ARE YOU IN OR OUT?: HONG KONG AND THE APPLICABILITY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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I. INTRODUCTION

Recent civil unrest in Hong Kong has brought more international attention to the state of the relationship between Hong Kong and mainland China. The degree of control that the mainland has over Hong Kong has risen in saliency over the past several years. While many of the questions surrounding the recent unrest have been concerned with the political structure between the special administrative region and the central government, the international media and scholars have given little attention to the continuation of the Hong Kong legal tradition when it comes to the framework of its international contracts. Because of the United Kingdom's colonial sovereignty over the city-state, Hong Kong inherited the Anglo-Saxon tradition of common law, which continues even after the separation of Hong Kong from the United Kingdom in 1996.[1] However, whether the mainland has changed this tradition by pushing Hong Kong into international obligations is still a question that has befuddled courts across the globe.

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[2] was ratified by China on December 11, 1986, applying the CISG to the whole of China.[3] Pursuant to the terms of Article 93 of the CISG, a contracting state must expressly file a declaration with the depositary of the United Nations if it wishes to limit the applicability of the Convention to specific territories of separate law systems.[4] In 1997, China issued a declaration listing international agreements that would apply to Hong Kong.[5] Yet, the CISG was not on this list, and China has not issued an express Article 93 declaration pursuant to the CISG at the time of this writing.[6] Instead, courts have been left to interpret whether China's 1997 list qualifies as an Article 93 declaration that removes Hong Kong from the CISG's sphere of applicability by virtue of negative inference. This question has arisen time and time again as Hong Kong companies

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[1] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 1399 U.N.T.S. 61 [hereinafter Joint Declaration].

[2] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

[3] *Status of Treaties*, U.N. CONVENTION ON CONTRACTS FOR INT'L SALE GOODS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en#EndDec (last visited Mar. 2, 2021).

[4] CISG, *supra* note 2, at art. 93.

[5] Letter of Notification of Treaties Applicable to Hong Kong After 1 July 1997, Deposited by the Government of the People's Republic of China with the Secretary-General of the United Nations, June 20, 1997, 36 I.L.M. 1675.

[6] Status of Treaties, *supra* note 3.

contract around the world for the trade of goods and subsequently get hauled into court when the contracts are in dispute.

In 2004, staff attorney Ulrich Schroeter, with the German consulate in Hong Kong, published an initial study addressing this question in 2004.[7] Schroeter argues that the CISG does apply to Hong Kong by virtue of the policies of the CISG and the power of the Chinese central government over the international obligations of Hong Kong.[8] The study conducted under this Note ultimately agrees with Schroeter, but I expound upon the growing friction that this question has created in international courts since the publication of Schroeter's study. This Note addresses the significance of the CISG's drafting history and its evolution from the Hague Conventions that preceded it. Moreover, this Note argues that the trend of international courts in the past decades has, for the most part, diverged from the purposes and intent of the CISG. Many of the reported cases discussed by this Note have interpreted China's 1997 list to constitute an Article 93 declaration, but it is the position of this Note that it does not.

II. BACKGROUND

On July 1, 1997, Hong Kong receded back to China from the United Kingdom, and in this recession, the two nations set forth the guidelines for the continuation of Hong Kong's political and economic rights.[9] In the Opium Wars of the Eighteenth Century, Britain obtained concessions of land from imperial China including and surrounding the island of Hong Kong.[10] After the People's Republic of China solidified itself as the governing power on the Chinese mainland, China took up the position that many of the treaties between imperial China and western powers were invalidated by coercive bargaining, and the nation set about applying pressure to recover lost territories.[11] In an effort to maintain good relations and to preempt the rise of any localized instability, the governments of China and the United Kingdom reached an agreement on May 27, 1985, called the Sino-British Joint Declaration on the Question of Hong Kong, in which Hong Kong

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[7] Ulrich G. Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT'L L. REV. 307 (2004).

[8] *Id.* at 325, 332.

[9] Joint Declaration, *supra* note 1.

[10] Donna Deese Skeen, *Can Capitalism Survive Under Communist Rule? The Effect of Hong Kong's Reversion to the People's Republic of China in 1997*, 29 INT'L L. 175, 177 (1995).

