



University  
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Faculty of Law



# **What you must know about the CISG as a legal practitioner**

New Ordinance on CISG: Update on Hong  
Kong's Law on International Sale of Goods  
24 January 2022

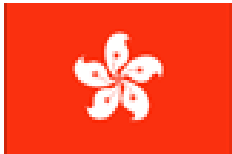
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# Introduction: CISG in Hong Kong – The immediate future (1)



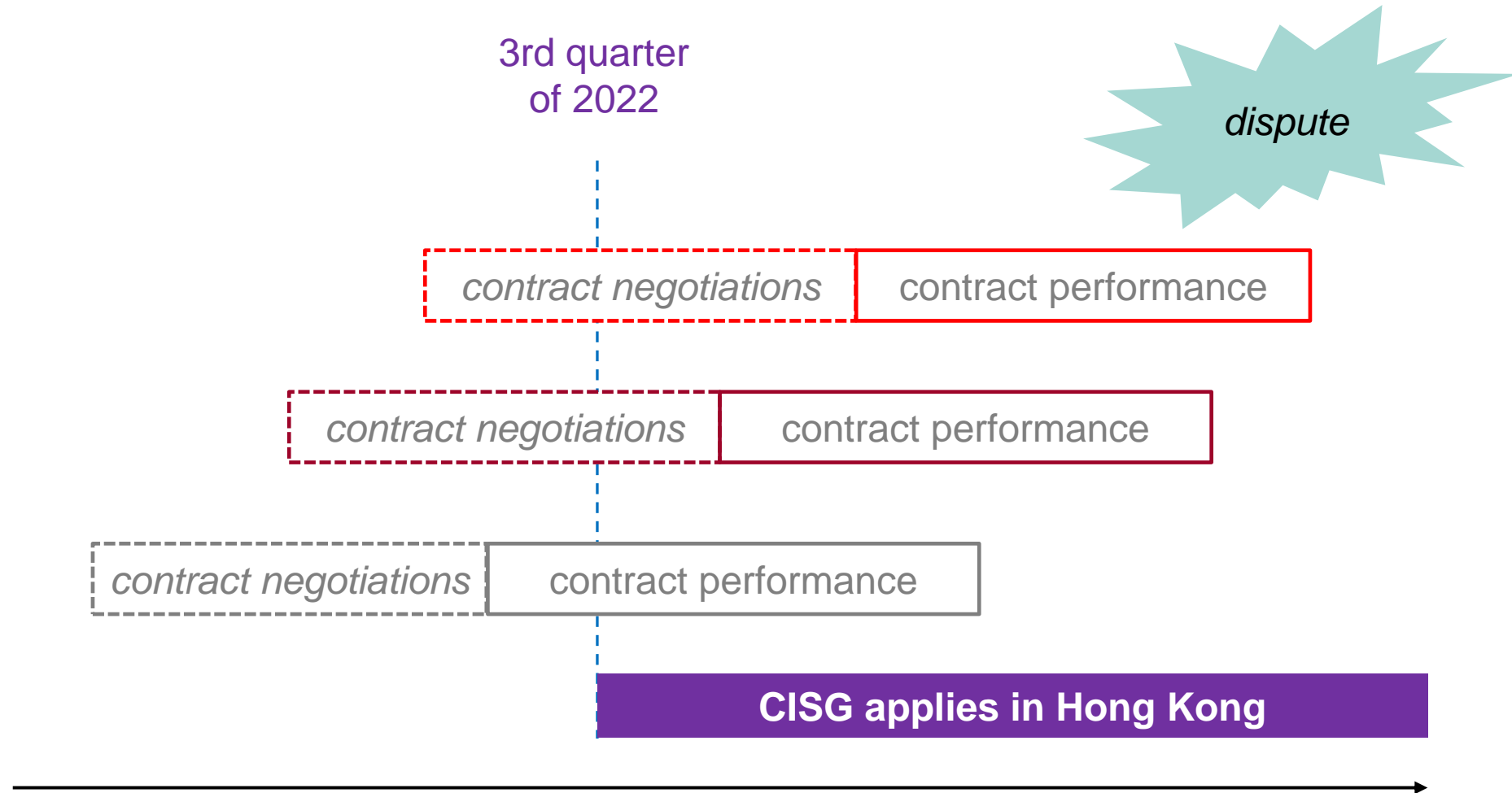
## Art. 1 CISG [Sphere of application]

- (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) – (3) [...]

