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**COMPARATIVE ANALYSIS ON THE INTERPRETATION OF  
THE CISG BY GERMAN AND CHINESE COURTS**

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## **ABSTRACT**

The world is becoming more global and countries that were considered developing countries only fifteen years ago have now become major players in the world of international trade. China's economic power has grown to be of a significant degree in the world of international trade, but despite this, their court system is not independent from political influence, which might scare of some western businesses. China will remain a major player on the global stage and therefore it is important to understand how Chinese courts view and interpret the law and more particularly the CISG, which is one of the most successful conventions, regarding international sales law, to date and is also highly popular in China. By comparing the methods of interpretation of German courts, which represent the western ideology, and the Chinese courts regarding the CISG, one will obtain an overview on how the Chinese courts interpretation might differ, and how this has affected the interpretation of the CISG so far and how it might affect the future interpretation of the CISG.

Keywords: CISG, Case Law, Interpretation, China, Germany

## **LIST OF ABBREVIATIONS**

CISG - The United Nations Convention on Contracts for the International Sale of Goods

CIETAC - China International Economic Trade and Arbitration Commission

U.C.C. - Uniform Commercial Code

## INTRODUCTION

The United Nations Convention on contracts for the international sale of goods, also known as the CISG, has now been in force for 30 years, and it is one of the most successful international conventions on trade so far, with 85 contracting states, but this does not imply that it would be flawless.<sup>1</sup> Throughout the history of the CISG, various problems have been identified with the CISG, and a lot of effort has been put down into rectifying and clarifying these flaws, and rather than amending the convention to achieve these goals, the most common source for further clarification on how certain principles should be interpreted and applied have been scholarly writings.<sup>2</sup> Article 7 of the CISG states that the convention should be applied uniformly<sup>3</sup>, and it has been a hot topic of discussion since the adoption of the convention how to achieve this. How can one assure that a court in Germany gives the same decisions on a case that a court in Sweden would give? Well, there is no right or specific procedure on how to achieve this, one alternative has been to use the published scholarly writings on the CISG, but besides that, also existing case law can be used in creating a more uniform interpretation of the CISG. The influence of existing case law in judgments has increased in recent times, and it has provided courts with the opportunity to contribute more to the way that the convention is interpreted.<sup>4</sup> The use of case law from other jurisdictions has also increased in the recent years, and therefore courts in other jurisdictions might have a possibility to affect future decisions in other jurisdictions.<sup>5</sup> The issue here is, as mentioned earlier, that courts in different jurisdictions unavoidably decide cases differently. Therefore, this paper will focus on the role of courts and the case law that they produce in the forming of further and more comprehensive interpretation of the CISG, and more specifically, on the influence that case law originating from Chinese courts may have in respect to the case law originating from German courts. This is due to the fact that Germany has for many years been the biggest contributor when it comes to case law regarding the CISG, in 2000 one third of the case law

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<sup>1</sup> Castellani, L, G. (2009). Promoting the Adoption if the United Nations Convention on Contracts for the International Sales of Goods (CISG), - *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 13, p 243.

<sup>2</sup> Ferrari, F. (2008). *The CISG and its Impact on National Legal Systems*. Munich: Walter de Gruyter, p 445.

<sup>3</sup> United Nations Convention on Contracts for the International Sales of Goods (Vienna, 1980); Art. 7.

<sup>4</sup> DiMatteo, L, A. (2014). *International Sales Law: A Global Challenge*. New York: Cambridge University Press, p 601.

<sup>5</sup> *Ibid.*, p 601.

available was of German origin, and this of course meant that the German courts had an immense possibility to affect the way the CISG was interpreted.<sup>6</sup> China has in recent years become a large contributor regarding CISG case law<sup>7</sup> and has almost by-passed Germany in the amount of published case law available.<sup>8</sup> China is regarded as a pro CISG country with high approval numbers and a low percentage of opting out compared to other countries,<sup>9</sup> therefore the amount of case law originating from China will probably not decrease in the future, but rather the opposite.

This paper will analyse how the German and Chinese courts interpret the CISG and which methods are used in the process. In order to distinguish the methods of interpretation, it is important to analyse how the CISG is applied in the courts and what effect the case law originating from these countries have had on the past interpretation of the CISG and also what effect it might have on the future interpretation of the CISG. Establishing the differences in the methods of interpretation by the respective courts and their actual effects is important in order to analyse the way the CISG might be interpreted in the future, where China has a big role to play with its rising number of CISG related case law. The question to be answered is; does the rising number of CISG related case law originating from Chinese courts together with China's growing economic strength provide its courts with more possibilities and an improved position regarding the future interpretation of the CISG, or will German courts maintain their status as the leading source of case law regarding the CISG.

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<sup>6</sup> Magnus, U. (2010). The Vienna Sales Convention (CISG) Between Civil and Common Law – Best of all worlds? – *Journal of Civil Law Studies*. Vol.3, p 84-85.

<sup>7</sup> Institute of International Commercial Law – Albert. H. Kritzer CISG database: Country case schedule; The number of court and arbitral proceedings listed by jurisdiction. Last edited on 25 of January 2016. Accessible: <http://www.cisg.law.pace.edu/cisg/text/casecit.html>, 20 of April 2018.

<sup>8</sup> Institute of International Commercial Law – Albert. H. Kritzer CISG database: Yearbook of CISG cases from 2000-2016. Accessible: <http://www.cisg.law.pace.edu/cisg/text/YB2006-2000.html>, 20 of April 2018.

<sup>9</sup> Spagnolo, L. (2009). A Glimpse Through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope part 1). - *Vindobona Journal of International Commercial Law & Arbitration*, Vol 12, p 135-136.

# 1. LEGAL HISTORY OF THE CISG

In order to analyse the methods applied by the courts when interpreting the CISG, one must first understand the legal history and principles that are distinctive to the country in question. The fact that Germany and China have far from similar legal histories can contribute to the final interpretation of a legal act by the courts in the respective countries. Therefore, it is important to understand which ideas and methods contribute to the final reasoning and decision of the court.

Germany has a rich legal history dating back centuries, under which certain methods and philosophies have emerged. China, on the other hand, began a new era of codified law after the death of Mao in 1976, which was the beginning of a period of modernisation and opening up to the rest of the world, a good example of this was the participation of the Chinese delegation in the 1980 Vienna Diplomatic conference, which resulted in the ratification of the CISG by China.<sup>10</sup> This, on the other hand, means that China's legal history, especially on the international stage is relatively young compared to Germany. When it comes to the CISG both countries have been parties to the convention from very early on, China ratified the CISG in 1988 and Germany followed suit ratifying it only two years later in 1990<sup>11</sup>, which in practice means that they have had the equal amount of time to produce CISG related case law, but in reality, that has not been the case until recently.

## 1.1. Germany

Germany implemented the CISG in 1990, and since then it has produced the highest amount of case law regarding the CISG.<sup>12</sup> In Germany, the CISG is widely known by lawyers, and nearly all lawyers in Germany have come in contact or are otherwise familiar with the CISG.<sup>13</sup> This is reflected by reasonably high usage numbers with only around 45% of lawyers usually opting out

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<sup>10</sup> Yang, F (2006) The Application of the CISG in the Current PRC law and the CIETAC Arbitration Practise – *Nordic Journal of Commercial law*, No.2, p 3-5.

<sup>11</sup> Institute of International Commercial Law – Albert. H. Kritzer CISG database: List of participating countries - Germany. <https://www.cisg.law.pace.edu/cisg/countries/cntries-Germany.html>, 20 of April 2018.

<sup>12</sup> Institute of International Commercial Law – Albert. H. Kritzer CISG database, *supra nota* 8.

