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THE SCOPE OF CISG IN CHINA AND BRAZIL AND FACILITATION OF TRADE WITH PORTUGUESE SPEAKING COUNTRIES

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Abstract

Trade facilitation achieved through harmonization of private law governing international trade is well recognized. The CISG, albeit being a hall mark of a successful harmonization attracted a limited interest from the Portuguese speaking (Lusophone) countries except Brazil. In the light of China's trading interest with the Lusophone Countries, the question of relevance of the CISG to promote Sino-Lusophone trade gains significance. To address the above question, this paper seeks to examine the scope and limitations of the CISG application to China and Brazil and adopts a case law method to examine the jurisprudence resulting from judicial interpretations and arbitration awards. The paper examines the reception of the CISG in both countries, before enquiring the significance of the CISG in facilitating their bilateral trade. The paper briefly refers to the implications arising from the lack of formal extension of the CISG by China to Macau SAR, which has been designated as a jurisdiction to facilitate trade between China and Lusophone Countries. In conclusion, the paper underscores the importance of the CISG based

on the findings of its scope of application in China and Brazil and calls for the need to study the phenomenon further in the light of the experience of post Brazilian accession to the CISG.

Keywords

Trade Facilitation, Harmonization of Sale of Goods Law, Scope and Limitations of CISG, China and Lusophone Countries, Role of Macau SAR

1. Introduction

Trade facilitation is typically perceived in a narrow sense comprehending efforts aimed at breaking procedural and information barriers to enhance trade flows across markets. For example, the UN Centre for Trade Facilitation and Electronic Business (UN/CEFACT) of the United Nations Economic Council for Europe (UNECE) defines trade facilitation as “the simplification, standardization, and harmonization of procedures and associated information flows required to move goods from seller to buyer and to make payment” (UNECE, 2012). It is evident that the definition mainly pertains to procedural and information barriers. Although the elements emphasized are important in eliminating key practical obstacles for cross border trade, a more comprehensive definition of trade facilitation is required, which will encompass potential challenges arising from every perceivable context and stage of international trade. Such a definition should encompass concerns that may arise in the context of private legal relations between the trading parties as well as dispute resolution between them. Key concerns in this regard arise from the divergence in national legal standards governing international sale contracts as well as the resulting uncertainties including in the enforcement of rights and remedies across borders (Efrat, 2016).

The diversity in national rules governing jurisdiction, governing law and enforcement and the consequential uncertainties create formidable challenges for private traders engaged in cross-border trade. An effective trade facilitation initiative should therefore comprehend legal challenges relating to jurisdiction, governing law and enforcement of judgment/arbitral awards in international trade. In this context, the efforts of international bodies seeking to harmonize domestic private laws should gain significance. Harmonization is acknowledged as one of the four pillars of trade facilitation by UNECE¹, albeit its relevance is mainly recognized in procedural matters like trade procedures, operations, and documents (UNECE, 2015).

With an objective to accentuate the significance of a broader trade facilitation mandate comprehending harmonization of substantive private law, the present paper closely investigates the relevance of the key international instrument harmonizing substantive law governing international sale of goods. Among the works of major international legal harmonization bodies like the Hague Conference on Private International Law², UNIDROIT³ and UNCITRAL⁴, the role of the UN Convention on Contracts for the International Sale of Goods (CISG) in facilitating international trade deserves an explicit recognition. Trade facilitation achieved through harmonization of substantive private law governing international sale contracts needs to be well recognized by the international trading community⁵ (UNCITRAL, 1980). In spite of being a hall mark of a successful harmonization of international sales law and having a fairly large number of state parties, the CISG has not been acceded by some prominent trading nations (Moss, 2005-06).

The conspicuous absence of a trading block, which China as one of largest trading nations has a specific trading interest, namely the Lusophone markets, raises a question of the significance of the CISG in facilitating trade among the involved nations. With an objective to address the above question, the present paper seeks to examine the scope and limitations of the CISG as manifested in the international obligations and the jurisprudence in China and Brazil, who are the only parties to the CISG among Sino-Lusophone markets. The first part of the paper examines the scope and limitations of the CISG in the context of China through a primary analysis of the interpretation made by judicial decisions as well as arbitration awards in China. The second part of the paper investigates the situation in Brazil, which is the only Portuguese speaking country that has acceded to the CISG albeit recently in 2014. Therefore, the reception of CISG in Brazil is mainly examined through the analysis of a select set of domestic cases that have referred to the CISG or the domestic law provisions inspired by the CISG.

