

**Consultation 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”)**

FAQs

Updated as at: 31 July 2020

These FAQs have been prepared with the aim of providing a general overview of the CISG and highlighting certain matters relevant to the consultation on the proposed application of the CISG to Hong Kong. For detailed discussions of the CISG and the above matters, please refer to the Consultation Paper and its executive summary, which are available at: <https://www.doj.gov.hk/eng/public/CISG.html>.*

What is the CISG?

1. What is the CISG and what are its main objectives?

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

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Then comes the CISG. In summary, the CISG is a treaty which provides a set of uniform rules governing the formation, performance and remedies for breach of contracts for the international sale of goods within its scope, with a view to removing legal barriers in, and promoting the development of, international trade. The CISG was prepared by the United Nations Commission on International Trade Law ("UNCITRAL") and adopted by a diplomatic conference on 11 April 1980 in Vienna. The CISG entered into force on 1 January 1988.

2. Which countries are Contracting States to the CISG?

As of 31 July 2020, 93 countries are Contracting States to the CISG, among them some of Hong Kong's principal trading partners such as Mainland China, the USA, Japan, Singapore, South Korea, Vietnam, Germany, Switzerland, the Netherlands, France, Italy and Australia. Information on the status of the CISG is available at the following webpage of the United Nations Treaty Collection: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en.

3. Is the CISG currently applicable to Hong Kong?

Whilst China is a Contracting State to the CISG, the CISG is currently not applicable to Hong Kong.

When does the CISG apply?

4. When does the CISG apply? If a transaction meets the requirements for the application of the CISG and the parties to a transaction want the CISG to govern the transaction, how should they do it?

The CISG does not apply to all contracts. Under CISG Article 1(1), the Convention will only apply to a transaction if three requirements are met.

First, the transaction must constitute a contract for the sale of goods:

- (a) "Goods" (not defined in the CISG) cover tangible property capable of delivery e.g. raw materials, commodities, finished goods etc.;
- (b) Contracts for services or for the sale of property other than "goods" are not

governed by the CISG (Article 1(1)).

Regarding “mixed” contracts for the sale of both goods and services, please refer to Question 7.

Second, the contract of sale must be “international”, defined as between parties whose places of business are in different States. Thus purely local transactions are not within the scope of the CISG. The “place of business” of each party generally means where that party usually trades or is located, and not necessarily that party’s nationality (CISG Article 1(3)).

Third, the contract must relate to the CISG in either of the following ways:

(a) each party to the contract is located in a different CISG Contracting State (CISG Article 1(1)(a)); or

(b) the rules of private international law (i.e. the choice-of-law or conflict-of-law rules of the court or tribunal hearing a dispute) lead to the application of the law of a CISG Contracting State (CISG Article 1(1)(b)).

Regarding the CISG Article 1(1)(b) ground, please refer to Question 5.

Where each party to the sale of goods contract has its place of business in a different Contracting State, the CISG will apply automatically unless the parties have "opted-out" and chosen a different law to govern their contract. Therefore, if you are a business located in a CISG Contracting State, and enter into a contract with a business located in another Contracting State, the CISG will automatically apply unless the parties have specifically “opted-out” of it in the contract. “Opting-out” of the CISG is discussed in the “Party autonomy” section below.

Example 1 - Application under CISG Article 1(1)(a):

A seller whose place of business is in the USA sells 10,000 widgets to a buyer whose place of business is in Germany. As each party to the contract is in a different Contracting State (i.e. the USA/Germany), the CISG would automatically apply to their transaction in accordance with CISG Article 1(1)(a), unless the parties have agreed to “opt-out” of its application in favour of other

law.

Example 2 - Application under CISG Article 1(1)(b):

The seller's place of business is in India and the buyer's place of business is in the UK. India and the UK are not CISG Contracting States. However, if the parties have chosen the contract to be governed by German law and heard in the courts of Germany, since Germany is a CISG Contracting State, the CISG would apply in accordance with CISG Article 1(1)(b) (even though neither party is in a Contracting State), unless the parties have agreed to "opt-out" of its application.

5. What is the effect of a declaration under CISG Article 95 in relation to Article 1(1)(b)? Which Contracting States to the CISG have made such a declaration?

