

TRANSFER OF SOVEREIGNTY AND APPLICATION OF AN INTERNATIONAL CONVENTION: CISG IN CHINA IN THE CONTEXT OF “ONE COUNTRY, TWO SYSTEMS”

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Abstract: The transfer of sovereignty over the former British colony of Hong Kong and the former Portuguese colony of Macau to China has given rise to an interesting question regarding the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Hong Kong and Macau, the two Special Administrative Regions (SARs) of China. The question is whether CISG extends to these two SARs by virtue of China’s membership of CISG. This article examines the pivotal treaty provision, art.93, and concludes that CISG has not been extended to Hong Kong and Macau. It argues that the more important provision is the one in the Hong Kong Basic Law, reproduced in Macau, which recognises the power of China to extend a treaty of the CISG type where it considers it appropriate to do so and in consultation with the relevant SAR. It concludes by urging China to put an end to the prevailing uncertainty by making a declaration of extension.

Keywords: *CISG; UNCITRAL; conflict of laws; Vienna Convention on the Law of Treaties; Basic Laws of Hong Kong and Macau; People’s Republic of China.*

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG), a multilateral treaty developed by the UN Commission on International Trade Law (UNCITRAL) for the purpose of unifying contract law for international sale of goods, is one of the most successful international conventions¹ and provides a common legal framework for international sales transactions with a view to

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1 “Arguably the greatest legislative achievement aimed at harmonizing private commercial law”, says Joseph M Lookofsky. See “Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules” (1991) 39 American Journal of Comparative Law 403, 403; See also Ronald A Brand and Harry M Fletcher, “Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention” (1993) 12 Journal of Law and Commerce 239, 239.

promoting greater efficiency in commercial activities.² As of March 2015, there were 83 contracting states to the convention.³ Most developed countries are members of the CISG with perhaps the exception of the United Kingdom (UK) and Portugal. Members of the CISG belong to diverse legal traditions, including both the common law tradition to which UK belongs and the civil law tradition to which Portugal belongs, suggesting that some inconsistency between civil or common law jurisprudence with the CISG philosophy is not the reason for their non-participation.

Perhaps because Hong Kong and Macau were colonies of the UK and Portugal, respectively, until 1997 and 1999, these two territories too remained outside the CISG regime. The return of these two territories to the People's Republic of China (PRC) when colonial rule came to an end has not led to their participation in CISG, notwithstanding that the PRC has been a participating member of the CISG since 1988.⁴

Unlike other local administrative regions (units) of China, which operate directly under administration of the Central Government, the Hong Kong Special Administrative Region (HKSAR) and the Macau Special Administrative Region (MSAR) enjoy a high degree of autonomy.⁵ The Basic Law of both Hong Kong and Macau reserve jurisdiction in relation to foreign affairs and defence to the Central People's Government of China.⁶ Importantly, however, both Hong Kong and Macau are allowed to participate, in the name of "Hong Kong, China" or "Macau, China", in certain international activities and organisations where sovereignty is not a prerequisite for participation.⁷ Thus, by authorising the two administrative regions to exercise some functions which, as a matter of constitutional principle, are reserved to the Chinese Central Government, the two basic laws give effect to the unique political philosophy of "One Country, Two Systems". It is in the context of such relationship that we can best understand problems and challenges in extending the CISG to Hong Kong and Macau.

2 As the Preamble to the Convention declares: "[C]onsidering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States . . . [it is suggested that] the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade".

3 See http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. Visited on 30 April 2015.

4 *Ibid.*

5 Hong Kong Basic Law art.12; and Macau Basic Law art.12.

6 Hong Kong Basic Law arts.13 and 14; and Macau Basic Law arts.13 and 14.

7 Hong Kong Basic Law Chapter VII External Affairs, arts.150–152; and Macau Basic Law Chapter VII External Affairs, arts.135–137. Most relevantly, art.136 provides as follows: "The Macao Special Administrative Region may, on its own, using the name 'Macao, China', maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports fields". The corresponding provision in the Hong Kong Basic Law is art.151.

China resumed sovereignty over Hong Kong in 1997 and Macau in 1999. Had CISG been implemented by the British and Portuguese governments during their colonial administration, they would have continued to be operational in Hong Kong and Macau, surviving the return of the two territories to China.⁸ Being a member of the CISG since 1988, China has the constitutional power to extend the CISG to Hong Kong and Macau, if it so wishes,⁹ but the Chinese Central Government has not taken any action to do so. In the next three sections of this article, we will discuss issues concerning the possible extension of the CISG to Hong Kong and Macau. Section II examines the relationship between the CISG and the two SARs, explaining how the CISG may affect the interests of a contracting party from a non-CISG member state. Section III reviews the relationship between the Basic Law and the application of the CISG in the two SARs. The author discusses the view that CISG is already part of the law of Hong Kong and Macau and will argue that this view is unsupportable. Section IV discusses arguments for and against extending the CISG to the SARs, explores possible reasons why the UK and Portugal still remain outside the CISG and makes the case why the Chinese central government should consider extending CISG to Hong Kong and Macau.

II. CISG and the SARs

A. *Do the SARs have capacity to join CISG?*

Neither Hong Kong nor Macau did ever enjoy territorial sovereignty. Until 1997, Hong Kong was a British colony, taken away from China through a number of “unequal treaties”, including the 1842 Treaty of Nanjing, the 1860 Convention of Beijing and the 1898 Convention for the Extension of Hong Kong Territory (the Second Convention of Peking).¹⁰ The first two treaties forced China to cede part of Hong Kong (mainly Hong Kong Islands and harbour) to Britain in perpetuity, and the last treaty forced China to lease the new territories to the British for 99 years. The Joint Declaration between China and UK in 1984¹¹ paved the way for China to resume sovereignty over Hong Kong in 1997, at the end of the 99-year lease of the New Territories.

8 Article 153 of the Hong Kong Basic Law states that international agreements to which China is not a party but which are implemented in Hong Kong may continue to be implemented in the HKSAR. A similar statement is seen in art.138 of the Macau Basic Law.

9 The principle is stated in art.153 of the Hong Kong Basic Law and in art.138 of the Macau Basic Law. Article 138 provides, *inter alia*, as follows: “The application to the Macao Special Administrative Region of international agreements to which the People’s Republic of China is a member or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region”.

10 Peter Wesley-Smith, *Unequal Treaty 1898-1997: China, Great Britain and Hong Kong’s New Territories* (Oxford University Press, 1998); Jung Fang Tsai, *Hong Kong in Chinese History, 1842-1913* (Columbia University Press, 1993).

11 The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong.

Macau's "colonial" history is somewhat more complicated. It is said that after a number of failed military attempts to take control of ports in Zhejiang and Fujian Provinces in the first half of the 16th century, the Portuguese turned to indirect ways to build their trade base in China. It is believed that in 1553 the Portuguese obtained permission from local officials of the Ming dynasty in Guangdong Province to land in Macau. The Portuguese maintained the status of a lessee in Macau until 1887 when it secured Macau in perpetuity under the China–Portugal Treaty of Beijing.¹² Under this treaty, Portugal agreed never to alienate Macau and its dependencies without China's agreement. It has been said that Portugal received only the right to occupy without the right to dispose of Macau freely, which meant that the Chinese government never surrendered sovereignty over Macau. In addition, it is said that in 1928 the National Government of China denounced the China–Portugal Treaty of Beijing, casting further doubts on any Portuguese claim to sovereignty. However, the question of sovereignty over Macau was resolved unilaterally when in 1974 Portugal adopted a policy of decolonisation and subsequently recognised Macau to be a Chinese territory under Portuguese administration.¹³ Therefore, the 1999 handover of Macau to China appears to be less dramatic than the 1997 handover of Hong Kong to China.

