

**THE DEPARTMENT OF JUSTICE OF HONG KONG**

**CONSULTATION PAPER**

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

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# THE DEPARTMENT OF JUSTICE OF HONG KONG

## CONSULTATION PAPER

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

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# Preface

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1. The Department of Justice would like to invite comments and views from the community, including the legal profession, business organisations and other interested parties, on a proposal to extend the application of the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”) to the Hong Kong Special Administrative Region (“Hong Kong”).

2. This Consultation Paper consists of 5 Chapters. Chapter 1 provides an overview of the CISG and highlights its salient features, including its scope, interpretation as well as choices of opting out and opting in. Chapter 2 analyses the interplay between the CISG and Hong Kong law by giving an overview of the relevant Hong Kong law at present, highlighting the key similarities and differences between the CISG and the existing Hong Kong law regime and discussing the overall compatibility between the two regimes. Chapter 3 examines the relevance and significance of the CISG to Hong Kong’s economy and in the light of that, the pros and cons of implementing the CISG in Hong Kong. Chapter 4 considers how the CISG is to be implemented in Hong Kong, if it is decided that the CISG will be extended to Hong Kong. Chapter 5 sets out some final comments and a summary of the recommendations.

3. Unless otherwise specified, references to “Article” in this Consultation Paper are references to the correspondingly numbered articles in the CISG.

4. In summary, the Department of Justice would like to seek the public’s views on whether the CISG should be applied to Hong Kong, and if so, its implementation in Hong Kong.

5. It is emphasised that this is a consultation paper and the recommendations presented herein are put forward for the purpose of facilitating discussions. We welcome views, comments and suggestions on any issues raised in this Paper. Final recommendations will be drawn up after the Department of Justice has considered the responses to this consultation.

## Acknowledgements

6. In preparing this Consultation Paper, Mr Kevin Lau of Des Voeux Chambers, Mr Eric Ng, formerly of the Gilt Chambers, and Mr Danny Tang of Temple Chambers were consulted and we are grateful for their invaluable advice and research assistance.



# Chapter 1

## Introduction and Overview

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### Background of the CISG

1.1 The CISG provides uniform rules to govern contracts for international sales of goods, with a view to removing legal barriers in, and promoting the development of, international trade<sup>1</sup>. The CISG was adopted at a Diplomatic Conference of the UN General Assembly on 11 April 1980 in Vienna<sup>2</sup>, by 42 votes in favour and nine abstentions. It entered into force on 1 January 1988<sup>3</sup>. As of 1 February 2020, 93 countries are parties to the CISG<sup>4</sup>.

### History and origins of the CISG

1.2 In the 19<sup>th</sup> Century, efforts began for a unification of the substantive rules applicable to international trade, with the rise of industrialisation and the increasing importance of international trade. The existing conflict of laws approach was considered to be risky, uncertain and insufficient to deal with complex issues arising from international sale of goods contracts. Further, the domestic commercial law regimes at the time were fragmented, obsolete and generally inadequate to govern international transactions<sup>5</sup>.

1.3 The first attempt at producing a uniform law for the international sale of goods was made by the International Institute for the Unification of Private Law (“UNIDROIT”). This process was interrupted by World War II, but resumed thereafter and resulted in the adoption of two conventions at The Hague in 1964<sup>6</sup>, containing the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods (collectively “1964 Uniform Laws”)<sup>7</sup>. Only 28

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1 United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 Preamble.

2 CISG Eschatocol.

3 Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck 2018) 5, para. 9.

4 United Nations Commission on International Trade Law (UNCITRAL), “Status: United Nations on Contracts for the International Sale of Goods” (2018), available at [https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status).

5 Kröll, Mistelis and Perales Viscasillas (n 3) 2, paras. 3-4.

6 Convention Relating to a Uniform Law on the International Sale of Goods (adopted 1 July 1964, entered into force 18 August 1972) 834 UNTS 107; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (adopted 1 July 1964, entered into force 23 August 1972) 834 UNTS 169.

7 Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016) 1.

states attended the Conference, of which 19 were from Western Europe, three from Eastern Europe (excluding the USSR), and one each from Latin America, Asia and Africa/Middle East. The two conventions came into force eight years later, upon ratification by five states<sup>8</sup>.

1.4 The 1964 Uniform Laws were not a success; they were only implemented by nine states, with no developing nations among them<sup>9</sup>. The main criticism was that their provisions primarily reflected the legal traditions and economic realities of continental Western European countries, which had most actively contributed to their preparation<sup>10</sup>. In the words of John Honnold, the former Secretary of the United Nations Commission on International Trade Law (“UNCITRAL”):

“The basic difficulty stemmed from inadequate participation by representatives of different legal backgrounds in the preparation of the 1964 Conventions; despite efforts by UNIDROIT to encourage wider participation these Conventions were essentially the product of the legal scholarship of Western Europe.”<sup>11</sup>

1.5 In light of this criticism, one of the first tasks undertaken by UNCITRAL, upon its establishment in 1966, was to decide whether to promote acceptance of the 1964 Uniform Laws or to prepare a new text, taking into account the views of member states on the content of the 1964 Uniform Laws and whether they intended to adhere to those provisions. It decided on the latter course. Deliberate efforts were made to achieve a balance of representation from different regions of the world in the composition of UNCITRAL and the Working Groups<sup>12</sup>. UNCITRAL initially worked separately on the issues of formation of contract and the rights and obligations of parties<sup>13</sup>, making such modifications to the 1964 Uniform Laws as would render them capable of wider acceptance by countries of different legal, social and economic systems<sup>14</sup>. The two draft texts were then combined into a single Draft Convention (the “New York Draft”), which was approved on 11 April 1980<sup>15</sup>.

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8 Sub-Committee on Commercial Law of the Law Reform Committee of the Singapore Academy of Law, “The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980): Should Singapore ratify?” AG/769/74 Pt 1 Vol 1, 1994, para. 20.

9 Namely Belgium, Gambia, Germany, Israel, Italy, Luxembourg, the Netherlands, San Marino and Great Britain (albeit with a reservation that the parties must expressly opt in, which severely restricted the field of application of the Uniform Laws): see Schwenger (n 7) 1 fn 6.

10 Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, para. 3.

11 John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry M Flechtner ed, 4th edn, Kluwer 2009) 9.

12 Schwenger (n 7) 2.

13 Kröll, Mistelis and Perales Viscasillas (n 3) 4-5, para. 8.

14 UNCITRAL Secretariat (n 10) para. 3.

15 Schwenger (n 7) 2.

## Status of the CISG

1.6 As of 1 February 2020, there are 93 parties to the CISG<sup>16</sup>, including six of the top 10 trading partners of Hong Kong by total volume of trade, namely Mainland China, the USA, Japan, Singapore, South Korea and Vietnam<sup>17</sup>. 24 of the 27 member states of the European Union have adopted the CISG, the exceptions being Ireland, Malta and Portugal<sup>18</sup>. Of the G20 nations, only the said three member states of the European Union above, India, Indonesia, Saudi Arabia, South Africa and the United Kingdom are not parties to the CISG<sup>19</sup>. Of the 21 members of the Asia-Pacific Economic Cooperation (APEC), 13 have adopted the CISG<sup>20</sup>.

1.7 Major trading nations that have not ratified the CISG include the United Kingdom, India and South Africa. Of these countries, only India is among the top 10 trading partners of Hong Kong<sup>21</sup>.

## Structure of the CISG

1.8 The CISG consists of 101 articles, divided into four Parts.

1.9 Part I (Articles 1-13) deals with the general rules of the CISG. Articles 1-5 concern the scope of application of the CISG, the definition of “sales” and the exclusion of certain types of sales from the scope of the CISG. Article 7 stipulates general interpretative principles for the provisions of the CISG, and Article 8 sets out principles for interpreting the statements and conduct of parties to the contract. Article 11 provides that there is no requirement of form for contracts of sale<sup>22</sup>.

1.10 Part II (Articles 14-24) deals with formation of contract. It contains provisions regarding offer, revocation, acceptance and withdrawal<sup>23</sup>.

1.11 Part III (Articles 25-88) contains provisions regarding the obligations of the buyer and seller in international sale of goods contracts, and remedies in case of breach. It is further divided into five Chapters. Chapter I

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16 United Nations Commission on International Trade Law (UNCITRAL) (n 4).

17 Trade and Industry Department, “Hong Kong’s Principal Trading Partners in 2018”, available at [http://www.tid.gov.hk/english/trade\\_relations/mainland/trade.html](http://www.tid.gov.hk/english/trade_relations/mainland/trade.html). Hong Kong’s third largest trading partner, Taiwan, currently cannot become a party to treaties deposited with the UN Secretary General.

18 European Union, “European Union: Countries”, available at [https://europa.eu/european-union/about-eu/countries\\_en](https://europa.eu/european-union/about-eu/countries_en).

19 G20, “G20 Participants”, available at <http://www.g20.org/en/g20/g20-participants>.

20 Namely China, Australia, Canada, Japan, South Korea, New Zealand, Singapore, the US, Mexico, Chile, Peru, Russia and Vietnam: see Asia-Pacific Economic Cooperation, “Member Economies”, available at <http://www.apec.org/About-Us/About-APEC/Member-Economies>.

21 India is the 7th largest trading partner of Hong Kong by value of total trade, and the United Kingdom is 12th: see Trade and Industry Department (n 17).

22 Kröll, Mistelis and Perales Viscasillas (n 3) 6, para. 14.

23 *Ibid* 6, para. 15.

covers general provisions, in particular the definition of “fundamental breach” (Article 25), notices and communications (Articles 26-27), specific performance (Article 28) and contract modification (Article 29). Chapter II deals with obligations of the seller and remedies for breach by the seller. Chapter III deals with obligations of the buyer and remedies for breach by the buyer. Chapter IV concerns passing of risk in general as well as in specific situations, such as contracts involving the carriage of goods and goods sold in transit. Chapter V covers provisions common to the obligations of seller and buyer, such as instalment contracts, anticipatory breach, damages, interest, exemption from liability to pay damages for breach due to impediment beyond the breaching party’s control, effects of avoidance (i.e. termination) of contract and preservation of goods<sup>24</sup>.

1.12 Part IV (Articles 89-101) contains the final provisions, which include the rules of ratification and entry into force, as well as reservations<sup>25</sup>.

## **Salient Features of the CISG**

### ***Scope of the CISG***

1.13 In terms of territorial scope, the CISG only covers contracts where the places of business of the parties are located in different states, and either both states are Contracting States, or the rules of private international law lead to the application of the law of a Contracting State.

1.14 The first requirement is that the places of business of the parties to the contract be in different states at the time of the conclusion of the contract (Article 1(1))<sup>26</sup>. The term “place of business” is not defined in the CISG, but Article 1(3) makes clear that neither the nationality nor the civil or commercial character of the parties or of the contract are relevant.

1.15 The general view is that a place of business exists if a party uses it openly to participate in trade and if it displays a certain degree of duration, stability and independence<sup>27</sup>. For a company, the place of its administrative centre will certainly be a place of business; but a branch office may also be sufficient, provided the aforementioned criteria are satisfied<sup>28</sup>. On the other hand, places of temporary sojourn, such as conference centres of exhibitions or hotels, or rented offices at exhibitions, cannot be considered “places of business” under the CISG<sup>29</sup>.

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24 *Ibid* 6-7, para. 16.

25 *Ibid* 7, para. 17.

26 See Schwenger (n 7) 28, para. 3; Rechtbank van Koophandel Hasselt, 20 September 2005, CISG-online 1496.

27 See Oberster Gerichtshof, 10 November 1994, CISG-online 117; Oberlandesgericht Köln, 13 November 2000, CISG-online 657; Tribunale di Padova, 25 February 2004, CISG-online 819.

28 Schwenger (n 7) 36 para. 23.

29 Franco Ferrari, ‘Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing’ (1995-1996) 15 J L & Com 1, section II.4.

1.16 Where a party such as a private individual does not have a place of business, Article 1(1) is taken to refer to his habitual residence (Article 10(b)).

1.17 Where a party has more than one place of business, Article 10(a) provides that the relevant place of business is that having the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties before or at the conclusion of the contract. This means that the place of business that is responsible for the conclusion and performance of the contract will be decisive<sup>30</sup>. Where different places of business are responsible for conclusion and performance, the majority opinion is that the place of business responsible for conclusion of the contract should be accorded greater weight, although there are alternative views favouring the place of business responsible for performance, or the place of business with the most power to exert influence over the contractual relationship<sup>31</sup>.

1.18 **Example:** A seller in France entered into a sale of goods contract with a buyer with places of business in both the US and Belgium. The invoice was sent to the buyer's Belgian place of business, and it was written in Dutch (a language known only at the buyer's Belgian offices). Therefore, the Belgian district court found that the Belgian place of business had the closest relationship with the contract and its performance, under Article 10(a). Since Belgium is a party to the CISG, the CISG was found to be applicable. The court also noted that even if the buyer's place of business were in the US, the CISG would still apply, because the US is party to the CISG<sup>32</sup>.

1.19 The first requirement is subject to a qualification: if the fact that the places of business are in different states is not apparent (from the contract, dealings between or information disclosed by the parties) before or at the time of contracting, the contract falls outside the scope of the CISG (Article 1(2)).

1.20 Where agents are used, the view adopted by most commentators is that the relevant place of business is that of the party bound to the contract, which depends on the domestic law of agency<sup>33</sup>. Taking Hong Kong law as an example, where an agent makes a contract on behalf of a disclosed principal, in the absence of contrary indication, only the principal is bound by the contract, so only the principal's place of business is decisive<sup>34</sup>. Conversely, where an agent makes a contract on behalf of an undisclosed

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30 *Asante Technologies, Inc v PMC-Sierra Inc* 164 F Supp 2d 1142 (ND Cal 2001); Oberlandesgericht Stuttgart, 28 February 2000, CISG-online 583.

31 Schwenger (n 7) 200, para. 6.

32 Rechtbank van Koophandel Hasselt, 2 June 1999, CISG-online 762.

33 Schwenger (n 7) 38, para. 27. See in particular fn 97.

34 *Dragages Et Travaux Publics v Gladhover Ltd* [1988] 1 HKLR 298, 303. Ultimately, however, the question of whether the agent has incurred personal liability on the contract depends on the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances, including any binding custom – see Peter G Watts (ed), *Bowstead and Reynolds on Agency* (1st supp, 21st edn, Sweet & Maxwell 2018) para. 9-005; *Halsbury's Laws of Hong Kong*, vol 15 (Agency) para. 15.075.

principal, principal and agent are both bound<sup>35</sup>. Accordingly, they should be regarded as one party with two places of business – that of the principal and that of the agent. However, if the agent’s place of business is in the same state as that of the other contracting party, the contract will typically fall outside the scope of the CISG even if the undisclosed principal’s place of business is in a different state. This is because the internationality of the contract will not be apparent, so Article 1(2) applies.

1.21 **Example:** A buyer based in France sent a purchase order to an individual in France, who was the agent of a seller based in Germany. The order confirmations, invoices and deliveries of goods were all sent or made from the seller’s place of business in Germany. On this basis, the French appellate court held that even if the seller had a place of business in France, the place of business which had the closest relationship to the contract and its performance was the German one, under Article 10(a). Accordingly, the requirement of internationality in Article 1(1) was satisfied<sup>36</sup>.

1.22 Second, the states in which the parties’ places of business are located must both be Contracting States at the time the contract was concluded (Articles 1(1)(a), 100(2)). Alternatively, if the rules of private international law lead to the application of the law of a Contracting State (Article 1(1)(b)), the contract falls within the territorial scope of the CISG even if neither or only one of the parties has its place of business in a Contracting State. However, Article 1(1)(b) provision is subject to the reservation in Article 95.

1.23 Under Article 1(1)(b), the relevant question is whether the conflict of laws rules of the forum state lead to the application of the law of a Contracting State. For this purpose, it is irrelevant whether the applicability of the law of a Contracting State is as a result of a choice of law clause, or an objective test<sup>37</sup>. However, the doctrine of *renvoi* raises a potential complication. *Renvoi* refers to a situation where the court of the forum state applies the law of a Contracting State, but the conflict of laws rules of that Contracting State refer the issue back to the law of the forum state or to the law of a third state<sup>38</sup>. On one view, *renvoi* should not be followed in the CISG context, because the conflict of laws rules of the Contracting State should be regarded as having been superseded by Article 1(1)(b)<sup>39</sup>. Thus, the CISG should simply be applied as part of the substantive law of the Contracting State.

1.24 **Example:** a United Kingdom-based seller and a Germany-based buyer enter into a contract for the sale of goods. The parties choose

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35 *Siu Yin-Kwan and Anor v Eastern Insurance Company Limited* [1994] 1 HKLR 77, 83.

36 Cour d’appel de Colmar, 24 October 2000, CLOUT case No. 400.

37 Jacob Ziegel, ‘The Scope of the Convention: Reaching Out to Article One and Beyond’ (2005-2006) 25 J L & Com 59, 64; Bundesgerichtshof, 11 May 2010, CISG-online 2125.

38 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, 124; see also Lord Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins: The Conflict of Laws* (15th edn, Sweet & Maxwell 2018) 4-004.

39 Schwenzler (n 7) 40-41, para. 34.

German law as the governing law of the contract. The CISG will not apply by virtue of Article 1(1)(a), but will apply under Article 1(1)(b).

1.25 As regards the subject matter scope of the CISG, there must be a contract for the sale of goods. It is irrelevant whether the contract is of a civil or commercial nature (Article 1(3)).

1.26 Although the term “contract of sale” is not defined in the CISG, contracts of sale generally refer to reciprocal contracts directed at the exchange of goods against a ‘price’<sup>40</sup>. The general obligations of “contracts of sale” envisaged in the CISG include the delivery of goods, documents and transfer of property on the side of the seller (Article 30), and the payment of purchase price and taking delivery on the side of the buyer (Article 53).

1.27 The CISG expressly covers contracts involving the carriage of goods (Articles 31(a), 67), sales by sample or model (Article 35(2)(c)) or in accordance with the buyer’s specifications (Article 65), and instalment contracts (Article 73). Certain contracts for goods to be manufactured and mixed contracts are also covered (Article 3). On the other hand, contracts of sale by auction, and on execution or otherwise by authority of law, are expressly excluded (Articles 2(b) and 2(c)).

1.28 The CISG has been applied to sale of goods contracts which contain title retention clauses<sup>41</sup>. However, the proprietary aspects of retention of title are excluded from the scope of the CISG under Article 4(b), which stipulates that the CISG does not regulate the effect which the contract may have on the property in the goods sold. There is good reason for this, because the retention of title clause in effect performs a security function, which the CISG is ill-suited to regulating. For example, under the CISG, a seller can only repossess the goods by avoiding the contract for fundamental breach, in which case the buyer is no longer liable for the balance of the price. Further, once the contract has been avoided, it appears that the buyer has no right to redeem the goods, regardless of how much of the price has been paid. Such consequences are inconsistent with the security function of the title retention clause<sup>42</sup>.

1.29 There is some uncertainty as to whether sales contracts with special financing agreements, such as operating and finance leases, hire purchase agreements and sale and leaseback transactions, fall within the CISG’s scope. Generally speaking, these types of sales contracts will not be subject to the CISG<sup>43</sup>. However, the answer may vary from case to case, depending on whether the “preponderant part” (Article 3(2)) of the obligations

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40 *Ibid* 30, para. 8. Although nothing in the CISG stipulates that the price must be in money terms, it is widely agreed that the CISG does not apply to barter contracts: Kröll, Mistelis and Perales Viscasillas (n 3) 28, para. 25; Schwenger (n 7) 31-32, para. 11.

41 *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* [1995] 17 ASCR 153 (FCA).

42 Jacob Ziegel, “Comment on *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd*” (1998) Pace Law School, available at <http://www.cisg.law.pace.edu/cisg/biblio/4ziegel.html>.

43 Kröll, Mistelis and Perales Viscasillas (n 3) 31, para. 35.

agreed by the parties consist in the financing and use of the goods, rather than their purchase<sup>44</sup>. Where the transaction consists of legally distinct parts, the CISG may apply to the part of the transaction, for example the sale aspect of a sale and leaseback transaction<sup>45</sup>.

1.30 “Goods”: the term “goods” must be interpreted autonomously in accordance with Article 7(1) (see paragraph 1.48 *et seq.* below), i.e. without reference to domestic law. The CISG does not define the term specifically, but excludes certain items in Article 2<sup>46</sup>.

1.31 According to case law, “goods” are typically items that are “moveable and tangible” at the time of delivery, regardless of whether they are solid<sup>47</sup>, used or new<sup>48</sup>, or inanimate or alive<sup>49</sup>. Thus, livestock, human organs, artificial limbs, cultural items and pharmaceuticals would all be included<sup>50</sup>. The sale of an entire production plant has been held to constitute “goods”<sup>51</sup>. It is sufficient that the goods become moveable as a result of the sale (e.g. minerals or growing crops), or are moveable at the time of delivery even if intended by the buyer to be subsequently attached to real estate<sup>52</sup>.

1.32 Intangibles, such as intellectual property, assigned debts, company shares<sup>53</sup> and market research studies<sup>54</sup>, do not fall within the concept of “goods”.

1.33 The main area of controversy is whether software qualifies as “goods”. First, some courts have held that only standard software can constitute “goods”<sup>55</sup>; whereas others have found that tailor-made software can also fall within “goods”<sup>56</sup>, by virtue of Article 3(1). Second, there is a question as to whether software can be “goods’ if it is not delivered in a tangible form,

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44 Schwenzer (n 7) 32, paras. 12-13.

45 *Ibid* para. 13.

46 Namely goods bought for personal, family or household use where such use is known to seller; goods sold by auction; goods sold by authority of law; stocks, shares, investment securities, negotiable instruments or money; ships, vessels, hovercraft or aircraft; and electricity.

47 Oberster Gerichtshof, 6 February 1996, CISG-online 224 (propane gas).

48 Oberlandesgericht Köln, 21 May 1996, CISG-online 254 (used car).

49 Arrondissementsrechtbank Arnhem, 30 December 1993, CISG-online 104 (live lambs); Oberlandesgericht Jena, 26 May 1998, CISG-online 513 (live fish); Cour d'appel de Paris, 14 January 1998, CISG-online 347 (circus elephants); Landgericht Flensburg, 19 January 2001, CISG-online 619 (live sheep).

50 Schwenzer (n 7) 33-34, para. 16.

51 Bundesgericht, 16 January 2012, CISG-online 2371, IHR 2014, 99 (sale of a spinning plant from Switzerland to Indonesia).

52 ICC International Court of Arbitration 7153/1992, CISG-online 35, JDI 1992, 1005, 1006 (materials destined for the construction of a hotel).

53 Arbitral Award, Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 20 December 1993, CISG-online 94 (shares of stock).

54 Oberlandesgericht Köln, 26 August 1994, CISG-online 132 (market study).

55 Landgericht München I, 8 February 1995, CISG-online 203 (standard software); Oberster Gerichtshof, 21 June 2005, CISG-online 1043 (standard software).

56 Oberlandesgericht Koblenz, 17 September 1993, CISG-online 91 (computer chip); Rechtsbank Arnhem, 28 June 2006, CISG-online 1265.

e.g. a CD<sup>57</sup>. The view adopted by a number of commentators, such as Ingeborg Schwenzer and Frank Diederich, is that if the software is permanently transferred to the other party<sup>58</sup>, that should be regarded as a sale of “goods”, regardless of the medium through which the software is delivered<sup>59</sup>. Where the seller is contractually obligated to provide further services, such as instruction and technical support, the contract remains one of sale of goods unless those services form the “preponderant part” of the seller’s obligations (Article 3(2))<sup>60</sup>.

1.34 Documentary sales fall within the scope of the CISG. This is because they are sales for which goods will have to be delivered. Even though the subject matter of the contract is a document of title (such as a bill of lading and warehouse receipt), it represents the goods purchased<sup>61</sup>.

1.35 The sale of a company does not generally constitute sale of “goods”. The sale of shares falls under the express exclusion in Article 2(d). In asset sales, especially where the assets of the company consist only of movables such as machines, rolling stock and raw materials, there may be scope for the CISG to apply. Nevertheless, where the asset sale involves real property, and rights, goodwill or other intangibles (as is commonly the case), the CISG will be excluded<sup>62</sup>.

1.36 **Example:** Boeing (based in the US) and Air China (based in Mainland China) enter into a sale and leaseback transaction for a passenger airplane. This contract is unlikely to be governed by the CISG for two possible reasons: first, aircraft are excluded under Article 2(e), and second, it is unclear whether sale and leaseback transactions constitute “contracts of sale”.

1.37 In relation to excluded matters, Article 4 provides that except as otherwise expressly provided in the CISG, it is not concerned with (a) the validity of the contract or any of its provisions or of any usage; and (b) the effect which the contract may have on the property in the goods sold.

1.38 In Article 4(a), the term “validity” must be understood autonomously by reference to the international character of the CISG (Article 7(1)), and not by reference to domestic law (see paragraph 1.48 *et seq.* below). Validity encompasses vitiating factors that render a contract void or voidable, such as misrepresentation, fraud, duress, undue influence, unconscionability and incapacity<sup>63</sup>. It also includes the validity of standard

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57 Past cases have generally involved the transmission of software in a tangible form, for example on a computer chip or disc.

58 Except for the intellectual property rights over it, and subject to restrictions on use by third parties.

59 Schwenzer (n 7) 34-35, para. 18; Frank Diederich, ‘The CISG and Computer Software Revisited’ (2002) 6 *Vindobona Journal of International Commercial Law and Arbitration*, Supplement 55, 63-64. c.f. Ziegel (n 37) 61.

60 Schwenzer (n 7) 34-35, para. 18.

61 *Ibid* 35, para. 20; Kröll, Mistelis and Perales Viscasillas (n 3) 33, para. 41.

62 Schwenzer (n 7) 35-36, para. 21.

63 Kröll, Mistelis and Perales Viscasillas (n 3) 70, para. 16.

terms, exclusion or limitation clauses and penalty clauses or agreed remedies<sup>64</sup>.

1.39 However, where the CISG “otherwise expressly provide[s]” for an issue of validity, the domestic law is displaced. This proviso should apply if the provisions and general principles of the CISG address the issue and provide a solution on the same operative facts as domestic law<sup>65</sup>. One example is issues of formal validity. Article 11 states that there is no requirement as to the form of the contract of sale, unless a Contracting State where either party has its place of business requires such contracts to be in writing under its domestic legislation and makes a reservation under Article 96 (Article 12). In the absence of such reservation, any domestic rules as to formal validity of contracts are displaced if the CISG applies.

1.40 The position in relation to mistake is more complicated. Generally mistake is a matter of validity and is therefore excluded. Nevertheless, certain provisions of the CISG contain rules that govern issues which would usually be treated as issues of mistake, at least under common law, and potentially other domestic laws. For example, Article 8(2) stipulates that a party’s statements or conduct are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the circumstances. Accordingly, a unilateral mistake as to the terms of the contract that would be apparent to a reasonable person in the position of the other party would operate to invalidate the contract. Under common law, it is unclear if this would suffice. There are suggestions that this would in some jurisdictions, but at least one Commonwealth court has held that the doctrine of mistake applies only when the non-mistaken party had actual knowledge of the other’s mistake<sup>66</sup>. The common law rules regarding unilateral mistake (or the uncertain position thereunder) may therefore be said to be displaceable by Article 8(2). Article 36(1) renders the seller liable for any lack of conformity with the contract which exists at the time when risk passes, even though the lack of conformity becomes apparent only later, which may displace the common law rule as to common mistakes of quality<sup>67</sup>. Article 71, which primarily concerns anticipatory breach, may also displace the common law rules regarding unilateral mistakes as to the other party’s ability to perform and creditworthiness. At common law, such mistakes, being mistakes as to attributes rather than identity, generally cannot render a contract void<sup>68</sup>.

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64 Schwenzer (n 7) 42, paras. 38; 44-45, paras. 43-44.

65 John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (2nd edn, Kluwer 1991) 117, paras. 69; 311-2 paras. 234, 240.

66 *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 para. 53 (Singapore Court of Appeal). See generally Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) para. 3-023.

67 A common mistake as to quality of the subject matter is operative where it is “as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be”: *Bell v Lever Bros* [1932] AC 161 (HL) 218 per Lord Atkin. See, to similar effect, *Bank of China (HK) Ltd v Keen Lloyd Energy Ltd* [2012] unrep. CACV 132/2011, 133/2011, 28.

68 *Lewis v Averay* [1972] 1 QB 198, 209 (CA); *Midland Bank Plc v Brown Shipley & Co Ltd* [1991] 1 Lloyd’s Rep 576, 585 (QB) (mistake as to creditworthiness will not render contract void). However, the distinction between identity and attributes has been criticised, for example

1.41 Where the CISG governs the issue of “mistake”, there should be no concurrent recourse to domestic remedies for invalidity. For example, if a buyer loses the right to rely on non-conformity because it fails to give notice under Article 39, it should not be allowed to fall back on domestic remedies for mistake, since the CISG provides a comprehensive system of remedies for non-conformity of goods, including in relation to mistake of quality<sup>69</sup>.

1.42 The doctrine of frustration may also be displaced by the Article 79 of the CISG, which exempts a party from liability where its failure to perform was due to an impediment beyond its control, and which it could not reasonably be expected to have taken into account at the time of contracting.

1.43 Other important matters that are not governed by the CISG include jurisdictional issues and limitation periods (except insofar as Article 39(2) requires the buyer to give notice of non-conformity within two years of delivery of the goods, in order to utilise the remedies in the CISG).

### ***Interpretation of the CISG***

1.44 Articles 7 to 9 are the main provisions on interpretation in the CISG. Taken together, they establish the following hierarchy of rules (in descending order of primacy)<sup>70</sup>:

- (1) Articles 12 and 96 of the CISG, which are mandatory by virtue of Article 6;
- (2) Agreement of the parties, including established practices and agreed usages (Articles 8(3) and 9(1)), and agreed derogations or variations of the CISG provisions (Article 6);
- (3) International trade usages (Article 9(2));
- (4) Rules of the CISG;
- (5) General principles on which the CISG is based (Article 7(2)); and
- (6) Applicable law by virtue of the rules of private international law (Article 7(2)).

1.45 Article 7 is the primary provision governing the interpretation of the CISG. It contains general interpretative principles (Article 7(1)) as well as a gap-filling provision (Article 7(2)).

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by the minority in *Shogun Finance Ltd v Hudson* [2003] UKHL 62, 5 (per Lord Nicholls), 60 (per Lord Millett). See also *Chitty* (n 66) 3-045.

69 Kröll, Mistelis and Perales Viscasillas (n 3) 73, para. 22. See also Rechtbank van Koophandel, Hasselt, 19 April 2006, CISG-online 1389; Oberster Gerichtshof, 13 April 2000, CISG-online 576; Landgericht Aachen, 14 May 1993, CISG-online 86.

70 Kröll, Mistelis and Perales Viscasillas (n 3) 163-164, para. 4; James E Bailey, ‘Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales’ (1999) 32 *Cornell Int’l L J* 273, 286-287. However, an alternative view (taken in China, for example) is that non-written usages may apply irrespective of the imperative provisions in Articles 12 and 96: see Kröll, Mistelis and Perales Viscasillas (n 3) 163 fn 5.

1.46 The general interpretive method applicable to the CISG is interpretation based on the wording and context<sup>71</sup>. Where the text is not clear, it is necessary to have regard to the *travaux préparatoires*, including the Yearbooks, Official Records of the Diplomatic Conference in Vienna, and the Commentary prepared by the UNCITRAL Secretariat<sup>72</sup>. While case law from national courts applying the CISG is only of persuasive authority<sup>73</sup>, a number of tools have been developed to ensure that such decisions are widely accessible. The Case Law ON UNCITRAL Texts (“CLOUT”) system is a collection of court decisions and arbitral awards relating to the interpretation of UNCITRAL Conventions, including the CISG. For each entry, the original decision is available for reference, and an abstract is available in all the working languages of the UN<sup>74</sup>. The UNCITRAL Digest on the United Nations Convention on Contracts for the International Sale of Goods 1980 compiles and presents cases relevant to each Article of the CISG. Other unofficial case databases have also been established, most notably CISG-online.ch and the CISG Database of the Institute of International Commercial Law of the Pace Law School<sup>75</sup>.

1.47 This mode of interpretation is not foreign to Hong Kong courts. In *Attorney General v Yau Kwok-lam, Johnny*<sup>76</sup>, the Court of Appeal, interpreting the implementing legislation for the Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted a purposive construction of the convention looked at as a whole, unconstrained by technical rules of domestic law or domestic legal precedent, but instead on broad principles of general acceptance<sup>77</sup>.

1.48 Article 7(1) requires regard to be had to the international character of the CISG, the need to promote uniformity in its application, and the observance of good faith in international trade.

1.49 The fact that the CISG has an international character means that it must be interpreted autonomously. In other words, the meaning of the terms used by the CISG must be ascertained independently from any particular domestic law<sup>78</sup>, and the interpretive solutions must be compatible with different legal systems and traditions. As noted by a Dutch court<sup>79</sup>:

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71 Schwenzer (n 7) 129, para. 21.

72 Kröll, Mistelis and Perales Viscasillas (n 3) 128, para. 39.

73 *TeeVee Toons, Inc & Steven Gottlieb, Inc v Gerhard Schubert GmbH* 2006 WL2463537 (SDNY 2006).

74 United Nations General Assembly, “Case Law on UNCITRAL Texts (CLOUT): User Guide”, UN Doc A/CN.9/SER.C/GUIDE/1/Rev.3, para. 5.

75 Institute of International Commercial Law, Pace Law School, “CISG Database”, available at <http://iicl.law.pace.edu/cisg/cisg>.

76 *Attorney General v Yau Kwok-lam, Johnny* [1988] 2 HKLR 394.

77 *Ibid* 404-405 per Hunter JA, citing *Buchanan & Co v Babco Ltd* [1978] AC 141 (HL) and *Fothergill v Monarch Airlines* [1981] AC 251 (HL).

78 Bundesgerichtshof, 2 May 2005, CISG-online 999.

79 Gerechthof’s-Hertogenbosch, 16 October 2002, CISG-online 816, IHR 2004, 194.

“The international character of the CISG and the necessity of uniformity in its application means that it is of great importance... how the question is answered in the laws of the countries that are party to the CISG and what can be regarded as common principles of the judicial systems.”

1.50 Even where it can be shown that a particular term of the CISG was based on domestic law (for example, Article 74, which is roughly based on the remoteness test in *Hadley v Baxendale*<sup>80</sup>), it should be interpreted independently from that domestic law. One example of this approach is that of the US Federal District Court in *Calzaturificio Claudia Snc v Olivieri Footwear Ltd*<sup>81</sup>, which recognised similarities between the CISG and the Uniform Commercial Code (UCC), but declined to apply UCC case law to interpret the CISG.

1.51 However, in practice courts are often tempted to fall back on the meaning of legal terms in their domestic law<sup>82</sup>. One notable example of this tendency is in relation to Article 39, which requires a buyer to give notice to a non-conforming seller within a “reasonable time” after discovery, in order to take advantage of its rights under Section III. German<sup>83</sup> and Austrian<sup>84</sup> courts have (drawing on their own national traditions) interpreted “reasonable time” to be a few short weeks, even though the CISG itself sets the ceiling for reasonable time at two years (Article 39(2)). In effect, these courts have deprived the buyer of substantial rights against the seller, without any investigation of whether the buyer’s delay in giving notice is in any way prejudicial to the seller or compromises the seller’s right to cure a defective delivery<sup>85</sup>. In contrast, other jurisdictions, such as the US<sup>86</sup> and Spain<sup>87</sup>, have

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80 *Hadley v Baxendale* [1854] 9 Ex 341. See Schwenzer (n 7) 122 para. 9 fn 24. Note, however, that the UK is not a party to the CISG.

