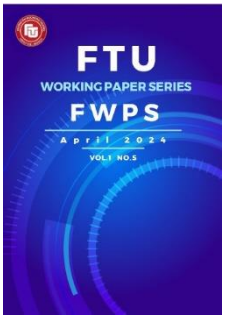

Working Paper 2024.1.5.10
- Vol. 1, No. 5

CISG EXCLUSION DURING LEGAL PROCEEDINGS: A COMPARATIVE PERSPECTIVE FROM THE US AND CHINA AND LEARNING EXPERIENCES FOR VIETNAM ENTERPRISES

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ABSTRACT

The Vienna Convention was established to help resolve differences in national laws in disputes related to sales contracts, aiming for transparency and fairness. However, in practice there are still cases where parties want to exclude the CISG based on the flexibility in Article 6 that allows CISG exclusion. However, this article does not provide any guidance for valid exclusions, causing confusion in the understanding and application of it, leading to undesirable results. During legal proceedings when exclusion becomes ambiguous, many courts have taken advantage of this loophole to exclude despite unsatisfied requirements. This act is considered a violation of general principles of international justice. Understanding this issue, research was conducted to provide a legal basis for excluding CISG during legal proceedings, comparing practice in the US and China - two representatives of civil law and common law to draw lessons for Vietnamese enterprises to protect their rights. The research applies methods of analyzing and synthesizing documents, case study method, comparative law.

Keywords: article 6 CISG, CISG exclusion, choice-of-law clause, homeward trend, non-plead based on CISG

VẤN ĐỀ LOẠI TRỪ CÔNG ƯỚC VIÊN VỚI TƯ CÁCH LUẬT ÁP DỤNG RA KHỎI HỢP ĐỒNG MUA BÁN HÀNG HÓA QUỐC TẾ: GÓC NHÌN SO SÁNH TỪ HOA KỲ VÀ TRUNG QUỐC VÀ BÀI HỌC KINH NGHIỆM CHO CÁC DOANH NGHIỆP VIỆT NAM

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Tóm tắt

Công ước Viên ra đời giúp giải quyết sự khác biệt về pháp luật các quốc gia trong tranh chấp liên quan đến hợp đồng mua bán hàng hóa, hướng đến sự minh bạch và công bằng. Dù vậy, trên thực tế vẫn có trường hợp các bên muốn loại trừ CISG nhờ vào tính linh hoạt ở Điều 6 cho phép loại trừ CISG. Tuy nhiên, điều khoản này không cung cấp bất kỳ hướng dẫn nào để việc loại trừ hợp lệ, gây ra sự nhầm lẫn trong việc hiểu và áp dụng Điều 6, dẫn đến kết quả không mong muốn. Đặc biệt, trong tố tụng khi việc loại trừ trở nên mơ hồ, nhiều tòa án đã lợi dụng khoảng hở này để loại trừ dù một số điều kiện không thỏa mãn theo Điều 6. Hành vi này được xem là vi phạm nguyên tắc chung của tư pháp quốc tế. Hiểu được điều này, nghiên cứu được thực hiện nhằm giúp cung cấp cơ sở pháp lý loại trừ CISG trong tố tụng, so sánh thực tiễn áp dụng tại Mỹ và Trung Quốc – hai đại diện cho dân luật và thông luật để rút ra bài học cho doanh nghiệp Việt Nam, giúp họ bảo vệ quyền lợi của mình. Bài nghiên cứu áp dụng các phương pháp phân tích và tổng hợp tài liệu, case study, luật học so sánh nhằm đưa ra tương quan giữa các hệ thống luật khi tranh chấp về loại trừ CISG xảy ra ở tòa án Mĩ và Trung Quốc

Từ khóa: Điều 6 CISG, điều khoản chọn luật, loại trừ CISG, hành vi không tranh luận, xu hướng homeward.