While Hong Kong and Macau did not become independent states at the termination of their colonial status, they enjoy, under the "One Country, Two Systems" constitutional structure, much more freedom to participate in certain international activities than under colonial rule. They, however, do not have capacity, acting on their own, to join the CISG, which is a convention open only to sovereign states. Thus, the only way for these two SARs to become part of the CISG regime is through the intervention of China.¹⁴

Indeed, there is some divided judicial opinion on whether Hong Kong is in the CISG regime because of its special relationship with China. For instance, certain US courts have held that the CISG was applicable in Hong Kong because China is a member of CISG, a view that has not found acceptance in French courts.¹⁵ This difference of opinion is due to different understandings of the implications of art.93 of the CISG for China. Those cases which have held that the CISG is not yet part of Hong Kong law have noted that China is allowed to declare whether the CISG should apply to all its territories and in fact China has indirectly declared that CISG has not been extended to Hong Kong after 1997.¹⁶ Judicial decisions taking the

12 See <http://zh.wikipedia.org/wiki/%E4%B8%AD%E8%91%A1%E5%92%8C%E5%A5%BD%E9%80%9A%E5%95%86%E6%A2%9D%E7%B4%84>. Visited on 30 April 2015.

13 The author has relied on works in Chinese for this account of Macau's pre-1999 history, which have not been cited, because this article is intended for a predominantly non-Chinese readership.

14 Hong Kong Basic Law art.153 and Macau Basic Law art.138.

15 Fan Yang, "A Uniform Sales Law for the Mainland China, Hong Kong SAR, Macao SAR and Taiwan — the CISG" (2011) 15 *Vindobona Journal of International Commercial Law and Arbitration* 345, 348.

16 See eg, *Société L v C M Lt*, 2008, Cour de Cassation [Supreme Court], Pourvoi no. 04-17726, available at <http://cisgw3.law.pace.edu/cases/080402f1.html>, visited on 30 April 2015, and *Innotex Precision Ltd v Horei Image Products, Inc, et al.*, 2009, US District Court, Northern District of Georgia, Atlanta Division

opposite view have ignored the possibility that China might have made a declaration under art.93 of the CISG, and concluded that the CISG shall apply because Hong Kong is part of China.¹⁷ The implications of art.93 of the CISG to the operation of the CISG in Hong Kong and Macau will be examined later in this article.

B. Applicability of CISG under conflicts rules

1. Applicability of CISG to Non-Contracting States

The operation of the CISG is not limited to contracting states. Article 1(1)(b) of the CISG makes the CISG applicable “when the rules of private international law lead to the application of the law of a Contracting State” whether or not the contracting parties are from CISG member states.¹⁸ This provision highlights the application of the relevant private international law rules, conflict rules or conflict of laws rules¹⁹ (which are all interchangeable terms).²⁰ Under this provision, the CISG may apply to a contract where one or both parties are not from CISG member states, (i) where CISG has been chosen by the contracting parties as the governing law of contract,²¹ or (ii) where CISG has been held by the court or arbitral tribunal to be applicable on the ground of the closest connection,²² applying the private international law/conflict of laws rules.²³

[Federal Court of First Instance], available at <http://cisgw3.law.pace.edu/cases/091217u1.html>, visited on 30 April 2015.

17 For example, *Electrocraft Arkansas, Inc v Super Electric Motors, Ltd and Raymond O’Gara*, 2009, US District Court, Eastern District of Arkansas, Western Division [Federal Court of First Instance], available at <http://cisgw3.law.pace.edu/cases/091223u1.html>, visited on 30 April 2015; and *CNA Int’l v Guangdong Kelon Electronical Holdings, et al.*, US District Court, Northern District of Illinois, United States, 3 September 2008, available at <http://cisgw3.law.pace.edu/cases/080903u1.html>, visited 30 April 2015.

18 UN Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, p.15. The document is the evidence of legislative intention underlying the CISG.

19 There have been many cases illustrating the operation of art.1(1)(b), eg, see *Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires*, Argentina, 7 October 2010, available at www.globalsaleslaw.org/content/api/cisg/urteile/2156.pdf, visited on 30 April 2015; *Landgericht Potsdam*, Germany, 7 April 2009, available at <http://cisgw3.law.pace.edu/cisg/text/090407german.pdf>, visited on 30 April 2015.

20 “Rules of conflict of laws”, “conflicts rules” or “conflict of laws rules” are common law terms and “rules of private international law” or “private international rules” are civil law terms. All refer to domestic or international rules of the same nature developed for the purpose of helping the court or arbitral tribunal to resolve conflicts between laws of different countries or between domestic and international laws.

21 UNCITRAL Secretariat, *United Nations Convention on Contracts for International Sale of Goods* (UNCITRAL Secretariat, 2012) 35.

22 UNCITRAL Secretariat, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2012 Edition* (UNCITRAL Secretariat, 2012) 6.

23 For example, Elizabeth Crawford, *International Private Law* (Edinburgh, W Green/Sweet and Maxwell: 1998) 247; and in European Union, the autonomy of the parties to choose the governing law is recognised in art.3 of the Rome I, and the closest connection test has been regulated by art.4 of the Rome I, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union, L 177/6.

Article 1(1)(b) of the CISG does not spell out these two rules for determining the governing law or applicable law of contract, but they are fundamental to the private international law/conflict of laws rules in both the civil and common law traditions.²⁴ Thus, when the private international law/conflict of laws rule leads to the application of the law of a contracting state, the CISG would apply either because parties have chosen the CISG or because the CISG is part of the law of the contracting state.²⁵ Although party autonomy is not articulated in art.1(1)(b), it is no doubt a principle underlying the CISG. The official Explanatory Note of the CISG states that the CISG may apply “as the law applicable to the contract if so chosen by the parties”.²⁶ Note also that art.6 of the CISG permits parties to exclude the application of the CISG or, subject to art.12, derogate from or vary the effect of any of its provisions.

2. Applicability of CISG under Hong Kong Law

In Hong Kong, the common law conflict of laws rules permit both party autonomy to choose governing law²⁷ and the determination of applicable law on the basis of the closest connection.²⁸ When both parties have chosen the CISG expressly as the governing law of their international sales contract, the court would uphold this choice unless a legal ground for denying or restricting the effect of such choice can be established. In the absence of agreement on the governing law, the court or arbitral tribunal may determine the applicable law by reference to the closest connection, which means the law which has the closest connection to the contract in question. There are a number of rules for determining the closest connection, such as the place where the contract is signed, where the contract is performed, where the payment is made or where the loss occurs.²⁹

The Sale of Goods Ordinance (Cap.26) is the major law applicable to sale of goods contracts, including international sales in Hong Kong. The Ordinance recognises the possibility that parties may choose to depart from the provisions

24 For discussions on common acceptance of party autonomy, see Matthew Parish, “The Proper Law of an Arbitration Agreement” (2010) 76(4) *Arbitration* 661–679 and Christopher Tillman, “The Relationship between Party Autonomy and the Mandatory Rules in the Rome Convention” (Jan 2002) *Journal of Business Law* 45–77; for a discussion of the party autonomy and the closest connection principles in both common law and civil law traditions, see Hong Lin Yu, “Choice of Laws for Arbitrators: Two Steps or Three?” (2001) 4(5) *International Arbitration Law Review* 152–163 and Simona Grossi, “Rethinking the Harmonization of Jurisdictional Rules” (2012) 86 *Tulane Law Review* 623–710.

25 The UNCITRAL Secretariat observes that “it will depend on the domestic rules of private international law whether the parties are allowed to choose the applicable law”. See UNCITRAL Secretariat *Digest of Case Law* (n.22) 5.

26 UNCITRAL Secretariat, *United Nations Convention on Contracts* (n.21) 35.

27 See, eg, *Vita Food Products Inc v Unus Shipping Co* [1939] AC 277.

28 *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 69.

