

Letter to *Hong Kong Lawyer*

給《香港律師》的信

Law Professor urges China to Extend CISG to Hong Kong

A Review of John Shijian Mo, "Transfer of Sovereignty and Application of an International Convention: Case of CISG in the Context of 'One Country, Two Systems' (2015) 2:1 JICL 61-86

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In the latest issue of the *Journal of International and Comparative Law*, Professor John S. Mo, Dean of Law of the University of Macau, discusses the importance of extending the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention") to Hong Kong and Macau. He discusses the ongoing debate as to whether the Convention applies in Hong Kong and Macau by default, because the Chinese Central Government failed to make a declaration when Hong Kong and Macau became parts of China that the CISG was not applicable in Hong Kong. This view, which the learned professor does not agree with, is founded on the principle that it would promote uniformity of law if the application of CISG could be presumed in the absence of evidence to the contrary.

The CISG, which is aimed at providing a common legal framework for international sales transactions, has been described as "arguably the greatest legislative achievement aimed at harmonising private commercial law." (Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, (1991) 39 Am J. Comp L. 403, 403).

Professor Mo argues that the Convention is immediately relevant to Hong Kong, which enjoys an important international trading status, not forgetting its crucial economic relationship with China. For instance, in 2012, according to the official statistics of World Trade Organisation ("WTO"), Hong Kong ranked as the 10th largest importer and the 12th largest exporter in merchandise trade. Hong Kong is a member of the WTO and has legal competence to participate in international trade and commercial activities in its own name. It also can enter into certain types of international treaties, but only sovereign states can join the CISG. It is in this economic and legal context that Professor Mo approaches the need for the Convention's formal application in Hong Kong.

The importance of CISG is such that conflicts of law rules permit the application of it to a contract if the contracting parties have opted to be governed by it, even though they come from non-member states. Conflict of laws rules also allow the tribunal to apply the CISG if that is the law that has the closest connection to the contractual dispute. However, as Professor Mo

points out, joining the CISG at the territorial level will introduce an ever desirable element of uniformity of law, which promotes international trade transactions.

The question of the application of CISG to Hong Kong and Macau arises from their historical context. The UK and Portugal are not signatories to the Convention and for that reason the Convention was never extended to Hong Kong and Macau until they were unified with China. China is one of the earliest members of the CISG regime, and at the time it joined the CISG in 1988 Hong Kong and Macau were still under the British and Portuguese administration.

Article 93(1) of the CISG provides that "if a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, 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". A declaration

under this article could not have been made by China in 1988 in relation to Hong Kong and Macau which were not at that time territorial units of China.

When Hong Kong and Macau became special administrative regions of China in 1997 and 1999, China notified the United Nations what international treaties were to be extended to these two SARs and there was no mention in them of the CISG. Professor Mo convincingly argues that these notifications cannot be regarded as declarations for the purpose of Art. 93(4) which provides that "if a Contracting State makes no declaration under para. (1) of this article, the Convention is to extend to all territorial units of that State".

While China has made no express stipulation that the Convention extends to Hong Kong and Macau, which Professor Mo argues China is undoubtedly competent to do so, Hong Kong and Macau lack competence to make the Convention applicable in their territory because it is an international convention which may be subscribed to only by sovereign states.

Professor Mo argues that the provisions of the Basic Laws of Hong Kong and Macau hold the key to resolving the dispute. These provisions state that the Chinese Central Government may extend the application of an international convention or treaty to Hong Kong and Macau after consultation with them. He points out that CISG is in conformity with both the common law of Hong Kong and civil law of Macau and that both territories stand to gain from joining the CISG.

While conceding that it is the sovereign power of China to decide

whether or not the CISG should be extended to either of the SARs, Professor Mo argues that it is in the best interests of China that the CISG applies uniformly in China. He concludes: "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".

In view of the prevailing uncertainty as to whether CISG is applicable in Hong Kong, Professor Mo is right to suggest that the Central Chinese Government must initiate the formal extension of the Convention to Hong Kong. There is no obstacle to the Convention's compatibility with Hong Kong's common law system. In fact the Convention and the Sale of Goods Ordinance have much in common. The extension of the Convention to Hong Kong would clarify the law applicable to international sales contracts for the legal profession which has followed the Sale of Goods Ordinance in relation to domestic sale of goods transactions. Whether the Convention and the Ordinance should continue to govern these two different areas of contracts or whether the Convention should promote harmonisation of local law with the convention is a matter for further discussion. If China decides to initiate the extension of the Convention to Hong Kong, Hong Kong has to be consulted. Our legal profession will have an important part to play in providing Hong Kong's consultation response and for that reason alone Professor Mo's well-reasoned arguments deserve careful study. ■

法學教授敦促中國擴大《國際貨物銷售合同公約》範圍至香港

對莫世健《主權移交以及一項國際公約的應用》：「一國兩制」下《國際貨物銷售合同公約》的情況之評論 (2015)2:1 JICL 61-68

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在最新一期的《國際法與比較法雜誌》，澳門大學法律學院院長莫世健教授討論了把聯合國《國際貨物銷售合同公約》（《公約》）的適用範圍擴大至香港及澳門的重要性。他就「由於當香港和澳門成為中華人民共和國其中一部分之際，中國中央政府並未聲明《公約》不適用於香港地區的情況下，《公約》是否自動適用於香港和澳門」的正在進行中爭辯，作出討論。此觀點是建基於一原則，該原則就是：如果在沒有相反證據的情況下可以假定應用《公約》，則法律的一致性會獲得促進。而這位博學的教授並不認同此觀點。

此《公約》旨在為國際銷售交易提供共同的法律框架，並被形容為「可以說是旨在協調商業私法的最高立法成就。」（Joseph M. Lookofsky, 著作《國際銷售中的曲解與不明朗之處：協調私法時存在的問題》，(1991) 39 Am J Comp L 403, 403).

莫教授論證稱，該《公約》是與享有重要國際貿易地位的香港密切相關，不要忘記其與中國的重要經濟關係。例如，根據2012年世界貿易組織(WTO)的官方統計，香港被列為在商品貿易中第10大進口地區和第12大出口地區。香港是世貿組織的成員，具有法定能力以自己名義參與國際貿易和商務活動。也可以簽訂某些類型的國際條約，然而，只有主權國家才可以加

The third issue of the *Journal of International and Comparative Law* was published in June 2015. The journal, which comes out in June and December, welcomes articles of international and comparative interest, especially in the area of commercial law. The journal is published by Sweet & Maxwell. Please send all comments to Anton.cooray.1@city.ac.uk.