81 *Calzaturificio Claudia Snc v Olivieri Footwear Ltd* 1998 WL 164824 (SDNY 1998). See also *Orbisphere Corp v United States* 726 F Supp 1344 (Ct Intl Trade 1989); *Delchi Carrier SpA v Rotorex Corp* 71 F 3d 1024 (2d Cir 1995).

82 See, for example, Oberlandesgericht Oldenburg, 5 December 2000, CISG-online 618 (reference to German law as excluding certain pleadings if contradicting good faith principles); *Chicago Prime Packers, Inc v Northam Food Trading Co* 408 F 3d 894, 898 (7th Cir 2003) (relying on case law interpreting analogous provisions of the UCC); *Hilaturas Miel, SL v Republic of Iraq* 573 F Supp 2d 781 (SDNY 2008) (relying on section 2-614 UCC as useful guide in addressing question of substitute performance under CISG).

83 Landgericht Stuttgart, 31 August 1989, CISG-online 11, RIW 1989, 984 (16 days too long for non-conforming shoes); Oberlandesgericht Saarbrücken, 13 January 1993, CISG-online 83 (2.5 months too long for non-conforming doors); Landgericht Tübingen, 18 June 2003, CISG-online 784, IHR 2003, 236 (9 days too long for non-conforming computers).

84 A number of decisions of the Austrian Supreme Court have adopted a notice period of 14 days: e.g. Oberster Gerichtshof, 15 October 1998, CISG-online 380; Oberster Gerichtshof, 2 April 2009, CISG-online 1889, IHR 2009, 246.

85 Michael Bridge, ‘A Law for International Sales’ (2007) 37 HKLJ 17, 24.

86 *Sky Cast, Inc v Global Direct Distribution, LLC* US Dist LEXIS 21121 (ED Ky 2008) (11 months considered timely for late delivery of concrete light poles); *Shuttle Packaging Systems, LLC v Jacob Tsonakis, INA SA and INA Plastics Corp* WL 34046276 (WD Mich 2001) (with complicated machines, notice cannot be expected within a few weeks).

87 Audiencia Provincial de Asturias, 29 September 2010, CISG-online 2313 (4 months considered timely for non-conforming anchovies in brine; Audiencia Provincial de Navarra, 30 July 2010, CISG-online 2315 (2 months considered timely for hidden defects that became apparent only on processing of materials).

allowed a much longer notice period. It is the view of Michael Bridge, who is a leading academic in this field, that the German/Austrian approach is inconsistent with the interpretive principles espoused in Article 7, and should not be followed<sup>88</sup>.

1.52 The CISG is intended to be equally authentic in its six official language versions (Arabic, Chinese, English, French, Spanish and Russian)<sup>89</sup>. This may aid in the interpretation of the CISG. For example, in considering the meaning of “place of business”, common law courts have required a degree of permanency. The existence of such requirement is reinforced by the French and Spanish versions, which use the terms “*établissement*” and “*establecimiento*” respectively. Similarly, a question might arise as to whether a rowing boat falls within the meaning of “ships” and “vessels”, which are excluded from the CISG under Article 2(e)). While the answer may not be clear from the English text, the French version uses the word “*bateau*” which would probably encompass a rowing boat, and the drafting history supports this wider reading<sup>90</sup>.

1.53 However, there are certain inconsistencies between the different language versions<sup>91</sup>, such as the difference in Article 3(1) between “substantial” (English), “*essentielle*” (French) and “*wesentlich*” (German), the latter two being more similar<sup>92</sup>; and in Article 3(2) between the plural “obligations” (English) and the singular “*obligation*” (French). Where this problem arises, Article 33(4) of the Vienna Convention on the Law of Treaties (“VCLT”) stipulates that the meaning which best reconciles the texts, having regard to the object and purpose of the CISG, shall be adopted. On one view<sup>93</sup>, the English text may often carry more weight, because both the negotiations and drafting were done in English.

1.54 Article 7(1) also raises the prospect that parties to international sales contracts must deal with each other in “good faith”. This typically means that parties must act fairly, openly and honestly in their course of dealing. On the one hand, the text of Article 7(1) suggests that “good faith” is only relevant to the interpretation of the CISG, and not in determining how the parties should conduct their contractual relationship. For example, a buyer need not explicitly declare a contract avoided if the seller has refused to perform its obligations, and to insist on an explicit declaration in such circumstance would violate the principle of good faith, even though the CISG expressly requires a declaration of avoidance in Article 39<sup>94</sup>. On the other hand, judicial decisions

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88 Bridge (n 85) 24.

89 CISG Eschatocol.

90 Singapore Academy of Law (n 8) Appendix C2, 19-20.

91 Schwenzler (n 7) 63, paras. 5; 66-67, para. 11.

92 Claire M Germain, ‘CISG Translation Issues: Reducing Legal Babelism’ (2012) UF Law Scholarship Repository, 6, available at <http://scholarship.law.ufl.edu/facultypub/329>.

93 Schwenzler (n 7) 129, para. 21; c.f. Kröll, Mistelis and Perales Viscasillas (n 3) 127-128, para. 38.

94 UNCITRAL Secretariat, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016 Edition* (UNCITRAL Secretariat 2016) 43, para. 13, citing (at fn 43) Oberlandesgericht Hamburg, 28 February 1997, CLOUT case No. 277.

and commentary from civil law countries such as Germany<sup>95</sup> and Spain<sup>96</sup> have treated Article 7(1) as directly applying a good faith requirement to the contractual relationship between the parties, consistently with the recognition of good faith as a principle of contract law in civilian legal systems. Schwenger<sup>97</sup> and Bridge<sup>98</sup> prefer the former view, because it matches the wording of Article 7(1) more closely<sup>99</sup>.

1.55 Article 7(2) is a gap-filling provision. Where questions concerning matters governed by the CISG<sup>100</sup> are not expressly settled in it, they must be settled in conformity with the general principles on which the CISG is based.

1.56 Such general principles include freedom of contract (Article 6); protection of a party's reasonable reliance (Articles 16(2)(b), 29(2)); the requirement to give notice in order to avail oneself of one's rights under the CISG (Articles 26, 88(1)-(2)); the principle of equality between the parties (based on the remedies available for each party); the principle that parties should generally be held to their contractual bargain (Articles 25, 49, 64); the compensatory principle (Article 74); and others<sup>101</sup>.

1.57 However, where a question is not expressly settled and there are no applicable general principles, Article 7(2) requires the court to have recourse to the law applicable by virtue of the rules of private international law. This will be the domestic law chosen by the parties, or where no choice is made, the law of the country with which the contract had its closest and most real connection<sup>102</sup>. One example of this is where a seller has an obligation to provide services in a mixed contract. As long as the preponderant part of the obligations is in relation to the sale of goods, the contract is still covered by the CISG. However, if the seller breaches the service obligations, the CISG does not address the consequences or the remedies available. Recourse must be had to domestic law<sup>103</sup>.

1.58 Article 8 concerns the interpretation of the statements and conduct of the parties in relation to the contract, including pre- and post-

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95 Oberlandesgericht Naumburg, 13 February 2013, CISG-online 2455, IHR 2013, 158; Oberlandesgericht Hamburg, 15 July 2010, CISG-online 2448; Oberlandesgericht Brandenburg, 18 November 2008, CISG-online 1734, IHR 2009, 105.

96 Audiencia Provincial de Zaragoza, 31 March 2009, CLOUT case No. 1036.

97 Schwenger (n 7) 126-127, para. 17.

98 Michael Bridge, *The International Sale of Goods* (4th edn, OUP 2017) para. 10.42.

99 In contrast to e.g. Article 1.7 of the 2004 and 2010 UNIDROIT Principles of International Contracts, which explicitly and mandatorily requires parties to "act in accordance with good faith and fair dealing in international trade."

100 This refers to the matters as set out in the first part of Article 4.

101 Schwenger (n 7) 134-137, paras. 31-35.

102 *Bonython v Commonwealth of Australia* [1951] AC 201, 219 (PC).

103 Schwenger (n 7) 138, para. 37.

contractual statements and conduct. It is also generally regarded as applying to the interpretation of the terms of the contract itself<sup>104</sup>.

1.59 Article 8(1) deals with the case where the recipient knew or could not have been unaware of the statement-maker's intent (i.e. subjective intent). The threshold of "could not have been unaware" requires a greater degree of carelessness than "ought to have known", which is used elsewhere in the CISG<sup>105</sup>. If neither of the situations in Article 8(1) applies, Article 8(2) provides that the statement should be interpreted according to the understanding of a reasonable person of the same kind as the recipient in the same circumstances (i.e. objective intent). This is taken to mean a reasonable business person in the same type of business<sup>106</sup>.

1.60 Article 8(3) directs that, in determining the matters in Articles 8(1) and 8(2), the court must consider all relevant circumstances, including the negotiations, any practices as between the parties, usages and subsequent conduct. The breadth of this provision is significant. It essentially displaces the parol evidence rule at common law, because it is a clear direction to the court to admit and consider evidence related to the negotiations that could reveal the parties' true intent<sup>107</sup>. Similarly, Article 11 provides that a contract of sale may be proved by any means, including witnesses. The result of these two provisions is that parties may adduce extrinsic material (i) to explain the content of a written contract, and (ii) to demonstrate the existence of oral agreements beyond the written contract<sup>108</sup>.

1.61 By virtue of Article 8(3), courts have frequently held that parties can be assumed to have agreed to the extension of certain terms from prior contracts to subsequent contracts, based on established practice. These include terms as to notice periods<sup>109</sup>, delivery clauses<sup>110</sup>, maturity<sup>111</sup>, and occasionally even for standard terms as a whole<sup>112</sup>. For the purposes of Article 8(3), a "usage" need not be widely known in international trade, unlike Article 9(2). Local or national usages should therefore suffice<sup>113</sup>.

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104 Handelsgericht des Kantons Aargau, 5 February 2008, CISG-online 1740; Handelsgericht des Kantons Aargau, 26 November 2008, CISG-online 1739; Kröll, Mistelis and Perales Viscasillas (n 3) 147, para. 2; Schwenger (n 7) 145, para. 3.

105 Schwenger (n 7) 152, para. 17.

106 Schiedsgericht der Börse für landwirtschaftliche Produkte in Wien, 10 December 1997, CISG-online 351; Bundesgericht, 4 August 2003, CISG-online 804, note 4.3; Bundesgericht, 5 April 2005, CISG-online 1012, note 3.3.

107 *MCC-Marble Ceramic Center, Inc v Ceramica Nuova D'Agostino SpA* 144 F3d 1384, 1389-1390 (11th Cir 1998).

108 Schwenger (n 7) 159, para. 33.

109 *MCC-Marble* (n 107) 1392.

110 Oberlandesgericht Karlsruhe, 20 November 1992, CISG-online 54.

111 Supreme Court of the Slovak Republic, 30 April 2008, CISG-online 1873.

112 ICC International Court of Arbitration, 23 January 1997, CISG-online 236; Landgericht Coburg, 12 December 2006, CISG-online 1447.

113 Schwenger (n 7) 167, para. 47.

1.62 The powerful effect of Article 8(3) can be seen in the case of *Filanto, SPA v Chilewich International Corp*<sup>114</sup>. There, the US Court of Appeals of the 2<sup>nd</sup> Circuit held that although silence or inactivity did not constitute acceptance (Article 18(1)), the court could consider the previous dealings between the parties in assessing whether it constituted acceptance under Article 8(3). In light of the extensive course of prior dealings between the parties, and the fact that the buyer had already commenced performance, the seller was under a duty to alert the buyer in a timely fashion as to its objections to the terms of the buyer's offer. In failing to respond promptly, the seller was taken to have accepted the offer.

1.63 Article 9 governs the role of usages and practices in interpreting the CISG. Article 9(1) binds the parties to any usage to which they have agreed, and any practices which they have established between themselves. Insofar as agreed usages and practices are already dealt with under Article 8(3), Article 9(1) is somewhat replicative<sup>115</sup>.

1.64 A "practice" is defined as "conduct that occurs with a certain frequency and during a certain period of time set by the parties, which the parties can then assume in good faith will be observed again in a similar instance."<sup>116</sup> Examples of practices include disregard of notice deadlines, allowance of certain cash discounts upon immediate payments, delivery tolerances and others<sup>117</sup>. Courts have considered that an "ongoing business relationship with several sales contracts"<sup>118</sup> is required, and that one<sup>119</sup> or two<sup>120</sup> transactions may be insufficient.

1.65 An agreed "usage" for the purposes of Article 9(1) is a rule which is regularly observed by participants in an industry or marketplace<sup>121</sup> and which the parties have agreed will apply to their own contract. This may be a regional or local usage, a usage from another trade sector, or uniform rules such as the ICC Incoterms<sup>122</sup> or the UCP 600<sup>123</sup>, as long as the parties have agreed to its application<sup>124</sup>.

1.66 On the other hand, Article 9(2) binds the parties to usages of which the parties knew or ought to have known, and which are widely known

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114 *Filanto, SPA v Chilewich International Corp* 984 F2d 58 (2nd Cir 1993).

115 Schwenzer (n 7) 183-184, para. 6.

116 Oberster Gerichtshof, 31 August 2005, CISG-online 1093.

117 *Ibid.*

118 Zivilgericht Basel-Stadt, 3 December 1997, CISG-online 346.

119 *Calzaturificio* (n 81).

120 Zivilgericht Basel-Stadt (n 118).

121 Schwenzer (n 7) 187, para. 12.

122 The International Chamber of Commerce ("ICC") Incoterms® 2010 provide internationally accepted definitions and rules of interpretation for most common commercial terms used in contracts for the sale of goods: see 'Incoterms® Rules' (ICC), available at <https://iccwbo.org/resources-for-business/incoterms-rules/>.

123 The ICC Uniform Customs and Practice for Documentary Credits UCP 600 2007 are a set of rules on the issuance and use of documentary credits: see *ICC Uniform Customs and Practice for Documentary Credits – English Leaflet edition* (ICC 2007).

124 Kröll, Mistelis and Perales Viscasillas (n 3) 167-168, paras. 14-15.

in and regularly observed in international trade, subject to contrary agreement. Thus, Article 9(2) is primarily based on an objective rather than subjective test<sup>125</sup>, and a party that does not know about an international trade usage or is mistaken as to its existence may still be bound if it ought to have known of such usage<sup>126</sup>. In assessing whether a party ought to have known, courts typically take into account the party's residency in an area where the usage is observed, and its regular activity in the relevant usage's sphere of observance (i.e. the geographical area or the industry in which it is used)<sup>127</sup>.

1.67 Article 9(2) states that the trade usage must be widely known in international trade to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. Therefore, there must be no significant group in this particular trade that is unaware of such usage<sup>128</sup>. Although worldwide observance is not required, it must generally be an international usage. Exceptionally, regional or local usages may fall within Article 9(2), if they are regularly observed by businesses which are involved in the sale or purchase of goods with foreign companies, or if there is some other relation between the usage and international trade<sup>129</sup>.

1.68 One example of such usage is the letter of confirmation (which is common in certain European countries and, to some extent, the US). This is a written confirmation sent by one party to another within a reasonable time after a contract is orally concluded or modified, and silence of the addressee will be deemed to mean acceptance<sup>130</sup>.

1.69 There has been some concern as to whether Article 9 deals adequately with standard business terms such as Cost, Insurance and Freight ("CIF") and Free on Board ("FOB"), which are examples of ICC Incoterms. Such terms may certainly fall under Article 9(1) if there is evidence of agreement between the parties, but they may not necessarily qualify as international trade usages under Article 9(2). This is because they may not be sufficiently regularly observed; there are recurring new versions of Incoterms; and there may be regional variations in the understanding of "CIF" or other standard terms<sup>131</sup>. However, in practice this is unlikely to pose a problem, because the use of CIF and FOB terms may well constitute a derogation from the CISG, in accordance with Article 6 and the principle of party autonomy<sup>132</sup>.

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125 *Ibid* 172, para. 25.

126 Schwenzer (n 7) 188, para. 14.

127 Oberster Gerichtshof, 21 March 2000, CISG-online 641.

128 Schwenzer (n 7) 189, para. 17.

129 Oberlandesgericht Graz, 9 November 1995, CISG-online 308.

130 Schwenzer (n 7) 194-195, para. 25.

131 *Ibid* 195-196, para. 27. c.f. *St Paul Guardian Insurance Co v Neuromed Medical System & Support* WL 465312 (SDNY 2002), in which the Federal District Court held that Incoterms were incorporated through Article 9(2), but this decision has been criticised by *inter alia* Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, OUP 2007), para. 11.50; and William P Johnson, 'Analysis of Incoterms as Usage under Article 9 of the CISG' (2013) 35 U Pa J Int'l L 379, 409-411.

132 Alison E Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom' in *Pace International Law Review, Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-2001* (Kluwer

Moreover, as Bridge has noted, “[b]y not descending into the detail of shipping terms which may alter in accordance with evolving commercial usage, the architects of the CISG wisely decided to leave these matters to usage in Article 9 and to external instruments like Incoterms 2010”<sup>133</sup>.

### **Choices of opting out and opting in**

1.70 The CISG applies automatically when its conditions are satisfied<sup>134</sup>. However, under Article 6, the parties may exclude the application of the CISG, or derogate from or vary the effect of any its provisions. This can be in part or in whole. The exception is that the parties cannot derogate from or vary Article 12<sup>135</sup>, 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.

1.71 There are no formal requirements for exclusion, derogation or variation in Article 6. It is sufficient that the parties express their agreement to that effect, howsoever they wish<sup>136</sup>.

1.72 First, parties may opt out of the CISG by inserting a choice of law clause. This can be done by choosing the law of a non-Contracting State, or specifically choosing only the domestic law of a Contracting State<sup>137</sup>. However, a choice of law clause designating the law of a Contracting State without specific reference to the CISG does not exclude it<sup>138</sup>, unless (perhaps) the Contracting State has made a reservation under Article 95 so as to exclude the effect of Article 1(1)(b)<sup>139</sup>. A mere jurisdiction agreement in favour of a non-Contracting State without specific agreement on the applicable substantive law would not normally amount to an exclusion or derogation from the CISG<sup>140</sup>.

1.73 A mere negative choice of law, such as “this contract shall not be governed by German law”, may not necessarily exclude the CISG. In this case, the court must determine the applicable law using its conflict of laws rules. If those rules lead to the application of the law of another Contracting

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2002) section IV(B)(2); UNCITRAL Secretariat (n 10) para. 31. However, this argument is not without controversy: see Bridge (n 85) 37.

133 Bridge (n 98), para. 11.44.

134 Oberster Gerichtshof, 8 November 2005, CISG-online 1156 (“The CISG is applicable when the contract between the parties falls into the material sphere of application of the Convention. Whether it is applicable is to be assessed *ex officio*.”)

135 Parties can, of course, exclude the entirety of the CISG including Article 12.

136 Kröll, Mistelis and Perales Viscasillas (n 3) 104, para. 10.

137 *Ibid* 104-105, para. 12.

138 Bundesgerichtshof, 11 May 2010, CISG-online 2125. See also Schwenzer (n 7) 107 fn 47.

139 There are conflicting decisions on this point in the US: c.f. *Asante Technologies Inc v PMC-Sierra, Inc* 164 F Supp 2d 1142 (ND Cal 2001) (CISG applies) and *Impuls ID Internacional, SL v Psion-Teklogix, Inc* 234 F Supp 2d 1267 (SD Fla 2002) (CISG is excluded). See also Ziegel (n 37) at 66, favouring the latter view.

140 Kröll, Mistelis and Perales Viscasillas (n 3) 104-105, para. 12.

State, the CISG may still be applied, because the parties have indicated no specific discontent with the CISG or intention to exclude it<sup>141</sup>.

1.74 If the choice of law clause only refers selectively to the domestic law of a state (e.g. “this contract shall be governed by English law on contractual remedies”), this will be treated as a modification of the CISG’s provisions<sup>142</sup>.

1.75 Second, parties may opt out of the CISG through contractual drafting. This may be done in three ways. (i) Parties may agree expressly that the CISG is excluded. If no applicable law is chosen in its place, the governing law will be identified by means of the conflict of laws rules of the forum state<sup>143</sup>. (ii) Parties may draft provisions in the contract to modify or replace some or all of the CISG provisions. (iii) Parties may refer to a domestic sales or contract law (e.g. the Sale of Goods Ordinance, Cap. 26 (“SGO”)), or individual provisions thereof, to modify or replace some or all of the CISG provisions. Where parties merely refer to national law rather than a sales or contract law, that may not be sufficient to exclude or derogate from the CISG<sup>144</sup>. Merely referring to the ICC Incoterms is generally not considered sufficient to exclude or derogate from the CISG entirely<sup>145</sup>.

1.76 Parties may also opt in to the CISG if their contract does not otherwise satisfy its requirements (for example, because one of the parties has its place of business in a non-Contracting State). Although the CISG does not explicitly address opting in<sup>146</sup>, there is nothing that prohibits it in principle<sup>147</sup>, and case law confirms the possibility of opting in<sup>148</sup>. Parties may do so by (i) choosing the law of a Contracting State<sup>149</sup> as the applicable law so that Article 1(1)(b) applies, or (ii) expressly agreeing that the CISG shall apply<sup>150</sup>.

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141 Schwenzer (n 7) 111, para. 19.

142 *Ibid* 113, para. 22.

143 Kröll, Mistelis and Perales Viscasillas (n 3) 108-109, para. 22.

144 *Ibid* 109, para. 23.

145 Oberster Gerichtshof, 22 October 2001, CISG-online 614; Hof van Beroep, Antwerpen, 22 January 2007, CISG-online 1586.

146 C.f. Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (adopted 1 July 1964, entered into force 23 August 1972) 834 UNTS 169 art 4(1).

147 UNCITRAL Secretariat (n 94) 34, para. 18.

148 Tribunale di Padova, 11 January 2005, CISG-online 967; Xiamen Intermediate People’s Court, 5 September 1994, CISG-online 464.

149 Except a Contracting State that has made an Article 95 reservation. However, even if the Contracting State has made such reservation, there is some uncertainty as to whether the court of another forum state, applying the law of that Contracting State, would nevertheless be bound by Article 1(1)(b): see para. 1.23 above.

150 Whether parties may choose the CISG not merely as a set of substantive rules, but as the applicable law for the purposes of conflict of laws, is an interesting academic question but one that makes no practical difference: Kröll, Mistelis and Perales Viscasillas (n 3) 110 para. 26.

## Chapter 2

# Interplay between the CISG and the Relevant Law of Hong Kong

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### Introduction

2.1 This Chapter will analyse the interplay between the CISG and Hong Kong law by:

- (1) giving an overview of the relevant Hong Kong law at present;
- (2) highlighting the key similarities and differences between the CISG and the existing Hong Kong law regime; and
- (3) discussing the overall compatibility between the two regimes.

### Brief Overview of the Relevant Hong Kong law

2.2 In order to set the scene for the comparative exercise regarding the similarities and differences between Hong Kong law and the CISG below, a brief overview of the existing Hong Kong law which governs contracts for the international sale of goods has been prepared. With the said purpose in mind, whilst this overview aims to present a relatively complete introduction to the Hong Kong law of international sale, it will focus in greater detail on those areas which will be revisited in the comparative exercise to follow.

2.3 For ease of reference, the topics that will be discussed in the brief overview include:

- (1) When the Hong Kong law of sale applies and whether Hong Kong courts will apply the CISG even under the status quo;
- (2) Formation of a valid sales contract in Hong Kong law (offer and acceptance, consideration and intention to create legal relations);
- (3) General principles on ascertaining the contents of the contract (i.e. interpretation of the contract, implied terms, controls on onerous terms, including liquidated damages clauses);
- (4) Specific contents of a contract for sale of goods (i.e.

arrangements for passing of property, mandatory implied terms under SGO and duties of the buyer and seller respectively);

- (5) Remedies for breach of a sales contract (from the buyer's and seller's perspective respectively); and
- (6) Factors vitiating or terminating a sales contract (mistake, misrepresentation and frustration).

2.4 The brief overview of the relevant Hong Kong law is attached to this Consultation Paper as Annex 2.1. In order to keep the printed version of the Paper to a reasonable length, Annex 2.1 has not been included in the printed version. The full version of the Consultation Paper, including all of its Annexes, is available at: <https://www.doj.gov.hk/eng/public/CISG.html>.

## **Comparison between the CISG and Hong Kong Law**

2.5 This Part will:

- (1) Compare the CISG rules with existing Hong Kong law (as discussed in Annex 2.2 to the Consultation Paper); and
- (2) Identify the key similarities and differences between the two bodies of laws.

2.6 We have approached this comparison exercise on an issue-by-issue basis. The issues we have considered include (in the order as discussed below):

- (1) Rules for application of the body of law (CISG as compared to local Hong Kong law);
- (2) Contract formation;
- (3) Contents of the contract, i.e. incorporation, interpretation and implication of terms, and variation of the contract;
- (4) Seller's obligations and defences to allegations of breach;
- (5) Buyer's obligations;
- (6) Remedies on breach; and
- (7) Passing of risk.

2.7 It will be noted that we have not made any comparative examination of Part IV of the CISG entitled "Final Provisions". These

provisions govern the application of the CISG as an international treaty and have no comparative counterparts in Hong Kong law. Where appropriate (e.g. if the reservations allowed for in Part IV of the CISG have an effect on the substantive comparative exercise), the individual Articles in Part IV will be discussed.

## Summary table of main points of analysis

2.8 By way of executive summary, a table setting out the main points of analysis and our conclusions on each issue is produced below. The detailed analysis is set out at Annex 2.2 to the Consultation Paper.

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
<i>General Applicability<sup>1</sup></i>			
1.	Article 1: Application of CISG, either via consideration of contracting parties' place of business, or application of choice of law rules	Application of local law straightforward if parties validly and expressly choose to do so, but difficult where parties dispute governing law or choose foreign law	Implementing CISG does not necessarily simplify the status quo; certain issues depend on the state and domestic courts
2.	Article 2: CISG excluded from specific types of contracts	No counterpart <sup>2</sup>	Nil <sup>3</sup>

1 For details of the analysis on the "Scope of Application of the CISG", please refer to Section II of Annex 2.2 to the Consultation Paper.

2 "No counterpart" means there is no counterpart in Hong Kong law.

3 "Nil" means that there is no discussion of the relevant CISG Article in Annex 2.2 to the Consultation Paper.

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
3.	Article 3: Provides that contracts for the manufacture/ production of goods (which involve both goods and services) are sales, subject to exceptions	Hong Kong law adopts the “substance of the contract” test to delineate between contract for sale of goods from mixed contracts, or contracts for work and materials	The Hong Kong law test is arguably more vague and difficult to apply than Article 3
4.	Article 4: Provides for general applicability of CISG. In particular, provides that CISG prima facie does not apply to (1) validity of contract, and (2) effect of contract on property	No statutory counterpart; application of Hong Kong law governed by Hong Kong conflict of law rules.	Article 4 neither clearly nor exhaustively states what the CISG does not govern
5.	Article 5: CISG does not govern seller’s liability for the goods causing death or injury to any person	No counterpart	Nil
6.	Article 6: Parties free to exclude the CISG in whole or derogate from or vary the effect of any of its provisions (subject to certain restrictions)	Most provisions in SGO are amenable to contracting out	Similar

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
<i>Formation of the Contract<sup>4</sup></i>			
7.	Article 11: Freedom of contracts from form and evidential restrictions for proof of existence	Largely same stance as Article 11; parol evidence rule still applies	Article 11 would override parol evidence rule upon implementing CISG
8.	Article 12: Additional stipulations in relation to form of contract after accounting for the Article 96 declaration	No counterpart	Nil
9.	Article 14: Distinguishes between an offer and an invitation to treat; defines the criteria that an offer must be “sufficiently definite”	Similar reasoning	Similar
10.	Article 15: Stipulates that an offer takes effect when it “reaches” the offeree, and when even an irrevocable offer can be withdrawn	Similar rules though slight differences in terminology	Nil

<sup>4</sup> For details of the analysis on “Contract Formation”, please refer to Section III of Annex 2.2 to the Consultation Paper.

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
11.	Article 16: Provides for when an offer can (Article 16(1)) and cannot be revoked (Article 16(2))	An offer can be withdrawn inter alia when it is unsupported by consideration	Article 16(1) loosely based on a reverse postal rule; Article 16(2) is in conflict with the common law doctrine of consideration
12.	Article 17: Offer, even if irrevocable, is terminated when a rejection reaches the offeror	Offers can be revoked at any time before it is accepted, even if offeror promised not to revoke where such promise is unsupported by consideration	Different results as CISG has no requirement of consideration
13.	Article 18: An acceptance can be made by statement or conduct; silence per se is not acceptance; acceptance becomes effective upon reaching the offeror	Hong Kong law position in line with general rule of acceptance in Article 18, but it applies the postal rule which is based on the dispatch of the acceptance	Hong Kong law does not apparently go so far as suggesting notice to offeror is rendered unnecessary by established practice or usage
14.	Article 22: Provides for when an acceptance can be withdrawn	Little room for revoking acceptance, save possibly where acceptance is by post	Practically similar; albeit Hong Kong law position subject to some uncertainty
15.	Article 21(1): Late acceptance can be effective if offeror so informs offeree without delay	No counterpart	Hong Kong law likely to arrive at same conclusion via different reasoning (e.g. a new offer and acceptance)

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
16	Article 21(2): Late acceptance can be effective if it would have been on time in normal transmission	Postal rule applies for the acceptance	No issue relating to delayed transmission would arise under Hong Kong law; offeror may be left with no relief from postal delay
17.	Article 24: Defines how an indication of intention “reaches” the addressee	Does not treat all forms of acceptance alike, and also has postal rule as express exception	Different positions
18.	Article 19(1): Reply to an offer is not an acceptance if it modifies the offer	Generally, mirror-image rule	Broadly consistent
19.	Article 19(2): Where modifications to the offer are not materially different, the reply can still be acceptance, unless objection is made without undue delay	Generally, mirror-image rule and last-shot approach	Different positions
<i>Ascertaining Contents of CISG Contracts<sup>5</sup></i>			
20.	Article 7(1): Interpretation of CISG to account for its international character, promoting uniform application and good faith in trade	Domestic principles governing approach to statutory interpretation	Broadly similar, though Article 7(1) has narrower scope in use; the CISG good faith provision is not directly replicated

5 For details of the analysis on “Ascertaining the Contents of CISG Contracts”, please refer to Section IV of Annex 2.2 to the Consultation Paper.

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
21.	Article 7(2): General principles or domestic law to be applied to matters governed by but not expressly settled in CISG	General principles found in other statutes and case law	Article 7(2) based on the philosophy of civil law systems; but should not pose undue difficulties in practice
22.	Article 8: Legally relevant statements and conduct of parties only to be interpreted objectively if they cannot be interpreted subjectively	Overarching rule that all matters are interpreted objectively	Objective interpretation is practically prevalent, if theoretically subsidiary, in CISG
23.	Article 9: CISG contracts governed also by usages and practices between parties	Usages and practices may bring about revocable waivers, promissory estoppels or terms implied by custom	Usages and practices afforded greater effect under CISG than Hong Kong law
24.	Article 29: Contract may be modified or terminated by mere agreement of the parties	Requirement for consideration (but may be prone to circumvention by courts)	Generally similar results; but CISG more aligned with modern commerce and business needs

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
<i>Seller's Obligations<sup>6</sup></i>			
25.	Article 31: Governs manner and place of delivery where seller is not bound to deliver to any particular place	SGO sections 31(1) and 34(1)	Similar
26.	Article 33: Governs seller's obligations in time of delivery	SGO section 31(2)	Similar
27.	Article 32: States seller's various duties in the course of making delivery	SGO sections 34(2) and 34(3)	Duties comparable where SGO has corresponding provision; but no local counterpart for Article 32(1) (give notice of consignment if goods shipped not identified)

<sup>6</sup> For details of the analysis on "Obligations of the Seller under the CISG", please refer to Section V of Annex 2.2 to the Consultation Paper.

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
28.	Article 34: Seller has contractual duty to hand over documents relating to the goods; the seller that does so ahead of time has the right to cure any defect in the documents, subject to unreasonable inconvenience or unreasonable expense to the buyer	Duty of seller to deliver documents governed by contract	No local statutory counterpart to right to cure, although may be provided for under common law
29.	Article 35: Requirements for goods to be considered to conform with the contract	SGO sections 16(2), 16(3), 17, 57	CISG uses single concept of "fitness" and is simpler than SGO, otherwise structurally similar; buyer has easier right of rejection under SGO
30	Articles 41-42: Seller must deliver goods that are free from third party rights and claims, specifically including industrial property and intellectual property-based claims	SGO section 14	SGO does not distinguish between intellectual property based claims with other third-party claims; rare instance here where SGO is more restrictive in termination rights than CISG

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
31.	Articles 38-39: Buyer must examine the goods as soon as they come into his possession; if buyer fails to give notice specifying defect within specified times, he cannot rely on non-conformity of the goods	SGO section 37(4)	SGO much less stringent than CISG with regard to the buyer's duty to give notice specifying defect
32.	Article 79: General defence for seller against damages claims for allegations of non-conforming goods	Doctrine of frustration; loss apportionment under section 16 of the Law Amendment and Reform (Consolidation) Ordinance (Cap.23)	Article 79 may be more broadly applicable but the two should apply to similar circumstances in practice; no defence to certain claims under Article 79; no power to apportion loss under Article 79
33.	Article 80: One party cannot rely on fault of the other party if the fault was due to the former's act or omission	Establishing causation to make good a claim; duty of mitigation; acknowledgement of contributory negligence; clean hands requirement for granting specific performance	No substantive difference; likely to arrive at same position via different means

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
<i>Buyer's Remedies<sup>7</sup></i>			
34.	<p>Article 25: Defines “fundamental breach” as the filter through which all contractual breaches under CISG must be assessed</p> <p>Article 49: Right to avoid contract for fundamental breach</p>	<p>Right to terminate for any breach of condition; right to terminate for breach of an innominate term depends on extent and gravity of breach</p>	<p>CISG has higher threshold for buyer to avoid the contract, though the Article 25 test appears somewhat similar to the domestic test for a repudiatory breach of an innominate term</p>
35.	<p>Article 46: Right to compel seller to perform obligations</p> <p>Article 28: Specific performance remedy subject to domestic law limitations</p>	<p>Specific performance rarely granted save in the case of unique goods</p>	<p>Practically similar given the effects of Article 28</p>
36.	<p>Article 26: Terminating party is required to give notice of such to the other party for avoidance to be effective</p>	<p>Election to terminate is to be unequivocally communicated</p>	<p>Similar</p>
37.	<p>Articles 39 and 49: long inaction by a party deprives him of his right to terminate</p>	<p>Affirmation by inaction</p>	<p>Similar</p>

<sup>7</sup> For details of the analysis on “Remedies of the Buyer under the CISG”, please refer to Section VI of Annex 2.2 to the Consultation Paper.

