US-China Law Review, January 2024, Vol. 21, No. 1, 28-40
doi:10.17265/1548-6605/2024.01.004

The Application of International Usages in China in the Era of the Civil Code

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With the entry into force of the Civil Code of the People's Republic of China (PRC), the General Principles of the Civil Law of the PRC and other single civil laws, which contain norms on the application of law to foreign-related civil relations, have been repealed, resulting in a legal vacuum in the application of international usages in China. International usages in the field of public international law theoretically refer to "general practice" stipulated in Article 38(1)(b) of the Statute of the International Court of Justice. In the field of private international law and international economic law, international usages mainly refer to international commercial usages. In the judicial and arbitral practice of China, there are two ways in which international usages are applied: indirect application and direct application, and the latter is the main way of application in practice. In order to fill this legal vacuum, it is recommended to add a provision on the application of international usages when amending the Law of the PRC on the Application of Law to Foreign-Related Civil Relations, and to clarify the indirect application of international usages.

Keywords: international usages, Civil Code, international commercial usages, direct application, indirect application

Introduction

As the first law named after a code in the People's Republic of China (PRC)[1], the Civil Code of the PRC (Civil Code) came into force on January 1, 2021. As a code mainly consists of substantive norms, the Civil Code has hardly absorbed the norms on the application of law to foreign-related civil relations in the General Principles of the Civil Law of the PRC (GPCL) and other single civil laws.[2] Pursuant to Article 1260 of the Civil Code, nine laws, including the GPCL, have been repealed with the entry into force of the Civil Code. In addition, the Law of the PRC on the Application of Law to Foreign-Related Civil Relations (LAL) and its judicial interpretations do not contain the provisions on the application of law to foreign-related civil relations that were previously stipulated in single laws such as the GPCL. Therefore, after the entry into force of the Civil Code, the

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[1] The terms "PRC" and "China" used in this paper do not include the Hong Kong Special Administrative Region, the Macao Special Administrative Region, and the Taiwan Region.

[2] Throughout the Civil Code of the People's Republic of China, only Article 467(2) concerns the application of law to foreign-related civil relations, i.e., "The laws of the People's Republic of China shall apply to the contracts of Sino-foreign equity joint venture, contracts of Sino-foreign contractual joint venture, or contracts of Sino-foreign cooperation in the exploration and exploitation of natural resources, that are to be performed within the territory of the People's Republic of China".

legal basis for the application of law to foreign-related civil relations, including the application of international usages, which was originally stipulated in the GPCL, no longer exists.

Prior to the entry into force of the Civil Code, the general basis for the application of international usages was set out in Article 142(3) of the GPCL. Pursuant to this provision, international usages may be applied where the laws of PRC and international treaties concluded or acceded to by PRC do not contain provisions on foreign-related civil relations. With the entry into force of the Civil Code, the GPCL was repealed. As a result, the general legal basis for the application of international usages in China no longer exists. Although the Maritime Law of the PRC (ML),[3] the Civil Aviation Law of the PRC (CAL),[4] the Negotiable Instruments Law of the PRC (NIL),[5] and other single laws contain the same or similar provisions as Article 142(3) of the GPCL, they are only applicable to legal relations in specific fields, such as maritime, civil aviation, and negotiable instruments, and the application of international usages to legal relations in other fields is currently in a state of legal vacuum.

However, the need to apply international usages in the judicial practice of China will not disappear. On the contrary, with the in-depth implementation of the "Belt and Road" Initiative, the application of international usages in China will become more and more frequent. The Opinion concerning the Establishment of the "Belt and Road" International Commercial Dispute Resolution Mechanism and Institutions issued by the General Office of the Communist Party Central Committee and the General Office of the State Council calls for the "active application of international usages". The Several Opinions of the Supreme People's Court (SPC) on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts[6] also emphasize the need to "accurately apply international treaties and usages in accordance with the law". Therefore, how to apply international usages in the era of the Civil Code is a practical problem that needs to be solved urgently. To this end, this paper will begin by clarifying the concept and scope of international usages as explored in this paper, and then elaborate the manner in which international usages are applied in the judicial practice and arbitral practice in China. Ultimately, this paper will explore the path of the application of international usages in China in the era of the Civil Code.

