# THE STATUS OF HONG KONG AND MACAO UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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## I. INTRODUCTION

Hong Kong and Macao are two territories located on opposite sides of the Pearl River Delta in South Eastern China, at the heart of the Chinese region that hosts most of the People's Republic of China's strong economic players. Historically, international trade was the very reason why both Hong Kong and Macao emerged as distinct territorial entities – established on Chinese soil, but for centuries administered by two European powers, the United Kingdom and Portugal, respectively – and international trade has been the economic life-blood of both territories ever since. Although Hong Kong and Macao are now *Special Administrative Regions* (SARs) of the People's Republic of China (PRC), and thus form part of a socialist country, their traditional capitalist system has been maintained under the "One country, two systems" principle.[1]

Likewise, their economic importance has remained undiminished in recent years: In 2001, Hong Kong's total merchandise trade amounted to US $409 billion, thus making it the

[1] *See* Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1990, art. 5 (hereinafter Hong Kong Basic Law) and Basic Law of the Macao Special Administrative Region of the People's Republic of China, Mar. 31, 1993, art. 5 (hereinafter Macao Basic Law).

world's 10th largest trading entity.[2] Macao, albeit somewhat smaller, still added another US $5 billion of total annual trade value. With both SARs now being linked to Mainland China through Closer Economic Partnership Arrangements (CEPAs) signed in 2003,[3] the amount of international trade conducted through Hong Kong and Macao is likely to increase even further as a result of the zero tariff concessions made by China under the CEPAs.

For trade dependent economies like Hong Kong and Macao, the legal framework governing international contracts of sale is naturally of particular importance. On a global scale, roughly two thirds of international sales of goods are subject to the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (CISG),[4] with nine of the world's twelve largest trading entities being among the 60-plus States that have ratified and implemented this uniform law convention.[5] Against this background, it appears particularly unfortunate that the status of Hong Kong and Macao under the CISG is currently at best unclear.

## II. SIGNIFICANCE OF THE STATUS AS A "CONTRACTING STATE" UNDER THE UN SALES CONVENTION

The question as to whether a certain State is a Contracting State under the CISG is in a number of respects of vital importance for the applicability of the Convention. According to Article 1(1)(a) CISG, the Convention applies to contracts for the sale of goods between parties whose places of business are in different Contracting States. The CISG is furthermore applicable under Article 1(1)(b) CISG when the rules of private interna-

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[2] WORLD TRADE ORGANISATION, LEADING EXPORTERS AND IMPORTERS IN WORLD MERCHANDISE TRADE (2001).

[3] The Mainland/Hong Kong Closer Economic Partnership Arrangement was signed on June 29, 2003, and its Macao equivalent on October 17, 2003. *See generally* The Mainland/Hong Kong Closer Economic Partnership Arrangement (CEPA) (China 2003). Both CEPAs entered into force on January 1, 2004.

[4] Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, *in* INTERNATIONAL ENCYCLOPEDIA OF LAWS ¶ 6 (Roger Blanpain ed., 2000).

[5] Namely the United States, Germany, France, China, Canada, Italy, the Netherlands, Belgium and Mexico. The CISG has not yet been adopted by Japan and the United Kingdom, while the status of Hong Kong remains disputed and is discussed in the present article.

tional law lead to the application of the law of a Contracting State. To this end, it should be kept in mind that courts from numerous States have held that contract clauses that select the law of a Contracting State (e.g., "This contract is governed by Swiss law") lead to the applicability of the UN Sales Convention, as the Convention forms part of the legal order of each Contracting State and, containing special rules for the international sale of goods, has priority over non-uniform national sales law.[6]

Moreover, the status of a country as a Contracting State to the Convention is of relevance from a public international law point of view: Only courts in States that have adhered to the CISG are faced with a public international law obligation to apply the UN Sales Convention whenever a contract of sale comes within its sphere of application.[7] The reason is that by becoming a Contracting State the respective country accepts an obligation towards the other Contracting States to apply the CISG's rules: "We will apply these uniform law rules in place of our own domestic law on the assumption that you will do the same."[8] On a practical level, however, it will often be equally important to courts in non-Contracting States to determine if a foreign State is a Contracting State to the CISG. While these courts are under no direct treaty obligation to apply Article 1 CISG, they have to apply their respective national private international law rules. In doing so, they must keep in mind the general aim underlying the conflict of laws, which is to apply the national law of a foreign State the way it would be applied by a judge of that State.[9] Should their national conflict of law

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[6] Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001); Bundesgerichtshof [BGH] [Federal Supreme Court] n. VIII ZR 259/97, 25 Nov. 1998 (F.R.G.), *at* http://cisgw3.law.pace.edu/wais/db/cases2/981125gl.html; Sté Ceramique Culinare de France v. Sté Musgrave Ltd., Cour de Cassation [Supreme Court] n. Y 95-20.273, 17 Dec. 1996 (Fr.), *at* http://cisgw3.law.pace.edu/cases/961217fl.html; KG Nidwalden [District Court] n. 15/96 Z, 3 Dec. 1997 (Switz.), *at* http://cisgw3.law.pace.edu/cases/971203s1.html.

