Master DCI 2010-2011
Law School of Montpellier

Dissertation:

Commercial Usages in Chinese Law

Jie LI

31 mars 2011






Table

INTRODUCTION

Importance of knowing the usages in Chinese law

The market economy and the Law have, hand in hand, formed the modern world1. The usage is one of the communication bridges between them. In France, the United States, Russia and the Islamic world, etc., the usages have an increasing importance in commercial field. Under the effect of globalization, especially in 2010, China became the second largest economy in the world. However, The Chinese legal system is, of all the systems studied, probably the farthest from2 the occidental legal culture. There is a growing urgency for mutual understanding and constructive interactions between the world and China.

China, which "China"?

On 25 October 1971, the United Nations General Assembly Resolution 2758 recognized the representative to the government of the People's Republic of China as the "*the only legitimate representative of China to the United Nations*" and as "*a founding member of the United Nations*". A lot of Westen people think that "China" has a larger sense than the "People's Republic of China", and they often put P.R. China or Chine populaire (in French) and Taiwan, Hongkong at parallel positions. In reality, this a violation of an international legal document voted by themselves. China is not a larger notion, but just a shortened name of the People's Republic of China.

Certainly, we can not ignore that the People's Republic of China has four different legal units: mainland China, Hongkong, Macau and Taiwan, which have independent legal systems and separated customs policies. Briefly speaking, the four legal units are respectively influenced by Germany, Great Britain, Portugal and Japan and Germany, which means that the four legal units have distinct judicial circumstances. The territory concerned in the dissertation is mainland China.

Usage as an informal source of law in mainland China

The formal sources of law in China is written law, such as the Constitution, various statutes, Regulations published by the Ministries and local Regulations issued by the provincial congresses. In mainland China, there is not the Civil Code yet. The General Principles of Civil Law of the People's Republic of China states the "general rules of a civil code". Various special statutes, such as the property law, the contract law, etc. provide special stipulations. The General Principles of Civil Law of P.R.C. and the special civil statutes consist the "system of civil law norms".

The informal sources of law are the Policies of the central government, the Judicial Explanations of the Supreme People's Court of P.R.C., and the usages.

Different fields of usages in mainland China

Firstly, the political usages is a result of the speciality of the Chinese political regime, which is trying to balance between communist ideology and market economy. For exemple, un constitutional unwritten rule is that the President of the country, of the Chairman of Communist Party and the Chairman of the Army should be the same person, and from 1980s all the Chinese Presidents have only 2 presidencies totally counting 10 years.

---

[1] L'empire du moindre mal, Jean-Claude Michéal, essaie

[2] Les grans systèmes juridiques étrangères, Éric CARANO, Emmanuelle MAZUYER, Gualino, Lextenso éditions, septembre 2009, P97

Secondly, the customary law of the ethnic minorities is directly integrated in the contemporary legal system of mainland China[3]. For example, in the field of public law, the social organization in the villages of the Yao people, who live in the mountainous regin in the south-west China, is regulated by their customary rules caved in stone tablets in each villages. In the field of penalty law, in case of killing or wounding, the Tibetan people always tend to reach a pecuniary settlement according to their "Custom of Life Compensation". In the field of marriage law, monetary marriage, early marriage, kidnap marriage, succession of one'e elder brother's wife still have great effets in many ethnic minority areas, while the state marriage law is often neglected.

Thirdly, in the field of commercial law, the practices repeated between the parties to a contract can be advocated to interprete the real will of the parties. However, because the economy reform of China moves forward progressively and always under the orientation and protection of the Government, nearly all the morden economic rules are codified, for instance the special statutes issued by the National Congress; the Decrees, Guidelines, Regulations, Explanations published by the National Administration Council or the Ministries; the Guidelines, Regulations legislated by local congress; the Judicial Explanations, Reviews, Advice published by the Supreme Court. For example, Article 126 - 2 of the Contract Law of P.R.C. states: "*For a Chinese-foreign equity joint venture contract, Chinese-foreign contractual joint venture contract, or a contract for Chinese-foreign joint exploration and development of natural resources which is performed within the territory of the People's Republic of China, the law of the People's Republic of China shall be applied.*"

As a result, the application of commercial usages as a source of law, is excluded from the fields of company law, taxation law, customs law, etc. and is limited to international trade, such as the sales, payment, shipment, and assurance.

