

中国法通讯 China Law Newsletter 跨境贸易与投资 Cross-border Trade and Investment

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编者按：本刊旨在报道与中国有关的跨境贸易与投资的最新动态与我们的实务经验，但本刊不可替代个案的正式法律意见。若您重复收到本刊或者要订阅、退订或进一步了解本刊的内容，请与大成的有关律师联系。

Editor's note: the purpose of this publication is to report the most recent developments in the field of cross-border trade and investment in connection with China, as well as our practical experience therein. However, this publication should not be treated as a substitute for a formal legal opinion in individual cases. If you have received this publication more than once, or would like to subscribe or unsubscribe to this publication, or follow up on any issues raised in this publication, please be in contact with the lawyer you usually deal with at Dacheng Law Offices.

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立法新闻 **LEGISLATIVE NEWS**

- 国家外汇管理局 海关总署 国家税务总局发布《关于货物贸易外汇管理制度改革的公告》（来源：国家外汇管理局网站，2012 年 7 月 2 日）

General Administration of Customs, the State Administration of Taxation and the State Administration of Foreign Exchange release the Announcement on the Reform of Foreign Exchange Administration System for Trade in Goods (Source: www.safe.gov.cn, July 2, 2012)

6 月 29 日，国家外汇局等三机关发布了《国家外汇管理局 海关总署 国家税务总局关于货物贸易外汇管理制度改革的公告》（《公告》）。《公告》决定，自 2012 年 8 月 1 日起在全国实施货物贸易外汇管理制度改革，改革之日起，取消出口收汇核销单，企业不再办理出口收汇核销手续，并相应调整出口报关流程，优化升级出口收汇与出口退税信息共享机制。

On June 29, three bodies, including the State Administration of Foreign Exchange (the

"SAFE") released the Announcement of the General Administration of Customs, the State Administration of Taxation and the State Administration of Foreign Exchange on the Reform of Foreign Exchange Administration System for Trade in Goods (the "Announcement"). As decided in the Announcement, the reform of foreign exchange administration system for trade in goods will be launched throughout China from August 1, 2012, from which, the verification forms of foreign exchange revenue from export shall be cancelled, enterprise are not required to go through the formalities of verification for foreign exchange revenue from export, export customs declaration procedure shall be adjusted accordingly, and the information sharing system of export foreign exchange revenue and export rebates shall be optimized and upgraded.

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- 13 部委发布《关于印发鼓励和引导民营企业积极开展境外投资的实施意见的通知》(来源: 国家发改委网站, 2012 年 7 月 4 日)

13 Departments Promulgate Implementing Opinions on Encouraging and Guiding Private Enterprises to Proactively Develop Overseas Investment (Source: www.sdpc.gov.cn, July 4, 2012)

7 月 3 日, 国家发改委、外交部、工信部、商务部、中央银行等 13 个部门发布了《关于印发鼓励和引导民营企业积极开展境外投资的实施意见的通知》(《意见》)。《意见》鼓励和引导民营企业积极开展境外投资, 拓展民营企业境外投资的融资渠道, 支持重点企业在境外发行人民币和外币债券。

On July 3, thirteen departments, including the National Development and Reform Commission, the Ministry of Foreign Affairs, the Ministry of Industry and Information Technology, the Ministry of Commerce and the People's Bank of China, promulgated the Implementing Opinions on Encouraging and Guiding Private Enterprises to Proactively Develop Overseas Investment (the "Opinions"). The Opinions encourage and guide private enterprises to actively develop overseas investment, expand the financing channel of private enterprises in overseas investment, and support key enterprises to issue bonds abroad in RMB and foreign currencies.

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- 浙江省人民政府发布《关于鼓励民营企业与外资嫁接提升的意见》(来源: 浙江省人民政府, 2012 年 7 月 4 日)

Zhejiang People's Government released the Opinions on Encouraging Cooperation and Joint Development of Private Enterprises and Foreign Investment (Source: Zhejiang People's government, July 4, 2012)

2012 年 7 月 3 日, 浙江省人民政府网站公布了《浙江省人民政府关于鼓励民营企业与外资嫁接提升的意见》(浙政发〔2012〕47 号, 以下简称“《意见》”)。《意见》明确了三项基本原则: 坚持政府推动、市场运作; 坚持突出重点、招商选资; 坚持多种途径、创新推进。《意见》提出要充分发挥政府在投资促进工作中的作用, 充分尊重民营企业的自身发展意愿, 运用市场规律推动“以民引外、民外合璧”; 重点引进高端制造业、高新技术产业、现代服务业、新能源和节能环保产业, 重点引进世界 500

强和境外行业龙头企业，重点引进技术、管理、人才、品牌和市场；支持民营企业以多种形式和途径与境外企业合资合作。《意见》鼓励设立合资合作企业，鼓励外方增资扩股，鼓励民营企业境外上市，鼓励开展研发合作，鼓励开展品牌合作，鼓励开展营销网络合作，鼓励实行兼并收购。根据《意见》，浙江省将为民营企业与外资嫁接提升营造良好环境，支持以民引外企业加快产业升级步伐。

On July 3, 2012, Zhejiang People's government released the Opinions on Encouraging Cooperation and Joint Development of Private Enterprises and Foreign Investment (Zhe Zheng Fa [2012] No. 47, the "Opinions"), which specify three basic principles: insisting on promoting by the government and operated by the market; insisting on focusing on key points and attracting and selecting investment; insisting on development in diversified ways and by innovation. The role of the government in attracting investment shall be fully played; the development intention of the private enterprises shall be fully respected; the attraction of foreign investment to private enterprises and the cooperation between the foreign investors and the private enterprises shall be promoted by playing the role of the market. Emphasis shall be put on the attraction of high-end manufacturing industries, high-tech industry, modern service industry, new energy and energy saving industry; on the attraction of enterprises ranked in Global 500 and overseas industry leading enterprises, and on the attraction of technology, management, talents and market. The private enterprises are supported to cooperate with the overseas enterprises in various ways. The Opinions encourage the private enterprises to establish joint ventures, encourage the foreign investors to increase investment and hold more equities, encourage the private enterprises to be listed overseas, conduct cooperation in brand and marketing networks and make merger and acquisition. Zhejiang province will create sound environment for the cooperation and development of the private enterprises and foreign investors and support the private enterprises to attract foreign investment to accelerate industry upgrading.

