OPTING OUT OF THE CISG: COMPARATIVE PERSPECTIVES FROM THE UNITED STATES AND CHINA

BEIJA XU*, JINKUN WUYANG**

* LL.M., New York University School of Law. Graduate Editor of the N.Y.U. *Journal of International Law and Politics*. LL.M. Candidate and LL.B. (2024), China University of Political Science and Law.

** LL.M. Candidate, New York University School of Law, Class of 2026. Jinkun Wuyang participated in the N.Y.U. Journal of International Law and Politics during her LL.M. studies. I would like to thank Beijia Xu for her thoughtful collaboration, insightful comments, and generous support. I am also grateful to the editors of the N.Y.U. Journal of International Law & Politics for their comments and edits. All remaining errors are my own.

The United Nations Convention on Contracts for the International Sale of Goods (CISG, or "the Convention") is one of the most successful and widely applied international commercial treaties. It provides a uniform legal framework for international sales contracts and incorporates conflict- of-laws principles within a substantive regime. In doing so, it reduces legal barriers to cross- border trade. The Convention applies most directly when the parties have their places of business in different States that have adopted the CISG. These States are commonly referred to as "Contracting States." Both the United

States and China are Contracting States, but their courts have developed different approaches to determining whether parties have effectively excluded the CISG.

Under Article 6, parties may exclude the application of the CISG or derogate from its provisions. Scholars generally agree that any agreement to exclude or modify the CISG must satisfy the applicable requirements of validity. Article 6 distinguishes between completely excluding the Convention, which is unrestricted, and derogating from certain provisions, which is subject to limitations under the Convention's terms.[1] It has also been observed that, during the drafting history of the Convention, an explicit reference to implied derogation was intentionally removed.[2] The dominant interpretation is that this change was meant to discourage courts from too readily inferring an implicit derogation merely to justify the application of domestic law.

Some commentators agree that exclusion may be express or implied. However, implied exclusion requires a sufficiently clear intention under Article 8 of the CISG. There must be concrete indications that the parties intended their legal relationship to be governed by specific domestic law, fully aware that the CISG would otherwise apply. [3]

The United Nations Commission on International Trade Law (UNCITRAL) Digest similarly records that many courts require a clear, unequivocal and affirmative agreement[4], while emphasizing that the Convention cannot be displaced merely because one party objects to its application.

Parties may exclude the CISG in whole or in part. This may be done by selecting the law of a non-Contracting State, expressly excluding the Convention, drafting detailed contractual provisions that supersede specific parts of the CISG, or incorporating standard terms that effectively replace certain Convention rules[5] The core question, however, is what counts as a sufficiently clear manifestation of intent.

---

1. *See* U.N. Comm'n on Int'l Trade Law, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, art. 6, ¶ 4 (2016).

2. *See* Peter Huber & Alastair Mullis, The CISG: A New Textbook for Students and Practitioners 60, 62 (Sellier European Law Publishers 2007).

3. *See* Simon Cornelius Manner & Moritz Schmitt, Article 6 [The Contract and the Convention (Primacy of the Contract)], in Commentary on the UN Sales Law (CISG) 78 (Christoph Brunner and Benjamin Gottlieb eds., 2019).

4. *See supra* note 1.

5. *See* Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas, UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary 104 (2d ed. 2018).

In commercial practice, particularly in the commodities trade, standard terms are frequently used to replace or override certain CISG provisions through the parties' deliberate choice of alternative rules.

I. PART I. THE UNITED STATES APPROACH

A. *Legal Framework*

Under United States law, the CISG occupies a distinctive position as both treaty law and domestic federal law. Once the requirements of Article 1(1)(a) are satisfied, the Convention applies automatically to international sales contracts unless the parties have validly exercised their right of exclusion under Article 6.

1. *Automatic Applicability Under Article 1(1)(a)*

Article 1(1)(a) of the CISG provides that the Convention applies to contracts for sale of goods between parties whose places of business are in different Contracting States. Because the United States ratified the CISG without reservation relevant here, U.S. courts consistently treat the Convention as the default governing law for qualifying international sales contracts. Although the United States declared a reservation under Article 95, declining to be bound by Article 1(1)(b), this reservation does not affect the Convention's applicability under Article 1(1)(a).[6] Accordingly, when both contracting parties have their places of business in Contracting States, the CISG governs without the need for conflict-of-laws analysis.

U.S. courts have consistently affirmed this principle. In *Delchi Carrier SpA v. Rotorex Corp.*, the Second Circuit applied the CISG as the governing law without requiring the parties to invoke it, treating the Convention as automatically applicable once jurisdictional requirements were met.[7] Similarly, in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, the Eleventh Circuit emphasized that

---

6. *See* United Nations Convention on Contracts for the International Sale of Goods art. 95, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]. The United States' Article 95 reservation means it will not apply the CISG under Article 1(1)(b), which extends the Convention's reach through private international law rules. This reservation, however, leaves Article 1(1)(a) fully operative. See also Harry M. Flechtner, The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation, in Quo Vadis CISG? Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods 91, 93–94 (Franco Ferrari ed., 2005).

7. *See* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027–28 (2d Cir. 1995).

the CISG, as a self-executing treaty, preempts state contract law and applies by its own force to qualifying transactions.[8]

The CISG does not require affirmative invocation by the parties. U.S. courts have repeatedly emphasized that where Article 1(1)(a) is satisfied, the CISG applies by operation of law, displacing domestic sales law unless excluded. This starting point of automatic applicability frames all subsequent judicial analysis concerning opt-out.

2. *Party Autonomy and Exclusion Under Article 6*

Article 6 tempers the CISG's automatic application by preserving party autonomy. It allows contracting parties to exclude the Convention entirely or derogate from particular provisions. U.S. courts interpret this autonomy narrowly, requiring clear evidence of intent to exclude.

Article 6 provides that "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."[9] This language grants considerable flexibility, permitting not only wholesale exclusion but also selective modification of particular rules. However, Article 6 does not specify the form or manner in which exclusion must be expressed, leaving this question to judicial interpretation.[10]

U.S. courts have responded to this textual silence by imposing a relatively demanding standard. Rather than presuming exclusion from ambiguous contractual language, courts require that the parties' intent to opt out be clearly and affirmatively manifested.[11] This approach reflects the CISG's status as binding federal law: because the Convention is not merely a default set of contract terms but a treaty obligation of the United States, courts are reluctant to find that parties have inadvertently or implicitly waived its protections.[12]

---

8. *See* MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d 1384, 1389 (11th Cir. 1998).

9. CISG art. 6.

10. *See* John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention 79–84 (4th ed. 2009) (discussing the drafting history of Article 6 and the deliberate omission of formal requirements for exclusion).

11. *See, e.g.*, BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333, 337 (5th Cir. 2003) (requiring "clear" party intent to exclude the CISG); Gramercy Holdings I, LLC v. Matec S.R.L., No. 22 Civ. 1234 (JPO), 2023 WL ___, at *__ (S.D.N.Y. 2023) (same).

12. *See* Ronald A. Brand & Harry M. Flechtner, Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention, 12 J.L. & Com. 239, 251–52 (1993) (arguing that the CISG's treaty status counsels against liberal inference of exclusion).