International trade usages in mainland China

As a legal term, usage is still vast and ambiguous, even it is already limited in the field of international trade in mainland China. It has different dimensions, such as usages between the parties and the usages of a branch of economy. It has different forms, such as the practices which is unwritten, the usages which is recognized by the judges or arbitrators and the customs which is complied by some private organisations. The wording used in mainland China legislation is "practice", which seems have a very large sense and flexibility, Nevertheless, what the judicial precedents recognized and what the scholars discussed about is only the international trade customs.

So, the object of this dissertation is the application of the international trade customs in mainland China.

[3] Sources of law and legal reform in China, Edited by Kotovtchikhine, Litec, 2003, Page 183 s

Chapter I - APPLICABILITY OF INTERNATIONAL TRADE CUSTOMS

Section I - Conditions of applicability

§ 1 - With reference of general rules

The actual civil law regard international trade customs as a supplementary source of law in the case of absence of specific written provisions of Chinese law or international treaty. The General Principles of Civil Law of P.R.C., Chapter VIII Application of Law in Civil Relations with Foreigners, Article 142 - 2 states: "*International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or accorded to by the People's Republic of China has any provisions*."

The National Congress of P.R.C. is preparing for a Civil Code, and it has published several editions of Draft of Civil Code in the aim of gathering the domestic and international opinions. From the drafts, we can preview the future provision which will determine the application of law in civil relationships with foreigners. Part 9, Article 3 and Article 4 of all the drafts have the same wording:

"If any international treaty concluded or acceded to by the People''s Republic of China contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People''s Republic of China has announced reservations.

International practice may be applied to matters for which neither the relevant laws of the People''s Republic of China nor any international treaty concluded or acceded to by the People''s Republic of China contain any relevant provisions." and

"Parties to a foreign-related contract may agree on to expressly select international practice as applicable law.

In the virtue of this Code, the laws of the People''s Republic of China should be applied, but theses laws have no relevant provisions on the issue in question, the international practice should be applied. "

§ 2 - With reference of special rules

I - In the field of sales

The provisions in the Vienna Convention on the International Sales of Goods 1980, is an important reference to Chinese law, because in the absence of internal regulations in mainland China, this international agreement can be invoked directly in China .

Article 9 of the Convention states:

"(Practice) which the parties have agreed and by any practices they have established between themselves.

Every practice they (the parties) knew or should have known and which in international trade is widely known and regularly observed by parties to contracts of the type involved in the trade concerned."

Most Chinese scholars regard this provision as giving contractual effect to international trade customs, instead of a normative binding effect. Through domestic law and international treaties, this effect is endued to the parties on the basis of the principle of autonomy of will.

II - In the field of arbitration

Article 43 -1 of the Arbitration Rules of China international Economic and Trade Arbitration Commission (2005), the main international trade arbitration institution in China, requests "*the arbitral tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness.*"

Besides, according to Article 258 - 1 of the Civil Procedure Law of the People's Republic of China (2007) [4], when the Chinese Courts review the commercial arbitration awards, they only review the procedure justice(the formality), not the substantial justice. That is to say they do not evaluate whether the application of law is correct or not, as a result, if the arbitrator applies international trade customs, the Chinese Courts have not right to refuse the enforcement of the arbitration award.

Moreover, if the parties demand the arbitral tribunal to not explain the reason(s) for their award, the arbitral tribunal should respect the will of the parties. Article 43 - 2 of the Arbitration Rules of China international Economic and Trade Arbitration Commission (2005) states: "*The arbitral tribunal shall state in the award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs and the date on which and the place at which the award is made. The facts of the dispute and the reasons on which the award is based may not be stated in the award if the parties have agreed so, or if the award is made in accordance with the terms of a settlement agreement between the parties...*". Thus Chinese Courts have even less reason to interfere the arbitration awards, once the arbitral tribunal makes judgement based on international commercial customs and does not explained the reasons of the award.

---

[4] **Article 258:**

If a defendant provides evidence to prove that the arbitration award made by a foreign-affair arbitration institution of the People's Republic of China involves any of the following circumstances, the people's court shall, after examination and verification by a collegial bench, rule to disallow the enforcement of the award:

(1) The parties have not stipulated any clause regarding arbitration in their contract or have not subsequently reached a written agreement on arbitration;

(2) The defendant is not duly notified of the appointment of the arbitrators or the arbitration proceeding, or the defendant fails to express his defense due to the reasons for which he is not held responsible;

(3) The formation of the arbitration panel or the arbitration procedure is not in conformity with rules of arbitration; or

(4) The matters decided by arbitration exceed the scope of the arbitration agreement or the authority of the arbitration institution.