[11] *Id.* at 176.

would recede back to China on July 1, 1997.[12] The international community viewed the Joint Declaration as a treaty, but China has expressed the opinion that it is purely a declaration that puts words to what is, in effect, sovereign grace, therefore leaving the binding nature of its provisions questionable.[13]

The Joint Declaration summarily appears to be a document reflecting a wish for continuance of the status quo. The Joint Declaration provides that the "laws currently in force in Hong Kong will remain basically unchanged" and "[t]he current social and economic systems in Hong Kong will remain unchanged . . . [r]ights and freedoms . . . will be ensured by law."[14] The annexes to the Joint Declaration go on to elaborate what the law of Hong Kong will be, stating:

> After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e., the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature.[15]

The Joint Declaration leaves much room for the bending of its terms and the creation of new restrictions via its qualifying language. Commentators note that the Joint Declaration is full of nebulous and imprecise language such as "[t]he Hong Kong Special Administrative Region will enjoy a high degree of autonomy" and "the laws previously in force . . . shall be maintained, save for any that contravene the Basic Law."[16] Indeed, Article 3(12) leaves much of the interpretation of the agreement open to China, stating:

> The above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.[17]

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[12] Joint Declaration, *supra* note 1, at 62.

[13] Skeen, *supra* note 10, at 178.

[14] Joint Declaration, *supra* note 1, at 61–62.

[15] *Id.* at 64.

[16] *Id.* at 61, 64. *See* Skeen, *supra* note 10, at 181 (noting that the phrases "high degree" and "save for any that contravene the Basic Law" provide nothing concrete and too much qualification).

[17] Joint Declaration, *supra* note 1, at 62.

The National People's Congress passed the "Basic Law" referenced in the Article in 1990 and it became effective on July 1, 1997, the date that Hong Kong receded back to China.[18] The Basic Law does textually give effect to the language of the Joint Declaration and provides that the Standing Committee of the national government may invalidate any Hong Kong law or ruling that contravenes the Basic Law.[19] Moreover, the interpretation of the Basic Law is not solely left to an independent Hong Kong judiciary; instead, whenever a decision concerning a Basic Law provision that affects the central government is before the Hong Kong courts, they must consult with the Standing Committee.[20] Thus, any law or decision promulgated by the Hong Kong government and judiciary may be determined by the central government to be in contravention of the Basic Law.

Prior to the recession of Hong Kong back to China, the United Kingdom was not—and still is not—a ratifying state to the CISG.[21] Thus, Hong Kong was never an applicable territory of the CISG during the establishment of its "laws previously in force" provision[22] for the purposes of the Basic Law.[23] Article 153 of the Basic Law provides that:

> The 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.[24]

Article 153 removes any doubt that, though Hong Kong retains economic capitalist freedom, international agreements on trade or uniform contract law may be imposed on Hong Kong by the central government. China was, and is, a ratifying state of the CISG.[25] Hence, domestically, the central government appears empowered to issue an Article 93 declaration under the CISG to reserve or expressly apply the CISG to Hong Kong. Indeed, the central government has

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[18] People's Republic of China: The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 29 I.L.M. 1519 (1990) [hereinafter Basic Law].

[19] *Id.* at art. 158.

[20] *Id.*

[21] *See* Status of Treaties, *supra* note 3.

[22] Joint Declaration, *supra* note 1, at 64.

[23] Basic Law, *supra* note 18, at art. 8.

[24] *Id.* at art. 153.

[25] Status of Treaties, *supra* note 3.

apparently used this power to great effect.[26] Accordingly, courts have been left to interpret whether China's list of applicable conventions to Hong Kong qualifies as an Article 93 declaration by virtue of negative inference.

III. ANALYSIS

The reasoning behind the drafting of the CISG, specifically Article 93, closely reflects the reality of Hong Kong's relationship with mainland China as an autonomous special administrative region. An analysis of the drafting of the CISG is useful for discussing the applicability of the CISG to Hong Kong in light of the Joint Declaration and the Basic Law. Additionally, the application of uniform international law requires analysis of how international courts have tried to find cohesion in the CISG's interpretation.

A. The Drafting of the CISG

Schroeter argues that Article 93 of the CISG is a mere injection at the request of Canada and Australia on the drafting committee.[27] But the history and evolution behind Article 93 and the CISG as a whole is more influential than this brief allusion might give it credit for. The CISG is a byproduct of the United Nations' push for global economic integration as a source of global well-being, and it follows previous attempts at creating uniform laws of contract and sale undertaken by the United Nations.[28] The Hague Convention of 1955 and the Hague Convention of 1964 served as the principle attempts at creating a multinational agreement for the contract and sale of goods.[29] Both Hague Conventions included precursory articles of territorial applicability to Article 93 of the CISG, and the examination of this development provides insight into the shift in focus by the

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[26] *See* Letter of Notification of Treaties Applicable to Hong Kong After 1 July 1997, *supra* note 5; U.N. Secretary-General (Depositary Notification), *Notification by China and the United Kingdom of Great Britain and Northern Ireland Relating to Hong Kong*, C.N.276.1997 (Aug. 18, 1997) (notifying the United Nations of China's reservations to international treaties of transit, navigable waters, and customs, with respect to Hong Kong); U.N. Secretary-General (Depositary Notification), *Notification by China Relating to Hong Kong*, C.N.318.1997 (Aug. 22, 1997) (notifying the United Nations of China's application of the Single Convention on Narcotic Drugs to Hong Kong).