The Concept and Scope of International Usages

The concept and scope of international usages have been the subject of much debate among scholars, and so far no consensus has been reached.

Specifically, some scholars are of the view that there is a distinction between international usages in the broad and narrow sense, and that the former include international custom and international general practice (Gao & Si, 2010, p. 30). For instance, Mr. Wang Tieya, a famous international jurist in China, holds this view. To be specific, he posits that international usages in the narrow sense exclusively refer to international custom, while international usages in the broad sense include both international custom and international usages (Wang, 1995, pp. 13-14). In addition, some scholars do not make such distinction between the broad and narrow sense, and

[3] Article 268(2) of the Maritime Law of the People's Republic of China.
[4] Article 184(2) of the Civil Aviation Law of the People's Republic of China.
[5] Article 95(2) of the Negotiable Instruments Law of the People's Republic of China.
[6] Fa Fa [2015] No. 9 (法发[2015]9 号).

directly consider that international usages include international custom and international commercial usages (Che, 2020, p. 4). Among them, some scholars have classified international usages into those falling within in the legal context and those of an arbitrary nature, corresponding to international custom and international commercial usages respectively (Xiao, 2003, p. 73).

By contrast, other scholars hold that there is no inclusive relationship between international usages and international custom, and that a distinction needs to be drawn. For example, according to Oppenheim's International Law, as revised by the famous British international jurist Lauterpacht, usages only refer to a certain kind of "habit of doing certain actions", but lacks "the conviction that these actions are, according to International Law, obligatory or right", whereas custom contains both elements, and usages and custom should not be confused.[7]

> International usages, as a source of law, belong to different legal fields and legal categories. Some belong to the field of public international law, some belong to the field of private international law and some belong to the field of international economic law. (Chen, 1994, p. 77)

In the author's view, in order to clarify the concept of international usages, it is necessary to place it in a specific field.

On the one hand, in the field of public international law, the author agrees with the second point of view, that is, there is no inclusive relationship between international usages and international custom. Unlike daily language, legal terms must be used with precision and clarity. Article 38 of the Statute of the International Court of Justice (ICJ Statute) is recognized as an authoritative statement of the sources of international law. Article 38(1)(b) of the ICJ Statute defines international custom as "evidence of a general practice accepted as law". International usages in the field of public international law are, in theory, the "general practice" as defined in that provision, as the material element that constitutes international custom (Zhai, 2021, p. 23). In addition to proving the existence of "general practice", international custom requires proof that the "general practice" has been accepted as law, i.e., the existence of *opinio juris*, which is the psychological element constituting international custom. Therefore, international usages cannot be equated with or encompass international custom and the two should not be confused. Although in theory "general practice" stipulated in Article 38(1)(b) of the ICJ Statute refers to international usages, since the ICJ Statute has opted for the legal term "general practice", the term "general practice" should be used uniformly when referring to unwritten practice followed by states in the field of public international law, so as to avoid unnecessary confusion.

On the other hand, in the fields of private international law and international economic law, international usages primarily refer to international commercial usages (Li, 2011, p. 18; Du, 2005, p. 82; Zhai, 2021, p. 23), which are sources of modern merchant law (Huang & Hu 1997, p. 154; Xu, 1993, p. 85; Li, 2011, p. 19). Different scholars in China use different wording to define international commercial usages. It has been argued, for example, that international commercial usages are "practices and norms of a deterministic nature that are repeatedly used and observed in a particular industry in a particular region or on an international scale" (Huang & Hu, 1997, p. 155). Some scholars have also defined international commercial usages as "unwritten rules or procedures developed in the course of commercial practice by businessmen engaging in international commercial transactions, which are recognized and customarily observed by the parties to the transaction" (Zuo, 2007, p. 98).

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[7] See Lauterpacht, Oppenheim International Law 26 (8th ed., 1955).

The author posits that, as its name implies, international commercial usages are practices relating to international commercial transactions that is customarily observed in a particular geographic area or industry. Typical international commercial usages include, but are not limited to, the following: in the area of international payments, the Uniform Customs and Practice for Documentary Credits (UCP), the Uniform Rules for Demand Guarantees (URDG), and the Uniform Rules for Collections (URC) developed by the International Chamber of Commerce (ICC); in the area of international trade, the Incoterms developed by the ICC; and in the area of common maritime losses, the York-Antwerp Rules developed by the International Maritime Committee.