<sup>13</sup> Ferrari, F. (2008), *supra nota* 2, p 145.

from the CISG, compared to the United States where this number is at 70%.<sup>14</sup> The fact that German lawyers are familiar with the CISG, and usually do not tend to opt out from it, has led to the situation where Germany produces the most CISG related case law, and this, of course, has provided German courts with an immense opportunity to influence the way the CISG is interpreted. This was true especially in the early years of the convention, wherein 2001; one-third of all CISG related cases originated from Germany.<sup>15</sup>

Although the CISG should be interpreted uniformly and independently from national law, it is inevitable that certain national characteristics are embedded into decisions from a certain jurisdiction, especially in cases where there are no earlier precedence or clear legal rules. This is also the case with Germany,<sup>16</sup> and with the huge amount of case law originating from Germany it is important to understand and identify these characteristics in order to understand in which ways German courts have contributed to the interpretation of the CISG and how it can be seen in today's world, where decisions from other jurisdictions have become more and more influential. German courts have produced case law for a long time and in high quantities, and therefore many of the German contributions to the interpretation of the CISG might not be so evident and are often taken for granted without acknowledging their origin.<sup>17</sup> Judgements rendered by German courts are widely used and referred to by courts in other jurisdictions, but this seems to be limited to the European continent and German judgements have had less influence in jurisdictions outside Europe.<sup>18</sup> The sole reliance on German case law has also diminished over the years and the use of case law from other jurisdictions, as a reference in judgements, has increased.<sup>19</sup> Before if a judgement concerned article 38 CISG, almost every reference by a court outside Germany referred to German court decisions, however, in recent years case law originating from other countries have also gained influence.<sup>20</sup> In cases concerning article 38 CISG, in which courts referred to foreign case law, approximately half was of German origin.<sup>21</sup>

Many of the significant cases from German courts originates from the first 10 years of the CISG, they have laid down the groundwork on how some principles adopted by the CISG should be

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<sup>14</sup> Spagnolo, L (2009) *supra nota* 9, p 135.

<sup>15</sup> *Ibid.*, p 135-136.

<sup>16</sup> Ferrari, F. (2008) *supra nota* 2, p 156.

<sup>17</sup> DiMatteo, L. A. (2014) *supra nota* 4, p 600-601.

<sup>18</sup> *Ibid.*, p 600-601.

<sup>19</sup> Ferrari, F. (2003) Gap-Filling and Interpretation of the CISG: Overview of International Case Law – *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 7, p 66-67.

<sup>20</sup> DiMatteo, L, A. (2014) *supra nota* 4, p 600.

<sup>21</sup> *Ibid.*, p 600.

interpreted and since they have done so in the early stages of the CISG, they have also had a significant effect on the overall interpretation of the convention.<sup>22</sup>

The German courts have used methods derived from domestic German law in the course of interpreting the CISG,<sup>23</sup> these methods are not exactly the same as those which can be found in German law, but they are still recognisable as such. The following chapter will describe some areas of the CISG where German court decisions have played a significant role when interpreting the convention, and decisions that have had a significant influence on the way the CISG is interpreted today. In these decisions, the court has established some ground rules that should be followed when interpreting certain provisions of the CISG.

German judges have as a tradition to explain and clarify why a specific article was used in a specific situation. The justification for using a certain provision of the CISG is important since without that case law regarding the CISG would be more or less useless for further use by other courts.<sup>24</sup> The clearness and thoroughness of the decisions issued by German courts is probably one reason why German court decisions are used as references when adjudicating in other jurisdictions.<sup>25</sup>

### **1.1.1. Application of CISG**

The CISG has a limited scope of application and it does not cover all kind of transactions and issues that may arise when concluding a contract, these excluded areas are left to domestic law to decide. In the Benetton case<sup>26</sup>, a franchising contract governed by German law and a sales contract governed by CISG were concluded. The franchising contract included a provision, which was contrary to German competition law, and therefore the contract was declared invalid. The CISG, on the other hand, does not address invalidity of a contract<sup>27</sup>, and therefore the court was left to decide if the invalidity of the franchising contract could extend to the sales agreement and also make it invalid. Such a result could have been possible, according to the court, but in the particular case, the court decided that there were two separate transactions that did not affect each other and therefore the court did not declare the sales contract, governed by the CISG, invalid.

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<sup>22</sup> DiMatteo, L. A (2014) *supra nota* 4, p 600.

<sup>23</sup> *Ibid.*, p 597.

<sup>24</sup> *Ibid.*, p 600-601.

<sup>25</sup> *Ibid.*, p 600.

<sup>26</sup> Federal Supreme Court of Germany, Case Benetton II, VIII ZR 134/96, 23.7.1997.

<sup>27</sup> Art. 4 CISG.

The German courts have applied the CISG as intended by the convention, more specifically article 1 of the CISG, where the important principle is the place of business principle which has been followed by the German courts, and as a result the convention has been applied because of its international character and on the grounds of the provisions laid down in the convention,<sup>28</sup> rather than through any domestic law provisions, as in China, which will be discussed later.

### 1.1.2. Conformity of goods

When a contract is concluded between parties, then the goods delivered shall, according to article 35 of the CISG<sup>29</sup>, conform with the characteristics specified in the contract or be fit for the purpose which the buyer had made the seller aware of at the time of conclusion of the contract. In the beginning, it was unclear whether, in cases where the characteristics were not explicitly specified, the safety standards and requirements regarding the quality of goods set by the seller's country or the buyer's country should be followed.<sup>30</sup> In the "mussel case", where mussels exported from Switzerland to Germany contained amounts of cadmium which exceeded the allowed levels set by the German authorities but was, however, compliant with the requirements set by the Swiss authorities.<sup>31</sup> The question asked by the court was that which requirements should be decisive, the requirements of the seller's country or the requirements set by the country of the buyer. On this point the court stated that the rules and standards of the seller's country would apply to the contract goods, other courts later referred to this decision, but legal writers objected the decision.<sup>32</sup> Usually decisions by the Federal Supreme Court of Germany, regarding the CISG, are highly respected and followed by other courts, but in this case, a U.S. District Court overturned the principle set out by the German court<sup>33</sup>, and instead decided that the requirements and standards of the buyer's country shall apply instead of the seller's. The Federal Supreme Court of Germany did not, however, follow exactly the ruling of the U.S. district court in a similar case five years later where a Belgian seller sold pork to a German buyer that was later found out to be infected.<sup>34</sup> The difference to the "mussel case" here was that the European Union had issued a public law restriction on the sale of the particular pork due to public health, but this was done after the risk

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<sup>28</sup> Schlechtriem, P. (2002) Uniform sales law in the decisions of the Bundesgerichtshof – 50 years of the Bundesgerichtshof (Federal Supreme Court of Germany): A celebration anthology from the academic community, chapter 1.1.

<sup>29</sup> Art. 35 CISG.

<sup>30</sup> Schlechtriem, P. (2002) *supra nota* 28, chapter 4.1.

<sup>31</sup> Federal Supreme Court of Germany. Case: VIII ZR 159/94, 8.3.1995.

<sup>32</sup> Schlechtriem, P. (2005) Compliance with local law; seller's obligations and liability- *Juristenzeitung*, p 846-848.

<sup>33</sup> United States, U.S District court, Eastern District of Louisiana, Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l. 99-0380 Section "K" (1). 17.5.1999.

<sup>34</sup> Federal Supreme Court of Germany, Case: VIII ZR 67/04, 2.3.2005.

had passed from the seller to the buyer. If the German court had followed the judgement from the “mussel case” then the pork would have been conforming, since it did conform with the requirements of the Belgian authorities when the risk passed to the buyer. The question here was that what effect the public law notice, issued by the European Union, had on the contract since it essentially declared that the contract goods were unusable and a danger to public health. The court held, that the fact that there was a public law enactment was not per se essential in deciding whether the tainted goods were conforming, but rather the fact that the suspicion that meat originating from Belgium was contaminated, and therefore unusable, had emerged before the risk had passed, was seen as a deciding factor.<sup>35</sup> The suspicion of contaminated meat led to the exclusion of resaleability of the goods and therefore the goods could not be used for the purposes that they were intended for by the buyer, and therefore the court stated that the meat was non-conforming. This decision by the Federal Supreme Court of Germany is of high importance since cases regarding contaminated food are not unusual and the information of such contaminated merchandise is usually quickly spread out through various media outlets and can cause high damages to the seller or the buyer since the contaminated merchandise will most likely become unusable and worthless.<sup>36</sup>

### **1.1.3. Notice of non-conformity**

When the seller delivers goods to the buyer, which do not conform with the functions or characteristics agreed at the time of conclusion of the contract, the buyer is obliged to inform the seller of the non-conformities within a reasonable time according to article 39 of the CISG.<sup>37</sup> Article 38 of the CISG requires the buyer to inspect the goods within a short period of time after taking delivery of the goods<sup>38</sup>, if the buyer fails to notify the seller of the non-conformities within a reasonable time after one has discovered, or ought to have discovered, the non-conformity then the buyer loses the right to rely on the non-conformity.<sup>39</sup> The point where there has been an issue with establishing uniform interpretation is the time frames, what is considered a reasonable time and what is considered a short period of time. The time period is often dependent on the nature of the case; for example, if the non-conformity is evident to the naked eye then the reasonable period of time, provided in article 39, is rather short. Despite a large amount of German case law regarding

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<sup>35</sup> Schlechtriem, P. (2005) *supra nota* 32, p 846-848.