## Art. 100 CISG [Temporal applicability]

- (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) [...]

# Introduction: CISG in Hong Kong – The immediate future (2)



# Changed meaning of your standard choice-of-law clause

- Example: “This contract is governed by **Hong Kong law.**”
  - What meaning/effect will this clause have after the CISG has entered into force in Hong Kong?
- (Internationally uniform) CISG **case law**: Choice of the law of CISG Contracting State or territory is **choice of CISG**
  - Reason: CISG forms part of the Hong Kong legal order
- Resulting **effect** of such a choice-of-law clause
  - Where Art. 1(1)(a) or (b) applies: **No exclusion of CISG** (Art. 6 CISG); choice of HK (non-CISG) law for gap-filling purposes
  - Where Art. 1(1)(b) applies: Clause results in applicability of CISG
- If **exclusion of CISG** (Art. 6 CISG) is desired: **Be more specific**

# Changed meaning of your standard choice-of-law clause



*Asante Technologies, Inc. v. PMC-Sierra, Inc.*,  
164 F.Supp.2d 1142 (N.D. Cal. 2001)

“Although selection of a particular choice of law, such as ‘the California Commercial Code’ or the ‘Uniform Commercial Code’ could amount to implied exclusion of the CISG, the choice of law clauses at issue here **do not evince a clear intent to opt out of the CISG.**”

For example, Defendant’s choice of applicable law adopts **the law of British Columbia**, and it is undisputed that the CISG *is* the law of British Columbia. (International Sale of Goods Act ch. 236, 1996 S.B.C. 1 et seq. (B.C).) Furthermore, even Plaintiff’s choice of applicable law generally adopts the ‘**laws of**’ **the State of California**, and California is bound by the Supremacy Clause to the treaties of the United States. U.S. Const. art. VI, cl. 2 ([...]). Thus, under general California law, **the CISG** is applicable to contracts where the contracting parties are from different countries that have adopted the CISG.”

# How to make standard terms and conditions part of a CISG contract (1): Basics

- Very frequently arising issue in CISG case law
  - Catch-words e.g. “incorporation of standard terms”, “inclusion of standard terms and conditions by reference” etc.
  - One of the most frequently litigated issues under the CISG ⇒ may also affect parties’ agreement on forum selection clauses or arbitration clauses contained in standard terms
- **Basic position of CISG**
  - No specific provisions about standard terms ⇒ general rules apply
  - Therefore, standard terms **must be made part of offer** (Art. 14 CISG) as interpreted in accordance with Art. 8 CISG; offer must then be accepted (Art. 18 CISG)
  - Offer must (1) **refer** to standard terms and (2) **make terms text available** to the **other party** (the “making available” test)

# How to make standard terms and conditions part of a CISG contract (2): Basics



*Machinery case*, German Supreme Court,  
31 October 2001 – VIII ZR 60/01

There is unanimous agreement that the recipient of an offer that seeks to “incorporate standard terms and conditions must have the possibility to become aware of the standard terms in a reasonable manner ([...]). An effective inclusion of standard terms and conditions [into a CISG contract] thus first requires that the offeror’s intention to include his terms and conditions into the contract be apparent to the offeree. In addition, as the Court of Appeal correctly assumed, **the CISG requires the user of standard terms and conditions to send the standard terms’ text or to make it available to the other party in a different way.**”



