

Insights

CONSTRUCTION INDUSTRY PARTICIPANTS BEWARE: CISG AND CISOP AND THEIR IMPACT ON OVERSEAS PROCUREMENT

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SUMMARY

It is common for construction industry participants to source various machinery, materials or components from overseas for construction projects in Hong Kong, or to have part of the construction and fabrication or assembly works carried out outside Hong Kong before transporting them into Hong Kong.

There are two pieces of recent legislation that have a potential impact on these “overseas” procurement activities. They are (i) the Sale of Goods (United Nations Convention) Ordinance (Cap. 641) which came into effect in December 2022, and (ii) the Construction Industry Security of Payment Ordinance (Cap. 652) which was gazetted on 27 December 2024, with the bulk of which coming into operation in August 2025.

In this article, we will explore the changes brought about by these two pieces of legislation, and what those procuring such works or items should do and pay attention to when they source from international suppliers or contractors for construction projects in Hong Kong.

FIRST PIECE OF LEGISLATION: THE CISG

The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) is now law in Hong Kong, having come into effect in December 2022 under the Sale of Goods (United Nations Convention) Ordinance (Cap. 641). This development carries significant potential implications for construction industry participants who source from overseas.

The CISG was adopted by the United Nation Commission On International Trade Law (UNCITRAL) in 1980 and came into effect in 1988. There are now over 90 states who have adopted the CISG (see the [full list of signatory states and declarations made and whether the Convention is in force](#)),

including Australia, Canada, the PRC, Germany, Japan, Korea, Singapore and the US. (The UK is not a signatory state.)

The CISG applies to contracts for international sales of goods (“sales contracts”) and governs the formation of sales contracts, the rights and obligations of the buyer and the seller, and the available remedies. Rather than operating as a set of conflicts of law rules, the CISG is a substantive law convention that provides rules which domestic courts are required to apply to determine the merits of disputes arising from sales contracts to which the CISG applies.

Because there are significant conceptual differences between the CISG and domestic/non-CISG Hong Kong law (“HK law”), the CISG has the potential to make a significant impact on those who source directly from international suppliers. Buyers might be at risk of being caught off-guard if they are unfamiliar with the changes in the legal landscape brought upon by the application of the CISG to their transactions.

We will (a) explore the scope of the CISG – Part A below, and (b) provide an overview of the key differences between the CISG and HK law – Part B below. We will conclude with some practical tips and considerations for buyers regarding the adoption or exclusion of the CISG – Part C below.

A. TERRITORIAL, TRANSACTIONAL, AND SUBJECT MATTER SCOPE OF THE CISG

1. Territorial scope

The CISG applies to sales contracts concluded on or after the CISG came into effect in Hong Kong, if the sales contract is entered into between parties whose places of businesses are in different contracting states, or if the law of a contracting state applies as a result of the application of private international law rules. This means that, after 1 December 2022, the parties’ choice of HK law as the governing law may mean that the CISG applies, even if the sales contract is entered between a Hong Kong party and a party from a non-contracting state.

Parties may expressly opt-in or opt-out of the CISG provisions. However, if parties wish to opt-out of the CISG, they should exclude the CISG clearly and explicitly. As discussed above, a simple reference to HK law as the governing law likely would lead to the application rather than exclusion of the CISG.

2. Transactional scope

The CISG does not define explicitly “contracts of sale of goods” but instead specifies the types of contracts it does not cover: sales of consumer goods; sales by auction; sales on execution or otherwise by authority of law; sales of stocks, shares, investment securities, negotiable instruments or money; sales of ships, vessels, hovercraft or aircraft; and sales of electricity. The CISG also excludes contracts where the buyer provides a substantial part of the materials, or where the preponderant part of the seller’s obligations consists in the supply of labour or other services.

Construction supply contracts often involve a mix of goods and services (e.g., design and build contracts, and supply and install contracts). Also, it is common in the industry to import materials or machinery, or to have certain works, building parts or modules, etc., completed outside Hong Kong before transporting them into Hong Kong. This raises questions as to whether the CISG would apply to such contracts. International jurisprudence suggests that the answer might depend not only on the value of the goods vis-à-vis the services components but also on an analysis as to whether it is the goods or the services that constitute the essential obligations under the contract. To avoid such uncertainties, parties are well advised to make an express choice in their contracts as to whether the CISG is to apply.

