2021年3月22日
討論文件

立法會司法及法律事務委員會

《聯合國國際貨物銷售合同公約》適用於香港特別行政區的建議

目的

當局已就《聯合國國際貨物銷售合同公約》(《銷售公約》)[1]適用於香港特別行政區(香港)的建議進行諮詢[2]，本文件旨在告知委員有關諮詢結果及當局把《銷售公約》延伸至適用於香港的計劃。

背景

2. 《銷售公約》訂明規管國際貨物銷售合同的統一規則，目的是減少國際貿易的法律障礙，並促進國際貿易的發展。《銷售公約》在1988年1月1日生效[3]。截至2021年1月底，《銷售公約》共有94個締約國[4]，包括按貿易總量計香港二十大貿易夥伴中的過半數，即中國、美國、新加坡、日本、南韓、越南、德國、荷蘭、法國、瑞士、意大利和澳洲[5]。

3. 雖然中國是《銷售公約》的締約國[6]，但《銷售公約》現時不適用於香港[7]。

4. 有意見主張把《銷售公約》延伸至適用於香港，理由是這或可促進貿易增長、避免企業在訂立跨境交易時受不熟悉的外地法律規

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1 《銷售公約》內容可瀏覽：https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/zh/v1056996-cisg-c.pdf

2 公眾諮詢文件題為《〈聯合國國際貨物銷售合同公約〉適用於香港特別行政區建議》，內容可瀏覽：https://www.doj.gov.hk/tc/featured/consultation_paper.html。

3 關於《銷售公約》的生效日期和狀況，可瀏覽《聯合國條約集》網址：https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en (英文版)。

4 同上。

5 關於2020年香港主要貿易夥伴的資料，可瀏覽：https://www.tid.gov.hk/tc_chi/trade_relations/mainland/trade.html。

6 《銷售公約》於1988年1月1日對中國生效。詳情請參閱：http://www.uncitral.org/uncitral/zh/uncitral_texts/sale_goods/1980CISG_status.html。

7 《銷售公約》在1997年7月1日前不適用於香港。在過渡期間及之後，中國沒有就《銷售公約》適用於香港的事宜照會聯合國秘書長。

限、提高香港解決《銷售公約》爭議的能力，從而提升香港的國際貿易和金融中心地位[8]。

5. 隨着《銷售公約》的締約方不斷增加，當局認為現在是適當時機，就把《銷售公約》延伸至適用於香港的建議諮詢相關持份者，特別是法律界和商界。當局遂於2020年3月2日至9月30日期間進行公眾諮詢(《銷售公約》諮詢)[9]。

諮詢回應

6. 《銷售公約》諮詢邀請公眾回應**附件 1**載列的五條諮詢問題，當局共收到16份公眾意見書。回應者名單載於**附件 2**。

7. 大多數回應聚焦於諮詢問題2(即《銷售公約》應否適用於香港(適用問題))和諮詢問題4(即落實建議的法例應否包含條文，使《銷售公約》規則實質上適用於內地與香港之間的銷售交易(內地與香港之間的交易問題))，另有某些回應關乎諮詢問題1和諮詢問題3(兩條都是資料搜集的問題，問及香港貿易商的跨境銷售合同的適用法律)，以及諮詢問題5(關於在香港實施《銷售公約》的條例草案)。

8. 下文探討有關公眾回應的主要事宜。

適用問題

9. 公眾對此事宜的回應摘錄於**附件 3**，與其相關的主要觀察所得如下：

(a) 在法律專業方面，香港大律師公會和香港律師會在注意到《銷售公約》與香港現行法律有差異的同時[10]，對《銷售公約》適用於香港亦表示支持，沒有從法律角度提出任何重大阻力／顧慮之處。幾乎所有從法律學術界收到的意見書[11]也同樣表示支持。

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[8] 詳情請參閱當局題為《〈聯合國國際貨物銷售合同公約〉適用於香港特別行政區建議》的諮詢文件(立法會CB(4)908/18-19(03)號文件)第10段。

[9] 當局在2020年3月2日發表公眾諮詢文件。公眾諮詢期為三個月，但因當時的公共衞生情況而延長至2020年9月底。

[10] 香港大律師公會的意見書第15段和香港律師會的意見書第7段。意見書複本載於**附件 4**。

[11] 例如香港城市大學法律學院的教授(即陸飛鴻教授、劉橋教授和王江雨教授)和香港中文大學法律學院的教授(鄔楓教授)所提交的意見書。另一方面，香港中文大學法律學院專業顧問兼大律師 Alan Gibb 先生則在其意見書中對

(b) 在貿易／商業方面，香港總商會及香港貿易發展局(貿發局)作出了回應。貿發局支持該適用建議，但香港總商會對建議有所保留，質疑現有的"選擇適用"狀況還是(在假設《銷售公約》適用於香港的情況下)"選擇不適用"安排對本港企業較佳。香港總商會亦對《銷售公約》適用所涉及的成本(例如檢視現有合同的成本)表示關注。就此，香港總商會認為，香港的法律專業就諮詢問題 1 和諮詢問題 3 及上述"選擇適用"／"選擇不適用"的問題作出的相關回應會有幫助。為回應香港總商會在其意見書內提出的關注事項，當局於 2020 年 12 月 11 日去信香港總商會，闡述我們對其意見書內提出的重點問題的初步看法，並向香港總商會反映香港大律師公會與香港律師會對該建議的支持。香港總商會的意見書及本司覆函的副本載於**附件 5**。

(c) 部分回應者表示，從本身角度來看，對該建議或《諮詢文件》並無任何特別意見[12]。

10. 總括而言，上述公眾回應大多知悉《銷售公約》在全球的重要性，認為其適用於香港會配合並加強本港作為國際商貿中心及爭議解決中心的角色，對《銷售公約》適用於香港的建議表示支持。雖然香港總商會對建議表示保留，當局已在覆函中設法回應其關注。在這方面，除香港總商會外，沒有行業協會或商會來信對建議表示保留[13]。

11. 因此，當局擬尋求中央人民政府(中央政府)批准，依據《基本法》第一百五十三條把《銷售公約》延伸至適用於香港[14]。經參考其他普通法司法管轄區(例如澳洲、加拿大及新加坡)[15]如何在其法律

建議的改變"不表支持，主要原因是有關做法會損害香港提供區內最優質法律服務的法律聲譽"(意見書第 1 段)。此看法主要建基於英國／香港普通法規則(其中《貨品售賣條例》(第 26 章)是組成部分)"確保爭議結果有更高的可預測性"。(以上引述乃中文譯本)

[12] 有關回應者為消費者委員會及個人資料私隱專員。至於保險業監管局，則指《銷售公約》對保險業界的直接影響相對輕微。

[13] 兩場有關《銷售公約》建議適用於香港的簡介會於 2020 年 1 月 8 日(英語)及 1 月 9 日(中文)在香港總商會舉行，參加者包括香港中華出入口商會及商界代表。

[14] 《基本法》第一百五十三條訂明："中華人民共和國締結的國際協議，中央人民政府可根據香港特別行政區的情況和需要，在徵詢香港特別行政區政府的意見後，決定是否適用於香港特別行政區……"

[15] 例如：
《1986 年貨物銷售(維也納公約)法令》(昆士蘭)，見：https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1986-041
《國際貨物銷售合同公約法令》(加拿大)，見：https://laws-lois.justice.gc.ca/PDF/I-20.4.pdf
《貨物銷售(聯合國公約)法令》(新加坡)，見：https://sso.agc.gov.sg/Act/SGUNCA1995

制度下實施《銷售公約》後，當局計劃藉制定獨立成章的新條例在香港實施《銷售公約》。

第95條的保留事宜

12. 中國已根據《銷售公約》第95條作出保留，聲明其不受公約第1條第(1)款(b)項約束。公約第1條第(1)款(b)項訂明，就營業地在不同國家的當事人之間所訂立的合同，如果國際私法規則導致適用某一締約國的法律，則《銷售公約》便會適用。在收到的公眾回應當中，有三份特別就第95條的保留事宜表達意見：