If a people's court determines that the enforcement of an award will violate the social and public interest, the court shall make a ruling to disallow the enforcement of the arbitration award.

In summary, in mainland China there is no substantial obstacles to apply international trade customs in international trade arbitration.

III - In the field of payment

Article 2 of the Rules of the Supreme People's Court on Hearing Letter of Credit Dispute Cases states: "*When hearing a Credit Dispute Case, a People's court shall apply the relevant international practice or other rules that the parties thereto agreed upon; and in the absence of such agreement, this court shall apply the Uniform Customs and Practice For Documentary Credits of ICC and other international practice*.", which grants UCP custom a priority to the International treaty and Chinese law. This is a special case in Chinese legal system.

Section II - Limits of applicability

Article 150 of the General Principles of Civil Law of P.R.C. states: "*the application of foreign laws or international practice in accordance with the provisions of this chapter shall not violate the public interest of the People's Republic of China.*"

This article reagards the public interest as a reason to prevail the application of international trade customs. It raises controversy, but most Chinese scholars support it:

Firstly, according to the sovereignty doctrine, regardless it is international treaty or international practice should apply, or what the reason to apply non-domestic laws, in order to protect its public order, a State can exclude, without exception, the foreign law, international treaty and international practice.

Secondly, although international usages are commonly recognized by the international commercial community, it is still possible that it has conflict of fundamental interest of a specific country.

Thirdly, Exclude the application of international treaty and international practice, will not necessarily form a legal vacuüm. The Court can make reference to the general principles of law and the relating policies.

The Draft of Civil Code agrees on these arguments and retains the same stipulation. Part 9, Article 11 of the Draft states: "*the application of foreign laws or international practice in accordance with the provisions of this Code shall not violate the public interest of the People's Republic of China.*"

Chapter II - APPLICATION OF INTERNATIONAL TRADE CUSTOMS

Section I - Conflict of international trade customs

§ 1 - Generation of conflict between international trade usages

Various reasons lead to the conflict of customs:

- Conflict between national laws, international treaties and international trade customs

In the international business field, the relevant international treaties and international commercial customs have not so developed to fully replace national laws, therefore, it could have conflict between national laws, international treaties and international trade customs in the process to determine the applicable law of an international contract.

- Conflict between international trade customs of different dimensions

There are world-wide international customs and regional customs, for instance the customs in European Union, and customs between Est Asia businessmen.

- Conflict between different customs

To the same international commercial practice, there are different interpretations. For example, to the sales terms FOB, the Revised American Foreign Trade Definitions 1941 and the Incoterms of ICC give different explains. As to CIF trade term, Incoterms of ICC, the Warsaw ─ Oxford Rules 1932 of International Law Association and the Revised American Foreign Trade Definitions 1941 have similar but not fully conform interpretations.

- Conflict between different versions of one custom

As the science and technology develop constantly, some customs are often amended. For example, the Incoterms of ICC have six amendments, however, its new version does not deny the old ones, consequently there are six Incoterms side by side. This leads to confusion of application.

§2 - Conflict rules of international trade usages

In mainland China, a Code of Private International Law is still in preparation. The rules of private international law now scattered in various statutes. The main conflict rule of international trade customs are listed below:

I - Principle of autonomy of will

This principle is widely recognized by national laws, international treaties and international trade customs, consequently, it is important in determination of the applicability and the order of application of the three types regulations. The parties may agree in the contract that all the possible litigation should apply one international trade custom instead of a national law or an international treaty. In the virtue of the same principle, the conflict of different customs, of different explanations of a trade custom and of different versions of a custom can be resolved.

II - Segmentation

In the field of international commercial, the current national laws and international commercial treaties do not cover all the legal issues, so the international business customs make the gap up. Therefore, in the resolution of conflict of national laws, international treaties and international customs, the segmentation would be an effective approach. Article 142 - 3 of the General Principles of Civil Law of the People's Republic of China[5], and Article 268 - 2 of the Maritime Code of P.R.C.[6], has combined the three types of rules together. The legal issues of commercial contracts, that Chinese law and international treaties P.R.C. has concluded or acceded have relevant provisions shall apply, if there is no provisions, international commercial customs should apply.

Article 6 of the United Nations Convention on Contracts for the International Sale of Goods(1980)[7] and Article 3 of the Uniform Law on the International Sale of Goods (1964) [8]show that the parties may exclude the application of some provisions of them, which may lead to the segmentation of different regulation by the parties.