29 For a discussion of various indicators for determining connecting factors, see Brooke Adele Marshall, “Reconsidering the Proper Law of the Contract” (2012) 13 *Melbourne Journal of International Law* 505–539. See also *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th ed., 2006) 1539–1540.

of the Ordinance. Section 57 of the Ordinance states that where “any right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Control of Exemption Clauses Ordinance (Cap.71)) be negated or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract”. This provision can be interpreted as allowing not only the application of certain articles of the CISG to some matters regulated by the Sale of Goods Ordinance but also to the application of the whole of the CISG to the sales contract concerned. Since the CISG as a whole is consistent with Hong Kong law, whether it is applicable to a specific contractual dispute is a determination to be made on a case-by-case basis. This is what happens in the UK which has not ratified the CISG.³⁰

3. Applicability of CISG under Macau Law

Macau law is largely based on Portuguese law imported in the 1990s.³¹ The rules of contract law are found mainly in the Code of Civil Law and the Code of Commercial law, but there are certain other codified and uncodified sources of contract law.³² The rules of private international law concerning contracts are found mainly in Chapter I of the Code of Civil Law.

Article 40 of the Code of Civil Law recognises party autonomy to choose the governing law of contract and art.41 adopts the closest connection as the ground for determining the applicable law of contract in the absence of agreement on the governing law. However, art.40(2) restricts party autonomy through the application of two alternative tests: the relevant interest test and the actual connection test. The relevant interest test means that the law chosen by the parties must be suitable to the interest which ought to have been kept in mind by the parties making the choice, and the actual connection test means that the law chosen by the parties must have some actual connection to one of the factors of private international law concerning contracts, such as place of contract, performance or payment, and so forth.

C. *Article 93 of the CISG and the applicability of CISG in the SARs*

1. Conflicting Views on the Interpretation of Art.93

Article 93 of the CISG permits a state whose territory consists of territorial units operating under different legal systems to declare whether the CISG applies to all or some of such units. Article 93(1) states that a state may “at the time of signature,

30 Anna Rogowska, “CISG in UK: How Does the CISG Govern the Contractual Relations of English businessmen?” (2007) 18(7) *International Company and Commercial Law Review* 226–230.

31 Liu Gaolong and Zhao Guoqiang, eds, *Commentaries on Contemporary Macau Law* (Social Sciences Academic Press, 2011) 9 (in Chinese).

32 Tong Io Cheng, “Macau Contract Law” in *International Encyclopedia of Laws* (Wolters Kluwer, 2009) 55–58.

ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time". It appears that academics and courts of different countries have given different interpretations to art.93, in particular on the requisite formality of such declaration.

There are two views on the formality requirements. One view is that the declaration under in art.93 must be made "at the time of signature, ratification, acceptance, approval or accession",³³ along with the express or implicit suggestion that some formal declaration is necessary.³⁴ This means that if China did not make a declaration "at the time of signature, ratification, acceptance, approval or accession", or failed to exclude Hong Kong and Macau in its "declarations", it must be assumed that the CISG should apply to Hong Kong and Macau due to China's membership because of failure to comply with art.93 of the CISG. The first view often relies on a number of decisions of national courts which have held the CISG to be applicable on the ground that in the absence of such a declaration, CISG becomes applicable in such territorial units by default, by the application of art.93(4).³⁵ The other, contrary, view is that China has made a declaration under art.93 of the CISG to exclude Hong Kong from the operation of the CISG.³⁶ The key difference between these two views lies in the interpretation of art.93 of the CISG.

33 Ulrich G Schroeter, "The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods" (2004) 16 Pace International Law Review 307, 323.

34 One commentator observed that while China "had the legal opportunity to make a declaration under Article 93 of the CISG stipulating that the UN Sales Convention is not to extend to Hong Kong and Macao, it did not do so". See Schroeter, "The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods" (n.33) 324. A US court in its decision also found that China failed to comply with the formality requirements under art.93 if China intended to exclude Hong Kong from the operation of the CISG. See Yang, "A Uniform Sales Law for the Mainland China, Hong Kong SAR, Macao SAR and Taiwan — the CISG" (n.15) 350. A similar view is also seen in Jianjun Yao, "A Preliminary Analysis of the CISG" (in Chinese), available at http://www.law-lib.com/lw/lw_view.asp?no=23797. Since China did notify the Secretary General of the UN on international treaties applicable to Hong Kong and Macau after the 1997 and 1999 handovers, respectively, these observations appear to suggest that such notifications do not constitute declarations under art.93 of the CISG. China's notifications are found in the *Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009*, Historical Information, pp.V–X, available at <http://www.treaties.un.org/doc/source/publications/MTDSG/2009/English-I.pdf>, visited 12 Nov 2014.

35 For example, *CAN Int'l, Inc v Guangdong Kelon Electronical Holdings et al.* US District Court, Northern District of Illinois, United States, 3 September 2008, available at <http://cisgw3.law.pace.edu/cases/080903u1.html>, visited 30 April 2015; *Electrocraft Arkansas, Inc v Super Electric Motors, Ltd and Raymond O'Gara* (n.17).

36 Weiguo Zhang, "Study of a Number of Theoretical Issues Concerning China's Declarations on the CISG" (2009) 25(3) International Economics and Trade Research 67 (in Chinese). See also observations made in Yao, "A Preliminary Analysis of the CISG" (n.34). CLOUT case No 1030 (Cour de Cassation, France, 2 April 2008), English translation available at <http://cisgw3.law.pace.edu/cases/080402f1.html>, visited 12 Nov 2014; *America's Collectibles Network, Inc v Timlly* (HK, US District Court, E.D. Tenn., USA, 20 October 2010), 746 F Supp 2d 914, available at <http://cisgw3.law.pace.edu/cases/101020u1.html>, visited 30 April 2015; *Innotex Precision Ltd v Horei Image Products, Inc, et al.* (n.16); *TV Broadband Network Products Case*, Provincial Supreme Court of Hubei, China, 19 March 2003, English translation, available at <http://cisgw3.law.pace.edu/cases/030319c1.html>, visited 30 April 2015.

The interpretation of art.93 of the CISG is indeed a difficult task. Even the *UNCITRAL Digest*, which is an official publication, appears to be non-committal (or rather uncertain) on whether China has made effective declarations under art.93 of the CISG, even though implicitly it appears to suggest that China's declarations (if any) are not effective. It must be noted that the 2012 *Digest of Case Law on the CISG* edited by the UNCITRAL Secretariat expressly states that the "designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries".³⁷

The *Digest* states that Australia, Canada, Denmark and New Zealand have made declarations pursuant to art.93.³⁸ By failing to mention that China has also made a declaration under art.93, the *Digest* implies that China has not made any declaration under art.93. But at the same time, the *Digest* acknowledges the fact that "the People's Republic of China deposited with the Secretary General of the United Nations a declaration announcing the conventions to which China was a party and which thereafter should apply to Hong Kong. The CISG was not on this list".³⁹ There is no comment on the effect of such declaration. Further, the *Digest* also acknowledges the existence of conflicting judicial decisions on Hong Kong and the CISG under art.93 without commenting on the merits of those cases.⁴⁰ Therefore, it is not clear what view the UNCITRAL holds.

The reference in the *Digest* to the judicial decisions ends abruptly with some ambiguous statement that under "article 93(1) a Contracting State must make an affirmative declaration as to which territorial units the Convention will apply (which was not done in China's declaration to the United Nations). Absent such a declaration, article 93(4) automatically extends the Convention to all the territorial units, including Hong Kong".⁴¹

The statements are ambiguous because it is not clear whether the *Digest* is interpreting the cases or drawing its own conclusion on art.93. If the statements are observations based on some cases, there is no footnote referring to the relevant cases or sources on which the observations are based. If they represent the position of the *Digest*, which is prepared by the UNCITRAL Secretariat, why does it not directly comment on the declaration made by China? And why does the *Digest* choose to use the ambiguous word "declaration" to refer to China's "notification" deposited with the Secretary General of the UN on 20 June 1997?⁴² The use of the word "declaration" to refer to the "notification" deposited by China, and the offer of

37 UNCITRAL Secretariat, *Digest of Case Law* (n.22), the copyright page.

38 *Ibid.*, p.438.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 China's notification is found in the *Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009* (n.34) V-VIII.

some ambiguous statements on the possible impact of China's notifications (China has deposited two notifications on Hong Kong and Macau respectively⁴³) under art.93 of the CISG suggest that even the UNCITRAL Secretariat is uncertain as to how art.93 of the CISG should be interpreted in the case of Hong Kong or Macau.

