

to be determined. Whether the CISG as the most widely applied rule in the uniform international sales law can be applied as the applicable law to the international purchase agreements for vaccines and vaccine-related products, is significant for more efficiently and effectively resolving the relevant disputes.

In order to determine the applicable law, relevant articles in the CISG on its applicability shall be considered, along with the features of vaccines and related transactions. The following issues shall be emphasized:

1. Whether Vaccines and Related Products Constitute "Goods" under the CISG

According to the WHO, a vaccine is a substance used to stimulate the production of antibodies and provide immunity against one or several diseases, prepared from the causative agent of a disease, to act as an antigen and to create active acquired immunity to a particular infectious disease. Vaccines can be prophylactic or therapeutic.

A vaccine is basically a biological product. Vaccines are produced by biological technologies with original materials from pathogenic microorganism or its components, metabolites. Viral vector vaccines use a modified version of different virus (vector) to deliver important instructions to human body cells. Therefore, the vaccines purchase agreements may also contain provisions about the transactions for pathogenic microorganism, vectors or cells.

According to Article 1(1) of the CISG, the Convention applies to contracts for the international sale of goods. Therefore, the subject matter of the contracts to which the CISG applies shall fall into the scope of "goods" under the CISG. However, the Convention itself does not define "goods". This does not mean that one should resort to one's domestic definition. In light of Article 7(1), the concept of "goods" should be

interpreted autonomously, in light of the Convention's "international character" and "the need to promote uniformity in its application", rather than referring to domestic law for a definition.

Article 2 of the CISG identifies an exhaustive list of sales that are excluded from the Convention's sphere of application. Therefore, we believe that the concept of "goods" should be interpreted extensively subject to Article 2 and other relevant articles of the CISG, in order to promote the application of the CISG as a uniform rule. Any subject matter which can be commercially transacted with a transferrable title may fall into the scope of "goods" under the Convention.

Furthermore, according to case law, "goods" in the sense of the Convention are items that are, at the moment of delivery, "moveable and tangible", regardless of their shape and whether they are solid, used or new, inanimate or alive.

We believe that no matter for vaccines or the related vectors and cells, the requirement of being "moveable and tangible" at the moment of delivery can both be satisfied. This interpretation is in conformity with the original intention of the CISG since Article 2 of the Convention does not exclude related biological products from the CISG's sphere of application. In fact, a large number of commercial contracts in the pharmaceutical industry also have virus vectors as subject matter transacted. In practice, it is already supported by case law that pharmaceutical materials have been explicitly recognized as "goods" under the Convention.

A special situation which may exist in the purchase contracts for vaccines and related products is, intellectual properties are usually involved during the whole process of vaccines development and production due to the high risk and heavy investment involved. This particular situation in vaccines development often result in diversified

and complicated structures of the intellectual property rights of the vaccines and related products. Therefore, some vaccines related products, such as virus vectors and cells, often contain certain know-hows and patents. We believe, some software cases can be used as reference in vaccines and related products purchase contracts. Software transactions frequently involve the sale of software itself as well as the use of the intellectual property rights indicated in the software. Currently, in the CISG practice, a widely accepted view is that the sale of standard software for certain price is a sale of goods, rather than service. Similarly, if the parties transact on standard virus vectors, even though certain intellectual property rights are involved therein, it does not affect the conclusion that the subject matter still falls into the scope of goods under the Convention.

2. Parties' Identity

For international vaccines purchase agreements, if the seller and buyer both have common commercial natures, and their places of business are located in different Contracting States, the CISG can be automatically applied. However, a special case is, since the purchase of vaccines is related to the national disease control and public health, some contracts are signed by nations or international organizations. For example, the European Commission has signed the advance purchase agreement for the production, purchase and supply of a Covid-19 Vaccine in the European Union ("APA") on behalf of all its members with AstraZeneca in August 2020. In such contracts, the parties are nations or international organizations rather than common commercial parties. Therefore, the question is whether the natures of the parties' identity, either public or private, affect the application of the Convention?

As indicated in the Convention, the CISG does not distinguish public or private identities of the parties and does not explicitly limit the application of the Convention

to contracts only between private parties. We believe that, if the public party's acts are essentially commercial or private rather than public, then it cannot have immunity for such acts (jure gestionis). In vaccines purchase contracts, if a nation or an international organization sign and perform the contract as ordinary buyer, it should be equally treated as any ordinary private buyer. Therefore, the application of the Convention shall not be excluded.

In addition, in the formation process of vaccines purchase contracts signed by nations or international organizations, bidding process may be required before the contracts are finally concluded in order to regulate the purchase and improve the supervision. The other party can only sign the vaccines purchase contract with the nations and international organizations after attending and winning the bid. We believe that, even if such prior bidding process exists, it does not affect the application of the Convention, since Article 2 of the CISG only excludes sales by auction, not sales by bidding.

3. Place of Business

The Convention's sphere of application is limited to contracts for the sale of goods that meet a specific internationality requirement set forth in Article 1(1). Therefore, pursuant to Article 1(1)(a), a contract for the sale of vaccines is international when the parties have—at the moment of the conclusion of the contract —their relevant places of business in different Contracting States of the Convention. In addition, according to Article 10(a), if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclu¬sion of the contract.

One special question relevant with the place of business is that, if the vaccines purchase

contracts are signed by a nation or an international organization, then how to determine the place of business for such nation or organization?

For an international organization, the place where it has the principal office can be deemed as its place of business. For example, the European Commission has its main base of operation in Brussels, and it would be reasonable to consider the Commission has a place of business in Belgium.

We believe that, for a nation, although there is no real case happened yet, considering the fact that this nation is a Contracting State, it would also be reasonable to consider this nation has a place of business in a Contracting State.

In addition, it has been decided by courts that the Convention also applies to multi-party sales contracts involving more than one buyer and/or more than one seller. The CISG's application to the entire multi-party sales contract remains unaffected even if only one of the parties on one "side" of the contract has its place of business in a different State than the opposing party as required by Art. 1(1) CISG, because any other approach would be impractical and result in the splitting-up of a coherent legal transaction. Therefore, for multi-party vaccines purchase contracts, the CISG can still be applied as long as at least one buyer and one seller have places of business in the Contracting State.

4. Exclusion of the Parties

According to Article 6 of the Convention, the parties may exclude the Convention's application or derogate from its provisions. However, the parties' intention to exclude must be clear and express.

Therefore, the specific wording of the applicable law clause in the vaccines purchase

contracts is essential. As discussed above in this Report, if the parties choose the domestic law of a Contracting State to govern their contract, such choice of the law of the Contracting State, if made without particular reference to the domestic law of that State, does not exclude the Convention's application.

Take the APA as an example, the Parties have chosen the "laws of Belgium" to govern this Agreement. Importantly, Belgian courts have repeatedly held that the choice of Belgian law includes the Convention.

Take Chinese law as another example, as proved above in this report, CIETAC tribunals believe the parties' choice of the Chinese laws in the contract does not amount to an implicit exclusion of the Convention. Actually, to better support the Convention and promote its application, the CISG, rather than the Chinese domestic laws, shall prevail.

5. Nature of the Contract

For vaccines purchase agreement, since the development and promotion of vaccines are very special, the framework of vaccines purchase agreement is quite different from the ordinary sales contract. There are several special issues to be considered.

Firstly, at the time of the conclusion of the vaccines purchase agreement, it might be that the vaccines are not successfully developed yet. Therefore, the parties may only sign an advance purchase contract instead of a real sales contract. The buyer promises to buy certain number of vaccines which are not developed and permitted for commercialization yet. Therefore, it could be argued that the contract is only for advance purpose rather than for sale purpose and the Convention cannot be applied as a result.

We believe that the advance nature of the contract is not a decisive factor. The

application of the CISG essentially depends on whether the contract has the fundamental characteristics of a sales contract. Also, pursuant to Article 3(1), the Convention extends to contracts for the sale of goods to be manufactured or produced.

Secondly, there is more to vaccines purchase agreements delivery and sale of the vaccines. Such contracts usually have mixed and complex natures. The buyer may undertake some other obligations, such as to use best reasonable efforts to assist the seller in securing the supply of drug substances and other materials, or to provide funding to the seller and enable it to procure the necessary materials. The seller may grant licenses for certain patents or other intellectual property rights to the buyer during the transaction of vaccines and related products. For example, under one contract, the buyer intends to buy virus vectors from the seller. The seller not only provides the vectors but also gives licenses to the buyer which allow the buyer to use the patent and know-how on the vectors. The buyer shall pay to the seller the purchase price of the vectors and the royalty. If the buyer successfully develops the vaccines, the buyer has the option to request the seller to produce the vaccines, or to continue the purchase of cell and cell culture medium from the seller. Therefore, the buyer's payment includes both the purchase of the vectors and the licenses granted.

Article 3(2) is the main source in the CISG to determine the natures of the contracts under which the seller has mixed obligations, such as sale and license. It provides that "this Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services". However, Article 3(2) does not provide a standard to determine "the preponderant part of the obligations of the party".

In practice, domestic courts seem to have different views on it. Not many cases on this

issue have been published so far. Therefore, there is no clarified rule for the determination of "the preponderant part of the obligations of the party" and how to apply or interpret Article 3(2).

The first issue is the standard to be applied, e.g. economic value or essential criterion. In the practice, it is more extensively supported that the economic value criterion prevails. Therefore, a comparison between the obligations related to the goods and the obligations of labor or services is needed in order to see whether the Convention applies. Generally, at the time of the contract conclusion, if the economic value of the obligations of labor or services accounts for 50% or more of the total contract value, the Convention shall be excluded. However, as pointed out by the CISG Advisory Council Opinion No. 4, the economic value criterion alone is not enough and 50% is not an absolute dividing line. The word "preponderant" should not be quantified by predetermined percentages of values but on the basis of an overall assessment. In its interpretation, the intention of the parties as expressed in the documents, the title of the contract, the denomination and entire content of the contract, the price or payment structure and the parties' respective interests should be taken into account as well.

Therefore, for the contracts under which the seller not only provides the vectors but also grants licenses to the buyer which allows the buyer to use the patent and know-how on the vectors, in order to determine the nature of the contracts between sale and license, we believe that in addition to the comparison between economic value of the obligations related to the goods and the obligations of labor or services, the following factors should also be considered: the entire and essential content of the contract, the price structure (such as payment portions for license or purchase), and the weight given by the parties to the different obligations under the contract. The parties' intention should also be determined by due consideration to the title given to the contract (either license or

purchase), the legal position of the parties (either buyer or licensee), and the parties' purpose (either for the tangible subject matter or for the technology). Furthermore, according to Article 8 of the Convention, the intention of the parties as expressed in the negotiation and the formation of the contract should be taken into account as well.

Certainly, the side effect of such an overall assessment is the difficulty to identify a definite and uniform rule, especially for cases involving complicated transaction structures and various payment types. In fact, it has been the new normal that the sales structures are becoming increasingly complicated. Not only vaccines sales, but also many other contracts, may mix sale, license and other service together in one contract. Therefore, we suggest that, for the purpose of more foreseeability, a clear guideline should be made to determine the preponderant part in the future CISG amendments.

In summary, we believe that the application of the CISG, the most widely applied uniform rule in the international commercial law area, as the governing law for the international vaccines and related sales contracts, is both theoretically feasible and practicably significant. By far, the CISG as the governing law is the most appropriate choice in this area. In fact, it would be difficult to find a better alternative.

As it has been pointed out in the Preamble of the 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". For vaccines and related products sales which are very important matters for the global future, the CISG already has a comparatively completed structure which is able to deal with the most common issues in the contracts, and provide uniformity and foreseeability for relevant disputes, together with many clear

and definite substantive concepts of fair and justice after long term development.

XI Determination on the Authenticity of Electronic Evidence

The development of electronic commercial transactions has facilitated contract conclusion and parties' communication. Electronic communication tools such as e-mail, SMS, WeChat, etc. are widely used in contract conclusion and performance. The parties of international trade use them more frequently due to the more stringent requirement of timeliness of information. Article 116 of the 2015 Interpretation of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China stipulates, '[E]lectronic data shall refer to information generated or stored in electronic media through e-mails, electronic data interchange, online chatting histories, blogs, micro-blogs, mobile text messages, electronic signatures, domain names, etc.' The authenticity of electronic evidence, as a technological product, is more likely to cause doubts in litigation and arbitration than traditional evidence due to the unique nature of electronic data.

The characteristic of electronic evidence is that it is difficult to distinguish the original from the copy due to the lack of significant distinction because both are prints of electronic data on paper. The original carrier of electronic evidence is easily changed or deleted. Article 5 of the Electronic Signature Law of the People's Republic of China stipulates, 'Data messages that meet the following conditions shall be deemed to satisfy the requirements for the form of the original copies as provided by laws and regulations: (1) messages that can give effective expression to the contents carried and can readily be picked up for reference; and (2) messages that can unfailingly guarantee that the contents remain complete and unaltered from the time when they are finally generated. And the completeness of the data messages shall not be affected when endorsements are added

to the data messages or when their forms are altered in the process of data interchange, storage and display'.

In practice, there are two main points of controversy regarding the authenticity of electronic evidence: one is regarding the actual sender or issuer of electronic data, such as the actual controller of an email; the other is the verifiability of electronic data sources and the completeness electronic data may affect the determination of the authenticity of electronic data. Therefore, arbitrators should determine the identity of the sender and the unaltered content of electronic evidence in the admission of evidence.

In CIETAC practice, a tribunal, when determining the authenticity of an electronic evidence sender, would first consider the reliability of the system. For example, the email from a publicly known enterprise mailbox or the communication address specified in the contract has a strong probative effect. For a WeChat or SMS message, the tribunal would first check the identity of the sender, i.e., whether it is from the party's own phone number or WeChat account. It is easy to determine the identity of the user of a mobile phone number or WeChat account since China has implemented the real-name system. The party denying such identity can easily provecan easily provide proof for such denial, otherwise the tribunal would find him as the owner of the phone number or WeChat account.

A tribunal, when investigating the authenticity of an email, generally consider factors such as the sender, the recipient, the sending time, the receiving time, the security of transmission process, the email content, and the method of obtaining the email address (either purchased from internet services, registered for free, or a company address obtained from a company which is normally controlled by the company), etc. During the hearing, the parties should present the emails on the computer and download and

print them for submission. The parties can also have the emails notarized and submit the notarization documents.

It is still a common problem in the practical use of electronic evidence to determine whether the original evidence has been altered. Thorough investigation of electronic evidence is needed for the whole process of generation, storage and collection thereof.

One practical solution for the tribunal is to require the parties to provide continuous WeChat records, email exchanges or SMS records for a period of time, and determine whether they have been deleted or altered through the correlation among the emails, text messages, WeChat records and other forms of evidence. The party providing electronic evidence, especially WeChat and SMS exchange records which cannot be used alone as the basis for determining the facts of the case should be regarded as having fulfilled the burden of proof if such evidence can be supported by the contract, the transaction documents and other evidence and fit in the evidence chain, while the other party can challenge it by counter-evidence.

We have noted Article 11 of the CISG recognizes contracts concluded in various forms which surely include contracts concluded or amended through electronic communication. The CISG Advisory Council Opinion No.1 specifically discusses the rules regarding the offer and acceptance for contract conclusion by electronic communication and notifications by electronic means. In practice, the development of e-commerce has played a significant role in promoting the international sales of goods in China. Electronic communication tools represented by email, Wechat, QQ, etc. have greatly improved the efficiency of contract conclusion and performance as well as the parties' communication. A large number of related documents involved in bank transactions, customs clearance, inspection and quarantine and transportation insurance

are electronic data or certificates. The Supreme People's Court of China has also noticed the extensive use of electronic evidence in practice and made clearer provisions on relevant issues in Some Provisions of the Supreme People's Court on Evidence in Civil Procedures (hereinafter referred to as the Civil Evidence Provisions) revised in December 2019 among which Article 14 clarifies the scope of electronic data, including '(2) communication information through network application services such as text messages, emails, instant messaging and communication groups' and using 'other information that can be stored, processed and transmitted in digital form that can prove the facts of the case' as the miscellaneous provision to reserve space for new forms of electronic data that may appear in the future development of technology. Article 93 of the Civil Evidence Provisions is about the rule for reviewing and determining electronic data of which the core is the review of the integrity of electronic data due to the feature that electronic data evidence may be easily changed or deleted. The considerations include: (1) whether the hardware and software environment of the computer system on which the electronic data is generated, stored and transmitted is complete and reliable; (2)whether the hardware and software environment of the computer system on which the electronic data is generated, stored and transmitted is in a normal operating state, if not, whether the abnormal status affects the generation, storage and transmission of electronic data; (3) whether the hardware and software environment of the computer system on which the electronic data is generated, stored and transmitted has effective monitoring and verification means to prevent errors; (4)whether the electronic data is completely stored, transmitted and extracted and whether the storage, transmission and extraction method is reliable; (5)whether the electronic data is formed and stored in normal transactions; (6) whether the subject storing, transmitting and extracting electronic data is appropriate; and (7) other factors that affect the integrity and reliability of electronic data.[79]

79 Article 93 of the 2019 Some Provisions of the Supreme People's Court on Evidence in Civil Procedures.

Regarding the requirement of the original copies of evidence, Article 15(2) of the Civil Evidence Provisions stipulates 'the party, when submitting electronic data as evidence, shall provide the original. A copy made by the producer of the electronic data consistent with the original, or a printed copy directly derived from the electronic data or other output medium that can display or identify the electronic data may be recognized as the original of the electronic data'. Meanwhile, the Supreme People's Court, considering that electronic evidence is more likely to be challenged by the other party, pointed out in the Civil Evidence Provisions that 'the people's courts may confirm the authenticity of electronic data in the following circumstances, unless there is sufficient evidence to the contrary: (1)unfavorable electronic data submitted or kept by the party; (2) provided or confirmed by a neutral third-party platform that records and preserves electronic data; (3) electronic data formed in normal business activities; (4) electronic data kept in the form of archive administration; (5) electronic data preserved, transmitted or extracted in the manner agreed by the parties. If the content of the electronic data has been notarized, the people's courts shall confirm the authenticity thereof unless there is sufficient evidence to the contrary'.[80] The above rule of determining and accepting electronic evidence in the latest revised Civil Evidence Provisions is basically consistent with the CIETAC tribunals' way approach of handling electronic evidence in recent years and will be widely adopted in future cases involving the application of the CISG.

XII Interest

Article 78 of the CISG provides, '[I]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74'. Furthermore, Article 84(1) stipulates, '[I]f the seller is bound to refund the price, he must also pay interest on it, from the date on

80 Article 94 of the 2019 Some Provisions of the Supreme People's Court on Evidence in Civil Procedures.

which the price was paid'.

In an international transaction, if one party delays payment, the other party will suffer from not being able to use the money while the defaulting party benefits from it, saving credit costs or at least increasing the amount of deposits to earn interest. Therefore, it is necessary for the defaulting party to pay statutory interest. One CIETAC tribunal pointed out that it had been widely recognized at home and abroad that the breaching party should pay interest on arrears because interest would accrue on the delayed payment if it had turned into the other party's cashflow while such interest would compensate the other party for its losses. Meanwhile, the interest on arrears would play an active role in pushing the party delaying payment to make the payment as soon as possible so as to avoid the additional interest burden.[81]

Article 78 is one of the most frequently cited articles of the CISG because the plaintiff or claimant in a litigation or arbitration case always requests the other party pay certain amount and interest thereof. However, this article only stipulates the general right of creditors to get interest but leaves how to determine the interest rate as an unresolved CISG matter, which is a product of compromise as shown in the drafting records.

1. Types of 'the Price or any other Sum'

Article 78 of the CISG provides, '[I]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it…'. One possible debate is whether the other party is entitle to interest on damages, which is normally denied by the CIETAC tribunals.

In the 2004 goods sales case,[82] the tribunal pointed out it could be concluded from

81 The CIETAC Award on 29 July 2005.

82 The CIETAC Award on 24 November 2004.

Article 78 of the CISG providing, '[I]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74' that the entitled party could claim for both interest and damages but only interest on 'price or any other sum that is in arrears' while the so-called 'other sum that is in arrears' should not cover damages.

Similarly, in the 2005 wool sales case,[83] the tribunal deemed that the payment owed by the buyer was essentially damages for breach of contract instead of payment in arrears so the seller suffered no interest loss since the amount of damages was only determined in the award. Therefore, the tribunal rejected the seller's claim on interest.

2. Party Claiming Interest

It is noticeable that 'a party fails to pay' under the CISG includes both a buyer who has not paid the price and a seller who is obliged to return the price after the contract is declared avoided. In the 2015 clothes sales case,[84] the tribunal supported the buyer's interest claim and held that it was reasonable to calculate the interest loss from 29 April 2014 since the claimant had declared the contract avoided void and requested the return of payment in the No.2 Letter sent to and received by the respondent on 28 April 2014. Additionally, in the 2016 equipment sales case,[85] the tribunal decided to support the buyer's counterclaims on both the return of the advance payment and the interest thereof.

3. Interest Rates

There is neither specific formula nor a uniform interest rate for the calculation of

83 The CIETAC Award on 16 September 2005.
84 The CIETAC Award on 29 September 2015.
85 The CIETAC Award on 31 August 2016.

interest in Article 78 of the CISG. It is necessary to explore the nature of such lack of provision first, i.e., whether the unclear provision on interest rates is within or beyond the scope of the CISG. The CISG application would be excluded if it is beyond the scope while the application may be adjusted if it is within the scope but with no clear solution. If it is within the scope, arbitrators must first resolve the issue of determining interest rates in accordance with CISG general principles as per Article 7 or according to the applicable law determined through the rules of private international law if reliance cannot be had found on in the general principles. However, if it is beyond the scope, i.e., the determination of interest rates should not be regulated by the CISG at all, indicating that the CISG drafters were determined not to regulate the matter, then arbitrators can solve it according to the applicable law determined through the rules of private international law directly or by other methods. The CISG itself does not provide a criteria for identifying 'within the scope' or 'beyond the scope', so there is no uniform method for the determination of interest rates by courts and arbitration institutions in various countries.

First, the vast majority of the CIETAC arbitral tribunals tend to treat the determination of interest rates as an issue beyond the scope of the CISG and solve it according to the applicable law determined through the rules of private international law. For example, in the 2016 equipment sales case,[86] the tribunal deemed the determination of interest rates should be in accordance with the applicable laws, i.e., the relevant Chinese laws and regulations, since there was no applicable CISG stipulation. For its interest claim, the claimant relied on Article 24 of the Interpretation of the Supreme People's Court on the Issues concerning the Application of Law for the Trial of Cases of Disputes over Sales Contract which provides, 'if the seller claims compensation for late payment due to the buyer's breach of contract when the parties have not agreed on the late payment penalty

86 The CIETAC Award on 21 December 2016.

or the calculation method thereof in the sales contract, the people 's court may refer to the overdue penalty and calculate the penalty based on the RMB benchmark interest rates for loans of the People 's Bank of China for the same period' and Article 3 of the Notice of the People's Bank of China on Some Issues concerning RMB Loan Interest Rates stipulating, 'Concerning penalty interest rates, the penalty rate for overdue loans (i.e., loans the borrower has failed to repay before the specified dates) will be changed from the current rate of 0.021% per day to 30-50% increase on the loan interest rate stated in the loan contract…'. With above references, said claimant calculated the interest rates for late payments under three contracts as 50% increase on the benchmark loan rate of the corresponding periods. The tribunal supported such claim and held that the claimant's calculation method was in accordance with the above provisions in the judicial interpretation by the Supreme People's Court and the notice of the People's Bank of China and that the calculation periods were appropriate.

The above CIETAC practice is consistent with the current international trend in the application of the CISG. Firstly, it is pointed out in the 2016 UNCITRAL Digest that 'the interest rate is not governed by the Convention at all; thus, its determination is left to the law applicable to be identified by means of the rules of private international law of the forum'.[87] Secondly, a few CIETAC tribunals tend to adopt reasonable interest rates in international business due to the concern over the international nature of contracts. For example, in a the 2009 rebar sales case,[88] the tribunal found the calculation of interest should be based on the amount owed and the interest rate of the short-term bank loan available to borrowers enjoying preferential interest rates, i.e., the three-month LIBOR rate for the same day.

87 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016 p 364.

88 The CIETAC Award on 15 January 2009.

Lastly, when considering the parties' claims on interest, some CIETAC tribunals would exercise discretion based on the past interest rate levels and adopt different general standards such as the loan interest rates of Chinese commercial banks,[89] the fixed term deposit interest rates of Chinese commercial banks,[90] the annual loan interest rate of the People's Bank of China for the same period,[91] etc. or alternatively, determine the direct calculation of the specific interest rate.[92]

89 The CIETAC Award on 29 September 2015, the CIETAC Award on 24 February 2005 and the CIETAC Award on 22 August 2005.

90 The CIETAC Award on 6 November 2003.

91 The CIETAC Award on 31 August 2016, the CIETAC Award on 22 August 2018, the CIETAC Award on 29 May 2015 and the CIETAC Award on 29 March 2019.

92 The CIETAC Award on 12 April 2007, the CIETAC Award on 28 December 2015, the CIETAC Award on 9 June 2009, the CIETAC Award on 11 June 2018, the CIETAC Award on 12 April 2003, the CIETAC Award on 5 March 2005, the CIETAC Award on 8 March 2018, the CIETAC Award on 16 April 2013 and the CIETAC Award on 2 September 2005.

Part V Selected CIETAC Cases

Case 1 2005 Wool Case

I The Merits of the Case

[1]The Claimant claimed it had signed three Order Confirmation Sheets as the seller with the Respondent as the buyer for the sales of wool on March 2003 under the serial numbers D1, D2 and D3. The parties had agreed on not only the quantity, price and shipment but also 'Payment: By irrevocable L/C at sight basis to be opened one month before shipment month by full telex in favor of……'.

The Claimant had prepared the goods, but the Respondent had failed to open a letter of credit in accordance with the contractual provisions. The legal representative of the Respondent had proposed in through various many phone calls to compensate the Claimant about RMB million since the Respondent could not perform the contract due to market changes and liquidity problems. The Claimant had not accepted such proposal and sent letters to the Respondent on June and August 2003, requesting it immediately open a letter of credit, but the Respondent had been refusing to perform its contractual obligations.

On November 12, 2003, the Claimant sent a notice to the Respondent by fax and mail, stating that the non-performance of the Respondent had caused serious and continuous economic losses to the Claimant, and requesting the Respondent to compensate its losses. The Respondent responded by mail on November 13 and 21, 2003, stating that

1 *China International Economic and Trade Arbitration Commission* Compilation *of Arbitration Awards*, published by the Law Press in August 2009, pp 306-322.

it had never signed any wool sales contract with the Claimant, instead it had only signed three letters of intent for the purchase of wool with a Hong Kong company A.

However, the Claimant asserted that the three Order Confirmation Sheets had clearly indicated A.D F Hong Kong Ltd. (hereinafter referred to as the Hong Kong company) as the Claimant's agent and stated the Claimant as the seller.

Thus, the Claimant submitted the dispute to arbitration and made the following claims, as amended:

1) The Respondent shall compensate the Claimant approximately USD 800,000 for its loss due to the difference between the contract price and the market price at the time of the Respondent's fundamental breach;

2) The Respondent shall compensate the Claimant for its loss of interest on the contract value, calculated at an annual interest rate of 1%;

3) The Respondent shall compensate the Claimant USD for its loss of interest on the difference between the contract price and the market price, calculated at an annual interest rate of 1%; and

4) The Respondent shall reimburse the Claimant for its reasonable expenses incurred for this case which is calculated at 10% of the claim amount as per Article 59 of the Arbitration Rule and the arbitration fee.

The Respondent argued in its Statement of Defense that:

1) There was no contractual relationship between the Claimant and the Respondent.

The Claimant had not directly entered into any contract or agreement with the

Respondent while the Respondent had only got the incomplete Order Confirmation Sheets with the Hong Kong company which considered itself as the Claimant's agent. However, the Hong Kong company could not represent the Claimant since it had neither obtained the Claimant's power of attorney nor informed the Respondent the full content of the Order Confirmation Sheets. The Order Confirmation Sheets had been sent via fax without the content on the back, so they could only be deemed as order intention instead of complete contracts.

2) The transaction mode was against international trade practices.

The Claimant knew that the Respondent, without the permit of import, could only trade through a foreign trade entity which would issue a letter of credit to the Claimant after a standard contract had been signed. Therefore, the Claimant must not, could not and should not purchase materials for stocking according to the Order Confirmation Sheets under wool trade practices.

3) The Respondent's confirmed intention in the Order Confirmation Sheets was conditional.

The intention in the Order Confirmation Sheets clearly stated that the payment method was under the condition of shipment from an Australian port on or before June 30, 2003. Under the conditional payment method, the Respondent should issue an irrevocable sight letter of credit to the Claimant before May 30, 2003. After the Respondent had failed to do so, the Claimant neither urged the Respondent nor notified the Respondent of its purchasing materials for stock. The Claimant only claimed for loss resulting from its purchasing materials after it had initiated the arbitration process, thus the Respondent had to suspect that the Claimant had provided false proof and loss.

4) No loss should occur since the Claimant should not have purchased materials for stock when the Respondent had not issued an irrevocable letter of credit one month before shipment.

No loss should occur since the Claimant should not have purchased materials for stock when the Respondent had not issued an irrevocable letter of credit. According to Article 32(2) and (3) of CISG, the seller should be obliged to arrange the transportation of goods and notify the buyer to effect insurance on its own. Neither the Claimant nor the Hong Kong company, as the Seller, had notified the buyer of the mode of transportation, which further supported the impossibility of the Claimant's purchasing materials for stock. Even if the Order Confirmation Sheets were concluded without condition, the Claimant should have reasonably mitigated losses in accordance with Article 77 of CISG.

5) The Order Confirmation Sheets signed by the Hong Kong company and the Respondent was an unfair 'letter of intent' for unilateral interests.

If the Respondent had issued the letter of credit to the Claimant, the Claimant would have possibly refused to deliver any goods to the Respondent on the excuse that it had never authorized the Hong Kong company when the price of wool soared while the Hong Kong company could have relied on the exemption clause on the back of the Order Confirmation Sheets to shirk its responsibilities. Thus, the Respondent's benefits could not be guaranteed.

The Claimant asserted against the Respondent's defense that:

1) The three Order Confirmation Sheets sent by the Claimant to the Respondent by fax through its agent the Hong Kong Company in 2003 were sufficient to constitute effective offer since they all clearly stated the terms of quantity, price, shipment and

payment method of the goods. The legal representative of the Respondent signed all three Order Confirmation Sheets on March 5, 2003, expressing acceptance of the entire content of the Claimant's offer. According to Article 18 (1), of CISG, the legal representative's signing of the Order Confirmation Sheets constituted a valid acceptance. The acceptance arrived at the Claimant on the same day and became effective. Thus, the three contracts were concluded.

2) The three Order Confirmation Sheets were real contracts based on their signing process and contents. The Respondent had no ground to deny the nature of the three documents as contracts only because they were named as 'order confirmation sheets'. The contents of the three contracts were clear and specific, without any incompleteness.

3) The three contracts clearly stated that they were signed by the Hong Kong company as the Claimant's agent while the Claimant was the Seller. The Respondent's signing thereof indicated that it not only knew the agency relationship but also agreed to perform contractual obligations to the Claimant in accordance with all the contractual terms.

4) The terms on the back of the Order Confirmation Sheets were only general terms and force majeure terms between sellers and agents in international sales contracts. They should not affect the contract conclusion since they had no substantial influence on the Respondent's rights and obligations.

5) It would not affect the Respondent's ability to sign and perform contracts whether it had the import or export permit. The import or export permit had a restrictive effect only at the time of import or export declarations but could not hinder the conclusion of international trade contracts. The Respondent could have issued letters of credit under the three contracts by itself or by another company through relevant arrangements. Therefore, the Respondent could not breach the contracts and refuse to

bear responsibilities on the excuse of no import or export permit and the inability to issue letters of credit.

6) The letter of credit term was not the condition for the contracts to take effect. The three contracts were concluded and effective on March 5, 2003. The contracts all adopted the CIF price term under which the Claimant was responsible for arranging transportation and insurance matters while the Claimant's obligation to notify shipping and insurance was neither related to the Respondent's performance of its contractual obligations nor necessary condition for the Respondent to issue letters of credit. In fact, the Claimant had repeatedly notified the Respondent that the goods were ready and the shipment could be arranged in accordance with the contracts after the issuance of letters of credit.

7) It was groundless for the Respondent to assert that the contracts were unfair based on its subjective speculation. The three contracts were signed on the basis of equal negotiation between the two parties. The rights and obligations of the two parties were equal. The Respondent had also failed to point out any specific contract term which was unfair or unilaterally beneficial.

The Respondent submitted further that:

1) The Hong Kong company could not declare as the Claimant's agent by itself. The contracts could only come into effect after being confirmed by the Claimant.

2) The Order Confirmation Sheets were only order intention. It was very clear that there were contents on the back of the Sheets, but the Hong Kong company had never notified thereof, so they were only incomplete order intention.

3) The Claimant, as well as the Hong Kong company, had neither proof of urging the Respondent nor any loss.

II The Tribunal's Opinions

1. The Applicable Law

The Claimant claims that the applicable law of the disputed contract shall be CISG (hereinafter referred to as the Convention) while the Respondent deems that the tribunal shall arbitrate in accordance with the applicable law agreed by the parties, i.e. Chinatex's general terms and conditions governing purchase of wool and wooltops dated 1/7/90 which is the ground of arbitration and the parties' true intention. The tribunal notes that the parties agreed in the Special Clauses in the three contracts of this case, i.e. the three Order Confirmation Sheets that '[A]ll other terms and conditions as per Chinatex's general terms and conditions governing purchase of wool and wooltops dated 1/7 / 90' . The tribunal holds that, according to the above agreement, the parties have expressly incorporated Chinatex's general terms and conditions governing purchase of wool and wooltops dated July 1, 1990 in this case as the transaction terms and conditions in addition to those stated in the contracts involved in this case. However, Chinatex's general terms and conditions governing purchase of wool and wooltops dated July 1, 1990 is neither a bilateral treaty between the two nations involved nor a law formulated or recognized by the Chinese legislature. Obviously, there is no provision on the applicable law in either the contracts involved in this case or Chinatex's general terms and conditions governing purchase of wool and wooltops dated July 1, 1990. The tribunal finds through investigation that Australia, i.e. the country in which the Claimant is located and China, i.e., the country in which the Respondent is located are both Contracting Partiesof the Convention. Therefore, the arbitral tribunal holds

that, in accordance with the Convention obligations assumed by the two countries, the Convention shall be the applicable law for the settlement of disputes arising out of the contracts involved in the case since the parties have not ruled out the application of the Convention. As to matters not covered by the Convention, the law of the People's Republic of China shall be applied in accordance with the most significant relationship principle since the buyer's country and the arbitration place are both in China.

2. The Validity of The Contracts Involved in This Case

The Respondent asserts that there is no contractual relationship between the two parties while the Respondent only signed incomplete order confirmation with the Hong Kong company considering itself the Claimant's agent. The Hong Kong company has no authorization and failed to notify the Respondent of the content on the back of the Order Confirmation Sheets. The Claimant argues that the three Order Confirmation Sheets could constitute a valid offer with clear terms of quantity, price, shipment and payment method. The Respondent's acceptance of the offer through its legal representative's signing of the three Sheets constituted a valid acceptance. As per Article 23 of the Convention, the three contracts were concluded when the acceptance became effective. Concerning the effectiveness of its authorization, the Claimant recognizes the agent's behaviour. The terms on the back of the contracts would not affect the contract conclusion at all.

The tribunal finds the following facts through hearing.

On March 5, 2003, the Hong Kong company considering itself the Claimant's agent and the Respondent signed the following three Order Confirmation Sheets, i.e. the contracts involved in this case.

The three contracts all contain Special Clauses and Remarks. It is stated in the Remarks '[P]lease note that in this transaction, we are acting as Agent for the Seller on the general terms and conditions as specified on the back of this ORDER CONFIRMATION SHEET'.

The signature section at the bottom of the contracts contains a clear statement that the Hong Kong company as the Seller's agent with the agent's representative's signature as well as the statement '[W]e have accepted' with the signature of the Buyer's representative B.

During the hearing, the Respondent confirmed the authenticity of the signature of B as the signatory of the buyer on the above three contracts, and B was the general manager of the Respondent.

The tribunal notes that the general terms and conditions listed on the back of the contracts involved in this case include the clear statement that the Seller's signatory had received the order as the Seller's agent, the obligations and responsibilities of the Seller could not be passed on to the agent, and the force majeure clauses. During the hearing, the Claimant, as the Seller, confirmed it had signed the contracts through its agent and authorized the agent thereof, and acknowledged that the back of the contracts was not faxed to the buyer, i.e. the Respondent.

Article 14(1) of the Convention stipulates that '[A] proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price'. Article 18(2) there of stipulates that '[A]n acceptance of an offer becomes effective at the moment the indication of

assent reaches the offeror'. Article 23 thereof 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'.

According to the above facts, the three Order Confirmation Sheets signed by the Claimant's agent with clear description, specifications, quantity, price, shipment and payment method of the goods constituted a valid offer after being signed by the Claimant as per Article 14(1) of the Convention. B, the general manager of the Respondent signed the three Order Confirmation Sheets constituting a valid offer as the buyer, clearly stated '[W]e have accepted', and then faxed them to the Hong Kong company representing the Seller which confirmed receipt thereof. The tribunal deems the act of the Respondent signing the three Order Confirmation Sheets constituting a valid offer as an acceptance. As per Article 18 (2) of the Convention, the Respondent sent the acceptance by faxing it to the Claimant's agent, i.e. the offeror, and the acceptance became effective when reaching the offeror. Meanwhile, according to Article 23 of the Convention, the three Order Confirmation Sheets were concluded when the acceptance became effective, i.e. when the Respondent signed and faxed them to the Claimant's agent. Therefore, the tribunal does not support the Respondent's claim that there is no contractual relationship between the two parties.

Concerning the authorization of the Claimant's agent, the tribunal finds that the contracts involved in this case clearly state the Hong Kong company as the Claimant's agent, and deems the Claimant's acts during the contract performance such as directly urging the Respondent to issue letters of credit are confirmation of the identity of the Hong Kong company as its agent. Furthermore, the Claimant clearly recognized the authorization of its agent during the hearing. Therefore, the tribunal holds that, in accordance with the general civil agency principles, an agent could be authorized in

writing or orally. An agent obtaining no written or even any prior authorization can still act effectively on behalf of the principal so long as the latter recognizes or agrees with such act.

The Claimant does not deny that the Respondent has not been informed of the contents on the back of the contracts. The tribunal notes that the contents on the back of the contracts are agency and force majeure clauses. The Claimant should have informed the Respondent thereof by fax or other means when signing the contracts. It's the Claimant's fault for not doing so. However, on the face of the contracts, it is mentioned at the beginning that '... the sales contract has been consummated between the buyer and the Seller on the terms and conditions on the face and back of this order confirmation sheet', and at the end that 'we act as the Seller's agent in accordance with the general terms and conditions listed on the back in this transaction'. Obviously, the terms and conditions on the back of the contracts are mentioned on the face thereof. If the Respondent considered the back side clauses so important then, it could have requested the Claimant to inform it there of by fax or other means before deciding to sign the contracts. There is no evidence that the Respondent has so requested, which turns to be the Respondent's negligence. However, neither the Claimant's fault nor the Respondent's negligence could affect the effective conclusion of the contracts involved in this case.

The tribunal also notes the difference between the Chinese translation of the Order Confirmation Sheets submitted by the Claimant and that by the Respondent, mainly in the first paragraph. The tribunal holds that the English version shall prevail because the signed contracts are in English. The first paragraph of the Order Confirmation Sheets in English states that '[W]e hereby confirmed that we have received on behalf of the Seller that under mentioned order from you as the buyer and the sales contract has been consummated between the buyer and the Seller on the terms and conditions on

the face and back of the order confirmation sheet', which indicates that the Seller has confirmed its receipt of the buyer's order and the parties have reached the sales contracts. Therefore, the Order Confirmation Sheets would have no contractual effect if the buyer refused to sign after the Seller or its agent had signed them but were concluded as the sales contracts since the buyer agreed and signed them. Furthermore, the tribunal deems that the Order Confirmation Sheets would have no contractual effect and need no actual performance if the Special Clauses had clearly stated that 'this Order Confirmation Sheet is only an agreement of intent. It has no binding force on both parties unless the parties sign another formal sales contract'. If so, the Order Confirmation Sheets would have no contractual effect and need no actual performance. However, there is no such statement in the Special Clauses of the Order Confirmation Sheets.

In addition, the Respondent submits Australia-New Zealand-China Model Wool Contract (2000) to the tribunal and asserted in the hearing that the parties should have followed the Model Contract. The tribunal deems that the Model Contract is only a template drafted by relevant Chinese entities for the promotion of Chinese wool trade with Australia and New Zealand. It is not mandatory but optional for transaction parties. A wool contract not following the Model Contract shall not be deemed as invalid.

3. The Contract Performance

The Claimant alleges that it prepared goods according to the contracts and repeatedly urged the Respondent to issue letters of credit which should be issued one month before shipment, but the Respondent refused to do so on various excuses.

The Respondent argues it could not perform the contracts due to the incapability of issuing letters of credits without the import or export permit. It has never received any letter from the Claimant urging it to issue letters of credit while the Claimant should

have only prepared goods after the issuance of letters of credit. The Claimant breached the contracts since it had neither prepared goods nor notified the Respondent of the shipment including the vessel name, shipment date, etc.

The tribunal finds through hearing that:

1) The payment term of the contracts involved in this case stipulates an irrevocable documentary letter of credit shall be opened by telex with the Claimant as the beneficiary one month prior to shipment.

2) On June 2003, the Claimant sent a fax to the Respondent stating that 'we hereby notify you that the above contract goods are ready for shipment. However, it is a pity that we have not received the relevant letters of credit as stipulated in the contracts before the shipping arrangement. We would appreciate it if you could issue letters of credit soon. Waiting for your good news'.

The Claimant provided the local telecommunication company's charging record for its fax to the Respondent's fax number ×××××××× on the same day. The record shows the duration was 31 seconds. The Respondent denied receiving the fax in the cross-examination.

3) On August 21, 2003, the Claimant sent a fax to the Respondent stating that' [A]fter sending you the fax on June 18, 2003, our Shanghai office staff has repeatedly urged you to issue letters of credit for the above-mentioned contract shipments but informed us of receiving no letter of credit for the shipments in accordance with the contracts. We hereby notify you that we will hire a lawyer to represent us in arbitration proceedings and related legal procedures, unless the letters of credit for the above contracts reach our office by August 30, 2003. I hope to hear from you soon'

The Claimant provided the local telecommunication company's charging record for its fax to the Respondent's fax number ××××××× at 9:47 am on the same day. The record shows the duration was 40 seconds. The Respondent denied receiving the fax in the cross-examination.

4) The Claimant also submitted multiple proofs of wool inventory in a warehouse which is a storage company. The Respondent doubted the existence of this warehouse, the authenticity of the warehouse proofs and the data therein in the cross-examination and requested further investigation and verification.

As stated in the above tribunal's opinion, the contracts involved in this case are valid and shall bind both parties. The payment term of the contracts clearly states that the buyer shall 'open an irrevocable documentary credit by telex one month before shipment'. The Respondent's statement 'we have accepted' and signature on the contracts indicate it has expressly agreed to be bound by the letter of credit term and other contractual terms. The tribunal denies the Respondent's allegation that it could not perform the contracts without the import or export permit and deems its failure to issue letters of credit constitute breach of contract. In normal practice, the Respondent could have issued letters of credit in certain appropriate way.

Concerning the Respondent's denial of receiving the Claimant's fax requesting the issuance of letters of credit, the tribunal admits the Claimant's evidence on sending fax to the Respondent on June 18, 2003 and August 21, 2003, i.e. the Claimant's Annex 5, through analysis of the charging record containing the fax time, the telephone / fax number, and the duration, etc. The Respondent further argued that the Claimant could not be relieved from the responsibility of breaching the contracts first without notifying the shipment date and vessel name 'even if the tribunal mistakenly believes that the

Claimant sent the fax.' In fact, the tribunal's admission of the Claimant's evidence is based on the facts instead of misunderstanding.

In the performance of an international sales contract, the buyer's obligation to issue a letter of credit is not conditional on whether the Seller has urged it to do so. The buyer's failure to issue a letter of credit in accordance with the contract constitutes a serious breach of contract. The price term of the contracts involved in this case is CIF. According to international trade practice, the Claimant's obligation is to give the Respondent sufficient notice of the delivery of goods so that the Respondent can take usual necessary measures for receiving the goods.

In this case, when the Respondent's failure to issue letters of credit constitutes anticipatory breach of contract, the Claimant, as the Seller, could have chosen to urge the Respondent to issue letters of credit and reschedule the shipment after receiving them, or to terminate the contracts. It was impossible for the Claimant to arrange the shipment according to the contracts after the Respondent had breached the contracts for not issuing letters of credit. Thus, the Claimant did not and could not notify the Respondent of the shipment date and vessel name before the shipping time stated in the contracts. The Claimant has not breached the contracts and shall bear no liability therefor.

The tribunal also notes that Article 7 of Chinatex's general terms and conditions governing purchase of wool and wooltops dated July 1, 1990 stipulates that 'the Seller under C & F or CIF shall notify the buyer by telegram or telex 15 days before shipment of the vessel name, nationality, age, shipment date and can only load onboard after obtaining the buyer's permission'. The tribunal deems that it is actually impossible to load the ship under the contract schedule since the buyer fails to issue letters of credit one month before shipment according to the contracts. Thus, the Seller's obligation

to give notice 15 days before shipment becomes uncertain or can only be performed after the parties agree on a new shipping schedule. The Claimant has not breached the contracts for not notifying the Respondent of the vessel name and shipment date 15 days in advance and shall assume no liability therefor.

The Respondent doubted the Claimant's evidence on the wool inventory and requested 60 days for further investigation and verification. However, the Respondent failed to submit a timely opinion within this 60-day period. And, the Respondent submits no detailed explanation or specific opinion of its investigation and verification even within the time limit for the last submission set by the tribunal after the last oral hearing. Therefore, the Respondent's objection thereto shall not be sustained. On the other hand, the tribunal deems it unnecessary to review and admit the Claimant's evidence on the wool inventory since the Claimant's claims could be supported on ground other than such evidence which is mentioned in the following section.

4. The Claimant's Claims

The Claimant requests the Respondent to compensate for its loss due to the difference between the contract price and the market price at the time of the Respondent's fundamental breach, its loss of interest thereon, and its lawyers' fees and other costs incurred for this case.

The Claimant alleges that August 30, 2003 is the final deadline for performance and the Respondent's failure to issue letters of credit therebefore constitutes a fundamental breach of the contracts. The Respondent argues that the Claimant could have suffered no loss since it should not have purchased materials for stocking when the Respondent had not issued letters of credit one month before shipment.

Article 61(1) of the Convention states that '[I]f the buyer fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in article 62 to 65; (b) claim damages as provided in articles 74 to 77'. Article 76 stipulates that '[I]f the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74'.

According to the above provisions, the tribunal holds that the Respondent's failure to perform the buyer's obligation of issuing letters of credit as per the contracts and within the reasonable time given by the Claimant constitutes a fundamental breach of contract while the Claimant is entitled claim damages. According to the Claimant's statement during the oral hearings, the Claimant does not resell the goods under the contract and sent a letter to the Respondent on November 12, 2003, declaring the termination of the contracts. Therefore, according to Article 76 of the Convention, the Claimant can obtain the difference between the contract price and the market price at the time of the Respondent's fundamental breach as compensation. The tribunal rejects the Respondent's view that the Claimant could have suffered no loss when the Respondent failed to issue letters of credit one month before shipment.

Based on the Claimant's evidence, the tribunal confirms loss due to the difference between the contract price and the market price at the time of the Respondent's fundamental breach as approximately USD800,000.

Regarding the loss of interest, the tribunal deems the Claimant suffers no such loss since the above amount due from the Respondent is damages for breach of contract but not payment in arrears while such amount is fixed by this award only. Therefore, the tribunal

does not support the Claimant's request for such loss.

Regarding the Claimant's costs incurred for this case, the tribunal considers it reasonable for the Respondent to compensate the Claimant USD 4,000 for its lawyers' fees and other costs since its claims are only partially supported.

5. The Arbitration Fees

The tribunal decides that the Claimant and the Respondent shall bear 20% and 80% thereof respectively.

Case 2 2006 Water Pump Case

I The Merits of the Case[1]

Acting as agent of import for Beijing a Chinese Company ("Company C"), the Claimant entered into a Sale-Purchase Contract with the Respondent on 23 August 2004.

The terms and conditions of the Sale-Purchase Contract are as follows.

1) Goods. the Claimant shall purchase eight water pumps from the Respondent;

2) Price. The total price shall be $ 580,000, CIF Tianjin New Port;

3) Payment. 20% of the sales price shall be prepaid by the Claimant in T/T, while the remaining 80% shall be paid in the form of an irrevocable letter of credit at sight;

4) Delivery. The Respondent must arrange delivery within twenty weeks after the receipt of letter of credit;

5) Non-conformity. If the Claimant finds any lack of conformity of the goods received with the contract with respect to the quality, size or quantity, the Claimant may request the Respondent for repair, replacement or remedies for loss;

6) Arbitration. Clause 18, the Arbitration clause, stipulates that if any disputes arise

1 The English version of this case is quoted from the Pace CISG database and cited as http://cisgw3.law.pace.edu/cases/060803c1.html. The translation was made by Wang Minna, Tsinghua University representative in the "Fifteenth Annual Willem C. Vis International Commercial Arbitration Moot in 2008 (Counsel for both sides); Third Place in "Fifth Annual CIETAC International Commercial Arbitration Moot" in 2007 (Counsel for Respondent); The English translation was edited by Li Jie, Master degree of Law, Tsinghua University in Beijing, BA in Law, Tsinghua University, Beijing.

between the two parties with respect to their performance of this Contract, the disputes are in the jurisdiction of CIETAC;

7) Appendix. The Appendix deals with the materials of the main parts of the water pumps. According to the Appendix, the cover of pumps and electric motor, diffuser and intake chamber, must be made of GG25 Gray Cast-Iron.

During their performance, the two parties negotiated and agreed to extend the period for delivery and the Claimant made corresponding changes on the letter of credit.

the Respondent made the delivery on 27 March 2005. The goods arrived at Tianjin New Port on 14 April 2005.

Disputes arose with respect to the materials of the goods. The disputes could not be solved by negotiation; consequently, the Claimant submitted its application for arbitration.

The parties have disputes over the following Issues:

1) Texts of the Contract

The Respondent alleges that the copy of the Contract submitted by the Claimant as evidence for the arbitration is not the copy signed by the Respondent.

In August 2004, the Respondent signed each page including the signature page and then delivered that copy of the Contract to the Claimant. the Claimant notified the Respondent that it also signed that copy on 23 August 2004, but did not return that copy with the signature of the Claimant to the Respondent.

the Respondent alleges that there are seven differences between the copy submitted by

the Claimant and the copy signed by the Respondent. In the submitted copy, only the signature page has the Respondent's signature and the signatures on the other pages are missing. Accordingly, the Respondent alleges that the Claimant made unauthorized changes on the copy delivered by the Respondent and failed to notify the Respondent about that. the Respondent refuses to recognize any inconsistent part between the submitted copy and the copy signed by the Respondent.

In its Statement of Defense, the Respondent further alleges that 19 September 2004 is the date that two parties made changes to the contract, not the date on which the contract was made. The letter of credit can be used to evidence the validity of the contract. Since the letter of credit was issued on 15 September 2004, containing all material clauses of the contract, the Claimant's allegation that the contract was made on 19 September 2004 is not truthful.

In response to the Respondent's argument, the Claimant alleges that it had never made any change to any clause of the contract. The copy of contract provided by the Respondent was only signed by the Respondent. It is not the copy agreed and signed by both parties. Therefore, it is not legally binding. The fact is that the copy signed and delivered by the Respondent with signatures on each page was never recognized by the Claimant. Accordingly, the Claimant did not sign that copy which was later amended for several times. The final copy of the Contract provided by the Claimant to the tribunal was established as follows: upon the consensus reached by the Parties, the Claimant signed and sealed it firstly then mailed to the Respondent.

As for the letter of credit, the reason why the Claimant issued it before entering the Contract was due to the Claimant's trust in the Respondent and with the purpose to urge the Respondent to arrange the delivery as soon as possible. Since the Contract was

not concluded between two parties, in order to issue the 20% pre-paid letter of credit, the Claimant had asked the Respondent for the final copy. That indicates that the Contract was never concluded before the issuance of letter of credit.

2) Late Delivery

The Claimant alleges that the date of delivery is the 20th week after the receipt of the letter of credit, 2 February 2005.

On 15 January 2005, the Respondent e-mailed to the Claimant asking to postpone the delivery to the end of May. the Claimant refused this request and insisted on due delivery under the contract. the Respondent finally delivered the goods on 27 March 2005. The goods arrived at Tianjin New Port on 14 April 2005, fifty-three days later than the date required by contract.

The fact that the Claimant accepted the late delivery does not affect the Claimant's right to declare damages caused by the late delivery. A Chinese Court had ordered the Claimant to pay RMB 389,000 because of the delayed delivery. Since the late delivery was caused by the Respondent, the Claimant requires compensation of that amount.

In response to the Claimant's argument, the Respondent alleges that it never failed to perform its duty under the contract. On 6 February 2005, the Respondent asked the Claimant to postpone the delivery to April 2005 and extend the validity period of the letter of credit from 13 March 2005 to 16 May 2005. After negotiation, the Claimant agreed to postpone the delivery to 31 March 2005, and to extend the validity of the letter of credit to 21 April 2005. On 27 March 2005, the Respondent delivered the goods. This delivery date was within the required period by the Claimant,i.e. before 31 March 2005.

All the letters regarding negotiation and confirmation about the change of delivery became a new agreement under CISG and the Amendment to the Contract, made a substantial change regarding the delivery period. Since the Respondent delivered the goods within the final period agreed by both parties, there was no late delivery. Therefore, the Claimant's allegation of late delivery lacks both factual and legal basis.

3) Conformity of the good

a. Materials

The issue of materials of the equipment is the core issue in this case.

(a)the Claimant's position

The Claimant alleges that the materials of the pumps provided by the Respondent are not consistent with requirements of this Contract. According to the Contract, the cover for both the water pumps and their electric motors, diffusers and intake chambers, must be made of GG25 Gray Cast-Iron, in order to avoid erosive saline and alkaline. However, the cover for the water pumps and their electric motors, diffusers and intake chambers pumps provided by the Respondent are all made of Q235 Ordinary Carbon Steel, which fails to meet the requirement for prevention of erosion and cannot be used in Tianjin. This failure made the Claimant fail to perform its duty to its ultimate client and caused irreparable loss to the ultimate client.

The Respondent alleges that the two different materials are equal in their function and that the anti-erosion purpose could be achieved by an antiseptic process. However, the fact is that the Respondent delivered another material that is not required by the Contract. Even if the antiseptic process is taken, it can never affect the fact that the

Respondent failed to perform its duty under this Contract. Although the Respondent submitted an Expert Opinion, it is a comparison between Q235 and HT 250, which cannot be used to prove that Q235 equals GG25. Therefore, the Expert Opinion fails to be of any evidential value and should not be accepted as evidence.

During its performance of the contract, the Respondent never notified the Claimant of the fact that it had changed the materials without authorization. It was not until 9 June 2006 that the Respondent finally admitted that the materials delivered were not the materials required by the contract. Knowing that there were obvious inconsistencies, the Respondent provided the Claimant a Certificate that the materials were the same. After discovering the failure of materials, the Claimant tried to keep negotiating with the Respondent and several times insisted on the seriousness of such failure; however, the Respondent neither answered nor took any action. Since the goods could not be used for flood control any longer, the ultimate client, Tianjin GGG Municipal Company refused to accept the goods and terminated its contract with the Claimant. The reason for the ultimate client's insisting on GG25 material is that GG25 is the best material that proved to be useful according to its twenty-year experience. Since the ultimate client refused to take the goods, the Claimant failed its purpose for resale and was deprived of expected profits which could have been achieved under the Contract. According to CISG, the Respondent's failure amounts to a fundamental breach of the Contract.

It is true that the Claimant had discussed compromise proposals with the permission of the ultimate client. However, the proposals never admitted that the loss could be remedied by replacement. Since no agreement has been reached between the Respondent and the Claimant, any suggestion or measure proposed by the Claimant is only a unilateral allegation and not binding. In addition, the Claimant had exercised its utmost efforts to persuade the ultimate client to accept the goods. Therefore the Claimant had

already fulfilled its duty to mitigate the loss as required by CISG.

(b) the Respondent's position

The Respondent admits that part of the materials are made of Q235 Carbon-Steel, however, the steels have been antisepticized on the surface. In addition, according to the Expert Opinion "Opinion that Q235 Steel is equal to HT 250 Cast-Iron (which is equal to GG25) in anti-erosiveness -- in response to Mr.Zhao __ of ___ Law Firm, although the materials are not the ones required by the contract, there are no significant differences between them in the function of anti-erosiveness. The function could be further improved by different antisepticizing processes. Therefore, the Claimant's allegation that Q235 Carbon-Steel substantially fails to meet the anti-erosiveness purpose lacks theoretical foundation.

The Respondent later submitted another Expert Opinion "Opinion regarding the relationship between HT250 and GG25 -- in response to ___ Law Firm", testifying that HT 250 and GG25 are different names for the same material. HT 250 is the name used in China while GG 25 is referred to in Germany. the Respondent argues that the Expert Opinion has a close connection with this case, therefore is of great significance.

The Claimant alleges that the prices for the two materials differ greatly but fails to provide any supporting evidence. the Respondent alleges that even if the price of Q235 is lower than that of GG25, since the anti-erosiveness function is about the same, the purpose of flood control could be fulfilled and the purpose of the contract was not affected by the differences of materials.

The Respondent has tried its best to remedy and solve the dispute. On 15 June 2005, the Respondent proposed to extend the one-year Quality-Guarantee Period or return

the fee for the one-year Quality-Guarantee Period. In August 2005, the Respondent also proposed to replace part of the materials or to take metalation measures on the water pumps. However, the Claimant insisted on replacement of all of the goods. On 1 September 2005, the Claimant required the Respondent to either take metalation measures and pay an additional $300,000 or replace part of the equipment and pay $20,000 additionally. The proposal raised by the Claimant was neither legal nor reasonable and the Respondent refused.

b. Product inspection

(a) the Claimant's position

The Claimant argues that the Respondent failed to fulfill its duty to have the products inspected which is required by the Contract. The Inspection Report provided by Company F only deals with the general techniques and appearances. the Respondent failed to take any inspection that meets the standard of this Contract, failed to provide any inspection report or material certificate, therefore failed to prove that the goods that the Respondent provided meet the standards required by the Contract. After discovering the differences between the goods provided and goods purchased, the Claimant invited the China Commodity Inspection Bureau to make a re-inspection of the goods and notified the Respondent for its cooperation. However, the Respondent refused the Claimant's request for inspection.

After the receipt of the goods, the Claimant took an inspection of materials of some other parts such as the pump spindles and impellers and found that, here too, there were inconsistencies with the requirements of the Contract. According to the Contract, the materials of the pump spindle and impeller shall be stainless steel 1.4057 and duplex phase stainless steel 1.4517. However, the Respondent only provided ordinary stainless

steels. the Claimant called for re-inspection but the Respondent refused unilaterally.

(b) the Respondent's position

The Respondent argues that in the "Standard and Rules for Inspection and Acceptance" clause of this Contract, there is no requirement as to which institution or company may make the inspection. The Certificate report provided by the Respondent does not constitute a breach of contract. Additionally, the Respondent neither prevented nor obstructed the Claimant from exercising its right of re-inspection.

c. Samples and goods delivered

(a) the Claimant's position

The Claimant alleges that, the water pumps in the sample pictures provided by the Respondent were nice and exquisite, which satisfied the Claimant as the goods to be purchased. Following the numbers, illustrations and prices of those samples, the Claimant then entered into the Contract with the Respondent. The number references listed on the first page and illustrations provided on the sixth page of this Contract demonstrate that the water pumps are to be made in accordance with the sample provided by the Respondent, not the specific products that the Respondent designed and produced especially for the Claimant. There is no evidence to prove that the products numbered MF and AF were produced in accordance with the instructions from the Claimant. On the contrary, they are also standard products made by the Respondent, in accordance with the samples provided. Therefore, since there is no specific requirement in the Contract, the Claimant reasonably believed that the Respondent would produce the goods in accordance with the standards set forth in the Product Description Catalogue. The pictures and description in the sample Product Description Catalogue which was

shown by the Respondent to the Claimant, are binding upon the unambiguity of this Contract.