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- 国务院正式对外发布《国务院关于支持深圳前海深港现代服务业合作区开发开放有关政策的批复》（来源：中国政府网，2012年7月4日）

State Council Officially Releases the Official Reply on Policies Concerning the Development and Opening of Qianhai Shenzhen-Hong Kong Modern Service Cooperation Zone of Shenzhen (Source: www.gov.cn, July 4, 2012)

7月3日，国务院正式对外发布《国务院关于支持深圳前海深港现代服务业合作区开发开放有关政策的批复》（《批复》），支持深圳前海实行比经济特区更特殊的先行先试政策，未来深圳将从金融、财税、法制、人才、教育医疗及电信六个方面先行先试。

On July 3, the State Council officially released the Official Reply of State Council on Policies Concerning the Development and Opening of Qianhai Shenzhen-Hong Kong Modern Service Cooperation Zone of Shenzhen ("Official Reply") to support Shenzhen's Qianhai area to enjoy the pilot policies which is more special than the Shenzhen Economic Special Zone. In future, Shenzhen will launch pilot programs in 6 aspects, namely, finance, tax, legal system, talents, education and medical care, as well as telecommunication.

《批复》中金融领域的优惠政策占了 8 条，包括：允许前海探索拓宽境外人民币资金回流渠道，构建跨境人民币业务创新试验区；支持设立在前海的银行机构发放境外项目人民币贷款；积极研究香港银行机构对设立在前海的企业或项目发放人民币贷款；支持在前海注册、符合条件的企业和金融机构在国务院批准的额度范围内在香港发行人民币债券，用于支持前海开发建设。

In the Official Reply, there are 8 preferential policies in financial sector, including permitting Qianhai area to explore the expansion of the channel for backward flow of overseas RMB-dominated fund and to establish an experimental zone for the innovation of cross-border RMB business; supporting the banking institutions established in Qianhai to grant RMB-dominated loans for overseas projects; actively study the grant of RMB-dominated loans by Hong Kong-based banking institutions for the enterprises and projects established in Qianhai; supporting the qualified enterprises and financial institutions registered in Qianhai to issue RMB-dominated bonds in Hong Kong within the quotas approved by the State Council to support the development of Qianhai.

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- **商务部发出关于商业保理试点有关工作的通知（来源：商务部，2012 年 7 月 5 日）**
MOFCOM issued the Notice on Works concerning the Pilot Programs of Business Factoring (Source: Ministry of Commerce, July 5, 2012)

2012 年 6 月 27 日，《商务部关于商业保理试点有关工作的通知》（商资函[2012]419 号）发布。该通知根据《商务部财政部人民银行银监会保监会关于推动信用销售健康发展的意见》（商秩发[2009]88 号）、《商务部关于进一步推进商务领域信用建设的意见》（商秩发[2009]234 号）等文件精神，为积极探索优化利用外资的新方式，促进信用销售，发展信用服务业，同意在天津滨海新区、上海浦东新区开展商业保理试点。试点内容为设立商业保理公司，为企业提供贸易融资、销售分户账管理、客户资信调查与评估、应收账款管理与催收、信用风险担保等服务。该通知对试点中加强准入管理与规范经营行为等工作作出了要求，根据该通知，试点地区商务主管部门根据上述要求制定试点实施方案，于 15 个工作日内书面报商务部，由商务部组织评审后正式施行。

On June 27, 2012, the Notice of the Ministry of Commerce on Works concerning the Pilot Programs of Business Factoring (Shang Zi Han [2012] No. 419) was released. The Notice agrees to set up pilot programs of business factoring at Binhai New Area of Tianjin and Pudong New Area of Shanghai for the purpose of actively exploring the new methods of optimizing and utilizing foreign investment, promoting credit sales, and developing credit service industry. The pilot program includes establishing business factoring companies to provide the enterprises with the services of trade financing, management of sales ledger accounts, clients credit investigation and assessment, management and collection of accounts receivable, etc. The Notice requires the pilot programs to enhance the entry management and regulate their operation. The commercial authorities of the pilot programs shall formulate pilot program implementation plan according to the requirements of the Notice and submit in writing the plan to the Ministry of Commerce within 15 working days. The plan will be officially implemented after approval by the Ministry of Commerce.

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- 国务院关税税则委员会发布《关于 2012 年下半年对内地与港澳更紧密经贸关系的安排（CEPA）项下部分货物实施零关税的通知》（来源：www.gov.cn，2012 年 7 月 10 日）

Customs Tariff Commission of the State Council Issues Circular on Imposing Zero Tariffs in the Second Half of 2012 on Certain Goods under the Mainland and Hong Kong Closer Economic Partnership Arrangement and the Mainland and Macau Closer Economic Partnership Arrangement (Source: www.gov.cn, July 10, 2012)

国务院关税税则委员会发布《国务院关税税则委员会关于 2012 年下半年对内地与港澳更紧密经贸关系的安排（CEPA）项下部分货物实施零关税的通知》，对新完成原产地标准磋商的 7 项香港原产商品和 1 项澳门原产商品，自 2012 年 7 月 1 日起实施零关税。

The Customs Tariff Commission of the State Council has issued the Circular of Customs Tariff Commission of the State Council on Imposing Zero Tariffs in the Second Half of 2012 on Certain Goods under the Mainland and Hong Kong Closer Economic Partnership Arrangement and the Mainland and Macau Closer Economic Partnership Arrangement (CEPAs), effective as of July 1, 2012. Zero tariffs shall apply to the 7 commodities from Hong Kong and 1 commodity from Macao that has completed the negotiation on the standards for the place of origin.

