RCCL Online Symposium on the Application of the CISG to the HKSAR (28 August 2020)

29 August 2020
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The United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted on 11 April 1980, was designed to provide uniform rules for contracts involving sale of goods between different countries that may have different legal regimes. To date, there are more than 90 countries that are parties to the CISG, including the mainland China, US and Japan, which are among the top trading partners of Hong Kong. However, due to the unique historical development of Hong Kong, the CISG has never been applicable locally. On the other hand, as transnational trades become increasingly significant in the era of globalisation, there are more calls for Hong Kong to adopt the CISG to facilitate such trading activities.

To this end, the Department of Justice of the Hong Kong Special Administrative Region (HKSAR) issued a public consultation paper entitled "Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region" on 2 March 2020. In response to this call for views, the Centre for Chinese and Comparative Law (RCCL) of the School of Law of City University of Hong Kong (CityU) held an online symposium on 28 August 2020 and invited leading experts on commercial law and the CISG from the UK, Australia, Hong Kong and Singapore to comment and discuss on whether, and how, the CISG should be applied in Hong Kong.

The Symposium, moderated by Prof. Liu Qiao, started with the opening address by the Dean of the School of Law, Prof. Tan Cheng Han, who welcomed the speakers and thanked them for their participation. He also noted the success of the CISG in the area of international commercial law, as well as the advantages it brought to trades concluded by small and medium enterprises.

Prof. Tan Cheng Han (right), delivered the opening speech;
Prof. Liu Qiao (left) chaired the symposium.

The discussion was then started by Mr. Peter Wong, the Deputy Law Officer (Treaties & Law) of the Department of Justice, who explained the HKSAR Government's plan on the adoption of the CISG. He pointed out that the consultation submissions they received are generally supportive of the proposal, and that the CISG is important in securing Hong Kong as the hub for international dispute resolution as well as its economic competitiveness. Although he observed that there will be costs at the early stage of adoption, including the learning curve for local practitioners and transactional costs, the HKSAR Government is of the view that such costs could be eventually reduced with experience and the CLOUT database. He also explained that, should the CISG be adopted in Hong Kong, there will, in addition to the procedures under Article 153 of the Basic Law, be a local ordinance setting out prevailing provisions over the CISG and any possible declarations or reservations under the CISG. Lastly, he introduced speakers to comment on whether Hong Kong should, following the Chinese Government's approach, make a reservation under Article 95 of the CISG (on the application of the CISG when the other party is from a non-CISG jurisdiction), and concluded that the benefits of the CISG would outweigh the initial costs.

The next speaker, Prof. Bruno Zeller from the University of Western Australia, explained the lessons that could be learned from Australia in the adoption of the CISG. He noted that, although Australia is among the first members of the CISG, the judiciary is not ready to appreciate and apply the CISG properly to cases. For example, he commented on a few cases where the courts have erroneously treated the Sale of Goods Act (SAGA) and the CISG as being the same, thus applying the SAGA jurisprudence to the CISG, which resulted in later judges applying these cases as precedents. He opined that this is unfortunately caused by the Australian courts' failure to understand the effect of the CISG and its ramifications. On this point, Prof. Liu Qiao commented that this reflects that the CISG is not simply a matter for the legislature, but also requiring cooperation and reception by the judiciary.

Prof. Gary Bell from the National University of Singapore then explained why Hong Kong should not make an Article 95 reservation under the CISG. He noted that such a reservation effectively limits parties' freedom of contract (to choose the contract law), which would go against the principle of free economy of Hong Kong, as well as damaging Hong Kong's status as the hub of international legal services since parties who wish to apply the CISG would avoid

Hong Kong courts, and cited Singapore as example of how the reservation resulted in no application of the CISG by local courts and its systemic exclusion in standard form contracts. He also examined the reason put forward by the US and China in making the reservation — reciprocity. He noted that, while reciprocity may be relevant in public international law, it should be less relevant in matters of private law, and that the reservation was actually introduced (by then) to encourage socialist countries to join the CISG, but not reciprocity. Therefore, he does not recommend making an Article 95 reservation under the CISG in the case of Hong Kong.

Following that, Prof. Wang Jianyu, the Director of the RCCL, introduced the possible ways to apply the CISG in Hong Kong. He noted that, since the CISG can only be joined by "States", if Hong Kong is to apply the CISG, it can only do so under the three models introduced by Article 153 of the Basic Law: the Consultation, Continuation, and Authorisation/Assistance Approaches. After examining the above approaches in detail, he was of the opinion that the Consultation Approach should be adopted, i.e. the Central People's Government should consult the HKSAR Government before extending the CISG to the city. He also examined *Sanum Investments Limited v Laos People's Democratic Republic* [2016] SGCA 57, a case where the Singaporean Court of Appeal held that a bilateral investment treaty between China and Laos is capable of extending to Macao based on a number of public international law rules, which is erroneously decided in his opinion. Lastly, he questioned the possibility of applying Article 93 of the CISG to extend its application to Hong Kong directly given the clear wordings in that article, and the possibility of applying the CISG to trades between mainland China and Hong Kong.