1. Introduction

In today's economic development environment, international trade serves as a bridge for trade between countries because it contributes greatly to national development. Increased transaction volumes have made international trade more volatile and potentially hazardous. Specifically, when the parties have a dispute, the potential risk is that the various legal frameworks of those countries will influence the ultimate determination of the issue. That demonstrates the importance of having a comprehensive framework of international private law to govern contracts for the sale of goods, such as the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). However, the implementation of CISG does not appear to be particularly prevalent because many people purposefully ignore or are even unaware that CISG is in effect. That deliberately violates the CISG principles since in many cases, the Courts rely on vagueness and implicit exclusion to diverge from the original responsibilities committed when signing the CISG, resulting in them prioritizing the application of national law and the final dispute resolution being biased. As a result, studying how to successfully exclude the CISG during legal proceedings using typical examples in two countries representing civil law, China, and common law, the United States, is essential to understand the process of exclusion, the role of legal representatives and courts, and whether the parties have a genuine intention to exclude or whether there is implicit manipulation. With the topic "A comparative perspective from the US and China and learning experiences for Vietnam enterprises", the authors will clarify and deepen issues related to the exclusion of the CISG during proceedings to help Vietnamese enterprises have a more general view of exclusion and what conditions need to be satisfied for exclusion to be successful during legal proceedings. Besides, a parallel comparison of the two countries is also conducted to identify similarities, differences, and trends in their approaches, delivering a more comprehensive view of the subject.

2. General theory

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a multilateral treaty that sets a uniform legal regime for cross-border sales of goods contracts. This Convention plays a critical role in promoting international trade as it establishes a modern, standard, and equitable environment.

Even though CISG is recommended for a wide area in international commercial contracts, it allows the parties to opt out of its application and choose a different legal framework for their contract through Art.6: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions". This practice is called CISG exclusion, which is based on its dispositive nature to preserve the basic principle of party autonomy[2].

Contracting parties have the right to exclude at many stages of their legal relationship, including ex-ante (in the contracting period) and ex-post (during the legal proceedings) (Malgorzata, 2023). Different approaches are needed to exclude CISG in different stages. Different from the former which consist of exclusion ways in contract, CISG exclusion during legal proceedings has many other ways that enterprises can exclude by oral, writing or even implicit way. Because Art 6 does not provide any instructions for contracting parties to exclude valid CISG. Due to its implicitness and ambiguity, whether an exclusionary act is considered valid or not depends on the approach of the country's legal system and the practices of the judicial authority in that country, making CISG exclusion during legal proceedings unpredictable and risky for enterprises.

3. Legal issues arising around CISG exclusion during legal proceedings: Perspectives from the CISG drafting committee, scholars, judicial bodies and judicial practices in the US and China

3.1. Homeward Trend as a Manipulation of CISG Exclusion

The "homeward trend" describes the tendency of the courts to apply their domestic laws to CISG provisions (Ferrari, 2009). This bias in judicial outcomes undermines CISG's purpose, as highlighted in CISG Official and Advisory Council opinion no. 16.

3.1.1. The Homeward Trend's false approach on the principle of good faith of the contracting parties and the autonomous interpretation to CISG exclusion

The homeward trend actually violates Article 8 of the CISG which states that the intent of the parties to exclude the CISG must be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter, and that such intent should be determined "autonomously" in accordance with Article 8 CISG, not by domestic rules or presumptions (Spagnolo, 2014). Unfortunately, courts can regrettably adopt 'nationalistic' interpretations without sufficient justification from legislative history (Ferrari, 2017). One reasonable explanation for this problem might be the parochialism (Rockwell, 1992) under the cover of the homeward trend: They might have forgotten the initial aim of CISG to deprive the collective signatories of the predictability and reliability of law which it was meant to create (Larson, 1996).

Another problem is the failure of certain courts to acknowledge Article 6 in excluding the CISG. The limited understanding, lack of experience, or a discomfort-driven instinct (Zeller, 2021) prompt

[2] Party autonomy principle: the parties to an international contract have the freedom to determine the applicable law to govern their dispute

the courts to adopt a more familiar approach on the basis of domestic law even though any implied exclusion must align with the regulations present in the CISG, specifically whether the parties intended to exclude its application, as assessed under Article 8. However, Article 27 of CISG already explicitly declares that a party cannot cite the provisions of its domestic law as a valid reason for not fulfilling the obligations as non-mandatory law. A mere assertion like "In the absence of a specific provision in the CISG" does not constitute an explicit or implicit exclusion of the CISG. If the parties intend to exclude its application, such exclusion is deemed valid only when adhering to the provisions outlined in Articles 6, 11, 14-24, or else, the court should look for Art 4(a). It is crucial to note that merely opting for a choice of law does not automatically result in the exclusion of the CISG because the CISG is inherently integrated into the legal framework of Contracting States, and any decisions made outside this system are typically regarded as foreign (Zeller, 2021). It is also stated undoubtedly in the Comment that "Reference to domestic laws alone during proceedings is not per se indicative of agreement to exclude CISG". In such instances, there is often insufficient evidence for the court to take such actions, as the highest prioritization should be the parties' intent in each case.