CISG Article 95 permits Contracting States to declare that they are not bound by the ground under CISG Article 1(1)(b). Courts in a Contracting State which has declared such reservation have to apply the CISG only if the requirements of CISG Article 1(1)(a) are met, i.e. where each party to the contract has its place of business in a different Contracting State. Contracting States which have made such declaration include China, the USA and Singapore.

Example:

A seller whose place of business is in the UK sells 10,000 widgets to a buyer from the USA. The parties choose Singapore law to apply to their contract. While the USA is a CISG Contracting State, the UK is not. If a court in Singapore hears the relevant dispute, since Singapore has issued an Article 95 declaration saying that it will not be bound by Article 1(1)(b) and will apply the CISG only between those parties whose places of business are in different Contracting States, the CISG will not apply (either under Article 1(1)(a) or Article 1(1)(b)).

Types of contracts covered by the CISG

6. What kinds of transactions are excluded by the CISG?

Certain transactions are not governed by the CISG even if they meet the above-mentioned requirements under CISG Article 1(1). CISG Article 2 states that the

Convention does not apply to the following sales:

- Consumer sales i.e. where goods are bought for personal, family, or household use (unless the seller neither knew nor ought to have known that the goods were bought for any such use);
- Sales by auction;
- Sales on execution or otherwise by authority of law;
- Sales of stocks, shares, investment securities, negotiable instruments, or money;
- Sales of ships, vessels, hovercraft or aircraft; and
- Sales of electricity.

7. Does the CISG apply to mixed contracts for sale of goods and services?

In the case of a mixed contract for sale of both goods and services, whether the CISG will apply will depend on whether the contract is mostly for the sale of goods, or whether the contract is mostly for the supply of labour or other services. CISG Article 3(2) states that the CISG does not apply to contracts in which the preponderant part of the obligations of the party furnishing the goods consists in the supply of labour or other services.

8. Does the CISG apply to framework contracts?

While this would depend largely on how the framework contract is structured and its content, the CISG generally does not apply to distributorship, dealership, agency or franchise contract. However, individual supply orders under a framework contract can be sales contracts and may fall under the CISG.

Legal issues within/outside the scope of the CISG

9. What legal issues relating to the international sales of goods would fall within the scope of the CISG? What matters would fall outside its scope?

CISG Article 4 provides that the CISG governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract.

Several aspects of international sales transactions are explicitly outside the scope of the CISG (CISG Articles 4 and 5). These excluded aspects include:

- The validity of the contract or of any of its provision or of any usage;
- The effect that the contract may have on the property in the goods sold (e.g. retention of title clauses); and
- The liability of the seller for death or personal injury caused by the goods to any person.

Example 1:

A seller and a buyer enter into a contract governed by the CISG. The buyer eventually claims that the goods received have significant defects and are no longer of merchantable quality. This is a matter that is clearly about the rights and obligations of the seller and the buyer arising from the contract and clearly falls within the scope of the CISG.

Example 2:

Party A and Party B enter into a contract governed by the CISG. Party B eventually argues that it was defrauded by Party A in entering into the contract. The question of whether the contract was induced by fraud is a matter of contractual validity, which is not governed by the CISG.

10. If the CISG applies to a transaction, does it mean there is no scope for domestic law (other than the CISG) to apply to that transaction?

As stated above, the CISG does not cover every aspect of an international sale of goods transaction and so there are some aspects that will still be governed by domestic law. Some matters are expressly excluded from the scope of the CISG under Article 4, such as matters relating to the validity of the contract, and so rely on the relevant domestic law. Under CISG Article 7(2), domestic law may also apply to fill in "internal gaps" in the CISG (i.e. questions the CISG governs but for which it does not expressly provide answers), but this is only when no relevant general principles of the CISG can be identified to settle such questions.

In addition, there may be certain specific circumstances where a court is not obliged to grant specific performance under the CISG. Under CISG Article 28, where a party has a right to require performance of an obligation by the other party, the court is not bound to require specific performance unless the court would do so under its own domestic law regarding similar contracts of sale not governed by the CISG.

Example 1:

A buyer from Hong Kong enters into a contract with a seller in Germany for the purchase of goods. The contract includes an exclusive jurisdiction clause for the courts of Hong Kong and the application of Hong Kong law (assuming the CISG is applicable to Hong Kong then and is implemented in Hong Kong law and that it applies to this contract). The buyer later contests the validity of the contract, alleging that the contract was procured by fraud. Even though the CISG applies, Article 4 CISG excludes issues of validity of the contract. As such, the Hong Kong court will have to apply Hong Kong law to determine the issue of whether the contract would be valid.