<sup>36</sup> *Ibid.*, p 846-848.

<sup>37</sup> Art. 39 CISG.

<sup>38</sup> Art. 38 CISG.

<sup>39</sup> Art. 39 CISG.

article 39, the courts have not made any precise distinctions on what is considered a reasonable amount of time, but rather established a basic period of one month that can be the adjusted depending on the characteristics of the case, such as the goods involved, commercial branch, and the level of knowledge possessed by the buyer to identify the problem.<sup>40</sup> The courts have left a margin inside which they can adjust the time limit depending on the case for a reason, since if the time limits would be precise then it could result in unfair decisions.<sup>41</sup>

The notice procedure is derived from German law, and its purpose is to provide closure and certainty to the parties that the transaction is finished and there are no further claims regarding the particular transaction.<sup>42</sup> In German law the notice procedure is stricter and more precise than in the CISG, and in early cases German courts applied this strict rule, where the non-conformity had to be described in a very precise manner, for example, the word printer was considered to be too general and it was not precise enough to claim that the printer was non-conforming,<sup>43</sup> but instead the court stated that the notice of non-conformity should have included a detailed description of the non-conformity in the printer. This strict approach has however been removed and the German courts have taken a more relaxed approach to the details required when notifying the seller of the non-conformity, and this follows the trend that the CISG has adopted elements from German law but they have been adjusted in order to better suit the international character of the CISG.

#### **1.1.4. Avoidance of contract**

Avoidance of a contract is considered as a mean of last resort and should only be used in case of a fundamental breach of the contract, this is due to the fact that the CISG strives to preserve the contract enforceable as long as possible. The German courts have followed this limited scope of application of avoidance in cases of breach of contract, as intended by the convention. A good example of this is the “colbat sulfate” case,<sup>44</sup> where the court did not consider a single defect to be a sufficient reason to claim a fundamental breach. The court emphasised the fact that it is the responsibilities of the parties to describe in the contract what they consider to be the fundamental characteristics of the contract, and if the product does not conform with the characteristics specified in the contract, then the party could claim avoidance.<sup>45</sup> In other words, it is possible for

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<sup>40</sup> Schlechtriem, P. (2002) *supra nota* 28, chapter 4.2.

<sup>41</sup> *Ibid.*, chapter 4.2.

<sup>42</sup> *Ibid.*, chapter 4.2.

<sup>43</sup> *Ibid.*, chapter 4.2.

<sup>44</sup> Federal Supreme Court of Germany, Case VIII ZR 51/95, 3.9.1996.

<sup>45</sup> Federal Supreme Court of Germany, Case VIII ZR 51/95, 3.9.1996, *supra nota* 44.

the parties to claim guarantees from the other party that must be fulfilled, and if not, then the grieving party has the opportunity to claim avoidance of the contract. The principle of limited application that allows the parties to claim avoidance only in cases of fundamental breach is, however, not applied uniformly by all courts and in some jurisdictions, the courts have failed to apply the principle of avoidance in the same manner as intended by the convention and as applied by the German courts.<sup>46</sup> Therefore, the German case law regarding avoidance is important, since the German courts have interpreted the principle of avoidance according to the way that was intended by the convention, while other courts have, in some cases, failed to take in consideration this principle and the related case law and commentaries and therefore made their judgements on false grounds.

### **1.1.5. The Nachfrist principle**

In cases of non-performance the grieving party can set an additional time period for the breaching party to complete the performance; this concept is derived from the German law principle called nachfrist.<sup>47</sup> This concept is used to interpret the reasonableness of the additional time for performance in case the breaching party has failed to perform within the agreed time. There is not, however, a correct answer that would fit every case, instead every case must be analysed individually. The German courts have however established some principles that can be used to determine the reasonableness of this extended time period. The criteria includes; the buyer's desire to receive the goods in question as quickly as possible was made evident at the time of conclusion of contract, as well as the availability of transport for the delivery in question.<sup>48</sup> The court's opinion on an unreasonably short time period for performance is that, even though unreasonable in its entirety, it nevertheless indicates the start of a reasonable time period for performance.<sup>49</sup> The nachfrist method is derived from German law and it simplifies the procedure of termination of a contract, if the party fails to perform during the nachfrist, then the grieving party can terminate the contract without taking into account the seriousness of the breach. The nachfrist principle is not used precisely as it is in German domestic law, but it has a rather limited scope of application. It only applies to situations where either the seller has failed to make delivery, or the buyer has failed

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<sup>46</sup> Case Société Sacovini/M. Marrazza v. Sté les fils de Henri Ramel/Sté Bonfils Georges/Sté Preau et compagnie; 173 P/B 93-16.542, France, Supreme Court.

<sup>47</sup> DiPalma, M. (1999). Nachfrist under National Law, the CISG, and the UNIDROIT and European Principles: A Comparison. – *International Contract Adviser*, Vol. 5, No. 1, p 30.

<sup>48</sup> DiMatteo, L, A. (2014) *supra nota* 4, p 597.

<sup>49</sup> *Ibid.*, p 597.

to pay for the goods in question, in other words in cases of non- performance.<sup>50</sup> The nachfrist principle does not apply in all situations, especially in situations where the party's only intention is to convert a minor and insignificant breach or non- conformity to a fundamental breach by the mere lapse of the additional time period.<sup>51</sup> This limitation is done in accordance with the principles of the CISG, which is to preserve the effectiveness of the contract as long as possible, and that avoidance is used only as a last resort.

### **1.1.6. Damages**

The breaching party is always liable for damages, according to art 74 CISG, that arise from the breach, except if the breaching party can exempt itself from liability according to article 79 CISG.<sup>52</sup> The CISG extends the scope of damages to everything that was foreseeable; in case of a breach of contract, at the time of conclusion of the contract, if a party does not want to bear such risk then the party must be able to limit its liability in the contract. The Federal Supreme Court of Germany dealt with the foreseeability rule in the “cheese case”, which is considered a precedence concerning the foreseeability rule.<sup>53</sup> A buyer from Germany bought cheese from a Dutch seller, the cheese was non- conforming and the German buyer sought damages. The buyer sought damages for loss of profits that occurred due to fact that the cheese was defective, this included the loss of four wholesale customers, damages paid to another buyer's customers who failed to receive delivery due to the defective cheese and the loss of a group delivery arrangement which resulted in higher transportation costs for the buyer in the future. The court applied the foreseeability rule at the time of conclusion of the contract rather than at the time of the actual breach, and therefore the Dutch seller, who knew at the time of the conclusion of the contract that the German buyer was a so-called middleman, should have been able to foresee, at the time of conclusion of the contract, that if the cheese delivered would turn out to be defective the buyer would suffer damages of such kind since he would not be able to resell the cheese to third parties.<sup>54</sup>

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<sup>50</sup> Magnus, U. (2010) *supra nota* 6, p 86.

<sup>51</sup> DiPalma, M. (1999) *supra nota* 47, p 30-31.

<sup>52</sup> Schwenzer, I. (2010). *Commentary on the UN Convention on the International Sale of Goods*. 3<sup>rd</sup> ed. New York: Oxford University press, p 1000.

<sup>53</sup> Federal Supreme Court of Germany, Case VIII ZR 210/78, 24.10.1979.

<sup>54</sup> DiMatteo, L, A. Dhooge, L. Greene, S. Maurer, V. Pagnattaro, M. (2004). The Interpretive turn in international sales law: An analysis of fifteen years of CISG jurisprudence. - *Northwestern Journal of International Law and Business*, Vol. 34, p 420-421.

### 1.1.7. Domestic law influence

German courts have early on made a clear distinction between domestic law and the CISG, this is clearly shown by the fact that, even though the CISG have adopted several principles that derive from German law, the courts have managed to apply the principles as intended by the convention, and restrained from applying the domestic law interpenetration.<sup>55</sup> The Federal Supreme Court of Germany stated in 1997 that the CISG shall be interpreted separately from German domestic law and that principles used in German domestic law cannot be transferred to the CISG.<sup>56</sup> The court further clarified the situation of case law, it stated that case law decided based on German domestic law, even though issued before the ratification of the CISG, could not be used as a reference despite the fact that they concern the same subject matter as the case at hand, since it would be against the principle of uniform application and undermine the international character of the CISG provide in article 7(1) of the CISG.<sup>57</sup> This shows that German courts have established a strong precedent that the CISG is to be interpreted autonomously, and despite there being domestic principles or case law that could be applied to a particular case it would be against the intention of the CISG and therefore not acceptable.

