



A Common Language for International Trade – The CISG and its Implementation in the HKSAR

By International Law Division, Department of Justice

On 29 September 2021, the Sale of Goods (United Nations Convention) Ordinance (Cap. 641) (“**Ordinance**”) was enacted by the Legislative Council (“**LegCo**”). The Ordinance seeks to implement the United Nations Convention on Contracts for the International Sale of Goods (“**CISG**”) in the HKSARⁱ.

This follows the public consultation

(“**Consultation**”) conducted by the Government between March and September 2020 on the proposal to apply the CISG, rated as “the most successful substantive uniform commercial law treaty”ⁱⁱ, to the HKSAR.

Noting that there is general support among the respondents to the Consultation for applying the CISG to the HKSAR, and after consulting LegCo’s

Panel on Administration of Justice and Legal Services, the Government introduced the Sale of Goods (United Nations Convention) Bill into LegCo in July 2021.

To allow sufficient time for the legal and business sectors to become familiarised with it, the Ordinance will come into operation on a day to be appointed by the Secretary for Justice by notice published

in the Gazette and is envisaged to take effect in around the third quarter of 2022.

This article will introduce the CISG as well as its implementation in the HKSAR through the Ordinance.

What is the CISG?

Adopted in 1980, there are currently 94 Contracting States to the CISG from different regions and economic and legal systems, including more than half of the HKSAR's top 20 trading partners by total trade value.

Before the CISG (and still, when it is not applicable), parties to an international sale of goods need to deal with the choice-of-law question, namely, what law governs the subject transaction. Very likely, the answer will be the domestic sales law of one of the parties. The possible costs associated with this are: uncertainty regarding the applicable law, one party at a disadvantage as it needs to deal with "foreign" law, bargaining costs etc.

The CISG helps address the above applicable law issue by providing a modern, uniform and fair regime for contracts for international sale of goods. When it is applicable, it provides neutral legal rules governing such contracts within its scope and largely avoids the necessity of determining which jurisdiction's law governs key issues, thereby introducing certainty in commercial exchanges and decreasing transaction costs.

When Does the CISG Apply?

Geographical scope and nexus requirement of the CISG

A sale of goods is considered to be "international" when the parties have their respective places of business in different States (Art. 1(1)). The CISG applies automatically to contracts for sale of goods between parties whose places of business are in different Contracting States (Art. 1(1)(a)). It also applies to international sale contracts where the rules of private international law (of the forum) lead to the application of the law of a Contracting State (Art. 1(1)(b)). A Contracting State may, however, make a

declaration under Article 95 (that it will not be bound by Article 1(1)(b)), which excludes the application of the CISG through the application of the private international rules.

Transactional scope of the CISG

The CISG applies to commercial sales of goods, and it will not generally apply to consumer sales (Art. 2(a)). Further, certain types of international sales are excluded from its scope, including sales by auction or on execution or otherwise by authority of law (Art. 2(b) and (c)), and sales of "goods" of certain nature e.g. shares and other securities as well as ships, vessels and aircraft, and electricity (Art. 2(d) to (f)).

Subject matter scope of the CISG

The CISG does not cover all of the legal issues regarding international sale of goods. It governs two of the most important matters arising in contracts of such sale (Art. 4), namely (1) whether and when a contract has been concluded; and (2) the rights and obligations of the seller and buyer arising from the contract, and the remedies in case of breach of contract.

The CISG is not generally concerned with the validity of the contract, any of its provisions, or any usage (Art. 4(a)), or with the effect of the contract on the property in the goods sold (Art. 4(b)). Liability of the seller for death or personal injury caused by the goods to any person also falls outside the scope of the CISG (Art. 5). Matters not governed by the CISG will be governed by the law applicable under private international law principles.

Party autonomy and opting out

Party autonomy is a fundamental principle of the Convention. It allows parties to opt out of the Convention. Specifically, Article 6 of the CISG allows parties to a contract to, by agreement, opt out of the Convention or derogate from or vary the effect of any of the provisions

of the Convention with the exception of Article 12 (which concerns requirements as to form of contract). There are no formal requirements for exclusion, derogation or variation. It is sufficient that the parties express their agreement to that effectⁱⁱⁱ.

Reasons for Applying the CISG to the HKSAR?

In light of the uniform rules governing contracts for international sale of goods provided for in the CISG, the application of the Convention to the HKSAR would enable local businesses to trade with their



overseas trading partners using a sales law that both are familiar.

