

However, the *Technology Contract Law* did, for the first time, recognised that a Chinese individual can be a party to a commercial or economic contract, as opposed to a civil contract which was governed by the GPCL.

The PRC's reservations under the CISG

The reservation to Article 1(1)(b)..... ¶10-241

The reservation to Article 11 and provisions relating to Article 11..... ¶10-242

The PRC made the following reservations under the CISG:

"Upon approving the Convention, the People's Republic of China declared that it did not consider itself bound by sub-paragraph (b) of paragraph (1) of Art 1 and Art 11, nor the provisions in the Convention relating to the content of Art 11."

¶10-241 The reservation to Article 1(1)(b)

Article 1(1)(b) of the CISG extends the application of the CISG "when the rules of private international law lead to the application of the law of a Contracting State." The PRC made a declaration against Art 1(1)(b) pursuant to Art 95 of the CISG.

The legislative history of the CISG reveals that, as the Czechoslovak representative pointed out:

"Article 1(1)(b) raised difficulties in countries like his own or the German Democratic Republic where special legislation had been enacted to govern transactions pertaining to international trade. Similar legislation was under preparation in Poland and Romania. For countries with such a system, Art 1(1)(b) would mean the exclusion of whole areas of the special legislation enacted to govern international trade transactions. The net result was that countries like Czechoslovakia would be unable to ratify the Convention because of the effect which CISG Art 1(1)(b) would have on the application of their special legislation on international trade."¹⁷

The PRC was at that time preparing to implement such a dual contract law framework. With the promulgation of (1) the *Economic Contract Law* (13 December 1981), which governed domestic economic contracts; and (2) the *Foreign-related Economic Contract Law* (21 March 1985), which governed Foreign-related economic contracts, the PRC unsurprisingly declared its reservation on Art 1(1)(b) when it ratified the CISG on 11 December 1986. Arguably, had the PRC wanted to broaden the application of the CISG pursuant to Art 1(1)(b), it certainly could have done so.

¹⁷ See Legislative History 1980 Vienna Diplomatic Conference *Summary Records of the Plenary Meetings*, 11th meeting: <http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary11.html>

After all, the PRC only promulgated its two domestic contract laws after it signed the CISG in 1981. In the years between signing the CISG and acceding to it, the PRC could have "created" a single contract-law regime. However, it did not. On the contrary, the promulgation of the two PRC economic contract laws prepared and enabled the PRC to exclude Art 1(1)(b), and thereby limit the application of the CISG in the PRC. From this perspective, the CISG had a rather passive influence on PRC domestic contract law legislation in the 1980s.

The fact that the United States made the same reservation on Art 1(1)(b) did not necessarily inform the PRC's decision to do so. The economic, social and political factors in existence at the time were a more important factor. In the early stages of the Reform and Opening-up, PRC legislators wanted to cultivate the new domestic market in a relatively favourable and protective environment. Reform and Opening-up took the form of an experimental and gradual process. Needless to say, the then "new" CISG was itself something of an experiment at the time. Thus, conditions in the PRC in the 1980s, and the PRC's apprehensions concerning the CISG, necessitated the domestic and Foreign-related contract law split.

As will be discussed in the next chapter, the PRC brought the domestic and Foreign-related contract laws together when it implemented *PRC Contract Law 1999*. If the purpose of the exclusion of Art 1(1)(b) was the upholding of the PRC dual contract-laws regime in existence in the 1980s, then the unified *PRC Contract Law 1999* seemingly rendered that part of the PRC declaration no longer necessary. The effect of the exclusion of Art 1(1)(b) on the unified PRC contract law, both in theory and practice, will be further discussed in the next Chapter together with a proposed withdrawal of the reservation to Art 1(1)(b).

¶10-242 The reservation to Article 11 and provisions relating to Article 11

Article 11 of the CISG provides:

"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".

Article 96 then provides:

"A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Art 12 that any provision of Art 11, Art 29, or Part II of this 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 that State."

Although the PRC's declaration to exclude Art 11 and provisions relating to Art 11 did not mirror Art 96's authorised reservation, arguably, it should be taken as a reservation within the scope of Art 96.