## 1.2. China

Despite the fact that China was one of the original signatory states to the CISG in 1988, they have not contributed nearly as much to the interpretation of the CISG as Germany, especially if one considers the effect of case law originating from the respective countries.<sup>58</sup> However, in recent years China has been one of the most active producers of CISG related case law.<sup>59</sup> When China ratified the CISG, it was a big step towards a western law approach, but their domestic law was still under development and consisted of multiple acts that were unclear for many. Before the Vienna diplomatic conference in 1980, there were almost zero existing codified Chinese domestic texts, concerning contract or civil law, and it was not until 1981 when China adopted their first contract law text called the P.R.C. Economic contract law. In the following years, China also

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<sup>55</sup> Ferrari, F. (2008) *supra nota 2*, p 156.

<sup>56</sup> Federal Supreme Court of Germany, Case VIII ZR 51/95, 3.9.1996, *supra nota 44*.

<sup>57</sup> Ferrari, F. (2008). Have the Dragons of Uniform Sales Law Been Tamed? Ruminations of the CISG's Autonomous Interpretation by Courts. – *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*. p 139-141.

<sup>58</sup> Institute of International Commercial Law – Albert. H. Kritzer CISG database, *supra nota 8*.

<sup>59</sup> *Ibid.*

adopted the foreign related economic contract law in 1985 and the P.R.C. General principles of civil law in 1986.<sup>60</sup> The adoption and ratification of the CISG followed shortly after in 1988, the adoption of these legal texts marked a significant turning point for China and made the Chinese market significantly more approachable for western entities. In 1999 China adopted a new sales law, which unified the P.R.C. economic contract law, and the foreign related economic contract law, into one piece of legislation. This unification further stressed the western influence on Chinese domestic law, since the new contract law was strongly based on the CISG and in some parts German law.<sup>61</sup> The new contract law was an important step towards the opening up of China, and after the adoption of the new Chinese contract law, the amount of CISG related case law originating from China has also rapidly increased.<sup>62</sup> Despite the more open approach to western companies, one must still keep in mind that China is still politically completely different from what, for example, Germany is. There is still only one ruling party and there is no separation of powers in the same way as in, for example, countries in the European Union.<sup>63</sup> Due to these facts parties often decide to opt for arbitration when dealing with Chinese companies and more specifically they usually choose the China international economic and trade arbitration commission (CIETAC). It has become a very popular place for arbitration in Asia and its reputation has also grown around the world.<sup>64</sup> Despite this, there are still many cases that are litigated in the public courts and therefore it is important to understand how an international convention, like the CISG, is interpreted by the Chinese courts, and which elements attribute to the reasoning and final decisions of the court.

Unlike Germany, China did not have as much influence on the interpretation of the CISG in its early years but has rather gained more influence in recent years. Chinese courts have not made landmark decisions in the way that the Federal Supreme Court of Germany has done, but they have rather established an approach where the lack of experience concerning CISG is visible.<sup>65</sup> The lack of Chinese legal culture regarding western influenced laws is clearly visible in the way Chinese courts have interpreted the CISG in the past. Their judgments are usually unclear and poorly

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<sup>60</sup> Yang, F. (2006) *supra nota* 10, p 1.

<sup>61</sup> DiMatteo, L, A. Jingen, W (2016). Chinese Reception and Transplantation of Western Contract law. – *Berkley Journal of International Law*, Vol. 34, No.1, p 98.

<sup>62</sup> Institute of International Commercial Law – Albert. H. Kritzer CISG database, *supra nota* 8.

<sup>63</sup> Rosen, A, L. (2013). Chinese Contract Formation: The roles of Confucianism, Communism and International Influences. – *University of Miami International and Comparative Law Review*, Vol. 20, p 190.

<sup>64</sup> Yang, F. (2006) *supra nota* 10, p 18.

<sup>65</sup> Yongping, X. Weidi, L. (2008). Selected Topics on the Application of the CISG in China. – *Pace International Law Review*, Vol. 20, No 1, p 101.

justified,<sup>66</sup> and since the legal history is almost non-existent, unlike in German law, the influence of cultural traditions may have a greater influence in some decisions made by Chinese courts.<sup>67</sup> Despite the fact that court decisions originating from China may not be as precise as decisions from German courts, they are still important, since the CISG is very popular in China and it is considered one of the most CISG positive countries. The approval numbers of the CISG are high in China where only 37% of lawyers tend to opt out from the CISG, and furthermore, the CISG is included in the curriculum of Chinese law schools which will probably furthermore promote China's reputation as a CISG friendly country.<sup>68</sup> Case law originating from China may not at the moment have the same influence as the case law originating from Germany, but since the amount of case law from Chinese courts is increasing, it is important to analyse how the CISG is interpreted by Chinese courts and how it differs from the interpretation of German courts. The following chapter will describe some typical elements that can be identified in the reasoning of Chinese courts regarding CISG related cases.

### **1.2.1. Domestic law influence**

As mentioned earlier the CISG should not be interpreted according to domestic law principles and should instead be applied autonomously, as clearly stated by the Federal Supreme Court of Germany in 1997.<sup>69</sup> The influence of domestic law, in cases where the CISG should be applied independently without having to resort to domestic law, is sometimes clearly visible in Chinese case law. Chinese courts have gone so far that in some cases they have used the CISG as a secondary legislation to fill gaps in their domestic legislation when deciding on cases where the CISG should be applied independently from domestic law.<sup>70</sup> Chinese courts have in some cases resorted to domestic law to fill certain uncertainties in the CISG, which would not have been necessary since those areas had been covered in earlier cases regarding the CISG.<sup>71</sup> This proves that Chinese courts might favour the use of domestic law, or apply it jointly with the CISG, this might be due to lack of familiarity with the CISG or some other reasons, but it is difficult to understand the reason for this, since the Chinese courts often fail to justify and explain the reasons for the application of a particular law or a particular provision of the law.

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<sup>66</sup> Neuman, T. (2012). Chinese Success and Failure in Achieving Uniform Application of the CISG. – *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 16, p 88-89.

<sup>67</sup> Rosen, A, L. (2013) *supra nota*, 63, p 190.

<sup>68</sup> Spagnolo, L. (2009) *supra nota* 9, p 155.

<sup>69</sup> Federal Supreme Court of Germany, Case VIII ZR 51/95, 3.9.1996, *supra nota* 44.

<sup>70</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 69.

<sup>71</sup> *Ibid.*, p 76.

It is also important to point out that Chinese courts do not have to follow the doctrine of precedence, which means that when examining a case, the Chinese courts do not have to follow earlier decisions.<sup>72</sup> This behaviour acts against the principle of uniform application of the CISG since court decisions from other jurisdictions is an excellent method to promote the uniform application of the CISG. Chinese courts seldom use scholarly writings or previous court decisions as assistance when interpreting a case, this is mostly due to the fact that the majority of the scholarly writings on the CISG are in English and are not translated into Chinese, this has however changed in recent years when important CISG writings have been translated into Chinese.<sup>73</sup> The lack of case law and scholarly writings in the Chinese language has led to the situation where Chinese courts have used domestic law to fill gaps when applying the CISG. Furthermore, the fact that as long as Chinese courts do not have access or have the desire to use foreign case law or scholarly writings in their reasoning, it is difficult for Chinese courts to create a situation where the CISG would be interpreted uniformly in the courts located on Chinese territory. The Supreme Court of P.R.C. did, however, take this into consideration in 2007 by implementing a principle called “Case Guidance”, which promotes the use of former decisions when interpreting new cases.<sup>74</sup>

#### *1.2.1.1. Application of the CISG*

Chinese courts have had some difficulties in applying the convention, especially when it comes to the application of article 1(1)(a) of the CISG. The first article of the CISG describes the sphere of application of the convention and states that if both parties have their place of business in a contracting state then the CISG shall be the governing law of the contract. This is not however always the case, a survey concluded that in 60% of the cases examined, the Chinese courts failed to apply the place of business criterion established by article 1(1)(a), and furthermore, no reasoning was usually provided by the court.<sup>75</sup>

The international character of the CISG means that it is directly applicable to contracts that fulfil the criterion laid down in the first article of the convention, without having to resort to domestic legislation.<sup>76</sup> The Chinese courts have, however, in some cases established the applicability of the

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<sup>72</sup> Ferrari, F. (2008) *supra nota 2*, p 72-73.