After examining the recognition and application of CISG in both China and Brazil separately, the paper refers to the positive impact it may have on the bilateral trade between China and Brazil. In the light of the potential of CISG to promote trade between member states, the concluding section of the paper briefly refers to the implications arising from the lack of formal extension of the CISG to Macau SAR, which has been designated as a jurisdiction to facilitate trade between China and Lusophone Countries. Based on the discussions, the paper

draws some pertinent conclusions regarding the relevance of the CISG for other Lusophone countries to promote trade with China.

2. The Scope of the CISG in Trade with China

Before examining the scope of the CISG application in China as evident in the relevant jurisprudence, it is important to take note of how it manifests from the declarations and reservations made by China in undertaking obligations as a contracting party to the CISG⁶. First and foremost, the application of the CISG in China is limited to the situation when the parties to the international sale contracts have place of business in contracting states. China does not apply the rules of CISG in situations when the rules of the relevant private international law point to the application of the law of a CISG contracting state⁷ (Zhen, 2016-17). Although, at the time of accession, China also made another declaration requiring a written form of sale contract for the application of the CISG, it subsequently withdrew that reservation in 2013 and extended the CISG application to all forms of contracts,⁸(UNIS, 2013).

Questions pertinent to the above two Chinese reservations arose in the case of *Zhuguang Oil Company v. Wuxi Zhongrui Group Corporation*⁹. In this case, the dispute involved a claim for compensation by a buyer of acrylic acid bulk yarn against the seller from China due to the quality problems of the goods delivered. The buyer entered into the sales contract through a Korean business man Mr. Piao for the export of goods from Shanghai, China to Santos, Brazil. However, only the terms indicated in the letter of credit issued by the buyer were in the written form. The other terms relating to the contract itself were unwritten. When Mr. Piao asked for compensation from the Seller, he denied that there were any quality problems. With regard to the applicable law to determine the dispute between the parties, the buyer contended that the CISG shall be applied. But the Court of first instance in China held that by virtue of the reservation made by China regarding Article 1(1) (b) of the CISG, it is only applicable when the place of business of both parties to the sale contract were in the contracting states of the CISG. However, as the place of business of the buyer (i.e. Mr. Piao as the agent) was in Korea, which was not a contracting party to the CISG by then¹⁰, the Court held that the CISG was not applicable to the dispute. As a result, the Court applied the Chinese law as the law of the country that has the closest connection to the contract (doctrine of the closest connection) and a pertinent question of

whether the lack of a written contract, in this case, made the underlying contract void was also raised (High People's Court of Jiangsu Province, 2002).

Interestingly, the Court upheld the validity of the oral contract in this present case on the ground that Article 10 of the new Contract Law, which became effective on 1 October 1999 in China, started to recognize that the parties to a contract may conclude the contract by oral, written forms or by other means. It is important to note that Chinese courts have started to recognize the validity of the oral sale contracts under the Chinese law even before China formally withdrew its reservation under the CISG that limited its application only to the written forms of sale contracts as discussed earlier. The decision of the Court of first instance on the above two questions was later affirmed by the Appellate Court. The analysis of the above case shows that China, while continuing to limit the application of the CISG subject to its reservation on Article 1 (1) (a), has started to lay foundations for the potential extension of the scope of application of the CISG to all forms of contracts as early as 1999. Such extension was the result of the reforms introduced in its domestic contract law.

In the case of *Dong Feng Trade Co. Ltd. v. Hangzhou Dongli Rubber & Plastomer Co. Ltd.*¹¹ a district court in China again did not recognize the application of the CISG to the dispute because the seller's country was not a state party to the convention although the buyer was from China, a party to the CISG. Instead of CISG, the Court held that the applicable law to the dispute was Chinese domestic law relying on the basis of the doctrine of the closest connection. The Court determined the closest connection with reference to the price terms agreed in the sale contract, which was Cost and freight (CFR) Shanghai. Under the CFR terms, the seller was obliged to arrange for the carriage of goods by sea to the port of Shanghai and furnish the buyer with the documents necessary to obtain the goods when they reach Shanghai. The Court held that as the buyer accepted the goods in Shanghai that was the port of destination, the place of performance in the present case was in China. As a consequence, the Court held that China was the jurisdiction with the closest connection to the Contract and hence the Chinese contract law was applicable to the dispute (Second Intermediate People's Court of Shanghai, 2003). The analysis of this case evidences the consistency among Chinese courts in rejecting the application of the CISG based on the Chinese reservation to Article 1 (1) (b) of the CISG¹² (Qingdao Intermediate People's Court of Shandong, 2005) and its willingness to find the necessary link to

justify the application of Chinese domestic contract law on the basis of the doctrine of closest connection.

