

**For discussion on
22 March 2021**

**Legislative Council
Panel on Administration of Justice and Legal Services**

**Proposed Application of the
United Nations Convention on Contracts for the International Sale of Goods to
the Hong Kong Special Administrative Region**

Purpose

This paper informs Members of the outcome of the Administration's consultation exercise¹ on the proposed application of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")² to the Hong Kong Special Administrative Region ("Hong Kong") and the Administration's plan of extending the application of the CISG to Hong Kong.

Background

2. The CISG provides uniform rules to govern contracts for the international sale of goods, with a view to removing legal barriers in, and promoting the development of, international trade. It entered into force on 1 January 1988³. As at the end of January 2021, 94 countries are parties to the CISG⁴, including more than half of the top 20 trading partners of Hong Kong by total volume of trade, namely, China, the USA, Singapore, Japan, South Korea, Vietnam, Germany, the Netherlands, France, Switzerland, Italy and Australia⁵.

3. Whilst China is a Contracting State to the CISG⁶, the CISG is currently not applicable to Hong Kong⁷.

¹ The public consultation paper is titled "Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region". It is available at: https://www.doj.gov.hk/en/featured/consultation_paper.html.

² The CISG is available at: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

³ The entry into force date and the current status of the CISG is available on this United Nations Treaty Collection webpage:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=en.

⁴ *Ibid.*

⁵ Information on Hong Kong's principal trading partners in 2020 is available at: https://www.tid.gov.hk/english/trade_relations/mainland/trade.html.

⁶ The CISG entered into force for China on 1 January 1988. For details please refer to: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

⁷ The CISG was not applied to Hong Kong prior to 1 July 1997. During and after the transition, China has not deposited notification with the Secretary General of the United Nations for applying the CISG to Hong Kong.

4. There are views in favour of extending the application of the CISG to Hong Kong for reasons that such application could potentially promote trade growth, prevent businesses from being subject to unfamiliar foreign laws when entering into cross-boundary transactions, improve Hong Kong's competence in resolving CISG disputes and hence enhance Hong Kong's status as an international trade and financial centre⁸.

5. With the number of Contracting States to the CISG growing, the Administration considers that it is the appropriate time to consult the relevant stakeholders, in particular, the legal and business sectors, on the proposal to extend the CISG to Hong Kong. Accordingly, the Administration conducted the public consultation exercise during the period 2 March to 30 September 2020 (the "CISG Consultation")⁹.

Responses to the Consultation

6. The CISG Consultation sought responses from the public to five Consultation Questions ("CQs") set out in **Annex 1**. 16 submissions have been received from the public in total. A list of the respondents is at **Annex 2**.

7. A majority of the responses are focused on CQ 2 (ie whether the CISG should be applied to Hong Kong ("the Application Issue")) and CQ 4 (ie whether the implementing legislation should include provisions which in effect apply the CISG rules to Mainland – Hong Kong sales transactions ("the Mainland-HK Transactions Issue")). There were also some responses to CQ 1 and CQ 3 (which are fact-finding questions concerning the governing law of cross-boundary sales contracts of Hong Kong traders) and CQ 5 (on the draft Bill to implement the CISG in Hong Kong).

8. The key issues in relation to the public responses are discussed below.

The Application Issue

9. A summary of the public responses received on this issue is at **Annex 3**. Our key observations on these responses are as follows:

(a) On the legal professional side, the Hong Kong Bar Association ("HKBA") and the Law Society of Hong Kong ("HKLawSoc"), whilst

⁸ For details please refer to paragraph 10 of the Administration's paper titled "Consultation on the Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region" (LC Paper (CB(4)908/18-19(03))).

⁹ The Administration issued the public consultation paper on 2 March 2020. The public consultation period was for three months but had been extended to the end of September 2020 owing to the current public health situation.

observing the differences between the CISG and existing Hong Kong law¹⁰, have expressed support for applying the CISG to Hong Kong with no major obstacle/concern raised from the legal perspective. This support was also expressed in almost all the submissions received from the legal academic sector¹¹.

(b) On the trade/commerce side, Hong Kong General Chamber of Commerce (“HKGCC”) and Hong Kong Trade Development Council (“HKTDC”) have responded. While HKTDC supported the proposed application, HKGCC expressed reservation, questioning whether Hong Kong businesses would be better off with the current “opt-in” position or with the “opt-out” position (assuming that the CISG is applied to Hong Kong). HKGCC also raised concerns about the costs of the said application (e.g. costs in reviewing existing contracts). In this regard, HKGCC considered that relevant input from the Hong Kong’s legal profession on CQ1 and CQ3 as well as the said “opt-in”/“opt-out” question would be useful. To address the concerns raised in HKGCC’s submission, the Administration sent HKGCC a letter on 11 December 2020 providing our preliminary views on the major points raised in its submission and relaying to it the support to the proposal given by HKBA and HKLawSoc. A copy set of HKGCC’s submission and our reply letter is at **Annex 5**.

(c) Some respondents indicated that they had no particular comment, from their respective perspectives, on the proposal or the consultation paper¹².

10. In summary, a majority of the above-mentioned public responses, noting the global importance of the CISG and that its application to Hong Kong would be in line with and enhance Hong Kong’s role as an international centre of trade and commerce and centre for dispute resolution, expressed support for the proposed application of the CISG to Hong Kong. Whilst HKGCC expressed reservation, the Administration has tried to address its concerns in our reply letter. Relevantly, save

¹⁰ HKBA’s submission paragraph 15 and HKLawSoc’s submission paragraph 7. A copy set of these submissions is at **Annex 4**.

¹¹ For example, the submissions from professors from School of Law of the City University of Hong Kong (namely, Prof Loke, Prof Liu Qiao and Prof Wang Jiangyu) and from the Faculty of Law of the Chinese University of Hong Kong (Dr. Wolff). On the other hand, Mr Alan Gibb, Professional Consultant, Barrister-at-law, Faculty of Law, the Chinese University of Hong Kong in his submission expressed the view that the proposed change was “not welcomed mainly due to the fact that it would diminish Hong Kong’s legal reputation of providing a legal service superior to any other in the region.” (paragraph 1 of the submission) A major premise of this view was that the English/Hong Kong common law rules, of which the Sale of Goods Ordinance (Cap 26) was an integral part, “ensured far greater predictability in the outcome of disputes”.

¹² The respondents concerned are the Consumer Council and the Privacy Commissioner for Personal Data. In the case of the Insurance Authority, it commented that the direct impact of the CISG on the insurance industry would be relatively peripheral.

for HKGCC, no trade associations or chambers of commerce have written in expressing reservation to the proposal¹³.

11. In light of the above, the Administration intends to seek the approval of the Central People's Government ("CPG") to extend the application of the CISG to Hong Kong pursuant to Article 153 of the Basic Law¹⁴. With reference to how other common law jurisdictions have implemented the CISG in their legal systems (e.g. Australia, Canada and Singapore)¹⁵, the Administration plans to implement the CISG in Hong Kong by enacting a new stand-alone Ordinance.

The Article 95 Reservation Issue

12. China has made a reservation under Article 95 of the CISG, declaring that it is not bound by Article 1(1)(b) which provides for application of the CISG to contracts between parties whose places of business are in different States where the rules of private international law lead to the application of the law of a Contracting State. Among the public responses received, three of them specifically commented on the Article 95 reservation issue:

- (a) HKBA saw no need to apply the Article 95 reservation (for reasons including the historical background that Article 95 was originally proposed by Czechoslovakia on the basis that Article 1(1)(b) would have the effect of limiting the practical applicability of its special legislation governing transactions pertaining to international trade, the fact that currently only seven Contracting States have maintained the reservation, absence of any special legislation in Hong Kong governing transactions of international trade, and the views of CISG Advisory Council in its Declaration No. 2 (e.g. such reservation would have a detrimental effect on the Convention's practical application)), and invited the Administration to reconsider the matter;
- (b) HKLawSoc, after referring to the effect of making the Article 95 reservation in respect of Hong Kong, was of the view that Hong Kong

¹³ Two briefing sessions on the proposed application of the CISG to Hong Kong were held on 8 January 2020 (in English) and 9 January 2020 (in Chinese) at the HKGCC. The participants included representatives of the Hong Kong Chinese Importers' and Exporters' Association and those from the business sector.

¹⁴ Article 153 of the Basic Law provides 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..."

¹⁵ Please see for example:

Sale of Goods (Vienna Convention) Act 1986 (Queensland) at <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1986-041>

International Sale of Goods Contracts Convention Act (Canada) at <https://laws-lois.justice.gc.ca/PDF/I-20.4.pdf>

Sale of Goods (United Nations Convention) Act (Singapore) at <https://sso.agc.gov.sg/Act/SGUNCA1995>

should mirror the reservation and declaration that have been made by China, though without discussing the reasons therefor; and

- (c) In the joint submission of two legal academics¹⁶, having noted the effect of the Article 95 reservation in making the application of the CISG more restrictive and taking into account the arguments which have been made to call for the withdrawal by Singapore of its Article 95 reservation (briefly, that the withdrawal would increase the appeal of Singapore as a forum and Singapore law as a choice of law and that the reservation itself constitutes a major cause of confusion¹⁷), the professors found it in Hong Kong's interests that the CISG be applied to the region without the Article 95 reservation.

