

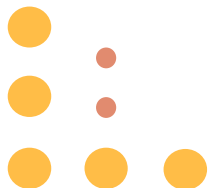


# 2023 CISG Workshop: The CISG vs. Contract Law in Hong Kong

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# 1. What is the CISG?

United Nations **C**onvention on **C**ontracts for the **I**nternational **S**ale of **G**oods (CISG)

- ▷ Uniform ‘contract law’ treaty applicable to international sale of goods. Not regulatory law.
- ▷ UN Commission on International Trade Law (UNCITRAL)
- ▷ Adopted in 1980; entered into force on January 1, 1988; currently 95 Contracting States
  - China is one of the first 11 Contracting States.
  - UK is not a Contracting State.

# 1. What is the CISG?

- ▷ Post-1997 applicability of CISG to HK was unclear.
  - 20 June 1997: China submitted a Diplomatic Note to UN on the status of HK in relation to treaties deposited with the UN. However, **CISG was not mentioned**.
    - Is this a reservation under Art 93 CISG or not?
  - 5 May 2022: China deposited a declaration of extension of the territorial application of CISG to HK. Application from 1 December 2022.
  
- ▷ 29 September 2022: HK Ordinance

# 1. What is the CISG?

- ▷ Applies to Hong Kong SAR from 1 December 2022
  - Sale of Goods (United Nations Convention) Ordinance (Cap. 641)
  - Clarifies the confusion arising from Art 93(4) CISG
- ▷ Temporal scope: CISG applies to:
  - ‘formation of contracts’ if offer made on or after 1 Dec 2022; and
  - ‘contracts’ if concluded on or after 1 Dec 2022
- ▷ HK and Mainland China transactions not covered
  - Not between parties ‘in different States’

# 1. What is the CISG?

- ▷ Structure of the CISG
  - Part 1: Sphere of Application and General Provisions (Arts 1–13)
  - Part 2: Formation of the Contract (Arts 14–24)
    - ‘offer and acceptance’
  - Part 3: Rights and Obligations of the Seller/Buyer (Arts 25–88)
  - Part 4: Final Provisions (Arts 89–101)
    - Public International Law (treaty law) provisions

## 2. When Does the CISG Apply?

- ▷ Basic Rule: Art 1(1) CISG
  - ‘contracts of sale of goods’;
  - ‘between parties whose places of business are in different States’ (i.e. internationality); and
  - Either:
    - ‘[those] States are Contracting States’ (e.g. HK–Japan) (Art 1(1)(a)); or
    - ‘the rules of private international law [of the forum] lead to the application of the law of a Contracting State’ (e.g. HK–India if HK PIL leads to the application of HK law) (Art 1(1)(b))

## 2. When Does the CISG Apply?

- ▷ What are ‘contracts of sale of goods’ ?
  - Contracts of sale:
    - S delivers goods and transfers property in it (cf. Art 30); B pays the price and takes over the goods (Art 53)
    - Sale of goods to be manufactured or produced covered, unless buyer supplies ‘a substantial part’ of the materials (Art 3(1))
    - Contract of sale and services covered, unless ‘preponderant part’ of the obligations of the party who furnishes the goods consists in the supply of labour or other services (Art 3(2))

## 2. When Does the CISG Apply?

- ▷ What are 'contracts of sale of goods' ?
  - Goods: movable tangible assets
    - Information, software, digital assets?
      - Sales v licenses



## 2. When Does the CISG Apply?

- ▷ Exclusion of the CISG (Art 2)
  - Consumer sales (Art 2(a))
  - Sale by auction (Art 2(b)) and on execution (Art 2(c))
  - Sale of certain movable assets (Art 2(d)–(f))
    - Stocks, negotiable instruments, money, ships, vessels, aircrafts, electricity, etc.
  
- ▷ Opting out of the CISG (Art 6)

# 3. Interplay of CISG and HK Law

- ▷ CISG does not govern everything. There are gaps.
- ▷ CISG governs (Art 4):
  - Formation of the contract of sale
  - Rights and obligations of the seller and buyer

# 3. Interplay of CISG and HK Law

- ▷ CISG does NOT govern (external gaps):
  - Unless there are express provisions in the CISG covering the situation
    - Validity (Art 4(a)) [incapacity, public policy, fraud, etc.]
    - Property (Art 4(b))
  - Rights of third parties (Art 4)
  - Liability of seller for death or personal injury caused by the goods (Art 5) [products liability]