Professor Schlechtriem and many experts concur that the Art 96 reservation may be declared only by a state which itself requires the written form for contracts of sale under

its domestic law.¹⁸ Interestingly, at the time when the PRC delegation attended the 1980 Diplomatic Conference in Vienna, there was no PRC domestic legislation, at least not in the codified form, on the subject of contract or civil law in general. By the time of the PRC's ratification of the CISG and its declared reservations, however, the PRC had implemented two contract laws both of which required the written form.

Economic Contract Law (1981)	Foreign-related Economic Contract Law (1985)
Article 3: Economic contracts, except for those in which accounts are settled immediately, shall be in written form.	Article 7: A contract shall be formed as soon as the parties to it have reached a written agreement on the terms and have signed the contract. ...
第三条: 经济合同, 除即时清结者外, 应当采用书面形式。	第七条: 当事人就合同条款以书面形式达成协议并签字, 即为合同成立。...

The above begs the following question: despite attending the 1980 Diplomatic Conference and participating in the debates on all the relevant subjects and issues, why did the PRC fail to adopt the CISG's abandonment of the written form requirement? Once more, it appeared that the CISG's impact or influence on PRC contract law legislation was passive in the 1980s.

Nevertheless, the CISG does concede and authorise the Art 96 reservation. The US delegate, E. Allan Farnsworth, in the Eighth meeting of the First Committee in the 1980 Vienna Diplomatic Conference pointed out that at the tenth session of UNCITRAL at Vienna, it had been decided that the written form would not be compulsory:

"...The intention was not to allow too many countries to make reservations, either partial or total. The aim was merely to remove the difficulties which might be encountered by the USSR or perhaps by other countries where the State was responsible for international trade."¹⁹

It may be that the USSR prompted the PRC's decision to make the Art 96 reservation. In the 1980s, the PRC's economic, social, political and legal domestic structures were still largely influenced by Soviet models. If the Art 96 reservation was in fact designed for the USSR and those countries in which the State was responsible for international trade, then the PRC was right to follow suit. As stated earlier, when the Reform and Opening-up began, restrictions existed as to who could become a party to an

¹⁸ See Schwenger Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3d ed., Oxford University Press 699 (2010).

¹⁹ See 1980 Vienna Diplomatic Conference *Summary Records of Meetings of the First Committee, 8th meeting at paragraph 43*, available at <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting8.html>.

economic contract. The central government strictly controlled the right to engage in foreign trade and international commerce (see table below). Naturally, those government officials directly engaging in foreign trade would prefer written forms.

Economic Contract Law (1981)	Foreign-related Economic Contract Law (1985)
Article 2: Economic contracts are agreements <i>between legal entities</i> for the purpose of realizing certain economic goals and clarifying each other's rights and obligations. <i>(emphasis added)</i>	Article 2: This Law shall apply to economic contracts concluded <i>between enterprises or other economic organizations of the People's Republic of China and foreign enterprises, other economic organizations or individuals.</i> (hereinafter referred to as "contracts"). However, this provision shall not apply to international transport contracts. <i>(emphasis added)</i>
第二条: 经济合同是法人之间为实现一定经济目的, 明确相互权利义务关系的协议。 (斜体部分为附加强调)	第二条: 本法的适用范围是中华人民共和国的企业或者其他经济组织同外国的企业和其他经济组织或者个人之间订立的经济合同(以下简称合同)。但是, 国际运输合同除外。 (斜体部分为附加强调)

Perhaps more importantly, Chinese culture favours the written form. It is generally acknowledged that the Chinese culture embraces the idea that anything formal and important should be in written form, so as to avoid evidential issues in the event of a later dispute. As a new player in international trade, the PRC was understandably cautious. Therefore, it naturally favoured the written form.

Yet, the implementation of the Reform and Opening-up policy constituted an evolving process. As will be discussed in the next chapter, the PRC changed its position on the written form requirement when it enacted the *PRC Contract Law 1999*.

use of the Art 95 reservation to limit the CISG's scope of application has been minimal. In particular, arguably, PRC courts' decision to apply the CISG as a primary source of law when parties choose the law of the PRC renders the Art 95 reservation a dead letter in the PRC. Further, in view of the uncertainties and impracticalities the Art 95 reservation brings both in theory and practice, the PRC should withdraw its reservation without further delay.