The Claimant's requirements regarding the quality and material of the water pump originated from the requirement of the ultimate client and all these requirements are exactly the same as the bidding document between the Claimant and ultimate client. The fundamental reason that Tianjin No. 2 Intermediate People's Court ordered that the contract be terminated is that the materials of equipment supplied by the Respondent are problematic.

(b) the Respondent's position

The Respondent argues that, the Contract in this case is not for a sale by sample but a Contract following the Claimant's instruction. Therefore, the sample pumps cannot be used to testify the quality of pumps delivered. The difference between them does not lead to the conclusion that the Respondent breached the Contract. The main reason why the court ruled the Respondent in breach of contract is that the requirements set out by the Claimant in the Contract are different from those in the bidding document.

d. Packaging

(a) the Claimant's position

The Claimant alleges that the packaging provided by the Respondent fails to meet the wooden packaging standards set out in the Contract.

(b) the Respondent's position

The Respondent rebuts that the standard in this Contract is that the packages must

be fit for long-distance shipping. The Contract further requires the Respondent to use none-wooden packaging. If the package is wooden, a certificate from the corresponding bureau in the exported country that the wooden packages have already been fumigated is needed. In this case, what the Respondent provided is the wooden-fumigated certificate. Therefore the packages meet the standards of this contract.

e. The cables

(a) the Claimant's position

The Claimant alleges that associated cables provided by the Respondent were made in Jiangsu, China. The cable is the main associated equipment of the goods, which must also meet the requirement of this Contract. However, the Respondent failed to notify the Claimant of the fact that the cables are not made in the USA. This was a breach of contract. the Respondent provided the model size, offtrack statistics several times in its e-mails to the Claimant as well as in the random documents. However, the cables received by the Claimant are substantially different from those statistics provided before, failing to match all the cable exit seal caps prepared for the cables and causing all the seal caps wasted finally.

(b) the Respondent's position

The Respondent rebuts that, neither in the contract nor in any of those documents between the two parties is there any agreement regarding the origin of cables. Since the cable is not the main part of the equipment, the Respondent is under no obligation to notify the Claimant of the specific fact that the cables are not made in the USA. In addition, in the e-mails the Claimant also emphasized several times that the associated equipment could be purchased from other countries. As a result, no matter whether the

cables are made in China or not, this does not constitute a breach of contract in this case.

f. Origin of electronic motor

(a) the Claimant's position

The Claimant alleges that an inspection shows that the electronic motors for the pumps delivered by the Respondent were made in China, not in the USA. The Certificate of Origin provided by the Respondent could only prove that the pump as a whole is an American product, yet fails to prove that the electronic motor, as the main part of the pump is also made in the USA. According to the Contract, such inconsistency constitutes a substantial breach of contract. Since the electronic motor could be purchased separately from the pump, a separate certificate of purchase is also required. the Claimant has raised this problem several times, however, the Respondent refused to provide any documents about the origin of the electronic motors. To make things worse, the Respondent removed the logo of the producer intentionally, hiding the instructions in order to conceal the country of origin.

(b) the Respondent's position

The Respondent rebuts that, the Certificate of Origin was issued in accordance with Clause 2 and Clause 10 Section 7 of the Contract, as well as following the American rules and the Rules of the People's Republic of China on the Origin of Export Goods. According to the rules, if accessories are imported from foreign countries but processed and assembled in the USA, resulting in the changes of the custom tariff category, then the USA could be marked as the Country of Origin. Consequently, the origin as the USA fulfills the requirement that the nationality of the pump producer shall be the USA.

In light of Clause 13 of this Contract, the Respondent must provide instructions for both water pumps and the accessories and the Respondent had already provided all the above documents. Since the electronic motor is an indispensable part of the water pump, there are no special instructions available.

The Certificate of Origin issued by the American DDD Chamber of Commerce meets the requirement of the Contract. According to international practice, the Certificate of Origin is issued by the Chamber of Commerce upon the certification of the producer's voucher of production. Therefore, the Certificate of Origin issued by American DDD Chamber of Commerce is completely legally binding and evidences the USA as Country of Origin without any doubt.

4) Written Agreement signed between Company C and Company D

(a) the Respondent's position

The Respondent alleges that on 15 June 2004, Company C and Company D entered an agreement which stipulates that both parties jointly submit a bid in the name of Company D. Later the bid was won and the two parties agreed to conclude the contract in the name of Company D, while the contract would actually be performed by Company C. The content of this agreement violates the compulsory regulations of the Tendering and Bidding Law of the People's Republic of China; therefore, it should be deemed invalid. Accordingly, the clause regarding deposit of performance is invalid and could not be used as the legal base for remedy. All the loss that COMPANY D alleges lacks sufficient legal base. As a result, the Respondent is not responsible for liquidated damages which the court ordered as to the ultimate client.

(b) the Claimant's position

According to the supplementary opinion submitted on 28 March, the cooperation agreement made between Company C and Company D neither equals a joint bidding nor constitutes any transfer. Therefore, the Tendering and Bidding Law is not applicable and the agreement between Company C and Company D is valid and binding. In addition, the "Sales and Purchase Contract" concluded between Company D and Tianjin GGG Municipal Company was pronounced valid by Tianjin No.2 Intermediate People's Court. The cooperation stipulated by the agreement between Company C and Company D with respect to the bid has been fulfilled with no objection from any third party. Consequently, the effect of the agreement should be recognized.

5) Fundamental breach

(a) the Claimant's position

the Claimant submits that, in light of Article 25 of CISG, the Respondent failed to deliver goods in conformity with the requirements of the Contract, which, obviously breached the agreement between the parties and deprived the Claimant of what it was entitled to expect under the Contract. Because of the refusal of the ultimate client, the Claimant has suffered a great loss and its purpose for this Contract failed. Therefore, there is a fundamental breach of contract.

It may be possible that the equipment with another material provided by the Respondent is workable. However, since more than 80% of the materials have suffered a complete change, the pumps provided can no longer be the ones the Claimant needs. On one side, the Respondent admits that the change of materials is against the Contract. On the other side, the Respondent refused to arrange a replacement, finally resulting in the refusal of the ultimate client. Therefore, it is the Respondent who should take full responsibility for the failure of contract, not the Claimant. As for any proposals raised by the

Respondent, although they are unreasonable, the Claimant has never missed any chance of negotiation. To mitigate the loss, the Claimant has also actively negotiated with the ultimate client for a better solution. What the Respondent did constitutes a fundamental breach of the Contract.

(b) the Respondent's position

The purpose of this contract is to provide equipment with the function of anti-erosiveness in an erosive environment. Although the materials provided are different from the materials ordered, the function of anti-erosiveness is of no difference; it is sufficiently qualified to work in rain with seawater content. Therefore, the purpose of this contract is fulfilled. According to the Claimant's logic, a presumption that the Respondent is expected to understand that the water pumps are to be used in the sea water could be drawn from the words "rain water with sea water content" under the "Working Conditions" clause in the Contract. However, it is noted that rain water with sea water is totally different from a pure sea water environment, while the erosivity of the latter is much higher than the former one. If the engineers of the Respondent had knowledge that the water pumps were to be used in the seawater, they would have had suggested that the Claimant adopt a kind of stainless steel material with the greatest anti-erosiveness function.

Since it is remediable as to the materials, there is no fundamental breach on the Respondent's side. The ultimate client's refusal is due to the fact that the water pumps the Claimant ordered in this contract are different from the ones required by the bidding document. As to the differences in materials, the Respondent proposed several remedial measures but they were refused by the Claimant. In light of Article 77 of CISG, while other parts of the equipment meet the requirement of the contract and the equipment

itself could work properly to fulfill the purpose of the contract, the Claimant is not authorized to demand replacement for all the equipment. the Claimant's failure to perform its duty of mitigating the loss makes itself responsible.

6) Foreseeability of the loss

(a) the Respondent's position

The Respondent alleges that both the Claimant and Company Care new clients to it, hence the Respondent had no chance to learn that the ultimate client is GGG, nor did the Respondent know that Company D was also involved in this case. As a result, the loss Company D suffered because of GGG's refusal of the goods is a loss that could not have been foreseen by the Respondent and the Respondent is not responsible for such loss.

The Claimant submitted the evidence of three invitation letters sent by the Respondent to three engineers alleging that these letters prove that the Respondent clearly knew that GGG was the ultimate client of the Contract. However, the letters were sent at the request of the Claimant to help the engineers with their visa applications. The purpose of providing those letters was to cooperate with the Claimant. This does not lead to the presumption that the Respondent knew the ultimate client for those water pumps.

The Claimant also submitted a video tape recording that both the Claimant and the ultimate client visited the Respondent's plant. the Respondent calls attention to the fact that this visit was in December 2004, after the contract had been concluded. Even if the Respondent had knowledge of the ultimate client at the time of that visit, such knowledge was not present when the contract was signed. Hence, the loss regarding the ultimate client could not have been reasonably foreseen.

(b) the Claimant's position

Company C and Company D cooperated with the ultimate client to purchase the equipment. Although it appears to be Company D which suffered a partial loss, in fact it was Company C which bore it all. During the whole process, Company C was responsible for purchasing equipment from the Claimant and selling it through Company D. Therefore, Company C. shall be entitled to claim the. Losses it suffered from the transaction of equipment disputed against the Respondent. Even if COMPANY D was not engaged in this transaction, COMPANY C would suffer the same loss, which was reasonably foreseeable by the Respondent.

The Respondent knew that the purpose for which the Claimant purchased the equipment was for bidding and that the Claimant could never be the ultimate client. It is the Claimant's position that the Respondent must have and could have reasonably foreseen that its breach of contract would be responsible for the loss suffered by the ultimate client, no matter whom the ultimate client will be and where they are.

7) Request of the Claimant

After amendment, the Claimant requests the Tribunal to order the Respondent to:

(a) Return RMB 4,807,573.60 that the Claimant has already paid for the purchase and to take all the unqualified water pumps back at the Respondent's own cost;

(b) Pay RMB 2,972,536.4 as the price difference between purchase and resale;

(c) Pay RMB 24,190,000 for the electronic cabinets and pitshafts purchased by the Claimant, the ownership of which will be transferred to the Respondent after the payment;

(d) Pay RMB 389,000 liquidated damages which the Claimant had paid to the ultimate client under the judgment of Tianjin No.2 Intermediate People's Court, plus RMB 48,910 for the first trial, RMB 50,000 for the attorneys and RMB 48,910 for the appeal;

(e) Pay RMB 2,334,033 for the loss of deposit for performance;

(f) Pay the storage fees and storage charge for enter/out warehouse that were incurred from 8 June 2005 to the date of payment. Up to the end of January 2006, the storage fee incurred was RMB 237,000 and the storage charge for enter/out warehouse was RMB 3,200;

(g) Pay RMB 400,000 as attorneys' fees incurred in this case;

(h) Pay the cost of arbitration.

2) Rebuttal to the Claimant's Request

In response to the Claimant's request, the Respondent makes the following statement of defense.

(a) Concerning the price differences between purchase and resale

The Claimant's request to take back all equipment is equal to a declaration to avoid the contract. However, the anti-erosiveness function of Q235 Carbon Steel is mainly the same as that of GG25 Gray Cast-Iron, therefore, no actual loss has been caused to the Claimant. The difference in materials does not constitute a fundamental breach of contract. Also, the Respondent was willing to proceed with an antisepticizing process as a remedial measure. Accordingly, the Claimant is not entitled to declare the Contract avoided and require the Respondent to take back the equipment.

When the Contract was concluded, the Respondent did not know that GGG was the ultimate client and did not recognize the relationship between COMPANY D and this current case. The only thing known was that COMPANY C would be the client of this equipment. The price difference between purchase and resale was not foreseeable.

(b) Concerning the associated equipment

COMPANY C had a contract with Company E for purchasing electronic controllers. That contract was signed on 15 April 2005, which is the period in which COMPANY C tried to cancel the letter of credit. COMPANY C failed to provide a reasonable explanation why it intended to avoid the contract with the Respondent while continuing to purchase associated accessories. In addition, the Claimant also fails to explain how the contract between COMPANY C and Company H affects this case. Furthermore, the loss for associated equipment was not foreseeable when the contract was concluded. Since the Claimant got the accessories that were needed, there was no loss suffered in this respect.

(c) The reason for the final user to reject the equipment was due to the fact that Claimant refused the reasonable remedial measure proposed by the Respondent. The liquidated damages, litigation cost and attorney fee compensated by the Claimant to the final user were unforeseeable to the Respondent and shall be borne by the Claimant itself.

(d) For the loss of deposit for performance, the Claimant did not any legal basis for requesting so. The agreement signed between Company C and Company D was invalid due to its violation of the mandatory legal rules. The Respondent was not aware of the relations between Company C and Company D, and such loss was unforeseeable to the Respondent.

(e) The goods arrived at the Chinese port on 14 April 2005 while the storage contract

was dated 8 June 2005. Therefore, it could not be proved that the goods under the storage contract was the same goods under the disputed contract.

(f) The Claimant shall bear its own attorney fee since the Respondent did not have a fundamental breach of the contract and it was the Claimant itself that resulted in the final user's rejection of the equipment.

II The Tribunal's Opinions

1. Applicable law

The parties did not choose any applicable law for dispute settlement in their contract. the Claimant is a Chinese entity and the Respondent is American. Since both China and the U.S. are members of CISG and both parties referred to relevant provisions of CISG in the oral hearings as well as written statements, the applicable law in this case shall be CISG.

With respect to the issues not regulated by CISG, the Tribunal may decide according to the proper rules for choice of law. The tribunal decides to apply the conflict of law rules in the arbitration seat, i.e. China. According to Article 145 of the "General Provisions of the Civil Law of the People's Republic of China" and Article 126 of the "Contract Law of the People's Republic of China," if the parties to a contract involving foreign interests have not made a choice of law, the law of the country to which the contract is most closely connected shall be applied. Since the locations of the buyer, places of the equipment installation and the location of the Tribunal are all within the territory of China, China is the country that has the closest connection with this contract. Therefore, in the absence of effective CISG Articles, Chinese domestic law that shall be the applicable law.

2. Validity of the Contract

This contract was concluded between the two parties willingly and freely. No conditions or time limitation have been attached to its validity. And both parties have capacities to sign the contract. In addition, in this case there does not exist any occasion listed from Article 52 to Article 54 of Chinese Contract Law, which makes the contract invalid or revocable. In fact, both parties have performed the contract and neither challenged the validity of this contract. Therefore, the Tribunal finds that the contract in this case is a valid contract based on party autonomy.

The parties have divergent views on the validity of the Agreement signed between COMPANY C and COMPANY D on 15 June 2004. However, because neither COMPANY C nor COMPANY D is a party to this case, the Tribunal has no jurisdiction over the validity of the agreement between them, although it may be of relevance to the performance of this Contract.

3. Texts of the Contract

The parties have disputes over the texts of the Contract. The Tribunal finds that the copy alleged effective by the Respondent does not contain the signature of the Claimant. Though the Respondent alleges that the Claimant signed this copy on 23 August 2004, the Respondent failed to provide evidence to support this allegation.

To the contrary, concerning the signature of the Respondent in the copy submitted by the Claimant which was dated 19 September 2004, the Respondent has never challenged its Authenticity, but only alleges that the two parties once made changes on this copy on 19 September 2004. The Tribunal finds that, even if the real contract is the copy signed on 23 August 2004 as the Respondent alleges, the copy signed by both parties on 19

September 2004 is a newer version which is binding on the two parties.

The tribunal noticed that, the Claimant submitted the Evidence Exhibit No. 5, the copy of an e-mail sent by the Respondent to the Claimant at 1:40 a.m. on 15 September 2004. In that e-mail, the content of the Contract was changed, such as modifying the new Quality Guarantee Period as "18 months from the date of shipment or 3,000 hours operation whichever comes first." This modification is consistent with the copy submitted by the Claimant, not by the Respondent. It also indicates that the Respondent has participated in the negotiation and modification process of the contract and made a final agreement based on party autonomy on 19 September 2005.

In addition, the Tribunal is of the opinion that it may be possible to issue a letter of credit before a contract is concluded. Accordingly, the Respondent's argument that the time to conclude the contract must be prior to the issuance of a letter of credit which was dated 15 September 2004 cannot be supported.

To conclude, the Tribunal holds that the copy dated 19 September 2004, which was submitted by the Claimant, is the Contract binding on the two parties in this case.

4. Late delivery

The time limit for delivery is within twenty weeks after the receipt of the letter of credit, that is, before 2 February 2005. According to the e-mails between the Claimant and the Respondent dated 5 January 2005 and 17 February 2005, on 5 January 2005, the Respondent asked to postpone the delivery, but the Claimant refused since the equipment must be made available for the rainy season. After negotiation, the parties agreed to arrange the delivery before the end of March 2005 and extend the validity period of the letter of credit to 21 April 2005. the Respondent finally delivered the goods

on 27 March 2005, within the newly negotiated time for delivery. Both parties agree on this fact.

The Tribunal notes that during their negotiation for rescheduling the delivery, the Claimant once raised the issue of compensation for loss caused by late delivery, but there was no consent to this.

The Claimant argues that its acceptance of late delivery does not deprive it of the right to claim compensation from the Respondent, which was the RMB 389,000 of liquidated damages paid to the ultimate client pursuant to the court's judgment. The Tribunal will determine whether the Respondent should be responsible for this part of the compensation in the following text.

5. Materials

The problem of the materials of the water pumps is the core issue in this case. According to the Claimant's submission, the materials provided are not the materials required by the Contract. Under the Contract, the cover for both the water pumps and their electric motors, diffusers and intake chambers, must be made of GG25 Gray Cast-Iron, while what the Respondent provided were all made of Q235 Ordinary Carbon Steel. the Claimant alleges that this fails to meet the purpose of erosiveness prevention. the Respondent agrees with the fact that it changed the materials, yet argues that the anti-erosiveness function of Q235 and GG25 is about the same, and that the function could be better if an antisepticizing process is taken.

It is the Tribunal's opinion that the difference in materials itself has already constituted a breach of contract. As to the issue of fundamental breach, further evidence shall be checked regarding the degree of difference, the agreement about materials and the

relationship between materials and the purpose of this contract.

The Respondent submitted a document with the title "Expert Opinion that Q235 Steel is equal to HT 250 Cast-Iron (which equals to GG25) in anti-erosiveness" -- in response to Mrs. Zhao __ of ___ Law Firm". The expert opinion states that it is very complicated to evaluate the difference in anti-erosiveness function between Q235 Steel and HT 250 Cast-Iron. Furthermore, the expert opinion also points out that the corrosion rate for Q235 Steel and HT 250 Cast-Iron is about the same in the typical medium such as ordinary atmosphere, fresh water and sea water. The Tribunal notices that the expert opinion claims that Q235 Steel is equal to HT 250 Cast-Iron. Later, in another expert opinion with the title "Opinion regarding the relationship between HT250 and GG25" -- in response to ___ Law Firm, the expert states that both HT 250 and GG25 are names for Gray Cast-Iron: HT 250 is the name used in China while GG 25 is the name used in Germany and they share a similar chemical composition and mechanical structure. Therefore, GG25 is equivalent to HT250 in China. However, the Tribunal cannot draw the conclusion from the two expert opinions that HT 250 is GG25. Therefore, the Respondent's allegation that its breach of contract did not affect the purpose of contract cannot be supported.

The Tribunal has considered the evidence submitted by the Claimant, including the Letter of Authorization dated 21 April 2004 for the Respondent, the e-mail sent to COMPANY C by the Respondent on 13 September 2004 and the Invitation Letter. In addition, COMPANY C was also mentioned several times in the faxes between two parties. And they also sent copies of their relevant communication to COMPANY C. All the abovementioned evidence sufficiently indicates that the Respondent knew the role that COMPANY C played in this transaction, relevant information about COMPANY D as well as the fact that Tianjin GGG Municipal Co. Ltd. was the ultimate client.

Aware of the fact that the materials provided were not the materials required by the Contract, the Respondent still provided a Material Certificate stating that the water pumps are made of GG25 Grey Cast-Iron.

It is a fact agreed by both parties that the ultimate client refused to accept the goods. Before the refusal took place, the two parties once tried to negotiate on this dispute. the Respondent expressed its willingness to make remedies but refused to replace all unqualified equipment and disagreed with the compensation requirement. Because of the discrepancy between the parties and the missing of the rainy season, no agreement was reached.

The judgment issued by the Chinese Court holds that:

"Because the goods provided failed to meet the requirements in the bidding documents and contract and the equipment imported became unable to be used and could not be fixed or repaired anymore, the purpose of the contract failed."

Based on this finding, the ultimate client had the right to terminate its purchase contract with COMPANY D. This holding was confirmed by the Appellate Court. From the judgment, the Tribunal finds that the lack of conformity of materials was the main reason that the court supported the avoidance of contract.

It is the Tribunal's opinion that the purpose of the Contract at issue in this case, or the interests expected under this Contract, was that the Respondent deliver goods as agreed by both parties. This was to enable the Claimant to fulfill its obligation with its client. Because of the lack of conformity of the goods, the ultimate client refused to accept them and sued COMPANY C for liquidated damages. In that sense, the purpose of this Contract has failed and the Claimant has been deprived of the profits it expected under

its contract with the Respondent. the Respondent failed to provide goods that are in conformity with the Contract, and this constituted a fundamental breach in accordance with Article 25 of CISG.

6. Other issues

Other issues include the origin of electronic motors and associated cables, the alleged lack of conformity with samples, the problem of wooden packages, and so on.

Since the lack of conformity of materials has already constituted a fundamental breach of the Contract, even had the Respondent performed all of its duties regarding the above matters the Respondent shall still be responsible for its fundamental breach of Contract.

The Tribunal delivers its findings on the above issues as follows:

1) Origin of electronic motors and associated cables

The Tribunal notes that:

a) The Country of Origin agreed in this Contract is the USA;

b) The agreement on the Certificate of Origin is that "the Producer shall provide the Certificate of Origin, and mark the USA as the country of Origin for both electronic motors as well as water pumps;"

c) The agreement in the attachment to the Contract is that "all major parts not made in USA should be declared to us, all labels and marks showing original maker should be removed;" and

d) In the e-mail to COMPANY C on 24 August 2004, the Respondent acknowledged

that there have been no water pumps which were completely made in the USA.

Based the above findings, it is the Tribunal's opinion that the Respondent did not breach the Contract by providing cables made in China. The first reason is that two parties did not mention the cables in their agreement on the Certificate of Origin. Second, the cables are not the main parts of water pumps in this Contract. Third, before the conclusion of the Contract, the Respondent had already notified the Claimant that not all parts of the goods were made in the USA.

As to the origin of the electronic motors, according to the Contract, the Respondent is obliged to provide electronic motors made in the USA. However, the Claimant cannot sufficiently prove that the electronic motors provided by the Respondent are not made in the USA. Therefore, the Tribunal finds that the Respondent did not breach its duty on the issue of the origin of electronic motors.

2) Conformity with the samples

It is the Tribunal's finding that, although the Respondent once showed the samples to the Claimant before they signed the Contract, neither in the Contract nor in the communications between two parties was there express agreement indicating that the Respondent should deliver goods in conformity with the samples. As a result, the Claimant's allegation on this issue is dismissed.

3) Packaging

It is the Tribunal's finding that since the Respondent provided the wooden-fumigated certificate issued by the American government, the packages for the goods meet the requirement of this Contract.

7. Relief

The Claimant's first request is that the Respondent should return the RMB 4,807,573.60 that the Claimant has already paid for the purchase and that the Respondent take back all the unqualified water pumps at its own cost.

Since the Respondent's failure to provide goods in conformity with the Contract constitutes a fundamental breach of the Contract, the Claimant may declare the Contract avoided and request return of the payment and goods, pursuant to Article 49(1) of CISG. Therefore, the Tribunal supports the Claimant's request that the Respondent return the payment and take back all the goods with the cooperation of the Claimant.

Article 74 of CISG states that:

"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such 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."

Therefore, in addition to returning the payment that the Claimant has already paid, the Respondent shall also compensate the Claimant the lost profits of COMPANY C, since the Claimant is COMPANY C's agent of import.

In this case, it was foreseeable that the electronic cabinets and pitshafts were purchased to complete the necessary installations for the equipment. COMPANY C purchased the

electronic cabinets and pitshafts on April 2005 which is around the time that the goods arrived at the port. In the evidence submitted by the Claimant there are the e-mails between the Claimant and the Respondent dated 18 April 2005 and 19 May 2005. the Claimant asked for a Material Certificate in those e-mails. This indicates that the Claimant had no idea about the lack of conformity of goods at that time. Accordingly, the Claimant's purchase of an electronic controller at that time did not breach the duty to mitigate the loss under Article 77 of CISG. As a result, the Tribunal supports the Claimant's third request that the Respondent shall pay RMB 24,190,000 for the electronic cabinets and pitshafts purchased by the Claimant, the ownership of which will be transferred to the Respondent after the payment.

In the same vein, pursuant to the principle under Article 74 of CISG, the Tribunal supports the Claimant's Sixth Request that the Respondent shall pay the storage fees and storage charge for enter/out warehouse which were directly caused by the Respondent's breach of contract. These are the fees and costs incurred from 8 June 2005 to the date that this award is made.

the Respondent further requests compensation for loss of expected profit as well as loss of deposit for performance (See the second and fifth request). As stated above, the Tribunal finds that the Respondent had known that Company G was the ultimate client and of the relationship between COMPANY C and COMPANY D before the conclusion of this contract. However, the amount that the Claimant requests is too high to be expected at the time the Respondent signed the contract. Therefore, the Claimant's second and fifth requests are not granted.

The Claimant's fourth request is for liquidated damages paid to the ultimate client under the judgment of Tianjin No.2 Intermediate People's Court and the fees for the first trial,

legal representatives and appeal. It is the Tribunal's opinion that, although that litigation is related to this case, it is between the ultimate client and COMPANY D. There is no necessary connection between COMPANY D's breach of that contract (did not provide Chinese Instructions, for example) and the Respondent's breach of this Contract. Hence, the Claimant's fourth request is also dismissed.

As to the arbitration fee, the Claimant shall bear 30% and the Respondent bears the remaining 70%. And the parties shall bear their own respective attorney fee.

Case 3 2007 Stearic Acid Case

I The Merits of the Case

The Claimant and the Respondent signed the Sales Contract No. D1 by fax on November 17, 2006 under which the Claimant (the Buyer, the tribunal's note) purchased 100 tons of stearic acid from the Respondent (the Seller, the tribunal's note) at the unit price of USD580/ton. The parties agreed on L/C at sight as the payment method, FOB Port D as the shipping condition and from late December 2006 to early January 2007 as the shipping period.

The Claimant issued the L/C through the issuing bank on November 28, 2006, after which the Respondent requested to adjust the unit price to USD615/ton due to the rising price of the goods and to amend the contract on December 5. The Claimant agreed and the parties re-signed No. D2 Sales Contract (the contract of this case, the tribunal's note) on December 8, 2006, agreeing: 1.100 tons of stearic acid at the unit price of USD600/ton FOB Port D should be delivered; 2.the shipping period should be late December 2006 till early January 2007; 3.the payment method was the Buyer should issue L/C at sight and pay the balance by T/T when receiving a copy of the B/L.

The Respondent requested again on January 8, 2007 to change the documents to be presented to the negotiation bank for the L/C payment from a full set of original B/L to a copy of the agent's certificate for receiving the goods and required the Claimant to make the advance payment on January 11, 2007. The Claimant refused the above requests and formally notified the Respondent of the place of delivery and the nominated vessel on January 11, 2007, but the Respondent failed to deliver the goods within the

specified period. The Claimant purchased the goods from another supplier on February 8, 2007 and initiated the arbitration on March 7, 2007.

1 The Claimant's Statement and Claims

1) The Validity of the Contract and the Respondent's Breach of Contract

The Claimant alleged No. D2 Sales Contract signed on December 8, 2006 was legal and valid. The Claimant had issued the L/C to fulfill its obligation. The Respondent's request to change the documents to be presented to the negotiation bank for the L/C payment from a full set of original B/L to a copy of the agent's certificate for receiving the goods on January 11, 2007 was a request for the amendment of the L/C and the contract. However, the contract was not amended since the Claimant never accepted such request and the Respondent should perform its delivery obligation in accordance with No. D2 Sales Contract. The Respondent had breached the contract fundamentally for its refusal to deliver the goods and should be liable therefor. The Claimant submitted the original D2 Sales Contract and the parties' correspondence regarding the amendment of the L/C to support its claims.

2) The Purchase of Goods in Replacement

The Claimant asserted it formally notified the Respondent of the delivery place and the nominated vessel on January 11, 2007 and urged the Respondent to deliver the goods on January 15 and 16, 2007. The Respondent's non-delivery resulted in the dead freight and severe losses of the Claimant.

The Claimant purchased the substitute industrial stearic acid from Company E on February 8, 2007 to avoid further losses. Thereafter, the Claimant notified the

Respondent to terminate the contract and requested it to compensate for the losses on March 14, 2007. The Claimant claimed the Respondent should compensate for the price difference loss and other losses according to CISG.

3) The Claimant's Claims

a) The Respondent shall compensate the Claimant for the price difference loss in the amount of approximately USD 10,000;

b) The Respondent shall compensate the Claimant for the dead freight in the amount of approximately USD10,000; and

c) The Respondent shall bear the arbitration fees of this case.

2. The Respondent's Defense

1) The Applicable Laws

The Respondent argued in its defense that the applicable laws of a contractual dispute should be the laws of the place where the contract was signed and performed according to the private international law rules, and asserted the applicable laws of this case should be the laws of the People's Republic of China since the contract of this case was signed and performed in the People's Republic of China while the parties had not agreed thereon.

2) The Validity of the Contract

The Respondent argued that the Claimant sent an offer to the Respondent on November 16, 2006 regarding the purchase of Type 200 industrial stearic acid in compliance with the national standards of the People's Republic of China, specifying the delivery

place, the unit price, the delivery period and L/C at sight as the payment method. The Respondent intended to start good cooperation with the Claimant and signed the Sales Contract on November 17, 2006. Thereafter, the parties negotiated and re-signed the Sales Contract on December 8, 2006 due to the sharp increase in the price of raw materials. The Respondent, based on its reasonable doubts about the Claimant's ability to pay the increased price and good faith, requested the Claimant to present relevant documents of its Beijing office so as to clear up the doubts, but the Claimant made no response. The Respondent got all the goods ready on January 8, 2007 and would arrange the delivery after the Claimant amended the L/C as requested. However, the parties could not reach agreement on the advance payment through various negotiations. The fact was not 'the Respondent requested for the amendment of the L/C and the contract unilaterally on January 11, 2007 while the Claimant never accepted' as alleged by the Claimant. Therefore, D2 Sales Contract signed by the parties had never come into force.

3) The Claimant's Purchase of Goods in Replacement

The Respondent argued the Claimant's purchase of goods in replacement was an invalid action since the Claimant's notice to declare the contract avoided on March 14, 2007 had never reached the Respondent. The Respondent also argued the Claimant failed to leave sufficient time for the Respondent's delivery since the delivery period provided in the contract was from the end of December 2006 to the beginning of January 2007. The Claimant had not notified the Respondent the estimated arrival time of the vessel was January 13 to 16, 2007 till mid-January 2007. Therefore, the Respondent should not compensate for the price difference loss and the dead freight.

The Respondent asserted the price difference loss claimed by the Claimant was the intentionally enlarged economic loss totally incompatible with 'purchase goods in

replacement in a reasonable way' since the quality of the industrial stearic acid the Claimant purchased from Company E and that of the Respondent's products were not of the same level while the former was off-grade. The Claimant had no factual or legal basis for its claim on the dead freight since it had not notified the Respondent thereof and the Respondent could not have foreseen such loss when signing the contract.

II The Tribunal's Opinions

1. The Applicable Laws

The parties have not agreed on the applicable laws of this case in No. D2 Sales Contract. CISG (hereinafter referred to as the Convention) shall be applied to the contractual dispute involved in this case since both China and Belgium where the parties' places of business are located are both the Contracting Parties thereof. Furthermore, the tribunal will apply the relevant provisions of the INCOTERMS 2000 published by International Chamber of Commerce according to the practice since the FOB price term is adopted in this case.

2. The Validity of No. D2 Sales Contract

Article 23 of the Convention stipulates '[A] contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention'. The Claimant sent the Respondent the offer for the purchase of stearic acid on November 16, 2006 and the parties reached agreement on the purchase of 100 tons of Type 200 stearic acid and signed No. D1 Sales Contract by fax on November 17, 2006, which actually confirmed the parties' contractual relationship. The Respondent requested to increase the price of the goods due to the rising price of raw materials on December 5, 2006 and the parties signed No. D2 Sales Contract by fax on December 8,

2006, through which No. D1 Sales Contract was amended. The tribunal finds No. D2 Sales Contract, i.e. the disputed contract of this case, formally concluded and valid as of December 8, 2006 since it is the expression of the parties' true intention while neither party objects to its authenticity and legality. The parties shall be bound by the contract and perform their respective obligations accordingly.

As to the amendment of L/C mentioned by the Respondent, the tribunal notes that the Respondent proposed to amend the L/C on January 8, 2007 but the Claimant made no commitment thereto. The amendment of L/C may constitute the amendment of the contract under certain situations in international trade, but such situation does not exist in this case. Furthermore, the normal performance of No. D2 Sales Contract shall not be influenced by whether the L/C has been amended. Therefore, the tribunal finds No. D2 Sales Contract valid and binding on both parties and rejects the Respondent's argument that the contract is invalid.

3. The Analysis of the Parties' Performance and the Respondent's Fundamental Breach of the Contract

1) The Claimant is the observing party since it has fulfilled its obligations.

In this case, the Claimant is the buyer under the obligation to issue the L/C. The tribunal, based on the parties' evidence, finds the Claimant has issued the L/C in accordance with the contract of this case, to which the Respondent has no objection. The tribunal, after examining the L/C issued by the Claimant, holds the Claimant had fulfilled its obligation to issue the L/C in accordance with the contract. Furthermore, the Claimant has the obligation to nominate a vessel to ship the goods from the loading port and notify the seller of the name of the vessel, the loading place and the specified delivery time under the INCOTERMS 2000 since the contract of this case provides FOB as the

shipping condition. The designated loading port of this case is Port D. The Claimant's Evidence 5 shows the Claimant's nominated vessel arrived at Port D on January 13, 2007 and the Claimant notified the Respondent of the vessel name, the loading date and the shipping agent by fax on January 11, 2007. The Respondent has no objection to the above evidence and ascertained facts. Therefore, the tribunal finds the Claimant is the observing party since it had fulfilled the contractual obligations of payment, vessel nomination and notification.

The tribunal notes the Respondent's argument that the Claimant's notification of the loading time was too late and finds: the parties signed the contract for the purchase of the stearic acid as early as November 17, 2006 and resigned the contract of this case on December 8, 2006 after the Claimant agreed to the Respondent's request for price increase. However, the Respondent requested again for the amendment of the L/C and the advance payment on January 8 and 11, 2007 and made no delivery after the Claimant refused such request. Moreover, the Respondent stated in its defense that it got the goods ready on January 8, 2007. The above facts show that the real reason for the Respondent's non-delivery is not the Claimant's loading notification on January 11 was too late but the Respondent intended to re-negotiate the contract conditions. Furthermore, the Respondent still had 5 days to prepare for the loading on January 16 after receiving the loading notification on January 11. The tribunal, considering the above, rejects the Respondent's argument that the Claimant's loading notification was too late.

2) The Respondent had fundamentally breached the contract due to its non-delivery.

The Respondent's main obligation under the contract of this case is to deliver the goods as the Seller. After the Claimant had fulfilled its obligation of issuing the L/

C and nominated the vessel, the Respondent was obliged to deliver the goods. The Respondent admits the fact that it had not delivered the goods. The tribunal, after reviewing the parties' emails around the delivery date, confirms the following facts. The Respondent, after signing the contract, requested the Claimant to amend the payment term in the contract and make the so-called advance payment before the delivery date. The Respondent stated in the email to the Claimant on January 11, 2007 that '[I] have transferred all my boss's meaning to you. Maybe you can persuade your boss to effect the prepayment, and then our factory can effect the shipment. Sorry about the present condition, you know, I have try my best'. The Claimant refused such request and urged the Respondent to deliver the goods repeatedly after the nominated vessel arrived at Port D but the Respondent made no delivery till the vessel departed. Regarding the advance payment asserted by the Respondent, the tribunal, after reviewing the contract, finds no contractual obligation of the Claimant to make the advance payment since the contract only provides the Claimant shall pay approximately USD60,000 by L/C and the balance after receiving a copy of the B/L. The tribunal, based on the above facts, holds the Respondent had fundamentally breached the contract for non-delivery and shall be liable therefor since it should have continued the performance in accordance with the contract after the Claimant had refused its amendment request.

4. The Claimant's Remedial Measure of Purchasing Goods in Replacement and Declaration of Contract Termination

As mentioned above, the Respondent had fundamentally breached the contract for non-delivery. Thus, the Claimant is entitled to declare the contract avoided, take corresponding remedial measures including purchasing goods in replacement and claim for damages according to Articles 45, 49 and 75 of the Convention.

The tribunal notes Article 26 of the Convention provides '[A] declaration of avoidance of the contract is effective only if made by notice to the other party' and Article 75 sets the precondition for the purchase of goods in replacement as 'the contract is avoided'. In this case, the Respondent argued the Claimant had never effectively declared the contract avoided and the alleged notice on March 14, 2007 had never reached the Respondent. The Claimant could not prove the way of sending the March 14 notice to the Respondent or the Respondent's receipt thereof. Therefore, one main issue of the parties' dispute is whether the Claimant was entitled to take remedial measures including purchasing goods in replacement when the Respondent had fundamentally breached the contract while the Claimant had not effectively declared the contract avoided.

The tribunal also notes that Article 26 of the Convention was a new article inserted therein when the 1964 Hague Convention, i.e. the uniform Law on the International Sale of Goods (ULIS), was amended. Under the original Hague Convention, as long as one party breached the contract, the contract would be terminated automatically with no need of the other party declaring the contract avoided, which may result in the breaching party's continuous performance of the contract without noticing the other party's termination of the contract and is clearly inappropriate. Article 26 was inserted in the Convention, providing '[A] declaration of avoidance of the contract is effective only if made by notice to the other party', so as to avoid the uncertainty of the continuous performance of the contract resulted from the automatic contract termination under the original Hague Convention. Obviously, the purpose of such provision is to protect the breaching party and make it aware of the performance status of the contract so as to decide whether to continue the performance or take other remedial measures such as stopping the shipment or returning the delivered goods to mitigate the losses caused by its default.

The tribunal, considering the relevant provisions of the Convention and the facts of this case, holds that the Respondent does not need to be protected by Article 26 due to the facts of its default. The relevant facts are as follows. The Respondent stated in the email on January 11 that it would deliver the goods only if the Claimant agreed to the advance payment. Furthermore, the Respondent, after receiving the delivery notice from the Claimant, showed no intention to deliver the goods when the vessel stayed in the port. The Respondent had shown no intention and made no delivery though being urged by the Claimant till the vessel departed on January 16. The Respondent, after breaching the contract, has never shown any intention to perform the contract. Thus, the Respondent's non-delivery fact is very clear while the non-performance status of the contract would not be affected no matter whether the Claimant sent the notice to declare the contract avoided or not. It was unnecessary for the Claimant to send such notice since it would not directly influence the parties' actual interests. The tribunal further considers purchasing goods in replacement was the only remedial measure for the Claimant to avoid further losses when the Respondent refused to deliver the goods since the Claimant, as a middleman in stearic acid trade, would resell the goods to a third party after obtaining them. If the Claimant's right to purchase goods in replacement were denied only because the Claimant had not met the formative requirement of 'notification', the Claimant would have been deprived of the right to effective remedy for its losses under the contract, which is against the Convention purpose of relief for observing parties in good faith.

Above all, the tribunal holds that, despite the Claimant's flaw in declaring the contract terminated, the Claimant shall enjoy all the rights stipulated by the Convention under the circumstance that the seller had fundamentally breached the contract including the right to purchase goods in replacement from a third party based on the legislative

purpose of the Convention and the fact of the Respondent's fundamental breach.

5. The Way of Purchasing Goods in Replacement and the Specification of the Goods

In this case, the Claimant purchased 100 tons of stearic acid from Company E at the unit price of USD710/ton which is USD95 higher than the original contract price and the total price of USD71,000 on February 8, 2007. The Respondent argued it should not compensate for the price difference loss due to the Claimant's unreasonable way of purchasing goods in replacement which were not of the same level as the goods under the contract and inconsistent with the international market price. In this regard, the tribunal, after reviewing the relevant evidence, finds that the goods in replacement and the goods under the contract of this case are both Type 200 industrial stearic acid with slight difference in the specification. The specification of the latter is fully within the scope of the national standards while that of the former is slightly different therefrom with most of the Type 200 standards met.

The tribunal, considering the above facts and the chemical characteristics of the products, i.e. it is difficult to have the same proportion of ingredients in all the products even in the production and sales of the same kind, holds that the goods in replacement purchased by the Claimant are identical to the goods under the contract in principle. The Respondent submitted the price of stearic acid it sold to other buyers at the end of 2006 and in January 2007 as evidence to prove the price of the goods in replacement was inconsistent with the international market price. The tribunal deems such evidence could not prove the unit price of USD710/ton of the goods in replacement is higher than the international market price in February 2007. Meanwhile, the tribunal holds the Claimant's purchase of goods in replacement is a reasonable act of mitigating losses since the Claimant purchased industrial stearic acid from Company E through legal and

normal channel while the goods delivered are basically in compliance with the national standards. The Claimant is entitled to recover the difference between the contract price and the price in the substitute transaction according to Article 75 of the Convention, so the tribunal supports the Claimant's first claim.

6. The Compensation for the Dead Freight

The dead freight paid by the Claimant as the consignor to the carrier on March 21, 2007 is the loss directly caused by the Respondent's breach of contract since the Respondent failed to deliver the goods within the specified time after the Claimant sent the delivery notice to inform the Respondent of the delivery time and the nominated vessel on January 11, 2007. The Respondent, as a company engaged in the import and export transaction of chemical products for long, should have foreseen the dead freight borne by the consignor if the goods were not delivered in time. Therefore, the tribunal rejects the argument '[T]he Claimant had no factual or legal basis for its claim on the dead freight since it had not notified the Respondent thereof and the Respondent could not have foreseen such loss when signing the contract'. The Respondent shall compensate the Claimant for the dead freight according to Article 74 of the Convention, so the tribunal supports the Claimant's second claim.

7. The Arbitration Fees

The losing party shall bear the arbitration fees according to the parties' agreement in the contract. Therefore, the Respondent shall bear all the arbitration fees of this case due to its default and the tribunals' support of all the Claimant's claims.

Case 4 2009 Printing Press Case

I The Merits of the Case

1. The Claimant's assertation in the Application for Arbitration

The Claimant, the Respondent and Company C, a third party (the buyer, as the agent of the end user) signed the contract of this case on September 26, 2002. Under the contract, the Respondent sold Company C one Model Q1 printing press manufactured by Company D in the US. The total contract price was USD 450,000 CIF China Port A. The payment terms and conditions were: 5% prepayment within 5 days after the contract was signed, 60% payment by L/C within 45 days after the contract was signed, 35% payment by T/T within 180 days after shipment of the goods. The warranty period was 12 months after the arrival of the goods. If there was any defect, damage or inconsistency of quality or nature with the contract during the warranty period, the buyer should entrust China Commodity Inspection Bureau (CCIB) to inspect the goods and claim for damages (including replacement) with the inspection certificate. The Respondent should bear all the costs incurred therefor. If the Respondent failed to reply within 20 days after receiving the notice of claim, the Respondent should be deemed as having accepted the claim. The Respondent should send an engineer to install and adjust the goods and train the Claimant's staff when the goods arrived (the training time was changed to one month before arrival).

The Claimant made the prepayment in accordance with the contract on October 8, 2002. The Claimant and the Respondent signed the agreement as the attachment to the contract on January 17, 2003. Under the agreement, the Respondent sold two parts

necessary for the operation of the printing press: a corona treatment device and a flip stand.

The Claimant, after signing the agreement, paid by L/C in accordance with the contract and the agreement (including 60% payment of the contract and the total price of the two parts under the agreement).

The Respondent delivered partial goods on April 29, 2003 with a delay of about four months. The goods arrived at a city of China on June 11, 2003 with four types (items) of parts missing, which was inspected by the local branch of China Commodities Inspection Corporation (CCIC). The inoperability of the equipment after installation was also confirmed by the representatives of both the Claimant and the Respondent.

The Respondent sent some missing parts and the parts unilaterally altered by the Respondent to the city of China by air on August 14 and 23, 2003. These parts were also inspected. According to the Quantity Certificate issued by the local CCIB, the following items specified in the contract were missing from the Respondent's delivery: 1) two sets of mortise and tenon crimping roller (one set delivered); 2) three sets of die cuttersroller. The delivered one set of mortise and tenon crimping roller was actually what the Respondent later called 'tenon roller cutters combined with flexible blade cutters'. The Respondent believed that the delivered one set of tenon roller cutters combined with flexible blade cutters could replace three sets of mortise and tenon crimping roller and three sets of die cuttersroller, totaling six sets, which was never recognized by the Claimant.

The equipment delivered by the Respondent, after being installed and adjusted with certain missing parts, could not run normally. The provincial Administration for Entry-Exit Inspection and Quarantine issued the Quality Certificate after inspection on April

18, 2004, stating the equipment as unqualified.

Furthermore, the Respondent failed to provide the Claimant with operational training in accordance with the supplementary agreement. The Claimant had claimed damages in writing since April 2004. The Respondent promised in writing to solve the three quality problems of the equipment in July 2004 but had not actually solved the problems till now. From 2004 to 2006, the Respondent requested the Claimant to pay within 180 days after shipment, the Claimant refused to make the final payment and requested the return or replacement of the goods since the printing press delivered by the Respondent was inconsistent with the contract in quantity, specifications and services and was unqualified.

The Respondent applied for arbitration by CIETAC in August 2006, claiming for the final payment and compensation for other losses. The Claimant should make the final payment of approximately USD 160,000 and bear the arbitration under the CIETAC award on June 28, 2007.

The Claimant claimed damages against the Respondent and declared the contract avoided (terminated) on July 17, 2006.

The Claimant asserted that the goods delivered by the Respondent was inconsistent with the contract and unqualified. The Respondent had not returned or replaced the goods, solved the quality or quantity problems or offered training services after the Claimant claimed damages in 2004. The Claimant had not been able to obtain the goods and related services that should have been obtained under the contract, which resulted in the non-realization of the purpose of the contract and unnecessity of continuing the performance. Therefore, the Claimant submitted the following claims.

1) The Claimant's termination of the Contract (i.e. declaring the contract avoided) should be confirmed valid;

2) The Respondent should return the Claimant's payment for the goods in the amount of approximatelyUSD330,000;

3) The Respondent should compensate the Claimant for the following losses.

a) Economic loss due to late performance of contract in the amount of approximately USD 30,000;

Calculation method: according to the contract, the Respondent shall deliver the goods within 90 days after receiving Claimant'sprepayment (i.e. before January 8, 2003), but the actual delivery date was April 29, 2003. It is calculated as per 0.05% of the total contract price per day, from January 9, 2003 to April 28, 2003, a total of 110 days.

b) Economic loss caused by the non-conformity of the goods (from April 29, 2003 to December 8, 2008), including the fund possession cost of approximately USD90,000 and the exchange rate losses of RMB470,000; and

c) The import agency fee, the L/C opening charges, serveicecharges, the customs declaration fee, the entry inspection and quarantine fee, the D/O fee, the freight, the insurance premium, the travel expense, the notarization fee and the legal fee paid by the Claimant for the goods of this case.

4) The Respondent should bear all the arbitration fees of this case.

2. The Respondent's argument in its Statement of Defense

One main claim of Claimant was to confirm that the Claimant's termination of the

contract (i.e. declaring the contract avoided) should be valid. The Claimant asserted the contract termination had the effects such as claims for restitution and damages. Therefore, the Claimant, based on its claim of 'termination of the contract (i.e. declaring the contract avoided)', requested the Respondent to return the payment and compensate for its losses.

The contract of this case had not been terminated and the Claimant had no right to declare the contract avoided according to law and the facts. Therefore, the Claimant's other claims should not be supported as well. The reasons were as follows.

1) The Respondent had fulfilled its delivery obligation.

The Respondent delivered the goods under the contract to the carrier on April 29, 2003 as shown in the Respondent's Evidence 3. According to the INCOTERM's interpretation on the terms of CIF, the Respondent fulfilled its main delivery obligation on April 29, 2003.

The Claimant alleged some parts missing including mortise and tenon crimping roller and die cuttersroller. In fact, mortise and tenon crimping roller and die cutters roller were removable molds for the large Model Q1 printing press. Without mortise and tenon crimping roller and die cuttersroller, the Model Q1 printing press could still print and complete a large number of printing operations. Furthermore, the Respondent delivered the substitute parts for mortise and tenon crimping roller and die cutters roller on August 21, 2003 which were more advanced and more valuable than the mortise and tenon crimping roller and die cutters roller specified in the attachment of the contract.

In fact, the Respondent had sent technicians to install and adjust the goods successively since at least June 2003, which showed the equipment was not unused due to the missing

parts after being delivered by the Respondent. According to the work report signed by Engineer E of the Respondent and Deputy General Manager F of the Claimant on December 2, 2003, the both parties performed the final test of the unwinding and die-cutting scrap parts and issued the report. That was the final work report after several tests the both parties performed on the Model Q1 printing press since the Claimant received the goods in June 2003. Engineer E of the Respondent had worked in the city for over 20 days. If there were still non-delivered goods, the parties should have recorded it in the report. The Claimant had never requested the Respondent to continue the delivery or make up the missing parts since 2004 or even since the Respondent had initiated the arbitration proceeding because the Respondent had fully performed its delivery obligation and the both parties had no dispute over the quantity of delivered goods.

2) The goods received by the Claimant could operate normally with no design or manufacturing defects.

The Claimant relied on the Quality Certificate issued by the provincial Administration for Entry-Exit Inspection and Quarantine on April 18, 2004 to allege the goods as unqualified. This evidence had the following serious problems.

a) No Design or Manufacturing Defects of the Goods

① The Inspection Time

The Quality Certificate clearly stated the inspection time as 'from August 2003 to April 18, 2004' which obviously contradicted with the facts supported by other evidence.

First, the Respondent reminded the Claimant in writing on October 23, 2003 of the payment of approximately USD160,000 within 180 days after shipment (i.e. October

29, 2003) in accordance with the contract. The Claimant replied on October 24, 2003, stating 'Do you need us to arrange the inspection by the Bureau of Technical Supervision for confirmation?'. It could be seen that the inspection had not been arranged in October 2003, which was clearly in contradiction with the statement that the inspection had been started in August 2003 in the Quality Certificate.

Second, the work report by both parties on December 2, 2003 showed that the goods were 'in good condition' after the Respondent had made debugged the problems raised by the Claimant. The report made during the inspection process, stating the goods were 'in good condition' was clearly in contradiction with the statement in the Quality Certificate as well.

The above contradiction showed the authenticity and legality of the Quality Certificate was suspectable.

② The So-called 'Design Defects'

The Quality Certificate stated the reason for all the malfunction as 'caused by the manufacturer's design defects'. In common sense, if there were design defects in the equipment, the same type equipment must have got the same design defects. It was impossible that the design defects only existed in one equipment. Dozens of Model Q1 printing press of the same model as the goods under the contract had been sold in China. However, no other users of Model Q1 printing press had claimed the 'design defects' up till now.

③ Non-compliance with the Regulations for the Implementation of the Law of the People's Republic of China on Import and Export Commodity Inspection

Article 18 of the Regulations for the Implementation of the Law of the People's Republic of China on Import and Export Commodity Inspection (No. 5 CCIB Order, effective as of October 23, 1992 and abolished on December 1, 2005) which was valid at the time of the inspection stipulates '[I]nspection institutions shall issue the notice of not allowing the installation and use of the import whole set of equipment and the materials thereof that have not passed the inspection'. However, the provincial Administration for Entry-Exit Inspection and Quarantine, after had inspected and assessed the goods as unqualified equipment, never issued the notice of not allowing the installation and use, for which the reason was the goods were not unqualified and the Claimant had been using the equipment to make a profit.

b) The Claimant's Continuous Use of the Goods

The Respondent found through investigation from March to October 2006 that the products printed by the Claimant could be purchased in the market including H Brand milk which was the second ranked product in the city's diary market and Q Brand yogurt which had a wide market coverage. It could be seen that the Claimant had been using the goods delivered by the Respondent to print a large number of products. Furthermore, the Claimant could print lots of other products by using other molds on the Model Q1 printing press which was for general purpose.

3) No Delay in the Respondent's Performance

The schedule for the parties' performance under the contract was as follows.

5% prepayment within 5 days after the contract was signed, 60% payment by irrevocable L/C with the Seller as the beneficiary within 45 days after the contract was signed, shipment within 90 days after receiving the prepayment, and 35% payment by T/T

within 180 days after shipment of the goods.

The actual performance of the contract was as follows.

The Claimant made the prepayment according to the contract on October 8, 2002 but failed to open the L/C for the 60% payment within 45 days after the contract was signed.

On January 17, 2003, the Claimant, as the buyer, signed the agreement with the Respondent, ordering two sets of devices respectively. The Claimant should open the L/C for the payment of approximately USD300,000 including the 60% payment which should have been paid within 45 days after the contract was signed and the payment under the agreement within 45 days before shipment. It was particularly emphasized in the agreement that the Respondent should try its best to deliver the ordered devices together with the printing press to the destination.

The Respondent delivered the goods to the carrier on April 29, 2003. However, the Claimant had not issued the L/C for the payment of approximately USD300,000, i.e. the 60% payment under the contract and the payment under the agreement, till May 13, 2003.

The above facts showed that there was no delay in the Respondent's performance. Instead, the Claimant made the overdue payment. The reasons were as follows.

First, the Claimant should open the L/C for the 60% payment within 45 days after the contract was signed while the Respondent should deliver the goods within 90 days upon receipt of prepayment under the contract, which showed the Respondent's delivery obligation was later than the Claimant's obligation to open the L/C.

Second, Article 3 of the agreement signed on January 17, 2003 provides that the Claimant should open the L/C for the payment for the newly ordered devices and the 60% payment under the contract 'within 45 days before shipment', which further proved the Respondent's delivery should be later than the Claimant's opening L/C.

Article 67 of the Contract Law of People's Republica of China (hereinafter referred to as the Contarct Law) stipulates '[W]here both parties have obligations toward each other and there is an order of priority in respect of the performance, and the party who is to perform first fails to perform, the party who is to perform later has the right to reject the other party's demand for performance'. It was obvious that the Claimant and the Respondent had obligations toward each other. As to the two contractual obligations of opening L/C and shipping goods, the Claimant should perform first while the Respondent was to perform subsequently. The Respondent could surely reject the delivery of goods as the party performing subsequently before the Claimant opened L/C according to the contract and the agreement as per Article 67 of the Contract Law. Thus, the Respondent never delayed the performance. In this case, the Claimant obviously delayed its performance by opening L/C after the Respondent had shipped the goods.

4) The Respondent's Performance of the Training Obligation

First, the Respondent had fulfilled its training obligation from June to July 2003. The Respondent stated clearly in the letter to the Claimant on October 23, 2003 that 'Engineer E was sent to the city to install and adjust the equipment on June 18…Later, he was back to our company on July 23 after finishing all the training'. In response, the Claimant sent a letter to the Respondent on October 24, 2003 with no objection thereto. It could be seen that the Respondent had fulfilled all the training obligation on site from June to July 2003.

Second, if the Respondent had not fulfilled the training obligation, why didn't the Claimant request the Respondent to provide training in the correspondence between the parties from its receipt of the goods in June 2003 to the Respondent's initiation of the arbitration proceeding on the printing press sales contract dispute in August 2006? In fact, the Respondent had fulfilled its training obligation. The Claimant argued the Respondent had not provided training in the previous arbitration case over the printing press sales contract dispute, using it as an excuse for its refusal to pay the overdue balance. In this case, the Claimant relied on the same excuse to declare the contract avoided, which was far-fetched.

5) The Claimant had no right to 'declare the contract avoided according to CISG

a) The Applicability of CISG

Article 17 of the contract provided the CIETAC award should be based on 'Chinese laws'. Article 142(2) of the General Principles of the Civil Law of the People's Republic of China stipulated '[I]f any international treaties 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'. CISG should prevail in this case since both China and the United States at which the parties were located were Contracting Parties thereto. The award for the previous case on the printing press sales contract dispute also made it clear that CISG should prevail in the resolution of disputes arising out of the contract. Where there was no provision in CISG, and the relevant provisions of the Contract Law did not conflict with CISG, the relevant provisions of the Contract Law should apply.

The Claimant's main claim was to confirm 'the termination of the contract (i.e. declaring the contract avoided'. Since there was only provision on 'declaring the contract avoided'

but no provision on contract termination in CISG, the basis for the claim regarding 'declaring the contract avoided' should be the relevant provision in CISG.

The Claimant, though had the right to declare the contract avoided under CISG, must meet certain prerequisites, i.e. the buyer could only declare the entire contract avoided when the seller's failure to deliver the goods according to the contract amounts to a fundamental breach of the contract. CISG also provided two situations where the buyer lost the right to declare the contract avoided. First, if the seller had delivered the goods. Second, if the buyer could not make restitution of the goods substantially in the condition in which he received them.

This case involved no fundamental breach of contract. Thus, the prerequisites for the buyer to declare the contract avoided under CISG were not met. Meanwhile, the Claimant, as the buyer, lost the right to declare the contract avoided according to the provisions of CISG.

b) No Fundamental Breach by the Respondent

Article 49(1) of CISG stipulated clearly '[T]he buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamentally breach of contract'. Article 51(2) further provided '[T]he buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract'.

Thus, the Claimant should prove that the Respondent 'had fundamentally breached the contract' to support its claim. In fact, the Respondent had made delivery completely according to the contract and the agreement with no violation of the contract, let alone

'fundamental breach of the contract'.

As stated above, the Respondent had delivered the goods and fulfilled its contractual obligations. The goods delivered by the Respondent had no design defects while the Claimant had been using the goods to publicize and contract business for profit. Therefore, the Claimant's contractual purpose had been achieved. As to the alleged late delivery and non-performance of the training obligation under the after-sales service agreement, the Respondent had evidence to prove the non-existence of such breaches. Moreover, such breaches could not amount to 'fundamental breach of contract'.

Above all, though the Claimant alleged problems with the quantity, quality and service of the goods, such problems were untrue and not as serious as 'the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract'. Thus, the Claimant could not rely thereon to declare the contract avoided.

c)The Claimant's Loss of the Right to Declare the Contract Avoided

CISG provided the situation under which the buyer lost the right to declare the contract avoided. In this case, the Claimant, as the buyer, had lost the right to declare the contract avoided. The facts and legal basis were as follows.

① The Claimant had no right to declare the contract avoided since the Respondent had delivered the goods

Article 49(2) of CISG clearly provided '[H]owever, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided…' The possible exception applicable to this case was subparagraph (b) stipulating 'in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to

have known of the breach'.

In this case, the Claimant had long lost the right to declare the contract avoided under CISG, since the Respondent delivered the goods as early as 2003.

Even if the Claimant asserted that it had declared the contract avoided, such declaration was far later than the reasonable time 'after he knew or ought to have known of the breach'. In this case, the Claimant, after receiving the goods in June 2003, had not declared the contract avoided till July 16, 2007 by sending notice to the Respondent. According to the Claimant's statement in the Application for Arbitration, it 'had claimed damages in writing since April 2004'. It could be inferred that the Claimant 'knew or ought to have known' the alleged non-conformity of the goods since at least April 2004 but never declared the contract avoided in over three years. Therefore, the Claimant could not invoke Article 49(2)(b) for the exception. The Claimant's notice for such declaration on July 16, 2007 had no legal effect.