This paper attempts to address the application of international usages in China in the era of the Civil Code. The "application" of the law generally refers to the process by which a dispute resolution body resolves disputes between the parties in accordance with the law or other provisions (Che, 2020, p. 4; Xu, 2014, p. 70). When resolving international civil or commercial disputes, the subjects of applying international usages are mainly domestic courts and arbitrators. In the field of public international law, due to the "absence of jurisdiction between equals", disputes between states usually will not be submitted to the jurisdiction of domestic courts or arbitrators. Therefore, international usages discussed below do not refer to international usages in the field of public international law, but only refer to international usages in the fields of private international law and international economic law.

The Manner in Which International Usages Are Applied in China

Although international usages do not have *ipso facto* legal effect, it may be recognized by the law through specific means and thus acquire legal effect (Xiao, 2003, p. 74). Specifically, international usages may become legally binding in an indirect or direct manner. Accordingly, the methods in which international usages are applied also include indirect application and direct application.

Indirect Application

Indirect application refers to the application of international usages by a court or an arbitrator based on the agreement between the parties. Since the parties have expressly agreed on the applicability of international usages in the contract, international usages have in fact become part of the contract. Therefore, indirect application is also referred to as "application as contractual clauses" (Che, 2020, p. 10) or "contractual application". Under the circumstance where international usages are applied indirectly, the legal effect of international usages stems from respect for party autonomy.

Indirect application of international usages has been recognized in many international treaties and domestic laws. For instance, pursuant to Article 9(1) of the 1980 United Nations Convention on Contracts for the Sale of Goods (CISG), the parties are bound by any usage to which they have agreed. Although the domestic laws of China do not provide for indirect application of international usages, the SPC has repeatedly recognized it in the form of judicial interpretations.

Firstly, the 1989 Summary of the National Symposium on Economic Trials Involving Foreign Countries, Hong Kong and Macao in Coastal Areas (Summary) emphasized the basic principle of "respecting international usages", stating that:

> international usages that the parties to an economic dispute involving foreign countries, Hong Kong and Macao have chosen to apply in the contract shall be used as the basis for resolving the dispute between the parties, as long as they do not contravene the social and public interests of China.

In addition, the Summary also stipulated that:

> International usages cited by the parties in the contract, including international trade price conditions such as Free on Board (FOB), Cost and Freight (C&F), Cost, Insurance and Freight (CIF), and international trade payment methods such as collection and payment by letter of credit, are binding on the parties, the court shall respect this choice of the parties and apply them.

Secondly, Article 2 of the Provisions of the SPC on Several Issues Concerning the Hearing of Cases of Disputes over Letter of Credit (PDLC) stipulates that:

> When the people's court hears a case of disputes over letter of credit, if any stipulation is made by the parties concerned on applying the relevant international usages or other provisions that should be applicable to such case, this stipulation shall prevail.

Moreover, Article 6(1) of the PDLC also stipulates that:

> Where the people's court is involved in the examination of documents in the hearing of a dispute over letter of credit, it shall conduct it in accordance with the relevant international usages or other provisions applicable by agreement of the parties.

Thirdly, Article 5(1) of the 2016 Provisions of the SPC on Several Issues Concerning the Hearing of Cases of Disputes over Independent Letter of Guarantee (PDLG) requires that, when a model rule for a certain transaction is stated to be applicable to independent guarantees, or is invoked by both the issuer and the beneficiary unanimously prior to the close of the arguments in the court of first instance, the content of such a model rule shall be recognized as an integral part of the terms of the independent guarantees.

Last but not the least, Article 5 of the 2023 Interpretation of the SPC on Several Issues Concerning the Application of International Treaties and International Usages in the Trial of Foreign-related Civil and Commercial Cases (IATU)[8] stipulates that:

> If the parties to a foreign-related civil and commercial contract explicitly choose to apply international usages, and the parties claim to determine the rights and obligations between the parties to the contract based on international usages, the people's court should support the claim.