[27] Schroeter, *supra* note 7, at 320 (noting that Canada and Australia requested to clause to accommodate federal states with more than one legal system in place).

[28] Comm'n on Int'l Trade Law, Rep. on the Work of Its Second Session, ¶ 38, U.N. Doc. A/7618 (1969) [hereafter Comm'n on Int'l Trade Law 1969].

[29] *Id.* at 11.

United Nations to make such uniform laws and agreements more appealing to prospective ratifying states.

The Hague Convention of 1955 reflects a very Eurocentric basis for international trade. This Eurocentricity extends to the language of the adopted agreement with Article 10, which is the apparent precursor to Article 93 in the CISG, stating, in part, "[t]his Convention shall apply to the metropolitan territories of the Contracting States as a matter of course."[30] The term "metropolitan territories" in its usage in international law denotes "the territory of the parent State of a colony or any other type of dependent territory in respect of which the metropolitan State exercises international functions."[31] In other words, the use of the term metropolitan territories in Article 10 extends the applicability of the Convention to the "homeland" of a state, as opposed to the dependent external territories of the state. Thus, the default rule of the Convention is to not apply the treaty to dependent territories. Historically, treaties did not provide for any severance in the territorial application, and states would apply a treaty's terms unreservedly to their territories.[32] However, after 1945, colonial powers began to include territorial application clauses to account for dependent territories that required separate regulation.[33]

Article 10 also reflects a territorial application clause procedure that is now commonplace in international law and present in both the Hague Convention of 1964 and Article 93 of the CISG.[34] This procedure is the filing of a notification with an assigned depositary.[35] Article 10 goes on to state:

> If a Contracting State wishes the Convention to be applicable to all its other territories, or to those of its other territories for the international relations of which it is responsible, it shall give notice of its intention in this regard by an instrument which shall be deposited with the Ministry of Foreign Affairs of the Netherlands.[36]

Building on the Hague Convention of 1955, the Hague Convention of 1964 changed the substantive rules of international contract and issued the first uniform law in this field with the Uniform Law on the Formation of Contracts for

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[30] Convention on the Law Applicable to the International Sales of Goods art. 10, June 15, 1955, 510 U.N.T.S. 147 [hereinafter The Hague Convention of 1955].

[31] *Metropolitan Territory*, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW (3d ed. 2009).

[32] *Id.*

[33] *Id.*

[34] The Hague Convention of 1955, *supra* note 30, at art. 10.

[35] *Id.*

[36] *Id.*

the International Sale of Goods.[37] However, the Convention of 1964 did not change the default rule of 1955, where a state must notify the depositary of its intent to extend the application to dependent territories.[38] Article XI, which is the territorial application clause of the Hague Convention of 1964, provides the following:

> Any State may, at the time of the deposit of its instrument of ratification or accession or at any time thereafter, declare, by means of a notification addressed to the Government of the Netherlands, that the present Convention shall be applicable to all or any of the territories for whose international relations it is responsible.[39]

Article XI does drop the preface of "metropolitan territories" that is found in the Hague Convention of 1955, removing the connotation of colonialism. But the general application of the Hague Convention of 1964 is still only to what would qualify as a metropolitan territory or motherland, with an Article XI declaration being the avenue for states to extend the application to dependent territories. In 1969, the historic rules of treaty application changed with the Vienna Convention on the Law of Treaties.[40] In accordance with the Vienna Convention, an agreement will apply to the entire territory of a ratifying state unless the agreement a contrary intention appears in the language or is otherwise established.[41] It is likely from this new presumption of absolute application that the CISG draws the basis for Article 93.

Article 93 of the CISG shifts the default rule from solely metropolitan application into absolute application. Article 93 of the CISG requires a ratifying state to file a declaration naming what territories the treaty will extend to.[42] Otherwise, the application will be extended to all territories. Restated, Article 93 provides, in part, that:

> If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or

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[37] Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169 [hereinafter the Hague Convention of 1964].

[38] *Id.* at art. XI; The Hague Convention of 1955, *supra* note 30, at art. 10.

[39] The Hague Convention of 1964, *supra* note 37, at art. XI.

[40] Vienna Convention on the Law of Treaties art. 29, May 23, 1969, 1155 U.N.T.S. 331.

[41] *Id.*

[42] CISG, *supra* note 2, at art. 93.