(a) 香港大律師公會認為第95條的保留條文無需適用於香港，並建議當局重新考慮此事，原因包括：第95條的歷史背景(捷克斯洛伐克基於第1條第(1)款(b)項會限制其規管國際貿易交易的專門法例的實際適用範圍，而提議訂立第95條)；目前只有七個締約國繼續作出保留；香港沒有規管國際貿易交易的特別法例；以及《銷售公約》顧問委員會在其聲明(二)所載的意見(例如上述保留會損害該公約的實際應用情況)；

(b) 香港律師會在提述作出第 95 條的保留對香港的影響後，認為香港應反映中國作出的保留和聲明，但沒有闡釋其理由；以及

(c) 兩名法律學者提交的聯合意見書[16]，指出鑑於根據第 95 條作出的保留會令《銷售公約》的適用範圍較受限制，加上考慮到有論據要求新加坡撤回根據第 95 條作出的保留(簡言之，撤回會提升新加坡作為訴訟地和選擇新加坡法律作為適用法律的吸引力，而保留本身是引起混淆的主因[17])，認為《銷售公約》在剔除根據第 95 條作出保留的情況下適用於香港，符合香港的利益。

13. 因應上述公眾回應，當局在進一步考慮有關第 95 條的保留事宜後，擬支持《銷售公約》在連同中國根據第 95 條作出保留的情況下適用於香港作為向前推展的路向， 這與《諮詢文件》第 4.15 段所述的初步建議一致。此外，當局亦擬諮詢中央政府有關不把第 95 條的保留延伸至適用於香港的方案，以跟進公眾反饋的意見。

[16] 即香港城市大學法律學院劉橋教授及王江雨教授提交的聯合意見書。
[17] 同上，第 16 段。

內地與香港之間的交易問題

14. 由於中國內地企業與香港企業之間的交易在同一國家內進行，《銷售公約》作為規管國際貨物銷售的國際公約，並不適用。《諮詢文件》第 4.10 段提出下述初步建議：

> "4.10 然而，即使《銷售公約》不會自動適用於[中國內地企業與香港企業之間的交易]，鑑於中國內地與香港經濟關係緊密，為利便兩地企業之間的貨物銷售，**現建議新訂條例單方面包含條文，使《銷售公約》規則實質上適用於營業地分別位於中國內地與香港的當事各方之間所訂立的貨物銷售合同**。"(粗體為本文所加)

15. 對此事宜的主要回應載於**附件 6**，並論述如下 (以下引述乃中文譯本)：

(a) 普遍支持《銷售公約》規則適用於內地與香港之間的銷售交易，原因包括：規則適用後，"可能促進大灣區的貿易發展，並可支援參與"一帶一路"倡議的企業"[18]；規則適用與否，對收回《銷售公約》的經濟收益至關重要[19]；以及會"減少在不同法律傳統的地區之間進行交易而產生的誤解及法律費用，並……[會]有助提升交易績效，提高確定合同適用法律的預知性，以及增強當事各方的信心"[20]；

(b) 香港大律師公會和香港律師會均普遍贊同《諮詢文件》第 4.10 段載述的建議。然而，香港律師會建議落實建議的"較佳方法"，是中國內地與香港就《銷售公約》條文適用於營業地分別位於中國內地及香港的當事各方之間的交易，達成相互安排，以確保"在當事各方採用中華人民共和國法律的情況下，《銷售公約》條文可**相互適用**"[21] (粗體為本文所加)。內地一名律師[22]和香港兩名法律學者[23]亦提出相類的建議，傾向採納雙互安排方案，而非(《諮詢文件》第 4.10 段所述的)單方面適用條文方案，並進一步提出原

[18] 保險業監管局就問題 4 提交的意見書。
[19] 劉教授與王教授提交的意見書第 18 段。
[20] 曹麗軍先生(中倫律師事務所)提交的建議書第 25 段。
[21] 香港律師會提交的意見書第 14 段。
[22] 曹麗軍先生(中倫律師事務所)提交的建議書。
[23] 劉教授與王教授提交的意見書第 19 段。保險業監管局就問題 4 提交的意見書及曹麗軍先生(中倫律師事務所)提交的建議書第 34 段，均提出類似的關注。

因，認為雙互安排方案會要求"不論把有關爭議訴諸香港或中國內地的法院，均採用同一套規則"；及

(c) 香港律師會亦提出，由於《銷售公約》並不適用於中國內地與香港之間(如上文第 14 段解釋者)，雙互安排方案可避免因為在同一條例內，使《銷售公約》在香港實施並且納入關乎內地與香港之間交易的元素，而可能引起的"混淆"。[24]

16. 因應上述公眾回應，在進一步考慮有關事宜後，為了從法律確定性及可預測性的角度鞏固最初的建議，並避免上文第 15(c)段提述的潛在混淆，當局計劃：

(a) 刪除《諮詢文件》附錄 4.1 載述的條例草案擬稿的第 4(2)條，該條旨在落實(上文第 14 段所引述的)該文件第 4.10 段所載的單方面適用條文方案的建議；及

(b) 就當局建議與內地商討訂立安排使《銷售公約》條文相互適用於內地與香港之間的銷售交易，與中央政府展開討論，並且建議在該安排一旦訂立後，在內地及香港實施該安排。

過渡期及進一步宣傳工作

17. 鑑於相關持份者可能需時適應轉變和適當地調整經營方法及業務，香港大律師公會建議當局如決定採納《銷售公約》，應確保在實施公約的法例制定和生效之間預留充足時間。因此，當局計劃將有關條例(在條例制定後)的生效日期，延至條例通過至少六至九個月後。我們也會在該段期間與法律界和商界合作，進一步宣傳《銷售公約》及實施公約的法例。

律政司
2021 年 3 月

[24] 香港律師會提交的意見書第 14 段。

<u>附件 1</u>

《銷售公約》公眾諮詢：諮詢問題

諮詢問題 1：

我們歡迎公眾(特別是香港商界及法律界)就以下事項提出意見和建議：

(a) 在與非本港企業訂立的貨物銷售合同中，受香港法律規管合同所佔的比例為何(與受非香港法律規管合同相比)？

(b) 在此等受非香港法律規管的合同中，最常選用的非香港法律為何？

(c) 此等合同中載有適用法律條款訂明選用《銷售公約》所佔的比例為何？

(d) 在選擇適用法律時，是否存在被建議排除適用《銷售公約》的情形？

諮詢問題 2：

我們歡迎公眾就《銷售公約》是否應適用香港提出意見。

諮詢問題 3：

關於本港企業與非本港企業之間訂立的貨物銷售合同，我們歡迎公眾(特別是香港商界及法律界)就以下事宜提出意見和建議：

(a) 就此等合同選擇不適用《銷售公約》的原因為何？

(b) 如有機會選擇，就此等合同選擇不適用《銷售公約》的可能有多大？

諮詢問題 4：

就中國內地與香港之間的貨物銷售交易而言，若交易各方的營業地分別位於中國內地及香港，旨在實施《銷售公約》的香港本地法例應否也適用？

諮詢問題 5：

我們歡迎公眾就旨在讓香港法律實施《銷售公約》的法例條文擬稿(載於諮詢文件附錄 4.1)發表意見。

附件 2

《銷售公約》諮詢—回應者名單

	回應者
1.	中國政法大學國際法學院 李巍教授
2.	中國法律研究中心 何嘉俊先生
3.	香港消費者委員會 (總幹事黃鳳嫺女士)
4.	香港大律師公會
5.	香港城市大學陸飛鴻教授
6.	莫納什大學 Benjamin Hayward 博士
7.	香港中文大學法律學院院長 鄔楓教授
8.	香港貿易發展局 (研究總監關家明先生)
9.	香港個人資料私隱專員 (助理律師黎國榮先生)
10.	香港城市大學中國法與比較法研究中心 劉橋教授和王江雨教授
11.	香港總商會
12.	保險業監管局 (法律總監郭家華先生)
13.	香港中文大學 專業顧問 Alan Gibb 先生