The CL1999 and the PRC's Article 96 Reservation

The issues pertinent to the PRC's Article 96 reservation	¶20-310
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The other reservation that the PRC made upon the adoption of the CISG in the 1980s was the Art 96 reservation. The PRC does not consider itself to be bound by Art 11 and the provisions relating thereto.¹⁰⁶ This section investigates the effect of the Art 96 reservation on the current CL1999 and whether the Art 96 reservation remains compatible with current law and practice in the PRC.

¶20-310 The issues pertinent to the PRC's Article 96 reservation

The first issue concerns the exact meaning and scope of the PRC's Art 96 reservation. All other Declaring States, except the PRC, have adopted the "standard" declaration, which states that:

*"in accordance with Articles 12 and 96 of the Convention, that any provision of Art 11, Art 29 or Part II of the Convention that allows a contract of sale or its modification or termination by mutual agreement or any offer, acceptance or other indication of intention to be made in any other form than in writing, does not apply where any party has its place of business in [the Declaring State]."*¹⁰⁷

The PRC, however, used a different wording in its declaration, stating that:

*"[T]he People's Republic of China does not consider itself to be bound by ... Art 11 as well as the provisions in the Convention relating to the content of Art 11."*¹⁰⁸

Does the variation in the PRC's declaration mean that the PRC's reservation only applies to Art 11,¹⁰⁹ which dispenses with the need for writing or written evidence in the

¹⁰⁶ See United Nations Treaty Collections (UNTC) website: Chapter X 10. available at: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en#EndDec

¹⁰⁷ See the UN Treaty Database (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en#EndDec)

¹⁰⁸ Ibid.

formation of contracts? But what about Art 29 of the CISG, which allows for contracts to be modified or terminated informally?¹¹⁰ Or the whole of Part II of the Convention, which deals with the process of contractual formation? Further, what constitutes those provisions "relating to the content of Art 11"?

According to Schlechtriem, the complete or standard form of the Art 96 declaration, and more specifically, the wording "its modification or termination by agreement" contained in Articles 12, 29 and 96 makes it clear that at least the following situations do not fall within the scope of the reservation: (1) a one-sided declaration to terminate a contract; (2) a declaration to reduce the price according to Art 50 sentence 1; and (3) the notification of defects, the fixing of time limits and other communications. Schlechtriem was of the view that these are not subject to form requirements, even when, on the basis of the Art 96 reservation, the contract, in principle, is subject to domestic form regulations which require that such communications adhere to formal writing requirements¹¹¹.

Concerning the PRC's reservation, Reiley & Fu commented that the special wording could mean either only provisions relating to contract formation or all provisions relating to a writing requirement.¹¹² Logan stated that:

*"The end result of the Chinese reservation to Art 11 rather than Art 96 is to narrow the restrictions on contract formation. Instead of requiring all elements of contract formation to be in writing as is the case under Articles 96 and 12 . . . China's reservation appears to only require that contracts 'be concluded in or evidenced by writing' . . . This would mean that all aspects of a transaction may be oral to the extent allowed under the Convention except the resultant contract of sale . . ."*¹¹³

Given that the PRC's reservation was made in 1986, before the enactment of the CL1999, the author is of the view that the scope of the PRC's Art 96 reservation should be interpreted broadly enough to cover not only the formation of contracts, but also the modification and termination of contracts. According to Art 3 of the *Economic Contract*

¹⁰⁹ Article 11 of the CISG: 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.

¹¹⁰ Article 29 of the CISG: (1) A contract may be modified or terminated by the mere agreement of the parties. (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.

¹¹¹ See Peter Schlechtriem, "Uniform Sales Law — The Experience with Uniform Sales Laws in the Federal Republic of Germany" in "Särtryck", Juridisk Tidskrift vid Stockholm Universitet, Årgång 3NR 1/1991-92, p. 45; see also Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law International), Suppl. 10, July 1994, Detailed Analysis 118-119.