<sup>73</sup> *Ibid.*, p 72-73.

<sup>74</sup> Ferrari, F. (2008) *supra nota 2*, p 73.

<sup>75</sup> Liu, Q. Ren, X. (2017). CISG in Chinese Courts: The Issue of Applicability. – *The American Journal of Comparative Law*, Vol. 65, No. 4, p 883.

<sup>76</sup> Liu, Q. Ren, X. (2017) *supra nota 75*, p 900.

CISG through domestic law provisions; more specifically article 142 (2) of the P.R.C. General principles of civil law.<sup>77</sup> Article 142 of the P.R.C. General principles of civil law states that if an international treaty has been established and China has conceded to this convention, then that convention shall apply.<sup>78</sup> This of course, in principle, means that in case of international agreements CISG should be applied, but the courts have reasoned the applicability of the CISG on the basis of article 142(2) of the P.R.C. General principles of civil law, rather than article 1(1)(a) of the CISG.<sup>79</sup> There has also been some confusion by the Chinese courts in which situations the CISG should be applied, they have in several cases failed to justify their choice of law and also failed to explain on which grounds the law was applied, this behaviour has caused some uncertainties, which is strange taken into account the fact that the CISG, is according to studies<sup>80</sup>, well known and accepted in China, but nevertheless courts seem to tend to fail to justify the use of the CISG on correct grounds. The Chinese courts have applied the CISG to cases where the requirements of article 1 of the convention were not fulfilled, for example, CISG was applied to contracts where the other party had their place of business in Portugal, Japan and Korea<sup>81</sup>, countries which were not at the time parties to the CISG. In the cases where the Chinese courts applied the CISG, despite the fact that the contract in question did not fulfil the conditions laid out in article 1, they reasoned that the CISG should be applied since it covers contracts of international sales, but no further explanation was provided by the court why they decided to apply the CISG between parties that did not fulfil the requirements of the first article of the CISG.<sup>82</sup>

#### *1.2.1.2. Material scope of the CISG*

Another point where the Chinese courts evidently seem to struggle is the material scope of application of the CISG. The Chinese courts have managed to apply the convention in many instances where it could have been excluded based on article 2, for example, in a case concerning the sale of souvenir coins<sup>83</sup>, the court did not consider the fact that the sale of money is excluded from the CISG, nor did it present any argument why the souvenir coins should not be interpreted as money, but instead decided, without any consideration, that the CISG should be applicable.

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<sup>77</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 70.

<sup>78</sup> General Principles of Civil Law of the People's Republic of China (1986) Art. 142(2)

<sup>79</sup> Carl Hill v. Cixi Old Furniture Trade Co., Ltd, Cijingchuzi No. 560, Cixi Peoples Court, Zhejiang Province. 18.7.2001.

<sup>80</sup> Spagnolo, L. (2009) *supra nota* 9, p 135-136.

<sup>81</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 68.

<sup>82</sup> Nanjing Resources Group v. Tian An Insurance Co. Ltd., Nanjing Branch, Wu Hai Fa Shang Zi Di No. 91, Wuhan Maritime court, 10. 9.2002.

<sup>83</sup> China International economic and trade arbitration commission, Case CISG/2000/17. 2000.

The application of the CISG by the Chinese courts can be highly inconsistent, and they have in several cases applied the CISG based on false grounds, and this, of course, has given rise to certain uncertainties regarding the interpretation of the CISG in Chinese courts. This behaviour is also harmful to the international reputation of Chinese court practice, since it damages the credibility of the Chinese courts and the case law originating from Chinese courts, and furthermore it damages their credibility to apply the CISG correctly.

#### *1.2.1.3. Submission of evidence*

The domestic law influence can also be visible when it comes to the submission of evidence to the court, especially regarding evidence collected outside of China.<sup>84</sup> Article 11 of the provisions of the Supreme Court on evidence in civil proceedings, states that evidence that originates from outside of China, and is submitted to the Chinese courts, shall be proved authentic by the authorities of the country from where the evidence originates, and also by the Chinese embassy in that particular country, before the evidence can be admitted by the court.<sup>85</sup> The fact that one acquires the required authentication documentation, does not by itself guarantee that the court will value the foreign evidence equally to evidence originating from China since the other party can still challenge the credibility and authenticity of the foreign evidence.<sup>86</sup>

#### **1.2.2. Cultural influence**

Chinese law might not have a long history but Chinese culture, on the other hand, has a long history and despite the political changes in the country, the cultural values have remained and still exist today and are viewed as an important part of the Chinese system.<sup>87</sup> These values are also somewhat reflected into the way Chinese courts view certain aspects of a case, they might, for example, consider some things more important, elements that might be irrelevant if the case was tried before, for example, German courts. These might be certain cultural values or customs that are distinctive in Chinese court practise but are unfamiliar and hard to comprehend for individuals outside of China.<sup>88</sup> Values such as loyalty, respect for the elders and trustworthiness are very important in the Chinese society; another important value is the importance of the common good. The western

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<sup>84</sup> Yang, S, J. (2014). Application of CISG in PRC Court Practise: Tips and Pitfalls, 5-6 Accessible: <http://www.nysba.org/workarea/DownloadAsset.aspx?id=52712>, 20 of April 2018.

<sup>85</sup> Provisions of the Supreme People's Court on Evidence in Civil Proceedings (2002) Art. 11.

<sup>86</sup> Yang, S, J. (2014) *supra nota* 84, p 5-6.

<sup>87</sup> Rosen, A, L. (2013) *supra nota* 63, p 224.

<sup>88</sup> Rosen, A, L. (2013) *supra nota* 63, p 192.

influence on Chinese legislation has led to a political and legal reform of the Chinese legal thinking where western values have gained more influence, but this does not mean that values important in the Chinese society would not still be present in the reasoning of Chinese courts.

The principle of good faith is one of the underlying principles applied by the Chinese courts; it is used to fill gaps in the law and it is usually done in a way that promotes Chinese cultural values.<sup>89</sup> The difference, compared to for example Germany, is the contents of the principle of good faith, whereas in Germany the principle is used to protect individuals who acted in good faith, in China good faith also includes, for example, promoting the values and policies of the state.<sup>90</sup> Good faith is often used to promote collective interest, but the practical use of the principle of good faith is rather inconsistent in Chinese court practise, and there is no clear consensus by the Chinese courts on how this principle should be applied.<sup>91</sup>

### 1.2.3. Damages

The Chinese influence on the interpretation of the CISG is not as visible as the German, but on the point of damages and more specifically article 74 of the CISG, China has a big opportunity to influence the way this article is to be interpreted in the future<sup>92</sup>. This is due to the fact that damages are the most sought out remedy regarding the CISG in China<sup>93</sup>, and furthermore, China is the single largest contributor of case law concerning article 74 of the CISG.<sup>94</sup> Therefore it is important to understand how Chinese courts interpret article 74 of the CISG and furthermore if there is a visible trend in the way Chinese courts award damages. Is it, for example, more likely to be awarded damages in a case tried in a Chinese court than in one tried in a German court, or the other way around?

A study showed that Chinese courts, when awarding damages, take into account the nature of the case and especially the outcome of the case on the viewpoint of the society. The judges that took part in the study would change the outcome in a way that it would not cause instability or

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<sup>89</sup> DiMatteo, L, A. (2017) 'Rule of Law' in China: The Interaction of Freedom of Contract and Good Faith with Cultural Norms, p 54-55. Accessible: <https://ssrn.com/abstract=2994344>, 20 of April 2018.

<sup>90</sup> *Ibid.*, p 60.

<sup>91</sup> DiMatteo, L, A. (2017) *supra nota* 89, p 61-62.

<sup>92</sup> Kritzer, A, H. (2007). The Application and Interpretation of the CISG in Member States with Emphasis on Litigation and Arbitration in the P. R. China. - *International Law Review of Wuhan University*, Vol. 10, p 82.

<sup>93</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 93.