13. Taking into account the above public responses and upon further consideration of the matter concerning the Article 95 reservation, the Administration is inclined that while the CISG together with China's Article 95 reservation are to be applied to Hong Kong as a step forward in line with the suggestion in paragraph 4.15 of the consultation paper, it intends to follow up the public responses by consulting the CPG on the option of not extending the Article 95 reservation to Hong Kong.

The Mainland-HK Transactions Issue

14. As regards transactions between businesses in Mainland China and businesses in Hong Kong, since such transactions are within the same country, the CISG, being an international convention governing international sale of goods, would not apply. At paragraph 4.10 of the consultation paper, the following initial proposal was made:

“4.10 However, even if the CISG would not automatically apply to [transactions between businesses in Mainland China and businesses in Hong Kong], in view of the close economic ties between Mainland China and Hong Kong, to facilitate sale of goods between businesses in the two places, **it is proposed that, on a unilateral basis, the New Ordinance would contain provisions which would in effect apply the CISG rules also to contracts for the sale of goods between parties with their places of business respectively in Mainland China and Hong Kong.**”
(emphasis added)

15. The main responses received on this issue are set out at **Annex 6** and

¹⁶ Namely, the joint submission of Prof Liu Qiao and Prof Wang Jiangyu from School of Law of the City University of Hong Kong.

¹⁷ Ibid, paragraph 16.

discussed below:

- (a) There is general support to applying the CISG rules to Mainland–HK sales transactions. The reasons included: such application “could potentially foster the development of trade in the Greater Bay Area and support businesses involved in the Belt & Road Initiative”¹⁸; such application would be “critical for recouping the economic benefits of the CISG”¹⁹ and would “reduce misunderstandings and lower legal costs arising from transactions across different legal traditions, and ... [would] be helpful in promoting performance of transactions, foreseeability of identifying a contract’s applicable law, and the confidence of the parties”²⁰;
- (b) HKBA and HKLawSoc generally agreed to the proposal set out in paragraph 4.10 of the Consultation Paper. However, HKLawSoc proposed that “a better way” to achieve this is for Mainland China and Hong Kong to enter into a mutual arrangement concerning the applicability of the CISG provisions to transactions between parties having respective places of business in Mainland China and Hong Kong, with a view to ensuring “the **reciprocal applicability** of the CISG provisions in the case where the parties adopt the PRC law”²¹ (emphasis added). This preference for a bilateral-arrangement-approach over an unilateral-application-approach (as described in paragraph 4.10 of the Consultation Paper) was echoed by a Mainland lawyer²² and two legal academics in Hong Kong, with the further reason that the bilateral-arrangement-approach would require that “the same set of rules be applied whether the dispute is referred to a court in Hong Kong or Mainland China”²³; and
- (c) HKLawSoc added that the bilateral-arrangement-approach could avoid “confusion” which may be created by including the element about Mainland – Hong Kong transactions in the same ordinance for implementing the CISG in Hong Kong, since the CISG does not apply between Mainland China and Hong Kong as explained in paragraph 14 above²⁴.

16. Taking into account the above public responses, and upon further

¹⁸ Submission by the Insurance Authority on CQ 4.

¹⁹ Submission by Prof Liu and Prof Wang paragraph 18.

²⁰ Submission by Mr Lijun CAO (Zhong Lung Law Firm) paragraph 25.

²¹ Submission by HKLawSoc paragraph 14.

²² Submission by Mr Lijun CAO (Zhong Lung Law Firm).

²³ Submission by Prof Liu and Prof Wang paragraph 19. Similar concerns were expressed in the submission by the Insurance Authority on CQ 4 and the submission by Mr Lijun CAO (Zhong Lung Law Firm) paragraph 34.

²⁴ Submission by HKLawSoc paragraph 14.

consideration of this matter, in order to strengthen our initial proposal from the legal certainty and predictability perspective and avoid the potential confusion referred to in paragraph 15(c) above, the Administration plans to:

- (a) remove clause 4(2) of the draft Bill set out in Annex 4.1 of the consultation paper, which seeks to implement the unilateral-application-approach proposal in paragraph 4.10 of the paper (as quoted in paragraph 14 above);
- (b) initiate discussion with the CPG regarding the Administration's proposal to negotiate with the Mainland an arrangement for the mutual application of the CISG provisions to Mainland – Hong Kong sales transactions, and propose implementing such arrangement in the Mainland and Hong Kong, if and when concluded.

Transition Period and Further Promotion

17. Noting that relevant stakeholders may require time to adapt to the change and adjust their business practice and affairs as appropriate, HKBA encouraged the Administration, should it decide to adopt the CISG, to ensure sufficient time between enactment of the implementing legislation and its taking of effect. In this light, the Administration plans that the commencement of the ordinance (after enactment) will be deferred until at least six to nine months after its passage. During that period, we shall also collaborate with the legal and business sectors to further promote the CISG and the implementing legislation.

Department of Justice
March 2021

CISG Public Consultation: Consultation Questions

Consultation Question 1:

We would welcome views and comments, in particular from the Hong Kong business and legal sectors, on:

- (a) What proportion of their sale of goods contracts with a non-Hong Kong business are governed by Hong Kong law (as compared with non-Hong Kong law)?
- (b) Where such contracts are governed by non-Hong Kong law, which non-Hong Kong law is the most commonly chosen?
- (c) What proportion of such contracts include the express choice of the CISG in their governing law clauses?
- (d) Whether there is any experience of being advised to exclude the application of the CISG in their governing law clauses?

Consultation Question 2:

We would welcome views and comments on whether the CISG should be applied to Hong Kong.

Consultation Question 3:

In respect of sale of goods contracts between Hong Kong businesses and non-Hong Kong businesses, we would welcome views and comments (in particular from the Hong Kong business and legal sectors) on:

- (a) Why would one choose to opt out of the CISG in such contracts?
- (b) The likelihood of opting out of the CISG in such contracts if given the opportunity?

Consultation Question 4:

In respect of sale of goods transactions between Mainland China and Hong Kong, should our local legislation, which seeks to implement the CISG, also apply where the parties to those transactions have their respective places of business in Mainland China and Hong Kong?

Consultation Question 5:

We welcome the public's comments on the draft legislative provisions to implement the CISG in Hong Kong law (as attached to Annex 4.1 to the Consultation Paper).

CISG Consultation – List of respondents

	Respondents
1.	Prof Li Wei The School of International Law, China University of Political Science and Law (中國政法大學國際法學院)
2.	Mr Kinsey Ho Chinese Legal Research Institute (中國法律研究中心)
3.	Consumer Council, Hong Kong (Ms Gilly Wong, Chief Executive)
4.	Hong Kong Bar Association
5.	Prof Alexander Loke City University of Hong Kong
6.	Dr Benjamin Hayward Monash University
7.	Prof Lutz-Christian Wolff Dean of the Faculty of Law/Chinese University of Hong Kong
8.	Hong Kong Trade Development Council (Mr Nicholas Kwan, Director of Research)
9.	Privacy Commissioner for Personal Data, Hong Kong (Mr Alex Lai, Assistant Legal Counsel)
10.	Prof. LIU Qiao and Prof. WANG Jiangyu The Centre for Chinese and Comparative Law, City University of Hong Kong
11.	Hong Kong General Chamber of Commerce

12.	Insurance Authority (Mr Peter Gregoire, General Counsel)
13.	Mr Alan Gibb, Professional Consultant Chinese University of Hong Kong
14.	CIETAC Hong Kong Arbitration Centre
15.	Mr Lijun Cao Zhong Lun Law Firm
16.	The Law Society of Hong Kong

Summary of Responses received to Consultation Question 2

Consultation Question 2 (“**CQ 2**”): We would welcome views and comments on whether the CISG should be applied to Hong Kong.

