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Paper for the House Committee meeting on 10 September 2021

Bills Committee on Sale of Goods (United Nations Convention) Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Sale of Goods (United Nations Convention) Bill ("the Bills Committee").

Background

2. According to the Legislative Council Brief (File Ref.: IL/ITF/1/81), the United Nations Convention on Contracts for the International Sale of Goods ("CISG") is an important and widely adopted commercial law treaty that provides a set of uniform rules governing contracts for the international sale of goods within its scope. It represents a modern and fair regime that introduces certainty in commercial exchanges and decreases transaction costs. The proposed application of CISG to Hong Kong seeks to enhance Hong Kong's legal infrastructure for international sale of goods and bolster its role as an international hub for trade and dispute resolution. The People's Republic of China ("China") is a Contracting State to CISG,¹ but CISG is currently not applicable to Hong Kong. The Administration has sought the support of the Central People's Government ("CPG") for CISG's application to Hong Kong. The Bill is introduced into the Legislative Council ("LegCo") with a view to implementing CISG in Hong Kong.²

¹ China has made a reservation under Article 95 of CISG. It means that China applies CISG rules only to international sale contracts between parties whose places of businesses are in different Contracting States; but not to international sale contracts where the rules of private international law lead to the application of the law of a Contracting State.

² Whilst China has made a reservation under Article 95 of CISG, in the light of certain responses from the consultation and after careful consideration, the Administration seeks to apply CISG without China's Article 95 reservation to Hong Kong.

The Bill

3. The Bill seeks to implement CISG in Hong Kong. The main provisions of the Bill are as follows:

- (a) clause 3 seeks to provide that the enacted Ordinance (if the Bill is passed) would apply to the Government;
- (b) clause 4 seeks to give CISG the force of law in Hong Kong;
- (c) clause 5 seeks to provide that if there is any inconsistency between the enacted Ordinance or CISG and any other law, the enacted Ordinance or CISG would prevail to the extent of the inconsistency; and
- (d) the Schedule to the Bill contains the text of CISG.

Provisions of CISG

4. CISG, as set out in the Schedule to the Bill, contains 101 articles divided into four Parts: (i) general rules (Articles 1 to 13), (ii) provisions on formation of contract including on offer, revocation, acceptance and withdrawal (Articles 14 to 24); (iii) provisions on rights and obligations of the seller and the buyer arising from international sale of goods contracts, together with remedies in case of breach (Articles 25 to 88); and (iv) final provisions, including the rules of ratification and entry into force, as well as reservations (Articles 89 to 101).

The Bills Committee

5. At the House Committee meeting held on 16 July 2021, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon Steven HO Chun-yin, the Bills Committee held a meeting with the Administration on 20 August 2021. The Bills Committee decided to invite views in writing from the general public vide an announcement on the website of LegCo, and no submission has been received before the deadline. The membership list of the Bills Committee is in the **Appendix I**.

Deliberations of the Bills Committee

Application of CISG to Hong Kong

6. Members note that CISG was not applied to Hong Kong prior to 1 July 1997 and that during and after the transition, China has not deposited notification with the Secretary General of the United Nations for applying CISG to Hong Kong. A member enquires why the Administration only starts to seek the application of CISG to Hong Kong according to Article 153 of the Basic Law some 20 years after the Reunification, albeit that China has already been a Contracting State since 1 January 1988.

7. The Administration explains that over the past 20 years or so, it has from time to time conducted internal reviews on the issue, and realizes that it is now opportune to apply CISG to Hong Kong to complement Hong Kong's overall economic and legal infrastructure development, especially in view of CISG's wide acceptance internationally to date. Added to the consideration is the general support from the business sector and the legal sector that the Administration has gauged during the 7-month consultation on CISG's application. In this relation, the application of CISG to Hong Kong would bring about several benefits. Given that almost all major trading members of the World Trade Organization (including, for example, China, the United States, Japan, Singapore, South Korea and Germany) and nearly half of the countries participating in the Belt and Road Initiative are members of the CISG and that in 2020, more than half of Hong Kong's top 20 trading partners by total volume of trade are Contracting States to the CISG³, its application to Hong Kong has the potential to facilitate Hong Kong's GDP and trade growth.