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- 跨境人民币直接投资（人民币 FDI）操作细则出台，投资范围严格受限（来源：上海证券报，2012 年 7 月 11 日）

The detailed operating rules for RMB foreign direct investment were released: the investment scope was strictly restricted (Source: Shanghai Securities News, July 11, 2012)

上海证券报 7 月 11 日消息，该记者从相关渠道获悉，中国人民银行日前已下发《中国人民银行关于明确外商直接投资人民币结算业务操作细则的通知》。根据该细则，境外投资者人民币前期费用专用存款账户内的资金，不得用于土地招拍挂或购买房产；人民币资本金专用存款账户、人民币境外借款一般存款账户存放的人民币资金，不得用于投资有价证券和金融衍生品，不得用于委托贷款，不得购买理财产品、非自用房产。对于外商投资企业境外借用人民币事宜，该细则特别明确，外商投资房地产企业不得自境外借用人民币资金。

The People's Bank of China issued the Notice of the People's Bank of China on Clarifying the Detailed Operating Rules for RMB Settlement Business in Relation to Foreign Direct Investment recently. According to these Rules, the fund in the dedicated deposit account for upfront expenses in RMB shall not be used for land bidding, auction and listing or real estate purchase; the RMB fund in the dedicated deposit account for RMB capital funds and the general deposit account for RMB overseas borrowing shall not be used for investment in valuable securities and financial derivatives, for entrusted loans nor for purchase of wealth management products and non-self-used real estates. In particular, the

Rules specify that the foreign invested real estate enterprises shall not borrow RMB fund from abroad.

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- 卫生部发布《关于做好区域卫生规划和医疗机构设置规划促进非公立医疗机构发展的通知》(来源: www.gov.cn, 2012 年 7 月 11 日)

The Ministry of Health releases a Circular on Doing a Good Job in Regional Health Planning and Medical Institution Placement Planning to Promote Development of Non-Public Medical Institutions (Source: www.gov.cn, July 11, 2012)

卫生部发布《卫生部关于做好区域卫生规划和医疗机构设置规划促进非公立医疗机构发展的通知》，进一步放宽社会资本办医门槛。《通知》指出，我国鼓励有实力的企业、慈善机构、基金会、商业保险机构等社会力量以及境外投资者举办医疗机构，鼓励具有资质的人员（包括港、澳地区）依法开办私人诊所，鼓励社会资本举办和发展具有一定规模、有特色的医疗机构。调整和新增医疗卫生资源时，在符合准入标准的条件下，优先考虑由社会资本举办。

The Ministry of Health released a Circular on Doing a Good Job in Regional Health Planning and Medical Institution Placement Planning to Promote Development of Non-Public Medical Institutions, to further lift the barriers for private investment in setting up medical institutions. According to the Circular, China encourages private entities with the necessary resources, including enterprises, charity organizations, foundations, commercial insurance companies, as well as foreign investors, to set up medical institutions, and encourage qualified professionals (including from HK and Macau SAR) to duly open private clinics, and encourage private funding to set up and develop special medical institutions of certain size and scale. Subject to compliance with the access criteria, priority consideration will be given to private funding when the government adjusts and adds new medical and health resources.

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- 《福建省人民政府关于鼓励外商投资的若干意见》出台(来源: 福建省人民政府, 2012 年 7 月 16 日)

Several Opinions of Fujian People's Government on Encouraging Foreign Investment released (Source: Fujian People's Government, July 16, 2012)

2012 年 6 月 27 日,《福建省人民政府关于鼓励外商投资的若干意见》(闽政[2012]35 号) 出台。该意见明确, 鼓励外资投向先进制造业、高新技术产业、现代服务业和战略性新兴产业, 将符合条件的外资项目列为福建省“百项千亿”重点技术改造计划的支持对象, 对企业购置国际先进技术设备, 按购置费的 5% 优先给予补助。引导境外上市企业以设立投资性公司和创业投资公司的方式返程投资, 提高资金使用效率, 鼓励外商以持有的境外合法人民币出资。对鼓励类外资项目, 优先保障供地, 并在确定土地出让底价时, 按不低于所在地土地等别相对应《全国工业用地出让最低价标准》的 70% 执行。对重大项目使用林地、海域及围填海计划指标给予倾斜。允许符合条件的外资企业利用现有厂区、厂房改造建设, 在不改变用途的前提下, 不再增收土地出让金。

On June 27, 2012, the Several Opinions of Fujian People's Government on Encouraging Foreign Investment (Min Zheng [2012] No. 35) were released. The Opinions encourage the foreign investment to be directed to the advanced manufacturing industry, the high-tech industry, the modern service industry, and the strategic new industry. The eligible foreign investment projects will be listed in the Major Technology Reformation Plan of "One Hundred Projects and Thousand Billion Investment" and obtain corresponding support. As to the purchase of international advanced technical equipment, 5% of the purchase price will be subsidized. The overseas listed enterprises are guided to make round-trip investment by way of establishing investment companies and venture capital companies. The foreign investors are encouraged to make contribution by overseas legal RMB. For encouraged foreign investment projects, land will be provided in priority, and the land granting basic premium will adopt the rate of no less than 70% of the Lowest Granting Price for National Land for Industrial Use corresponding to the land class of the locality. Preferential policy will be provided to the major projects in terms of using forest, sea area and sea reclamation. The eligible foreign investment companies are allowed to transform the current plant area and workshops, and no land granting premium will be charged under the condition that the use purpose remains unchanged.

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- 国家发改委发布《“十二五”利用外资和境外投资规划》（来源：国家发展和改革委员会，2012年7月25日）

NDRC released the Plan for Using Foreign Investment and Overseas Investment during the 12th Five-Year Period (Source: National Development and Reform Commission, July 25, 2012)

2012年7月17日，国家发展改革委发布了《“十二五”利用外资和境外投资规划》（以下简称《规划》）。《规划》明确了“十二五”期间利用外资的目标，即：有效利用国外贷款，稳定贷款规模，优化投向；统筹境外借款、融资租赁、债券发行等境外融资方式，进一步提高资金使用效益；提升外商投资水平，使外资在推动我国产业升级、结构优化、科技创新、区域协调发展等方面发挥更加积极的作用。在上述目标指导下，《规划》明确了“十二五”时期利用外资和境外投资的重点任务。

On July 17, 2012, the National Development and Reform Commission (NDRC) released the Plan for Using Foreign Investment and Overseas Investment during the 12th Five-Year Period, which specifies the objectives of using foreign investment during the 12th Five-Year Plan period: effectively using the foreign loans, stabilizing loan scale, and optimizing investment sectors; coordinating the overseas financing methods such as overseas borrowing, financing lease, and bond overseas issuance; further improving the efficiency of using fund; improving the investment level of foreign investors, and better playing their roles in promoting industry upgrading, structure optimization, scientific innovation and regional coordination. Under the guidance of the above objectives, the Plan clarifies the major tasks in using foreign investment and overseas investment during the 12th Five-Year Plan period.