---

[5] **General principles of civil law of the People's Republic of China, Chapter VIII Application of Law in Civil Relations with Foreigners, Article 142:**

The application of law in civil relations with foreigners shall be determined by the provisions in this chapter.

If any international treaty concluded or acceded to by the People'sRepublic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.

International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or accorded to by the People's Republic of China has any provisions.

[6] **Maritime Code of the People's Republic of China, Chapter XIV Application of Law in Relation to Foreign-related Matters, Article 268:**

If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People's Republic of China has announced reservations.

International practice may be applied to matters for which neither the relevant laws of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China contain any relevant provisions.

7 **United Nations Convention on Contracts for the International Sale of Goods(1980) , Article 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.

8 **Uniform Law on the International Sale of Goods(1964), Article 3:**

The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially.

Such exclusion may be express or implied.

III - Application order

Some national laws and international treaties provide an application order of regulations of different nature. Article 9 - 2 of the Uniform Law on the International Sale of Goods (1964) provides that "*They (the parties) shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contrat. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties.*"

However, the provisions of Chinese law hold a conservative view. According to Article 142 - 3 of the General Principles of Civil Law of P.R.C., and Article 268 - 2 of the Maritime Code of P.R.C., in case of conflict of domestic legislation, international treaties and international business customs, the application order is international treaties, national law, then international business customs. The priority is of international treaties, not of the customs.

Section I - Proof of international trade customs

§ 1 - Express choice by the parties

Chinese statutes and some Regulations of Supreme People's Court clearly recognize that the parties to an international commercial contract have the right to choose international business customs as applicable law to their contract.

Article 126 - 1 of the Contract Law of the People's Republic of China states: "*Parties to a foreign-related contract may select the applicable law for resolution of a contractual dispute, except as otherwise provided by law. Where parties to the foreign-related contract fails to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto.*" Here the "applicable law" should be interpreted broadly. There is no need to limit the range of applicable law to positive regulations.

In the Reviews of judicial issues on foreign-related maritime affaires (I)[9], Supreme People's Court points out clearly: "*The applicable law to an international business contract includes international conventions, international practice and foreign law*."

From the perspective of judicial practice, the juridical authorities in mainland China generally recognize the practice that the contractual parties choose international trade customs as applicable law. For instance, the Supreme Court, in the sentence of Newcomen (Swiss) v. China Construction Bank demonstrated : "*Both parties agreed on applying UCP500 as applicable law. This agreement is valid. So in this case, the rights and obligations of the parties should be adjusted on the basis of this international (business) custom*."

The express choice of international trade custom by the parties is already a common sense in law-world in mainland China. Part 9, Article 4 - 1, and Article 50 - 1 of the Draft of the Civil Code of People's Republic of China (2003) declares that the Parties to a foreign-related contract may agree

---

9 translated by author, the Chinese origine is 中华人民共和国最高人民法院《涉外商事海事审判实务问题解答》(一)

on to expressly select international practice as applicable law. We can see that comparing with other legislation, the Draft is still conservative, for example the requirement of the consensus of the parties, and the express choice. However, if this draft is passed by the National Congress, the express choice will be recognized by Civil law, no longer just by Contract law or limited in foreign-related maritime affaires.

§ 2 - Presumed choice by the Courts

I - As a supplementary of national law and international treaty

Presumed choice by the court, or the implied choice by the parties, means that in absence of an express choice-of-law clause in a contract, the judge or the arbitrator can presume that the parties impliedly chose international trade customs as applicable law to their eventual litigation.

Article 142 - 3 of the General Principles of Civil Law of P.R.C. stipulates: "*International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or accorded to by the People's Republic of China has any provisions*.". In virtue of this article, the Chinese Court can presume international commercial customs as a supplementary rule in dispute resolving, in the absence of provisions of international treaty and Chinese laws.

II - As a replacement of national law and international treaty

There are two exceptions of the application order mentioned above. One is an exception in the field of Letter of Credit. Article 2 of the Rules of the Supreme People's Court on Hearing Letter of Credit Dispute Cases states: "*When hearing a Credit Dispute Case, a People's court shall apply the relevant international practice or other rules that the parties thereto agreed upon; and in the absence of such agreement, this court shall apply the Uniform Customs and Practice For Documentary Credits of ICC and other international practice*.", which grants UCP custom a priority to the International treaty and Chinese law.

The other exception is made by the High People's Court of the Beijing Municipality. In a Guidance on Hearing Sales Disputes Cases, published in 2009, it declares that this guidance is not applicable to the foreign commercial cases to which international practice is applicable.