② The Claimant had no right to declare the contract avoided since it had used the goods for several years and could not return the goods in the condition in which it received them.

Article 82 of CISG stipulated '[T]he buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them'.

The Claimant had held the goods for over four years and used the equipment to print a large number of products. The Claimant could not return the goods 'in the condition in which he received them' if it could not prove the goods had not worn out during its possession and use. Therefore, the Claimant had lost the right to declare the contract

avoided.

6) The Claimant had no right to 'terminate the contract' under the Contract Law.

As mentioned above concerning the applicable law of this case, the relevant provisions of the Contract Law could be applied where there was no provision in CISG if the relevant provisions of the Contract Law did not conflict with CISG.

The Claimant's main claim was to confirm its termination of the contract valid. Since there was no stipulation on contract termination but on 'declare the contract avoided' in CISG, the legal basis for the termination of contract should be the relevant provisions of the Contract Law. The Claimant's right to terminate the contract under the Contract Law was analyzed as follows.

a) The Claimant had no right to terminate the contract.

Article 94 of the Contract Law provided circumstances for the parties to terminate the contract. However, such circumstances never occurred in this case.

In this case, the Respondent had delivered the goods and fulfilled its main obligations under the contract. The Claimant had acquired the title of the goods and could use the goods normally, through which its contract purpose was achieved. Therefore, the Claimant had no right to terminate the contract unilaterally since no circumstances for the parties to terminate the contract under the Contract Law occurred in this case.

b) The Claimant's failure to exercise its right to terminate the contract within reasonable time had extinguished such right.

Even if the Claimant asserted it had the right to terminate the contract, its failure to

exercise such right in accordance with law had extinguished the right. The Contract Law stipulated '[W]here neither the law stipulates nor the parties make an agreement upon the time limit to exercise the right to terminate the contract, and no party exercise it within a reasonable time period after being urged, the said right shall be extinguished.'

The Respondent, after the Claimant raised the quality problems through Company C on June 8, 2004, wrote to the Claimant on September 6 and 14, 2004, proposed solution for such problems, which constituted demand thereon. However, the Claimant responded with 'request for return or replacement of goods' without mentioning the termination of contract. In the following three years, the Claimant never declared the contract terminated as well. Moreover, the Claimant's request for 'replacement' further showed it had no intention to exercise the right to terminate the contract because the replacement request was an expression of continuing the performance. Such acceptance of replacement showed that the Claimant, after receiving demand from the Respondent, stated clearly that the contract performance could be continued instead of exercising its right to terminate the contract.

During the hearing of the previous case on the printing press sales contract dispute, the Claimant asserted the quality problems as its excuse for the delayed payment. In this regard, the Respondent pointed out repeatedly in its oral and written opinions that the Claimant should have made counterclaims thereon if it requested for compensation. However, the Claimant, all through the hearing of the previous case, mentioned nothing about declaring the contract avoided or terminating the contract.

The Claimant had not declared the contract terminated till July 16, 2007 when the award of the previous case on the printing press sales contract dispute was rendered, requesting the Claimant to make payment for the goods. The time for the Claimant to

exercise the right to terminate the contract was three years later than the Respondent's demand, which was far beyond the 'reasonable time' stipulated in the Contract Law. Therefore, even if the Claimant believed it had the right to terminate the contract, such right had been extinguished. The Claimant's declaration of the contract termination in its Letter of Claim on July 16, 2007 was invalid.

7) The Claimant had no right to terminate the contract according to the contract.

The contract stipulated '[I]f there is any damage caused by the defect in the design or production or inconsistency in the contractual quality or nature, during the warranty period, the buyer should entrust CCIB to inspect the goods and claim for damages (including replacement) with the inspection certificate'. This provision was the sole basis in the contract for the Claimant to claim damages for quality problems. However, it could be seen from this provision that the way of claiming damages included replacement. The contract never provided that the Claimant could request for restitution or declare the contract terminated if there were quality problems. Therefore, the Claimant had neither legal nor contractual basis for its declaration of the contract termination.

8) The Claimant's Claims should not be supported.

As mentioned above, the Respondent had delivered the goods specified in the contract and made no late delivery. There was no design defect in the goods while the Claimant could normally use the goods delivered by the Respondent. Furthermore, the alleged delayed performance of contractual obligations and non-performance of the training obligation were untrue. Therefore, the Claimant had no right to declare the contract avoided or terminate the contract while its claims should not be supported. The Claimant's Claim 2 on the return of payment should not be supported since the

precondition for the Claimant to return goods was the contract was invalid or terminated while the contract was valid and unterminated. The Claimant's Claim 3(1) on its economic loss due to the Respondent's delayed performance should not be supported since the Respondent had never delayed the shipment. The Claimant's Claim 3(2) on its economic loss due to the non-conformity of goods should not be supported since there was no design defect in the goods while the Claimant could use the printing press normally. Moreover, this claim could not be supported since the Claimant had failed to prove the economic value of the so-called non-conforming goods and its economic losses. The Claimant's Claim 3(3) on its economic loss of returning the goods after the termination of the contract should not be supported since the contract had not been terminated while the Claimant had no right to terminate the contract.

The Respondent, based on the above facts and legal analysis, requested the tribunal to ascertain facts and reject all the Claimant's claims according to relevant legal and contractual provisions.

II The Tribunal's Opinions

1. The Applicable Law of this Case

The tribunal ascertains Article 17 of the contract of this case provides '[A]ny dispute arising out of or related to this contract shall be resolved through friendly negotiations between the parties or be submitted to arbitration by China International Economic and Trade Arbitration Commission according to relevant Chinese laws and regulations if such negotiations fail'. The provision does not make it clear whether 'according to relevant Chinese laws and regulations' in the arbitral clause refers to the procedural law applicable to the arbitration process or the substantive laws applicable to the dispute resolution. The Claimant, though making no statement on the applicable law of this case

in its Application for Arbitration, has taken Chinese laws and CISG as its legal basis in both its written and oral statements during the hearing.

The Respondent asserted in its Statement of Defense on April 25, 2008 that 'Article 17 of the contract provided the CIETAC award should be based on 'Chinese laws'. Article 142(2) of the General Principles of the Civil Law of the People's Republic of China stipulated '[I]f any international treaties 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'. CISG should prevail in this case since both China and the United States at which the parties were located were Contracting Parties thereto…Where there was no provision in CISG and the relevant provisions of the Contract Law did not conflict with CISG, the relevant provisions of the Contract Law should apply'. The tribunal, considering the contractual provision, the parties' clear arguments and actual actions in this case, finds CISG and relevant Chinese laws be the applicable substantive law of this case while CISG shall prevail if there is any conflict.

2. The Substantive Issues of this Case

The tribunal summed up the following six focus issues of the dispute in this case according to the parties' written statements and the issues raised during the on-site investigation of the equipment in the preliminary hearing held at Hotel M on November 22, 2008: Issue 1, whether the Respondent's performance of the delivery obligation was consistent with the contract; Issue 2, if not, whether such inconsistency constituted fundamental breach; Issue 3, whether the Claimant declared the contract avoided within reasonable time; Issue 4, whether the Claimant had lost the right to declare the contract avoided for any other reasons; Issue 5, whether the Claimant had suffered any

loss under the contract of this case and Issue 6, whether the loss, if any, was caused by the Respondent's default. The tribunal clearly informed the parties that the above issues were the focus issues that the tribunal must solve for the resolution of the dispute in this case and requested the parties to submit further statements and evidence thereon. Nevertheless,the tribunal's determination of these focus issues would not prevent any party from raising any other issues it deemed relevant to this case. The tribunal notes that the parties have submitted statements and evidence thereon while the last oral hearing also focused on these issues. The parties have stated their reasoning and arguments thereon according to their respective understandings. The tribunal elaborates its opinions on the six focus issues as follows.

1) Whether the Respondent's performance of the delivery obligation is consistent with the contract

The Claimant asserted the non-conformity of the printing press delivered by the Respondent was reflected in the following five aspects: first, the Respondent delayed the delivery of the goods; second, the quantity of the goods was inconsistent with the contract; third, the origin of the goods was inconsistent with the contract; fourth, the quality of the goods was inconsistent with the contract; and fifth, the Respondent failed to fulfill the training obligation under the After-sales Service Agreement supplementary to the contract. In this regard, the tribunal analyzes the five aspects as follows.

(a) Whether the Respondent has delayed the delivery of the goods.

Article 6 of the contract stipulated the delivery as 'shipping time: within 90 days after receiving the prepayment'. Article 10 of the contract provided 'payment conditions: (1) prepayment: 5% of the total contract price, paid within 5 days after the contract is signed; (2) payment by L/C: within 45 days after the contract is signed, the buyer shall

open an irrevocable sight L/C with the seller as the beneficiary in the amount of 60% of the total contract price. The seller shall collect payment from the issuing bank or the entrusted paying bank with the draft and the documents listed in Article 11 of this contract through a negotiation bank at Chicago, USA'. Article 3 of the supplementary agreement on January 17, 2003 provided 'the buyer agreed to pay for the corona treatment device and for the flip stand. With the original L/C amount of approximately USD270,000, the buyer shall open an irrevocable L/C with the seller as the beneficiary in the total amount of approximately USD300,000 within 45 days before shipment'. The tribunal holds that the agreement clarified the payment terms of the contract based on the actual performance situation and stipulated the buyer should open L/C within 45 days before shipment. The tribunal finds that the Claimant made the prepayment of approximately USD20,000 on October 8, 2002 while the Respondent delivered the goods on April 29, 2003. The Claimant opened the L/C for the 60% payment plus the payment for the supplementary agreement on May 13, 2003, which means the Claimant had not opened L/C before shipment. The parties have no dispute over the above fact. L/C, as a means of payment for international trade, has the main role of ensuring the seller receive the payment after delivers the goods and documents with the bank credit guarantee. If the buyer were obliged to open L/C after the seller delivers goods, L/C, as a payment method guaranteed by bank credit, would lose its due role. It's against the L/C transaction practice to request the seller to deliver goods before the buyer opens L/C under an international sales contract with L/C as the payment condition. The tribunal holds that the Respondent was under no obligation to deliver the goods before the Claimant opened L/C according to the contract and the L/C transaction practice. Therefore, the Respondent commits no breach by delivering the goods on April 29, 2003 when the Claimant had failed to open L/C at the time specified in the contract and shall not bear any liability for breach of contract.

(b) Whether the quantity of the goods is consistent with the contract.

The Clamant asserted 'the goods arrived at a port in China on May 28, 2003 and arrived in a city of a province on June 11, 2003. On August 15, 2003, the local CCIB inspected the goods according to the contract, the invoice and the packing list and found the following parts missing: 1 plate, 3 sets of mortise and tenon crimping roller and 3 sets of die cuttersroller. The Quantity Certificate issued by the local CCIB showed that the missing parts were caused by the delivery shortage. The Missing Parts Statement issued by the Respondent's customer service manager on June 23, 2003 also indicated the existence of the above situation. The Equipment Installation Site Report signed by both parties on the same day further mentioned the Respondent had not delivered the linkage between the printing press and the 72'' unwinder and other built-in small parts. The Respondent made further delivery to make up the missing parts. In the end, the Claimant asserted 'the Respondent has so far failed to deliver the 2 sets of mortise and tenon crimping roller and 3 sets of die cutters roller according to the contract'.

The tribunal finds that the parties have no substantial dispute over the basic facts of the quantity of goods delivered. The Respondent acknowledged it had delivered one set of tenon roller cutters combined with flexible blade cutters to replace three sets of mortise and tenon crimping roller and three sets of die cuttersroller specified in the contract and believed the replacing parts 'were more advanced and more valuable than the mortise and tenon crimping roller and die cutters roller specified in the attachment of the contract and fully functional'. The Respondent's view is the one set of replacing parts can replace the three sets of mortise and tenon crimping roller and 3 sets of roller die cutters specified in the contract with more advanced technology. In fact, the Claimant received the replacement parts and carried out the installation and commissioning under the Respondent's guidance but denied the Respondent's view that the replacement parts

could replace the specified ones in the contract with more advanced technology.

First, the tribunal finds that the parties have no dispute over the actually delivered pressing and film cutting device were inconsistent with the contract specifications. Second, the tribunal makes the following analysis of whether the inconsistency of the delivered goods necessarily results in default. The tribunal, considering the Claimant received the replacement parts and carried out the installation and commissioning under the Respondent's guidance, may determine the Respondent's delivery of replacing parts does not constitute breach of contract if the Respondent can prove the actually delivered goods could replace the specified ones in the contract with more advanced technology and would cause no inconvenience to the Claimant. However, it should be noted that the Claimant's receipt of the replacement parts shall be deemed as the Claimant's conditional acceptance thereof instead of unconditional. If the Respondent can prove the actually delivered goods could replace the specified ones in the contract with more advanced technology and would cause no inconvenience to the Claimant, the Claimant cannot refuse to accept the replacing parts after receiving them. Since the tribunal finds the replacement parts inconsistent with the contract specifications, the burden of proof to prove such delivery does not constitute breach of contract lies with the Respondent. The Respondent shall prove the actually delivered replacement parts could really replace the three sets of mortise and tenon crimping roller and three sets of die cutters roller specified in the contract with more advanced technology and would cause no inconvenience for the Claimant. The tribunal, considering the issue of the specifications of the goods is essentially a quality issue, leaves it to be analyzed later with other quality issues.

(c) Whether the origin of the goods is consistent with the contract.

Concerning this issue, the Claimant alleged 'according to the contract, the country of origin of the printing press purchased by the Claimant from the Respondent is the United States while the manufacture is Company D. The Model 4150 printing press specified in the contract includes mortise and tenon crimping roller, die cutters roller and plate. However, the above parts delivered by the Respondent are not manufactured by Company D in the USA. Furthermore, the onsite machining of parts is inconsistent with the contract'. The Certificate of Origin issued by Company D is one of the Respondent's evidence of which the Claimant admits the authenticity. The tribunal also notes that the manufacturer of some parts is specified in the attachment of the contract but not all. For example, the manufacturer of 72'' unwinder is Company G while no manufacturer is mentioned for the mortise and tenon crimping roller, die cutters roller and plate mentioned above by the Claimant. This shows that not all the parts should be manufactured by Company D while purchasing parts from elsewhere is allowed under the contract. In this case, it can be understood as Company D is entrusted to make professional decisions on the external purchase of parts under the contract. The tribunal, considering the circumstances of this case, finds the Claimant's argument that the place of origin of the goods is inconsistent with the contract unsustainable since the Claimant has submitted no evidence or applicable relevant industry standards to prove that the mortise and tenon crimping roller, die cutters roller and plate should be manufactured by Company D according to the intent of the contract or relevant industry standards. The onsite machining of parts is obviously a minor issue. The Claimant has not proved that the onsite machining of parts makes it necessary to redetermine the place of origin of the goods. In addition, the Claimant has cooperated with the onsite machining of parts. Therefore, the Claimant loses the right to claim the inconsistency of the origin of the goods due to its awareness of the impact (if any) of such act thereon.

(d) Whether the quality of the goods is consistent with the contract.

The Claimant's main evidence concerning the quality issue includes the Quality Certificate issued by the provincial Administration for Entry-Exit Inspection and Quarantine on April 18, 2004, the parties' subsequent correspondence and expert reports. In addition, the tribunal deliberates the issue concerning the specifications of the pressing and film cutting device alleged as the 'quantity discrepancy' by the Claimant but considered as a quality issue by the tribunal. The Respondent doubts the authenticity and legality of the content of the Quality Certificate, which is analyzed as follows.

First, the inspection time. The Respondent argued the statement on starting the quality inspection in August 2003 in the Quality Certificate clearly contradicted with the Claimant's indication of 'Do you need us to arrange the inspection by the Bureau of Technical Supervision for confirmation?' on October 24, 2003. The tribunal holds that though the inspection time stated in the Quality Certificate is 'August 2003 to April 18, 2004', it could not be understood in common sense that the inspection was ongoing all through the period which may cover different inspection for different purposes from the time when the first inspection was carried out after the goods had arrived at the destination and the Quantity Certificate was issued to the time when the Quality Certificate was issues upon the Claimant's application. Furthermore, the Quality Certificate was issued by the provincial Administration for Entry-Exit Inspection and Quarantine instead of the Bureau of Technical Supervision mentioned in the Claimant's letter on October 24, 2003. It could not be concluded here that the statement in the Quality Certificate contradicts with the facts mentioned in the Claimant's previous correspondence. The Work Report on December 2, 2003, stating the situation of certain aspects at certain time during the performance of the contract, is a periodic record. The parties have not signed the final acceptance document. Therefore, the Work Report

cannot be cited to deny the authenticity and legality of the Quality Certificate. The tribunal shall make comprehensive determination, combining the two pieces of evidence with other evidence of this case, especially the facts stated in the parties' subsequent correspondence.

Second, the so-called 'design defects'. The Quality Certificate contains no analysis or reasoning for the conclusion of 'design defects' and 'manufacturing defects' to which the Respondent objects. The tribunal deems it unnecessary to further analyze this issue since it need not to answer whether the alleged inconsistency of the goods is caused by 'design defects' or 'manufacturing defects' and other relevant questions when determining the existence of such inconsistency and whether the inconsistency constitutes fundamental breach.

Third, the non-compliance with the Regulations for the Implementation of the Law of the People's Republic of China on Import and Export Commodity Inspection. The Respondent asserted 'Article 18 of the Regulations for the Implementation of the Law of the People's Republic of China on Import and Export Commodity Inspection (No. 5 CCIB Order, effective as of October 23, 1992 and abolished on December 1, 2005) which was valid at the time of the inspection stipulates '[I]nspection institutions shall issue the notice of not allowing the installation and use of the import whole set of equipment and the materials thereof that have not passed the inspection'. However, the provincial Administration for Entry-Exit Inspection and Quarantine, after had inspected and assessed the goods as unqualified equipment, never issued the notice of not allowing the installation and use, for which the reason was the goods were not unqualified and the Claimant had been using the equipment to make a profit'. The tribunal holds that the commodity inspection institution's issuance of 'the notice of not allowing the installation and use' is a supervision act by the institution in performing its duties and a

decision based on specific circumstances. The authenticity of the content of the Quality Certificate shall not be directly affected by whether the inspection institution issued the notice or whether its decision and practice conform to the requirements of the Regulations.

Fourth, other issues concerning the Quality Certificate. (1) The Respondent pointed out the Quality Report mistakenly stated Company P of the USA as the manufacturer of the G72'' diameter unwinder and the Respondent as the manufacturer of the Model Q1 printing press and alleged 'such mistakes result in doubts over the professionalism of the Quality Certificate'. The tribunal will pay necessary attention to these errors and their possible impacts when assessing relevant issues and make analysis and determination in combination with other evidence of this case. (2) Concerning the vacuum waste suction device, it is stated under Item 2 of the Quality Certificate that 'the vacuum waste suction device lost the function of collecting die cutting waste edges due to insufficient suction power and too narrow suction pipe'. The tribunal notes the undisputed fact concerning the vacuum waste suction device is the device delivered by the Respondent can only collect small waste edges instead of net-shape waste edges or wide ones. The parties' dispute is on what kind of waste suction function the vacuum waste suction device should have. The Claimant asserted the vacuum waste suction device should be able to collect all the die-cut waste edges during the printing process while the Respondent believed the vacuum waste suction device was consistent with the contract and the installation of the device was entirely the Claimant's choice. The tribunal holds that the parties have no dispute over the actual functional status of the device as stated in the Quality Certificate. The only dispute is whether such function status is consistent with the contract, which is to be determined in accordance with the contract stipulation. In summary, the authenticity and legality of the Quality Certificate

as a whole cannot be denied though the Respondent has pointed out certain untrue content therein. The tribunal will analyze and determine the issue in combination with other evidence of the case. The Quality Certificate states '1. G72'' diameter unwinder. After the G72'' diameter unwinder (manufactured by Company P of the USA) had been connected with and installed in the Model Q1 printing press (manufactured by Company B of the USA), it was found that the electrical control system of the G72'' diameter unwinder could not be effectively matched and connected with the control system of the Model Q1 printing press. Certain functions of the printing press such as the automatic deviation correction function, the automatic stop function and the automatic unwinding tension control function of the electronic coiling device could not be started'. The tribunal notes that the Respondent did not deny the existence of this problem and proposed an improvement plan after receiving the Quality Certificate and being aware thereof. The Respondent mentioned the solution to this problem in the faxes on July 12 and September 6, 2004, including numerical calculation and simulation test, installing a sensing system for the matching and connection of the 72'' unwinder with the controlling system of the printing press, and turning the unwinder 180 degrees to solve the friction problem. The tribunal found a special bracket behind the unwinder when inspecting the equipment onsite. The Claimant explained it was made and installed onsite according to the request of the Respondent's technical staff to solve the problem of insufficient tension of the unwinder while the Respondent's agent asserted the tension problem could be solved through proper adjustment of certain parts without the need of the metal bracket. This proves that the reason for the malfunction of the equipment during the installation and commissioning is complicated while even the Respondent's technical staff explored new ways to solve the problem. Unfortunately, the parties disputed over whether to pay first or to resolve the problem first while no solution has been found till now. The tribunal holds that though the Quality Certificate

contains obvious errors regarding the manufacturers, it is not difficult to determine, based on other evidence of this case, especially the parties' subsequent faxes, and the onsite investigation, the equipment delivered by the Respondent is inconsistent with the contract concerning the matching and connection of the unwinder with the printing press, resulting in the malfunction of the equipment while the problem stated in the Quality Certificate does exist. The Claimant, as the buyer, is entitled not only to the title of the goods, but also the title of functional goods. There is no evidence showing the problem has been caused by the Claimant. The Quality Certificate also states '2. vacuum waste suction device. During the test, it was found the vacuum waste suction device lost the function of collecting die cutting waste edges due to insufficient suction power and too narrow suction pipe'. Concerning this issue, the parties have no dispute over the relevant basic fact that the vacuum wastesuction device could not collect waste edges during the printing process. However, the Respondent cannot accept the conclusion in the Quality Certificate 'the vacuum waste suction device lost the function of collecting die cutting waste edges due to insufficient suction power and too narrow suction pipe'. The Respondent mentioned in the fax on July 12, 2004 that 'when we negotiated with Company A about the configuration of the Model 4150 equipment in September 2002, the buyer agreed to resolve it in China due to insufficient funds of the buyer and the expensive price of the system, so the waste disposal system was not purchased while the standard waste edge suction system was provided (as discussed before purchase)' to which the Claimant has no objection. The tribunal notes that the Q1 Flexo Printing Press Quality Appraisal Report submitted by the Respondent as the expert report states 'vacuum waste discharge device is used to take away the small waste edges cut off from paper. The device is unsuitable for net-shape or wide waste edges which should be collected and disposed of by winders. It is also common practice for flexo printing press'. The Technical Analysis Opinions submitted by the Claimant as the expert report fails

to provide more convincing analysis on this issue. The tribunal also notes there is no technical specifications for the vacuum waste suction device in the contract with only the name of the device mentioned.

The Claimant, admitting the vacuum waste suction device provided by the Respondent has partial waste suction function, has submitted no evidence to prove the device should have other function as alleged by it. Therefore, the tribunal deems the Claimant unable to prove the inconsistency of the vacuum waste suction device with the contract.

The Quality Certificate also states '3. Rear die-cutting station. The die cutting roller is fixed by the sliding bearing seat in the positioning groove between the front and rear frame plates at the rear die-cutting station of Model Q1 printing press. The rear frame plate is 44cm in length and 1cm in width. The frame plate is 2cm in thickness. The impact during the die-cutting process caused the die-cutting roller bearing seat and the positioning groove to deform and gap, ultimately resulting in the impossibility of consecutive and effective cutting at the rear die-cutting station'. Same as the unwinder problem mentioned before, the Respondent did not deny the existence of this problem after receiving the Quality Certificate and being aware of the content of the problem, and mentioned the solutions to this problem in its faxes on May 21, July 12 and September 6, 2004. The May 21 fax states 'Factory D has completed manufacturing the parts for the solution of this problem. The parts have been shipped to China. We will send engineers to your company in the near future to further solve this problem'. Thereafter, the Respondent alleged it had delivered 'a pair of reinforced locking devices' to the Claimant. Unfortunately, the problem was not resolved in the end because the parties disputed over whether to pay first or to resolve the problem first. In relate to this problem, the tribunal has determined above the crimping and die-cutting device provided by the Respondent is inconsistent with the contract specifications, so the Respondent is obliged to prove

the replacement device is reasonable and has the functions required by the contract, or even 'more advanced in technology' through installation and test operation but has not done so till now. The tribunal will further analyze which party shall be responsible therefor. The tribunal holds that from the perspective of the rear die-cutting station and the crimping and die-cutting device, the equipment delivered by the Respondent is inconsistent with the contract.

In view of the above, the tribunal supports the Claimant's claim on the quality discrepancy of the goods delivered by the Respondent.

(e) Whether the Respondent has failed to fulfill the training obligation under the After-sales Service Agreement supplementary to the contract.

The Claimant asserted that the Respondent had failed to fulfill the training obligation under the After-sales Service Agreement supplementary to the contract.

The Respondent argued it had fulfilled the training obligation from June to July 2003. The Respondent clearly stated in its letter to the Claimant on October 23, 2003 'Engineer E was sent to the city to install and adjust the equipment on June 18…Later, he was back to our company on July 23 after finishing all the training' to which the Claimant did not object in the reply on the next day. In over three years thereafter, the Claimant never requested the Respondent to provide training in the multiple correspondences. The tribunal holds that the Claimant's no objection in its reply and no subsequent request for the Respondent to provide training could neither prove the Claimant has recognized the completion of training nor prove the Respondent has actually completed the training since the parties focused on solving the quality problems at that time. Article 2 of the After-Sales Service Agreement stipulates 'the seller will invite five technicians of the buyer for professional training at the place designated by the seller one month before the

installation of the equipment. The seller will pay the training and accommodation fees and other expenses for the ten-day training' from which it can be seen that the training shall be before the installation and commissioning under the purpose of familiarizing the buyer's technicians with the equipment functions. It can be inferred from the expressions such as 'invite', 'the place designated by the seller' and 'the seller will pay the training and accommodation fees' that the place of training should be a place with some training facilities or the same model printing press in operation outside the buyer's location. It can also be inferred from the limitation of 'five technicians' that the expenses should not be too small to be ignored. Therefore, the Respondent's argument that the onsite training could be taken as the training at 'the place designated by the Respondent' is unsustainable.

The tribunal, based on the above analysis from five aspects, finds the Respondent has not breached the contract in terms of delivery time and origin of the goods but has indeed breached the contract in terms of the specifications and quality of the delivered goods and the performance of its training obligation, which means the Respondent's performance of the delivery obligation is inconsistent with the contract.

2) Whether the Respondent has fundamentally breached the contract

Article 25 of CISG stipulates '[A] breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such as result'. Though the Contract Law does not adopt the concept of 'fundamental breach', Article 94 thereof provides '[T]he parties may terminate a contract if…the other party delays performance of its obligations, or breaches the contract in

some other manner, rendering it impossible to achieve the purpose of the contract' under the same legal intent. 'Substantially to deprive him of what he is entitled to expect under the contract' or 'rendering it impossible to achieve the purpose of the contract' is the principle criterion for the determination of fundamental breach of contract.

The Respondent argued 'the Claimant, as the buyer, is entitled to expect the title of the goods, i.e. possession, use, control and disposal of the goods under the contract. The Respondent delivered the goods as early as April 20, 2003. The Claimant has obtained the entire title of the goods since receiving the goods while the goods are in conformity with the contract'. The tribunal deems that the Claimant is entitled to expect not only the title of the goods but also the title of the goods 'with quality, specifications and functions consistent with the provisions of this contract' as stated in the quality guarantee clause of the contract. Therefore, the quality issue is the key issue of this case.

Concerning the specifications of the delivered goods, the Respondent clearly has not conformed to the contract. The Respondent delivered one set of tenon roller cutters combined with flexible blade cutters instead of three sets of mortise and tenon crimping roller and three sets of die cuttersroller as specified in the contract. The Respondent explained it as replacement for the contract goods with more advanced technology, better value and full functions, which has never been proved through installation and commissioning of the equipment though the Respondent had the opportunity.

There are serious problems in the connection and matching between the loading device and the printing press and at the rear film cutting station as described in the Quality Certificate, of which the consequence is that the Claimant cannot use the printing press normally so far. During the onsite investigation by the tribunal, the Claimant mentioned the printing press could not work without the necessary tension through continuous

manual assistance, constantly stopped and the rear film cutting station could not offer continuous and effective cutting of products.

The Respondent acknowledged the three sets of mortise and tenon crimping roller and three sets of die cuttersroller as specified in the contract and the one set of tenon roller cutters combined with flexible blade cutters actually delivered in this case are both in supply. The configuration of three sets of mortise and tenon crimping roller and three sets of die cutters roller has not been eliminated but is still in supply. The Respondent, choosing to deliver the 'replacement products' with different specifications from the contract without consulting and agreeing with the Claimant, has voluntarily assumed the responsibility to prove they are more advanced, valuable and fully functional through the product installation, commissioning and operation. However, the Respondent has so far failed to do so. One reason is the parties' dispute over whether to pay first or to resolve the quality problems of the equipment first. The Respondent insisted the Claimant must pay USD120,000 for the balance of the contract before the resolution of the quality problems and chose to leave the quality problems unsolved after the Claimant rejected its request. The tribunal, noting the specifications of the delivered parts are inconsistent with the contract while the printing press has not been able to operate normally, finds the Respondent's request unreasonable since the Respondent, when the parties argued whether to pay first or to resolve the quality problems first, chose not to solve the technical problems existed from the time of delivery and causing the malfunction of the equipment but to insist on the payment of USD120,000. The Claimant should not be blamed for the malfunction of the equipment. Instead, the inconsistency of specifications and quality and malfunction of the equipment delivered by the Respondent results in the non-realization of the Claimant's contractual purpose of using the purchased the equipment for production and operation and the final deprivation of what the Claimant

is entitled to expect under the contract. Therefore, the Respondent's default constitutes fundamental breach of the contract.

3) Whether the Claimant has declared the contract terminated within reasonable time

In this case, this issue involves two aspects. Aspect one, whether the Claimant's request on 'return or replace the goods' is an act declaring the contract avoided. Aspect two, whether the Claimant's request is within reasonable time.

The tribunal notes that the Claimant requested the Respondent 'to return or replace the goods' in the faxes on April 24 and June 8, 2004. The tribunal holds that the Claimant's claim is clear and 'return the goods', as a colloquial term used by businessmen to declare the contract terminated or avoided, should not cause misunderstanding. The declaring party just leaves the option to the other party by requesting 'to return or replace the goods'. If the other party disagrees with replacing the goods, the legal consequence is clear that his only choice would be 'return the goods'. 'To make up the missing parts' can only be applied to the situation of replacing the goods instead of returning the goods, which is common sense and should not cause misunderstanding. Therefore, the tribunal holds that the Claimant's request 'to return or replace the goods' in the faxes on April 24 and June 8, 2004 is an act declaring the contract avoided since it contained a clear claim to return the goods if the Respondent refused to replace the goods while the Respondent could make the refusal decision by itself.

Concerning reasonable time, Article 49(2)(b)(i) of CISG stipulates the buyer, if intends to declare the contract avoided due to the quality discrepancy of the goods, he must do so 'within a reasonable time after he knew or ought to have known of the breach'. There is no specific provision on the determination of 'a reasonable time'. The referable articles include Article 39 of CISG stipulating '(1) The buyer loses the right to rely on

a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee' and Article 14 of the contract providing 'quality guarantee: the seller guarantees that the goods are brand new, the quality, specifications and functions are consistent with the provisions of this contract and the warranty period is 12 months after the arrival'.

The tribunal finds that the goods arrived at a Chinese port on May 28, 2003, the loading plate arrived at the port on August 11, 2003 and the disputed replacement parts for mortise and tenon crimping roller and die cutters roller arrived at the port on August 21, 2003. The tribunal, considering that the crimping and die-cutting process is an indispensable process for printing milk packs, whether the functions and technical performance of mortise and tenon crimping roller and die cutters roller as specified in the contract could be realized by the replacement parts could only be determined through installation, commissioning and operation, the actual situation of the onsite installation and commissioning and the '12 months after the arrival' warranty under the contract, and noting the Claimant requested the Respondent 'to return or replace the goods' in writing on April 24, 2004, provided the Respondent with the Quality Certificate before May 21, 2004 and formally sent the Letter of Claim against Company B of the USA to the Respondent on June 8, 2004 with the Quality Certificate attached, deems that the Claimant's above notice is within reasonable time, i.e. the Claimant has declared the contract avoided within reasonable time.

4) Whether the Claimant has lost the right to declare the contract avoided for any other

reason

Article 82 of CISG stipulates '(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. (2) The preceding paragraph does not apply: (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity'.

The Respondent relied on the above article to argue that the Claimant had lost the right to declare the contract avoided, stating 'the Claimant has held the goods for more than four years and begun using the goods to carry out printing business'. The tribunal, when investigating onsite, clearly saw the goods had been severely tainted and damaged, such as the large amount of stains left by the use of ink, scratches on the surface of the goods and the two die-cutting rolls of the multi-purpose unit randomly discarded without any protection. In addition, the 900hours displayed on the timer of the goods showed the goods had been used while such using time was far more than the reasonable commissioning time (see the Q1 Flexo Printing Press Quality Appraisal Report by the three experts engaged by the Respondent). Obviously, the Claimant had used the equipment and lost the right to declare the contract avoided since 'it is impossible for him to make restitution of the goods substantially in the condition in which he received them'.

The Claimant argued it had never used the equipment while the installation and commissioning were conducted under the guidance of the Respondent's technicians. Except for the inspection by the provincial Administration for Entry-Exit Inspection and Quarantine for the issuance of the Quality Certificate in February 2004 and the appraisal by the engaged experts in November 2006, the Claimant had never run the equipment while it only took several hours to run the equipment for the above inspection and appraisal.

The Claimant has made no objection to the 900-hour operating time displayed on the equipment. The tribunal notes that the 900-hour operating time is equivalent to 111 operating days based on the calculation of 8 hours per day. It is estimated from the parties' faxes that the Respondent's technician could not have stayed onsite for 111 days while the technician spent most of the time on partial improvement of the equipment. Therefore, the tribunal considers the Claimant's explanation of the 900hours not convincing.

The tribunal also notes the onsite protection of the equipment is not satisfactory while oil stains and rust can be easily found. Two die-cutting rolls were abandoned in an open wooden box among other articles without any protection. Though the Claimant explained that the Respondent's technician had requested it to remove the rolls, it is obviously improper for the Claimant to leave the die-cutting rolls unprotected for so long.

The tribunal also notes that the Claimant had taken no active measures or clearly required the Respondent to take back the goods without taking any proper maintenance measures on the equipment till the Respondent of this case initiated the previous arbitral process claiming for the balance payment while the equipment was left idle. According

to the Claimant's evidence, its main defense ground in the previous arbitral case is the right of orderly performance under Article 67 of the Contract Law which usually applies when the contract has not been terminated. The above actions of the Claimant have undoubtedly delayed the timely resolution of disputes, leaving the maintenance of the equipment in a state of uncertainty for a long time.

In view of the above, the tribunal finds the Claimant be mainly responsible for the equipment being left idle for long without proper protection.

The tribunal deems the Claimant has lost the right to declare the contract avoided according to Article 82 of CISG since the disputed equipment cannot be returned in the condition in which the Claimant received them while the Claimant is mainly responsible for such result.

It should be noted that the Claimant's loss of the right to declare the contract avoided does not mean the Claimant has also lost the right to claim damages. The tribunal notes that the Claimant claimed damages when requesting the tribunal to confirm its declaration valid. The tribunal will determine the two other key issues, i.e. whether the Claimant has suffered any loss under the contract of this case and whether the loss, if any, is caused by the Respondent's default, when analyzing the Claimant's specific claims.

3. The Claimant's Claims

The Claimant has four claims as stated in the amendment of claims on January 20, 2009. The tribunal analyzes them one by one as follows.

Claim 1, the Claimant's termination of the Contract (i.e. declaring the contract avoided) shall be confirmed valid. The tribunal rejects this claim since the Claimant has lost

the right to declare the contract avoided according to Article 82 of CISG due to the impossibility of returning the goods in the condition in which it received them though the tribunal finds the Respondent's performance of the delivery obligation inconsistent with the contract and such inconsistency constitutes fundamental breach of the contract, and determines the Claimant has declared the contract avoided within reasonable time.

Claim 2, the Respondent shall return the payment for the goods. The Claimant has lost the right to require the Respondent to fully return the payment for the goods since it has lost the right to declare the contract avoided. However, the tribunal need to consider whether to partially support this claim. The tribunal finds the Respondent's performance of the delivery obligation inconsistent with the contract and such inconsistency constitutes fundamental breach, but the Claimant has lost the right to declare the contract avoided due to the impossibility of returning the goods in the condition in which it received them, and rejects the Claimant's claim on confirming such declaration valid according to Article 82 of CISG. However, Article 83 of CISG provides '[A] buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention'. Accordingly, the tribunal holds that the Claimant retains all other remedies though its claim for confirming the declaration valid is rejected. Article 50 of CISG stipulates '[I]f the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time'. The tribunal deems this claim on returning the full payment for the goods covers the request for returning partial payment, so it has the power to consider whether to partially support this claim. According to Article 83 of CISG, the tribunal holds that a 40%

reduction in the total price of the equipment is reasonable based on the circumstances of the inconsistent performance of the Respondent's delivery obligation and the fact the equipment could not be used normally. The total price of the goods is approximately USD500,000 including USD460,000 under the main contract and USD40,000 for the additional parts purchased by the Claimant under the agreement on January 17, 2003, so the payment after a 40% reduction shall be USD300,000. The Respondent shall return the additional part to the Claimant after deducting such after-reduction payment from the amount actually paid by the Claimant.

Claim 3, the Respondent shall compensate the Claimant for the following losses consisted of three parts. (1) Economic loss due to late performance of contract. The tribunal rejects this claim since it has found no delay in the Respondent's performance of the contract. (2) Economic loss caused by the non-conformity of the goods (calculated from April 29, 2003 to December 8, 2008), including the fund possession cost and the exchange rate losses. Article 84(1) of CISG stipulates '[I]f the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid'. The tribunal holds that the provision is not only for the situation when the contract is declared avoided but also applicable for partial refund of the price. The tribunal adopts the Claimant's method of calculating the interest to which the Respondent has not objected and calculates according to such method and the proportion of the refund to the paid price. The tribunal rejects this claim on the exchange rate losses since fluctuations in exchange rates are normal commercial risks when the parties agreed on the USD price and no one could have predicted the subsequent big change in the exchange rate between USD and RMB in 2003. Regarding the various expenses in Claim 3, the tribunal decides the Claimant shall bear all the import agency fee, the L/C opening charges, servicecharges, customs declaration fee, D/O fee, freight and

insurance premium incurred for the import of the equipment since the tribunal rejects the Claimant's Claim 1 and the Claimant has lost the right to return the goods. The tribunal, noting the quality problems and missing parts of the equipment, decides the Respondent shall bear the entry inspection and quarantine fee. As to the travel expense, the notarization fee and the legal fee, the tribunal, considering the Claimant's claims are partially supported, deems it reasonable for the Respondent to compensate the Claimant RMB80,000 therefor.

Claim 4, the Respondent shall bear all the arbitration fees of this case. The tribunal, considering the Claimant's claims are partially supported, decides the parties shall each bear half of the arbitration fees of this case and half of the actual cost for the tribunal's onsite investigation of the equipment. The Claimant shall bear all the actual expenses of Arbitrator W appointed by it.

Case 5 2009 Steel Bars Case

I The Merits of the Case

1. The Claimant'sassertation

On April 26, 2007, the parties signed the contract on the sale of approximately 5,000 tons of BS4449/1997 Grade 460B deformed steel bars under CFR term with May31, 2007 as the latest shipping date. The parties agreed later to postpone the latest shipping date until July 9, 2007 based on the shipping schedule and adjusted the contract unit price. The Respondent made corresponding amendments to the letter of credit.

On July 9, 2007, the Claimant fulfilled its delivery obligation, transferring the goods to the carrier, and obtained full set bill of lading issued by the carrier for the batch of goods. The parties disputed whether the remarks on the corrosion status of the goods in the bill of lading were acceptable under the contract. The Claimant could not collect payment under the letter of credit due to the Respondent's undue influence on its issuing bank. To solve the disputes, the parties signed a supplementary contract on September 7, 2007 and changed the payment method. The supplementary contract stipulated that the buyer should notify the bank to make 93% payment and obtain the full set bill of lading. The remaining 7% should be paid by T/T after the goods were unloaded, depending on the SGS inspection report. If the SGS report showed that the goods met the contract specifications, the Respondent should pay the balance within 3 working days. If the SGS report showed that any quality discrepancy of the cargo according to the specification of the contract, the parties should reach a discount or compensation amount in good faith under which the Respondent should pay the Claimant the balance after price reduction

or compensation. If the parties could not reach an agreement on the discount amount, the contract would be cancelled and the Claimant should collect the goods and refund the 93% payment.

The Claimant, after signing the supplementary contract, transferred the full set documents of title including the bill of lading through the L/C operation process to the Respondent and received the 93% payment. The goods arriving at a Port on September 25, 2007 were inspected by SGS onboard from September 26, 2007, unloaded on October 12-19, 2007 and kept in open storage thereafter. SGS issued the final inspection report on October 22, 2007.

The Respondent argued that the SGS final inspection report dated October 22, 2007 did not conform to the quality terms stipulated in the contract and refused to pay the balance. The Claimant alleged that the quality problem addressed in the SGS report provided as evidence by the Respondent was either a quality discrepancy allowed by the contract or under the liability of the carrier and/or the insurance company. Therefore, the SGS report showed no quality discrepancy with the contract specification. The Respondent could not rely on the SGS report to request for discount. In the case where the Claimant had fulfilled all contract obligations and the SGS report showed no quality discrepancy, the Respondent should have paid the 7% balance T/T within 3 working days in accordance with the supplementary contract. As of the date when the Claimant submitted the arbitration application, the Respondent had made no such payment, which constituted a serious breach of contract.

The Claimant's claims are as follows:

1) The Respondent shall pay the balance approximately USD 190,000 according to the contract and the interest thereon from October 23, 2007 till the payment day (based on

the rate of 5.08%, i.e. LIBOR over the same period, + 2%);

2) The Respondent shall compensate the Claimant for the legal costs not exceeding 10% of the amount in dispute; and

3) The Respondent shall bear the arbitration fees.

2. The Respondent's argument and counterclaims

1) Articles 3 and 5 of the supplementary contract substantially changed the relevant provisions of the main contract.

The supplementary contract was authentic and valid, indicating the parties' true intention. Article 8 of the main contract was the relevant provision corresponding to Articles 3 and 5 of the supplementary contract stipulating the remedy for quality problems. In brief, Article 8 of the main contract stipulated that the Respondent could claim against the Claimant within 45 days of the arrival of the goods if the SGS report showed discrepancies of quality, quantity or weight, unless such discrepancy was under the liability of the insurance company and the carrier.

The understanding of Articles 3 and 5 (especially Art. 3) of the supplementary contract was the basis of the parties' different opinions and the main cause of dispute in this case. The parties understood the two articles in different ways. The Claimant alleged two circumstances should be distinguished in the application of the provision 'any quality discrepancy of the Cargo according to the specification of the contract' in Article 3, i.e., the discrepancy existed before loading; and that was under the liability of the insurance company and the carrier after the loading. The Claimant argued that'any quality discrepancy of the Cargo" only referred to the first circumstance. The Respondent denied

such distinction since the Claimant had shipped the goods without its consent to the delayed loading while the goods were not insured at that time. It was impossible for the Respondent to get insurance covering the whole shipment since the goods had already left the port when the supplementary contract was signed. Thus, it was unfair and unreasonable for the Respondent to make any distinction on 'any quality discrepancy' in the supplementary contract.

First, the background for the Respondent's signing of the supplementary contract should be considered in understanding Article 3 thereof. The parties' true intent should be explored based on the signing background when they had different views on contract provisions. The parties specified May 31, 2007 as the latest shipping date in the main contract. The Claimant delayed the loading though the Respondent had issued the letter of credit under the contract and requested the Respondent to amend the letter of credit on June 27, extending the latest shipping date to July 10. The Claimant's delay in shipment for one month caused the Respondent to lose the opportunity to resell the goods as reasonably expected when signing the main contract, resulting in reasonable doubts about the Claimant's commercial credit.

Although the documents submitted by the Claimant indicated that the goods were PRIME, the Respondent, when knowing the remarks on the bill of lading and receiving photos of the surface condition of the goods, was concerned about the difference between 'different degrees' of rust remarked on the bill of lading and 'slight' rust acceptable in the contract, doubted whether the goods were prime, and reasonably believed the existence of quality discrepancy at the time of loading.

The issuing bank notified the Claimant on August 7, raising two document discrepancies. According to international trade practice, if the issuing bank considered the documents

to be inconsistent, it could raise discrepancies and refuse acceptance. The Respondent could have returned the goods when the quality or quantity of the goods was inconsistent with the contract. However, the Respondent decided in good faith to complete the transaction from the perspective of maintaining the cooperative relationship between the parties. In order to protect its legitimate rights and interests and to eliminate doubts about the Claimant's commercial credit and concerns about the quality of the goods, the Respondent proposed to the Claimant on August 15 that 90% payment should be made in advance while the balance was subject to the quality of the goods. The Respondent also intended to inspect the goods in Turkey. However, the Claimant rejected the proposal. The Respondent compromised again after negotiation, agreeing to pay 93% of the price first, and signed the supplementary contract on September 7.

Normally the compromising party would surely require compensation or guarantee in another way. The Respondent, considering the inspection agreed by the parties could not be carried out till the goods arrived at the destination since the goods had left the port when the parties signed the supplementary contract, surely expected no distinction between the before loading and after loading circumstances regarding the quality discrepancy mentioned in the supplementary contract after it had compromised on the proportion of the first payment. Such expectation was reasonable, otherwise the Respondent's concern about the quality of the goods could not be eliminated.

Second, the relationship between the main contract and the supplementary contract should be considered. The main contract and the supplementary contract indicated completely different ideas on how to solve quality problems. The main contract stipulated that the Respondent could directly claim damages for pre-loading quality problems while the supplementary contract provided that the parties should negotiate the discount or cancel the main contract when the negotiation failed. Negotiation was an

obligation instead of a right under Article 3, and a common obligation of both parties ('... seller and buyer shall consult with each other ...'). The Respondent, through requesting negotiation on the next day of obtaining the SGS report, fulfilled this obligation under the supplementary contract.

For the Respondent, the way of handling quality problems under the supplementary contract prolonged time for dispute resolution and increased uncertainty in the outcome thereof. The Respondent's agreement to the negotiation obligation under the supplementary contract in no regard of its right to claim damages directly under the main contract was under the precondition that there would be no more distinction between the two situations described in Article 8 of the main contract regarding 'any quality discrepancy'. In other words, it would be unnecessary for the Respondent to restrict its own remedy if it had no such reasonable expectation. The insertion of Articles 3 and 5 into the supplementary contract would be unreasonable if they were not amendments to Article 8 of the main contract which clearly stated the Respondent's remedy. Therefore, the Claimant's understanding thereof was unsustainable while its way of inferring the meaning of the supplementary contract terms based on the main contract term reached earlier was unreasonable.

Third, the expression in the supplementary contract should be taken into consideration. The foreword of the supplementary contract, stating '[N]ow because seller and buyer have different idea on the conformity to L/C of the documents delivered by seller, especially for the description in the B/L of the quality of the cargo', explained the reasons for the parties' signing the supplementary contract and emphasized the parties' different views on the description of quality in the bill of lading. Obviously, the parties signed the supplementary contract under the special purpose of solving the quality problems.

There was no mentioning of distinctive circumstances regarding 'any quality discrepancy' in Article 3 of the supplementary contract. Therefore, Article 8 of the main contract and Articles 3 and 5 of the supplementary contract were on parallel relationship. In case of conflicts between the two, the subsequent supplementary contract shall prevail.

The expression at the end of the supplementary contract, stating '[T]he other terms in the contract not mentioned here remains valid and unchanged', further illustrated that the parties' purpose of signing the supplementary contract was to amend the corresponding terms of the main contract on the payment method and remedy for quality problems.

Above all, the Respondent argued that Articles 3 and 5 of the supplementary contract substantially changed the parties' agreement on the way of handling quality problems under the main contract no matter based on the expression in the supplementary contract or according to the parties' original intention when signing the supplementary contract. Thus, 'any quality discrepancy' mentioned in Article 3 of the supplementary contract should be interpreted in accordance with the Respondent's understanding. Concerning the way of handling quality problems, the supplementary contracts should be applied.

2) The quality problems mentioned in the SGS report constituted discrepancies of goods delivered by the Claimant.

As mentioned above, the quality discrepancies could be distinguished into two circumstances, i.e. those existed before loading and those caused after loading. As to whether the SGS report could prove the quality discrepancies of the goods, the Respondent made the following analysis. First, for pre-loading discrepancies, the B/L remarks acceptable under the contract were 'slight atmospheric rust on surface and/or

materials partly rust stained / rusty edges / rust stained / some rusty edges', showing the acceptable rust as 'slight', 'on surface' or 'edges'. The letter of credit contained the same description. However, the actual remark on the bill of lading was 'atmospherical rust to varying degrees apparent on all bundles'. 'All' could not be taken as 'partly' while 'varying degrees' could not be regarded as 'slight'. In common sense, 'varying degrees' included not only 'slight' but also 'medium', 'severe' or even too rusty to be used, otherwise the B/L remark would be 'slight' instead of 'varying degrees'. This was sufficient to prove the Claimant had provided goods inconsistent with the contract in disregard of the aforementioned disputed scope of 'any quality discrepancy'.

It should also be pointed out that the description of the quality and quantity of the goods in the bill of lading was based on the Claimant's declaration. Extra 19 bundles and 21 bundles of deformed steel bars under two different specifications were found in the SGS report among all the five different specifications stated in the bill of lading. Where were these extra 40 bundles from? Even if steel bars from other sellers were on board, they could not have been mistaken as the goods under the contract since the latter was covered with various minerals. Excluding the above possibility, the Respondent could conclude that the quantity of goods loaded by the Claimant was inconsistent with the contract at the beginning of shipment. The Claimant's failure to fulfill its obligation of tally further confirmed the Respondent's suspicion of its commercial credit was reasonable.

As to discrepancies caused after loading, the SGS report made 7 remarks on the status of the goods. Among them, remarks (v) and (vii) were acceptable under the contract while the others were out of the sepcification of the contract. The latter could be summarized as: first, some deformed bars were bent at one end or along length; and second, the goods were covered with various minerals.

Article 35 (2) (a) of CISG stipulated that '[E]xcept where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit for the purpose for which goods of the same description would ordinarily be used'. The Claimant acknowledged that 'deformed steel bars are used for construction of houses or roads, etc.' How could those steel bars bent at one end or along length be used for construction? The Claimant actually delivered 2,538 bundles of deformed steel bars among which 717 bundles (more than 28% of the total) contained bent bars in different quantities. How could these goods be fit for the purpose for which they were normally used? According to the SGS inspection report, the goods could not be used for such purpose and did not conform with the contract.

Above all, the quality of the goods was inconsistent with the contract specification either due to the corrosion status or not fitting for the purpose of usage. Even if 'any quality discrepancy' referred to the pre-loading circumstance only as understood by the Claimant, which did not mean the Respondent having given up the above point of view, it could be concluded that the goods were inconsistent with the contract specification based on the corrosion status only.

3) The Respondent was entitled to cancel the contract and requested refund.

As mentioned above, the Respondent had been actively performing the main contract in good faith before the dispute occurred. Its final declaration of cancelling the contract was on the following three grounds.

a) the contractual provision on the cancellation under the main contract.

The main contract set no prerequisite for such cancellation while Article 5 of the supplementary contract stipulated that the main contract could be cancelled when

the parties failed to reach an agreement on the discount amount. This was the only prerequisite for such cancellation in either the main contract or the supplementary contract. The Claimant also clearly acknowledged 'the supplementary contract only renews the provision on the conditions and effects of the contract termination…'. Therefore, the corresponding article of the supplementary contract should be applied to the cancellation of the main contract.

Second, the cancellation of the main contract and the disposal of the goods were different legal relationships. The cancellation of the main contract was due to the parties' failure to reach an agreement on the discount amount while the disposal of the goods was based on the Respondent's actual possession of the goods. There was no cause-and-effect relationship between them. Even if the Respondent had no title to the goods, its right to cancel the main contract in accordance with Article 5 of the supplementary contract should not be influenced.

The above two grounds showed that the Claimant was wrong in alleging the Respondent had no right to declare the contract cancelled since it had disposed of the goods. The reason for such mistake was the Claimant regarded the possession of the goods as a precondition for cancelling the main contract. Even if such logic was recognized, the Respondent was still entitled to cancel the contract. The Respondent could have returned the goods when declaring the contract cancelled since such declaration was before the actual disposal of the goods. Thus, the Claimant's allegation was wrong from all aspects.

As mentioned above, the only prerequisite for the cancellation of the main contract was the parties' failure to reach an agreement on the discount amount while the precondition for the parties' negotiation on the discount amount was the quality discrepancy shown in the SGS report. Of course, such negotiation may have resulted in the parties' agreement

thereon and the continuous performance of the contract. In any case, the parties should first negotiate on the discount or compensation amount instead of the necessity of discount ('... to reach an agreement on the reasonable discount or compensation amount which ...'). In other words, there was no choice on whether to discount. The Claimant, when signing the supplementary contract, agreed to discount the goods when the prerequisite was met while the discount amount would be negotiated by the parties.

It could be found from the above analysis that the logical sequence of the cancellation of the main contract was the occurrence of quality discrepancies-the parties' negotiation on the discount amount-failure to reach an agreement-the cancellation of the main contract. As mentioned earlier, the quality of the goods was inconsistent with the contract, so the Respondent had the right to cancel the main contract when the parties failed to reach an agreement on the discount amount.

b) the factual basis for the cancellation of the main contract.

On October 23, i.e. the day after the SGS report was made, the Respondent required the Claimant to suggest a discount amount via email, but the Claimant did not respond thereto. On November 9, the Claimant requested the Respondent to pay the balance 7% by fax without mentioning the discount amount. The Respondent therefore reasonably believed that the Claimant had refused to perform the obligation of negotiation in Article 3 of the supplementary contract. At this point, the prerequisite for cancellation of the main contract was met.

c) the legal basis for the cancellation of the main contract.

According to Articles 25 and 49 of CISG, one party's breach of contract, if causing the other party to be deprived of what it was entitled to expect under the contract,

constituted a fundamental breach of contract while the other party had the right to cancel the contract. The Respondent, when signing the main contract, expected to obtain qualified deformed steel bars (slight rust allowed) at prime level. However, as mentioned above, the corrosion status and level of the goods, when being loaded, were inconsistent with the Respondent's reasonable expectation. According to CISG, the Respondent had the right to cancel the main contract when the Claimant had constituted a fundamental breach of contract.

Above all, the Respondent had the right to cancel the main contract based on the contractual provision, the factual prerequisite, and the legal basis.

4) The Respondent's disposal of the goods was reasonable.

The reasonableness of the Respondent's disposal or resale of the goods should be explored from the following aspects.

Aspect one, the rationality of the resale contract. It should be noted that the Claimant's title retention could not affect the Respondent's right to sign the resale contract. The Respondent intended to sell the goods on the European market when purchasing them, of which the Claimant was aware. According to general principle of law, the Respondent, with expectation on the timely arrival of the goods and objective possibility of reselling the goods, could sign resale contracts with other buyers at any time after signing the main contract. Such practice was common in international trade.

Signing a resale contract was not the same as actual disposal of goods. The Respondent might sign multiple resale contracts but could only deliver the goods to the next-level buyer according to one of them. Further, even if the Respondent had no title when signing the resale contract, it would only affect the validity of the resale contract instead

of the rationality of the act of signing the resale contract. In fact, the Respondent signed the resale contract with Company C as early as September 14, 2007, because the earlier the resale contract was signed, the higher price could be reached due to the dropping tendency of the market price of deformed steel bars in September 2007. Therefore, the Respondent's signing of the resale contract was reasonable in no regard of its title of the goods.

Aspect two, the reasonableness of the factual disposal of the goods. The Respondent, when the Claimant refused to negotiate on the discount amount, required it to retrieve the goods on November 12, 2007. However, the Claimant refused to not only the discount but also the return of goods in accordance with Article 5 of the supplementary contract, which caused the retention of goods at the unloading port while the Respondent had to bear a storage fee of EUR 0.27/ton per day (about EUR 1,347). If the Respondent took no proactive and timely measures, the storage fee would increase by the day. According to Article 5 of the supplementary contract, the Claimant should bear the storage fee when the contract was cancelled. Furthermore, the market price of deformed steel bars continued to fall in November 2007. The later the goods were disposed of, the greater the loss the Claimant would suffer. The Respondent, considering the above, sought a buyer to dispose of the goods in good faith and in the interests of the Claimant. In addition, the goods kept in open storage would have deteriorated if no timely disposal was made and gradually become waste products with the continuous depreciation. If so, the party finally disposing the goods, no matter which party, would suffer from depreciation, which was inconsistent with either party's expectation when signing the main contract. Therefore, the only reasonable measure the Respondent could take was to dispose of the goods in a timely manner when the Claimant refused either the negotiation on discount or the return of goods.

Article 88(2) of CISG stipulates that '[I]f the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to resell them. To the extent possible he must give notice to the other party of his intention to sell'. Accordingly, the resale of goods was an obligation. The Respondent was 'a party who is bound to preserve the goods' under Article 86 (1) of the Convention. In other words, the Respondent's disposal of the goods was due performance of its obligations under CISG. As mentioned above, the Respondent paid storage fee of EUR1,347 per day for the preservation of goods. More storage fee would incur through the lengthy process of finding buyers, negotiating, signing contracts, actual shipments, etc. for the disposal of goods. The Respondent could and should dispose of the goods based on business sense or CISG. The Respondent also notified the Claimant of its disposal in a timely manner, so the disposal act was reasonable and legal.

Aspect three, the reasonable time for the actual disposal of goods. The Respondent informed the Claimant of its intent to resell the goods as early as October 11, 2007 but the Claimant did not expressly consent or object thereto. Thus, the Respondent presumed the Claimant's implied agreement based on its awareness of the Respondent's purpose of reselling the goods when purchasing them. However, the Respondent made no hasty actual disposal of the goods. Instead, the Respondent reached agreement with the buyer when signing the second resale contract on November 30, 2007 under which it would retain its title before receiving the full payment. The Respondent notified the Claimant of the resale on December 3, 2007, the first working day after November 30, 2007, Friday when the Claimant was out of work because of the time difference (Beijing time was 7 hours earlier than Austria time), and further notified the Claimant of the disposal of goods on December 5, 2007. Moreover, the Respondent, when signing the

resale contract, did not deliver the goods on the spot. It took reasonable time to deliver about 5,000 tons of deformed steel bars. The second resale contract showed that the Respondent had actually held the goods at least before December 8, 2007 and could have returned the goods to the Claimant then. Thus, the time for the Respondent's actual disposal of the goods was reasonable since the Respondent had notified the Claimant thereof repeatedly.

Aspect four, the rationality of the resale price. The resale price USD560/ton was determined by the following three factors. The first factor was the market situation at that time. The second resale contract was signed on November 30, 2007 when the FOB price of deformed steel bars in the European market was about USD520-560/ton which indicated the resale price was rather high. The second factor was the quality of the goods. As mentioned above, various degrees of rust existed when the goods arrived at the Port on September 25, 2007. The goods, after having been kept in open storage for over two months, could only be sold as inventory instead of new products by November 30, 2007 when the second resale contract was signed. The deteriorated goods could not be sold as prime ones, which was confirmed by the SGS report as well (see page 8, Respondent's Evidence 5). The third factor was the goods, without CE certification, could only be sold to limited countries such as Romania instead of most European countries. The above three factors determined that the resale price USD560/ton was reasonable while the Respondent had tried its best to sell the goods at a possible high price.