《规划》中特别强调，要择优选资，促进“引资”与“引智”结合，注重引入先进技术、管理经验和高素质人才。引导外商投资更多地投向高端制造、高新技术、节能环保、生态建设、新能源等产业，积极推动战略性新兴产业的国际合作。在政策措施方面，《规划》提到，要积极推动国外贷款管理创新，适时制定出台《外债管理条例》。

The Plan emphasizes that we should make good selection of investment, combine the introduction of investment with the introduction of talents, and stress on the introduction of advanced technologies, management experiences and high-quality talents. The foreign investment shall be directed to the industries of high-end manufacture, high and new technology, energy saving and environmental protection, ecological construction, new energy etc. The international cooperation in strategic new industries should actively promote. The Plan also mentions that the foreign loan management innovation should be promoted and the Regulations on Foreign Debt Administration will be issued at proper time.

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投资动态

INVESTMENT DEVELOPMENTS

- **CEPA 补充协议：支持香港金融机构在内地设立合资公司（来源：第一财经日报，2012年7月2日）**

CEPA Supplementary Agreement: Support Hong Kong Financial Institutions Establish Joint Venture in Mainland (Source: www.yicai.com, July 2, 2012)

6月29日，商务部副部长蒋耀平代表中央与香港特区政府签署的CEPA(《内地与香港关于建立更紧密经贸关系的安排》)补充协议九提出降低H股上市规模要求，支持内地民企到港上市形成“小H股”市场，同时还支持香港金融机构到内地设立合资公司等多项金融领域相关措施。此次CEPA补充协议涉及22个服务领域的37项开放措施，与金融领域相关的具体措施共6项。该协议将于2013年1月1日起正式实施。

On June 29, on behalf of the central authorities, Jiang Yaoping, the vice minister of Ministry of Commerce signed CEPA (Supplement IX to Mainland and Hong Kong Closer Economic Partnership Arrangement), which sets out to lower the listed scale of H share, support mainland private-owned companies to list on Hong Kong Stock Market and form "small scaled H share" market, and meanwhile, it also supports many measures related to the financial sector, such as allowing Hong Kong financial institutions to establish joint venture in mainland. The CEPA Supplementary Agreement signed this time involves 37 open measures in 22 service scopes, and there are 6 specific measures which relate to the financial sector. This Agreement will come into effect as of January 1, 2013.

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- **《浙江省人民政府关于进一步做好世界500强企业引进工作的意见》发布（来源：浙**

江省人民政府，2012 年 7 月 4 日)

Opinions of Zhejiang People's Government on Further Ensuring the Work of Attracting Global 500 Enterprises released (Source: Zhejiang People's Government, July 4, 2012)

2012 年 7 月 3 日，浙江省政府网站公布《浙江省人民政府关于进一步做好世界 500 强企业引进工作的意见》(浙政发〔2012〕50 号，以下简称《意见》)。《意见》提出了一系列的相关优惠政策，鼓励世界 500 强企业投资生物、新能源、物联网、高端装备制造、节能环保、新材料、新能源汽车、海洋新兴产业及核电关联产业等战略性新兴产业；鼓励世界 500 强企业参与浙江海洋经济发展示范区、舟山群岛新区和义乌国际贸易综合改革试点及现代服务业集聚示范区建设。投资企业同等享受《中共浙江省委浙江省人民政府关于加快培育战略性新兴产业的实施意见》(浙委〔2011〕76 号)以及浙江省《关于加快发展海洋经济的若干意见》中的财政、税收、技术、人才、土地、金融等政策。《意见》所称的世界 500 强企业，以上年度公布的《财富全球 500 强》为依据。境外行业龙头企业可同等享受优惠政策，境外行业龙头企业由浙江省商务厅会同省发改委、省经信委、省科技厅、省财政厅等部门予以认定。

On July 3, 2012, the Opinions of Zhejiang People's Government on Further Ensuring the Work of Attracting Global 500 Enterprises (Zhe Zheng Fa [2012] No. 50, the "Opinions") were released. The Opinions put forward a series of preferential policies to encourage the Global 500 enterprises to invest in strategic new industries such as biology, new energy, internet of things, high-end equipment manufacturing, energy saving and environmental protection, new material, new energy automobile, ocean new industries and nuclear affiliated industries. The Global 500 enterprises are encouraged to participate in the construction of Zhejiang Ocean Economic Development Demonstration Area, Zhoushan Islands New Area and Yiwu International Trade Comprehensive Reform Pilot Program and the Modern Service Industry Clustering Demonstration Area. The investment companies will enjoy the finance, taxation, technology, talents, and land polices stipulated in the Implementing Opinions of Zhejiang Party Committee and Zhejiang People's Government on Accelerating the Promotion of Strategic New Industries (Zhe Wei [2011] No. 76) and the Several Opinions on Accelerating Ocean Economy. The overseas industry leading enterprises may enjoy the same preferential policies. Such enterprises will be determined by the Department of Commerce of Zhejiang Province together with Zhejiang Development and Reform Commission, Zhejiang Commission of Economy and Information Technology, Zhejiang Department of Science and Technology and Zhejiang Department of Finance.

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- 台湾将允许上市公司发行人民币债券 (来源: 财新网, 2012 年 7 月 4 日)

Taiwan to Allow Listed Companies to Issue Yuan-Denominated Bonds (Source: www.caixin.com, July 4, 2012)

台湾“行政院”金融监督管理委员会主委陈裕璋 7 月 1 日表示，将努力推动具有“两岸特色”的金融业务，包括松绑企业赴香港发行人民币计价债券、开放优质台商回台上市、放宽证券投信投资大陆有价证券、推动银行人民币清算机制及持续强化两

岸金融平台。目前，台湾上市公司可透过海外子公司在香港发人民币计价债券，但规模较小、债信也没有台湾母公司好；未来若开放台湾上市柜公司直接以在台母公司在海外发人民币债券，将有利企业多元筹资，更可扩大台湾券商及银行商机。

On July 1, the chairman of the Financial Commission Supervisory of the Taiwan "Executive Yuan", Chen Yuzhang stated that financial businesses with "Cross-Strait Feature" will be promoted, including easing the restriction on enterprises to issue dim sum bonds in Hongkong, opening up for the return of excellent Taiwanese companies abroad for listing locally, easing the restriction of securities investment trusts to invest in mainland negotiable securities, improve Renminbi liquidation system of the banks and continuously enhancing cross-strait financial platforms. Currently, the listed companies of Taiwan may issue dim sum bonds in Hongkong through subsidiaries abroad, but in a smaller scale and lesser credit than the parent company. In future, if the restrictions on the listed companies in Taiwan can be eased and the parent companies in Taiwan are allowed to issue Yuan-denominated bonds overseas directly, it will provide the enterprises with multiple sources of funds and to further expand the business opportunities of securities dealers and banks in Taiwan.