Respondents	Supportive	Responses received in further detail
1. CIETAC Hong Kong	✓	
2. Consumer Council, Hong Kong		<ul style="list-style-type: none">• No specific comment provided as the proposed application of the CISG to the HKSAR (“Application”) “does not have immediate and direct implications on general consumer interest”.
3. Hong Kong Bar Association	✓	<ul style="list-style-type: none">• CISG is a “global and important convention that has been widely adopted”.• The Application is in line with, and furthers, Hong Kong’s reputation as an internationally leading centre of trade and commerce and in the long run would assist international trade business of Hong Kong.• Resolution of CISG related disputes in Hong Kong would also be in line with, and further, Hong Kong’s reputation as an internationally leading centre for dispute resolution in terms of both arbitration and in Hong Kong Courts. The Courts, legal practitioners, and academics could contribute to international jurisprudence of trade law.• There are bound to be differences between the CISG and existing Hong Kong law. However, Hong Kong’s

		<p>Judiciary and legal sector have rich experience in adopting international legal rules into the Region’s legal system in a sensible and harmonious manner.</p> <ul style="list-style-type: none">• Suggested sufficient time between enactment of implementing legislation and its taking of effect to allow stakeholders to adapt to and adjust their business, conduct and affairs.• <u>Article 95 of the CISG</u>: For reasons set out in the submission (including the history of Article 95, small number of Contracting States that had made the reservation, absence of any special legislation in Hong Kong governing international trade transactions, and the views of the CISG Advisory Council in its Declaration No. 2), the respondent saw no need to apply China’s reservation under Article 95 to Hong Kong, and invited the DoJ to reconsider the matter.
4. Hong Kong General Chamber of Commerce		<ul style="list-style-type: none">• Whilst being appreciative that there are advantages to the Application, the respondent expressed a few concerns on potential drawbacks.• Considered the central question posed by CQ 2 to be whether, on balance, Hong Kong businesses would be better off with the current “opt-in” position or with the “opt-out” position under the Application.• Commented that it was “not self-evident” that using the CISG rules would reduce transaction costs in net terms (as CISG rules unfamiliar to

		<p>many Hong Kong businesses and their legal advisors). Also, concerned about costs of the Application e.g. costs related to reviewing / amending existing contracts.</p> <ul style="list-style-type: none">• Considered that input of the Hong Kong legal profession (on the “opt-in” / “opt-out” question, CQ 1 and CQ 3 and on costs of the Application) would be useful.• In conclusion, believed it was essential to evaluate responses to CQ 1 and CQ 3, and to obtain input of the Hong Kong legal profession to these questions, in considering the recommended way forward.
5. Hong Kong Trade Development Council	✓	<ul style="list-style-type: none">• Considered that the Application could facilitate Hong Kong’s trade growth and help reduce legal uncertainty and friction in international trade, keep Hong Kong’s legal services sector abreast of international development, consolidate Hong Kong’s position as an international trade and legal dispute resolution hub, facilitate Hong Kong’s trade with BRI participating countries and its role as a dispute resolution hub in the BRI context.• To ensure effective implementation and to maximize the benefits of the CISG, the respondent recommended related promotion among local traders and provision of sufficient training to Hong Kong merchants (particularly local SMEs) and legal practitioners upon the Application.

6. Insurance Authority		<ul style="list-style-type: none">• Neither contracts of insurance nor contracts to provide insurance broker services were covered by the CISG.• The direct impact of the CISG on the insurance industry would be significantly less (and peripheral) as compared with other industries whose core businesses are buying and selling goods cross-border.
7. Law Society of Hong Kong	✓	<ul style="list-style-type: none">• There is widespread recognition and adoption of the CISG.• The Application will enhance Hong Kong's status as a dispute resolution hub for CISG disputes: advantageous for sale of goods contracts between Hong Kong and the Belt and Road ("BRI") countries to be governed by CISG; can encourage confidence in Hong Kong law and resolving disputes in Hong Kong.• CISG and Hong Kong domestic laws do not have grave differences that lead to incompatibility – overall, most of the principles and provisions in the CISG are not irreconcilable with the provisions in the Sale of Goods Ordinance (Cap. 26) or the common law legal concepts.• CISG allows flexibility for the parties to exclude its application.• The Application may disturb the status quo and would distract from the common law but consider the pros outweigh the cons of the Application.

		<ul style="list-style-type: none">• <u>Article 95 of the CISG</u>: The Law Society is of the view that Hong Kong should mirror the reservation and declaration that have been made by China, in the case of the Application.
8. Privacy Commissioner for Personal Data, Hong Kong		<ul style="list-style-type: none">• No specific comment from a data privacy protection perspective.
Individuals		
9. Mr Lijun CAO (Partner, Zhong Lun Law Firm, Beijing)	✓	<ul style="list-style-type: none">• The Application will provide Hong Kong's traders with an additional option to apply a neutral law to govern their international sale of goods transactions.• From experience, observed that: as an arbitrator, parties in dispute welcomed the neutral nature of the CISG; as counsel, parties from CISG Contracting States were comfortable with applying the CISG as the applicable law.• The Application contributes to Hong Kong's aim of being a dispute resolution hub for the BRI - the CISG is an important basis for the establishment of a "bridging legal system" among BRI members.• The CISG Advisory Council Opinions facilitate better understanding and application of the CISG by legal practitioners in Hong Kong (if unfamiliarity with concepts in the CISG is of concern).

		<ul style="list-style-type: none">• The CISG has the “gap-filling function” for small and medium enterprises (“SMEs”) (which unlike large enterprises, may buy and sell without contracts drafted by legal professionals). This function could save SMEs time and costs when conducting cross-border deals, compared to application of the national law of the counterparty or of a third party.
10. Mr Alan GIBB, (Professional Consultant, Barrister-at-Law, from the Faculty of Law, the Chinese University of Hong Kong)	x	<ul style="list-style-type: none">• Expressed reservation, stated reasons / views included: the proposed change “would diminish Hong Kong’s legal reputation of providing a legal service superior to any other in the region”; the English / Hong Kong common law rules “ensure far greater predictability in the outcome of disputes” and “the existing law is perceived by a high number of commercial parties throughout the world as being better than civil law based systems like CISG”; “the existing sale of goods law provides a much more comprehensive set of rules than the CISG”; concern about legal profession in Hong Kong facing difficulty in dealing with certain concepts of the CISG; reservation regarding the benefits of the Application set out in the Consultation Paper.• It was concluded in the response that while certain types of harmonisation of the law were to be welcomed, alternative approach was suggested to facilitate cross border transactions e.g. amending relevant existing sale of goods law, changes made to Hong Kong’s relevant conflict of laws rules etc.

<p>11. Mr Kinsey HO (Researcher from the Chinese Legal Research Institute)</p>	<p>✓</p>	<ul style="list-style-type: none">• The Application facilitates cross-border sale of goods and would “unleash the potential of Hong Kong as an international city and dispute resolution centre.”• Education regarding the CISG is needed once it is incorporated into domestic law.
<p>12. Prof LI Wei (The School of International Law, China University of Political Science and Law 中國政法大學國際法學院)</p>	<p>✓</p>	<ul style="list-style-type: none">• No specific comment.
<p>13. Prof LIU Qiao and Prof WANG Jiangyu (Centre for Chinese and Comparative Law, School of Law, City University of Hong Kong)</p>	<p>✓</p>	<ul style="list-style-type: none">• Taking into account relevant economic and legal considerations and pros and cons discussed in the Consultation Paper, considered that there was a strong case in favour of the Application; above all, the Application seems to produce no real disadvantage, but have potentially huge advantages.• The economic case for the Application would be considerably weakened if the Application is not accompanied by applying the CISG substantive rules to Hong Kong-Mainland contracts.• <u>Article 95 of the CISG</u>: Found the non-application of the Article 95 reservation to be in the interests of Hong Kong, taking into account the effect of the reservation and the argument that had been made to call for the withdrawal by Singapore of such reservation.

<p>14. Prof Alexander LOKE (Director, HK Centre for Commercial & Maritime Law, City University of Hong Kong, School of Law)</p>	<p>✓</p>	<ul style="list-style-type: none">• The most persuasive benefit of the Application relates to improving Hong Kong’s competence in resolving CISG disputes. Further benefits include the legal community being better placed to advise on transactions from the CISG perspective.• The CISG improves current Hong Kong law with three examples given (including the issues of modification of contracts, effective acceptance and merchantable quality).• Given the CISG merely provides an alternative – and one not necessarily superior to the existing Hong Kong regime on the law of sales, the increase in Hong Kong trade (from the Application) likely to be modest.• The Application carries a “switching costs” for businesses as businesses that currently use Hong Kong law as the governing law have to consider their contracts from the CISG perspective. The costs involved, however, should not present an obstacle to the Application.• Predicted that the use of the CISG likely to be incremental and driven by demand from parties more familiar with the CISG. Nonetheless, when the need arises, Hong Kong law can be presented as attractive to such parties, as it provides the “option of a sales regime more familiar to such parties”.
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<p>15. Dr Lutz-Christian WOLFF (Dean, Faculty of Law & Wei Lun Professor of Law, from the Chinese University of Hong Kong)</p>	<p>✓</p>	<ul style="list-style-type: none">• Supportive, for the reasons generally put forward in support of the CISG, as summarised in an article regarding China’s BRI Initiative and the CISG¹ attached to the submission.²• Considered that perceived disadvantages of the CISG (also summarised in the article) were “only partly convincing” and did not in any event outweigh the advantages of the Application.
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¹ Lutz-Christian Wolff, ‘From a “Small Phrase with Big Ambitions” to a Powerful Driver of Contract Law Unification? ---China’s Belt and Road Initiative and the CISG’ (2017) 34 Journal of Contract Law 50, 56-60.

² The article included is the article of the Professor titled “China’s Belt and Road Initiative and the CISG” in (2017) 34 Journal of Contract Law 50.



HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

3 August 2020

Department of Justice
7/F Main Wing, Justice Place
18 Lower Albert Road, Central, Hong Kong


Attn: Mr Paul Tsang
Law Officer, International Law

Dear *Paul*

**CONSULTATION PAPER ON THE PROPOSED APPLICATION OF
THE UNITED NATIONS CONVENTION ON CONTRACT
FOR THE INTERNATIONAL SALE OF GOODS (“CISG”) TO THE HKSAR**

With reference to your letter dated 4 March 2020 inviting the Hong Kong Bar Association to comment on the proposal, we are pleased to submit our comments. Please find the attached document for your kind attention.

Yours sincerely


Philip Dykes SC
Chairman

Encl.

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Mr. Robin Gregory D'Souza 蘇諾賢

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Mr. Randy Shek 石書銘

Mr. Timothy E.D. Parker 白天賜

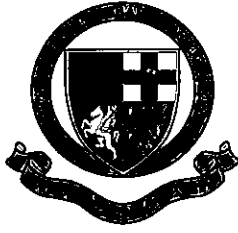
Mr. Jeffrey C.K. Tam 譚俊傑

Mr. Lester H.L. Lee 李曉亮

Ms. Lorraine H.M. Tsang 曾希雯

Ms. Fiona F.C. Chong 臧禧潯

Ms. Christy Y.P. Wong 黃宛蓓



HONG KONG BAR ASSOCIATION

SUBMISSIONS ON THE CONSULTATION PAPER ON
THE PROPOSED APPLICATION OF THE UNITED
NATIONS CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS TO THE HONG
KONG SPECIAL ADMINISTRATIVE REGION

1. By letter dated 4 March 2020 of the Department of Justice, the Hong Kong Bar Association (“**HKBA**”) was invited to provide its views on the Department’s Consultation Paper on the Proposed Application of The United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region (“**Consultation Paper**”).
2. The HKBA has reviewed the Consultation Paper and hereby provides its views.
3. The stated purpose of The United Nations Convention on Contracts for the International Sale of Goods (“**Convention**”) is to remove legal barriers in, and promote the development of, international trade through the adoption of a uniform set of rules designed to cover contracts for international sale of goods. The above purpose is to be welcomed.

A. The Principle of Good Faith

4. The HKBA notes in the Consultation Paper the different interpretations of the reference to “good faith” in Article 7 of the Convention and the concern that such a concept is foreign to the current Hong Kong legal system.¹
5. Though there is no general principle or requirement of good faith under the English common law of contract, a duty of good

¹ Consultation Paper at [1.54], [3.94]-[3.95], Annex 2.2 [93], Annex 2.2 [96] and Annex 2.2 [99(3)].

faith may be implied in a contractual arrangement in individual cases based on the intention of the contracting parties.²

6. Furthermore, there are many instances in the the application of the law of contract at common law where the law reflects or recognizes the notion of good faith even though it is not spelt out in that exact term. For instance, where a contracting party agrees to carry out acts which cannot effectually be done without the other contracting party's cooperation, there is an implied term that each party will do all that is necessary on his part to cause the act to be carried out.³ There are also cases where express clauses to negotiate in "good faith" were upheld.⁴
7. In relation to pre-contractual negotiations, there is no duty to act in good faith as such a duty would be contradictory to the inherently adversarial nature of pre-contractual dealings.⁵
8. The question then arises seems to be whether the Convention's rules regarding pre-contractual dealings would import a new duty of good faith which does not exist under the current Hong Kong law.
9. Upon due consideration of Articles 14 to 24 of the Convention, none of them appears to be inconsistent with the principle that there is no duty to negotiate in good faith.
10. The HKBA notes that there are other instances of international conventions / model laws where, in spite of the requirement that they be interpreted with the principle of good faith in mind, Hong Kong has nonetheless adopted them: see the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)⁶ and the

² *So Sheung Hin Ben v. Chubb Life Insurance Co. Ltd.* [2018] HKCA 209 at [58] (per Kwan JA); and *Yam Seng Pte Ltd. v. International Trade Corp. Ltd.* [2013] 1 CLC 662 at [131]-[132], [145] and [147] (per Leggatt J).

³ *Mackay v. Dick* (1881) 6 App Cas 251 at 263 (per Lord Blackburn), applied in Hong Kong by the Court of Final Appeal in *Ying Ho Co. Ltd. & Ors. v. The Secretary for Justice* (2004) 7 HKCFAR 333 at [128] (per Bokhary PJ).

⁴ *Petromec Inc. v. Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891 at [117] (per Mance LJ).

⁵ *Kowloon Development Finance Ltd. v. Pendex Industries Ltd. & Ors.* (2013) 16 HKCFAR 336 at [20] (per Lord Hoffmann NPJ); and *Walford v. Miles* [1992] 2 AC 128 (UKHL) at 138E (per Lord Ackner).

⁶ *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* (1999) 2 HKCFAR 111 at [92] (per Sir Anthony Mason NPJ).

United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.⁷

11. In light of the above, the HKBA considers that there should not be any undue concern that the Convention would be seeking to import into the law of contract in Hong Kong a foreign concept hitherto unknown to it (and such concern should not be a basis for rejecting the implementation of the Convention in Hong Kong).

B. Consultation Questions 1 and 3: Experiences with the Use of Hong Kong / Non-Hong Kong Law and the Convention

12. In relation to Consultation Questions 1 and 3, save as may be dealt with in these Submissions, the HKBA considers that these questions are of non-legal nature and in the circumstances, would make no comment on the same.

C. Consultation Question 2: Whether Hong Kong should apply the Convention

13. The HKBA takes the view that the Convention in principle should be extended to Hong Kong. This is a global and important convention that has been widely adopted. The extension of the Convention to Hong Kong is in line with, and further, Hong Kong's reputation as an internationally leading centre of trade and commerce and in the long run be would assist international trade business of Hong Kong.
14. Further, resolution of the Convention related disputes in Hong Kong would also be in line with, and further, Hong Kong's reputation as an internationally leading centre for dispute resolution in terms of both arbitration and in Hong Kong Courts. The Courts, legal practitioners, and academics could contribute to international jurisprudence of trade law.
15. The HKBA acknowledges that there are bound to be differences between the Convention and existing Hong Kong law, as in any case of adoption of any uniform international

⁷ Section 9 of the Arbitration Ordinance (Chapter 609, Laws of Hong Kong).

law. However, Hong Kong's Judiciary and legal sector have rich experience in adopting international rules into the Region's legal system in a sensible and harmonious manner and in any event, Article 6 of the Convention allows parties to contracts to opt out of the Convention or, subject to a limited caveat, derogate from or vary the effect of any of the provisions of the Convention.

16. The HKBA would encourage the Government, should it decide to adopt the Convention locally and should such legislation be passed, to ensure that there is sufficient time between the enactment of such legislation and its taking of effect to allow stakeholders to adapt to and adjust their business, conduct and affairs. The HKBA would also encourage the Government in such circumstances to ensure sufficient promotion of the Convention (including, in particular, Article 6 thereof) amongst the business and legal sectors.

D. Consultation Question 4: Hong Kong and Mainland China Transactions

17. The HKBA agrees with the proposal at [4.10] of the Consultation Paper that adoption of the Convention in Hong Kong should mean application of the Convention to business transactions/contracts between Hong Kong and Mainland China as if the two jurisdictions were two different contracting states to the Convention. This makes logical sense and is in line with the 'One Country, Two Systems' principle.
18. The HKBA has considered whether, in adopting the Convention, Hong Kong should make a reservation under Article 95 thereof ("**Article 95**").⁸
19. The Department of Justice considers that such a reservation should be made. For reasons set out below, the HKBA sees no need to make the reservation under Article 95 and would invite the Department of Justice to reconsider the matter.
20. Article 95 was originally proposed by Czechoslovakia at, *inter alia*, the 11th Plenary Meeting of the United Nations Conference on Contracts for the International Sale of Goods

⁸ Consultation Paper at [4.12]-[4.15].

on 10 April 1980 on the basis that Article 1(1)(b) of the Convention would have the effect of limiting the practical applicability of its special legislation governing transactions pertaining to international trade.⁹ Such special legislation was to apply in Czechoslovakia when the rules of private international law referred to the law of Czechoslovakia.¹⁰ Article 1(1)(b) of the Convention would, however, have had the effect of depriving such special legislation of much relevance, as it would have meant that the Convention and not the special domestic legislation would have to be applied.¹¹ The then German Democratic Republic shared similar concerns.¹²

21. Article 95 was therefore introduced as a compromise to cater for the specific concerns of primarily Czechoslovakia and to maintain the support of Czechoslovakia and the other then Socialist countries for the Convention.¹³
22. Presently, out of the 93 Contracting States to the Convention, only the following 7 Contracting States have made a reservation under Article 95: Armenia, China, Laos, Saint Vincent and the Grenadines, Singapore, Slovakia and USA.¹⁴
23. Hong Kong, by contrast, has not enacted any special legislation governing transactions of international trade. The underlying rationale for Article 95 therefore does not appear to apply to Hong Kong.

