



Hong Kong General Chamber of Commerce  
香港總商會 1861

香港總商會

香港金鐘道統一中心廿二樓

Hong Kong General Chamber of Commerce

22/F United Centre,

95 Queensway, Hong Kong

Tel (852) 2529 9229

Fax (852) 2527 9843

Email [chamber@chamber.org.hk](mailto:chamber@chamber.org.hk)

[www.chamber.org.hk](http://www.chamber.org.hk)

*Helping Business since 1861*

18 September 2020

Mr. Paul Tsang  
Law Officer (International Law)  
International Law Division  
Department of Justice  
7/F, Main Wing, Justice Place  
18 Lower Albert Road  
Central, Hong Kong

Dear Mr. Tsang,

**Re: Consultation Paper on the proposed application of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) to the HKSAR**

The Hong Kong General Chamber of Commerce welcomes the opportunity to express our views on the subject consultation.

Although we understand that there are advantages to adopting CISG in Hong Kong, there can also be potential drawbacks, which we have detailed in the attachment to this letter. We would therefore recommend that a proper cost-benefit analysis be carried out to determine whether CISG implementation would be in the overall interests of the business community, as well as our status as a leading international trading centre.

We hope you will find our comments useful to your deliberations.

Yours sincerely,

George Leung  
CEO

*Encl.*

**Department of Justice Consultation Paper (March 2020) “Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region”**

**Response by The Hong Kong General Chamber of Commerce (HKGCC)**

*Introduction*

1. HKGCC welcomes the opportunity to respond to this consultation paper (“CP”).
2. The objective of this UN Convention (hereafter referred to as the CISG<sup>1</sup>), when it was adopted in 1988, was to remove legal barriers in, and promote the development of, international trade, by providing a standard set of rules to govern international contracts for the sale of goods (ISG contracts).<sup>1</sup>
3. Currently, Hong Kong businesses are free to negotiate with overseas businesses the choice of rules governing any such ISG contracts, including the Hong Kong rules, the rules of the overseas party’s jurisdiction, or the rules set out in the CISG itself, in whole or in part. The choice of the CISG rules can therefore be described, in the CP’s words, as an “opt-in”.
4. The central question posed by the CP (Question 2 in the CP) is whether the current “opt-in” position should be changed to an “opt-out” position (which would be the effect of the proposed application of the CISG to Hong Kong). Under an opt-out position, the CISG rules would be adopted, unless both parties agreed to exclude them.
5. As a preliminary point, HKGCC believes that any proposed change to the *status quo* in terms of Hong Kong business’s international trade relationships needs to be approached extremely cautiously. As the CP notes, Hong Kong has achieved the status of being the eighth largest trading economy in the world - a remarkable feat considering its small population relative to the other top ten trading economies - without the CISG rules being imposed as a default position. It is therefore legitimate to question the need for change, with the risks involved, and the inevitable disruption it would cause. The benefits of any change would very clearly have to outweigh the costs, especially at a time when Hong Kong’s position as a leading trading economy is already under threat by the trade dispute between the US and the Mainland.
6. If a change to the *status quo*, in the form of the imposition of the CISG rules as a default position, had been perceived as beneficial for Hong Kong businesses, it might be expected that they, or the Hong Kong legal profession, would have advocated it previously. Thus far, we are not aware of any desire for change being expressed by our members, or by the Hong Kong legal profession. That said, we agree that it is an issue that merits consideration.

*The effect of the Proposal on Freedom of Contract*

---

<sup>1</sup> CP para 1.1.

7. Intuitively, it would seem that the existing opt-in position would give Hong Kong businesses greater contractual freedom to negotiate contractual terms than an opt-out position. Under the latter (unlike the former), deviating from the CISG rules would require the other party's agreement. If the other party was unwilling to do so, the Hong Kong business would have no option but to accept the CISG rules, or refuse to buy or sell the goods in question.
8. It is true that Hong Kong businesses would be faced with the same dilemma under an "opt-out" position, if the other party insisted on opting for any rules other than the CISG ones. However, having the CISG rules as a default position may give the Hong Kong businesses greater leverage to insist on them, if they felt it was in their interests to do so. But equally, and conversely, an "opt-out" position may make it more difficult for Hong Kong businesses to insist on rules other than the CISG ones, including Hong Kong law, if they felt it was in their interests to do so. The net result appears to be that, if an "opt-out" position is adopted, as proposed in the CP, *the CISG rules would be more likely to apply* to a Hong Kong business's ISG contract than under the existing "opt-in" position.
9. The question therefore is whether, on balance, Hong Kong businesses would be better off with the CISG rules as a default position for any ISG contract (as proposed in the CP), or with retaining the current "opt-in" position whereby the choice of rules is completely open for negotiation, with no "built-in" preference for any particular set of rules.