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- 商务部承诺改善环境引外资（来源：上海证券报，2012 年 7 月 17 日）

MOFCOM commits to improve environment to attract foreign investment (Source: Shanghai Securities News, July 17, 2012)

2012 年 7 月 16 日，商务部副部长王超在中国香港地区出席“2012 中国投资政策研讨会”时表示，“今年上半年内地实际利用外资 591 亿美元，同比下降 3%，下半年将改善法律、政策及商业环境来吸引更多外资。”王超认为，国外需求不强，欧美经济下滑影响内地出口表现，内地应对方法只能是让贸易便利化。下半年，内地将进一步创新利用外资方式，拓宽吸收外资领域，不断改善投资环境，优化公共管理和服务，希望全年吸引外资规模可以保持稳定，或较去年略有增长。

On July 16, 2012, Wang Chao, Vice Minister of the Ministry of Commerce (MOFCOM) stated at the 2012 Seminar of Chinese Investment Policies that the foreign investment in actual use by Mainland China is USD 59.1 billion in the first half of 2012, with 3% drop compared with last year. China will improve the law, policy and commercial environment in the second half of 2012 to attract more foreign investment. He said the weak overseas demand and European and American economy slump affected the export of Mainland. The only reaction is to increase trade facilitation. In the second half of 2012, the Mainland will further explore new ways to make use of foreign investment, expand the fields of attracting foreign investment, continue to improve investment environment, and optimize public administration and service with the expectation that the amount of foreign investment attracted in 2012 could be stable or increase slightly compared with last year.

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- 民政部：港澳人可独资在汕头办福利机构（来源：新京报，2012 年 7 月 17 日）

Ministry of Civil Affairs: Hong Kong and Macao Residents Allowed Opening

Wholly-funded Welfare Institutions in Shantou (Source: bjnews.com.cn, July 17, 2012)

日前，民政部与广东省民政厅、汕头市政府举办签约仪式，在汕头市设立民政工作改革创新观察点。在协议设立观察内容的中，民政部将给汕头 14 款政策支持，主要集中在社会福利普惠探索和社会组织管理体制等领域。民政部鼓励港澳台人士参与汕头的公益慈善类、社会福利类社会组织发展。比如，在养老方面，民政部支持汕头市登记由港澳服务提供者以独资民办非企业单位形式举办的社会福利机构。在社会组织管理方面，支持汕头市试点在公益慈善类社会组织中吸收港澳台地区人士为会员。

The Ministry of Civil Affairs (MOCA), the Civil Affairs Department of Guangdong Province and the Government of Shantou City held a signing ceremony of an agreement, according to which new observation posts will be set up in Shantou to follow the reform and innovation of civil affairs administration. According to the observation provisions in the Agreement, the MOCA will issue a total of fourteen supporting policies for the city of Shantou, which are mainly about universal social welfare and reforming the administration of social organizations. In addition, the MOCA encourages residents of the regions of Hong Kong, Macao and Taiwan to get involved in the development of public charity and social welfare organizations. For example, in terms of caring for the elderly, MOCA encourages the City of Shantou to allow the registration of social welfare institutions established and operated by service providers from Hong Kong and Macao in the form of wholly-funded private non-enterprise entities. In terms of the administration of social organizations, the Ministry encourages the city to include residents from Hong Kong, Macao and Taiwan as members of charity and welfare social organizations.

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- 交通运输部：12 个大陆港口与台湾商港深化合作（来源：交通运输部网站，2012 年 7 月 25 日）

Ministry of Transport: 12 Ports in China's Mainland to Deepen Cooperation with Taiwan Commercial Ports (Source: www.moc.gov.cn, July 25, 2012)

日前，天津港集团有限公司与台湾港务股份有限公司在高雄签署了战略合作意向书，双方将在港口、航运、物流等方面进一步加强合作。据悉，两岸直航港口已扩大到 83 个。上海、天津、大连、青岛、厦门、泉州、舟山、台州、虎门等 9 个大陆沿海港口和太仓、安庆、城陵矶等 3 个内河港口，与高雄、基隆、台中、花莲等 4 个台湾港口签署战略合作协议。双方重点优化两岸间客货运输与物流服务，构建信息共享平台，加强人员和企业的交流和互访，努力实现货运“无缝衔接”。

Recently, Tianjin Port (Group) Co., Ltd. and Taiwan International Ports Corporation, Ltd. have signed the letter of intent on strategic cooperation in Kaohsiung. Both parties will further strengthen the cooperation in terms of ports, shipping and logistics, etc. It is reported that there are 83 ports for direct cross-strait shipping so far. 9 costal ports, namely, Shanghai, Tianjin, Dalian, Qingdao, Xiamen, Quanzhou, Zhoushan, Taizhou and Human, and 3 inland river ports of the Mainland, namely, Taicang, Anqing and Chenglingji, have signed the strategic cooperation agreement with 4 Taiwan ports, namely, Kaohsiung, Keelung,

Taichung and Hualien. Parties across the strait give the priority to the passenger and freight transport, logistics services, the establishment of information sharing platform and the improvement of individual and enterprise exchange and visits to realize the "seamless freight connection".

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- 外资行开始免收异地跨行取款费（来源：新华网，2012 年 7 月 30 日）

Foreign-funded Banks Starts to Exempt Intercity and Interbank ATM Charges (Source: www.xinhuanet.com, July 30, 2012)

近日，渣打银行宣布：“用户可享受在内地 28 万台银联 ATM 机跨行取款免收手续费”。在此之前，对于提供异地、跨行取款服务，各家银行几乎无一例外都要收取一笔手续费，且收费标准不低，最高收费超过百元。目前，中资银行尚无跟进之意。以五大行为例，收费标准相对较低的建设银行，异地取款按照取款额度的 0.5% 收费（最低 2 元、最高 50 元），跨行收取取款额度 1% 的手续费（最低 2 元、最高 50 元）。

Recently, Standard Chartered Bank has announced that "users will be exempted from interbank ATM fees on the 28,000 ATMs in China". Previously, for intercity and interbank withdrawal services, every bank charges a certain fee, which may go up to more than one hundred Yuan each time. At present, Chinese banks have not yet indicated whether they will follow the lead. Take the five major Chinese banks for example, China Construction Bank, whose charge is comparatively low, charges a procedural fee of 0.5% of the amount withdrawn for intercity withdrawal (from CNY2 to CNY50), and 1% of the amount withdrawn for interbank withdrawals (from CNY2 to CNY50).