In addition, the resale price was under the terms of FOT while the USD 656-685/ton price underlined in the Claimant's evidence 17 was under the terms of CIF. The latter was higher since the seller should bear the freight and insurance costs under the terms of CIF. The two prices were non comparable since the latter was for prime new products. Thus, it was unreasonable for the Claimant to compare the resale price under the terms

of FOT for non-prime inventory without CE certification to that under the terms of CIF for prime new products with CE certification. In addition, the Claimant's evidence 17, i.e. the price trend chart, though showing the rising tendency, could not reflect the true price trend when the dispute occurred or when the goods were sold due to the long timespan from May 2007 to June 2008 and the irrelevance of the price trend after the end of November 2007. Therefore, the evidence could not support the Claimant's allegation that the resale price was unreasonable. The Respondent's evidence 17 accurately showed that the price of deformed steel bars in the European market declined continuously in November 2007.

The conclusion could be drawn from the above four aspects that both the Respondent's disposal of the goods and the resale price were reasonable.

Accordingly, the Respondent made the following counterclaims.

1) TheClaimant shall compensate the Respondent for the total loss of approximately USD360,000;

2) The Claimant shall compensate the Respondent for the legal costs in arbitration; and

3) The Claimant shall bear the arbitration fees.

The Respondent believes that, Article 58 of the Contract Law of the People's Republic of China stipulates that '[T]he property acquired as a result of a contract shall be returned after the contract is confirmed to be null and void or has been revoked; where the property can not be returned or the return is unnecessary, it shall be reimbursed at its estimated price. The party at fault shall compensate the other party for losses incurred as a result therefrom…'.

Accordingly, the Claimant was the party at fault due to its refusal to perform the negotiation obligation stipulated in Article 3 of the supplementary contract and should compensate all the losses suffered by the Respondent. The counterclaims for legal fees and arbitration fees were general practices of arbitration and clearly stipulated in Article 31 of the Arbitration Rules. The specific amount of legal fees incurred by the Respondent in this case could only be calculated after the award, based on the working hours of the attorney and the arbitration award. Therefore, the Respondent could not provide all the relevant evidence at present.

Above all, the Respondent concluded as follows: 1) before loading and after loading should not be distinguished for 'any quality discrepancy' in Article 3 of the supplementary contract while the supplementary contract changed the remedy under the main contract; 2)the rust degrees of the goods exceeded the acceptable scope agreed in the main contract even before loading, which was inconsistent with the contract and further supported by the SGS report; 3) the Respondent was entitled to cancel the main contract since the precondition was met; 4) the Respondent's disposal of goods was reasonable since the title of the goods would not influence the Respondent's right to resell the goods while the resale price was reasonable. The Respondent's counterclaims were sustainable based on the above conclusions which had made the undecided matters clear.

3. The Claimant's argument against the counterclaims

1) Was the apportionment of liability under the main contract changed by the supplementary contract?

The parties disputed whether Articles 3 and 5 of the supplementary contract had changed the remedy under the main contract. The Respondent reckoned that the parties

should negotiate a discount as long as the SGS inspection report showed any quality discrepancy no matter which party should bear liabilities therefor. The Claimant believed that the quality discrepancy mentioned in the supplementary contract should exclude the responsibility of a third party while the supplementary contract only changed the payment method and the conditions and effects for the termination of the contract. Other matters, in particular the allocation of risks, should still be determined according to the main contract.

The above dispute was related to the interpretation of the supplementary contract. Article 8 of CISG stipulated that '(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'.

Accordingly, the true intentions of the parties should be explored from the following aspects in the interpretation of the supplementary contract. Aspect one, the purpose of signing the supplementary contract. The purpose was not to change the apportionment of liability under the main contract but to solve whether the remarks on the bill of lading was acceptable under the contract and how the payment should be.

According to the main contract, the Respondent should obtain the goods after making

the full payment by letter of credit and could claim damages with the SGS report if any quality discrepancy was found. The Respondent breached the contract for not making the full payment due to its concern over the quality of goods and the risks in claiming damages when the quality discrepancy was not confirmed. In order to substantially resolve the dispute, the Claimant agreed to collect partial payment instead of full payment and leave the rest till the quality issue was determined. Accordingly, the parties signed the supplementary contract. In other words, the parties did not mention whether the transportation risks borne by the Respondent under the contract should be transferred to the Claimant in the supplementary contract. At that time, the Respondent had insured against the transportation risks (including the loss of goods caused by the insurance company and the carrier) in accordance with Article 7 of the main contract. Therefore, the parties did not expect or intend to make the Claimant bear the transportation risks that should have been borne by the Respondent.

Aspect two, the expression in the supplementary contract. The last sentence of the supplementary contract clearly indicated that '[T]he other terms in the contract not mentioned here remains valid and unchanged'. The supplementary contract, when being used to resolve the parties' disputes, should be coordinated with the main contract. It could be easily found from the wording of the supplementary contract that it only changed the payment method and the conditions and consequences for the termination of the contract, rather than the damages for quality claim, through amending the remedy provision under the main contract. The main amendments were as follows: First, the supplementary contract stipulated that the 93% payment should still be made by letter of credit while the remaining balance would be paid by T/T, depending on the SGS report, leaving the 7% payment as the guarantee for the Respondent's claim. Second, both parties would be entitled to terminate the contract when they could not agree on

the discount amount if any quality discrepancy occurred. Third, the Respondent should return the title certificate to the Claimant after the termination of the contract while the Claimant should return the 93% payment and the interest thereon from the date of payment to the date of return and bear the unloading and storage fees. However, the preconditions for the seller's responsibility for quality discrepancies were not mentioned. Therefore, the prerequisite for the seller's responsibility for quality discrepancies remained the same under Article 8 of the main contract. Accordingly, the buyer's claim against the seller must meet the following conditions: 1) The SGS report showed the quality discrepancy after the goods had arrived at the destination; 2) No third party such as the insurance company or the carrier was responsible for such discrepancy; 3) The claim should be made within 45 days after the goods had arrived at the destination.[1] 'If the SGS Inspection result shows that any quality discrepancy of the cargo according to the specification of the contract' as stated in Article 3 of the supplementary contract actually referred to any quality discrepancy not attribute to the insurance company or carrier when the precondition for assuming liability under Article 8 of the main contract was met, which was the parties' true intent when entering into the supplementary contract.

Article 15 of the main contract stipulated 'Risk: as per Incoterms 2000'. The parties adopted the terms of CFR under which all risks of loss of or damage to the goods should be transferred to the buyer after passing the ship's rail according to INCOTERMS 2000. The buyer should bear all damages or losses of goods found through inspection

1 The original text of the Article 8 of the main contract is 'In case the quality and/or quantity/weight are found by the buyer to be not in conformity with the contract after arrival of the goods at the port of destination, the buyer may lodge claim with the seller supported by an independent surveyor's (SGS) report, with exception, however, of those claim for which the insurance company and/or the shipping company are to be responsible. Claim for quality/quantity discrepancy should be filed by the buyer within 45 days after arrival of the goods at the port of destination. In the event that the buyer does not make such claim within the above-mentioned time-limit, the buyer shall forfeit its right to make a claim with respect to the quality/quantity discrepancy'.

at the destination as long as the carrier had issued a clean bill of lading or one with remarks on quality discrepancy acceptable under the contract while the buyer might claim against the carrier or the insurance company according to the circumstances. This article also indicated that 'any quality discrepancy of the cargo' described in Article 3 of the supplementary contract should refer to any quality discrepancy existed before the transfer of risk. In fact, the Respondent had already filed a claim with the carrier for the contamination and loose bundles of the goods found at the destination and obtained the carrier's compensation promises.

Aspect three, the parties' behavior during the performance of the contract. The Claimant never expected itself to bear the transportation risks. The Claimant reminded the Respondent several times to claim against the insurance company and the carrier timely after the Respondent had raised the quality issue for which it was not liable. It also actively urged SGS to inspect the goods and issue the report after the conclusion of the supplementary contract and the arrival of the goods. After obtaining the report, it sent fax in a timely manner, requesting the Respondent to pay the balance according to the supplementary contract.

The Respondent recognized the exclusion of any quality discrepancy caused by the insurance company and the carrier from 'any quality discrepancy of cargo' as described in Article 3 of the supplementary contract by conduct. The Respondent stated in its email to the Claimant on October 12, 2007 that 'after owner's confirmation, that the costs for the contamination and the rebundling will be taken over by them', showing that the Respondent, believing the contamination and other issues mentioned in the SGS report had occurred during transportation, had claimed against the carrier and obtained its compensation promises for the contamination and rebundling. Thus, the Respondent had no reason to claim a discount from the Claimant for such issues. The Respondent

stated in its email to the Claimant on October 23, 2007 '3) Our marine insurers have been advised accordingly. But unless the final and complete report is given, they would not agree or disagree at this stage' (see Evidence 15), showing the Respondent was convinced that the insurance company should be liable for the quality discrepancy found through inspection at the destination and claimed against it. The Respondent stated in the third paragraph of the first issue in its email to the Claimant on November 12, 2007 that 'the insurer is refusing his responsibility unless the suppliers can prove, that the Outturn report was wrong', which indicated that the Respondent requested for the Claimant's discount after its claim against the insurance company had been rejected while it had no evidence to prove the Claimant should be liable for such discrepancy.

The Respondent, after obtaining the SGS report, admitted the quality discrepancy stated therein was neither inconsistency with the contract specification nor discount cause by conduct. The Respondent, after receiving the report on October 22, 2007, neither provided it to the Claimant in time nor claimed damages accordingly. The Claimant received the report by email on November 6, 2007 after urging the Respondent to do so. On December 3, 2007, the Respondent sent the email for discount to the Claimant without mentioning the SGS report but stating the reasons for discount as '[T]he major reason for this was that all the cargo has no clear cut ends-resulting in terrible extra costs when further processing-and due to the existing rust as well as the condition of the material because of the unfortunate contamination'. Thus, the three reasons were: 1) no clear-cut ends,2) rust and 3) contamination. Among them.The first one was the major reason but not a quality problem described in the inspection report. The other two minor reasons were either acceptable under the contract or caused during transportation and compensated by the carrier. The Claimant did not respond to the email since the Respondent's discount request was not based on the inspection report and it had

disposed of the goods. Then, the Respondent faxed on December 5, 2007, declaring the termination of the contract and requiring refund. It was obvious that the reasons for the Respondent's termination of the contract was not the quality issues mentioned in the SGS report, but 'no clear-cut ends, rust and contamination' stated in the email on December 3.

In summary, the parties' disputes over the quality discrepancy should be settled according to their true intent when signing the contract (including the main contract and the supplementary contract) and a comprehensive, complete and correct understanding of the contract terms, under the principle of *ex aequo et bono* and in accordance with trade practices. Article 78 of the Contract Law of the People's Republic of China stipulated that '[W]here an agreement by the parties on the contents of a modification is ambiguous, the contract shall be presumed as not having been modified'. The Respondent ignored the mutual connection and consistency of the terms of the main contract and the supplementary contract, violated international trade practices, and overturned the facts that it had confirmed by conduct. The Respondent had no sustainable ground for its allegation that Articles 3 and 5 of the supplementary contract instead of Article 8 of the main contract should be applied when the parties had disputes over the quality discrepancy.

2) The Respondent had no right to declare the termination of the contract without any evidence to prove the quality discrepancy of the goods delivered by the Claimant under the main contract and the supplementary contract.

(a) The Respondent had no evidence to prove the goods delivered by the Claimant was inconsistent with the specifications under the main contract and the supplementary contract while the SGS report could not support the inconsistency.

a. The Effectiveness of the SGS Report

The SGS inspection report sent by the Respondent to the Claimant contained three pages. The first two pages were the STEEL PRODUCTS FINAL REPORT issued by SGS on October 22, 2007 when the goods had just been discharged. The third page was issued by SGS on December 27, 2007, over two months after the discharging and final inspection. It was not related to the previous two pages and could not represent the true status of the goods when arriving at the port. It was unreasonable for the Respondent to rely on the third page for the quality discrepancy. Therefore, the parties' disputes over the quality discrepancy should be settled through comparison between the SGS final report on October 22, 2007 and the contract while the report on December 27, 2007 could not be cited as an effective evidence in the determination of the quality discrepancy.

b. The Quality Discrepancy Alleged by the Respondent

① The Prime Level

According to the contract, the conditions for a quality defect to be a reason for discount were: first, the quality was clearly stated on a valid inspection report; second, the quality defect was not acceptable under the contract; and third, the Claimant was responsible for the quality defect. The SGS final inspection report on October 22, 2007 never mentioned the goods as non-prime, so the Respondent had no ground for the quality discrepancy regarding the prime level. Furthermore, the quality determination should be based on the contract instead of the bill of lading, the certificate of origin or other documents according to relevant provisions in the main contract and the supplementary contract. The main contract described the goods as 'HOT ROLLED STEEL DEFORMED BAR' without mentioning 'prime'. Therefore, the Respondent had no contract basis to allege the quality discrepancy since the goods were not prime.

The Claimant, maintaining the above views, regarded '[P]rime newly produced hot rolled steel deformed bar' stated in the bill of lading and the certificate of origin as commodity description only. 'Prime newly produced' referred to the commodity status at the factory instead of a quality requirement. The inspection at the destination was after the signing of the contract, the delivery of goods, the transfer of goods to the carrier and certain transportation time. The SGS report stated the goods as non-prime was issued on December 27, 2007 when the goods had been kept in open storage at the destination for over two months, thus the nature of the deformed steel bars could not be the same as the status when they were newly produced.

Supplier E of the goods involved in this case produced deformed steel bars under national inspection exemption with high recognition in China. The Respondent, accompanied by the Claimant and the port administration staff, had visited Changshu Port, i.e. the loading port, to check the goods before signed the contract and issued the letter of credit. Its signing of the contract after checking the goods was actual recognition of the goods status and quality. Thus, the Respondent clearly knew that the goods were in stock when the contract was concluded.

The transaction of 'stocked material' was the true intent of the parties since the Respondent was aware of the actual status of the goods from the signing of the contract to the delivery of the goods. The specifications of the goods in the contract never included 'prime' while it could be found from the provision of Article 5.5 of the main contract on the acceptable rust conditions such as 'slight atmospheric rust on surface/ material partly rust stained/rusty edges/rust stained/some rusty edges' that the goods under this contract were not 'prime newly produced' but 'stocked material'. The final inspection report at the destination never mentioned the goods were not prime. Therefore, the prime status of the goods should not be considered as quality discrepancy

or a justifiable reason for the Respondent to request a discount.

② The Damage Shown in the SGS Report

The five quality problems unacceptable under the contract in the SGS report as alleged by the Respondent could be summarized into two aspects. First, 'some bars bent at one end and some bars bent along length'. Second, '10% of bundles present rests of various minerals'. The remarks on the bill of lading issued at the port of involved none of them, which showed that the goods delivered by the Claimant met the contract requirements since the quality of the goods was good except for the remarks when the risk of damage was transferred. Before the goods passed the ship's rail, the parties only disputed whether the rust status in the remarks was acceptable under the contract. Thereafter, the problems arising during the transportation or the unloading process at the destination port were irrelevant to the Claimant. According to the provisions of the main contract and the supplementary contract and related trade practices, any quality discrepancy, even if unacceptable under the main contract, should not be the Respondent's ground for discount if it occurred after the transfer of risk. The tribunal should note that the rust status had become a key issue. In the case where the Respondent paid special attention to the rust status, the SGS final inspection report depicted 'more than half or completely covered with a light surface rust', proving that the rust status was acceptable under the contract (slight atmospheric rust on surface/material partly rust stained/rusty edges/rust stained/some rusty edges) and was the normal status of deformed steel bars.

③ The Suitability of the Goods for Usual Purpose

First, the precondition for the quality discrepancy when the goods were not 'fit for which goods of the same description would ordinarily be used' under Article 35 (2) (a) of CISG was no agreement on quality issues in the sales contract. The main contract specified

the quality standard of the goods as BS4449/1997, the grade as 460B, and the lists of acceptable quality issues in Article 5.6. Therefore, the above provision of the CISG was not applicable. The quality discrepancy except those caused by a third party should be determined according to the relevant provisions of the contract.

Second, the Claimant, maintaining its above opinions, alleged that the Respondent, when arguing the goods were not fit for the general purpose of use, should prove the purpose, standards, etc. of the general use. No conclusion could be drawn from the SGS report of December 27, 2007 that the goods were not fit for the general purpose of use. The report was for the accurate determination whether the goods met the original quality requirements through analysis of the chemical composition and mechanical value of the goods with no negative result achieved. The presence of minerals on 10% of the surface would not necessarily cause the goods unsuitable for the general purpose of use. Deformed steel bars were used for buildings, roads, etc. Even newly produced deformed steel bars would be stored in open air for certain time to get slight rust so as to strengthen its adhesion with concrete. The quality of steel bars would not be affected as long as no chemical corrosion occurred. In addition, the statement in the report '[F]rom our experience we cannot state to which extent of existence of the remaining minerals on the bundles of bars will be a hindrance of using the bar' was also very good proof.

Finally, as mentioned above, the Respondent, even if fully proved that the goods were not suitable for the general purpose of use, could not rely on such quality discrepancy to request a discount on the balance since it occurred after the Claimant had delivered the goods according to the contract.

It could be found from the above analysis that the alleged quality discrepancy was caused during transportation. Instead, the SGS final inspection report could prove

that the goods, when delivered by the Claimant, were in compliance with the contract. The Respondent could not prove the quality discrepancy of the goods when delivered and had no ground for requesting discount. It could not cancel the contract since the prerequisite for the application of Article 5 of the supplementary contract did not exist.

(b) The Respondent had no right to declare the cancellation of the contract after its disposal of the goods.

According to the email sent by the Respondent to the Claimant on December 3, 2007, the Respondent had resold the goods. Article 82 (1) of CISG provided '[T]he buyer loses the right to declare the contract avoided or to request the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them'. Legally speaking, The Respondent's resale of the goods was an act of disposing of the goods obtained in accordance with the contract and had nothing to do with the Claimant. The Respondent, treating the goods as those he had the right to dispose of, could not return the goods to the Claimant, thus lost the right to declare the cancellation of the contract.

In this case, there were two possible grounds for the Respondent to cancel the contract.

Ground one was based on Article 5 of the supplementary contract. The Respondent could cancel the contract when the SGS report showed the existence of quality discrepancy for which the Claimant should be liable and the parties reached no agreement on the discount amount and return the title certificates including the bill of lading. However, the defect of the goods shown in the SGS report obviously occurred after the Claimant had delivered the goods in accordance with the contract. The condition for discount and contract cancellation was not met. Even if the condition were met, the Respondent had disposed of the goods before sending the cancellation notice. Such unilateral cancellation

was not effective.

Ground two was the statutory right of cancelling. Article 49 of CISG stipulated '(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract' while Article 25 provided '[A] breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract…'. The Respondent, if cancelling the contract according to CISG, should send a notice to the Claimant within a reasonable time limit while the parties should make restitution at the same time. First, there was no evidence to prove that the Claimant's delivery of the goods constituted a fundamental breach of the contract, thus the condition for cancelling the contract according to CISG was not met. Second, even if the quality issues in the SGS report constituted a fundamental breach of contract, the fax sent by the Respondent to the Claimant on December 5, 2007 could not invalidate the contract. On one hand, the Respondent only requested for the refund but did not mention the transfer of the title certificates including the delivery note to the Claimant in the fax and took no such action thereafter. If the Respondent really intended to cancel the contract, it should have transferred the relevant documents to the Claimant before requesting for refund. On the other hand, the Respondent requested the Claimant to return the 93% payment to its designated account within 48 hours otherwise it would resell the goods, which was unreasonable for the Claimant.

Article 51(2) of CISG stipulated that '[T]he buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract'. The Claimant, insisting on the above opinions, assumed that even if the quality issues in the SGS report were

accepted as quality discrepancy, they only affected a small portion of the goods while such issues would not influence the resale of the goods. Thus, the Respondent had no right to declare the contract avoided in its entirety or to resell the goods after such declaration. Surely, the Claimant should not bear all the resale loss.

3)The Respondent's counterclaims were unsustainable.

Above all, the quality issues in the SGS report were not quality discrepancy agreed on by the parties. The contract remained valid because the precondition for discount and contract cancellation under the supplementary contract was not met. The Respondent's storage and resale of the goods which it had received were the buyer's normal commercial flow and had nothing to do with the Claimant. The Respondent had no right to claim damages from the Claimant. Its counterclaims were unsustainable. First, the counterclaimed costs including the 93% payment, the unloading fee, the storage fee, the interest thereon, the bank fees, the cargo storage insurance premium, the vessel overage insurance premium, the bank credit insurance premium, the courier fee and the sales commission were either payments under the contract or commercial fees should be borne by the Respondent in the performance of the contract and had nothing to do with the Claimant. Second, another counterclaimed cost, i.e. the expected loss of profit from reselling the goods, did not exist. The Respondent calculated its expected profit based on the sales contract on September 14, 2007. However, it could be found in the Respondent's email on November 12, 2007 that the contract on September 14, 2007 had been cancelled. The buyer refused to accept the goods due to the late arrival rather than quality problems ('the customers have cancelled the orders because of the late arrival'). The Claimant had discounted USD15/ton as consideration for the late delivery. Thus, the alleged loss of expected profit had nothing to do with the alleged breach of contract by the Claimant.

Furthermore, the searching results of authoritative industry websites showed that the CIF import prices of steel products in southern European ports ranged from USD 656/ton to USD 685/ton in December 2007 with the continuous rising trend. After the insurance premiums were deducted, the CFR import price in the same month should be at least between USD655-684 / ton. Even if the Respondent resold the goods at the lowest price of USD655/ton which was still much higher than its purchase price of USD558/ton from the Claimant. If the Respondent resold the goods at a reasonable price, the alleged losses could have been fully made up.

If the Respondent alleged to cancel the contract according to Article 5 of the supplementary contract, even if the condition therefor was met (the Claimant insisted such condition was not met based on the above reasons), the Respondent was only entitled to the unloading fee and storage fee while it had no right to claim against the Claimant for other expenses including the bank fees, the maritime insurance premium, the bank credit insurance premium, the sales commission, the vessel overage insurance premium, the courier fee, etc.

Above all, the SGS inspection report could not support the quality discrepancy while the Claimant should not be liable for certain surface defects of the goods after transportation described in the report according to the contract. According to Article 82 (1) of CISG, the Respondent lost its right to declare the contract avoided due to its disposal of the goods before such declaration. The contract was still binding on the parties while the Respondent should fulfill its payment obligation under the contract. The Claimant had contractual and legal basis for its claims while the Respondent counterclaimed on matters for which the Claimant was not liable under the contract or CISG. In view of the above facts and reasons, the tribunal should support the Claimant's claims according to law, including the payment of the 7% balance and interest thereon, the relevant legal

fees and the arbitration fee, and reject all the counterclaims.

The parties reiterated or emphasized their above views during the oral hearing and in their post-hearing supplementary opinions.

II The Tribunal's Opinions

1. The Contract of This Case

The parties signed the mainContract on April 26, 2007 and the supplementary contract on September 7, 2007. The contract is a common international trade contract on the sales of deformed steel bars with the Claimant as the seller and the Respondent as the buyer. The parties negotiated and determined the contractual provisions with no violation of the mandatory legal provisions in the applicable laws stated below and have confirmed the validity of the contract. Thus, the tribunal finds the contract of this case valid and be the basis for determining the parties' rights and obligations.

Meanwhile, the tribunal deems that the contract is the parties' mutual assent. In a transaction, the parties' agreement includes those reached during the execution of the contract which may be reflected in other documents. In international contracts for the sale of goods involving L/C, the L/C and their amendments may often form part of the contractual content of the parties' supplementary agreement. In this case, the evidence on the parties' change of price is the amendment of the L/C. Such documents are binding on the parties.

2. The Place of Arbitration and The Applicable Laws

The parties agreed in Article 10 of the contract that the place of arbitration should be Beijing. Accordingly, the tribunal finds Beijing be the place of arbitration of this case.

Article 10 also stipulates '[T]his agreement is governed and construed pursuant to the United Nations Convention on the International Sales of Goods'. The parties further discussed the applicable laws of this case at the preliminary hearing on August 29, 2008, agreeing 'the 1980 CISG shall be applicable to the substantial issues of this case. For matters not stipulated in the Convention, the Contract Law of China shall be applied'. The tribunal finds the parties' true intent is Chinese laws should be applied to certain issues not covered by the Convention.

3. The Facts Confirmed by Both Parties

Both parties confirmed they signed the contract of this case on April 26, 2007, agreeing the Claimant sold 5,013.962 tons of standard BS4449/1997, grade 460B deformed steel bars to the Respondent under the terms of CFR FO CQD at the unit price of USD570/ton. The L/C should be issued before April 30 and the shipment should be made before May 31. On April 30, the Respondent issued the L/C through the bank, but the goods were not loaded before the end of May. On June 27, the Claimant suggested the Respondent to amend the latest shipment date on the L/C to July 10. On July 4, the Respondent requested a price reduction of USD15/ton for delayed shipments by email. On July 20, the Respondent amended the L/C through the issuing bank to change the contract unit price to USD558/ton. On July 9, the Claimant, after finishing the loading, submitted a full set of documents to the issuing bank for payment. After the goods were shipped, the parties disputed whether the rust remark on the bill of lading was acceptable under the contract and the L/C. On August 7, the issuing bank notified the Claimant that there were two discrepancies in the documents. On September 7, the parties signed the supplementary contract stipulating that the Respondent should notify the bank to make 93% payment and obtain the full set of documents. The payment for the remaining 7% should be made by T/T and up to the SGS inspection report after

the goods were unloaded. On September 12, the Claimant received the 93% payment through the L/C. The cargo arrived at the port of destination on September 25, 2007 and was unloaded from October 12 to 19. SGS began inspection of the goods On September 26 and issued the final inspection report on October 22. On November 6, the Respondent emailed the inspection report to the Claimant. On November 9, the Claimant faxed and requested the Respondent to pay the remaining 7%. On November 12, the Respondent requested the cancellation of the contract, the refund and the return of goods. On November 14, the Claimant faxed and requested the Respondent to pay the balance again. On November 30, the Respondent signed the resale contract. On December 3, the Respondent notified the Claimant of the resale. On December 5, the Respondent notified the Claimant the contract was cancelled and requested the refund be made within 48 hours. On December 27, SGS issued the last page of the inspection report. On January 29, 2008, the Claimant filed for arbitration.

4. The Facts Disputed by the Parties

The parties disputed mainly over the following: first, whether the provisions of the supplementary contract changed the quality provision in the main contract; and second, whether the quality problems in the SGS inspection report constituted quality discrepancy. For both questions, the Claimant's answer was no while the Respondent answered yes.

5. Whether Articles 3 and 5 Changed the Quality Provision in the Main Contract

This issue is the first matter to be decided as agreed by the parties as well as the mainly disputed fact. In essence, the parties' disputes thereon involve two questions: (1) when was the point for determining the goods quality under the supplementary contract, before loading or after unloading? (2) was the quality standard changed?

The tribunal considered the parties had accepted the terms of CFR under Incoterms 2000 as the standard to determine the risk transfer. CFR A5 of Incoterms 2000 stipulates the seller bears all risks of loss or damage to the goods until the goods have passed the ship's rail except for circumstances described in B5. This case involves no such circumstances. The parties both agreed the risks should be transferred to the buyer when the goods had passed the ship's rail at the loading port under the main contract.

Article 3 of the supplementary contract stipulates 'If the SGS Inspection result shows that there is any quality discrepancy of the Cargo according to the specification of the contract, seller and buyer shall consult with each other in good faith to reach an agreement on the reasonable discount or compensation amount which shall only be deducted from contract value. After the deduction, buyer shall remit the remaining amount of the value of the cargo to seller by TT'.

In addition, the final paragraph of the supplementary contract states '[T]he other terms in the contract not mentioned here remains valid and unchanged'. The supplementary contract never changed the terms of CFR.

The tribunal, based on Article 3 and the last paragraph of the supplementary contract, finds the parties have not changed the terms of CFR. The price of the contract is consisted of cost and freight, excluding shipping insurance and other costs. The point of risk transfer remains when the goods passed the ship's rail at the loading port. If the goods were completely lost during the maritime transportation, the risks should have been borne by the Respondent in accordance with the terms of CFR, and ultimately borne by the insurance company.

Article 67 of the Convention provides '…if the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are

handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk'. Article 36(1) of the Convention stipulates '[T]he seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time'. Based on the above provisions, the parties, through agreeing on the terms of CFR, fixed the time for determining the goods quality as when the goods crossed the ship's rail at the loading port. The Respondent specially emphasized 'any quality discrepancy of the Cargo' in Article 3 of the supplementary contract had not changed the point for risk transfer. Thus, the quality of the goods should still be determined according to the status when the goods were loaded instead of after the goods arrived.

The tribunal finds the usual meaning of the contract expression shall be taken as the authoritative interpretation of the parties' intentions unless it leads to unreasonable conclusion. The provision 'any quality discrepancy of the Cargo according to the specification of the contract' clearly indicates the standard agreed by the parties for the determination of the goods quality. It first shows the parties' concern over the goods quality in the supplementary contract. Of course, this supplementary agreement does not affect other rights the Respondent have under the contract or laws. Second, the standard for determining quality discrepancy is 'according to the specification of the contract'.

Article 1 of the main contract stipulates the product specification/standard, size, quantity, unit price and total price. Among them, the product standard is "BS4449/1997 460B". The parties confirmed that the standard was the British standard for deformed steel bars. Thus, Article 3 of the supplementary contract means that any quality discrepancy shall be determined in accordance with the specific British BS4449/1997 460B standard.

Above all, the provision 'any quality difference of the goods determined in accordance with the contract specifications' in Article 3 of the supplementary contract has not changed the quality provision of the main contract. The two are consistent and both require the determination of quality according to the above British standard. Article 5 of the supplementary contract is about the arrangement after the quality discrepancy is determined and has no direct relationship with whether the quality provision has been changed.

6. Whether the Quality Problems in the SGS Report Constituted Quality Discrepancy

SGS is the inspection institution jointly selected by the parties, so its inspection report shall in principle bind both parties. Both parties submitted the two-page inspection report issued by SGS on October 22, 2007. In addition, the Respondent submitted a one-page inspection report issued by SGS on December 27, 2007. The Respondent alleged it had only received one page and it was part of the entire SGS inspection report. In form, the latter report has the same number as the previous report.

The inspection report on October 22 shows the following difference in goods quantity compared with the B/L quantity: 5 bundles of goods with 12mm diameter short, 42 bundles of goods with 14mm diameter short, 19 bundles with 16mm diameter extra, and 21 bundles of goods with 18mm diameter extra. In total, the quantity of goods arrived is 7 bundles less than the B/L quantity.

Besides the quantity difference, the inspection report on October 22 indicates the following problems: First, some of the goods were covered with a light surface rust. Second, there is a considerable amount of steel bars bent at one end or all along. Third, a certain number of metal strapping bands binding the deformed steel bars were broken

but replaced by the carrier. Fourth, 10% goods present rest of various minerals. Finally, there are missing or inconsistent cargo labels.

The inspection report on December 27 contains certain conclusive descriptions of the surface condition of the goods. The report states that no chemical and mechanical analysis has been done but concludes that the goods cannot be identified as "PRIME".

The tribunal, after reading these three pages of the inspection report, finds them are not the entire SGS inspection report which should contain at least 6 pages. The report on October 22, according to its own illustration, should contain at least 3 pages but Annex 1 thereto, i.e. the inspection result of the shipping marks, has not been submitted. The December 27 report with the same number as the October 22 report indicates 3 pages contained therein but the tribunal only got the last page. The following situation regarding the inspection report is also puzzling: the report on December 27, still based on the surface condition of the goods at the time of unloading, was issued over two months later than the previous report. In the over two-month time, as SGS admitted itself, it did not inspect the chemical composition and mechanical properties of the goods in accordance with the BS4449/1997 460B standard stipulated in the contract. In addition, according to the facts confirmed by both parties, this report was issued after the goods had been resold.

The most important basis for determining whether the goods conform to the contract is the agreement of the parties in the contract. The tribunal finds that both parties agreed in the main contract and the supplementary contract that the quality inspection should be conducted 'according to the specification of the contract', i.e. BS4449/1997 460B. The parties have no dispute over the inspection of the goods by SGS at the port of destination. It is quite a pity that the SGS report contains no result of inspection

according to the BS4449/1997 460B standard and no conclusion whether the slight rust on the surface of the goods is acceptable under the standard, which means that the tribunal cannot rely on the report to determine whether the quality discrepancy specially mentioned in the supplementary contract has occurred. The tribunal also cannot determine whether 'PRIME' is necessarily related to the compliance with BS4449/1997 460B standard. The parties, with different views on the meaning of 'PRIME', both have provided no authoritative explanation.

According to Article 35(2) of the Convention, the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used. The parties agreed that the goods of this case are ordinarily used for the production of reinforced concrete in various construction projects. In the opinion of the tribunal, slight rust on the surface of the deformed steel bars does not affect the use in construction projects, which means they are fit for the purposes of ordinary use. Of course, being fit or the purposes of ordinary use also means that they can be normally traded in commercial transactions. The goods in this case have been resold to a third party, indicating that they are marketable. Therefore, the tribunal rejects the Respondent's allegation that the goods are not fit for the purposes of ordinary use.

The bent deformed steel bars and the presence of minerals stated in the SGS report were not mentioned in the bill of lading. The tribunal, taking into account that the carrier approved the surface condition of the goods when issuing the bill of lading, which means that it had observed the surface condition found no problem other than rust, finds those issues mentioned in the SGS report occurred after the goods had passed the ship's rail at the loading port while the Claimant shall not be liable therefor.

Above all, the issues mentioned in the SGS report do not constitute either quality

discrepancy or non-compliance with the contract. Thus, there is no need to carry out the procedure for negotiation stipulated in Article 3 of the supplementary contract. However, this conclusion does not mean that the goods are fully consistent with the contract provisions other than the quality one (see the analysis in section 8 below).

7. Whether the Respondent Had the Right to Cancel the Contract and Request for Refund

The parties agreed in Article 5 of the supplementary contract '[S]hould the parties not be in a position to agree on the discount, the contract will be withdrawn and the order to be considered as cancelled'. The parties further clarified during the hearing that 'the contract will be withdrawn' actually referred to 'declare the contract avoided' under the Convention, resulting in the parties' respective return of goods and refund.

The Respondent, in it written presentation and oral one during the hearing, confirmed the goods was resold in December 2007 and submitted the relevant evidence.

Article 82(1) of the Convention provides '[T]he buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them[2]'. According to the 1978 UN Secretariat Commentary on the Draft Convention,[3] the above provision contains a basic principle that the natural consequence of declaring the contract avoided is to make restitution of the goods, otherwise the buyer loses the right to declare the contract avoided according to Article 49 of the Convention. In this case, the Respondent, after reselling the goods, could not return the goods. Thus, the

2 The tribunal considers that there is a discrepancy between the Chinese version and the English version of Article 82(1) of the Convention. The English version is more accurate, but this difference does not affect the tribunal's determination of the pending matter.

3 The interpretation was directed to Article 67 of the 1978 draft of the Convention, which later became Article 82 of the Convention.

Respondent has lost its right to declare the contract avoided even if it had declared the contract avoided before reselling the goods.

Return of goods and refund are closely related. Since the Respondent could not return the goods and has lost its right to declare the contract avoided, its request for refund is unsustainable. The Respondent's amendment of its counterclaims actually means it has waived the request for returning the 93% payment.

8. Whether the Respondent's Disposal of the Goods Is Reasonable

This pending matter mainly relates to whether the Respondent is entitled to counterclaim the difference between the original contract price and the resale price, and if so, whether the resale price is reasonable. The precondition of answering this question is to determine whether the Claimant has breached the contract as a seller, and if so, whether the breach circumstances are sufficient to allow the Respondent, as the buyer, to counterclaim for the different between the resale price and the original contract price.

According to the actual situation of this case, the relevant provisions of the Convention mainly include the following.

'Article 30 The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Article 35 (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract…(a) are fit for the purposes for which the goods of the same description would ordinarily be uses…

Article 45 (1) If the seller fails to perform any of his obligations under the contract or

this Convention, the buyer may…(b) claim damages…

Article 74 Damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such 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.'

The tribunal finds through the current evidence that the Claimant, when performing the contract, fulfilled the basic obligations of the seller under the Convention, i.e. delivering goods and documents and transferring the title. Concerning the consistency with the quality provision in the contract, the tribunal, through its analysis in the above Section 6 Whether the Quality Problems in the SGS Report Constituted Quality Discrepancy, has partially answered the question. The Respondent could have provided an exact answer through the SGS inspection, but no such answer is found. Based on the evidence submitted by the Claimant, the tribunal believes that the quality of the goods in this case meets the BS4449/1997 460B standard agreed by the parties. According to Article 35 of the Convention, the consistency requirement involves not only the quality but also the quantity of the goods. The SGS inspection report shows the difference in the inventory at the unloading port and the marked quantity in the bill of lading which is the same as the quantity in the contract. The question is who should be responsible for such quantity difference.

Pursuant to Article 77 of the Maritime Law of the People's Republic of China, the bill of lading is the preliminary evidence that the carrier has received the goods in accordance with the conditions stated therein or the goods have been loaded except for reservations

made by the carrier or the person issuing the bill of lading on its behalf. In other words, even if it is a clean bill of lading, the quantity of the goods stated thereon can be overturned by other evidence. The bill of lading in this case has the following remarks: 'shipper's load, stow and count, quantity and quality said to be', which indicates the carrier did not count when the goods were loaded while the Claimant did not request the carrier bear the related responsibility otherwise it should have at least asked the carrier not to make the above remarks. Although the ship arrived at the port of destination much later than expected, the parties did not provide evidence on what had happened during the shipment which resulted in the possible change of quantities in cabins 1, 2, 3 and 7 holding the goods delivered by the Claimant. The tribunal has no ground or reason to determine the change of quantities during the shipment. Therefore, if the B/L quantity is different from the inventory quantity counted by SGS at the destination, the latter shall prevail. The SGS report shows wrong sizes and a shortage of 7 bundles in total. The tribunal, considering no mention of more or less loading in the letter of credit, deems such wrong sizes and shortage the Claimant's default. However, the Claimant shall only compensate for the shortage of 7 bundles since the Respondent has failed to prove its actual loss due to the wrong sizes while the unit price of different size deformed steel bars is the same.

In accordance with the compensation principle of the Convention, the amount of damages borne by the party in breach shall be equal to the amount of losses, including profits, suffered by the other party due to the breach of contract. In other words, the damages under the Convention shall be based on and related to the breach. This case does not involve the non-conformity with the quality standard under the contract. Thus, the Respondent has the right to refuse paying for the goods not actually delivered but no right to declare the contract avoided since the difference between the quantity of

the delivered goods and that under the contract is less than three-thousandths of the total, which is taken as a minor breach. In addition, the Respondent's counterclaim for damages was based on the quality discrepancy instead of the quantity shortage. Therefore, the Respondent shall not be compensated for the damages or counterclaim for the 'price difference' despite the Claimant's minor breach.

Based on above analysis, the Respondent's resale occurred after the conclusion of contract in this case, which was irrelevant to the Claimant. The Respondent is not entitled to request the price difference or other damages according to the Convention. Therefore, it is not necessary to determine whether the disposal of goods is reasonable or not.

9. The Claimant's Claims

The Claimant's three claims are as follows.

1) The Respondent shall pay the balance approximately USD 200,000 according to the contract and the interest thereon from October 23, 2007 till the payment day (based on the rate of 5.08%, i.e. LIBOR over the same period, + 2%);

2) The Respondent shall compensate the Claimant for the legal costs not exceeding 10% of the amount in dispute; and

3) The Respondent shall bear the arbitration fees.

Concerning the balance, the parties unanimously confirmed that the Claimant had received 93% of the contract price but not the remaining 7%. The amended letter of credit shows the total payment is USD 2,800,000, so 7% thereof should be USD 200,000. According to Article 4 of the supplementary contract, the Respondent should have paid the balance no later than October 25, 2007, i.e. three working days after the

inspection report was issued. The Respondent has breached the contract for not doing so and shall bear corresponding liabilities. However, the tribunal decides the payment for the 7 bundles of goods not delivered by the Claimant shall be deducted from the balance. Each bundle weighs about 2 tons based on the number of bundles and the total weight of deformed steel bars stated in the bill of lading. The deformed steel bars with 14mm diameter has the most significant shortage. According to the bill of lading, the total weight of such steel bars is 965.026MT and the total number of bundles is 493. Thus, the weight of each bundle is calculated as follows.

965.026(MT)÷493(bundles)=1.95746(MT/bundle)

According to the amended letter of credit, the unit price of deformed steel bars is approximately USD 600/ton. The deductible amount is calculated as follows.

USD 600×1.95746(MT/bundle)×7(bundles)=USD8,000(approximately)

Therefore, the balance to be paid by the Respondent is approximately USD192,000.

Concerning the interest thereon, Article 78 of the Convention provides '[I]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74'. Thus, the Claimant shall be entitled to the interest. The tribunal decides the calculation of interest shall be based on the amount of arrears, the available preferential short-term bank loan interest rate and the period from the due date till the day this award is made. The principal for the calculation of interest shall be USD180,000, the interest rate shall be 5.08%, the three-month London Interbank Offered Rate (LIBOR) plus 1% and the period shall be from October 25, 2007 to January 15, 2009 (each year is calculated as 360 days).

The Claimant's claim 2 is the Respondent shall compensate it for the legal costs not exceeding 10% of the amount in dispute. The tribunal understands the amount in dispute as the specific amount of the arrears claimed by the Claimant, i.e. USD 200,000 of which 10% is USD 20,000. The Claimant's evidence shows more legal costs than such amount. The last paragraph of Article 10 of the contract stipulates '[T]he fee for arbitration shall be borne by the loosing party', where 'loosing' should be a clerical error of 'losing'. According to Article 31 of the Arbitration Rules, arbitration fees include the arbitrators' remuneration, the administration fee of the arbitration commission, the fees for experts engaged by tribunals, and legal and other costs incurred by parties for arbitration. The tribunal deems the parties, agreeing on the application of the arbitration rules, have authorized the tribunal to award the losing party compensate the winning party for its reasonable legal costs. In this case, the Respondent's default in payment is the main reason for arbitration and breach of contract while the Claimant has minor breach as well. The tribunal, considering its support of the main claims but not the main counterclaims (see analysis in Section 10 below), decides the Respondent bear part of the Claimant's legal costs in the amount of USD 6,000.

The arbitration fees claimed by the Claimant shall refer to the costs of the arbitrators' remuneration and the administration fee of the arbitration commission excluding the aforementioned legal fees. Based on the specific circumstances of the case, the tribunal decides the Claimant and the Respondent shall bear 10% and 90% respectively of the arbitration fees.

10. The Respondent's Counterclaims

The Respondent had 7 counterclaims with a total amount of approximately USD3,000,000 at the beginning and amended them into three counterclaims as follows

(the main difference was due to the resale of goods and the deduction of the resale price from the counterclaimed amount).

1) The Claimant shall compensate the Respondent for the total loss of approximately USD360,000;

2) The Claimant shall compensate the Respondent for the legal costs in arbitration; and

3) The Claimant shall bear the arbitration fees.

The main ground for the counterclaim on the total loss is the quality discrepancy. In this regard, the tribunal stated its main point above that the quality of the goods had met the contract standard. The minor shortage of goods, though regarded as a breach of contract, only results in the Claimant's non-entitlement to the payment of the undelivered goods. The Respondent should not have relied thereon to declare the contract avoided and claim for damages. Therefore, the various costs incurred by the Respondent during its performance of the contract (except for the vessel overage insurance premium, see the next paragraph) and the expenses incurred after it got the title of the goods are normal transaction costs and shall be borne by the Respondent itself.

The evidence shows that the vessel carrying the goods of this case is over 20 years old of which the Claimant has also acknowledged. Due to the overage of the vessel, the Respondent paid an additional insurance premium of EUR 5,707.43 which should be borne by the Claimant. The exchange rate between EUR and USD shall be that on the day when the premium was paid (August 23, 2007). The exchange rates announced by banks in different countries on that day vary. The tribunal deems it suitable to take EUR1 to USD1.355 as the exchange rate.

The tribunal supports the counterclaim on EUR5,707.43 vessel overage insurance premium but rejects the rest of counterclaim 1.

Concerning the counterclaim that Claimant shall compensate the Respondent for the legal costs in arbitration, the tribunal decides the Respondent shall bear such legal costs by itself since the tribunal has found the Respondent bear the main liability for breach of contract based on the facts shown in the evidence (the failure to pay the balance according to the contract) and rejected its main counterclaims.

Concerning the counterclaim on the arbitration fees, the tribunal has stated its position when discussing the last claim of the Claimant. Accordingly, the Respondent and the Claimant shall bear 90% and 10% respectively of the arbitrator's remuneration and the administration fees.

Case 6 2009 Children's Tents Case

I The Merits of the Case

The Claimant and the Respondent signed No. D****3 Purchase Order on June 25, 2008 under which the Respondent purchased approximately 94,000 children's tents from the Claimant at the approximate unit price USD 4.00 and the total price of USD 370,000, the delivery was to be made before August 10, 2008, FOB a port in China and the payment condition was 20% in advance and 80% by T/T before shipment. The Claimant's production cost increased and cycle prolonged due to the Respondent's multiple change of its requirements. The parties changed part of the Purchase Order through negotiation and signed No. 08 Sales Contract on August 1, 2008 under which the unit price was raised to USD 4.00 and the total contract price was adjusted to USD 390,000, the shipping time was changed from August to September 2008, an arbitration clause was inserted on arbitration in Beijing by the China International Economic and Trade Arbitration Commission and the payment condition was changed to approximately USD 70,000 by T/T before production and the remaining USD 320,000 by T/T before shipment.

1. The Claimant's Claims

The Claimant alleged it had fulfilled all its contract obligations. The Claimant, after signing the Purchase Order on June 25, 2008, signed the purchase contract with the same specifications and quantity with Company C, a third party, on June 26, 2008. After the Claimant and the Respondent signed No. 08 Sales Contract on August 1, 2008, the Claimant and Company C changed the purchase contract accordingly. The Claimant

prepared the goods which passed the inspection by the third-party inspection institution designated by the Respondent and its client. The Claimant believed that it had the right to require the Respondent to make the full payment and take delivery according to the Sales Contract.

However, the Respondent failed to fulfill the buyer's obligations. The Respondent, from its advance payment of approximately USD 150,000 till the Claimant initiating this arbitration proceeding, never paid the balance of approximately USD 240,000 before shipment according to the Sales Contract. At the same time, the Claimant had no right to dispose of the goods which were specially produced for the Respondent under third parties' intellectual property rights, so the Respondent was not entitled to terminate the Sales Contract. The Respondent's breach of contract made the Claimant unable to deliver the goods while suffering from financial pressure and severe damage on its legitimate rights and interests. Furthermore, Company C sued against the Claimant since it could not perform the sales contract due to the Respondent's default, causing the Claimant to suffer economic and goodwill losses.

The Claimant, based on the above, made the following claims.

1) The Respondent shall continue to perform No.08 Sales Contract, i.e. pay the remaining approximately USD240,000 to the Claimant;

2) The Respondent shall bear the arbitration fees including the case acceptance and administration fees prepaid by the Claimant; and

3) The Respondent shall bear other necessary expenses incurred for this case.

2. The Respondent's Defense and Counterclaims

1) The Respondent's Statement of Facts

At the end of May 2008, the Respondent received an order from Company D to purchase approximately 94,000 children's tents at the approximate unit price of USD 5.00. Company D ordered such goods for Thanksgiving and Christmas in 2008 and had obtained the permission of the relevant intellectual property right owner.

The Respondent, to prepare the goods, remitted approximately USD 70,000 to the Claimant on June 24, 2008 as the 20% prepayment for No. D****3 Purchase Order which was signed on June 25, 2008. In July 2008, the Claimant declared it could not deliver on August 10, 2008 and requested for extending the delivery period and increasing the unit price of the goods in July 2008. On August 1, 2008, the parties signed No. 08 Sales Contract, allowing partial shipments.

In August 2008, the Claimant notified the Respondent that the goods were ready and requested for full payment. On September 5, 2008, the Respondent negotiated with the Claimant over the payment of the goods on phone, requiring the Claimant to ship all the goods when the Respondent made further payment of USD 80,000 to which the Claimant agreed. The Respondent confirmed by email on September 6 that the parties had reached the agreement that the Claimant would arrange the shipment of all the goods when the Respondent paid USD 80,000 and the Respondent would remit the balance within 30 days after receiving the goods. The Claimant acknowledged in its reply that it would arrange the shipment upon receipt of the payment. The Respondent believed that the parties had reached the Amendment Agreement on the payment terms.

According to the Amendment Agreement, the Respondent remitted USD80,000 to the Claimant on September 9, 2008. On September 16, 2008, the Claimant notified the Respondent that it had received USD 80,000, but the processing factory refused

to deliver the goods due to their failure to reach agreement on the payment condition. The Respondent requested the Claimant to arrange shipment in accordance with the Amendment Agreement on the next day by email, but the Claimant refused to perform the delivery obligation on the excuse that the factory had refused to release the goods. According to the Respondent's investigation, the Claimant did not transfer the USD 80,000 payment to the factory.

As the Claimant refused to ship the goods in accordance with the Amendment Agreement, the Respondent requested it to deliver the goods for which the price of approximately USD 150,000 had been already paid so as to mitigate loss. The Respondent considered such request reasonable since partial shipments were acceptable under the contract. However, this request was rejected by the Claimant, so the contract could not be fulfilled. From September 17 to mid-October, 2008, the Respondent negotiated with the Claimant, requiring it to fulfill all or part of its shipping obligations, but the Claimant insisted on no delivery before full payment.

On October 24, 2008, Company D cancelled its order for approximately 49,000 pieces of goods and retained that for 45,000 pieces since the goods were seasonal and would be late for the Thanksgiving in the United States. The Respondent could only purchase from other factories due to the Claimant's refusal to make full or partial delivery.

On November 7, 2008, the Respondent declared the Sales Contract terminated.

2) The Respondent's Defense

① The Applicable Laws

CISG should be applied in this case since both China and the United States are the

Contracting Parties.

② The parties, after reaching the Amendment Agreement, should have performed accordingly.

The Claimant and the Respondent reached the oral amendment agreement on September 5, 2008, changing the payment terms of the original contract, which was confirmed by both parties via email in conformity with the writing requirement on contract amendments under Article 29 of the Convention. According to the agreement, the parties agreed that the Claimant should arrange the shipping after the Respondent made further payment of USD 80,000 while the Respondent should pay the balance by T/T within 30 days after receiving the goods.

Amendments on sales contracts could be conditional or unconditional. The parties, once amended the contract, should perform in accordance with the amended one. In this case, the Claimant, after unconditionally accepted the amendment on the original payment terms on September 5, 2008, should have performed according to the amended contract. Thus, the Claimant had no ground to allege the Respondent's default for not making the full payment.

③ The Claimant breached the Amendment Agreement by refusing to deliver the goods

The Respondent, relying on the Claimant's promise on September 5, paid USD 80,000 in accordance with the Amendment Agreement and fulfilled its payment obligation. However, the Claimant, after receiving USD 80,000, refused to deliver the goods on the ground that the processing factory had refused to release the goods, thus fundamentally breached the Amendment Agreement. The agreement between the Claimant and the factory was independent of the contract between the Claimant and the Respondent, thus

the Claimant could not breach the agreement on the excuse that the factory had refused to release the goods.

The Claimant's refusal to deliver in accordance with the Amendment Agreement constituted a breach of contract. According to Article 49 (1) (b) of the Convention, the Respondent could have terminated the contract and declared the contract avoided. The Claimant as the defaulting party had no right to require the Respondent to continue to perform the obligations of receiving goods and making payments under the contract.

④ The Claimant had no right to claim damages due to its refusal of the Respondent's request on shipping part of the goods worth over USD150,000.

The Respondent believed that even if the Claimant refused to recognize the validity of the Amendment Agreement, its allegation that the Respondent could only require the Claimant to make partial or full delivery after it had paid in full according to the original payment condition was wrong due to the following reasons.

First, partial shipments were involved in this case. According to Article 73 of the Convention, when part of the contract could not be performed, the non-defaulting party could only declare that part of the contract invalid instead of terminating the entire contract. Partial shipments were allowed under the contract, so even if the original contract were still valid, the Claimant should not have terminated the entire contract when the Respondent did not pay the balance. It was obliged to deliver goods at least worth USD 150,000.

Second, the Claimant was obliged to take reasonable measures to mitigate loss even if the Respondent had breached the contract according to Article 77 of the Convention. The Claimant was aware that it could not dispose of the goods at will due to third parties'

intellectual property rights in the goods. Therefore, the Claimant should have considered the characteristics of the goods and taken reasonable measures to mitigate loss for itself, the processing factory and the Respondent. The Claimant had no right to request the Respondent to continue performing the contract and receive the goods at least against the loss due to its refusal to the Respondent's reasonable request on delivering goods worth USD 150,000 and failure to mitigate loss.

3) The Respondent's Counterclaims

According to Article 49 (1) (b) of the Convention, the Respondent may declare the contract avoided when the seller refused to deliver goods according to the Amendment Agreement. Under Article 81 of the Convention, the Claimant should return approximately USD 150,000paid by the Respondent.

The Respondent believed that according to the Article 74 of the Convention, the Claimant should compensate the Respondent for the profits it could have gained if the contract were performed. Company D cancelled its purchase of 49,000 pieces of goods with the Respondent due to the Claimant's refusal to make partial or full delivery. Therefore, the Respondent's loss of profits due to the Claimant's breach of contract was at least USD 38,000 (49,000 pieces × (USD 5-4)).

Above all, the Respondent made the following counterclaims.

- The Claimant shall return approximately USD 150,000 paid by the Respondent;
- The Claimant shall compensate the Respondent at least USD 38,000 for loss of profits; and
- The Claimant shall bear the legal fees and arbitration fees of this case.

3. The Claimant's Defense Against the Counterclaims and Amended Claims

1) The Claimant's Statement of Facts

On July 25, 2008, the Respondent emailed the Claimant, agreeing to partial shipments and setting out the quantities of goods delivered from nine ports on August 10, 16 and 23 respectively. The Claimant, in its reply, adjusted the quantities allocated to two ports. On July 31, 2008, the Respondent sent three modified orders with signatures under the numbers of D****3, D****3A, and D****3B to the Claimant by email, stating the shipment dates as August 10, 16 and 23 and the goods' value as USD 190,000, USD 74,000 and USD 126,000.

Before the delivery date specified in the contract, the Claimant had repeatedly requested the Respondent to pay the balance. The Respondent explicitly refused such request on August 6, 16 and 20, 2008 on the ground that it had not received payment from its client and needed to adjust its own funds. The Respondent's failure to pay the balance of USD 320,000 until the delivery date of the last batch of goods stipulated in the contract (August 23, 2008) constituted a serious breach of contract.

On September 6, 2008, the Respondent showed its clear intention of paying USD 80,000 and paying the balance within 30 days. On September 18, 2008, the Claimant sent the amended sales contract to the Respondent by email, stating the paid amount and stipulating the balance of approximately USD 240,000 should be paid before shipment. The Claimant notified the Respondent therein that it had 'amended the payment condition of the contract, recorded the paid amount, and guaranteed to ship the goods immediately after receiving the entire balance'. On September 20, 2008, the Respondent expressed his gratitude in the reply and asked the Claimant to provide the original or scanned copy for its financial department.

The Respondent broke the agreement and refused to pay the balance, resulting in the non-delivery of goods.

2) The Claimant's Defense Against the Counterclaims

The Respondent's counterclaims were all under the precondition that 'the Respondent had the right to declare the contract avoided', but the Respondent as the breaching party had no right to declare the contract avoided. Such counterclaims were unsustainable due to the following reasons.

① The contractual provisions on the parties rights and obligations and the order of performance were clear and specific while the Respondent's breach of contract was clear.

The Respondent had not paid the balance equivalent to 80% of the total contract price before the partial shipments on August 10, 16 and 23, 2008 in accordance with the Sales Contract and three Purchase Orders under No. D****3, D****3A, and D****3B. After the breach of contract, the Respondent still failed to perform within the grace period given by the Claimant. According to Article 80 of the Convention, the Respondent, as the breaching party, had no right to allege the Claimant's refusal to deliver the goods as breach of contract, and therefore had no right to declare the contract avoided due to the 'Claimant's breach'.

② The content of the so-called Amendment Agreement stated by the Respondent was untrue and could not support its counterclaims

The Respondent alleged that it reached an oral agreement with the Claimant on September 5, 2008 but had no direct evidence to prove the authenticity and content thereof. China kept its reservations to Article 11 of the Convention, so the so-called 'oral

agreement on September 5, 2008' was invalid.

The Respondent made serious mistakes in the content of the so-called Amendment Agreement and made up the facts. The correct translation of the Respondent's email on September 6 should be: 'According to the last call, we (the Respondent) agreed to further pay USD 80,000 and pay the balance by T/T within 30 days'. The Respondent changed the content and added 'the Claimant would arrange the shipment of all the goods' after 'pay USD 80,000' and added 'after the Respondent receives all the goods' before 'pay the balance by T/T within 30 days' in its translation so as to support its counterclaims.

The Respondent considered that '... I can ask the financial and accounting department to check the accounts after receiving the water bill, and then arrange the future shipment' indicate that the Claimant had confirmed to arrange shipment after receiving the payment. So far, the parties had changed the original payment terms in the contract and reached a new agreement. The Claimant believed that the content of the above message was very clear without exempting the Respondent's paying obligation before shipment after it paid USD 80,000.

③ The so-called loss of profit (if any) suffered by the Respondent due to non-performance of the contract should be borne by itself and had nothing to do with the Claimant.

The Claimant considered the Respondent's counterclaim for loss of profits due to Company D's cancellation of orders for approximately 49,000pieces of goods unsustainable. First, the Claimant doubted the authenticity of the 'loss of profits' alleged by the Respondent since the evidence on the two orders of Company D contained no signature by both parties. Second, the contractual relationship between the Respondent and Company D was independent of the contract in this case. The Respondent's own

default resulted in the non-delivery of goods, so the Claimant should not be blamed for the cancellation of the above orders. Last, the orders were cancelled on October 24, 2008 which was over two months later than the final performance date stipulated in the contract and obviously later than the grace period given by the Claimant. This showed that if the Respondent had fulfilled its obligations in accordance with the contract and the remedy measures reached by both parties thereafter, the cancellation of the orders could have been avoided. Therefore, even if the Respondent did suffer loss due to the cancellation of the orders, the Claimant was not at fault and should not bear any responsibility.

④ The Claimant, refusing to deliver goods worth USD 150,000, did not violate the obligation of 'reasonably controlling losses'.

First, the Respondent's request for 'delivering partial goods worth over USD 150,000' was conditional. The Respondent requested the Claimant to deliver goods worth USD 150,000 on September 27, 2008, and proposed 'Company D could decide whether to receive the remaining goods after the goods arrive in the U.S. If so, the parties would discuss the payment thereon. If not, the Claimant cannot dispose of the goods by itself'. Therefore, the Claimant, if accepted such request, may have lost its right to claim the payment of approximately USD 240,000 for the remaining goods, and paid the huge debt to the processing factory for the remaining goods that could not be resold. Therefore, the Claimant rejected the Respondent's request to avoid greater losses.

Second, the Claimant had reasonable doubts about the Respondent's credit. The Claimant, after the Respondent had breached the contract, took the reasonable measure to avoid greater losses by rejecting the Respondent's request. In September 2008, the Claimant found a Civil Judgment issued by the Ningbo Maritime Court which showed

that a company in Ningbo, Zhejiang, China had exported goods to the Respondent which had taken the goods from the defendant carrier without the bill of lading, causing the plaintiff to lose the payment for the goods. The bad credit history of the Respondent shown in the above judgment gave the Claimant good reason to doubt whether the Respondent would pay and receive the remaining goods worth USD 240,000 after receiving the goods worth USD150,000. Therefore, the Claimant did not accept the Respondent's conditional request to deliver goods worth over USD 150,000 to avoid greater losses.

⑤ The Respondent had no right to claim against the Claimant for the so-called 'seasonal features of the goods'.

The goods involved in this case had no seasonal feature. Different from holiday goods, the goods involved in this case were tents used for children's play of which the appearance and functions were not limited to holiday purposes such as Halloween or Christmas, thus were completely suitable for sale at any time. In addition, the Respondent, being a large toy trader, supply children's tents as regular commodity throughout the year. The same children's tents as the goods involved in this case were on the Respondent's website for the public to purchase till the day the Respondent submitted its defense.