¹¹² See Reiley & Fu, "Doing Business in China after Tiananmen Square: The Impact of Chinese Contract Law and the UN Convention on Sale of Goods in Sino-American Business Transactions", 24 *U. San Francisco L. Rev.* 54 n. 88 (1989)

¹¹³ See Logan, Tim N. [US], "The People's Republic of China and the United Nations Convention on Contracts for the International Sale of Goods: Formation Questions", 5 *China L. Rep.* 63 (1988)

Law (1981) (ECL) (repealed), except for those in which accounts are settled immediately, economic contracts should be in written form.¹¹⁴ Further, Art 28 of the ECL provided that notice of or agreement on the modification or termination of an economic contract shall be in written form.¹¹⁵

Similarly, Art 7 of the *Foreign-related Economic Contract Law (1985)* (FECL) (repealed) provided that a contract shall be formed when the parties reach a written agreement and sign on it.¹¹⁶ Further, the FECL Art 32 provided that notices or agreements on the modification or termination of contracts shall be made in writing.¹¹⁷ Similar requirements were found in the *Technology Contract Law (1987)* (TCL) (repealed). Article 9 of the TCL stipulated that the formation, modification and termination of a technology contract should be conducted in written form.¹¹⁸ Thus, it is reasonable to believe that the intention of the PRC's reservation was to preserve the written form requirements as to formation, modification and termination of contract under the old (repealed) pre-1999 three-pillar contract law regime.

The PRC's Art 96 reservation raises another issue when read together with the current CL1999. On one hand, the CL1999 has embraced the principle of informality espoused by the CISG.¹¹⁹ On the other hand, the PRC's Art 96 reservation continues to require for writing or written evidence with respect to the formation, modification and termination of contracts, where any party has its place of business in the PRC, a Declaring State.¹²⁰ A direct conflict appears to exist between the CL1999 and the PRC's Art 96 reservation.

The CL1999's position concerning the writing requirement constituted a radical change from the position taken by all previous contract laws in the PRC. Article 10 of the CL1999 prescribes:

*"[Writing Requirement] 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."*¹²¹

¹¹⁴ ECL Art 3 in Chinese texts: 第三条: 经济合同, 除即时清结者外, 应当采用书面形式。

¹¹⁵ ECL Art 28 in Chinese texts: 第二十八条: 变更或解除经济合同的通知或协议, 应当采取书面形式。

¹¹⁶ FECL Art 7 in Chinese texts: 第七条: 当事人就合同条款以书面形式达成协议并签字, 即为合同成立。

¹¹⁷ FECL Art 32 in Chinese texts: 第三十二条: 变更或者解除合同的通知或者协议, 应当采用书面形式。

¹¹⁸ TCL Art 9 in Chinese texts: 第二十八条: 变更或解除经济合同的通知或协议, 应当采取书面形式。

¹¹⁹ Jerzy Rajski, Comments on Art 11 CISG [Form of Contract], in: Bianca/Bonell Commentary on the International Sales Law (Giuffrè: Milan 1987) 121-124

¹²⁰ As of 22 Aug 2010, according to the UN Treaty Database (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=X-10&chapter=10&lang=en#EndDec), Art 96 declaration has been made by Argentina, Armenia, Belarus, Chile, China, Estonia (withdrew its Art 96 reservation in 2004), Hungary, Latvia, Lithuania, Paraguay, Russia and Ukraine.

¹²¹ Article 10 of the CL1999 in Chinese: 第十条: 【合同的形式】当事人订立合同, 有书面形式、口头形式和其他形式。法律、行政法规规定采用书面形式的, 应当采用书面形式。当事人约定采用书面形式的, 应当采用书面形式。

Article 11 continues:

*"[Definition of Writing] A writing means a memorandum of contract, letter or electronic message (including telegram, telex, facsimile, electronic data exchange and electronic mail), etc. which is capable of expressing its contents in a tangible form."*¹²²

These two provisions clearly embrace the freedom of parties to determine the form that their contracts will take. Thus the CL1999 has adopted the position of Art 11 of the CISG. Moreover, the CL1999 went a step further than the CISG and embraced not only the conventional forms, e.g. letter, telegram, telex, but also modern electronic data exchange and electronic communications. This development showed the PRC's need for legislation to support its rapid economic, technological and social development, but also demonstrated a willingness of PRC legislators to have PRC legislation reflect international legal practice.