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实务经验

PRACTICAL EXPERIENCE

CISG 第 78 条延迟支付利息权的利率问题探究（概要）

Rate of Interest under Article 78 of CISG (Summary)

原文 第一作者：Denis Philippe* 第二作者：蔡传敏**

The Original Lead Author: Denis Philippe Co-Author: Chuan Min CAI

联合国国际货物销售合同公约（CISG）自 1980 年通过以来，至今已有 77 个缔约方，在国际商事活动中发挥着重要的规范作用。CISG 第 78 条（利息）赋予国际货物销售合同当事人对延迟支付款额追索利息的权利，然而对据以计算具体利息的利率并未进行明确

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的规定。在实践中，由于 CISG 在该问题上的空白规定，导致了不同的法院和仲裁庭对类似案件的相异判决，使延迟支付的利息问题在一定程度上成为国际商事活动中不确定的因素。这无疑和 CISG 第 7 条所规定的促进公约适用上的统一的精神相悖。笔者认为，随着实践的发展和国际经济全球化的进一步深化，在促进 CISG 在国际上统一适用的精神指导下，深入地探究如何填补第 78 条关于利率的空白规定，以使 CISG 在规范国际商事活动中更好地发挥作用是亟待解决的问题。

The United Nations Convention on the International Sale of Goods (CISG) has been accepted by 77 Member States and playing an important role in regulating international trade. Article 78 of CISG just provides general entitlement to interest on delayed payment, but doesn't specify the rate of interest. In practice, different courts and tribunals may issue different rulings on interest under Article 78 of CISG in similar cases because of applying different rates, which make the calculation of interest uncertain. It's contrary to the spirit of uniformity in the application of CISG. With development of international trade and economic globalization, the author considers that it's necessary to fill the gap under Article 78 CISG to promote uniformity in its application and to make effective regulation of international trade.

第 78 条的立法背景和立法史表明利率规定的空白是缔约国之间各种提议无法达成一致而无奈的妥协结果。然而，对于延迟支付的利率问题是否属于 CISG 管辖的范围却有两种观点：其一，若属于 CISG 范围外的问题，则适用国际私法的一般原则来确定利率；其二，若属于 CISG 范围内的问题而 CISG 未明确解决的，则适用 CISG 第 7 条规定的解决机制来确定延迟支付的利率。根据联合国贸易法委员会的统计，绝大多数法院认为利率问题不受公约管辖，应适用国际私法规则指向某一国的国内法规定的利率。而从促进 CISG 在国际上统一适用的精神出发，笔者认为将利率归入 CISG 范围内而依 CISG 第 7 条来确定无疑是最适宜的。这是因为，一方面，将第 78 条的利率问题作为 CISG 的法定缺漏适用国际私法规则来确定利率的方法本身缺乏确定性，毕竟，国际私法规则属于国内法的范畴，各国国际私法规则的差异性不可避免地使利率的确定具有不确定性；另一方面，第 78 条利率问题的不确定性是 CISG 在起草时各种不确定性因素共同作用的结果，而 CISG 并非一部排除所有不确定性因素的绝对法律，却正是通过第 7 条容忍并补正法的相对不确定性，目的是使 CISG 本身固有的某些不确定性因素能够在适用过程中趋于确定。援引第 7 条来确定第 78 条利息的计算方法符合 CISG 作为有机规则体的需要，从而使 CISG 本身具有逻辑自洽性，可预见性和稳定性。

The drafting background and history reveal that the gap under Article 78 is a result of compromise among different proposals on determining the rate. However, it's arguable whether the rate of interest is a gap *intra legem* or a gap *praeter legem*. Gap *intra legem* means that matters are excluded from the scope of CISG and are determined according to private international law, while gap *praeter legem* means that matters are governed by CISG but not expressly settled by it and are determined according to Article 7 of CISG. Notably, United Nations Commission on International Trade Law (UNCITRAL) found that most of courts of contracting countries consider that the rate of interest under article 78 of CISG is a gap *intra legem* and shall be referred to national law according to private international law. To promote the uniformity in its application, the author holds that the rate of interest shall be a gap *praeter legem* and determined by CISG itself. On the one hand, different contracting countries have

different rules to determine the rate of interest on late payment. Consequently, calculation of interest under Article 78 will be uncertain and unpredictable if the rate is referred to private international law. On the other hand, as any legal text, CISG is not a body of perfect rules without any uncertainty. However, Article 7 of CISG provides a mechanism to fill gaps and to clarify confusion in order to make CISG self-repair and self-improvement as a living organism. Only if the calculation of interest is determined by CISG itself, the uniform regulation of interest on late payment makes sense of removing legal barriers for international trade. Thus the rate under Article 78 shall be determined by invoking Article 7. This is also necessary for CISG as a living organism to keep self-consistency, predictability and stability.