Indirect application is the main way in which international usages are applied (He, 2023, p. 212). Several international usages also specify in their scope of application that they may apply to situations where the parties expressly agree upon their application. For example, Article 1(a) of the 2010 URDG stipulates that it applies to any demand guarantee or counter-guarantee that expressly indicates it is subject to them. Similar provisions are also found in Article 1 of the 2007 UCP 600 and Article 1(a) of the URC. In practice, there is no lack of parties to make agreements on the applicability of international usages in the contract. As of December 31, 2022, of the 389 cases in which Chinese courts applied international usages, the proportion of indirect application reached 90.7% (He, 2023, p. 211). For example, in *Hyundai Motor Group Co., Ltd. v. Zhejiang Branch of Industrial and*

[8] Fa Shi [2023] No. 15.

Commercial Bank of China, one of the second batch of model cases involving the construction of the "Belt and Road" released by the SPC (Supreme People's Court, 2017), the independent guarantee involved in the case stated that the URDG was applicable to the guarantee. Both of the Hangzhou Intermediate People's Court of Zhejiang Province of the first instance and the Higher People's Court of Zhejiang Province of the second instance recognized the legal effect of such agreement, and determined the rights and obligations between the parties in accordance with the URDG. In *Tai Shing Maritime Co., S.A. v. Qingshan Holdings Group Ltd.*, one of the typical cases on the application of international treaties and international usages in foreign-related civil and commercial cases released by the SPC, as the bill of lading read that "the common sea loss shall be adjusted, stated and resolved in London in accordance with the 1994 York-Antwerp Rules", the Xiamen Maritime Court recognized the validity of the clause and determined the adjustment of the common sea loss in accordance with the York-Antwerp Rules (SPC, 2023).

Direct Application

Direct application describes the circumstance where a court or an arbitrator applies international usages in resolving a dispute on the basis of the provisions of domestic legislations, international treaties, or arbitration rules. Unlike indirect application, direct application does not rely on the parties' agreement on the applicability of international usages, but directly apply international usages to a dispute. For this reason, it is referred to as "application as law" (Che, 2020, p. 10). After all, international usages are not law, and in the absence of express agreement by the parties, it can acquire legal effect and thus be applied only if the conditions for its application set forth in domestic legislations, international treaties, or arbitration rules are met. Thus, under the circumstance where international usages are applied directly, their legal binding force derives from relevant provisions of domestic legislations, international treaties, or arbitration rules on the application of international usage.

Domestic Legislations

The earliest Chinese law concerning the application of international usages was the 1985 Law of the PRC on Foreign-related Economic Contracts, Article 5(3) of which only provided for one situation in which international usages may be applied, namely, "there is no stipulation in the laws of the PRC". On the basis of this article, Article 142(3) of the 1986 GPCL added a situation, namely, "there is no stipulation in the international treaties concluded or acceded to by China". Similar wording has also been adopted in the ML, the CAL, and the NIL. Article 5 of the 2012 Interpretation of the SPC on Several Issues Concerning the Application of the LAL (I) also stipulates that, where the application of law to foreign-related civil relations involves the application of international usages, the people's court shall apply it in accordance with the provisions of the said laws. Article 6 of the IATU also reaffirms the two aforementioned situations in which international usages may be applied and requires the court to reject a party's claim to exclude the application of international usages on the sole ground that they are not expressly chosen.

Pursuant to the laws in force in China, direct application of international usages is of a gap-filling nature and thus is known as "gap-filling application" (He, 2023, pp. 206-207). Moreover, even in the case where the condition for direct application has been met, the adjudicator has the discretion to apply or not to apply international usages because the wording used in the aforementioned provisions is "may" rather than "shall".

Therefore, compared to indirect application, direct application of international usages by Chinese courts in accordance with the aforementioned provisions is not very common.