Example 2: Party A and Party B enter into a contract governed by the CISG. Party B later alleges that it made a unilateral mistake and therefore is entitled to void the contract. While this goes to the validity of the contract between the parties, some aspects of whether there was a mistake may also be governed by the CISG. For example, CISG Article 8 dictates how statements and conduct of a party are to be determined and interpreted. These rules may conflict with various domestic provisions on mistake.

Example 3: A buyer from Hong Kong enters into a contract with a seller in Germany for the purchase of 10,000 bushels of wheat, governed by Hong Kong law and to be heard in the courts of Hong Kong (assuming the CISG is applicable to Hong Kong then and is implemented in Hong Kong law and that it applies to this contract). The seller eventually breaches the contract and the buyer claims for specific performance under CISG Article 46. However, under Hong Kong law, the courts will treat specific performance as a matter of discretion and are unlikely to grant specific performance for the sale of commodity goods. Under CISG Article 28, the Hong Kong court will not be bound to require specific performance under CISG Article 46. The Hong Kong court's discretion to demand specific performance is thus preserved.

11. If the CISG applies to a transaction, would it also apply to any agency aspect of that transaction?

While the CISG governs many aspects of an international sale of goods transactions, it does not cover all aspects that may arise. Agency is one of these situations, meaning that even if the CISG is applicable, domestic law (and not CISG) will generally decide the agency aspects of that transaction.

Interpretation of the CISG

12. How would the CISG provisions be interpreted? Are there any rules of interpretation of the CISG?

In operation, the CISG is interpreted and applied by regular courts and arbitral tribunals with jurisdiction over the disputes in which it is applicable. To ensure uniformity in the application of the CISG, Article 7(1) requires those interpreting the CISG to have regard to its international character and the need to promote uniformity in its application and the observance of good faith in international trade. As regards questions concerning matters governed by the CISG but which are not expressly settled in the CISG ("internal gap" situations – see Question 10), they are to be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law (CISG Article 7(2)).

As to the general method of interpretation of the CISG, this is mainly based on the ordinary meaning of the wording and context of the provisions itself. Case

law from domestic courts may be persuasive, but not binding. Hence, domestic courts' decisions on CISG matters may be pertinent to the interpretation of the CISG, and they are accessible, for example, by virtue of the Case Law on UNCITRAL Texts database, commonly known as the CLOUT database.

As noted above, the interpretation of the CISG is with regard to promoting uniformity in the CISG's application. This concept of "uniformity" means that the terms used by the CISG must be determined independently from domestic preconceptions. While domestic law may be relevant, interpretation of the CISG under Article 7 relies on domestic law as a "last resort" in order to reduce inconsistency in application in various jurisdictions.

The general principles on which the CISG is based, and which may be used for "gap-filling" (i.e. settling questions concerning "internal gap" situations) under Article 7(2) include in gist:

- The freedom to contract/party autonomy;
- The protection of a party's reasonable reliance caused by the other party;
- The requirement to give notice in order to enforce one's rights;
- The principle of equality between the parties;
- The principle of upholding contracts; and
- The principle of compensation.

Party Autonomy

13. Does the CISG restrict freedom to contract? Under the CISG, are the buyer and seller required to transact based on the CISG or can they depart from the CISG and agree on whatever contract terms that suit them?

A fundamental principle of the CISG is party autonomy. In this regard, whilst the CISG will apply by default to transactions between parties from different Contracting States under CISG Article 1(1)(a), CISG Article 6 specifically allows parties to opt out of the entire CISG or to apply the CISG but exclude or

modify certain aspects of it¹. So long as the relevant CISG provisions are not mandatory, parties are free to exclude or modify specific provisions of the CISG to govern the transaction between them.

14. What are some of the factors that buyer and seller may wish to consider in deciding whether or not to have their transaction governed by the CISG?

If the CISG is to apply to Hong Kong and be incorporated into Hong Kong law, it will apply by default to transactions between parties from different Contracting States. Hence, when entering into a transaction with a party from another Contracting State, the parties should consider whether they want to rely on the provisions of the CISG instead of a specific domestic law.

