The CISG in Hong Kong – What good is it for my business?

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Overview

5 Main Parts:

2. Salient features of the CISG
3. Proposed Implementation of the CISG
4. Interplay between the CISG and Hong Kong law
5. Pros and cons of the application of the CISG to Hong Kong
Introduction to the CISG

What is the CISG?

• Uniform rules to govern contracts for the international sale of goods.
• Entered into force on 1 January 1988.
• 93 countries are parties to the CISG.
• Currently not applicable to Hong Kong.
Introduction to the CISG

2018 Hong Kong’s top trading partners (by total trade) which are party to the CISG include:

- The Mainland of China
- USA
- Japan
- Singapore
- South Korea
- Viet Nam
- Germany
- Switzerland
- Netherlands
- France
- Italy
- Australia
Introduction to the CISG

Structure of the CISG

101 Articles divided into 4 parts:

- Part I - Scope of application and general provisions
- Part II - Formation of the contract
- Part III – Obligations and rights, in particular the remedies, of the buyer and the seller
- Part IV - Final provisions.
CISG’s Salient features

Scope of application

CISG applies to a transaction if 3 requirements are met:

- **Requirement 1: A contract of sale of goods**
  - “Goods” (not defined) cover tangible property capable of delivery.
  - Mixed goods and services.
  - CISG will not apply where “preponderant” part of the obligations consists in the supply of labour or other services (Art 3(2)).
CISG’s Salient features

Scope of application

• **Requirement 2:** The contract is between parties whose places of business are in different States.

• **Requirement 3:** Either:
  
  a. The States are Contracting States to CISG (Article 1(1)(a)); **OR**
  
  b. Rules of private international law lead to application of the law of a Contracting State (Article 1(1)(b)), but see Article 95 reservation.
CISG’s Salient features

Scope of application

CISG Article 95

“All State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.”
CISG’s Salient features

Scope of the CISG
Example 1: Article 1(1)(a)

Seller A (US)

CISG automatically applies unless “opt-out”.

Buyer B (Germany)

Note: US and Germany are both parties to the CISG.
CISG’s Salient features

Scope of the CISG
Example 2: Article 1(1)(b)

Seller A (India)

• Applicable law: German law
• CISG applies under Article 1(1)(b).

Buyer B (UK)

Note: India and UK are **not** parties to the CISG.
## CISG’s Salient features

### Scope of the CISG

**Example 3: Article 1(1)(b) & Article 95 Reservation**

<table>
<thead>
<tr>
<th>Seller A (UK)</th>
<th>Buyer B (US)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Applicable law: Singapore law</td>
<td>•</td>
</tr>
<tr>
<td>• CISG does <strong>not</strong> apply under Article 1(1)(a) or (b).</td>
<td></td>
</tr>
</tbody>
</table>

**Notes:**
- UK is **not** party to the CISG.
- While Singapore is a party to the CISG, it has made an Article 95 reservation.
CISG’s Salient features

Scope of the CISG (excluded transactions)

Under Article 2, the CISG does not apply to:

• Consumer sales (ie goods bought for personal, family or household use, unless 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;
• Sales of electricity.
CISG’s Salient features

Scope of the CISG (aspects covered)

• The CISG governs **only** (Article 4):
  • Formation of contract of sale; and
  • The **rights and obligations** of the seller and the buyer arising from the contract.
**CISG’s Salient features**

**Scope of the CISG (aspects excluded)**

- Generally speaking, the CISG is **not** concerned with (Articles 4 and 5):
  - Validity of the contract (or of any of its provisions) or of any usage;
  - Effect of the contract on the property in the goods sold (e.g. retention of title clauses);
  - Product liability issues.
CISG’s Salient features

Scope of the CISG (aspects included/ excluded)

Question 1: Party A and Party B enter into a contract and it is governed by the CISG.

Goods received from you have significant defects and are not of merchantable quality!

Is this matter within the scope of the CISG?
CISG’s Salient features

Scope of the CISG (aspects included/ excluded)

Question 2: Party A and Party B enter into a contract and it is governed by the CISG.

You induced me to enter into the contract by deceit!

Is this matter within the scope of the CISG?
CISG’s Salient features

Interpretation of the CISG (Article 7)

• **Rule 1**: Have regard to:
  - its “international character” and
  - the need to promote “uniformity” in its application and observance of “good faith” in international trade.

