

Organisers



# Application of CISG to Hong Kong and Key Differences between CISG and Domestic Trade Laws

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# Origin and History of the CISG and Its Application to Hong Kong

# Origin and History of the CISG and Its Application to Hong Kong

- Rise of international trade and the need for uniform legal regime to regulate international sale of goods transactions
- UNIDROIT's attempt to supply such a regime
- Convention Relating to a Uniform Law on the International Sale of Goods (1964)
- Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964)
- CISG: adopted in the Vienna Conference on 11 April 1980, and entered into force on 1 January 1988

# Origin and History of the CISG and Its Application to Hong Kong

- One of the most successful international treaties
- As of November 2023, 97 States have adopted the CISG
- Regime a compromise between the Civilian and Common Law approach
- Despite being an international convention, it is not a treaty that governs the relationship between States: hence the Vienna Convention on the Law of Treaties does not have much application to CISG

# Origin and History of the CISG and Its Application to Hong Kong

- Notably, United Kingdom as a major trading nation is not a State party to CISG.
- Concerns about the effect of CISG effect on commodities trading, which typically involves a series of string contracts.
- Perceived threat of CISG to the prestigious role of English law in settling international trade disputes.
- Before return of sovereignty to China, Hong Kong did not adopt CISG.

# Origin and History of the CISG and Its Application to Hong Kong

- China is a State party to CISG, but it has opted out of **Article 1(1)(b)** by making a declaration under Article 95.
- In 2020, Hong Kong SAR Government proposed to adopt CISG to Hong Kong and began consultation. Positive feedbacks from stakeholders.
- **Sale of Goods (United Nations Convention) Ordinance** was passed on 29 September 2021, adopting CISG in full (without opting out from Article 1(1)(b)). Entered into force on 1 December 2022.
- In the meantime, on 5 May 2022, China deposited a declaration with UN extending the territorial application of CISG to Hong Kong, to take effect on 1 December 2022.
- The Ordinance prevails over other laws that are inconsistent with it (s.5).

# Key Differences between CISG and Domestic Trade Law



# Key Differences between CISG and Domestic Trade Law

## A. Application

- Autonomous application if **Article 1** is satisfied
- Parties' autonomy to exclude or vary CISG (subject only to Article 12): **Article 6**
- Consumer transactions and certain other types of transactions excluded: **Article 2**
- **Article 4**: CISG only governs formation of contract and rights and obligations of seller and buyer. Not concerned with validity of contract or passing of property (passing of risk is covered though): **Chapter IV (Articles 66–70)**. Local law continues to govern these matters (c.f. ss.19-27 of Sale of Goods Ordinance ('**SOGO**'))

# Key Differences between CISG and Domestic Trade Law

## B. Interpretation

- **Article 7:** International character, uniformity and good faith. Note that CISG does not impose a general duty of good faith on the parties
- For matters covered by CISG: interpretation is primarily self-contained: general principles to be distilled from the Convention itself. No implied terms. All interpretation.
- **Article 8:** compromise between the subjective and objective approach. No parol evidence rule. Evidence of negotiation admissible.

# Key Differences between CISG and Domestic Trade Law

## C. Usage

- **Article 9:** parties bound by usage (includes international usage that is 'widely known')
- Important article as this makes international usage generally applicable to international sale of goods
- Particularly important for transactions that involves documentary credits and carriage of goods
- Parties bound by international usage (such as doctrine of strict compliance of shipping documents for documentary credits) regularly observed in the particular trade concerned

# Key Differences between CISG and Domestic Trade Law

## D. Preservation of Contract

- Philosophy behind CISG: preserve contract as much as possible
- For example, seller's right to cure breach both before and after date of delivery: **Articles 37 and 48**
- A breach is only regarded as fundamental if it results in such substantial detriment to the innocent party as to deprive him of what he is entitled to expect under the contract. Even then foreseeability is required before a breach is treated as fundamental: **Article 25**
- Note that the test is entirely facts-based. There is no room for contractual characterisation of conditions, warranties or innominate terms

# Key Differences between CISG and Domestic Trade Law

## E. Breach of Duties by Seller

- Failing to make delivery in accordance with **Articles 31–34**. General rule: buyer to collect goods except where carriage is involved. Note that early delivery is a breach: **Article 52**
- Failing to deliver conforming goods – Fitness for the purposes for which goods of the same description would ordinarily be used, fitness for any particular purpose made known to seller, correspondence with sample etc.: **Articles 35–36** (c.f. implied conditions under SOGO for merchantable quality etc.: ss.15–17)
- Seller’s right to cure breach (see above). Buyer’s duty to give notice within reasonable time and not later than two years after delivery: **Article 39**

# Key Differences between CISG and Domestic Trade Law

## F. Flexible Remedies

- Buyer's right to require substitute goods in case of fundamental breach: **Article 46(2)**
- Buyer's right to request for repair: **Article 46(3)**
- Buyer's right to fix an additional period of time of reasonable length for Seller's performance: **Article 47**
- Similarly, seller may fix an additional period of time for Buyer's performance: **Article 63**
- Buyer's right to 'self-help' by paying a reduced price (in the same proportion as the value of the goods delivered bears to the value of conforming goods at time of delivery): **Article 50**
- A party may suspend performance if it becomes apparent that the other party will not perform: **Article 71**

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