Broadly speaking, some of the considerations that parties may wish to take into account include:

- The CISG is generally more pro-contract than local Hong Kong law and has a broader scope of contract formation, acceptance, and interpretation than domestic law.
- If there has been a significant amount of pre-contractual and post-contractual conduct and statements, parties may wish to consider whether it would be beneficial to have that information in the interpretation of their agreement. The CISG allows for both pre-contractual and post-contractual statements and conduct to be used in interpreting the intention of the parties under the contract, whereas local Hong Kong law generally does not.
- Under the CISG, the seller generally has a right to cure any defects or non-conformity in their performance. Under Hong Kong law, buyers can in appropriate cases simply reject goods but under the CISG, they may have to accept the seller's substitute or cure (see further Question 22).
- The CISG provides remedies for breach of a sale contract which have no

¹ The exception is that the parties cannot derogate from or vary Article 12, which states that provisions allowing freedom of form for the creation, modification or termination of a contract of sale do not apply where the Contracting State in question has made a declaration under Article 96.

direct equivalent in Hong Kong law e.g. the right to cure, the easy ability to vary the contract, and the remedy of price reduction. Also, while the CISG tends to promote symmetry between buyers and sellers in terms of rights and obligations, when discussing remedies buyers and sellers have different rights and obligations that parties should be aware of.

15. If a buyer and a seller want to exclude the applicability of the CISG from a transaction between them, how should they do it?

If the buyer and seller want to exclude the applicability of the CISG from a transaction between them, it is recommended that any governing law clause in the parties' contract includes a specific exclusion of the CISG, such as wording along the lines of: "*The applicability of the United Nations Convention on Contracts for the International Sale of Goods is expressly and entirely excluded.*" This would have to be added to the parties' express choice of governing law.

16. I am a trader whose place of business is in Hong Kong. If the CISG is to apply to Hong Kong, should our standard form purchase orders, sale confirmations or contracts expressly state that the CISG does not apply?

You are recommended to carefully consider the pros and cons of having your transactions governed by the CISG before deciding whether to opt out from the CISG in the standard form purchase orders, sale confirmations or contracts. If you and the other party to the contract, after careful consideration, decide not to have the CISG govern the transaction in question, it is suggested that the relevant standard form purchase order, sale confirmation, or contract should expressly provide that the CISG shall not apply to that transaction. This is especially important if you are dealing with a party who has its place of business in Mainland China (see Questions 20 and 24) or another Contracting State to the CISG.

17. Can we use trade terms that are sourced from both common law and Incoterms 2010, e.g. FOB, CIF, in our contract of sale of goods which is governed by the CISG?

Yes. As mentioned above (please refer to Question 13), under CISG Article 6, parties to a contract may derogate from and vary the effect of individual provisions of the CISG to suit their needs. Further, CISG Article 9 allows for the

adoption of usages to which the parties have agreed or usages of which the parties knew or ought to have known and which are widely known in international trade. These may include trade terms such as *Incoterms* 2010.

18. If a transaction meets the requirements for the application of the CISG, can the buyer and seller choose the CISG rules to govern certain matters of the transaction while at the same time opt for the domestic law of a chosen jurisdiction (other than the CISG) to govern the other matters of that transaction? How should they do it?

Yes. CISG Article 6 allows for the parties to modify or depart from specific provisions of the CISG as they so wish, so long as they are not modifying one of the mandatory provisions (please refer to Question 13). It is recommended that if the parties agree on certain aspects of the transaction to be governed by the CISG and other parts to be governed by the domestic law of a chosen jurisdiction, the contract should specifically state which laws or rules will apply to which parts of the transaction.

Application and Implementation of the CISG in Hong Kong

19. Why should we look into whether to extend the application of the CISG to Hong Kong now? What benefits and costs would such application entail?

Regarding the CISG application and implementation proposal, please refer to Question 20.

The key benefit from applying the CISG to Hong Kong would be the additional option (to apply a neutral law) Hong Kong traders will have regarding the governing law of their sale of goods contracts with businesses in other CISG Contracting States. Parties to a contract would be free to utilise the CISG as designed, with local Hong Kong law used as residual law; alternatively parties can choose to be governed solely by local Hong Kong law rather than the CISG.

Also as mentioned above (see Question 2), many of the major trading countries who are Contracting Parties to the CISG are also Hong Kong's top trading partners. With the increasing popularity of the CISG worldwide, the application of the CISG to Hong Kong has the potential to facilitate GDP and trade growth by assisting in reducing legal barriers that could diminish or hamper the free flow

of trade between countries that have applied the CISG.