> accession, declare that this Convention is to extend to all its territorial units or only to one or more of them . . . .[43]

On its face, Article 93 does not appear much different from Article 10 of the Hague Convention of 1955 or Article XI of the Hague Convention of 1964. Article 93 does condition any declaration on a presence of two or more different law systems in a state, but the procedure is laid out in similar verbiage as the Hague Conventions, notably the phrase "declare that this Convention is to extend to all its territorial units or only to one or more of them."[44] However, paragraph four of Article 93 removes any doubt that the CISG is modeled after the Vienna Convention, stating: "If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State."[45] Further, under paragraph two, the declaration must "state expressly the territorial units to which the Convention extends."[46]

In practice, the application of CISG has been absolute and in line with the Vienna Convention unless a state files an Article 93 declaration, as evidenced by the ratifying states that have filed Article 93 declarations.[47] Both Canada and Denmark are nations with territories of fluctuant autonomy and law systems, and both have used Article 93 declarations as a way to either slowly integrate the CISG into their territories or abstain from those territories altogether.[48] In 1991, Canada acceded to the CISG but issued an Article 93 declaration to extend application to all territories except Quebec and Saskatchewan.[49] A little over a year

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[43] *Id.* at art. 93 (2).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See* U.N. Secretary-General (Depositary Notification), *United Nations Convention on Contracts for the International Sale of Goods Concluded in Vienna on 11 April 1980: Accession by Canada*, C.N.88.1991 (May 31, 1991) [hereinafter Canada 1991 Declaration] (declaring, expressly in reference to Article 93, that the CISG will apply to the territories of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward's Island, and the Northwest Territories); U.N. Secretary-General (Depositary Notification), *United Nations Convention on Contracts for the International Sale of Goods Concluded in Vienna on 11 April 1980: Accession by Canada*, C.N.255.1992 (Oct. 19, 1992) [hereinafter Canada 1992 Declaration] (declaring, expressly in reference to Article 93, that the CISG will apply to Quebec and Saskatchewan); U.N. Secretary-General (Depositary Notification), *United Nations Convention on Contracts for the International Sale of Goods Concluded in Vienna on 11 April 1980: Ratification by Denmark and the German Democratic Republic*, C.N.41.1989 (Apr. 17, 1989) [hereinafter Denmark Declaration] (declaring, expressly in reference to Article 93, that the CISG will not apply to the Faroe Islands and Greenland).

[48] Canada 1991 Declaration, *supra* note 47; Canada 1992 Declaration, *supra* note 47; Denmark Declaration, *supra* note 47.

[49] Canada 1991 Declaration, *supra* note 47.

later, in 1992, Canada issued a second Article 93 declaration to expressly extend application to Quebec and Saskatchewan.[50] In accordance with Article 93(2), in both instances Canada expressly stated and listed the territories to which the CISG would apply.[51] Similarly, in 1989, Denmark ratified the CISG and filed an Article 93 declaration to reserve application from Greenland and the Faroe Islands.[52] Noticeably, rather than expressly state what territories the CISG would apply to, Denmark expressly stated the territories to which the CISG would not apply.[53] In the declarations of both Canada and Denmark, the depositary accepted the language and effectuated Article 93 to keep the CISG from applying to those territories the states did not intend for it to apply.

The examples of Denmark and Canada illustrate one of the purposes behind the overhaul of the Hague Conventions into the CISG. Previously, the Hague Conventions and their pre-Vienna "metropolitan" language permitted colonial systems—but not complex federal systems—to direct the application of the uniform laws.[54] The language of Article 93 in the CISG modernized the application of the uniform laws to account for not just resemblances of a colonial system, but also flexible federated systems.[55] This federal flexibility is what permitted Canada to stagger the application of CISG to its provinces; provinces which one might not deign to call colonies of the Canadian metropole like the Hague Convention of 1955 suggests. While Greenland and the Faroe Islands might not be provinces or states like those of Canada, they are also not colonies of Denmark. Rather, Greenland and the Faroe Islands represent highly autonomous territories that Denmark maintains responsibility for within international relations and defense.[56]

The drafting of the CISG was accompanied by a purpose to de-westernize the existing uniform rules and create more flexibility.[57] These purposes are apparent in the United Nations reports that would ultimately lead up to the establishment of a uniform law working group.[58] In a report to the General Assembly in 1969,

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[50] Canada 1992 Declaration, *supra* note 47.

[51] *Id.*; Canada 1991 Declaration, *supra* note 47; CISG, *supra* note 2, at art. 93, ¶ 2.

[52] Denmark Declaration, *supra* note 47.

[53] *Id.*

[54] *See* Metropolitan Territory, *supra* note 31.

[55] United Nations Comm'n on Int'l Trade Law, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, at 422, ¶ 1 (2016) https://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf [hereinafter UNCITRAL Digest] (stating that Article 93 "enables federal States to accede to the Convention for some territorial units when otherwise legally restricted to apply it to all their territorial units").