⁹ CISG Advisory Council Opinion No.15, 'Reservations under Articles 95 and 96 CISG' (21-22 October 2013) at [2.2]; United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 April 1980), 'Official Records' at page 229; CISG Advisory Council Declaration No.2, 'Use of Reservations under the CISG' (21 October 2013) ("**Declaration No.2**") at [2]; and 'UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods' (2016 Edition) at page 6.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status>.

24. Indeed, the CISG Advisory Council¹⁵ recommends in its Declaration No. 2 that states newly acceding to the Convention ought to do so without making any declarations under, *inter alia*, Article 95 of the Convention.¹⁶ Such reservations under Article 95 have a “detrimental effect upon the Convention’s practical application” in that they “inevitably [undermine] the considerable measure of uniformity that exists and increases the likelihood of confusion regarding the application of the [Convention].”¹⁷ Declaration No. 2 adds that the reservation is, further, unnecessary since Article 1(1)(a) of the Convention “has become the vastly more important basis for the Convention’s applicability” in practice (rather than Article 1(1)(b) of the Convention).
25. Paragraphs [4.12] to [4.15] of the Consultation Paper cite a need to prevent confusion in the application of the Convention between Hong Kong and Mainland China, as well as a need to avoid confusion in foreign courts in applying the Convention to Hong Kong related disputes. However, there is no explanation as to what actually this “confusion” is.
26. Indeed, if Hong Kong and Mainland China were to be regarded as separate contracting states *vis-à-vis* foreign jurisdictions and courts and as between themselves (as proposed in [4.10] of the Consultation Paper), it is not immediately apparent why a reservation under Article 95 is needed in the case of Hong Kong.
27. In the absence of any convincing reason in support, the intended declaration would lead to a less expansive application of the Convention in Hong Kong and that would not be in line with the stated aims of applying the Convention in Hong Kong in the first place.
28. The HKBA accordingly invites the Department of Justice to reconsider the matter relating to a reservation under Article 95

¹⁵ The CISG Advisory Council is an authoritative body of judges and academics expert in the field of international trade law that issues opinions and declarations on the Convention with the aim of ensuring a uniform application and interpretation of the Convention: “Welcome to the CISG Advisory Council (CISG-AG) <<http://www.cisgac.com/>>.”

¹⁶ Declaration No. 2 at [2].

¹⁷ *Ibid.*

and, if it maintains the view that the reservation should be made, to clarify the potential confusion that may arise.

E. Consultation Question 5: Draft Legislation

29. In relation to the proposed legislation that would implement the Convention in Hong Kong, as set out at Annex 4.1 to the Consultation Paper, the HKBA invites the Department of Justice to consider the following:

- (1) The new ordinance may be called the “*International Sale of Goods (United Nations Convention) Ordinance*”, as opposed to “*Sale of Goods (United Nations Convention) Ordinance*”, to distinctly identify the legislation as applicable only to *international* sale of goods.
- (2) There is no need to exclude subparagraph (1)(b) of Article 1 of the Convention under the proposed Section 4(1) for the reasons set out above.

HONG KONG BAR ASSOCIATION
3 August 2020



THE
LAW SOCIETY
OF HONG KONG
香港律師會

3/F WING ON HOUSE · 71 DES VOEUX ROAD
CENTRAL · HONG KONG DX-009100 Central 1
香港中環德輔道中71號
永安集團大廈3字樓

TELEPHONE (電話) : (852) 2846 0500
FACSIMILE (傳真) : (852) 2845 0387
E-MAIL (電子郵件) : sg@hklawsoc.org.hk
WEBSITE (網頁) : www.hklawsoc.org.hk

Our Ref :
Your Ref :
Direct Line :

TLC/20/5435909

President
會長
Melissa K. Pang
彭韻儀

27 October 2020

Vice-Presidents
副會長
Amirali B. Nasir
黎雅明
Brian W. Gilchrist
喬柏仁
C. M. Chan
陳澤銘

International Law Division (Treaties & Law Unit)
7/F., Main Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong

**BY EMAIL
AND BY POST**

Council Members
理事

Attn.: Miss Katie Kwong, Senior Government Counsel

Denis Brock
白樂德
Warren P. Ganesh
莊偉倫
Rodan M.L. Tong
湯文龍
Jonathan Ross
羅彰南
Pierre T.H. Chan
陳達顯
Eric T.M. Cheung
張達明

Dear Miss Kwong,

**Re: Consultation Paper on Proposed Application of the United Nations
Convention on Contracts for the International Sale of Goods to the
Hong Kong Special Administrative Region**

Karen Lam
藍嘉妍
Careen H.Y. Wong
黃巧欣

I refer to the captioned matter and enclose a copy of the Law Society's
Submissions for your attention.

Calvin K. Cheng
鄭偉邦
Mark Daly
帝理邁
Doreen Y.F. Kong
江玉歡

The Law Society has no objection to the Submissions being passed to other
relevant bodies or published, in connection with the consultation exercise.

Christopher K.K. Yu
余國堅

Lastly, I thank you for your indulgence for the time extension rendered for us to
respond to the Consultation.

Kenneth Lam
林洋鉉
Janet H.Y. Pang
彭皓昕
Michelle W.T. Tsoi
蔡穎德

Yours sincerely,

Davyd Wong
黃鑑初

Kally Lam

Secretary General
秘書長

Heidi K.P. Chu
朱潔冰

Assistant Director, Practitioners Affairs

Deputy Secretary General
副秘書長

Christine W.S. Chu
朱穎雪





**CONSULTATION PAPER ON
THE PROPOSED APPLICATION OF THE UNITED NATIONS CONVENTION
ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS
TO THE HONG KONG SPECIAL ADMINISTRATIVE REGION**

SUBMISSIONS

1. In March 2020, the Department of Justice issued a consultation paper on the proposed application of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) to the Hong Kong Special Administrative Region (“Hong Kong”) for public views and comments.
2. The Law Society of Hong Kong has reviewed the Consultation Paper and has the following comments on the consultation questions posed.

Question 1:

We would welcome views and comments, in particular from the Hong Kong business and legal sectors, on:

- (a) What proportion of their sale of goods contracts with a non-Hong Kong business are governed by Hong Kong law (as compared with non-Hong Kong law)?
- (b) Where such contracts are governed by non-Hong Kong law, which non-Hong Kong law is the most commonly chosen?
- (c) What proportion of such contracts include the express choice of the CISG in their governing law clauses?
- (d) Whether there is any experience of being advised to exclude the application of the CISG in their governing law clauses?

Law Society's Response:

3. (a) According to our members' experience, this depends on where the non-Hong Kong business is located. Hong Kong business is generally more familiar with Hong Kong law and English law. As such, the contracts are often governed by either Hong Kong law or English law. However, depending on the negotiating power of the non-Hong Kong business, the parties may also agree on another governing law. We cannot say for certain about the exact proportion but we would say that a fair amount of contracts concluded by a Hong Kong business with a non-Hong Kong business are still governed by Hong Kong law. Of course, our members have seen PRC law and/or CISG as applicable law.
- (b) English law.
- (c) As the UK is not a party to the CISG, it is uncommon for such contracts to include the express choice of the CISG. But for non-English speaking countries and the CISG Contracting States, the CISG is often chosen.
- (d) Not so often. As Hong Kong is not a party to the CISG, only where the parties choose to adopt a governing law of a CISG Contracting State that may trigger the applicability of the CISG. In other cases, where a Hong Kong business is involved and English law is adopted, the CISG is *prima facie* not applicable to such contracts.

Question 2:

We would welcome views and comments on whether the CISG should be applied to Hong Kong.

Law Society's Response:

4. We believe that the CISG should be applied to Hong Kong for the following reasons.
5. **Widespread recognition and adoption of CISG:** as per the information contained in the Consultation Paper, as of 1 February 2020, there are 93 parties to CISG, including most of Hong Kong's top 20 trading partners, such

as Mainland China, the USA, Singapore, the European countries and Australia. It is not uncommon for countries adopting a common law system (such as Singapore and Australia) to apply the CISG.

6. **Enhancing Hong Kong's status as a dispute resolution hub for CISG disputes:** as noted by the Consultation Paper, about half of the Belt and Road Initiative ("BRI") participating countries have become a party to the CISG and there has been a growing trend for the BRI countries to join the CISG in recent years. Taking into account the cultural and legal differences in various BRI countries, for example, the different legal systems, it would be advantageous if the CISG is extended to Hong Kong to govern the sale of goods contracts concluded with other BRI countries. This could promote certainty by adopting a unified regime for sale of goods disputes. More importantly, should the CISG apply in Hong Kong, the foreign business may have more confidence to agree on Hong Kong law being the governing law and to resolve any disputes in Hong Kong. This could greatly sharpen Hong Kong's edge as an international dispute resolution hub and more legal talent in Hong Kong will be required to deal with such disputes.