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
38.	Article 49(1)(b): for breaches by non-delivery, buyer can extend time to the seller in breach, and then terminate on the expiry of such extended period	Common law right to extend time to a breaching party before termination at the end of such extension	Hong Kong law appears to have a wider ambit: remedy not confined to breaches for non-delivery
39.	Article 81(2): Entire contract is unwound upon avoidance, and parties required to make specific (but concurrent) restitution	Contract is prospectively discharged if party terminates; restitution for total failure of consideration a personal remedy	Different effects of avoiding the contract
40.	Article 50: Price reduction remedy possible for buyer	No counterpart	Remedy unknown to Hong Kong law, though slightly similar to the relief of abatement against the price
41.	Article 74: Primary rule for calculating damages for breach of contract, focus on actual loss	Damages for non-acceptance or non-delivery cases are ascertained with reference to the market	Different starting points for ascertaining damages; different tests for limiting damages for foreseeability/remoteness
42.	Article 52: Rules in relation to partial and/ or early and/ or excess delivery by the seller	SGO section 32(2) and common law for cases of early delivery	Generally similar

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
43.	Article 71: Right of suspension where after contract conclusion, the counterparty will not substantially perform due to certain conditions, and how to exercise such right	Suspension normally only occurs where a contractually-required condition precedent is not satisfied	No general right of suspension under Hong Kong law
44.	Article 72: Buyer's right to immediately declare avoidance in case of anticipatory fundamental breach	Common law rules on whether innocent party accepts or rejects the anticipatory repudiation	Generally similar
<i>Buyer's Obligations<sup>8</sup></i>			
45.	Article 54: Buyer's duty to pay the price	Without contractual stipulation, buyer's duty to pay arises when the goods go into his control	Similar
<i>Seller's Remedies<sup>9</sup></i>			
46.	Article 64: Seller's entitlement to avoid contract where buyer commits fundamental breach	See above at buyer's entitlement to avoid contract for seller's fundamental breach (Item 34)	Seller under CISG subject to the same time limits and bar for impossibility of restitution as with the buyer

8 For details of the analysis on "Obligations of the Buyer under the CISG", please refer to Section VII of Annex 2.2 to the Consultation Paper.

9 For details of the analysis on "Remedies of the Seller under the CISG", please refer to Section VIII of Annex 2.2 to the Consultation Paper.

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
47.	Article 62: Seller's right to compel buyer to perform his obligations	Action for the price is specifically kept distinct from damages claims, and is subject to additional limits	Unlikely to be substantially different, since Article 62 is a specific remedy and would hence be subject to Article 28 discretion
48.	Article 74: Seller's right to claim damages	See above at buyer's right to claim damages (Item 41)	See above at buyer's right to claim damages (Item 41)
49.	Article 72: Seller's right to immediately declare avoidance in case of anticipatory fundamental breach	See above at buyer's right to immediately declare avoidance (Item 44)	See above at buyer's right to immediately declare avoidance (Item 44)
<i>Passing of Risk<sup>10</sup></i>			
50.	Articles 66-70: Risk passes upon delivery	Risk <i>prima facie</i> passes upon the passing of property	No practical difference in use; both CISG and SGO require that goods be identified/ascertained before risk can pass

<sup>10</sup> For details of the analysis on the "Passing of Risk", please refer to Section IX of Annex 2.2 to the Consultation Paper.

<u>Item</u>	<u>CISG</u>	<u>Hong Kong Law</u>	<u>Comments</u>
51.	Article 69(1): Where buyer does not take over the goods “ <i>in due time</i> ”, there is no explicit notice requirement on the seller to fix an extended period of time before risk can pass; risk considered to pass when the goods were placed at the buyer’s disposal and he failed to take delivery	In the same situation, SGO has no explicit notice requirement on the seller either; risk passes not when property passes but when buyer assumed control of the goods	Similar

## Summary of Comparative Exercise - Legal Considerations for Extension of the CISG to Hong Kong

2.9 Stepping away from comparing the CISG and the relevant Hong Kong law rules at a micro level, the following high-level conclusions may be drawn in light of the comparative exercise above.

2.10 Firstly, and as a preliminary observation, whilst the list of differences set out above is long, their practical importance should not be overstated. Much of the differences are technical divergences on the margins which may be of far greater interest to academics than to businesspeople (e.g. the limits on the recoverability of damages, such as rules as to foreseeability and the date of assessment, are of less practical importance than the availability of damages in the first instance). It appears that the single area where differences carry greatest practical weight is that of the choice of remedies<sup>11</sup>.

2.11 Secondly, the CISG is pro-contract. As discussed above, its policy is to avoid the waste inherent in the rejection of goods in the international sales context. This focus appears to be different from that of the Hong Kong law, where the easy right of rejection favours a policy of protecting buyers in volatile markets<sup>12</sup>. In practice, the pro-contract nature of the CISG is

11 Peter Piliounis, ‘The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?’ (2000) 12 Pace International Law Review 1, fn13.

12 Michael Bridge, ‘A Law for International Sale of Goods’ (2007) HKLJ 17, 22.

likely to be pro-seller, as the buyer rejecting goods for non-conformity occurs far more frequently than sellers terminating for non-payment, etc. Assuming this to be true, whether implementing the CISG in Hong Kong would benefit our business community would depend on, among other things, whether we are predominantly buyers or sellers in international trade.

2.12 Thirdly, the CISG professes to be drafted in simple language and accessible to businesspeople without formal legal training<sup>13</sup>. However, this should not be overstated - as is evident in the analysis in this Chapter, underlying the apparently plain language of the CISG are difficulties in interpretation (e.g. the meaning of “fundamental breach”<sup>14</sup>) and in the unsaid relationship of provisions to one another (e.g. the interrelationship of remedies<sup>15</sup>).

2.13 With that said, from a comparative perspective, the CISG appears to remain overall easier to understand than the sale of goods law regime in Hong Kong, which: (1) contains technical language (“merchantable” quality, sale by description, “consideration” for variation); and (2) is not only contained in SGO but supplemented by significant common law rules (e.g. those as to offer and acceptance). In this regard, the CISG also appears to be more comprehensive than SGO – it covers more of the basics one needs to know to execute a sale of goods contract. Implementation of the CISG would likely be empowering to businesspeople, at least in the long run.

2.14 Fourthly, it has been said that the CISG is more suited to commercial practice. As regards two important areas of international sales, i.e. the seller’s fitness obligations and the parties’ remedies, there is an element of truth.

2.15 The fitness obligations under the CISG, despite being simpler and leaner (being based around only one key concept of “fitness for purpose”), cover much of the scope of the patchwork of merchantability, fitness and description obligations under SGO. Therefore, the simpler regime is more suited as a default rule, especially where the value of the transaction is small<sup>16</sup> (more complex transactions will usually provide for express fitness obligations). Further, some authors have noted that certain specific rules under SGO can be invoked against common commercial expectations, e.g.

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13 Anselmo Reyes, ‘Potential and Problems in Hong Kong and the Philippines acceding to the CISG’ in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Growing the CISG: 6th MAA Schlechtriem CISG Conference* (Eleven International Publishing 2016) fn16.

14 For a criticism going beyond the CISG itself and to the lack of clarity in the official explanatory notes, see Zhou Qi, ‘The CISG and English Sales Law: An Unfair Competition’ in Larry DiMatteo (ed) *International Sales Law: A Global Challenge* (Cambridge Press 2014) 669, 676.

15 Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016) Article 48, paras. 18-21, Article 50 paras. 17-18.

16 Bridge (n 12) 22.

the description obligation has been used to strike down an examination clause providing that an independent examiner's certificate of quality is binding on the parties<sup>17</sup>.

2.16 As to remedies, two points are of note:

- (1) First is that whilst the CISG provides a more varied choice of remedies for an innocent party (and in particular an innocent buyer)<sup>18</sup>, the remedies unknown to Hong Kong law are usually justifiable as in line with common commercial practice, e.g. in the case of the right to cure<sup>19</sup>, variation of contracts<sup>20</sup>, and price reduction<sup>21</sup>.
- (2) Second is the duties imposed by the CISG before one can exercise a remedy. The CISG is notably "replete with requirements for the service of notice and prompt action (especially as to inspection)"<sup>22</sup>. The imposition of such duties may on the one hand be said to be economically inefficient. On the other, they enforce contact between buyer and seller which is in line with commercial practice. Where buyers and sellers who end up in litigation after duly negotiating in good faith, the CISG adds little; but for buyers and sellers who are inclined to "pull the plug", the CISG duties help avoid the breakdowns in communication that are all too commonly a precursor to repudiation.

2.17 That said, given the inherent nature of the CISG as uniform law and hence a compromise between the different legal traditions of the world<sup>23</sup>, certain concepts and practices embedded therein may be alien to Hong Kong lawyers. Examples include the doctrines of interpretation by subjective intent, and of "gap-filling" by reference to the four corners of the CISG. It can be expected that there will be an initial period of adaptation by the legal and business communities in the event that the CISG is extended to the Hong Kong<sup>24</sup>.

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17 *Ibid.*

18 A.G. Guest (ed), *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell 2017), para. 12-082.

19 Bridge (n 12) 29.

20 F.M.B. Reynolds, 'A Note of Caution' in Peter Birks (ed), *The Frontiers of Liability* (Vol.2) (OUP 1994) 18, 22.

21 Schwenzer (n 15) Article 48 paras.18-21, Article 50 para. 1 fn 3.

22 Guest (n 18) para. 12-082.

23 Bridge (n 12) 17.

24 Benjamin Hayward, Bruno Zeller & Camilla Baasch Andersen, 'The CISG and the United Kingdom - exploring coherency and private international law' (2018) ICLQ 607, 625-626.

## ***Compatibility of the CISG with Hong Kong Law***

2.18 This part deals with the compatibility of the CISG with existing Hong Kong law (i.e. how and how well it would work together with Hong Kong law), and also the relevance of opting in and out of the CISG for private parties.

2.19 On one view, there is no incompatibility between the CISG and domestic law: where the CISG applies, it governs to the exclusion of domestic law and vice versa.

2.20 However, the potential for incompatibility can stem from the fact that the CISG envisages a dual regime in respect of sales of goods in Contracting States, where international sales are governed by a combination of the CISG and the domestic law (for residual matters outside the scope of the CISG).

2.21 Potential incompatibility therefore arises in those cases where the CISG would give one answer, but where domestic law (which applies in parallel due to the in-built exclusions from the scope of the CISG) would give a different answer<sup>25</sup>.

2.22 This is not to be confused with different questions often highlighted in the CISG accession debate, such as:

- (1) Where the CISG may be silent on particular matters within its scope, it is unclear whether the answer should be supplied by gap-filling under Article 7 or by application of domestic law. The difficulty in such situations is “which set of laws should we apply?” When discussing incompatibility, the difficulty is instead that “two conflicting laws appear to apply at the same time”; or
- (2) Where rules under the CISG appear alien to or harsh in the eyes of the Hong Kong law, as in the requirement to give reasonable notice of defects<sup>26</sup>. These situations are in fact ones where the CISG has prevailed over pre-existing Hong Kong law; compatibility issues by definition do not arise.

2.23 In this regard, key areas of analysis are those which are expressly excluded from the scope of the CISG. We shall first give an example where the CISG expressly regulates incompatibility, followed by further examples in respect of two main areas outside the scope of the CISG, namely (1) substantive validity of the contract, and (2) property (Article 4).

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25 One example of a representation incorporated as a contract term is given in Michael Bridge, “A Law for International Sale of Goods” (2007) HKLJ 17, 24.

26 Bridge (n 12) 25.

## ***Where the CISG itself regulates incompatibility - Agency***

2.24 Agency is an interesting illustration which shows the capability of the express CISG provisions to resolve issues of compatibility. The potential difficulty here concerns whether the CISG applies. Assume the CISG has been extended to Hong Kong and two parties make a contract for the sale of goods with one another in Hong Kong. In such circumstances, the CISG would not apply given the parties are not in different states (Article 1(1)(a)). However, if one party is in fact agent for an overseas principal, the situation may be different.

2.25 Agency issues, even though not expressly mentioned in Article 4, are generally agreed to fall outside the scope of the CISG<sup>27</sup>. Therefore, if a Hong Kong court were faced with such a situation, it would assess the validity of the agency issue under local law. Assuming that the agency is valid, the CISG could apply, as the contract was in fact made between principals in different (Contracting) states<sup>28</sup>.

2.26 Incompatibility occurs where the agent does not disclose that he is acting for an overseas principal. Hong Kong agency law recognises undisclosed agency, so the agency remains valid under Hong Kong law. However, despite not regulating agency, the CISG expressly requires the internationality of a sales contract to be disclosed in the contract or pre-contractually (Article 1(2)). Hence, the express, albeit tangential, CISG requirement would be superimposed on top of the underlying local law rule as to validity. The contract, whilst valid, would not be governed by the CISG.

2.27 The agency example above is a relatively rare situation where the CISG expressly regulates issues of compatibility. Most difficulties arise in areas with no express provision, to which we now turn.

## ***Select Compatibility Issues - Validity***

### *Misrepresentation*

2.28 The potential difficulties of reconciling the common law approach to misrepresentation with the CISG is well-known<sup>29</sup>. The typical problem scenario is that: (1) a pre-contractual representation has been incorporated as a term of the contract, and (2) the representation is false.

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27 Michael Bridge, *The International Sale of Goods* (4th Edn, Oxford Press 2017) para. 10.28.

28 Schwenzer (n 15) Article 1 para. 27.

29 Bridge (n 12) 24-25; Ulrich G Schroeter, 'Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent, or Fraudulent Misrepresentation' (2013) Villanova LR 553, 568.

2.29 Under the common law, the representee may (aside from claiming damages for breach of contract) elect to rescind the contract for misrepresentation. Recent authority confirms that rescission remains the primary remedy in cases of misrepresentation<sup>30</sup>.

2.30 However, under the CISG, to avoid the contract on the basis of that representation being false would require showing that the breach of the representation-turned-term is fundamental in an Article 25 sense. This is a much higher hurdle than the test for rescission.

2.31 As such, it is possible that the CISG and Hong Kong law conflict - under the CISG, the contract remains afoot; under Hong Kong law, it is rescinded. The difficulty is that, as rescission is an apparent issue of substantive validity, the CISG may not (as is usually the case) exclude Hong Kong law.

2.32 The solutions put forward are important as they are illustrative of the general approach to issues of incompatibility.

2.33 One leading solution is put forward by Professor Ulrich Schroeter<sup>31</sup>. In gist:

- (1) The key starting premise is that the “dogmatic categories” of concepts under domestic law are not to be relied on<sup>32</sup>. This is because different legal systems may define the same concept differently, e.g. misrepresentation is a contractual matter under English law but a tortious one in the US<sup>33</sup>. In other words, the Hong Kong law categorisation of rescission for misrepresentation as a matter of validity does not (necessarily) hold true under the CISG.
- (2) The question perhaps can then be asked of whether misrepresentation is a matter of validity under the CISG. However, Professor Schroeter points to the wording of Article Art.4 and reminds that it excludes from the CISG issues of validity “except as otherwise expressly provided”. Therefore, not all issues of validity are excluded.
- (3) Instead, the approach is that a domestic law rule is excluded if:
  - (a) it is triggered by a factual situation to which the CISG also applies; and

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30 *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745.

31 Schroeter (n 29) 553.

32 *Ibid* 560-561.

33 *Ibid*.

- (b) it governs a “matter” also regulated by the CISG<sup>34</sup>, i.e. a specific risk which the CISG addresses already.
- (4) Applying this to misrepresentation as regards features of the goods sold, the factual situation of pre-contractual negotiations/contractual formation is no doubt covered by the CISG. The legal matter underpinning the doctrine of misrepresentation is “the buyer’s state of knowledge about features of the goods at the moment of contract conclusion.”<sup>35</sup> This is, however, regulated by in particular Article 35, which does not require the seller to inform the buyer of any non - conformity prior to contract conclusion.<sup>36</sup> The risk is one which is already governed by the CISG; domestic remedies for misrepresentation should generally be excluded.
- (5) The situation is different for fraudulent misrepresentation. Whilst the factual situation is similarly covered in the CISG, the legal matter is not only the buyer’s knowledge about the goods but also the general obligation of honesty. The latter matter is not regulated by the CISG. It follows that both the CISG remedies (for breach of contract) and the domestic remedies (for fraud) apply concurrently<sup>37</sup>.
- (6) However, Professor Schroeter is careful to limit his analysis to representations about the state of the goods<sup>38</sup>. Insofar as representations concern different subject-matter, the result may well be different (as the factual situations and legal matter are different).

2.34 Professor Schroeter’s solution appears to have been largely accepted by commentators, at least in principle<sup>39</sup>. For present purposes, what is important is that it provides a well-reasoned framework free from domestic law categorisations, with which to consider the validity exception (and hence the matter of incompatibility).

### *Penalty Clauses*

2.35 Another issue of potential incompatibility concerns penalty clauses: under Hong Kong law, agreed sums to be payable in the event of

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34 *Ibid* 563.

35 *Ibid* 572.

36 *Ibid* 573.

37 *Ibid* 585.

38 And the issue of the parties’ ability to perform, albeit the analysis is excluded here for brevity.

39 Approved in Reyes (n 13) fn19; Schwenger (n 15) Article 35, para. 50; Bridge (n 27) para. 10.34.

breach (which appear *prima facie* allowed as per Article 6 under the CISG) may be struck down as invalid penalty clauses.

2.36 In practice, the validity of penalty clauses is recognised as a matter of validity even under the CISG and hence governed by domestic law<sup>40</sup>. However, it has been suggested that the domestic law tests to be applied are to be read and interpreted in light of the CISG's underlying policies<sup>41</sup>.

2.37 This gives rise to some uncertainty in the case of Hong Kong law. Leading commentators have suggested that the pre-existing Hong Kong test, namely that a clause is penal if it is not a reasonable pre-estimate of loss, is not applicable when given a CISG interpretation as the possibility of inducing performance (or deterring breach) by an agreed sum is: (1) widely accepted in other legal systems, and (2) an anachronism within the common law itself<sup>42</sup>.

2.38 There is force in such comments. Indeed, the English courts have substantially reformed the penalty rule and moved away from this conception of the penalty test.

2.39 To sum up, it appears that there may be difficulties in applying the penalty rule in CISG contracts in the Hong Kong courts, but that the primary source of difficulty is not so much any incompatibility with the CISG as uncertainties in Hong Kong local doctrine.

### *Exclusion Clauses*

2.40 Finally, for completeness, the CISG also makes provision for clauses excluding and limiting liability. The approach appears to be similar to that for penalty clauses: domestic law governs, subject to limitations derived from the international nature of the CISG<sup>43</sup>.

2.41 However, in the Hong Kong context, these concerns are at present only of peripheral relevance. As discussed in Annex 2.1 to the Consultation Paper, the Control of Exemption Clauses Ordinance (Cap.71) will likely not apply to the majority of international sales contracts. This is the same for another piece of unfair clause-regulating legislation, i.e. the Unconscionable Contracts Ordinance (Cap.458), which applies only to

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40 CISG Advisory Council Opinion No.10, para. 3.3, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op10.html>; Pascal Hachem, 'Agreed Sums in CISG Contracts' (2011) *Belgrade Law Review*, Year LIX, no. 3, 140, para. 3.2.1.

41 CISG Advisory Council Opinion No.10 (n 40) paras. 4.2.1-4.2.2; Pascal Hachem, 'Agreed Sums in CISG Contracts' (2011) *Belgrade Law Review*, Year LIX, no. 3, 140, para. 3.2.2; Bridge (n 27) para. 10.34.

42 CISG Advisory Council Opinion No.10 (n 40) paras. 4.3.2-4.3.7.

43 Schwenzer (n 15) Article 4 para.43.

consumer sales<sup>44</sup>; however, such sales are largely excluded under the CISG (Article 2(a)).

### **Select Compatibility Issues - Property**

2.42 A second set of compatibility issues concerns the property exclusion from the CISG (Article 4). Here, the literature recognises fewer difficulties than under the validity exclusion.

#### *General position on property*

2.43 As a general statement, property issues are left to the applicable domestic law. The CISG does no more than provide that the seller is under a duty to transfer property (Article 30). However, breach of this obligation gives rise to contractual (*in personam*), not proprietary, remedies.

2.44 The CISG does not govern when and how property passes, or the effect and use of common retention of title clauses<sup>45</sup>. As such, generally, “should [Hong Kong] accede, the CISG’s position on property **is** the [Hong Kong] position on property” (emphasis original)<sup>46</sup>.

#### *Restitution after termination/avoidance*

2.45 One potential area of incompatibility concerns restitution. Annex 2.2 to the Consultation Paper noted the difficulty in ascertaining the legal effect where a CISG contract is avoided. If, contrary to the prevailing trend of commentary as noted in this Chapter<sup>47</sup>, the effect is that the contract is *void ab initio*, then issues as to the re-vesting of property (insofar as it has passed) may arise. Such issues are governed by the domestic law<sup>48</sup>.

2.46 Incompatibility may arise where one is concerned with the possibility of proprietary claims, especially when juxtaposed against parties’ bankruptcy (another matter left to domestic law<sup>49</sup>). It is conceivable that situations may arise where one party may have substantive claims based on domestic proprietary remedies but where the CISG will afford it limited recourse (e.g. where the other has entered insolvency).

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44 S. 5(1).

45 Hayward, Zeller & Andersen (n 24) 620; Schwenger (n 15) Article 4 para. 47.

46 Hayward, Zeller & Andersen (n 24) 620.

47 See para. 191 of Annex 2.2 to the Consultation Paper.

48 Schwenger (n 15) Article 4, para. 46.

49 Schwenger (n 15) Articles 81-84, para. 5.

2.47 However, this potential unfairness appears to have been addressed by the express provisions of the CISG itself: the requirement of concurrent restitution in Article 81(2) enables it to “avoid direct involvement with the proprietary consequences of restitution”<sup>50</sup>. In effect, where one party’s claims are limited by property laws and the insolvency regime, so will the other party’s, thus avoiding incompatibility and unfairness.

### ***Conclusion on Compatibility***

2.48 It is not particularly surprising that potentially difficult compatibility issues may arise - after all, the introduction of any new legal regime could lead, at least initially, to greater (rather than less) uncertainty as controversies are worked out through case law<sup>51</sup>.

2.49 What is of greater importance, however, is the existence of principled frameworks with which to answer such difficult questions. In short, the answers need not be worked out in advance (or else accession would never occur), but the ability to work the answers out must be ready, so as to ensure that the answers eventually given are consistent.

2.50 In light of the approaches adopted internationally to the various issues addressed above, it is considered that such prerequisites for answering difficult questions of compatibility exist. It follows that compatibility does not pose a strong argument against application of the CISG to Hong Kong.

### **Freedom of Choice: Opt-In or Opt-Out?**

2.51 The above section has set out a view that compatibility is not a strong argument against application.

2.52 From a comparative legal perspective (i.e. focusing on the legal regimes and ignoring social, political and economic arguments), it remains to consider the relevance of opting in versus opting out to the question of whether the CISG should be extended to Hong Kong.

2.53 The question can be posed this way: “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?”

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50 Michael Bridge, ‘The Nature and Consequences of Avoidance of the Contract Under the United Nations Convention on the International Sale of Goods’ (2008-2009) *International Law Review of Wuhan University* 118, 119-120.

51 Reyes (n 13) fn 23 *et seq.*

2.54 The answer can be approached as a balancing exercise: (1) what problems are there with the existing opt-in regime, compared to (2) what difficulties will an opt-out regime pose?

### ***Problems with Opting In***

2.55 The difficulty with the status quo is that one cannot effectively create a contract: (1) which is governed primarily by the CISG and subsidiarily by Hong Kong law, and (2) where the CISG displaces Hong Kong law to the full extent of its scope.

2.56 One can begin by asking how Hong Kong businesspeople can use the CISG to govern their contracts if they so wish at the present. An easy choice is to choose the law of a CISG Contracting State. However, this necessarily entails subsidiary issues being governed by a law which Hong Kong businesspeople and lawyers may not be familiar with. As highlighted in the discussion on compatibility above, these issues may be difficult indeed.

2.57 Alternatively, Hong Kong businesspeople can provide that a contract is “governed by the CISG”. Leaving aside whether this is valid, the subsidiary law of such a contract will be determined by the choice of law rules of the forum court. If the contract (litigated in Hong Kong) has the closest connection with, e.g. Mainland China, then the subsidiary rules will be the laws of Mainland China and not Hong Kong.

2.58 The best that our hypothetical Hong Kong businesspeople can do is to incorporate the CISG as contractual terms<sup>52</sup> into a contract otherwise expressly governed by Hong Kong law.

2.59 However, even such a contract has its differences from a contract governed by Hong Kong law, where the CISG is part also of Hong Kong law:

- (1) First, the CISG is not capable of regulating contract formation if it is incorporated only as contract terms. In other words, under a SGO- governed contract incorporating the CISG as chosen terms, the rules for offer and acceptance remain those of the local Hong Kong law. In short, there is no way of bringing CISG Articles 14-24 (which govern pre-contractual matters yet are incorporated only when a contract is already formed) into play.
- (2) Second, mandatory rules of Hong Kong law take priority over the CISG terms if the latter are only incorporated as contractual

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52 Hayward, Zeller & Andersen (n 24) 616.

terms<sup>53</sup>. This may have implications e.g. in the case of penalty clauses - a SGO contract incorporating the CISG would be subject to the local Hong Kong law on penalties. This would be different from the penalty test if the CISG governs the contract; whilst referring the doctrine back to domestic law, the CISG does require the domestic law tests to be applied in an international manner<sup>54</sup>.

- (3) Third, and perhaps most significantly, it is likely that the approach to interpreting the CISG would be different from what was envisaged by its drafters. The interpretive rules in Articles 7-8, if incorporated only as contract terms, would unlikely prevail over the domestic rules of interpretation. Still further, even leaving aside domestic interpretation rules, it would appear that if the CISG is incorporated as contract terms, Article 7 and Article 8 would need to be applied concurrently as interpretive principles (Article 7 as it governs the interpretation of the CISG generally, and Article 8 as it governs interpretation of contract terms)<sup>55</sup>. This would of course lead to questions of potential conflict between the two Articles.

2.60 Summing up the above, it is clear that notwithstanding the ability to opt in under the status quo, it remains the case that businesspeople cannot fully utilise the CISG as it was designed. Indeed, there is significant risk in opting in under the status quo, given: (1) the unique legal problems the incorporation of the CISG as only contractual terms poses, and (2) the relative lack of guidance from international CISG jurisprudence on such situations.

### ***Difficulties with the Opt-Out Regime***

2.61 Turning now to the opposite scenario, assuming the CISG is extended to Hong Kong, what would be the cost?

2.62 The first and most obvious are the relevant transaction costs. In the short term, for example, businesspeople and lawyers would need to be educated on the CISG, existing sales contracts with Hong Kong choice of law clauses would need to be revised with a view to either opting in or out of the CISG regime, and standard forms would need to be revised and updated (or customised in line with parties' rights to modify the CISG default terms).

2.63 A different type of cost is the inherent uncertainty and litigation costs incurred in working out difficult problems, both within the new body of

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53 *Ibid.*

54 See paras. 2.35-2.39 above.

55 Hayward, Zeller & Andersen (n 24) 616.

law and at the interface of the old and new, including the issues highlighted in this Chapter.

2.64 However, these are largely short-term, one-off costs, similar in nature (if perhaps not in magnitude) to those inherent in any changes in the law, and which may be ameliorated by the processes of consultation and gradual phasing in adopted for modern major legislative programmes (e.g. the coming into force of the Competition Ordinance (Cap.619)). As CISG use, practice and domestic case law matures, the long-term costs of ensuring that the CISG functions smoothly as part of Hong Kong law should not be unduly burdensome.

2.65 Finally, it is important to note that the possibility of using purely local Hong Kong law (i.e. not the CISG rules) to govern an international sales contract remains perfectly feasible after the extension of the CISG to Hong Kong. It would only require parties to expressly provide for the same in their contracts; again, whilst teething problems in the necessary choice of law clauses may exist, this should become standardised with time.

### ***Conclusion on Opt-In or Opt-Out***

2.66 On the whole, from the limited comparative perspective of this section, it appears that one powerful argument in favour of extending the CISG to Hong Kong is simply contractual freedom: insofar as accession can be done without excessive short-term costs, it would make a broad range of useful and realistic contractual options newly available, without detracting from the widely-used choices of law available under the status quo.

## Chapter 3

# Economic and Legal Considerations for Extension of the CISG to Hong Kong

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### Introduction and Overview

3.1 This Chapter will address the following issues: -

- (1) whether there is a need for Hong Kong to apply the CISG, taking into account relevant factors such as Hong Kong's external trade in light of, *inter alia*, the Belt and Road Initiative ("BRI") and Hong Kong's status as a leading international legal and dispute resolution services centre in the region;
- (2) the pros and cons of implementing the CISG in Hong Kong in view of the discussion in part (1) above;

3.2 The following Annexes discussed in this Chapter are attached to the Consultation Paper:

- (1) Annex 3.1: Hong Kong's Rank in World Trade Since 2008;
- (2) Annex 3.2: Hong Kong's Top 20 Trading Partners and Their CISG Status;
- (3) Annex 3.3: Hong Kong's Top 20 Export Partners and Their CISG Status;
- (4) Annex 3.4: Members of the BRI and Their CISG Status.

### Whether there is a need for Hong Kong to apply the CISG

3.3 This section will cover the issues relating to whether there is a need for Hong Kong to apply the CISG. In particular, it will go over the general economic factors and Hong Kong's position as a key player in world trade. This section will also review Hong Kong's position in relation to the BRI and examine

whether the extension of the CISG is a necessary element in relation to Hong Kong's role as a dispute resolution hub. Finally, this section will also address the issue of China's Article 93 reservation and the confusion that this has created when foreign courts have been tasked with determining the applicable law, which may have real economic impacts on Hong Kong businesses.

### **General economic factors**

3.4 The trade statistics of Hong Kong and Mainland China are recorded and published by the World Trade Organization ("WTO") on a regular basis. Among these statistics include figures relating to Hong Kong's total merchandise exports and imports. These figures are both relevant and important to the present analysis as merchandise trade will involve the exact transactions that the CISG is meant to govern, and the fact that the WTO statistics are able to differentiate between trade in merchandise and trade in commercial services means that the figures provided can be directly applied to determine what effect implementation of the CISG would have on Hong Kong's trading status.

3.5 According to statistics published by the WTO, in 2018, Hong Kong ranked eighth in world trade in both exports and imports of merchandise. Trade per capita between 2016 and 2018 was \$86,275<sup>1</sup>. In relation to merchandise, Hong Kong is responsible for 2.92% of the world's total exports, and 3.16% of the world's total imports<sup>2</sup>.

3.6 Hong Kong has also grown in prominence in the world trade rankings as compared to 10 years ago. A table of Hong Kong's annual exports and imports as well as its respective export and import world ranking from 2008 – 2018<sup>3</sup> is attached as Annex 3.1 to the Consultation Paper. As can be seen in Annex 3.1, in 2008, Hong Kong ranked 13<sup>th</sup> in both worldwide exports and imports, with total exports and imports just over 763 billion USD. Hong Kong's trade numbers have steadily grown over the past ten years, leading to its current rank with combined exports and imports of over 1.19 trillion USD.

3.7 As can be seen from the above figures, Hong Kong's status as a major player in world trade cannot be denied, particularly when examining the merchandise and goods markets. However, alongside the United Kingdom, Hong Kong has yet to implement a harmonized international sale of goods law such as the CISG, which stands in stark contrast to other major traders in the world.

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1 World Trade Organization, "2018 WTO Trade Profile, Hong Kong, China", available at [https://www.wto.org/english/res\\_e/statis\\_e/daily\\_update\\_e/trade\\_profiles/HK\\_e.pdf](https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/HK_e.pdf).

2 *Ibid.*

3 See Annex 3.1 to the Consultation Paper: Hong Kong's Rank in World Trade Since 2008.

3.8 In 2017 – 2018, the top 10 leading merchandise traders in the world consisted of: Mainland China, the USA, Germany, Japan, the Netherlands, France, Hong Kong, South Korea, the United Kingdom, and Italy<sup>4</sup>. Of these nations or regions, the top 5 traders in the world are all members of the CISG and accounted for approximately 38.1% of world trade in 2018<sup>5</sup>. With the exception of Hong Kong and the United Kingdom, all other countries in the top 10 are members of the CISG.

3.9 Looking beyond the top 10 traders in the world, of the world's top 25 merchandise importers and exporters, the CISG is not applicable to only Hong Kong, the United Arab Emirates, Taiwan, India, Thailand, Saudi Arabia, the United Kingdom, and Malaysia<sup>6</sup>. This means that a majority of the world's top 25 traders are members of the CISG.

3.10 While Hong Kong's general economic position as a major player in world trade is significant, it does not establish how the application of the CISG now would further benefit Hong Kong's economy. Therefore, there must also be analysis of the position of Hong Kong in relation to each of its major trading partners – in particular in regard to their respective CISG status.

3.11 Utilizing data obtained from the Trade and Industry Department of the Hong Kong SAR in relation to the top 20 trading partners of Hong Kong in 2018<sup>7</sup>, Annex 3.2 to the Consultation Paper sets out the top 20 trading partners of Hong Kong in 2018, their total trade in HK dollars and percentage of Hong Kong's total trade, as well as that partner's CISG status and date of entry into force of the CISG (if applicable).

3.12 Using the same data obtained from the Trade and Industry Department of the Hong Kong SAR, Annex 3.3 to the Consultation Paper sets out the top 20 export partners of Hong Kong in 2018, total exports to those countries in HK dollars and percentage of Hong Kong's total exports, as well as that partner's CISG status and date of entry into force of the CISG (if applicable).

### ***Hong Kong's position in total external trade***

3.13 As evidenced in Annex 3.2 to the Consultation Paper, Hong Kong's top 20 trading partners in 2018 consisted of Mainland China, the USA, Taiwan,

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4 World Trade Organization, "World Trade Statistical Review 2019", 48, available at [https://www.wto.org/english/res\\_e/statis\\_e/wts2019\\_e/wts2019\\_e.pdf](https://www.wto.org/english/res_e/statis_e/wts2019_e/wts2019_e.pdf).

5 *Ibid* 48.

6 *Ibid* 100.

7 Trade and Industry Department, "Hong Kong's Principal Trading Partners in 2018", available at [https://www.tid.gov.hk/english/trade\\_relations/mainland/trade.html](https://www.tid.gov.hk/english/trade_relations/mainland/trade.html).

Japan, Singapore, South Korea, India, Malaysia, Thailand, Vietnam, Germany, the United Kingdom, the Philippines, Switzerland, the Netherlands, France, the United Arab Emirates, Italy, the Macao SAR, and Australia.

3.14 Of those trading partners, Mainland China is by far Hong Kong's largest trading partner, with over HK\$ 4 trillion in trade, accounting for 50.4% of Hong Kong's entire international trade. Mainland China is, of course, a member of the CISG and the CISG has entered into force in Mainland China since 1988.

3.15 Of those top 20 trading partners listed above, 12 partners are also members of the CISG. The CISG is not presently applicable to eight partners, those being Taiwan, India, Malaysia, Thailand, the United Kingdom, the Philippines, the United Arab Emirates, and the Macao SAR.

3.16 Of the 12 trading partners who are members of the CISG, three of those members, namely Japan, South Korea, and Vietnam, have acceded to the CISG within the last 15 years. Japan became a member of the CISG in 2009, South Korea in 2005, and Vietnam in 2017. These countries are also Hong Kong's fourth, sixth, and tenth largest trading partners respectively, with a combined value of over HK\$ 874 billion, accounting for 9.9% of Hong Kong's total trade.

3.17 Of Hong Kong's top 20 trading partners, CISG member states account for a total of over HK\$ 6.8 trillion, and 77.3% of Hong Kong's total trade.

3.18 While there are still significant trading partners who are not members of the CISG, namely India, Malaysia, Thailand, the United Kingdom, and the Philippines, what can be evidenced from this analysis is that the sphere of influence of the CISG has been increasing over recent years, and the number of outliers are steadily diminishing.

