

Contracts for the International Sale of Goods ('CISG') does not apply to Hong Kong. However, given Hong Kong's unique past and present, we must look at two points in time. It is evident that the CISG could not apply to Hong Kong when it was a British colony because the United Kingdom did not adopt the CISG and because Hong Kong could not adopt it in its own right. However, following the handover in 1997, and as Hong Kong fell under the "one country and two systems" principle, the CISG should in theory be automatically applicable to Hong Kong as China has itself been a member of the CISG since 1988. Nonetheless, various cases and scholars have supported contrary observations vis-à-vis the application of the CISG in Hong Kong. Nevertheless, it is only from a step-by-step analysis of this sort that we can ascertain the position of Hong Kong under the CISG and whether or not such position is satisfactory.

Step 1: How can a State adopt or be a party to the CISG?

Article 91(3) of the CISG provides for non-signatory States to become Contracting States via accession. Hong Kong has not acceded to the CISG.

Step 2: Can Hong Kong become a Contracting Party to the CISG?

Hong Kong cannot become a Contracting Party per se as Hong Kong is not a State.

Step 3: What then is Hong Kong's current position in the context of the CISG?

Hong Kong is a territorial unit of China and thus has no independent status vis-à-vis the CISG.

Step 4: How can territories adopt or exclude the CISG?

A territory cannot accede to the CISG in its own right. It is for the State to whom that territory belongs to either extend the CISG to it or to exclude it from accession.

Express Declaration of Accession

Art 93(1) of the CISG provides that where a Contracting State has two or more territorial units, it may declare for

the CISG to extend to all or some of its territorial units at the time of signature, ratification, acceptance, approval or accession. The written declaration needs to be formally notified with the depository, which refers to the UN Secretary-General, and should expressly state the territorial units to which the CISG extends.

China had not made any declaration in respect of Hong Kong at the time of adopting the CISG, and indeed it could not have done so when Hong Kong was a British colony. However, the "may" has generally been classified as permissive rather than a mandatory obligation. Thus it could be argued that a Contracting State may make a declaration at any stage and not only upon accession. In 1997 at the handover, China had sent a written notification to the UN Secretary-General containing two lists of treaties. The first list, which is crucial, identifies those treaties to which China itself is a party and which would expressly apply to Hong Kong (for example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards). Notably, the CISG was not on this list. It is for this reason that the various scholars and cases have concluded that the CISG cannot apply to Hong Kong.

Silence as to the Application of the CISG

On the other hand, the requirement under Art 6 of the CISG is that there must be an express intention that is "clear, unequivocal and affirmative" for the CISG not to apply. While Art 6 concerns parties of States – rather than the States themselves – having the right to exclude the CISG, and in that regard "the parties must expressly opt out", the same rationale can be applied to States. Hence some cases have viewed China's notification, or its failure to make a subsequent declaration concerning the CISG in 1997, as an affirmative declaration precluding the applicability of the CISG under Art 93(1). In other words, mere silence on the CISG does not exclude

its application. Consequently, these cases rely Art 93(4) of the CISG, which refers to an automatic extension to a territorial unit of the State where no declaration has been made under Art 93(1), as support for the argument that the CISG applies to Hong Kong as it has not been expressly excluded by China.

Conclusion

There are many similarities between the CISG and common law but at the same time there are also many differences as the former is considered an international legal hybrid combining Common Law elements and Civil Law ideas from various jurisdictions (see A. Janssen and N. Ahuja, "Bridging the Gap: The CISG as a Successful Legal Hybrid between Common Law and Civil Law?" in Francisco de Elizalde (ed.). Uniform Rules for European Contract Law? – A Critical Assessment? (Hart) 2018). Given the diversity in thinking amongst cases and scholar views, both of which internationally carry similar weight, each court will have to decide the question as to whether or not the CISG does apply to Hong Kong on the basis of what is then argued before them. Ending with some food for thought: China can of course resolve this ambiguity by making a subsequent notification to either extend the CISG to or exclude it from application over Hong Kong.

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國際銷售法

《聯合國國際貨物銷售合同公約》是否適用於香港？

2017年10月17日，聯合國國際貿易法委員會(UNCITRAL)秘書處在第二屆UNITRAL亞太司法峰會上承認，《聯合國國際貨物銷售合同公約》(CISG)不適用於香港。但是，鑑於香港獨特的歷史和地位，我們必須看兩個時間點。很明顯，CISG在英國殖民時期不適用於香港，因為英國沒有採納CISG，而香港本身不能採納。但是，在1997年回歸後，基於「一國兩制」的原則，CISG理論上應該自動

適用於香港，因為中國自1988年以來一直是CISG的締約國。儘管如此，多宗案件和學者都對CISG在香港適用持相反意見。只有透過循序漸進的分析，我們才可以確定香港在CISG的地位。

第一步：一個國家如何採納或成為CISG的締約方？

第91(3)條規定，非簽署國通過加入成為締約國。香港尚未加入CISG。

第二步：香港能否成為CISG的締約方？

由於香港不是一個國家，香港本身不能成為締約方。

第三步：香港目前在CISG的位置是什麼？

香港是中國的領土單位，因此針對CISG沒有獨立地位。

第四步：領土如何採納或排除CISG？

領土本身不能加入CISG，要由領土所屬國家將CISG擴展至適用於該領土，或將其排除在外。

明確加入聲明

CISG第93(1)條規定，若締約國有兩個或以上的領土單位，締約國可在簽署、批准、接受、核准或加入時宣布CISG擴展至適用於其全部或部分領土單位。書面聲明須正式提交給聯合國秘書長，並應明確說明CISG擴展至適用的所屬領土單位。

中國在採納CISG時並無就香港作出任何聲明，而中國當時亦不能這樣做，因為香港當時是英國殖民地。但是，「可」一般被視為容許而非強制義務。因此，可辯稱締約國可在任何階段作出聲明，而不僅在加入時進行。1997年回歸時，中國向聯合國秘書長發出書面通知，其中載有兩



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份條約清單。第一份清單至關重要，確定了中國已加入並明確適用於香港的條約(例如《承認及執行外國仲裁判斷公約》)。值得注意的是，CISG不在此列表中。正是由於這個原因，各種學者和案例得出的結論是，CISG不適用於香港。

默認CISG適用

另一方面，CISG第6條規定，CISG不適用得「清楚、明確和肯定地」明示。雖然第6條指締約國，而不是國家本身，有權排除CISG，但「締約方必須明確退出」，同樣的理據可適用於國家。因此，有些理據認為，中國未有在1997年作出關於CISG的後續聲明，作為根據第93(1)條排除CISG適用性的肯定聲明。換言之，保持沉默並不排除CISG的適用性。支持理據認為，根據第93(4)條規定，CISG自動擴展

至未根據第93(1)條作出聲明的國家領土單位，因此CISG適用於香港，未被中國明確排除。

結論

CISG與普通法之間有許多相似之處，但同時也存在很多差異，因為前者被視為將不同司法管轄區的普通法要素和民法思想相結合的國際法律混合體(參見A. Janssen and N. Ahuja, “Bridging the Gap: The CISG as a Successful Legal Hybrid between Common Law and Civil Law?” in Francisco de Elizalde (ed.). *Uniform Rules for European Contract Law? — A Critical Assessment?* (Hart) 2018)。鑑於案例和學者意見有異，而兩者在國際上均有一定的份量，因此法院必須根據當前的論據決定CISG是否適用於香港。中國當然可以通過提出後續通知將CISG擴展或排除至適用於香港來解決這個含糊不清的問題。

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