For example, in *Beijing Branch of Shenzhen Development Bank Co., Ltd. v. Shar Metal Scrap Co. Ltd.*,[9] the collection instruction given by Shar Metal Scrap Co. Ltd. provided for applicability of the URC to the collection, and the Bank did not reject the instruction after acceptance. The Beijing No. 1 Intermediate People's Court held that, pursuant to Article 142(3) of the GPCL, the URC, as an international usage, could be applied in the present case where there was no direct stipulation on collections both in the laws of China and international treaties concluded or acceded to by China. Again, in *Jiangsu Huajian Energy Group Co., Ltd. v. Nanjing Ocean Shipping Co., Ltd.*, the Tianjin Maritime Court[10] (Li & Zhang, 2017, p. 77) of the first instance and the Higher People's Court of Tianjin[11] (Li & Zhang, 2017, p. 77) of the second instance both held that the nickel mines involved in the case conformed to the definition of "readily fluidizable cargoes" as provided for in the Code of Safe Practice for Solid Bulk Cargo, and that the Code, as an international shipping usage, was applicable to the present case in accordance with Article 286(2) of the ML. In *Guangzhou Yanjiang Branch of Bank of China v. Guangzhou Gulangma Trading Co., Ltd.*,[12] the Guangzhou Intermediate People's Court applied the URC in accordance with Article 95(2) of the NIL, on the ground that the NIL did not contain any provisions on the rules of collection of foreign-related instruments and that China did not accede to relevant international treaties. In *Koufu Foods Co. Ltd. v. Korea Enterprise Bank & Nuclear Power Station Branch of Bank of China*,[13] the Nanjing Intermediate People's Court of first instance cited Article 142(2) of the GPCL and held that:

> All parties relied on the UCP 500 when filing the lawsuit and submitting defense. Since there are currently no legal provisions regulating the relationship of letters of credit in China, and UCP 500 is an international usage regulating this relationship, it should be applied in this case.

It is worth mentioning that the judicial practice has broken through the prerequisite for the application of international usages set out in Article 142(3) of the GPCL and other provisions in some highly specialized and technical fields, such as letter of credit. Specifically, Article 2 of the PDLC stipulates that the people's court shall apply the UCP and other relevant international usages if the parties do not agree to apply the relevant international usages or other provisions to letters of credit. This provision has, to a certain extent, broken through the said provisions on the gap-filling application of international usages. The reason for this breakthrough lies to a large extent in the fact that, due to the highly specialized and technical nature of letter of credit, most countries do not have specific legislations on letter of credit, and thus usually apply the UCP (Song, 2020, p. 195). This is also reflected in the SPC's Explanation on the PDLC.[14]

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[9] Beijing No. 1 Intermediate People's Court, (2009) Yi Zhong Min Chu Zi No. 5459 ((2009)一中民初字第 5459 号).

[10] Tianjin Maritime Court, (2011) Jin Hai Fa Shang Chu Zi No. 117 ((2011)津海法商初字第 117 号).

[11] The Higher People's Court of Tianjin, (2013) Jin Gao Min Si Zhong Zi No. 84 ((2013)津高民四终字第 84 号).

[12] Guangzhou Intermediate People's Court of Guangdong Province, (2005) Sui Zhong Fa Min San Chu Zi No. 220 ((2005)穗中法民三初字第 220 号).

[13] The Higher People's Court of Jiangsu Province, (2003) Su Min San Zhong Zi No. 52 ((2003)苏民三终字第 52 号), Gazette of the SPC, 2006, No. 1.

[14] In the Explanation of the Supreme People's Court on the Provisions on the Hearing of Disputes over Letter of Credit, the Supreme People's Court pointed out that, "Disputes over letter of credit are a relatively special field. So far, the vast majority of countries in the world do not have specialized legislation on letters of credit. Regarding the handling of disputes relating to letters of credit, in addition to the application of international usage, the relevant legal principles are scattered in the domestic civil and commercial statutory laws of each countries or are adjusted by case law. Similarly, there are no special statutory provisions on letters of credit in China."

However, this breakthrough does not necessarily extend to international usages in other fields, such as in the area of independent guarantee. Pursuant to Article 5(2) of the PDLG, a model rule for transaction shall not be applicable if it has not been set forth as applicable in the independent letter of guarantee and has not been invoked by the issuer and the beneficiary unanimously by the end of the arguments in the court of first instance. In other words, in the absence of express consent of the parties, the court cannot directly apply model rules for independent letter of guarantee transactions such as the URDG. In *Anhui Foreign Economic Construction (Group) Co., Ltd. v. Inmobiliaria Palacio Oriental S.A.*,[15] the Guiding Case No. 109 released by the SPC, the Higher People's Court of Anhui Province as the court of second instance had stated that,

> The rules for guarantee were not limited to the URDG, and there were domestic laws, international usages, and international conventions for parties to choose. As an international usage, the URDG may be applied only when the parties to the guarantee specify its applicability in the guarantee.