# How to make standard terms and conditions part of a CISG contract (3): Particular questions

- Making standard terms' text available: **How?**
  - No formal requirements, but **active** “making available” necessary
  - **Sufficient:** Sending full text by mail, or as e-mail attachment (practically important: **proof** of other party's receipt)
  - insufficient: Offer to make terms available “upon request”; deposit of terms with local Chamber of Commerce or Court
  - Disputed: Availability of standard terms on offeror's internet **website** sufficient?
  - Important: “Making available” test is **no form requirement** ⇒ no need to repeat it with every follow-up contract ⇒ sufficient if standard terms **were made available** at **beginning** of business relationship (first CISG contract)

# How to make standard terms and conditions part of a CISG contract (4): Particular questions

- Making standard terms' text available: **When?**
  - Before contract formation (= **before** the **other party accepts** offer)
  - Insufficient (too late): Sending of standard terms' text for the first time with/on **invoice**, on shipping documents etc.
    - ↳ May be offer to *modify* contract (but unlikely to be accepted)
- **Language** in which standard terms' text is written
  - Principle: Reasonable person in offeree's shoes must be able to understand terms (Art. 8(2) CISG)
  - Sufficient: Language of contract negotiations; language understandable to the offeree
  - “World language” per se understandable?

# How to make standard terms and conditions part of a CISG contract (5): Particular questions



***Chateau des Charmes Wines Ltd. v. Sabaté USA, Inc.,***  
**328 F.3d 528 (9th Cir. 2003)**

“Indeed, Sabaté France and Sabaté USA do not contend that a forum selection clause was part of their **oral agreements**, but merely that the clauses in the **invoices** became part of a binding agreement. The logic of this contention is defective. Under the Convention, a ‘contract may be modified or terminated by the mere agreement of the parties.’ *Id.*, art. 29(1). However, the Convention clearly states that ‘[a]dditional or different terms relating, among other things, to ... the settlement of disputes are considered to alter the terms of the offer materially.’ *Id.*, art. 19(3). There is no indication that Chateau des Charmes conducted itself in a manner that evidenced any affirmative assent to the forum selection clauses in the invoices. Rather, Chateau des Charmes merely performed its obligations under the oral contract. **Nothing** in the Convention suggests that the **failure to object** to a party’s unilateral attempt to alter materially the terms of an otherwise valid agreement **is an ‘agreement’ within the terms of Article 29.**”

# Reviewing existing standard terms and conditions: Does the CISG require such terms to be revised? (1)

- Generally, **no**, because **Art. 6 CISG** allows parties to derogate from the CISG's provisions ⇒ far-reaching **party autonomy** under the CISG
  - However, **validity** of standard terms is not governed by the CISG (see Art. 4(a) CISG), but by **applicable domestic law**
  - Examples: Unfairness, unconscionability, unreasonableness of terms' content

# Reviewing existing standard terms and conditions: Does the CISG require such terms to be revised? (2)

- But, if existing standard terms were developed against background of domestic law (e.g. Hong Kong SOGO) ⇒ **adjustment of terms to CISG advisable**
  - Example 1: Specification of time for buyer's notice of non-conformity (Art. 39(1) CISG: "within a reasonable time")
  - Example 2: Definition of innocent party's right to avoid (terminate) the contract (Arts. 49(1)(a), 64(1)(a) CISG: in case of a fundamental breach of contract)

# Freedom of form (Arts. 11, 29(1) CISG) and contract interpretation in light of circumstances (Art. 8(3) CISG)

## **Art. 11 CISG [Freedom of form]**

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.

## **Art. 29 CISG [Contract modification by party agreement]**

- (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.

# Freedom of form (Arts. 11, 29(1) CISG) and contract interpretation in light of circumstances (Art. 8(3) CISG)

## **Art. 8(3) CISG [Interpretation of party declarations]**

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.