Second, the Respondent, when purchasing the goods from the Claimant, neither mentioned the seasonable features thereof nor inserted a relevant provision in the contract. The Claimant was not aware of the seasonal features of the goods (if any). The Respondent's client's purchasing purpose could only bind the Respondent and had nothing to do with the Claimant.

3) The Claimant's Amended Claims

The Respondent, in its Statement of Defense and Counterclaims, clearly declared the contract avoided on the excuse of the Claimant's breach of contract. The Claimant considered the Respondent had no faith in continuing the contract performance and it would be impractical to request the Respondent to do so. Therefore, the Claimant declared the contract avoided in accordance with Articles 64 (1) (b) and 74 of the Convention and requested the Respondent to compensate for the following losses.

① The Claimant's Direct Loss and Loss of Profit due to Trust and Performance of the Contract

The goods involved in this case were specific. All the goods were printed with the pattern authorized by the third party for use by the Respondent, sewn with fabric labels carrying the Respondent's trademark at visible points, labeled with the Respondent's name in product descriptions and outer packaging cartons. The Respondent's client's stickers were on the inner packaging boxes while its designated marks were printed on the outer packaging cartons. Therefore, the goods were fully specified. Even if the Respondent allowed the Claimant to resell the goods, it would be impossible in fact. The Respondent, as the sole legal buyer of the goods, refused to take delivery in accordance with the agreed procedures, resulting in no commercial value of all the goods for the Claimant. The Claimant's direct loss and loss of profit of the Claimant should be equal to the balance of the total contract price after deducting the payment from the Respondent, that is:

USD390,000-USD150,000=USD240,000(approximately)

② The Interest on the Delayed Payment from the Date of Default to the Date of Claim by the Claimant

The interest loss of the Claimant should be calculated as 'the due balance' multiplied by

'the exchange rate for the same period', 'the daily bank interest rate' and 'the delayed days of the payment'. Since the Claimant received the second payment from the Respondent on September 12, 2008, the interest on the delayed payment should be calculated in two stages, namely:

Stage 1: From August 11 to September 12, 2008 (32 days in total)

USD320,000×6.8448×0.0002988×32= RMB 20,000(approximately)

Stage 2: From September 13, 2008 to February 12, 2009 (154 days in total)

USD 240,000×6.8321×0.0002988×154=RMB 70,000(approximately)

The total sum of the interest losses above should be RMB 90,000(approximately)

③ The Claimant's Expenses Incurred for this Case

The Claimant, though giving the Respondent the grace period after its breach of contract, never waived the right to claim damages against the Respondent. According to Article 61 (1) (a) and Article 63 of the Convention, when the buyer fails to perform his contractual obligations, the seller may provide a reasonable period for the buyer to perform his obligations. However, the seller does not lose any right to claim damages for the buyer's delay in performing his obligations.

Above all, the Claimant amended its claims as follows.

① The Contract between the Claimant and the Respondent shall be declared avoided;

② The Respondent shall compensate the Claimant approximately USD240,000 for the direct loss and the loss of profit;

③ The Respondent shall compensate the Claimant approximately RMB90,000for the interest loss on the delayed payment;

④ The Respondent shall compensate the Claimant for the legal fees, arbitration fees, travel expenses and other necessary fees incurred for this case.

4. The Respondent's Supplementary Defense

1) The Respondent's Supplementary Statement of Facts

The Respondent held that the parties had no major dispute over the transaction process including the signing and amending of the Purchase Order, the preparation of goods and the signing of the Sales Contract from May to August 2008. The parties' disputes were mainly over the following issues. First, the Respondent's payment. Second, whether the parties reached a supplementary agreement early September 2008 to make new arrangement on the payment and delivery.

On September 5, 2008, the Respondent and the Claimant reached an agreement on the phone: the Respondent made further payment of USD80,000, then the Claimant would ship the goods, and the Respondent should pay the balance in 30 days. On September 6, 2008, the Respondent confirmed the above agreement in writing by email. The Claimant confirmed in its email on September 10, 2008 that it would arrange shipment after receiving the payment. At this point, the parties changed the original payment terms of the contract and reached the Amendment Agreement.

On September 16, 2008, the Claimant notified the Respondent that it had received USD 80,000 and tried to arrange shipment, but the processing factory refused to release the goods since the Claimant could not reach agreement on payment with the factory.

The Respondent wrote to the Claimant on September 18, 2008, requesting for a performa invoice to reflect that the Claimant had received the Respondent's total payment of approximately USD 150,000. However, the performa invoice produced by the Claimant did not reflect such amount, so the Claimant changed the paid amount in the contract and sent it to the Respondent. The Claimant, knowing the factory had refused to release the goods, took the opportunity when the Respondent requested for confirmation of receipt of payment to unilaterally change the payment terms of the contract back to 'shipment after receiving the full payment' which was never recognized by the Respondent.

The Respondent, though having required the Claimant to ship all the goods in accordance with the Amendment Agreement, proposed on September 26, 2008 that the Claimant ship goods worth over USD150,000 first so as to mitigate loss and perform the orders of its client, but the Claimant rejected the request. On September 30, 2008, the Respondent emailed the Claimant again, asking the Claimant to deliver all the goods, or deliver the goods worth over USD150,000 first. In the reply, the Claimant insisted that the Respondent should pay the full amount.

On October 24, 2008, Company D cancelled approximately 49,000 pieces of goods and retained 45,000 pieces under the orders. The Respondent, considering that the Claimant had expressly stated it would neither make delivery before receiving the full payment nor accept the Respondent's suggestion of transferring the letter of credit, had to purchase from other factories.

The Respondent declared the contract avoided on November 7, 2008.

2) The Authenticity and Validity of the Amendment Agreement Stating 'Deliver All the Goods after Receiving Partial Payment'

① The Amendment Agreement was the expression of mutual intention

The Claimant alleged in its Statement of Defense on February 12, 2009 that the Claimant had never explicitly agreed to ship all the goods after receiving USD80,000 but only mentioned the release of goods and the arrangement of shipment. Such allegation was wrong in the following three aspects.

First, the parties' various emails showed that the Claimant agreed to ship all the goods after receiving the partial payment. Such intent could also be supported by the Claimant's suggestion of 'shipment after receiving 30% payment' in several emails after the parties had failed to transfer the letter of credit. Furthermore, the Claimant mentioned in the email on September 16, 2008 that the factory insisted on releasing the goods upon full payment. Thus, the meaning of shipping the goods was confirmed.

Second, the parties' purpose of amending the payment terms was to continue the contract performance. If the intention was not shipping all the goods after the payment of USD80,000, the parties should have made arrangement on the delivery of goods, but they never mentioned it in the negotiation.

Third, the Claimant later refusal of the Respondent's request on partial shipment proved that the Claimant should have shipped all the goods.

Therefore, the provision on shipping all the goods in the Amendment Agreement was the parties' mutual intention.

5. The Claimant's Opinions

1) The order for the parties' performance of the contract was clear and unchanged

The Claimant believed that the focus of this case was on whether the parties reached the Amendment Agreement in September 2008; if so, what the content was; and whether the 'shipment upon full payment' principle under the contract was maintained or new arrangement was made on the parties' performance order.

The Claimant considered the two emails on September 6 and 10, 2008 submitted by the Respondent were the parties' mutual intention. Regardless of the true content thereof, such mutual intention, if conflicting with the parties' subsequent consent (on September 18 and 20, 2008), the later should prevail just based on the time of expression.

It was wrong for the Respondent to interpret 'T/T 30' as 'T/T 30 after shipment' during the hearing. The Claimant alleged Chinese laws should be applied to the 'interpretation of contract terms' which was not stipulated in the Convention. According to Article 125 of the Contract Law of PRC, the Claimant interpreted '[W]e had agreed to move forward on the $ 80K additional down payment and T/T 30 for the rest of the balance' as follows:

① Literary Interpretation

In the expression, 'make further payment of USD80,000' was next to 'pay the balance by T/T in 30 days'. Therefore, it should be understood as 'the Respondent agreed to make further payment of USD80,000 and pay the balance by T/T within the following 30 days'.

② Integrity Interpretation

Both the Purchase Order and the Sales Contract confirmed and reiterated the performance order as full payment before the delivery of goods. In particular, the parties,

after making such expression, explicitly reiterated on September 18 and 20, 2008 the performance order specified in the contract. Therefore, even if the expression on September 6 was vague, it could be fully supplemented by the explicit expressions made by both parties thereafter.

③ Objective Interpretation

The contract of this case was the first transaction between the two parties. The goods under the contract was specific and could not be resold. The prepayment was only 20% of the total price. The Claimant had been in a disadvantaged position from the beginning of the transaction. Such background was the reason for the parties to arrange the delivery upon full payment arrangement to protect the transaction security of the Claimant as the seller. The Claimant could not accept the obviously disadvantageous delivery before full payment arrangement against the fair trade principle under the contract when the Respondent had breached the contract, the parties could not find a solution through negotiation and the Respondent's bad credit was shown in various facts.

④ Interpretation according to Customs and Practices

T/T is a common term in international trade practice. 'T/T 30' literally means 'T/T in 30 days'. There is no international practice of interpreting 'T/T 30' as 'T/T 30 after shipment'. The contract of this case was the parties' first transaction, so there is no trade practice for reference. The parties had no such expression in the execution and performance of the contract as well.

⑤ Interpretation under the Principle of Good Faith

Even if the expression was ambiguous, the tribunal should not accept interpretation

unilaterally beneficial to the Respondent who made such expression. Under the principle of good faith, if one party's vague expression can be interpreted in more than two ways, the one unfavorable to the party making the expression should prevail.

The Claimant believed that all the claims and arguments that the Respondent tried to demonstrate based on the two emails on September 6 and 10, 2008 wrongly taken as the 'factual basis' were unsustainable due to the lack of true factual basis.

2) The Claimant's refusal to deliver the goods was legal due to the Respondent's failure in payment.

The Claimant, when the Respondent had failed to perform its prior obligations, had the right to exercise the right to plea of orderly performance, refusing to release the goods in accordance with Article 80 of the Convention and Article 67 of the Contract Law of PRC. The Respondent, after the breach of contract, unreasonably requested the Claimant on September 27, 2008 for 'conditional delivery of USD 150,000 worth of goods' which actually meant 'to give the Respondent unilateral contract termination right over the remaining goods other than those worth USD 150,000 (with the value of over USD240,000). Such request was unreasonable and against the principle of good faith. The Claimant's refusal of such unreasonable request was a reasonable choice to avoid greater losses.

6. The Respondent's Final Statement

1) The Authenticity and Validity of the Amendment Agreement Stipulating 'Full Shipment after Partial Payment'

The Amendment Agreement was formed on the basis of the Claimant's proposal of

'full shipment after partial payment'. A valid chain of evidence was formed since the content of the Amendment Agreement corresponded to such proposal in various emails. The parties, when they had reached no agreement on the transfer of letter of credit or the discount, had another phone consultation on such proposal and reached the final agreement on full shipment after the further payment of USD80,000.

Concerning the Claimant's allegation that its offer had lapsed because of the Respondent's rejection, the Respondent considered that the parties' failure to reach agreement on the Respondent's proposal of 'full shipment after partial payment' at the end of August 2008 had not affected the parties' renegotiation and agreement on the proposal on September 5, 2008. The email sent by the Respondent to the Claimant on September 6, 2008 confirmed the parties' agreement on September 5, 2008. The Claimant reconfirmed it would arrange shipment after receiving the payment in the reply on September 10, 2008. The Amendment Agreement was established and binding on the Claimant.

The Claimant alleged the 30 days of 'T/T in 30 days' should have started from September 5, 2008. According to the Amendment Agreement, the Respondent should pay USD80,000 first and pay the balance before October 5, 2008. The Claimant would arrange the shipping after receiving the full payment. The Claimant explained its visit to the factory for the release of goods as the test of the attitude of the factory as 'requested' by the Respondent instead of fulfilling the delivery obligation under the Amendment Agreement. The Respondent considered such explanation untrue.

First, the Claimant, when replying on September 10, 2008, mentioned it would let the financial and accounting department to confirm the receipt of USD80,000 so as to 'arrange the future shipment' but never mentioned 'shipment upon full payment'.

Second, the Claimant, when explaining the non-delivery to the Respondent on September 16, mentioned 'the current problem is the factory, though having received the advance payment, has a very strong attitude and requires delivery upon full payment. I have tried my best to persuade' which showed that the Claimant and the Respondent had previously agreed on delivery on partial payment. The Claimant broke its promise, requesting the Respondent to pay the balance only after the factory had refused to release the goods. If the parties had agreed on shipment upon full payment, the Claimant would not have urged the factory to release the goods after receiving USD80,000. The Claimant's visit to the factory for the arrangement of shipment showed its attempt to deliver all the goods according to the Amendment Agreement.

Third, the Claimant never took October 5, 2008 as the deadline for the Respondent's payment. The Claimant, after the factory had refused to release the goods, requested the Respondent to pay the balance before the deadline of September 23, 2008. If the content of the supplementary agreement on September 5, 2008 were as alleged by the Claimant, the payment deadline should have been October 5, 2008. October 5, 2008 or similar dates were never mentioned in all the evidence submitted by the Claimant.

2) The parties, having reached the Amendment Agreement, made no more amendment on the payment terms and should perform their obligations accordingly.

The Claimant alleged the parties had amended the payment terms of the contract on September 18-20, 2008, to which the Respondent objected.

First, the Respondent expressed no intention of amending the payment terms again.

Second, the Claimant deemed it unnecessary to amend the contract at that time. The Respondent's Evidence 16 showed that the Claimant had no intention to amend the

contract regarding no matter the Sales Contract or the Amendment Agreement.

In this case, the Claimant unconditionally agreed to amend the original payment terms under the contract on September 5, 2008. The parties, having amended the contract, should have performed their obligations according to the amended contract no matter whether the Respondent had delayed payment in previous performance of contract or not.

3) The Claimant was the breaching party due to its refusal to ship the goods after receiving the payment under the Amendment Agreement.

The Claimant confirmed at the oral hearing that it had not transferred USD 80.000 paid by the Respondent to the factory. The Claimant failed to make reasonable efforts to resolve its dispute with the factory, which caused the factory to detain the goods according to the contract between it and the Claimant and resulted in the non-performance of the contract.

4) The Respondent had fulfilled its obligation to mitigate losses and should at least not be liable for the compensation of the goods worth over USD 150,000.

After Company D had cancelled partial orders, the Respondent purchased goods under the remaining orders from other factories to mitigate losses. The Respondent was short of funds and could only transfer the letter of credit from company D as payment, but the conditions for amending the letter of credit proposed by the Claimant were inoperable. Other factories accepted the transfer of the letter of credit, and finally successfully delivered the goods and received the payment. The Respondent realized the profits under these orders and mitigated the possible losses caused by the Claimant's breach of contract.

5) The Respondent's Final Counterclaims

① The Claimant shall returnapproximately USD 150,000 paid by the Respondent;

② The Claimant shall compensate the Respondent at least approximately USD 38,000 for loss of profits;

③ The Claimant shall bear the arbitration fee; and

④ The Claimant shall bear the Respondent's legal fees incurred for this case till March 31, 2009.

II The Tribunal's Opinions

The tribunal holds the Convention (the tribunal's note:theConvention in this Award specifically refers to the 1980 CISG, i.e. CISG) be applicable to this case since it is the unified substantive law applicable to the parties in international sales of goods due to the fact that the parties' places of business are in the United States and China for which the Convention entered into force on January 1, 1988 and the parties' no objection to the application thereof.

The parties have no objection to the establishment and validity of the contract on August 1, 2008 and no dispute over the Respondent's failure to fulfill the contract obligation timely in August. The tribunal determines the key issues of this case as follows based on the facts of the case: (1) whether the parties have reached an agreement on the amendment of the contract; (2) whether the parties have the right to declare the contract avoided; (3) whether the parties have fulfilled their obligations to mitigate losses; (4) whether the seller has lost the right to claim damages against the buyer if the contract was amended; and (5) the division of liabilities. The tribunal's opinions on evidence

admission, fact-finding and law application are as follows.

1. Whether the Parties Have Reached an Agreement on the Amendment of the Contract

1) China's Reservation to the Written Form

The Claimant alleged that the so-called 'oral agreement' reached by the parties on September 5, 2008 did not comply with the written form requirement under the Convention. The oral agreement was not valid since it was not in written form according to China's reservation to Article 11 of the Convention. The Respondent argued that the oral agreement on September 5 had been confirmed by the parties in subsequent written emails, which was in line with the definition of 'written form' under Article 13 of the Convention and the written requirements for contract amendments under Article 29 thereof, thus China's reservation to Article 11 was not relevant to this case.

China's declaration for not being bound by Article 11 of the Convention was based on Article 96 of the Convention. At that time, Article 7 of Foreign Economic Contract Law of People's Republic of Chinarequired foreign economic contracts be in written form, so China had the right to make the declaration in accordance with Article 96. Although the wording of the declaration did not strictly follow Article 96, the declaration, with Article 96 as its legal basis, could be restated in strict accordance with Article 96 as 'China declares any provision of article 11, article 29 or Part II of the Convention that allows 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 where any party has his place of business in China'. The expression in the China's declaration is a simplification of the expression in Article 96 of the Convention and should be considered the same in terms of legal effects.

However, such reservations cannot be understood as China requires contracts be concluded or amended in writing only. According to Article 96 and Article 12 of the Convention, the legal effect of China's declaration of reservations is that if any party's place of business is in a Contracting State that has made a declaration in accordance with Article 96 of the Convention, Each party shall not derogate from this article (Article 12) or change its validity. That is to say, according to Article 12 of the Convention, if a party's place of business is in China that has made the declaration under Article 96, the principle of no form requirement itself does not apply. In this way, the tribunal shall determine the law applicable to the determination of the contract form based on the conflict rules at the jurisdiction venue. The tribunal, taking into account the contract conclusion place, the contract performance place, the seller's place of residence and arbitration commission's location are all in China, decides that the relevant provisions of the Contract Law of PRC shall apply to this case according to the rules of private international law. Article 10 of the Contract Law stipulates that '[A] contract may be made in a writing, in an oral conversation, as well as in any other form. A contract shall be in writing if a relevant law or administrative regulation so requires. A contract shall be in writing if the parties have so agreed'. The written form of the contract of this case is not required by laws or administrative regulations or agreed by the parties. Therefore, it need not be in writing.

Article 29 is not applicable since China has declared reservation according to Article 96 of the Convention while Article 29 is also mentioned in Article 12. According to the above principle, Article 77(1) of the Contract Law provides '[A] contract may be amended if the parties have so agreed'. Accordingly, the amendment of the contract in this case need not be in writing as well.

Above all, the tribunal deems if the parties reached an oral agreement on September

5, the emails on September 6 and 10 are evidence to prove the specific content of such agreement. It's for sure that the specific content of the agreement is up to the interpretation of these related emails no matter how they are interpreted, so there will be no substantial difference in the result.

The tribunal also needs to point out that the parties' amendment of the contract is directly related to the Respondent's breach of contract. The Respondent requested the Claimant to amend the contract since it could not fulfill its payment obligation according to the original contract. The Respondent's breach of contract could not be denied just because the Claimant finally agreed to this request after various consultations.

2) The Content of the Amended Contract

① The Applicability of the Contract Law to the Interpretation of the Expression of Intent

The Claimant alleged in written statement that it was wrong for the Respondent to interpret 'T/T 30' as 'T/T 30 after shipment'. The Claimant believed Chinese laws should be applied to 'the interpretation of the contract terms' since there was no related provisions in the Convention.

The tribunal notes 'T/T 30' was originally stated in the Respondent's email to the Claimant on September 6 as a unilateral expression of intent. Therefore, the interpretation of 'T/T 30' shall be classified as interpretation of the expression of intent.

The applicability of the Contract Law to the interpretation of the expression of intent depends on the application of Article 7 (2) of the Convention which requests two steps for the application of domestic laws. The first step is 'questions concerning matters

governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based. The second step is 'in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law'. Therefore, the Claimant's allegation that the application of Article 7(2) of the Convention cannot pass the test of the first step is unsustainable since Article 8 stipulates clearly on the interpretation of parties' declaration and other conduct.

② The Lapse of the Contract Amendment Offer

The Claimant considered its offer of 'shipment upon partial payment' made on August 20 and 27, 2008 lapsed due to the Respondent's rejection on August 22 and 29, 2008. Therefore, the Respondent's unilateral expression of intent to the Claimant by email on September 6, 2008 could not establish a contractual relationship between the parties but was a new offer up to the Claimant's acceptance.

Concerning the Claimant's allegation on the lapse of the offer due to the Respondent's rejection, the Respondent argued that the parties' failure to reach agreement on the Claimant's proposal on 'shipment upon partial payment' made at the end of August 2008 did not affect the parties' renegotiation and agreement on the plan on September 5, 2008. The email sent by the Respondent to the Claimant on September 6, 2008 was a confirmation of the parties' agreement on September 5, 2008. The Claimant reconfirmed it would arrangement shipment after receiving the payment in the reply on September 10, 2008.

It can be seen that the parties have no objection to the lapse of the Claimant's offer at the end of August 2008. The difference was the Claimant alleged the email on September 6 could only be considered a new offer while the Respondent argued the email was a confirmation of the agreement already reached by the parties on September 5. As stated

above, the tribunal finds no written form required for the contract amendment in this case, so the key issue is whether the contract has been amended and the specific content of the amendment instead of the way of amendment no matter the emails on September 6 and 10 are taken as evidence to prove the content of the agreement on September 5, or the email on September 6 is considered an offer and the one on September 10 considered the acceptance.

③ The Translation and Interpretation of the Email on September 6

Regarding the content of the email on September 6, 2008, the tribunal basically admits the Claimant's translation, that is, 'According to the last call, we (the Respondent) agreed to further pay USD 80,000 and pay the balance by T/T within 30 days. The payment will be made around the middle of next week. Please arrangement shipment with our Shanghai team'.

Although 'we' is plural, it only refers to the Respondent because 'our Shanghai team' is mentioned later and only the Respondent has the obligation to pay. However, 'we agree' here only refers to the Respondent's unilateral consent. The tribunal needs to consider various factors to decide whether such consent is part of the agreement between the parties. The tribunal shall determine the expression of intent in the Respondent's email on September 6 according to Article 8 of the Convention, especially paragraph (3) regarding the interpretation of expression of intent. Therefore, although the Claimant's email on September 10 is not a direct response to the email on September 6, the tribunal must take it into consideration as the 'subsequent conduct of the parties' so as to further determine the parties' true intention. Moreover, although the email of September 10, 2008 is not a direct response to the email on September 6, 2008 and does not involve T/T 30 and other content, the tribunal finds the Claimant admit the two

emails are regarding the same topic and related since the Claimant stated in its written opinions that evidence 5 could prove 'the Respondent expressed the intent of payment installments by email to the Claimant on September 6' and 'the Claimant replied the above email on September 10'. It is obvious from the email on September 10 that the Claimant agreed to the Respondent's further payment of USD80,000. The Claimant's arguing over the starting point of '30 days' also shows its agreement to 'T/T in 30 days'. Therefore, the tribunal deems the parties reached agreement on the contract amendment and needs to determine the specific scope and content thereof.

The Claimant alleged the parties reached agreement on the contract amendment on September 20 when the Respondent expressed gratitude to the Claimant's amending the payment terms of the original contract on September 18, stating 'the paid amount is recorded and we guarantee to ship the goods after receiving all the balance', as requested by the Respondent in the email on September 6. At this point, the parties reached agreement on the contract amendment. The tribunal holds that the amendment here is actually 'the paid amount is recorded' only since the Claimant insists that the order of shipment upon full payment has not been changed from beginning to end, but the Claimant's act of inquiring about the payment on September 10 is sufficient to show that the parties have reached an agreement on the further payment of USD80,000, so the act of recording the paid amount on September 18 can only be considered as a post written confirmation in the contract. Therefore, the tribunal rejects the Claimant's view that the parties had not reached agreement on the contract amendment until September 20, 2008.

④ The Order of Performance

The issue whether the order of performance has been changed is the key issue of this

case. The parties have debated over such issue with the focus on the starting point of '30 days' and the meaning of 'arrange shipment'.

First, the starting point of '30 days'.

The Claimant alleged the starting point of '30 days' was not expressed in the emails. The parties neither agreed on the definition or interpretation of 'T/T in 30 days' in the emails nor had the practice of replacing 'T/T 30 days before shipment' or 'T/T 30 days after shipment' with 'T/T 30 days'. According to common linguistic logic, if a linguistic expression contains a period with no specific starting point, the starting point should be the time when the linguistic expression is made or the point closest to the period in the expression. During the oral hearing on March 26, 2009, the Claimant alleged '30 days' should be within 30 days after the email according to normal logic. However, the Claimant considered the 'further payment of USD 80,000' as the closest point to 'T/T in 30 days' in the post-hearing written statement, and interpreted the email as 'the Respondent agree to make further payment of USD80,000 and will pay the balance in the next 30 days'.

The Respondent argued the Claimant had never taken October 5, 2008 as the deadline for the Respondent's payment. The Claimant requested the Respondent to pay the balance with September 23, 2008 as the deadline after the factory had refused to release the goods. If the content of the supplementary agreement reached on September 5, 2008 were the same as that alleged by the Claimant, the deadline for the Respondent's payment should have been October 5, 2008. However, such date or similar dates could not be found in any evidence submitted by the Claimant.

The tribunal rejects the Claimant's allegation due to its inconsistent views on the starting point of '30 days' and no urging payment of the balance around October 5 or 18. The

arbitral tribunal notes that the use of 'T/T' is related to the shipment in the contract on August 1, 2008, and the same in the Claimant's proposal at the end of August, 2008. Taking these factors into account, the tribunal decides the date of shipment shall be the starting point of '30 days'.

Second, the meaning of 'arrange shipment'.

The Claimant argued that the expression '... I can ask the financial and accounting department to check the accounts after receiving the water bill, and then arrange the future shipment' did not mean the Claimant would exempt the Respondent from paying the balance before shipment when it received USD80,000 from the Respondent. 'Arrange the future shipment' referred to the Claimant's cooperation with the Respondent's Shanghai branch to schedule the shipment in advance so that the shipment could be made immediately after the Claimant received the full payment as promised by the Respondent. The Respondent argued that, the Claimant did not mention that the shipment would be made only after all payment were received, since the Claimant only mentioned in its email to the Respondent on September 10, 2008 that '... I can ask the financial and accounting department to check the accounts after receiving the water bill, and then arrange the future shipment". The Respondent considered: first, the various emails submitted by the parties showed 'shipment' meant delivery of all the goods after the Claimant received partial payment. Such intent could be proved by the various emails regarding the Claimant's proposal of 'shipment upon receipt of 30% payment' after the transfer the letter of credit had failed. Second, the purpose for the parties' amendment of the payment terms was to continue the performance of the contract. If no full shipment were to be made upon the payment of USD80,000, the parties should have arranged for the delivery of the goods, which could not be found in the parties' negotiations. Third, the Claimant's refusal of the Respondent's request of partial

shipment proved the Claimant's intent was shipping all the goods. Last, the Claimant, when explaining to the Respondent the reason for non-delivery on September 16, stated 'the current problem is the factory, though having received the advance payment, has a very strong attitude and requires delivery upon full payment. I have tried my best to persuade', which indicated the Respondent was not required to pay the balance under the previous agreement between the Claimant and the Respondent. There was no need for the Claimant to urge the factory release the goods after receiving USD80,000 if the parties had reached agreement on shipment upon full payment. The Claimant's urging the factory for the shipment showed its attempt to deliver all the goods according to the Amendment Agreement reached by the parties.

The tribunal deems that the interpretation of 'arrange shipment' shall be in accordance with Article 8(3) of the Convention and based on the specific circumstances of the parties. The Claimant alleged it had to compromise due to its disadvantageous position. First, the goods were produced under third parties' intellectual property rights and could not be sold to other buyers. Second, the goods were fully specific and could not be sold to other buyers. If so, how could the Respondent, after refusing the Claimant's compromise at the end of August, propose payment installments on its own at the beginning of September? The tribunal finds the Claimant's allegation unsustainable.

Furthermore, the parties interpreted 'arrange shipment' in the email on September 6 from a negative point of view. The Claimant alleged it never expressed the intent of exempting the Respondent from paying the balance before shipment after receiving USD80,000 from the Respondent while the Respondent argued the Claimant never mentioned shipment upon full payment. This is mainly caused by the ambiguity of 'arrange shipment'. Under such circumstance, the tribunal, considering the relevant intent is to amend the contract signed on August 1, 2008, decides the unamended

content of the contract shall be taken into consideration for the interpretation of 'arrange shipment'. The parties agreed on 'FOB *Port' in the contract under which the seller is responsible for delivering the goods to the vessel designated by the buyer within the agreed date or time at the designated loading port in accordance with the normal practice of the port. In the case where the parties have not changed the price term, 'arrange shipment' shall refer to the obligation of such obligation unless otherwise specified. According to Article 8(1) of the Convention, 'arrange shipment' in the emails on September 6 and 10 can only be interpreted as intended by the Claimant when the Respondent 'knew or could not have been unaware what that intent was'. In this case, the tribunal has no ground to support the Respondent 'knew or could not have been unaware of' the Claimant's intent. Therefore, 'arrange shipment' shall refer to the shipment of the goods instead of cooperation with the Respondent's branch to schedule the shipment in advance only. Thus, the tribunal deems '... I can ask the financial and accounting department to check the accounts after receiving the water bill, and then arrange the future shipment' refer to shipment upon receipt of USD80,000.

Finally, the Respondent believed that the Claimant's statement on September 16 showed that the Respondent was not required to pay the balance under the previous agreement between the parties. The tribunal admits such convincing argument.

The tribunal also points out that, although the tribunal tends to find that the parties have reached an agreement on the contract amendment after the Respondent's breach of contract, the specific content of the amendment can only be presumed through interpretation of the intention. Therefore, the parties shall be liable for the ambiguity of the content of such amendment.

2. Whether the Parties Have the Right to Declare the Contract Avoided

1) The Claimant's Right to Declare the Contract Avoided

According to the relevant provisions on declaring contracts avoided in the Convention and based on the circumstances of this case, the seller can only declare the contract avoided according to Article 64 (1) stipulating '[T]he seller may declare the contract avoided: (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed'.

The seller declared the contract avoided because he believed the Respondent had no faith in continuing the performance while it was unrealistic to require the Respondent to continue the performance with faithful and practical attitude. However, after the amendment of the contract, the seller had no right to declare the contract avoided because the buyer had not paid the balance since the seller was obliged to ship the goods before such payment.

2) The Respondent's Right to Declare the Contract Avoided

In this case, the buyer can only declare the contract avoided according to Article 49 (1) of the Convention stipulating '[T]he buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed'.

The Respondent argued in the Statement of Defense and Counterclaims that the Respondent could declare the contract avoided when the seller refused to deliver goods according to the Amendment Agreement as per Article 49 (1) (b) of the Convention. However, the Respondent relied generally on Article 49 in its supplementary defense. Therefore, the tribunal need to analyze Article 49 (1) (a) and (b).

① Whether the Buyer Can Declare the Contract Avoided under Article 49 (1) (a) of the Convention

Under subparagraph (a), the remedy of declaring the contract avoided may be used as a last resort when it is no longer possible to expect the seller to continue the performance of contract. According to the provision on the fundamental breach of contract in Article 25 of the Convention, the criteria for 'fundamental' is the damage to the creditor's subjective interests, i.e. the consequences and significance it will have on the creditor, instead of objective degree of breach, especially the damage degree. The creditor, when declaring the contract avoided, need not to prove how much actual loss or threat of loss he has suffered. It should be noted that if on-time delivery is of fundamental importance to the buyer, he must stipulate it clearly in the contract. Moreover, from the perspective that the parties should have established the expected benefits and the importance of each specific benefit maintained by specific obligations when signing the contract, the time point for foreseeability shall be only related to the time of contract conclusion. However, the parties did not agree on the fundamental significance of on-time delivery in the contract of this case. Even in the supplementary defense, the Respondent still reckoned 'the Respondent does not need to claim any rights against the Claimant on the ground of the seasonal feature of the goods. The Respondent mentioned the seasonal feature of the goods just to explain the damages caused by the Claimant's breach', which shows the Respondent never attempts to rely on the seasonal feature of the goods to prove the

Claimant's fundamental breach of the contract.

② Whether the Buyer Can Declare the Contract Avoided under Article 49 (1) (b) of the Convention

Even if the delayed delivery constituted no fundamental breach of contract, Article 47 of the Convention would allow the buyer to fix an additional period of time of reasonable length after the deadline stipulated in the contract expires, or to declare the contract avoided according to Article 49 (1) (b) of the Convention when the seller still fails to perform its obligations. Therefore, the seller's failure to deliver within the additional time given as per Article 47 of the Convention amounts to a fundamental breach of contract. It can be seen that the buyer also benefits from the additional time for the seller's performance of the delivery obligation. If the seller fails to deliver within the reasonable additional time, the buyer can declare the contract avoided without proving the seller's delay is a fundamental breach. In other words, the buyer has no right to declare the contract avoided if he fails to fix additional time for delayed delivery. In addition, the buyer's indication of a deadline must be clear (for example, 'Last Delivery Date: September 30, 2002'). A request for immediate delivery is not sufficient since it mentions no specific extended delivery time.

According to the Respondent's statement of the fact '[F]rom September 17to mid-October, 2008, the Respondent had been negotiating with the Claimant to either fully ship the goods or partially fulfill the delivery obligations, but the Claimant expressly requested for shipment upon full payment'. The Respondent has submitted no evidence of fixing an additional period of time from mid-October to November 7, 2008 when it declared the contract avoided. The requirement of subparagraph (b) is not met due to the buyer's failure to fix an additional period of time after the seller made no delivery.

The Respondent had not declared the contract avoided till the Claimant initiated this arbitration proceeding. Therefore, the tribunal finds such declaration improper.

The best way to settle the case may be the seller continues to perform his shipping obligation while the buyer pays the balance by T/T in 30 days after shipment. However, the tribunal can only award on the parties' claims and counterclaims when neither party requests to continue the performance of the contract.

The tribunal supports the Claimant's claim for declaring the contract avoided since the Claimant, though having not effectively exercised the right to terminate the contract (i.e. to declare the contract avoided) during the performance of the contract, has the right to claim for the declaration of the termination during the arbitration process, also based on the fact that both parties believe the contract could not be possibly performed further.

3. Whether the Parties Have Fulfilled the Obligation of Mitigating Losses

1) The Parties' Opinions

The Respondent, in the Statement of Defense and Counterclaims, alleged that even if the Respondent had breached the contract, the Claimant was obliged to take reasonable measures to mitigate losses as per Article 77 of the Convention, but the Claimant failed to fulfill such obligation by refusing to accept the Respondent's reasonable request of shipping goods worth USD150,000, so the Claimant had no right to request the Respondent to continue the performance and receive the goods at least against these goods. The Claimant raised two arguments in its Defense against the Counterclaims and Amended Claims. First, the Respondent's request for 'shipping goods worth USD150,000' was conditional. Second, the Claimant had reasonable doubts about the Respondent's credit. Its refusal of such request was a reasonable measure to avoid greater

losses after the Respondent had breached the contract.

The Respondent argued against the Claimant's above two arguments. First, the statement quoted by the Claimant was not from the Respondent's email but from the Claimant's email on September 2007. Second, the Respondent never intended to give up either all the goods or the goods worth over USD 240,000. Instead, the Respondent insisted on either shipping goods worth over USD150,000 first or shipping all the goods according to the Amendment Agreement. The Claimant rejected the first point in its written opinions, stating that its narrative was based on the facts reflected in the Respondent's Evidence 9 which was true. The email cited by the Claimant and dated on September 27, 2008 was from the Respondent's Evidence 9. The Respondent submitted the group of emails as Evidence 9, admitting the authenticity thereof. Second, The Respondent never objected to the authenticity of the content of the Claimant's restatement in the email in its reply thereto. The Respondent had not provided any other evidence to prove the Claimant's statement was inconsistent with the facts. In the Claimant's opinions on the Respondent's supplementary defense, the Claimant deemed it wrong that the Respondent had explained its request on the Claimant's delivery of goods worth over USD150,000 as 'to fulfill the obligation of mitigating losses' and refused to compensate for damages over the goods worth over USD150,000 based on such explanation. Article 60 of the Convention stipulates '[T]he buyer's obligation to take delivery consists: (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and (b) in taking over the goods'. Under the contract, the time and amount for the payment and the delivery were not one-to-one corresponding. The Respondent had no legal basis to request the Claimant deliver goods worth over USD150,000 which it had paid. The Respondent's refusal to accept such goods due to the Claimant's rejection of its unreasonable request was a typical breach of contract and

it should be liable for such breach. Furthermore, if the 'buyer's partial acceptance of goods' were interpreted as 'the act of mitigating losses', such interpretation must be based on the premise that 'the buyer has the right to refuse the goods completely'. However, the Respondent had no statutory or agreed reasons for its refusal of the goods. Therefore, the Respondent's argument that its request for delivering goods worth over USD150,000 was to mitigate losses could not be supported.

The Respondent, in its final statement, argued it should not be liable to compensate for the goods worth over USD150,000 at least since it had fulfilled its obligation to mitigate losses through purchasing the remaining orders from other factories. The Claimant alleged in its defense against the Respondent's counterclaims that the most direct, economic and appropriate choice for the Respondent should be performing the payment obligation under the contract to obtain qualified goods while the Respondent's purchase from elsewhere costed extra money and time.

2) The Tribunal's Opinions

First, the Respondent has changed its argument on the obligation of mitigating losses. In the Respondent's Statement of Defense and Counterclaims and subsequent statements, the Respondent argued from the perspective of the Claimant's failure to fulfill the obligation of mitigating losses on the premise that 'even if the Respondent had breached'. However, in the Respondent's Final Statement, the Respondent argued from the perspective that it had fulfilled the obligation of mitigating losses on the premise that 'the Respondent is the victim and creditor'.

The Respondent's legal basis for the obligation of mitigating losses is Article 77 of the Convention stipulating '[A] party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of

profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated'. Article 77, contained in Section II (Damages),Chapter V, Part III of the Convention, has no express applicability to other remedies provided by the Convention, so the legal effect of violating the obligation to mitigate losses is only 'the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated'. Therefore, the Respondent's argument that the Claimant 'has no right to request the Respondent to continue to perform the contract and receive the goods' cannot be supported according to Article 77 of the Convention. Furthermore, Article 77 does not clearly specify the time when the suffering party must take measures to mitigate losses, but several judgments support that the suffering party shall not be obliged to take measures to mitigate losses before the contract is avoided (i.e. when both parties can still request the other party to perform the contract).

The parties have disputed much over whether the requirement of 'shipping goods worth over USD150,000' is conditional. From the fact that the Respondent submitted the disputed email as evidence and no explicit objection can be found in the Respondent's reply to the email, the tribunal deems that though the content of the email is summarized by the Claimant, the authenticity thereof can be confirmed. However, even if the requirement of 'shipping goods worth over USD150,000' is not conditional, it is necessary to consider whether such act is within the Claimant's obligation to mitigate losses. The Respondent alleged such obligation on the assumption that the Respondent had breached the contract, from while it may be inferred that the performance order is shipment upon full payment. If the Claimant is obliged to perform its subsequent obligation when the Respondent has failed to perform its payment obligation, the Respondent would be prompted to breach the contract. The tribunal finds the

Respondent's considering 'shipping goods worth over USD150,000' as the Claimant's obligation to mitigate losses against the legislative purpose of the obligation to mitigate losses.

The Respondent argued it was not obliged to compensate for goods worth over USD150,000 at least since it had purchased the remaining orders from other factories to mitigate losses. If the tribunal admits the Respondent's evidence and finds the Respondent's measures to mitigate losses reasonable, the legal effect shall not be no liability to compensate but no reduction in the damages according to Article 77 of the Convention.

4. Whether the Seller Has Lost the Right to Claim Damages against the Buyer if the Contract Was Amended

The Claimant alleged that the so-called Amendment Agreement was about the grace period given by the non-defaulting party to the defaulting party under which the Respondent's liability for breach of contract was not exempted. The parties reached agreement on the amendment of payment terms after the Respondent had breached the contract and the performance time specified in the contract had passed half a month. Such amendment was fundamentally different from an amendment agreement made before the expiration of the performance time specified in the contract under the purpose of ensuring the proper performance of the contract. Regardless of the amendment, the fact of breach and the loss of the non-defaulting party had already occurred. The Amendment Agreement was about the grace period given by the non-defaulting party to the defaulting party and was essentially a remedy measure taken by the non-defaulting party. According to Article 61(1)(a) and Article 63 of the Convention, the non-defaulting party should not be deprived of the right to claim damages by giving

the defaulting party the grace period. Therefore, the Claimant believed that, on the premise that the Respondent had breached the contract, the parties actually amended the payment terms of the original contract, but the Claimant disagreed with the Respondent on the time, content and legal effect of the Amendment Agreement.

The tribunal holds that Articles 61 and 63 of the Convention are about remedies for the buyer's breach of contract which is fundamentally different from the contract amendment. The main purpose of Article 63 is to explain what will happen when the buyer fails to perform one of his fundamental obligations, i.e. to pay the price or to receive the goods on time. If the seller gives the buyer the grace period in such situation according to Article 63 while the buyer fails to fulfill the obligation within the grace period, the seller is entitled to declare the contract avoided without proving the buyer's delay in performing his obligations constitutes fundamental breach of contract. Article 63 is actually the Claimant's right and the Claimant's exercise of the right does not result in the contract amendment. Therefore, the Claimant cannot assert on one hand that 'the parties have indeed amended the payment terms of the original contract' and allege it as the grace period on the other hand.

Thus, the tribunal finds the Claimant not entitled to require the Respondent to assume responsibility for delay in performance.

5. The Division of Liabilities

Concerning compensation, Article 74 of the Convention stipulates '[D]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such 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'.

In this case, the Claimant shall bear full responsibility for the foreseeable loss caused by its breach of contract since the Claimant failed to perform the contractual obligations. However, the tribunal need to consider the following factors concerning the loss which the Claimant ought to have foreseen. First, the Respondent neither stated the seasonal feature of the goods in the contract nor mentioned the seasonal feature in various emails between the parties, so the tribunal deems at least the seasonal feature is not as obvious as the Respondent emphasized. Second, the tribunal must consider the cause and effect of the loss when calculating compensation therefor. The Respondent asserted Company D had cancelled some orders due to the Claimant's non-performance of its contractual obligations but has not provided any evidence showing Company D's acknowledgment of such cause and effect. Third, the Respondent's evidence for its ordering from other factories has defects such as the inconsistency of numbers in the bank statement of which the Claimant doubted the authenticity and relevance.

Above all, the tribunal finds the Respondent's counterclaim for the Claimant's compensation for its loss of profit unsustainable.

6. The Tribunal's Decisions

The actual situation of the contract performance at the initiation of this arbitration proceeding was the Respondent had made two payments, i.e. 20% advance payment in the amount of approximately USD70,000 and a payment of USD80,000, and the Claimant had made no delivery of the goods under the contract.

In view of the fact that the parties cannot continue the performance of the contract while the Claimant has not delivered any goods under the contract, the Claimant should, in

principle, return all the payments from the Respondent. However, the tribunal, taking into account the facts that the Respondent breached the contract first, the Claimant has produced all the goods according to the Respondent's requirements and is unable to resell the goods to mitigate losses due to the specificity of the goods, decides that the Claimant shall return USD80,000 of the USD150,000 to the Respondent.

Based on the above analysis, the tribunal supports no other claims or counterclaims for damages.

7. The Arbitration Fees, the Legal Fees and Other Expenses of this Case

The tribunal decides, according to the Arbitration Rules of China International Economic and Trade Arbitration Commission and the tribunal's determination and decisions on the claims and counterclaims, each party shall bear 50% of the arbitration fees for the claims and counterclaims.

Each party shall bear its own travel expenses, legal fees and other expenses incurred for this case.

Case 7 2010 Printing Press Case

I The Merits of the Case

1. The Facts and Claims in the Application for Arbitration

Company C (the Claimant's import agent), the Claimant and the Respondent signed No. 02 sales contract on January 13, 2006 under which the Claimant purchased one MO-3300 high-speed multifunctional rotary printing press. The total contract price was approximately EUR1,700,000 CIF a port in China. The main technical data was specified in the annex to the contract. The parties agreed Chinese laws should be applicable to the contract in Article 15 of the general terms of the sales contract and relevant disputes should be submitted to arbitration by China International Economic and Trade Arbitration Commission (CIETAC) in Article 16 thereof.

The Claimant, after signing the contract, paid RMB16,800,000 to the import agent in accordance with the contract. Then, the import agent paid 95% of the total contract price, i.e. approximately EUR1,650,000 to the Respondent with the remaining 5% unpaid, of which the Respondent acknowledged receipt.

The installation and commissioning began in December 2006 after the equipment had arrived at the Claimant's factory. The Claimant and the Respondent organized three acceptance inspections on February 2, 2007, April 9, 2007 and March 3, 2008 but all failed due to the quality discrepancy of the equipment. The Claimant applied for statutory commodity inspection in June 2008. On August 6, 2008, a municipal branch of China Entry-Exit Inspection and Quarantine Bureau (CIQ) inspected the equipment and issued the quality certificate stating '1) The electrical and mechanical safety signs

of the entire production line are not in Chinese (the signs and marks in English are not complete as well), which is inconsistent with the national mandatory standards; 2) The documents such as the technical ones and acceptance standards are not in Chinese, which is inconsistent with the national mandatory standards' and suggesting '[T]he seller should be liable for the above non-conformity with the mandatory standards of the People's Republic of China and must rectify such non-conformity, before which no installation, commissioning or use is allowed'. Such act had constituted a fundamental breach of contract under relevant Chinese laws, but the Claimant continued to negotiate and communicate on the acceptance issues under the principle of friendly negotiation. Due to the non-acceptance and unqualified sample products for clients, the Claimant urged the Respondent to take effective measures to pass the acceptance as soon as possible, but the Respondent failed to do so. The Claimant invited the Respondent's legal representative to come to China for negotiation and settlement, but the Respondent turned down the invitation on the excuse that the legal representative was too old. In order to resolve the problem more quickly, on December 16, 2008, the Claimant entrusted the municipal CIQ to inspect the equipment again after its legal representative D's negotiation at the Respondent's headquarters in Denmark had failed. The municipal CIQ arranged the inspection by the expert team composed of well-known Chinese scholars and industry experts on January 16, 2009. The expert team determined 'the characteristics of the aluminum foil material were not fully considered during the design and manufacture of the equipment, so the equipment is not suitable for the printing of such material'. On January 20, 2009, the municipal CIQ, based on the experts' determination, issued the Appraisal Certificate stating '1) The equipment could not print normally when tested with the made-in-China aluminum foil with a thickness of 0.025 mm which was severely wrinkled in the process; 2) The overprint accuracy could not meet the requirement of ± 0.1 mm when the equipment was tested

with the 0.03mm thick aluminum foil produced by Company B of Denmark which was wrinkled in the process and operated at four speeds (30, 70, 100 and 150 meter/minute)' and suggesting '[T]his Bureau considers the above serious quality problems are caused by the manufacturer's failure to fully consider the characteristics of the aluminum foil material specified in the contract when designing and manufacturing the equipment'. The Claimant informed the Respondent of the appraisal result and sent the demand letter to the Respondent on March 5, 2009 by email, courier and fax, requesting the Respondent to take remedial measures immediately after receiving the demand letter to make the equipment meet the quality standards agreed in the contract within one month, otherwise the Claimant would initiate the arbitral process, requesting the return of goods and claiming damages, which was ignored by the Respondent. As a result, the Claimant's contractual purpose could no longer be achieved.

The Claimant suffered losses of approximately RMB18,800,000 due to the Respondent's fundamental breach of contract from the day the contract was signed till June 2009, including the loss of interest on loans for the purchase of ancillary facilities in the amount of approximately RMB540,000, the loss of depreciation in the factory buildings and ancillary facilities in the amount of approximately RMB300,000, the loss of rent in the amount of approximately RMB340,000, the loss of materials in the amount of approximately RMB210,000 and the loss of travel expenses in the amount of approximately RMB20,000.

The Claimant also suffered the loss of expected profits in the amount of approximately RMB17,400,000 since it could not perform the contract with its client due to the unsatisfactory test samples, and the loss of necessary expenses in this case in the amount of RMB 1.5 million. Furthermore, the Claimant suffered incalculable loss since the Respondent's fundamental breach had affected its corporate image and resulted in losing

customers.

The Claimant's claims are as follows.

1) The Respondent shall return the payment for the equipment in the amount of approximately RMB16,800,000, the bank loan interest for the same period in the amount of approximately RMB3,500,000 and the exchange loss of RMB1,500,000;

2) The Respondent shall compensate the Claimant for losses of approximately RMB18,800,000, including the loss of interest on loans for the purchase of ancillary facilities in the amount of RMB540,000, the loss of depreciation in the factory buildings and ancillary facilities in the amount of RMB300,000, the loss of rent in the three years from 2006 to 2009 in the amount of RMB340,000, the loss of materials for testing the equipment in the amount of RMB210,000, the loss of travel expenses in the amount of RMB20,000 and the loss of expected profits in the amount of RMB17,400,000.

3) The Respondent shall compensate the Claimant for the necessary expenses in this case in the amount of RMB 1.5 million;

The total amount of the above three claims is approximately RMB42,100,000; and

4) The Respondent shall bear the arbitration fees.

The Claimant submitted the Application for Additional Arbitration Claim on March 31, 2010, adding the claim '[T]he multifunctional combined rotary printing press sales contract between the Claimant and the Respondent shall be terminated' so as to further clarify the original claims on the return of equipment payment, the compensation of losses and other necessary expenses in this case.

2. The Respondent's Counterclaims and Reasons

The Respondent and the Claimant signed No. 01 Sales Contract (hereinafter referred to as Contract One) on July 12, 2005 under which the Respondent sold one Model MO-3300 high-speed multifunctional combined rotary printing press (hereinafter referred to as the subject equipment) to the Claimant at the total contract price of EUR1,880,000 CIF a port in China.

The parties signed the Sales Contract (hereinafter referred to as the Contract) on November 30, 2005, changing the total contract price to approximately EUR1,700,000 without significant adjustment of the remaining terms. Both parties acknowledged this contract as the final contract performed by them.

The Claimant, for customs declaration and tax purposes, requested the Respondent to sign No. 02 Sales Contract (hereinafter referred to as Contract Three) together with its import agent, Company C, with the total contract price unchanged on January 13, 2006, under which the whole set of high-speed multifunctional combined rotary printing press was divided into the main unit of high-speed multifunctional combined rotary printing press, the die-cutting unit (rotary), the printing auxiliary device, the color monito and the camera.

The equipment arrived at the buyer's designated location and was installed at the end of 2006. 95% payment for the equipment was made by L/C. Since then, the Claimant had been using the equipment to print products. The record of the Respondent's staff showed the equipment had run on electricity for approximately 5,560 hours as of August 4, 2009. The Respondent repeatedly sent technicians to replace consumables and maintain the equipment due to the consumption of the consumables of the equipment. In the meantime, the Respondent repeatedly requested the Claimant to perform the inspection

and acceptance in accordance with the contract, but the Claimant refused to do so in accordance with international practice or to pay the 5% balance. The Claimant's refusal of payment constituted a serious breach of contract. The Respondent, to protect its legitimate rights and interests, filed this counterclaim on the payment of the balance.

The Respondent's counterclaims are as follows.

1) The Claimant shall pay the Respondent approximately EUR80,000 and the overdue interest temporarily calculated as approximately RMB50,000(calculated from July 1, 2008 to July 23, 2009 at the interest rate of 5.31% and at the exchange rate of 9.7109, i.e. the central parity rate on July 23, 2009);

2) The Claimant shall bear the Respondent's legal fees for handling the counterclaim matters of this case; and

3) The Claimant shall bear the arbitration fees of this case.

3. The Claimant's Final Statement

1) The Claimant has fulfilled its contractual obligations by paying 95% of the total contract price and actively cooperating with the commissioning.

The Respondent should have sent engineers to the buyer's factory within two weeks after the arrival of the equipment in November 2006 for the installation, commission and training of the buyer's staff as required by the contract. However, the Respondent actually conducted the first commissioning on February 2, 2007, over two months later. The Claimant still actively cooperated with the commissioning, arranging three inspections with the Respondent on February 2, 2007, April 9, 2007 and March 3, 2008 which all failed due to the quality discrepancy of the equipment.

2)The Claimant has actively claimed rights under the contract and relevant laws.

① Article 7 of the contract

Article 7 of the general terms of the Respondent's sales contract provides '[I]nspection and Claims If the quality, specifications or quantity of the goods are inconsistent with the provisions of this contract and the insurer or carrier is not liable for such inconsistencies, the buyer has the right to request the seller to replace the parts for free within 30 days after the goods arrive at the end-user's factory with the inspection certificate issued by CIQ while the seller shall bear the inspection fees. If the insurer or carrier is liable therefor, the buyer shall immediately send a notice to the liable party while the seller bears no liability for any actual loss, profit loss or indirect loss'.

First, there are three possible liable parties under Article 7, i.e. the insurer, the carrier and the seller. Obviously, they are only liable for loss or damage of goods during shipment, including appearance quality discrepancies, inconsistent specifications or quantity shortage which can be found easily.

Secondly, this article provides if the seller is liable, the buyer can 'request the seller to replace the parts for free'. The expression of 'replace' instead of 'repair' further confirms the previous analysis, i.e. the inspection and claims under this article are for loss or damage of goods during shipment, including appearance quality discrepancies, inconsistent specifications or quantity shortage which can be found easily when the goods arrive at the destination.

Finally, the Explanation on Matters Relevant to the Quality Certificate by the municipal CIQ states 'the content of quality covers single or multiple items regarding safety, environment protection, appearance quality and inherent quality etc'. In this case,

the municipal CIQ issued two certificates, one is the Quality Certificate involving the national mandatory requirements on the safety of the goods and the language of signs and marks, the other is the Appraisal Certificate regarding the inherent quality of the goods.

Obviously, this article only refers to the appearance quality of the goods. Otherwise, the quality guarantee period in Article 8 will be meaningless.

The Claimant did not request the seller to replace the parts for free within 30 days because the Quality Certificate had not been issued yet. The equipment arrived at the destination port on November 6, 2006 while the Quality Certificate was issued on August 6, 2008, which means CIQ did not issue the Quality Certificate within 30 days. The quality inspection is mandatory and within the authority of the government. The inspection process was initiated upon the Claimant's application as one necessary procedure in customs declaration. In other words, the Claimant has fulfilled its obligations and claimed its rights according to the contract.

② Article 8 of the Contract

'Article 8 The seller guarantees that the goods under this contract have no material or manufacturing defects and fully comply with the specifications specified in this contract.

The guarantee period of this contract is 12 months, starting from the day the seller's maintenance report is signed. However, if the seller is not liable for the delay in the installation, commissioning and acceptance of the equipment, such period shall be no longer than 18 months after the ex-factory date.

The guarantee period covers repair of the goods or replacement of defective parts.

The seller's liability for guarantee is limited to defects occur under normal use and maintenance of the goods. This guarantee shall be void if the installation and maintenance of the goods is not under the supervision of the seller or is changed by the buyer without the seller's written consent. This guarantee does not cover normal depreciation and wear of the goods.

The seller has no other express or implied guarantee on the goods except for the above. Under no circumstances shall the seller be liable for any actual loss, loss of expected profits or consequential loss'.

The above article states '[T]he guarantee period of this contract is 12 months, starting from the day the seller's maintenance report is signed', but the installation and commissioning have not been successful so far. It also states '[H]owever, if the seller is not liable for the delay in the installation, commissioning and acceptance of the equipment, such period shall be no longer than 18 months after the factory exit day'. However, the Appraisal Certificate issued by the municipal CIQ shows that the serious quality problems in the equipment are caused by the manufacturer's failure to fully consider the characteristics of the aluminum foil material specified in the contract when designing and manufacturing the equipment, which is seriously against '[T]he seller guarantees that the goods under this contract have no material or manufacturing defects and fully comply with the specifications specified in this contract'. The Respondent has inescapable responsibility for the quality problems of the equipment. Therefore, neither the 12-month period nor the maximum period of 18 months is applicable. Relevant legal provisions should be invoked since the contractual guarantee period cannot be applied in this case.

③ Article 158 and Article 129 of the Contract Law shall be applied in this case while

the Claimant's application for arbitration is in accordance with these provisions

3) The Existence of Serious Quality Problems in the Equipment Delivered by the Respondent in Non-compliance with the Contract

① The Quality Certificate issued by the municipal CIQ proves the existence of serious quality problems in the equipment in non-compliance with the contract.

The municipal CIQ issued the Quality Certificate for the high-speed multifunctional combined rotary printing press (the equipment) on August 6, 2008. The inspection result shown in the Quality Certificate is 'this Bureau, according to the Law of the People's Republic of China on Import and Export Commodity Inspection and the Regulations for the Implementation, and Articles 5 and 7 of the contract, inspected the equipment against GB5083-1999, GB18209.2-2000, GB9969.1-1998, GB5226.1-2002, finding that: 1) The electrical and mechanical safety signs of the entire production line are not in Chinese (the signs and marks in English are not complete as well), which is inconsistent with the national mandatory standards; 2) The documents such as the technical ones and acceptance standards are not in Chinese, which is inconsistent with the national mandatory standards, suggesting that the seller should be liable for the above non-conformity with the mandatory standards of the People's Republic of China and must rectify such non-conformity, before which no installation, commissioning or use is allowed, and remarking that the CIQ staff will participate in the assessment and acceptance of the equipment, so the buyer and the seller are requested to provide the Chinese technical documents, materials and basis necessary for the assessment and acceptance of the equipment, make other necessary preparations including the acceptance standards, the aluminum foil materials to be used (with clear marks on the specifications, manufacturers, labels and various functions), the yield, loss rate and

printing speed of the equipment, etc. and determine the acceptance date.

The municipal CIQ arranged the inspection by the expert team composed of well-known Chinese scholars and industry experts on January 16, 2009 and issued the appraisal report, stating '1) The equipment could not print normally when tested with the made-in-China aluminum foil with a thickness of 0.025 mm which was severely wrinkled in the process; 2) The overprint accuracy could not meet the requirement of ± 0.1 mm when the equipment was tested with the 0.03mm thick aluminum foil produced by Company B of Denmark which was wrinkled in the process and operated at four speeds (30, 70, 100 and 150 meter/minute). The main reasons are: 1) the mechanical structure design is unreasonable, for example, the diameter of the guide roller is too small and the rotation is not flexible; 2) no traction device between the units of different printing methods and no tension break result in the overprint accuracy inconsistent with the contract; and 3) the automatic overprint control system responds slowly and cannot correct the errors in time. The expert team determines the equipment unsuitable for printing aluminum foil material due to the manufacturer's failure to fully consider the characteristics thereof when designing and manufacturing the equipment'.

The municipal CIQ, based on the opinions of the expert team, issued the Appraisal Certificate on January 20, 2009, stating '[T]his Bureau considers the above serious quality problems are caused by the manufacturer's failure to fully consider the characteristics of the aluminum foil material specified in the contract when designing and manufacturing the equipment'.

The above CIQ inspection result is sufficient to prove the fact that serious quality problems exist in the equipment in non-conformity with the contract.

4. The Final Statement of the Respondent

1)The Respondent has fulfilled all its obligations in accordance with the contract. The parties, due to the different understanding of the acceptance criteria stipulated in the contract, could not reach agreement on the inspection and acceptance of the equipment, for which the Respondent is not liable.

① Article 18 'Pre-acceptance of the Equipment' of the general provisions of the contract the parties have agreed to perform provides 'the buyer will send three delegates to the seller's factory in Denmark for a one-week pre-acceptance of the equipment before the ex-factory date…'. Accordingly, Mr. D, the legal representative of the Claimant went to Denmark, where the Respondent's headquarters is located, to pre-accept the equipment in September 2006, confirming the good condition of the equipment and approving for the shipment, which proves the equipment delivered by the Respondent is in fully compliance with the contract.

② Article 17 'Installation, Commissioning and Operation Training' of the general provisions of the contract the parties have agreed to perform provides 'the seller shall send an engineer to the buyer's factory as soon as possible for the installation and commissioning of the goods and the training of the buyer's staff after the goods arrive at the buyer's factory…'. The equipment arrived at the Claimant's factory which was still under construction in November 2006. The Respondent's technician started the installation and commissioning of the equipment on December 27, 2006. During the following 30 days, the Respondent's technician installed and commissioned the equipment in full compliance with the contract under the unfavorable condition of below-requirement environment, temperature and humidity at the installation site of the Claimant (evidenced by the fax from the Respondent's after-sales service department to the Claimant) and trained and guided the Claimant's staff (evidenced by the training record). The equipment, as tested onsite by the Respondent's technician, met all the

criteria under the contract.