### ***Hong Kong's position as an exporter***

3.19 As evidenced in Annex 3.3 to the Consultation Paper, Hong Kong's top 20 export partners include Mainland China, the USA, Vietnam, Singapore, Taiwan, the Macao SAR, Thailand, South Korea, Switzerland, Malaysia, Japan, the United Kingdom, the United Arab Emirates, Australia, India, Canada, Indonesia, the Philippines, France, and Nepal.

3.20 Analysis of Hong Kong's export partners leads to a similar conclusion for total external trade. With the exception of Taiwan, all of Hong Kong's top 5 export partners are also members of the CISG. Of the top 10 export partners, the CISG is not applicable to only Taiwan, the Macao SAR, Thailand,

and Malaysia. CISG members account for 73.4% of Hong Kong's total exports, valued at over HK\$33.93 billion.

3.21 Given the significant disparity that now exists between those trading partners which are members of the CISG and those which are not, the data supplied shows that there may now be significant economic incentive to extend the CISG to Hong Kong and therefore harmonize the legal framework governing transactions between these major trading partners.

### ***Effect of the Belt and Road Initiative on CISG implementation***

3.22 We shall examine whether there is a need to extend the CISG to Hong Kong in light of the BRI and the fact that Hong Kong will be acting as a leading international legal and dispute resolution services centre in the region.

3.23 For the purposes of clarity, the BRI consists of the development strategy launched by the Chinese government, designed to promote economic cooperation between various nations, most of whom exist along the old trade routes between China, Europe, and Africa<sup>8</sup>.

3.24 For the purposes of this part, Annex 3.4 to the Consultation Paper is a table of all participating BRI countries and their respective CISG status and date of entry into force of the CISG (if applicable)<sup>9</sup>.

3.25 As of 1 February 2020, 144 countries are participating in the BRI. Of those 144 countries, 66 (45.8%) are members of the CISG. However, it should be noted that of those 66 countries that are members of the CISG, the CISG has entered into force for 16 countries within the last 10 years, and entered into force for 27 BRI countries within the last 20 years<sup>10</sup>.

3.26 Most importantly, from the data available, since the BRI was first announced in 2013, 11 countries (specifically: Azerbaijan, Bahrain, Cameroon, Congo, Costa Rica, Fiji, Guyana, Laos, Madagascar, Palestine, and Vietnam) have become members of the CISG.

3.27 It should be noted that as the BRI is primarily driven by China, and that China currently is the strongest economic power in the current BRI group,

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8 Hong Kong Trade Development Council, "The Belt and Road Initiative", available at <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative/obor/en/1/1X3CGF6L/1X0A36B7.htm>.

9 Based on Hong Kong Trade Development Council "The Belt and Road Initiative: Country Profiles", available at <http://china-trade-research.hktdc.com/business-news/article/One-Belt-One-Road/The-Belt-and-Road-Initiative-Country-Profiles/obor/en/1/1X000000/1X0A36I0.htm>.

10 See Annex 3.4 to the Consultation Paper.

the fact that China is a member of the CISG may potentially explain why there is a sudden uptick in the number of BRI countries that are now acceding to the CISG<sup>11</sup>.

3.28           Regardless of the underlying reason, what is clear is that there is an apparent trend of BRI countries acceding to the CISG, which will likely push the number of CISG members in the BRI above 50% and may also lead to greater adoption in the future.

3.29           The increasing number of BRI countries that are adopting the CISG also has multiple impacts on Hong Kong as a leading international dispute resolution hub for the BRI.

3.30           Firstly, as a participant in the BRI, extension of the CISG to Hong Kong would mean automatic application of the CISG between Hong Kong and other BRI/CISG members. The application of the CISG in these transactions would allow Hong Kong businesspeople to have a uniform law govern the bulk of their sales transactions, rather than having to potentially deal with the pitfalls of disparate legal systems, cultures and backgrounds.

3.31           Secondly, Hong Kong's position as a leading international dispute resolution hub for the BRI means that there will be a demand for lawyers prepared to advise on commercial transactions and who are qualified to handle disputes between different members of the BRI. As the CISG is currently not commonly applied in Hong Kong, it may be difficult for Hong Kong to satisfy that demand at the present moment. Extension of the CISG to Hong Kong would contribute to building a greater complement of CISG talent in Hong Kong, which would in turn enhance Hong Kong's competence as a dispute resolution hub for CISG disputes among BRI countries.

3.32           Furthermore, considering that a significant amount of the BRI deals with infrastructure development that will invariably include purchase and trade of equipment and other materials that fall within the ambit of the CISG, it is conceivable that at least a significant portion of these eventual disputes will deal with CISG matters, and therefore it is important that Hong Kong begin developing its CISG competence sooner rather than later.

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11           See Bruno Zeller, 'One Belt One Road – One Law?' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018).

## ***Confusion in foreign legal systems as to the position of Hong Kong under the CISG***

3.33 The ambit of this section extends to exploring the need for Hong Kong to apply the CISG, with particular emphasis on economic and BRI factors. However, it is also critical to understand that perhaps one of the most important factors in determining whether to extend the CISG to Hong Kong is the fact that businesspeople may face uncertainty in how their transactions may be decided in foreign courts. In particular, the fact that a foreign court may apply a law which was not agreed by the parties and which would not be applied by a Hong Kong court is something which must be discussed even if the primary emphasis is to look at economic factors – the application of an “incorrect” law inherently has an economic impact on businesspeople as it generally results in increased transaction and litigation costs.

3.34 The issue regarding foreign courts almost inevitably stems from whether the diplomatic notes deposited by China with the Secretary General of the United Nations shortly before the reunification of Hong Kong with the Mainland in 1997 and Macao in 1999 which did not mention the CISG were sufficient to have satisfied the requirements of making a reservation under Article 93 of the CISG<sup>12</sup>.

3.35 Article 93 of the CISG states:

### “Article 93

- (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
- (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

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12 See Fan Yang, ‘A Uniform Sales Law For The Mainland China, Hong Kong SAR, Macao SAR and Taiwan – The CISG’ (2011) 15(2) VJ 345 at 347-348; see also the discussion in Joseph Lookofsky, *Understanding the CISG* (5th edn, DJOF Publishing Copenhagen 2017), para 8.5 and accompanying fn 27 with related overseas cases.

- (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
- (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.”

3.36 Article 93 was apparently included upon the request of Canada and Australia, both of which are federal states, with the intent that Article 93 would allow the CISG to apply in federated situations so that each state would not be required to accede to the CISG<sup>13</sup>.

3.37 The diplomatic notes submitted by China to the United Nations immediately prior to Hong Kong and Macao's reunification with the Mainland laid out the treaties that would apply to Hong Kong and Macao respectively, but in those notes, there was no mention of the CISG. As a result, foreign courts were often tasked with determining whether or not the diplomatic notes would have satisfied Article 93(1) or whether Article 93(4) would apply, resulting in application of the CISG to Hong Kong or Macao related transactions.

3.38 The first case tasked with deciding this question was the French Supreme Court in the *Telecommunications Products* case<sup>14</sup> where the Court examined the diplomatic note submitted by China in 1997 prior to the Hong Kong's reunification with the Mainland, where no mention of the CISG was made. The Court found that the absence of the CISG in that note was sufficient to qualify as a reservation under Article 93(1), and that as a result, the CISG would not apply to Hong Kong. This conclusion has been supported in other cases such as in *Innotex Precision Ltd v Horei Image Products*<sup>15</sup>, decided by the US District Court of Georgia where the US court held that a decision that the CISG would not apply to Hong Kong was supported by the Hong Kong Department of Justice, foreign judgments, and scholarly authority<sup>16</sup>. This reasoning was later relied upon by the Tennessee District Court in *America's Collectibles Network Inc. v Timlly*

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13 Fritz Enderlein & Dietrich Maskow, *International Sales Law* (Oceana Publications 1992) Article 93, para. 1. See also Ulrich G. Schroeter, 'The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods' (2004) 16 *Pace Int'l L. Rev.* 307, 320-321.

14 Cour de Cassation, Case No. 04-117726, 2 April 2008, tr. Nathalie Hoffman, available at <http://cisgw3.law.pace.edu/cases/080402f1.html>.

15 *Innotex Precision Ltd v Horei Image Products* 679 F. Supp. 2d 1356 (2009).

16 *Ibid.*

(HK) Ltd.<sup>17</sup> as being more persuasive than the two cases below which did apply the CISG. This position was also advanced in the *TV Broadband Network Products Case*<sup>18</sup> decided by the Provincial Supreme Court of Hubei, China in 2003.

3.39 However, these types of decisions have not been entirely consistent. For example, in the case of *CNA Int'l Inc. v Guangdong Kelon Electronical Holdings et al.*<sup>19</sup> decided by the Illinois District Court, the court decided that the diplomatic notes deposited by China did not satisfy the requirements for a reservation as the note did not "state expressly the territorial units to which the Convention extends."<sup>20</sup> This case was then used by the District Court of Arkansas in *Electrocraft Arkansas, Inc. v Super Electric Motors Ltd.*<sup>21</sup> as justification for applying the CISG to a transaction between a Hong Kong seller and an Arkansas buyer. The court eventually allowed the parties to make submissions on the effect of the *Innotex* decision, but the parties eventually agreed to apply the CISG in any event<sup>22</sup>.

3.40 There also appears to be a split in scholarly authority as to whether China's diplomatic notes should be treated as reservations under Article 93. Certain CISG scholars have noted that the application of Article 93(4) should apply to Hong Kong as the Chinese government did not explicitly mention the CISG when depositing its diplomatic notes and that as a result, there was no declaration of reservation under Article 93<sup>23</sup>. Certain scholars also note that requiring foreign courts to inquire as to the actual intentions of the Chinese government would be impractical, and would run contrary to the uniform nature of the CISG as established in Article 7(1) CISG<sup>24</sup>.

3.41 Other scholars, however, have disagreed with the automatic application of Article 93(4) CISG so as to deprive China of the ability to deny application of the CISG to its territories, stating that the principles of good faith and general rules of interpretation under the VCLT requires that any interpretation must take into account the intention of China when depositing the relevant notifications<sup>25</sup>.

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17 *America's Collectibles Network Inc. v Timlly (HK) Ltd.* 746 F. Supp. 2d 914 (2010).

18 *Wuhan Yinfeng Data Network Co. Ltd. v Xu Ming* (19 March 2003), Hubei High People's Court, tr. Jing Li, available at <http://cisgw3.law.pace.edu/cases/030319c1.html>.

19 *CNA Int'l Inc. v Guangdong Kelon Electronical Holdings et al.* Case No. 05 C 5734 (2008).

20 *Ibid.*

21 *Electrocraft Arkansas, Inc. v Super Electric Motors Ltd.* (2009) 4:09 CV 00318 SWW.

22 *Ibid.*

23 Yang (n 12) 351.

24 Ulrich Schroeter, 'The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the Sale of Goods' (2004) 16 Pace Int'l L. Rev. 307, 326.

25 John Shijian Mo, 'Transfer of sovereignty and application of an international convention: CISG in China in the context of "One Country, Two Systems"' (2015) 2:1 JICL 61, 70-76.

3.42 In sum, there is some confusion and conflict as to whether or not China's diplomatic notes for Hong Kong and Macao, deposited in 1997 and 1999 respectively, are sufficient to exclude the application of the CISG to Hong Kong related transactions under Article 93 of the CISG. While it is not disputed that in Hong Kong at least, the CISG should not apply, this has not stopped foreign courts from disregarding these intentions and applying their own reasoning to determine whether the CISG should apply to a Hong Kong based transaction. Scholarly authority is also inconsistent in relation to whether the CISG should apply, and if so, how it should apply.

3.43 As a result, it is arguable that for Hong Kong businesspeople, there may exist uncertainty as to whether the CISG may erroneously be applied to their transaction even if no such selection was made and even though the CISG is not yet applicable to Hong Kong. This increases uncertainty for Hong Kong businesspeople who may face potential litigation in foreign courts.

3.44 Extension of the CISG to Hong Kong could potentially remove such uncertainty. Such express extension would make it clear whether the CISG applies to Hong Kong. This in turn may result in lower transaction and litigation costs for businesspeople in Hong Kong as less time and money may be spent on research and legal advice for foreign jurisdictions.

## **Pros and Cons of Implementing the CISG in Hong Kong**

3.45 This section will expressly go into some of the most common and likely pros and cons if the CISG is to be applied to Hong Kong. These examples are not exhaustive, and are based on the analysis conducted in the section above, which focuses primarily on economic issues in general, Hong Kong's position as a BRI disputes hub, and potential confusion in the governing law as applied by foreign courts.

### ***Pros of implementing the CISG in Hong Kong***

3.46 Based on the figures and analysis above, there are significant advantages to implementing the CISG in Hong Kong. Extension of the CISG to Hong Kong may potentially act as a positive influence to drive GDP and trade growth. The extension of the CISG may also allow Hong Kong businesses to level the playing field in regard to negotiating contracts with businesses located in traditional economic powerhouses, almost all of whom are CISG members. Further, from a legal perspective, extension of the CISG may enhance Hong Kong's comparative advantage as a CISG competent jurisdiction, which will be more important in the coming years as the BRI moves forward. Finally, the

flexibility of the CISG will provide a significant safety net for Hong Kong businesses by providing a neutral set of default rules to govern matters not originally contemplated by the parties.

*Implementation of the CISG will potentially drive GDP and trade growth*

3.47 As noted in paragraph 3.8 above, almost all of the major trading economies, including Mainland China, the USA, Germany, Japan, the Netherlands, France, South Korea, and Italy are also Contracting States to the CISG. While their economic strength cannot be directly attributed to the CISG, it is clear that the CISG is a common factor in major traders.

3.48 South Korea is an example of an economy that has grown and developed significantly following adoption of the CISG. In 2008, approximately three years after the CISG had been adopted, South Korea ranked 12<sup>th</sup> and 10<sup>th</sup> in world merchandise exports and imports respectively, with total trade in merchandise of approximately \$857 billion USD<sup>26</sup>. In 2018, 10 years later and approximately 13 years after adopting the CISG, South Korea now ranks 6<sup>th</sup> and 9<sup>th</sup> in exports and imports respectively with over \$1.1 trillion USD in trade<sup>27</sup>. While it would be difficult to say that the economic growth of a country like South Korea over the past 10 years can be either directly or solely attributed to adoption of the CISG, South Korea serves as an example where adoption of the CISG and economic growth were correlated.

3.49 The fact that the relationship between implementation of the CISG and economic growth is correlative rather than causative is further evidenced when examining other jurisdictions such as Singapore. Singapore implemented the CISG in 1996. Based on publicly available WTO trade statistics, while Singapore has seen significant trade growth in the 21 years since adoption of the CISG, economic growth trends have been comparable to Hong Kong, to which the CISG is yet to apply<sup>28</sup>. If adoption of the CISG were to be causative, one would expect to see amplified growth trends during strong years compared to Hong Kong and mitigated or diminished decreases in trade during weaker years.

3.50 However, even if the relationship between adoption of the CISG and economic growth is correlative rather than causative, what can be evidenced from the fact that almost all top trading economies in the world, with the notable exceptions of the United Kingdom, Hong Kong, India, Thailand, and Malaysia, is

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26 World Trade Organization, "WTO Trade Profiles 2009", 93, available at [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/trade\\_profiles09\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles09_e.pdf).

27 World Trade Organization, "WTO Trade Profiles 2019", 196, available at [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_profiles19\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_profiles19_e.pdf).

28 World Trade Organization, "WTO Data Portal", available at <https://data.wto.org>.

that a harmonized and uniform sales law such as the CISG forms a part of their legal system. There does not appear to be any economies in the top 25, which after acceding to the CISG, experienced a significant drop in their trading status.

3.51 Further, given that the aim of the CISG is to reduce legal barriers that could diminish or hamper the free flow of trade between countries, thereby increasing efficiency, and driving economic growth, there exist logical and reasonable grounds to believe that the CISG will assist in Hong Kong's GDP and trade growth.

3.52 The primary aims of the CISG in reducing legal trade barriers and costs associated with having to deal with a diverse ecosystem of legal concepts and cultures create direct economic impacts on trade. The original assumption was that the reduction of trade barriers would increase the volume of trade and therefore drive economic growth<sup>29</sup>. Indeed, USSR and French representatives for the United Nations explicitly referenced this objective at the time UNCITRAL was created<sup>30</sup>. Therefore, even if there exists no conclusive data showing the CISG directly causing economic or trade growth, there is good reason to believe that adoption of the CISG may, at the least, have a positive influence on economic development and growth.

3.53 Additionally, given the number of top trading economies that have now implemented the CISG, it is arguable that the adoption of the CISG is creating network effects for each constituent member. In particular, considering that the CISG will automatically apply to Contracting States, each member that accedes to the CISG creates greater value for the entire network. While network effects have normally been considered on a microeconomic level between businesses, such reasoning should easily extend to a macroeconomic level and the adoption of harmonization efforts such as the CISG<sup>31</sup>. Thus, considering the number of existing economies that apply the CISG, joining that network should create additional economic benefits, and create a positive force towards economic growth.

*Implementation of the CISG will prevent Hong Kong businesses from being subject to unfamiliar foreign laws when entering into cross-boundary transactions*

3.54 As noted in paragraph 3.13 above, Hong Kong's top trading partners include economic powerhouses such as Mainland China, the USA,

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29 Lisa Spagnolo, *CISG Exclusion and Legal Efficiency* (Kluwer Law International 2014) 29.

30 *Ibid* 31.

31 *Ibid* 45.

Japan, and South Korea. In particular, Mainland China and the USA constituted 57% of Hong Kong's total trade in 2018.

3.55 Given the economic strength of these major players, it is arguable that when concluding contracts with businesses from these countries, regardless of whether the contract is for import or export, Hong Kong businesses may find themselves with limited negotiation or bargaining power in shifting entrenched positions in relation to governing law and jurisdiction clauses.

3.56 The result of this is that Hong Kong businesses currently may face situations where disputes arise and must subsequently be governed by American or Chinese domestic laws, or to a lesser extent, Japanese or Korean domestic laws.

3.57 The fact that businesspeople face obstacles in potentially having to have their disputes governed by unfamiliar foreign laws is arguably the most important and primary reason for implementing the CISG. The ultimate goal of the CISG from the very beginning was to reduce legal barriers to trade caused by diverse legal systems and cultures, thus allowing traders to operate in a mostly frictionless legal environment<sup>32</sup>. As stated in the Preamble to the CISG, the "development of international trade on the basis of equality and mutual benefit" was a primary objective of the CISG. Furthermore, the Preamble states: -

"...the adoption of uniform rules which govern contract for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."<sup>33</sup>

3.58 Commentators on the CISG have stated that the practical impact of these statements in the Preamble is that the CISG is intended to provide a "strictly neutral set of rules which does not grant preferred treatment to one or the other side."<sup>34</sup> Thus, regardless of whether the parties are acting as importer or exporter, and regardless of the economic or bargaining power of each individual entity, the CISG provides a neutral set of rules to govern major elements of the parties' transaction.

3.59 By applying a neutral and visible set of rules to the transaction between parties from different members of the CISG, it is arguable that Hong Kong businesses will obtain a benefit from reduced transaction costs in the

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32 Spagnolo (n 29) 29.

33 CISG Preamble.

34 Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016) Preamble, para. 8.

negotiation and research of governing law clauses and possibly reduced litigation costs in the event that a dispute arises by avoiding having to obtain legal advice on foreign law and retain foreign litigators. Having the CISG as an available option to the parties also means that Hong Kong businesses in situations where their counterparts have much stronger bargaining power and therefore insist on using their own domestic law as the governing law of the contract.

3.60 Furthermore, as noted in paragraph 3.33 *et seq.* above, even if a Hong Kong business is able to contract on the basis of Hong Kong law, there is no guarantee that the foreign court of forum will apply local law correctly, if at all. The USA, for example, and as noted above, has incorrectly applied the CISG to disputes involving Hong Kong parties on the basis of confusion and lack of clarity in relation to the application of Article 93. Clarifying Hong Kong's position, and applying the CISG as the default rule means that parties can adequately predict and determine their potential liability and quantum in the event that a dispute arises.

3.61 Furthermore, even if the foreign court of forum accepts that Hong Kong local law should apply, the party involved in the dispute will still have the burden in most cases of proving the Hong Kong law, which will become a matter of expert evidence, thereby further increasing litigation costs. Certain scholars have noted that by extending the CISG to Hong Kong, parties are able to avoid these types of costs due to the fact that the courts of the Contracting State would also have knowledge of the CISG, the fact that there is to be a uniform interpretation of the CISG among its members, and the fact that the CISG is authoritatively available in multiple languages<sup>35</sup>.

3.62 The above considerations are on the basis that Hong Kong is trading with its existing partners, whom are almost all Contracting States of the CISG as well as being economic powerhouses. However, the principles considered above are even more important when considering the BRI and the fact that Hong Kong businesses participating in the BRI may find themselves dealing not only with foreign legal systems, but legal systems that may not be as developed as the major trading partners that Hong Kong businesses have traditionally dealt with.

3.63 In particular, given the geographical and economic scope of the BRI, the need for a neutral set of rules to govern potential disputes is a necessity so as to avoid the application of foreign laws that Hong Kong businesses may not have dealt with in the past. Furthermore, application of the CISG eases concerns for foreign parties as well who may be hesitant to agree to the application of

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35 Ingeborg Schwenzer and Pascal Hachem, 'The CISG – Successes and Pitfalls' (2009) *The American Journal of Comparative Law*, vol. 57, no. 2 457, 466-467.

Hong Kong local law. The growing trend of BRI countries that have acceded to the CISG lends credence to this theory.

3.64 In sum, while Hong Kong currently enjoys a strong economic position and reputation as an international trader, economic imbalances in power mean that Hong Kong businesses may be subject to foreign laws, which require additional costs to prepare for. Furthermore, even if Hong Kong law governs, foreign courts may not necessarily correctly apply Hong Kong local law, increasing uncertainty and unpredictability.

**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?

*Implementation of the CISG will improve Hong Kong's competence in resolving CISG disputes*

3.65 Extension of the CISG to Hong Kong and implementing it in Hong Kong law may bring indirect benefits by enhancing Hong Kong lawyers' competence in handling and managing CISG related disputes and thereby preparing Hong Kong to serve as a dispute resolution hub for BRI members.

3.66 As noted by certain scholars, Hong Kong has already accomplished this with arbitration services, building up a pro-arbitration regime in the jurisdiction and building up a volume of arbitration cases that in turn have

rendered Hong Kong as a high-profile, high-volume arbitration jurisdiction<sup>36</sup>. It therefore follows that the more expertise there is in relation to certain laws, the greater the comparative advantage that jurisdiction has in relation to those laws<sup>37</sup>. Extending this to the CISG, the conclusion should be that jurisdictions that have extensive and frequent contact with CISG matters should enjoy a comparative advantage when compared against jurisdictions with no such expertise or experience<sup>38</sup>.

3.67 In this regard, Hong Kong is behind the curve in relation to developing CISG expertise when compared with other key dispute resolution jurisdictions which have joined the CISG.

3.68 Considering that Hong Kong aims to be a dispute resolution hub for the BRI, it is critical that Hong Kong enhances its competence and experience in this regard, which would prove useful not only for advising clients dealing with BRI matters, but also provide a stable of competent and experienced CISG lawyers to handle what appears to be a growing number of CISG-applicable disputes.

3.69 Building up that competence and expertise should also provide for increased benefits in the long-term, as more and more countries adopt the CISG. As stated above, adoption of the CISG can provide network effects – the value of the CISG tends to increase proportionally to the increasing number of its users. As more and more countries join the CISG, the number of businesses and traders that fall within its sphere of application grows, thereby making the CISG more and more useful as time goes on.

3.70 These network effects will likely be concentrated due to the BRI. While, as stated above, less than half of all BRI members are also members of the CISG today, that number will only rise as the BRI progresses. Extension of the CISG now allows for the development of the requisite competence and expertise, which can then be leveraged to greater degrees in the event that more BRI members accede to the CISG.

3.71 In sum, extension of the CISG allows for Hong Kong lawyers to develop and hone the expertise that will be expected of a sophisticated dispute resolution hub for the BRI. While not every BRI case will involve the CISG, there are already a significant number of nations that are CISG members and that number is expected to only grow over time. In order to sufficiently and competently provide advice and dispute resolution services to clients, whether

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36 Spagnolo (n 29) 125.

37 *Ibid.*

38 *Ibid.*

domestic or foreign, development of CISG expertise needs to be started sooner rather than later.

*Access to relevant information and resources will make CISG provisions easier to understand for businesses*

3.72 Given that the CISG does present key differences as opposed to the common law, extension of the CISG will potentially present new questions and complexities that will need to be dealt with. Parties that may either be planning on incorporating the CISG expressly into their contracts, or whom will be covered by the automatic sphere of application provided for under Article 1 of the CISG will need to understand the differences between the CISG and the laws that they had operated under before.

3.73 Due to the CISG's nature as an attempt to harmonize international sales law, the CISG must be applied as uniformly as possible. This means that the CISG must be interpreted autonomously with due regard to its international character<sup>39</sup>. This in turn usually means that a comparative approach must be extended and that foreign decisions may have to be relied upon to provide guidance on how certain CISG provisions should be applied<sup>40</sup>.

3.74 To that end, the CISG benefits from concerted efforts to provide as much transparency and visibility in relation to cases, commentaries, and scholarly articles as possible. UNCITRAL in particular, has devoted significant efforts to its Case Law on UNCITRAL Texts ("CLOUT") initiative, which aims to collate and translate information on court decisions and arbitral awards so as to "promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts."<sup>41</sup>

3.75 The CISG is also supported by the CISG Advisory Council, which was founded in 2001 and works to issue Advisory Opinions relating to the interpretation and application of the CISG<sup>42</sup>. These Advisory Opinions usually relate to issues that have been considered by courts and arbitration tribunals around the world and assist in disseminating key information and advice in order to promote uniformity of application.

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39 Schwenzer and Hachem (n 35) 468.

40 *Ibid.*

41 United Nations Commission on International Trade Law (UNCITRAL), "Case Law on UNCITRAL Texts (CLOUT)", available at [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html).

42 CISG Advisory Council, available at <https://www.cisgac.com>.

3.76 Furthermore, the Institute of International Commercial Law (“IICL”) maintains a database of CISG case law from around the world, as well as a database of scholarly articles dealing with specific issues revolving around the CISG<sup>43</sup>.

3.77 All of these materials are publicly available – both to lawyers and to businesspeople. The expansive nature of the available material means that the ability to research and catch up on issues relating to the CISG is available to all parties, which eases the learning curve for both lawyers and laymen if and when the CISG is extended.

*The ability to derogate from the CISG increases party autonomy and flexibility*

3.78 As will be noted below, there may be concerns about the application of the CISG to Hong Kong as it adds an additional layer of complexity atop the existing SGO, and there may be resistance to change from a system that has worked well for Hong Kong over the past several decades.

3.79 However, it should be noted that one of the greatest strengths of the CISG is its ability to be flexible and respect for party autonomy, allowing the parties to either derogate from some of the provisions in the CISG or exclude application of the CISG altogether.

3.80 In particular, Article 6 CISG states: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." This flexibility is therefore available for businesses that consider certain provisions of the CISG not having done enough to protect their interests, or for those which consider that application of Hong Kong local law would be more favorable to them.

3.81 Extension of the CISG to Hong Kong therefore provides a safety net of sorts. For those who do not wish to use the CISG, they are free to opt out of its provisions or derogate from them to the extent that it can be tailored towards their business. However, for those who have not considered or not included specific provisions to govern their contractual relationship, the CISG will provide a set of default rules. Such a system can be seen when looking at the adoption of Incoterms, for example. Incoterms would provide for specific derogations from the CISG but for issues not governed or not applied by the

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43 Institute of International Commercial Law, Pace Law School, “CISG Database”, available at <http://iicl.law.pace.edu/cisg/cisg>.

parties, the CISG would serve as a general background that would provide default rules<sup>44</sup>.

3.82 Therefore, rather than adding an additional layer of complexity, the CISG should provide an additional layer of protection, governing situations that may not have been normally contemplated by the parties. Exclusion or modification of those provisions will always be allowed by businesses, meaning that the adoption of the CISG should actually improve flexibility and emphasize party autonomy.

### ***Cons of implementing the CISG in Hong Kong***

3.83 It is undeniable that there are also several consequences for extending the CISG that need to be examined and considered before any extension of the CISG. Such concerns 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. In particular, there may be a significant concern as to whether the strong trading position of Hong Kong currently may be adversely affected by extension of the CISG. Further, the CISG, as a hybrid of civil and common law, introduces several principles foreign to the local Hong Kong legal regime. The CISG also deliberately does not deal with certain issues, such as validity of contract, which raises issues as to how those gaps should be filled. Finally, there may also be significant concerns that the CISG is already normally excluded by parties and therefore will not add anything to the Hong Kong regime. These concerns will be detailed below.

### *The implementation of the CISG in Hong Kong may disturb the status quo*

3.84 The economic numbers that have been established in paragraph 3.6 above show that Hong Kong has been able to steadily improve its position in world trade rankings and has become a major trader in merchandise and goods, all without reliance on the CISG. Accordingly, there may be some arguments or criticism against extending the CISG to Hong Kong on the basis that there is no need at the moment to disturb or disrupt the status quo.

3.85 Following from this criticism, it may be arguable that Hong Kong's economic strength as a major world trader may mean that businesspeople and traders enjoy economic strength when determining the governing law of their disputes. Consequentially, they may be able to argue for use of the local sales law of Hong Kong in their contracts, i.e. SGO, which allows for some advantages for local Hong Kong businesspeople in the event that a dispute should arise.

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44 Schwenzer and Hachem (n 35) 477.

3.86 However, implementation of the CISG would provide for a neutral law, which could potentially negate the economic advantage that a local Hong Kong businessman may enjoy, and instead put the parties on a more balanced footing. From a local perspective, this may potentially disrupt or disturb an existing edge of Hong Kong businessmen.

3.87 While such sentiment may be perfectly understandable as a notion that there may be no need to fix what is not broken, the addition of the CISG to Hong Kong's legal system should provide greater flexibility and options for local businesspeople, rather than restrict or disturb the status quo.

3.88 The existence of the CISG should not be seen as an impediment to economic or trading strength, when in reality, the trade statistics seem to show that the existence of the CISG is a common element of all major traders in the world. As discussed in paragraph 3.8 above, the top 5 traders in the world according to WTO statistics are all members of the CISG<sup>45</sup>. Of the top 10 traders in the world, only the United Kingdom and Hong Kong are not members of the CISG.

3.89 The fact that the top traders in the world are also CISG members also indicates that extending the CISG to Hong Kong may in fact provide advantages for businesspeople who are dealing in trade with these nations. As noted in paragraph 3.13 above, Hong Kong's major trading partners include Mainland China, the USA, Japan, Singapore, and South Korea<sup>46</sup>. While there are significant similarities between Singapore and Hong Kong law, the same cannot be said for any other major trading partners. Especially considering that Mainland China and the USA alone constitute 57% of Hong Kong's trade, and given the economic strength of those players, it is arguable that the balance of bargaining power would favor businesspeople from those countries rather than those from Hong Kong.

3.90 The intent and purpose of the CISG is to normalize that imbalance by removing legal barriers such as disparate governing laws for contracts for the international sale of goods<sup>47</sup>. This normalization would allow smaller trading countries to more effectively and reliably trade with economically stronger nations. This can be further evidenced by the fact that other major trading countries such as Japan and South Korea have relatively recently also acceded to the CISG (2009 and 2005 respectively)<sup>48</sup>.

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45 See para. 3.8.

46 See paras. 3.13-16.

47 See CISG, Preamble.

48 See Annex 3.2, rows 4, 6.

3.91 Japan's accession to the CISG can be used as an example for how this concern should be allayed. In 2007, around the time that Japan was considering adopting the CISG, Japan was the fourth largest trader in the world in merchandise with over \$1.3 trillion USD in total exports and imports<sup>49</sup>. While several factors contributed to Japan eventually becoming a member of the CISG in 2009, one of the more important factors was the idea that small to medium enterprises as well as more established trading companies could be major beneficiaries from the CISG as transaction costs could be reduced<sup>50</sup>. Another reason cited for joining the CISG was an increased focus on trade within Asia, with China becoming one of Japan's major trading partners alongside the USA<sup>51</sup>. Japan's accession to the CISG was therefore one method of dealing with the diversity of Asian economies, infrastructure, and legal systems<sup>52</sup>.

3.92 To the best of our knowledge and research, there is currently no recent data or study conducted that has analyzed to what proportion Hong Kong trade contracts include applicable law provisions favoring Hong Kong local law rather than USA or Chinese domestic law. In any event, given the reasoning above, while there may be concern that the addition of the CISG to Hong Kong's legal system may disruption of Hong Kong's already strong position Hong Kong businessmen's existing edge in determining the governing law of their disputes, the likelihood of this disruption seems to be low and in any event would be balanced out by significant benefits in normalizing the applicable law for businesses.

*Implementation of the CISG would detract from the common law*

3.93 Hong Kong, as a previous British colony, has enjoyed the advantage of a legal system deeply entrenched and steeped in English culture, including its common law legal principles and methods. It is these principles that have contributed to Hong Kong's strong reputation in the legal community. It is also these principles may be considered as obstacles to extension of the CISG in Hong Kong.

3.94 The CISG presents several concepts that are foreign to the current Hong Kong legal system. Concepts such as good faith as identified in Article 7 of the CISG are concepts imported from civil law legal systems and which for the most part, have no bearing in the Hong Kong legal environment. Further, concepts of interpretation such as those found in Article 8 of the CISG run counter to principles of contract interpretation in Hong Kong, which have relied on

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49 World Trade Organization (2009) (n 26) 89.

50 Hiroo Sono, 'Japan's Accession to the CISG: The Asia Factor' (2008) 20 Pace Int'l L. Rev. 105.

51 *Ibid* 110.

52 *Ibid*.

the parol evidence rule usually found in common law legal systems. These are only examples of how principles in the CISG are significantly different from the SGO and the Hong Kong legal system in general.

3.95 However, it should be noted that the CISG acts as a hybrid between the common and civil law, and that the concepts inherent in the CISG act to harmonize the two different legal cultures rather than favor one over the other. For example, while concepts such as good faith in Article 7 may be foreign to a common law lawyer, issues relating to remedies should be quite similar to Hong Kong local law, in part because the drafters of the CISG intended to implement a remedies system based on breach of contract rather than the cause oriented Roman law approach extended by many civil law jurisdictions<sup>53</sup>.

3.96 Notably, several major CISG members are also common law jurisdictions. Primarily, the USA, Singapore, and Australia are common law jurisdictions that are also members of the CISG. It is not unworkable, therefore, for the CISG to form part of, or even influence, aspects of the common law system. As a result, there should be little concern that the CISG is fundamentally incompatible with the common law.

*The CISG deliberately does not address certain issues*

3.97 The CISG governs many facets of the relationship between buyer and seller, but it does not govern all aspects of the trade relationship. In fact, the CISG deliberately refrains from attempting to govern certain issues, such as the validity of the contract or any proprietary effects of the contract.

3.98 In particular, Article 4 CISG states that: -

“Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.”

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53 Schwenzer and Hachem (n 35) 462.

3.99 The examples provided in Article 4 are non-exhaustive and could also exclude other situations that could occur between the parties<sup>54</sup>. These gaps were necessary in order to conclude the CISG, as the differences between domestic legal systems as to validity were too diverse as to come to a harmonized conclusion<sup>55</sup>.