# 3. Interplay of CISG and HK Law

- ▷ How are external gaps handled?
  - law applicable according to private int'l law of the forum
    - e.g. **CISG + HK contract law for gaps (dual regime)**

## 4. Interpretation of the CISG

- ▷ Art 7(1): in the interpretation of the CISG, regard is to be had
  - to its international character
    - avoidance of the ‘homeward trend’
  - to the need to promote
    - uniformity in its application; and
    - the observance of good faith in int’l trade

## 4. Interpretation of the CISG

- ▷ **‘Good faith’** *in the interpretation* of CISG (Art 7(1))
  - Not *duty of good faith* imposed on the parties
  - Compromise between common law and civil law
    - certainty v good faith
    - general principles of good faith ‘sneaking in from the backdoor’ (Farnsworth)

## 4. Interpretation of the CISG

- ▷ Art 7(2): for matters governed by the CISG but not expressly settled in it (internal gaps)
  - **‘general principles’** underlying the CISG;
  - In the absence of such ‘general principles’, law applicable by virtue of private int’l law

# 4. Interpretation of the CISG

- ▷ Example of general principle: ***favor contractus*** (pro-contract)
  - ‘... the aim of preserving the contract whenever possible, thus limiting the number of cases in which its existence or validity may be questioned or in which it may be terminated before time.’ (Bonell, 1994 [on the UNIDROIT Principles])
    - Facilitation of contract formation (Art 19(2))
    - Denial of invalidation due to ‘initial impossibility’
    - Limitation of avoidance of contracts (fundamental breach (Arts 25, 49, 64); seller’s right to cure (Art 48))



# 5. Freedom of Contract

- ▷ Freedom of Content (Art 6)
- ▷ Freedom of Form (Art 11)
  - Writing is not a requirement for enforceability or evidence ... no statute of fraud, parol evidence rule
- ▷ 'Consideration' is not a requirement
  - Offer is revocable (Art 16(1))
  - Modification by agreement (Art 29)

# 6. Formation of the Contract

- ▷ Offer and Acceptance
  - Contract concluded when acceptance of an offer becomes effective (Art 23)
- ▷ In principle, offer revocable (Art 16(1); common law approach)
  - Revocable until acceptance is dispatched
  - ‘Revocation’ and ‘withdrawal’ distinguished (Arts 15(2), Art 22)
- ▷ Exceptions: offer irrevocable (civil law approach) if :
  - Firm offer (Art 16(2)(a))
  - Reliance (Art 16(2)(b))

# 6. Formation of the Contract

- ▷ Acceptance: offeree's indication of assent to an offer
  - Mode of acceptance
    - By notice (Art 18(1))
      - Performance may also constitute acceptance 'by notice': e.g. arrival of dispatched goods.
    - By performing an act, if offeree may indicate assent **without notice**, *by virtue of the offer, practices established between the parties, or usage* (Art 18(3))

# 6. Formation of the Contract

- ▷ Acceptance: offeree's indication of assent to an offer
  - Time acceptance becomes effective
    - By notice (Art 18(1)) ... **arrival principle** (Art 18(2))  
[denial of common law mailbox rule]
      - But dispatch is not without consequences: offer can no longer be revoked (Art 16(1))
    - By performing an act (Art 18(3)) ... the moment the act is performed

# 6. Formation of the Contract

- ▷ Acceptance: offeree's indication of assent to an offer
  - **Mirror Image Rule** (Art 19(1)) ... additions, limitations, or other modification to the offer is a rejection of the offer and constitutes a counter-offer (cf. Art 17)
  - Relaxation of the mirror-image rule (Art 19(2))
    - If additional/different terms do not materially alter the terms of the offer (cf. Art 19(3))
    - And if the offeror, without undue delay, does not object to the discrepancy
    - 'Battle of forms' and favor contractus

# 6. Formation of the Contract

## ▷ Late acceptance

- In principle, late acceptance is ineffective
  - Acceptance must reach the offeror within the time fixed by the offeror or, if no time is fixed, within a reasonable time (Art 18(2)).
- Late acceptance can be effective as an acceptance if:
  - The offeror, without delay, orally informs the offeree or dispatches a notice to that effect (Art 21(1)); or
  - If acceptance would have reached in time 'if transmission had been normal', unless the offeror, without delay, informs the offeree or dispatches a notice that offer has lapsed (Art 21(2)).
- Favor contractus

# 7. Interpretation of the Contract

- ▷ Interpretation of statement or conduct
  - According to subjective intent, if the other party knew or could not have been unaware of that intent (Art 8(1))
  - Otherwise, objective interpretation according to understanding of a reasonable person (Art 8(2))
  