# Freedom of form (Arts. 11, 29(1) CISG) and contract interpretation in light of circumstances (Art. 8(3) CISG)

- Under CISG, contracts may be concluded and modified **orally** or **implicitly**
  - **Inapplicable** under CISG: **Consideration requirement**; statutes of frauds
- Party declarations and contract may be interpreted in light of pre-contractual negotiations
  - **Inapplicable** under CISG: “Four corner” rule; parol evidence rule
- But, “**no oral modifications**” **clauses**, **merger clauses** as drafting option ⇨ valid also in CISG contracts
  - Reason: Party autonomy (Art. 6 CISG); specific acknowledgement in Art. 29(2) CISG (with limited exceptions)



# Freedom of form (Arts. 11, 29(1) CISG) and contract interpretation in light of circumstances (Art. 8(3) CISG)



## *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24

“The reasons advanced in the case law for disregarding [NOM clauses] are entirely conceptual. The argument is that it is conceptually impossible for the parties to agree not to vary their contract by word of mouth because any such agreement would automatically be destroyed upon their doing so. The difficulty about this is that if it is conceptually impossible, then it cannot be done, short of an overriding rule of law (presumably statutory) requiring writing as a condition of formal validity. Yet it is plain that it can. **There are legal systems which have squared this particular circle. They impose no formal requirements for the validity of a commercial contract, and yet give effect to No Oral Modification clauses.**”

The Vienna Convention on Contracts for the International Sale of Goods (1980) has been ratified by 89 States, not including the United Kingdom. It provides ... [citing Arts. 11 and 29(2) CISG]...”

# Buyer's duty to inspect the goods & notify the seller about non-conformities, Art. 39(1) CISG

- Art. 39(1) CISG obliges every buyer to **notify the seller** of any non-conformity of the goods “within a reasonable time” after buyer discovered/ought to have discovered it
  - Art. 38(1) CISG: Buyer must examine the goods within as short a period as is practicable in the circumstances
- What is “**a reasonable time**” (Art. 39(1) CISG)?
  - Decisive: Circumstances of transaction (in particular: type of goods)
  - CISG case law: “Noble month” as rule of thumb
- (Harsh) **effect** of missing/late notice of non-conformity: **Buyer loses all remedies (!!)**
  - Narrow exceptions: Art. 40 CISG (seller's constructive awareness); Art. 44 CISG (buyer's reasonable excuse)

# The two-year cut-off rule, Art. 39(2) CISG

- All remedies of buyer are **cut off** for any non-conformity not notified to seller once **two years** from handing-over of goods have passed
  - Relevant for hidden defects ⇒ those are not covered by Art. 39(1)
  - No counterpart to Art. 39(2) CISG in most domestic laws
  - Two-year cut-off period problematic in case of long-lasting goods
- Exceptions to Art. 39(2) CISG:
  - Contractual guarantee for goods; contractual derogation from Art. 39(2) CISG (possible according to Art. 6 CISG)
  - Art. 40 CISG (buyer's constructive awareness); not Art. 44 CISG
- Art. 39(2) CISG applies independently of and in addition to limitation (prescription) periods under domestic law

# Avoidance (termination) of the contract: The “fundamental breach” hurdle

- CISG treats contract avoidance as **remedy of last resort** (*ultima ratio*)
  - Underlying reasoning: Costs and risks of re-shipping goods over long distances; preservation of contractual bargain in cases of minor contract breach ⇒ compensation of innocent party through damages
- Arts. 49(1)(a), 64(1)(a) CISG: Buyer’s/seller’s right to avoid contract only in case of “fundamental breach” (Art. 25 CISG)
  - See also: “Nachfrist” procedure, Arts. 49(1)(a), 64(1)(a) CISG
- “Fundamental breach” threshold: Generally strictly construed
  - But, parties can (and should) **define** threshold **in their contract** (see Art. 25 CISG: “...entitled to expect *under the contract* ...”)
  - Contractual perfect tender rule possible under CISG



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# Thank you for your attention.

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