3. Subject matter scope

The CISG states expressly in Article 4 that it governs only the formation of sales contracts, the rights and obligations of the buyer and the seller, and the available remedies. For matters governed by the CISG, the CISG prevails in the event of conflict with HK law. Domestic HK law continues to apply to matters not covered by the CISG, such as the validity of the contract; the validity of the contract's provisions and usage; the effect of the sales contract on the property in the goods sold; and the seller's liability for death or personal injury.

The boundaries between CISG-governed matters and excluded matters are blurry. By way of example, the Hong Kong Department of Justice ("DOJ") has identified the following compatibility issues that might arise from the interface of the CISG and domestic HK law and are not dealt with within the CISG:

- **Misrepresentation:** Potential conflicts may arise regarding misrepresentations. The DOJ's analysis is that innocent or negligent misrepresentation will be governed exclusively under the CISG, while fraudulent misrepresentation will be dealt with by domestic HK law, potentially leading to incoherent results. See the discussion in [paragraphs 51 to 57 of the consultation paper](#) prepared by the DOJ.
- **Penalty Rule:** A question that arises, the DOJ's consultation paper says, is whether the CISG overrides the rule against penalties under domestic HK law. See the discussion in [paragraphs 58 to 61 of the consultation paper](#).

B. KEY DIFFERENCES BETWEEN THE CISG AND HK LAW

1. Formation of contract

Under the CISG, a contract is formed by offer and acceptance. While the CISG rules in this regard are functionally similar to their HK law counterparts, the CISG rules tend to be more comprehensive. Also, the CISG differs from HK law in a number of other respects. Key areas of difference include:

- **Formality and consideration:** The CISG does not require sales contracts to be in writing and allows sales contracts to be modified or terminated by mere agreement, without needing legal “consideration” (giving of value). By contrast, under HK law, consideration normally is required for a variation to be valid.
- **Revocation of offer:** Under the CISG, an offer is irrevocable if the offer states a fixed time for acceptance or is expressed to be irrevocable, or if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. This differs from HK law, where an offer generally is revocable before acceptance unless it is an irrevocable offer supported by consideration.
- **Battle of forms:** Under the CISG, a purported acceptance with additional or different terms is a valid acceptance, unless the offeror objects without delay to the changes, or unless the purported acceptance materially alters the terms of the offer. The CISG provides a non-exhaustive list of material terms, which include price, payment, quantity, delivery, liability, and dispute resolution. This is a significant difference from HK law, which generally follows the “last shot” rule. There is no international consensus on the conclusiveness of the list of material terms or on the approach for ascertaining the terms of the contract formed. Some CISG jurisdictions follow the “knock-out” rule: if the contract comes into existence by parties exchanging conflicting standard terms, any conflicting terms that cannot be reconciled will be “knocked out” (removed) from the contract formed, leaving that issue to be dealt with as if no agreement at all had been reached regarding it. It waits to be seen whether Hong Kong courts will apply the “last shot” rule or the “knock-out” rule.
- **Principles of interpretation:** The CISG directs the court, when carrying out the task of interpreting a statement or conduct of a party, first to consider the party’s subjective intent (if the other party knew and could not have been unaware of that intent) before considering what a reasonable person would have understood in the same circumstances. The court is directed to look at all relevant circumstances, including pre-contract negotiations, established practices, usage, and post-contract conduct. This differs from HK law, where the starting point for interpreting a contract is the text and its context, followed by the objective intention of the parties.
- **Late acceptance:** Late acceptance is permissible under the CISG if the offeror informs the offeree, or if a timely acceptance is delayed in transmission unless the offeror objects. There is no direct equivalence of this under HK law.

Buyers should review carefully their procurement procedures to ensure that contracts are formed at expected times and on anticipated terms. In particular, buyers should review quickly “acceptances” to see if there are any deviations from the offer and should object immediately to material alterations. Buyers also should maintain good records of all communications, dealings, and

“knowledge” of the other party, and train procurement staff on CISG principles and how these might impact procurement procedures.