不过，要适用第 7 条第 2 款的规定来确定第 78 条的利率也是不易的。最主要的原因是 CISG 并没有具体的公约的一般原则的规定，也没有关于确定公约一般原则的说明。因此，认为第 78 条的利率问题为 CISG 法定外缺漏的一些法院和仲裁院，在适用第 7 条第 2 款的时候，有可能还是求助于国际私法规则指向的国内法这一最后的选择。判例法表明，只有在少数的判决中，法院和仲裁院是根据 CISG 的一般原则来确定计算延迟支付利息的利率的。从这些判例中，我们仍然无法找到一个统一的确定利率的方法，毕竟，法院或者仲裁院对公约的一般原则有不同的理解。有法院和仲裁院根据 CISG 第 9 条裁决应该参照国际贸易惯例来确定第 78 条的利率。值得注意的是，CISG 本身也并没有对‘贸易惯例’进行定义，惯例的确定完全交由法院和仲裁院来决定。无疑，适用国际贸易惯例来确定第 78 条的利率，使利率陷入另一个不确定规则的难题。毕竟，在国际贸易中，并不存在被商事活动主体广泛知道并所经常遵守的利率。也有一些法院和仲裁院认为充分补偿原则是 CISG 的一般原则之一，应该被用来确定第 78 条的利率。要适用充分补偿原则，就必须确定受损害方因损害行为而遭受的实际损失额，然后进行全额赔偿。债权人因债务人的延迟支付会遭受损失也是确定无疑的，然而实际的损失额是多少呢？如果债权人因延迟支付而不得不借贷运营，那么他为借贷和延迟支付相同的款额而付的利息便构成他因延迟支付而遭受的实际损失，同时，对于债权人可用的借贷手段和适用的利息也因债权人所处境遇不同而不同；如果债权人本身资金充裕，即使发生延迟支付也无需借贷，那么债权人遭受的损失至少是延迟支付的款额会产生的存款利息；再如果，因债权人的运营依赖于延迟支付的款额，而通过借贷来维持运营又发生了客观不能的情况，结果导致了债权人破产，那么因延迟支付而遭受的实际损失就非借贷利息那么简单。可见，债权人因债务人延迟支付而遭受的实际损失额并不能简单地等同于利息，无论是何种利息，充分补偿原则便失去了适用基础。还有一些法院支持将返还不当得利作为公约的一般原则用来确定第 78 条的利率，以防止债务人故意延迟支付以获取不当利益。同理于充分补偿原则，延迟支付给债务人带来的不当得利并不一定表现为贷款或者存款利息，那么求助于返还原则来计算第 78 条的利息也是不适宜的。至于极少数案件判定合理的利率计算第 78 条的利息，从而运用了合理性原则的观点，和主张国际贸易惯例说的观点一样，由于合理性标准本身是模糊的，在适用时也具有极大的不确定性。

However, Article 7 of CISG doesn't provide a direct answer to determine the rate under Article 78. The main difficulty lies in the lack of specified explanation about what are general principles or how to confirm general principles within the meaning of Article 7. As a result, some courts or tribunals, who consider that the rate under Article 78 is a gap *praeter legem* and invoke Article 7 (2), might, still refer to the last resort, i.e. private international law. UNCITRAL Digest of Case Law shows that general principles were seldom invoked to determine the rate

under Article 78. In addition, it's hard to find a unified answer according to invoked general principles since different courts or tribunals have different understanding of applicable general principles. Some of courts or tribunals refer to usages according to Article 9 on the ground that usages have a higher hierarchy than other general principles. Regardless of the hierarchy of usages, it's noted that CISG doesn't define 'usages' and it's up to competent courts or tribunals to decide what are usages. Obviously, Article 9 cannot give a certain answer to fill the gap of the rate under Article 78, but rather makes it more uncertain due to absence of usages, which are widely known and regularly observed in international trade to determine the rate of interest on late payment. Others take full compensation as the general principle of CISG and apply it to fill the gap of the rate under Article 78. To apply full compensation principle, the creditor must prove his loss. It's no doubt that the creditor shall suffer some loss because of late payment. However, how much is it? If the creditor must get a loan to run his business, the interest on the same sum of money as late payment will be his loss, which depends on available loan to him; if late payment doesn't affect the creditor's financial situation, his loss will be interest on deposit of the sum of late payment, at least; if the creditor's business relies on late payment and there is no loan available to him due to difficult situations, the loss will be more than interest on loan or deposit. Thus, it's not convincing to apply full compensation principle since interest is not equivalent to the loss out of late payment. In addition, another courts or tribunals hold interest under Article 78 is unjust enrichment and the general principle of restitution is invoked to avoid intentional late payment by the debtor. Like full compensation principle, unjust enrichment by the debtor due to late payment is not simply equivalent to interest on deposit or loan. Then it's not suitable to apply the general principle of restitution to claim interest under Article 78. As to the general principle of reasonableness, which was referred in some cases, it has similar defect as usages in sense of uncertainty.

笔者认为，第 78 条利率的确定取决于对第 78 条功能的正确理解。利息作为货币的时间价值，无论是基于其稀缺性，基于人们认知心理的反映，还是基于通货膨胀和货币贬值，都体现了现在货币价值总是高于未来的货币价值的经济学理论。为了避免货币的价值因时间而减少，商人不会闲置他的资金也是经济学上的铁律。延迟支付使债权人无法使用到期款额，发挥货币的当前效用，未来支付的相同款额其效用也必然降低。同样，债务人因延迟支付可以利用货币的当前效用，未来支付相同款额的价值会减少。因此，延迟支付会使债权人遭受损失而使债务人获利，而第 78 条的利息规定正是为了保证货币的价值实质上相等。市场利息率随着市场的变化而变化，能够反映通货膨胀的水平 and 货币贬值的程度，进而真实地确定货币的时间价值。与市场利率相对的法定利率，是由各国政府确定的一定时期内不变的利率，其主要功能是作为各国政府进行宏观经济调控的重要政策工具，也即官方利率。CISG 作为规范国际商事主体间合同行为的私法，调整的是微观经济行为，应当适用市场利息率。然而在国际贸易中，由于各个国家的市场利息率不同，导致债权人遭受的损失并不等同于债务人的获利。这就要从 CISG 本身的一般原则出发进一步确定第 78 条利息在 CISG 中的特殊功能，明确其所要追求的法律效果。

In the author's mind, calculation of interest under Article 78 depends on its function. Due to scarcity, people's cognitive-psychological reflection or inflation, interest as the time value of money shows an economic theory, i.e. current value of money is always more than its future value. To avoid devaluation, it's well known that businesspersons don't leave their money idle.

When payment is in arrears, the creditor cannot use due sum to pursue its current value and will suffer devaluation of the same sum in the future and vice versa the debtor could benefit from late payment. In this sense, interest under Article 78 is to keep the value of payment unchanged, even if it's in arrears. Market interest rate reflects the level of inflation and the degree of devaluation according to market situation and could correctly evaluate the time value of money. On the contrary, legal interest rate, also called official rate, is decided by the government and unchanged in certain period as a monetary policy to regulate macro economy. Therefore, market interest rate shall be applied to Article 78 in conformity with the private feature of CISG to regulate micro economy. Regarding different market interest rates in different contracting countries, the degree of devaluation is also different for the creditor on one hand and the debtor on the other hand. To determine right rate under Article 78, its function must be considered in line with general principles of CISG.