• **Rule 2**: Regarding “internal-gap” situations (i.e. matters governed by the CISG which are not expressly settled in it), relevant questions to be settled in conformity with:
  - CISG general principles; or if none
  - The law applicable by virtue of private international rules.
CISG’s Salient features

Interpretation of the CISG

• General method of interpretation based on the **ordinary meaning of wording and context** of the provisions.
• Case law from other national courts persuasive but not binding.
• Case Law on UNCITRAL Texts (“CLOUT”) - [https://www.uncitral.org/clout/](https://www.uncitral.org/clout/).
CISG’s Salient features

**Interpretation of the CISG**

- “Uniformity” (Article 7(1))
- Domestic law as a last resort (Article 7(2))
CISG’s Salient features

**Interpretation of the CISG**

General principles on which CISG is based (Article 7(2)) for “internal-gap” filling:

- Party autonomy;
- Protection of a party’s reasonable reliance;
- Notice in order to enforce one’s rights;
- Principle of equality between parties;
- Principle that bargains should be kept;
- Principles of compensation.
CISG’s Salient features

Party autonomy – Opting-out

• CISG, when implemented in HK, will apply by default (Article 1(1)(a) scenarios).

• Parties to the contract may agree to (Article 6):
  • Opt out of the CISG entirely; or
  • Apply CISG but modify certain aspects - excluding or modifying specific provisions of the CISG (so long as not mandatory).
CISG’s Salient features

Party autonomy – Opting-out

• Opt-out wording.
• Considerations to be taken into account by parties to the contract, for example:
  • The CISG is generally more pro-contract than Hong Kong domestic law;
  • Under the CISG the seller has a right to cure any defects or non-conformity in their performance.
Implementation in HK

Proposal to implement the CISG:

• By way of a stand-alone New Ordinance.
• Broadly speaking, the New Ordinance will:
  • give “prevailing effect” to the CISG provisions (to the extent of any inconsistency between the CISG and any other Hong Kong laws); and
  • Reflect reservation(s) made by China under the CISG (e.g. China’s reservation under CISG Article 95).
### Interplay between CISG and HK law

#### CISG vs Hong Kong law – key differences

<table>
<thead>
<tr>
<th>Contract formation</th>
<th>CISG</th>
<th>Hong Kong law</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Acceptance of an offer</td>
<td>• Late acceptance may still be effective.</td>
<td>• “Postal rule”</td>
</tr>
<tr>
<td>• Revocation of offer</td>
<td>• Provides for when an offer can and cannot be revoked.</td>
<td>• Offer unsupported by consideration revocable at will.</td>
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*Generally, more pro-contract than HK law*
## Interplay between CISG and HK law

### CISG vs Hong Kong law – key differences

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<th>CISG</th>
<th>Hong Kong law</th>
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<td>• Fitness and quality of goods delivered</td>
<td>• Single concept of “fitness” - simpler and more streamlined way of defining “merchantability”.</td>
<td>• Patchwork of tests for “merchantability” &amp; conformity to “description” under SGO (Cap. 26).</td>
</tr>
<tr>
<td>• Non-conforming goods</td>
<td>• Seller may be able to cure defects.</td>
<td>• Buyer’s right to reject goods.</td>
</tr>
<tr>
<td>• Inspection of goods (and notice requirement)</td>
<td>• Inspection by buyer once obtaining possession (and notice requirement).</td>
<td>• Inspection by buyer within reasonable period of time.</td>
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Interplay between CISG and HK law

CISG vs Hong Kong law – key differences

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| Fundamental breach and termination | • Fundamental breach as defined is a much **stricter** requirement – when established, innocent party entitled to “avoid” the contract.  
• Rarely established. | • Generally, allows for greater rights of termination. |
| Choice of remedies on breach     | • Greater latitude in compelling specific performance (subject to domestic courts’ discretion).  
• Allows buyer to claim for reduction in price for non-conforming goods. | • Specific performance rarely granted save in the case of unique goods.  
• No counterpart though slightly similar to the relief of abatement against the price. |
Interplay between CISG and HK law

Key observations from the comparison:

• CISG relatively more pro-contract than existing Hong Kong law.

• CISG provides remedies for breach which have no direct equivalent in Hong Kong law.

• Significant similarities between the two regimes and differences identified not of a fundamental systemic nature.
Interplay between CISG and HK law

Compatibility:

• For matters outside the scope of CISG or “internal-gap” matters, Hong Kong law may be relied upon.
• There does not appear at present to be any CISG provisions fundamentally incompatible with Hong Kong domestic law.
Pros and Cons of CISG to HK

Pros

• **Additional choice** (to a “neutral” law) for Hong Kong businesses, freedom to:
  • Utilize the CISG with local Hong Kong law as residual law; or
  • Opt-out of CISG and use e.g. local Hong Kong law.

• Through reducing legal barriers to trade, potential to drive trade growth.

• **Level playing field**: Prevent Hong Kong businesses from being subject to unfamiliar foreign laws.
Pros and Cons of CISG to HK

**Cons**

- Changing the status quo:
  - Transaction Costs involved in reviewing existing standard contracts.
  - CISG contains both civil and common law concepts – unfamiliarity in the beginning.
CISG Consultation

Public Consultation

• Early 2020.
Questions?

• Q & A