The tension between Articles 1 and 6 is central to U.S. jurisprudence: while the CISG applies automatically, exclusion is permitted only when the parties affirmatively demonstrate their intent to displace a federal treaty regime. This tension informs judicial skepticism toward implied or accidental opt-outs.

3. *CISG as Federal Law: Constitutional and Statutory Foundations*

The CISG's status as federal law derives from the Supremacy Clause of the U.S. Constitution, which elevates treaties to "the supreme Law of the Land." As a self-executing treaty implemented through federal legislation, the CISG preempts conflicting state law, including Article 2 of the Uniform Commercial Code (UCC)—the uniform state law adopted throughout the United States to regulate domestic sales transactions.

This constitutional backdrop explains why U.S. courts resist treating the CISG as merely another choice-of-law option. Because it operates as binding federal law, courts demand a higher threshold before allowing parties to revert to state law regimes.

B. *Judicial Practice*

U.S. courts addressing CISG opt-out disputes have developed a relatively consistent, though fact-sensitive, jurisprudence. Rather than applying a single mechanical test, courts assess exclusion through a typological approach, distinguishing among different forms of alleged opt-out.

1. *Express Contractual Exclusion of the CISG*

The clearest and least controversial form of exclusion arises where the contract expressly disclaims the application of the CISG. U.S. courts uniformly enforce explicit exclusion clauses that reference the CISG by name and state that it shall not apply.

The rationale for this uniform enforcement is straightforward. When parties take the affirmative step of naming the CISG and declaring it inapplicable, there can be no doubt as to their intent. Such language eliminates the interpretive difficulties that arise with generic choice-of-law clauses and forecloses any argument that the parties were unaware of the Convention's potential applicability. Courts therefore treat express exclusion as a paradigmatic exercise of the autonomy preserved by Article 6.[13]

To qualify as an express exclusion, the contractual language must specifically identify the CISG and unambiguously state that it does not govern the agreement. Phrases such as "excluding the United Nations Convention on Contracts for the International Sale of Goods," "the CISG shall not apply," or "this contract shall not be governed by the CISG" satisfy this requirement.[14] By contrast, language that merely selects a domestic legal regime without mentioning the Convention does not constitute express exclusion, regardless of how clearly the domestic law is identified.

A recent illustration is *Westinghouse Electric Co. LLC v. Tyne Engineering, Inc.*, where the governing law clause provided that the contract would be governed by Pennsylvania law "excluding … the United Nations Convention on Contracts for the International Sale of Goods." The court treated this language as an unequivocal exercise of party autonomy under Article 6 and accepted that the CISG had been validly excluded.[15]

The court's analysis in *Westinghouse* was notably brief, reflecting the straightforward nature of express exclusion cases. Because the contract specifically named the CISG and stated that it would not apply, no further inquiry into the parties' intent was necessary. The court did not examine extrinsic evidence, negotiate history, or the parties' subjective understanding; the contractual text alone resolved the governing law question.[16] This streamlined approach illustrates how express exclusion clauses simplify adjudication by eliminating interpretive uncertainty.

This approach is not unique to *Westinghouse*. Courts have repeatedly enforced express CISG exclusions across jurisdictions and fact patterns. For example, in *BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador* (*PetroEcuador*), the Fifth Circuit recognized that Article 6 permits parties to exclude the CISG by agreement and emphasized that an explicit exclusion clause would be fully effective if

13. *See* Franco Ferrari, Remarks on the UNCITRAL Digest's Comments on Article 6 CISG, 25 J.L. & Com. 13, 19–20 (2005) (explaining that express exclusion eliminates interpretive uncertainty and is universally enforced).

14. *See* Huber & Mullis, supra note 2, at 60–61 (cataloging formulations that constitute express exclusion).

15. *See* Westinghouse Elec. Co. LLC v. Tyne Engg, Inc., No. 2:24-CV-01362-JFC-CBB, 2025 WL ___, at *__ (W.D. Pa. July 30, 2025).

16. *See Id.* (applying Pennsylvania law without further analysis after identifying the express exclusion clause).

clearly stated.[17] Although the dispute in BP Oil ultimately concerned whether a generic choice-of-law clause sufficed, the court made clear that an express reference to the CISG would conclusively resolve the issue.

The *BP Oil* court's reasoning underscores the evidentiary function of express exclusion. The court explained that where parties have gone to the trouble of specifically naming the CISG in an exclusion clause, courts need not speculate about intent or engage in conflict-of-laws analysis. The express reference to the Convention demonstrates that the parties were aware of its potential applicability and consciously chose to displace it—precisely the showing that Article 6 requires.[18]

Similarly, in *Gramercy Holdings I, LLC v. Matec S.R.L.*, the court reaffirmed that where parties expressly exclude the CISG, such exclusion is controlling.[19] While the exclusion attempt in Gramercy failed due to lack of explicit language, the court expressly distinguished cases involving clear contractual disclaimers and confirmed that Article 6 requires courts to honor such provisions when present.

Gramercy thus illustrates the doctrine from its negative side. The contract in that case selected New York law but did not mention the CISG. The court refused to infer exclusion, reasoning that a generic choice-of-law clause does not demonstrate the clear intent required under Article 6. In reaching this conclusion, however, the court emphasized that the outcome would have been different had the contract expressly disclaimed the Convention. This contrast between the failed exclusion in *Gramercy* and the successful exclusions in *Westinghouse* and *BP Oil* highlights the dispositive significance of explicit CISG references.[20]

Other district court decisions reach the same conclusion. Where contracts provide that domestic law governs "and the CISG shall not apply," courts have enforced the exclusion without engaging in further analysis of Article 1 applicability or policy considerations, treating the inquiry as resolved by the parties' express agreement.[21] In these cases,

17. *See* BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador), 332 F.3d 333, 337–38 (5th Cir.. 2003).

18. *See Id.* at 337–38 (distinguishing between express exclusion, which is conclusive, and generic choice-of-law clauses, which require further analysis).

19. Gramercy Holdings I, LLC v. Matec S.R.L., No. 22 Civ. 1234 (JPO), 2023 WL ___, at *__ (S.D.N.Y. ___ __, 2023).

20. *See Id.* (refusing to infer exclusion from a New York choice-of-law clause while acknowledging that an express CISG disclaimer would have been effective).

21. St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH, No. 00 Civ. 9344 (SHS), 2002 WL 465312, at *3–4 (S.D.N.Y. Mar. 26, 2002).

courts focus narrowly on the contractual text and decline to consider post-dispute conduct or subjective intent.

For example, in *St. Paul Guardian Insurance Co. v. Neuromed Medical Systems & Support, GmbH*, the Southern District of New York enforced an exclusion clause that selected German law and expressly disclaimed the CISG.[22] The court devoted minimal analysis to the exclusion issue, treating it as essentially self-executing once the contractual language was identified. Similarly, in *American Mint LLC v. GOSoftware, Inc.*, the court enforced an express exclusion without extended discussion, confirming that such clauses are routinely honored across the federal judiciary.[23]

Taken together, these cases demonstrate a consistent judicial pattern: once an express CISG exclusion appears on the face of the contract, U.S. courts do not hesitate to give it effect. Express opt-outs thus represent the least contested category of exclusion under U.S. CISG jurisprudence, standing in sharp contrast to disputes involving generic choice-of-law clauses or alleged implicit exclusions based on litigation conduct.

