stages of an investigation or during a so-called "dawn raid" a law firm may need time to clarify its instructions, particularly as regards a corporate entity and its senior management. The need to ensure that those who are the subject of an investigation receive timely and proper access to legal representation should trump the Commission's "house-keeping" concerns about who may be acting for whom early on in an investigation involving multiple parties.

Of more concern is a suggestion that lawyers should confirm the scope of their appointment to representatives of the Commission's Executive. That part of a lawyer's engagement is almost certainly protected by legal professional privilege and should not be disclosed in any shape or form without client consent and, only then, after careful consideration. The Competition Ordinance expressly recognises legal professional privilege (section 58(1)).

The Commission is doing a lot of good work in the local community but some of its representatives more recent suggestions may not assist these efforts. The recent pronouncements concerning access to lawyers' "written authorisations" have apparently already attracted the attention of members of the Legislative Council (which includes several lawyers). At the time of writing, it is not known what the members of the Commission who are lawyers make of these recent pronouncements. One or more members of the Commission are or have been members of the Legislative Council.

One thing is for sure. There are some twelve thousand or so legal practitioners in Hong Kong (solicitors in private practice, barristers, in-house lawyers and registered foreign lawyers) and a common denominator among them is a steadfast protection of their clients' right to legal professional privilege. Indeed, it is not unknown for legal practitioners within the Commission's Executive to come and go and there is a local saying in the village – which loosely translates (in English) to "*What's good for the goose is good for the gander*".

- Warren Ganesh and Michael Maguiness, RPC

競爭

競爭事務委員會及「訊息含混不清」

香港競爭事務委員會的網站，內容豐富多姿，經常上載委員會在鄉村社區舉辦的活動和研討班，還有相關的新聞稿，我們只消瞥一眼，就知道委員會在香港鄉村是最活躍的監管機構之一。由於委員會與受調查對象的關係不涉及（舉例說）發牌或監管，委員會的積極主動，令人讚嘆。

然而，除了別的原因之外，委員會和委員會管理層的特質截然不同，要是機構某些公告引起廣大市民的關注或混淆，同時看起來又與本地情況有點格格不入的，也就不足為怪了。在某些情況下，委員會（特別是委員會管理層）仍在摸索前行（finding their feet）。本文撰寫時，委員會第一宗入稟的案件將會在2018年6月中旬開庭審理（估計審理19天）。

今年較早前，《業界透視》有文章（2018年1月的「*昂首挺胸，警惡懲奸*」）提到行政總裁公開呼籲加重懲罰，包括把目無法紀的人收監，那時候正值委員會研究修訂其寬待政策和推出合作指引。雖然兩者沒有矛盾，但行政總裁較早前的呼籲，引起一些人士關注。

最近一份代表委員會管理層發出的報告，同樣引起關注，按照報告的要求，代表訴訟方的律師事務所提供的，不只是按指示行事的確認書，還有委聘範圍的確認書。書面確認授權律師行事是一回事，書面確認他們獲委聘的範圍是另一回事。

提供授權行事的確認書（包括客戶的姓名或名稱及地址）不會受到反對——《競爭條例》第58(2)條。不過，某些情況應得到一點通融；舉例說，在調查初期或所謂的「凌晨突襲」（dawn raid）期間，律師事務所可能需要時間闡明指示，公司實體或其高級管理層方面的，更是如此。如果調查涉及多方人士，在調查初期，確保調查標的及時尋得合適法律代表的需要，應該解決到委員會關於誰人替誰行事的「管家」（house-keeping）問題。

更受人關注的是，有建議認為律師應向委員會管理層的代表，確定他們（指律師）受委聘的範圍。委聘律師是經過審慎考慮的，只有這樣才幾可肯定，那一部分的委聘享有法律專業保密權的保護，未經客戶同意，不得以任何形式披露。《競爭條例》明確地認可法律專業保密權（第58(1)條）。

委員會在本地社區做了大量工作，不辭勞苦，但是委員會一部分代表較近期的看法，也許無助委員會的工作。委員會最近發出關於取得律師的「書面授權」的聲明，明顯已經引起立法會議員（有幾位是律師）關注。本文撰寫時，無人知道，同時是律師的委員會成員怎樣解釋這些最近發出的聲明。其中一名或多名委員會成員是或曾經是立法會議員。

有一件事是肯定的。香港現有大約12,000名法律執業人員（私人執業律師、大律師、企業律師、註冊外地律師），他們的共通之處是，全部受到客戶所享有的法律專業保密權保護。委員會管理層不時有法律執業人員加入或請辭，但他們無不知曉，保密權適用於客戶也適用於律師，保密權的效用大概是英文諺語的*What's good for the goose is good for the gander*。

- RPC莊偉倫及Michael Maguiness

INTERNATIONAL SALES LAW

CISG in Hong Kong - to Apply or not to Apply?