14.	中國國際經濟貿易仲裁委員會香港仲裁中心
15.	中倫律師事務所 曹麗軍先生
16.	香港律師會

附件 3

就諮詢問題 2 收集所得的回應摘要

諮詢問題 2(**問題 2**)：我們歡迎公眾就《銷售公約》是否應適用香港提出意見。

* 以下引述乃中文譯本。

回應者	支持	收集所得的詳細回應*
1. 中國國際經濟貿易仲裁委員會香港仲裁中心	✓	
2. 香港消費者委員會		• 沒有特別意見，因為《銷售公約》適用於香港特區的建議(**適用建議**)"對一般消費者利益並無即時及直接影響"。
3. 香港大律師公會	✓	• 《銷售公約》是"廣受採納的全球重要公約"。 • 適用建議能配合並提升香港作為國際主要商貿中心的聲譽，長遠有助香港的國際貿易業務。 • 就仲裁及在香港法院解決爭議而言，在香港解決《銷售公約》相關爭議能配合並提升香港作為國際主要爭議解決中心的聲譽。法院、法律執業者和學者可為貿易法的國際法理學作貢獻。 • 《銷售公約》與香港現行法律必有差異，但香港的司法機構和法律界有豐富經驗，能務實而諧協地把國際法律規則納入特區的法律制度。 • 在制定實施《銷售公約》的法例及其生效之間，建議給予充足時

回應者	支持	收集所得的詳細回應*
		間，讓持份者適應並調整其業務、做法及事務。 • **《銷售公約》第 95 條**：回應者在意見書列舉理由(包括第 95 條的歷史；作出保留的締約國為數甚少；香港沒有規管國際貿易交易的特別法例；以及《銷售公約》顧問委員會在其聲明(二)所載的意見)，認為中國根據第 95 條作出的保留無需適用於香港，建議律政司重新考慮。
4. 香港總商會		• 回應者明白適用建議的好處，但對其潛在弊端有一些顧慮。 • 考慮所有因素後，認為問題 2 的關鍵在於，"選擇適用"的現行狀況對本港企業較有利還是適用建議下"選擇不適用"的安排對本港企業較有利。 • 認為採納《銷售公約》規則"並非顯然"可以減少交易成本淨額，因為本港企業及其法律顧問大多不熟悉《銷售公約》規則；並對適用建議所涉成本，例如檢視／修訂現有合同涉及的成本，表示關注。 • 認為香港法律界就"選擇適用"／"選擇不適用"問題、問題 1 和 3，以及適用建議所涉成本提出意見會有助益。 • 總括而言，在考慮建議方案時，必須評估公眾對問題 1 和 3 的意見，以及諮詢香港法律界對此等問題的意見。
5. 香港貿易發展局	✓	• 認為適用建議可促進香港貿易增長，有助減少法律不明確的情況及國際貿易摩擦，使香港法律服務界掌握國際的最新發展情況，

回應者	支持	收集所得的詳細回應*
		鞏固香港作為國際貿易及法律爭議解決樞紐的地位，以及利便香港與"一帶一路"沿線國家進行貿易及加強其作為"一帶一路"地區爭議解決樞紐的角色。 • 為確保《銷售公約》有效實施和發揮其最大效益，回應者建議在落實適用建議後，向本地貿易商進行相關推廣，並為香港商戶(尤其是本地中小企)及法律執業者提供充足培訓。
6. 保險業監管局		• 《銷售公約》既不涵蓋保險合同，也不涵蓋保險經紀服務合同。 • 《銷售公約》對保險業的直接影響遠遠小於其他以跨境貨物買賣為核心業務的行業，而且影響亦微不足道。
7. 香港律師會	✓	• 《銷售公約》廣受認同和採納。 • 適用建議會加強香港作為《銷售公約》爭議解決樞紐的地位：有利於香港與"一帶一路"國家訂立受《銷售公約》規管的貨物銷售合同；可增強對香港法律和在香港解決爭議的信心。 • 《銷售公約》與香港本地法律並無重大差異以致兩者互不相容 —— 總體而言，《銷售公約》的大部分原則和規定與《貨品售賣條例》(第 26 章)的規定或普通法的法律概念並非不能協調。 • 《銷售公約》容許當事各方靈活地選擇不適用公約。 • 適用建議或會干擾現狀，並會偏離普通法，但認為適用建議利多於弊。

回應者	支持	收集所得的詳細回應*
		• 《銷售公約》第95條：香港律師會認為，如落實適用建議，香港應反映中國作出的保留和聲明。
8. 香港個人資料私隱專員公署		• 從保障資料私隱的角度來看，沒有特別意見。
個人		
9. 曹麗軍先生(北京中倫律師事務所合伙人)	✓	• 適用建議會為香港貿易商提供多一個選擇，以中立的法律規管國際貨物銷售交易。 • 以仲裁員的經驗來說，爭議各方樂見《銷售公約》性質中立；而以律師的經驗來說，來自《銷售公約》締約國的合同當事各方樂意以《銷售公約》為適用法律。 • 《銷售公約》是在"一帶一路"成員之間建立"銜接法律制度"的重要基礎，適用建議有助香港成為一帶一路爭議解決樞紐。 • (如關注對《銷售公約》的概念不熟悉這個問題)《銷售公約》顧問委員會的意見有助香港法律執業者加深對《銷售公約》的認識和更妥善應用《銷售公約》。 • 《銷售公約》對中小企有"填補法律空白的作用"(中小企有別於大型企業，或會在沒有法律專業人員草擬合同的情況下進行買賣)。與交易對手或第三方的國家法律相比，此作用可節省中小企進行跨境交易所需的時間和成本。

回應者	支持	收集所得的詳細回應*
10. Alan GIBB先生(香港中文大學法律學院專業顧問兼大律師)	×	• 表示有所保留，提出的原因／意見包括：擬議修訂"會損害香港提供區內最優質法律服務的聲譽"；英國／香港普通法規則"確保爭議結果有更高的可預測性"及"世界各地不少商業機構都認為現行法律較《銷售公約》等建基於大陸法的法制為佳"；現行貨品售賣法律規則較《銷售公約》全面；擔心香港法律界難以處理《銷售公約》某些概念；對諮詢文件載列的適用建議好處有所保留。 • 總而言之，樂見某類法律協調工作，但建議採用替代方案，以利便跨境交易，例如修訂相關的現行貨品售賣法律、修改香港相關的法律衝突規則等。
11. 何嘉俊先生(中國法律研究中心研究員)	✓	• 適用建議可利便跨境貨物銷售，並"充分發揮香港作為國際城市和爭議解決中心的潛力"。 • 《銷售公約》一經納入本地法律，當局需要提供有關培訓。
12. 李巍教授(中國政法大學國際法學院)	✓	• 沒有特別意見。
13. 劉橋教授及王江雨教授(香港城市大學法律學院中國法與比較法研究中心)	✓	• 在考慮相關經濟及法律因素和諮詢文件所述的利弊後，認為有充分理由支持適用建議；最重要的是，適用建議似乎百利而無一害。 • 如果實施適用建議，但《銷售公約》的實質規則並不同時適用於香港與內地之間的合同，則適用建議的經濟效益便會大減。

回應者	支持	收集所得的詳細回應*
		• 《銷售公約》第 95 條：在考慮作出保留的影響，以及有論據要求新加坡撤回其保留後，認為若根據第 95 條作出的保留不適用於香港，是符合香港利益的。
14. 陸飛鴻教授(香港城市大學法律學院香港商務及海事法研究中心主任)	✓	• 適用建議最令人信服的好處是提高香港解決《銷售公約》爭議的能力，而其他好處包括法律界可以從《銷售公約》的角度，為交易提供意見。 • 《銷售公約》可改善香港現行法律，並舉出三個例子說明，包括更改合同、有效承約，以及可商售品質的問題。 • 鑑於《銷售公約》僅屬替代方案，而且不一定優於香港現行的銷售法制度，因此實施適用建議後，香港貿易相當可能只有輕微增長。 • 適用建議會為企業帶來"轉換成本"，因為現以香港法律為適用法律的企業必須從《銷售公約》角度考慮其合同。然而，所涉成本應不會成為實施適用建議的障礙。 • 預料《銷售公約》的應用情況會逐漸增加，並由較熟悉《銷售公約》當事方的需求所推動。然而，香港法律提供"此類當事方較熟悉的銷售制度予其選擇"，故在有需要時，對此類當事方有吸引之處。
15. 鄔楓博士(香港中文大學法律學院院長暨偉倫	✓	• 支持；理由與一般支持《銷售公約》的相同，撮述於隨意見書