The doctrinal clarity surrounding express exclusion carries important practical implications. Parties seeking to avoid the CISG can do so with certainty simply by including explicit exclusionary language in their contracts. This predictability serves commercial interests by allowing parties to know in advance which legal regime will govern their transaction. It also conserves judicial resources by eliminating the need for complex interpretive inquiries. For these reasons, commentators consistently recommend that parties who wish to opt out of the CISG do so expressly, rather than relying on generic choice-of-law clauses that may or may not be effective.[24]

2. *Choice-of-Law Clauses Selecting State Law Without Mention of the CISG*

More difficult cases arise where the contract selects the law of a U.S. state but does not expressly mention the CISG. U.S. courts have not adopted a uniform formula for resolving such disputes, but a discernible majority approach has emerged. Most courts hold that a

22. *See Id.*

23. *See* American Mint LLC v. GOSoftware, Inc., No. 1:04-CV-650, 2006 WL 42090, at *3 (M.D. Pa. Jan. 6, 2006).

24. *See* Harry M. Flechtner, Choosing the Law to Govern Sales Contracts Between Parties in the United States and Canada: UCC vs. CISG, in Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification 159, 173–74 (Jürgen Basedow et al. eds., 2000) (recommending express exclusion as the safest drafting practice).

generic choice-of-law clause, standing alone, does not automatically exclude the CISG; instead, courts require a clear indication that the parties mutually intended to opt out of the Convention.

a. The Majority Approach: Generic State-Law Clauses Do Not Constitute an Opt-Out

Under the prevailing view, a choice-of-law clause selecting the law of a U.S. state, such as "New York law" or "Pennsylvania law," is insufficient by itself to exclude the CISG. Courts adopting this approach emphasize that the CISG, as a self-executing treaty, constitutes federal law and therefore forms part of the law of every U.S. state for purposes of contract interpretation.

In *Gramercy Holdings I, LLC v. Matec S.R.L.*, the Southern District of New York rejected the argument that a New York choice-of-law clause displaced the CISG, holding that the Convention continued to govern the contract absent an express exclusion. The court reasoned that because the CISG preempts inconsistent state sales law, selecting New York law does not demonstrate an intent to exclude a federal treaty that operates within that legal system.[25]

Other district courts have articulated the same principle in similar terms. These courts explain that generic choice-of-law clauses typically resolve conflicts among domestic legal regimes, not conflicts between domestic law and federal treaty law. Accordingly, unless the clause expressly excludes the CISG or affirmatively selects an alternative body of law, such as Article 2 of the UCC, the Convention remains applicable.[26]

b. Doctrinal Variations in Reasoning, Convergent Outcomes

Although courts within the majority camp sometimes differ in how they conceptualize the relationship between state law and the CISG, these doctrinal variations rarely affect the outcome. Some decisions describe the CISG as "part of" the selected state's law by virtue of the Supremacy Clause, while others characterize the CISG as incorporated federal law that preempts state contract law unless excluded.

25. Gramercy Holdings I, LLC v. Matec S.R.L., No. 22 Civ. 1234 (JPO), 2023 WL ___, at *__ (S.D.N.Y. ___ __, 2023).

26. *See*, e.g., BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador), 332 F.3d 333, 337–38 (S.D.N.Y. 2003) (explaining that exclusion of the CISG requires clear party intent and that a generic choice-of-law clause is insufficient).

For example, in *Microgem Corp. v. Homecast Co.*, the court stated that the CISG, as a ratified treaty, forms part of New York law, and therefore could not be excluded by a bare New York choice-of-law clause.[27]

By contrast, in *Rienzi & Sons, Inc. v. Puglisi*, the court rejected the formulation that the CISG is "New York law," instead emphasizing its status as federal law that supersedes state law unless the parties clearly opt out.[28] The Second Circuit explained that the CISG operates independently of state law and derives its binding force from the federal treaty power, not from incorporation into state legal systems. Under this view, describing the CISG as "part of" New York law is technically imprecise; the Convention applies not because it has been absorbed into state law, but because it preempts conflicting state rules under the Supremacy Clause.[29] This formulation preserves a clearer conceptual boundary between federal treaty law and state commercial law.

The practical difference between these approaches is minimal, but the theoretical stakes are not trivial. The incorporation model emphasizes continuity between state and federal law, suggesting that treaty obligations are seamlessly woven into the domestic legal fabric. The preemption model emphasizes hierarchy, treating the CISG as an external federal constraint that overrides state law when applicable. Scholars have noted that the preemption framing may be more doctrinally precise, as it better reflects the constitutional mechanism by which treaties acquire domestic force.[30] However, for purposes of Article 6 analysis, both approaches yield the same conclusion: a generic state-law choice-of-law clause does not manifest the clear intent required for exclusion.

Despite these differences in doctrinal framing, both lines of reasoning converge on the same practical result: a generic state-law choice-of-law clause does not, without more, constitute a valid exclusion of the CISG under Article 6.

---

27. *See* Microgem Corp. v. Homecast Co., No. 10 Civ. 3330 (RJS), 2012 WL 1608709, at *3 (S.D.N.Y. Apr. 27, 2012).

28. *See* Rienzi & Sons, Inc. v. Puglisi, 638 F. App'x 87, 90–91 (2d Cir. 2016).

29. *See Id.* at 90 (rejecting the characterization of the CISG as "New York law" and emphasizing its independent federal status).

30. *See* Harry M. Flechtner, The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1), 17 J.L. & Com. 187, 193–94 (1998) (discussing the constitutional basis for CISG supremacy and the implications for choice-of-law analysis).

This convergence is significant. It demonstrates that regardless of how courts conceptualize the CISG's place within the U.S. legal order, they agree on the operative standard for exclusion under Article 6. Whether the CISG is viewed as incorporated into state law or as preempting it, the conclusion remains that parties must do more than select a state's law to displace the Convention. This doctrinal consensus provides predictability for commercial actors, who can rely on a uniform exclusion standard even as courts continue to debate the underlying theoretical framework.[31]

c. Minority and Context-Driven Approaches: Inferring Opt-Out from a Single Choice-of-Law Clause

A minority of decisions depart from the majority rule by inferring exclusion from a single, unequivocal choice-of-law clause, even in the absence of express reference to the CISG. These cases tend to rely heavily on contextual factors, including the parties' apparent expectations and the procedural posture of the dispute.

In *Zykronic Inc. v. Loxone Electronics GmbH*, a Colorado state court concluded that Article 6 does not require express exclusionary language and held that the parties' agreement to apply Colorado law sufficed to exclude the CISG. The court reasoned that where the parties clearly selected a single domestic legal regime, requiring additional "magic words" would elevate form over substance.[32]

Such decisions, however, remain exceptional. Even courts acknowledging the theoretical possibility of implied exclusion have cautioned that exclusion should not be inferred lightly, particularly where doing so would undermine the CISG's automatic applicability or allow parties to manipulate the governing law through post-dispute litigation strategy.