[56] *The Greenland Committee*, FOLKETINGET: THE DANISH PARLIAMENT, https://www.thedanishparliament.dk/en/committees/committees/the-greenland-committee#:~:text=In%20the%20vast%20majority%20of,the%20Danish%20Government%20and%20Parliament (last visited April 28, 2021).

[57] Comm'n on Int'l Trade Law 1969, *supra* note 28, ¶ 38, § 3(a).

[58] *Id.*

the United Nations Commission on International Trade Law (UNCITRAL) created a working group to analyze "which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems."[59] The United Nations had noticed the sparse number of states ratifying the Hague Conventions and issued questions to member states for the working group to analyze why so many states were not ratifying the Conventions.[60] In answer, the working group's goal was to draft uniform rules that would bridge the gaps between legal systems,[61] removing the Eurocentricity of the Hague Conventions and "promot[ing] harmonization of substantive law by the largest number of States, regardless of their legal tradition."[62] As one representative of UNCITRAL noted, "in international trade, especially in East-West trade, both parties often proposed their own detailed forms; as a result substantial time was spent in reaching agreement on the provisions of the contract. A set of uniform conditions could simplify this procedure."[63]

B. International Case Law

Courts around the world have issued disparate opinions on whether the CISG does apply to Hong Kong. Fortunately, Article 7(1) of the CISG offers instruction on how fora are to interpret the provisions of the Convention. Article 7(1) provides: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[64] Courts have taken Article 7(1) to mean that the CISG must be interpreted and "applied exclusively on its own terms" and without reference to national law, which would corrupt the "international character" of the Convention.[65] Unfortunately, courts have tried their best to "autonomously" apply the CISG, but have come to wildly different conclusions.[66] Because the international character and policy of uniformity promotes the influence and persuasiveness of international courts, tribunals often look to

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[59] *Id.*
[60] *Id.* ¶ 38.
[61] *Id.*
[62] UNCITRAL Digest, *supra* note 55, at xi, ¶ 4.
[63] Comm'n on Int'l Trade Law, Rep. on the Work of Its Sixth Session, ¶ 19, U.N. Doc. A/9017 (1973) [hereafter Comm'n on Int'l Trade Law 1973].
[64] CISG, *supra* note 2, at art. 7, ¶ 1.
[65] UNCITRAL Digest, *supra* note 55, at 42, ¶¶ 2–6.
[66] *Id.*

decisions made by other courts in other countries.[67] As one scholar has succinctly put it:

> The consequence of Art. 7 (1) and the duty to consider foreign case law is not that an official *stare decisis* exists. Rather, the effect is that an adjudicator must take relevant court and arbitral decisions into consideration to the extent that they are available and only differ from them if there is good reason for doing so. The interpretive value of foreign decisions will then depend on their persuasive value and it is up to adjudicators to be persuaded by well-reasoned decisions, as well as be reluctant to deviate from a foreign line of corresponding precedents.[68]

i. Chinese Jurisprudence

Because Article 93 places the impetus of declaring territorial applicability on the filing state, courts and scholars may look to the jurisprudence of Chinese courts for aid in determining whether the CISG applies to Hong Kong. The logic is that the domestic courts of the pertinent country would have the best disposition towards the intent of the government filing—in this case, the filing of China's list of applied conventions to Hong Kong.[69] Much to the chagrin of interested scholars and judges, however, the Chinese courts have been neither instructive nor consistent when they have addressed the question.

Commentators have remarked on a particular "homeward trend" that the Chinese courts have seemed to adopt when cases implicate the CISG. International law professor Thomas Neumann argues that the Chinese courts have avoided applying the CISG to Article 80 arbitral awards, instead opting for a remedy mirroring domestic Chinese law.[70] Additionally, Neumann brings attention to the significant problem that Chinese law does not require domestic courts to provide a legal basis for their decisions.[71] This lack of stated reasoning frequently thwarts the "international" character of the CISG to establish uniformity across

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[67] *Id.* ¶ 7.

[68] Thomas Neumann, *Chinese Success and Failure in Achieving Uniform Application of the CISG*, 16 VINDOBONA J. INT'L COM. L. & ARB. 83, 87 (2010) (citations omitted).

[69] *See generally* Innotex Precision Ltd. v. Horei Image Prods., Inc., 679 F. Supp. 2d 1356, 1359 (N.D. Ga. 2009) (discussing how the Chinese Courts have applied the CISG to Hong Kong).

[70] See Neumann, *supra* note 68, at 92–93 (noting that the Chinese Contract Law may have provided the basis for a remedy, rather than the CISG).