③ Article 7 'Inspection and Claims' of the general provisions of the contract the parties have agreed to perform provides '[I]f the quality, specifications or quantity of the goods are inconsistent with the provisions of this contract and the insurer or carrier is not liable for such inconsistencies, the buyer has the right to request the seller to replace the parts for free within 30 days after the goods arrive at the end-user's factory with the inspection certificate issued by CIQ while the seller shall bear the inspection fees…'. It can be presumed that the equipment, when arriving at the Claimant's factory, met the quality standard under the contract since the Claimant neither applied for the CIQ inspection within 30 days after the arrival nor complained about the quality thereof.

④ Article 8 'Quality Guarantee' of the general provisions of the contract the parties have agreed to perform provides '[T]he guarantee period of this contract is 12 months, starting from the day the seller's maintenance report is signed …such period shall be no longer than 18 months after the ex-factory date'. The Respondent's technician went to the Claimant's factory to commission or maintain the equipment regularly or upon the Claimant's request during the guarantee period of the equipment (evidenced by the service report). On January 17, 2008, the Respondent notified the Claimant in advance that the guarantee period would expire on March 28, 2008 (evidenced by the fax from the Chinese office of the Respondent to the Claimant on January 17, 2008).

⑤ The Claimant shall be liable for the failed final acceptance of the equipment.

In this case, the Claimant adopted neither the international standard nor the usual standard, but found an extreme standard which can be met by no equipment, i.e. running the equipment at the maximum paper feeding speed for a long time with poor-quality materials used, and forced the Respondent to follow such standard for the

acceptance, which is on no legal basis and contrary to common sense.

2) The equipment is a qualified product.

The Respondent has fully fulfilled its contractual obligations and the equipment involved in the dispute is a qualified product. The frustration of the purpose of contract alleged by the Claimant is untrue.

① As mentioned above, the Claimant pre-accepted the equipment before shipment and confirmed it qualified.

② The equipment is a multi-functional combined rotary printing press with printing methods such as offset printing, flexo printing, gravure printing, line gravure printing, silk printing and digital printing and post-processing functions such as hot stamping, laminating, die cutting, embossing, folding, cutting and drying. It can print on an extremely wide variety of materials such as plain paper, cardboard, plastic film (PVC, OPP, etc.), aluminized film, stickers and composite materials besides aluminum foil.

③ The equipment passed the import inspection by the municipal CIQ.

④ The Claimant, after the installation of the equipment, has carried out long-term operation with the equipment running on electricity for approximately 5,560 hours (evidenced by the Respondent's service report on August 4, 2009). The Respondent arranged the training of the Claimant's staff and the Claimant started operation after the installation at the end of 2006. The Respondent repeatedly sent technicians to replace consumables and maintain the equipment due to the consumption of the consumables of the equipment. The Claimant had used the equipment for 5,564 hours till August 4, 2009. If calculated at the minimum printing speed of 30 meters per minute,

approximately 5,560 hours means the printing of approximately 10,000,000 meters. If there were quality problems, the Claimant would not have used the equipment for so long and printed so many.

3) Occasional failure of the device has nothing to do with the quality.

The test report of the combined equipment by the Respondent on April 9, 2007 clearly stated that external reasons such as 'poor performance of the materials, bad tension stress of the coils and instability' had caused 'the combined sets shift sideways and move unsteadily' which was 'nothing about the functions of the equipment because the overprint accuracy could be ensured at steady speed, showing good performance and normal functions'. The instability of the equipment was not caused by quality problems but the inconsistency with the operation requirements in the specific operation methods, the quality of the materials used and even the temperature and humidity of the environment in which the equipment was running (the specification clause of the contract the parties have agreed to perform provides clear temperature and humidity requirements for the operation of the equipment).

② The Claimant's employee recognized that the instability was caused by the materials in the parties' correspondence regarding the operation of the equipment.

4) The Claimant has no legal basis for its claims.

① The Claimant has no legal basis for the contract termination claim.

Contract termination applies to the circumstance where one party's breach results in the non-realization of the contract purpose. In this case, the Respondent has fully and correctly fulfilled all the agreed obligations according to the contract, so the Claimant

cannot meet any condition of contract termination and has no legal basis for such claim.

② The Claimant has no legal or factual basis for the second claim.

First, the liability consists of the facts of damage, breach of contract, causal relationship between breach and damage, fault and other elements. In this case, on one hand, the Respondent has properly performed its contractual obligations with no breach or fault; on the other hand, the Claimant has gained big profits and output value by using the equipment for approximatel5,560 hours and printing 10,000,000 meters. The Claimant, suffering no indirect loss or loss of expected profits because of the Respondent, has no factual basis for its damage claim.

Secondly, the contract is the expression of the parties' true intention. There is no provision on the Respondent's liability and the scope thereof under such circumstance in Article 10 on the liability for breach of contract. Article 8 of the general provisions of the contract also provides '[U]nder no circumstances shall the seller be liable for any actual loss, loss of expected profits or consequential loss'. Article 60 of the Contract Law stipulates '[T]he parties shall fully perform their respective obligations…'. Therefore, the Respondent shall not bear any loss of expected profits or indirect losses of the Claimant in accordance with the contract. The loss of interest on loans for the purchase of ancillary facilities, the loss of depreciation in the factory buildings and ancillary facilities, the loss of rent, the loss of materials used for testing and the loss of expected profits claimed by the Claimant are not losses of actual benefits but losses of future benefits, thus the Respondent shall not be liable for these indirect losses while the Claimant has no contractual basis for its alleged indirect losses and expected profit loss.

II The Tribunal's Opinions

1. The Claims

1) The Basis for Hearing this Case

Article 15 of the general provisions of the contract stipulates that this contract shall be governed by and interpreted in accordance with the laws of the People's Republic of China while the Convention on Contracts for the International Sale of Goods (CISG) and other international treaties and practices may be referred to.

The tribunal deems the above contractual agreement between the parties valid. The tribunal, noting the parties have explicitly cited CISG during the oral hearing and in their written statements, which shows their recognition of the applicability of CISG in this case, determines CISG and other international treaties and practices may apply when there is no corresponding or clear provision in Chinese laws.

2) The Hearing Focus and Methods

The tribunal focuses on the arbitration claims and counterclaims of the parties in the hearing and award of this case. The arbitral tribunal has no power and cannot rule beyond this scope.

In addition, the Claimant and the Respondent shall bear burden of proof for their respective claims, counterclaims and opinions. If one party fails to fulfill the basic standard of proof, its corresponding claim, counterclaim or opinion cannot be supported.

The tribunal summarizes the Claimant's claims as follows.

① The Claim on the Contract Termination and Restitution (hereinafter referred to as

Claim One)

※ The Respondent shall return the payment for the equipment in the amount of approximately RMB16,800,000 and compensate the Claimant for the loss of loan interest for the purchase of the equipment in the amount of approximately RMB3,500,000;

※ The Respondent shall compensate the Claimant the loss of interest on loans for the purchase of ancillary facilities in the amount of approximatelyRMB540,000;

※ The Respondent shall compensate the Claimant the loss of depreciation in the factory buildings and ancillary facilities in the amount of approximatelyRMB300,000;

※ The Respondent shall compensate the Claimant the loss of rent in the three years from 2006 to 2009 in the amount of approximately RMB340,000; and

※ The Respondent shall compensate the Claimant the loss of materials for testing the equipment in the amount of approximately RMB210,000.

② The Claim on the Compensation for the Expected Profit Loss in the Amount of approximately RMB 17,400,000 (hereinafter referred to as Claim Two)

③ The Claim on the Compensation for the Travel Expenses in the Amount of approximatelyRMB20,000, the Necessary Expenses in the Amount of RMB1.5 Million Incurred for this Case and the Arbitration Fees (hereinafter referred to as Claim Three)

The tribunal, considering the circumstances of this case, holds that the determination on Claim One shall be based on the decision whether the contract could be terminated as requested by the Claimant. If not, all the compensation requests under the restitution

claim shall not be supported because all the costs involved therein are inevitable expenses during the contract performance for which the Claimant cannot claim compensation when the contract is not terminated. In contrast, Claim Two is essentially for the expected profit loss which could have been realized if the contract were properly performed but cannot be realized due to the Respondent's breach of contract. Obviously, the restitution requests in Claim One are completely contrary to Claim Two regarding the expected profit loss. Even if the tribunal finds the Respondent has breached the contract as alleged by the Claimant, it cannot support both Claim One and Claim Two. The tribunal's determination on Claim Three shall be based on its decision on the first two.

The tribunal, considering the above, conducts the hearing and award of this case from the following aspects.

① In the specific circumstances of this case, whether the Claimant's request for the contract termination and restitution can be supported; and

② In the specific circumstances of this case, whether the Claimant's request for the Respondent's compensation of its expected profit loss can be supported.

3) Claim One

The Claimant has been trying to explain and prove the serious quality problems in the equipment delivered by the Respondent fall within the scope of 'frustrating the purpose of the contract' under Article 94 (4)of the Contract Law of the People's Republic of China (hereinafter referred to as the Contract Law) and 'fundamental breach' under Article 25 of CISG (hereinafter referred to as the fundamental breach) and request for the contract termination and restitution accordingly during the hearing of this case.

The tribunal holds that the breaching party's fundamental breach of the contract is the basic condition for the non-breaching party's right to terminate the contract and restitution under either the Contract Law or CISG, but it does not mean the non-breaching party can enjoy the right to terminate the contract in any case as long as the breach constitutes a fundamental one.

The tribunal further holds through hearing whether the Respondent has fundamentally breached the contract is no longer a key issue for the hearing and award of this case when determining whether the Claimant has the right to terminate the contract and restitution under the specific circumstances of this case and based on the Claimant's claims and statements. In other words, the tribunal's determination on Claim One is not affected by whether the Respondent has fundamentally breached the contract. The reasons are as below.

Article 81 of CISG stipulates '[A]voidance of the contract releases both parties from their obligations under it…' (note: the avoidance of the contract under CISG actually refers to the termination of the contract).'[A] party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently'.

Article 82 of CISG stipulates '[T]he buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them'. In addition, the article also provides exceptions therefor.

Accordingly, even if the Claimant could have enjoyed the right to terminate the contract due to the Respondent's breach, it would lose such right if it is impossible to make

restitution of the goods substantially in the condition in which it received them.

The tribunal notes the Claimant, though having received the equipment delivered by the Respondent in mid-November 2006, has never showed the intent or ability to return the equipment in the condition in which it was received, or explained to the tribunal that the reason for not returning the equipment in the original status is not within the scope of the exceptions under Article 82 of CISG either in its application for Claim One or all through the hearing of this case. In this case, the tribunal can only understand Claim One as the Claimant will continue to enjoy the equipment delivered by the Respondent for free when claiming for the contract termination and restitution. The tribunal finds the Claimant has lost the right to declare the contract terminated due to its inaction even if the quality problems in the equipment delivered by the Respondent constitute fundamental breach of the contract according to the relevant provisions of CISG.

Furthermore, Article 49 of CISG clearly provides '[T]he buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract…in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so… within a reasonable time after he knew or ought to have known of the breach', which means in the case where the seller has delivered the goods, even if the seller has a fundamental breach of contract, the buyer will lose the right to terminate the contract if he does not notify the seller of his intent to terminate the contract within a reasonable time after he knew or ought to have known of the breach.

The tribunal notes the following basic facts of this case. The Respondent delivered the equipment to the buyer's factory in late November 2006. Then the parties arranged three inspection and acceptance of the equipment on February 2, 2007, April 9, 2007

and March 3, 2008 but all failed with no acceptance certificate signed. The Claimant insisted the quality problems had caused such failure, but only indirectly showed its intent to terminate the contract in its Application for Arbitration on June 4, 2009, orally requested the contract termination in the first oral hearing on October 28, 2009 and stated such intent in writing for the first time on March 31, 2010.

The tribunal considers that the Claimant knew or ought to have known the quality problems in the equipment delivered by the Respondent at least as of March 3, 2008 under the circumstances of this case but had not formally declared the contract terminated till March 31, 2010 with a two-year gap. Even if the tribunal takes the indirect expression of the intent to terminate the contract on June 4, 2009 as the time for the Claimant's declaration of the contract termination, there is a gap of over 15 months. However, the Claimant never explained or submitted evidence as to why it had not declared the contract terminated till two years or at least 15 months later or such late action would not enlarge or increase the damages the parties may have suffered if it had exercised the right to terminate the contract timely. Therefore, the tribunal holds that the Claimant has lost the right to declare the contract termination and restitution since it exercised the right to terminate the contract two years or at least 15 months later than when it knew or ought to have known the Respondent's breach which is beyond the reasonable time even if the Respondent did breach the contract.

Article 97 of the Contract Law provides '[U]pon termination of a contract, a performance which has not been rendered is discharged; if a performance has been rendered, a party may, in light of the degree of performance and the nature of the contract, require the other party to restore the subject matter to its original condition…'.

According to the above provision of the Contract Law (note: CISG also adopts the same

principle), although the restoration of the original status is not the only remedy under the termination of the contract, if the breaching party chooses such remedy, the premise thereof is the contract can be terminated. In this case, the tribunal rejects the Claimant's claims for various restitution compensations premised on the contract termination since the Claimant has lost the right to terminate the contract.

4) Claim Two

The non-breaching party, no matter whether the breach is fundamental or whether it has exercised or can exercise the right to terminate the contract, shall have the right to claim for damages caused by the breach under the Contract Law and CISG. The tribunal deems that though the tribunal rejects the claim on the contract termination and restitution, the Claimant still has the legal right to claim for the loss of expected profits if the Respondent did breach the contract.

① Whether the Claimant has waived its right to claim for the loss of expected profits under the exemption provision in Article 8 of the general terms of the contract

'Article 8 The seller guarantees that the goods under this contract have no material or manufacturing defects and fully comply with the specifications specified in this contract.

The guarantee period of this contract is 12 months, starting from the day the seller's maintenance report is signed. However, if the seller is not liable for the delay in the installation, commissioning and acceptance of the equipment, such period shall be no longer than 18 months after the ex-factory date.

The guarantee period covers repair of the goods or replacement of defective parts. The seller's liability for guarantee is limited to defects occur under normal use

and maintenance of the goods. This guarantee shall be void if the installation and maintenance of the goods is not under the supervision of the seller or is changed by the buyer without the seller's written consent. This guarantee does not cover normal depreciation and wear of the goods.

The seller has no other express or implied guarantee on the goods except for the above. Under no circumstances shall the seller be liable for any actual loss, loss of expected profits or consequential loss'.

The Respondent argued that the above provision had excluded the liability for the loss of expected profits even if the quality problems did exist in the delivered equipment. Therefore, the Claimant's claim for the loss of expected profits should be rejected.

The tribunal holds that the true meaning of the exemption provision in Article 8 of the general terms of the contract shall be determined as a whole in accordance with Article 125 of the Contract Law and the principle of good faith. The provision, as understood from the overall expression, is essentially on the seller's guarantee of the equipment quality and operation within certain period after the installation, commissioning and operation (i.e. the guarantee period) and the scope and limitation of liability of such guarantee. In other words, the exemption provision means that the seller's guarantee liability is limited to free replacement of defective parts and maintenance within the guarantee period besides which the seller shall be liable for no actual loss, expected profit loss or consequential loss. The Respondent's allegation of interpreting Article 8 as exempting the seller from any liability for damages caused by quality problems in the equipment before the installation, commissioning and operation of the equipment is unsustainable. In this case, the equipment has been neither accepted nor operated normally, so the liability within the guarantee period has not started yet, not to mention

the exemption under Article 8.

② Whether the quality of the equipment delivered by the Respondent is in compliance with the contract

The tribunal notes the following basic facts. The parties arranged three inspection and acceptance after the Respondent had delivered the equipment but all failed. During the inspection and acceptance process, the Claimant notified the Respondent of the problems found through inspection timely. The tribunal also notes the Respondent argued against the quality problems alleged by the Claimant, asserting the inspection failure was not caused by quality problems but due to the parties' disagreement on the inspection standard, the specific operation methods, the temperature and humidity of the environment in which the equipment was running and the poor quality of the made-in-China aluminum foil material used by the Claimant. In this regard, the tribunal, considering the Claimant has reserved its right to claim for damages by informing the Respondent of the problems in the equipment timely when the inspection and acceptance failed, finds the Respondent's argument that the Claimant's claim for compensation for the quality problems is beyond the time for filing claims unsustainable.

However, the tribunal must point out, though the Claimant has reserved its right to claim for damages by informing the Respondent of the problems in the equipment timely, the Claimant shall bear the burden of proof to prove the quality discrepancy of the equipment when the Respondent objects thereto and the parties have disputes thereover. Otherwise, the claim regarding the quality discrepancy cannot be supported.

The Claimant has submitted two quality inspection reports to the tribunal to prove the quality discrepancy of the equipment delivered by the Respondent.

The first quality inspection report is the Quality Certificate issued by the municipal CIQ on August 6, 2008. The tribunal finds this Quality Certificate cannot prove the quality discrepancy alleged by the Claimant.

i. The Quality Certificate clearly states that the quality inspection is carried out in accordance with Article 7 of the general terms of the contract which stipulates '[I]f the quality, specifications or quantity of the goods are inconsistent with the provisions of this contract… the buyer has the right to request the seller to replace the parts for free within 30 days after the goods arrive at the end-user's factory with the inspection certificate issued by CIQ…'. The fact of the case is the equipment arrived at the seller's factory in mid-November, 2006 but the Quality Certificate was issued on August 6, 2008 which was about 250 days later and seriously overdue.

ii. Concerning the content thereof, though the buyer is requested to inspect the quality, specifications and quantity of the goods within 30 days after the goods arrive at the end-user's factory under Article 7 of the general terms of the contract, the municipal CIQ did not inspect the quality, specifications or quantity of the equipment or at least there is no remark on the quality, specifications or quantity of the equipment in the Quality Certificate.

iii. The subject matter of the contract in this case is a complete set of equipment instead of finished products. The characteristics of complete sets of equipment determine that some defects cannot be found before the installation, commissioning and transportation. In view of this, the common international practice is to inspect the set of equipment twice, one is the preliminary inspection on defects that can be reasonably found with general inspection methods within a short period of time after the goods are delivered, another is the inspection on the internal defects that can only be discovered after the

equipment is installed, commissioned and operated for a reasonable period of time. In this case, the inspection provided in Article 7 of the general terms of the contract is obviously the aforementioned preliminary inspection. The inspection purpose is to address the defects of the equipment delivered by the seller which could be reasonably found through with general inspection methods. However, the quality discrepancy alleged by the Claimant is regarding the inherent defects of the equipment that could not be reasonably found with general inspection methods. Such allegation has nothing to do with the inspection purpose of the Quality Certificate.

The second quality inspection report is the Appraisal Certificate issued by the municipal CIQ on January 20, 2009. The tribunal deems that the Appraisal Certificate is regarding the inspection on the inherent quality of the equipment.

However, the tribunal also notes that there is no provision on the institution or time for the inherent quality inspection (i.e. the second inspection) in the contract of this case.

Concerning the inspection institution, though the inspection institution for the second inspection is the same as the one issuing the Quality Certificate, distinction should be made. The inspection institution acted as the institution agreed on by the parties when issuing the Quality Certificate but acted as the institution unilaterally selected by the Claimant when issuing the Appraisal Certificate. As to the inspection time, the tribunal shall refer to the Contract Law and CISG when there is no specific provision in the contract.

Article 157 of the Contract Law provides '[U]pon receipt of the subject matter, the buyer shall inspect it within the prescribed inspection period. Where no inspection period was prescribed, the buyer shall timely inspect the subject matter'.

Article 38 of CISG stipulates '(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances'.

The basic facts related to the time of the second inspection for the Appraisal Certificate are as follows.

● On November 6, 2006, the equipment arrived at the destination port.

● In mid-November 2006, the equipment arrived at the buyer's factory.

● On February 2, 2007, the parties conducted the first acceptance of the equipment but failed.

● On April 9, 2007, the parties conducted the second acceptance of the equipment but failed.

● On March 3, 2008, the parties conducted the third acceptance of the equipment but failed.

● On January 20, 2009, the inspection institution entrusted by the Claimant issued the Appraisal Certificate.

The tribunal has fully noticed the appraisal conclusion on the quality of the equipment in the Appraisal Certificate, i.e. serious quality problems exist in the equipment [i.e. the equipment could not print normally when tested with the made-in-China aluminum foil with a thickness of 0.025 mm which was severely wrinkled in the process; the overprint accuracy could not meet the requirement of ± 0.1 mm when the equipment was tested with the 0.03mm thick aluminum foil produced by Company B of Denmark which was wrinkled in the process due to the manufacturer's failure to fully consider the

characteristics of aluminum foil when designing and manufacturing the equipment.

Furthermore, the tribunal notes that the equipment under the contract is a multi-functional combined rotary printing press with multiple printing methods and post-processing functions. It can print on wide range of materials including aluminum foil while there is no specific provision on the source and standard of aluminum foil in the contract.

The tribunal, considering the above factors and other specific facts of the case, determines there are still some uncertain factors and confusion if the tribunal finds the sole reason for the acceptance failure is the inherent quality defects of the equipment. For example:

i. As mentioned above, the parties had serious disputes regarding the quality of the equipment at least on March 3, 2008. It is confusing why the Claimant had not entrusted CIQ to inspect the equipment till January 6, 2009 which was over 10 months later. Furthermore, the Claimant has never explained or proved such ten-month period should be regarded as 'the reasonable time' or 'as short a period as is practicable in the circumstances' for the inspection of the equipment. Therefore, the tribunal can hardly find the Claimant conducted the second inspection within a reasonable period of time stipulated in the Contract Law or CISG.

ii. The tribunal notes the Respondent's assertion that the reason for the equipment acceptance failure is not necessarily the quality defect of the equipment, but the uncertainty of the acceptance criteria, the operator's operation method, the temperature and humidity of the equipment operation environment, especially the poor quality of the made-in-China aluminum foil used for testing or acceptance by the Claimant. In this regard, the Claimant stated in the email to the Respondent on August 15, 2008 'if your company has determined the problem is caused by the material, we have no objection

and request your company to confirm the testing and acceptance with uncoated aluminum foil which may not cause problem'. In light of the foregoing, the tribunal holds that the Claimant should have excluded various uncertain factors other than the equipment itself, or at least send a written inspection notice to the Respondent so that the Respondent could have had the opportunity to be present or to clarify the uncertain factors such as the condition of the equipment, the inspection criteria, the testing material, the testing environment, etc. so as to ensure the objectivity and adequacy of the inspection when unilaterally entrusting CIQ to inspect the disputed equipment over 10 months later. However, the Claimant never submits any evidence to prove it has made such efforts.

The tribunal can hardly determine the inspection failure is solely caused by the inherent quality defects of the equipment before the Claimant reasonably explains, clarifies and provides evidence for the above issues. In this regard, the tribunal has to point out the Respondent failed to fully explain and prove in its defense and counterclaims that the equipment it delivered had no inherent quality defects or that the acceptance failure was fully due to factors other than the equipment quality. The actual situation of the equipment quality dispute in this case is neither party can prove its assertion with sufficient evidence. The tribunal finds that both parties have deficiencies and faults and shall bear certain responsibility for the current situation in the dispute settlement process in which the equipment could not be accepted in over three years after the dispute had occurred. However, since the tribunal only hears the claims and counterclaims from the parties, the responsibilities and effects beyond these would not be included in this award.

③ Whether the Claimant's claim for compensation of expected profit loss is sustainable

The tribunal holds that in the specific circumstance of this case, even if quality problems

do exist in the equipment delivered by the Respondent, the Claimant's claim for compensation of expected profit loss cannot be supported according to the specific content and method as requested by the Claimant.

The tribunal notes that the expected loss of profit claimed by the Claimant in this case actually refers to the loss in the company's operation caused by the defects in the equipment delivered by the Respondent.

● Article 111 of the Contract Law stipulates '[W]here a performance does not meet the prescribed quality requirements, the breaching party shall be liable for breach in accordance with the contract. Where the liabilities for breach were not prescribed or clearly prescribed, and cannot be determined in accordance with Article 61 hereof, the aggrieved party may, by reasonable election in light of the nature of the subject matter and the degree of loss, require the other party to assume liabilities for breach by way of repair, replacement, remaking, acceptance of returned goods, or reduction in price or remuneration, etc'.

● Article 50 of CISG provides '[I]f the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time…'.

It can be seen that the normal compensation for damages under common circumstances excludes operational loss or expected profit loss of the buyer when the goods delivered by the seller do not conform to the contract because the compensation for expected profit loss can generally be reflected when the buyer gets timely compensation under the Contract Law or CISG. Furthermore, under normal circumstances, it is often difficult for a seller to reasonably foresee that his sale of equipment to the buyer constitutes a

guarantee for the operating profit of the buyer in a certain sense. The tribunal finds this claim for compensation of expected profit loss unsustainable according to the provisions on limitation or predictability of liability in Article 113 of the Contract Law or Article 25 of CISG unless the parties have specially agreed in the contract or the Claimant could prove the Respondent knew or ought to have foreseen it would be liable for the buyer's operational loss or expected profit loss when signing the contract. The Claimant has never explained or provided evidence thereon during the hearing of this case. Therefore, the tribunal cannot support the Claimant's claim for compensation of expected profit loss even from the point of view of the claim itself.

In addition, the tribunal notes the Claimant has only submitted some basic documents such as contracts with third parties, a large number of receipts and correspondence to support its claim for compensation of expected profit loss during the hearing but never submitted any inductive written explanation, statistic or calculation to prove the calculation of its claimed amount of compensation for the expected profit loss, to prove whether the claimed amount is for the operation loss with deduction of various expenses, to prove such loss is caused by the qualify defects in the equipment delivered by the Respondent, or to prove its action after the Respondent's breach of contract and calculation of the compensation for expected profit loss are not against the provision on the obligation of the observing party to mitigate losses in Article 119 of the Contract Law. For this reason alone, the tribunal cannot support the Claimant's Claim Two due to insufficient evidence.

5) Claim Three

The tribunal, after rejecting Claim One and Claim Two, decides to reject Claim III as well.

2. The Counterclaims

The Respondent filed counterclaims in this case, mainly requesting the Claimant to pay the 5% balance in the amount of approximately EUR80,000 and the overdue interest in the amount of approximatelyRMB50,000.

The tribunal, considering Article 8 of the contract clearly provides that the 5% balance shall be paid upon the acceptance report and the fact of this case is the equipment has not passed the acceptance till now, finds the payment condition of the 5% balance is not met.

Furthermore, the Respondent has not provided sufficient reason, basis or evidence to prove there is no quality problem in the equipment delivered or to prove the acceptance failure is entirely due to the Claimant's non-cooperation, unreasonable obstructing or external factors other than the Respondent's fault or liability during the hearing.

In this case, the tribunal, considering the Respondent should continue to perform its uncompleted obligations and actively cooperate with the Claimant to finish the acceptance of the equipment before such acceptance and during the continuous performance period of the contract, cannot support the counterclaim on the balance payment prior to that.

Case 8 2014 Granular Urea Case

I The Merits of the Case

The Claimant and the Respondent's agent, Company C, signed two sales contracts for the sale of large granular urea and small granular urea respectively on April 18, 2012. The Claimant initiated the arbitral proceeding after the parties had disputed over the goods preparation and the vessel nomination.

1. The Claimant's Statement in the Application for Arbitration

The Respondent's associated company, Company D in China, inquired about the fertilizer trade with the Claimant in 2011. The parties reached an agreement on the purchase of urea from the Claimant after they had negotiated by phone and email.

The Claimant negotiated with Company D again on the fertilizer trade in April 2012. The two contracts involved in this case were signed under the arrangement of Company D.

The Claimant and the Respondent signed No.182 sales contract (hereinafter referred to as No.182 contract or the small granular urea contract) on April 18, 2012 under which the Claimant sold the Respondent 25,000 tons of bulk small granular urea made in China based on the FOB T terms. The unit price wasover USD450 per ton. The payment method was irrevocable L/C. The shipping period was in July 2012 with July 31 as the latest shipping date. Later, the parties changed the payment method to T/T. The Claimant prepared the goods at the designated port and notified the Respondent. However, the Respondent had not nominated a vessel to receive the goods till July 31

due to the price dropping tendency of small granular urea in the international market.

The Claimant and the Respondent signed No.183 sales contract (hereinafter referred to as No.183 contract or the large granular urea contract) on April 18, 2012 under which the Claimant sold the Respondent 25,000 tons of bulk large granular urea made in China based on the FOB T terms. The unit price was USD470 per ton. The payment method was irrevocable L/C. The shipping period was in July 2012 with July 31 as the latest shipping date. Later, the parties changed the payment method to T/T. The Claimant prepared the goods at the designated port and notified the Respondent. However, the Respondent had not nominated a vessel to receive the goods till July 31 due to the price dropping tendency of large granular urea in the international market.

The Claimant tried to settle the dispute, requesting the Respondent to arrange the shipment of the goods under the above two contracts before August 15 in its email on August 2, otherwise the goods would be sold on site and the Claimant would claim for damages. From August 8 to August 11, the Respondent sent its staff to a port in China to settle the dispute with the Claimant but no agreement was reached. The Respondent had not nominated a vessel to receive the goods as of August 15.

The Claimant initiated the arbitral proceeding to protect its legitimate rights and interests since the Respondent had fundamentally breached the contracts.

The Claimant's final claims after amendment are as follows.

1) The two sales contracts signed by the Claimant and the Respondent on April 18, 2012 shall be terminated while the Respondent shall compensate the Claimant for the damages in the amount of approximately RMB21,200,000 (calculated till June 30, 2014);

2) The Respondent shall compensate the Claimant for the legal fees and other reasonable expenses incurred for this case in the amount of RMB1,450,000; and

3) The Respondent shall bear all arbitration fees of this case.

2. The Respondent's Arguments in the Statement of Defense

1) During the performance of the two disputed contracts, the Claimant failed to perform the seller's delivery obligation under the terms of FOB, i.e. the seller should prepare the goods to be loaded before the shipping date specified in the contracts (i.e. before July 1, 2012). The two contracts could not be performed due to the Claimant's default and refusal to perform the contracts. The specific facts were as follows.

① The Claimant stated in Item 5 of the offer for the large granular urea to the Respondent on April 17, 2012 that 'cargo ready: before the end of June' and in Item 5 of the offer for the small granular urea on the same day that the shipment of the goods would be in July. According to the practice, the Claimant should have prepared the goods at the loading port before July 1, 2012 while the Respondent, as the buyer, could nominate a vessel for the shipment during the period from 1 to 31 July, which was in consistency with the contract provision on the shipping date and the international trade practice.

The Respondent inquired about the Claimant's preparation of the goods, including the quantity of large granular and small granular urea which had arrived in Port Y, China, the quantity of the goods in transit and the delivery schedule for the rest in its email at 1:54pm on June 18, 2012. The Claimant replied in its email at 5:54pm on June 28, 2012 that the goods were being continuously shipped to Port Y and the large granular and small granular urea would be ready around July 20, 2012 which was inconsistent

with the shipping dates under the two contracts, giving no direct answer to the Respondent's inquiry about the goods preparation situation.

The Claimant, though stating the goods under the two disputed contracts would be ready around July 20 in its email at 5:54pm on June 28, 2012, had not notified the Respondent that the goods under the two contracts of this case were ready till it sent the notice that the goods were ready for other contracts at 2:26pm on July 23.

② The Claimant, after receiving the Respondent's notice on the vessel nomination on July 24, 2012, not only refused to accept without reservation but also indicated it would not load the goods as required by the contracts to complete the delivery.

The Claimant stated in the attachment to the email at 2:26pm on July 23, 2012 'please arrange the shipping vessel within the shipping period specified in the contract, otherwise we would resort to legal action'. The Claimant, due to its prior breach of contract and expression of contrary intentions, had no right to assert the Respondent be bound by the shipping period specified in the contracts. The Claimant's sudden request of the Respondent's shipment according to the contract was against the contracts and CISG (hereinafter referred to as the Convention).

The Respondent, though no longer being bound by the shipping periods specified in the two contracts, sent the vessel nomination notice to the Claimant by email at 5:38pm on July 24 after receiving the shipping agency's email regarding the information and quotation for the vessel No. 1 available for the shipment of the goods under the two disputed contracts at 3:35pm on July 24, 2012, nominating vessel No. 1 as the vessel for the shipment of the goods under the two disputed contracts, informing the Claimant that the Laycan was July 25-29, 2012, etc., and requesting the Claimant to confirm its acceptance of such nomination before the end of Singapore's normal business hours. The

above vessel nomination notice was fully consistent with the provision on the shipping period in the contracts.

The Claimant replied to the Respondent's nomination notice at 6:03pm on July 24, 2012, stating that Laycan was too close while it could accept July 27, 2012 as the Laycan period only if the Respondent designated the shipping agent at Port Y, China before 10pm on the same day, which was unreasonable and beyond the contract. At the same time, the Claimant stated it could not guarantee the B/L date to be before July 31, 2012.

The Respondent expressed its surprise at the Claimant's refusal to accept the vessel nomination without reservation and pointed out the Claimant was self-contradicting for not being able to load all the goods onboard before July 31 while having previously requested the completion of the loading before July 31 in its email at 2:48pm on July 25, 2012. The Respondent lost the chance to lease the vessel because the Claimant had set conditions for accepting the vessel nomination. The Claimant's email at 6:03pm on July 24 contained various breaches.

First, the Claimant, as the buyer, had no right to set conditions on the shipping schedule for the vessel nominated by the buyer no matter under the contracts or the INCOTERMS 2010. The Claimant should have accepted the Respondent's vessel nomination notice which was fully in line with the contract without reservation and fulfilled its corresponding delivery obligation, otherwise its additional conditions on the performance of the contractual obligation would be taken as its expression of the intent not to fulfill the delivery obligation according to the contract.

Secondly, the Claimant had no right to request the Respondent be solely liable for its inability to complete the vessel nomination which was due to the Claimant's fault according to Article 80 of the Convention.

Thirdly, the Claimant stated in the email that the B/L date could not be before July 31, 2012, which further showed the Claimant's changing attitude towards the shipping period specified in the contract. The Claimant proposed the Respondent to arrange shipment in late July to early August in mid-May 2012, requested the Respondent to finish loading before July 31, 2012, and then indicated itself could not meet the requirement of loading before July 31, 2012. Such self-contradictory and self-denial were against not only the basic principle of good faith but also estoppel.

③ The Respondent continued to actively nominate the vessel and perform the contracts in good faith after the Claimant had breached the contracts but the Claimant refused to perform the contracts.

The Respondent and Shipping Company F confirmed the terms of the charter party at 3:27pm on July 31, 2012. The two parties signed the supplementary agreement, confirming the vessel No. 2 at 7:42pm on August 1, 2012.

The Respondent clarified with F whether Port Y, China could be added as the loading port as discussed by the parties and whether the freight rate would change in the email at 10:29am on August 2, 2012. F replied that the loading port could be added but the freight would be increased if the vessel went to Port Y, China first at 10:31am on August 2, 2012.

The Respondent sent another vessel nomination notice to the Claimant at 11:07am on August 2, 2012, nominating Vessel No. 2 as the vessel for loading the goods under the small granular urea contract. Such vessel nomination was in line with the Claimant's suggestion on the Respondent's shipment in late July or early August in the email on May 15, 2012. The Claimant replied at 1:56pm on August 2, 2012, accepting the Respondent's nomination of Vessel No. 2 as the vessel for loading without reservation or

additional conditions.

The Claimant requested the Respondent to send the vessel to Port Y, China before August 15, otherwise it would initiate the arbitral proceeding in the email at 4:24pm on August 6, 2012. The shipping period specified in the small granular urea contract was not binding on the Respondent due to the Claimant's prior breach mentioned above. The Claimant had no right to unilaterally set the schedule or the shipping date unless the parties reached another agreement on the shipping period.

The Respondent informed the Claimant that Vessel No. 2 was loading goods at Port S, China and would arrive at Port Y, China around August 15 as informed by the shipping agent at 2:26pm on August 8, 2012. The Claimant replied at 4:47pm on August 13, 2012.

However, the Claimant refused the settlement plan previously proposed by the Respondent, claiming the Claimant had no obligation to accept the loading vessel nominated by the Respondent under the small granular urea contract before the parties reached a new agreement. Such refusal of accepting Vessel No. 2 as the loading vessel confirmed by itself on August 2, 2012 was against good faith and constituted serious breach.

The Respondent notified the Claimant as follows in the email on August 15, 2012.

a) The loading l Vessel No. 2 still planned to load the goods under the small granular urea contract at Port Y, China;

b) The Respondent would load the goods under the small granular urea contract if the Claimant still intended to continue the performance thereof; and

c) The Respondent would be forced to look for new supplies and arrange the owner to cancel the route of the nominated vessel to Port Y, China if the Claimant failed to conform it would continue the performance before 2pm on the same day.

The Claimant's sudden refusal to accept the Respondent's nominated Vessel No. 2 on August 13, 2012 and refusal to reply to the Respondent's expression of intention to continue the performance of the contract on August 15, 2012 fully demonstrated that it would not perform its delivery obligation under the small granular urea contract and constituted anticipatory breach under Article 71 of the Convention.

The Respondent continued to nominate the vessel under the large granular urea contract but stopped sending the vessel for loading the goods due to the Claimant's anticipatory breach.

2) The Claimant had no legal or factual basis for its claim for damages.

The Claimant, as the party in breach, had no right to claim for the so-called damages since its fundamental and anticipatory breach in the performance of the two disputed contracts had resulted in the non-performance of the contracts as mentioned above.

Without prejudice to the above assertions of the Respondent, the Claimant had no right to claim for damages as stated in the Application for Arbitration and the Basis for the Claim for Damages attached thereto even if the tribunal found the Respondent should be partially liable for the non-performance of the contracts.

First, about the price difference loss.

① It should be calculated in USD instead of RMB.

② The quantity for the calculation of price difference loss should be the quantity stipulated in the two contracts, i.e. 25,000 tons each.

③ Even if the Claimant had the right to resell the goods according to the Convention, the price difference loss could not be calculated on the basis of the imagined resale price or the current resale price.

The 'price difference loss' should be calculated on the basis of the international market price on August 14, 2012 if the Claimant's email on August 14, 2012 were taken as 'the declaration for contract avoidance' according to Article 75(1) of the Convention.

④ Changes in the export customs duty would influence the loss. The Claimant, when claiming for the so-called price difference loss, exaggerated the price difference loss without considering the reduction in the export customs duty based on the lower prices.

Based on the facts of this case, the unit price under the small granular urea contract was overUSD450/ton and that under the large granular urea contract was USD470/ton while the quantity was 25,000 tons each. Through calculation, the applicable customs duty rate for small granular urea should be 20.094% and that for large granular urea should be 21.55%. The total export customs duty to be borne by the Claimant under the small granular urea contract was approximately RMB12,100,000 and that under the large granular urea contract was approximately RMB1,300,000. Therefore, the difference between the payable export customs duty calculated at the current market prices and the above export customs duty based on the original contract prices should be deducted from the so-called price difference loss if the current market prices of the goods under the two disputed contracts were lower than the FOB contract prices.

Second, about the financial costs.

It was obviously unreasonable for the Claimant to use the 6% interest rate to calculate the financial costs of the so-called price difference loss which should be determined based on the USD loan interest rate over the same period even if such costs did exist since the contract prices of the two contracts were in USD.

Third, about the storage fees.

The Claimant's goods could enjoy a free storage period of 60 days after arriving at the loading port. Even if the Claimant's goods under the two disputed contracts all arrived at the port on August 6, 2012 which was less than 1 month before August 14, the Claimant's should have borne no storage fees during such period and had no factual or legal bases to claim therefor.

Fourth, about the legal fees and arbitration fees.

Nearly RMB1.5 million legal fees claimed by the Claimant was obviously too much. The Claimant should bear such unreasonably high legal fees and the arbitration fees by itself since it had no factual or legal basis for its claims for damages and the claimed amounts.

3. The Claimant's Opinions after the Second Oral Hearing

1)The Respondent had no factual or legal basis to assert the Claimant's delay in the preparation of goods constituted breach since the parties involved in this case had not agreed on the time for the Claimant to prepare the goods. The specific reasons were as follows.

① The Claimant's offer on the large granular urea to the Respondent on April 17, 2012 had expired, so the Respondent had no legal basis to require the Claimant to prepare the goods according to such offer.

② There was no contractual provision on the time for the Claimant to get the goods ready, so the Respondent had no factual or legal basis to assert the Claimant's delay in getting the goods ready constituted a breach.

The parties had agreed on the delivery time (i.e. the shipping period), requesting 'the buyer shall have the goods shipped in July, latest date of shipment July 31,2012'.

Article 33 of the Convention stipulated '[T]he seller must deliver the goods: (b) if a period of time is fixed or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date…'. Article 138 of the Contract Law provided '[T]he seller shall deliver the subject matter at the prescribed time. Where the contract prescribes a period during which delivery is to take place, the seller may deliver at any time during the delivery period'.

According to the above provisions, the prescribed shipping period in the disputed contracts meant that the Claimant, as the seller, could deliver the goods at any time during the delivery period specified in the contracts without any limitation on the time for the Claimant to prepare the goods.

③ The Claimant had prepared the goods according to the contracts while the Respondent made no objection during the performance of the contracts.

2) The Respondent should bear the liability for breach of contract since its failure to perform the obligation to receive the goods resulted in the non-performance of the contracts.

① The Respondent should bear the liability for breach of contract since it had failed to nominate the vessel for shipping the goods within the period designated by the

Claimant.

The Claimant was entitled to deliver at any time during the delivery period and the Respondent should be ready to receive the goods according to the Convention and the Contract Law.

② The Respondent's failure to nominate the vessel within reasonable time and refusal to provide the shipping agent information to the Claimant showed its negligence in performing the obligation to receive the goods.

③ Regarding the Respondent's argument that the Claimant should be liable for the delayed vessel nomination since it had delayed the preparation of goods, the Claimant asserted such argument was of no factual or legal basis and against the international trade practices.

First, as mentioned above, the Claimant had prepared the goods according to the contracts without any delay in the preparation. The Respondent's failure to nominate the vessel for shipping the goods at the time designated by the Claimant constituted delay in receiving goods. The Respondent had no factual or legal basis for the above argument.

Secondly, the Respondent, as the buyer, should nominate the vessel within reasonable time so as to ensure sufficient time for the Claimant to load the goods, otherwise it would be negligent in fulfilling its obligation to receive the goods in accordance with the contracts and international trade practices.

According to Articles 7 and 11 of the contracts, the Respondent should nominate the vessel for shipping the goods within reasonable time so that the Claimant could load the goods at the normal loading rate of the port in order to ship the goods out of the port

within the shipping period.

Thirdly, the Respondent should be liable for breach of contract since it had not actually nominated the vessel to receive the goods, making it impossible to perform the contracts.

Fourthly, the Respondent should be liable for breach of contract since its refusal to inform the Claimant of the shipping agent's information was a refusal to perform its obligation to receive the goods.

The Respondent had been engaged in international fertilizer trade for years and was very familiar with China's export trade procedures. Its refusal to provide the shipping agent's information though being repeatedly urged by the Claimant showed it had no intention to perform the contracts.

Fifthly, the Respondent repeatedly argued that no actual vessel nomination was because the Claimant could not guarantee July 31 as the B/L date in its Statement of Defense and oral presentation during the hearing. Such argument emphasized the Claimant's delivery obligation but avoided the Respondent's obligation to receive the goods.

4. The Respondent's Opinions after the Oral Hearing

1) The period for the preparation of goods could be determined according to the shipping period specified in the contracts.

2) The Claimant should bear all the liabilities and losses due to its failure in preparing the goods within the preparation period such as the specialization of the goods.

3) Despite the Claimant's delay in preparing the goods, the Respondent had always actively fulfilled its obligation of vessel nomination and nominated vessel No. 1 for

the performance of the contract but could not charter the vessel due to the Claimant's unwillingness to perform the contracts.

II The Tribunal's Opinions

1. The Applicable Laws

There is no provision on the applicable laws in No.182 contract and No.183 contract of this case. Article 47(2) of the Arbitration Rules stipulates '[W]here the parties have agreed on the law applicable to the merits of their dispute, the parties' agreement shall prevail. In the absence of such an agreement or where such agreement is in conflict with a mandatory provision of the law, the arbitral tribunal shall determine the law applicable to the merits of the dispute'.

The tribunal notes that the places of business of the parties are in China and Switzerland which are both the Contracting Partiesof the Convention and also notes the parties, in their written statements and oral presentations, state, defend and argue in accordance with relevant Chinese laws and regulations. Therefore, the tribunal decides to apply the Convention and relevant Chinese laws to hear this case. Furthermore, the tribunal will determine the parties' liabilities and obligations for the delivery of goods under No.182 and No.183 contracts in accordance with the INCOTERMS 2010 and its amendments since Article 16 of the two contracts stipulates 'this contract shall be interpreted in accordance with the INCOTERMS 2010 and its amendments published by the International Chamber of Commerce'.

2. The Validity of the Two Contracts in this Case (No. 182 and No.183 contracts)

The tribunal finds the contract conclusion process as follows. First, the Claimant sent

the offer to the Respondent by email on April 17, 2012. Then, the Respondent sent the Claimant the draft contracts containing main transaction conditions and general trade terms which it had signed. The contracts were concluded after the Claimant signed and stamped the draft contracts. The parties have no objection to the above facts.

The tribunal determines the two contracts involved in this case are the expression of the parties' true intentions, are concluded according to laws, and are legal and valid since all the terms and conditions in No.182 and No.183 contracts are in compliance with laws while the parties have no objection to the validity of the two contracts.

3. The Basic Facts about the Two Contracts of this Case

1) The Claimant and the Respondent signed No.182 and No.183 contracts on April 18, 2012 under which the Claimant sold the Respondent 25,000 tons of bulk small granular urea made in China and 25,000 tons of bulk large granular urea made in China, totaling 50,000 tons, based on the FOB Term.

No.182 contract is the small granular urea contract with the unit price of overUSD450/ton.

No.183 contract is the large granular urea contract with the unit price of USD470/ton.

The payment method under the contract is irrevocable L/C and then changed by the parties through negotiation, for which the parties have signed Supplementary Agreement I and Supplementary Agreement II.

2) The parties have signed Supplementary Agreement I to change the L/C opening date and Supplementary Agreement II to change the payment method from L/C to T/T.

3) The shipping period under the two contracts is 'the buyer shall have the goods shipped in July, latest date of shipment July 31,2012'.

4) The parties, after having signed the two contracts, further communicated on the specific issues regarding the preparation of goods and the vessel nomination by email and provided information mutually during the performance of the contracts.

5) The subject matters are small granular urea and large granular urea of which the domestic and international market have fluctuated since May. The FOB export price of large granular urea went up in May but down in June. The domestic ex-factory price and FOB export price of small granular urea started to decline abruptly at the end of May.

6) The goods under the two contracts were not delivered within the specified shipping period due to the parties' disputes over the preparation of goods and vessel nomination.

4. The Main Issues concerning the Disputes over the Two Contracts Involved in this Case

The tribunal deems the parties' disputes are mainly on the four issues regarding the preparation of goods, the vessel nomination, the parties' negotiation on the continuous performance of the contracts after the expiry of the specified shipping period and the compensation for damages based on a large amount of written materials submitted by the parties including corresponding evidence and the three oral hearings. The parties have different views on not only the factual issues but also the legal issues regarding the above disputes.

The tribunal, considering the parties' opinions and arguments have been stated in the merits section and the award would be too lengthy if such contents are repeated here,

only summarizes the parties' main opinions and arguments, analyzes them according to laws and practices and based on evidence and ascertained facts and makes determinations in this section.

First, about the preparation of goods.

The Claimant's main opinions are as follows.

a) There is no provision on the period for the preparation of goods in the two contracts involved in this case. The Respondent has no legal or factual basis to assert the Claimant's breach of contract due to its delay in preparing the goods.

b) Though the Claimant stated 'cargo ready' in the offer for large granular urea, the Respondent failed to accept the offer within the effective time. The Respondent also modified the unit price in the offer in its reply thus the offer was no longer effective while 'cargo ready' therein was ineffective as well. There is no 'cargo ready' in the offer for small granular urea.

c) The Claimant's emails on May 11 and 15, 2012 are replies to the Respondent's inquiries about the preparation of goods which only indicate the supplier's delivery plan for the goods under the two contracts instead of the Claimant's promise on getting the goods ready in the last 10 days of June 2012.

d) The Claimant has performed its obligation to prepare the goods according to the contracts. The goods under the two contracts were ready for shipment around July 20, 2012, but the Respondent had not notified the Claimant of the vessel nomination and other relevant information till July 24, 2012 after being urged by the Claimant. The Respondent has breached the contracts for not performing its obligation of receiving the

goods in accordance with the contracts.

The Respondent's main opinions are as follows.

a) During the contract conclusion process, the Claimant stated 'cargo ready' in Item 5 of the offer, i.e. the goods would be ready at the end of June 2012, which is the expression of the Claimant's true intention when concluding the contract and is contained in the contracts confirmed by the parties.

b) During the performance of the contracts, the Claimant sent emails to the Respondent on May 11 and 15, 2012, repeatedly confirming the goods would be ready in the last 10 days of June 2012.

c) According to the international trade practices, the seller shall get the goods ready before the shipping date. The Claimant's failure to get the goods ready within the promised time constitutes breach of the contracts.

The tribunals' opinions on the issues are as follows.

1) The Statement of 'Cargo Ready' in the Offer for Large Granular Urea

The tribunal finds the parties concluded the two contracts involved in this case by way of offer and acceptance.

It is stated in Item 5 of the Claimant's offer for large Granular urea 'Cargo ready: before the end of June'. The Respondent, after receiving the offer, replied with the draft contract containing various terms and conditions on April 18, 2012 but in which there was no 'cargo ready' clause and the unit price was changed from USD473 FOBST in the offer to USD470 FOB T. The draft contract (AME 1204183) was sent to the Claimant

on April 18, 2012, later than the time specified in Item 9 of the offer, i.e. '[T]he offer shall be kept strictly confidential and remains valid until 17pm of April 17th'. The Claimant, after receiving the draft contract from the Respondent, signed and stamped No.183 contract on April 18.

Based on the above actions of the parties, the tribunal holds that:

a) The Respondent's reply to the offer with the draft contract (183) on April 18, 2012 is later than the time specified in Item 9 of the offer. Article 18(2) of the Convention stipulates '[A]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time…'. The Claimant's offer is no longer binding since the Respondent's acceptance did not reach the Claimant within the fixed time.

b) Article 19 of the Convention stipulates '(1)A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer…(3)Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially'. The draft contract containing the main transaction conditions and the general trade terms sent by the Respondent on April 18 is essentially a new 'offer' in the form of a draft contract from the Respondent to the Claimant.

c)The Claimant's signing and stamping No.183 contract from the Respondent constitutes the Claimant's acceptance of the Respondent's new offer. The parties shall be bound by the terms and conditions therein.

Therefore, the tribunal rejects the Respondent's assertion that the 'cargo ready' statement in Item 5 of the Claimant's offer on April 17, 2012 has been confirmed by the parties when concluding the contract and included in No.183 contract.

In fact, there is no provision on 'the seller shall get the goods ready' or 'the buyer shall nominate the vessel' in either No.182 contract or No.183 contract. The main reason for the parties' disputes is the lack of specification on 'the time to get the goods ready', 'the time for the goods to be ready for shipments in port Y', 'the time for the notification of the vessel information' and 'the vessel nomination notice'. The tribunal need to consider the parties' liabilities from different aspects and make determinations based on the facts under the principle of fairness and reasonableness.

2) The Two Emails in Mid-May

The tribunal notes that the Respondent asserted the Claimant had confirmed repeatedly in its two emails (May 11 and 15) the goods would be ready in the last 10 days of June 2012 and breached the contract first for breaking such promise.

The Claimant argued the two emails in May was the supplier's delivery plan. The Respondent had no factual or contractual basis for its assertion since there was no provision on the time for the seller (the Claimant) to get the goods ready in the two contracts involved in this case.

As mentioned above, there is no provision on the liabilities and obligations for 'get the goods ready' or 'nominate the vessel' in the two contracts involved in this case (No.182 contract and No.183 contract). The parties only agreed in the shipment clause 'Shipment time: the buyer shall have the goods shipped in 2012, July latest date of shipment July 31, 2012'. Therefore, during the parties' performance of the FOB contract, the parties

must further communicate and negotiate on issues such as when the seller should get the goods ready, when the goods should be delivered to the port, when the seller should send the goods ready notice to the buyer, when the buyer should send the vessel nomination notice, informing the seller of the vessel name, the loading port and the chosen delivery time within the specified period (if necessary), etc. to make up for the lack of relevant provisions in the contracts.

The tribunal, after checking the parties' emails, finds that the parties negotiated on the above issues in several rounds of emails in May and June 2012 from which the tribunal excerpts as follows.

The Respondent inquired about the goods preparation for 50,000 tons of urea under the contracts of this case and 30,000 tons of MAP at 5:16pm on May 10, 2012.

'As per our telecon. Pls kindly let us know the status of captioned cargo, how many tons have been delivered to port ad when will all cargo be ready?'

The Claimant replied to the above email at 5:05pm on May 11, 2012.

'The factory delivery the urea to domestic market now, our delivery plan is from the last ten days of Jun.…'.

The Respondent inquired about the delivery plan for 25,000 tons of small granular urea and 25,000 tons of large granular urea at 3:50pm on May 14, 2012, and asked for the names of producers as well as delivery schedule for the 50,000 tons of urea.

The Claimant replied at 10:11am on May 15, 2012.

'The factory delivery the urea to domestic market now, our delivery plan is from the last

ten days of Jun, as we know, from early July….'.

The Respondent inquired again about the producer at 11:46am on May 15, 2012.

'Regarding the shipment time, as stipulated in the contract, the latest shipment time is end of July, so pls ensure that producers can deliver cargo to port in time. Pls kindly keep us informed about the delivery schedule and notify us in advance'.

The Respondent inquired again about the goods arrival time at Port Y, China at 1:54pm on June 18, 2012.'(1)How many tons of prilled urea and granular urea have arrived at Port Y?(2) How many tons of prilled urea and granular urea are on the way to Port Y now? Except above, what is the delivery schedule for remaining urea?'

Concerning whether the above emails constitute the Claimant's commitment to 'get the goods ready' for the contracts of this case, the tribunal holds:

Under the term of FOB T in both the contracts involved in this case, the seller's delivery obligation and the buyer's vessel nomination obligation are separate but corresponding to each other. Since there is no contractual provision on 'get the goods ready' or 'nominate the vessel', the parties, in the performance of the contracts, should communicate the relevant matters timely to ensure the smooth performance.

It can be found from the above emails that the Claimant's response to the 'delivery plan' is consistent and affirmative, i.e. 'the factory delivery the urea to domestic market and now our delivery plan is from the last ten days of June'.

However, the tribunal considers the above expression may be ambiguous. Based on the meaning of the two neighboring sentences, the Claimant's assertion that it is the delivery plan of the factory (supplier) instead of the Claimant seems logical. From the

perspective of the sender and recipient of the two emails, 'our delivery plan' is obviously the Claimant's commitment to the Respondent, so the Respondent's argument that the Claimant repeatedly confirmed the period for getting the goods ready in the emails makes sense.

The tribunal, based on the shipping clause of the contracts and the ascertained facts, finds:

① The Claimant's expression of getting the goods ready in the last 10 days of June 2012 is consistent with 'the buyer shall have the goods shipped in July 12, latest date of shipment July 31, 2012' in the shipping clause and is reasonable.

In legal sense, the shipping period of the two contracts is clear enough. The Claimant, as the FOB seller, shall perform the obligation of getting the goods ready according to the shipping period specified in the contract instead of taking the Respondent's vessel nomination as the precondition. The Claimant should have got the goods ready on the first day of the shipping period. Therefore, the tribunal supports the Respondent's assertion on the Claimant's delay in getting the goods ready.

② As mentioned above, the Claimant should have got the goods ready on July 1 but had failed to do so till July 20, so the Claimant shall be liable for such delay.

③ On the other hand, the Respondent, after receiving the Claimant's above email about the goods ready time, should have notified the Claimant of the date on which it intended to charter the vessel in early July and the time for receiving the good at the loading port during the shipping period, otherwise, the tribunal cannot support the Respondent's assertion that the Claimant should have got the goods ready before the shipping period and waited for the Respondent to request it to load the goods on the vessel chartered at

any time based on the Claimant's expression 'our delivery plan is from the last ten days of June' in the emails only if the Respondent failed to charter any vessel or send any vessel nomination notice during the period.

④ The Claimant's delay in getting the goods ready is not a default so serious that the performance of the two contracts could not be continued. The two contracts are both under the terms of FOB T. The Respondent, as the FOB buyer, failed to perform the vessel nomination obligation within the period promised by the Claimant, which is also a fault. It is hard for the tribunal to determine the parties' allegation against each other.

3) The Shipping Period under the Contracts

The Claimant's main opinions are as follows.

① According to Article 33(b) of the Convention and Article 138 of the Contract Law, the Claimant is entitled to fix the specific delivery date within the shipping period under the two contracts of this case (No.182 contract and No.183 contract).

② The 'time of shipment' clause in the two contracts is another expression of the delivery period and does not mean the buyer has the right to choose the delivery period.

③ The parties have reached an agreement on the specific delivery date of the goods under the two contracts during the performance, which is proved by the Claimant's email at 5:54pm on June 28, 2012.

④ Even if the Respondent had the right to choose, from the signature date to June 30, 2012, it had never indicated its choice of the specific delivery date or notified the Claimant thereof

The Respondent's main opinions are as follows.

The Claimant misunderstood Article 33(b) of the Convention. 'The buyer shall have the goods shipped in July 2012, latest date of shipment July 31' in the 'time of shipment' clause of the two contracts is an exception of Article 33 of the Convention. Under the clause, the Respondent has the right to choose the specific delivery date and to ship the goods at any time between July 1 and 31, 2012.

The Claimant should have got the goods ready before the shipping period, i.e. June 30, 2012, so that the Respondent could have sent the vessel to ship the goods at any time.

In this regard, the tribunal holds that:

The determination on the meaning of the 'shipping period' under the two contracts shall be made in accordance with Article 125 of the Contract Law which stipulates '[I]n case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith' since the parties have different understandings thereof.

The two contracts are both FOB contracts and provide the shipping period as 'the buyer shall have the goods shipped in July 2012, latest date of shipment July 31'.

The above provision on the 'shipping period' is different from the normal provision or expression on the 'shipping period' in FOB contracts.

In legal sense, the shipping period clause is one of the main conditions in sales contracts with the purpose of fixing the date or period for the seller's delivery of goods. The seller's

violation of such date or period will constitute a breach of contract. The seller normally adopts provisions such as 'delivery before a certain date' or 'delivery between two certain dates' or 'delivery in a specific month with a certain date as the latest shipping date' in the negotiation so that it would be convenient for the seller to arrange the delivery time in contracts under which the seller shall deliver the goods and arrange the transportation such as CFR, CIF or CPT contracts. Once the parties agree to adopt any of the above provisions when concluding the contract, the seller is entitled to deliver the goods on any day within the specified period according to the Convention and the Contract Law. However, the two contracts of this case are different from the above-mentioned contracts. The buyer is responsible for arranging transportation while the seller's delivery must be coordinated with the buyer's vessel nomination. The shipping period specified in the two contracts is 'the buyer shall have the goods shipped in July 2012, latest date of shipment July 31'of which the Claimant's understanding is not right.

Furthermore, the expression of the 'shipping period' provision in the two contracts shows the shipping clause which is usually used to fix the seller's delivery time is changed into the time clause which is used to fix the buyer's vessel nomination/goods receiving time, i.e. the buyer is entitled to nominate a vessel to ship/receive the goods at the loading port on any day of July 2012 with July 31 as the latest shipping date. As long as the buyer sends the vessel nomination notice, informing the seller of the nominated vessel, the seller is obliged to get the goods ready before the arrival of the vessel as notified by the buyer and load the goods on the nominated vessel so to fulfill its delivery obligation. Therefore, the tribunal rejects the Claimant's assertion that it is entitled to get the goods ready on any day of July 2012 according to Article 33(b) of the Convention based on the expression of the 'shipping period' clause in the two contracts of this case.