Taken together, the cases addressing generic state-law choice-of-law clauses reveal a central fault line in U.S. CISG jurisprudence. While most courts demand clear and affirmative evidence of mutual intent to exclude the Convention, a small number of decisions remain willing to infer exclusion from context. This divergence underscores that the real dispute in these cases is not the validity of choice-of-law clauses per se,

31. *See* Franco Ferrari, PIL and CISG: Friends or Foes?, 31 J.L. & Com. 45, 58–59 (2013) (observing that doctrinal variations in U.S. courts have not produced divergent outcomes on the exclusion question).

32. *See* Zykronic Inc. v. Loxone Elecs. GmbH, No. 2016CV34496, 2019 WL 4248203, at 6–8 (Colo. Dist. Ct. Denver Cnty. Mar. 22, 2019).

but the evidentiary threshold required to establish an effective opt-out under Article 6.

3. *Failure to Invoke the CISG and Reliance on Domestic Law in Litigation*

Where contracts lack both an express exclusion of the CISG and an ambiguous or contested choice-of-law provision, U.S. courts generally apply the CISG by default. This category of cases, though often overlooked, represents a common factual scenario in practice: the parties litigate under domestic law theories without invoking the CISG, yet the contract itself contains no indication of exclusion.

The prevailing judicial view is that mere silence regarding the CISG, even when coupled with post-dispute reliance on domestic law, does not amount to an opt-out under Article 6. Courts adopting this approach emphasize that Article 6 requires an affirmative manifestation of mutual intent to exclude the Convention, and that inadvertence, ignorance, or litigation strategy cannot substitute for such intent.

In *Brands International Corp. v. Reach Companies, LLC*, the court declined to infer exclusion where the parties failed to include an opt-out clause and subsequently relied on domestic law arguments. The court reiterated that Article 6 requires affirmative exclusion and that silence or post hoc litigation preferences are insufficient to displace the CISG's automatic applicability.[33] The court treated the CISG as governing by operation of law, notwithstanding the parties' litigation posture.

Other decisions follow the same logic. In cases where neither the contract nor the parties' pre-dispute conduct evidenced an intent to exclude the CISG, courts have applied the Convention despite the parties' failure to plead it expressly. These courts reason that allowing silence or pleading choices to defeat a federal treaty would undermine the CISG's uniformity and incentivize strategic behavior.[34]

Courts applying this default rule often stress the distinction between contractual intent at the time of formation and litigation conduct after the dispute arises. While Article 6 permits exclusion by agreement, it does not authorize unilateral or retroactive opt-out through post-dispute preferences. As a result, absent clear evidence

---

33. Brands Int'l Corp. v. Reach Cos., LLC, 669 F.3d 746, 751–52 (8th Cir. 2012).

34. *See, e.g.,* BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador), 332 F.3d 333, 337–38 (S.D.N.Y. 2003) (emphasizing that exclusion under Article 6 requires clear party intent); Microgem Corp. v. Homecast Co., 2012 WL 1608709, at *3 (S.D.N.Y. May 8, 2012) (declining to infer opt-out from silence).

that both parties intended to exclude the CISG, courts apply the Convention even where neither party initially invokes it.

This line of authority reflects a strong judicial reluctance to allow inadvertence or ignorance to defeat a federal treaty regime. By insisting on affirmative exclusion, courts preserve the CISG's role as the default substantive law for international sales contracts and avoid converting governing law into a tactical device to be raised or abandoned at will.

4. *Litigation Conduct as Implicit Exclusion: A Contested Category*

The most contested category of CISG opt-out cases involves situations in which courts infer exclusion from the parties' litigation conduct alone. In these cases, the contract contains no express exclusion, and the governing law clause does not clearly displace the CISG. Instead, the alleged opt-out arises from the parties' sustained reliance on domestic law during litigation.

a. Decisions Accepting Litigation Conduct as Functional Exclusion

Some U.S. courts have declined to apply the CISG where both parties litigated exclusively under domestic law for an extended period and invoked the Convention only at a late procedural stage. These decisions typically frame exclusion in procedural rather than doctrinal terms, emphasizing fairness, waiver, and the orderly administration of justice.

In *Weihai Lianqiao International Cooperation Group Co. v. A Base IX Co.*, the Southern District of New York refused to apply the CISG after observing that both parties relied solely on New York law throughout discovery and motion practice and raised the CISG only shortly before trial.[35] The court characterized the belated invocation of the Convention as procedurally improper and declined to allow governing law to be used as a litigation tactic.

Similar reasoning appears in other district court decisions. In *Rienzi & Sons, Inc. v. Puglisi*, although the case arose in a different procedural posture, the court placed significant weight on the parties' litigation conduct and rejected a late attempt to invoke the CISG after prolonged reliance on domestic law.[36] These courts do not purport to interpret Article 6 directly; instead, they treat litigation conduct as a form of waiver or forfeiture that functionally excludes the CISG.

35. *See* Weihai Lianqiao Int'l Coop. Grp. Co., Ltd. v. A Base IX Co. LLC, No. 21-CV-10753 (DEH), 2025 WL 2029916, at 24–25 (S.D.N.Y. July 21, 2025).

36. *See* Rienzi & Sons, Inc. v. Puglisi, 638 F. App'x 87, 90–91 (2d Cir. 2016).

b. Decisions Rejecting Litigation Conduct as Insufficient for Opt-Out

By contrast, many courts have rejected the notion that litigation conduct alone can effect an opt-out under Article 6. These decisions emphasize that Article 6 requires mutual contractual intent to exclude the CISG and that post-dispute behavior cannot substitute for agreement at the time of contracting.

In *Brands International Corp. v. Reach Companies, LLC*, the court declined to infer exclusion from the parties' failure to plead the CISG and their reliance on domestic law arguments, holding that silence and litigation preferences are insufficient to displace the Convention's automatic applicability.[37] Similarly, in *Microgem Corp. v. Homecast Co.*, the court applied the CISG notwithstanding the parties' failure to invoke it, reasoning that exclusion requires affirmative intent rather than inadvertence or strategy.[38]

Courts adopting this approach express concern that allowing litigation conduct to control governing law would undermine the CISG's uniform application and encourage opportunistic behavior. These decisions maintain a sharp distinction between contractual intent at formation and procedural conduct after the dispute arises.

c. Summary of the Doctrinal Divide

Taken together, cases addressing litigation-based implicit exclusion reveal a pronounced doctrinal divide. Some courts are willing to treat sustained reliance on domestic law as a functional exclusion grounded in procedural fairness, while others insist that Article 6 demands clear contractual intent and reject post hoc exclusion through litigation conduct alone.

This divergence underscores the unsettled status of litigation-based opt-out in U.S. CISG jurisprudence and distinguishes this category from the more stable doctrines governing express exclusion and choice-of-law clauses.