<sup>94</sup> Institute of International Commercial Law – Albert. H. Kritzer CISG database: Directory on the number of cases concerning article 74 CISG originating from China. Accessible: <http://www.cisg.law.pace.edu/cgi-0>, 20 of April 2018.

uncertainty in the society.<sup>95</sup> The research indicated that damages are lower when cultural and social values are taken into consideration by the court,<sup>96</sup> in other words, if the breaching party has nevertheless behaved according to cultural values, then the court is likely to award smaller damages. Social values that were taken into account by the judges in the research were, social orderliness, social egalitarianism and self-cultivation, but in the absence of these social values the damages awarded were usually higher.<sup>97</sup> It is, for example, apparent that a Chinese judge would not provide damages to a plaintiff in an amount that would bankrupt the defendant if the defendant would be an important employer in the society, since it would result in unemployment and it would be against the values and interest of the common good. The question on how much of this translates into actual case law is unclear, but it shows that Chinese judges take into consideration social values and are even sometimes ready to award damages in the manner that is more suitable for the whole society, rather than in the way intended by the law. The Chinese courts have, as a result of a large amount of case law regarding article 74, a huge potential to affect the way damages are awarded regarding the CISG.

Despite the research showing that Chinese judges were willing to decrease the number of damages awarded to the plaintiff in order to benefit the society, it cannot be clearly seen, at least so far, from decisions made by Chinese courts regarding damages. So far, the Chinese courts have followed the full compensation principle as intended by the CISG, where the grieving party can cover actual losses and any loss of profit caused by the breach as well.<sup>98</sup> Chinese courts have managed to follow the example and principle set out by the Federal Supreme Court of Germany in the “cheese case”<sup>99</sup> where the doctrine of foreseeability was applied.

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<sup>95</sup> Niu, Z. (2015). *The Law of Damages in Chinese Contract Law: A Comparative Study on Damages Calculation in Chinese Law, English law and the CISG, with Empirical Results from Chinese Practise*. (Doctoral Thesis) Tilburg University, Department of Private Law, Tilburg, p 173. Accessible: [https://pure.uvt.nl/portal/en/publications/the-law-of-damages-in-chinese-contract-law\(5cf00f1a-d259-4675-adee-3a39d4a671c6\).html](https://pure.uvt.nl/portal/en/publications/the-law-of-damages-in-chinese-contract-law(5cf00f1a-d259-4675-adee-3a39d4a671c6).html), 20 of April 2018.

<sup>96</sup> Niu, Z. (2015). *supra nota* 95, p 172.

<sup>97</sup> *Ibid.*, p 180.

<sup>98</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 93.

<sup>99</sup> Federal Supreme Court of Germany, Case VIII ZR 210/78, 24.10.1979.

## 2. COMPARATIVE ANALYSIS

Western law, and especially German law together with the CISG had a significant influence when China adopted their new contract law in 1999.<sup>100</sup> One could therefore presume that this would also transfer the western legal culture and traditions into the Chinese legal system, but this is not the case in every situation, and Chinese courts have established some of their own distinctive ways to interpret and apply the CISG, which can significantly differ, in some cases, from the way that, for example, the German courts interpret the CISG.<sup>101</sup> Chinese court decisions are not available in English in the same quantities as German court decisions, and as a consequence, it can cause some difficulties when analysing the differences between German and Chinese court decisions.<sup>102</sup> The facts used to analyse Chinese court behaviour are not usually based on the same quantity of cases as when analysing German court behaviour, but the available Chinese court decisions are still sufficient to reveal some key differences between the two respective countries, and furthermore it shows that even though, on some aspects, the interpretation by German courts can be drastically different from the way Chinese courts interpret the CISG, there are still several areas where the CISG is interpreted similarly or at least relatively similarly.

German courts have interpreted the CISG generally in the way that it was intended by the drafters, and they have also managed to contribute with a huge number of court decisions, of which several are considered landmark decisions and are often referenced to by other courts when they apply the CISG.<sup>103</sup> This is made possible by the fact that decisions rendered by German courts are usually clear and well-reasoned, and the judgements usually include a thorough explanation why a certain provision was applied.<sup>104</sup> Chinese courts, on the other hand, have made a habit of providing little explanation for why a certain provision was applied and why the court came to a particular conclusion.<sup>105</sup>

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<sup>100</sup> DiMatteo, L. A. Jingen, W (2016) *supra nota* 61, p 98.

<sup>101</sup> Liu, Q. Ren, X. (2017) *supra nota* 75, p 917.

<sup>102</sup> Neuman, T. (2012) *supra nota* 66, p 88-89.

<sup>103</sup> Ferrari, F. (2008) *supra nota* 2, p 143.

<sup>104</sup> DiMatteo, L. A. (2014) *supra nota* 4, p 600-601.

<sup>105</sup> Liu, Q. Ren, X. (2017) *supra nota* 75, p 917-918.

The other main difference is the ground for the application of the CISG, where the German courts apply the CISG correctly as intended by article 1(1), the Chinese courts, on the other hand, have sometimes had to resort to domestic law provisions to determine the applicability of the CISG.<sup>106</sup> This leads to the other main difference, which is the effect of domestic law provisions in the interpretation of the CISG. The Federal Supreme Court of Germany made a landmark decision in 1997,<sup>107</sup> which stated that the CISG shall be interpreted independently from domestic law, and this principle has been followed, and the decision has also been referred to in cases outside of Germany.<sup>108</sup> This has not however always been the case in Chinese courts, where the judges have managed to include domestic law provisions when applying the CISG, and this inclusion of domestic law provisions is done on a very inconsistent and unclear basis, where there is often no explanation why the domestic law was used instead of the CISG.<sup>109</sup> The use of domestic law and the application of the CISG through domestic law, rather than on the basis of the convention itself, are probably the two major differences when it comes to the interpretation of the CISG by courts in the respective countries.

There are, however, some other noticeable differences between the way that German courts and Chinese courts apply and interpret the CISG, they might not be as significant as the two mentioned earlier, but they still tend to show the fact that the CISG is applied differently by courts in the two respective countries. The effect of cultural influences is present especially in Chinese legal culture,<sup>110</sup> where, for example in damages, the courts might not always reward the correct amount of damages since it might result in an unfair situation that would not benefit the society.<sup>111</sup> This is not always however the case since in most cases, the Chinese courts follow the foreseeability rule and the principle of full compensation, the difference to German courts is often the methods used to come to the final conclusion.<sup>112</sup> The final decisions might be in line with the ones of the German courts, but the reasoning might differ significantly, or in many cases, the reasoning behind the judgement might be virtually non-existent.<sup>113</sup>

As a result of the inconsistent application of the CISG by Chinese courts, two major differences have emerged between the case law originating from German courts compared to the case law

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<sup>106</sup> Liu, Q. Ren, X. (2017) *supra nota* 75, p 881.

<sup>107</sup> Federal Supreme Court of Germany, Case VIII ZR 51/95, 3.9.1996, *supra nota* 44.

<sup>108</sup> *Ibid.*

<sup>109</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 69.

<sup>110</sup> Niu, Z. (2015) *supra nota* 95, p 172.

<sup>111</sup> Yang, S. J. (2014) *supra nota* 84, p 9.

<sup>112</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 93.

<sup>113</sup> Liu, Q. Ren, X. (2017) *supra nota* 75, p 917-918.

from Chinese courts. They are the; overall quality of the court decisions and the international recognition of the particular case law. German court decisions are often used by courts in other jurisdiction when interpreting CISG related cases and are often also referred to in scholarly writings regarding the CISG.<sup>114</sup> Chinese court decisions have however not been used, in other jurisdictions, in the same amounts as German decisions have been.<sup>115</sup> Therefore, decisions of Chinese courts have had much less effect on the overall interpretation of the CISG than court decisions from German courts. This can however change in the future because of the fact that there are more and more cases originating from Chinese courts, and also the number on scholarly writings about the CISG in the Chinese language has increased at the same pace as the amount of case law in the past ten years.<sup>116</sup>

## **2.1. Conclusion on the past interpretation of the CISG by German courts**

The German courts have for a long time dominated the publicly available case law, which has resulted in the situation where the majority of the important case law, regarding the CISG that is referred to by other courts, usually originates from the Federal Supreme Court of Germany.<sup>117</sup> This has provided German courts with an extraordinary chance to influence the interpretation of the CISG and therefore the importance of case law originating from German courts cannot be overlooked. The German courts have followed the intention of the convention when interpreting the CISG and have, as a consequence, issued several landmark decisions that establish the international character of the CISG.<sup>118</sup> The German courts have provided clear and justified decisions that are based on the provisions of the CISG and are not influenced by German domestic law provisions or methods. As seen, the German case law has had an effect on the interpretation of several important areas of the CISG, such as the foreseeability rule regarding damages, and the principle of avoidance.<sup>119</sup> This has made German court decisions regarding the CISG respected in other jurisdictions and has,<sup>120</sup> as a result, had an enormous effect on the uniform interpretation of the CISG. The outstanding work done by the German courts is reflected by the fact that they have managed to implement methods that exist both in German law, and the CISG, separately. They

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<sup>114</sup> DiMatteo, L. A. (2014) *supra nota* 4, p 600-601.