3.1.2. The Homeward trend's false approach on the moving towards the CISG ultimate purpose of international law uniformity

The homeward trend disrupts the uniformity and consistency of the CISG, which are required by Article 7 of the CISG. Hence, CISG should not be interpreted as an independent and self-contained body of law that reflects the common understanding and expectations of the parties from different legal systems and cultures. However, CISG naturally does not comprehensively address all aspects of the law governing international sales contracts, leaving certain matters without explicit resolution. Rather, the CISG offers a mechanism for filling gaps, necessitating reliance on the overarching principles of the CISG or, if those are absent, turning to the law determined by the rules of private international law. A majority of courts might overlook this essential by raising two main prevailing types of homeward trend bias: (1) Interpret the gaps in the CISG extensively; or (2) Supplement them with non-uniform rules derived from domestic law (Smythe, 2016). Many scholars disapprove of this approach, contending that general principles are used to address internal gaps without resorting to domestic law (Zeller, 2021). In another view point, domestic rules instruct the court to uphold the international commitments of the Contracting State under the CISG (Spagnolo, 2014). Professor Eorsi (1984) also noted that the principles of CISG emphasizing the international nature of the Convention and the need for uniform application to serve 2 important purposes: first, to counteract the inclination towards applying domestic laws (homeward trend), and second, to encourage adherence to international precedents. In this way, Art 7 must be presented for the "autonomy" not "nationality" of CISG.

3.1.3. The Homeward trend's false approach on applying Private International Rules

Given that the CISG is essentially a substantive law treaty without establishing any rules of private international law, the term "private international law" (PIL) in Articles 7(2) of the CISG should be interpreted as a mention of the forum's private international law (Torsello, 2022). The PIL rules of the forum may be either merely the domestic PIL rules or uniform PIL rules embodied in an international agreement (convention) or any other international act of a regional nature (Pohl-Michałek, 2020).

Many scholars disagree with the act of disguising CISG exclusion as the Homeward trend. DiMatteo (2003) suggests 4 levels of CISG's interpretive methodology where the third approach is

PIL and the last resort is domestic sales law without any disguise as the homeward trend (remind that these are only the third and the last approach when the court is unable to proceed case law under CISG). This hierarchy of prioritization during the analogical reason for using or excluding any governmental laws for the contract would clear the heavy fog surrounding the boundary of homeward trend and the PIL rule: Homeward trend refers to the tendency of courts and arbitrators to interpret and apply the CISG in light of their own domestic laws and legal traditions, while the PIL rules refer to determine the applicable law in the absence of the CISG or its general principles. Even though both of them do not necessarily lead to CISG exclusion, only the homeward trend can indicate a lack of uniform and autonomous interpretation of the CISG. To summarize, the Council Advisory recommends that dispute settlement bodies adopt a disciplined approach to gain a comprehensive understanding of the parties' intent, which is prioritized highly in every case:

(1)Examine whether there was an establishment of an agreement to exclude CISG's application in case of Contracting States or non-Contracting states once the contract is prima facie governed by the CISG by virtue of Art. 1.

(2)Examine whether the incorporation of the clause aimed at excluding the CISG is aligning with the stipulations set forth in Articles 11, 14-24 (not determine the applicable contract law by virtue of conflict rules).

(3)As PIL rules which primarily address conflicts of laws, it guides the next step of the determination of which other national law governs a particular international contract.

Vietnamese enterprises operating in foreign countries should take note of the potential implications of the homeward trend in court proceedings in case of unfavorable outcomes that may not align with the intended purpose of CISG, potentially affecting the rights and obligations of parties involved in cross-border contracts. Therefore, the authors recommend exercise caution and professional legal advice when entering into contracts governed by international treaties to ensure a clear understanding of their rights and responsibilities under such agreements, irrespective of the tendencies of local courts to apply domestic laws in their interpretation of these treaties. Additionally, they should be proactive in ensuring that any exclusions or inclusions of international laws like the CISG in their contracts are done in accordance with the specific requirements outlined in the relevant treaty, rather than being influenced solely by domestic legal principles. By doing so, Vietnamese enterprises can better protect their interests and mitigate the risks associated with the homeward trend in international court proceedings.