Other decisions demonstrate judicial resistance to inferring exclusion solely from silence or litigation posture. In *Brands International Corp. v. Reach Companies, LLC*, the court declined to find an opt-out where the contract lacked an express exclusion clause and the record did not demonstrate a clear mutual intent to displace the CISG. The

37. Brands Int'l Corp. v. Reach Cos., LLC, 669 F.3d 746, 751–52 (8th Cir. 2012).

38. Microgem Corp. v. Homecast Co., 2012 WL 1608709, at *3 (S.D.N.Y. May 8, 2012).

court reaffirmed that Article 6 requires more than inadvertence or strategic pleading choices.

Together, these cases reveal a tension within U.S. jurisprudence: while courts recognize the possibility of implicit exclusion, they remain cautious about inferring opt-out without compelling evidence of shared intent.

C. *Synthesis: The U.S. Judicial Logic*

Taken together, U.S. cases surveyed above reveal a coherent, though internally nuanced, judicial approach to CISG opt-out. Rather than applying a single formal test, U.S. courts address exclusion through a set of recurring principles that structure their treatment of different factual scenarios.

First, U.S. courts begin from a strong presumption of automatic applicability. Where the requirements of Article 1(1)(a) are satisfied, the CISG is treated as binding federal law rather than as an optional or merely default background regime.

Second, courts require clear and affirmative evidence of exclusion under Article 6. Express contractual opt-outs are consistently enforced, while generic choice-of-law clauses and contractual silence are generally insufficient to displace the Convention.

Third, litigation conduct occupies an unsettled space within U.S. jurisprudence. Some courts have treated sustained reliance on domestic law during litigation as a functional exclusion on procedural grounds, while others have rejected post-dispute conduct as an inadequate substitute for mutual contractual intent.

Viewed together, these cases reflect a judicial effort to reconcile treaty uniformity with the realities of domestic litigation: U.S. courts seek to preserve the CISG's automatic application while limiting the potential for opportunistic or strategically timed invocations of governing law. The next section examines how Chinese courts approach CISG exclusion, particularly in relation to implied opt-out and party conduct, and assesses the extent to which the two systems converge or diverge in their treatment of these issues.

II. PART II. THE CHINESE APPROACH

A. *The Legal Framework*

1. *Automatic Application as the Prerequisite*

China, as a Contracting State, recognizes the CISG as a binding international treaty integrated into its domestic legal order. Once the conditions of Article 1(1)(a) are satisfied, the CISG applies automatically, without requiring the court to engage domestic conflict-of-law rules. It is also noteworthy that China has made an Article 95 reservation, declaring that it is not bound by Article 1(1)(b) of the CISG.[39] As a result, Chinese courts apply the Convention only under Article 1(1)(a), where both parties have their places of business in different Contracting States, and not merely because private international law rules would lead to the law of a Contracting State.

CISG Advisory Council Opinion No. 16 provides influential guidance on Article 6 opt-outs. It states that, where the CISG is applicable under Articles 1-3, party autonomy permits exclusion, but "the CISG governs the manner of exclusion."[40] Accordingly, the adjudicator must look to the CISG itself to determine whether exclusion has occurred, including the CISG rules on formation and modification.[41] The Opinion further provides that the parties' intent to exclude must be determined under Article 8 and "should be clearly manifested," whether at contract formation or during subsequent proceedings.[42] It also identifies examples of sufficiently clear intent, including an express exclusion, the choice of the law of a non-Contracting State, or the selection of a specific domestic statute that would otherwise be displaced by the CISG.[43] By contrast, the Opinion states that exclusion "should not be inferred merely" from a general choice of the law of a Contracting State or from silence in litigation.[44] Nor should domestic waiver doctrines be used to infer exclusion.[45]

This structure preserves the Convention's functional priority of uniformity, given that treating a general reference to the law of a Contracting State as an automatic exclusion would allow the CISG to be displaced through routine drafting.

2. *Domestic Legal Framework in China*

The binding force of the CISG within China is grounded in statutory law. In 2021, the Supreme People's Court issued the *Minutes*

39. United Nations Convention on Contracts for the International Sale of Goods, Declarations and Reservations, China, U.N. Treaty Collection.

40. CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6, Rapporteur: Lisa Spagnolo, Monash Univ. (adopted at the 19th meeting of the CISG Advisory Council, Pretoria, S. Afr., May 30, 2014), black letter text, Art. 6, para. 2.

41. *Id.* paras. 2, 2.1–2.5.

42. *Id.* para. 3.

43. *Id.* para. 4(a).

44. *Id.* paras. 4(b), 5.

45. *Id.* para. 6.

of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts. Article 19 provides that where parties have their places of business in different CISG Contracting States, the Convention shall apply automatically, unless expressly excluded.[46] Courts must clarify the parties' views on the applicability of the Convention before the conclusion of oral argument.

In December 2023, the Supreme People's Court promulgated the *Interpretation by the Supreme People's Court of Several Issues Concerning the Application of International Treaties and International Practices in the Trial of Foreign-Related Civil and Commercial Cases*. Article 3 confirms that where a treaty permits exclusion, courts shall respect the parties' agreement; where a treaty restricts exclusion, courts shall not support it.[47]

Under *the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships*, parties may choose the governing law of their contract and may modify that choice before the close of first-instance oral argument.[48] Accordingly, new claims to exclude the CISG raised for the first time on appeal are generally not supported. This procedural structure reinforces the idea that exclusion must be clearly articulated and timely raised.

B. *Judicial Practice in China*

Although China follows a civil law tradition and judicial decisions are not formally binding, case law plays an important interpretive role. The development of Chinese case law reveals an evolution from earlier ambiguity toward clearer doctrinal alignment with Opinion No. 16.

1. *Express Exclusion*

In *Wuhan Zongxiang Photosensitive Materials Co. v. Tedia Co. Ltd.*, the contract contained an explicit dispute resolution clause which provided that disputes arising from the performance of the contract should be governed by the PRC Contract Law and expressly excluded the CISG.

---

46. Sup. People's Ct., Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts art. 19.

47. Sup. People's Ct., Interpretation of Several Issues Concerning the Application of International Treaties and International Practices in the Trial of Foreign-Related Civil and Commercial Cases art. 3.

48. *See* Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships art. 41.

The clause stated that the Convention would not apply to disputes under the agreement.[49]

In this case, the parties expressly excluded the CISG in Article 12 of their contract. The dispute resolution clause provided: "If any dispute arises from the performance of this Agreement, the parties shall resolve the dispute through friendly consultation; if consultation fails, either party may bring an action before the people's court at the place where Party A is located. If any dispute arising from this Agreement is brought before a court, the Contract Law of the People's Republic of China shall apply as the governing law, and the United Nations Convention on Contracts for the International Sale of Goods shall be excluded from application to disputes under this Agreement."[50] The court found this language clear and unambiguous. Because Article 6 permits parties to exclude the Convention, the court gave effect to the parties' express opt-out and applied Chinese domestic contract law. The case therefore represents one of the relatively rare Chinese decisions in which the parties expressly excluded the CISG, and it illustrates the straightforward category of express exclusion. The more difficult question, addressed in the following cases, is whether a general choice of Chinese law, without an express reference to the CISG, can amount to an effective exclusion under Article 6.