8. On members' further enquiry in respect of the benefits that CISG will bring to Hong Kong, the Administration advises that after CISG's application, Hong Kong businesses can have an additional choice of law option, namely utilizing CISG as designed with Hong Kong law being used as its residual law, an option that is not available under the status quo because CISG is not part of the Hong Kong law. Alternatively, parties can choose to be governed solely by the local Hong Kong law rather than CISG⁴ by agreement under the principle of party autonomy. The Administration stresses that applying CISG will prevent Hong Kong businesses, especially small and medium sized enterprises, from being subject to unfamiliar foreign laws when entering into cross-boundary transactions. Hong Kong businesses

³ For completeness, the CISG does not apply to Mainland – Hong Kong transactions: see paragraph 14 of Legislative Council Brief (File Ref: IL/ITF/1/81) for details.

⁴ Executive Summary of the Consultation Paper (available at: https://www.doj.gov.hk/en/featured/pdf/CISG_Eng_Executive_Summary_PDF.pdf), paragraphs 62 to 70.

may therefore derive benefits from the default application of the fair and uniform regime of CISG to contracts falling within its scope. Furthermore, it will help bolster Hong Kong's role as legal service centre and dispute resolution hub.

9. Members note that after the passage of the proposed legislation, the Government will need to seek the assistance of CPG in completing the necessary steps for the proposed application of CISG to Hong Kong. In the light of the fact that there are more than 200 international conventions (or multilateral treaties) to which China is a party and which are presently not applicable to Hong Kong, members urge the Administration to proactively review their applicability and seek the advice and support of CPG for their application to Hong Kong as and when appropriate.

Implication of applying CISG to Hong Kong businesses

10. Noting that clause 5 of the Bill seeks to provide that if enacted, the Sale of Goods (United Nations Convention) Ordinance ("Ordinance") or CISG will prevail over any other law in case of any inconsistency, some members have expressed concern that the application of CISG may put Hong Kong businesses in a less favourable position, as the majority of the businesses and legal professionals in Hong Kong are unfamiliar with the provisions of CISG at present and the way it can be applied in the context of international trade. In particular, there may be differences between the existing contractual terms commonly adopted by Hong Kong businesses and the provisions of CISG. In this regard, members suggest the Administration to provide necessary assistance to the trades for adapting to CISG's implementation, such as providing the legal profession and the relevant trades with samples of standard contracts in conformity with CISG, or setting up a dedicated team for providing professional advice after the Ordinance (if enacted) comes into effect. Members also urge the Administration to step up communication efforts with businesses and the legal profession to promote the merits and knowledge of the implications of applying CISG to Hong Kong.

11. The Administration advises that the terms and conditions laid down in the contracts as agreed by both parties to the international sale of goods will form the major foundation governing the transaction. CISG can fill in the gaps in respect of issues which may not have been explicitly provided for in the contracts, for instance, matters relating to the formation of contract, rights and obligations of the seller and the buyer, as well as remedies for breach. Hence, CISG can bring profound benefits to Hong Kong businesses in that it can reduce disputes and enhance trade efficiency. In addition, pursuant to Article 6 of CISG, the parties can, by agreement, derogate from or vary the effect of any provisions of CISG, or exclude

CISG's application entirely under the party autonomy principle. The Administration points out that parties to the international sale of goods may therefore decide on the best-suited contractual terms based on the particular circumstances.

12. On the promotion of CISG, the Administration advises that a dedicated website has been set up by the Department of Justice on CISG to provide interested stakeholders with publicly accessible information and resources. The Administration adds that since CISG has been in force for many years, there are ample resources and references on the Internet such as the CISG database of Pace University in New York, U.S. and those available at the website of the United Nations Commission on International Trade Law. In addition, noting that relevant stakeholders may require time to adapt to the change and adjust their business practice as appropriate, the Administration will defer the commencement of the Ordinance (if enacted) until at least six to nine months after the passage of the Bill. In the meantime, the Administration will collaborate with the business and legal sectors to further promote CISG and the Ordinance (if enacted). A member proposes that the commencement of the Ordinance (if enacted) should take place at least one year after the passage of the Bill.⁵

Consultation with relevant stakeholders

13. Some members consider that the implementation of CISG will have far-reaching impact on Hong Kong businesses and the legal profession in relation to the international sale of goods, and query whether sufficient and extensive consultation has been made with the trades before the Administration puts forward the current legislative proposal. Questions are put on how the Administration has conducted relevant consultations, whom the Administration has consulted and the responses received. There are also comments that the Administration could have gauged the views of the trades through LegCo Members returned from the functional constituencies of commercial, import and export, wholesale and retail as these Members have extensive network with businesses in the international trade, and they can play a pivotal role in promoting the implementation of CISG in Hong Kong.