3.2. Intent consideration for the validity of implicit CISG exclusion

3.2.1. Subjective intent consideration: Intention of parties in party autonomy

Moreover, the parties' intent also relates to the party autonomy and choice of law clause which are determinants of a clear and real intent leading to a successful implicitly CISG exclusion. The true intent of the parties must either be made clear in an explicit or implicit agreement between the parties, or the other party must have known or been aware of such an intent, in order to exclude the application of the Convention implicitly by selecting the law of a non-Contracting State with required condition to govern the contract. Such intent is considered to be 'common', or 'clearly implied in fact', or 'certain', 'real—as opposed to theoretical or factious', or 'tangible intent rather than hypothetical intent' (Małgorzata Pohl-Michałek, 2023).

Specifically, the Contract Law of the People's Republic of China, 1999, states in Sentence 1 of Paragraph (1) that "The parties to a contract containing a foreign element may choose the law applicable to the settlement of contractual disputes, except as otherwise stipulated by law." This clause is almost exactly the same as paragraph (1) of Article 145 of the General Principles of Civil Law of the People's Republic of China, which was formulated on April 12, 1986, and went into effect on January 1, 1987. Both acknowledge that the fundamental guideline for selecting the appropriate law of a contract is the principle of party autonomy. On the other hand, in the United States, both explicit and implied exclusion may be made by the parties under the UCC, subject to specific restrictions. Stated differently, it is imperative to interpret and enforce exclusions in a reasonable manner. By doing this, it can prevent the unreasonableness that could lead the court to declare the exclusion clause unconstitutional.

3.2.2. Understanding of the third party interpretation for determination of implicit CISG exclusion: Principle of predictability and principle of separability in interpreting subjective intent

CISG art. 8(2) states that in cases where the court is unable to ascertain the parties' subjective intent, it shall interpret the parties' conduct and words in a way that would be reasonable given the circumstances. This has been described as an unbiased interpretation of the parties' intentions, sometimes known as a normative or presumptive intent. As far as the author mentioned in the above part, the interpretation of the reasonable person's understanding is subject to interpretation, as per article 8 (1), taking into account the relevant details of the case, such as the parties' conduct, usages, and negotiations; see also art. 8 (3). Given the phrasing, context, parties' interests, and the good faith standard, the statements made by the parties should be construed in accordance with their reasonable meaning. For instance, this should take precedence if the parties choose the law based on its particular applicability to the contract (Albrektsen, A. T.; 2020). However, a simple disregard for the applicable law cannot be regarded as an implied exclusion.

Albrektsen, A. T. (2020) claims given that the purpose of a contract is to resolve the rights and obligations between the parties, the significance of the parties' intentions becomes even more evident. The parties are responsible for applying and interpreting the contract, so the courts will only get involved in deciding what the parties agree upon in the event of a dispute. An interpretation that aligns with the parties' intent appears clear when analyzing the purpose of the contract clauses. Therefore, it is very difficult for the courts, arbitral awards and also the other parties to prove the exact intent of each other. In order for the other party to act in a way that aligns with the other party's aim, the intent must be made evident in some way. It must be possible for the parties to anticipate their own rights and responsibilities under the terms of the agreement. Thus, it is possible to regard the interpretation guidelines in article 8 (1) as being predicated on the principle of predictability for the parties. Moreover, according to Art. 8(2), the intention to be bound must be objectively determined and cannot be "rashly" asserted (Schwenzer & Hachem; 2010).

Although CISG exclusion during legal proceedings is not mentioned as an official classification, except for the latest study of Małgorzata (2023), many scholars do mention some conduct of exclusion that can occur in this stage including: Modification choice-of-law clause in original contract and non-plead act based on CISG. Different exclusion actions will have different requirements to determine validity, making the issue of interpretation and recognition of CISG exclusion by judicial authorities more complex and challenging.