Prof. Alex Loke from the CityU School of Law then commented on the transition from Hong Kong's Sale of Goods Ordinance (SOGO) to the CISG. He noted that, although both are similar, the CISG is different from the SOGO in that there is no classification of terms into conditions, warranties, and innominate terms; the absence of the parole evidence rule; the different effect of frustration; and the concept of "fundamental breach". He explained how, in international trades, the complexity of documentary sales and burdens created by the CISG may influence the decision on whether to apply the CISG. Nevertheless, he was of the opinion that the CISG can help promoting the sophistication of the Hong Kong legal system and, to promote understanding of the CISG, law schools in Hong Kong may introduce the CISG into their curriculums.

Prof. Liu Qiao then commented on how the CISG could be applied in mainland-Hong Kong trades. He agreed with Prof. Wang that Article 93 cannot be applied in the Hong Kong context, but opined that China may, in accordance with general public international law rules, make a valid declaration to extend the application of the CISG to Hong Kong. He also opined that, should Hong Kong consider it beneficial to receive the CISG without an Article 95 reservation, the HKSAR Government should seek support from the Central People's Government on the matter. As to mainland-Hong Kong trades, he opined that, in addition to local legislation setting out the application of CISG to such trades, there should also be a bilateral agreement to ensure that the Mainland courts would also apply the CISG to such trades.

Prof. Lutz-Christian Wolff, Dean of the Chinese University of Hong Kong Faculty of Law, then discussed the current state of opting-out the CISG. He opined that the figures of opt-out may not be conclusive since it is also necessary to compare that with the opt-out rate of domestic legislation in similar regards. He also looked at the main reasons why the parties opt-out the use

of CISG, noting that Article 95 reservations are, contrary to the belief held by previous speakers, not on the list. He also observed that there are also irrational decisions to opt-out, including the accustomed practice, time pressure, etc. Lastly, he expected that the practice of excluding the CISG would continue for many years until the lawyers and clients learn of the advantages that could be brought by the CISG, and how the CISG could be accepted through promotion and education.

After that, speakers from the UK shared their thoughts on the CISG, which was started by Prof. Ewan McKendrick from the University of Oxford, who compared the common law doctrine of frustration with Article 79 of the CISG. He noted that one of the major differences is the effect of change of circumstances, which is terminatory for common law but suspensory for the CISG. After going through the requirements under Article 79, he opined that the CISG is "locked in time" and only reflected the thinking at the time of adoption. He raised Covid-19 as an example of how academic discussions on adaption of contracts around the topic has failed to find a solution from Article 79. He also observed that, while there are cases going in different directions, the CISG Advisory Council could provide valuable advisory opinions to facilitate consistent interpretation in this regard. Lastly, he questioned whether, and how, the CISG may work with the UNIDROIT Principles of International Commercial Contracts in enabling an adaptation of the contract and providing other remedies.

Prof. Michael Bridge from the London School of Economics and Political Science then shared the UK's experience on CISG. He noted that, in the UK (which is not a party to the CISG), there are not much shared legal enthusiasm in adopting the CISG, and there are fears that London may lose its status as international dispute resolution centre and law firms having to learn more about other legal systems. In this regard, he noted how international contracts for commodity sales typically choose English law as the governing law and expressly exclude the application of the CISG. He observed that such contracts are not just for the sale of goods but also involving speculative trading. Such contracts require a high degree of uniformity and certainty. He also noted that, in string contracts, it is not uncommon to have domestic transactions so that the CISG cannot be applied. Moreover, issues may arise on whether the CISG could apply in financial derivatives which may be physically settled. He opined that English law brings more certainty in commodity trades than the CISG, especially on the concepts of "fundamental breaches" and "cure". Nonetheless, he believes that the CISG can work well outside commodity sales.

Lastly, Prof. Chen Lei from the Durham University compared the differences between the common law doctrine of frustration and the Chinese doctrine of change of circumstances (DCC). He noted that, while there is a practical convergence between the two, the underlying basis of them are different in that the former is built on the lack of consent to perform something different while the latter is based on good faith and fairness, and thus resulting in differences in their requirements on foreseeability, purpose of contract and unfairness. In addition, under the common law, frustration automatically discharges the contract while, under the DCC, Chinese courts have discretion to modify the contract. On this point, Prof. Liu Qiao commented that the CISG may serve as the middle point between the two different sets of rules. Lastly, Prof. Chen also noted how Chinese courts have been restrictive towards the use of DCC, which is supported by figures from the Supreme People's Court and provincial high courts in the past decade and case law examples.

Since this Symposium was organised in light of the Department of Justice's consultation paper, the RCCL will, at a later stage, submit a report to the Department of Justice based on the points made in this Symposium as well as speakers' papers.