- ▷ All relevant circumstances to be considered (Art 8(3)) ...  
No parol evidence rule (Art 8(3))

# 8. Obligations and Remedies for Breach

- ▷ Simple structure
  - What are the obligations of the seller and buyer
    - Seller's obligation: Arts 30–44
    - Buyer's obligation: Arts 53–60
  - What are the remedies available to the buyer and seller in case of breach of the other's obligation
    - Buyer's remedies: Arts 45–52
    - Seller's remedies: Arts 61–65



# 9. Seller's Obligations

- ▷ Seller's Obligations
  - **Delivery of the goods**
    - **Delivery (transfer of possession)**
    - **Conformity of the Goods**
  - Handing over of documents relating to the goods
    - Transport documents, various certificates, insurance policy, etc.
  - Transfer of property
    - But how/when property is transferred is left to domestic law (Art 4(b))

# 9.1 Seller's Obligation: Delivery

- ▷ **General rule:** to place the goods at the buyer's disposal at the place the seller had his place of business at the time of contract (Art 31(c));
- ▷ **Special rule (1)**  
**In case of specific goods, unidentified goods to be drawn from a specific stock, or goods to be manufactured or produced:** at the place where the goods were at or were to be manufactured/produced if the parties knew that place at the time of the contract (Art 31(b));

# 9.1 Seller's Obligation: Delivery

## ▷ Special rule (2)

**In case of 'sale involving carriage of the goods':** by handing the goods over to the first carrier for transmission to the buyer (Art 31(c))

- 'Sale involving carriage of the goods': sale where the seller's obligation consists of handing the goods over to an independent carrier for transmission to the buyer, rather than handing the goods over to the buyer.

## 9.2 Seller's Obligation: Conformity

- ▷ Non-conformity (Art 35) ... unitary concept
  - quantity, quality, description [type] required by the contract (Art 35(1));
  - If no agreement
    - Fitness for ordinary purpose (Art 35(2)(a))
    - Fitness for particular purpose made known to the seller at the time of the contract (Art 35(2)(b))
    - Sample/model; package/container (Art 35(2)(c),(d)); unless buyer knew or could not have been unaware of lack of conformity at the time of the contract (Art 35(3))

## 9.2 Seller's Obligation: Conformity

- ▷ (Buyer's) Notice requirement (Art 39)
  - buyer loses the right to rely on non-conformity unless the buyer does not give notice to the seller specifying the nature of the lack of non-conformity **within 'a reasonable time'** after he discovered or ought to have discovered it (Art 39(1))
    - When is the time buyer 'ought to have discovered' it?: duty to examine the goods within as short a period as is practicable in the circumstances (Art 38(1))
  - unless seller was aware of the non-conformity (Art 40)
  - Exception (Art 44) 'reasonable excuse'
    - Price reduction or damages (except loss of profits) allowed
  - **Absolute cut-off period (Art 39(2)): 2 years**

## 9.2 Seller's Obligation: Conformity

- ▷ Goods free from right or claim of third parties (Art 41)
  - Another aspect of conformity
  - Unfounded claims: 'The buyer is not purchasing a lawsuit.'
  - Special rule for intellectual property of third parties (Art 42)
    - due to territoriality of IP rights
  
- ▷ Notice requirement (Art 43)
  - Exception (Art 44)

## 9.2 Seller's Obligation: Conformity

- ▷ Seller's Right to Cure non-conformity (Art 48)
  - If he can do so
    - without unreasonable delay and
    - without causing the buyer
      - unreasonable inconvenience or
      - uncertainty of reimbursement by the seller of the expenses advance by the buyer
- ▷ Favor contractus:
  - If seller cures the non-conformity, buyer is satisfied (but buyer retains any right to claim damages)

# 10. Remedies for Breach

- ▷ Buyer's Remedies (listed in Art 45)
  - Specific Performance (including cure of non-conformity) (Art 46)
  - Avoidance [termination] (Art 49)
  - Reduction of Price (Art 50)
  - Damages (Art 45(1)(b))
  
- ▷ Remedies not available to the extent the S's breach was caused by the B's act or omission (Art 80)



# 10.1 Remedies for Breach: Avoidance

- ▷ Avoidance [termination] of the Contract
  - Immediate avoidance if breach is **fundamental** (Art 49(1)(a))
  - In case of non-delivery, avoidance after expiry of additional period of time given by the buyer (Art 49(1)(b))
  