7. **CISG and Hong Kong domestic laws do not have grave differences that lead to incompatibility:** where the CISG is applicable, it will prevail over domestic law unless such issues are not determinable by the CISG provisions. Some notable differences between the CISG and the Sale of Goods Ordinance (Cap. 26) ("SOGO") include but are not limited to the following:-
 - Article 11 of the CISG would override the parol evidence rule that is commonly known in the common law system by allowing the proof of a contract of sale by any means, including witness.

 - Articles 38 and 39 of CISG impose a stringent obligation on the buyer to give notice to the seller on the defective goods within as short a period as is practicable in the circumstances, but in any event within a period of two years from the date of receipt of the goods by the buyer.

 - Possibility of suspension by one party after contract conclusion (Article 71 of CISG).

- Article 79 of CISG (re exemption of liability due to an impediment beyond a party's control) is similar to the doctrine of frustration. But there is no such provision in SOGO.
- Unlike SOGO, CISG is not concerned with the effect which the contract may have on the property in the goods sold.

Overall, most of the principles and provisions in the CISG are not irreconcilable with the provisions in SOGO or the common law legal concepts.

8. **CISG allows flexibility for the parties to exclude its application:** for the parties who are not so comfortable with CISG, they may choose to exclude its application by making express provisions in the contract.
9. As set out in the Consultation Paper, the implementation of the CISG in Hong Kong may disturb the status quo and would distract from the common law. However, we consider that the pros outweigh the cons of implementing the CISG in Hong Kong.
10. We note that Article 95 of the CISG allows a Contracting State to the CISG to declare that it will not be bound by Article 1(1)(b) of the CISG and China has made such a reservation/declaration. Consideration should be given as to whether Hong Kong should make a reservation on Article 1(1)(b) of the CISG, i.e. where there is a sale of goods contract concluded between parties in two different states (but not two different CISG Contracting States), the CISG is not automatically applicable notwithstanding that Hong Kong law is the governing law of the contract. We are of the view that Hong Kong should mirror the reservation and declaration that have been made by China, if the CISG is extended to Hong Kong.
11. We agree that the CISG can be implemented in Hong Kong by enacting a separate ordinance and making it clear that the CISG provisions and principles would prevail to the extent there is any inconsistency between the new ordinance and domestic laws (including SOGO and other relevant common law principles).

Consultation Question 3:

In respect of sale of goods contracts between Hong Kong businesses and non-Hong Kong businesses, we would welcome views and comments (in particular from the Hong Kong business and legal sectors) on:

- (a) Why would one choose to opt out of the CISG in such contracts?
- (b) The likelihood of opting out of the CISG in such contracts if given the opportunity?

Law Society's Response:

12. (a) This is ultimately a question of agreement by the parties and a matter of commercial decision. It could be the case that some parties are not so familiar with the CISG and they may want to resort to the domestic law that they feel more comfortable with. Some parties may wish to opt out due to the reason that their jurisdiction does not apply the CISG; for example, a UK buyer may not wish to adopt the CISG given UK is not a Contracting State to the CISG.
- (b) For the sale of goods contracts between a Hong Kong business and a non-Hong Kong business, once the CISG is extended to be applicable in Hong Kong, we believe there may be a certain number of parties that may wish to exclude its applicability at the very initial stage of its application due to their unfamiliarity with the CISG. In the long term, we believe more parties are willing to apply the CISG to their contracts as this will provide a neutral set of default rules that are generally welcomed by both sides.

Consultation Question 4:

In respect of sale of goods transactions between Mainland China and Hong Kong, should our local legislation, which seeks to implement the CISG, also apply where the parties to those transactions have their respective places of business in Mainland China and Hong Kong?

Law Society's Response:

13. We generally agree that in respect of sale of goods transactions between Mainland China and Hong Kong, our local legislation, which seeks to

implement the CISG, could also apply where the parties to those transactions have their respective places of business in Mainland China and Hong Kong.

14. However, we suggest that a better way to achieve this is for Mainland China and Hong Kong to enter a mutual arrangement concerning the applicability of the CISG to the parties having respective places of business in Mainland China and Hong Kong, which is similar to the arrangement for reciprocal enforcement of arbitral awards between Mainland China and Hong Kong based on the spirit of the New York Convention. This can ensure the reciprocal applicability of the CISG provisions in the case where the parties adopt the PRC law. This can also avoid confusion which may be created by including such arrangement in the same ordinance for applying the CISG in Hong Kong, since Hong Kong is only a territorial unit of China and the CISG provisions should not be directly applicable to the parties having respective places of business in Mainland China and Hong Kong.

Consultation Question 5:

We welcome the public's comments on the draft legislative provisions to implement the CISG in Hong Kong law (as attached to Annex 4.1 to the Consultation Paper).

Law Society's Response:

15. We refer to our comments at paragraphs 12 and 13 above.

The Law Society of Hong Kong
27 October 2020



Hong Kong General Chamber of Commerce
香港總商會 1861

香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

Helping Business since 1861

18 September 2020

Mr. Paul Tsang
Law Officer (International Law)
International Law Division
Department of Justice
7/F, Main Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong

Dear Mr. Tsang,

Re: Consultation Paper on the proposed application of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) to the HKSAR

The Hong Kong General Chamber of Commerce welcomes the opportunity to express our views on the subject consultation.

Although we understand that there are advantages to adopting CISG in Hong Kong, there can also be potential drawbacks, which we have detailed in the attachment to this letter. We would therefore recommend that a proper cost-benefit analysis be carried out to determine whether CISG implementation would be in the overall interests of the business community, as well as our status as a leading international trading centre.

We hope you will find our comments useful to your deliberations.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'George Leung', with a long horizontal stroke extending to the right.

George Leung
CEO

Encl.

Department of Justice Consultation Paper (March 2020) “Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region”

Response by The Hong Kong General Chamber of Commerce (HKGCC)

Introduction

1. HKGCC welcomes the opportunity to respond to this consultation paper (“CP”).
2. The objective of this UN Convention (hereafter referred to as the CISG¹), when it was adopted in 1988, was to remove legal barriers in, and promote the development of, international trade, by providing a standard set of rules to govern international contracts for the sale of goods (ISG contracts).¹
3. Currently, Hong Kong businesses are free to negotiate with overseas businesses the choice of rules governing any such ISG contracts, including the Hong Kong rules, the rules of the overseas party’s jurisdiction, or the rules set out in the CISG itself, in whole or in part. The choice of the CISG rules can therefore be described, in the CP’s words, as an “opt-in”.
4. The central question posed by the CP (Question 2 in the CP) is whether the current “opt-in” position should be changed to an “opt-out” position (which would be the effect of the proposed application of the CISG to Hong Kong). Under an opt-out position, the CISG rules would be adopted, unless both parties agreed to exclude them.
5. As a preliminary point, HKGCC believes that any proposed change to the *status quo* in terms of Hong Kong business’s international trade relationships needs to be approached extremely cautiously. As the CP notes, Hong Kong has achieved the status of being the eighth largest trading economy in the world - a remarkable feat considering its small population relative to the other top ten trading economies - without the CISG rules being imposed as a default position. It is therefore legitimate to question the need for change, with the risks involved, and the inevitable disruption it would cause. The benefits of any change would very clearly have to outweigh the costs, especially at a time when Hong Kong’s position as a leading trading economy is already under threat by the trade dispute between the US and the Mainland.
6. If a change to the *status quo*, in the form of the imposition of the CISG rules as a default position, had been perceived as beneficial for Hong Kong businesses, it might be expected that they, or the Hong Kong legal profession, would have advocated it previously. Thus far, we are not aware of any desire for change being expressed by our members, or by the Hong Kong legal profession. That said, we agree that it is an issue that merits consideration.

The effect of the Proposal on Freedom of Contract

¹ CP para 1.1.

7. Intuitively, it would seem that the existing opt-in position would give Hong Kong businesses greater contractual freedom to negotiate contractual terms than an opt-out position. Under the latter (unlike the former), deviating from the CISG rules would require the other party's agreement. If the other party was unwilling to do so, the Hong Kong business would have no option but to accept the CISG rules, or refuse to buy or sell the goods in question.
8. It is true that Hong Kong businesses would be faced with the same dilemma under an "opt-out" position, if the other party insisted on opting for any rules other than the CISG ones. However, having the CISG rules as a default position may give the Hong Kong businesses greater leverage to insist on them, if they felt it was in their interests to do so. But equally, and conversely, an "opt-out" position may make it more difficult for Hong Kong businesses to insist on rules other than the CISG ones, including Hong Kong law, if they felt it was in their interests to do so. The net result appears to be that, if an "opt-out" position is adopted, as proposed in the CP, *the CISG rules would be more likely to apply* to a Hong Kong business's ISG contract than under the existing "opt-in" position.
9. The question therefore is whether, on balance, Hong Kong businesses would be better off with the CISG rules as a default position for any ISG contract (as proposed in the CP), or with retaining the current "opt-in" position whereby the choice of rules is completely open for negotiation, with no "built-in" preference for any particular set of rules.