2. Principles Underlying the Interpretation of Art.93

The author of this article argues that art.93 of the CISG must be interpreted in the whole context of the CISG in pursuance of the relevant principles set out in the Vienna Convention on the Law of Treaties. In particular, the author argues that the following principles are essential for determining whether China has made effective declarations under art.93 of the CISG:

- (1) Article 7(1) of the CISG sets out the basic principles for the interpretation of articles of the CISG. It states that in the "interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade". This provision refers to three considerations: international character, uniformity of CISG's application and good faith principle. The international character may have different meanings for different purposes. It may be observed that a majority of cases have suggested that the international character of the CISG as stated in art.7(1) requires national courts to interpret the CISG autonomously in the sense that the provisions of the CISG should be interpreted in the context of the convention and the approaches and methods of interpretation developed in the application of domestic laws should not restrain the courts from adopting such an autonomous interpretation.⁴⁴ The consideration of international character is important because it cautions us not to use a stereotype mentality when interpreting the formality requirements in art.93 of the CISG.

The consideration of uniformity is relevant to the interpretation of art.93 in the sense that the present inconsistent state practices concerning validity of China's declarations under art.93 should be resolved as soon as possible through a cooperative approach adopted by domestic courts or tribunals.

The consideration of good faith is essential not only to interpret the provisions governing private rights of the contracting parties in a sales contract but also to interpret the provisions governing the rights and obligations of members of the CISG. In essence, the good faith principle in its application to private parties and governments is similar or comparable in nature. For example, it has been said that a buyer need "not explicitly declare a contract avoided if the seller has refused to perform its obligations, and that to insist on an explicit

43 These notifications are found in the *Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009* (n.34) V-X.

44 UNCITRAL Secretariat, *Digest of Case Law* (n.22) 42.

declaration in such circumstance would violate the principle of good faith, even though the Convention expressly requires a declaration of avoidance”.⁴⁵ If we apply the rationale of this court decision to the interpretation of art.93, we would naturally reach the conclusion that the formality requirement for declaration is dispensable as long as the true intention of the government making a declaration is understandable in a reasonable manner by other member governments. The good faith principle as commonly expected and accepted in the context of public international law will be examined further when discussing the relevant principles of the Vienna Convention on the Law of Treaties.

- (2) Article 7(2) of the CISG provides rules to supply omissions or to fill gaps in the convention. It states that questions “concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”. This provision identifies two bases of gap-filling: (a) the underlying principles of the CISG and (b) the relevant domestic rules as determined by the rules of private international law.

For the purpose of interpreting art.93, only the underlying principles of the CISG are relevant because art.93 regulates rights and obligations of member states, which cannot be determined by any domestic law. China became a country with territorial units of different legal systems only in 1997 and 1999, well after it joined the CISG in 1988, and this situation does not fit art.93, which requires a state to make a declaration “at the time of signature, ratification, acceptance, approval or accession”.⁴⁶

There is an omission in art.93 in relation to the formality of a declaration that China is required to make regarding whether the CISG applies to Hong Kong or Macau. Such omission can be supplied only in accordance with the underlying principles in art.93 which permits a state to declare the effect of the CISG among its territorial units adopting a certain formality. What are these underlying principles then? The author argues that good faith principle, freedom of choice and promotion of the CISG are the major principles underlying art.93.

The good faith principle relates to all provisions of the CISG and requires all member states and private contracting parties to interpret the provisions and perform their duties in good faith. The freedom of choice is evident because art.93 and a number of other provisions in the final part of the CISG⁴⁷

45 *Ibid.*, p.43.

46 CISG, art.93(1).

47 The freedom to make declarations as prescribed is also stated in the Explanatory Note to the CISG. See UNCITRAL Secretariat, *United Nations Convention on Contracts for the International Sales of Goods* (UNCITRAL Secretariat, 2010) 41.

represent the spirit of giving members the freedom or discretion in making a number of declarations as exceptions to the general rules of the CISG.

The freedom and discretion in making a declaration is evident in the language of art.93, because it is entirely up to the state whose territory consists of territorial units operating under different legal systems whether to make the CISG applicable to all some of them. Of course, the freedom and discretion of the state is qualified or limited by art.93(4), which provides that if “a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State”. This provision represents the principle of promoting uniform operation of the CISG as much as possible, and it constitutes a counter-balance against the freedom of choice that art.93(1) gives the member states.

Since art.93 does not provide a clear answer to the question whether China can be said to have extended the application of CISG to Hong Kong and Macau, the author would argue that art.94(4) should not be interpreted against China so as to deprive China of its right to declare that the CISG does not extend to Hong Kong and Macau merely because China did not do so in 1986 when it ratified the CISG, or even when it became a country with more than one territorial unit in 1997 and 1999. Accordingly, the author respectfully disagrees with the observation that the CISG applies in Hong Kong and Macau by default by virtue of art.93(4).⁴⁸ The author argues that the good faith principle and the general rules of interpretation also require us to take into account the intention of China when depositing the relevant notifications in 1997 and 1999, respectively. These issues will be further discussed in subsequent paragraphs.

- (3) The rules of interpretation as stipulated in art.8 of the CISG are relevant for the purpose of art.93, even though these rules are mainly applicable to statements or acts of private parties. The author argues that the notifications deposited by China with the Secretary General of the UN in 1997 and 1999 should be interpreted according to China’s intent in pursuance of art.8(1) of the CISG. The author argues that these notifications clearly manifest China’s intention not to extend the CISG to Hong Kong and Macau.

It may also be argued that, in case of any uncertainty regarding China’s intention because either the notifications are not solely made for the purpose of art.93⁴⁹ or the notifications do not satisfy the formality of “affirmative

48 Sarah Howard Jenkins, “Construing Laws Governing International and US Domestic Contracts for the Sale of Goods: A Comparative Evaluation of the CISG and UCC Rules of Interpretation” (2012) 26 *Temple International and Comparative Law Journal* 181, 207–208.

49 It has been observed, however, that China’s notifications are “silent on the issue of the UN Sales Convention”. Schroeter, “The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods” (n.33) 324.

declaration”,⁵⁰ art.8(2) of the CISG, which provides the reasonable person test, may help other states to understand the intention of China when it deposited the notifications. The author argues that, under the reasonable person test, the inevitable consequence of the notifications is that the CISG does not extend to Hong Kong and Macau after 1997 and 1999.

- (4) Article 31(1) of the Vienna Convention provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Applying these principles, the author argues that art.93 of the CISG should be interpreted to give sufficient opportunity to China to decide whether the CISG should be extended to Hong Kong and Macau after their return to China.

It is submitted that even though the scenario where a country becomes a state with more than one territorial unit after it attained CISG membership is not expressly addressed in art.93, the right to decide whether to extend the CISG to its newly added/restored territorial units must not be less than the freedom it enjoys in relation to a state’s constituent territorial units in existence at the time of signature, ratification, acceptance, approval or accession.

The author argues that the good faith principle and the principle of literal interpretation of words in their context by taking into account the relevant legislative objective and purpose would lead to a conclusion favourable to China in the present case. This is because the spirit of art.93 is to give freedom and discretion to a state consisting of a number of territorial units to decide whether to extend the CISG to all or some of such territorial units. That spirit should also guide any gap-filling exercise under art.93.