#### *Possible Benefits of the Proposal*

10. The CP suggests that the main possible benefit of adopting the CISG rules is that it would reduce transaction costs for Hong Kong businesses "by avoiding having to obtain legal advice on foreign law and retain foreign litigators".<sup>2</sup> In doing so, the CP also suggests that this might also drive Hong Kong GDP and trade growth, although it recognises that there are "no conclusive data showing the CISG directly causing economic or trade growth".<sup>3</sup>
11. If any reduction of transaction costs arising from using the CISG rules were to be realised, this, by definition, would require the parties to choose them to govern their ISG contracts. However, the CP notes that, even in jurisdictions that have an opt-out position, the parties choose to exclude the CISG rules in many cases. Based on information from the legal profession, the rates of exclusion were 55-71% in the US, 45% in Germany, 41% in Switzerland, 55% in Austria and 37% in China. The CP recognises that "the alleged benefits [of the CISG rules] may be reduced by the potentially high rates of exclusion".<sup>4</sup>
12. It is not self-evident that using the CISG rules as would reduce transaction costs in net terms. The CISG rules themselves, as the CP recognises, will be unfamiliar to many Hong Kong businesses (and their legal advisers), as the rules of an overseas jurisdiction might be. Even if they were adopted, they may have to be litigated in a foreign court, with the need to engage local lawyers.
13. In this context, the CP rightly raises five sub-questions listed under Consultation Questions 1 and 3 that are, in essence, designed to elicit factual information about the

---

<sup>2</sup> CP paras 3.57 and 3.59.

<sup>3</sup> CP para 3.52.

<sup>4</sup> CP para 3.106.

factors affecting the choice of law in ISG contracts involving Hong Kong businesses. In particular, Question 3 asks (a) why one would choose to opt-out of the CISG rules, and (b) the likelihood of opting-out of the CISG rules, given the opportunity. HKGCC believes that this information is critical in evaluating whether the adoption of the CISG rules would bring real benefits. The input of Hong Kong’s legal profession would be particularly useful in this respect.

14. Even if adoption of the CISG rules were shown to reduce transaction costs in net terms, the question remains whether the parties should be left free to decide whether to “opt-in” to them (as at present), or whether (as the CP proposes) this should be changed to an “opt-out” position, whereby the CISG rules apply, unless the parties agree otherwise. The CP states that a benefit of the latter position is that the CISG rules can apply to their fullest extent, whereas this is not the case under the former.<sup>5</sup> The CP also notes, however, that there are certain matters that the CISG rules does not address in any event, and would have to be governed by local laws.<sup>6</sup> In addition, there is a question as to whether having the freedom to opt-in to the CISG rules, if the other party agrees, would be better for Hong Kong businesses than having to obtain the other party’s agreement to opt-out. Again, the input of the legal profession would be useful in this respect.

#### *Costs of the Proposal*

15. While the possible benefits of imposing the CISG rules as a default position are at this stage, as noted above, largely hypothetical, the costs (or “cons”, as the CP puts it) are more tangible. The CP recognises that these concerns about the proposal “also need to be bolstered by the submissions of trade and businesses so that they can be addressed if extension of the CISG is carried forward”.<sup>7</sup>
16. As the CP notes, there are a number of fundamental principles in the CISG rules that are alien to Hong Kong’s common law system, and “it is these [common law] principles that have contributed to Hong Kong’s strong reputation in the legal community”.<sup>8</sup> (We would also add that they have contributed to Hong Kong’s position as a leading global financial centre). It is unclear how the courts would resolve these conflicts.
17. Moreover, as the CP notes, Hong Kong businesses and their lawyers, and indeed Hong Kong courts, would have to deal with new rules and concepts with which they are unfamiliar.<sup>9</sup> Businesses may have to engage overseas lawyers with experience of the CISG rules for assistance. Existing contracts may have to be reviewed and amended.
18. HKGCC believes that, here too, the input of the Hong Kong legal profession would be useful before deciding whether to implement the CP’s recommendations.

#### *Conclusion*

19. HKGCC welcomes any proposal that would ease barriers to trade for Hong Kong businesses. However, at this stage, it is questionable whether a requirement to use the

---

<sup>5</sup> CP paras 2.59, 2.60.

<sup>6</sup> CP para 3.100.

<sup>7</sup> CP para 3.83.

<sup>8</sup> CP paras 3.93, 3.94.

<sup>9</sup> CP paras 2.48 and 3.72.

CISG rules as a default position would do so, or whether in fact it would create new trade obstacles. In other words, it is questionable whether any benefits of the proposal would outweigh the costs.

20. To resolve this issue, HKGCC believes it is essential to obtain and evaluate the information sought under Consultation Questions 1 and 3, and to obtain the input of the Hong Kong legal profession to these questions. We therefore urge the Government to defer any decision to implement the CP's recommendations until this information and input is received and evaluated.

HKGCC Secretariat  
September 2020