14. The Administration advises that a public consultation on the application of CISG to Hong Kong was conducted for a period of seven months from 2 March to 30 September 2020 on specific questions of implementing CISG in Hong Kong. Invitation for views was extended to local and overseas chambers of commerce, public bodies, legal professional bodies and the academia. The majority of the respondents, including the

⁵ Please see the Administration's response to this proposal attached as Appendix II.

Hong Kong Bar Association ("HKBA") and the Law Society of Hong Kong ("LawSoc"), supported the proposal. Public bodies such as the Hong Kong Trade Development Council also welcomed the implementation of CISG in Hong Kong. However, the Hong Kong General Chamber of Commerce ("HKGCC") expressed reservation on whether Hong Kong businesses would be better off with the current "opt-in" position or, assuming CISG would be applied to Hong Kong, with the proposed "opt-out" position. The responses from HKBA and LawSoc were relayed by the Administration to HKGCC with a view to addressing its concerns. No other trade associations or chambers of commerce have written to the Administration to express reservation. Due to the outbreak of the Coronavirus Disease 2019, online webinars were organized to engage different trades and to collect their views.

15. Members note that the Administration briefed the Panel on Administration of Justice and Legal Services of LegCo at meetings held in May 2019, May 2020 and March 2021 respectively regarding the salient features of CISG, the proposed application of CISG to Hong Kong, and the public consultation in this regard and its outcome. Various concerns expressed by Panel members are noted.

16. The Administration reiterates that it will maintain close liaison with LegCo Members and step up promotional efforts in explaining details of the legislation to the trades and the relevant stakeholders before the commencement of CISG's implementation in Hong Kong.

Reservation under Article 95 of CISG

17. Under Article 1(1)(a) of CISG, CISG applies automatically to contracts of sale of goods between parties whose places of business are in different Contracting States. CISG, under its Article 1(1)(b), also applies where the rules of private international law lead to the application of the law of a Contracting State. It is noted that several Contracting States, including China, have declared under Article 95 of CISG that they will not be bound by Article 1(1)(b). Members note that the Administration plans to apply CISG without China's Article 95 reservation to Hong Kong. Enquiries are made on the reasons why the above reservation will not be extended to Hong Kong.

18. The Administration explains that if China's Article 95 reservation is to extend to Hong Kong, Hong Kong will not be bound to apply CISG where the rules of private international law (of the forum) lead to the application of the law of a Contracting State. According to the Administration, during the consultation, there were views that advocate otherwise on the ground that Article 95 reservation would have the effect of limiting the practical

applicability of CISG governing transactions pertaining to international trade, thereby making the application of CISG more restrictive. Having carefully considered the issue and in light of the public views received, the Administration considers it in Hong Kong's interest to apply CISG without China's Article 95 reservation so that Hong Kong can apply CISG rules to both scenarios under Article 1(1)(a) and (b) of CISG.

Approach to implementing CISG in Hong Kong

19. The Legal Adviser to the Bills Committee points out that when implementing international agreements through domestic legislation, different approaches may be adopted, such as by incorporating the agreement texts into the bill (usually in the schedule), drafting legislative provisions to implement the agreement provisions with local adaptation, and making direct reference to the international agreement or the requirements under it⁶. The Legal Adviser enquires the reasons why the Administration has adopted the approach of setting out the text of CISG in the Schedule to the Bill in this legislative exercise, and what the general considerations in deciding the approach to use are.

20. The Administration explains that the above approach is adopted because CISG already provides a uniform text of law for international sale of goods and there is no need for adaptation and no room for amendment. This approach has also been adopted by other common law jurisdictions such as Australia, Canada and Singapore for implementing CISG domestically. The Administration supplements that the approach of drafting legislative provisions to implement the agreement provisions with local adaptation would be more appropriate, for instance, in situations where the international agreement concerned provides for certain outcome or result, such as criminal liability, but leaving room on the means to achieve such outcome or result.

21. In response to the enquiry on the necessity of amending local Hong Kong sales law such as the Sale of Goods Ordinance (Cap. 26) in light of the differences between the local laws and CISG provisions, the Administration advises that⁷ albeit there are differences identified, there does not appear to be any provisions of CISG that are fundamentally incompatible with the local Hong Kong law. Furthermore, under the current implementation proposal, CISG rules will be given prevailing effect under clause 5 of the Bill, so that there is no need to amend the existing local legislation governing international sale of goods for the implementation of CISG in Hong Kong. This is especially so as Article 6 of CISG also allows parties to the contract by agreement to opt out of CISG, or derogate from or vary the effect of any

⁶ References are made to LC Paper Nos. CB(2)1398/06-07(04) and CB(2)2059/06-07(01).