[71] *Id.* at 93.

jurisdictions. More particular to this study, the failure to provide a legal basis compounds with the scarcity of decisions rendered by Chinese courts on the applicability of the CISG to Hong Kong. Both the scarcity of decisions on applying the CISG to Hong Kong and the unstated legal bases of those decisions that are reported create insubstantial grounds to draw any conclusions as to the predilection of the Chinese judiciary as a whole.

Academics Qiao Liu and Xiang Ren conducted a brief survey of the cases where Chinese Courts rendered a decision regarding the CISG and a Hong Kong party.[72] In the fourteen cases Liu and Ren analyzed, ten were between a Hong Kong party and a China mainland party and four were between a Hong Kong party and another contracting state party.[73] In the first category of cases, four of the cases concluded with the courts deciding that Hong Kong and China itself were not separate states, and therefore, could not be two contracting states with each other.[74] Perhaps these decisions were intended to rebuke arguments that the different law systems between Hong Kong and China created distinct "contracting states," but as Liu and Ren explain, "[o]bviously, even if the CISG extends to Hong Kong, it extends to it as a territorial unit of China, rather than as an independent contracting state."[75] Most poignantly, the only case found by Liu and Ren that directly addressed the question of Article 93 was *Hong Kong Yingshun Development, Co. v. Zhejiang Zhongda Technology Import, Co*. . . In *Yingshun Development*, the Zhejiang High People's Court stated that because China had never filed an express Article 93(1) declaration, the CISG did not apply to Hong Kong.[76] Yet, as Liu and Ren point out, this decision neglects to consider Article 93(4),[77] which states: "If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State."[78]

The remaining cases addressed by Liu and Ren, including those between a Hong Kong party and another contracting state party, circuitously avoided answering the question of whether the CISG applied to Hong Kong. In nearly every case, the courts decided that either Chinese domestic law incorporated CISG law or that the choice of law provisions in each case elected domestic Chinese law over CISG law.[79] Liu and Ren remark that the reasoning that Chinese domestic

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[72] Qiao Liu & Xiang Ren, *CISG in Chinese Courts: The Issue of Applicability*, 65 AM. J. COMP. L. 873, 888–91 (2017) (hereinafter Liu & Ren).

[73] *Id.* at 888.

[74] *Id.*

[75] *Id.*

[76] *Id. See also* Hong Kong Yingshun Development Co. Ltd v. Zhejiang Zhongda Technology Import Co. Ltd., Zhe Shang Wai Zhong Zi No. 99 Civil Judgment (2010).

[77] Liu & Ren, *supra* note 72, at 888.

[78] CISG, *supra* note 2, art. 93 at ¶ 4.

[79] Liu & Ren, *supra* note 72, at 888–89.

law incorporates CISG law is "dubious" because China filed an Article 95 reservation to exclude CISG law whenever there is a conflict with Chinese domestic law, a statement that runs contrary to any "incorporation" reasoning of the two laws.[80] Other scholars have found cases where the Chinese courts simply use the CISG as a "gap-filler" when the parties include it in the choice of law provision and domestic law does not provide for a situation.[81] While Liu and Ren's study concentrated on the treatment by Chinese courts of Hong Kong as a "contracting state" under Article 1(1)(a), they conclude, like Neumann, that the Chinese courts have demonstrated a homeward trend to use domestic law when reviewing CISG law.[82] Consequently, this homeward trend has both prevented any clear decisions from emerging on whether the CISG applies to Hong Kong and disrupted the intention of the CISG to retain an international construction untainted by domestic law.

ii. International Jurisprudence

Globally, courts settling disputes between countries, and even within the same country, have come to different conclusions on whether the CISG applies to Hong Kong. Though most courts have not circumvented the question like the Chinese courts (except for *Yingshun Development*) they have grappled with the negative inference dilemma of China's convention list. The courts' interpretations appear to divide cleanly into two camps: intentionalism and formalism. The intentionalism courts rely on the intention of the convention list filed by China to be a single vehicle expressing China's wish that the CISG not be among the international agreements applied to Hong Kong. The formalism courts predicate their conclusions on the express terms of Article 93 and the Article 93 declarations of other contracting states.

The first non-American court to squarely address this question is the Supreme Court of France in the *Telecommunication Products Case*.[83] The court's decision is brief, but undeniably employs an intentionalism rationale. The court held that the list of conventions filed by China did qualify as an Article 93 declaration because it "effectuated with the depositary of the Convention a formality equivalent to what is provided for in Art. 93 CISG."[84] This "formality equivalent" was taken as procedurally sufficient to signify that China did not intend for the CISG

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[80] *Id.* at 889–90.

[81] Xiao Yongping & Long Weidi, *Selected Topics on the Application of the CISG in China*, 20 PACE INT'L L. REV. 61, 82–84 (2008).

[82] Liu & Ren, *supra* note 72, at 917; *see also* Neuman, *supra* note 68, at 94.