Generally, there are two approaches for the intent of parties according to two separate schools of thought: civil law and common law. Civil law countries aim to understand the true will of the parties which can be considered as subjective intent, while common law countries attach more importance to the words of the contract itself than the will of the parties which will depend mostly on the third parties' intent such as lawyer or judicial agencies. To deep dive more in this research under comparative analysis, the authors take Chinese law as a representative of civil law and US law as a replacement for common law. Implicit exclusion of CISG can be valid only when parties achieve a high level of intent and conduct. There are two kinds of intent of parties which will be considered for the validity of implicit exclusion: subjective intent and objective intent.

3.3. Modification in choice of law clause during legal proceedings

3.3.1 Possible scenarios when the two parties want to exclude CISG

During legal proceedings, the exclusion by choice of law clause seems to be much more complicated in the validity of the offer and the corresponding acceptance to make the exclusion agreement valid. According to Małgorzata (2023), when it comes to the exclusion during legal proceedings by modification of the contract, the contracting parties can exclude by meeting the following criteria:

(1) Only when the exclusion is permitted under the specific procedural law of the *lex fori* [3].

(2) The parties must both have an intent to reach a settlement to exclude.

Thereafter, a valid exclusion that meets the requirements of Articles 6, 11, 14 - 24, and 29 of the CISG must result in a mutually acceptable and conforming agreement, or an agreement to modify the prior agreement.

In her research, Małgorzata (2023) also concluded that there might be at least two scenarios that will happen:

Scenario 1: If there is no choice of law clause between the parties and the Convention applies *ex officio* following Article 1(1) (a) or 1(1) (b), an agreement to exclude must satisfy the conditions of a valid offer and corresponding acceptance, which is to say, Articles 14 - 24 CISG, respectively;

Scenario 2: If the parties have already made a choice of law clause, they must modify the contract which complies with Article 29 of the CISG if they intend to exclude the Convention from any existing agreement regarding the choice of law clause, which makes the CISG applicable.

3.3.2. Validity of the offer or the corresponding acceptance to modify the contract

3.3.2.1. Validity of the offer and the corresponding acceptance to modify the contract under the CISG

In terms of the validity of the offer or acceptance, according to Article 18(1) of the CISG, the Convention clarifies that an offeree's statement or other behavior demonstrating assent to an offer constitutes an acceptance, including an offer modifying the contract. As a result of this, an implied agreement is permitted and can be inferred from action that indicates consent. It's essential to keep in mind, though, that being silent or unresponsive is not equivalent to acceptance. Even in the case the parties are not modifying the agreed choice of law clause but are making an agreement to exclude the

[3] Lex fori literally means "the law of the forum or the law of the jurisdiction where the case is pending" - from Black's Law Dictionary (8th ed. 2004)

application of the CISG straightforward in the contract or in the case the CISG is applied *ipso jure*[4], it is critical to indicate their intent to make this agreement valid. Any offer or acceptance under Article 14 is still valid in case of *ex ante* exclusion and in *ex post* exclusion when the involved parties have provided their evidence of true intent for the adjudicator to examine. The failure to object to a modification offer can only be accepted in very few cases where there is already a contractual balance of rights and obligations[5].

Generally, an offer or acceptance to modify the contract during legal proceedings should consist of

(i) clear intent to be bound by the law chosen by the involved parties in the event of acceptance

(ii) which law sought to be excluded to make the offer definite

3.3.2.2 Validity of the offer and the corresponding acceptance to modify the original contract in the PRC and the United States of America

Form of the offer and the corresponding acceptance to modify the contract

In the PRC

According to The Contract Law of The PRC 1999, a contract can be in writing, oral or in any other form. If required by applicable law or administrative regulation, a contract must be in writing. Unless otherwise agreed by the parties, a contract must be in writing[6]. The offer to amend the contract should show the consent of the involved parties[7] and it must reach the offeree. When an offer is accepted, it shall be made in the form of a notice or in light of trade practices, the offer can be expressed by the offeree through performing an act[8]. There is also a requirement for an acceptance to reach the offeror and the time limit for acceptance. Regarding the requirement for amendments in the contract, the required form is also similar to that of a contract form as it can be seen that Article 77 does not explicitly mandate written form for modifications in general, but it differs from other laws or regulations that might impose such requirements [9].