3.100 The result of this is that several issues that commonly arise in common law such as the capacity of a party to enter into a contract, impossibility, consumer protection, mistake, fraudulent misrepresentations, violation of exemption clauses, retention of title clauses, recovery of attorney's fees, jurisdictional issues, and limitation issues, for example, are not settled by the CISG<sup>56</sup>. As far as matters are not governed by the CISG, generally, they must be dealt with either under the applicable domestic law or any other uniform sets of rules in force which address the matter at issue<sup>57</sup>.

3.101 In addition, as discussed in Section IV(B) (Gap-filling under the CISG) of Annex 2.2 to the Consultation Paper, the CISG contains a gap-filling rule for "questions concerning matters governed by [the] Convention which are not expressly settled in it" (which are usually referred to as "internal gaps"<sup>58</sup>). Article 7 CISG states that:

"Article 7

- (1) 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.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

3.102 The application of Article 7 means that whenever such "internal gaps" are encountered, the court or tribunal must make a determination firstly on the general principles on which the matter is based, not on an immediate reliance on domestic law<sup>59</sup>. This means that in between the CISG and the domestic law, there is in fact another layer, a determination by the court as to general principles

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54 Schwenzler (n 34) Article 4, para. 3.

55 *Ibid.*

56 *Ibid.*, paras. 31-50.

57 *Ibid.*, para. 6.

58 *Ibid.*, Article 7, para. 27.

59 *Ibid.* para. 42.

regarding, for example, validity of the contract. Recourse may be had to uniform projects such as the UNIDROIT Principles on International Commercial Contracts (UPICC)<sup>60</sup>, but even then, commentators have stated that such uniform projects can only serve as an additional argument in relation to general principles<sup>61</sup>. In any event, there is added complexity as opposed to the current situation where the domestic law and relevant case decisions will usually be able to govern the entirety of the matter.

3.103 It should be noted, however, that every jurisdiction that has applied the CISG must deal with this issue, and to date other common law jurisdictions such as Australia and Singapore have not reported any significant issues as to these inherent gaps.

**Consultation Question 2:**

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

*The practice of exclusion of the CISG*

3.104 As stated in paragraph 3.79 *et seq.* above, the flexibility of the CISG derives from Article 6 CISG which allows the parties to derogate from certain provisions of the CISG or exclude it entirely. However, the effect of this is that parties may automatically decide to exclude the CISG in the first place, whether that is due to the nature of their industry, concerns about gaps in the CISG as noted above, or simply due to comfort with their pre-existing practice.

3.105 As noted above, the United States is one of the largest traders in the world today, and also a member of the CISG. However, it is estimated that anywhere from 55–71% of American lawyers exclude application of the CISG in their contracts<sup>62</sup>. Germany has an estimated 45% opt out rate, Switzerland has an estimated 41% opt out rate, Austria has an estimated 55% opt out rate, and China has an estimated 37% opt out rate<sup>63</sup>. Scholars have noted that while no data has yet been produced, Australia is likely to be on the higher end of the exclusion spectrum as well<sup>64</sup>.

60 International Institute for the Unification of Private Law, "UNIDROIT Principles of International Commercial Contracts 2016", available at <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

61 Schwenger (n 34) Article 7, para. 36.

62 Spagnolo (n 29) 150.

63 *Ibid.*

64 *Ibid.*

3.106 As can be evidenced by the data above, the exclusion rates for the CISG are significant. While there could be several reasons for this high rate of exclusion, the end result is that the alleged benefits as noted in paragraphs 3.46 to 3.82 above may be reduced by the potentially high rates of exclusion.

3.107 High rates of exclusion in and of itself may not be reason enough not to extend the CISG to Hong Kong. As stated above, the flexibility inherent in the CISG and the existence of Article 6 of the CISG underline that the parties may either derogate from or exclude the CISG. Insofar as the parties will include contractual mechanisms to govern their application, the CISG not only assumes but accounts for party autonomy.

**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?



## Chapter 4

# Application and Implementation of the CISG in Hong Kong

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4.1 This Chapter will consider how the CISG is to be applied and implemented locally in Hong Kong, if it is decided that the CISG will be extended to Hong Kong as a matter of treaty law. It will also consider whether and how Hong Kong local law, which seeks to implement the CISG in Hong Kong (if it is so extended), should apply to sale of goods transactions between Mainland China and Hong Kong where the parties to the transactions have their respective places of business in Mainland China and Hong Kong. Finally, a set of draft legislative provisions for implementation of the CISG are attached as Annex 4.1 to the Consultation Paper.

### Application of the CISG to Hong Kong

4.2 Article 91 of the CISG states that the CISG is only open for accession by states. As a result, Hong Kong would not be able to independently accede to the Convention.

4.3 As mentioned in Chapter 3 of the Consultation Paper, China is a Contracting Party to the CISG. Accordingly, if it is decided that the CISG should be applied to Hong Kong, the Government of the Hong Kong Special Administrative Region would seek such application under Article 153 of the Basic Law<sup>1</sup>.

### Implementation of the CISG

#### *How should the CISG be implemented locally?*

4.4 In order to give effect to the CISG in Hong Kong, the Convention would need to be incorporated into Hong Kong local law.

4.5 In this regard, it is useful to refer to how certain other common law jurisdictions have approached the incorporation of the CISG into their domestic legal systems. Singapore, for example, incorporates the CISG into their

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1 Article 153 of the Basic Law provides that: "The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region...".

domestic law via a separate Act, the Sale of Goods (United Nations Convention) Act (Cap 283A)<sup>2</sup>. The provisions of that Act co-exist with domestic Singaporean sales law, both in statute and common law<sup>3</sup>. Similarly, Australia has implemented the CISG via separate Acts that incorporate the CISG into each territory's domestic law<sup>4</sup>.

4.6 Each of the examples mentioned above have certain commonalities. Firstly, each of the laws mentioned above operate in dualist regimes, and therefore serve to incorporate the CISG into domestic law, similarly to what would be required in Hong Kong. Secondly, each of the laws mentioned above include explicit clauses that provide for the superiority of Convention law to the extent that there may be any inconsistency between itself and domestic law. This means that CISG principles and provisions will supersede common law principles (such as the common law "postal rule")<sup>5</sup>. Finally, both statutes do not expressly incorporate each individual Article of the CISG, and instead attach the CISG as a Schedule to the Ordinance.

4.7 Having made reference to the above implementation approach, it is proposed that similar implementation methods should take place in Hong Kong as follows:

- (1) the CISG be implemented in Hong Kong law by way of enacting a new stand-alone Ordinance ("New Ordinance");
- (2) the New Ordinance would reflect any declaration/reservation made under the CISG which is applicable to Hong Kong;
- (3) 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. SGO and the relevant common law principles).

4.8 Incorporating the CISG via an entirely separate Ordinance will draw a clear distinction between the application of the CISG as opposed to the application of local law such as the SGO. This in turn will reduce confusion as to how the CISG should apply. Secondly, this would better allow for incorporation of specific provisions (such as any reservation under the Convention which is applicable to Hong Kong) into local law. Thirdly, this may reduce potential usage of local law to fill gaps in the CISG at first instance, rather than as a last resort. Finally, it makes clear that where the Convention does apply, its provisions would prevail to the extent there is any inconsistency between the New Ordinance or the CISG and any other Hong Kong laws (e.g. SGO and the relevant common law principles).

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

3 Charles Lim Aeng Cheng and Soh Kee Bun, 'Singapore and the CISG' (UNCITRAL-Singapore Seminar on 35 years of the CISG: Achievements and Perspective, Singapore, 23-24 April 2015).

4 See e.g. "Sale of Goods (Vienna Convention) Act 1986 Western Australia", available at [http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/sogca1986308/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/sogca1986308/).

5 Cheng and Bun (n 3).

## ***Mainland China/Hong Kong transactions***

4.9 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.

4.10 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.

4.11 In order to prevent confusion in application of the CISG between Mainland China and Hong Kong, as well as potential confusion from relevant courts when applying the CISG to Hong Kong related disputes, it is recommended that the Hong Kong application of the CISG also mirrors the reservations and declarations that have been made by China.

### **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?

## ***Reservation under Article 95 of the CISG***

4.12 The CISG allows a Contracting State to make certain declaration/reservation under the Convention. Of particular relevance to Hong Kong is Article 95 of the CISG.

4.13 In order to prevent confusion in application of the CISG between Mainland China and Hong Kong, as well as potential confusion in foreign courts in applying the CISG to Hong Kong related disputes, it is recommended that the Hong Kong application of the CISG also mirrors the reservations and declarations that have been issued by China.

4.14 Article 95 allows a Contracting State to the CISG to declare that it will not be bound by Article 1(1)(b) of the CISG. In this regard, it is noted that there appears to be confusion which sometimes surrounds the application of Article 1(1)(b)<sup>6</sup>.

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6 See Section II(A) of Annex 2.2 to the Consultation Paper.

4.15 China has made a declaration pursuant to Article 95 of the CISG that, “The People’s Republic of China does not consider itself to be bound by subparagraph (b) of paragraph 1 of Article 1.”<sup>7</sup> In order to prevent potential confusion in applying the CISG to Hong Kong-related disputes, the Department of Justice’s initial view is that, if the CISG is extended to Hong Kong, China’s declaration under Article 95 should also apply in respect of Hong Kong. This means that Hong Kong will apply CISG rules to the contracts of sale of goods only between those parties whose places of business are in different Contracting States to the CISG. The New Ordinance is proposed to reflect this accordingly.

## Provisions of the Draft Bill

4.16 A set of draft legislative provisions to implement the CISG in Hong Kong local law can be found in Annex 4.1 to the Consultation Paper. Among the key provisions are sections incorporating the CISG into local law and providing for an Article 95 reservation (Section 4(1)), the superiority of Convention law over local sales law when applicable (Section 3), and, on a unilateral basis, the applicability of the provisions of the CISG to Mainland China/Hong Kong transactions (Sections 4(2)).

### **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).

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7 See: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-10&chapter=10&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en).

## Chapter 5

### Final Comments and Summary of Recommendations

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5.1 In this final Chapter, we shall take stock of the issues covered and summarise the recommended way forward for consultation.

5.2 On the proposal to extend the CISG to Hong Kong, we have considered the following:

- (1) the interplay between the CISG and Hong Kong law and in particular, the comparison and overall compatibility of the CISG and Hong Kong law regimes;
- (2) whether it will be for Hong Kong's overall benefit to apply the CISG, taking into account relevant factors such as Hong Kong's external trade, its role in the BRI and Hong Kong's status as a leading international legal and dispute resolution services centre in the region, and after balancing the pros and cons for applying the CISG to Hong Kong;
- (3) how the CISG will be implemented in Hong Kong, including whether the proposed Hong Kong's legislation, which aim to implement the CISG should apply to cross-boundary sale of goods where the parties involved have their respective places of business in Mainland China and Hong Kong.

5.3 In view of the above, we have the following recommendations:-

- (1) as it appears that the proposed application of the CISG could bring significant and relevant benefits to Hong Kong which outweigh its potential disadvantages, that the CISG should be extended to Hong Kong;
- (2) in order to prevent potential confusion in applying the CISG to Hong Kong-related disputes, if the CISG is extended to Hong Kong, China's declaration under Article 95 of the CISG should also apply in respect of Hong Kong such that Hong Kong will apply CISG rules to the contracts of sale of goods only between those parties whose places of business are in different Contracting States to the CISG;
- (3) if the CISG is applied to Hong Kong, since the CISG would not govern sales within the same country such as those between businesses in Mainland China and businesses in Hong Kong, and

in order to facilitate sale of goods between business in the two places, that the Hong Kong legislation (which seeks to implement the CISG in Hong Kong) should apply the CISG rules also to Mainland China/Hong Kong transactions;

- (4) for the purposes of implementing the recommendations in subparagraphs (1) to (3) above, that local legislation be enacted along the lines of the draft provisions as attached to Annex 4.1 to the Consultation Paper.

## **Annexes**



# 1. United Nations Convention on Contracts for the International Sale of Goods<sup>1</sup>

## PREAMBLE

*The States Parties to this Convention,*

*Bearing in mind* the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

*Considering* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Being of the opinion* that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

*Have agreed* as follows:

### **Part I. Sphere of application and general provisions**

#### **CHAPTER I. SPHERE OF APPLICATION**

##### *Article 1*

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial

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<sup>1</sup> Multilateral Treaties Deposited with the Secretary-General, United Nations, New York, as available on [https://treaties.un.org/doc/Treaties/1988/01/19880101%2003-03%20AM/Ch\\_X\\_10p.pdf](https://treaties.un.org/doc/Treaties/1988/01/19880101%2003-03%20AM/Ch_X_10p.pdf) on 11 July 2019.

character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

## *Article 2*

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

## *Article 3*

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

## *Article 4*

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

## *Article 5*

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

## *Article 6*

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

## CHAPTER II. GENERAL PROVISIONS

### *Article 7*

(1) 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.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

### *Article 8*

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

### *Article 9*

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

### *Article 10*

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

### *Article 11*

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

### *Article 12*

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

### *Article 13*

For the purposes of this Convention "writing" includes telegram and telex.

## **Part II. Formation of the contract**

### *Article 14*

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

### *Article 15*

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

### *Article 16*

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

### *Article 17*

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

### *Article 18*

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

### *Article 19*

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

### *Article 20*

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

### *Article 21*

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

### *Article 22*

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

### *Article 23*

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

### *Article 24*

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

## **Part III. Sale of goods**

### **CHAPTER I. GENERAL PROVISIONS**

### *Article 25*

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

### *Article 26*

A declaration of avoidance of the contract is effective only if made by notice to the other party.

### *Article 27*

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

## *Article 28*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

## *Article 29*

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

## CHAPTER II. OBLIGATIONS OF THE SELLER

### *Article 30*

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

### ***Section I. Delivery of the goods and handing over of documents***

#### *Article 31*

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods-in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place-in placing the goods at the buyer's disposal at that place;

(c) in other cases-in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

### *Article 32*

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

### *Article 33*

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

### *Article 34*

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

## ***Section II. Conformity of the goods and third-party claims***

### *Article 35*

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

#### *Article 36*

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

#### *Article 37*

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

#### *Article 38*

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

#### *Article 39*

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

#### *Article 40*

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### *Article 41*

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

#### *Article 42*

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### *Article 43*

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### *Article 44*

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### ***Section III. Remedies for breach of contract by the seller***

#### *Article 45*

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### *Article 46*

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

#### *Article 47*

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

#### *Article 48*

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

### *Article 49*

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

### *Article 50*

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

### *Article 51*

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

*Article 52*

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

CHAPTER III. OBLIGATIONS OF THE BUYER

*Article 53*

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

**Section I. Payment of the price**

*Article 54*

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

*Article 55*

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

*Article 56*

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

*Article 57*

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

#### *Article 58*

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### *Article 59*

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

### **Section II. Taking delivery**

#### *Article 60*

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

### ***Section III. Remedies for breach of contract by the buyer***

#### *Article 61*

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

- (a) exercise the rights provided in articles 62 to 65;
- (b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

#### *Article 62*

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

#### *Article 63*

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

#### *Article 64*

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has

become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

- (i) after the seller knew or ought to have known of the breach; or
- (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

#### *Article 65*

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

### CHAPTER IV.      PASSING OF RISK

#### *Article 66*

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

#### *Article 67*

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

### *Article 68*

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

### *Article 69*

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

### *Article 70*

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

## CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

### ***Section I. Anticipatory breach and instalment contracts***

### *Article 71*

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his credit-worthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

#### *Article 72*

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

#### *Article 73*

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

## **Section II. Damages**

### *Article 74*

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

### *Article 75*

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

### *Article 76*

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

### *Article 77*

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

### **Section III. Interest**

#### *Article 78*

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

### **Section IV. Exemptions**

#### *Article 79*

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

#### *Article 80*

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

## **Section V. Effects of avoidance**

### *Article 81*

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

### *Article 82*

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

### *Article 83*

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

### *Article 84*

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

- (a) if he must make restitution of the goods or part of them; or
- (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

## **Section VI. Preservation of the goods**

### *Article 85*

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

### *Article 86*

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

### *Article 87*

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

### *Article 88*

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

#### **Part IV. FINAL PROVISIONS**

##### *Article 89*

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

##### *Article 90*

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

##### *Article 91*

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

##### *Article 92*

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the

preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

#### *Article 93*

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

#### *Article 94*

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

### *Article 95*

Any 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.

### *Article 96*

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

### *Article 97*

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

### *Article 98*

No reservations are permitted except those expressly authorized in this Convention.

## *Article 99*

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary coordination in this respect.

### *Article 100*

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

### *Article 101*

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

## Annex 2.1

Please refer to <https://www.doj.gov.hk/eng/public/CISG.html> for the full text of Annex 2.1.

## Comparison between the CISG and Hong Kong Law – Detailed Analysis

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### I. Introduction

1. This Annex will: (1) compare the CISG rules with existing Hong Kong law and (2) identify the key similarities and differences between the two bodies of laws.

2. We have approached this comparison exercise on an issue-by-issue basis. The issues we have considered include (in the order discussed below):

- (1) Rules for application of the body of law (the CISG as compared to local Hong Kong law);
- (2) Contract formation;
- (3) Contents of the contract, i.e. incorporation, interpretation and implication of terms, and variation of the contract;
- (4) Seller's obligations and defences to allegations of breach;
- (5) Buyer's obligations;
- (6) Remedies on breach; and
- (7) Passing of risk.

3. It will be noted that we have not made any comparative examination of Part IV of the CISG entitled "Final Provisions". These provisions govern the application of the CISG as an international treaty and have no comparable counterparts in local Hong Kong law. Where appropriate (e.g. if the reservations allowed for in Part IV have an effect on the substantive comparative exercise), the individual articles in Part IV will be discussed.

4. For the summary table of the main points of analysis and our conclusions on each issue, please refer to Chapter 2 of the Consultation Paper.

5. References to "Article" in this Annex are, unless otherwise specified, references to the correspondingly numbered articles in the CISG.

## II. Scope of Application of the CISG

### (A) *The CISG as the Governing Law*

6. The comparative question can be posed as: “if the CISG is extended to Hong Kong, when will the CISG apply in Hong Kong courts?”

7. The answer is largely governed by Article 1(1), which provides that in cases concerning contracts for the sale of goods between parties with places of business in different states, then the CISG applies if:

- (1) Article 1(1)(a): The states are all state parties to the CISG (“Contracting States”); or
- (2) Article 1(1)(b): The conflict of law rules of the forum<sup>1</sup> lead to the application of the law of a Contracting State.

8. Article 1(1)(a) is relatively straightforward. The forum court first assesses the “place of business” of the parties, which is not defined in the CISG but which the general view holds to be a place (1) used to participate in trade, which (2) displays a certain degree of duration, stability and independence<sup>2</sup>. In cases where one party has more than one place of business, Article 10 helpfully directs the court to consider that place with the closest relationship to the contract and its performance.

9. Assuming the parties’ places of business are in different states (and that this is known to the parties<sup>3</sup>), the forum court then simply considers whether such states are Contracting States. If so, the CISG applies.

10. The question arises as to the interaction of Article 1(1)(a) with an express choice of law clause, e.g. (assuming that the CISG is extended to Hong Kong) where a contract litigated in Hong Kong is between parties with their places of business respectively in Germany and Hong Kong, and with an express choice of Hong Kong law. In such circumstances, is the CISG “contracted out” of by virtue of the parties’ ostensible agreement to the contrary (allowed under Article 6 of the CISG)? Does local Hong Kong law apply?

11. The case law under the CISG indicates that such a choice is generally not considered effective to exclude the CISG<sup>4</sup>. This does not mean that the choice of law is otiose - on the contrary, that law will be effective to govern matters outside the scope of the CISG<sup>5</sup> (see further below).

12. Article 1(1)(b), which is alternative and subsidiary to Article 1(1)(a),

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1 The phrase “of the forum” is not present in the text of Article 1(1) but is necessarily implied; see Michael Bridge, *The International Sale of Goods* (4th edn, OUP 2017) para. 10.12.

2 Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016) Article 1 para. 23.

3 Article 1(2).

4 Schwenzer (n 2) Article 6 para. 14.

5 *Ibid.*

is similarly simple when read alone. It directs the forum Court (in a Contracting State) to apply its conflict of law rules, and if the chosen law is that of a Contracting State, to apply the CISG.

13. The difficulty in application of Article 1(1)(b) arises in cases where an Article 95 reservation (which allows a Contracting State not to be bound by Article 1(1)(b)) is concerned.

14. The key factors are the status of: (1) the forum court (is it in a Contracting State with an Article 95 reservation?) and (2) the state whose law is chosen by the forum court's conflict of law rules (again, whether this is a Contracting State with an Article 95 reservation).

15. A simple diagram of the permutations (assuming that the parties' places of business are not in two Contracting States<sup>6</sup>) is as follows:

<u>Forum Court</u>	<u>Chosen Law</u>	<u>Result</u>
A Contracting State which is bound by Article 1(1)(b).	A Contracting State which is bound by Article 1(1)(b).	The CISG applies. Article 1(1)(b) applies directly.
A Contracting State which is bound by Article 1(1)(b).	A Contracting State which is <u>not</u> bound by Article 1(1)(b).	Prevailing view (with exceptions) is that the CISG applies. See paragraph 16 below.
A Contracting State which is <u>not</u> bound by Article 1(1)(b).	A Contracting State which is bound by Article 1(1)(b).	The forum State can, by policy, <u>choose</u> whether to apply the CISG. See paragraph 17 below.
A Contracting State which is <u>not</u> bound by Article 1(1)(b).	A Contracting State which is <u>not</u> bound by Article 1(1)(b).	The CISG does not apply. Article 1(1)(b) has no application.

16. **The forum being a Contracting State bound by Article 1(1)(b) while the chosen law being the law of a Contracting State not bound by Article 1(1)(b) (“Reserving State”):** in this scenario, the argument for applying the CISG is that the forum state has not made any Article 95 reservation, and from the forum's point of view the Reserving State is also a Contracting State to the CISG, hence satisfying the requirements of Article 1(1)(b) (Article 95 noticeably does not provide that the Reserving State's status as a Contracting State is affected)<sup>7</sup>. It should be noted, however, that Germany has adopted the contrary view, no doubt on the basis that the position above renders the Article

6 Article 1(1)(a) will apply in such circumstances.

7 Schwenzler (n 2) Article 1 para. 38.

95 reservation of unduly narrow application<sup>8</sup>.

17. **The forum being a Reserving State while the chosen law being the law of a Contracting State bound by Article 1(1)(b):** here, Article 95 applies. However, its wording is not mandatory - it provides only that a Reserving State is “not ... bound” to apply Article 1(1)(b). Hence, the forum Court may still, subject to its own state policy, apply Article 1(1)(b)<sup>9</sup> (e.g. on the simple application of its own conflict of law rules, the law chosen is that of a Contracting State which by definition has indicated its preference for the CISG to apply over its domestic sales law in international sales). On the other hand, there are Reserving States which have made it expressly clear that they will apply the CISG only if Article 1(1)(a) is satisfied<sup>10</sup>.

18. **Comparative analysis.** The existing Hong Kong position on choice of law is relatively certain if the parties validly make an express choice of law, which is the majority of cases. Difficulties arise, however, where there is dispute over the governing law, or where the chosen law is foreign.

19. Application of the CISG would simplify the choice of law question in those cases where the dispute falls to be governed wholly by the CISG (i.e. proof of foreign law becomes unnecessary).

20. However, in other cases, application of the CISG would add further questions to the analysis already undertaken by Hong Kong courts, i.e. whether and over which issues in dispute does the CISG apply.

21. Whilst the analysis of whether the CISG applies is not unduly difficult, there remain individual points on which there is significant uncertainty and which can only be resolved by the practice or policy of the Contracting State (e.g. deciding whether China’s reservation under Article 95 should be extended to Hong Kong, and if so whether to expressly state that Hong Kong courts would only apply the CISG in cases of Article 1(1)(a)).

22. Further, for cases in which the CISG governs only part of the issues in dispute, the relevant Hong Kong court will (as under the *status quo*) have to apply its conflict of law rules to ascertain the law governing such disputes, and will in fact have to apply two bodies of law (the CISG and the governing law) to different aspects of the same case. The economies (or lack thereof) to be achieved by accession are empirical questions (e.g. how frequently are cases resolved entirely under the CISG) outside the scope of this Consultation Paper but may merit further investigation.

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8 *Ibid.*

9 CISG Advisory Council Opinion No.15, para. 3.8, available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op15.html#60>.

10 *Ibid* para. 3.9, concerning in particular Singapore and various states in the US.

## **(B) Sale of Goods or Supply of Services?**

23. A second issue in determining the scope of the CISG is whether the contract on hand is one for the sale of goods or for something else. As we have seen, this issue also arises in local Hong Kong law, but given the autonomous interpretation to be given to the CISG as uniform international law<sup>11</sup>, domestic jurisprudence cannot assist.

24. The answer is instead found in Article 3. Article 3(1) provides that contracts for the supply of goods to be produced are sales, unless the party ordering the goods supplies a “substantial part” of the materials necessary for such production. Article 3(1) distinguishes contracts for goods from contracts for work and materials.

25. Regarding the “substantial part” test under Article 3(1), factors relevant include: (1) the economic value of the materials supplied, (2) the relative volume of the materials supplied, and (3) the functional importance of the materials to the end-product<sup>12</sup>. The interaction of these factors is unclear, although courts and commentators generally agree that the economic value test, being the most objectively certain test, is an appropriate starting point for analysis<sup>13</sup>.

26. Article 3(2), meanwhile, excludes the CISG from contracts in which the “preponderant part” of the obligations of the party producing the goods consists in the supply of labour or services. Article 3(2) addresses contracts with mixed supply of goods and services.

27. The “preponderant part” test in Article 3(2) is similarly controversial, although it appears settled that the starting point is again the relative economic value of the services involved in the mixed contract to the goods finally furnished, and that “preponderance” means at least 50%<sup>14</sup>. It is also recognised that such an economic value analysis is subject to any contrary intention of the parties<sup>15</sup>.

28. **Comparative analysis.** It is clear that both the CISG and Hong Kong local law struggle with delineating sale of goods from mixed contracts or contracts for work and materials. Indeed, the “substance of the contract” test under local Hong Kong law<sup>16</sup> is, if anything, even more vague and difficult to apply in practice than the tests under Article 3. A party applying the CISG would at least, given the existing case law and commentary, know what kind of evidence (e.g. on economic value) to collate and arguments to make, albeit the weighing and balancing of different arguments by the tribunal would be difficult to predict. The same can be said with even less confidence for the more open-

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11 Schwenzer (n 2) Article 7 para. 5.

12 *Ibid* Article 3 para. 6.

13 *Ibid* Article 3 para. 7. See also CISG Advisory Council Opinion No.4, paras. 2.3-2.6, available at: <https://www.cisg.law.pace.edu/cisg/CISG-AC-op4.html>.

14 Schwenzer (n 2) Article 3 paras. 18-20.

15 *Ibid* Article 3 para. 19.

16 See paras. 12-14 of Annex 2.1 to this Consultation Paper.

textured test under local law.

### **(C) Excluded Areas**

29. In addition to the coverage issues above, the CISG expressly exempts from its scope certain subject-matters. These include (relevantly for present purposes) the following.

30. First, consumer sales are excluded, defined as goods “bought for personal, family or household use” (Article 2(a)).

31. Second, the CISG does not govern the liability of the seller for death or personal injury caused by the goods to any person (Article 5). However, this exemption is relatively narrow: it has been argued that, where X sells to Y and the goods are passed on to and injure Z, Y’s claim against X is not liability for personal injury but instead only for indemnity of the compensation paid by Y to Z, i.e. a type of economic loss which falls within the CISG<sup>17</sup>.

32. Third, the CISG *prima facie* does not govern matters of (substantive) validity of the contract of sale or of property issues inherent in such contract (Article 4).

33. This exemption is prefaced with “*prima facie*” as the exclusionary text of Article 4 is subject to two caveats:

“In particular, except as otherwise expressly provided in this Convention, it is not concerned with ... [issues of validity and property]” (emphasis added)

34. Given such caveats, there is agreement that there are other matters not mentioned in Article 4 which falls outside the CISG, such as agency and limitation<sup>18</sup>. There is also recognition that validity, insofar as it relates to form (i.e. offer and acceptance), is in fact governed by the CISG in the express rules concerning formation of contract<sup>19</sup>.

35. A comprehensive summary of matters covered by and excluded by the CISG is outside the scope of this overview, and in any event is not altogether relevant for the comparative exercise to be conducted in this Annex. Instead, specific issues of compatibility between local Hong Kong law and the CISG due to its limited scope (e.g. on the continued viability of rescission for misrepresentation under the CISG, or of the doctrine of penalty clauses under the CISG) are identified and addressed in greater detail in Chapter 2 of this Consultation Paper.

36. **Comparative analysis.** Very little need be said as the above is only concerned with delineating the scope of the CISG, instead of comparing

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17 Schwenzer (n 2) Article 5 paras. 9-10; Bridge (n 1) para. 10.27.

18 Bridge (n 1) para. 10.28.

19 Schwenzer (n 2) Article 4 para. 29.

CISG provisions to local Hong Kong law provisions.

#### **(D) Contracting Out**

37. The CISG professes to be a set of default rules governing a contract for the international sale of goods. In line with the general principle of freedom of contract, the parties are generally free to agree on variations or alterations to such default rules, and this is provided for in Article 6.

38. However, despite the unqualified wording of Article 6 (“may ... derogate from or vary the effect of any of its provisions”), there are provisions of the CISG which the parties cannot derogate from or vary the effect of, including e.g. Article 12 (which is excepted from Article 6), Article 28 (which provides for the forum court’s discretion to decline specific performance notwithstanding CISG provisions to the contrary) and Part IV (which contains provisions not directed at the contractual counterparties but rather the Contracting States, e.g. the right to make reservations)<sup>20</sup>.

39. **Comparative analysis.** In terms of its function in setting default rules, the CISG is similar to the Sale of Goods Ordinance, Cap. 26 (“SGO”), most of the provisions of which are amenable to contracting out as well<sup>21</sup>. Indeed, the parties’ scope of contracting out under international sale of goods contracts governed by SGO is broader than under the CISG, as the former extends to “any right, duty or liability [that] would arise under a contract of sale of goods by implication of law” (i.e. not only duties that would arise under SGO itself). However, under Article 6 parties can contract out of CISG provisions only.

### **III. Contract Formation**

40. This section deals with the CISG provisions governing the formation of a contract.

#### **(A) Requirements of Form**

41. **Article 11.** The first sentence of Article 11 takes the same stance as local Hong Kong law, rejecting formalities in contract formation. The second sentence of Article 11 provides that all evidence is admissible to prove a contract. In effect, therefore, it overrides the Hong Kong parol evidence rule (which is itself not always relevant<sup>22</sup>, and is also already subject to numerous exceptions in local Hong Kong law<sup>23</sup>).

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20 *Ibid* Article 6 para. 9.

21 SGO section 57(1).

22 *Feco Development v Bonny Forward Company* (unreported, HCA 1465/2005, 18 July 2012) at para. 54.

23 For example, the rule does not apply where the evidence goes to prove that a written agreement was not intended to give rise to contractual relations between parties: Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) para. 13-110.

42. **Article 12.** For any party with its place of business in a Contracting State that has made the Article 96 declaration of reservation, courts must apply the conflict of law rules of the forum state to determine the governing law, and hence the corresponding requirements as to form. If the law of a CISG Contracting State (which has made no Article 96 reservation) is the governing law, then Article 11 would apply again<sup>24</sup>.

### **(B) Offer**

43. **Making offers.** Under Article 14(1), any proposal addressed to the relevant entity/entities for the purpose of concluding a contract is considered to constitute an “offer” if it is “sufficiently definite” and “indicates the intention of the offeror to be bound in case of acceptance”. A proposal is “sufficiently definite” if it indicates the goods and expressly or implicitly determines the quantity and the price.

44. **Comparative Analysis.** Despite the apparent similarity in the express wording of Article 14(1) with the definition of an offer in local Hong Kong law, the operation of the provision is heavily influenced by factual considerations<sup>25</sup>.

45. The first sentence of Article 14(1) makes it clear that the objective meaning of the proposal is decisive for determinative purposes, and that the proposal is to be interpreted on the basis of the understanding that a reasonable person “of the same kind” as the addressee would have had in the same circumstances (an application of Article 8(2))<sup>26</sup>. This is significant, as otherwise the interpretation of statements and conduct under the CISG is *prima facie* performed from a subjective perspective.

46. One potential difficulty from a comparative perspective is determining whether a contract of sale is binding if no provision for calculating the price is made in the offer<sup>27</sup>.

47. Such agreements can be binding under local Hong Kong law, since courts would endeavour to find practical meaning in commercial agreements that businesspeople have made and acted upon. This means that the intention to pay a reasonable price can be inferred<sup>28</sup>.

48. As for the CISG, it has been suggested that Article 14(1) is not exhaustive, and that there are offers that should be recognised as such even when they fall outside the provision, as they may nevertheless be accommodated by Article 55<sup>29</sup>, which states “[w]here a contract has been

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24 Schwenger (n 2) Article 12 para. 3.

25 Bridge (n 1) para. 11.02.

26 Schwenger (n 2) Article 14 para. 26.

27 Bridge (n 1) para. 11.12.

28 *New World Development Co Ltd and another v Sun Hung Kai Securities Ltd* (2006) 9 HKCFAR 403.

29 Bridge (n 1) para. 11.14.

validly concluded but does not expressly or implicitly fix...the price, the parties are considered...to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances...”.

49. To the extent that Article 55 can take precedence over Article 14(1), it can be said that, through their treatment of unmeritorious objections to the existence of a binding contract, both the CISG and local Hong Kong law are similar in their encouragement of commerce.

50. However, where the accepted offer is one that specifies for price to be fixed by the valuation of a third party, and the said valuation is not made, section 11(1) of the SGO specifically states that the contract would be avoided. On the other hand, applying Article 14(1) with reinforcement from Article 55, the contract would likely remain binding under CISG.

51. **Offers to the public.** Article 14(2) seems to lay down the default rule that an invitation to an indefinite group of persons, which for instance can be a price list, circular or newspaper advertisement, is merely an invitation to treat. The provision additionally states that such an invitation can nevertheless be an effective offer if the offeror clearly indicates as such.

52. **Comparative analysis.** This is the same as local Hong Kong law. Examples of sufficiently clear indications are offers to regular customers and special promotions made “as long as stocks last”<sup>30</sup>. This is reminiscent of the well-known reasoning in *Carlill v Carbolic Smoke Ball*<sup>31</sup>.

53. **Terminating offers.** Article 15(2) distinguishes between withdrawing and revoking an offer, with them respectively occurring before and after the offer becomes effective by reaching the offeree pursuant to Article 15(1).

54. Article 16(1) then provides that a bar to revoking an offer is the offeree’s dispatch of an acceptance, rather than the offeror’s receipt of that acceptance. Hence, contrary to what the provision may seem to suggest, the offeror’s right to revoke its offer is in fact necessarily terminated before the time a contract is concluded<sup>32</sup>. This is somewhat based on the postal rule, but applies to revocation rather than acceptance of an offer. Article 17 then provides that an offeror remains bound by an offer until the offeree’s rejection reaches him/her.

55. **Comparative analysis.** There is little in Article 15 which would disturb the Hong Kong lawyer, except for the matter of different terminology<sup>33</sup>. However, as to Article 16(2), the introduction of two specified criteria through which an offer becomes irrevocable renders it in clear conflict with the local Hong Kong law position, where offers unsupported by consideration are

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30 Schwenzer (n 2) Article 14 para. 32.

31 *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

32 Schwenzer (n 2) Article 16 para. 4.

33 Barry Nicholas, ‘The Vienna Convention on International Sales Law’ (1989) LQR 201, 213.

revocable at will.