Apart from the courts, arbitration panels in China have also limited the scope of application of the CISG in accordance with the Chinese reservation. The arbitration award in *Medical equipment case*¹³ evidences the consistency in limiting the application of the CISG by an arbitration panel as well as in providing the justifications for applying Chinese law as the governing law of the matter. In this case, the seller from Japan instituted arbitration proceedings against the buyer from the PRC over a dispute regarding the payment of contract price. As the sale contract was silent about the law governing the contract, the arbitration panel had to first determine the applicable law to decide the dispute as the parties have not stipulated the same in the sale contract. As a result, the question of whether the CISG could be applied to present contract arose. However, the arbitration tribunal held that the CISG was not applicable because the place of business of the seller was located in Japan, which was by then not a Contracting Party to the CISG¹⁴. Having ruled out the possibility to apply the CISG, the arbitration panel found the applicable law to be the Chinese law, based on different elements. Firstly, the panel held that as China was the place of conclusion of the contract in question as well the place of its performance, the necessary connection with China was satisfied. Moreover, the panel seems to have relied on the facts that China was the place of arbitration and the parties had cited Chinese laws in their statement and defenses in establishing the necessary connection to justify the application of Chinese laws (CIETAC, 2004).

3. CISG in Brazil: From Recognition to Accession

Brazilian accession to the CISG is a recent development¹⁵, (Faria, 2015) which happened more than a quarter of a century after China's approval of the Convention. Although Brazil has been quite late in joining the club, it is still the first among the Lusophone countries to accede to the CISG. Moreover, in comparison with China, the absence of any reservation in the Brazilian accession to the CISG indicates a larger scope of application of the CISG in Brazil. Especially, the absence of reservation with regard to Article 1 (1) (b) enlarges the scope of application of the CISG in Brazil, where the courts or arbitration bodies could apply the provisions of the CISG when the rules of private international law lead to the application of Brazilian law or laws of any other contracting state to the CISG.

Interestingly, even in the period when Brazil did not accede to the CISG, judicial decisions have upheld the application of the CISG in international arbitration proceedings, while the resulting awards were sought for recognition and enforcement in Brazil. Similarly, in certain cases, Brazilian courts have also drawn parallels with the provisions of the CISG even when they applied Brazilian domestic law to resolve the underlying sale disputes (Cerqueira, 2007). A close analysis of some of those cases will indicate the scope of reference and recognition to the provisions of the CISG in Brazil during the period prior to its accession to the CISG.

In *Atecs vs. Rodrimar*¹⁶, a Brazilian buyer challenged the action of a German Seller, who sought the recognition of a foreign arbitration award against him in Brazil. The award was rendered in the arbitration proceedings held in Switzerland, which ordered the payment of damages to the seller for an alleged breach of contract by the buyer. The buyer resisted the recognition of the award before the Superior Court of Justice in Brazil on various grounds including some very interesting ones related to the application of the CISG during the arbitration proceedings. The buyer contended that the award violated the public policy of Brazil as the arbitration tribunal did not apply the Swiss material law expressly chosen by the parties and instead applied the private international rules of Swiss law that pointed to the application of the CISG. The buyer further argued that the award violated articles 49, I and 84, VIII of the Brazilian Constitution because the arbitration tribunal applied the CISG to which Brazil was by then not a state party.

The Brazilian Superior Court rejected the above arguments. Firstly, the Court pointed out that it did not have the authority to address the merits of the award sought to be recognized under the Brazilian procedure for recognition of the arbitral award. The Court could only verify certain intrinsic or extrinsic requisites necessary for the recognition of the effects of the arbitration award in question. Secondly, regarding the application of the CISG by the Swiss arbitration tribunal, the Court held that the result of the reference to Swiss material law as the applicable law in the contract would have in any case lead to the application of the CISG. The Court pointed out that the CISG would have been applicable as part of Swiss material law unless its application was excluded by the parties to the sale contract. Moreover, the Court held that it was the arbitrator and not the Brazilian court that had the authority to decide how the term Swiss material law should be interpreted. As a consequence, the Court concluded categorically that the application of the CISG, which was already incorporated by the Swiss law within the concept of

‘Swiss material law’ did not violate the Brazilian public policy or the arbitration clause in the sale contract.