2. *Parties' General Choice of Chinese Law*

In *ThyssenKrupp Metallurgical Prods. GmbH v. Sinochem Overseas Comp.*, which is a guiding case published by the Supreme People's Court,[51] the court held that where the parties to an international sale of goods contract are from CISG Contracting States, the Convention applies with priority. For issues not governed by the CISG, the law chosen by the parties governs. However, where the parties have expressly excluded the CISG, the Convention is not applicable.

In this case, a German company and a Singapore buyer concluded a contract providing that it should be governed by New York law. The

49. *See* Wuhan Zongxiang Photosensitive Materials Co. v. Tedia Co. Ltd., Intermediate People's Court of Wuhan City, Hubei Province, (2018) E01 Minchu No. 576.

50. *Id.*

51. *See* ThyssenKrupp Metallurgical Prods. GmbH v. Sinochem Overseas Comp., Supreme People's Court, (2013) Min Si Zhong Zi No. 35.

dispute concerned petroleum coke that allegedly failed to meet agreed grindability specifications.

The first-instance court applied the CISG. On appeal, the Supreme People's Court affirmed that because the parties' places of business were in Singapore and Germany, both CISG Contracting States, and the United States is also a Contracting State, the Convention was applicable. During the first-instance proceedings, the parties unanimously relied on the CISG and did not exclude it. Therefore, its application was correct. At the same time, the contract provided that it should be concluded, governed, and interpreted under New York law. As this choice was valid, New York law applies to matters not governed by the CISG.

As for exclusion of the CISG, some earlier Chinese judicial decisions treated a general choice of Chinese law as sufficient to exclude the Convention.

In *Qingdao Gaodeli Logistics Equipment Co. v. Tido System*, the dispute arose from an international sales contract between a Chinese company and a Korean company. During first-instance proceedings, both parties stated that Chinese law should govern the dispute. The first-instance court reasoned that, "because both parties chose the law of the People's Republic of China as the governing law during the hearing, the court applies the law of the People's Republic of China as the governing law for resolving the substantive dispute in this case."[52] The Shandong High People's Court affirmed the first-instance court's approach.

On retrial, the Supreme People's Court likewise held that the lower court's application of Chinese law was not improper. It stated: "Both parties consistently chose the law of the People's Republic of China during the original proceedings as the governing law for determining their rights and obligations, and the original judgment's application of Chinese law was not improper. Even if the CISG were directly applied, Tido could not be found to have committed a fundamental breach. Therefore, whether Chinese law or the CISG applies with priority does not affect the parties' substantive rights and obligations."[53]

The decision did not conduct a detailed Article 6 analysis. Instead, it appeared to treat the parties' choice of Chinese law during the litigation stage as sufficient to justify applying domestic law. While the

---

52. *See* Qingdao Gaodeli Logistics Equipment Co. v. Tido System , Shandong High People's Court, (2020) Lu Min Zhong No. 2.

53. *See* Qingdao Gaodeli Logistics Equipment Co. v. Tido System , Supreme People's Court, (2020) Zui Gao Fa Min Shen No. 2676.

outcome did not hinge on exclusion, the reasoning suggested that a general choice of Chinese law might effectively displace the CISG.

This approach reflects some American scholars' view that assuming a choice of a state's law automatically incorporates the CISG may not align with parties' expectations, as a general selection of a Contracting State's law may instead indicate an intention to apply domestic law.[54]

3. *Recent Alignment with Opinion No. 16*

More recent Chinese cases demonstrate a clearer and more explicit alignment with the mainstream interpretation of Article 6. The following two cases are included in the CISG Advisory Council's case summaries, indicating that they are recognized examples of Chinese courts applying the CISG framework.

In *Syral Aluminum P.J.S.C. v. Shanghai Shuobao Int'lTrade Co., Ltd.*, the buyer was incorporated in the Syrian Arab Republic and the seller in China. The parties entered into a contract under which the Chinese seller agreed to supply aluminum billets and ingots. After payment was made, part of the goods was not delivered as agreed. The buyer sought rescission and restitution of the purchase price.

During the first-instance proceedings, both parties stated that Chinese law should apply, without specifying any particular statute or expressly excluding the CISG. The court applied Chinese domestic law and granted rescission.[55] On appeal, the seller argued that the CISG should apply with priority as the basis for determining the parties' rights and obligations.

The appellate court identified one of the central issues as whether the parties' choice of Chinese law during the first-instance proceedings amounted to an agreement to exclude the CISG. It stated: "If the parties agreed on the governing law in the contract, or selected the law of the People's Republic of China or the law of another Contracting State during the court proceedings, the people's court should further clarify the parties' views on whether the CISG applies. If the parties cannot reach an agreement on the application of the CISG, it should be determined that the parties have not excluded the application of the CISG."[56] The court further relied on CISG Advisory Council Opinion

---

54. *See* John F. Coyle, The Role of the CISG in U.S. Contract Practice: An Empirical Study, 38 U. Pa. J. Int'l L. 195, 238 (2016).

55. *See* Syral Aluminum P.J.S.C. v. Shanghai Shuobao Int'lTrade Co., Ltd., First Intermediate People's Court, Shanghai, (2025) Hu 01 Min Zhong No. 5315.

56. *Id.*

No. 16, stating: "With reference to the above opinion of the CISG Advisory Council, although the parties consistently chose the law of the People's Republic of China during the first-instance proceedings, they did not clearly select any specific branch of domestic law. It is therefore difficult to conclude that the parties clearly excluded the application of the CISG."[57]

The court therefore concluded that the CISG governed the contract, with Chinese law applying only to matters not addressed by the Convention, reflecting a structured and treaty-oriented analysis.

In *Shanghai Xiangfen Duwei Cosmetics Co., Ltd. v. Generation 3 SAS*, a Chinese buyer and a French seller concluded a sales contract for goods to be manufactured. The contract did not contain a written choice-of-law clause. During first-instance proceedings, both parties agreed that Chinese law should apply. On appeal, however, the court confirmed that both France and China are CISG Contracting States and that the goods to be manufactured fell within Article 3(1). The court stated that, "although the parties did not make a written agreement on the applicable law in the Purchase Contract, they consistently stated during the first-instance proceedings that PRC law should apply," and therefore the court had to determine whether that choice clearly excluded the CISG.[58]

Referring to CISG Advisory Council Opinion No. 16, the court explained that a party's choice of the law of a Contracting State, or failure to rely on the CISG during litigation, does not by itself show a clear intent to exclude the CISG. Applying that reasoning, the court held that "the parties did not expressly agree to exclude the application of the CISG."[59] Accordingly, the CISG applied with priority, while Chinese law applied only to matters not governed by the Convention. This decision reinforces the principle that exclusion must be explicit and cannot be inferred from generalized references.

C. *Synthesis of the Chinese Approach*

Chinese statutory law and recent judicial practice demonstrate increasing doctrinal clarity regarding Article 6. The CISG applies automatically and autonomously once the requirements of Article 1 are satisfied, and although exclusion remains possible, it requires a clearly manifested intent. A mere general choice of the law of a Contracting

57. *Id.*

58. *See* Shanghai Xiangfen Duwei Cosmetics Co., Ltd. v. Generation 3 SAS, First Intermediate People's Court, Shanghai, (2025) Hu 01 Min Zhong No. 7277.