56. Furthermore, in common law, 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. In contrast, civil law systems generally regard an offer as irrevocable until any time fixed for its acceptance lapses.

57. This has caused Article 16(2)(a) to be described as a potential “trap for the unwary common lawyer”, since its ambiguous formulation may lead a common lawyer to emphasise the need for an indication of irrevocability, while a civil lawyer would treat the fixing of a time as an indication of such by itself<sup>34</sup>.

58. The provision in Article 16(2)(b) that an offer cannot be revoked “if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer” is reminiscent of promissory estoppel in local Hong Kong law<sup>35</sup>.

59. Summing up both limbs of Article 16, one view is that the provision is an attempt to create a compromise between the relevant consideration-based common law doctrine with the civil law position, demonstrated particularly in Germanic tradition, that an offer itself embodies obligation<sup>36</sup>.

60. As for Article 17, the local Hong Kong law position, as aforementioned, is instead that contractual offers may be revoked at any time before acceptance, even if the offeror promised not to revoke (where such promise is unsupported by consideration)<sup>37</sup>.

## **(C) Acceptance**

### *(1) Making Acceptance*

61. Under Article 18, acceptance is allowed by means of a “statement” or “other conduct”, whilst acceptance by silence “in itself” is not allowed. A contract is formed when the acceptance reaches the offeror.

62. Regarding acceptances by post, the CISG has the general rule that an acceptance is effective on receipt, such that it is for the offeree to inquire if he/she receives no response to the acceptance<sup>38</sup>.

63. Article 18(3) outlines exceptions to the general rule that acceptance must reach the offeror to become effective whereby, with established practices or usage between the parties, certain acts indicating assent can form effective acceptance the moment they are performed. It is suggested that the effectiveness of such conduct indicating consent is to be

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34 *Ibid* 214.

35 *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130.

36 *Bridge* (n 1) para. 11.03.

37 *Routledge v Grant* (1828) 4 Bing 653.

38 *Nicholas* (n 33) 215.

evaluated based on the objective understanding of the offeror, in the Article 8(2) sense<sup>39</sup>.

64. It is worth noting that under Article 18(3), since notice of the act effectively indicating consent may not need to be given to the offeror, it is possible for the offeror to be contractually bound without actually being aware of it.

65. Article 18(3), in creating an exception to notice where parties have established prior practices or usage, can also be seen as a tacit acknowledgement that there exists a general rule in the CISG requiring notice to the offeror when it comes to the offeree's acceptance by conduct.

66. **Comparative analysis.** The general rule for acceptance in Article 18 is in line with the local Hong Kong law position, namely that a contract is formed when the acceptance reaches the offeror<sup>40</sup>. On the other hand, local Hong Kong law applies the postal rule, which is based on the dispatch of the acceptance, so that the offeror bears the risk of not receiving the acceptance.

67. As for acceptance by conduct, this is similarly assessed according to the objective principle in Hong Kong<sup>41</sup>, but local Hong Kong law does not seem to go as far as to specify that notice to the offeror is unnecessary where there is established practice or usage.

## (2) *Withdrawing acceptance*

68. Through Article 22 and Article 18(2), CISG allows the withdrawing of an acceptance up to the moment the said acceptance reaches the offeror. In practice, this rule is rarely applied save for revocation of an acceptance sent by post or otherwise delivered with a delay. On this point, the CISG provides for greater clarity than local Hong Kong law (for which this point is mired in uncertainty<sup>42</sup>).

## (3) *Late acceptance*

69. Article 21(1) stipulates that late acceptance is still effective if the offeror so notifies the offeree without delay. It may enable an offeror to take advantage of any market changes in his favour<sup>43</sup>. Having said that, Article 22 balances this advantage out by availing the offeree of the possibility to withdraw his acceptance<sup>44</sup>.

70. As to timing, in the situation where the offeree gives a late

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39 Schwenger (n 2) Article 18 para. 13, fn 74.

40 See para. 26 of Annex 2.1 to this Consultation Paper.

41 Beale (n 23) para. 2-029.

42 See para. 29 of Annex 2.1 to this Consultation Paper.

43 Nicholas (n 33) 215.

44 *Ibid.*

acceptance, the time of contract conclusion is not when the offeror gives a written or oral notice of approval under Article 21, but is retroactively dated back to the time the late acceptance reached the offeror<sup>45</sup>.

71. Where the arrival of the late acceptance concludes an effective contract, it would no longer be possible for the offeree to withdraw its declaration of acceptance under Article 22 once the offeror makes a declaration of approval<sup>46</sup>.

72. **Comparative analysis.** While Article 21(1) does not correspond to any conventional common law rule, it has been suggested that English courts are likely to treat the late acceptance as an offer, which the original offeror could then accept<sup>47</sup>. The same may happen in Hong Kong courts.

73. A clearer departure from local Hong Kong law is seen at Article 21(2), under which a late acceptance can be also effective where it can be shown that, if its transmission happened normally, the acceptance would have reached the offeror in due time.

74. Article 21(2) places a burden on the offeror who does not want to approve of the offeree's late acceptance to inform the offeree "without delay" that he/she considers the offer to have lapsed. Whereas in common law no such issue would arise, as acceptance would have been effective from the moment of its dispatch. The offeror would be left with no relief from postal delay, as the contract would be deemed concluded at the time of dispatch of the acceptance, unless the offeree was responsible for the late arrival of the acceptance letter.

#### **(D) "Reach"**

75. Article 24 defines how an offer, acceptance or any other indication of intention is considered to "reach" its addressee. Despite its wording, Article 24 expresses a general principle and hence, in light of Article 7(2), applies also to Part III of the CISG<sup>48</sup>.

76. However, in outlining how an acceptance can be considered to reach the offeror, the provision is not expressed in a way that embraces acceptance by conduct of the offeree.

77. It should be noted that the CISG does not lay down rules to govern any potential misconduct by a recipient, which can include acting in bad faith to delay or prevent a communication from "reaching" himself/herself<sup>49</sup>. In this situation, a potential issue is how to determine whether an acceptance of

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45 A precondition for contract conclusion is that the late acceptance reaches the offeror. See Schwenger (n 2) Article 21 para. 6.

46 Schwenger (n 2) Article 21 para. 10 and fn 45.

47 Bridge (n 1) para. 11.08.

48 Schwenger (n 2) Article 24 para. 3.

49 *Ibid* Article 24 para. 42.

an offer (Article 18), a withdrawal of an offer (Article 15) or an acceptance (Article 22), or a revocation of an offer (Article 16) has “reached” its addressee.

78. It has been suggested that Article 7(1), which promotes “the observance of good faith in international trade”, is the appropriate basis to interpret Article 24 and its rules governing how a declaration “reaches” its addressee, and for any gaps in the provision with regard to situations like that of the recipient acting in bad faith, Article 7(2) be applied to arrive at autonomous interpretations that bridge the gaps<sup>50</sup>.

79. However, it has also been suggested that the wording in Article 24 is sufficient to remove the meaning of “reach” from the domain of private international law and the applicable law further to Article 7(2)<sup>51</sup>.

80. **Comparative Analysis.** Article 24 departs from local Hong Kong law by treating all forms of acceptance alike when requiring acceptance to “reach” the offeror<sup>52</sup>, with no express exception that corresponds to the postal rule (for acceptance)<sup>53</sup>.

81. As mentioned in paragraph 28 of Annex 2.1 to this Consultation Paper, acceptance by electronic communications becomes effective under local Hong Kong law either when it is received by a designated information system, or where no such information system is designated, when the electronic message “comes to the knowledge of the addressee”: section 19(2)-(3) of the Electronic Transactions Ordinance (Cap. 553).

82. The Electronic Transactions Ordinance (Cap. 553) is said to offer an addressee in the latter situation a higher level of protection, compared to the United Nations Model Law on Electronic Commerce that Cap. 553 is largely based on (which deems receipt to have occurred when the electronic message “enters” the addressee’s information system)<sup>54</sup>.

83. In light of the discussion in paragraphs 78 and 79 above, it may well be difficult to arrive at a settled definition for “reach”. Nevertheless, there is likely to be force in the argument that the Cap. 553 requirement for the recipient’s knowledge similarly offers the recipient a higher level of protection than Article 24, given the CISG position that receipt is deemed to have occurred when the email enters and is stored in the addressee’s information system<sup>55</sup>. For the avoidance of doubt, Article 24 likely displaces Cap.553 insofar as the CISG applies<sup>56</sup>.

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50 *Ibid.*

51 Bridge (n 1) para. 11.09.

52 *Ibid* para. 11.06.

53 However, as discussed in para. 54 above, Article 16(1) preserves the postal rule, though for revocation of an offer rather than acceptance.

54 Annotated Ordinances of Hong Kong - Electronic Transactions Ordinance (Cap. 553) para. 19.02.

55 Schwenger (n 2) Article 24 para. 24.

56 Given the autonomous CISG rules on e-mail acceptance: see e.g. Schwenger (n 2) Article 24 paras. 6, 24-28.

### **(E) Battle of the Forms**

84. Article 19(1) states that a reply to an offer is not an acceptance (in the ordinary sense) if it contains additions, limitations or other modifications to the said offer, and is instead a counter-offer. This provision is a recognition of the traditional mirror image rule of having offer and acceptance exactly matching each other, and is broadly consistent with local Hong Kong law.

85. However, Article 19(2) stipulates that when the original offeree includes additional or different terms in its reply to an offer, but the terms of the offer do not become materially different<sup>57</sup>, the said reply, subject to the exception mentioned in paragraph 87 below, still functions as an acceptance, and a contract is concluded on the terms of the offer and the modifications contained in the reply.

86. As to “material difference”, Article 19(3) regards all of price, quantity, quality, payment, extent of liability, time and place of delivery, and settlement of disputes as altering the terms of the offer materially. It has hence been suggested that Article 19(2) may not be applied with any regularity at all, though it has been held that a long-established contractual relationship demonstrated that a difference in terms was not material<sup>58</sup>.

87. A further exception to the last shot taking effect as the contract is where the original offeror objects to the altered terms “without undue delay” (Article 19(2)). The concept of “without undue delay” is a concept of German law. It allows for the recipient of the altered terms (the original offeror) to have a period of time for deliberations, the length of which is flexibly determined according to the circumstances of that particular case<sup>59</sup>. Existing CISG case law has held that a five-day delay was too long for a Chinese-Swedish sales contract concluded by fax; commentators suggest a period of about one to three days for average cases<sup>60</sup>.

88. The original offeror can make its objection orally, which also includes using the telephone, radio or video conferences etc., or by any other means that the original offeree had consented to use in its communications with the offeror, including by electronic messages<sup>61</sup>.

89. It is worth noting that Article 19(2) requires a non-oral objection to only be dispatched to be effective. Therefore, if the party that created different terms (the original offeree) treats the contract as effectively concluded and proceeds to perform, it must bear the risk of the original offeror’s objection being lost or late in transmission<sup>62</sup>.

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57 The burden of proving that the original offer had not become materially different rests on the party claiming conclusion of the contract. See Schwenzer (n 2) Article 19 para. 26.

58 Bridge (n 1) para. 11.10 and fn 85.

59 Schwenzer (n 2) Article 19 para. 28 and fn 113.

60 *Ibid* Article 19 para. 28.

61 *Ibid* Article 19 para. 27.

62 *Ibid* Article 19 para. 28.

90. **Comparative analysis.** Article 19 departs from the mirror image rule in local Hong Kong law and generally applicable also under the CISG, by introducing the factor of “material difference”, and diverges from the “last shot” approach by introducing the option to object “without undue delay”<sup>63</sup>. It is in principle significantly different from local Hong Kong law, albeit the case law is not altogether consistent<sup>64</sup>.

#### **IV. Ascertaining the Contents of CISG Contracts**

91. This section deals with the principles on the interpretation of the CISG and parties’ conduct thereunder, as well as the processes of “gap-filling” and “usage” by which the contents of CISG-governed contracts are determined.

##### **(A) Interpretation of the CISG**

92. Article 7(1) lays down the general principle for interpreting the CISG. It provides that the interpretive exercise should take into account: (1) the international character of the CISG, (2) the need to promote uniformity in its application across different states, and (3) the principle of good faith in international trade. (Article 7(2) deals with “gap-filling” and will be explained separately below.)

93. It is generally agreed that, by virtue of its wording, Article 7(1) applies only to the interpretation of the CISG itself and not the contractual relationship of the parties (subject to some debate over whether the “good faith” principle is so limited as well)<sup>65</sup>.

94. The exhortation to bear in mind the international character of the CISG embodies the principle of autonomous interpretation and reminds courts to be wary of domestic preconceptions and concepts in interpretation<sup>66</sup>.

95. The need to promote uniform understanding of the CISG is obvious in light of its application across jurisdictions with different legal traditions. The interpretive principle reminds courts (especially those from civil law traditions) to have regard to the existing body of case law on the CISG<sup>67</sup>.

96. The requirement to observe good faith is controversial. Not only is the notion of good faith itself autonomous and hence hard to define other than by CISG case law, it may be said to be of limited utility insofar as it applies only to interpretation of the CISG and not of the conduct of the contractual parties<sup>68</sup>. The better view, more consistent with the text of Article 7(1), is to confine the

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63 On the “last shot” approach in local Hong Kong law, see the discussion in para. 31 of Annex 2.1 to this Consultation Paper.

64 E.g. the “last shot” rule in fact has some support in CISG case law. See Bridge (n 1) para. 11.11.

65 Schwenzer (n 2) Article 7 para. 6.

66 *Ibid* Article 7 para. 8.

67 *Ibid* Article 7 para. 10.

68 *Ibid* Article 7 para. 17.

concept of good faith to (1) elucidating the meaning of terms in the CISG which are unclear (e.g. the extent of the duty to “mitigate” under Article 77), and (2) requiring the court to interpret the parties’ contractual conduct (as per Article 8) in good faith (i.e. to read Article 8 subject to the good faith principle)<sup>69</sup>.

97. Leading commentators have noted that Article 7(1) itself does not actually “lay down the [exact] methods to use in interpreting the Convention”<sup>70</sup>. However, general practice in interpreting the CISG has grown to encompass methodologies such as (1) recourse to textual and contextual analysis, (2) reference to *travaux préparatoires*, and (3) comparative use of other uniform law projects<sup>71</sup>.

98. **Comparative analysis.** It is clear that Article 7(1) performs a function similar to that of the principles of statutory interpretation under local Hong Kong law, serving to thresh out the meaning of a statutory code which can be incorporated as terms of the parties’ contract (like SGO).

99. The methodology applied in practice is also broadly similar to the local Hong Kong law approach to statutory interpretation, although:

- (1) Background legislative material under Article 7(1) is used in a narrower manner than in local Hong Kong law. Under local Hong Kong law, reference to legislative history can: (a) identify the social mischief which the legislature was trying to cure; and (b) identify the legislature’s intention by way of tracing the history of debate, additions and/or modification to proposed statutory terms. The *travaux préparatoires* under the CISG can be (and often is<sup>72</sup>) used to fulfil the latter function, but not the former.
- (2) The requirement under Article 7(1) to adopt an autonomous interpretation of the CISG of course restricts the scope of argument in an interpretive exercise when compared to interpretation under local Hong Kong law, where parties can bring into play other statutes and pre-existing common law principles (i.e. consistency arguments).
- (3) Finally, the good faith provision in Article 7(1) is not directly replicated in local Hong Kong law, but the canons of statutory interpretation against absurdity therein<sup>73</sup> may do much the same work insofar as the interpretation of ambiguous words is concerned. Of course, the Hong Kong courts have no equivalent to using the good faith principle to “flesh out” provisions of the CISG in the abstract, but must instead turn to the legislative

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69 *Ibid* Article 7 para. 17.

70 *Ibid* Article 7 para. 20.

71 *Ibid* Article 7 paras. 20-26.

72 See e.g. Nicholas (n 33) 208 on how the “good faith” provision in Article 7(1) was the result of a difficult compromise between civil and common law jurisdictions. Hence the lack of clarity in how it was intended to function.

73 Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (7th edn, LexisNexis 2017) paras. 12.1-12.7.

history and pre-existing local law to ascertain the meaning of insufficiently detailed wording in statute.

**(B) Gap-filling under the CISG**

100. Article 7(2) provides for the approach to be adopted when the CISG covers a specific subject-matter generally but fails to provide specific guidance thereon. Broadly, in such circumstances, courts applying the CISG are directed to first extrapolate solutions from the “general principles on which [the CISG] is based”<sup>74</sup>, and failing that, to apply domestic law.

101. It is acknowledged that the line between (liberal) interpretation of the CISG under Article 7(1) and gap-filling under Article 7(2) can be difficult to draw in practice<sup>75</sup>, albeit this may not be too relevant in practice insofar as both processes arrive at the same result.

102. A few examples of gap-filling may serve to illustrate its operation:

- (1) Article 3 provides that contracts for mixed goods and services may be governed by the CISG. However, the CISG makes no provision in terms of obligation, breach and/or remedy in respect of the services aspect. It has been held that the provisions of Part II and III of the CISG governing the goods aspect should apply *mutatis mutandis* to the services under the contract<sup>76</sup>.
- (2) Another example concerns the right to withhold performance. Article 58 provides for the right of the parties to withhold payment or delivery subject to conditions. However, there will often be cases where the parties wish to suspend performance of other obligations (e.g. where the parties terminate the contract by agreement). Commentators therefore derive a general right to withhold, subject to the proportionality of the performance still to be performed<sup>77</sup>.

103. Finally, recourse to domestic law is allowed, although given the CISG objective of uniformity this is only used as a last resort where the (sometimes difficult) exercise in ascertaining the general principles of the CISG do not bear fruit, or where the parties have by contract excluded pertinent provisions of the CISG for deriving the general principles<sup>78</sup>.

104. **Comparative analysis.** Article 7(2) is, at its heart, a provision based on civil law philosophy, where general principles are derived from within the four corners of an enacted law. By contrast, a common lawyer finds general

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74 Article 7(2).

75 Schwenger (n 2) Article 7 para. 29.

76 *Ibid* Article 7 para. 37.

77 From Articles 58, 71 (right to withhold) and Articles 50, 51, 80 (proportionality). See Schwenger (n 2) Article 7 paras. 40-41.

78 Schwenger (n 2) Article 7 para. 42.

principles in the case law<sup>79</sup> and turns to the authorities where the statute runs out. It is understandable that Article 7(2) is included in a uniform law project without a body of pre-existing case law.

105. Within the scheme of the CISG, Article 7(2) appears to serve two functions. First, it updates the CISG in line with the passage of time (e.g. it extends Article 13, defining “writing” in the CISG as including telegrams and telexes, to faxes and email). This is a role which Hong Kong lawyers, especially those practicing constitutional law, are familiar with, given the interpretation of the Basic Law as a “living instrument”<sup>80</sup>.

106. Secondly, Article 7(2) mandates a court to read in new provisions into the CISG where the terms run out. It seems safe to say that there is no functional equivalent in the local Hong Kong law of statutory interpretation. Whilst our courts are empowered, by the doctrine of rectifying interpretation<sup>81</sup>, to rewrite or expand on legislative enactments, this is confined to cases of clear drafting mistakes which must be necessarily rare. Further, rectifying interpretation only clarifies the statute in line with the legislative intent; it does not, unlike gap-filling, constructively extend the legislative intent.

107. However, insofar as the dispute concerns the CISG applied as contractual terms between the parties<sup>82</sup>, the gap-filling process performs a function similar to the implication of terms under local Hong Kong law (i.e. to complete the contract), albeit the reasoning process is clearly different.

108. Overall, Article 7(2) should not pose undue difficulties in practice:

- (1) First, Article 7(2) is limited in scope. Difficulties with the text of the CISG in the abstract are first addressed by interpretation under Article 7(1), which Hong Kong lawyers and courts are likely comfortable with. Difficulties with the CISG as applied to the specific case may be addressed by interpreting the parties’ intention and usages<sup>83</sup>.
- (2) Second, the large body of academic literature on Article 7(2) exercise<sup>84</sup> would hopefully ensure that a Hong Kong court embarking on an Article 7(2) exercise will not proceed in a vacuum.
- (3) In any event, whilst there will be some measure of uncertainty in the Article 7(2) gap-filling process, domestic law (which will often be pleaded for completeness in practice) can be used not only as an alternative to gap-filling but also as a means of confirming the

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79 Nicholas (n 33) 209; Bridge (n 1) para. 10.46.

80 *W v Registrar of Marriage* (2013) 16 HKCFAR 112 [84].

81 *Chan Pun Chung v HKSAR* (2000) 3 HKCFAR 392 at 397.

82 Schwenzer (n 2) Article 7 para. 31 confirms this application of Article 7(2).

83 Article 8 and Article 9 respectively. See Schwenzer (n 2) Article 7 para. 31.

84 See e.g. the general principles which have been variously derived from the CISG at Schwenzer (n 2) Article 7 paras. 32-35.

outcome in terms of reasonableness and commercial sensitivity, insofar as local Hong Kong law principles do not run contrary to CISG principles.

### **(C) Interpretation of Parties' Conduct**

109. Article 8 governs the interpretation of all legally relevant statements made by and other conduct of the parties, including statements leading to contract formation and the various declarations required under the different CISG provisions (e.g. declaration of avoidance of contract under Article 26).

110. Whilst not expressly stated in Article 8, there is also consensus that Article 8 governs the "interpretation" of contracts<sup>85</sup>, not in the sense of resolving ambiguity, but rather in determining the contents of the contract. This can be where the contract is constituted by or modified by the parties' conduct or statements, or where the parties have introduced terms beyond those set out in the CISG.

111. Operatively, Article 8 requires that a party's conduct be first interpreted subjectively according to his intent insofar as the other party knew or should have known of such intent (Article 8(1)), or failing that be interpreted objectively according to what a reasonable person would have understood in the circumstances (Article 8(2)). In both exercises the Court is required to take all circumstances into account (Article 8(3)). This includes pre-contractual negotiations and post-contract conduct.

112. Despite the primacy of the subjective intent, in practice parties will largely rely on the objective interpretation rule in Article 8(2), only resorting to Article 8(1) where one party's subjective understanding is not objectively reasonable<sup>86</sup>, as its elements (of (1) an unreasonable understanding, and (2) the other party's knowledge (actual or constructive) of the same) are clearly difficult to establish by evidence.

113. **Comparative analysis.** There is relatively little debate in local Hong Kong law on the approach to interpretation of the parties' conduct - it is generally assumed as an overarching rule that all matters are interpreted objectively.

114. Given the practical prevalence of the objective rule under the CISG as well, the practice of interpretation under the two regimes appears to be largely similar, albeit the scope of admissible evidence under the CISG is broader (as pre-contractual negotiations<sup>87</sup> and post-contract conduct are excluded under local Hong Kong law<sup>88</sup>).

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85 Schwenzer (n 2) Article 8 para. 3.

86 *Ibid* Article 8 paras. 18, 20.

87 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

88 Although see *Asset Managers Co Ltd v Pacific Electric Wire & Cable Co Ltd* (unrep., HCA 1867/2006, 19 March 2007) fn 2, where the Hong Kong court noted that it may be time to revisit such restrictions.

115. However, one issue which merits mention is non-inclusion of the notion of implied terms in Article 8. Whilst the CISG makes provision for implication of terms by custom<sup>89</sup>, it has no express equivalent to the local Hong Kong law doctrines of implication in fact or in law<sup>90</sup>.

116. Understandably, there is perhaps relatively little need for implied terms in law under the CISG as, by definition, it regulates only one type of contract (for sale of goods). However, the unavailability of implied terms in fact does create problems when the contract between the parties appears incomplete.

117. There are two distinct, albeit complementary, approaches to remedying this lack of a most useful doctrine in the CISG. The first attempts to have other provisions in the CISG do the “heavy lifting”, notably to adopt generous interpretations of the parties’ conduct (Article 8), to find that they have referred the issue on hand to other bodies of laws (via Article 6), to readily ascribe customs and usages to the parties (Article 9), and to infer subsequent variations of the contract, perhaps by conduct alone (Article 29)<sup>91</sup>.

118. The second, bolder approach, which is not without objection<sup>92</sup>, is to suggest that, by virtue of gap-filling under Article 7(2), courts applying the CISG in fact have power to supplement the contract by implying terms in accordance with the hypothetical intent of the parties<sup>93</sup>.

#### **(D) Custom and Usage**

119. Article 9 makes clear that the content of any contract governed by the CISG is governed not only by expressly agreed terms but also by usages and practices, which the parties have (1) agreed on, (2) established between themselves, or (3) knew or should have known would govern contracts of the type involved (i.e. those which “go without saying”<sup>94</sup>).

120. The threshold for establishing such usages and practices is not very clearly defined. There are decisions to the effect that usages agreed on (type 1 above) are to be proven just like offer and acceptance under the CISG<sup>95</sup>, that usages “established” between the parties (type 2 above) require more than two occurrences<sup>96</sup>, and that usages of the trade (type 3 above) must be known by the majority of those in the industry with no considerable group remaining unaware<sup>97</sup>.

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89 Article 9, discussed below.

90 See paras. 48-50 of Annex 2.1 to this Consultation Paper.

91 Schwenger (n 2) Article 8 paras. 26-27.

92 See e.g. sources set out at *Ibid* Article 8 para. 26, fn 138.

93 Schwenger (n 2) Article 8 paras. 27-28.

94 John O Honnold and Harry M Fletchner, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, Kluwer International 2009) Article 9 paras. 112, 121.

95 *Ibid* Article 9 para. 114.

96 Schwenger (n 2) Article 9 para. 8.

97 *Ibid* Article 9 para. 17.

121. Importantly, the parties' custom and usage go beyond determining the terms of a contract (or effecting a variation<sup>98</sup>) after it has been formed, but may also govern whether a contract has indeed been formed in the first place<sup>99</sup>.

122. **Comparative analysis.** Observations can be made of the three types of usages and practices described above separately.

123. First, type 1 usage is somewhat otiose, as it is merely declaratory of the general principle that the parties can, by agreement, contract out of provisions of the CISG. Whether such agreement is by usage or not does not affect its effect.

124. Second, as to type 2 usages (i.e. usages established between the parties), it appears that they are afforded greater effect under the CISG than under local Hong Kong law. Such usages may give rise to revocable waivers or estoppels under local Hong Kong law<sup>100</sup>, whilst Article 9 of the CISG elevates such usages to the level of contractual terms. Of course, revocable waivers are (by definition) revocable, and (promissory) estoppels being generally suspensive may be cancelled out by giving reasonable notice<sup>101</sup>, whilst a one-sided termination of an established practice under the CISG only affects prospective (but not pre-existing) contracts<sup>102</sup>.

125. Third, it can immediately be seen that type 3 usages (i.e. usages of the trade) perform a function similar to that of terms implied by custom under local Hong Kong law. In this regard, the (minor) difference lies in terms of proof. Whilst the local Hong Kong law position requires an open-ended proof of "notoriety", the CISG requires more objective evidence of numbers.

### **(E) Form of Variation of Terms**

126. Article 29(1) provides that a variation can be effected by the mere agreement of the parties without any further requirement as to form.

127. As such, under the CISG, requirements as to form or consideration are generally excluded for variations, and so long as the parties agree, a variation can be entirely for the benefit of one party<sup>103</sup>.

128. However, Article 29(2) sets out an exception, namely where the parties have agreed that variation must be effected in writing (i.e. a non-oral modification clause ("NOM Clause"). In other words, a NOM Clause (which itself must be in writing<sup>104</sup>) is upheld under the CISG (and indeed variation of a

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98 Bridge (n 1) para. 10.62.

99 Schwenger (n 2) Article 9 para. 3.

100 Bridge (n 1) para. 10.62.

101 Beale (n 23) para. 4-097.

102 Schwenger (n 2) Article 9 para. 10.

103 *Ibid* Article 29 para. 4.

104 *Ibid* Article 29 para. 31.

contract to cancel a NOM Clause must itself be in writing<sup>105</sup>).

129. The NOM Clause exception is itself qualified where one party's conduct precludes his reliance on a NOM Clause to the extent such conduct is relied on by the other party. This applies most usually in the scenario where, after oral modification of the contract in face of a NOM Clause, party X stands by and allows party Y to perform the contract as modified, but later wishes to object to party Y's performance. However, it is unclear whether party Y's reliance must further be "detrimental", although leading commentators suggest not<sup>106</sup>.

130. **Comparative analysis.** Article 29(1) differs from local Hong Kong law insofar as the latter's requirement of consideration is concerned. However, as evidenced by the contortions of the courts in "inventing" consideration supporting variations to the extent that the English Supreme Court now calls for revisiting this area of law<sup>107</sup>, it may be said that the CISG position is more in keeping with modern commercial practice and the needs of businesspeople.

131. As to Article 29(2), insofar as Hong Kong courts will follow the position now in England, local Hong Kong law and Article 29(2) are largely similar: the enforceability of NOM Clauses is provided for in the first sentence of Article 29(2), and a carve-out very similar to that of estoppel is provided for in the second sentence. Two minor observations are in order:

- (1) Local Hong Kong (and English) law has no firm requirement that a NOM Clause itself be in writing, but the CISG does.
- (2) Whether the reliance to create an "estoppel" needs to be detrimental in nature is apparently a vexed question under both the CISG and local Hong Kong law<sup>108</sup>.

132. Overall, it would seem that there is little to distinguish local Hong Kong law and the CISG on the subject of variation. If anything, the CISG position seems more conducive to business practice.

## V. Obligations of the Seller under the CISG

133. The general obligations of the seller are set out in Article 30. The seller must, in accordance with the CISG or with the actual contract between the parties: (1) deliver the goods, (2) hand over documents relating to the goods (which is an obligation not imposed under the CISG itself<sup>109</sup>), and (3) transfer the property in the goods<sup>110</sup>.

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105 *Ibid* Article 29 para. 24.

106 *Ibid* Article 29 para. 37.

107 See para. 41 of Annex 2.1 to this Consultation Paper above.

108 Beale (n 23) para. 4-095 suggesting no detriment necessary. Contrast *Kong Colin Chung Ping v Kong Wing On* (unrep., CACV 69/2015, 11 November 2015) [35]-[37] where the Court of Appeal appears to require detriment as an element of all types of estoppel.

109 Schwenger (n 2) Article 30 para. 8.

110 Transfer of property in goods is not provided for in the CISG and is a matter for the *lex situs*.

## **(A) Delivery**

### *(1) Manner of delivery*

134. This is governed by Article 31. The primary rule is that the manner (and place) of delivery is governed by the contract, as the various sub-articles in Article 31 apply only “[if] the seller is not bound to deliver the goods at any other particular place”<sup>111</sup>. In practice, this means that if the parties have agreed on Cost Insurance and Freight or Free on Board terms, those terms will displace Article 31.

135. Assuming there is no contractual choice to this effect, Article 31(a) then proceeds in three tiers. It first asks if the contract involves the carriage of the goods, i.e. where the contract requires the seller to transport the goods in order for the buyer to take them over<sup>112</sup>. The carrier(s) must be an independent third party and not the seller’s employees or agents<sup>113</sup>. In such circumstances, delivery is effected when (and at the place where) the seller hands over physical custody of the goods<sup>114</sup> to the carrier (the first carrier, in the event of multiple carriers).

136. If the contract does not involve carriage of the goods, Article 31(b) secondly asks if, when the contract was made, the parties had actual knowledge<sup>115</sup> of: (1) the location of the goods if they are specific goods; (2) the location of the stock if the goods sold are part of the stock; (3) the location of the manufacturer if the goods are yet to be made; or (4) the location of the production site (e.g. the plantation), if the contract is for natural goods yet to be produced (e.g. cotton to be grown).

137. In such circumstances, delivery is effected by placing the goods at the buyer’s disposal (including giving notice of such disposal<sup>116</sup>) at the location thus known to the parties in each scenario.

138. Failing both Article 31(a) and (b), Article 31(c) requires the seller to deliver the goods by placing them at the buyer’s disposal at the seller’s place of business (or, if he has no place of business, his residence<sup>117</sup>) at the time the contract was made.

139. It should be noted that the question of delivery affects not only the parties’ obligations *inter se*, but may also have jurisdictional implications, insofar as the forum court is directed by its private international law rules to consider that the *forum conveniens* is the place of delivery<sup>118</sup>. Delivery also carries

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111 Article 31, first sentence.

112 Schwenzer (n 2) Article 31 para. 11.

113 *Ibid* Article 31 paras. 15, 17.

114 *Ibid* Article 31 para. 25.

115 *Ibid* Article 31 para. 45.

116 *Ibid* Article 31 paras. 47-48.

117 Article 10.

118 Schwenzer (n 2) Article 31 para. 83.

implications for the passing of risk<sup>119</sup>.

140. **Comparative analysis.** The CISG rules are very similar to the SGO as regards manner and place of delivery. The SGO, as with the CISG:

- (1) Describes the manner of delivery first and foremost by reference to the contract (section 31(1));
- (2) Provides that for the carriage of goods, delivery to the first carrier is deemed good delivery (section 34(1));
- (3) Provides that if the contract is for the sale of specific goods which are in a place known to the parties, then delivery is effected at that place (section 31(1)); and
- (4) As a last resort, directs delivery to be made at the seller's place of business or failing that his residence (section 31(1)).

(2) *Time of delivery*

141. Under the CISG, the primary date for delivery is that (if any) specified by the contract (Article 33(a)). If the contract provides for delivery within a period of time, assuming the buyer is not to choose a date within that period<sup>120</sup>, delivery is to be effected at any moment within that period (Article 33(b)).

142. Failing both these default rules, the obligation is to deliver within a reasonable time after the conclusion of the contract (Article 33(c)). What is reasonable is a fact to be determined with reference to, in particular, what is common in similar circumstances and what is equitable (for example, difficult circumstances arising for one party will be factored in only if disclosed to the other party)<sup>121</sup>.

143. **Comparative analysis.** SGO section 31(2) (and where it runs out, the common law<sup>122</sup>) provides that if time for delivery is not fixed by the contract, then a term for delivery within a reasonable time will be implied. It appears that there is little real difference between CISG and local Hong Kong law here.

(3) *Aspects of delivery*

144. Article 32 provides for various duties of the seller in the course of making delivery. First, in a sale by carriage, the seller must identify the goods

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119 See Part IX below on "Passing of Risk".

120 Which may be provided for by the contract, or if necessary by implication of terms, commonly where the buyer must arrange the means of transportation. See Schwenger (n 2) Article 33 para. 12.

121 Schwenger (n 2) Article 33 para. 15.

122 A.G. Guest (ed), *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell 2017) para. 8-034.

shipped, or alternatively give notice to the buyer of the relevant consignment (Article 32(1)), which is to ensure that risk passes to the buyer (Article 67).

145. Second, the seller must reasonably make such contracts as are necessary to arrange for carriage to the place where the goods are to be shipped (Article 32(2)), albeit the prevailing view is that the costs of such carriage are to be borne by the buyer<sup>123</sup>. Third, if the seller is not responsible for insuring the goods in respect of the carriage, he must (on request) provide such information to the buyer to enable the buyer to so insure (Article 32(3)).

146. **Comparative analysis.** SGO provides for comparable duties of the seller as regards Article 32(2) (SGO section 34(2)) and Article 32(3) (SGO section 34(3))<sup>124</sup>. However, there is no comparable provision to Article 32(1)<sup>125</sup>, in part due to the fact that the passing of risk is differently governed under the SGO.

#### (4) *Delivery of documents*

147. The first sentence of Article 34 declares the seller's contractual duty (if any) to hand over relevant documents relating to the goods. The significance of Article 34 is in the second sentence, which affords the seller a right to cure any defect in the documents (subject to unreasonable inconvenience or unreasonable expense to the buyer<sup>126</sup>) if he delivers the documents early. This serves (in the absence of contrary agreement) to prevent the buyer from immediately avoiding the contract for lack of conformity in tendered documents<sup>127</sup>.