Similarly, in *Xuancheng Economic and Technological Development Zone Construction Investment Co., Ltd. v. Jinchang Branch of China Construction Bank Corp.*,[16] the URDG was neither stated to be applicable to the guarantees involved, nor was it invoked by the issuer prior to the conclusion of the arguments before the court of the first instance. Therefore, the appellant's claim for the application of the URDG was not upheld by the Higher People's Court of Gansu Province.

International Treaties

At the level of international treaties, both Article 9(2) of the 1964 Uniform Law on the International Sale of Goods and Article 9(2) of the CISG give international usages legal force in the absence of the parties' express consent. They enable international usages to be applied in disputes arising out of international commercial contracts even in the absence of express agreement. For example, in an international commercial arbitration before the ICC, the buyer purchased manganese ore from the seller for resale to a third party. The seller issued two invoices to the buyer, informing the buyer that the first invoice contained only a provisional price and that the price on the second invoice was the final sales price. After making payment in accordance with the first invoice, the buyer refused to pay for the goods under the second invoice. The seller initiated arbitration based on the arbitration clause in the contract. Relying on Article 9(2) of the CISG, the arbitral tribunal found that the adjustment of the sales price was a usage regularly observed by the parties to the mineral trade contract, and that the seller had therefore acted reasonably in adjusting the sales price.[17]

Arbitration Rules

Many arbitration rules provide that the arbitral tribunal shall take into account or refer to international usages when rendering arbitral award. For instance, Article 21(2) of the 2021 ICC Arbitration Rules stipulates that "The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages." Similar provisions can also be found in the 2010 United Nations Commission on International

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[15] The Supreme People's Court of China, (2017) Zui Gao Fa Min Zai No. 134 ((2017)最高法民再 134 号), 14 December 2017.
[16] The Higher People's Court of Gansu Province, (2019) Gan Min Zhong No. 242 ((2019)甘民终 242 号), 27 March 2019.
[17] ICC Award No. 8324, 1995, UNILEX (Aug. 10, 2023), https://www.unilex.info/cisg/case/240.

Trade Law (UNCITRAL) Arbitration Rules,[18] the 2022 Arbitration Rules of Beijing Arbitration Commission,[19] the 2015 Arbitration Rules of China International Economic and Trade Arbitration Commission,[20] the 2022 Arbitration Rules of Shanghai Arbitration Commission,[21] and the 2019 Arbitration Rules of Shenzhen Court of International Arbitration (SCIA)[22].

On the basis of these provisions, it is also likely that the adjudication of international commercial disputes by arbitral tribunals will involve the application of international usages. Among 66 international arbitration cases that have been included in the International Council for Commercial Arbitration (ICCA) Yearbook Commercial Arbitration from 2010 to 2018, international commercial usages were applied *ex officio* by arbitral tribunals in eight international commercial arbitration cases, representing 12% of the total sample (Song & Cui, 2021, p. 47). In addition, the application of international usages was also involved in an international arbitration case before the SCIA (then South China International Economic and Trade Arbitration Commission). In this case, the buyer and the seller entered into a gas supply contract. The buyer notified the seller in writing to terminate the contract on the ground of change of circumstances after 10 years of performance. The seller submitted the dispute for arbitration in accordance with the arbitration clause in the contract. The arbitral tribunal held that, the contract agreed to apply the laws of China, which did not provide for the principle of change of circumstances, while the principle of change of circumstances had been generally recognized and applied in the practice of international commercial dispute resolution, constituting an international usage. Since the contract involved in the case was an international commercial contract, the arbitral tribunal made a reference to the principle of change of circumstances in accordance with Article 53 of the 2000 Arbitration Rules of the SCIA (Liu, 2020, pp. 179-180).