To date, the PRC has not filed a withdrawal of its Art 96 declaration. Only those Contracting States with domestic legislation requiring the written form may avail itself of the Art 96 reservation.¹²³ Because the current PRC domestic contract law, the CL1999, no longer requires the written forms, is the PRC prohibited from invoking the Art 96 reservation? Has this change in its domestic law rendered the PRC's Art 96 reservation null? Unfortunately, the CISG does not provide a direct answer to these questions. Although Art 97(4) of the CISG states that a declaration may be withdrawn, it does not seem to impose an obligation on Contracting States to file a withdrawal when circumstances would seemingly warrant it.

In the absence of withdrawal, the PRC's Art 96 reservation is perhaps still valid. As was the case with the Art 95 reservation, the Art 96 reservation leads to confusion. Assuming the following: two parties, one of which has its place of business in the PRC, a reservation state, and the other of which has its place of business in the United States, a non-reservation state, enter into an oral contract. A dispute between the parties give rise to litigation in the US. Should the judge consider whether the PRC's Art 96 is still applicable? Could the judge even do so? Should the PRC's Art 96 reservation cease to be valid automatically or as a default upon the change in the PRC's domestic law? These questions do leave uncertainties in law and legal practice.

A third issue concerns the effects and consequences wrought by the PRC's Art 96 reservation. As Professor Albert Kritzer pointed out that:

"[W]hen a Contracting State has made an Art 96 declaration; some commentators believe that its requirements as to form will always be preserved. Others are of the opinion that the answer turns on principles of conflict of laws of the forum: if they point to

¹²² Article 11 of the CL1999 in Chinese: 第十一条: 【书面形式】书面形式是指合同书、信件和数据电文(包括电报、电传、传真、电子数据交换和电子邮件)等可以有形地表现所载内容的形式。

¹²³ Article 96 of the CISG: A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Art 12 that any provision of Art 11, Art 29, or Part II of this 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 that State.

ten world traders, only the United Kingdom has not “joined” the CISG. Hong Kong’s major trading partners, including the Mainland of China, the United States of America, Singapore, Japan, the Netherlands, Germany and the Republic of Korea (South Korea) are all signatory states of the CISG. In 2010 Hong Kong’s trade with the CISG jurisdictions accounts for at least 70% of Hong Kong’s total domestic exports, outbound re-exports and imports.²

Hong Kong traders have long been exposed to the CISG,³ but much to their detriment, the status of the HKSAR under the CISG is not at all settled. This section examines the status of the HKSAR under the CISG after the handover of Hong Kong from Britain to the PRC on 1 July 1997. For reasons that will be demonstrated herein, the PRC should extend the application of the CISG to the HKSAR.

Did the HKSAR’s reunification with the PRC result in the HKSAR becoming a “party” to the CISG?

The telecommunications products case and the Innotex case.....	¶50-111
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What were the intentions of the PRC central government and the HKSAR government?	¶50-113

On 20 June 1997, shortly before Hong Kong’s reunification with the Mainland of China, the PRC deposited a diplomatic note (PRC Diplomatic Note) with the Secretary General of the United Nations announcing that the treaties in Annex I to the note “will be applied” to the HKSAR.⁴ Annex I, however, did not include any reference to the CISG despite the fact that the PRC was a party to the convention. Further, prior to the reunification, the CISG had not been applied in Hong Kong, as the United Kingdom was not a party to the Convention.⁵ As a result, courts seated throughout the world have taken inconsistent positions with respect to the CISG’s applicability to the HKSAR. For example, the Supreme Court of France (*Cour de cassation*) has decided that the CISG does not apply to the HKSAR.⁶ On the other hand, some courts in the United States have

exports. See trade statistics published by the Trade and Industry Department of HKSAR, available at http://www.tid.gov.hk/english/aboutus/publications/tradestat/tradestat_maincontent.html.

² Ibid.

³ F. Yang, *CISG in China and Beyond*, 40 No. 3 UCCLJ Art 5 (2008) 376.

⁴ See Letter of Notification of Treaties Applicable to Hong Kong after 1 July 1997, deposited by the Government of the People’s Republic of China with the Secretary-General of the United Nations on 20 June 1997, Annex I, 36 International Legal Materials, vol XXXVI, No 6, November 1997, para 1675 et seq., available at <http://www.hku.hk/ccpl/database/annex1.html>.