回應者	支持	收集所得的詳細回應*
法律學講座教授)		[1]付上有關中國"一帶一路"倡議及《銷售公約》的文章。[2] • 認為《銷售公約》的可見壞處(撮述於上述文章)"僅是部分令人信服"，並且在任何情況下均不會超越適用建議的好處。

[1] 隨附文章名為"China's Belt and Road Initiative and the CISG"，由鄔楓教授撰寫，載於(2017) 34 Journal of Contract Law 50。

[2] Lutz-Christian Wolff, 'From a "Small Phrase with Big Ambitions" to a Powerful Driver of Contract Law Unification? --- China's Belt and Road Initiative and the CISG"' (2017) 34 Journal of Contract Law 50, 56-60。

附件 4

HONG KONG BAR ASSOCIATION

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3 August 2020

Department of Justice
7/F Main Wing, Justice Place
18 Lower Albert Road, Central, Hong Kong

Attn: Mr Paul Tsang
Law Officer, International Law

Dear Paul

CONSULTATION PAPER ON THE PROPOSED APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS ("CISG") TO THE HKSAR

With reference to your letter dated 4 March 2020 inviting the Hong Kong Bar Association to comment on the proposal, we are pleased to submit our comments. Please find the attached document for your kind attention.

Yours sincerely

Philip Dykes SC
Chairman

Encl.

HONG KONG BAR ASSOCIATION

SUBMISSIONS ON THE CONSULTATION PAPER ON THE PROPOSED APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS TO THE HONG KONG SPECIAL ADMINISTRATIVE REGION

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1. By letter dated 4 March 2020 of the Department of Justice, the Hong Kong Bar Association ("**HKBA**") was invited to provide its views on the Department's Consultation Paper on the Proposed Application of The United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region ("**Consultation Paper**").

2. The HKBA has reviewed the Consultation Paper and hereby provides its views.

3. The stated purpose of The United Nations Convention on Contracts for the International Sale of Goods ("**Convention**") is to remove legal barriers in, and promote the development of, international trade through the adoption of a uniform set of rules designed to cover contracts for international sale of goods. The above purpose is to be welcomed.

A. The Principle of Good Faith

4. The HKBA notes in the Consultation Paper the different interpretations of the reference to "good faith" in Article 7 of the Convention and the concern that such a concept is foreign to the current Hong Kong legal system.[1]

5. Though there is no general principle or requirement of good faith under the English common law of contract, a duty of good

[1] Consultation Paper at [1.54], [3.94]-[3.95], Annex 2.2 [93], Annex 2.2 [96] and Annex 2.2 [99(3)].

faith may be implied in a contractual arrangement in individual cases based on the intention of the contracting parties.[2]

6. Furthermore, there are many instances in the the application of the law of contract at common law where the law reflects or recognizes the notion of good faith even though it is not spelt out in that exact term. For instance, where a contracting party agrees to carry out acts which cannot effectually be done without the other contracting party's cooperation, there is an implied term that each party will do all that is necessary on his part to cause the act to be carried out.[3] There are also cases where express clauses to negotiate in "good faith" were upheld.[4]

7. In relation to pre-contractual negotiations, there is no duty to act in good faith as such a duty would be contradictory to the inherently adversarial nature of pre-contractual dealings.[5]

8. The question then arises seems to be whether the Convention's rules regarding pre-contractual dealings would import a new duty of good faith which does not exist under the current Hong Kong law.

9. Upon due consideration of Articles 14 to 24 of the Convention, none of them appears to be inconsistent with the principle that there is no duty to negotiate in good faith.

10. The HKBA notes that there are other instances of international conventions / model laws where, in spite of the requirement that they be interpreted with the principle of good faith in mind, Hong Kong has nonetheless adopted them: see the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[6] and the

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[2] *So Sheung Hin Ben v. Chubb Life Insurance Co. Ltd.* [2018] HKCA 209 at [58] (per Kwan JA); and *Yam Seng Pte Ltd. v. International Trade Corp. Ltd.* [2013] 1 CLC 662 at [131]-[132], [145] and [147] (per Leggatt J).

[3] *Mackay v. Dick* (1881) 6 App Cas 251 at 263 (per Lord Blackburn), applied in Hong Kong by the Court of Final Appeal in *Ying Ho Co. Ltd. & Ors. v. The Secretary for Justice* (2004) 7 HKCFAR 333 at [128] (per Bokhary PJ).

[4] *Petromec Inc. v. Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891 at [117] (per Mance LJ).

[5] *Kowloon Development Finance Ltd. v. Pendex Industries Ltd. & Ors.* (2013) 16 HKCFAR 336 at [20] (per Lord Hoffmann NPJ); and *Walford v. Miles* [1992] 2 AC 128 (UKHL) at 138E (per Lord Ackner).

[6] *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* (1999) 2 HKCFAR 111 at [92] (per Sir Anthony Mason NPJ).

United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.[7]

11. In light of the above, the HKBA considers that there should not be any undue concern that the Convention would be seeking to import into the law of contract in Hong Kong a foreign concept hitherto unknown to it (and such concern should not be a basis for rejecting the implementation of the Convention in Hong Kong).

B. Consultation Questions 1 and 3: Experiences with the Use of Hong Kong / Non-Hong Kong Law and the Convention

12. In relation to Consultation Questions 1 and 3, save as may be dealt with in these Submissions, the HKBA considers that these questions are of non-legal nature and in the circumstances, would make no comment on the same.

C. Consultation Question 2: Whether Hong Kong should apply the Convention

13. The HKBA takes the view that the Convention in principle should be extended to Hong Kong. This is a global and important convention that has been widely adopted. The extension of the Convention to Hong Kong is in line with, and further, Hong Kong's reputation as an internationally leading centre of trade and commerce and in the long run be would assist international trade business of Hong Kong.

14. Further, resolution of the Convention related disputes in Hong Kong would also be in line with, and further, Hong Kong's reputation as an internationally leading centre for dispute resolution in terms of both arbitration and in Hong Kong Courts. The Courts, legal practitioners, and academics could contribute to international jurisprudence of trade law.

15. The HKBA acknowledges that there are bound to be differences between the Convention and existing Hong Kong law, as in any case of adoption of any uniform international

[7] Section 9 of the Arbitration Ordinance (Chapter 609, Laws of Hong Kong).

law. However, Hong Kong's Judiciary and legal sector have rich experience in adopting international rules into the Region's legal system in a sensible and harmonious manner and in any event, Article 6 of the Convention allows parties to contracts to opt out of the Convention or, subject to a limited caveat, derogate from or vary the effect of any of the provisions of the Convention.

16. The HKBA would encourage the Government, should it decide to adopt the Convention locally and should such legislation be passed, to ensure that there is sufficient time between the enactment of such legislation and its taking of effect to allow stakeholders to adapt to and adjust their business, conduct and affairs. The HKBA would also encourage the Government in such circumstances to ensure sufficient promotion of the Convention (including, in particular, Article 6 thereof) amongst the business and legal sectors.

D. Consultation Question 4: Hong Kong and Mainland China Transactions

17. The HKBA agrees with the proposal at [4.10] of the Consultation Paper that adoption of the Convention in Hong Kong should mean application of the Convention to business transactions/contracts between Hong Kong and Mainland China as if the two jurisdictions were two different contracting states to the Convention. This makes logical sense and is in line with the 'One Country, Two Systems' principle.