This also acknowledges that in many situations where a Hong Kong business may be trading with an overseas party which has stronger bargaining power, that the Hong Kong business may be at a disadvantage when negotiating governing law clauses that are either neutral or advantageous to the Hong Kong business. Extension of the CISG allows for the choice and application of a neutral set of rules that both sides will be able to understand and apply, thereby achieving a level playing field for the parties.

As to the cons of applying the CISG to Hong Kong, the main one would appear to be changing the status quo and its associated costs (such as the transaction costs involved in reviewing existing standard contracts governed by Hong Kong law in light of the CISG and litigation costs (e.g. to work out the problems within the CISG and at the interface of the CISG and local Hong Kong law)). As the CISG contains both civil and common law concepts, some of these concepts may seem unfamiliar to Hong Kong businesses and their legal advisors when it is first introduced here.

20. If the CISG is to apply to Hong Kong, how would the CISG be implemented in Hong Kong? Would any existing Hong Kong law governing international sale of goods (e.g. the Sale of Goods Ordinance (Cap. 26) and the relevant common law principles) be affected or need amendments?

If it is decided that the CISG is to be applied to Hong Kong, in order to give effect to it in Hong Kong, the CISG (as an international treaty) would need to be incorporated into Hong Kong local law. In this regard, it is currently proposed that:

- (a) the CISG be implemented in Hong Kong law by way of enacting a new stand-alone Ordinance (“New Ordinance”);
- (b) the New Ordinance would reflect any reservation made by China under the CISG (e.g. reservation under Article 95 as discussed in Question 5 above) as decided to be applied to Hong Kong; and
- (c) the New Ordinance would contain provisions with the effect that the CISG rules would prevail to the extent there is any inconsistency between the New

Ordinance or the CISG and any other Hong Kong laws (e.g. the Sale of Goods Ordinance (Cap. 26) and the relevant common law principles).

The proposal of mirroring China's reservation under the CISG is for the purpose of preventing potential confusion in applying the CISG to Hong Kong-related disputes. This means that Hong Kong courts have to apply the CISG only if the requirements of Article 1(1)(a) are met, i.e. where both parties have their places of business in different Contracting States.

Transactions between businesses in Hong Kong and businesses in Mainland China (being transactions taking place within the same country and not "international" ones as discussed above) are outside the scope of the CISG. 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 Mainland China/Hong Kong transactions.

Interaction between the CISG and Hong Kong law

21. Which Hong Kong law currently governs international sale of goods?

Currently, if Hong Kong law governs an international sale of goods transaction, it will be governed by the Sale of Goods Ordinance (Cap. 26). However, there is currently no default law or set of rules that will govern an international sale of goods transaction with a party in Hong Kong if Hong Kong law is not applicable.

22. Will the CISG change the way traders in Hong Kong transact with their buyers/sellers outside Hong Kong? What are the key differences between Hong Kong law governing international sale of goods at present and the CISG?

The CISG, being a harmonization of sales laws around the world, will obviously bear some significant differences from local Hong Kong sales law. In this regard, Hong Kong traders may be particularly concerned about: (a) whether the CISG changes the way Hong Kong traders transact with their buyers/sellers outside Hong Kong; and (b) what the key differences between Hong Kong law governing international sale of goods at present and the CISG are. Some major differences

are outlined below. For detailed discussions in this regard, please refer to Chapter 2 of the Consultation Paper and its Annex 2.2.

Contract Formation:

(a) With some exceptions, the provisions of the CISG tend to be more pro-contract than local Hong Kong law. Lawyers and businessmen should be aware that there are some differences in formation of contract as compared to current Hong Kong law.

(b) For example, in relation to revocation of offers, CISG Article 16(2) dictates certain criteria that make an offer irrevocable (such as when a fixed time for acceptance is stated or where it is reasonable to rely on the offer as irrevocable). This differs from common law, where an offer made that is unsupported by consideration is treated as revocable at will and stating a fixed time for acceptance is *prima facie* no more than an indication that after that time, the offer (unless revoked meanwhile) will lapse.