Possible Benefits of the Proposal

10. The CP suggests that the main possible benefit of adopting the CISG rules is that it would reduce transaction costs for Hong Kong businesses "by avoiding having to obtain legal advice on foreign law and retain foreign litigators".² In doing so, the CP also suggests that this might also drive Hong Kong GDP and trade growth, although it recognises that there are "no conclusive data showing the CISG directly causing economic or trade growth".³
11. If any reduction of transaction costs arising from using the CISG rules were to be realised, this, by definition, would require the parties to choose them to govern their ISG contracts. However, the CP notes that, even in jurisdictions that have an opt-out position, the parties choose to exclude the CISG rules in many cases. Based on information from the legal profession, the rates of exclusion were 55-71% in the US, 45% in Germany, 41% in Switzerland, 55% in Austria and 37% in China. The CP recognises that "the alleged benefits [of the CISG rules] may be reduced by the potentially high rates of exclusion".⁴
12. It is not self-evident that using the CISG rules as would reduce transaction costs in net terms. The CISG rules themselves, as the CP recognises, will be unfamiliar to many Hong Kong businesses (and their legal advisers), as the rules of an overseas jurisdiction might be. Even if they were adopted, they may have to be litigated in a foreign court, with the need to engage local lawyers.
13. In this context, the CP rightly raises five sub-questions listed under Consultation Questions 1 and 3 that are, in essence, designed to elicit factual information about the

² CP paras 3.57 and 3.59.

³ CP para 3.52.

⁴ CP para 3.106.

factors affecting the choice of law in ISG contracts involving Hong Kong businesses. In particular, Question 3 asks (a) why one would choose to opt-out of the CISG rules, and (b) the likelihood of opting-out of the CISG rules, given the opportunity. HKGCC believes that this information is critical in evaluating whether the adoption of the CISG rules would bring real benefits. The input of Hong Kong's legal profession would be particularly useful in this respect.

14. Even if adoption of the CISG rules were shown to reduce transaction costs in net terms, the question remains whether the parties should be left free to decide whether to "opt-in" to them (as at present), or whether (as the CP proposes) this should be changed to an "opt-out" position, whereby the CISG rules apply, unless the parties agree otherwise. The CP states that a benefit of the latter position is that the CISG rules can apply to their fullest extent, whereas this is not the case under the former.⁵ The CP also notes, however, that there are certain matters that the CISG rules does not address in any event, and would have to be governed by local laws.⁶ In addition, there is a question as to whether having the freedom to opt-in to the CISG rules, if the other party agrees, would be better for Hong Kong businesses than having to obtain the other party's agreement to opt-out. Again, the input of the legal profession would be useful in this respect.

Costs of the Proposal

15. While the possible benefits of imposing the CISG rules as a default position are at this stage, as noted above, largely hypothetical, the costs (or "cons", as the CP puts it) are more tangible. The CP recognises that these concerns about the proposal "also need to be bolstered by the submissions of trade and businesses so that they can be addressed if extension of the CISG is carried forward".⁷
16. As the CP notes, there are a number of fundamental principles in the CISG rules that are alien to Hong Kong's common law system, and "it is these [common law] principles that have contributed to Hong Kong's strong reputation in the legal community".⁸ (We would also add that they have contributed to Hong Kong's position as a leading global financial centre). It is unclear how the courts would resolve these conflicts.
17. Moreover, as the CP notes, Hong Kong businesses and their lawyers, and indeed Hong Kong courts, would have to deal with new rules and concepts with which they are unfamiliar.⁹ Businesses may have to engage overseas lawyers with experience of the CISG rules for assistance. Existing contracts may have to be reviewed and amended.
18. HKGCC believes that, here too, the input of the Hong Kong legal profession would be useful before deciding whether to implement the CP's recommendations.

Conclusion

19. HKGCC welcomes any proposal that would ease barriers to trade for Hong Kong businesses. However, at this stage, it is questionable whether a requirement to use the

⁵ CP paras 2.59, 2.60.

⁶ CP para 3.100.

⁷ CP para 3.83.

⁸ CP paras 3.93, 3.94.

⁹ CP paras 2.48 and 3.72.

CISG rules as a default position would do so, or whether in fact it would create new trade obstacles. In other words, it is questionable whether any benefits of the proposal would outweigh the costs.

20. To resolve this issue, HKGCC believes it is essential to obtain and evaluate the information sought under Consultation Questions 1 and 3, and to obtain the input of the Hong Kong legal profession to these questions. We therefore urge the Government to defer any decision to implement the CP's recommendations until this information and input is received and evaluated.

HKGCC Secretariat
September 2020

律政司
國際法律科

香港中環下亞厘畢道18號
律政中心中座7樓
圖文傳真：852-3918 4791
電郵地址：ild@doj.gov.hk
網站：[http:// www.doj.gov.hk](http://www.doj.gov.hk)



DEPARTMENT OF JUSTICE
International Law Division

7/F., Main Wing,
Justice Place,
18 Lower Albert Road, Central, Hong Kong
Fax: 852-3918 4791
E-mail Address : ild@doj.gov.hk
Web Site : [http:// www.doj.gov.hk](http://www.doj.gov.hk)

本司檔號 Our Ref.: IL/ITF/1/81/2
來函檔號 Your Ref.:
電話號碼 Tel. No.: (852) 3918 4766

11 December 2020

Mr. George Leung, CEO
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway
Admiralty,
HONG KONG

Dear Mr. Leung,

**Re: Consultation Paper on the proposed application of the United Nations
Convention on Contracts for the International Sale of Goods (“CISG”)
to the HKSAR**

Thank you for HKGCC’s letter dated 18 September 2020 in response to our Consultation Paper on the proposed application of the CISG to the HKSAR (“**Consultation Paper**” or “**Consultation**”) and for the valuable comments set out in it. Our Department is currently studying all the submissions received regarding the Consultation before formulating its recommendations to the HKSAR Government on the way forward.

Whilst it would be premature for us to indicate our Department’s recommendations at this stage as we are still carefully studying the submissions, it may be helpful for us to provide our preliminary views on certain points raised in HKGCC’s letter.

We note that while the HKGCC is appreciative of the benefits of the proposed application of the CISG to the HKSAR, it has a few specific concerns. Firstly, it suggested that a cost-benefit analysis be conducted before adopting the proposal. In this relation, from our study of the economic and legal considerations as detailed in Chapter 3 of the Consultation Paper with overseas experience taken into account, it appears that the benefits of the proposal would outweigh the initial costs of adaptation (including those arising from review of the relevant

contractual documents). Moreover, as noted by a number of respondents to the Consultation, for business parties based in different CISG Contracting States, the automatic application of a set of well-tested, fair and neutral law to regulate the formation of sales contract and the rights and obligations of the sellers and buyers would facilitate cross-border trade. The value of this benefit cannot be over-emphasized in respect of trade with Belt and Road countries about half of which have become a party to the CISG.

“The effect of the Proposal on Freedom of Contract”

Secondly, we note from paragraphs 7 to 9 of HKGCC’s submission that there are some concerns on freedom of contract of the businesses. On this issue, as you would agree, the choice of law question for a sale of goods contract (like other contractual terms) is largely a question of agreement by the parties and a matter of commercial decision, to which the bargaining power of the respective parties will be an important factor.

Regarding the scenario referred to in paragraph 7 of HKGCC’s submission, it appears that the premise of such a scenario is that the Hong Kong business and its overseas counterpart may have difficulties in agreeing on the governing law of the contract, be it Hong Kong law, the law of the jurisdiction of the overseas counterpart or the law of a third jurisdiction. It further appears that the scenario could arise with different fact patterns. For example, the overseas counterpart may be located in a CISG Contracting State (e.g. Viet Nam) and that party may insist on choosing, as the governing law of the contract, domestic Vietnamese law (excluding the CISG) as its first preference and if the Hong Kong business cannot agree to it, it may offer either Vietnamese law (with the CISG implemented therein) or the law of a third jurisdiction as another option¹. In other words, the scenario referred to in the said paragraph 7 is one potentially faced by Hong Kong businesses even under the status quo (i.e. even without the CISG applying to the HKSAR) as they transact with their overseas counterparts coming from different parts of the world including CISG Contracting States².

Bearing this context in mind, the application of the CISG to the HKSAR will have the attraction that, when faced with the above scenario (i.e. each party to the contract may have difficulties convincing the other to accept its preferred choice of law clause), the Hong Kong business in question will have an **additional** choice of law option (namely, the CISG as implemented into Hong Kong law) to put on the negotiation table, such that if agreed by its overseas

¹ Under Article 1(1)(b) of the CISG, the Convention applies to contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State.

² It is noted that such scenario may arise more and more frequently as the number of CISG Contracting States continues to grow. For completeness, at present, there are 94 Contracting States to the CISG.

counterpart, the contract will be governed by the CISG and possibly also by Hong Kong law. In this regard, it is important to note that the CISG (under its Article 6) gives parties to the contract the *freedom* to derogate from or vary the effect of any its provisions³ as well as the *freedom* to exclude the CISG in its entirety in accordance with their agreed commercial decision.