18. The HKBA has considered whether, in adopting the Convention, Hong Kong should make a reservation under Article 95 thereof ("**Article 95**").[8]

19. The Department of Justice considers that such a reservation should be made. For reasons set out below, the HKBA sees no need to make the reservation under Article 95 and would invite the Department of Justice to reconsider the matter.

20. Article 95 was originally proposed by Czechoslovakia at, *inter alia*, the 11th Plenary Meeting of the United Nations Conference on Contracts for the International Sale of Goods

[8] Consultation Paper at [4.12]-[4.15].

on 10 April 1980 on the basis that Article 1(1)(b) of the Convention would have the effect of limiting the practical applicability of its special legislation governing transactions pertaining to international trade.[9] Such special legislation was to apply in Czechoslovakia when the rules of private international law referred to the law of Czechoslovakia.[10] Article 1(1)(b) of the Convention would, however, have had the effect of depriving such special legislation of much relevance, as it would have meant that the Convention and not the special domestic legislation would have to be applied.[11] The then German Democratic Republic shared similar concerns.[12]

21. Article 95 was therefore introduced as a compromise to cater for the specific concerns of primarily Czechoslovakia and to maintain the support of Czechoslovakia and the other then Socialist countries for the Convention.[13]

22. Presently, out of the 93 Contracting States to the Convention, only the following 7 Contracting States have made a reservation under Article 95: Armenia, China, Laos, Saint Vincent and the Grenadines, Singapore, Slovakia and USA.[14]

23. Hong Kong, by contrast, has not enacted any special legislation governing transactions of international trade. The underlying rationale for Article 95 therefore does not appear to apply to Hong Kong.

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[9] CISG Advisory Council Opinion No.15, 'Reservations under Articles 95 and 96 CISG' (21-22 October 2013) at [2.2]; United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 April 1980), 'Official Records' at page 229; CISG Advisory Council Declaration No.2, 'Use of Reservations under the CISG' (21 October 2013) ("**Declaration No.2**") at [2]; and 'UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods' (2016 Edition) at page 6.

[10] *Ibid.*

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status>.

24. Indeed, the CISG Advisory Council [15] recommends in its Declaration No. 2 that states newly acceding to the Convention ought to do so without making any declarations under, inter alia, Article 95 of the Convention. [16] Such reservations under Article 95 have a "detrimental effect upon the Convention's practical application" in that they "inevitably [undermine] the considerable measure of uniformity that exists and increases the likelihood of confusion regarding the application of the [Convention]."[17] Declaration No. 2 adds that the reservation is, further, unnecessary since Article 1(1)(a) of the Convention "has become the vastly more important basis for the Convention's applicability" in practice (rather than Article 1(1)(b) of the Convention).

25. Paragraphs [4.12] to [4.15] of the Consultation Paper cite a need to prevent confusion in the application of the Convention between Hong Kong and Mainland China, as well as a need to avoid confusion in foreign courts in applying the Convention to Hong Kong related disputes. However, there is no explanation as to what actually this "confusion" is.

26. Indeed, if Hong Kong and Mainland China were to be regarded as separate contracting states vis-à-vis foreign jurisdictions and courts and as between themselves (as proposed in [4.10] of the Consultation Paper), it is not immediately apparent why a reservation under Article 95 is needed in the case of Hong Kong.

27. In the absence of any convincing reason in support, the intended declaration would lead to a less expansive application of the Convention in Hong Kong and that would not be in line with the stated aims of applying the Convention in Hong Kong in the first place.

28. The HKBA accordingly invites the Department of Justice to reconsider the matter relating to a reservation under Article 95

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[15] The CISG Advisory Council is an authoritative body of judges and academics expert in the field of international trade law that issues opinions and declarations on the Convention with the aim of ensuring a uniform application and interpretation of the Convention: 'Welcome to the CISG Advisory Council (CISG-AG) <http://www.cisgac.com/>.

[16] Declaration No. 2 at [2].

[17] *Ibid.*

and, if it maintains the view that the reservation should be made, to clarify the potential confusion that may arise.

E. Consultation Question 5: Draft Legislation

29. In relation to the proposed legislation that would implement the Convention in Hong Kong, as set out at Annex 4.1 to the Consultation Paper, the HKBA invites the Department of Justice to consider the following:

    (1) The new ordinance may be called the "*International Sale of Goods (United Nations Convention) Ordinance*", as opposed to "*Sale of Goods (United Nations Convention) Ordinance*", to distinctly identify the legislation as applicable only to *international* sale of goods.

    (2) There is no need to exclude subparagraph (1)(b) of Article 1 of the Convention under the proposed Section 4(1) for the reasons set out above.

HONG KONG BAR ASSOCIATION
3 August 2020

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27 October 2020

International Law Division (Treaties & Law Unit)
7/F., Main Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong
Attn.: Miss Katie Kwong, Senior Government Counsel

BY EMAIL
AND BY POST

Dear Miss Kwong,

Re: Consultation Paper on Proposed Application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region

I refer to the captioned matter and enclose a copy of the Law Society's Submissions for your attention.

The Law Society has no objection to the Submissions being passed to other relevant bodies or published, in connection with the consultation exercise.

Lastly, I thank you for your indulgence for the time extension rendered for us to respond to the Consultation.

Yours sincerely,

Kally Lam
Assistant Director, Practitioners Affairs

THE LAW SOCIETY OF HONG KONG 香港律師會

CONSULTATION PAPER ON THE PROPOSED APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS TO THE HONG KONG SPECIAL ADMINISTRATIVE REGION

SUBMISSIONS

1. In March 2020, the Department of Justice issued a consultation paper on the proposed application of the United Nations Convention on Contracts for the International Sale of Goods ("CISG") to the Hong Kong Special Administrative Region ("Hong Kong") for public views and comments.

2. The Law Society of Hong Kong has reviewed the Consultation Paper and has the following comments on the consultation questions posed.

Question 1:
We would welcome views and comments, in particular from the Hong Kong business and legal sectors, on: (a) What proportion of their sale of goods contracts with a non-Hong Kong business are governed by Hong Kong law (as compared with non-Hong Kong law)? (b) Where such contracts are governed by non-Hong Kong law, which non-Hong Kong law is the most commonly chosen? (c) What proportion of such contracts include the express choice of the CISG in their governing law clauses? (d) Whether there is any experience of being advised to exclude the application of the CISG in their governing law clauses?

Law Society's Response:

3. (a) According to our members' experience, this depends on where the non-Hong Kong business is located. Hong Kong business is generally more familiar with Hong Kong law and English law. As such, the contracts are often governed by either Hong Kong law or English law. However, depending on the negotiating power of the non-Hong Kong business, the parties may also agree on another governing law. We cannot say for certain about the exact proportion but we would say that a fair amount of contracts concluded by a Hong Kong business with a non-Hong Kong business are still governed by Hong Kong law. Of course, our members have seen PRC law and/or CISG as applicable law.

(b) English law.

(c) As the UK is not a party to the CISG, it is uncommon for such contracts to include the express choice of the CISG. But for non-English speaking countries and the CISG Contracting States, the CISG is often chosen.

(d) Not so often. As Hong Kong is not a party to the CISG, only where the parties choose to adopt a governing law of a CISG Contracting State that may trigger the applicability of the CISG. In other cases, where a Hong Kong business is involved and English law is adopted, the CISG is *prima facie* not applicable to such contracts.

Question 2:
We would welcome views and comments on whether the CISG should be applied to Hong Kong.

Law Society's Response:

4. We believe that the CISG should be applied to Hong Kong for the following reasons.

5. **Widespread recognition and adoption of CISG:** as per the information contained in the Consultation Paper, as of 1 February 2020, there are 93 parties to CISG, including most of Hong Kong's top 20 trading partners, such

as Mainland China, the USA, Singapore, the European countries and Australia. It is not uncommon for countries adopting a common law system (such as Singapore and Australia) to apply the CISG.