为此，笔者援引了诚实信用原则和公平原则作为适用于 CISG 第 78 条的公约一般原则。(1) 第 7 条第 1 款的规定确定了诚实信用原则作为公约一般原则的地位，并特别地指向公约的解释。根据诚实信用原则，对第 78 条利息权的功能定位必须符合债权人和债务人之间诚信的需要。债权人基于对债务人信用的信赖而对到期债权的实现充满信心，然而支付限于延迟，妨碍了债权人实现到期款额的时间价值，即利息权。那么债务人就有责任修复其信用，通过合适的弥补措施，保护债权人对到期实现债权的信赖。(2) 公平原则在国际贸易中是一个根本的道德规范，也必然构成 CISG 的一般原则。延迟支付期间，债权人对到期款额没有控制权，无法影响到期款额在延迟期间的效用。相反，债务人作为一个理性的经济人必将追求到期款额在延迟支付期间的效用最大化。这是有违公平原则的。第 78 条利息作为延迟支付的责任条款，应该成为实现公平的工具，从而恢复债权人对到期款额的控制。这也与第 78 条利息责任不因第 79 条规定而免责相适应。即便延迟支付不可归咎于债务人，与债务人可实现的到期款额价值的最大化相比，利息责任的承担并不会对债务人造成不公平。在此意义上，第 78 条对延迟支付行为适用了公平责任。

The author considers that two general principles of CISG could be applied to Article 78. Firstly, Article 7 (1) confirms good faith as a general principle and its importance for interpretation of CISG. Accordingly, the function of Article 78 must satisfy good faith between the creditor and the debtor. Relying on the debtor's good faith, the creditor expects to receive due payment on time. Once payment is in arrears, the debtor is obliged to repair his faith and to protect the creditor's legal expectation through feasible means. Secondly, fairness is a fundamental ethic for international trade and certainly a general principle of CISG. During delayed period, the creditor loses his control over late payment and cannot maximize its use, while the debtor as a business person shall pursue maximization. It's unfair. As legal liability arising of late payment, Article 78 shall serve as a tool to realize fairness and return control over due payment to the creditor. It's also fair that liability under Article 78 cannot be exempted on the ground of Article 79. Even if the debtor is not liable for his failure to pay on time, it's still fair for him to pay interest, which is not comparable to maximization of the value of due payment. In this sense, Article 78 applies equitable liability to late payment.

基于以上分析，笔者认为第 78 条利息权的功能在于对债权人进行最低额补偿，使债

权人在支付陷于延迟时仍能实现对到期款额的控制，保证了债权人和债务人之间的诚信和公平。按照市场利息率计算的利息，本质上并非收益，而是货币保值的一种工具。不管债权人因延迟支付可能遭受的实际损失情况，适用客观计算方法的利息权，只能提供最低额的补偿，以恢复债权人对延迟支付款额的实际控制权。因此，第 78 条的利率应为在正常情况下债权人作为一般的商业主体可以获得的支付货币在支付地的银行短期借贷利率，使债权人能够在支付开始陷于延迟时通过正常的银行借贷获得延迟支付款额的实际控制权，和债务人同等地追求相同数额货币的效用最大化。《国际统一私法协会国际商事合同通则》

(2010)第 7.4.9 条规定的延迟支付利率确定方法与笔者对 CISG 第 78 条利率的结论一致，贯彻了诚实信用原则和公平原则，对法院和仲裁庭在根据 CISG 第 78 条确定对债权人可用的一般银行借贷利率时，具有很大的借鉴意义。值得一提的是，相比法官，仲裁员受‘思乡情结’的影响较少，更倾向于适用公平统一的规范。笔者相信本文对涉及到 CISG 第 78 条利息的国际商事仲裁案件具有较高的价值，一方面，从 CISG 本身的一般原则出发确立的最低额补偿，使仲裁员不必将《国际统一私法协会国际商事合同通则》第 7.4.9 条规定的利率方法解释为有争议的贸易惯例或者合理利率进行直接引用据以确定第 78 条的利率，而可以直接依据 CISG 第 7 条来运用相同的方法达到正当性和合理性的法律效果；另一方面，该利率确定方法在国际商事仲裁中越来越广泛的运用，也将会对各缔约国法院的裁决产生极大的影响力，进而实现 CISG 第 78 条利息权在国际上统一和公平的适用。

According to analysis above, the author concludes that the function of Article 78 is to provide minimum compensation to the creditor to ensure the creditor's control over due payment regardless of delay, so good faith and fairness are repaired. By nature, market interest is not sort of profit rather than a tool against devaluation. Regardless of real loss due to late payment, market interest is objectively calculated and only means minimum compensation to make it possible for the creditor to take control over due money. Thus, the rate under Article 78 of CISG shall be normal bank short-term lending rate, which is available to normal commercial borrowers under normal conditions for the currency of payment at the place of payment. In this way, the creditor could borrow the same sum of money as late payment and pursue its maximization as the debtor does. Unlike Article 78 of CISG, Article 7.4.9 of <UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2010> (UNIDROIT PRINCIPLES) expressly establishes a mechanism to determine the rate of interest on late payment. This mechanism is conformity with the author's conclusion on Article 78 of CISG and reflects general principles of good faith and fairness. To this extent, this mechanism is helpful to courts and tribunals when they want to confirm a right rate under Article 78 of CISG according to its general principles of good faith and fairness. It's noted that arbitrators tend to apply unified and fair rules, compared to national judges, who have more 'homesick feeling' than arbitrators have in international trade. The author believes that this article makes much sense to international commercial arbitration while application of Article 78 of CISG involves. On the one hand, as minimum compensation, interest under Article 78 of CISG could be calculated according to the rate determined by general principles of CISG. Arbitral tribunals could directly invoke Article 7 of CISG to find the reasonable and legitimate solution without referring to Article 7.4.9 of UNIDROIT PRINCIPLES and interpreting its mechanism as a usage or reasonable rate, which is not broadly accepted. On the other hand, contracting countries' courts will be affected by this solution with its popular application by arbitral tribunals. In the end, the gap under Article 78 of CISG will be filled in line with uniformity of application in international

trade.

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