148. **Comparative analysis.** Under local Hong Kong law, the duty of the seller to deliver documents is similarly governed by the contract. There is no comparable local statutory right to cure any defects in the documents pre-deadline, albeit this may be provided for under the common law<sup>128</sup>.

### (B) **Conformity: Obligations as to Quality and Fitness of Goods**

#### (1) *Fitness and quality in general*

149. Article 35 sets out the general duty of the seller to ensure the

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123 Under the general principle that each party bears the costs of its own performance: see Schwenzer (n 2) Article 31 para. 79, Article 32 para. 28.

124 It has been suggested that the "usual terms" requirement in Article 32(2) comes to the same thing as the "reasonable" contract requirement under section 32(2) of the English Sale of Goods Act 1979 (and hence SGO section 34(2)): see Bridge (n 1) para. 11.46 and fn 323.

125 Cf SGO section 20, rule 5(2) which provides that unmarked goods will be deemed appropriated to the contract on delivery to the carrier. The situation in Article 32(1) may not arise as a result of the operation of that provision.

126 Unlikely to be of great significance in the documents (as opposed to goods) context, see Schwenzer (n 2) Article 34 para. 15.

127 Schwenzer (n 2) Article 34 para. 10.

128 Guest (n 122) para. 12-032.

quality of goods under the CISG.

150. Article 35(1) imposes a (declaratory) general obligation to supply goods to the specifications of the contract. Article 35(2) provides the substantive default rules as to the fitness and quality of the goods which apply unless specifically contracted out of<sup>129</sup>. In gist:

- (1) The goods are required to be fit for the ordinary purposes to which they would be put. The seller must inform the buyer if the goods are fit for only some but not all such purposes<sup>130</sup>;
- (2) If the buyer has specified any particular purpose he wished to use the goods for (whether expressly or if the seller should reasonably have known the same<sup>131</sup>), the goods must be fit for that purpose, except where it was unreasonable for the buyer to rely on the seller's skill and judgment, e.g. where the buyer is an expert in the trade and is ordering a custom-built machine<sup>132</sup>. This provision is frequently applied where the goods are used in unusual conditions, or where they must comply with public law regulations in the state of use<sup>133</sup>;
- (3) The goods must possess the qualities of any samples or models provided to the buyer; and
- (4) The goods must be properly packaged.

151. Any deviation from these requirements are termed instances of "non-conformity" under the CISG. Generally, even immaterial non-conformities establish a breach, although the buyer will likely be unable to obtain substantial remedies (especially damages or price reduction)<sup>134</sup>.

152. Article 35(3) provides that if the buyer knew or must have known of any non-conformity at the time of contract, then he cannot make any claim based on the said non-conformities.

153. Non-conformity claims are subject to two major qualifications:

- (1) First, on matters of timing, the seller is liable for non-conformity which exists at the time when or after the risk in the goods passes to the buyer (Article 36).
- (2) Second, Articles 37 and 48(1) provide that the seller has an opportunity to cure any defects respectively before and after delivery is due, so long as this can be done without undue delay,

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129 Schwenzer (n 2) Article 33 para. 13.

130 *Ibid* Article 35 para. 14.

131 *Ibid* Article 35 para. 23.

132 *Ibid* Article 35 para. 25.

133 *Ibid* Article 35 para. 20.

134 *Ibid* Article 35 para. 34.

expense or inconvenience to the buyer.

154. **Comparative analysis.** The structure of the fitness requirements under the CISG is similar to those in the SGO.

155. First, fitness requirements are primarily governed by the contract: SGO section 57; Article 35(1).

156. Second, where it is known that the goods will be used for specified purposes, the goods must be fit for those purposes if the buyer had reasonably relied on the seller's skill or judgment: SGO section 16(3); Article 35(2)(b).

157. Third, there is a general default requirement of fitness. It is here that the codes diverge in their details. CISG Article 35(2)(a) provides for the commonsense requirement that goods must be fit for all ordinary purposes to which they are put; SGO section 16(2) meanwhile relies on the concept of "merchantable" (or re-saleable) quality, which implies that goods need be fit for only one of their ordinary purposes (so that they can be re-sold)<sup>135</sup>. In this regard, it is clear that the CISG terms are more in line with general commercial expectations; indeed, English law has expressly moved away from the concept of "merchantability" and towards the CISG standard<sup>136</sup>.

158. Finally, both codes exempt the seller from fitness obligations where the buyer has (actual or constructive) knowledge of defects prior to concluding the contract: SGO section 16(3); Article 35(3), albeit the CISG expresses this as a general principle and SGO provides for specific scenarios.

159. The provisions for sales by sample are similar across the two codes (SGO section 17; Article 35(2)(c)).

160. The CISG has no counterpart to the SGO obligations for sale by description. It is perhaps to its benefit that it does not have such counterpart: (1) the difficulties with all sales being potentially sales by description<sup>137</sup> (and fine distinctions drawn to prevent all pre-contractual statements describing the goods being deemed conditions) are well known<sup>138</sup>; and (2) it appears that the fitness and delivery obligations of a seller can do all the work of the concept of description<sup>139</sup>.

161. For completeness, the two codes are similar in principle in providing that the fitness obligations of the seller take effect only starting from the time that risk in the goods passes (case law under the SGO<sup>140</sup>; Article 36).

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135 *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1; the statutory amendment to the definition of "merchantable quality" in SGO has not had the effect of changing this: see Brian Gilchrist (ed), *Chitty on Contracts (Hong Kong Specific Contracts)* (5th edn, Sweet & Maxwell 2016) paras. 20-095, 20-102.

136 Sale of Goods Act 1979 s 14(2A), as amended in 1994: "satisfactory quality" is now required.

137 Guest (n 122) para. 11-008.

138 *Ibid* paras. 11-012-11-019.

139 Michael Bridge, 'A Law for International Sale of Goods' (2007) HKLJ 17, 21-22.

140 Guest (n 122) para. 11-044.

162. Overall, it appears that the CISG scheme of fitness obligations is simpler, involves less technicalities, and has a clearer sense of purpose than the SGO, which is well-suited to the international sales context where parties frequently supplement default obligations with express terms<sup>141</sup>.

163. It remains to discuss the right of the seller to cure any defects, an area in which the two codes diverge. Cure sits uneasily with the right to terminate or reject for non-conformity in the SGO, and indeed any attempt by the seller to unilaterally replace delivered goods may be a fresh breach for failure to comply with description<sup>142</sup>. Indeed, the Hong Kong Law Reform Commission has (albeit in 1990) considered and rejected a proposal to introduce a right of cure into the SGO regime<sup>143</sup>. The SGO offers a buyer a much easier right to reject, especially since the concept of fundamental breach under the CISG (which triggers the right to avoidance) depends in part on whether the goods are curable<sup>144</sup>.

### **(C) Warranty from Third Party or Intellectual Property Claims**

164. Article 41 contains a warranty from the seller that the goods are free from third party claims. Article 42(1) is *lex specialis* to Article 41 and warrants that the goods are free from specified intellectual or industrial property claims (collectively "IP Claims") known to the seller. Article 42(2) provides an exemption, *inter alia*, for where the buyer knew or must have known of the IP Claim when contracting.

165. **Comparative analysis.** The SGO counterparts to Articles 41-42 are found in section 14 and the undertakings as to title therein. The SGO does not make any distinction between IP Claims and other third-party claims. Notably, the SGO appears to be less strict than the CISG when it comes to constructive knowledge of IP Claims - the buyer under SGO is not denied from relying on the implied condition to title in such cases. SGO section 14 is also a rare instance of local Hong Kong law being more restrictive in termination than the CISG, as termination for third party claims is expressly prohibited under the SGO but not the CISG<sup>145</sup>.

### **(D) Duty on Buyer to Inspect for Non-conformity/Ascertain Potential Claims**

166. It is convenient to make a small digression here and to discuss a duty of the buyer relevant to delivery. Article 38 provides that the buyer must examine the goods (and by implication any documents deliverable too<sup>146</sup>) as

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141 Bridge (n 139) 22.

142 *Ibid* 29.

143 Law Reform Commission of Hong Kong, *Report on the Sale of Goods and Supply of Services* (Topic 21, February 1990) paras. 4.4.4-4.4.5.

144 See para. 186 below.

145 Albeit the strict test for fundamental breach under the CISG may be unlikely to be met in cases of third party claims.

146 Schwenzer (n 2) Article 38 para. 7.

soon as possible upon coming into his possession (in the case of a sale by carriage, after the goods have arrived at their destination: Article 38(2)).

167. Article 39 then provides that, if the buyer fails to give notice to the seller specifying<sup>147</sup> any defect: (1) within a reasonable time (tentatively suggested as one month<sup>148</sup>) after he discovered or ought to have discovered it, or (2) in any event, within a “long stop date” of two years after the goods were handed over to him, he loses the right to rely on any lack of conformity against the seller.

168. Article 39 is clearly a pro-seller provision. However, it is balanced out by two pro-buyer provisions:

- (1) The stricter provision is Article 40. Article 40 deprives the seller of his reliance on the lack of a non-conformity notice if the non-conformity was something which he knew or must have known of and which he did not disclose to the buyer. In other words, if the seller had knowledge of the non-conformity and did not disclose it to the buyer, he is fully liable for it.
- (2) A less strict limit is found in Article 44: if the buyer had a “reasonable excuse” for not giving a non-conformity notice in reasonable time, he would not lose the right to reduce the price (Article 50) or to claim damages except for loss of profit (Articles 74-76), although this is also subject to the 2-year “long stop date” and other remedies are no longer open to him (e.g. avoidance).
- (3) “Reasonable excuse” is an open-ended question of fact and much will depend on e.g. the steps the buyer did take and the resources available to him for inspection, whether the defect was difficult to discover, and the length of the delay<sup>149</sup>.

169. A similar system of notification and caveats is replicated in respect of IP Claims under Article 43: the buyer cannot rely on the seller’s warranty from IP Claims if he fails to give notice to the seller within a reasonable time of discovery (actual or constructive) of such an IP Claim (Article 43(1)), and the seller similarly cannot rely on the lack of notification if he knew of such IP Claims himself (Article 43(2)). Further, Article 44 also applies, enabling buyers who have “reasonable excuses” for not giving notice of IP Claims to preserve their rights to reduce the price and to claim damages.

170. **Comparative analysis.** The SGO is much less stringent than the CISG insofar as the buyer’s duty to notify defects is concerned. Under the SGO, if the buyer fails to give notice of a defect in reasonable time (which is a question of fact: SGO section 58), he is only debarred from exercising his right

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147 General notices complaining of “inferior and poor quality” etc. are insufficient: Schwenzer (n 2) Article 39 para. 7.

148 A balance between conflicting historical Germanic/Swiss and French/Spanish decisions: Schwenzer (n 2) Article 39 para. 17.

149 Schwenzer (n 2) Article 44 paras. 7-10.

to reject (SGO section 37(4)). By contrast, under the CISG, if the buyer fails to give notice of defects, he may risk losing all his rights as under the CISG.

171. Whilst less important in practice, it should also be noted that the “long stop date” of 2 years set out in the CISG functions as a de facto limitation period<sup>150</sup>. Whilst no doubt enhancing commercial certainty, this affects the buyer’s protection and thus may need to be addressed especially in the case of sophisticated goods where defects may not be discovered until long after they are put to use.

### **(E) General Defences to Non-conformity**

172. In Articles 79-80, the CISG provides for general defences to any allegation of non-conformity against a seller.

#### *(1) Impediment beyond Party’s Control*

173. Article 79(1) provides a party (the “Impeded Party”) with a defence to a claim for damages<sup>151</sup> against a failure to perform if that failure was: (1) due to “an impediment beyond his control”; and (2) he could not reasonably be expected to have taken the impediment into account when entering into the contract, or to have subsequently avoided it.

174. “Impediments” must be circumstances outside of the sphere of control of the defaulting party<sup>152</sup>. Whether it arises out of that party’s own fault is not relevant<sup>153</sup>. The foreseeability/avoidability requirement is applied strictly: a contracting party is expected to overcome an impediment even if it leads to greatly increased costs (or even a loss)<sup>154</sup>.

175. Procedurally, Article 79(4) requires the Impeded Party to give notice of the impediment and its effect to the counterparty and further obliges the Impeded Party to ensure that the counterparty receives the notice.

176. Importantly, however, the defence for the Impeded Party lasts only as long as the impediment exists (Article 79(3)).

177. **Comparative analysis.** In terms of scope of application, Article 79 appears similar to the local Hong Kong law of frustration in that it applies the concepts of “foreseeability” and “avoidability”. Whilst Article 79 is more broadly applicable<sup>155</sup>, especially given that fault is not relevant (as compared to self-

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150 Bridge (n 139) 25.

151 And damages only: see Article 79(5).

152 Schwenzer (n 2) Article 79 paras. 12, 19.

153 *Ibid* Article 79 para. 13.

154 *Ibid* Article 79 para. 15.

155 Anselmo Reyes, ‘Potential and Problems in Hong Kong and the Philippines acceding to the CISG’ in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Growing the CISG: 6th MAA Schlechtriem CISG Conference* (Eleven International Publishing 2016) fn 14.

induced frustration), there may be little practical difference: a party at fault will usually be hard-pressed to establish the unforeseeability or avoidability of the impediment at hand.

178. The key differences between local Hong Kong law and the CISG lie in terms of the effects of frustration or Article 79 impediment. First, Article 79 is suspensory as opposed to extinctive - contractual rights remain in being, subject to the parties' avoidance for long delay, and resume if the impediment passes. It has been commented that the CISG position is more flexible to cope with partial and temporary frustrating events<sup>156</sup>.

179. On the other hand, Article 79 suspension may be found inadequate in coverage and remedies:

- (1) As to coverage, it only protects against the counterparty's right to claim damages. In some circumstances, the (remaining) right to compel performance presents difficulty - a seller, invoking Article 79, may be immune from a damages claim by the buyer but be subject to an order for specific performance, which may be enforced by a punitive monetary sanction (e.g. a fine for contempt)<sup>157</sup>. Alternatively, the seller may remain liable for a reduction in price, which may defeat the purpose of exempting him from his liability in damages<sup>158</sup>.
- (2) As to remedies, Article 79 is conspicuous in its refusal to confer powers of loss apportionment on the courts. The mere barring of damages claims may not be an appropriate response to part-performance in genuine cases of impossibility or hardship, which usually require greater discretion when compared to standard restitutionary exercises<sup>159</sup>.

## (2) *Fault of counterparty*

180. Article 80 provides that a party cannot "rely on" the failure of the other party to perform, "to the extent" that the other party's failure is caused by his own act or omission. In other words, the buyer cannot rely on non-compliance if it was caused by the buyer's own acts.

181. In cases where both parties have contributed to non-compliance, it is generally agreed that the claiming party's monetary recovery should be reduced according to his relative contribution to causing the non-compliance<sup>160</sup>, whilst his entitlement to non-monetary remedies remains uncertain<sup>161</sup>.

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156 Bridge (n 1) para. 12.67.

157 Barry Nicholas, 'Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods' in Galston & Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Matthew Bender 1984) 5-1, 5-18.

158 Bridge (n 1) para. 12.68.

159 Nicholas (n 157) 5-1, 5-19.

160 Schwenger (n 2) Article 80 para. 10.

161 *Ibid.*

182. **Comparative analysis.** Whilst local Hong Kong law may not differ in substantive effect from Article 80, the position is arrived at under several distinct doctrines:

- (1) Where a party is himself at fault, he may find it difficult to establish causation necessary for any claim in local Hong Kong law<sup>162</sup>.
- (2) Even if the plaintiff establishes liability, the proportionate reduction of a plaintiff's monetary recovery for his contribution to the breach by the defendant is a familiar concept under the local Hong Kong law of contributory negligence (section 21 of the Law Amendment and Reform (Consolidation) Ordinance (Cap.23)). Alternatively, his recovery may be reduced by virtue of his duty to mitigate loss<sup>163</sup>.
- (3) Finally, if the plaintiff seeks non-monetary remedies (usually specific performance in the sale of goods context), the Hong Kong court retains a discretion to disallow such claims on the basis of the plaintiff's own fault (i.e. lack of clean hands<sup>164</sup>).

## VI. Remedies of the Buyer under the CISG

### (A) *Preliminary Concepts: Fundamental Breach and Avoidance*

#### (1) *Preliminary concepts: fundamental breach*

183. It is important to first begin with the concept of fundamental breach, as a range of remedies depends on whether such a breach can be established.

184. Fundamental breach, defined in Article 25, occurs when a breach:

“... results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”

185. The test of fundamentality is necessarily set at a high level of generality. In practice, assessment of fundamentality revolves around what the parties have stipulated (or would have stipulated) in the contract and pre-contractual negotiations<sup>165</sup>. The foreseeability requirement has variously been described as serving to set limits on the breaching party's liability, or as circumscribing the materials relevant to the test for fundamentality<sup>166</sup>.

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162 Guest (n 122) para. 16-053.

163 *Ibid* para. 16-053.

164 Beale (n 23) paras. 27-050, 27-053-27-054.

165 Schwenzer (n 2) Article 25 paras. 21, 23.

166 *Ibid* Article 25 paras. 26-27.

186. In practice, fundamental breaches by sellers are very rare under the CISG. A buyer who can make use of defective goods (even if not for the purpose they were purchased<sup>167</sup>, or a buyer who receives non-conforming goods which may be repaired<sup>168</sup>, will be unlikely to make out a fundamental breach. The CISG favours the upholding of contracts, so as to minimise the inefficient re-export of goods in the event the contract is avoided<sup>169</sup>.

#### (2) *Avoidance for fundamental breach*

187. Naturally, if a fundamental breach has occurred, the innocent party is entitled to no longer be bound by the contract. Article 49(1)(a) provides that the buyer may avoid the contract if the seller's breach is fundamental, subject to requirements for such avoidance to be prompt in various scenarios where the goods had actually been delivered (Article 49(2)).

188. As to form, Article 26 provides that a declaration of avoidance must be made by notice to the other party.

#### (3) *Avoidance for sustained delay*

189. Given the high threshold for establishing a fundamental breach, it is not uncommon in practice for buyers to be unsure if such a breach is made out. The CISG provides assistance in this regard to buyers in the specific case of the seller's non-delivery.

190. Article 47(1) provides that the buyer may generally fix an additional reasonable period of time for performance for the seller in the event of a breach. As the buyer is not entitled to pursue any remedy in this period (Article 47(2)), this generally benefits the seller<sup>170</sup>.

191. However, Article 49(1)(b) then provides that if such an additional reasonable period has been fixed as regards non-delivery in accordance with Article 47(1), upon the lapse of such period the buyer may declare avoidance of the contract.

#### (4) *Effect of and limit on avoidance: full restitution*

192. Upon avoidance, the parties are released from their obligations thereunder (Article 81(1)). There is controversy as to whether Article 81(1) operates to hold the contract *ab initio*, or to change the contract into an agreement to rewind the contract<sup>171</sup>; as the former view leads to the application

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167 Bridge (n 1) para. 12.04.

168 Schwenzer (n 2) Article 25 para. 48.

169 *Ibid* Article 25 para. 9.

170 In the specific situation where delivery of defective goods constitutes a fundamental breach, the further period of time also assists the buyer in keeping his option to avoid open: see Schwenzer (n 2) Article 47 para. 1.

171 Schwenzer (n 2) Article 81 para. 6.

of domestic law *in rem* claims (e.g. reversion of title by resulting trust), leading commentators prefer the latter as it ensures that restitution is addressed within the CISG<sup>172</sup>.

193. Parties are then primarily required to make concurrent restitution of any performance already obtained under the contract (i.e. the specific goods delivered<sup>173</sup>) thus far (Article 81(2)). This is further expanded on to allow restitution for the benefits derived from the goods if exact restitution cannot be made (Article 84).

194. The possibility of making restitution also acts as a bar to avoidance. Article 82 provides that the buyer loses the right to avoid the contract, where the seller is in breach<sup>174</sup>, if he cannot make restitution of the goods “substantially in the condition in which he received them”, unless such difficulty is (1) not due to his actions, (2) caused by his examination of the goods (as required under Article 38), or (3) due to the goods (or part thereof) having been sold or consumed in the normal course of business before the buyer reasonably discovered the non-conformity.

195. **Comparative analysis.** The immediately obvious point is that the scope for a buyer to avoid the contract is much narrower under the CISG than under local Hong Kong law:

- (1) Under the CISG, there is no equivalent to a contractual condition, even minor breaches of which would automatically entitle a party to terminate and which can be expressly drafted or implied by statute.
- (2) Instead, all breaches must be evaluated through the filter of the fundamental breach test. Whilst the test for fundamental breach appears somewhat (linguistically) similar to the test for a repudiatory breach of an innominate term in local Hong Kong law, it remains an open- textured term<sup>175</sup>. Of course, the CISG jurisprudence, in line with its policy of upholding the contract<sup>176</sup>, crystallises the term into a very high threshold for fundamental breach<sup>177</sup>.
- (3) In the sales of goods context, what is perhaps of greater practical significance is the relative ease which common breaches of duties can trigger termination rights in local Hong Kong law. Fitness obligations are (implied) conditions, as are (presumptively) time

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172 *Ibid* Article 81 paras. 8-10.

173 *Ibid* Article 81 para. 19.

174 No provision is made for the converse situation, i.e. the seller losing the right to avoid where the buyer is in breach. Commentators suggest that Article 82 does not apply to such scenarios, as the seller's duty under restitution is simply to repay the price: Schwenger (n 2) Article 82 para. 34.

175 Nicholas (n 33) 217-218.

176 Bridge (n 139) 22.

177 See para. 185 above.

stipulations<sup>178</sup>. Given this background, even if one accepts comments that: (a) a previously unclassified term may not easily be classified as a condition<sup>179</sup>; and (b) breaches of innominate term in Hong Kong law (because they are by definition not breaches of condition) are also unlikely to give rise to repudiation<sup>180</sup>, the practical impact remains that local Hong Kong law affords more generous termination rights.

- (4) This conclusion remains the same despite there being an added foresight requirement under the CISG (that the breaching party must have foreseen the consequences of the breach). The practical impact of the foresight requirement is likely to be slight. Not only is it unclear whether it serves as an additional defence for the breaching party at all<sup>181</sup>, but the severity of the consequences that give rise to a fundamental breach are usually obvious enough to “[render] it somewhat unlikely that the contract-breaker lacks the necessary foresight”<sup>182</sup>.

196. Whilst the substantive right to terminate under the CISG is stricter than under local Hong Kong law, the procedure and formalities are largely similar. Under both regimes, long inaction will deprive a party of the right to terminate (Articles 39 and 49; affirmation by inaction<sup>183</sup> under local Hong Kong law). Further, the CISG requires a party avoiding the contract to give notice (Article 26), which is similar to the local Hong Kong law requirement that an election to terminate be communicated “unequivocally”<sup>184</sup>. Although there may be differences in terms of the transmission risk (usually put on the recipient in the CISG, i.e. notices take effect on sending and not receipt<sup>185</sup>), this is increasingly less important in the age of the internet and instantaneous communication.

197. A second point of comparison between local Hong Kong law and the CISG is the similar right to extend time to a breaching party, and then to terminate the contract on the expiry of the extended time period. The remedy is provided for in local Hong Kong law not in SGO but in the common law<sup>186</sup>, although the right under local Hong Kong law appears wider than that in CISG, being not confined to breaches for non-delivery only (Article 49(1)(b)).

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178 Note that there is no equivalent in local Hong Kong law to Sale of Goods Act 1979 s 15A, which disallows rejection and termination where a breach is so slight that it would be unreasonable to do so.

179 Alastair C.L. Mullis, ‘Termination for Breach of Contract in CIF Contracts under the Vienna Convention and English Law; Is There a Substantial Difference?’ in Lomnicka & Morse (eds), *Contemporary Issues in Commercial Law* (Sweet & Maxwell 1997) 137 at fn 35.

180 Bridge (n 1) para. 12.04; Bridge (n 139) 24.

181 See para. 185 above.

182 Bridge (n 139) 24.

183 Edwin Peel, *Treitel: The Law of Contract* 14th edn, Sweet & Maxwell 2015) para. 18-085.

184 *Ibid* para. 18-010.

185 Article 27.

186 *Scandinavia Trader Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 at 703, but note difficulties caused by later authorities: Peel (n 183) para. 18-107.

198. Third, the effects of termination/avoidance merit comparison. Under local Hong Kong law, if the contract is terminated, the parties are released from all their future obligations thereunder<sup>187</sup>. Any monies paid or benefits conferred (if they were not paid/conferred unconditionally or if property in goods delivered had not passed) give rise to a claim of restitution for total failure of consideration<sup>188</sup>. Such claims are generally *in personam* claims only<sup>189</sup>.

199. Under the CISG, it is clear that avoidance is not only prospective but also has retrospective effect<sup>190</sup>. Hence restitution under the CISG is wider: there is no exception for benefits conferred unconditionally or in discharge of due obligations - instead, the entire contract is unwound (Article 81(2)). Further, parties are required to make specific restitution of the benefits (including goods) received. It is notable that this is an *in personam* duty notwithstanding that it bites against specific items of property. It follows from the requirement of specific restitution that impossibility of restitution is a bar to avoidance under the CISG (albeit subject to large exceptions for the lack of fault of the avoiding party). This of course does not apply to local Hong Kong law given the prospective effect only of termination.

### **(B) Right to Compel Performance - Substitution or Repair**

200. Aside from avoiding the contract, the buyer is also entitled to require that the seller duly performs his obligations (Article 46(1)).

201. More specifically, where the breach stems from the non-conformity of the goods (Article 46(2) and (3)), the buyer can require:

- (1) Delivery of substitute goods, if: (a) the non-conformity is a fundamental breach (Article 46(2)), (b) a request for substitute goods is made within a reasonable time of a notice of non-conformity by the buyer under Article 39 (Article 46(2)), and restitution of the goods is not impossible (Article 82(1)).
- (2) Repair by the seller, if: (a) this is a reasonable request in the circumstances, e.g. where the buyer's interests in repair is proportional against the seller's expenses<sup>191</sup>, and (b) a request for repairs is made within a reasonable time of a notice of non-conformity by the buyer under Article 39 (Article 46(3)).

202. However, requiring performance (and in particular of substitution and repair) is in effect an order for specific performance of the seller's obligations, notwithstanding the difference in wording<sup>192</sup>. It is hence subject to

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187 Beale (n 23) para. 24-049.

188 Guest (n 122) para. 12-069.

189 There is no proprietary restitution for total failure of consideration; see Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) pp.154, 159.

190 See para. 192 above.

191 Schwenzer (n 2) Article 46 para. 40.

192 Bridge (n 1) para. 12.48.

Article 28, which mandatorily<sup>193</sup> provides that the forum court may in its discretion refuse such orders if the court would not grant specific performance under the domestic law of the forum<sup>194</sup>.

203. The right to require performance is also excluded if the performance is objectively impossible<sup>195</sup>.

204. For completeness, insofar as the buyer wishes to reject the goods only after he has taken delivery, he is under a duty to take reasonable steps to preserve them (Article 86(1)), with reasonable expenses of the preservation to be paid by the seller. This includes taking possession of the goods from a carrier on behalf of the seller (Article 86(2)). If the seller unreasonably delays in taking back possession, or if the goods are subject to rapid deterioration, the buyer may sell them by way of self-help on giving notice (if possible) to the seller (Article 88).

205. Finally, it should also be noted that the right to (demand) cure is not only the prerogative of the buyer. The seller who is in breach is also entitled to cure any non-conformity in the goods, both before time due for delivery (i.e. cases of early delivery) (Article 37) and after such time (Article 48), subject to the proposed repairs not causing undue inconvenience to the buyer.

206. **Comparative analysis.** The right to require performance attains a prominence under the CISG that it does not under local Hong Kong law. As discussed<sup>196</sup>, it would be very rare for a court applying local Hong Kong law to order specific performance, save in the case of unique goods. Specific orders for substitution and repair (which usually concern generic goods<sup>197</sup>) are hence rarely, if ever, made.

207. In practice, a Hong Kong court applying the CISG would likely apply the same constraints to specific performance. This is because Article 28 affords the court a discretion to limit remedies for specific performance in line with its domestic law. Hence little practical difference would result in the Hong Kong court, even in cases where *prima facie* the remedy is available as a matter of right under the CISG but not under local Hong Kong law<sup>198</sup>. However, forum shopping is then clearly a potential problem<sup>199</sup>.

208. In line with its general policy of avoiding wastage of goods, the

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193 Schwenger (n 2) Article 28 para. 24.

194 It is not the law ascertained by the forum court's choice of law that rules, consistent with the general principle that remedies are governed by the *lex fori* and not the *lex causae*: Schwenger (n 2) Article 28 para. 9.

195 Schwenger (n 2) Article 28 para. 1.

196 See para. 89(8) of Annex 2.1 to this Consultation Paper.

197 Substitutable goods are by definition not unique; as for replaceable goods, see Schwenger (n 2) Article 46 para. 40.

198 Such as where the goods are unidentified and unascertained: see Peter Piliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?' 12 Pace International Law Review (Spring 2000) 1, section 4(a)-4(b).

199 *Ibid* section 4(b).

CISG imposes more stringent duties on a buyer avoiding the contract after receiving the goods than does local Hong Kong law<sup>200</sup>, i.e. requiring him to preserve them as opposed to simply refusing to accept delivery under SGO section 38, which has been criticised as “surely a defect” of local Hong Kong law<sup>201</sup>.

### **(C) Right to Reduce the Price**

209. A different remedy is for the buyer to keep any non-conforming goods, and then to claim for reduction of the price to reflect the value of the goods actually delivered (Article 50). This right can be exercised to reduce the price payable (if it has not been paid), or to seek repayment of part of the price already paid<sup>202</sup>. The right to do so is subject to the seller’s right to cure the non-conformity under Articles 37 and 48 (Article 50, second sentence).

210. However, the buyer cannot require the defect in the goods to be remedied by delivery of substitute goods or by repair in conjunction with price reduction<sup>203</sup>.

211. **Comparative analysis.** The price reduction remedy, being effectively a right to re-write the contract<sup>204</sup> (as opposed to a claim for damages) is unknown to common law systems<sup>205</sup>. There is a rough equivalent under local Hong Kong law by way of damages for “abatement against the price” if the price has not been paid<sup>206</sup>. However, the damages claim would give different results from the price reduction remedy in cases of rising or falling markets<sup>207</sup>. Given that the price reduction remedy appears to be exercisable in alternative to a claim for damages under the CISG which produces results similar to the abatement claim, this appears to give the CISG buyer the right to pick and choose the “best of both worlds”<sup>208</sup>. The price reduction remedy is also of particular use where the buyer cannot easily prove his loss<sup>209</sup>.

### **(D) Right to Claim Damages**

#### **(1) Primary measure - actual loss**

212. Article 74 sets out the primary rule for calculating damages under the CISG, viz “the loss, including loss of profit, suffered by the other party as a

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200 Bridge (n 1) para. 12.46.

201 Alastair C.L. Mullis, ‘Termination for Breach of Contract in CIF Contracts under the Vienna Convention and English Law; Is There a Substantial Difference?’ in Lomnicka & Morse (eds), *Contemporary Issues in Commercial Law* (Sweet & Maxwell 1997) 137 at fn 67.

202 Schwenzer (n 2) Article 50 para. 16.

203 *Ibid* Article 50 para. 17.

204 Bridge (n 1) para. 12.49.

205 Schwenzer (n 2) Article 50 para. 1.

206 Bridge (n 1) para. 12.49.

207 *Ibid* paras. 12.50-12.51.

208 *Ibid* para. 12.52.

209 Piliounis (n 198) section 6(a)(ii).

consequence of the breach". The principle of full compensation under the CISG entails the inclusion of consequential loss, loss incurred in mitigation and loss of chances<sup>210</sup>, to be assessed at the time of trial<sup>211</sup>. Disgorgement of profits is in general not provided for under Article 74<sup>212</sup>.

213. As for causation, it is generally necessary and also sufficient for the breach to be a "but for" cause of the loss without any distinctions for direct or indirect cause<sup>213</sup>.

214. Damages are overall limited by the test of foreseeability: the breaching party is not liable for loss which he did foresee or should have foreseen as a "possible consequence" of his breach at the time the contract was made (Article 74, 2nd sentence). The innocent party is also required to take reasonable steps to mitigate his loss and his claim for damages will be reduced (and his claim for performance may be denied<sup>214</sup>) to the extent he fails to do so (Article 77).

215. Finally, by way of miscellaneous remarks, damages are generally available in conjunction with any other remedy that the buyer chooses to exercise (Article 45(2)), and interest is recoverable on any damages claimed (Article 78) from the moment the loss occurs<sup>215</sup>.

## (2) *Particular damages rules in cases of avoidance*

216. Articles 75 and 76 are *lex specialis* to Article 74 damages where the contract is avoided. Article 75 provides that, if the parties have further made a substitute transaction, damages are assessed as the difference between the contract price and the price in the substitute transaction.

217. Article 76, meanwhile, provides that if the parties have not made a substitute transaction, damages are assessed as the difference between the price fixed by the contract and the price of the goods as at: (1) generally, the time of avoidance, or (2) if the damages-seeker has taken over the goods, the time of taking over.

218. Articles 75 and 76 both allow the damages-seeker to concurrently seek damages recoverable under the general damages rule in Article 74, subject to the principle of double compensation<sup>216</sup>. In practice, this often includes damages for delay and cost associated with substitute transactions or storage of the defective goods.

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210 Schwenzler (n 2) Article 74 paras. 33-38.

211 *Ibid* Article 74 para. 46.

212 *Ibid* Article 74 para. 45.

213 *Ibid* Article 74 para. 42.

214 This is not provided for expressly in Article 77, but is the preferred interpretation of its scope: see Schwenzler (n 2) Article 77 para. 5; to similar effect, Reyes (n 155) fn 10.

215 CISG Advisory Council Opinion No.14, para. 3.16, available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op14.html>.

216 Schwenzler (n 2) Article 75 para. 11; Article 76 para. 13.

219. **Comparative analysis.** Whilst both are committed to the principle of full compensation, and both subject the innocent party to a duty to mitigate, there are differences between the damages rules between local Hong Kong law and the CISG. First, the measure of damages under local Hong Kong law, as regards cases of non-acceptance or non-delivery, is primarily ascertained with reference to the market rather than any actual substitute transaction carried out by the innocent party<sup>217</sup>. This is the case under the CISG only as a residual option, i.e. where the contract is avoided and no cover transaction is made (Article 76). Damages for non-terminating breaches are calculated similarly under both regimes, by reference to the reduction in value of the goods received.

220. Second, damages are assessed at time of breach under local Hong Kong law, but at trial under the CISG. Whilst the Hong Kong courts may treat assessment at time of breach as no more than a *prima facie* starting point, to be adjusted as the case requires<sup>218</sup>, this appears to not yet be the case in the sale of goods context, where it is assumed that the duty to mitigate (on the open market) begins as of the date of breach<sup>219</sup>.

221. Third, the CISG limits recovery for outlandish losses only by the single device of foreseeability (set at the low threshold of “possible consequence” instead of “probable result” under local Hong Kong law<sup>220</sup>), instead of the complex amalgamation of causation and remoteness rules under local Hong Kong law. This promotes ease of application and certainty at the cost of protection for a party whose breach causes unexpectedly severe losses.

222. Further, it is established that damages claims under the CISG cannot be for an account of profits, whereas under local Hong Kong law this remains (at least in theory) possible<sup>221</sup>, albeit the special circumstances<sup>222</sup> for such a claim are rarely fulfilled in the sale of goods context.