6. **Enhancing Hong Kong's status as a dispute resolution hub for CISG disputes:** as noted by the Consultation Paper, about half of the Belt and Road Initiative ("BRI") participating countries have become a party to the CISG and there has been a growing trend for the BRI countries to join the CISG in recent years. Taking into account the cultural and legal differences in various BRI countries, for example, the different legal systems, it would be advantageous if the CISG is extended to Hong Kong to govern the sale of goods contracts concluded with other BRI countries. This could promote certainty by adopting a unified regime for sale of goods disputes. More importantly, should the CISG apply in Hong Kong, the foreign business may have more confidence to agree on Hong Kong law being the governing law and to resolve any disputes in Hong Kong. This could greatly sharpen Hong Kong's edge as an international dispute resolution hub and more legal talent in Hong Kong will be required to deal with such disputes.

7. **CISG and Hong Kong domestic laws do not have grave differences that lead to incompatibility:** where the CISG is applicable, it will prevail over domestic law unless such issues are not determinable by the CISG provisions. Some notable differences between the CISG and the Sale of Goods Ordinance (Cap. 26) ("SOGO") include but are not limited to the following:-

    - Article 11 of the CISG would override the parol evidence rule that is commonly known in the common law system by allowing the proof of a contract of sale by any means, including witness.

    - Articles 38 and 39 of CISG impose a stringent obligation on the buyer to give notice to the seller on the defective goods within as short a period as is practicable in the circumstances, but in any event within a period of two years from the date of receipt of the goods by the buyer.

    - Possibility of suspension by one party after contract conclusion (Article 71 of CISG).

- Article 79 of CISG (re exemption of liability due to an impediment beyond a party's control) is similar to the doctrine of frustration. But there is no such provision in SOGO.

- Unlike SOGO, CISG is not concerned with the effect which the contract may have on the property in the goods sold.

Overall, most of the principles and provisions in the CISG are not irreconcilable with the provisions in SOGO or the common law legal concepts.

8. **CISG allows flexibility for the parties to exclude its application:** for the parties who are not so comfortable with CISG, they may choose to exclude its application by making express provisions in the contract.

9. As set out in the Consultation Paper, the implementation of the CISG in Hong Kong may disturb the status quo and would distract from the common law. However, we consider that the pros outweigh the cons of implementing the CISG in Hong Kong.

10. We note that Article 95 of the CISG allows a Contracting State to the CISG to declare that it will not be bound by Article 1(1)(b) of the CISG and China has made such a reservation/declaration. Consideration should be given as to whether Hong Kong should make a reservation on Article 1(1)(b) of the CISG, i.e. where there is a sale of goods contract concluded between parties in two different states (but not two different CISG Contracting States), the CISG is not automatically applicable notwithstanding that Hong Kong law is the governing law of the contract. We are of the view that Hong Kong should mirror the reservation and declaration that have been made by China, if the CISG is extended to Hong Kong.

11. We agree that the CISG can be implemented in Hong Kong by enacting a separate ordinance and making it clear that the CISG provisions and principles would prevail to the extent there is any inconsistency between the new ordinance and domestic laws (including SOGO and other relevant common law principles).

Consultation Question 3:

In respect of sale of goods contracts between Hong Kong businesses and non-Hong Kong businesses, we would welcome views and comments (in particular from the Hong Kong business and legal sectors) on:

(a) Why would one choose to opt out of the CISG in such contracts?

(b) The likelihood of opting out of the CISG in such contracts if given the opportunity?

Law Society's Response:

12. (a) This is ultimately a question of agreement by the parties and a matter of commercial decision. It could be the case that some parties are not so familiar with the CISG and they may want to resort to the domestic law that they feel more comfortable with. Some parties may wish to opt out due to the reason that their jurisdiction does not apply the CISG; for example, a UK buyer may not wish to adopt the CISG given UK is not a Contracting State to the CISG.

(b) For the sale of goods contracts between a Hong Kong business and a non-Hong Kong business, once the CISG is extended to be applicable in Hong Kong, we believe there may be a certain number of parties that may wish to exclude its applicability at the very initial stage of its application due to their unfamiliarity with the CISG. In the long term, we believe more parties are willing to apply the CISG to their contracts as this will provide a neutral set of default rules that are generally welcomed by both sides.

Consultation Question 4:

In respect of sale of goods transactions between Mainland China and Hong Kong, should our local legislation, which seeks to implement the CISG, also apply where the parties to those transactions have their respective places of business in Mainland China and Hong Kong?

Law Society's Response:

13. We generally agree that in respect of sale of goods transactions between Mainland China and Hong Kong, our local legislation, which seeks to

implement the CISG, could also apply where the parties to those transactions have their respective places of business in Mainland China and Hong Kong.

14. However, we suggest that a better way to achieve this is for Mainland China and Hong Kong to enter a mutual arrangement concerning the applicability of the CISG to the parties having respective places of business in Mainland China and Hong Kong, which is similar to the arrangement for reciprocal enforcement of arbitral awards between Mainland China and Hong Kong based on the spirit of the New York Convention. This can ensure the reciprocal applicability of the CISG provisions in the case where the parties adopt the PRC law. This can also avoid confusion which may be created by including such arrangement in the same ordinance for applying the CISG in Hong Kong, since Hong Kong is only a territorial unit of China and the CISG provisions should not be directly applicable to the parties having respective places of business in Mainland China and Hong Kong.

Consultation Question 5:
We welcome the public's comments on the draft legislative provisions to implement the CISG in Hong Kong law (as attached to Annex 4.1 to the Consultation Paper).

Law Society's Response:

15. We refer to our comments at paragraphs 12 and 13 above.

The Law Society of Hong Kong
27 October 2020

Hong Kong General Chamber of Commerce
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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"), 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).[1]

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

[1] 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".[2] 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".[3]

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 of 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".[4]

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

[2] CP paras 3.57 and 3.59.
[3] CP para 3.52.
[4] 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.[5] 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.[6] 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".[7].

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".[8] (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.[9] 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

[5] CP paras 2.59, 2.60.
[6] CP para 3.100.
[7] CP para 3.83.
[8] CP paras 3.93, 3.94.
[9] 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

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11 December 2020

Mr. George Leung, CEO
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway
Admiralty,
HONG KONG

Dear Mr. Leung,

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

Thank you for HKGCC's letter dated 18 September 2020 in response to our Consultation Paper on the proposed application of the CISG to the HKSAR ("**Consultation Paper**" or "**Consultation**") and for the valuable comments set out in it. Our Department is currently studying all the submissions received regarding the Consultation before formulating its recommendations to the HKSAR Government on the way forward.

Whilst it would be premature for us to indicate our Department's recommendations at this stage as we are still carefully studying the submissions, it may be helpful for us to provide our preliminary views on certain points raised in HKGCC's letter.

We note that while the HKGCC is appreciative of the benefits of the proposed application of the CISG to the HKSAR, it has a few specific concerns. Firstly, it suggested that a cost-benefit analysis be conducted before adopting the proposal. In this relation, from our study of the economic and legal considerations as detailed in Chapter 3 of the Consultation Paper with overseas experience taken into account, it appears that the benefits of the proposal would outweigh the initial costs of adaptation (including those arising from review of the relevant

contractual documents). Moreover, as noted by a number of respondents to the Consultation, for business parties based in different CISG Contracting States, the automatic application of a set of well-tested, fair and neutral law to regulate the formation of sales contract and the rights and obligations of the sellers and buyers would facilitate cross-border trade. The value of this benefit cannot be over-emphasized in respect of trade with Belt and Road countries about half of which have become a party to the CISG.

"The effect of the Proposal on Freedom of Contract"

Secondly, we note from paragraphs 7 to 9 of HKGCC's submission that there are some concerns on freedom of contract of the businesses. On this issue, as you would agree, the choice of law question for a sale of goods contract (like other contractual terms) is largely a question of agreement by the parties and a matter of commercial decision, to which the bargaining power of the respective parties will be an important factor.