⁷ Reference is made to Annex to the Appendix of LC Paper No. LS93/20-21.

of the provisions of CISG.

Resumption of Second Reading debate

22. The Bills Committee notes that the Administration intends to resume the Second Reading debate on the Bill at the Council meeting of 29 September 2021. Members raise no objection to the Administration's proposal.

23. The Bills Committee and the Administration will not propose any amendments to the Bill.

Advice Sought

24. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 4
Legislative Council Secretariat
8 September 2021

Bills Committee on Sale of Goods (United Nations Convention) Bill

Membership list

Chairman Hon Steven HO Chun-yin, BBS, JP

Members Hon WONG Ting-kwong, GBS, JP
Hon CHUNG Kwok-pan
Hon Holden CHOW Ho-ding
Hon SHIU Ka-fai, JP

(Total : 5 Members)

Clerk Ms Sophie LAU

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By email

1 September 2021

Ms Sophie LAU
Clerk to the Bills Committee on
the Sale of Goods (United Nations Convention) Bill
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms LAU,

**Bills Committee on
the Sale of Goods (United Nations Convention) Bill (“the Bill”)**

Thank you for your letter dated 25 August 2021 inviting us to consider and provide a response in writing to the letter from Hon Holden CHOW dated 23 August 2021 (“Letter”) regarding the arrangement for the implementation of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) in the Hong Kong Special Administrative Region through the enactment of the Bill. The responses of the Department of Justice (“DoJ”) are set out below.

Commencement of the implementing ordinance

2. We appreciate Hon Holden Chow’s views in the Letter that the relevant sectors should be allowed sufficient time to prepare for the implementation of the new regime. Also noting that relevant stakeholders may require time to adapt to the change and adjust their business practice and affairs as appropriate, the Government therefore plans to defer the commencement of the implementing ordinance until at least six to nine months after its passage¹. During the period, we will collaborate with the legal and business

¹ See paragraph 10 of the Legislative Council (“LegCo”) Brief for the Bill, which is available at: https://www.legco.gov.hk/yr20-21/english/brief/ilitf181_20210707-e.pdf.

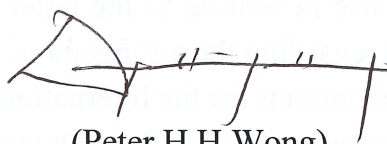
sectors to further promote the CISG and the implementing ordinance². We trust that the above arrangements would sufficiently assist the relevant sectors to get the necessary preparation.

Model contract samples

3. The Letter requests the Government to provide samples of model contracts for reference by the relevant private sectors. It would however not be appropriate for DoJ, as the Government's legal advisor, to do so. That said, we would like to draw Members' attention to the many informative reference materials on the CISG which are publicly available, for example, those on the respective webpages of the United Nations Commission on International Trade Law ("UNCITRAL")³ and the Institute of International Commercial Law ("IICL") of Pace University⁴ on the CISG. These webpages provide access to not only the texts of the CISG (in all of its authentic languages) but also relevant case law databases (and digest of case law), guides on applying the CISG, online lectures and scholarly articles on the CISG, as well as (in the case of the webpage of IICL) guides on drafting CISG contracts. In addition, DoJ currently maintains a featured webpage on the CISG⁵, with relevant useful information and resources (including links to the above two webpages) collected for easy access and reference by the public.

4. We would like to express our thanks to the Members again for their kind support to the Bill.

Yours sincerely,



(Peter H H Wong)

Deputy Law Officer (Treaties & Law)

² See paragraph 17 of the relevant discussion paper at the meeting on 22 March 2021 of the LegCo Panel on Administration of Justice and Legal Services, which is available at: <https://www.legco.gov.hk/yr20-21/english/panels/ajls/papers/ajls20210322cb4-648-3-e.pdf>.

³ The UNCITRAL's webpages on the CISG include: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg and <https://uncitral.un.org/cisg40>.

⁴ The IICL's "CISG Database" webpage is at: <https://iicl.law.pace.edu/cisg/cisg>.

⁵ The webpage is at: https://www.doj.gov.hk/en/featured/un_convention_on_contracts_for_the_international_sale_of_goods.html.