(c) Another difference arises from late acceptance of an offer. CISG Article 21(2) provides that late acceptance may still be effective if it can be shown that, if the acceptance was transmitted normally, that it would have reached the offeror in time, unless the offeror informs the offeree without delay that the offer has lapsed. This departs from the Hong Kong "postal rule" which establishes acceptance being effective from the moment it is dispatched, and places additional burden on the offeror.

Obligations of Buyers and Sellers:

(a) Whereas the Sale of Goods Ordinance (Cap. 26) includes a patchwork of criteria such as conformity with description, sample, and implied terms as to merchantability, the CISG uses a single concept of "fitness" (i.e. that goods must be fit for the purposes for which goods of the same description would ordinarily be used). Overall, it appears that the CISG uses a simpler and more streamlined way of defining merchantability while maintaining a similar scope of coverage as local Hong Kong law.

(b) Generally, buyers have rights under CISG Article 35 to goods that are fit for their ordinary purpose, and any particular purpose that it has specified to the

seller (or which the seller should have reasonably known). The goods must also possess the qualities of any samples or models provided to the buyer, and be properly packaged. Any deviation from these requirements renders the goods non-conforming and any non-conformity establishes a breach.

(c) Further, under CISG Articles 37 and 48, when there is non-conformity, the seller may cure any defects before and after delivery is due, so long as this can be done without undue delay, expense, or inconvenience to the buyer. This may conflict with the buyer's right to reject goods under local Hong Kong law.

(d) For buyers, some obligations may differ from local Hong Kong law. In relation to inspection, for example, CISG Article 38 requires buyers to examine the goods as soon as possible once obtaining possession. CISG Article 39 also requires the buyer to provide notice to the seller of any defects within a reasonable time, or in any event within two years after the goods were handed over, or else the buyer loses the right to rely on lack of conformity. This is more stringent than what local Hong Kong law provides, which only bars the buyer from rejecting the goods if inspection is not carried out in a reasonable period of time.

Fundamental breach and avoidance of contract:

(a) The concept of fundamental breach is defined under CISG Article 25 as a breach that causes such detriment to the other party as to substantially deprive them of the benefits under the contract. While this test appears somewhat (linguistically) similar to the test for a repudiatory breach of an innominate term in existing Hong Kong law, it is a much stricter requirement than what traders may be used to under Hong Kong common law. If fundamental breach is established, the innocent party is entitled to "avoid" the contract under either CISG Article 49 or 64 and seek restitution. This means that both parties must be put into their pre-contractual positions as far as possible.

(b) In practice, the specific concept of fundamental breach is very rarely established, especially given the CISG's pro-contract policy, and should not be considered similar to breaches of contractual conditions which under local Hong Kong law, would give rise to rights of termination.

Termination of the contract: Local Hong Kong law generally allows for greater rights of termination as compared to the CISG. Under Hong Kong law, breaches of condition generally give rise to termination rights. However, under the CISG, avoidance and termination are viewed in the context of fundamental breach, which is a much higher bar than what is normally seen in local Hong Kong sales law. Further, avoidance under the CISG has retrospective effect, meaning that both parties are required to make restitution of the benefits received, in an attempt to put the parties in the same situation that they would have been in prior to entering into the contract.

Choice of remedies on breach:

(a) One major difference between remedies under the CISG and under Hong Kong law is that the CISG allows the buyer to claim for a reduction in price for non-conforming goods: Under CISG Article 50, buyers have the choice to keep any non-conforming goods, and to subsequently claim for a reduction of the price to reflect the value of the goods actually delivered. While there is a rough equivalent remedy under existing Hong Kong law by way of damages for “abatement against the price” if the price has not been paid, this specific remedy allows a buyer under the CISG to essentially choose whether to reduce the price or seek damages.

(b) Further, the CISG provides for some greater latitude in compelling performance of the contract (“specific performance”), but this remedy is typically subject to domestic courts’ discretion (see CISG Article 28).

Damages: Claims for damages in the CISG and under local Hong Kong law are largely the same with some minor differences such as when damages are ascertained and how they may be calculated. Under the CISG, damages are assessed at the time of trial, whereas Hong Kong law dictates damages should be determined at time of breach. Further, damages are primarily assessed with reference to the market under Hong Kong law, whereas the CISG first looks at any actual substitute transactions before resorting to the market. Finally, the CISG limits recovery by examining whether damages are foreseeable, whereas under Hong Kong law, there is a more complex system of causation and remoteness.