It can also be found from the relevant clause, i.e. Article 1 on the subject matter of the

two contracts, the parties have clearly agreed on the terms of FOB T. According to the FOB rule under the INCOTERMS 2010 (Articles A4 and B3), the buyer shall sign the transportation contract while the seller shall load the goods on the vessel nominated by the buyer at the port and period specified in the contract. The buyer must give the seller sufficient notice of the vessel name, the loading port and its choice of the delivery time within the specified period (if necessary). The Claimant is not solely responsible for the failure to get the goods ready within the specified period since the Respondent had not chosen the specific delivery time within the shipping period specified in the two contracts of this case.

According to the shipping period clause of the two contracts, the Respondent is entitled to choose any time from July 1 to 31 for the vessel nomination, but the Respondent must perform its obligation under B7, i.e. sent the vessel nomination notice. Under the circumstance that the Respondent failed to perform such notification obligation, the Respondent's understanding of the shipping period clause of the two contracts as it could request the Claimant at any time to deliver the goods to the nominated vessel for shipping within the specified shipping period is not only inconsistent with the contractual provision but also against the law. The tribunal does not accept the Respondent's understanding as above.

The shipping period clause means the Respondent has the right to choose any time in July 2012 to receive/ship the goods within the specified shipping period but the Respondent could not exercise such right without performing its vessel nomination obligation or notification obligation. The Respondent's understanding lacks legal basis and is against the international trade practices. Therefore, the tribunal rejects both the Claimant's assertion it is entitled to deliver goods on any day of July and the Respondent's argument it can nominate the vessel for shipment at any time of July while

the Claimant should get the goods ready and deliver the goods on the vessel at any time.

4) The Respondent's Reference to the Textbook Practice of International Trade

The tribunal notes the Respondent has cited certain part of the textbook Practice of International Trade regarding shipping clauses, asserting the Claimant should have sent the goods ready notice to the Respondent within 30 days before the shipping period or the Claimant should have got the goods ready within 30 days before the shipping date.

In this regard, the tribunal holds that:

① The Respondent is suspected of quoting out of context to suit its purposes.

② The Practice of International Trade contains a comprehensive introduction of the conclusion of FOB or FCA contracts by buyer and sellers, stating they must be careful when signing the 'shipment clause' and try to avoid a simple provision on the shipping period, the loading port and the destination port only. To avoid disputes, the parties, when signing the shipping clause of a FOB/FCA contract, shall make clear provision on the 'goods ready notice' and the 'vessel nomination notice' under which the goods ready notice and the vessel nomination notice are normally sent to the corresponding party within 30 or 45 days before the shipping month.

③ The shipping clause of this case is just a simple provision without mentioning the 'goods ready notice' or the 'vessel nomination notice', which has resulted in disputes and turned into a lesson for both parties.

5) The Specialization of the Goods

The tribunal notes the Respondent argued the Claimant's failure to perform the

obligation to get the goods ready within the specified period including the specialization of the goods directly damaged the Respondent's right and interest in shipping the goods within the specified period under the contracts and resulted in the non-performance of the contracts, and asserted the Claimant had seriously breached the contracts due to its objective behavior of never specializing any goods for the performance of the disputed contracts and the subjective intention of mixing the goods for different buyers to avoid the specialization of the goods under the contracts of this case.

The Claimant has submitted evidence related to small granular urea which shows the Claimant purchased 27,500 tons of small granular urea from a third party which is far more than the 25,000 tons under the small granular urea contract of this case but failed to prove which part of the 27,500-ton small granular urea had been specialized as the goods under the small granular urea contract. Similarly, the Claimant purchased 30,000 tons of large granular urea which is far more than the 25,000 tons under the large granular urea contract but failed to prove which part of the 30,000-ton large granular urea had been specialized as the goods under the large granular urea contract.

In this regard, the tribunal considers:

① The so-called 'specification of goods' means the unconditional allocation of deliverable goods to the goods under a contract for the fundamental purpose of dividing the risks and costs related to delivery between the buyer and the seller of the international sales contract.

② The seller has many simple ways of 'specifying the goods', including marking or labelling cargo packing, stacking and labelling bulk goods, etc. The seller can take such actions before shipment. The buyer, if refuses to receive the goods allocated to the contract (specialized), shall bear the corresponding risks for damage or loss of the

goods and expenses incurred therefor (see Articles B5 and B6 of the FOB rule under the INCOTERMS 2010). The goods under the two contracts of this case are bulk ones, so the Claimant only need to stack and label them before shipment to indicate they are the goods ready for the contracts after the goods arrive at the loading port, i.e. the Claimant only need to stack the 25,000 tons of goods under No.183 contract separately from the 30,000 tons of small granular urea and stack the 25,000 tons of goods under No.182 contract separately from the 27,500 tons of large granular urea.

Therefore, the tribunal rejects the Respondent's argument that the Claimant's failure in specializing the goods has directly damaged the Respondent's right and interest in shipping the goods within the specified period under the two contracts and resulted in the non-performance of the contracts.

6) The Claimant's Evidence on Its Purchase of the Goods under the Two Contracts of this Case

The tribunal notes the Respondent relied on the Report on the Onsite Investigation and Interview of the Parties Involved in the Relevant Evidence Submitted by the Claimant dated October 17, 2014 to assert the Claimant had not prepared the goods while the Claimant submitted the Opinion on the Respondent's Report on the Onsite Investigation and Interview of the Parties Involved in the Relevant Evidence Submitted by the Claimant and Its Attachment dated November 1, 2014, alleging the report and its attachment actually proved the Claimant had performed the contractual obligations according to the contracts and the Respondent could not rely on the incomplete investigation and interview report after concealing key facts and violating laws and regulations in the investigation.

The tribunal, after carefully reading the Respondent's report, finds:

① The tribunal can hardly determine the legal effect of the report from the form thereof since it was made by the Respondent itself without the presence of the related parties or the signature of seal of the interviewees.

② The Respondent's conclusion could not be drawn from the content of the report since the interviewees' answers are incomplete, uncertain and unclear.

③ The subject matter of the two contracts of this case is urea in bulk with fluctuating market price. Therefore, the transaction of such goods does not necessarily follow the way of 'order by sale', i.e. purchasing the goods after getting an order, which means the Claimant may purchase the goods from time to time and store them in the port warehouse. During the oral hearing, the tribunal specifically inquired the Claimant about the delivery if the Respondent had chosen to nominate the vessel in early July. The Claimant replied it could provisionally allocate the goods stored in the loading port. The tribunal considers such answer in line with the special practice of bulk cargo. Therefore, the tribunal can hardly accept the Respondent's argument that the Claimant failed to get the goods ready for No.182 contract of this case after it had not nominated the vessel and requested for delivery by the Claimant before July 20.

④ On the contrary, the Claimant's evidence shows that the Claimant signed a contract with Company H on June 25, 2012 for the purchase of 25,000 tons of small granular urea and another contract with Company I for the purchase of 10,000 tons of small granular urea, and signed a contract with Company H on June 29, 2012 for the purchase of 25,000 tons of large granular urea for the preparation of the goods under No.183 contract of this case. Although the Claimant has not provided the originals of these contracts, they are signed and sealed by the parties involved and supported by other relevant evidence submitted by the Claimant. The tribunal determines according to the

relevant legal provisions on evidence that the Claimant prepared large granular urea and small granular urea at Port Y around July 20, 2012.

Second, about the vessel nomination.

The Claimant's main opinions are as follows.

1) According to the contracts of this case and the international trade practices, the Respondent, as the buyer, should nominate the vessel within a reasonable time to ensure sufficient time for the Claimant to complete the loading, otherwise it was negligent to fulfill the obligation of receiving goods.

2) According to the provisions on the shipping period and the loading rate in Article 7 and Article 11 of the two contracts, the Respondent, as the FOB buyer, has the obligation to ship the goods before the latest shipping date while the seller need to load the goods on the vessel nominated by the buyer. Therefore, the Respondent, in order to ship the goods within the specified shipping period, must receive the goods within reasonable time so that the Claimant could load the goods in accordance with the normal loading rate of the port.

3) The Claimant notified the Respondent to prepare for receiving the goods around July 20 in the email at 5:54pm on June 28, 2012 while the Respondent replied on the same day, inquiring how many tons of the goods under No.182 and No.183 contracts had arrived at Port Y, China. Therefore, July 20, 2012 shall be taken as the time for receiving the goods since the Claimant had reserved sufficient time for the Respondent to nominate the vessel while the Respondent made no objection to such time.

4) The Respondent did not inform the Claimant of the chartered vessel 1 till 5:38pm on

July 24, 2012 after the Claimant had requested so according to laws for three times and expressed the intention of taking legal measures.

5) The latest shipping date of the goods under the contracts was July 31, 2012. The Claimant needed to complete the customs declaration and loading within 7 days. Under such urgency, the Claimant requested the Respondent to designate the shipping agent on the same day, only so would the Claimant accept the vessel with July 27 as the Laycan without guaranteed B/L date before July 31.

6) The Respondent nominated the vessel only 7 days before the latest shipping date but only sent a vessel nomination notice to the Claimant, which shows it negligence in performing the obligation of receiving the goods.

The Respondent's main opinions are as follows.

1) The Claimant breached the contracts first due to its failure in getting the goods ready in accordance with the shipping period specified in the contracts and the commitment in its previous emails, which directly damaged the Respondent's right and interest in shipping the goods within the specified time under the contracts and resulted in the non-performance of the contracts.

2) The Claimant's email at 5:54pm on June 28, 2012 was not a direct reply to the Respondent's inquiry about the goods preparation but only a notification that the goods were being sent to Port Y, China continuously and the large granular urea and small granular urea would be ready around July 20, which is contradictory to the goods preparation period stated in the May 15 email. At least as of July 23, 2012, the Claimant had not sent the goods ready notice for the two contracts of this case to the Respondent.

3) The Respondent, after receiving the Claimant's email on June 28, 2012 confirming the goods would be ready around July 20, 2012, actively chartered the vessel and informed the Claimant thereof. The Respondent, after receiving the Claimant's email at 2:21pm on July 19, 2012 inquiring about the vessel nomination, immediately contacted the carrier and informed the Claimant of the chartered Vessel 1 quickly but the Claimant's conditional acceptance the proposed vessel nomination directly led to the Respondent's failure in chartering the vessel.

4) The Claimant's acceptance of the vessel and the customs declaration are two different things. The shipping agent is usually designated by the carrier while the charterer, i.e. the buyer could only get the relevant information after signing the charter party after obtaining the approval of the seller.

5) The Respondent must get the Claimant's confirmation before chartering the vessel but the Claimant, when being requested so, added the Respondent's designation of the shipping agent on the same day as the condition for such confirmation, which was an actual denial of chartering Vessel 1 and resulted in the Respondent's failure in chartering the vessel.

6) The Claimant alleged the Laycan of the vessel chartered by the Respondent was too close and expressed no guarantee of the B/L date before July 31, 2012, but the reason for insufficient loading time was the Claimant's delay in getting the goods ready.

The tribunal, considering the parties' above opinions, expresses its opinions as follows.

1) The Delivery Time around July 20, 2012

The tribunal notes that the Claimant alleged the delivery time around July 20, 2012

confirmed in the email on June 28, 2012 had been agreed upon by both parties and could be supported by the Respondent's email at 6:06pm on June 28, 2012.

The tribunal considers:

① The shipping period of the two contracts involved in this case is July 2012 which is the parties' agreement and could only be modified by the parties' further agreement through negotiation. The tribunal finds in the parties' correspondence that the Claimant stated in the email at 5:54pm on June 28 that '[A]s per telecom, cargo is transported to Port Y continuously, The p'urea and g'urea under contracts would be ready on about 20th July 2012 ...' while the Respondent replied in the email at 6:06pm on June 28, 2012 that '[T]hanks for your kind reply. How much granular urea and prilled urea is ready in Port Y?'.

According to the above emails of both parties, Article 18 of the Convention and Article 77 of the Contract Law, the Claimant has no factual or legal basis to assert the so-called delivery time around July 20 was confirmed by the Respondent's email at 6:06pm on June 28, 2012.

② It is only the Claimant's wishful thinking that the parties have reached agreement on changing the shipping period to delivery around July 20 or fixing such date as the delivery time based on the Respondent's email at 6:06pm on June 28 only. In fact, it cannot be concluded from the said email that the Respondent has confirmed around July 20 as the new delivery period.

③ The shipping period specified in the contract is still the only binding time for shipment and delivery for the parties when they have not agreed to change the shipping period specified in the contract to around July 20.

④ As mentioned above, the provision on the shipping period of the two contracts in this case is different from the usual provisions. According to the shipping period specified in the contracts, the buyer should nominate a vessel to ship the goods from July 1 to July 31 while the Claimant's email on June 28 actually unilaterally reduced the Respondent's vessel nomination time allowed by the contracts by about 20 days. Therefore, the Respondent's argument that the Claimant's delay in getting the goods ready directly damaged its right and interest in shipping the goods within the specified period under the contracts is sustainable.

2) The Vessel Nomination Time

The Claimant's main opinions are as follows.

① The Respondent should nominate a vessel to perform its obligation of receiving the goods after the Claimant had clearly notified it the goods under the two contracts of this case would be ready at Port Y, China around July 20, 2012 by the email on June 28, 2012.

② The Respondent's intentional failure to perform the contractual obligation of nominating the vessel for shipment within a reasonable time constituted a breach of contract since the Claimant had given sufficient time to the Respondent in accordance with the fertilizer shipment practices.

③ The Respondent nominated the vessel at 5:38pm on July 24 after being urged repeatedly by the Claimant in three emails (at 2:20pm on July 19, 2012, 6:01pm on July 20 and 2:26pm on July 23) without giving the Claimant sufficient time for customs clearance and loading since the Laycan of the nominated vessel No. 1 was July 25-29.

The Respondent's main opinions are as follows.

The Claimant's preparation of the goods under the two contracts was not in line with the shipping period specified in the contracts. To avoid unnecessary expensive demurrage, the Respondent dared not rush to nominate the vessel when the Claimant had not notified the Respondent of the exact date of getting the goods ready at the loading port but the Claimant had not notified it thereof till July 23.

The Respondent, after receiving the Claimant's goods ready notification, actively contacted the carrier and sent the email to the Claimant at 5:38pm on July 24, stating '[W]e are pleased to nominate vessel No. 1 or sub to you for lifting above mentioned contract. Laycan: 25-29July … please send us your acceptance immediately today …'

In this regard, the tribunal finds:

① As stated in the above tribunal's opinions, around July 20, 2012 cannot be regarded as the new delivery time agreed by the parties in legal sense, so the shipping period of the two contracts is still '[T]he buyer shall have the goods shipped in July 2012, latest date of shipment July 31, 2012'. Then, the Respondent's vessel nomination notice on July 24 shall be deemed as in compliance with the contracts. The tribunal rejects the Claimant's groundless assertion that the Respondent was negligent in performing its obligation of receiving the goods under the contracts for its delay in nominating the vessel.

② The fact is the Claimant stated it would get the goods ready at Port Y, China around July 20, showing there were no goods ready at Port Y around July 1-20. The Claimant's request on the Respondent to nominate a vessel when there were no goods ready at the port is not only impractical but also unfair.

The Respondent could not and need not nominate a vessel during the period mentioned above. In legal sense, the Respondent's vessel nomination notice on July 24 shall be regarded as within the shipping period specified in the contracts and in line therewith. Therefore, the tribunal rejects the Claimant's assertion on the Respondent's default delay in vessel nomination after having been given sufficient time to nominate a vessel by the June 28 email.

③ The Claimant, as the exporter, should have known it would take at least 10 days to finish the loading at the normal loading rate of 5,000mt/day at Port Y, China even without considering other factors. The arrival of goods at the port around July 20 should be regarded as a tight schedule. Even if the Claimant had got the goods ready then, it was still unreasonable and delayed. Therefore, the tribunal rejects the Claimant's assertion on the Respondent's delayed vessel nomination.

3) The Content of the Vessel Nomination Notice

The tribunal notes the Claimant's argument against the content of the vessel nomination notice on July 24 as follows.

① The Laycan on July 25-29 was only 7 days earlier than July 31, 2012, the latest shipping date specified in the contract, with narrow gap therebetween.

② The Claimant could not complete the customs declaration since the Respondent had not informed it of the shipping agent in the vessel nomination notice and still not informed thereof after being requested so for several times.

③ The Claimant accepted the vessel nomination but stated that the Respondent's request on July 31 as the B/L date could not be guaranteed.

However, the Respondent asserted:

① The Respondent should not be blamed for the narrow gap between the Laycan of the nominated vessel 1 and the latest shipping date July 31 which was caused by the Claimant's intentional delay in getting the goods ready to cut the cost.

② The Respondent's vessel nomination and the Claimant's customs declaration are two issues which could not be mixed together.

③ The Respondent could not get the shipping agent's information without signing the charter party with the charteree when the Claimant failed to confirm vessel 1 as the nominated vessel since a shipping agent should be designated by the charterer.

In this regard, the tribunal determines:

① The Narrow Gap between the Laycan and the Latest Shipping Date

As mentioned above, the Claimant got the goods ready around July 20, 2012 when the parties had not agreed on changing the shipping period to around July 20, 2012, which shortened the 31-day shipping period from July 1 to July 31 during which the buyer could choose a day for the vessel nomination by about 20 days and resulted in the narrow gap between the Laycan and the latest shipping date, for which the Respondent should not be liable.

② The Shipping Agent

In international trade practices, the customs administration usually does not require the buyer to provide the shipping agent's information when making export declaration but may request the carrier or the seller to provide such information when declaring

customs. In this case, the parties are both experienced in import and export business and are particularly familiar with the procedures of fertilizer import and export. According to the fertilizer export practices at Port Y, China, the buyer of an FOB contract should notify the seller of the shipping agent's information in the vessel nomination notice to clear the customs and load the goods. The Claimant, as the seller, should have considered the above according to Articles A2 and A4 of the FOB rule under the INCOTERMS 2010 and performed its contractual obligations with no default especially when the price factor was quite sensitive under the downward international market trend. In this case, the Claimant could have avoided the problem if it had got the goods ready in advance appropriately and reasonably.

On the other hands, the Respondent, as the buyer, though its vessel nomination notice on July 24 was in accordance with the contracts, should have chartered the vessel after receiving the June 28 email and the three reminder emails on July 19, 20 and 23, especially when it was aware of the parties' normal practice and knew the nominated vessel must be confirmed by the Claimant. If the nominated vessel had arrived at the loading port on time, it would be less than 6 or 7 days earlier than the latest shipping date July 31 specified in the contract. If the Respondent had considered the above practically, it could have avoided the problem of no shipping agent's information before the charter party was signed. Therefore, the tribunal holds that the Respondent's argument that the customs declaration and vessel nomination are two different things is not in line with the practices of Port Y, China.

In short, the parties' above-mentioned problem is related to the drop in the market price of the goods under the two contracts. The parties shall bear their respective responsibilities for defects in the performance of the contracts.

4) The B/L Date of July 31

In international trade, the seller of an FOB contract performs its delivery obligation by loading the goods on the vessel nominated by the buyer and transferring the B/L. The only proof of its delivery within the time specified in the contract is the issuing date of the B/L. Only the B/L date before the latest shipment date could prove the seller's performance of the delivery obligation within the specified time.

In this case, if the Respondent had charted the vessel1 and the vessel had arrived at the loading port within the Laycan while the B/L date was not July 31, the Claimant should have borne legal responsibility and the Respondent could have claimed against the late delivery of goods. However, the Respondent actually did not charter the vessel or send the vessel to ship the goods from the loading port on the excuse that the Claimant had stated it could not guarantee July 31 as the B/L date without being notified of the shipping agent. The Respondent should be liable for the non-performance of the two contracts since the Claimant could not load the goods without the vessel chartered.

The tribunal, based on the above analysis, determines:

① The shipping period shall be the one specified in the contracts and the Respondent's vessel nomination notice at 6:06pm on July 24 is in line therewith.

② Accordingly, the Claimant's delay in getting the goods ready is a defect but such defect is not serious enough to exempt the Respondent from the vessel nomination obligation. The Respondent should have nominated the vessel but had never really chartered vessel 1 and signed no charter party with the carrier. The Respondent should be liable for the non-performance of the two contracts of this case due to its failure in chartering the vessel as the buyer according to Article B3 of the FOB rule under the INCOTERMS

2010.

③ After all, the Claimant delivered the goods under No.182 and No.183 contracts to Port Y, China around July 20, 2012 which was within the shipping period specified therein. However, the Respondent failed to actually send the vessel to Port Y, China and had no factual basis to unilaterally require the B/L date to be before July 31. The Respondent could only claim against the Claimant when it had actually sent the vessel but the Claimant failed to provide the B/L with the date in line with the specified shipping date. Therefore, the Respondent has no legal ground for its failure in sending the vessel to ship the goods on the excuse that the Claimant could not guarantee the B/L date to be before July 31.

④ In the performance of FOB or FOB T contracts, the goods preparation and the vessel nomination should be strictly coherent to avoid the situation of cargo waiting for vessels or vessels waiting for cargo. The Claimant had clearly stated the goods would be ready at the port around July 20, 2012, so it was impossible for the Respondent to send the vessel to the port on July 1-20 with no goods there. The Respondent has defects in its performance since it refused to fulfill the vessel nomination obligation under the FOB contracts on the excuse that the Claimant could not guarantee the B/L date to be before July 31, 2012 when the Claimant had delivered the goods to Port Y, China around July 20, 2012 which was still within the specified shipping period.

Regarding the parties' dispute over the vessel nomination issue under the two contracts of this case, the tribunal finds the Claimant is at fault for delay in the goods preparation while the Respondent is at fault for its failure to perform the vessel nomination obligation. Under the doctrine of shared fault, the Claimant and the Respondent shall be jointly liable for the non-performance of the two contracts of this case. As to the legal

liabilities, the Respondent shall share more.

Third, about the parties' negotiation for the continued performance of the contracts after the expiry of the shipping period specified therein.

The tribunal notes the Claimant's assertion that the Respondent's failure in sending the vessel within a reasonable time constitutes another breach.

The Respondent argued it had started contacting the carrier late July or early August 2012 and notified the Claimant of the nomination of vessel No. 2 contract in the email on August 2, 2012 and the nomination of vessel No. 3 for No.183 contract on August 9 2012 after the expiry of the specified shipping period so as to perform the contracts actively but the Claimant refused to confirm or accept the above nominated vessels on the excuse that the parties had not reached any new agreement, which resulted in the non-performance of the two contracts and constituted a breach.

The tribunal, considering the parties' different opinions, has checked the parties' emails from August 1 to mid-August, 2012.

The tribunal's opinions based on the contents of the above emails are as follows.

① The above emails show that the parties negotiated for the continued performance of the two contracts and made efforts therefor through requirements and suggestions. However, the tribunal finds the parties both set conditions for the specific requirements and suggestions.

② The tribunal also notes the grace period of August 15 proposed by the Claimant in the email on August 2, 2012 is for three contracts, i.e. No.182 and No.183 contracts of this case and No.428 contract not involved in this case with different provision on

the shipping period. The two contracts of this case have no clear provision on the time for the seller to get the goods ready at the loading port or the Laycan of the vessel but No.428 contract has. The performance of these contracts is different as well. Therefore, the tribunal rejects the Claimant's assertion that it has given the Respondent the grace period with the said email.

③ According to the above opinions, the tribunal deems the Claimant lacks legal basis for taking August 15, 2012 as the grace period since it unilaterally set such time as the due date for the arrival of the vessel nominated by the Respondent when both parties had defect in performing the two contracts of this case.

④ The above emails of the parties, especially those of the Respondent, never show the Respondent's 'acceptance' of the 'grace period' given by the Claimant. Therefore, the Claimant has no legal ground to allege the Respondent's breach due to its failure in sending the vessel to receive the goods within the 'grace period'.

In short, the parties' requirements or efforts during the negotiation shall have no legal force on either party and the parties shall bear no legal responsibility for the agreement that has not been reached since the shipping period specified in the contracts, after its expiry, has not been changed due to the parties' failure in reaching the agreement on the continued performance of the contracts.

Fourth, about the compensation for damages.

The Claimant's main opinions are as follows.

① The Claimant had to resell the goods under the contracts within a reasonable time and in a reasonable way according to Article 75 of the Convention in mid-August

2012 when the Respondent had failed to perform the contracts within the grace period given by the Claimant and the parties had reached no agreement in negotiation. The Respondent shall compensate the Claimant for all its losses including the loss of profits according to Article 74 of the Convention.

② The Claimant signed No.611/4182 sales contract with a Hong Kong company on September 13, 2012 under which the Claimant sold the Hong Kong company 25,000 tons of small granular urea at the price of USD365/ton and actually delivered 19,800 tons (since the Claimant had sold the rest to Company N on October 15) for which the Hong Kong company paid in full.

③ The Claimant resold 16,250 tons of small granular urea to Company N and actually delivered 16,300 tons at the price of approximately RMB2,000/ton.

④ The Claimant has resold the goods under No.183 contract within a reasonable time and in a reasonable way.

The Clamant signed the sales contract with an American company on August 28, 2012 under which the Claimant sold the American company 30,000 tons of large granular urea at the price of USD380/ton with September 2012 as the shipping period and actually declared and delivered 29,750 tons on September 11, 2012 (including the 25,250 tons prepared for the Respondent).

⑤ The Respondent shall compensate the Claimant for its losses in the amount of approximately USD3,400,000besides the legal fees and arbitration fees according to Article 74 of the Convention.

The Claimant has deducted over RMB8 million of the reduced customs duty based on

the lower resale prices from the compensation amount since the corresponding customs duty need to be deducted from the losses calculated.

The total compensation amount for No.182 contract is approximatelyUSD2,000,000 including:

a) the price difference of USD1,300,000 after deducting the reduced customs duty; and

b) the overdue interest payable by the Respondent in the amount of USD4,900,000.

3) the loss for storage fee in the amount of USD 120,000.

The total compensation amount for No.183 contract is approximately USD1,400,000 including:

a) the price difference of USD1,100,000after deducting the reduced customs duty; and

b) the overdue interest payable by the Respondent in the amount of over USD300,000.

The Respondent's main opinions are as follows.

① The Claimant has no legal basis to claim for damages. The Claimant should have deducted its huge profits through breaching the goods preparation obligation under the disputed contracts from the losses calculated according to the rule of income offset, including the excess profit of RMB8,800,000 (approximately USD1,400,000) due to the cost cut through delayed preparation of goods under the small granular urea contract and the excess profit of RMB7,750,000 (approximately USD1,200,000) due to the cost cut through delayed preparation of goods under the large granular urea contract. In fact, the Claimant's huge profits due to the cost cut through delayed preparation of goods has exceeded the so-called price difference loss claimed by the Claimant.

② The Claimant shall bear the losses caused by its own fault according to the comparative negligence rule. Even if the Respondent had delayed the vessel nomination, the Claimant would not have suffered the so-called price difference loss if it had accepted the nominated vessel and continued the performance of the contracts.

③ The loss of expected profits claimed by the Claimant is far beyond the damages for breach of contract that the Respondent could reasonably expect at the contract conclusion time and shall not be supported according to the predictability rule.

In this regard, the tribunal determines:

① The Claimant is not entitled to declare the two contracts avoided since the two contracts have no clear provision on 'get the goods ready' and 'nominate the vessel' while both parties have defects in their performance of the contracts. The Claimant is not the fully observing party while the Respondent's failure in chartering vessel 1 and sending it to ship the goods partially due to the Claimant's fault does not constitute a fundamental breach.

Therefore, the tribunal deems it inappropriate for the Claimant to rely on Article 75 of the Convention to claim for the price difference loss.

② As shown by the evidence, the Claimant delivered the goods under No.182 and No.183 contracts to Port Y, China on July 20-21, 2012. According to the domestic and international market price evidence submitted by the parties, the price of the goods under the contracts was dropping at that time. The price difference loss was unavoidable since the Claimant could not get the goods ready in the last 10 days of June 2012 as promised while the Respondent did not charter the vessel. The Respondent shall be liable for such loss.

③ The Respondent's argument on the Claimant's huge profits due to the cost cut through delayed preparation of goods is unsustainable since the parties should perform the contracts according to the fixed price in the contracts while the goods preparation cost of the seller, i.e. the Claimant, has nothing to do therewith.

④ The tribunal notes the Claimant has calculated its losses including the interest loss in RMB and finds such calculation groundless since USD is the currency adopted in the two contracts of this case. The price difference loss shall be calculated in USD.

As for the calculation of the interest loss, the tribunal holds:

a) RMB cannot be exchanged completely freely in China.

b) The two contracts of this case are both for the export of urea by the Claimant. The settlement bank would convert the USD payment received by the Claimant into RMB before transferring it into the Claimant's account if the two contracts were actually performed, and will do the same for the compensation for losses. Therefore, the tribunal supports the Claimant's calculation of interest based on the compensation amount in RMB.

c) The tribunal notes the interest calculated by the Claimant includes the interest on the contract price and the interest on the price difference loss. As mentioned above, the Claimant has defects in the performance of the contracts in this case, so the tribunal only supports the interest on the price difference loss calculated from August 6, 2012 to June 30, 2014 at the loan interest rate announced by the People's Bank of China for the same period.

The tribunal, considering the circumstances of this case, finds it appropriate to refer to

the international market price in late July and early August, 2012 for the calculation of the price difference under the principle of practicality, fairness and reasonableness. The tribunal, noticing the slight difference in such price shown in the parties' evidence, decides to calculate the price difference loss at the price of USD383/ton for small granular urea and USD430/ton for large granular urea while the parties shall bear such loss in proportion. According to the above opinions, the tribunal deems appropriate for the Claimant to bear 45% and the Respondent to bear 55%. The reduced customs duty, the storage fees and other expenses shall not be calculated in such loss.

⑤ The calculation of the price difference loss shall be based on the 25,000mt specified in each contract of this case. Accordingly, the price difference loss shall be calculated as (457-383) × 25,000 + (470-430) × 25,000 = 1,850,000 + 1,000,000 = 2,850,000 (USD). As mentioned above, the Respondent shall bear 55% thereof, i.e. USD1,567,500.

The interest thereon shall be calculated as stated above.

Fifth, about the Claimant's claims.

Claim 1, the two sales contracts signed by the Claimant and the Respondent on April 18, 2012 shall be terminated while the Respondent shall compensate the Claimant for the damages in the amount of RMB21,200,000 (calculated till June 30, 2014).

The tribunal notes such claim contains two parts, i.e. the contract termination and the damage compensation.

① The Contract Termination

The tribunal, considering the circumstances of this case that the continued performance of the two contracts is impossible and the parties have no intention to do so, decides

No.182 and No.183 contracts shall be terminated.

② The Damage Compensation

As mentioned above, the Respondent shall compensate the Claimant for the price difference loss in the amount of USD1,567,500, i.e. 55% of the total loss of USD2,850,000, which shall be converted into RMB9,930,582.75 based on the exchange rate of 6.3353 on August 6, 2012, and the interest loss on RMB9,930,582.75 calculated from August 6, 2012 to June 30, 2014 at the loan interest rate announced by the People's Bank of China for the same period.

Claim 2, the Respondent shall compensate the Claimant for the legal fees and other reasonable expenses incurred for this case in the amount of approximately RMB1,450,000.

The tribunal, considering the circumstances of this case, deems it reasonable for the Respondent to compensate the Claimant for the legal fees and other expenses incurred for this case in the amount of RMB700,000.

Claim 3, the Respondent shall bear all arbitration fees of this case.

The tribunal, considering the circumstances of this case, decides the Claimant and the Respondent shall bear 45% and 55% of the arbitration fees of this case respectively.

Case 9 2014 Alloyed Round Bar Case

I The Merits of the Case

1. The Claimant's Claims in The Arbitration Application

On April 13, 2012, the Claimant, Company A in South Korea, (hereinafter referred to as the Claimant) as the buyer and the Respondent, Company B in the People's Republic of China, (hereinafter referred to as the Respondent) as the seller signed No.0413 contract under which the Claimant purchased 1,250 tons of ALLOYED ROUND BAR (quantity: 10% more or less allowed) at the price of approximately USD 700 per ton CFR FO a port in South Korea with the total contract price of approximately USD 900,000. The payment method is letter of credit and the shipping date is before June 30, 2012. Article 16 of the contract also provides that the buyer can cancel the contract and has the right to claim damages if the seller makes late or no delivery. If the buyer fails to issue letter of credit or the seller fails to deliver goods on time, the breaching party shall pay damages in the amount of 2% of the total contract price to the other party. After the contract was signed, the Claimant issued an irrevocable letter of credit with the Respondent as the beneficiary through the issuing bank on April 19, 2012. The shipping date recorded in the letter of credit was the same as the contract, i.e. before June 30, 2012.

On July 5, 2012, the Respondent emailed the Claimant, requesting the Claimant to stamp the letter of guarantee submitted by the Respondent so that the Respondent could obtain a backdated bill of lading from the shipowner to cover the overdue loading at the loading port. By doing so, the Respondent requested the shipowner to disregard the actual shipping date, i.e. July 2, 2012 and backdate the shipping date on the bill of

lading to the date required by the contract and the letter of credit, i.e. June 30, 2012. The Claimant turned down such request while the shipowner refused to backdate the bill of lading. The Respondent obtained the backdated bill of lading issued by a third party company C instead of the shipowner to satisfy the bank's letter of credit review requirements (shipping date: 2012.6.30, shipping weight: approximately 1,230 MT), and submit the bill of lading to the bank.

To prevent loss caused by the Respondent's fraud, the Claimant requested the Respondent to stop fraudulent behaviors, take back the illegal and invalid bill of lading, and dispose the goods on its own. On the other hand, the Claimant resorted to a South Korea court for injunction against the payment under the letter of credit. However, the bank only checked whether the documents were consistent according to relevant international practice. Therefore, the bank paid the negotiating bank approximately USD 900,000 under the letter of credit before the court made the injunction order, which resulted in the Claimant's actual loss including the payment under the letter of credit. The Claimant then submitted the dispute to arbitration by China International Economic and Trade Arbitration Commission (CIETAC).

The Claimant's claims are as follows:

1) The Claimant's cancellation of the contract shall be confirmed;

2) The Respondent shall refund the Claimant the payment under the letter of credit in the amount of approximately USD 900,000;

3) The Respondent shall pay the Claimant the interest loss for the above payment to the actual payment day (based on the annual USD deposit interest rate of 3%, temporarily calculated as approximately USD 8,900 till December 18, 2012);

4) The Respondent shall reimburse the Claimant approximately KRW2,200,000 for the L/C opening charges, KRW450,000 for the insurance premium, approximately KRW7,150,000 for the costs related to the South Korea court injunction, totaling KRW9,800,000;

5) The Respondent shall compensate the Claimant the liquidated damages in the amount of approximatelyUSD17,000; and

6) The Respondent shall bear the arbitration fee and relevant expenses and compensate the Claimant for the legal fees and travel expenses.

2. The Respondent's Statement of Defense

1) On June 27, 2012, the Respondent notified Company D designated by the Claimant through QQ of the vessel name, the way to contact the shipping agency at the destination and the estimated arrival time at a Chinese port, but the Claimant did not clear customs thereafter. On July 2, 2012, the Respondent notified Company D via QQ of the cargo arriving at the discharging port on July 4. However, the Claimant has made no customs clearance even till now.

2) The Respondent's late shipment for one day was caused by heavy rain in the Chinese port during which safe operation could not be guaranteed. The loading of other goods on the same vessel was delayed for one day as well. Those sellers all showed their understanding and issued backdated letters of guarantee. The Respondent's action is neither intentional nor fraudulent.

3) The Respondent had the Claimant's implied consent to the one-day late shipment. On July 5, 2012, the Respondent formally notified the Claimant of the late shipment

due to heavy rain and requested the Claimant to issue a backdated letter of guarantee for the shipowner's formal bill of lading, but the Claimant did not reply till 5 days later, i.e. July 9, 2012 and refused to accept the goods. Such delay in reply showed its implied consent.

4) The one-day late shipment has caused no damage to the Claimant due to price factors. The vessel carried five batches of steel totaling approximately 2,900 tons of steel. The shipping deadline for other three batches besides the Claimant's 1,230 tons of alloyed round bars was June 30, 2012. The shipment was delayed one day for these goods due to the heavy rain as well. After the Respondent explained the situation, the three companies issued the letter of guarantee for backdated bill of lading. The price of the alloyed round bars delivered at the same time as the Claimant's or one month later was USD7/ton higher than the Claimant's price. It can be concluded from the above facts that the one-day late shipment has caused no damage to the Claimant.

5) The Respondent has been actively fulfilling its contractual obligations throughout the contract performance. After the parties signed the contract on April 17, 2012, the Respondent organized the production and delivered the alloyed round bars to the port. The vessel was released by the customs in a Chinese port on June 28, arrived at the anchorage at 8am on June 29, and berthed at 7pm on June 30, 2012, but could not be loaded due to heavy rain. The lading of the Claimant's alloyed round bars was started at 5am and completed at 10pm on July 1. The vessel departed on July 2 and arrived at the destination on July 4. The Respondent has been actively and diligently fulfilling its contractual obligations in the whole process.

Above all, the Respondent has never fundamentally breached the contract. The Claimant has no right to terminate the contract since it has maliciously breached the contract for

not declaring the customs and receiving goods under either Article 25 of CISG or Article 94 of the Contract Law of the People's Republic of China.

3. The Claimant's Final Claims after Amendments

1) The Claimant's termination of the contract shall be confirmed;

2) The Respondent shall refund the Claimant the payment under the letter of credit in the amount of approximately USD 900,000;

3) The Respondent shall pay the Claimant the interest loss for the above payment to the actual payment day (based on the annual US dollar deposit interest rate of 3%, temporarily calculated as approximately USD24,000 till June 24, 2013);

4) The Respondent shall reimburse the Claimant approximately KRW2,200,000 for the L/C opening charges, KRW450,000 for the insurance premium, approximately KRW7,150,000 for the costs related to the South Korea court injunction, totaling KRW9,800,000;

5) The Respondent shall compensate the Claimant the damages for breach of contract in the amount of approximately USD17,000; and

6) The Respondent shall bear the arbitration fee and relevant expenses and compensate the Claimant for the legal fees and travel expenses.

4. The Claimant's Supplementary Opinions

1) The laws of the People's Republic of China shall apply to this case.

The contract of this case is a foreign-related contract on international trade. The

Respondent is a Chinese legal person while the Claimant is a South Korea legal entity. The exporter, the origin of the goods and the port of shipment are all in China. Thus, Chinese laws have close relationship with the contract. The Respondent has been quoting relevant Chinese laws, such as the Contract Law of the People's Republic of China, in its defense and arguments. Under the closest connection doctrine, the applicable law of this case shall be Chinese laws including the Contract Law and the General Principles of the Civil Law of the People's Republic of China.

2) The Validity of the Contract and The Main Contract Provisions

① The contract stipulates that the Claimant purchases 1,250 tons of ALLOYED ROUND BAR from the Respondent (quantity: 10% more or less allowed)) at the price of USD693.00 per ton CFR FO a port in South Korea with the total contract price of approximately USD870,000. The payment method is the issuance of an irrevocable letter of credit with the Respondent as the beneficiary by the Claimant within 5 working days after the contract is signed. Time of Shipment is before June 30,2012. Article 16 of the contract also provides that the buyer can cancel the contract and has the right to claim damages if the seller makes late or no delivery. If the buyer fails to issue letter of credit or the seller fails to deliver goods on time, the breaching party shall pay damages in the amount of 2% of the total contract price to the other party.

② According to the contract, the Respondent as the seller is obliged to ship the goods of this case before June 30, 2012. The shipment includes loading and transportation of the goods. Under the INCOTERMS, the risk is transferred to the Claimant once the goods have been loaded on board. If the Respondent delays delivery, the Claimant as the buyer has the right to terminate the contract. In addition, if the Respondent fails to deliver the goods on time, it shall pay damages in the amount of 2% of the total contract price to

the Claimant.

③ The Respondent's counsel alleged during the oral hearing and in the written cross examination opinions submitted thereafter that 'cancel the contract' mentioned in Article 16 of the contract did not mean 'terminate the contract', but has never clearly explained the meaning of 'cancel the contract'. As per Article 125 of the Contract Law, a contract term with different understanding by the parties shall be interpreted according to the expression of the contract, the relevant provisions in the contract, the purpose of the contract, trade practices, and the principle of good faith. Obviously, 'cancel' (as stated in the contract) shall be interpreted as 'terminate', and 'cancel the contract' shall be interpreted as 'terminate the contract'.

④ As per Article 39 of the Contract Law, Article 16 of the contract containing 'cancel the contract' is a standard term. According to Article 41 of the Contract Law, 'cancel the contract' shall be interpreted according to common sense when the parties argue over its meaning. If the standard term is subject to two or more interpretations, it shall be interpreted against the party supplying it. Obviously, 'cancel the contract' shall be interpreted as 'terminate the contract' either by common sense or as against the Respondent who provides the standard term.

⑤ Article 16 of the contract clearly states that 'if the delivery is delayed or not made, the buyer may cancel the contract and claim damages. If the buyer fails to issue letter of credit or the seller fails to deliver goods on time, the breaching party shall pay damages in the amount of 2% of the total contract price to the other party'. Obviously, it cannot be denied that the contract has clearly stipulated that the Claimant is entitled to claim for loss (including the payment under the letter of credit and the interest thereon, the legal fees, etc.) and damages for breach of contract due to the Respondent's delay in

delivery no matter whether 'cancel the contract' is interpreted as 'terminate the contract' or not.

3) The Claimant is entitled to terminate the contract due to the Respondent's late delivery.

① After signing the contract, the Claimant issued an irrevocable letter of credit with the Respondent as the beneficiary through the issuing bank on April 19, 2012 in accordance with the contract. The shipping date in the letter of credit is the same as the contract, i.e. before June 30, 2012 while the total amount is approximately USD 870,000 (10% more or less allowed). So far, the Claimant has fulfilled its basic contract obligations.

② It is clearly shown in the current evidence including those from the Respondent and the Statement of Defense that the goods were not shipped before June 30, 2012 as stipulated in the contract. The Respondent argued the shipping date was before July 1, 2012, but the letter of guarantee submitted by the Respondent clearly states that "ON BOARD DATE: 2012-7-2", which means the goods were loaded on July 2, 2012. The Respondent confirmed the authenticity of the letter of guarantee during the oral hearing. Furthermore, the Customs Declaration Form for other goods on the same vessel submitted by the Respondent shows the Export Date as July 2, 2012, which means the vessel carrying the goods of this case departed from the port on July 2, 2012. The departure on July 2 can also be confirmed by the Respondent's Evidence 1 (the chat record). The chat record on July 2 shows that vessel departed the port at noon on July 2. The Respondent has quoted and confirmed the chat record in its Statement of Defense. Finally, Customs Real-time Record, the Respondent's Evidence 10 under the List of Evidence submitted during the first oral hearing, clearly shows the 'completion time' as '07:50 on July 2'.

③ The Claimant's declaration for the termination of the contract according to the concluded and effective contract is legal and valid, and shall be confirmed and protected according to law. The Claimant refused in writing on July 9, 2012 to sign the 'exemption letter' exempting the carrier from backdating the bill of lading, or to accept the goods of which the Respondent was still the owner. The Claimant also required the Respondent to return the goods in a timely manner to mitigate loss and indicated it could assist with the return. July 9, 2012 is the de facto contract termination date. On August 29, 2012, the Claimant notified the Respondent in writing of the contract termination, reaffirmed the right to claim damages and reserved the right to make further claims. The Respondent has confirmed the authenticity thereof and cited the Claimant's written notice on refusing the goods and terminating the contract in the Statement of Defense.

4) The Claimant has the right to claim damages due to the Respondent's infringement.

① The Respondent requested Company C, a third party, to issue the backdated bill of lading recording the shipping date as June 30, 2012 instead of the actual date July 2, 2012. The Respondent received the payment under the letter of credit in the amount of approximately USD900,000. on July 16, 2012 while the Claimant paid such amount to the bank on November 13, 2012, resulting in the Claimant's actual loss including such payment.

② The Respondent had not informed the Claimant of the delayed delivery and the contents of the bill of lading either days before or after the goods were loaded (on either July 1or July 2, 2012) and shipped (on July 2, 2012) till the goods arrived at the South Korea destination on July 5, and directly requested the Claimant to sign the letter of guarantee to exempt the carrier from relevant liabilities. The Respondent, when the Claimant clearly refused to sign the letter or to receive the goods, unexpectedly obtained

the backdated bill of lading issued by Company C, a third party, and submitted it to the bank. The Respondent received the payment under the letter of credit by fraud, depriving the Claimant and the bank their opportunities and rights to refuse such payment due to the inconsistency in documents and directly causing the Claimant's loss. Obviously, such commercial fraud by the Respondent constitutes infringement to the Claimant's legal property rights and other benefits. The Respondent shall compensate all the loss caused by such infringement, including but not limited to the payment under the letter of credit, the interest thereon, the court costs, the legal fees, the L/C opening charges, the insurance premium and the arbitration fee.

5) The Respondent still owns the goods while the Claimant shall not be obliged to accept the goods delayed and unilaterally unloaded by the Respondent. The Claimant shall not bear loss caused by the abrupt price drop in the market or the accumulated port charges.

6) The Claimant would draw the tribunal's attention to the following.

① The Respondent's one or two day delay in delivery cannot change the Claimant's right to refuse the goods or to terminate the contract.

The contract provision on shipment covers both loading and shipping time. The current evidence is sufficient to prove that the loading was delayed for 2 days, which constitutes a serious breach of contract and meets the contract termination conditions stipulated in the contract. The Claimant has the right to terminate the contract in accordance with the contract or relevant laws. Such right shall not be affected by the number of days of delay in delivery.

② The Claimant relied on Article 16 of the lawful and valid contract instead of Article 94 of the Contract Law as alleged by the Respondent to terminate the contract.

③ Company C does not have the carrier's qualification to issue a bill of lading under the Maritime Law. Company C's backdated bill of lading as requested by the Respondent is illegal and invalid. The Claimant has sufficient reasons to believe that the bill of lading involved is illegal and cannot be used as a document of title or a delivery order. The Respondent shall bear all the relevant liabilities.

5. The Respondent's Further Defense

1) The Claimant's request for confirming its termination of the contract cannot be supported. Article 16 of the contract stipulates that the buyer may cancel the contract if the seller makes late or no delivery. The Chinese version is ' 取 消 ' instead of ' 解 除 ' while the English version is 'cancel' instead of 'release'. The Claimant could not terminate the contract according to Article 94 of the Contract Law since the legal situation for contract termination thereunder has never occurred in this case.

2) It is right for the Respondent to deliver the goods to a South Korea port and collect the payment according to the contract.

3) The discharging warehouse is Warehouse H designated by the Claimant. On July 5, 2012, the Claimant responded to the Respondent that it would reply next Monday (July 9), but in the afternoon of the same day, it applied to the port administration for discharging and entrusted Warehouse H to stock in the goods. The Claimant, having known the delayed shipment and backdated bill of lading, intentionally delayed 4-5 days to reply and arranged the discharging through the port administration and Warehouse H at the destination. After that, the Claimant requested for exorbitant compensation on the excuse of delayed shipment and backdated bill of lading. The Claimant's behavior obviously constitutes the actual acceptance of goods. It has recognized the Respondent's late shipment and backdating impliedly through the application and arrangement for the

discharging.

4) The Claimant alleged its right to neither declare customs nor receive the goods. Under the CFR term for international trade, the Claimant has the obligation to make the import declaration and receive the goods. The Claimant has mistakenly used its obligation as its right.

5) The Respondent's one-day delay in shipment and notification thereof constitutes no serious breach of contract. The price drop in the steel market is the reason why the Claimant refused to receive the goods.

Considering all the facts in this case, the tribunal shall reject all the claims since the Claimant's termination of the contract does not meet the conditions for statutory termination while there is no contractual provision on the termination.

II The Tribunal's Opinions

1. The Applicable Laws

The Claimant is a legal entity established in South Korea while the Respondent is a legal person established in the mainland of the People's Republic of China. The loading port is a port in China while the destination is a port in South Korea. Thus, this case involves foreign-related commercial contract disputes.

The parties have not agreed on the applicable laws in the contract. Article 1 of CISG (hereinafter referred to as the Convention) provides '(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting Parties…'. According to the Circular of the Supreme People's Court on Transmitting Certain Issues of the MOFTEC in Connection with the

Implementation of CISG, the Convention shall automatically apply to contracts of sale of goods between Chinese companies and companies from other Contracting Parties unless the parties have otherwise agreed. Furthermore, Article 7 (2) of the Convention states: '[Q]uestions concerning matters governed by this Convention 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'.

The Claimant and the Respondent have not agreed on applicable laws of this case. The Convention shall apply based on the above Convention provisions and judicial interpretation since South Korea and the People's Republic of China, i.e. the parties' place of business, are the ContractingParties. According to the Law of the People's Republic of China on the Choice of Law for Foreign-related Civil Relationships, the law of the place of habitual residence of the party whose obligation mostly reflects the characteristics of the contract or other laws with the closest connection to the contract shall apply to matters not expressly settled in the Convention. Thus, the tribunal decides the laws of the People's Republic of China shall apply thereto under the closest connection principle, considering the place of performance in this case is in the mainland of the People's Republic of China while one party to the contract is a legal person established in the mainland of the People's Republic of China, and taking into account that both parties have cited the laws of the People's Republic of China in the written submissions.

2. The Relevant Facts

The tribunal determines the following facts during the signing and performance of the No. 0413 contract involved in this case through reviewing the written opinions and

evidence submitted by both parties:

1) The parties signed No. 0413 contract on April 13, 2012 with the Claimant as the buyer and the Respondent as the seller, stipulating that the Claimant purchases 1,250 tons of ALLOYED ROUND BAR from the Respondent (quantity: 10% more or less allowed) at the price of approximatelyUSD700 per ton CFR a port in South Korea with the total contract price of approximately USD870,000.

2) Article 9 of the contract stipulates 'shipping date: before June 30, 2012' Article 11 states 'payment term: the buyer (i.e. the Claimant, the same below) shall issue an irrevocable sight letter of credit with Chinese Company B as the beneficiary…' Article 14 provides 'Force Majeure: If the seller (i.e. the Respondent, the same below) fails to ship the goods within the shipping date specified in the contract or fails to deliver the goods due to force majeure events, the seller shall bear no liability. However, the seller must immediately notify the buyer by telex or fax. If the buyer request so, the seller shall provide the buyer with a certificate issued by China Council for the Promotion of International Trade or other relevant authorities for the occurrence of such event'. Article 16 states 'the buyer shall issue a letter of credit for this transaction within 5 working days after the contract is signed, otherwise the seller has the right to cancel the contract without notifying the buyer and claim damages. If the seller makes late or no delivery, the buyer can cancel the contract and claim damages and loss. If the buyer fails to issue letter of credit or the seller fails to deliver goods on time, the breaching party shall pay damages in the amount of 2% of the total contract price to the other party'.

3) On April 19, 2012, the Claimant issued No. 0324 irrevocable letter of credit with the Respondent as the beneficiary through the issuing bank in the amount of approximately USD 870,000. (10% more or less allowed).

4) The Respondent rented the vessel named a vessel to deliver 1,230 tons of alloyed round bars, i.e. the goods under the contract.

5) On July 5, 2012, the Respondent emailed the Claimant, stating that the shipment was late due to continuous rain in a Chinese port (i.e. the loading port), and requesting the Claimant to issue a letter of guarantee for the backdated bill of lading so that the shipowner could release the original bill of lading to the Respondent.

6) On July 9, 2012, the Claimant refused the Respondent's request for such letter of guarantee in writing, stating '[T]he buyer can refuse to pay due to the delayed shipment while your company (i.e. the Respondent, the same below) has the ownership of the refused goods', '[R]egarding the return of the goods, our company will, if needed, try the best to assist with handling the domestic procedure in South Korea' and 'wish to return the goods as soon as possible…'.

7) For the goods under the contract, Company C, a third party, issued a bill of lading dated June 30, 2012. On July 16, 2012, the Respondent received approximately USD 860,000(including the actual receipt of USD 850,000 and the deducted bank fee of USD 160) under the letter of credit through a bank branch.

8) On July 18, 2012, the Claimant applied for a South Korea court's injunction. On July 20, 2012, the court made the injunction order against payment to the Respondent under the letter of credit for 1,230 tons of alloyed round bars.

9) On August 29, 2012, the Claimant sent a letter to the Respondent stating '[W] e hereby notify you that the sales contract (0413) signed by our company and your company (i.e. the Respondent, the same below) is cancelled based on Article 16 therein and your company's non-performance thereof. The contract is cancelled because the

delivery was not made within the specified time (shipping date: June 30), so your company must return the payment under the letter of credit and shall compensate our company for damages and loss due to your breach of contract …'.

10) On November 13, 2012, the Claimant paid Bank J of South Korea approximately USD 900,000 under the letter of credit.

Regarding the above background and facts in this case, the parties submitted written evidence including the contract, the letter of credit and bank transaction records, the bill of lading, emails and correspondence, the South Korea court's injunction order with translation, etc. The contract signed by the parties is legal, valid and binding without violating mandatory provisions of Chinese laws and administrative regulations in its form and content. The tribunal hereby confirms the above facts of this case.

3. The Main Controversial Issues

1) The Respondent's Breach of Contract

The Claimant asserted the Respondent's behavior constituted late delivery since all the existing evidence including the Respondent's acknowledgment showed the Respondent's failure to load the goods before June 30, 2012 in accordance with the contract.

The Respondent argued that the Claimant was aware of the whole situation due to its continuous contact with the Claimant all through the charter period. The one-day delay in loading was caused by heavy rain in a port in China and it obtained the Claimant's implied consent thereto.

Article 31 of the Convention stipulates 'if the contract of sale involves carriage of the goods-in handling the goods over to the first carrier for transmission to the buyer'.

Article 33 states '[T]he seller must deliver the goods: (a) if a date is fixed by or determinable from the contract, on that date…'. The tribunal noted that the price term of the contract was CFR a South Korea port. According to the INCOTERMS 2010, the seller is responsible for entering into a contract of carriage and performs its delivery obligations when transferring the goods to the carrier under the CFR term. Therefore, the Respondent shall complete the loading of the goods before June 30, 2012 as per the contractual provision on shipping date.

The Respondent claimed that it kept communicating with employee E of Company D, the Claimant's designated agent, about the charter process from June 19, 2012 to June 27, 2012. However, according to the COMMISSION AGREEMENT submitted by the Respondent, Company D signed the agreement as the Respondent's agent. There is no evidence showing Company D as the Claimant's agent, so the communication between the Respondent and its agent, i.e. Company D, cannot be regarded as expression of intents between the Claimant and the Respondent. Moreover, during the performance of the contract, the Respondent could not be exempted from the contractual obligation of completing the delivery before June 20, 2012 no matter whether the vessel chartered by the Respondent failed to arrive on time due to the shipowner's reasons, or the Respondent notified the Claimant of the chartering situation in a timely manner.

The Respondent argued that the one-day delay in shipment was due to heavy rain in a port in China. The tribunal noted that Article 14 provided 'Force Majeure: If the seller (i.e. the Respondent, the same below) fails to ship the goods within the shipping date specified in the contract or fails to deliver the goods due to force majeure events, the seller shall bear no liability. However, the seller must immediately notify the buyer by telex or fax…'.However, the Respondent has submitted neither evidence on the weather condition of the Chinese port on that day, nor evidence on its notification thereof by

telex, fax or any other way not specified in the contract on the same day of the alleged rain, i.e. June 30, 2012, or the next day. Therefore, the Respondent could not be exempted from liabilities for the late delivery on the ground of bad weather. The tribunal also noticed that the shipowner received the approximately 1,230 tons of alloyed round bars involved in this case at 10pm on July 1, 2012 as evidenced by the chief officer's receipt, the dynamic record of the Chinese port showed the vessel for loading the goods of this case arrived at 7pm on June 30, 2012 and started loading at 5am on July 1, 2012 due to heavy rain, the cargo loading record submitted by the Respondent showed the start time of loading as 5:15am on July 1, 2012 and the completion time as 7:50am on July 2, 2012. According to the foregoing records, the overall time for loading exceeds 26 hours. Even taking into account the Respondent's argument that 5 batches of goods totaling approximately 2,900 tons of steel were loaded on the same vessel and assuming the goods of this case were loaded first, it would have taken over 10 hours to load the goods of this case, resulting in shipment later than June 30, 2012. Therefore, the tribunal deems that, judging from the existing evidence, the loading time of the goods of this case would have been later than June 30, 2012 as stipulated in the contract even if there were no rain in the Chinese port on the same day. The tribunal rejects the Respondent's argument that the one-day delay in delivery was due to the rain.

Concerning the Respondent's argument that the Claimant was aware of the delayed shipment days before and after, the tribunal finds that the Respondent has not communicated with its agent Company D regarding the late shipment as evidenced by its chat record with Employee E of Company D since there was no record from June 30, 2012 when the vessel arrived at the port to July 1, 2012 when the vessel was loaded, the record for July 2 and 3, 2012 mentioned there was no date on the bill of lading, and the late shipment and the request for the letter of guarantee appeared for the first time in the

record for July 9, 2012. The Respondent had not notified the Claimant of the delayed shipment due to rain in a Chinese port till July 5, 2012. Thus, there is no evidence showing the Claimant knew the late shipment days before and after.

Regarding the Respondent's argument that the Claimant has actually accepted the goods by its act and consented to the late shipment impliedly, the tribunal noted that the Claimant's reply to the Respondent's email dated July 5, 2012 showed no intent to accept the late shipment or to receive the goods. The Claimant only inquired about the specific time of loading and informed that the person in charge would reply on the next Monday (i.e., July 9, 2012) since he was on a business trip. Thereafter, the Claimant notified the Respondent on July 9, 2012, refusing to issue the letter of guarantee or receive the goods which would be returned. In addition, it is shown in the letter from Warehouse H to the Claimant submitted by the Respondent as evidence that the Respondent had not notified the Claimant of the late shipment when the vessel carrying the goods of this contract arrived at the destination on July 4, 2012.

The tribunal finds that, first, there is no evidence showing the Claimant applied to the South Korea port administration for discharging and entrusted Warehouse H to stock in the goods on July 5, 2012, being aware of the late shipment. Secondly, the Respondent's behavior of notifying the Claimant of the late shipment after the vessel arrived at the destination in South Korea instead of when the delay in loading occurred led to the lack of sufficient time for the Claimant to decide whether to receive the goods while huge demurrage charges may have occurred if the goods were not discharged. Therefore, the tribunal deems that, even if the Claimant had arranged the discharging after being aware of the late shipment, it could not be taken for granted that the Claimant had accepted the goods by its action. In fact, the Claimant replied the Respondent on July 9, 2012, as pre-arranged in the email dated July 5, 2012, clearly refusing to receive the goods. In

the above communication process, the Claimant's reply on July 9, 2012 is still an explicit response to the late delivery within reasonable time considering July 7 and 8, 2012 were not working days though the Claimant made no prompt response to the Respondent's email regarding the backdated bill of lading. The tribunal finds no evidence to support the allegation that the Claimant has accepted the Respondent's late shipment by its action.

Concerning the alleged implied consent by the Claimant, the tribunal finds neither known usage of implied consent between the parties nor widely recognized implied consent practice in the performance of sales contracts of the same type. Article 9(2) of the Convention provides '[T]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'. Accordingly, the tribunal rejects the allegation that the Claimant has impliedly accepted the Respondent's late shipment. Article 66 of the Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (hereinafter referred to as the Opinions) stipulates '[W]hen a party claims a civil right to the other party while the other party makes no clear expression orally or in writing but accepts by its action, the other party may be regarded as consent thereto impliedly. Implied consent by no action can only be deemed as an expression of intent when it is provided by law or agreed by both parties'. Accordingly, the tribunal deems that the Claimant's implied consent to the Respondent's late shipment by no action cannot stand unless it is provided by law or agreed by the parties. However, the tribunal could find neither parties' agreement when signing and performing the contract nor legal provisions thereon. Thus, the Claimant

shall not be regarded as having consented to the late shipment impliedly.