[83] Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 2, 2008, no. 04-17726 (Fr.), http://cisgw3.law.pace.edu/cases/080402f1.html.

[84] *Id.*

to apply to China and that China formally stated such in its list by negative inference.[85] This view of intentionalism perhaps gives the most efficient and practical effect to China's list. After all, filing declarations and notifications under each treaty by its own terms would be cumbersome when they all similarly require the same thing—to be filed with the depositary.[86]

Courts latched on to the reasoning of the *Telecommunication Products Case* and have buttressed that opinion's sparseness with subsequent factors. In *Innotex Precision Ltd. v. Horei Image Products, Inc.*, the United States District Court for the Northern District of Georgia references the *Telecommunication Products Case* and—after remarking on the unhelpfulness of Chinese court decisions—notes that commentators have so far suggested not applying the CISG to Hong Kong for the same intentionalism and formality equivalency reasoning as the French court.[87] Additionally, the court mentions that the Hong Kong Department of Justice promulgates a list of current applicable treaties to Hong Kong, and the CISG is not on that list.[88] The United States District Court for the Eastern District of Tennessee echoed *Innotex* in *America's Collectibles Network, Inc. v. Timlly (HK)*.[89] The *Timlly* court substantively quoted *Innotex*, adding that the list is "especially significant," but provided no further reasoning.[90]

Some courts have taken the formalism approach; in *CNA International, Inc. v. Guangdon Kelon Electronical Holdings et al.*, the United States District Court for the Northern District of Illinois held that the CISG did apply to Hong Kong.[91] The court interpreted the treaty by reviewing "its plain language and to 'the general principles'" upon which it is based.[92] Quoting the United States Supreme Court, the court noted that "[i]t is axiomatic that a treaty's plain language must control absent 'extraordinarily strong contrary evidence.'"[93] Reading the

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[85] *Id.*

[86] CISG, *supra* note 2, art. 93 at ¶ 2.

[87] *Innotex*, 679 F. Supp. 2d 1356, at 1359.

[88] *Id.*

[89] America's Collectibles Network, Inc. v. Timlly (HK), 746 F. Supp. 2d 914 (E.D. Tenn. 2010).

[90] *Id.* at 920; *see also* Hannaford v. Australian Farmlink Pty Ltd. [2008] FCA 1591 (2008) (Austl.) (resolving case on other grounds, but commenting on the likelihood that the CISG does not apply to Hong Kong for the same reasons that the French court relied upon); *see generally* Lisa Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers*, 10 MELB. J. INT'L. L. 141 (2009) (discussing the hypothetical approach taken by the Hannaford court, but also the court's reasoning that China had not yet made Hong Kong a contracting state).

[91] CNA Int'l, Inc. v. Guangdon Kelon Electronical Holdings, No. 05-C-5734, 2008 WL 8901360 at *2 (N.D. Ill. Sept. 3, 2008); *see also* Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd., No. 4:09-CV-00318-SWW, 2009 WL 5181854 (E.D. Ark. Dec. 23, 2009).

[92] *CNA Int'l*, 2008 WL 8901360, at *2.

[93] *Id. at* *2 (quoting Sale v. Haitian Ctrs. Council, 113 S.Ct. 2549 (1993)).

language of Article 93(2), the district court reduced the Article as having two requirements for a declaration: (1) to be deposited with the depository; and (2) to state expressly the territories to which the CISG extends.[94] The court determined that the list filed with the Secretary-General by China satisfied the first requirement but not the second.[95] The court found that, logically, for the list to be an Article 93 declaration it must include an exhaustive and definitive list of all treaties to be applied.[96] Yet, the Chinese notice itself provided that for any treaty not listed the Chinese government would separately carry out any formalities required if the government decided to apply the treaty to Hong Kong.[97] Otherwise, application of the treaty would be automatic where the terms must apply to the whole state.

C. The CISG Should Apply to Hong Kong

Notwithstanding the CISG's goal of promoting uniformity in international jurisprudence, the CISG should apply to Hong Kong. The formalism approach is more congruous with the drafting history of the CISG, and the logic employed by the *CNA International* court is more persuasive than the approach taken by the intentionalism courts. The evolution of the CISG from the Hague Conventions and the Vienna Convention demonstrates that a ratifying state to the CISG understood the treaty to apply to all of the state's territory, absent a declaration under Article 93. China's 1997 list of applicable treaties should not be considered a valid Article 93 declaration because the history of the CISG militates in favor of express declarations, and China's list on its face leaves open the notion that the list is not exhaustive.