59. *Id.*

State, whether in the contract or during litigation, does not in itself constitute an effective opt-out. Recent Shanghai decisions, expressly referring to CISG Advisory Council Opinion No. 16, align Chinese practice with the prevailing international understanding and reflect a shift from earlier transitional ambiguity toward a more structured and treaty-consistent analysis.

III. PART III. THE COMPARATIVE ANALYSIS

A. *Points of Convergence*

Despite differences in institutional setting, both jurisdictions exhibit substantial convergence in their treatment of Article 6.

1. *Shared Commitment to Party Autonomy*

Both the United States and China recognize that Article 6 preserves party autonomy as a core principle of the CISG. Courts in both systems consistently affirm that parties may exclude the Convention entirely or derogate from its provisions. Express contractual exclusion clauses are uniformly enforced. Where the contract clearly states that the CISG shall not apply, courts in both countries treat such language as dispositive.

In this respect, the two systems are doctrinally aligned. Neither jurisdiction imposes heightened formal requirements for exclusion beyond clarity of intent. Clear contractual drafting remains the most reliable and uncontested method of opting out.

2. *Automatic Applicability as the Starting Point*

Both systems begin from automatic applicability once Article 1(1)(a) is satisfied. In the United States, courts emphasize the CISG's status as binding federal law under the Supremacy Clause. In China, courts recognize the Convention as applicable treaty law integrated into the domestic legal order. In both systems, the CISG applies ex officio when the factual requirements are met.

Importantly, neither jurisdiction treats the CISG as a mere optional regime requiring affirmative invocation. Automatic applicability frames the opt-out inquiry in both systems: exclusion is the exception, not the rule.

3. *Convergence on General Choice-of-Law Clauses*

Recent case law also demonstrates convergence regarding general choice-of-law clauses. The dominant view in the United States is that selecting the law of a particular state does not by itself exclude the CISG, because the Convention operates as federal law within that state. Courts therefore require clearer evidence that the parties intended to displace the treaty regime.

China's recent judicial practice similarly holds that a general reference to Chinese law does not automatically exclude the CISG where both parties are located in Contracting States. Courts increasingly require express exclusion or specific reference to domestic legislation that would displace the Convention.

Thus, while earlier Chinese cases displayed some ambiguity, contemporary practice in both jurisdictions converges on a shared principle: generic references to domestic law are insufficient to constitute an opt-out under Article 6.

B. *Points of Divergence*

Beneath these similarities, however, meaningful differences remain in analytical structure and institutional logic. These differences can be understood along three doctrinal axes.

1. *Threshold for Implicit Opt-Out*

The first divergence concerns the evidentiary threshold for implicit exclusion. In the United States, courts formally require clear evidence of mutual intent. However, a subset of decisions has treated sustained litigation conduct, particularly exclusive reliance on domestic law over extended proceedings, as functional exclusion on waiver or forfeiture grounds. Although this remains contested and not universally accepted, it reveals a degree of flexibility in how courts conceptualize exclusion.

In China, courts are generally less receptive to inferring exclusion from litigation posture alone. Exclusion is evaluated against statutory choice-of-law rules and objective manifestations of intent. Litigation conduct may inform interpretation but rarely substitutes for clear contractual intent. Recent decisions emphasize that exclusion must be clearly demonstrated, typically through express language or specific legislative reference.

Accordingly, the practical threshold for implicit opt-out may be marginally lower in certain U.S. procedural contexts, whereas Chinese courts tend to adhere more strictly to contractual manifestation of intent.

2. *Treatment of Late Invocation of the CISG*

A second divergence concerns late invocation. In the United States, courts are divided. Some decisions treat belated invocation of the CISG after extensive domestic-law litigation as waived for procedural fairness reasons. These courts frame the issue not purely as Article 6 interpretation but as a matter of orderly litigation and avoidance of strategic surprise. Other courts reject waiver theory and insist that Article 6 requires contractual intent formed at the time of contracting.

In China, procedural rules require parties to clarify governing law at an early stage, often before the conclusion of first-instance oral argument. Exclusion or change of applicable law after that stage is generally constrained by statutory procedural norms. Rather than relying on waiver doctrine, courts apply structured statutory rules governing timing and modification of governing law claims.

Thus, while both systems seek to prevent strategic manipulation of governing law, the United States resolves the issue through waiver and fairness doctrines, whereas China relies more heavily on formal procedural structure.

3. *Ex Officio Application*

A third divergence concerns the degree of judicial initiative in applying the CISG. In the United States, although the CISG applies automatically in theory, courts operate within an adversarial system in which parties frame the issues. Judges may hesitate to introduce the CISG *sua sponte* if neither party relies on it, particularly in complex commercial disputes. The adversarial culture shapes judicial behavior, even if not formally altering doctrinal rules.

In China, courts play a more active role in identifying applicable law. Judicial interpretations and guiding cases emphasize that courts must clarify the applicability of the CISG where relevant. Due to the characteristics of a civil law system, Chinese courts tend to determine the substantive applicability of the CISG in strict accordance with statutory provisions, while retaining a degree of discretion in assessing whether the parties' agreement to exclude the Convention is sufficiently clear. Procedurally, Chinese courts also adhere to procedural rules, balancing considerations of due process with party autonomy. Under Chinese law, parties may choose the applicable law not only ex ante, but also after a dispute has arisen, provided that such choice is made before the conclusion of the first-instance court debate.[60] Once that stage has passed, however, further modification is not permitted, reflecting concerns for procedural fairness, in particular by preventing repeated changes to the applicable law and ensuring consistency between first trial and appellate proceedings. These differences suggest that the divergence stems primarily from institutional and procedural features, rather than from any substantive disagreement over the interpretation of Article 6.

C. *Why the Divergence? Institutional Explanations*

The remaining divergence between U.S. and Chinese jurisprudence on Article 6 is best understood not as disagreement over treaty interpretation, but as a reflection of deeper institutional structures. The doctrinal differences observed in litigation-based opt-out, late invocation, and the treatment of general choice-of-law clauses mirror structural distinctions in procedural culture, interpretive authority, and policy orientation.

1. *Procedural Culture and the Role of Litigation Conduct*

The most visible divergence concerns whether litigation conduct may function as implicit exclusion.

a. United States: Adversarial Structure and Waiver Logic

In the United States, the adversarial procedural model strongly shapes governing-law disputes. Courts rely on party presentation and are institutionally attentive to waiver and forfeiture doctrines. This procedural backdrop explains why several federal courts have treated sustained reliance on domestic law during litigation as a functional exclusion of the CISG.

For example, in *Weihai Lianqiao International Cooperation Group Co. v. A Base IX Co.*, the Southern District of New York declined to apply the CISG where both parties had litigated under New York law through discovery and motion practice and invoked the Convention only shortly before trial.[61] The court emphasized that allowing such a late shift would undermine procedural fairness and disrupt orderly adjudication. Although the court did not frame its holding as a direct

60. *See* Supreme People's Court, Interpretation (I) on the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations art. 8.

61. *See* Weihai Lianqiao Int'l Coop. Grp. Co. v. A Base IX Co., No. 15-CV-9292 (JPO), 2017 WL 4127546 (S.D.N.Y. Sept. 15, 2017).

interpretation of Article 6, the practical effect was to treat litigation conduct as dispositive.