⁵ See the List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region, available at <http://www.legislation.gov.hk/interlaw.htm>.

⁶ The Supreme Court of France, 2 April 2008, CISG-online 1651, translation available at <http://cisgw3.law.pace.edu/cases/080402f1.html> (cited as: *Telecommunications products case*).

found that the CISG is applicable to the HKSAR, while still others have found it inapplicable.⁷

¶50-111 The telecommunications products case and the Innotex case

In the Telecommunications Products case, the Supreme Court of France paid special attention to the 1997 PRC Diplomatic Note, and more specifically, Annex I. The Court found that the failure of Annex I to include the CISG served as a declaration by the PRC that the CISG would not apply to the HKSAR after the handover in 1997.⁸ The Court further found that such a declaration by the PRC was in keeping with Art 93 of the CISG. Thus the Court held that “the People’s Republic of China has effectuated with the depositary of the Convention a formality equivalent to what is provided for in Art 93 of the CISG”.⁹

More recently, the United States District Court for the Northern District of Georgia also found that the CISG is inapplicable to the HKSAR. In *Innotex Precision Limited v. Horei, Inc., et al.*,¹⁰ the Court based its decision on the fact that the HKSAR is not a “Contracting State”. In further support of its conclusion, the Court highlighted the fact that its position was consistent with the position taken by the PRC government, the Hong Kong Department of Justice, the Supreme Court of France, and numerous commentators.¹¹

As reflected above, the two main arguments against the applicability of the CISG to the HKSAR appear to be as follows:

- (1) the 1997 PRC Diplomatic Note, and more specifically Annex I, constitutes the equivalent of a CISG Art 93 declaration; and
- (2) the PRC Central Government and the HKSAR Government have taken the position that the CISG does not apply to the HKSAR.

¶50-112 Did the 1997 PRC diplomatic note satisfy the requirements of Article 93 of the CISG?

Without question, the PRC did not “at the time of signature, ratification, acceptance, approval or accession” declare that the CISG is to extend to all of its territorial units or to only one or more of them.¹² The issue then is whether the 1997 PRC Diplomatic Note,

⁷ *Innotex Precision Limited v. Horei, Inc., et al.*, 2009 US Dist. LEXIS 117992 (N.D. Ga.) 17 December 2009, CISG-online 2044, available at <http://cisgw3.law.pace.edu/cases/091217u1.html> (cited as: *Innotex case*). For a contrary conclusion, see *Electrocraft Arkansas, Inc. v. Electric Motors, Ltd., et al.*, 2009 US Dist. LEXIS 120183 (E.D. Ark.), 23 December 2009, CISG-online 2045, available at <http://cisgw3.law.pace.edu/cases/091223u1.html>. See also *CNA International, Inc. v. Guangdong Kelon Electronical Holdings, et al.*, 05 C 5734 (N.D. Ill.), available at <http://cisgw3.law.pace.edu/cases/080903u1.html> (cited as: *CNA case*).

⁸ *Telecommunications products case*, supra note 6, at para. B.

⁹ Ibid.

¹⁰ *Innotex case*, supra note 7.

¹¹ *Innotex case*, supra note 7.

¹² See Art 93(1) of the CISG.

and in particular Annex I, can be seen as a new declaration made by the PRC after the PRC's adoption of the CISG. More specifically, did Annex I satisfy the requirements set forth by Art 93(2) of the CISG that any such declaration "state[s] expressly the territorial units to which the Convention extends"? Rather than adopting a textual interpretative approach, both the Supreme Court of France and the Innotex court focused on the "fact"¹³ that both the PRC Central Government and the HKSAR Government had taken the position that the CISG did not apply to the HKSAR.

