



HONG KONG BAR ASSOCIATION

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3 August 2020

Department of Justice
7/F Main Wing, Justice Place
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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.

香港大律師公會

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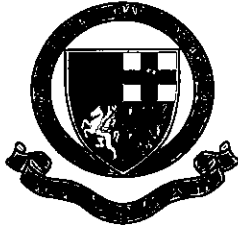
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HONG KONG BAR ASSOCIATION

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

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

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.

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 Council¹⁵ 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

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.

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3 August 2020