2. Parties' obligations

The parties' obligations under the CISG and under HK law are largely similar. A seller's obligations include delivering goods that conform to the contract and are free from third-party rights, whereas a buyer's obligations primarily involve paying the price and taking delivery of the goods. However, the CISG differs from HK law on the following important aspects:

- **Fitness and quality:** Both the CISG and HK law primarily define quality and fitness obligations by contract terms, then by specific purpose requests, and finally by a default standard. However, the CISG and HK law differ on the tests for the default standard. The CISG requires the goods to be fit for the purposes for which the goods of the same description would ordinarily be used, while HK law uses the tests of merchantable quality.
- **Inspection and notice:** The CISG mandates that buyers inspect the goods and notify sellers of any non-conformity within a reasonable time after discovery. A strict two-year cut-off from the date of delivery applies, barring claims if notice is not given, unless a contractual guarantee period exists to extend such a period. The CISG's notice rules are stricter than HK law, where the right to reject goods may be lost if the goods are not rejected within a reasonable time, but the right to damages remains. The CISG can result in a total loss of remedies if notice is not given in a timely and compliant manner.

For construction industry buyers, the CISG raises the question of whether the two-year time limit only bars the contractual claim, or whether it also bars tort claims based on the same facts. This feature of the CISG calls for the need to have in place express clauses in the contract or to obtain separate guarantees to ensure that potential damages claims for defects – especially latent defects – would not be lost.

3. Buyer's remedies

The CISG differs from HK law in the following important aspects:

- **Fundamental breach, avoidance, and restitution:** A key concept under the CISG is “fundamental breach”, being a breach that causes such detriment to the other party as to substantially deprive that party of the benefits under the contract, unless the breaching party did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. A fundamental breach by a seller gives the buyer the right to declare the contract avoided. Avoidance releases both parties from their primary contractual obligations, subject to any damages due. A party who performed can claim restitution if avoidance takes place. A buyer loses the right to avoid if the buyer cannot make restitution of the goods substantially in the condition received, unless the impossibility is not due to the

buyer's own act or omission, or if the goods were sold, consumed, or transformed in normal business, in which case the buyer must account for (give credit for) benefits derived by it from the goods.

- **Choice of remedies:** The CISG provides a range of remedies for buyers in case of breach by the seller. Buyers can demand specific performance from the seller, including delivery of goods, delivery of substitute goods, or repair of non-conforming goods, although Hong Kong courts retain the discretion not to order specific performance according to domestic HK law. Other remedies for buyers include proportional price reduction, and damages for loss suffered due to the breach.
- **Seller's opportunity to cure:** The CISG grants sellers the right to remedy non-conforming goods (e.g. by delivering missing parts, making up quantity deficiencies, delivering replacements, or remedying non-conformity) before the delivery date. Even after the delivery date, the seller retains the right to cure if it can be done without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty regarding reimbursement of expenses. Likewise, in case of non-delivery, a buyer can avoid the contract only after giving the seller an additional reasonable period to deliver, or if the seller declares that it will not deliver within that period. The seller may notify the buyer of its intention to perform, which is assumed to include a request for the buyer to declare whether it will accept the performance. If the buyer does not comply with this request, the seller can perform within the stipulated time, and the buyer cannot pursue remedies inconsistent with that performance, effectively suspending the buyer's right to avoid the contract and right to remedies.

In summary, the CISG provides a distinct framework for buyer's remedies compared to HK law. While buyers enjoy a broader range of remedies, such as specific performance, price reduction and damages, the CISG introduces the concept of "fundamental breach" as a trigger for contract avoidance and grants sellers both an opportunity to cure and a right to restitution. These differences, along with the comprehensive rules and procedures as to how parties are to act in the case of a breach or nonconformance, necessitate a careful understanding of the available remedies, the conditions under which they can be exercised, and the steps or communications the innocent and breaching parties should take.

C. RECOMMENDATIONS AND PRACTICAL TIPS TO CONSTRUCTION CONTRACTORS

A key benefit of the CISG is to facilitate international trade by removing the risks involved in being subject to unfamiliar foreign laws. However, for construction industry parties working on domestic projects in Hong Kong, the potential application of the CISG might bring unintended consequences. Therefore, for construction industry participants who frequently source from international suppliers, it is advisable to:

- Check whether the CISG applies to your procurement contracts, especially when dealing with a supplier that is based, operating from or carrying on business outside Hong Kong.
- Consider whether adopting or excluding the CISG would be more beneficial for your business/project.
- For parties looking to exclude the CISG, it is advisable to state explicitly in all invitations to tender, requests for quotations, purchase orders, etc., that the CISG expressly is excluded in its entirety.
- For parties looking to adopt the CISG, consider updating your standard contract terms to address CISG implications, including specifying the governing law for issues outside the CISG's scope, or varying certain CISG provisions.
- Review procurement procedures and ensure procurement staff understand how the CISG might impact procurement procedures when dealing with international suppliers.
- Review inspection, acceptance and dispute handling procedures and ensure frontline staff understand how the CISG might impact the requirements for notices, the concept of fundamental breach, and the remedies available under the CISG.
- Seek legal advice when unsure.