### **(E) Partial Delivery and Early Delivery**

223. If the seller delivers before the due date, the buyer may refuse to take delivery until the said date (Article 52(1)).

224. If the seller delivers in excess of the contract amount, the buyer may take delivery of the full amount (in which case the excess will be paid for at the contract rate) or only for the contracted amount (Article 52(2)).

225. If the seller delivers less than the contract amount, the buyer’s remedies as set out above apply to the shortfall (Article 51(1)). The buyer may

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217 Bridge (n 139) 35.

218 *Johnson v Agnew* [1980] AC 367 at 401.

219 Beale (n 23) para. 26-090.

220 *Hadley v Baxendale* (1854) 9 Ex 341, 354.

221 *Attorney General v Blake* [2001] 1 AC 268.

222 Usually requiring a strong (public) interest in performance or an analogy with breach of duties of loyalty: see Beale (n 23) para. 26-063.

avoid the contract in its entirety only if the failure to make complete delivery is a fundamental breach (Article 51(2)).

226. **Comparative analysis.** The rules in respect of excess delivery (Article 52(2); SGO section 32(2)) and for early delivery (Article 52(1); common law<sup>223</sup>) are similar across the CISG and local Hong Kong law.

227. However, delivery of less than the contracted amount is treated differently. The CISG requires the buyer to accept the goods tendered and to sue only in respect of the rest, with a right of avoidance only if the insufficiency amounts to a fundamental breach. Local Hong Kong law entitles wholesale rejection from the start (SGO section 32(1)).

### **(F) Anticipatory Breach and Suspension of Performance**

228. The CISG also provides for the buyer's right to suspend performance or preemptively avoid the contract in case the seller's inability to perform becomes known to the buyer ahead of time.

229. Article 71(1) provides that the buyer can suspend performance if he becomes aware that the seller may not perform due to the seller's conduct, "a serious deficiency in his ability to perform", or the seller's creditworthiness. The buyer, however, must immediately give notice of the suspension to the seller (Article 71(3)).

230. The scope of Article 71(1) has been expanded by case law into a general right of suspension in the event of the other party's breach, going beyond its strict wording (which confined it to cases where the breaching party's performance was not yet due); this enabled, for example, a buyer receiving defective goods to withhold payment of the price<sup>224</sup>.

231. The notice of suspension is superseded if the seller makes "adequate assurance of his performance" (Article 71(3)), i.e. provides evidence of his ability to perform (e.g. by giving security)<sup>225</sup>. There is to be read into Article 71 the requirement that such adequate assurance must be provided within a reasonable time<sup>226</sup>.

232. Article 72 provides for the buyer's right to immediately declare avoidance in cases of anticipatory fundamental breach. This may be inferred (albeit requiring a high degree of probability<sup>227</sup>) from the circumstances (Article 72(1)), or based on the seller's declaration that he will not perform (Article 72(3)). In the former situation (but not the latter), the buyer must, if time allows, give a reasonable notice period<sup>228</sup> to the seller in order to allow the seller to

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223 Guest (n 122) para. 8-069.

224 Schwenger (n 2) Article 71 para. 11.

225 *Ibid* Article 71 paras. 51-52.

226 *Ibid* Article 71 para. 50.

227 *Ibid* Article 72 para. 13.

228 *Ibid* Article 72 para. 26.

provide “adequate assurance” (Article 72(2)).

233. **Comparative analysis.** In contrast to the CISG, suspension is not a remedy formally recognised in local Hong Kong law; it usually occurs only where a contractually required condition precedent is not satisfied<sup>229</sup>.

234. The right to terminate for anticipatory breach is, however, similar to that under local Hong Kong law. Indeed, it was derived from the common law tradition<sup>230</sup>. It appears that there are only two differences of note:

- (1) First, whilst the question of whether the innocent party must accept the anticipatory repudiation (as opposed to going ahead to perform the contract and e.g. claiming the price) has caused great difficulty in local Hong Kong law<sup>231</sup>, it appears that under the CISG the mitigation rule escapes the technical limitations under local Hong Kong law (that it applies to damages and not to the obligation to avoid loss in the first place<sup>232</sup>) and does require the innocent party to accept<sup>233</sup>.
- (2) Second, the CISG affords a formal right for the party apparently in breach to provide adequate assurance. However, it has been commented that this right is unlikely to be unduly important in practice: as there are no sanctions for refusing to afford adequate assurance, the refusal to provide the same is only evidential in that it allows a court to more confidently conclude that the risk of non-performance was indeed real<sup>234</sup>.

## VII. Obligations of the Buyer under the CISG

235. The overarching duties of the buyer are set out in Article 53, *viz* the buyer must pay the price and take delivery of the goods.

### (A) *Duty to Pay the Price*

#### (1) *Scope of duty to pay*

236. The buyer must take all reasonable steps and comply with all formalities as required under the contract or applicable state regulations to enable payment to be made (Article 54). Such compliance is an independent actionable obligation in and of itself (and not merely anticipatory of a breach for

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229 Bridge (n 1) para. 12.16.

230 Schwenger (n 2) Article 72 para. 5.

231 Beale (n 23) para.24-010 *et seq*; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd Edn, Oxford Press 2004) 128.

232 *White & Carter (Councils) Ltd v McGregor* [1962] AC 413.

233 Bridge (n 1) para. 12.18.

234 *Ibid* para. 12.20.

non- payment)<sup>235</sup>.

237. Further, the buyer's duty to pay on the due date is automatic - the seller need not make any request or satisfy any formality before the duty to pay falls due (Article 59).

## *(2) Time and place of payment*

238. The time for payment is primarily ascertained with reference to the contract (Article 58(1)). However, if it is not so provided for, the buyer must pay when the seller places the goods or documents controlling their possession at the buyer's disposal (Article 58(1)). Payment may be made a condition for handing over the goods, both generally (Article 58(1)) and in cases of sale by carriage (Article 58(2)). Under these default rules, it is implied that, in carriage sales, payment may not be made conditional to "delivery" of the goods, as delivery occurs on the (first) carrier assuming custody of the goods, well before "handing over" to the buyer<sup>236</sup>.

239. However, the buyer is not bound to pay unless he has had an opportunity to inspect the goods (albeit usually only briefly and for visible non-conformities e.g. as to quantity<sup>237</sup>), although this presumptive rule may be displaced by the terms of the contract (Article 58(3)).

240. **Comparative analysis.** The rules for payment are similar under the CISG and local Hong Kong law. In default of contractual stipulation, the duty to pay arises when the goods pass into the control of the buyer; express provision is made under both regimes for the same even under contracts for sale by carriage. A reasonable price will be imputed by the law where the contract does not (explicitly or even by interpretation) provide for the price<sup>238</sup>.

## ***(B) Duty to Take Delivery of the Goods***

241. The duty to take delivery is pithily expressed in the CISG as the buyer: (1) doing all reasonable acts to enable the seller to make delivery; and (2) taking over possession of the goods (Article 60).

## ***(C) General Defences***

242. The general defences in Articles 79 and 80<sup>239</sup> apply to any breach of duty by the buyer.

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235 Schwenzler (n 2) Article 54 para. 8.

236 *Ibid* Article 33 para. 2.

237 *Ibid* Article 58 para. 34.

238 Article 55; SGO section 10.

239 See section V(E) (General Defences to Non-conformity) above.

## VIII. Remedies of the Seller under the CISG

243. By way of overview, much of the seller's remedies under the CISG are "mirror images" of (or at least closely correspond to) the buyer's remedies. As such, in the following section, there will be much reference to the analysis above concerning the buyer's remedies.

### (A) *Avoidance of the Contract*

244. The seller is entitled to avoid the contract in the event the buyer's breach amounts to a fundamental breach under Article 25 (Article 64(1)(a)).

245. A failure to pay or to take delivery in principle amounts to a fundamental breach; however, the difficulty question is whether the buyer is committed to such refusal or remains open to the possibility of performance at a later date<sup>240</sup>.

246. For less serious breaches (for non-delivery and non-payment only), the seller is entitled to fix a further reasonable period of time for performance by the buyer (Article 63(1)), and if no such performance is forthcoming after expiry of this period to declare the contract avoided (Article 64(1)(b)). There are similar limits on the seller's rights to pursue alternative remedies in the meantime as with the buyer's remedy in counterpart<sup>241</sup>.

247. More broadly, the time limits on the seller's right to avoid in the event of payment of the price correspond to the time limits on the buyer's right to avoid in the event of delivery of the goods<sup>242</sup>.

### (B) *Right to Compel Performance*

248. The seller also has the right to require the buyer to perform his specific obligations by way of a specific order. This, as with the buyer's corresponding right, is subject to the discretion of the forum court to refuse specific performance<sup>243</sup>. Further, insofar as the seller remains in the possession of goods due to the buyer's breaches, he must take reasonable steps to preserve them, in a counterpart to the buyer's duty to preserve<sup>244</sup>.

249. **Comparative analysis.** Of particular mention is the action for the price. In local Hong Kong law, the action for the price is kept distinct from any claim for damages. It is highly advantageous to the seller: being a claim for a debt, the seller has no duty to mitigate; the rules of causation and remoteness do not apply; and there is no need for the seller to prove any loss on his part<sup>245</sup>.

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240 Schwenzler (n 2) Article 72 paras. 6, 13.

241 Compare Article 63(2) to Article 47(2).

242 Compare Article 64(2) to Article 49(2).

243 Article 28.

244 Compare Article 85 to Article 86.

245 Guest (n 122) para. 16-004.

For these reasons, the action for the price under local Hong Kong law is subject to limits: generally, the property in the goods must have passed<sup>246</sup>, and the contract must be kept alive<sup>247</sup>.

250. The CISG action for the price also appears to not be subject to the requirements of mitigation, although there remains some controversy<sup>248</sup>. Further, as the CISG does not deal with property, the only limit which autonomous CISG case law can set on the action for the price is that the price must be due under the terms of the contract<sup>249</sup>.

251. In practice, however, these differences may not be significant, as it is well-recognised that the action for the price, being a form of specific remedy, is subject to the forum court's discretion in accordance with Article 28<sup>250</sup>. In other words, the local Hong Kong law requirement for property to pass will likely apply to cases even under the CISG.

### **(C) Right to Claim Damages**

252. The seller's right to claim damages are governed by the exact same CISG provisions as the buyer's corresponding rights<sup>251</sup>.

### **(D) Anticipatory Breaches by Buyer**

253. The seller's rights in the case of an anticipated breach by the buyer are governed by the exact same CISG provisions as the buyer's corresponding rights<sup>252</sup>.

## **IX. PASSING OF RISK**

254. This section touches on the CISG provisions governing the passing of risk from seller to buyer.

255. **Relevant Provisions.** Notwithstanding that the passing of risk would usually be regulated by contract, the CISG provides default rules on the passing of risk in Articles 66 to 69.

256. Article 66 stipulates that, upon the risk passing to the buyer, he is not discharged from his obligation to pay for the goods even if they were lost or damaged, unless the loss or damage was due to an "act or omission" of the

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246 SGO section 51(1).

247 Guest (n 122) para. 16-001.

248 Schwenger (n 2) Article 62 para.16.

249 *Ibid* Article 62 para. 10.

250 *Ibid* Article 62 para. 14.

251 Articles 74-77, which apply to damages claims by both buyer and seller. See Section VI(D) (Right to Claim Damages) above.

252 Articles 71-72. See section VI(F) (Anticipatory Breach and Suspension of Performance) above.

seller. This is rather self-evident as a principle.

257. “Reasonableness” is suggested to be the standard of determining whether the seller’s action or inaction constitutes an “act or omission” in the Article 66 sense<sup>253</sup>.

258. Article 67 deals only with contracts involving the carriage of goods, which means a situation where<sup>254</sup>:

- (1) the seller is required or authorised by the contract to arrange for the goods to be carried; and
- (2) the carriage will be by a third party, rather than by the seller, the buyer or their respective servants.

259. Depending on whether the seller is bound to hand over the goods at a particular place, risk would either pass upon the handing over to the first carrier for transmission (if no particular handover place), or upon the goods being handed over to the carrier at a particular place. There is no distinguishing between different modes of transportation for the hand over process.

260. This rule is considered to fit modern container trading, since it avoids the difficulty of having to prove at which part of the transport any loss or damage occurred<sup>255</sup>.

261. The final sentence of Article 67(1) states that the seller withholding documents that control the disposition of goods has no impact on the passing of risk. This is consistent with the CISG approach of not linking the passing of risk to the transfer of title.

262. Article 67(2) states that risk will not pass until the goods are identified. This is a general principle under the CISG<sup>256</sup>.

263. Article 68 is a provision for goods sold while in transit, i.e. already handed over to the independent carrier<sup>257</sup>. The general rule is that the risk in this situation passes to the buyer at the conclusion of the contract. However, “if the circumstances so indicate”, the buyer assumes the risk retroactively at the time the goods were handed over to the carrier, i.e. before the contract of sale is entered into.

264. Article 68 therefore turns on the scope of “if the circumstances so indicate”. It may be open to different interpretations: where export-oriented legal systems may favour a broad interpretation, their import-oriented counterparts

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253 Schwenzer (n 2) Article 66 para. 24.

254 Nicholas (n 33) 237.

255 Schwenzer (n 2) Article 67 para. 16.

256 Although only stated in Articles 67(2) and 69(3), it applies as a general requirement: Schwenzer (n 2) Article 67 para. 29.

257 Loading of the goods or commencement of the actual transportation is not necessary: Schwenzer (n 2) Article 68 para. 5.

may prefer a restrictive one<sup>258</sup>.

265. It is suggested that one such “circumstance” is where the contract of sale includes a provision requiring the seller to transfer an insurance policy to the buyer<sup>259</sup>. Another “circumstance” is where insurance for the goods covers the period between the handing over of the goods to the carrier and the conclusion of the contract<sup>260</sup>.

266. Regarding the final sentence of Article 68 on when the seller will still bear the risk of loss of or damage to the goods, it has been suggested that mere negligence is the sufficient standard for evaluating the seller’s behaviour<sup>261</sup>.

267. Article 69 is a residual rule for situations not covered by Articles 67 and 68. An example is a contract of sale that involves carriage of goods, but requires the seller to cause the goods to be handed over to the buyer directly at a particular place. The provision relies on the taking over of the goods for the passing of risk, rather than linking it with delivery.

268. Article 69(1) addresses the basic scenario of the buyer taking over the goods at the seller’s place, the default position being that the buyer bears the risk when he “takes over” the goods, i.e. when the loading process begins<sup>262</sup>. However, where the buyer does not take over the goods “in due time”, risk passes from when the goods were placed at his disposal and he committed a breach for failing to take delivery.

269. Article 69(2) covers the scenario where the seller must bring the goods to the buyer or to any other agreed place that is not the seller’s place of business, the risk passes when that delivery takes place if the goods are placed at the buyer’s disposal there and he is “aware” of that.

270. There is general agreement that the buyer’s actual knowledge of the goods having been placed at his disposal is required for him to be “aware” under Article 69(2), unawareness due to negligence or even gross negligence is insufficient<sup>263</sup>. Despite this, there is no notice requirement towards the buyer, although such notification is typically necessary to give the buyer the aforementioned actual knowledge, and such notice travels at the risk of the seller<sup>264</sup>.

271. It seems the main function of Article 70 to preserve the buyer’s ability to pursue avoidance of the contract and delivery of substitute goods<sup>265</sup>, which causes the risk to fall back on the seller.

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258 Schwenzer (n 2) Article 68 para. 8.

259 This is indeed a custom in contracts for the sale of goods in transit: Nicholas (n 33) 238.

260 Schwenzer (n 2) Article 68 para. 9.

261 *Ibid* Article 68 para. 21.

262 *Ibid* Article 69 para. 7.

263 *Ibid* Article 69 para. 21.

264 *Ibid*.

265 *Ibid* Article 70 para. 6.

272. **Comparative Analysis.** As aforementioned, risk in effect passes upon delivery under the CISG, while in local Hong Kong law it *prima facie* occurs upon the passing of property. However, both share the primary requirement that risk will not pass until the goods are identified or ascertained.

273. With the wording in Article 66, the domestic classification of the seller's "act or omission" (whether it is under contract law or tort law) is irrelevant<sup>266</sup>.

274. In the situation where the buyer delays in taking over the goods, the CISG itself does not have any requirement in relation to notice and fixing of an additional period of time before the risk can pass, and it precludes the application of any such corresponding legal requirement in domestic systems<sup>267</sup>.

275. Having said that, the SGO has no such explicit notice requirement either. Regardless, the Article 69(1) rule for the passing of risk when there is delay on the buyer's part is reminiscent of the "control"-based reasoning in local Hong Kong law for uncoupling the passing of risk from the transfer of property, as well as the wording of the second paragraph of SGO section 22.

276. In any event, any comparative analysis between the CISG and local Hong Kong rules on the passing of risk may be of limited practical relevance due to the widespread adoption of trade terms, particularly the ICC Incoterms, in international commercial agreements<sup>268</sup>.

- End of Annex 2.2 -

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266 *Ibid* Article 66 para. 18.

267 *Ibid* Article 69 para. 10.

268 The Incoterms often override the CISG rules on the passing of risk: Schwenzer (n 2) Intro to Articles 66-70 para. 23; Hong Kong rules on the passing of risk, notably SGO sections 20 and 22, can be subject to the agreement between the parties.

**Annex 3.1**

**HONG KONG'S RANK IN WORLD TRADE SINCE 2008**

<b>YEAR</b>	<b>RANK IN MERCHANDISE EXPORTS</b>	<b>RANK IN MERCHANDISE IMPORTS</b>	<b>TOTAL IN MERCHANDISE EXPORTS (US\$ MILLION)</b>	<b>TOTAL IN MERCHANDISE IMPORTS (US\$ MILLION)</b>
2018 <sup>1</sup>	8	8	569,241	627,517
2017 <sup>2</sup>	7	7	550,272	589,908
2016 <sup>3</sup>	6	7	516,734	547,336
2015 <sup>4</sup>	7	7	510,596	559,427
2014 <sup>5</sup>	9	7	524,065	600,613
2013 <sup>6</sup>	9	7	535,548	622,276
2012 <sup>7</sup>	10	8	492,907	553,486
2011 <sup>8</sup>	12	10	455,650	510,855
2010 <sup>9</sup>	11	9	401,022	442,035
2009 <sup>10</sup>	11	9	329,422	352,241
2008 <sup>11</sup>	13	13	370,242	392,962

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- 1 [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_profiles19\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_profiles19_e.pdf), 164.
  - 2 [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_profiles18\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_profiles18_e.pdf), 164.
  - 3 [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_profiles17\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_profiles17_e.pdf), 162.
  - 4 [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_profiles16\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_profiles16_e.pdf), 160.
  - 5 [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_profiles15\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_profiles15_e.pdf), 85.
  - 6 [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_profiles14\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_profiles14_e.pdf), 85.
  - 7 [https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_profiles13\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_profiles13_e.pdf), 85.
  - 8 [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/trade\\_profiles12\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles12_e.pdf), 81.
  - 9 [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/trade\\_profiles11\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles11_e.pdf), 81.
  - 10 [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/trade\\_profiles10\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles10_e.pdf), 78.
  - 11 [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/trade\\_profiles09\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles09_e.pdf), 78.

HONG KONG'S TOP 20 TRADING PARTNERS AND THEIR CISG STATUS<sup>1</sup>

RANK	COUNTRY/ TERRITORY	TOTAL TRADE (HK\$ MILLION)	TOTAL TRADE (%)	DOES THE CISG APPLY?	DATE WHEN CISG ENTERED INTO FORCE
1	Mainland China	4,473,570	50.4	YES	1 Jan 1988
2	USA	587,924	6.6	YES	1 Jan 1988
3	Taiwan	424,617	4.8	NO	N/A
4	Japan	389,282	4.4	YES	1 Aug 2009
5	Singapore	383,277	4.3	YES	1 Mar 1996
6	South Korea	336,181	3.8	YES	1 Mar 2005
7	India	226,735	2.6	NO	N/A
8	Malaysia	224,156	2.5	NO	NA
9	Thailand	152,690	1.7	NO	N/A
10	Vietnam	149,354	1.7	YES	1 Jan 2017
11	Germany	130,503	1.5	YES	1 Jan 1991
12	United Kingdom	113,484	1.3	NO	N/A
13	Philippines	107,406	1.2	NO	N/A
14	Switzerland	98,327	1.1	YES	1 Mar 1991
15	Netherlands	92,536	1.0	YES	1 Jan 1992
16	France	88,746	1.0	YES	1 Jan 1988
17	United Arab Emirates	81,257	0.9	NO	N/A

<sup>1</sup> The figures in this table are obtained from Trade and Industry Department, "Hong Kong's Principal Trading Partners in 2018", available at [http://www.tid.gov.hk/english/trade\\_relations/mainland/trade.html](http://www.tid.gov.hk/english/trade_relations/mainland/trade.html).

**Annex 3.2**

**HONG KONG'S TOP 20 TRADING PARTNERS AND THEIR CISG STATUS<sup>1</sup>**

<b>RANK</b>	<b>COUNTRY/ TERRITORY</b>	<b>TOTAL TRADE (HK\$ MILLION)</b>	<b>TOTAL TRADE (%)</b>	<b>DOES THE CISG APPLY?</b>	<b>DATE WHEN CISG ENTERED INTO FORCE</b>
18	Italy	80,433	0.9	YES	1 Jan 1988
19	Macao	56,745	0.6	NO	N/A
20	Australia	54,218	0.6	YES	1 Apr 1989
	<b><u>TOTAL CISG</u></b>	<b>6,864,351</b>	<b>77.3</b>		

HONG KONG'S TOP 20 EXPORT PARTNERS AND THEIR CISG STATUS<sup>1</sup>

RANK	COUNTRY/ TERRITORY	TOTAL TRADE (HK\$ MILLION)	TOTAL TRADE (%)	DOES THE CISG APPLY?	DATE WHEN CISG ENTERED INTO FORCE
1	Mainland China	20,475	44.2	YES	1 Jan 1988
2	USA	3,642	7.9	YES	1 Jan 1988
3	Vietnam	2,573	5.6	YES	1 Jan 2017
4	Singapore	2,486	5.4	YES	1 Mar 1996
5	Taiwan	2,469	5.3	NO	N/A
6	Macao	1,867	4.0	NO	N/A
7	Thailand	1,207	2.6	NO	N/A
8	South Korea	1,157	2.5	YES	1 Mar 2005
9	Switzerland	1,093	2.4	YES	1 Mar 1991
10	Malaysia	1,093	2.4	NO	N/A
11	Japan	997	2.2	YES	1 Aug 2009
12	United Kingdom	876	1.9	NO	N/A
13	United Arab Emirates	862	1.9	NO	N/A
14	Australia	671	1.4	YES	1 Apr 1989
15	India	598	1.3	NO	N/A
16	Canada	553	1.2	YES	1 May 1992
17	Indonesia	518	1.1	NO	N/A

<sup>1</sup> The figures in this table are obtained from Trade and Industry Department, "Hong Kong's Principal Trading Partners in 2018", available at [http://www.tid.gov.hk/english/trade\\_relations/mainland/trade.html](http://www.tid.gov.hk/english/trade_relations/mainland/trade.html).

**Annex 3.3****HONG KONG'S TOP 20 EXPORT PARTNERS AND THEIR CISG STATUS<sup>1</sup>**

<b>RANK</b>	<b>COUNTRY/ TERRITORY</b>	<b>TOTAL TRADE (HK\$ MILLION)</b>	<b>TOTAL TRADE (%)</b>	<b>DOES THE CISG APPLY?</b>	<b>DATE WHEN CISG ENTERED INTO FORCE</b>
18	Philippines	423	0.9	NO	N/A
19	France	283	0.6	YES	1 Jan 1988
20	Nepal	225	0.5	NO	N/A
	<b><u>TOTAL CISG</u></b>	<b>33,930</b>	<b>73.4</b>		

**Annex 3.4****MEMBERS OF THE BELT & ROAD INITIATIVE AND THEIR CISG STATUS**

<b>NO.</b>	<b>COUNTRY</b>	<b>MEMBER OF CISG?</b>	<b>DATE OF ENTRY INTO FORCE OF CISG</b>
1	Afghanistan	NO	N/A
2	Albania	YES	1 Jun 2010
3	Algeria	NO	N/A
4	Angola	NO	N/A
5	Antigua and Barbuda	NO	N/A
6	Armenia	YES	1 Jan 2010
7	Austria	YES	1 Jan 1989
8	Azerbaijan	YES	1 Jun 2017
9	Bahrain	YES	1 Oct 2014
10	Bangladesh	NO	N/A
11	Barbados	NO	N/A
12	Belarus	YES	1 Nov 1990
13	Benin	YES	1 Aug 2012
14	Bhutan	NO	N/A
15	Bolivia	NO	N/A
16	Bosnia & Herzegovina	YES	6 Mar 1992
17	Brunei	NO	N/A
18	Bulgaria	YES	1 Aug 1991
19	Burundi	YES	1 Oct 1999
20	Cambodia	NO	N/A

**Annex 3.4****MEMBERS OF THE BELT & ROAD INITIATIVE AND THEIR CISG STATUS**

<b>NO.</b>	<b>COUNTRY</b>	<b>MEMBER OF CISG?</b>	<b>DATE OF ENTRY INTO FORCE OF CISG</b>
21	Cameroon	YES	1 Nov 2018
22	Cape Verde	NO	N/A
23	Chad	NO	N/A
24	Chile	YES	1 Mar 1991
25	China	YES	1 Jan 1988
26	Comoros	NO	N/A
27	Congo	YES	1 Jul 2015
28	Cook Islands	NO	N/A
29	Costa Rica	YES	1 Aug 2018
30	Cote d'Ivoire	NO	N/A
31	Croatia	YES	8 Oct 1991
32	Cuba	YES	1 Dec 1995
33	Cyprus	YES	1 Apr 2006
34	Czech Republic	YES	1 Jan 1993
35	Djibouti	NO	N/A
36	Dominica	NO	N/A
37	Dominican Republic	YES	1 Jul 2011
38	Ecuador	YES	1 Feb 1993
39	Egypt	YES	1 Jan 1988
40	El Salvador	YES	1 Dec 2007

**Annex 3.4****MEMBERS OF THE BELT & ROAD INITIATIVE AND THEIR CISG STATUS**

<b>NO.</b>	<b>COUNTRY</b>	<b>MEMBER OF CISG?</b>	<b>DATE OF ENTRY INTO FORCE OF CISG</b>
41	Equatorial Guinea	NO	N/A
42	Estonia	YES	1 Oct 1994
43	Ethiopia	NO	N/A
44	Fiji	YES	1 Jul 2018
45	Gabon	YES	1 Jan 2006
46	Gambia	NO	N/A
47	Georgia	YES	1 Sept 1995
48	Ghana	NO <sup>1</sup>	N/A
49	Greece	YES	1 Feb 1999
50	Grenada	NO	N/A
51	Guinea	YES	1 Feb 1999
52	Guyana	YES	1 Oct 2015
53	Hungary	YES	1 Jan 1988
54	Indonesia	NO	N/A
55	Iran	NO	N/A
56	Iraq	YES	1 Apr 1991
57	Israel	YES	1 Feb 2003
58	Italy	YES	1 Jan 1988

1 Ghana signed the CISG on 11 Apr 1980. As of 1 February 2020, Ghana has not ratified the CISG and the CISG is not yet in force.

**Annex 3.4****MEMBERS OF THE BELT & ROAD INITIATIVE AND THEIR CISG STATUS**

<b>NO.</b>	<b>COUNTRY</b>	<b>MEMBER OF CISG?</b>	<b>DATE OF ENTRY INTO FORCE OF CISG</b>
59	Jamaica	NO	N/A
60	Jordan	NO	N/A
61	Kazakhstan	NO	N/A
62	Kenya	NO	N/A
63	South Korea	YES	1 Mar 2005
64	Kuwait	NO	N/A
65	Kyrgyzstan	YES	1 Jun 2000
66	Laos	YES	1 Oct 2020 <sup>2</sup>
67	Latvia	YES	1 Aug 1998
68	Lebanon	YES	1 Dec 2009
69	Lesotho	YES	1 Jan 1988
70	Liberia	YES	1 Oct 2006
71	Libya	NO	N/A
72	Lithuania	YES	1 Feb 1996
73	Luxembourg	YES	1 Feb 1998
74	(North) Macedonia	YES	17 Nov 1991
75	Madagascar	YES	1 Oct 2015
76	Malaysia	NO	N/A

2 The Lao People's Democratic Republic acceded to the CISG on 24 Sep 2019. The CISG will enter into force for Laos on 1 Oct 2020.

**Annex 3.4****MEMBERS OF THE BELT & ROAD INITIATIVE AND THEIR CISG STATUS**

<b>NO.</b>	<b>COUNTRY</b>	<b>MEMBER OF CISG?</b>	<b>DATE OF ENTRY INTO FORCE OF CISG</b>
77	Maldives	NO	N/A
78	Mali	NO	N/A
79	Malta	NO	N/A
80	Mauritania	YES	1 Sep 2000
81	Micronesia	NO	N/A
82	Moldova	NO	N/A
83	Mongolia	YES	1 Jan 1999
84	Montenegro	YES	3 Jun 2006
85	Morocco	NO	N/A
86	Mozambique	NO	N/A
87	Myanmar	NO	N/A
88	Namibia	NO	N/A
89	Nepal	NO	N/A
90	New Zealand	YES	1 Oct 1995
91	Niger	NO	N/A
92	Nigeria	NO	N/A
93	Niue	NO	N/A
94	Oman	NO	N/A
95	Pakistan	NO	N/A
96	Palestine	YES	1 Jan 2019

**Annex 3.4****MEMBERS OF THE BELT & ROAD INITIATIVE AND THEIR CISG STATUS**

<b>NO.</b>	<b>COUNTRY</b>	<b>MEMBER OF CISG?</b>	<b>DATE OF ENTRY INTO FORCE OF CISG</b>
97	Panama	NO	N/A
98	Papua New Guinea	NO	N/A
99	Peru	YES	1 Apr 2000
100	Philippines	NO	N/A
101	Poland	YES	1 Jun 1996
102	Portugal	NO	N/A
103	Qatar	NO	N/A
104	Romania	YES	1 Jun 1992
105	Russia	YES	1 Sept 1991
106	Rwanda	NO	N/A
107	Samoa	NO	N/A
108	Saudi Arabia	NO	N/A
109	Senegal	NO	N/A
110	Serbia	YES	27 Apr 1992
111	Seychelles	NO	N/A
112	Sierra Leone	NO	N/A
113	Singapore	YES	1 Mar 1996
114	Slovakia	YES	1 Jan 1993
115	Slovenia	YES	25 Jun 1991
116	Solomon Islands	NO	N/A

**Annex 3.4****MEMBERS OF THE BELT & ROAD INITIATIVE AND THEIR CISG STATUS**

<b>NO.</b>	<b>COUNTRY</b>	<b>MEMBER OF CISG?</b>	<b>DATE OF ENTRY INTO FORCE OF CISG</b>
117	Somalia	NO	N/A
118	South Africa	NO	N/A
119	South Sudan	NO	N/A
120	Sri Lanka	NO	N/A
121	Sudan	NO	N/A
122	Suriname	NO	N/A
123	Syria	YES	1 Jan 1988
124	Tajikistan	NO	N/A
125	Tanzania	NO	N/A
126	Thailand	NO	N/A
127	Timor-Leste	NO	N/A
128	Togo	NO	N/A
129	Tonga	NO	N/A
130	Trinidad & Tobago	NO	N/A
131	Tunisia	NO	N/A
132	Turkey	YES	1 Aug 2011
133	Turkmenistan	NO	N/A
134	Uganda	YES	1 Mar 1993
135	Ukraine	YES	1 Feb 1991
136	United Arab Emirates	NO	N/A

**Annex 3.4****MEMBERS OF THE BELT & ROAD INITIATIVE AND THEIR CISG STATUS**

<b>NO.</b>	<b>COUNTRY</b>	<b>MEMBER OF CISG?</b>	<b>DATE OF ENTRY INTO FORCE OF CISG</b>
137	Uruguay	YES	1 Feb 2000
138	Uzbekistan	YES	1 Dec 1997
139	Vanuatu	NO	N/A
140	Venezuela	NO <sup>3</sup>	N/A
141	Vietnam	YES	1 Jan 2017
142	Yemen	NO	N/A
143	Zambia	YES	1 Jan 1988
144	Zimbabwe	NO	N/A
	Total number of CISG countries	66	

3 Venezuela signed the CISG on 28 Sep 1981. As of 1 February 2020, Venezuela has not ratified the CISG and the CISG is not yet in force.

Consultation draft<sup>1</sup> of  
Sale of Goods (United Nations Convention) Bill

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# A Bill

# To

Implement the United Nations Convention on Contracts for the International Sale of Goods; to apply the provisions of the Convention between the Mainland and Hong Kong; and to provide for related matters.

Enacted by the Legislative Council.

**1. Short title and commencement**

- (1) This Ordinance may be cited as the Sale of Goods (United Nations Convention) Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

**2. Interpretation**

In this Ordinance—

**Contracting State** (締約國) means a state that is a party to the Convention;

**Convention** (《公約》) means the United Nations Convention on Contracts for the International Sale of Goods done at Vienna on 11 April 1980, as set out in the Schedule;

**Mainland** (內地) means the part of China other than Hong Kong, Macao and Taiwan;

**territorial unit** (領土單位), in relation to a state that has 2 or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in the Convention, means each of the territorial units.

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<sup>1</sup> These draft provisions are possible provisions to implement the proposals in this Consultation Paper and are included to assist in explaining those proposals. They are **not** the final version for the legislative process if legislation were to be introduced to give effect to the proposals.

**3. Ordinance or Convention to prevail in event of inconsistency with other laws**

If there is any inconsistency between this Ordinance or the Convention and any other law, this Ordinance or the Convention prevails to the extent of the inconsistency.

**4. Convention has force of law in Hong Kong**

(1) The Convention (except subparagraph (1)(b) of its article 1)<sup>2</sup> has the force of law in Hong Kong.

**Note—**

The Convention applies only to contracts of sale of goods between parties whose places of business are in different states when the states are Contracting States. See subparagraph (1)(a) of article 1 of the Convention.

(2) Despite Hong Kong being a territorial unit of China, the provisions of the Convention as it has effect under this Ordinance apply between the Mainland and Hong Kong as if the Mainland and Hong Kong were 2 different states and 2 different Contracting States.

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<sup>2</sup> The proposed exclusion of subparagraph (1)(b) of Article 1 of the Convention is subject to the outcome of the public consultation.

Schedule

[s. 2]

**United Nations Convention on Contracts for the International Sale of Goods**

[text of Convention to be inserted here]

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## Explanatory Memorandum

1. The United Nations Convention on Contracts for the International Sale of Goods (**CISG**) was done at Vienna on 11 April 1980.
2. The CISG provides a uniform text of law for international sale of goods. The object of this Bill is to implement the CISG in Hong Kong.
3. Clause 1 sets out the short title. If this Bill is passed, the Ordinance to be enacted (**Ordinance**) will come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.
4. Clause 2 defines terms for the interpretation of the Bill.
5. Clause 3 provides that the Ordinance or the Convention is to prevail if there is any inconsistency with any other law.
6. Clause 4(1) provides that the Convention (except subparagraph (1)(b) of its article 1) has the force of law in Hong Kong.
7. Clause 4(1) does not by itself have the effect of applying the CISG between different territorial units of the People's Republic of China. In view of the close economic ties between the Mainland and Hong Kong, to facilitate sale of goods between businesses in the two places, clause 4(2) is included to provide that the provisions of the CISG are to apply between the Mainland and Hong Kong.