Article 31(2) of the Vienna Convention states that the whole context, including its preamble and annexes, shall be taken into account for the purpose of interpretation. Relying on this provision, the author argues that even though the promotion of the CISG has been a major goal of the CISG, a compulsory application of the CISG has never been its objective. This can be seen in art.1 which sets out the scope and general conditions for the operation of the CISG. Nothing suggesting a compulsory application of the CISG can be found in art.1 or other relevant provisions. In fact, art.6 of the CISG gives autonomy to private parties to exclude the operation of the CISG, entirely or partially. In any event, art.93 cannot be interpreted in a manner so as to lead to the extension of the CISG to territorial units of a state against the intention of that state merely on the ground of a mere technicality, namely the lack of a declaration of intention.

50 It should be noted that the UNCITRAL Secretariat comments vaguely that under art.93(1) “a Contracting State must make an affirmative declaration as to which territorial units the Convention will apply (which was not done in China’s declaration to the United Nations)”. UNCITRAL Secretariat, *Digest of Case Law* (n.22) 438.

- (5) It may also be argued that in the gap-filling exercise under art.93 of the CISG, the supplementary rules in art.32 of the Vienna Convention may operate to avoid undesirable consequences against China. Article 32 provides as follows:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable”.

Article 32 sets out two alternative tests for determining adequate meaning of law. It requires the use of preparatory work of the treaty in question or the circumstance of its conclusion as supplementary considerations to avoid two undesirable consequences of interpretation. This means that the possible interpretation which leads either to an ambiguous or obscure meaning of a provision or to a meaning which is manifestly absurd or unreasonable should be excluded from acceptable choices of interpretation.

Based on the information available, the author argues that the preparatory work of the CISG demonstrates the existence of a legislative intent to give a federal state or a state with more than one territorial unit a chance to decide whether the CISG should be applied to all or some of its territorial units. The issue was first raised by the Secretariat of the UNCITRAL in its 1977 report,⁵¹ which invited governments to comment on whether a “federal-state clause”, which allows a federal state to declare that the convention is applicable throughout its constituent parts or in some of its constituent parts, should also be adopted in the CISG.⁵²

Probably with the strong support of Canada and Australia, which are federal states, art.93 was finally adopted.⁵³ China is not a federal state, but the relationship between China and Hong Kong/Macau share some similarities with a federal system. Relying on art.32 of the Vienna Convention, the author argues that the result that the CISG extends to Hong Kong and Macau because China’s notifications on international treaties applicable in Hong Kong and China are not declarations for the purpose of art.93 is manifestly absurd or unreasonable and thus must be excluded in the light of the preparatory work of art.93 of the CISG and the circumstance in which art.93 was finally adopted. This result is manifestly absurd and unreasonable because it deprives China of its right to rely on the so-called federal-state clause to make a decision which best suits its constitutional structure and interests.

51 Report of the Secretary General: draft convention on the international sale of goods; draft articles concerning implementation and other final clauses (A/CN.9/135), *Year Book of United Nations Commission on International Trade Law* (Vol VIII, 1977) 164.

52 *Ibid.*

53 Schroeter, “The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods” (n.33) 320.

- (6) An objective reading of art.93 of the CISG is also crucially relevant to ascertaining the principles underlying it. As we have seen, giving freedom and discretion to make a decision on the scope of the application of CISG in a state with more than one territorial unit is an underlying principle of art.93. In addition, the author would argue that making a declaration in compliance with the formality stipulated in art.93 is another principle underlying art.93. The formality requirement is seen in the joint operation of art.93(1) and 93(4). In particular, art.93(4) provides that if “a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State”. The significance of art.93(4) should not be neglected because it restates a principle which has been stated broadly in art.29 of the Vienna Convention.⁵⁴ Therefore, it is important for a country intending to resort to art.93 to comply with the formality stipulated in art.93(1), whose formality requirement is seen in both the timing of the declaration and the affirmative content of the declaration.

The timing requirement means that a declaration under art.93 should be made “at the time of signature, ratification, acceptance, approval or accession”, and the affirmative content requirement means that a declaration under art.93 should “declare that this Convention is to extend to all its territorial units or only to one or more of them”.⁵⁵

China could not comply with the first requirement because at the time of China’s ratification of the CISG, it was not yet a country with more than one territorial unit. As regards the affirmative content requirement, it is difficult to say that China has complied with the affirmative content requirement because the CISG is not on the list of the international instruments extending to Hong Kong and Macau after 1997 and 1999, respectively. However, the author argues that China’s failure to comply with the formality requirement may not necessarily lead to the conclusion that the CISG is part of Hong Kong or Macau law. This is because China’s act or omission (depending on one’s assessment on the nature of China’s notifications concerning Hong Kong and Macau) cannot be evaluated on a narrow interpretation of art.93. As seen above, there is a conspicuous gap in art.93, and when there is a gap in art.93, we cannot directly apply art.93(4) to judge the act or intention of China which is not regulated in art.93. It is argued that China’s notifications should be assessed in pursuance of art.7(2) of the CISG and arts.31 and 32 of the Vienna Convention to fill in the gaps in art.93 of the CISG.

The author disagrees with not only the observation that China had to make a declaration when it became a state with more than one territorial unit in 1997⁵⁶ but

54 Article 29 of the Vienna Convention provides that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.

55 CISG, art.93(1).

56 Schroeter, “The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods” (n.33) 324.

also with the conclusion that the underlying principle in art.93 is “to enable the Convention to be applied progressively to particular units of the State concerned”.⁵⁷ These observations are not supported by the preparatory work and history of art.93 (see relevant discussions in the proceeding paragraphs). In addition, the author argues that good faith principle, which is stated in art.7(1) of the CISG and also in a number of provisions of the Vienna Convention as a fundamental principle of international law,⁵⁸ is also one of the underlying principles of art.93. Accordingly, the author argues that under the good faith principle, the effectiveness or validity of China’s notification under art.93 must be evaluated reasonably and fairly in the light of China’s intention in depositing these notifications.

If China’s intention is not to extend the CISG to Hong Kong and Macau, such intention should not be disregarded under the good faith principle. This is consistent with the spirit of autonomy and free choice as seen throughout the CISG. Beside arts.93–96 of the CISG, which permit the member states to make different declarations to restrict and limit the operation of the CISG, art.101 of the CISG even allows a member state to exclude the CISG entirely or partially as it wishes. These provisions all suggest the importance of respecting China’s intention in making the notifications concerned, because any manifestly absurd or unreasonable interpretation of art.93 against true intention of any member state would not serve the common interests of all members. Hypothetically, if courts of most CISG members would hold the CISG to be applicable to Hong Kong and Macau against the intention of China, China may be forced to denounce whole or part of the CISG to avoid any undesirable consequence (if any) against its national interests. Such a result is not in the best interest of CISG members. Luckily, such a hypothetical result is unlikely in light of the present national practice on art.93.

III. Basic Laws and Application of CISG

A. *Hong Kong Basic Law and CISG*

Under the Basic Law, the external affairs power and defence power belong to the Chinese Central Government,⁵⁹ but the external affairs power is divided between the Central Government and HKSAR government in the sense that the Central Government “authorizes the Hong Kong Special Administrative Region to conduct relevant

⁵⁷ *Ibid.*

⁵⁸ The Preamble of the Vienna Convention states that “the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized”. Article 26 of the Vienna Convention also states that every “treaty in force is binding upon the parties to it and must be performed by them in good faith”. Article 31(1) of the Vienna Convention states that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

⁵⁹ Hong Kong Basic Law arts.13 and 14.

external affairs on its own in accordance with [the Basic Law]”.⁶⁰ The authorisation or delegation of external affairs power is found in two sources: the provisions of the Basic Law and specific delegation by the Central Government. The provisions of the Basic Law include two types of provisions: provisions which expressly delegate powers to Hong Kong, such as arts.150, 151, 152, and 156 of the Basic Law⁶¹ and provisions which authorise the Central Government to delegate certain powers to Hong Kong or assist Hong Kong to exercise certain powers, such as arts.154, 155 and 96.⁶² Such division of external affairs power may offer some assistance in determining whether and how China should extend the CISG to Hong Kong.