In summary, the Respondent's late shipment has constituted a breach of contract since the actual shipping date was later than June 30, 2012 as specified in the contract according to the evidence including the receipt of goods submitted by the Respondent and the Respondent's self-confession, the Claimant explicitly refused the delayed goods while the Respondent's allegation of the Claimant's acceptance of the goods and late shipment through implied consent could not stand.

2) The Claimant's Right to Terminate the Contract

The Claimant claimed its right to terminate the contract as per Article 16 of the contract stating '…if the delivery is delayed or not made, the buyer may cancel the contract'.

The Respondent argued that 'cancel' in Article 16 of the contract could not be understood as 'terminate' while the parties should assume no liability if the contract was 'cancelled'. The Respondent had not fundamentally breached the contract, so the Claimant had no right to cancel the contract either under Article 25 of the Convention or under Article 94 of the Contract Law. The cancellation of the contract met neither the statutory conditions nor the agreed terms.

The tribunal noted that Article 16 of the contract stipulated that the Buyer shall open the L/C within five working days after the Contract has been signed, otherwise the Seller can cancel the contract and claim relevant damages; if the delivery is delayed or not made, the buyer may cancel the contract and claim damages. If the buyer fails to issue letter of credit or the seller fails to deliver goods on time, the breaching party shall pay damages in the amount of 2% of the total contract price to the other party. Obviously, the parties agreed on the damages for breach of contract thereunder. Thus, the tribunal

finds the Respondent's argument that neither party should assume liability after the contract was 'cancelled' against the true intent shown in Article 16 of the contract. The tribunal, considering the specific content of Article 16 and referring to the English version, decides 'cancel the contract' shall be interpreted as 'terminate the contract'. The Convention contains no provision on the termination of contract by a party. According to Article 93(2) of the Contract Law of the People's Republic of China stating '[T]he parties may prescribe a condition under which one party is entitled to terminate the contract. Upon satisfaction of the condition for termination of the contract, the party with the termination right may terminate the contract', the tribunal supports the Claimant's right to terminate the contract due to the Respondent's delay in delivery as per Article 16 of the contract.

4. The Claimant's Claims

The tribunal decides on the Claimant's claims as follows.

Claim 1, the Claimant's termination of the contract shall be confirmed.

As aforesaid, the Respondent's delayed delivery has constituted a breach of the contract in this case. According to Article 16 of the contract, the Claimant is entitled to terminate the contract under such situation.

It is shown in the parties' correspondence that the Claimant replied the Respondent on July 9, 2012, clearly refusing to accept the goods and claiming to return the goods, and notified the Respondent on August 29, 2012, expressly terminating the contract and requesting for return of the L / C payment. Such communication clearly indicates the Claimant's intent to terminate the contract due to the Respondent's late delivery while the Respondent acknowledged receipt thereof. Therefore, the tribunal decides that the

contract of this case has been terminated since the Claimant notified the Respondent thereof.

Claim 2, the Respondent shall refund the Claimant the payment under the letter of credit in the amount of approximately USD 900,000.

Article 97 of the Contract Law of the People's Republic of China stipulates that '[A]fter the dissolution of a contract, for those clauses not yet performed, the performance shall cease. For those already performed, the party concerned may, in accordance with the situation of performance and the nature of the contract, demand their restoration to the original status or take other remedial measures, and have the right to claim compensation'.

Accordingly, the arbitral tribunal, bearing in mind that the contract of this case has been terminated while the Claimant paid Bank J in South Korea the L/C payment totaling approximately USD 860,000 on Nov. 13 2012 which the Respondent had collected through a bank branch, and noticing the minor difference between the amount stated in the Respondent's receipt of such payment, i.e. approximately USD 860,000, and the amount indicated in the Claimant's evidence of payment, i.e. approximately USD 900,000, decides the Respondent shall return the L/C payment totaling approximately USD 860,000 to the Claimant as stated in the Respondent's receipt.

Claim 3, the Respondent shall pay the Claimant the interest loss for the above payment to the actual payment day (based on the annual US dollar deposit interest rate of 3%, temporarily calculated as USD 24,000 till June 24, 2013).

The tribunal, considering Article 84(1) of the Convention providing '[I]f the seller is bound to refund the price, he must also pay interest on it, from the date on which the

price was paid' and sustaining the claim for the Respondent to return the L/C payment, deems it reasonable for the Respondent to pay the interest thereon.

The Claimant alleged the calculation period for such interest should be from July 6, 2012 when the Respondent collected the L/C payment to the actual date of repayment. The tribunal, noticing the Claimant paid Bank J of South Korea on November 13, 2012 though it requested 'the return of the L/C payment' in the letter to the Respondent on August 29, 2012, deems that the interest shall be calculated from the day the Claimant made the payment as per the above provision of the Convention.

The Claimant claimed the interest should be calculated at the annual rate of 3%, i.e. the term deposit interest rate of US dollars. The tribunal, though accepting the annual US dollar deposit interest rate as the reasonable rate for calculating interest on the L/C payment, decides to take the annual US dollar deposit interest rate for the same period issued by the People's Bank of China as the calculation rate since the Claimant has submitted no evidence for its alleged 3% rate. Such calculation rate also conforms with the Supreme People's Court's Reply on the Standard for the Calculation of Overdue Payment Penalties which allows Chinese courts to calculate overdue payment penalty with reference to financial institutions' standard for the calculation of overdue loans set by the People's Bank of China.

Claim 4, the Respondent shall reimburse the Claimant approximately KRW2,200,000 for the L/C opening charges, KRW450,000 for the insurance premium, approximately KRW7,150,000 for the costs related to the South Korea court injunction, totaling KRW9,800,000;

The Claimant has submitted no evidence for the claimed L/C opening charges and insurance premium. Thus, the tribunal deems it unsustainable.

For the claimed costs related to the application to the South Korea court for injunction against the payment under the letter of credit, the Claimant has submitted the receipts for its payment of KRW500,000 application fee in cash and the payment of KRW50,000 won court order service fee. The tribunal, considering the South Korea court made the injunction order and the tribunal decides the Respondent shall return such payment, confirms the Respondent shall compensate the Claimant for such application fee and service fee.

The Claimant has submitted the engagement agreement with a South Korea law firm and the notarized payment confirmation by a South Korea bank for the claimed legal fees. However, the tribunal noted the payment confirmation clearly stated that 'this document, being only a transaction reference, cannot be used as an invoice'. Thus, the tribunal deems the claimed legal fees unsustainable due to the Claimant's failure in submitting the invoice of such fees though the Respondent should have compensated the Claimant for the reasonable legal fees incurred for the injunction application considering the tribunal's support of other claims.

Claim 5, the Respondent shall compensate the Claimant the damages for breach of contract in the amount of USD17,000.

Article 16 of the contract stipulates that ',,,If the buyer fails to issue letter of credit or the seller fails to deliver goods on time, the breaching party shall pay damages in the amount of 2% of the total contract price to the other party'. Article 114 of the Contract Law of the People's Republic of China provides that '[T]he parties may prescribe that if one party breaches the contract, it will pay a certain sum of liquidated damages to the other party in light of the degree of breach…'.

Accordingly, the tribunal decides the Claimant shall be entitled to damages due to the

Respondent's late delivery and confirms the payable damages for breach of contract by the Respondent shall be USD17,000, i.e. 2% of the total contract price USD870,000.

Claim 6, the Respondent shall bear the arbitration fees and relevant expenses and compensate the Claimant for the legal fees (90,166,864.00 won) and travel expenses.

The Claimant has submitted the engagement agreement with a South Korea law firm and the notarized payment confirmation by a South Korea bank for the claimed legal fees. However, as mentioned above, the tribunal noted the payment confirmation clearly stated that 'this document, being only a transaction reference, cannot be used as an invoice'. Thus, the tribunal deems the claimed legal fees unsustainable due to the Claimant's failure in submitting the invoice of such fees though the Respondent should have compensated the Claimant for the reasonable legal fees incurred in this case considering the tribunal's support of other claims.

The tribunal does not support the claimed travel expenses since the Claimant has submitted no evidence therefor.

The tribunal, considering the Respondent's delay in delivery as the main cause of disputes in this case and the proportion of the supported claims, decides that the Claimant and the Respondent shall bear 20% and 80% of the arbitration fee for this case respectively.

Case 10 2016 Equipment Case

I The Merits of the Case

The parties signed No.108 contract on August 14, 2011 under which the Claimant sold a set of brand-new pure tension stretcher (hereinafter referred to as the equipment) including all the necessary devices, materials, spare parts for the safe and steady operation of the equipment and technical documents, on-site installation guidance and commissioning, training and after-sale services for the assembly, installation, testing, normal operation and maintenance of the equipment. The price term was CIF, a port in China (the latest version of INCOTERMS). The total contract price for the equipment, technical documents and services provided by the Claimant was approximately EUR2,700,000 among which the equipment price was EUR2,500,300 and the onsite service fee was EUR190,000. The Respondent should make the 15% advance payment within 30 days after the contract was signed and the Claimant provided the agreed documents, open the L/C valid for 9 months in the amount of 65% of the equipment price (no later than 3 months after the contact takes effect), issue the L/C valid for 7 months in the amount of 20% of the equipment price before the B/L date and pay the service fee in the amount of EUR190,000 within 30 days after the Claimant issues the final acceptance certificate. If the contract cannot be performed within the specified time, the L/C should be extended as requested by the Claimant. If the L/C was not paid/ opened before the specified deadline because of the Respondent, the overall schedule of the contract would be postponed. According to the contract, the Claimant should deliver all the equipment (partial shipments are not allowed) within 9.5 months after receiving the advance payment with a port in Europe as the destination.

The Respondent, after signing the contract, paid approximately EUR380,000 on September 8, 2011, issued the L/C on December 8, 2011 for 65% of the equipment price in the amount of approximately EUR1,700,000 with September 7, 2012 as the expiry date and June 23, 2012 as the latest shipment date. Thereafter, the Claimant failed to ship the equipment within the specified time. The parties reached an agreement on the postponed delivery in July-September 2013 under which the Respondent deducted 5% from the equipment price as the penalty for the Claimant's delayed delivery. On December 10, 2013, the Respondent issued the L/C for 65% of the equipment price with the 5% deduction in the amount of approximately EUR1,500,000. The equipment was loaded on January 12 and 15, 2014 and arrived at the destination port on February 22, 2014 and March 2, 2014 respectively. The Respondent sent an email to the Claimant on February 22, 2014, stating that the Claimant's partial shipment was against the contract and the L/C and requesting for the contract termination and the return of goods.

1. The Claimant asserted the following concerning the dispute of this case in the Application for Arbitration.

The parties signed the contract of this case on August 14, 2011. The Claimant completed the design and manufacture of the equipment in the fall/early winter of 2013 according to the requirements of the contract. Though the Respondent also delayed the issuance of L/C, the parties agreed on December 16, 2013 to reduce 5% of the equipment price (not the total contract price) as the final settlement for the delayed production according to Articles 9.7 and 9.8 of the contract. Since the equipment price agreed in Article 2.2.1 of the contract was approximately EUR2,500,000 of which 5% was EUR130,000, the parties agreed EUR2,600,000, the reduced price, instead of the original price of EUR2,700,000 should be the payment for the equipment and services

(the total contract price).

The equipment was loaded on January 12 and 15, 2014 and arrived at the destination, a port in China, on February 22 and March 2, 2014 respectively and was discharged at the yard of the container terminal. The Respondent, though was under the contractual obligation to receive the goods, refused to unpack and receive the equipment till now, resulting in the Claimant's continuous rental of all the containers containing the equipment of which the container detention charge would continue to incur till the Respondent received the equipment. According to CIF B6 under the INCOTERMS, the buyer must pay 'all costs relating to the goods from the time they have been delivered in accordance with A4…'. Therefore, the container detention charge of all the containers containing the equipment should be borne by the Respondent, i.e. the Respondent should compensate the Claimant the container detention charge for No. G***1, No. T***0, No. F***9, No. G***3, No. T***4 and No. F***1 containers from January 12, 2014, and No. C***4 container from January 15, 2014 until the Respondent actually collected the equipment therefrom.

According to Article 3.3 of the contract, the Respondent should pay EUR1,528,980 for 65% of the equipment price, i.e. the original price EUR1,656,395 deducted 5% of the equipment price for the delayed delivery as agreed by the parties with the L/C payment made within 30 days after the advising bank submitted the negotiating documents to the buyer's bank. However, the Claimant's negotiation for payment on February 13, 2014 was rejected by the Respondent.

The Respondent's refusal to fulfill the above payment obligation and to collect the equipment constituted a breach of contract, so the Respondent should pay the remaining contract price of EUR699,660 together with the aforementioned due payment with

March 15, 2014 as the due date as well, and should pay the interest on the remaining contract price of EUR699,660 from March 16, 2014.

The parties agreed on EUR payment in section two of the contract, so the RMB loan interest rate issued by the People's Republic of China was not applicable to the Claimant's claims. The interest should be calculated based on the following EUR interest rate for late payment in Germany since EUR payment was involved in this case while the Claimant was a German company.

According to Article 288(2) of the German Civil Code, the interest rate for late payment was 8% above the benchmark interest rate (which was adjusted from 8% to 9% for transactions after July 29, 2014).

The benchmark interest rate from January 1 to June 30, 2014 was -0.63% and was adjusted to -0.73% as of July 1, 2014. Therefore, the interest rate of the late payment from January 1, 2014 to June 30, 2014 should be 8%-0.63% = 7.37%, and that after July 1, 2014 should be 8% -0.73% = 7.27%. If the tribunal found that the Respondent should pay the interest in claim 4.1 (a), it should be paid at the annual interest rate of 7.37% from March 16, 2014 to June 30, 2014 and that of 7.27% from July 1, 2014 to the date of actual payment. The Claimant reserved the right to adjust the amount of claimed interest according to new changes in the applicable interest rate.

As mentioned above, the Respondent should bear the container detention charge and pay the interest thereon which was calculated from August 29, 2014 when the Claimant initiated this arbitration proceeding.

The Claimant requested the tribunal to award the Respondent should:

1(a) pay the Claimant approximately EUR2,200,000;

(b)collect the equipment from No.G***1, No.F***1, No.T***4, No.T***0, No.F***9, No.G***3 and No.C***4 containers stored in the yard of the container terminal at the Chinese port;

(c)bear all the costs including the storage and management costs incurred for the storage in the yard of the container terminal at the Chinese port from the unloading day at the destination port to the day the Respondent actually collected the equipment;

(d)compensate the Claimant for the container detention charge on No.G***1, No.F***1, No.T***4, No.T***0, No.FS***9 and No.G***3 containers from January 12, 2014 and No.C***4 container from January 15, 2014 to the day the Respondent actually collected the equipment (with the specific rate explained later);

(e)pay the interest on EUR 2,200,000 in claim 1(a) including EUR48,000 calculated from March 16, 2014 to June 30, 2014 at the annual interest rate of 7.37% and the interest from July 1, 2014 to the date of actual payment at the annual interest rate of 7.27%;

(f)pay the interest on the container detention fee in claim 1(d) from August 29, 2014 to the date of actual payment (with the specific rate explained later), and

2(a) compensate the Claimant for all the legal fees and other expenses incurred for this case;

(b)bear all the arbitration fees of this case.

2. The Respondent argued against the Claimant's claims, facts and reasons as

follows.

The Claimant's breach of the contract including the late performance and partial shipments had frustrated the contract purpose, so the Respondent exercised the right to terminate the contract according to law while the legal effect of such termination occurred when the notice thereof reached the Claimant. Thereafter, the Claimant's inaction to exercise its right, i.e. its failure to apply for arbitration by the dispute resolution institution regarding its objection to the contract termination within the three months period required by the law, had the legal effect of eliminating such objection right and resulted in the certain legal status of the contractual rights and obligations being terminated. Therefore, the tribunal should not support the Claimant's claims related to the continuous performance of the contract after the elimination of the right to object to the contract termination and should reject all the claims in this case.

The Respondent mainly relied on the following facts and reasons:

1) The disputed contract is valid and legally binding on both parties.

The Claimant failed to perform the delivery obligation before the specified shipping date, made no timely performance despite repeated reminds by the Respondent, and still could not deliver the goods in time after the implementation of the penalty for late delivery. Objectively, the Claimant's delayed performance and partial shipments had caused damages to the Respondent's production, operation and market benefits and frustrated the contract purpose, so the Respondent exercised the statutory right to terminate the contract and the notice of termination had reached the Claimant already. The Claimant initiated this arbitration proceeding six months later than the day of serving the notice.

a) The parties signed the contract of this case (contract number: 108) on August 14,

2011. Article 4.1 of the contract stipulated '…shall deliver all the equipment (partial shipments are not allowed) within 9.5 months after receiving the advance payment' which was a clear agreement on the delivery time and method.

b) The Respondent made the 15% advance payment by T/T on September 8, 2011 according to Article 3.1 of the contract. Thus, the Claimant should deliver all the equipment no later than June 23, 2012 as specified in the contract.

c) The Respondent opened the L/C for 65% of the equipment price on December 8, 2011 according to Article 3.2 of the contract under which the latest shipping date was the same as the one specified in the contract, i.e. June 23, 2012. However, the Claimant failed to fulfill the delivery obligation in time.

d) The Respondent, considering the urgent demand of the production line construction progress and the market and customer feedback, repeatedly urged the Claimant to fulfill the delivery obligation and ship the goods as soon as possible after the expiry of the delivery period. However, the Claimant ignored such request and made no timely delivery though the Respondent sent 28 emails to the Claimant in over two months from January 10 to March 15, 2013, urging the Claimant to deliver the goods and enquiring about the shipping date.

e) The Respondent sent an email to the Claimant at 8:40am on June 21, 2013, informing it that the Respondent had finished all the preparations for installing the production line and urging it to confirm the shipping date and deliver the goods as soon as possible.

f) The Respondent sent an email to the Claimant at 2:23pm on July 30, 2013, stating that the Claimant should bear the 'penalty for late shipment' according to the contract

so as to urge the Claimant to rectify the breach as soon as possible.

g) The Respondent sent an email to the Claimant at 4:17pm on July 30, 2013, stating that it could not accept partial shipments.

h) The Respondent sent an email to the Claimant at 4:42pm on August 8, 2013, stating that it was waiting for the Claimant's equipment in all the aspects including the equipment foundation, sales, customers, workshop workers, etc. while the Claimant's late delivery had caused a lot of waste in its market, finance and devices.

i) The Claimant sent an email to the Respondent at 11:23pm on August 13, 2013, agreeing to deduct the late delivery penalty in the amount of 5% of the equipment price. Article 9.7 of the contract provided 'the penalty shall not exceed 5% of the equipment price'.

j) However, the Claimant, after having agreed to the late delivery penalty, still failed to rectify the breach and let the breach status continued. The Claimant finally made the delivery 1 year and 7 months later than the shipping date specified in the contract and arranged partial shipments as against the contractual provision. The scanned B/L submitted by the Claimant showed the delivery was finally made on January 12 and 15, 2014 in partial shipments.

k) The late delivery and partial shipments of the equipment severely influenced the progress of the Respondent's project and the expected profits and resulted in the frustration of the contract purpose and market losses of the Respondent. The Respondent therefore exercised the statutory right to terminate the contract, sending email to the Claimant at 4:17pm on February 22, 2014, expressly requesting the termination of contract, the return of goods and the full advance payment and the

payment of reasonable interest.

l) The termination notice had actually arrived at the Claimant. The Claimant replied at 5:27pm on February 28, 2014, refusing to accept the contract termination.

m) The Claimant, though disagreeing to the contract termination, was inactive in exercising its objection right. The date on the Application for Arbitration was August 29, 2014, nearly 6 months later than the termination notice arrival day. The time for the arbitration notice of the arbitration commission was September 26, 2014, nearly 7 months later than the termination notice arrival day.

2) The Respondent exercised the right to terminate the contract in accordance with the law, and the contract was terminated when the notice reached the Claimant.

Although the Claimant enjoyed the objection right, such right was eliminated due to its inaction within the legal time limit. Thus, the legal status of the termination of the contractual rights and obligations was confirmed. The Claimant's claims should all be rejected due to lack of legal ground.

a) During the performance of the contract, the Claimant breached the contract by delaying the delivery for 1 year and 7 months which was quite long and refused to rectify it though being repeatedly urged by the Respondent. Meanwhile, the long delay in delivery harmed the Respondent's production planning and market benefits, caused actual losses and frustrated the contract purpose.

b) The termination right was the right of formation. The unilateral expression of intent of the party with the termination right without the other party's consent could result in the termination of the contractual rights and obligations. The termination

party should express its intention to the other party to exercise the termination right, so the Respondent notified the Claimant in writing to terminate the contract and the expression of intent had actually reached the Claimant. The Respondent exercised the termination right in accordance with Article 96 of the Contract Law while the contract was terminated when the notice reached the Claimant.

c) Article 97 of the Contract Law stipulates '[U]pon termination of a contract, a performance which has not been rendered is discharged; if a performance has been rendered, a party may, in light of the degree of performance and the nature of the contract, require the other party to restore the subject matter to its original condition or otherwise remedy the situation, and is entitled to claim damages'. Therefore, the tribunal should not support the Claimant's claim related to the continuous performance of the contract when the Claimant's objection right had been eliminated and the legal status of the termination of the contractual rights and obligations had been confirmed.

Above all, the Claimant's claims should all be rejected.

Based on the foregoing facts and reasons, the Respondent made the following counterclaims.

1) The Claimant shall return the advance payment in the amount of approximately EUR380,000 and compensate the Respondent for the interest loss from February 22, 2014 to the actual payment day thereon, temporarily calculated as approximately RMB150,000 till November 6, 2014 based on the same period loan interest rate of the People's Bank of China;

2) The Claimant shall bear all the arbitration fees and the Respondent's legal fees incurred for this case.

Regarding the above defense and counterclaims, the Claimant responded in the Claimant's Further Statement and Defense against the Respondent's Counterclaims as follows.

3. The Claimant further submitted the following opinions regarding the claims and counterclaims so that the tribunal could fully understand the merits of the case.

1) The Respondent had not declared the contract terminated according to the contract and CISG

a) The so-called 'termination' notice on February 22, 2014 was not in compliance with the contract. Article 14.7 of the contract provided 'during the performance of this contract, the communication between the parties shall be in both Chinese and English, and all formal documents shall be duplicate in writing and sent by registered airmail'.

The Respondent only expressed its intent to 'terminate' the contract by email on February 22, 2014, which was in inconsistent with the above provision on formal notices or decisions in Article 14.7 of the contract while the Respondent only repeatedly replied that it hoped the parties could continue to negotiate but never confirmed the contract had been terminated from the time when the Claimant requested the Respondent to formally confirm whether the contract had been terminated till the initiation of this arbitral proceeding.

Furthermore, the email was only in Chinese but not in Chinese and English as specified in Article 14.7 of the contract while the email address was not the notification mailbox of formal documents as requested by the contract.

Since the Respondent's email for the so-called contract termination was inconsistent with

the requirements on sending formal documents as agreed by the parties, the mail could only be the Respondent's intent to terminate the contract instead of the declaration or notice of the contract termination under CISG.

b) The Respondent's request to terminate the contract or reduce the price was not the declaration for the termination of the contract.

As shown in the emails between the parties on April 24 and 25, 2014, the Respondent requested either to terminate the contract or to reduce the price by 50% which was changed to 40% later. The termination notice under Article 26 of CISG should be declared while the Respondent's proposal of either terminating the contract or reducing the price was not a declaration for the contract termination. The Respondent had never notified the Claimant in writing of the contract termination in any way after the Claimant had agreed to neither the contract termination nor the price reduction. Furthermore, the Respondent, before submitting its defense of this case, wrote to the Claimant's component manufacturer in China, a Jiangsu Group, on June 6, 2014, stating it had suspended the performance of the contract of this case but not mentioning the termination of the contract as alleged in its written defense.

2) The Respondent's reasons in its written defense were beyond the statutory termination conditions and could not be the termination ground.

The Respondent alleged in its written defense that it exercised the statutory right to terminate the contract according to Article 94(3) and (4) of the Contract Law since the Claimant had delayed the delivery for 1 year and 7 months and made partial shipments. However, the provision on contract termination in CISG should prevail in this case instead of Article 94 of the Contract Law. Furthermore, the aforementioned termination ground was not among those breaches of contract sufficient for contract termination

under Article 94(3) and (4) of the Contract Law.

a) The Respondent's assertion of terminating the contract due to the Claimant's late delivery was against the facts and the law

① Concerning the postponement of the delivery date before July 2013 mentioned by the Respondent, the schedule for the Claimant to deliver the goods within 9.5 months after receiving the advance payment under Article 4.1 of the contract was actually a preliminary delivery plan according to Annex 7.8 of the Preliminary Technical Specifications, i.e. the plan for the transfer of the seller's documents, and Annex 11 thereof, i.e. the preliminary project progress schedule, which could be postponed reasonably due to the influence of the parties' continuous communication on design modifications, amendments and increment. Therefore, the postponement of the delivery schedule which was specified as 9.5 months after receiving the advance payment in Article 4.1 of the contract could not be understood as the Claimant's breach of contract under the principle of special terms prevailing over general terms. The parties reached agreement on issues regarding the delivery period specified in the contract, the postponement of the delivery period before July 2013 and the Claimant's delay in delivery on July 9, 2013, taking 5% deduction of the equipment price as the final settlement and requesting the Claimant continue to fulfill its delivery obligation.

② The parties negotiated from July to September 2013 and reached agreement on disputes such as the Claimant's delay in delivery in the first half of 2013, taking 5% deduction of the equipment price as the final settlement and requesting the Claimant continue to fulfill its delivery obligation, which indicated the contract purpose had not been frustrated by the parties' disputes.

③ Article 49(2) of CISG stipulated '[H]owever, in cases where the seller has delivered

the goods, the buyer loses the right to declare the contract avoided unless he does so (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;(b) in respect of any breach other than late delivery, within a reasonable time…'. The shipping date had to be postponed from January 6, 2014 to early January due to the bad weather at the loading port. The Claimant notified the Respondent thereof timely while the Respondent made no objection thereto and requested documents from the Claimant for import declaration on January 22, February 5 and 18, 2014 after the shipments, preparing to receive the goods. The 6 containers containing all the mechanical devices and spare parts of the equipment arrived at the destination port and were unloaded at 7:58am on February 22, 2014. The container for the electrical devices of the equipment arrived at the destination port and was unloaded at 7:26pm on March 2, 2014. Obviously, the Respondent accepted the Claimant's delayed delivery notice in January 2014 and the notice on the actual shipping time by action, thus the parties had reached agreement on changing the delivery time specified in the contract. Furthermore, the Respondent had never declared the termination of contract due to late shipment before it submitted the written defense and counterclaim on November 6, 2014 resulting in the elimination of such right. The Respondent should be estopped from declaring so in the defense and counterclaims.

b) The partial shipments should not be regarded as a fundamental breach and had not frustrated the contract purpose, so the Respondent could not rely thereon to terminate the contract.

The so-called partial shipments were not out of the Claimant's intention or negligence. The actual carrier proved that the Claimant had required the whole shipment but the actual carrier unilaterally decided to load the container containing the electrical devices of the equipment on Vessel R instead of Vessel G on which other goods were loaded due

to the operation of the loading port and the consideration of vessel safety. The actual carrier had not notified the Claimant thereof in advance but notified the Claimant afterwards when all the equipment was on the way. The Claimant, after being aware thereof, notified the Respondent timely.

Article 79(1) of CISG stipulated '[A] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences' while the other party could not claim damages against it.

c) The Respondent mentioned four reasons in the so-called 'termination' email on February 22, 2014, i.e. no way to collect the goods at the destination port, huge detention charge incurred, severe influence on the Respondent's project progress and expected benefits and impossibility for the Respondent to get import tax exemption, none of which could be the Respondent's legal basis for the contract termination.

3) The Respondent had no right to terminate the contract after the Claimant's delivery of the equipment according to CISG

a) The Respondent's email on February 22, 2014 was neither contractual nor statutory declaration to terminate the contract.

Article 26 of CISG stipulated '[A] declaration of avoidance of the contract is effective only if made by notice to the other party'.

Article 14.7 of the contract provided 'during the performance of this contract, the communication between the parties shall be in both Chinese and English, and all formal

documents shall be duplicate in writing and sent by registered airmail' which was the formal notification method agreed by the parties under the principle of party autonomy and should bind both parties. However, the Respondent only expressed its intent 'to terminate the contract' in Chinese by email on February 22, 2014, which was not in accordance with the formal notification method specified in the contract, could not bind the parties and should not be regarded as the declaration to terminate the contract. Thereafter, the Respondent had not made declaration to terminate the contract in accordance with the contract though the Claimant repeatedly requested it to confirm whether it would formally declare the contract termination till it submitted the written defense and counterclaims in this case.

In addition, the Respondent also acknowledged in writing to the Claimant's component supplier in China that the contract of this case had been 'suspended'. Therefore, the contract had not been terminated.

b) The Respondent had no right to terminate the contract since the Claimant had not breached the contract under CISG.

The Respondent's alleged termination of the contract on the ground that the Claimant had delayed the delivery for 1 year and 7 months and shipped the goods partially was against the fact and inconsistent with the above-mentioned requirements for contract termination under CISG.

① There were three time points for the lawful postponement or delay in this case. First, the delay before July 2013 (including the lawful postponement) for which the parties agreed to deduct 5% of the equipment price as the final settlement and continue the performance. Second, the postponement from September to December 11, 2013 when the Respondent re-issued the L/C for which the reason was the Respondent's

delay in issueing the L/C had caused the Claimant to postpone the delivery but not the Claimant's default. Third, the postponement from December 11, 2013 to the actual shipping date which was due to the Respondent's request to avoid the Chinese New Year holiday while neither party had objected to the actual shipping date, during which neither party breached the contract. Therefore, the only delay in delivery was before July 2013 and was not a unilateral delay by the Claimant. For this delay, not only had the parties agreed on reducing the equipment price as the final settlement but also caused no actual frustration of the Respondent's contract purpose of obtaining the whole set of equipment. It could also be found from the parties' emails from September 2013 to February 2014 that the Respondent still requested the Claimant's delivery to meet its production need. Therefore, the Claimant's fundamental breach by delaying the delivery for 1 year and 7 months alleged by the Respondent in its written defense was totally against the fact.

As mentioned above, the loading of the electrical devices on a different vessel and the arrival thereof at the destination 8 days later than other goods would have not affected the installation progress or frustrated the contract purpose according to the installation order of the equipment components. The so-called partial shipments were not out of the Claimant's intention or negligence. The actual carrier proved that the Claimant had required the whole shipment but the actual carrier unilaterally decided to load the container containing the electrical devices of the equipment on Vessel R instead of Vessel G on which other goods were loaded due to the operation of the loading port and the consideration of vessel safety. The actual carrier had not notified the Claimant thereof in advance but notified the Claimant afterwards when all the equipment was on the way. The Claimant, after being aware thereof, notified the Respondent timely. Therefore, the Claimant had not deprived the Respondent of what it could have expected under the

contract. Subjectively, the Claimant had no such intention or malice and objectively, there was no reason for the Claimant or an enterprise with the same qualification to reasonably foresee the result of 'frustrating the contract purpose'.

Therefore, the Respondent's reasons for terminating the contract in the written defense were inconsistent with the above provision on the conditions for contract termination under CISG and it had no right to terminate the contract.

② Article 51(2) of CISG stipulated '[T]he buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract'.

The so-called total non-performance referred to the party under the performing obligation refused to perform the contractual obligation completely. Under such circumstance, CISG allowed the other party to choose between continuous performance and termination of the contract.

Under the circumstance of this case that both parties' improper performance caused the delay in delivery, the Respondent chose the relief method of deducting 5% of the equipment price from the re-opened first L/C and requesting for continuous performance of the contract while the Claimant actually delivered all the equipment as per the Respondent's request. Thus, the Respondent had no right to other remedies (i.e. the contract termination) under CISG. In other words, the creditor gave the debtor a reasonable grace period after the delay in performance. The debtor, if failed to perform the contract within such period, would have serious fault and the creditor could terminate the contract. Otherwise, the creditor could not terminate the contract and the contract should continue to be performed.

a) Article 49 (2) of CISG stipulated '[However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:...(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time…'.

As mentioned above, the Claimant had notified the Respondent in advance that the shipping date was postponed from December 2013 to January 2014. The Respondent, before the actual shipment, had never objected to the shipping date suggested by the Claimant, but requested for documents on January 22, February 5 and 18, 2014 when the equipment was on the way and made preparations to receive the goods including the import declaration, and never objected to the Claimant's arrangement of shipment in January 2014 till it submitted the written defense and counterclaims on November 6, 2014. Therefore, the Respondent had obviously lost the right to declare the termination of contract within a reasonable time.

The Claimant submitted the Application for Amending Claims on the oral hearing day, stating the amended claims as follows.

1) The Respondent should be determined as not entitled to unilaterally terminate the contract between the Claimant and the Respondent on February 22, 2014;

2) The unilateral termination of the contract by the Respondent on February 22, 2014 should be determined as invalid and with no contract termination effect;

3) The Respondent should continue to perform the contract and collect the equipment (stored in No.G***1, No.F***1, No.T***4, No.T***0, No.F***9, No.G***3 and C***4 containers in the yard of the container terminal at the Chinese port);

4) The Respondent should pay the contract price of approximately EUR2,200,000 to the Claimant and compensate the Claimant for the interest thereon calculated from March 16, 2014 based on the annual rate of 8%;

5) The Respondent should bear all the costs including the storage and management costs incurred for the storage in the yard of the container terminal at the Chinese port from the unloading day at the destination port to the day the Respondent actually collected the equipment, including but not limited to port management fees such as storage fees, removal fees, port construction fees, port administration fees and port facility security fees;

6) The Respondent should bear the container detention charge from the discharging day to the day the Respondent actually collected the equipment;

7) The Respondent should compensate the Claimant for the legal fees incurred for this case;

8) The Respondent should bear all the arbitration fees of this case;

9) An interlocutory award should be rendered on claims 1 and 2; and

10) The Claimant reserved the right to supplement, modify and change its claims after the tribunal made the interlocutory award, including but not limited to the right to claim for damages caused by the Respondent's mistaken termination of the contract (such claim for damages would include but not be limited to port management fees such as storage fees, removal fees, port construction fees, port administration fees and port facility security fees, the container detention charge, the transportation expenses for the resale or disposal of the equipment, duties and taxes, the equipment renovation costs

for the resale or disposal of the equipment, the loss of the price difference in the resale or disposal of the equipment and all other losses, specific claims and amounts to be submitted later in due course of this arbitral proceeding).

The Claimant submitted the Supplementary Explanation on Claim 10 on May 5, 2015, clarifying Claim 10 as follows.

a) the difference between the original value and the present value of the equipment in the amount of approximately EUR2,100,000 and the interest thereon calculated at the annual interest rate of 8% from February 22, 2014 till the day the Claimant received the full payment as the compensation for the loss of equipment value;

b) Approximately USD60,000 to compensate the Claimant for the cost of shipping the goods back to Europe;

c) Approximately EUR20,000 to compensate the Claim ant for the loss of inland traffic fees to transfer the goods from the unloading port to the Claimant's factory;

d) Approximately RMB2,100,000 to compensate the Claimant for the cost of storing the equipment at a port in China and leasing the containers till the date of May 4, 2015;

e) RMB420/day storage fee from May 5, 2015 till the equipment left the port in China as compensation for the future loss of the Claimant;

f) Approximately RMB940/day removal fee from May 5, 2015 till the equipment left the port in China as compensation for the future loss of the Claimant;

g) Approximately RMB4,400 day container detention charge from May 5, 2015 till the containers were returned to the owner as compensation for the loss of the Claimant; and

h) Approximately RMB560/10 days container demurrage charge from May 5, 2015 till the containers were returned to the owner as compensation for the loss of the Claimant.

II The Tribunal's Opinions

1. The Applicable Laws

The tribunal, considering there is no contractual provision on the applicable laws, the places of business of the parties are in Germany and China which are both the Contracting Partiesof CISG, and the parties unanimously agreed during the hearing of this case that CISG should prevail and the laws of the People's Republic of China should be applied to matters not stipulated by CISG, determines CISG shall be applied in this case and the laws of the People's Republic of China shall be applied to matters not stipulated or not clearly stipulated in CISG.

2. The Validity of the Contract

The parties both acknowledged they had signed the contract of this case on August 14, 2011 under which the Claimant sold a set of brand-new pure tension stretcher (hereinafter referred to as the equipment) including all the necessary devices, materials, spare parts for the safe and steady operation of the equipment and technical documents, on-site installation guidance and commissioning, training and after-sale services for the assembly, installation, testing, normal operation and maintenance of the equipment. The price term was CIF, a port in China (the latest version of INCOTERMS). The total contract price for the equipment, technical documents and services provided by the Claimant was EUR2,700,000 among which the equipment price was EUR2,500,000 and the onsite service fee was EUR190,000.

The tribunal holds that the contract is the expression of the parties' true intention, is legal and valid, and is binding on both parties.

3. The Respondent's Right to Declare the Contract Avoided (Terminated) due to the Claimant's Delay in Delivery

The Claimant asserted the Respondent's termination of the contract due to its delay in delivery was against the facts and laws based on the following grounds.

First, the schedule for the Claimant to deliver the goods within 9.5 months after receiving the advance payment under Article 4.1 of the contract was actually a preliminary delivery plan which could be postponed reasonably due to the influence of the parties' continuous communication on design modifications, amendments and increment. Therefore, the postponement of the delivery schedule which was specified as 9.5 months after receiving the advance payment could not be understood as the Claimant's breach of contract.

Secondly, the parties negotiated from July to September 2013 and reached agreement regarding the Claimant's delay in deliver before July 2013, taking 5% deduction of the equipment price as the final settlement and requesting the Claimant continue to fulfill its delivery obligation, which indicated the contract purpose had not been frustrated by the parties' disputes.

Thirdly, the postponement from September to December 11, 2013 was caused by the Respondent's delay in opening the L/C. The Claimant could exercise the defensive right for uneasiness and refuse to deliver the goods before the opening of the L/C.

Fourthly, the postponement from December 11, 2013 to the actual shipping date on

January 12, 2014 and January 15, 2014 was due to the Respondent's request to avoid the Chinese New Year holiday while neither party had objected to the actual shipping date. Neither party breached the contract then.

Fifthly, the Respondent failed to prove the contract purpose had been frustrated due to the market change after the late shipment. The Claimant's delay in delivery was not a fundamental breach under Article 25 of CISG. At the same time, the Claimant actually shipped all the equipment in accordance with the parties' agreement, so the Respondent had no right to terminate the contract according to Article 52(2) of CISG.

Sixthly, the Respondent lost the right to terminate the contract due to its failure to declare the termination within a reasonable time after it had known the Claimant's delivery as requested by Article 49(2)(a). The Respondent recognized the late shipment in January 2014 and the actual shipment date by action, which constituted the agreement on the change of the delivery period under the contract. Meanwhile, the Respondent had never proposed the termination of contract due to late shipment till November 6, 2014, which resulted in the elimination of the right to terminate the contract due to late shipment.

The Respondent asserted that the Claimant's malicious serious delay in delivery had made the Respondent lose the market opportunities, frustrated the contract purpose and caused damages, which constituted a fundamental breach. The Respondent had the right to declare the contract avoided based on the following grounds.

First, the Claimant should have delivered all the equipment before June 23, 2012 according to Article 4.1 and Article 3.1 of the contract and the fact the Respondent made the advance payment of 15% of the equipment price as requested by the contract on September 8, 2011.

Secondly, the Claimant had failed to deliver the goods timely after the expiry of the above delivery period though repeatedly urged by the Respondent and requested on August 13, 2013 to deduct 5% of the equipment price as the penalty for late shipment.

Thirdly, the Claimant failed to rectify its default and continued the breach after having agreed to the penalty for late shipment. The final shipping date was about 1 year and 7 months later than the shipping date specified in the contract.

Fourthly, the long delay in delivery had seriously affected the Respondent's project progress and expected benefits. The Respondent's contract purpose had been fully frustrated since the entire downstream market was saturated and changed when the Claimant finally delivered the equipment. The substantive condition for contract termination was met since the Claimant's delayed delivery was a fundamental breach of the contract.

The tribunal finds that the parties had reached the agreement on the final delivery time by action though the Claimant had delayed the delivery seriously in non-compliance with the contract. First, the parties agreed on deducting 5% of the equipment price as the penalty for final settlement of disputes related to the Claimant's delay in delivery before July 2013. Secondly, regarding the delay between July 2013 and the final shipment dates on January 12 and 15, 2014, the tribunal, based on the parties' evidence, determines the parties had changed the final shipping date, i.e. the delivery time, to January 15, 2014 (under the terms of CIF, the seller must deliver the goods on board the vessel) by action according to the L/C opened by the Respondent on December 10, 2013 (Respondent's Evidence 5), the parties' emails (Claimant's Evidence 3 and 4) and Article 29(2) of CISG. The Respondent could not declare the contract avoided since the Claimant's delivery within the changed time was not a breach of the contract.

4. The Respondent's Right to Declare the Contract Avoided (Terminated) due to the Claimant's Partial Shipments

The Claimant asserted the partial shipments were not fundamental breach of the contract, had not frustrated the Respondent's contract purpose and had been caused by the actual carrier, for which the Claimant was exempted from liabilities under CISG. The Respondent had no right to terminate the contract for the following reasons.

First, the project progress under the contract would not have been affected by the 8-day later arrival of the container containing the electrical devices than those containing the mechanical devices and spare parts according to the detailed steps and specific requirements for the equipment installation as stipulated in Article 1.3, Article 1.4, Article 8.2 and Article 8.3 of the contract, Article 9.1.1 and Article 9.1.4 of Annex 9 and Annex 11, the Preliminary Technical Specification.

Secondly, the partial shipments were not fundamental breach of contract under Article 25 of CISG while the 8-day later arrival of the container containing the electrical devices than other containers would not have frustrated the Respondent's contract purpose.

Thirdly, the partial shipments were not out of the Claimant's intention or negligence. The Claimant had requested for the whole shipment but the actual carrier unilaterally decided to make partial shipments due to the operation of the loading port and the consideration of vessel safety. The actual carrier had not notified the Claimant thereof in advance but notified the Claimant afterwards when all the equipment was on the way. The Claimant, after being aware thereof, notified the Respondent timely. Article 79 of CISG stipulates '(1) A party is not liable for a failure to perform any of his obligation if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time

of the conclusion of the contract or to have avoided or overcome it, or its consequences'. Therefore, the partial shipments caused by the actual carrier could not be taken as the Claimant's default.

Fourthly, the Respondent had lost the right to terminate the contract due to its failure to declare the termination within reasonable time as stipulated in Article 49(2)(b) of CISG. The Claimant notified the Respondent of the partial shipments caused by the actual carrier on January 24, 2014. Thereafter, the Respondent made no objection and requested the Claimant to provide copies of the documents for import declaration on February 5, 2014. The Respondent had not requested for contract termination till February 22, 2014 and lost the right to terminate the contract within reasonable time.

The Respondent argued the Claimant's partial shipments were fundamental breach of the contract. First, Article 4.1 clearly provided partial shipments were not allowed. Secondly, during the performance of the contract, the Respondent reiterated refusal to partial shipments in its email on July 30, 2013, and emphasized again 'no partial shipments are allowed in any case, please ensure the standard measuring rolls arrive at the destination port together with other devices' on August 13 and 22, 2013. In this regard, the Claimant replied on September 11, 2013, promising to organize the whole shipment. Thirdly, the clear provision on the delivery mode and the Respondent's action of repeatedly requesting the Claimant to strictly follow the specified delivery mode all showed the importance thereof. The Claimant had been aware of the requirement but eventually unilaterally changed the delivery mode specified in the contract, breaching the contract intentionally and maliciously, causing the non-negotiation of the L/C due to the inconsistency of documents, and resulting in the Respondent's failure to obtain the B/L as the title of the goods. Fourthly, the Claimant's partial shipments resulted in the Respondent being deprived of what it was entitled to expect under the contract and

constituted a fundamental breach, so the Respondent was entitled to either declare the contract avoided according to Article 25 and Article 49(1)(a) of CISG or exercise the termination right under Article 94(4) of the Contract Law.

The tribunal finds the Claimant's partial shipments constitute the fundamental breach of contract under Article 25 of CISG and the Respondent is entitled to declare the contract avoided under Article 49(1)(a) of CISG.

Article 25 of CISG stipulates '[A] breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'. Accordingly, a fundamental breach of contract should meet the following two conditions. First, the breach results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. Secondly, whether the party in breach could foresee the result. The subjective standard is whether the party in breach could foresee the breach would result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. The objective standard is whether a reasonable person of the same kind in the same circumstances would have foreseen such a result.

Concerning the above conditions, the observing party should prove the result of the breach, i.e. it is deprived of what it is entitled to expect under the contract while the breaching party should prove the unpredictability of the breach result, i.e. it did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

It should be noted that, first, the breach result stipulated in CISG is 'deprive him of what

he is entitled to expect under the contract' which is not equal to the subject matter of the contract but means more. It covers all of those the observing party is entitled to expect under the contract such as the performance time and mode. Therefore, the delivery of the subject matter of the contract does not mean the observing party is not deprived of what it is entitled to expect under the contract. Secondly, the 'foresee' stipulated therein does not refer to the breach itself but the breach result, i.e. whether the party could foresee the serious result of the breach is to deprive the observing party of what it is entitled to expect under the contract.

In this case, the Respondent has proved the delivery of the equipment in one shipment is what it is entitled to expect under the contract. First, Article 4.1 of the contract clearly provides no partial shipments are allowed. Secondly, during the performance, the Respondent repeatedly reiterated and emphasized no partial shipments were allowed and notified the Claimant the consequences thereof. The Respondent stated in the email on July 30, 2013 that 'we have just got the information that our company would lose the state's tax refund subsidy if the standard measuring rolls were delivered by air in October, so our finance department cannot accept partial shipments. Furthermore, Article 4.1 of the contract provided 'partial shipments are not allowed'(Respondent's Evidence 7), notified the Claimant on August 13, 2013 that 'if the equipment is delivered in batches (the standard measuring rolls are delivered by air alone), it would be hard for us to apply for tax refund, my boss asked me to tell you to make no partial delivery in any case and ensure the standard measuring rolls arrive at the destination port together with other devices'(Claimant's Evidence 3), and notified the Claimant by email on August 22, 2013 that 'hello, my boss asked about the delivery again and said no partial delivery is allowed…'(Claimant's Evidence 3). It can be found through the above contract provision and the Respondent's emails emphasizing no partial delivery is allowed that the delivery

of the equipment as a whole is very important for the Respondent. Such performance method is what the Respondent is entitled to expect under the contract while the breach thereof results in depriving it of such expectation.

The Claimant has failed to prove the unpredictability of the breach result of partial shipments (i.e. the Respondent's expectation on the whole shipment) no matter according to the subjective standard or the objective one. First, the subjective standard is not met. As mentioned above, the Claimant's evidence shows that the Claimant knew that the Respondent had clearly requested for the whole shipment according to the contract and the Respondent's emails. The email on September 11, 2013 on page 283 of Claimant's Evidence 3 showed the Claimant's promise to the whole shipment, i.e. '[A] s requested by your company, we will organize the delivery in one lot'. Secondly, under the objective standard, the Claimant has failed to prove another equipment supplier with the same qualification could not have reasonably foreseen the serious result of partial shipments was to deprive the buyer of what it was entitled to expect under the contract, i.e. delivery of the equipment under the contract in one shipment. Therefore, the Claimant's assertion that it 'could not foresee the partial shipments would result in the Respondent being deprived of what it was entitled to expect under the contract' is unsustainable.

The Claimant also asserted the partial shipments had been caused by the actual carrier for which the Claimant should be exempted from liabilities under Article 79(1) (4) (5)of CISG while the Respondent could not claim for damages.

The tribunal rejects such assertion. First, Article 79 of CISG is on the exemption for force majeure, requesting the impediment to the performance of obligations be 'beyond his control', 'could not reasonably be expected to have taken the impediment

into account', 'could not have avoided or overcome it or its consequences'. Though the types of such impediment are not listed in CISG, normally two types of events can be taken as force majeure according to international sale of goods practice, i.e. the natural impediment such as typhoons, tsunamis, earthquakes, floods and fires and government actions such as embargoes, expropriation, import and export prohibition and foreign exchange control. Moreover, Article 11.1 of the contract clearly stipulates 'force majeure means events beyond the parties' control, including but not limited to: (a)war or the state of war (no matter whether the war is declared); and (b)serious fires, floods, typhoons, earthquakes, quarantine, restrictions and embargoes'. It can be seen that the force majeure event specified in the contract also refers to non-performance due to government actions or natural impediments excluding the impediment caused by the carrier. Secondly, the tribunal finds it hard to determine the partial shipments by the actual carrier was an impediment beyond the Claimant's control or it could not have avoided or overcome it or its consequences.

Above all, the Claimant's partial shipments resulted in the Respondent being deprived of what it was entitled to under the contract and constituted fundamental breach. The Respondent has the right to declare the contract avoided (terminated) under Article 49(1)(a) of CISG.

5. The Validity of the Respondent's Declaration and the Elimination of the Claimant's Objection Right

The Claimant asserted the Respondent had not declared the contract terminated according to the contract and CISG for the following reasons.

First, the Respondent's email in Chinese on February 22, 2014 was not in accordance with the contract and had no binding force since it did not follow the communication

way stipulated in Article 14.7 of the contract while the recipient's email address was not the notification mailbox of formal documents as requested by the contract.

Secondly, the Respondent requested to reduce the price in its emails on April 24 and 25, 2014. The Respondent's proposal of either the contract termination or the price reduction could not be taken as the declaration of contract termination under CISG, even so, the Respondent's request on the 60% price reduction in its email on April 24, 2014 should constitute the withdrawal of the contract termination notice. Moreover, the Respondent's letter to the component manufacturer under the contract on June 6, 2014 indicated that it had suspended the contract performance instead of terminated the contract.

Thirdly, the Respondent's replies to the Claimant's lawyer in July and August 2014 showed that the Respondent had hoped the parties continue the negotiation for dispute resolution till August 4, 2014.

Fourthly, CISG had no provision on the time limit for exercising the right to object to the contract termination. The Claimant was entitled to and did object to the Respondent's 'termination' of the contract and initiated this arbitral proceeding within reasonable time.

Fifthly, the Contract Law and its judicial interpretation by the Supreme People's Court of the Republic of China were not applicable to this case. Judicial interpretations were not the sources of law in China and could only be referred to by the people's courts in case hearing and law application. The tribunal should not rely thereon to render the award.

The Respondent argued the contract had been terminated through the Respondent's declaration and the legal status of the terminated contractual rights and obligations had

been confirmed due to the following reasons.

First, the termination right was the right of formation. The unilateral expression of intent of the party with the termination right without the other party's consent could result in the termination. The Respondent's expression of the intent to terminate the contract had actually reached the Claimant since it notified the Claimant of the contract termination in the email on February 22, 2014. The Claimant refused the contract termination in the email on February 28, 2014, which indicated the contract termination notice and the Respondent's expression of the intent to terminate the contract had been effectively served. The Respondent exercised the termination right in accordance with Article 96 of the Contract Law while the contract was terminated when the notice reached the Claimant.

Secondly, the Claimant's assertion that the termination notice should be written in English and sent by registered airmail, otherwise would be of no effect was not correct. During the performance of the contract, the parties had lots of correspondences in English or Chinese and all by email instead of registered airmail. The parties had agreed on bilingual communication and registered airmail so as to ensure the sending and arrival of the intent expression. In this case, the Claimant could not deny the effect of the Respondent's contract termination notice based on the so-called form discrepancy after it had timely received and understood the notice.

Thirdly, the Respondent proposed the price reduction after the contract had been terminated. The Respondent did not mean to continue the performance of the disputed contract by suggesting reducing the price and re-signing the contract while subsequent negotiation could not change the legal status of the terminated contract.

Fourthly, the Claimant had the right to object to the contract termination under Article

96 of the Contract Law. The time limit for statutory objection was 3 months according to Article 24 of the Interpretation II of Several Issues concerning the Contract Law by the Supreme People's Court while the Claimant's application for arbitration was beyond the statutory objection period. Thus, the objection right was eliminated and the legal status of the terminated contractual rights and obligations was confirmed.

Fifthly, judicial interpretations were among the sources of law in China and had legal force. Article 5 of the Provisions of the Supreme People's Court on the Judicial Interpretations (Fa Fa [2007] No.12) stipulated '[T]he judicial interpretations issued by the Supreme People's Court shall have legal effect'. Moreover, judicial interpretations had been integrated with statutory laws and were referred to as Chinese laws as a whole in China's legal practice. Non-application of judicial interpretations in arbitration cases was in non-conformity with China's legal practice.

The tribunal determines that the parties have changed the communication method specified in Article 14.7 of the contract by action during the actual performance of the contract. The parties negotiated on contract performance matters by email or phone while most of the emails were in Chinese or English except a few in both Chinese and English. None of the parties sent the so-called 'formal documents' in writing in duplicate by registered airmail. Therefore, both parties trust the way of communication by email in Chinese or English and have changed the communication method under the contract by action according to Article 29(2) of CISG. The Claimant's assertion that the Respondent's email on February 22, 2014 was not binding due to the form discrepancy is unsustainable.

Article 26 of CISG stipulates '[A] declaration of avoidance of the contract is effective only if made by notice to the other party'. In this case, the Respondent sent email to the

Claimant on February 22, 2014, stating 'in the afternoon of February 11, our company received the bank notice that the documents submitted by your company showed that the goods were shipped in two batches, which was a serious breach of the contract and the L/C, our company went to the bank on February 12 for the rejecting procedure…In view of the above, our company requests the contract termination, the return of goods and the refund of the full payment in advance and reasonable interest. Please make relevant preparations and arrangements and bear all the relevant expenses'(Respondent's Evidence 12). The Claimant replied on February 28, 2014, stating 'You email dated Feb.22th, 2014 is received…'(Respondent's Evidence 13). It can be seen that the Respondent has sent the notice to terminate the contract (declare the contract avoided) while the Claimant has received the notice. Therefore, the Respondent's declaration of contract termination (avoidance) is effective.

The contract termination right is a right of formation for which the other party's consent is not needed. Article 96 of the Contract stipulates '…The contract is terminated when the notice reaches the other party. If the other party objects to the termination, the terminating party may petition the People's Court or an arbitration institution to affirm the validity of the termination'. The tribunal, having confirmed the validity of the Respondent's contract termination (avoidance) declaration, considers it no longer necessary to discuss whether the provision on the time limit for objection right in the Interpretation II of Several Issues concerning the Contract Law by the Supreme People's Court is applicable to this case or whether the Claimant has lost the objection right. However, the tribunal notes that the judicial interpretations of the Supreme People's Court of the People's Republic of China have formed an important part of understanding and applying the laws of the People's Republic of China in China's legal practice including the arbitration activities conducted by the arbitration commissions.

Furthermore, the Claimant's assertion that the contract has not been terminated since the Respondent still negotiated and proposed the price reduction after having sent the notice is unsustainable since the contract should be terminated when the termination notice reached the other party according to the above provision of the Contract Law.

The Claimant alleged Article 49(2)(b)(ii) stipulated 'in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so in respect of any breach other than late delivery, within a reasonable time'. In this case, the Respondent lost the right to declare the contract terminated within a reasonable time since it had made no objection within one month after the partial shipments or even till the majority of the goods arrived at the unloading port and requested the Claimant to continue to perform the contract. The tribunal holds that the Respondent is entitled to declare the contract avoided (terminated) according to Article 49(1)(a) of CISG since the Claimant's partial shipments is a fundamental breach of contract. Furthermore, the Respondent has not lost the right to declare the contract avoided (terminated) even under Article 49(2)(b). The tribunal finds the Respondent's sending the termination notice when being informed by the bank of the partial shipments and non-arrival of certain goods as shown in the L/C documents is still within reasonable time according to the principle of performing the contract in goods faith and taking into account the nature of goods under the contract.

6. The Claimant's Claims

The tribunal analyzes the Claimant's amended claims as follows.

Claim 1, the Respondent shall be determined as not entitled to unilaterally terminate the contract between the Claimant and the Respondent on February 22, 2014.

The tribunal rejects this claim since it has found in the above opinions that the Respondent is entitled to declare the contract avoided (terminated) according to Article 49(1)(a) of CISG due to the Claimant's fundamental breach of the contract for partial shipments.

Claim 2, the unilateral termination of the contract by the Respondent on February 22, 2014 shall be determined as invalid and with no contract termination effect.

The tribunal rejects this claim since it has found in the above opinions that the contract has been terminated since the contract termination (avoidance) declaration was sent effectively by email on February 22, 2014 and reached the Claimant while the contractual rights and obligations have been terminated.

Claim 3, the Respondent shall continue to perform the contract and collect the equipment.

The tribunal rejects this claim since it has found in the above opinions that the avoidance of the contract releases both parties from their obligations under it as stipulated in Article 81(1) of CISG.

Claim 4, the Respondent shall pay the contract price of approximately EUR2,220,000 to the Claimant and compensate the Claimant for the interest thereon calculated from March 16, 2014 based on the annual rate of 8%.

The tribunal rejects this claim since it has found in the above opinions that the Respondent is entitled to declare the contract avoided according to Article 49(1)(a) of CISG due to the Claimant's fundamental breach of the contract and the avoidance of the contract releases both parties from their obligations under it as stipulated in Article 81(1)

of CISG.

Claim 5, the Respondent shall bear all the costs including the storage and management costs incurred for the storage in the yard of the container terminal at the Chinese port from the unloading day at the destination port to the day the Respondent actually collects the equipment, including but not limited to port management fees such as storage fees, removal fees, port construction fees, port administration fees and port facility security fees.

The tribunal rejects this claim since it has found in the above opinions that the Respondent is entitled to declare the contract avoided (terminated) due to the Claimant's fundamental breach of the contract.

Claim 6, the Respondent shall bear the container detention charge from the discharging day to the day the Respondent actually collects the equipment.

The tribunal rejects this claim since it has found in the above opinions that the Respondent is entitled to declare the contract avoided (terminated) due to the Claimant's fundamental breach of the contract.

Claim 7, the Respondent shall compensate the Claimant for the legal fees incurred for this case.

The tribunal rejects this claim since it has rejected the Claimant's main claims.

Claim 8, the Claimant shall bear all the arbitration fees of this case.

The tribunal rejects this claim since it has rejected the Claimant's main claims.

Claim 9, an interlocutory award shall be rendered on claims 1 and 2.

The tribunal, considering the need of the arbitration procedure and the specific circumstances of the dispute in this case, determines it unnecessary to render an interlocutory award on claims 1 and 2.

The tribunal disregards the Claimant's claim 10 and the supplementary explanations since it has not accepted this claim according a CIETAC Notice dated on June 3, 2015.

7. The Respondent's Counterclaims

The tribunal analyzes the Respondent's counterclaims as follows.

Counterclaim 1, the Claimant shall return the advance payment in the amount of approximatelyEUR380,000 and compensate the Respondent for the interest loss from February 22, 2014 to the actual payment day thereon, temporarily calculated as approximatelyRMB150,000 till November 6, 2014 based on the same period loan interest rate of the People's Bank of China.

The tribunal, according to Article 81 of CISG stipulating '…A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract', supports this counterclaim and requests the Claimant to return the advance payment in the amount of approximatelyEUR380,000 since it has found in the above opinions that the Respondent is entitled to declare the contract avoided (terminated) and the contract has been terminated due to the effective service of the contract avoidance declaration.

The Claimant argued that the Respondent had no right to request the return of the payment since the legal nature of such payment was down payment while the Respondent's refusal to collect the goods and make further payment constituted

fundamental breach. The tribunal rejects this argument since Article 3.1 of the contract clearly states 15% of the equipment price, i.e. approximatelyEUR380,000, as the advance payment while the Respondent's refusal to collect the goods and make further payment is caused by the Claimant's fundamental breach. Therefore, the Claimant shall return the advance payment of approximatelyEUR380,000.

The tribunal also supports the counterclaim on the interest since it has supported the claim on the return of the advance payment. The Claimant shall compensate the Respondent for the interest loss from February 22, 2014 to the actual payment day based on the same period loan interest rate of the People's Bank of China.

Counterclaim 2, the Claimant shall bear all the arbitration fees and the Respondent's legal fees incurred for this case.

The tribunal supports the counterclaim on the arbitration fees only since the Respondent has not submitted evidence on its legal fees though the tribunal should support the counterclaim on the arbitration fees and the legal fees since it has supported the Respondent's main counterclaims.