- ▷ Avoidance by notice (Art 26)

# 10.1 Remedies for Breach: Avoidance

- ▷ Loss of right to avoid the contract
  - Time limitation (if goods has been delivered) (Art 49(2))
  - Impossibility of making restitution of the goods substantially in the condition in which they were received (Art 82(1))
    - Exceptions
      - If such impossibility is not due to his act or omission (Art 82(2)(a))
      - If goods perished or deteriorated as a result of examination under Art 38 (Art 82(2)(b))
      - If sold in normal course of business or consumed/transformed in normal course of use (Art 82(2)(c))

# 10.1 Remedies for Breach: Avoidance

- ▷ The concept of ‘**fundamental breach**’ (Art 25)
  - Substantial deprivation of what the non-breaching party was entitled to expect under the contract
    - Not a subjective test nor an objective test. The test is the ‘contract’
  - Foreseeability of such a result by the breaching party or a reasonable person [at the time of the contract]
  
- ▷ Favor contractus

# 10.1 Remedies for Breach: Avoidance

- ▷ Effects of Avoidance (Arts 81–84)
  - Releases both parties from contractual obligations (Art 81(1))
    - Except for dispute resolution clauses etc.
    - Does not affect damages liability for breach
  - Obligation already performed: restitution (Art 81(2))
    - Interest on price paid, benefits derived from goods to be returned (Art 84)
  - No retroactive effect: third parties not affected

## 10.2 Remedies: Specific Performance

- ▷ Specific Performance
  - require performance (Art 46(1))
  - In case of non-conformity
    - Require delivery of substitute goods (Art 46(2)) ... only if the lack of conformity constitutes **'fundamental breach'**
    - Require repair (Art 46(3))
  
- ▷ Exception in Art 28 (HK courts have discretion)

## 10.3 Remedies: Price Reduction

- ▷ Price Reduction (Art 50)
  - Unknown in HK law?
  - Only in cases of non-conformity (but not if non-conformity is cured by the S or if B refuses cure by S)
  - Calculation

$$\frac{\text{Reduced Price}}{\text{Contract Price}} = \frac{\text{Value of the goods actually delivered had at the time of delivery}}{\text{Value the conforming goods would have had at the time of delivery}}$$

# 10.4 Remedies for Breach: Damages

- ▷ Damages (Art 45(1)(b))
  - Strict liability
  - Exemption of damages (Art 79)
    - Non-performance due to **‘impediment beyond [the breaching party’s] control’**; and
    - [Breaching party] reasonably could not be expected:
      - To have taken the impediment into account at the time of contract [foreseeability]; or
      - To avoid or overcome it or its consequences

# 10.4 Remedies for Breach: Damages

- ▷ Damages (Art 45(1)(b))
  - Full compensation of loss suffered as a consequence of breach, including loss of profit, that was foreseeable to the breaching party at the time of conclusion of the contract (Art 74)
  - Special market-damages rule when contract avoided:
    - Difference in contract price and substitute transaction (resale, cover purchase) + Art 74 (Art 75)
    - If no substitute transaction, difference in price fixed by the contract and market price + Art 74 (Art 76)
  - [in case of buyer's non-payment, interest + Art 74 (Art 78)]



# 10.4 Remedies for Breach: Damages

- ▷ Damages (Art 45(1)(b))
  - Mitigation of Damages (Art 77)
    - Reduction of the amount of damages for failure to take such measures as are reasonable in the circumstances to mitigate loss (e.g. substitute transaction, suspension of manufacturing)

# 11. Buyer's Obligation and Seller's Remedies

- ▷ Buyer's Obligation (listed in Art 53)
  - Payment of price (Art 54–59)
    - Principle of concurrent performance (Art 58)
  - Taking delivery of the goods (Art 60)
  
- ▷ Seller's Remedies (listed in Art 61) ...parallel to buyer's remedies
  - Specific performance (Art 62)
  - Avoidance (Art 64)
  - Damages (Art 61(1)(b)) ... cf. Art 78

# Conclusion

- ▷ CISG is a uniform law instrument
  - Compromise of common law and civil law
    - Differences with domestic law exist
  - However, fair and reasonable rule for commercial transactions (e.g. favor contractus)
    - Avoidance of legalese; businessperson's perspective (compared to 1964 ULIS)
    - Promotion of cooperative commercial practice
    - Model for various modern contract law reform (e.g. China's New Civil Code)
  - If considered unfit to certain transactions (e.g. commodities trade), can be opted out (Art 6)