Being an international convention, CISG belongs to the category of external affairs. As seen above, the CISG is not on the list of the treaties covered by the Notification of 22 June 1997 to the Secretary General of the UN.⁶³ Even though there are different views on whether the CISG should have been extended to Hong Kong owing to China’s membership, the CISG definitely does not apply to Hong Kong under the Basic Law of Hong Kong. Thus, the practical question to consider is whether the extension of the CISG to Hong Kong is an issue for the discretion of the Central Government or the discretion of the HKSAR government or a joint decision of both.

Before we discuss this issue, it is useful to examine the special provision of the Basic Law that stipulates the procedure for determining whether an international convention or treaty to which China is a member is applicable in Hong Kong. This is set out in art.153(1) of the Basic Law, which states that the “application to the Hong Kong Special Administrative Region of international agreements to which the People’s Republic of China is or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region”. Article 153(1) explicitly provides that China must consult the HKSAR government before making a declaration.⁶⁴

60 Hong Kong Basic Law art.31(3).

61 In brief, art.150 permits Hong Kong as a member of Chinese delegation to join diplomatic negotiations directly affecting Hong Kong. Article 151 authorises Hong Kong to use the name of “Hong Kong, China” to make international agreements or participate in international organisations in the appropriate fields, such as the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields. Article 152 permits Hong Kong as a member of Chinese delegation to attend international organisations or conferences when Hong Kong’s interest is involved, and it also allows Hong Kong to attend international organisations and conferences not limited to states in the name of “Hong Kong, China”. Article 156 permits Hong Kong to establish official or semi-official economic and trade missions in foreign countries subject to the report of such establishment to the Central Government.

62 In brief, art.154 deals with issue of HKSAR passports and immigration matters. Article 155 deals with visa waiver agreements made by HKSAR government. Article 96 states that with the assistance or authorisation of the Central Government, the HKSAR government may make appropriate arrangements with foreign states for reciprocal juridical assistance.

63 The notification is available in the *Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009* (n.34) VI–VIII.

64 This view is expressed by Professor Rao Geping, who is an expert on the Basic Law, when commenting on art.138(1) of the Macau Basic Law, which is identical to art.153(1) of the Hong Kong Basic Law. *See*

In order to better understand the division of external affairs power between the Central Government and SAR governments, it is necessary to note that China has adopted a policy of dividing international treaties into two broad categories: (i) treaties falling within the external affairs power of the Central Government and defence power which can only be exercised by the Central Government and (ii) treaties falling outside this category. The existence of such a division is evidenced by the Notification of China on 20 June 1997 deposited with the Secretary General of the UN concerning treaties applicable in Hong Kong after 1 July 1997.⁶⁵ In this notification, China states that for the avoidance of doubt, “no separate formalities will need to be carried out by the Government of the People’s Republic of China with respect to treaties which fall within the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State”.⁶⁶ This statement is important for us to understand the necessary internal formality for China to extend the CISG to Hong Kong. It can be argued that since art.93 of the CISG permits a state with more than one territorial unit to declare whether the CISG applies to all or some of such units, the CISG would not be an international treaty under the Hong Kong Basic Law whose application to Hong Kong would not require any formality. Simply put, it is necessary for the Chinese Central Government to make a special decision regarding whether to extend the CISG to Hong Kong.

B. Macau Basic Law and CISG

Many provisions of the Basic Law of Macau are identical to those of the Basic Law of Hong Kong. The provisions concerning the relationship between China and the SAR, and the provisions on external affairs power, defence power and operation of international treaties in the SARs are identical. Therefore, the analysis in the previous section on the Basic Law of Hong Kong is largely applicable to Macau, and the only point that remains to be made relates to art.138 of the Basic Law of Macau, which deals with the application to Macau of international treaties to which China is a signatory.

Article 138(1) of the Basic Law of Macau is identical to art.153(1) of the Basic Law of Hong Kong. It provides that the “application to the Macao Special Administrative Region of international agreements to which the People’s Republic of China is a member or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region”. The procedure for

Rao Geping, *Study of the Application of International Treaties in Macau* (One Country Two Systems Research Centre of Macau Polytechnic College, 2011) 37 (in Chinese).

65 The document is available in the *Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009* (n.34) VI–VIII.

66 *Ibid.*, p.VI.

extending treaties to Macau is the same as the one stipulated in art.153(1) of the Basic Law of Hong Kong.

However, in relation to the applicability of treaties to Macau, there is a minor difference in the Notification by China to the UN Secretary General dated 13 December 1999. As seen above, China's notification concerning Hong Kong states that "no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within in the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State".⁶⁷ However, this statement is omitted in the notification concerning Macau, which simply states that with respect to other treaties that are not listed in the Annexes to this Note, China "will go through separately the necessary formalities for their application to the Macao Special Administrative Region if it so decided".⁶⁸ Does such subtle difference in wording suggest any change in China's policy on the treaties which may directly apply to Macau or Hong Kong without complying with any formality requirement? This issue is probably too complicated to be considered in the present article. Since the author has argued that art.93 of the CISG suggests that the CISG is not a treaty which must apply to all Chinese territories owing to its nature and provisions, the difference between the notification concerning Macau and the notification concerning Hong Kong will not be examined further in the article.

C. Relevant factors for consideration

It is clear that the Chinese Central Government has not, acting under the Basic Law of Hong Kong and the Basic Law of Macau, extended the CISG to Hong Kong or Macau. Thus, the present question for us to consider is how could the CISG be extended to the two SARs if the Central Government so wishes. Two important issues will be discussed for this purpose: first, the nature of the decision-making power of the Central Government under art.153(1) of the Basic Law of Hong Kong or art.138(1) of the Basic Law of Macau and, second, the nature of the consultation process as stipulated in these provisions.

As to the nature of the decision-making power, the author argues that it is left to China's discretion whether to extend an international treaty to any of the SARs. This is so for two reasons: (a) art.153(1) of the Basic Law of Hong Kong and art.138(1) of the Basic Law of Macau state that a decision to extend a treaty to which China is a party "shall be decided" by the Central Government; (b) the external affairs power and the defence power belong to the Central Government⁶⁹ and, as the CISG being a treaty open only to sovereign states, Hong Kong and Macau are not competent to accede to the treaty on their own.

⁶⁷ *Ibid.*, p.VI.

⁶⁸ *Ibid.*, p.IX.

⁶⁹ Hong Kong Basic Law, arts.13 and 14; and Macau Basic Law, arts.13 and 14.

The exercise of the discretion of the Central Government is subject to a procedural requirement of consultation and a substantive requirement of acting “in accordance with the circumstances and needs of the Region”.⁷⁰ The substantive requirement should be considered by the Central Government, understandably in consultation with SAR governments. In the absence of any official information it is unclear why there is a lack of initiative on part of the Central Government. Hypothetically, the circumstances concerning applicability of the CISG in Hong Kong or Macau and the needs of Hong Kong or Macau for such extension can be assessed in the contexts of the inherent conflict (if any) between the CISG and Hong Kong law or Macau law and the trading status of the two SARs, including the relationship with China.