In the United States

In the U.S., the case seems to be much more different regarding the form of the original contract and the offer to modify it, as well. The UCC (Uniform Commercial Code) does not mandate a specific required form for sales contracts in the US. It generally prioritizes flexibility and freedom of contract formation. However, there are some exceptions regarding sales of goods contracts. Specifically, under UCC Section 2-201, contracts for the sale of goods worth $500 or more must typically be in writing to be enforceable. Under the UCC, an amendment to a sales contract does not require additional consideration to be binding[10]. This indicates that even in cases where a modification to a contract falling under the UCC's provisions is agreed upon and involves no exchange of value or additional compensation, the modification may still be enforceable. In subsection (2) of UCC 2-209, there is a clause limiting modifications to writing and the parties may then include a prohibition to modify

[4] "ipso jure" means by the law itself

[5] Ibid

[6] Chapter II, Article 10 of the Contract Law of the PRC

[7] Chapter II, Article 14 and 16 of the Contract Law of the PRC

[8] Chapter II, Article 22 of the Contract Law of the PRC

[9] Chapter V, Article 77 of the Contract Law of the PRC

[10] Article 2, Part 2, Subsection 2-209 (1) of the Uniform Commercial Code

clause in the original contract. Parties must also notice the Statute of Fraud mentioned in Section 2-201 when modifying the original contract as well.

3.4. Non-plead act based on CISG does not to CISG exclusion: An endless controversy in legal round-table

During legal proceedings, there are many cases in the world where one or both parties do not plead their arguments based on CISG but instead they are silent or just rely on a different set of laws. There is explosive debate among CISG Advisory, scholars and adjudicators whether this action constitutes an implicit CISG exclusion or not. In fact, many court decisions support the view that it is not sufficient to grant intent to exclusion. Conversely, in other cases, some courts concluded that this conduct is understood to demonstrate intent of exclusion. The conclusions are indeed very unpredictable in different jurisdictions. For example, in China, courts and tribunals appear to hold that parties' failure to plead based on the CISG always constitutes an implicit exclusion under Art 6 and applied domestic law inconsistently within the country. While in the opposite legal system - the US - the answer still depends on many factors and requires investigation on a case-by-case basis.

The same idea with the US court, CISG Advisory Council Opinion No.16 (2014) thinks that, essentially, for a plea during legal proceedings to amount to a valid exclusion, it needs to demonstrate

(1)awareness of both sides about the existence of the CISG

(2)clear intention to exclude the CISG on both sides

(3)mutual consent and agreement on the exclusion of CISG

3.4.1 Demonstrating awareness of both parties about current applicability of CISG: For avoiding the problem of vicious circle

Accordingly, the first requirement is that the parties must be aware of the applicability of the Convention. CISG Advisory argued that a lack of general awareness of the applicability of the CISG cannot lead to a clear CISG exclusion intention, since people cannot intend or agree about something of which they do not know the existence of the CISG. As we know, the exclusion was successful only when the parties applied party autonomy in article 6. However, because they did not know that the CISG applied, they had no right to rely on any CISG article to exclude it.

3.4.2 Showing intention of both parties to exclude CISG

Both parties must demonstrate a clear intention to exclude the CISG. This argument is followed from Article 14 CISG that ex post offers to exclude should exhibit an ‘intent to be bound’. In this section, we will consider what is a clear intention? According to CISG Advisory Council Opinion No 16, such a clear intent to exclude should be a plea based on the law of a non-Contracting State or an explicitly specified domestic statute or code where that would otherwise be displaced by the CISG application. By contrast, the action of argument based on the law of a Contracting State or a territorial unit of a Contracting State should not be inferred as a valid intention. All discussions about clear intent of parties already was deep dived in section 3.2 which we can refer to

3.4.3 Proving an agreement between both parties to exclude CISG - Ignorance should not be equated with intent

Courts must discern whether the parties have reached an exclusion agreement and should not consider the mere conduct of proceedings without reference to the CISG in the pleadings or arguments to be sufficient. CISG Advisory contended that it is not enough to view acceptance by both sides that

domestic law applies as sufficient agreement to exclude in the absence of any reference to the CISG. A court could only be certain that the parties clearly intended to amend their contract to exclude the CISG at the litigation stage if counsel presented the parties' express agreement or reported it during the proceedings. However, in most cases of failure to plead or argue based on CISG, the parties are silent and do not give any oral or written agreement on CISG exclusion. There are some courts that hold that one side's silence can constitute intent and agreement with the other side's argument. According to CISG this is not justified, the reasons for this will be analyzed below:

Failure to mention the CISG in argument can only constitute an exclusionary implied agreement if it actually modifies the existing CISG contract. So, in addition to Art. 6, such conduct must satisfy Art. 29 and Art 11, 14-24. Pursuant to Art.14 CISG, the previous request to exclude must demonstrate an 'intention to be bound'. The absence of debate as to the applicable law in the litigation shall constitute such an intention to bind. Conversely, failure to refer to the law sought to be excluded would leave the proposed amendments whose purpose is not fully determined under Art. 14 CISG (Spagnolo, 2014). Consistent with Art. 29 CISG, silence or inaction cannot constitute an amended agreement and failure to object to an amendment constitutes consent only in 'very exceptional circumstances'. Therefore, non-objection can only rarely be considered consent in the context of legal proceedings. The defense's mere response to the arguments advanced by the plaintiff cannot reasonably be understood as an acceptance of a unilateral attempt at amendment. Therefore, to meet the requirements of Articles 6, 11, 14-24 and 29 of the CISG in this respect, judges in CISG Contracting States must observe whether the parties have reached an agreement in this respect or agreement to amend an existing agreement.

4. Conclusion and learnings for Vietnam enterprises in England and Chinese courts

Given the differences in the approaches of CISG exclusion from the two world's leading laws which are in the US and China, it is clear that Chinese law has strict rules and regulations for exclusion. On the other hand, US law takes a more flexible view towards CISG exclusion in both explicit and implicit exclusion. The paper analyzes CISG exclusion through four above main parts which will be concluded individually as below.

In terms of exclusion by non-plead based on CISG during legal proceedings, Vietnam enterprises should be mindful that only Chinese courts fully recognize this action as a valid exclusion without strict investigation. Meanwhile, US courts require a higher threshold of evidence about intention, agreement and awareness. A useful piece of advice is that no matter which country the trial court is located in, Vietnam enterprises should try to meet all three requirements, by oral, written or any other form, to ensure CISG exclusion and their rights. Besides, the automatic acceptance of non-plead based on CISG as exclusion by Chinese courts is also a double-edged sword. In cases where the parties do not intend to exclude CISG but forget to mention it during legal proceedings, it can easily lead to the application of PRC law later instead of CISG. Therefore, Vietnam enterprises should be careful and mention the applicable law in detail before and throughout a trial.

Regarding the modification of the choice of law clause during legal proceedings, a notice that every Vietnamese enterprise should pay special attention to whether their case is proceeding in the US or China is their intent to accept and amend the original contract to choose the governing law. In both countries, this requirement is extremely investigated by the courts as this is evidence of party autonomy. If each party of the contract does not show awareness or clear intent to amend and protect

their benefits, the courts will not have enough space to conclude their intention to modify the choice of law clause. Furthermore, the source of law excluded should also be mentioned to make the case proceed in a timely manner and save time for each party. The form of the original contract and offer to modify shall be negotiated and best suited to each legal system. According to many experts, these modifications must be in written form as this will enhance clarity, lower the risk of conflicts, and make it easier in the preservation of evidence in the course of a disagreement.

In term of parties intent for a valid CISG exclusion, the parties' intent relates to the party autonomy and choice of law clause which are determinants of a clear and real intent leading to a successful implicitly CISG exclusion. The true intent of the parties must either be made clear in an explicit or implicit agreement between the parties, or the other party must have known or been aware of such an intent, to exclude the application of the Convention implicitly by selecting the law of a non-Contracting State with required condition to govern the contract. This issue will be analyzed further in the next part. Such intent is 'common', or 'clearly implied in fact', or 'certain', 'real—as opposed to theoretical or factious', or 'tangible intent rather than hypothetical intent' (Małgorzata Pohl-Michałek, 2023). According to art. 8(3), the parties' intentions must be established based on every relevant aspect of the case, such as the negotiations, customs, usages, and conduct of the parties (Albrektsen et A. T.,2020). The specific language selected by the parties, the context, the parties' interests, the goal of the contract, and the objective circumstances at the time of the contract's conclusion, for instance, are significant factors in ascertaining the subjective intent of the parties.

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