In summary, the following key observations from the above comparison are

noted in particular: (a) The CISG is relatively more pro-contract than existing Hong Kong law (in the sense that its policy is to keep the contract alive, even in the event of a breach, rather than allow for easy termination); and (b) the CISG provides remedies for breach of a sales contract which have no direct equivalent in Hong Kong law but may make ample common sense to traders, such as the right to cure and the remedy of price reduction.

On the other hand, the differences set out above do not appear to be of a fundamental systemic nature, whilst there are significant similarities across the two regimes. Should a Hong Kong trader wish to adopt the CISG (instead of Hong Kong law), the trader is likely required only to fine-tune, but not completely overhaul, his existing business practices.

23. If the CISG is to apply to Hong Kong, how would the CISG (as implemented in Hong Kong) work alongside existing Hong Kong law which governs international sale of goods? Is any CISG rule potentially incompatible with existing Hong Kong law? What are the potential solutions?

As mentioned, the CISG does not provide a complete code on international sale of goods, and only covers particular areas of such sale. For areas that are specifically excluded from the CISG as well as questions concerning matters covered by the CISG but are not adequately answered by its own principles (i.e. “internal-gap” situations referred to in Art 7(2) – see Question 10), Hong Kong law may be relied upon.

For example, the CISG does not cover issues of validity of contract. Therefore if a claim arose in a Hong Kong court where the CISG applied, and one party were to allege that the contract is not valid as it was procured by fraud, the issue of whether there was fraud and its effect on the contract would be governed by Hong Kong law.

As observed above, there may be differences between local Hong Kong sales law and the CISG, and in some cases these differences may be significant. For example, concepts of fundamental breach and avoidance, which are concepts which arose from civil law jurisdictions, find their way into the CISG by way of the CISG’s very nature as a compromise between civil and common law systems.

However, notwithstanding such differences, there does not appear at this moment

to be any provisions of the CISG that are fundamentally incompatible with provisions of local Hong Kong law. Furthermore, in situations where the CISG may contemplate remedies that may affect domestic court's discretion such as specific performance, provisions such as CISG Article 28 preserve the domestic court's inherent discretion under domestic law.

It should also be noted that, under the current implementation proposal, the CISG rules will be given prevailing effect under the New Ordinance. Thus, generally speaking, in situations where the CISG would apply and the CISG provisions govern that issue, the CISG rules would prevail to the extent there is any inconsistency between the New Ordinance/CISG and any other Hong Kong laws. Such being the case, there would be no incompatibility in this technical sense.

24. If the CISG is to apply to Hong Kong, would it apply to a transaction between parties whose places of business are in Mainland China and in Hong Kong respectively?

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.

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.

Please also refer to Question 20 for further details.

Further information

25. Is there anything about the CISG not mentioned above that we should know and watch out for?

While there are several other differences between the CISG and local Hong Kong

sales law, some of the key things to consider and watch out for include:

Passing of Risk

The CISG provides default provisions on the passing of risk from seller to buyer in CISG Articles 66 to 69. While under Hong Kong law, risk generally passes when the property in the goods passes from seller to buyer, under the CISG, the risk passes upon delivery of the goods. Practically speaking, however, the difference may be academic as the parties will normally dictate when risk passes in their contracts or via their use of *Incoterms* or other trade usages.

Force Majeure / Impediments to Performance

CISG Article 79 acts as a form of force majeure clause and acts to relieve a party of its obligations in the event that an impediment outside of that party's control arises that could not have been reasonably expected or accounted for. While similar to the concept of "frustration" in local Hong Kong law, differences arise in how Article 79 operates as compared to the doctrine of frustration.

The primary difference is that whereas frustration will render a contract automatically discharged and release the parties from further performance of the contract, Article 79 will only suspend the parties' obligations. Once the impediment has passed, the parties' obligations will resume.

26. Where can I find out more about the CISG e.g. articles, cases etc.?

UNCITRAL maintains a case law database known as the Case Law on UNCITRAL Texts (CLOUT) that has over 900 CISG cases from around the world.

The Institute of International Commercial Law at Pace University (<http://www.iicl.law.pace.edu/cisg/cisg>) also maintains an online database of resources for those who want to find out more about the CISG. The database includes links to all the texts of the CISG in all of its authentic languages, links to case law databases, and scholarly articles on the CISG.

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