On 17th October 2017, the United Nations Commission on International Trade Law ('UNCITRAL') Secretariat acknowledged at the 2nd UNITRAL Asia Pacific Judicial Summit that the Convention on

Contracts for the International Sale of Goods ('CISG') does not apply to Hong Kong. However, given Hong Kong's unique past and present, we must look at two points in time. It is evident that the CISG could not apply to Hong Kong when it was a British colony because the United Kingdom did not adopt the CISG and because Hong Kong could not adopt it in its own right. However, following the handover in 1997, and as Hong Kong fell under the "one country and two systems" principle, the CISG should in theory be automatically applicable to Hong Kong as China has itself been a member of the CISG since 1988. Nonetheless, various cases and scholars have supported contrary observations vis-à-vis the application of the CISG in Hong Kong. Nevertheless, it is only from a step-by-step analysis of this sort that we can ascertain the position of Hong Kong under the CISG and whether or not such position is satisfactory.

Step 1: How can a State adopt or be a party to the CISG?

Article 91(3) of the CISG provides for non-signatory States to become Contracting States via accession. Hong Kong has not acceded to the CISG.

Step 2: Can Hong Kong become a Contracting Party to the CISG?

Hong Kong cannot become a Contracting Party per se as Hong Kong is not a State.

Step 3: What then is Hong Kong's current position in the context of the CISG?

Hong Kong is a territorial unit of China and thus has no independent status vis-à-vis the CISG.

Step 4: How can territories adopt or exclude the CISG?

A territory cannot accede to the CISG in its own right. It is for the State to whom that territory belongs to either extend the CISG to it or to exclude it from accession.

Express Declaration of Accession

Art 93(1) of the CISG provides that where a Contracting State has two or more territorial units, it may declare for the CISG to extend to all or some of its territorial units at the time of signature, ratification, acceptance, approval or accession. The written declaration needs to be formally notified with the depository, which refers to the UN Secretary-General, and should expressly state the territorial unites to which the CISG extends.

China had not made any declaration in respect of Hong Kong at the time of adopting the CISG, and indeed it could not have done so when Hong Kong was a British colony. However, the "may" has generally been classified as permissive rather than a mandatory obligation. Thus it could be argued that a Contracting State may make a declaration at any stage and not only upon accession. In 1997 at the handover, China had sent a written notification to the UN Secretary-General containing two lists of treaties. The first list, which is crucial, identifies those treaties to which China itself is a party and which would expressly apply to Hong Kong (for example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards). Notably, the CISG was not on this list. It is for this reason that the various scholars and cases have concluded that the CISG cannot apply to Hong Kong.

Silence as to the Application of the CISG

On the other hand, the requirement under Art 6 of the CISG is that there must be an express intention that is "clear, unequivocal and affirmative" for the CISG not to apply. While Art 6 concerns parties of States – rather than the States themselves - having the right to exclude the CISG, and in that regard "the parties must expressly opt out", the same rationale can be applied to States. Hence some cases have viewed China's notification, or its failure to make a subsequent declaration concerning the CISG in 1997, as an affirmative declaration precluding the applicability of the CISG under Art 93(1). In other words, mere silence on the CISG does not exclude its application. Consequently, these cases rely Art 93(4) of the CISG, which refers to an automatic extension to a territorial unit of the State where no declaration has been made under Art 93(1), as support for the argument that the CISG applies to Hong Kong as it has not been expressly excluded by China.

Conclusion

There are many similarities between the CISG and common law but at the same time there are also many differences as the former is considered an international legal hybrid combining Common Law elements and Civil Law ideas from various jurisdictions (see A. Janssen and N. Ahuja, "Bridging the Gap: The CISG as a Successful Legal Hybrid between Common Law and Civil Law?" in Francisco de Elizalde (ed.). Uniform Rules for European Contract Law? – A Critical Assessment? (Hart) 2018). Given the diversity in thinking amongst cases and scholar views, both of which internationally carry similar weight, each court will have to decide the question as to whether or not the CISG does apply to Hong Kong on the basis of what is then argued before them. Ending with some food for thought: China can of course resolve this ambiguity by making a subsequent notification to either extend the CISG to or exclude it from application over Hong Kong.

- Navin G. Ahuja

國際銷售法

聯合國國際貨物銷售合同公約》是否適用於香港？

2017年10月17日，聯合國國際貿易法委員會(UNCITRAL)秘書處在第二屆UNITRAL亞太司法峰會上承認，《聯合國國際貨物銷售合同公約》(CISG)不適用於香港。但是，鑑於香港獨特的歷史和地位，我們必須看兩個時間點。很明顯，CISG在英國殖民時期不適用於香港，因為英國沒有採納CISG，而香港本身不能採納。但是，在1997年回歸後，基於「一國兩制」的原則，CISG理論上應該自動