The Court went one step further and pointed out that under the Brazilian law as well, a convention when ratified by a contracting state received the same status of a national law of that country. Interestingly, the Court held that although Germany (the country of the seller) had only ratified the CISG with restrictions and Brazil (the country of the buyer) had not even ratified the same, the fact that the parties choose Swiss material law as the applicable law amounted to the waiver of application of the domestic law of the parties. By implication, this could be seen as the recognition by the Brazilian Court that the wide scope of application of the CISG in relevant cases may not be constrained by the reservations or lack of accession to the CISG by the respective states of a seller or buyer. Based on the above reasoning, the Superior Court of Justice rejected the buyer’s objections and granted recognition to the award against the Brazilian buyer that was originally rendered with the application of the CISG (Superior Court of Justice of Brazil, 2009).

Brazilian courts have also taken the opportunity to draw parallels between Brazilian law and the CISG in different cases in the period before Brazil became a party to the CISG. In the *Electro-erosion machine* case¹⁷, it is interesting to note that the Appellate Court in Brazil referred to certain norms in the Brazilian domestic law that have been inspired by the provisions of the CISG. It is important to note that the Court was motivated to make reference to the CISG provisions in this instance, even though both the buyer and seller were Brazilian parties. In this case, the Buyer sued the seller for recovery of the cost incurred in repairing the machine purchased as well as for the loss incurred in profits resulting from the breach of sale contract arising from the lack of conformity of the goods sold (i.e. the selling of a defective machine). The Seller denied the charges and attributed the failure of the machine to the lack of care in handling by the buyer (Rio Grande do Sul Appellate Court, 2009).

When the lower Court only granted the prayer for the cost for the repairs of the machine, the buyer appealed the judgment seeking compensation for loss of profits. However, the appeal failed as the Appellate Court found that the buyer disregarded his duty to mitigate loss. In coming to this conclusion, the Appellate Court invoked the Brazilian Restatement of Law no. 169, which was inspired by Article 77 of the CISG that obliges the party relying on a breach to adopt a measure to reduce losses arising from the breach¹⁸ (Sao Paulo Appellate Court, 2007).

Moreover, the Brazilian Appellate Court concluded that the buyer in the present case failed to act as a reasonable person by referring to the relevant standards prescribed by Article 8 (3) of the CISG¹⁹. It is important to note that the reference to the relevant provisions and standards of the CISG by the Brazilian Appellate Court was made in 2009 when Brazil was not a party to the CISG. This underlines the significance attached by the Brazilian judiciary to the CISG even in the period when the Brazilian State was not yet convinced of the significance of the convention.

Similarly, in another dispute arising in the *Mortgage Loan* case,²⁰ the Appellate Court of Sao Paulo referred to the provisions of the CISG when the parties to the dispute were both Brazilians. In an action by the seller for the recovery of a remaining price, the buyer argued that the failure of the seller to comply with its obligation to deliver goods on-time was a fundamental breach that entitled him to refuse to pay the remaining price. However, the Court of first instance ordered the judgment in favor of the seller and compelled the buyer to pay the remaining amount along with a penalty and court expenses. When the buyer subsequently appealed, the Appellate Court reversed the decision on the ground that the seller, who failed to comply with its core obligations to deliver the goods, was barred from seeking the performance of the counter party obligation of the buyer. The decision of the Appellate Court in determining that the buyer was entitled to avoid the contract, if it was sufficiently clear prior to his performance that the seller would commit a fundamental breach, was inspired by the doctrine of *exceptio non adimpleti contractus*, which is also recognized in Article 72(1)²¹ of the CISG. The Appellate Court exempted the buyer from paying the amount imposed by the lower court and ordered the seller to pay the court expenses (Sao Paulo Appellate Court, 2008). Again, this is a case that evidences the reference value of the CISG to the Brazilian courts in the period when Brazil was not a party to the Convention and in the circumstances when both the seller and the buyer were Brazilian parties.

4. Conclusion

The objective of this paper to examine the scope of the CISG in China and Brazil is highly pertinent to determine the relevance and utility of this important international legal instrument in promoting trade between China and Lusophone markets. As discussed in the beginning of the paper, the utility of the CISG in facilitating trade between member countries needs to be well established in order to promote accession among non-members in general and

Portuguese speaking non-member states in particular. The fact that most of CISG non-member states have subscribed to the WTO regime and its trade facilitation initiatives, is a positive factor which increases the hope that with a better efforts to demonstrate the trade facilitation role of the CISG, more accession to CISG could be expected. However, it is equally important to realize that unlike the trade facilitation initiatives under the auspices of WTO, the legal issues arising out of the CISG are more sensitive.