Conversely, in *CNA International, Inc. v. Guangdong Kelon Electronical Holdings, et al.*,¹⁴ the United States District Court for the Northern District of Illinois relied upon the plain language of Art 93 of the CISG in reaching its conclusion that the CISG did, in fact, apply to the HKSAR.¹⁵ The Court first found that, pursuant to the language set forth in Art 93(1), the PRC had the right, when it resumed sovereignty over Hong Kong, to declare that the CISG did not apply to the HKSAR.¹⁶ Next, it found that Art 93(2) required a signatory state to do the following when making a declaration pursuant to this provision: first, the declaration must be notified to the Secretary-General of the United Nations who is the depositary for the CISG; and second, the declaration must expressly identify the territorial units to which the CISG extends. Although the Court held that the Diplomatic Note satisfied the first requirement, it found that the Diplomatic Note failed the second requirement, because Annex I was silent as to the CISG, and more importantly, it did not "state expressly the territorial units to which the Convention extends".

The author submits that Art 93 has two main implications for any Contracting State whose territory increases to include territory not formerly subject to the CISG. First, Art 93(1) should be interpreted to allow a Contracting State to make a declaration as well as amend its declaration at any time instead of only making the declaration "at the time of signature, ratification, acceptance, approval or accession". Second, Art 93(4) suggests that in the absence of a declaration under Art 93(1), the Convention is to extend to "all" territorial units of that State including any new territory that is not formerly subject to the CISG. Thus, unless the Diplomatic Note constituted a declaration pursuant to Art 93(1), the CISG should apply to the HKSAR after the handover in 1997.

¹³ The author questions whether it is a "fact" that both the PRC Central Government and the HKSAR Government had taken the position that the CISG did not apply to the HKSAR. As will be discussed at ¶50-113, the fact that Annex I did not include the CISG does not necessarily suggest that the PRC Central Government had decided against the application of the CISG to the HKSAR. Furthermore, cases discussed in ¶50-122 show that some PRC courts and many CIETAC arbitral tribunals have actually applied the CISG to HKSAR parties.

¹⁴ *CNA case*, supra note 7.

¹⁵ The court cited *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F. 3d 894 (7th Cir. 2005), CISG-online 1026, available at <http://cisgw3.law.pace.edu/cases/050523u1.html>, citing Art 7(2) CISG.

¹⁶ See generally U. Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 *Pace Int'l L. Rev.* 307, at 323 et seq., available at: http://www.schroeter.li/pdf/Schroeter_16_Pace_Intl_L_Rev_2004_307.pdf

¶50-113 What were the intentions of the PRC central government and the HKSAR government?

Following the above analysis, in deciding whether the Diplomatic Note constituted a declaration pursuant to Art 93 of the CISG, the Supreme Court of France and the Innotex Court took the view that it was the intention of the PRC Central Government and the HKSAR Government to exclude the CISG's application in the HKSAR. The author submits that:

- (1) the intentions of the PRC Central Government and the HKSAR Government are not directly relevant to the analysis and interpretation of Art 93 of the CISG; and
- (2) even if the intentions of the PRC Central Government and the HKSAR Government are relevant in deciding whether the Diplomatic Note constituted a declaration pursuant to Art 93 of the CISG, it is still subject to debate.

The author is of the opinion that the Diplomatic Note did not deal with the application of the CISG in the HKSAR at all and was not a declaration pursuant to Art 93 of the CISG.

Since the application of the CISG in the HKSAR is a matter that has not been specifically dealt with by the PRC Central Government and the HKSAR Government, according to Sec XI of Annex I to the Sino-British Joint Declaration (1984),¹⁷ and its mirror provision, Art 153 of the *Basic Law of the HKSAR*,¹⁸ the application of international agreements to which the PRC is or becomes a party to the HKSAR shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.

A plain reading of Art 153 of the *Hong Kong Basic Law*¹⁹ suggests that the question of the CISG's applicability to the HKSAR must be decided by the Central Government, in accordance with the circumstances and needs of the HKSAR, and after seeking the views of the HKSAR government. Therefore, the following two questions arise:

- (1) whether the application of the CISG to the HKSAR is in accord with the circumstances and needs of the HKSAR and
- (2) would the current HKSAR government support the application of the CISG in the HKSAR?

¹⁷ See the Section available on the website of the Constitutional and Mainland Affairs Bureau of the Government of the HKSAR: <http://www.cmab.gov.hk/en/issues/jd3b.htm#foreign>

¹⁸ Article 153 of *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 4 April 1990, available at http://www.basiclaw.gov.hk/en/basiclawtext/images/Basic_Law.pdf, states: "The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements."

¹⁹ *Ibid.*