<sup>115</sup> *Ibid.*, p 600.

<sup>116</sup> Ferrari, F. (2008) *supra nota* 2, p 74.

<sup>117</sup> DiMatteo, L. A. (2014) *supra nota* 4, p 600-601.

<sup>118</sup> *Ibid.*, p 600.

<sup>119</sup> Federal Supreme Court of Germany, Case VIII ZR 210/78, 24.10.1979, *supra nota* 53.

<sup>120</sup> DiMatteo, L. A. (2014) *supra nota* 4, p 600.

have managed to apply the methods that are used in the CISG, but are originally derived from German law, separately from the domestic law interpretation. For example, the *nachfrist* principle is interpreted and applied differently in cases that are governed by German domestic law than it is in cases governed by the CISG. The ability to separate domestic law from the CISG, despite the fact that some methods and provisions are similar, is important for the future of the CISG, and this follows the decision by the Federal Supreme Court of Germany, that the CISG is separate from German domestic law.<sup>121</sup> Without the contributions of the German courts the CISG might be interpreted in a different way than it is today, because if Germany would not be a party to the CISG, then the number of case law available would be significantly smaller than it is today.

## **2.2. Conclusion on the past interpretation of the CISG by Chinese courts**

The Chinese courts have not contributed to the interpretation in the same manner as the German courts have, despite the fact that the two countries have issued almost the same number of cases regarding the CISG. The Chinese courts have not made any clear contribution to the interpretation, despite the fact that it would have had an enormous potential to do so, but instead the Chinese courts have managed to establish an inconsistent way of interpreting the CISG which is not sustainable for the future development of the CISG. Chinese courts have failed to take into consideration the decision by the Federal Supreme Court of Germany, regarding the uniform interpretation of the CISG, that it should be interpreted and applied separately from domestic law. Instead, the Chinese courts have applied the CISG jointly and separately with domestic law, and in cases where the CISG should not even have been applied in the first place.<sup>122</sup> This is probably mostly due to the fact that Chinese judges are unfamiliar with the CISG, which is a result of the lack of scholarly writings regarding the CISG in the Chinese language, and furthermore, of the lack of translated case law, for example, German case law. The fact that China is a pro CISG country does not automatically mean that the CISG would be applied correctly, the fact that the majority of lawyers have come in contact with the CISG does not automatically mean that they are able to apply it correctly, and furthermore, it is not enough that only the lawyers are familiar with the CISG, but it is essential that also the judges are familiar with the CISG in order for the Chinese courts to be able to issue uniform and consistent judgments.

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<sup>121</sup> Federal Supreme Court of Germany, Case VIII ZR 51/95, 3.9.1996, *supra nota* 44.

<sup>122</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 70.

The fact that German courts have had much more influence on the interpretation of the CISG in the past does not however mean that the Chinese courts could not improve their position in the future and begin to issue clear and well-reasoned case law, which would inevitably influence the interpretation of the CISG in the future. Chinese case law suffers from the lack of international acknowledgment and this will remain a huge obstacle that the Chinese must overcome before they can begin to influence the CISG in the same manner as the German courts have done, since as long as Chinese court decisions are not used by other courts in other jurisdictions, then their influence will be minimal, but as soon as they obtain international recognition, then they can start to influence the way that the CISG is interpreted globally. China's increased possibility to influence the future interpretation is evident and will be discussed further in the next chapter.

### 3. FUTURE INTERPRETATION OF THE CISG

The CISG has been and will remain an important convention regarding international trade, and in the rapidly globalising world, it is crucial that also the CISG continues to develop, and further clarification regarding the provisions is established in order to make the convention more clear and easier to apply. The rising number of case law originating from China together with the growing number of scholarly writings in Chinese language might not by themselves provide the Chinese courts with a superior position to influence the interpretation of the CISG, but the Chinese courts have an immense opportunity to improve their position when it comes to the further formation of the interpretation of the CISG. German courts will continue to play an important role regarding the future interpretation of the CISG, but unlike China, German courts will most likely have less influence than they have had before, due to the fact that case law originating from other jurisdictions have gained more influence over the years. Therefore, this chapter will mostly focus on China's opportunity to influence the future interpretation of the CISG, since they have more room to improve their reputation regarding the quality and consistency of the case law than the German courts have, since German courts already have a reputation as an institution capable of issuing well-reasoned and justified case law on a consistent basis.

The crucial factor that provides the Chinese courts with more responsibilities in interpreting the CISG is the fact that China is a great economic power in the world and a lot of trade agreements are concluded with Chinese sellers, and as a consequence, this provides China with an opportunity to promote the application of the CISG. A good example is trade with the United States, a country where lawyers usually decide to opt out of the sphere of application of the CISG.<sup>123</sup> China is the United States' single largest trading partner,<sup>124</sup> and this provides China with an opportunity to promote the application of the CISG when trading with U.S. companies. Parties from the United States have been fairly reluctant to use the CISG and often opt-out from it, and instead apply, for example, the universal commercial code of the United States (U.C.C.) since the lawyers claim that

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<sup>123</sup> Koehler, M, F. Yujun, G. (2008). The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems. – *Pace International Law Review*, Vol. 20, p 48.

<sup>124</sup> Office of the United States Trade Representative. – US. – China trade facts. Accessible: <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china>. 20 of April 2018.

they feel more comfortable in using the U.C.C. than the CISG since they are more familiar with the U.C.C.<sup>125</sup> The fact that China has a strong economic position when it comes to trade with the United States provides China with an opportunity to use this enormous bargaining power to try to persuade the application of the CISG more often in contracts between Chinese and U.S. parties.<sup>126</sup>

The trade between the U.S. and China has come under scrutiny under the Trump administration and the U.S. has threatened to impose hefty tariffs on Chinese imports, such as consumer electronics.<sup>127</sup> This development can have an effect on the overall trade between the U.S. and China and it will possibly reduce the U.S. dependency on Chinese products that will, most likely, in addition, lessen China's bargaining power when it comes to trade with the United States.

This development places a lot of responsibility on Chinese courts in order to improve the reputation of the CISG among U.S. companies, since if they cannot use their economic bargaining power to the same extent as before, then the Chinese courts must make other adjustments which include adjustments in the way they interpret the CISG.

### **3.1. The role of German courts**

German case law will also play an important role in the further forming of the interpretation of the CISG since the German courts provide detailed explanations why certain provisions are used, and these decisions are also respected worldwide.<sup>128</sup> Case law from German courts might not have the same dominant position that they have enjoyed the past 25 years since case law from other jurisdictions has increased and also gained more influence, but Germany still remains, together with China; the single largest contributor of CISG related case law.<sup>129</sup> Therefore, German case law regarding the CISG will continue to play an important and influential role when it comes to the future interpretation of the CISG, and German courts will have a continued opportunity to affect the future interpretation of the CISG.

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<sup>125</sup> Coyle, J. F. (2016). The Role of the CISG in U.S. Contract Practice: An Empirical Study. – *University of Pennsylvania Journal of International Law*, Vol. 38, No. 1, p 208.

<sup>126</sup> Spagnolo, L. (2009) *supra nota* 9, p 149-150.

<sup>127</sup> Jennings, R. (2018). What Imports are at Risk When It Comes to Trump's Looming Tariffs on China? – *Forbes*. 27 March. Accessible: <https://www.forbes.com/sites/ralphjennings/2018/03/27/tech-tires-and-more-at-risk-as-trump-plans-trade-tariffs-against-china/#6cf35666a7b73>. 20 of April 2018.

<sup>128</sup> DiMatteo, L. A. (2014) *supra nota* 4, p 600.

<sup>129</sup> Institute of International Commercial Law – Albert. H. Kritzer CISG database, *supra nota* 7.