Section II - Legal effect of international trade customs

§ 1 - Contractual binding force

This is the situation the most frequent in China. In the view of Chinese legal system, international trade customs are selective or arbitrary. Their effectiveness depends on the voluntary of the parties in an international business transaction. By nature, they have no binding force to the parties. The application of international trade customs have a precondition: the parties expressly agree to choose them as an applicable law. But once the parties choose an international practice, in most cases, the national laws and international treaties can no more apply to the commercial relationship.

For example, in the international sale of goods transactions, the parties can choose to apply UCP500 or not. As long as the issuing bank noted that the UCP 500 is applicable, all the interested parties, such as the issuing bank, negotiating bank , advising bank, paying bank, should operate strictly in respect of UCP 500.

Another example is the standard trading format, such as the Standard Contracts on Grain Trading (GAFTA-conditions) developed by the London Corn Trade Association, the Conditions of Contract issued by the International Federation of Consulting Engineers (FIDIC) and the Combined Transport Bill of Lading(Through B/L) made by the International Federation of Freight Forwarders Associations(FIATA). These documents have relative binding force to the parties who choose them as applicable law.

§ 2 - Normative binding force

If a country grants an international trade custom general binding force through its legislation process, this international usage will have mandatory effect. In this case, this custom has the same effect as a national law, which is general and mandatory, and its effectiveness depends no more on the will of the parties.

I - Contra legem

Realizing the actual needs of international trade, some judicial organs recognize that in foreign-related commercial cases, certain international practice can prevail over domestic law.

Article 2 of the Rules of the Supreme People’s Court on Hearing Letter of Credit Dispute Cases declares that in the absence of a Choice-of-law clause, the court shall apply the Uniform Customs and Practice For Documentary Credits of ICC and other international practice. The High People’s Court of the Beijing Municipality made a similar rule. In a Guidance on Hearing Sales Disputes Cases, published in 2009, it limits the application of its own to the international commercial disputes, and admits the application of international usages.

II - Praeter legem

This situation is more frequent in China. If the Chinese law and international treaties have no material rule, Chinese Courts (and the arbitral tribunals) can apply international business usages.

In 1985, the Law of the People's Republic of China on Economic Contrats Involving Foreign Interest recognized this effect the first time in history. Article 5 of this law states: "*International practice may be applied to matters for which the law of the People's Republic of China has no provisions.*". Subsequently, Article 142 of the General Principles of Civil Law in 1986, Article 268 of the Maritime Code in 1992, Article 184 of the Civil Aviation Law of the People's Republic of China[10] in 1995, Article 95 of the Law of the People's Republic of China on Negotiable Instruments[11] in 2004 also followed this approach.

In this mode international trade customs are supplementary rules. The application of international trade customs have two previous conditions. The first is that, according to the conflict rules, Chinese law is the applicable law. The second is the absence of provision in Chinese law and international treaties. If Chinese law and international commercial customs have different regulations, Chinese law should apply. But if the applicable law is a foreign law, and this foreign law has no relating provision neither, Can the Chinese Court apply international practice?

Conclusion of this chapter

From the above regulations, we can find that the legislation actuality adopts three application methods. The express choice by the parties is the most prominent way, and it has a strong trend to be retained. The next is presumed choice as a supplementary rule. The third is presumed choice as a prior rule, which is limited in the field of Letter of Credit or in the city of Beijing. However these two attempts show the tendency to accept the third model.

It seems reasonable to believe that the Chinese legislature adopts a gradual-relaxation attitude to international trade customs, and the controls of transnational exchange is decreasing.

However, some improvements still should be done: the implied choice, or presumed choice of international commercial customs has become an important legal alternative in the international business disputes. The actuality of Chinese legislation is relatively back forward. The Chinese legislature should give presumed choice of international trade customs a greater scope and a higher status. That is to say, to enlarge the scope of presumed choice to all the applicable national law: as long as there is international practice and the applicable law invoked by the conflict rules has not direct provision on a field in question, the international usages should be applied. This is good for reducing litigation costs and ensuring the certainty and stability of judicial activity.

---

10 Civil Aviation Law of the People's Republic of China, Article 184:

Where the provisions of an international treaty concluded or acceded to by the People's Republic of China are different from those of this Law, the provisions of that international treaty shall apply, except the provisions for which reservation has been declared by the People's Republic of China.

In respect of cases which are not provided by the law of the People's Republic of China or by the international treaties concluded or acceded to by the People's Republic of China, international practices may apply.