Noting the views in favour of applying the CISG to the HKSAR, the Government conducted the Consultation in 2020. A majority of the respondents to the Consultation (including the Law Society of Hong Kong and the Hong Kong Bar Association) expressed support for such application. The Government therefore decided to introduce legislation for implementing the Convention in the HKSAR.

There are significant benefits of applying the CISG to the HKSAR. They include the potential to drive GDP and trade

growth, preventing local businesses from being subject to unfamiliar foreign laws when entering into cross-boundary sale transactions, improving the HKSAR's competence in resolving disputes involving CISG issues, and providing local businesses with an option to use the CISG as designed when transacting with their overseas counterparts. For traders who have not considered or included specific provisions to govern their relevant contractual relationships, the automatic application of the CISG could also provide a safety net of sorts to protect their interests.



Application of the CISG to the HKSAR

The CISG entered into force for China in 1988. Subject to completion of the relevant process under Article 153 of the Basic Law^{iv} as well as formal notification by the Central People's Government to the Secretary-General of the United Nations (as depositary for the CISG) of the requisite declaration for applying the CISG to the HKSAR, the Convention is expected to apply to the HKSAR with effect in around the third quarter of 2022, tying in with the commencement date of the Ordinance.

Reservation under Article 95 of the CISG

China has made a reservation under

Article 95 of the CISG (declaring that it is not bound by Article 1(1)(b)), meaning that it applies the CISG rules only to international sales contracts between parties whose places of business are in different Contracting States to the CISG (as required by Article 1(1)(a)).

In response to the Consultation submissions, subject to the requisite application procedures and notification mentioned above, the CISG is expected to apply to the HKSAR in full, that is without China's Article 95 reservation – an arrangement permissible under the principle of “one country, two systems” under the Basic Law.

“Inconsistency between the Ordinance or the CISG and any other Hong Kong law”

There are differences between the CISG (being a set of uniform international sales rules) and relevant existing Hong Kong law. In brief, these differences concern rules for formation of contract of sale, the rights and obligations of the seller and buyer arising from such a contract, and remedies for breach of contract. However, such differences are not of a fundamental systemic nature, whilst there are significant similarities across the two regimes.

Under section 5 of the Ordinance^v, these differences will be subject to the overriding effect of the relevant provisions of the CISG. Broadly speaking, this means that where the CISG (as incorporated into Hong Kong law) applies, it governs to the exclusion of other inconsistent Hong Kong law.

Regarding key differences between the CISG and relevant existing Hong Kong law, reference may be made to Chapter 2 and Annex 2.2 of the Consultation Paper issued by the Department of Justice on 2 March 2020^{vi}.

Mainland – HKSAR Sale Transactions

Being an international convention governing international sale of goods, the CISG does not apply to transactions within China, including those between

businesses in the Mainland and businesses in the HKSAR. In the Consultation, there was general support to apply the CISG rules to Mainland - HKSAR transactions by way of a Mainland - HKSAR arrangement. To follow up, the Government of the HKSAR is working on reaching such arrangement through discussion with the Central People's Government.

Conclusion

The CISG provides a common language for businesses to transact globally and resolve related disputes. Applying the CISG to the HKSAR would enhance its legal infrastructure for international sale of goods and bolster its role as an international hub for trade and dispute resolution. While there will be a learning curve to climb in the beginning, the legal and the business sectors, renowned for their versatility, could gradually get familiar with the CISG and put it to good use with the many publicly accessible and informative resources available.^{vii} ■

The Department of Justice of the Government of the Hong Kong Special Administrative Region

- i Section 4 of the Ordinance provides that the CISG has the force of law in the HKSAR.
- ii As commented by the Secretary of the United Nations Commission on International Trade Law, Ms Anna Joubin-Bret, at the 4th UNCITRAL Asia Pacific Judicial Summit in Hong Kong Legal Week 2021.
- iii Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck 2018) 104, para. 10.
- iv Article 153 of the Basic Law provides (inter alia) that, “[t]he application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.”
- v Section 5 of the Ordinance provides that if there is any inconsistency between the Ordinance or the CISG and any other law, the Ordinance or the CISG prevails to the extent of the inconsistency.
- vi The Consultation Paper is available at the Department of Justice's webpage for the CISG at:
- vii Many useful information and materials are also available on the Department of Justice's webpage for the CISG.