### 3.2. The role of Chinese courts

As mentioned earlier Chinese courts have a tendency, in certain instances, to issue unclear decisions with little explanation on why this conclusion was reached. This, in other words, means that case law from China is somewhat useless for future use if there is no explanation on why a provision was used in the particular situation. This might, however, change in the future since there are more and more scholarly writings in Chinese, and case law from other jurisdictions is also more easily accessible and available in the Chinese language than it was in the past.<sup>130</sup> Furthermore, many of the scholarly writings that are translated into Chinese are scholarly writings of western scholars that often also refer to, for example, German case law in their writings.<sup>131</sup> The use of scholarly writings of scholars from European countries, that have a reputation of interpreting the CISG as intended, might promote the ideology used by, for example, German courts in the future reasoning of Chinese courts regarding the CISG. There is already evidence that the Chinese courts are issuing more detailed and justified decisions regarding cases governed by the CISG, which shows that the development is heading in the right direction.<sup>132</sup>

The CISG still has many areas that need further clarification, and Chinese courts have an immense possibility to contribute to this development, a good example is article 74 of the CISG. China is, as said, the biggest contributor of case law regarding article 74, which means that the possibilities around creating further clarification around damages are immense for Chinese courts.<sup>133</sup> This is not however possible if Chinese cultural values have a possibility to affect the final decisions of the courts and, furthermore, as a consequence Chinese court decisions which include cultural influences will most likely be disregarded since they are not compliant with article 7 of the CISG. This would be unfortunate and unnecessary since case law regarding article 74 is important in the further forming of the interpretation of the CISG. This requires that Chinese courts start, in the future, to clarify the use of particular provisions in their judgements and that they use methods that can be understood by courts in other jurisdictions. The fact that China produces a significant portion of the CISG related case law does not by itself provide them the possibility to influence the future interpretation of the CISG, especially as long as the judgements, issued by Chinese courts, do not provide proper and detailed analysis on why they reached a certain conclusion in a

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<sup>130</sup> Ferrari, F. (2008) *supra nota* 2, p 74.

<sup>131</sup> *Ibid.*, p 73.

<sup>132</sup> *Ibid.*, p 78.

<sup>133</sup> Yongping, X. Weidi, L. (2008) *supra nota* 65, p 93.

certain case. It is also in everyone's best interest that Chinese courts issue more detailed and well-reasoned judgements in the future, since more available and well-reasoned case law contributes to the further interpretation of the CISG, and it would be a shame to waste a majority of the case law from Chinese courts only because they are poorly reasoned since the Chinese courts do not have the proper materials available to them in order to make more reasoned and justified judgements. Because as long as the judgements originating from Chinese courts are influenced by domestic law, and are poorly justified, they will be overlooked by other courts, and as a result, they will have minimum impact on the overall interpretation of the CISG.

China's economic power that inevitably creates more contracts between Chinese and partners from other countries does not automatically imply that the amount of CISG related case law would increase, even though the number of contracts governed by the CISG would rise. This is because most western companies tend to opt for arbitration, more specifically CIETAC, in case of a dispute over the contract.<sup>134</sup> Arbitration awards are often not published and therefore this would not help the development of the CISG, and it would also diminish China's chances of influencing the future interpretation of the CISG. If parties continue to opt for arbitration instead of litigation, then fewer cases will be made public, and consequently, Chinese courts will not attain any increased possibility to influence the future interpretation of the CISG. This trend can be diverted by the fact that Chinese courts would, in the future, start to issue clear and well-reasoned decisions, that are compliant with article 7 of the CISG, and not influenced or merged together with domestic law provisions. In addition, the use of case law and scholarly writings from other jurisdictions will help to improve the reputation of the Chinese case law and help to build trust in the Chinese court system and in their ability to render convincing decisions that are consistent with court decisions from other jurisdictions. As a consequence, Chinese courts would then, most likely, issue more accurate and practical case law that is then published, which in the future can provide assistance to the interpretation of the CISG in courts around the world.

As said, the fact that Chinese courts have in some instances issued unclear and poorly reasoned case law has also an effect on the international reputation on the case law originating from China, but this does not mean that every court decision from Chinese courts would be poor and influenced by domestic law.<sup>135</sup> Many of the decisions are well reasoned and justified, but the big problem is the inconsistency in these decisions, and as long as this inconsistency exists, it will be hard for Chinese courts to improve their reputation. By eliminating this inconstant behaviour, when it

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<sup>134</sup> Kritzer, A. H. (2007) *supra nota* 92, p 83-84.

<sup>135</sup> Ferrari, F. (2008) *supra nota* 2, p 78.

comes to the quality of CISG related case law, the Chinese courts will have a much better opportunity to influence the overall interpretation of the CISG. This is supported by the fact that more case law and scholarly writings are available in Chinese than ever before,<sup>136</sup> which will surely have an impact on the development of more consistent CISG related case law. After the Chinese courts have achieved a consistent way of interpreting the CISG, then it will also gain more trust among foreign entities, which will most likely make the use of public courts more lucrative than they were before. If the Chinese succeed in implementing the required changes, then they will have an opportunity to affect the future interpretation of the CISG on a much larger scale than they have done so far.

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<sup>136</sup> Ferrari, F. (2008) *supra nota* 2, p 74.

## 4. CONCLUSION

German case law, regarding the CISG, has had an enormous effect on the overall interpretation of the CISG and it will continue to have an important role also in the future. The German courts' ability to issue clear and well-reasoned case law, that is not influenced by domestic law, has been and will remain the most distinctive part when it comes to German case law. The CISG requires clear and well-reasoned case law in order to further develop and explain specific provisions in the future. The German courts have been able to distinguish between domestic law and the CISG when deciding cases, and have, unlike in China, abstained from mixing the two together and this has resulted in the creation of thorough, well-reasoned and consistent case law that is necessary for the interpretation and further development of the CISG.

The German courts might, in the future, not be as dominant as they have been over the past 25 years in issuing CISG related case law, but they will nevertheless remain an important source of high-quality case law since Germany still remains the biggest contributor of CISG related case law, together with China, which as a result provides German courts with a great opportunity to continue to influence the development of the uniform interpretation of the CISG.

Chinese courts have had an enormous chance to influence the future interpretation of the CISG, but so far, the Chinese courts have, however, failed to seize this opportunity. This has been due to the fact that in the past Chinese courts have not issued clear and consistent judgements, and this has been and will remain, an obstacle that they must overcome before they can genuinely start to influence the future interpretation of the CISG. China's ability to contribute to the interpretation of the CISG on the global scale will remain limited as long as Chinese court decisions, regarding the CISG, are influenced by domestic law or the decisions lack clear justification on why a certain provision was used. Chinese court decisions will be overlooked as long as this trend continues, but the elements for an improvement are visible. The possibilities for Chinese courts to issue more detailed and uniform decisions are higher than before, thanks to the rising amount of translated case law and scholarly writings regarding the CISG. The future improvement regarding the quality of Chinese case law is also supported by the fact that China is a pro CISG country, which means that Chinese entities do usually not opt out from the CISG and as a result China has an opportunity

to attain more influence on the global stage regarding the future interpretation of the CISG. This development, together with China's economic strength, further provides Chinese companies with big bargaining power when it comes to the choice of the applicable law regarding international contracts.

The inconsistent interpretation has resulted in the situation where Chinese case law regarding the CISG has not had nearly as much influence on the interpretation of the CISG as it could have had, and it has a long way to go before it attains the same influence as German case law has had on the CISG. The role of German courts will remain significant in the future because they still remain the biggest contributor of CISG related case law, together with China, by far, the difference in the future will be the fact that the CISG will not anymore be as reliant as before on German case law. China will have a huge opportunity to influence the future interpretation of the CISG, and it is also in China's and everyone's interest that China starts issuing case law that is compliant with the CISG and article 7. Otherwise, case law regarding the CISG originating from China will remain insignificant and the reputation of the Chinese court system will not improve, which will inevitably result in a situation where most of the cases will be solved in arbitration, and those decisions are seldom made public. This trend is not sustainable since the CISG requires more case law in order to improve its uniform application globally, and if cases are not made public then the improvement of the future interpretation stops. This will require action from the Chinese and they need to become more acquainted with the CISG, especially judges, and they must start using foreign case law as references in their judgements and, furthermore, their judgements must be more detailed and justified in order to make the Chinese case law regarding the CISG usable for courts in other jurisdictions. Chinese courts need to attain more respect and acknowledgement as an institution that is capable of issuing accurate and justified judgements in order promote the use of Chinese public courts.

The Chinese courts have an enormous potential to influence the interpretation of the CISG in a manner that they have so far failed to do, but this requires some adjustments in their methods of applying the CISG. If the Chinese courts manage to implement the required changes they will have possibilities to influence the future interpretation of the CISG in the same manner as the German courts have done in the past 25 years.

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