Further, on the questions of “why not keep the status quo and opt into the CISG as needed; why should the default choice be opting in, leaving parties who wish to be governed by local Hong Kong law to opt out?”, the problems/risks with opting in by Hong Kong businesses under the status quo (i.e. without the CISG applying to the HKSAR) are highlighted in the Consultation Paper at paragraphs 2.55 to 2.60. In brief, under the status quo, a Hong Kong business can choose to use the CISG to govern its contracts by various means e.g. by choosing the law of a CISG Contracting State as the governing law of the contract or by incorporating the CISG provisions as contractual terms etc. However, the difficulties with these options are in gist that, without the CISG applying to the HKSAR, a Hong Kong business cannot effectively create a contract which is governed by the CISG *and* possibly also Hong Kong law, and the CISG cannot be used as originally designed (for example, if the CISG provisions are incorporated as contractual terms only, it is likely that the approach to interpreting those provisions/terms would depart from the approach under the CISG, chiefly its Article 7⁴). Therefore, although Hong Kong businesses and their overseas counterparts can choose to opt-in under the status quo, the problems/risks associated with such choice cannot be dismissed.

In view of the above, the argument that non-application of the CISG to the HKSAR (the “existing opt-in position” in respect of Hong Kong law) gives Hong Kong businesses greater freedom to negotiate the choice of law clause/other terms of their cross-boundary sale of goods contracts may not be entirely well justified.

Inputs of the Hong Kong legal profession to the Consultation Questions

Since the adoption of the CISG involves introducing a new aspect to Hong Kong’s law governing cross-boundary sale of goods contracts, we agree with HKGCC’s comment in its submission that input from the Hong Kong legal profession would be important and useful in considering the Consultation questions. In this regard, we have received submissions from, among others, the Hong Kong Bar Association and the Law Society of Hong Kong (accessible in

³ The exception is that the parties cannot derogate from or vary Article 12 of the CISG (please see Consultation Paper paragraph 1.70).

⁴ Article 7(1) of the CISG provides that, “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.” (emphasis added)

their respective websites). In gist, they are both in favour of extending the CISG to the HKSAR, subject to a few specific points including the title of the proposed legislation, whether Art 1(1)(b) of the CISG should be applicable to the HKSAR etc.

Commencement of any implementing legislation

Lastly, noting HKGCC's concern about changing the status quo, we plan that should it be decided that the CISG is to be applied to the HKSAR, there will be ample time between the enactment of the implementing legislation and its taking into effect so that stakeholders, including the business sector, can adapt to the change and adjust their business practice and affairs as appropriate.

We trust that our comments above would assist in addressing HKGCC's concerns raised in its submission. We would be pleased to meet with you and your HKGCC colleagues to elaborate on the above, if needed. Please feel free to contact my colleague Mr Peter Wong, Deputy Law Officer (at peterwong@doj.gov.hk or 3902 8580) or Miss Katie Kwong, Senior Government Counsel (at katiekwong@doj.gov.hk or 3918 4780) for this purpose.

Yours sincerely,



(Linda Lam)
Law Officer (Acting)
International Law Division

Summary of Responses received to Consultation Question 4

Consultation Question 4 (“CQ 4”): In respect of sale of goods transactions between Mainland China and Hong Kong, should our local legislation, which seeks to implement the CISG, also apply where the parties to those transactions have their respective places of business in Mainland China and Hong Kong?

Respondents	Supportive	Responses received in further detail
1. Hong Kong Bar Association	✓	<ul style="list-style-type: none">• Agreed with the proposal at paragraph 4.10 of the Consultation Paper¹, and commented that, “[t]his makes logical sense and is in line with the ‘One Country, Two Systems’ principle”.
2. Insurance Authority		<ul style="list-style-type: none">• Commented that applying the CISG to transactions referred to CQ 4 “could potentially foster the development of trade in the Greater Bay Area and support businesses involved in the Belt & Road Initiative, but this would of course require consistency of enforcement of such contracts to which the CISG applies in both the Hong Kong and Mainland courts.”
3. Law Society of Hong Kong	✓	<ul style="list-style-type: none">• Generally agreed with the proposal in CQ 4.• However, suggested that “a better way to achieve this” is for Mainland China and Hong Kong to enter into a mutual arrangement

¹ Paragraph 4.10 of the Consultation Paper states: “However, even if the CISG would not automatically apply to such transactions, in view of the close economic ties between Mainland China and Hong Kong, to facilitate sale of goods between businesses in the two places, it is proposed that, on a unilateral basis, the New Ordinance would contain provisions which would in effect apply the CISG rules also to contracts for the sale of goods between parties with their places of business respectively in Mainland China and Hong Kong.”

Respondents	Supportive	Responses received in further detail
		<p>concerning the applicability of the CISG to the parties having respective places in Mainland China and Hong Kong. It was considered that this could, “ensure the reciprocal applicability of the CISG provision in the case where the parties adopt PRC law” and “avoid confusion which may be created by including such arrangement in the same ordinance for applying the CISG in Hong Kong”.</p>
<p>Individuals</p>		
<p>4. Mr Lijun CAO (Partner, Zhong Lun Law Firm, Beijing)</p>	<p>✓</p>	<ul style="list-style-type: none"> • Considered that: the application of the CISG between Mainland China and Hong Kong would “reduce misunderstandings and lower legal costs arising from transactions across different legal traditions”; and although “legal costs in Hong Kong” may increase in the short term (e.g. from revising or updating standard clauses in contract templates), such would “only amount to short-term costs, which would be reduced over time as the CISG is applied”. • With respect to the proposal in CQ 4, the respondent commented that, “passing new legislation in Hong Kong may not alone be able to achieve this desired effect [namely, the effect of the CISG rules automatically applying to transactions between Mainland China and Hong Kong, unless this

Respondents	Supportive	Responses received in further detail
		<p>is opted out by the parties], as such legislation would not have force of law within Mainland China.” In the respondent’s view, a “Hong Kong-Mainland China arrangement (or alternatively, introducing relevant legislation to similar effect in Mainland China, or both) will be needed for effective application of the CISG to sale of goods transactions between Mainland China and Hong Kong”. Without such arrangement/legislation, the respondent expressed concern about how the relevant cases will be dealt with in Mainland China.</p>
<p>5. Mr Kinsey HO (Researcher from the Chinese Legal Research Institute)</p>	<p>✓</p>	<ul style="list-style-type: none"> • Apart from extending CISG to Mainland China/Hong Kong transactions, it should also cover, for example, Hong Kong/Macau transactions.
<p>6. Prof LI Wei (The School of International Law, China University of Political Science and Law 中國政法大學國際法學院)</p>		<ul style="list-style-type: none"> • Commented that the CISG (even if it was applied and implemented in Hong Kong) would not apply to transactions between Mainland China and Hong Kong parties. Suggested that one possible solution was to encourage Hong Kong businesses, when entering into sales contracts with Mainland China businesses, to choose CISG as applicable law to govern their contracts. The respondent’s view was that such contractual clause concerned party autonomy and “should be legally effective” and “respected by both the Mainland

Respondents	Supportive	Responses received in further detail
		China and Hong Kong sides”. (The quotes are English translation)
7. Prof LIU Qiao and Prof WANG Jiangyu (Centre for Chinese and Comparative Law, School of Law, City University of Hong Kong)	✓	<ul style="list-style-type: none">• Believed it “critical for recouping the economic benefits of the CISG” that a sale of goods contract between parties whose places of businesses are in Hong Kong and Mainland China be subject to unifying rules contained in the CISG.• Considered that for this to work properly on a mutual basis, a bilateral arrangement between Hong Kong and Mainland China would be required, and the arrangement would: (a) provide “a legal basis for the binding effect of the unifying rules and the legitimacy of the consequent implementation measures” and (b) require that the same set of rules be applied whether the dispute is referred to a court in Hong Kong or Mainland China. In this context, the respondents further commented that, “[i]t is also plausible and may be even natural in the context of the ‘One Country, Two Systems’ framework, under which Hong Kong and Mainland China are considered two jurisdictions and treated as such in the domestic law of the PRC and the legal system in Hong Kong.”

Respondents	Supportive	Responses received in further detail
8. Dr Lutz-Christian WOLFF (Dean, Faculty of Law & Wei Lun Professor of Law, Chinese University of Hong Kong)	✓	<ul style="list-style-type: none">• Believed that businesses in Hong Kong and Mainland China should be allowed to benefit from the advantages of the CISG. It would be “unfortunate to introduce the CISG to Hong Kong, but not to have it applied in relation to the large portion of cross-border sale of goods transactions concluded between Hong Kong and Mainland China parties.”• Notwithstanding the wording in Article 1 of the CISG, application of the CISG to sales transactions between Hong Kong and Mainland China parties would reinforce the “one country, two systems” concept.