As can be seen in the case of some common law countries like UK or India, the reluctance to accede to the CISG could be due to domestic reasons rather than lack of failure to understand the facilitative role of the CISG. Such sensitivities may also prevail among other non-member states including the rest of the Lusophone countries that have not yet acceded to the CISG. The prevalence of such concerns, however, does not mean that they are insurmountable. In order to address the underlying concerns, it is important to establish that the benefits of accession to the concerned states will outweigh the costs. It is in this regard, contextual studies on the scope and importance of the CISG for specific sovereign nations or group of trading blocks are highly crucial to establish the benefits of harmonization of substantive private law governing international trade.

The first part of the paper, examining the scope of application of the CISG in China revealed interesting findings. Although China was pioneering in acceding to the CISG, the limitation on the scope of application of the CISG was revealed. The practical implications of the reservations made by PRC in acceding to the CISG became evident during the close analysis of the judicial decisions and arbitration proceeding in China. Although, China has since withdrawn its reservation as to the written form requirement for sale contracts, the fact that the reservation on Article 1 (1) (b) still continues to prevail clearly demonstrates the continued major limitation in the sphere of application of the CISG in China. Ironically, this limitation, however, can be seen as an additional reason or motivation for the Lusophone countries to consider acceding to the CISG. This is because if any of the Lusophone countries gets convinced of the importance of the CISG to promote their trade with China, the effect of the Chinese reservation on Article 1 (1) (b) will require them to become a member of the CISG in order to avail the only window of its application in China by virtue of Article 1(1) (a).

The other major limitation of the scope of application of the CISG in China is the lack of its formal extension to the territories of Macau SAR and Hong Kong SAR. Although this issue

was not addressed in the present paper, this limitation should be recognized as a potential barrier to the trade facilitation role of Macau SAR, especially after the Brazilian accession to the CISG in 2014. Although, the Brazilian accession to the CISG has enhanced the facilitation of bilateral trade between China and Brazil, the fact that the CISG had not yet been formally extended to Macau could dampen the role Macau could play in promoting bilateral trade between China and Brazil as well as with other Lusophone markets based on its inherent strength. Therefore, it is time to carefully evaluate the advantages and disadvantages of formally extending the CISG to Macau SAR, especially in the light of its formal designation by China as a territory to promote trade with Lusophone countries and the trade facilitation role of the CISG highlighted in this paper. Even if the hesitation to extend the CISG to Hong Kong SAR is understandable, the time is ripe to consider the case of Macau independently based on the above grounds and justifications argued in this paper.

Finally, the analysis of the jurisprudence in both China and Brazil relating to the CISG reveals a clear pattern. While the scope of application of the CISG seems to be more restrictive arising out of the implications of the PRC reservations, the reception of the CISG in Brazil seems to be much wider. This is evident not only from the absence of any reservation to the CISG during the Brazilian accession but also the positive references by judicial decisions and reception of the CISG provisions in the Brazilian domestic law identified in this paper. Although, this paper has not attempted to examine the impact of the CISG in Brazil subsequent to its accession, the examination of the jurisprudence and legislative reception prior to the Brazilian accession shows a positive trend. It is necessary to closely evaluate the impact of the Brazilian accession to the CISG especially with regard to the bilateral trade with China in order to determine whether a similar move would benefit other Lusophone countries. Unfortunately, due to the limitation in space, the present paper has to restrict its discussion to the issues raised and addressed in the paper. However, further studies on the subject matter, especially more focused investigations on the role of the CISG in promoting trade between China and Lusophone countries is the need of the hour, when China is making concrete initiatives to further expand its trade through one-belt, one-road initiative.

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¹ The other three pillars of trade facilitation as acknowledged by the UNECE are transparency, simplification, and standardization.

² See the list of major works and international legal instruments concluded under the auspices of the Hague Conference on Private International Law available online at <https://www.hcch.net/en/instruments/conventions>, accessed on 21 April 2017.

³ The list of UNIDROIT legal instruments are available online at <http://www.unidroit.org/> accessed on 3 May 2017.

