



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

SUBMISSIONS

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

Question 1:

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

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

Law Society's Response:

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

Question 2:

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

Law Society's Response:

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

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

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

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

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

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

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

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

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

Consultation Question 3:

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

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

Law Society's Response:

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

Consultation Question 4:

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

Law Society's Response:

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

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

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

Consultation Question 5:

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

Law Society's Response:

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

**The Law Society of Hong Kong
27 October 2020**