Regarding the scenario referred to in paragraph 7 of HKGCC's submission, it appears that the premise of such a scenario is that the Hong Kong business and its overseas counterpart may have difficulties in agreeing on the governing law of the contract, be it Hong Kong law, the law of the jurisdiction of the overseas counterpart or the law of a third jurisdiction. It further appears that the scenario could arise with different fact patterns. For example, the overseas counterpart may be located in a CISG Contracting State (e.g. Viet Nam) and that party may insist on choosing, as the governing law of the contract, domestic Vietnamese law (excluding the CISG) as its first preference and if the Hong Kong business cannot agree to it, it may offer either Vietnamese law (with the CISG implemented therein) or the law of a third jurisdiction as another option[1]. In other words, the scenario referred to in the said paragraph 7 is one potentially faced by Hong Kong businesses even under the status quo (i.e. even without the CISG applying to the HKSAR) as they transact with their overseas counterparts coming from different parts of the world including CISG Contracting States[2].

Bearing this context in mind, the application of the CISG to the HKSAR will have the attraction that, when faced with the above scenario (i.e. each party to the contract may have difficulties convincing the other to accept its preferred choice of law clause), the Hong Kong business in question will have an ***additional*** choice of law option (namely, the CISG as implemented into Hong Kong law) to put on the negotiation table, such that if agreed by its overseas

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1 Under Article 1(1)(b) of the CISG, the Convention applies to contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State.

2 It is noted that such scenario may arise more and more frequently as the number of CISG Contracting States continues to grow. For completeness, at present, there are 94 Contracting States to the CISG.

counterpart, the contract will be governed by the CISG and possibly also by Hong Kong law. In this regard, it is important to note that the CISG (under its Article 6) gives parties to the contract the ***freedom*** to derogate from or vary the effect of any its provisions[3] as well as the ***freedom*** to exclude the CISG in its entirety in accordance with their agreed commercial decision.

Further, on the questions of "why not keep the status quo and opt into the CISG as needed; why should the default choice be opting in, leaving parties who wish to be governed by local Hong Kong law to opt out?", the problems/risks with opting in by Hong Kong businesses under the status quo (i.e. without the CISG applying to the HKSAR) are highlighted in the Consultation Paper at paragraphs 2.55 to 2.60. In brief, under the status quo, a Hong Kong business can choose to use the CISG to govern its contracts by various means e.g. by choosing the law of a CISG Contracting State as the governing law of the contract or by incorporating the CISG provisions as contractual terms etc. However, the difficulties with these options are in gist that, without the CISG applying to the HKSAR, a Hong Kong business cannot effectively create a contract which is governed by the CISG ***and*** possibly also Hong Kong law, and the CISG cannot be used as originally designed (for example, if the CISG provisions are incorporated as contractual terms only, it is likely that the approach to interpreting those provisions/terms would depart from the approach under the CISG, chiefly its Article 7[4]). Therefore, although Hong Kong businesses and their overseas counterparts can choose to opt-in under the status quo, the problems/risks associated with such choice cannot be dismissed.

In view of the above, the argument that non-application of the CISG to the HKSAR (the "existing opt-in position" in respect of Hong Kong law) gives Hong Kong businesses greater freedom to negotiate the choice of law clause/other terms of their cross-boundary sale of goods contracts may not be entirely well justified.

Inputs of the Hong Kong legal profession to the Consultation Questions

Since the adoption of the CISG involves introducing a new aspect to Hong Kong's law governing cross-boundary sale of goods contracts, we agree with HKGCC's comment in its submission that input from the Hong Kong legal profession would be important and useful in considering the Consultation questions. In this regard, we have received submissions from, among others, the Hong Kong Bar Association and the Law Society of Hong Kong (accessible in

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3 The exception is that the parties cannot derogate from or vary Article 12 of the CISG (please see Consultation Paper paragraph 1.70).

4 Article 7(1) of the CISG provides 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." (emphasis added)

their respective websites). In gist, they are both in favour of extending the CISG to the HKSAR, subject to a few specific points including the title of the proposed legislation, whether Art 1(1)(b) of the CISG should be applicable to the HKSAR etc.

Commencement of any implementing legislation

Lastly, noting HKGCC's concern about changing the status quo, we plan that should it be decided that the CISG is to be applied to the HKSAR, there will be ample time between the enactment of the implementing legislation and its taking into effect so that stakeholders, including the business sector, can adapt to the change and adjust their business practice and affairs as appropriate.

We trust that our comments above would assist in addressing HKGCC's concerns raised in its submission. We would be pleased to meet with you and your HKGCC colleagues to elaborate on the above, if needed. Please feel free to contact my colleague Mr Peter Wong, Deputy Law Officer (at peterwong@doj.gov.hk or 3902 8580) or Miss Katie Kwong, Senior Government Counsel (at katiekwong@doj.gov.hk or 3918 4780) for this purpose.

Yours sincerely,

(Linda Lam)
Law Officer (Acting)
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此乃中文譯本，僅供參考。

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梁先生：

有關《聯合國國際貨物銷售合同公約》(《銷售公約》)
適用於香港特別行政區(香港特區)建議諮詢文件

2020 年 9 月 18 日來信收悉。承蒙貴會回應《銷售公約》適用於香港特區建議諮詢文件(**諮詢文件**或**諮詢**)並提出寶貴意見，謹此致謝。律政司現正研究是次諮詢收到的所有意見書，稍後會就未來路向給香港特區政府提出建議。

由於律政司仍在仔細審閱收到的意見書，在現階段表述其建議為時尚早。然而，我們或可就貴會信中的某些觀點提供初步意見。

我們得知貴會了解《銷售公約》建議適用於香港特區的好處，但對一些具體問題表示關注。首先，貴會提議在採納有關建議前進行成本效益分析。就此，根據我們經參考海外經驗後對經濟和法律考慮所作的研究(詳載於諮詢文件第 3 章)，建議的效益似乎超過作出適應的初始成本(包括因檢視有關合同文件而產生的成本)。再者，正如一些回應諮詢的人士指出，對以不同《銷售公約》締約國為根據地的商界人士而言，一套行之有效、公平和中立的法律自動適用，以規管銷售合同的訂立和買賣雙方的權利和義務，可促進跨境貿易。這一好處的價值在與"一帶一路"沿線國家進行貿易時更顯珍貴，因為當中約半數國家都是《銷售公約》締約方。

"建議對訂立合同自由的影響"

第二，貴會意見書第 7 至 9 段提到對企業訂立合同自由有所關注。就此，相信貴會也同意，貨物銷售合同的法律選擇問題(一如其他合同條款)基本上是當事各方之間協議的問題，屬於商業決定，當事各方的議價能力是箇中的重要因素。

關於貴會意見書第 7 段所指的情形，其前提似乎是香港企業與海外交易對手可能難以就合同的適用法律(不論是香港法律、海外交易對手所屬司法管轄區法律，還是第三司法管轄區法律)達成協議。該情形似乎也可能在不同事實情況下出現。舉例說，海外交易對手位於《銷售公約》締約國(例如越南)，堅持以越南當地法律(排除《銷售公約》)為合同適用法律的首選，而香港企業無法同意，海外交易對手遂提出越南法律(當中實施《銷售公約》)或第三司法管轄區法律作為另一選項 [1]。換言之，即使按照現狀(即沒有把《銷售公約》適用於香港特區)，香港企業與世界各地(包括《銷售公約》締約國)的海外交易對手交易時，仍可能要面對貴會意見書第 7 段所指的情形 [2]。

正因如此，把《銷售公約》適用於香港特區的吸引之處，在於相關香港企業遇到上述情形(即合同當事各方難以說服另一方接受其首選的法律選擇條款)時，會有***額外***的法律選擇選項(即落實納入香港法律的《銷售公約》)可供談判，如獲海外交易對手同意，有關合同便受《銷售公約》規管，也可能受香港法律規管。就此而言，必須注意的是，《銷售公約》(根據第 6 條)讓合同當事各方有***自由***可以減損《銷售公約》的任何規定或改變其效力 [3]，以及有***自由***可以排除整份《銷售公約》，以符合彼此同意的商業決定。