Broadly speaking, neither the common law tradition nor the civil law tradition is inherently in conflict with the CISG because the CISG represents a compromise between the common law and civil law traditions.⁷¹ The author believes that CISG will not meet with any significant resistance from the legal traditions of Hong Kong and Macau for the following reasons:

- (1) In the absence of any recent official explanation,⁷² the UK’s failure to join the CISG appears to be based on a mixture of related or unrelated reasons, such as the lack of legislative time, limited interest in the CISG, lack of support from influential organisations, rejection of civil law notions, perceived superiority of English law and the differences between the English sales law and the CISG.⁷³ Although it is not clear what the dominant reason is, a lack of sufficient interest appears to be the immediate reason for the UK to maintain its “splendid isolation”⁷⁴ in the area of international sales law.⁷⁵ Recently, there have been strong pleas for the UK to join the CISG because of the benefits it would bring to the country.⁷⁶ In case of Portugal, a number of

70 Hong Kong Basic Law, art.153(1) and Macau Basic Law, art.138(1).

71 For example, Shael Herman, “Specific Performance: A Comparative Analysis: Part 1” (2003) 7(1) *Edinburgh Law Review* 5–26; and Claude Witz, “CISG: Interpretation and Non Covered Issues” (2001) 3/4 *International Business Law Journal* 253–275.

72 It is noted that in 2006, the UK government did not see the ratification of the CISG as a legislative priority. S Moss, “Why the United Kingdom Has Not Ratified the CISG” (2005) 25 *Journal of Law and Commerce* 483–485.

73 E Simos, “The CISG: A Lost Cause in the UK?” (2012) 16 *Vindobona Journal of International Commercial Law and Arbitration* 251–282.

74 B Nicholas, “The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?” (1993), available at <http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html>, visited on 30 April 2015.

75 E Simos, “The CISG: A Lost Cause in the UK?” (n.73). K Georgiadou, “Apathy vis-à-vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG’s Incorporation in the UK Legal Order” (Sept 2012) 3(8) *Pace International Law Review*, *Online Companion* 256–277.

76 Georgiadou, “Apathy vis-à-vis the UN Convention on Contracts for the International Sale of Goods (CISG) in the UK and Two Proposed Strategies for CISG’s Incorporation in the UK Legal Order” (n.75). S Nikolova, “UK’s Ratification of the CISG – an Old Debate or a New Hope for the Economy of the UK

Portuguese commentators have observed that there is no legal or other reason to justify Portugal's reluctance to join the CISG.⁷⁷ Most European Union (EU) members, with notable exceptions of the UK, Portugal, Ireland and Malta, have ratified the CISG. There is no reason in terms of legal tradition why Portugal cannot keep company with other civil law countries in the CISG regime. Similarly, there is no reason why the CISG cannot exist in perfect harmony with Macau law.

- (2) There are significant benefits of membership to the two SARs. The benefits to Hong Kong and Macau from the CISG can be seen in their trading status, including their economic relationship with China. Hong Kong and Macau are both members of the World Trade Organization (WTO). They participate in international trade and commercial activities in their own names. According to official WTO statistics, Hong Kong was the 10th largest importer and the 12th largest exporter in merchandise trade in 2012,⁷⁸ and Macau was the 16th largest exporter in services trade (excluding intra-EU trade) in 2011.⁷⁹ These statistics suggest that the CISG is more important to Hong Kong, which is very strong in international merchandise trade, but less important to Macau, which is very strong in international services trade, that is not regulated by the CISG. It is thus argued that the CISG, which is a treaty of 83 member countries,⁸⁰ may help Hong Kong to resolve potential disputes arising from international sale of goods in a more effective and acceptable way. Macau is different from Hong Kong in the sense that services trade, in particular gaming and tourism, is its major economic strength. Since the CISG does not cover contracts of service, the benefits of the CISG are less attractive to Macau. However, the author argues that in the light of the Macau government's strategic plan to develop an appropriately multi-dimensional economy,⁸¹ extension of the CISG would be a positive step to build an appropriate legal foundation for the development of a multi-dimensional economy in Macau.

on Its Way Out of the Recession: The Potential Impact of the CISG on the UK's SME" (2012) 3(3) *Pace International Law Review*, Online Companion 69–110.

77 For example, Mariana Costa, "Portugal e a Convenção de Viena sobre a Compra e Venda Internacional de Mercadorias", available at <http://visao.sapo.pt/portugal-e-a-convencao-de-viena-sobre-a-compra-e-venda-internacional-de-mercadorias=f651205>, visited on 30 April 2015, and Luca G Castellani, "The Adoption of the CISG in Portugal: Benefits and Perspectives", *REVISTA ELECTRÓNICA DE DIREITO* (Oct 2013) No 2, available at <http://www.cije.up.pt/download-file/1202>, visited on 30 April 2015.

78 WTO, *International Trade Statistics 2012*, Table 1.7, available at http://www.wto.org/english/res_e/status_e/looking4_e.htm#summary, visited on 12 Nov 2014.

79 *Ibid.*, Table 1.10.

80 The information on the status of the CISG is available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, visited on 30 April 2015.

81 To develop appropriately multi-dimensional economy in Macau has been the policy goal of the Macau government in recent years. For example, during the National Day celebrations the Chief Executive of Macau referred to the policy to develop Macau into a world centre of tourism and to speed up the process of a multi-dimensional economy. News reported on 2 Oct 2013, available at <http://news.cnyes.com/Content/20131002/KHASEC1U59UXW.shtml>, visited on 30 April 2015.

Under art.153(1) of the Basic Law of Hong Kong and art.138(1) of the Basic Law of Macau, consultation with the HKSAR government or MSAR government is a necessary step before the Central Government decides to extend a treaty like the CISG to these SARs. Consultation, though it is different from consent and approval, still suggests the desirability of agreement between the Central Government and the SAR. However, if after consultation a consensus cannot be reached, the Central Government may still be able to extend the CISG to Hong Kong and Macau in the exercise of its discretion. The extension of a treaty to Hong Kong or Macau on the basis of a unilateral decision by the Central Government is possible and necessary, because the Central Government has to make a decision on a particular international treaty in the best interests of China.

Whether China should join an international treaty has never been an issue for public discussion under Chinese legal system. Under the Procedural Law for Treaty-Making, the Central Government of China is the authority to make treaties on behalf of China.⁸² The Standing Committee of the National People's Congress has the authority to decide whether to approve any treaty signed or acceded to by the Central Government.⁸³ If necessary, consultation may be held between the Ministry of Foreign Affairs and other government authorities, and the result of consultation should be reported to the State Council, which represents the Central Government, for approval.⁸⁴ A decision on whether to extend the CISG to Hong Kong and Macau would be carried out in a manner similar to the process stipulated in the Procedural Law on Treaty-Making. This means that the Ministry of foreign Affairs and other relevant government authorities of the Central Government should engage in discussions on whether to extend the CISG to Hong Kong or Macau with the relevant SAR government, and the result of such discussion would be reported for approval to the State Council. It is clear that the whole process involves communication and negotiation between government authorities and it is a matter for the executives at both the Central Government and the SAR levels to decide.

IV. Resolving the Uncertainty and the Way Forward

A. *Rights versus obligations under art.93 of the CISG*

Like many other provisions of the CISG, art.93 confers rights and imposes obligations on any member state whose territory consists of two or more territorial units. The most important right of a state with more than one territorial unit is to declare whether the CISG applies to all or some of the territorial units, and to amend the original

⁸² Procedural Law on Treaty-Making, art.3.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, art.5.

declaration at any time. The most important obligation of a state with more than one territorial units is to make the declaration “at the time of signature, ratification, acceptance, approval or accession”,⁸⁵ stating “expressly the territorial units to which the Convention extends”.⁸⁶ It must be pointed out that, in the whole of art.93, there is no express or implied obligation upon any member with more than one territorial unit to apply the CISG to all its territory whether immediately or progressively.⁸⁷ It appears that art.93 of the CISG should not be interpreted literally in such a way as to deprive a member of its right to make a decision on whether or not to extend the CISG to all or some of its territorial units nor should any provision of art.93 of the CISG be read out of context in contradiction to the interpretation principles stipulated in arts.31 and 32 of the Vienna Convention on the Law of Treaties.