11 Law of the People's Republic of China on Negotiable Instruments, Article 95:

If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those of this Law, the provisions of the international treaty shall apply; however, provisions on which the People's Republic of China has announced reservations shall excepted.

International practices may be applied to matters for which no provisions are contained in this Law or in any international treaty concluded or acceded to by the People's republic of China.

Chapter III - DISPARITION OF INTERNATIONAL TRADE CUSTOMS

In the view of Chinese law, the disparition of international trade customs have two modes.

§ 1 - Disparition by demotion

The first is the utility of the usage is vanished. During a certain period, the private actors of a branch of international economy had a practice which is commonly known and regularly observed. As the progress of technic or business mode, these businessmen adopted another practice. Consequently, the previous practice lost the basis of business reality.

For example, the earlier versions of Uniform Customs and Practice for Documentary Credits issued by ICC, there were rules of “Revocable Lettre of Credit”. In the latest version -- UCP 600 -- these provisions are all deleted, in the reason that this practice is rarely used in nowadays business reality. As the main business banks in China successively claimed that they will apply UCP 600. We can say that the usage of revocable Letter of Credit is disappeared in China from late 2007.

§ 2 - Disparition by promotion

The second mode of disparition of the usage is dissolved.

Above all, a question should be clarified: the transcription of international business usages have two forms: the incorporation and the codification. The incorporation is the legislature of a country or the parties of a contract adopted the substantial elements of a usage in the drafting of a new statute or a new contract. In this way, the content of the usage is still ruling the commercial relationship. What the parties apply is no more the international usage itself as a proper source of law, but the new statute or a clause of the new contract. One the contrary, the codification of international business practice is not a form of disparition. The result of codification is the international business customs, which keeps the characteristics of usages in substance and in formality.

There are two ways of incorporation of an international trade customs. One is the incorporation into a statute, and the other is the incorporation into a contract. The international trade customs incorporated into a written law of a country will have the same effect of a national law, and it will be generally applied in this country. Those incorporated into a contract, as an express choice of law, will have a contractual binding force on the basis of autonomy of will, and they will have a relative effect between the parties.

Bibliography

English

Xiao Ying LI-KOTOVTCHKINE (directed), Source of law and legal reform in China, Paris, Litec, 2003

Jacob S. SCHNEIDER, LIANG Huixing, The Draft Civil Code of the People's Republic of China, Leiden and Boston, Martinus Nijhoff Publishers, 2010

French

J.-M. JAQUES, P. DELEBECQUE, S. CORNELOUP, Droit du commerce international, 2e édition, Paris, Dalloz, 2010

Un nouveau regard sur le droit chinois, Paris, Société de législation comparée, 2008

Emmanuel MERIL, Dossiers internationaux, Chine: juridique, fiscal, social, Levallois, 2e édition, Francis Lefebvre, 2007

Chinese

2010 年国家司法考试辅导用书，法律出版社，2010 (Guidance Book of National Judicial Examination 2010, Law Press China, 2010)

许肖哲，《刍议国际惯例在中国的适用》，《法制与社会》2010 年 8 月(XU Xiaozhe, Discussion on the application of international practices in China, Legal system and Society, 2010(23))

陈亚芹，《有关国际商业惯例独立调整合同的理论探讨》，大连海事大学学报（社会科学版），2008，7 （1）(CHEN Yaqin, Study on theories concerning independent regulation of international commercial custom on contract, Journal of Dalian Maritime University (social science)，2008，7(1))

谢石松，《国际私法》，法律出版社，2007 年版(XIE Shisong, Private international law, Law Press China, 2007)

贺万忠，国际商事惯例合意选择条款的思考——兼评我国《民法（草案）》有关条款，外交学院学报，2005 （2）(HE Wanzhong, Ponder the Clause of Parties' Choice of International

Usages--On Relevant Provisions of the Draft Civil Law of China, Journal of China Foreign Affaires University, 2005 (2))

肖永平.论国际商事惯例在我国的适用.河南省政法管理干部学院学报.2003(1).(Xiao Yongping, The application of international commercial practices in China, Journal of Henan Administrative Institute of Politices and Law, 2003 (1))

赵秀文，国际商事仲裁及其适用法律研究，北京大学出版社，2002 (ZHAO Xiuwen, Study of the applicable law of International Commercial Arbitration, Peking University Press, 2002)

黄进,胡永庆，现代商人法论：历史和趋势，比较法研究，1997 （2）(HUANG Jin. HU Yongqing, Lex Mercatoria: History and Current, Journal of Comparative Law, 1997 (2))