The introduction of the CISG in Hong Kong represents a significant shift in the legal landscape for international trade. While the primary objective of the CISG is to harmonise international sales law and offer a neutral framework for cross-border sales of goods, its differences from established HK law call for caution and careful considerations by businesses primarily focused on the domestic market.

Construction industry participants who are involved in procurement from overseas should familiarise themselves with the CISG's scope, its key principles and provisions, and the potential implications on their projects and procurements. Such an understanding is foundational for contractors to proactively manage their risks, to ensure that their contractual terms align with their business objectives, and to mitigate potential disputes.

SECOND PIECE OF LEGISLATION: THE CISOP

The Construction Industry Security of Payment Ordinance (Cap. 652, "CISOP") was gazetted on 27 December 2024, and most of its provisions will come into operation on 28 August 2025, bringing the security of payment regime into HK law.

The CISOP applies to both public contracts and main private contracts ("main contracts") with main contract values not less than HK\$ 5 million for construction work contracts and HK\$ 0.5 million for

supply of goods contracts and services related to construction works. Where the CISOP applies to a main contract, the CISOP also applies to all the subcontracts (of any tier) under that main contract, including contracts for supplying any related goods and services for construction works under that main contract.

The CISOP further stipulates that the CISOP will apply to a main contract or a subcontract regardless of whether it is governed by HK law. The CISOP provides that the CISOP shall have effect despite any contrary agreement and contains anti-avoidance provisions that render any inconsistent contract provisions void.

In other words, where a construction industry participant sources from an international supplier for a construction project in Hong Kong, the CISOP would apply to the contract with the international supplier if the international supplier is supplying materials, components, etc., for a construction project to which the CISOP applies. This is the case whether or not the supplier is in Hong Kong, and whether or not the supply contract is governed by HK law.

There is, therefore, scope for the CISOP to apply to such “overseas” supply contracts, even if this is not intended or desired.

Caution is needed.

At BCLP, we have been closely monitoring the development of the security payment regime in Hong Kong, from the government’s contractual security of payment pilot scheme to the security of payment bill through the legislative process to passing into legislation.

To assist construction companies to prepare for the coming into effect of the security of payment regime in Hong Kong, we set out below links to resources and articles published by BCLP to date (organised in reverse chronological order):

- [27 February 2025: Government issues Model Adjudication Documents](#)
- [14 February 2025: Adjudication and insolvency: interface of two statutory regimes affecting the construction industry](#)
- [20 December 2024: Hong Kong Security of Payment Ordinance passed; goes into operation on 28 August 2025](#)
- [7 October 2024: Hong Kong Security of Payment Bill – Government responds to submissions from the public](#)
- [25 September 2024: Hong Kong Security of Payment Bill – insolvency exception to “pay when paid” clauses?](#)

- 5 August 2024: Hong Kong Government responds to 19 June letter from LegCo in-house lawyer regarding the Security of Payment Bill
- 22 July 2024: Comments from Hong Kong LegCo members regarding the Security of Payment Bill
- 25 June 2024: Changes in the payment and adjudication processes regarding variations and time-related disputes
- 24 June 2024: Key developments and changes of Security of Payment Bill in comparison with the existing contractual security of payment regime
- 24 June 2024: LegCo in-house lawyers request clarifications regarding the Security of Payment Bill
- 17 June 2024: Bills Committee formed to review Hong Kong Security of Payment Bill
- 29 May 2024: Hong Kong Security of Payment Bill gazetted
- 15 October 2021: New security of payment regime in Hong Kong – key issues to consider before its implementation
- 12 October 2021: Security of payment circular issued by the Development Bureau of Hong Kong – to take effect from 31 December 2021
- 6 July 2021: Security of payment in Hong Kong – Pilot Programme for Public Works Contracts (article authored by BCLP and published by FTI Consulting)
- 21 April 2021: Security of payment in Hong Kong – Pilot Programme for Public Works Contracts

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