The rights and obligations of art.93 represent basic principles underlying the provision. The message in art.93 is clear: it respects the unqualified autonomy of a state with more than one territorial unit to make a declaration as it wishes. The autonomy of a state with more than one territorial unit is central to art.93, and such autonomy can only be restrained by the stipulated formality requirements, and thus the wishes of the relevant state cannot be ignored or denied in case of ambiguity in a state’s practice. Such conclusion is supported by art.93(1) of the CISG, which provides that a state may amend its declaration at any time after the initial declaration.

The author argues that art.93(4) of the CISG does not restrain China from deciding whether or not to extend CISG to Hong Kong and Macau. This conclusion is based on the language of art.93(4), which states that if “a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State”.

The author wishes to point out that two factors are mostly relevant to the interpretation of this provision:

- (1) Article 93(1) refers only to the time for a state with more than one territorial unit to exercise its autonomy, namely the time of signature, ratification, acceptance, approval or accession or any time thereafter;
- (2) The so-called affirmative declaration requirement, which is set out in art.93(2) and not art.93(1), requires the state only to specify the territorial units to which the convention extends.

85 CISG, art.93(1).

86 *Ibid.*, art.93(2).

87 The author disagrees with the observation that “[i]t seems arguable...that States with a constitutionally guaranteed division of power among its constituent units should be given the chance to avoid the assumption of an unqualified obligation in international law to apply its provisions to contracts falling within the scope of Article 1 of the CISG, but rather to enable the Convention to be applied progressively to particular units of the State concerned”. Schroeter, “The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods” (n.33) 324.

In the light of these two factors, it may be argued that China could not make a declaration at the time of signature, ratification, acceptance, approval or accession, because it became a state with more than one territorial units only in 1997 and 1999 when Hong Kong and Macau returned to China, and accordingly it cannot be argued that the CISG applies to Hong Kong and Macau by default, on the basis of art.93(4). Similarly, it can be argued that the affirmative declaration requirement under the art.93(2) is not subject to the qualification of art.93(4) and thus even though China's notifications to the UN did not expressly refer to the CISG, such omission does not trigger off the operation of art.93(4), which only qualifies the operation of art.93(1). This means if the crucial time for China to make a declaration in pursuance of art.93(1) is 1997 for Hong Kong and 1999 for Macau, China's notifications to the Secretary General of the UN are sufficient for the operation of art.93(4). Consequently, China's notifications cannot be invalidated under art.93(4) for alleged non-conformity with art.93(2).

B. External affairs power versus autonomy under the two Basic Laws

The external affairs power and autonomy of Hong Kong and Macau must be balanced carefully. Based on the relevant provisions of the Basic Law of Hong Kong and the Basic Law of Macau, it can be said that CISG clearly falls within the jurisdiction of the Central Government. Therefore, whether to extend the CISG to Hong Kong and Macau is a decision to be made by the Central Government of China.

The author argues that when considering whether to extend the CISG to Hong Kong and Macau, the Central Government must take into account global cooperation and uniformity of international sales law. The benefit of having a uniform contract law for China, Hong Kong and Macau and any possible disadvantage of extending the CISG to Hong Kong and Macau must be balanced in a reasonable way. As argued above, there is no reason why CISG cannot operate alongside the Hong Kong law and Macau law. The fact that the UK and Portugal have not joined the CISG is not a valid reason for Hong Kong and Macau not to accept CISG, because they are now part of China not colonies of England or Portugal. As we have already seen there is sufficient economic justification for Hong Kong to accept the CISG because Hong Kong's merchandise trade can be better protected and facilitated by the CISG system. There is also economic justification for Macau to join the CISG system because of Macau's political and strategic need to develop a multidimensional economy. An effective legal system for international sale of goods may facilitate various economic developments on the basis of already strong performance of service trade dominated by the gaming industry. Accordingly, the author strongly argues that the Central Government should extend the CISG to Hong Kong and Macau in pursuance of the relevant provisions of the Basic Laws of the two SARs.

C. *Compulsoriness of uniformity versus liberty of uncertainty*

It seems that the two opposite views on whether the CISG has been extended to Hong Kong and Macau under art.93 of the CISG can be described as a debate between the notion of compulsoriness of uniformity and the notion of liberty of uncertainty as permissible under the CISG. The two representative academic papers arguing that the CISG should be regarded as having been extended to Hong Kong or Hong Kong and Macau because China has not made effective declarations under art.93 all appear to build their view on the underlying notion that the need for uniform application of CISG compels China to make declarations in compliance with art.93, and thus the CISG should have extended to Hong Kong (and Macau) owing to China's failure to comply with art.93.⁸⁸ The author describes their view as reflecting the notion of compulsoriness of uniformity. The opposite view is seen in some academic writings and decisions of different domestic courts.⁸⁹ Even though the expression of liberty of uncertainty is not used in the relevant papers and decisions, it appears that if we agree that the CISG has not been extended to Hong Kong and Macau on the ground of China's notifications in 1997 and 1999 respectively, we would have accepted China's liberty to create uncertainty in the application of the CISG. There is a dilemma as to whether we should recognise extension of the CISG to Hong Kong and Macau against China's intention for the sake of uniformity, or whether we should respect China's intention to cause uncertainty in the application of the CISG to Hong Kong and Macau.

The author takes the view that even if the promotion of uniformity is no doubt one of the important purposes of the CISG, this notion should not be employed to force the CISG upon Hong Kong and Macau against China's intention. Similarly, even if China's intent and autonomy to make a decision on the extension of the CISG should be respected, the respect to such autonomy should not lead to the proposition that China is at liberty to cause uncertainty on the status of the CISG in Hong Kong and Macau. This naturally leads to the conclusion that even if it is not reasonable and feasible to compel China to accept that the CISG has already been extended to Hong Kong and Macau as suggested by some academics and national courts, it is also not ideal for China to claim that the CISG does not extend to Hong Kong and Macau without complying with the formality requirements in a reasonably effective manner in its gap-filling exercise under art.93.

⁸⁸ *Ibid.*, and Yang, "A Uniform Sales Law for the Mainland China, Hong Kong SAR, Macao SAR and Taiwan — the CISG" (n.15).

⁸⁹ Zhang, "Study of a Number of Theoretical Issues Concerning China's Declarations on the CISG" (n.36). See also observations made in Yao, "A Preliminary Analysis of the CISG" (n.34). CLOUT case No 1030 (n.36); *America's Collectibles Network, Inc v Timlly* (n.36); *Innotex Precision Ltd v Horei Image Products, Inc, et al.* (n.16); *TV Broadband Network Products case* (n.36).

D. The way forward

CISG has not been extended to Hong Kong and Macau because China has made its intention not to extend it to Hong Kong and Macau clear in its notifications to the Secretary General of the UN in 1997 and 1999, respectively. Reading all the relevant provisions of the CISG and the Vienna Convention on the Law of Treaties together, we have to accept the conclusion that extending CISG to Hong Kong and Macau against China's will is not a reasonable and feasible option for all member states of the CISG. Harmony and cooperation is the essential spirit for the CISG's success. However, the author also argues that China must reconsider the issue carefully and cooperatively to avoid uncertainty in the promotion and enforcement of the CISG worldwide.

The author urges the Chinese National Government to make a decision as early as possible to extend CISG to Hong Kong and Macau. The express extension of CISG to Hong Kong and Macau appears to be more of a formality requirement under the relevant Basic Law than under art.93 of CISG. An explicit declaration of the application of CISG in the two SARs would certainly clarify the present uncertainty regarding the status of CISG in Hong Kong and Macau. Even if we accept the view that China's notifications to the Secretary General of the UN are valid declarations under art.93, China may still extend CISG to Hong Kong and Macau as it wishes because such change of position is allowed under art.93. Overall, the CISG has been successful in promoting uniformity and stability in global commerce of merchandise trade: such uniformity and stability are also in the best interests of China, including Hong Kong and Macau.