⁴ The pertinent instruments of legal harmonization achieved by UNCITRAL including the full text of the CISG and its current status are provided at http://www.uncitral.org/uncitral/en/uncitral_texts.html, accessed on 12 May 2017.

⁵ For example, the obvious acknowledged effects of the purpose of the CISG includes bringing the much needed certainty in trade transactions and decreasing the underlying transaction costs. See UNCITRAL, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) available online at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html accessed on 23 April 2017.

⁶ CISG entered into force for China on 1 January 1988 after it signed the Convention on 30th September 1981 and subsequently approved the same on 11th December 1986.

⁷ China has made a declaration that it will not be bound by para 1 (b) of article 1 of the CISG, while acceding to the CISG.

⁸ China withdrew the declaration on 16 January 2013, which took effect from 1 August 2013 from which CISG application in China was not limited to written form of international sale contracts (as manifested in Article 11 of the CISG).

⁹ 25 December 2002, High People's Court [Appellate Court] of Jiangsu Province, English translation provided by Pace Law School Institute of International Commercial Law. (May 11, 2010). CISG Case Presentation, CISG Database available online at <http://cisgw3.law.pace.edu/cases/021225c1.html> accessed on 2 April 2017.

¹⁰ Republic of Korea acceded to the CISG only on 17 February 2004, which subsequently entered into force on 1st March 2005.

¹¹ 20 June 2003, Second Intermediate People's Court of Shanghai, English translation provided by Pace Law School Institute of International Commercial Law. (February 2, 2010). CISG Case Presentation, CISG Database available online at <http://cisgw3.law.pace.edu/cases/030620c1.html> accessed on 2 April 2017.

¹² See also *Qingdao Benefim Trading Co. Ltd. v. Sinochem International* decided by Qingdao Intermediate People's Court of Shandong on 13 June 2005 on a dispute between a buyer from PRC and the seller from United Arab Emirates on a dispute involving the sale of Styrene-butadiene rubber. English translation of the case provided by Pace Law School Institute of International Commercial Law. (February 2, 2010). CISG Case Presentation, CISG Database available online at <http://cisgw3.law.pace.edu/cases/050613c2.html> accessed on 5 April 2017.

¹³ 24 December 2004, China International Economic and Trade Arbitration Commission (CIETAC) PRC Arbitration Award, English translation provided by Pace Law School Institute of International Commercial Law. (August 29, 2008). CISG Case Presentation, CISG Database available online at <http://cisgw3.law.pace.edu/cases/041224c1.html> accessed on 5 April 2017.

¹⁴ Japan however acceded to the CISG subsequently on 1 July 2008 and it entered into force on 1 August 2009.

¹⁵ Brazil acceded to the CISG on 4th March 2013 and it entered into force on 1st April 2014.

¹⁶ 19 August 2009, Superior Court of Justice of Brazil. English translation provided by Pace Law School Institute of International Commercial Law. (October 21, 2013). CISG Case Presentation, CISG Database available online at <http://cisgw3.law.pace.edu/cases/090819b5.html> accessed on 8 April 2017.

¹⁷ 20 May 2009, Rio Grande do Sul Appellate Court., English translation provided by Pace Law School Institute of International Commercial Law. (December 5, 2012). CISG Case Presentation, CISG Database available online at <http://cisgw3.law.pace.edu/cases/090520b5.html> accessed on 8th April 2017.

¹⁸ For another similar case decided by the Brazilian Appellate Court of Sao Paulo that involved Brazilian Restatement of Law no. 169 as inspired by Article 77 of the CISG see Gas station fuel case (*Auto Posto Shopping Diadema Ltda. & others v. Mercoil Distribuidora de Petróleo Ltda.*) decided by the Appellate Court of Sao Paulo, 3 July 2007. English translation provided by Pace Law School Institute of International Commercial Law. (December 5, 2012). CISG Case Presentation, CISG Database available online at <http://cisgw3.law.pace.edu/cases/070703b5.html> accessed on 7th April 2017.

¹⁹ Article 8(3) of the CISG prescribes that “In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”

²⁰ 24 April 2008, Sao Paulo Appellate Court, (*José Henrique S. Nascimento de Souza & other v. Construtora Costa Norte Empreendimentos Imobiliários SC Ltda.*), English translation provided by Pace Law School Institute of International Commercial Law. (December 5, 2012). CISG Case Presentation, CISG Database available online at <http://cisgw3.law.pace.edu/cases/080424b5.html> accessed on 7 April 2017.

²¹ Article 72 (1) of the CISG authorizes that “If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided”.