此外，關於"為何不維持現狀並按需要選擇適用《銷售公約》？為何預設選擇應是選擇適用公約，以致希望受香港本地法律規管的當事各方要另作不適用公約的選擇？"等問題，《諮詢文件》第 2.55 至 2.60 段概述本港企業在維持現狀下(即沒有把《銷售公約》適用於香港特區)選擇適用《銷售公約》會面對的問題／風險。簡而言之，按照現狀，本港企業可通過不同方式選用《銷售公約》規管其合同，例如選擇某《銷售公約》締約國的法律作為合同的適用法律或把《銷售公約》的條文納入為合同條款等。然而，此等方案也會引起難題，扼要言之，在沒有把《銷售公約》適用於香港特區的情況

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[1] 根據《銷售公約》第1條第(1)款(b)項，如果國際私法規則導致適用某一締約國的法律，《銷售公約》便適用於營業地在不同國家的當事人之間所訂立的貨物銷售合同。

[2] 隨着《銷售公約》締約國數目不斷增加，上述情形可能愈發常見。為提供完整資料，《銷售公約》現有94個締約國。

[3] 惟當事各方不得減損或改變《銷售公約》第12條。(請參看諮詢文件第1.70段)。

下，本港企業無法有效訂立受《銷售公約》*及*也可能受香港法律規管的合同，而《銷售公約》亦未能按原先的設定所用(例如若只把《銷售公約》的條文納入為合同條款，則解釋此等條文／條款的方式相當可能會偏離《銷售公約》(主要是第 7 條[4])所訂的方式)。因此，雖然本港企業及其海外交易對手在維持現狀下可選擇適用《銷售公約》，但不能排除會出現與此選項相關的問題 ／風險。

鑑於上述情況，若指《銷售公約》不適用於香港特區(就香港法律而言即維持"現有選擇適用狀況")可讓本港企業有更大自由度談判其跨境貨物銷售合同的法律選擇條款／其他條款，恐怕沒有充分理據支持。

本港法律專業對諮詢問題的意見

由於採納《銷售公約》將為香港規管跨境貨物銷售合同的法律帶來新一面，我們同意貴會在意見書所言，本港法律專業提出意見有助研究諮詢問題，亦對有關研究相當重要。就此，我們收到多方的意見書，包括香港大律師公會和香港律師會的意見書(分載於兩會的網頁)。扼要而言，兩會均贊成把《銷售公約》延伸至適用於香港特區，但也提出幾點具體意見，包括擬議法例的標題，以及《銷售公約》第 1 條第(1)款(b)項應否適用於香港特區等。

落實建議的法例生效日期

最後，鑑於貴會對改變現狀有所關注，我們計劃一旦決定把《銷售公約》適用於香港特區，將在制定落實建議的法例與法例生效之間預留充足時間，讓包括商界在內的持份者適應轉變，並適當地調整營業手法和業務。

我們相信上文有助回應貴會在意見書中表達的關注。如有需要，我們樂意與閣下及貴會各員會面，詳細解釋相關內容。有關會面安排，請與本科副國際法律專員黃慶康先生(電郵：peterwong@doj.gov.hk；電話：3902 8580)或高級政府律師江曉彤女士(電郵：katiekwong@doj.gov.hk；電話：3918 4780)聯絡。

國際法律科署理律政專員林美秀

2020 年 12 月 11 日

4 《銷售公約》第7條第(1)款訂明："在解釋本公約時，應考慮到本公約的**國際性質**和**促進**其適用的**統一**以及在國際貿易上遵守誠信的需要。"(**粗體及**底線為本文所加)

附件 6

就諮詢問題 4 收集所得的回應摘要

諮詢問題 4(**問題 4**)：就中國內地與香港之間的貨物銷售交易而言，若交易各方的營業地分別位於中國內地及香港，旨在實施《銷售公約》的香港本地法例應否也適用？

* 除第 6 項外，以下引述乃中文譯本。

回應者	支持	收集所得的詳細回應*
1. 香港大律師公會	✓	• 同意《諮詢文件》第 4.10 段中的建議[1]，並認為"此舉合乎邏輯，也符合'一國兩制'原則"。
2. 保險業監管局		• 認為使《銷售公約》條文適用於問題 4 所指的交易，"可能促進大灣區的貿易發展，並可支援參與'一帶一路'倡議的企業，惟若在執行此類交易合同時(而《銷售公約》條文適用)，香港和內地法院做法當然必須一致。"
3. 香港律師會	✓	• 大致上同意問題 4 中的建議。 • 但建議"落實建議的較佳方法"是中國內地與香港就《銷售公約》適用於營業地分別位於中國內地及香港的當事各方達成相互安排；認為此舉可"確保在當事各方採用中華人民共和國法律的情況下，《銷售公約》條文可相互適用"，並且"避免把此類安排納入使《銷售公約》適用於香港的同一條例內而可能引起混淆"。

[1] 《諮詢文件》第 4.10 段指出："然而，即使《銷售公約》不會自動適用於這些交易，鑑於中國內地與香港經濟關係緊密，為利便兩地企業之間的貨物銷售，現建議新訂條例單方面包含條文，使《銷售公約》規則實質上適用於營業地分別位於中國內地與香港的當事各方之間所訂立的貨物銷售合同。"

回應者	支持	收集所得的詳細回應*
個別人士		
4. 曹麗軍先生(北京中倫律師事務所合伙人)	✓	• 認為《銷售公約》如在中國內地與香港之間適用，會"減少在不同法律傳統的地區之間進行交易而產生的誤解及法律費用"；儘管"香港的法律費用"短期內可能上升(例如因為修訂或更新合同範本的標準條款)，但這些"僅屬短期成本，會因《銷售公約》適用而隨時間下降"。 • 關於問題4的建議，回應者認為"單憑在香港通過新法例，未必能達致預期效果[即除非當事各方選擇不適用，否則《銷售公約》規則自動適用於中國內地與香港之間的交易]，因為有關法例在中國內地不會具有法律效力。"回應者認為，"為使《銷售公約》有效適用於中國內地與香港之間的貨物銷售交易，兩地需制定安排(或在中國內地實施可達致類似效果的相關法例；又或兩者並行)。如沒有相關安排／法例，回應者則關注中國內地會如何處理相關情況。
5. 何嘉俊先生(中國法律研究中心研究員)	✓	• 除了把《銷售公約》延伸至中國內地與香港之間的交易，也應涵蓋例如香港與澳門之間的交易。
6. 李巍教授(中國政法大學國際法學院)		• 認為《銷售公約》(即使在香港適用和實施)不適用於中國內地與香港當事各方之間的交易；提議其中一個可行方案是鼓勵香港企業與中國內地企業訂立銷售合同時，選擇以《銷售公約》作為規管其合同的適用法律。回應者認為此類合同條款屬於當事方意

回應者	支持	收集所得的詳細回應*
		思自治，“應該合法有效”和“陸港兩地都會尊重”。
7. 劉橋教授和王江雨教授(香港城市大學法律學院中國法與比較法研究中心)	✓	• 認為營業地在香港和中國內地的當事各方之間訂立的貨物銷售合同須符合《銷售公約》所載的統一規則，這“對收回《銷售公約》的經濟效益至關重要”。 • 認為要令此相互運作得宜，香港與中國內地之間須訂立雙互安排，有關安排會(a)“為統一規則的約束力及相應實施措施的合法性”提供“法律基礎”；以及(b)要求不論把有關爭議訴諸香港或中國內地的法院，都應採用同一套規則。在這方面，回應者又認為“這也是在‘一國兩制’框架下合理可行甚或自然的做法，因為根據‘一國兩制’框架，在中國內地法律及香港法律制度下，香港和中國內地被視作兩個司法管轄區看待和處理。”
8. 鄔楓博士(香港中文大學法律學院院長暨偉倫法律學講座教授)	✓	• 認為應容許香港及中國內地企業受惠於《銷售公約》的優勢，“若在香港實施《銷售公約》，卻不讓其適用於香港與中國內地當事各方之間訂立的大部分跨境貨物銷售交易，則甚為可惜。” • 儘管有《銷售公約》第1條的規定，但讓《銷售公約》適用於香港與中國內地當事各方之間的銷售交易，可加強“一國兩制”理念。