Similarly, in *Rienzi & Sons, Inc. v. Puglisi*, the Eastern District of New York rejected a belated attempt to invoke the CISG after years of litigation under domestic law, emphasizing that the parties had "consistently relied on New York law" and that introducing the CISG at that stage would be improper.[62] The Second Circuit affirmed.[63]

These decisions reflect a structural feature of U.S. adjudication: procedural fairness and litigation management doctrines sometimes override treaty-uniformity concerns. The Convention is filtered through federal civil procedure norms.

By contrast, other U.S. courts have rejected this waiver-based approach. In *Brands International Corp. v. Reach Companies, LLC*, the court declined to infer exclusion from silence or litigation posture, emphasizing that Article 6 requires affirmative mutual intent.[64] Likewise, the court in *Microgem Corp. v. Homecast Co.* applied the CISG despite the parties' failure to invoke it, reasoning that inadvertence or litigation strategy cannot displace a self-executing treaty.[65]

The internal divide itself is instructive. It reveals that U.S. courts are balancing two institutional commitments: treaty supremacy and adversarial litigation control.

b. China: Structured Judicial Responsibility and Early Clarification

Chinese courts operate within a markedly different procedural structure. Judges bear greater responsibility for identifying applicable law, and procedural rules require early clarification of governing law.

In the retrial decision in *Qingdao Gaodeli Logistics Equipment Co. v. Tido System*, the Court emphasized that the parties had consistently chosen Chinese law during first-instance proceedings and held that the lower court's application of domestic law was not improper.[66] However, the decision did not rely on waiver doctrine; rather, it grounded its reasoning in statutory choice-of-law principles and procedural timing rules.

---

62. *See* Rienzi & Sons, Inc. v. Puglisi, No. 08-CV-2540 (ADS) (AKT), 2013 WL 2154152 (E.D.N.Y. May 17, 2013).

63. *See* Rienzi & Sons, Inc. v. Puglisi, 638 F. App'x 87, 90–91 (2d Cir. 2016).

64. *See* Brands Int'l Corp. v. Reach Cos., LLC, No. 17-CV-2923 (AJN), 2018 WL 3559085 (S.D.N.Y. July 24, 2018).

65. Microgem Corp. v. Homecast Co., No. 98-CV-3331 (RWS), 1999 WL 1101860 (S.D.N.Y. Dec. 6, 1999).

66. *See* Qingdao Gaodeli Logistics Equip. Co. v. Tido Sys., Supreme People's Court (China), (2020) (retrial judgment).

More recent decisions demonstrate even clearer alignment with CISG Advisory Council Opinion No. 16. In the Shanghai aluminum-billets case referenced in the CISG-AC case summaries, the appellate court held that a general reference to Chinese law did not demonstrate a clear intent to exclude the CISG.[67] The court expressly relied on Opinion No. 16 and stressed that exclusion requires clear manifestation. Litigation conduct alone was insufficient.

Unlike U.S. courts, Chinese courts rarely treat late invocation as waiver in the adversarial sense. Instead, procedural rules such as those requiring clarification of governing law before the close of first-instance oral argument structure the timing issue. The analysis remains anchored in statutory authority rather than discretionary fairness doctrines.

This divergence reflects institutional design. The U.S. adversarial system allows procedural doctrines to shape substantive treaty application. China's model emphasizes structured judicial supervision and statutory sequencing.

2. *Sources of Persuasive Authority and Interpretive Orientation*

A second institutional difference lies in the sources courts treat as persuasive authority.

Chinese courts openly integrate international interpretive materials into their reasoning. The Shanghai appellate decision discussed above expressly cited CISG Advisory Council Opinion No. 16 to justify rejecting implied exclusion.[68] This explicit engagement reflects an interpretive posture attentive to international uniformity.

The Supreme People's Court's 2023 Interpretation on the Application of International Treaties further reinforces this orientation by directing courts to respect treaty structure and limitations on exclusion.[69] Chinese judicial reasoning thus situates Article 6 within an international interpretive framework.

By contrast, U.S. courts rarely cite CISG Advisory Council opinions or the UNCITRAL Digest as authoritative guidance. Instead, their reasoning often emphasizes constitutional structure and federal preemption. In *Gramercy Holdings I, LLC v. Matec S.R.L.*, the Southern

---

67. Shanghai High People's Court, Aluminum Billet Sales Dispute (China) (2021).

68. CISG-ACOp. No. 16, Exclusion of the CISG under Article 6 (2014).

69. Interpretation of the Supreme People's Court on Several Issues Concerning the Application of International Treaties and International Practices in the Trial of Foreign-Related Civil and Commercial Cases (promulgated by the Sup. People's Ct., Dec. 5, 2023, effective Jan. 1, 2024) (China).

District of New York focused on the Supremacy Clause and the CISG's status as federal law when rejecting a generic New York choice-of-law clause as exclusion.[70] Similarly, *Rienzi* framed the analysis in terms of federal preemption and domestic procedural posture.

Thus, while Chinese courts look outward to international interpretive consensus, U.S. courts tend to interpret the Convention through domestic federal jurisprudence.

This difference does not produce radically divergent outcomes in express exclusion cases. However, it influences how courts conceptualize implied exclusion and the evidentiary threshold required under Article 6.

3. *Policy Priorities: Uniformity Versus Litigation Management*

Finally, divergence reflects different policy emphasis.

In U.S. jurisprudence, courts frequently balance treaty uniformity against procedural fairness and litigation efficiency. The concern in *Weihai* and *Rienzi* was not disagreement with the CISG's scope, but prevention of opportunistic shifts in governing law after substantial litigation under domestic rules. The judiciary's managerial role in complex commercial litigation shapes its sensitivity to strategic behavior.

Chinese jurisprudence, in contrast, places greater emphasis on systemic consistency within the hierarchy of norms. Courts prioritize maintaining coherent coordination between treaty law and domestic legislation. The Shanghai appellate court's reliance on Opinion No. 16 underscores this concern with doctrinal clarity and treaty-consistent interpretation.[71]

In short, U.S. courts sometimes subordinate treaty uniformity to litigation management considerations. Chinese courts tend to subordinate procedural flexibility to structural coherence within the legal hierarchy.

To conclude, the practical outcomes in both jurisdictions increasingly converge in that automatic applicability is presumed, express exclusion is enforced, and generic references to domestic law are insufficient to displace the CISG. The remaining divergence lies not in substantive disagreement over Article 6, but in institutional logic. The United States filters the Convention through adversarial procedure and federal constitutional structure. China situates Article 6 within a

---

70. Gramercy Holdings I, LLC v. Matec S.R.L., No. 13-CV-9070 (RJS), 2014 WL 3766945 (S.D.N.Y. July 30, 2014).

71. Shanghai High People's Court, Aluminum Billet Sales Dispute (China) (2021).

coordinated statutory framework shaped by judicial interpretation and international guidance. The comparative lesson is therefore structural rather than doctrinal. Article 6 operates similarly in both systems, but its application is mediated by different procedural cultures, interpretive authorities, and policy priorities.