Approach of Applying International Usages in the Era of the Civil Code

As mentioned earlier, there is a legal vacuum in the application of international usages in China after the Civil Code came into effect. Different scholars hold different views on how to apply international usages in the era of the Civil Code, and have proposed two approaches, namely, the interpretative approach and the legislative approach.

The Interpretative Approach

The interpretative approach lies in the expansive interpretation of existing legislations, so that international usages can be applied. Specifically, scholars who put forward the interpretative approach hold that, "the essence of international usages are 'custom' or 'transactional custom'" and that "the 'custom' in Article 10 of the Civil Code should be interpreted as including international usages", so as to apply international usages in China (Che, 2020, p. 7).

The author disagrees with this opinion. Article 10 of the Civil Code stipulates that, "Civil disputes shall be resolved in accordance with the laws. Where the laws do not specify, custom may be applied, provided that public order and good morals may not be offended." The SPC has illustrated that the "laws" stipulated in this provision

[18] Article 35(3) of the 2010 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.
[19] Article 69(4) of the 2022 Arbitration Rules of Beijing Arbitration Commission.
[20] Article 49(1) of the 2015 Arbitration Rules of China International Economic and Trade Arbitration Commission.
[21] Article 51(1) of the 2022 Arbitration Rules of Shanghai Arbitration Commission.
[22] Article 51(1) of the 2019 Arbitration Rules of Shenzhen Court of International Arbitration.

should be understood in a broad sense, rather than a narrow one. The SPC also lists the scope of the "laws", which include the Civil Code and a series of single laws on civil and commercial matters, civil norms covered by public law, administrative regulations, local laws and regulations, autonomy regulations and single regulations, international treaties and international usages (Zuigaorenminfayuan Minfadian Guanche Shishi Gongzuo Lingdaoxiaozu, 2020, p. 85). Obviously, the SPC considers that international usages fall within the category of the "laws" that should be applied to civil disputes with priority. Accordingly, the interpretation of international usages as "custom", whose application is supplementary, is contradictory to the above understanding of the SPC.

Moreover, if international usages are interpreted as "custom", the application of international usages will be subject to the premise that there is no stipulation in the "laws", and will be inferior to the application of normative documents of a lower legal effect, such as local regulations. That is to say, if a normative document, such as a local regulation has already regulated a certain issue, international usages cannot be applied. This approach is inconsistent with the status quo that international usages can be applied indirectly through the parties' agreement and that international usages can be applied directly by courts or arbitration institutions in accordance with relevant provisions. Consequently, it is not feasible to interpret international usages as "custom" under Article 10 of the Civil Code. Such an approach could not fill the legal vacuum in the application of international usages after the entry into force of the Civil Code. This is also confirmed by the judicial practice in China. Of the cases concluded within two years from the date of implementation of the Civil Code,[23] not a single case has been found in which a court has cited Article 10 of the Civil Code as the basis for applying international usages (He, 2023, p. 208).

The Legislative Approach

The legislative approach aims to provide a legal basis for the application of international usages by amending existing legislations. However, concerning the question which law should be amended, the opinions of different scholars vary. Some scholars advocate adding a new provision concerning international treaties and international usages when amending the Constitution of the PRC (Constitution) or the Legislation Law of the PRC (Legislation Law), and the provision on the application of international usages may follow the wording of Article 142(3) of the GPCL (Wang, 2021, pp. 207-208). Some scholars hold that the promulgation of the Civil Code provides an opportunity to systematically revise the LAL (Ding, 2019, p. 42). This group of scholars suggests amending Article 5 of the current LAL as "Where the application of foreign laws or international usages would jeopardize the social and public interests of the PRC, the laws of the PRC shall be applied", by drawing on the Article 150 of the GPCL (Ding, 2020, pp. 44-45). It has also been proposed that a new legislative paradigm be adopted when revising the LAL to clarify the contractual application and the gap-filling application of international usages (He, 2023, p. 221).

The Author's Opinion on the Approach of Applying International Usages in the Era of the Civil Code

The author is more in favor of the legislative approach than the interpretive approach. The reason is that the existing provisions fail to provide legal basis for the application of international usages in China, and the legal

[23] That is, cases concluded from January 1, 2021 to December 31, 2022.

vacuum can only be filled by amending or adding new provisions to the existing provisions. With regard to the law to be amended, the author is inclined to the latter, i.e., to add a new provision on the application of international usages in the future amendment of the LAL.