The CISG is a product of the United Nations' response to the changing landscape of global trade and emerging states after the end of decolonization. The period following the Hague Conventions saw a marked increase in exports to and the economic reformation of developing countries in Asia, particularly oil-producing countries and industrializing countries.[98] The desire to create a uniform law code that would add cohesion and certainty to trade between separate legal traditions became increasingly demanding, resulting in the flexible CISG.[99] The decolonization of much of Africa and Asia led to the development of states that

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[94] *CNA Int'l*, 2008 WL 8901360, at *4.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] U.N. Conference on Trade and Dev., *Rep. on Trade and Development 1982*, UNCTAD/TDR/2/Rev.1, 56-57.

[99] Comm'n on Int'l Trade Law 1969, *supra* note 28; UNCITRAL Digest, *supra* note 55, at xi, ¶¶ 2–4.

now find themselves forming, or being left in, political structures of federated systems, attempting to unite historically distinct peoples and territories.[100] The CISG Drafting Committee drafted the CISG against this new political structure backdrop. The Commission on International Trade's initial study into why the Hague Conventions were not universally adopted reflects this purpose of the CISG to appeal to diverse legal traditions and political structures.[101] Further, the Vienna Convention's mandate for absolute territorial application is reflected in the change that the CISG makes from the "metropolitan" and "dependent territories" of the Hague Conventions into paragraph (4) of Article 93 of the CISG: "[i]f a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State."[102]

Article 93 of the CISG shifts the default rule from solely metropolitan application into absolute application, and it is with this evolution and critical purpose that Article 93(2) demands a contracting member "to state expressly the territorial units to which the Convention extends."[103] In practice, declaring states have expressly stated the territories to which the Convention extends,[104] and China's 1997 list does not comport with this established procedure and history of Article 93. The goal of the CISG is uniformity and the creation of an "international character,"[105] and the bulk of the current case law on the question of the CISG's applicability to Hong Kong suggests a possible conclusion that China's 1997 list should be considered an intended Article 93 declaration.' However, the possibility of there being an intentionalist trend in international case law should not undercut the reasons behind Article 93 and its practice. Indeed, the *CAN International* court's argument that the 1997 list by its own terms cannot be exhaustive or all-inclusive is compelling. While it may be most efficient to take China's 1997 list as an "until-further-notice," all-inclusive depositary notification, that line of thinking should not be used as an easy-out from the express procedures of Article 93. Accordingly, China's 1997 list should not constitute an Article 93

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[100] *See* Donald Rothchild, *African Federations and the Diplomacy of Decolonization*, 4 J. DEVELOPING AREAS 509, 509 (1970) (discussing the use of federalism to unify historically disparate tribes and cultures in decolonized African countries); Michael Breen, *The Origins of Holding-Together Federalism: Nepal, Myanmar, and Sri Lanka*, 48 J. FEDERALISM 26, 28–29 (2017) (discussing the use of federalism to unify historically disparate people groups in decolonized Nepal, Myanmar, and Sri Lanka).

[101] Comm'n on Int'l Trade Law 1969, *supra* note 28, at ¶ 38; Comm'n on Int'l Trade Law 1973, *supra* note 63, at ¶ 19.

[102] *See* The Hague Convention of 1955, *supra* note 30; the Hague Convention of 1964, *supra* note 37; Vienna Convention, *supra* note 40; CISG, *supra* note 2.

[103] CISG, *supra* note 2.

[104] *See* Canada 1991 Declaration, *supra* note 47; Canada 1992 Declaration, *supra* note 47; Denmark Declaration, *supra* note 47.

[105] CISG, *supra* note 2, at art. 7, ¶ 1; UNCITRAL Digest, *supra* note 55, at 42, ¶¶ 2–6.

declaration, and pursuant to the provisions of the Joint Declaration and Article 93, the CISG should apply to Hong Kong.

IV. CONCLUSION

The recent volatility of the relationship between mainland China and Hong Kong has pushed the status of political and economic rights in Hong Kong to the fore. The ambiguity of the Joint Declaration and the subsequent Basic Law often will raise questions of political and economic autonomy for the special administrative region, but the power of the central government to bind Hong Kong to international agreements is perhaps one of the clearer aspects of the relationship.[106] Less clear is whether China has used this power to bind Hong Kong to the CISG. This study argues that China has not used this power because Article 93 of the CISG explicitly provides that for a contracting state to restrict territorial applicability, it must expressly state the territories to which the Convention will extend. Additionally, the history of Article 93 declarations has demonstrated that Article 93 is an attempt to bring more uniformity and certainty to the changing landscape of global trade, in accordance with the overall mission of the CISG, and that declaring states—in practice—do expressly name territories of applicability or non-applicability. The intentionalist approach that some courts have taken to the question does not conform to the mission and practice of the CISG. China's 1997 list does not expressly constitute an Article 93 declaration and, by its terms, does not attempt to do so.

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[106] Basic Law, *supra* note 18, at art. 93.