First, the procedure for amending the Constitution is more complex and rigorous than one for amending other laws. Specifically, in accordance with Article 64 of the Constitution, amending the Constitution needs to be proposed by the Standing Committee of the National People's Congress (NPC) or by more than one fifth of the deputies of the NPC, and adopted by the NPC by a majority of two thirds of all the deputies. In contrast, other laws and bills may be passed by the NPC by a majority of all deputies. In addition, since the Constitution is the fundamental law of China, it is not advisable to amend the Constitution too frequently. Given that the most recent amendment of the Constitution took place in 2018, it is foreseeable that China will not initiate plans to amend the Constitution in the near future. However, the application of international usages is a real problem that needs to be solved quickly in practice. Therefore, it is not realistic in the short term to provide for the application of international usages by amending the Constitution.

Secondly, the Legislation Law mainly regulates the competence and procedures of domestic legislations in China, while international usages do not belong to domestic laws in nature. Therefore, it is not appropriate to place the application of international usages under the Legislation Law. In contrast, it makes more sense to provide for it in the LAL. As mentioned above, the GPCL, the Contract Law, and other single laws which contain norms on the application of law to foreign-related civil relations have been repealed with the implementation of the Civil Code. In this way, the LAL has become the only law that regulates the application of law to foreign-related civil relations in China (He, 2023, p. 34). Given that the application of international usages mainly takes place in the field of foreign-related civil and commercial matters, and international usages are important sources of private international law and international economic law, it is more scientific to stipulate the application of international usages in the LAL, which is also conducive to promoting the systematization and codification of the LAL.

With regard to the content of the provision on the application of international usages, this paper makes the following suggestions. First, to regulate this issue in the future revision of the LAL, and to follow the wording of Article 142(3) of the GPCL. As previously illustrated, with the entry into force of the Civil Code, the provisions of the GPCL concerning the application of international usages have been repealed. The Civil Code should have inherited the provision of the GPCL on the application of international usages, but unfortunately, the Civil Code did not inherit this provision, resulting in a legal vacuum in the application of international usages in China. In view of the fact that the Civil Code has just come into force and is not yet suitable for revision in the near future, this paper suggests that the provision of Article 142(3) of the former GPCL should be added when the LAL is revised in the future.

Second, to further clarify that the parties are entitled to agree on the application of international usage on the basis of Article 142(3) of the GPCL, Article 142(3) of the GPCL only provides for direct application of international usages, but ignores indirect application of international usages. However, indirect application is precisely the most important way in which international usages are applied in practice. In order to reflect respect for party autonomy and to be consistent with judicial practice, the laws of China should recognize indirect application of international usages. In fact, Article 4 of the 2002 Draft Civil Code used to provide for indirect

application of international usages, which reads that, "Parties to a foreign-related civil relation may, by consensus, expressly choose to apply international usages." This wording may be added to the provision on the application of international usages.

To summarize, in order to fill the legal vacuum in the application of international usages in China, this paper proposes that a new provision on the application of international usage be added to the LAL, namely, "Parties to a foreign-related civil relation may, by consensus, expressly choose to apply international usages. International usages may be applied where there is no stipulation in the laws of PRC and international treaties concluded or acceded to by PRC."

Conclusion

The Civil Code has a major impact on the application of law to foreign-related civil relations in China. With its implementation, the GPCL and other single civil laws were repealed. Meanwhile, the Civil Code did not retain the provisions of the GPCL on the application of international usages. This results in the absence of legal basis for the application of international usages in the era of the Civil Code. As sources of private international law, international usages significantly influence the promotion and facilitation of international commercial transactions. In the "Belt and Road" international commercial dispute resolution, the application of international usages plays an important role. Therefore, China needs to fill the legal vacuum as soon as possible, so as to improve the "Belt and Road" international commercial disputes settlement. For this reason, this paper proposes to add a provision on the application of international usages when amending the LAL, and to clarify the indirect application of international usages.

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