[7] László Réczei, *Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L., 513, 518 (1981).

[8] JOHN P. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 103.2 (3d ed. 1999).

[9] ALBERT VENN DICEY ET. AL., DICEY & MORRIS ON THE CONFLICT OF LAWS ¶ 33-102 (13th ed. 1999); A.G. Guest, *Conflict of Laws*, *in* BENJAMIN'S SALE OF GOODS ¶ 2291-2391 (5th ed. 1997).

rules thus declare the law of a State other than the forum State to govern a given international contract of sale, the court will have to assess the status of that State under the CISG.

Lastly, the merchant's point of view needs to be considered. For him, the primary importance of the Convention's possible applicability will be the effect on his own and his contracting partner's rights and obligations arising from their contract of sale. In this respect, commentators on China trade issues have often stressed the advantages of the CISG over both the Foreign Economic Contract Law of the People's Republic of China as in force from 1985 to 1999[10] as well as the new Chinese Uniform Contract Law that took effect on October 1, 1999.[11]

Accordingly, the status of Hong Kong and Macao under the CISG possesses a significant practical importance, bearing in mind that one of the goals pursued by the Convention's drafters was to achieve predictability in international trade.[12] While participants in the 1980 Vienna Diplomatic Conference that adopted the text of the UN Sales Convention initially considered the Contracting State test to be a "relatively simple one,"[13] it will be shown that the case of the two Chinese Special Administrative Regions, in so many respects, defies easy categorization.[14]

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[10] For a detailed discussion see Frank N. Fisanich, *Application of the U.N. Sales Convention in Chinese International Commercial Arbitration: Implications for International Uniformity*, 10 AM. REV. INT'L ARB. 101, 112-15 (1999); Donald J. Lewis, *The UN Convention for the International Sale of Goods: Implications for Hong Kong and China*, *in* LAW LECTURES FOR PRACTITIONERS 257-53 (1988).

[11] *See* Ding Ding, *China and CISG*, *in* CISG AND CHINA: THEORY AND PRACTICE 35-37 (Michael R. Will ed., 1999).

[12] *See* Fisanich, *supra* note 10, at 101.

[13] ROLAND LOEWE, INTERNATIONALES KAUFRECHT 21 (1989); Peter Schlechtriem, *Anwendungsvoraussetzungen und Anwendungsbereich des UN-Übereinkommens über Verträge über den internationalen Warenkauf (CISG)*, *in* AKTUELLE JURISTISCHE PRAXIS 339, 343 (1992).

[14] For this general assessment see Roda Mushkat, *Hong Kong and Succession of Treaties*, 46 INT'L & COMP. L.Q. 181, 191 (1997); Peter Slinn, *Aspects Juridiques du Retour à la Chine de Hong-Kong*, *in* ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 273, 274 (1996). The practical effect is *inter alia* illustrated by Italdecor S.a.s. v. Yiu's Industries (H.K.) Ltd., Corte di Appello di Milano [Regional Court of Appeals] 20 Mar. 1998 (Italy), *at* http://cisgw3.law.pace.edu/cases/980320i3.html, where Italian law was applied to a contract between a Hong Kong seller and an Italian buyer only because the Court was unable to ascertain the content of Hong Kong law.

## III. The Case of Hong Kong and Macao

The difficulties that arise when categorizing the status of Hong Kong and Macao according to the standards of traditional treaty law are primarily a result of the change in sovereignty over the territories (the so-called "handovers") that took place in the 1990s.

### A. *Historical Background*

Since 1842, when the island of Hong Kong was ceded to the British Crown in the Treaty of Nanking, Hong Kong had been a British crown colony.[15] Under public international law, it therefore formed part of the United Kingdom of Great Britain and Northern Ireland. The situation with respect to Macao was somewhat comparable, as the sovereignty and the power to enter into treaties for Macao was exercised by another European State, the Republic of Portugal.[16] A difference of largely terminological nature arose from the fact that Portugal in 1979 had entered into an agreement with the PRC which characterized Macao as not being a colony, but a Chinese territory administered by Portugal.[17]

The PRC ratified the CISG in 1986 and the Convention entered into force for China and another ten ratified the CISG on 1 January 1988. However, this important development had no legal effect for Macao and Hong Kong, as the PRC lacked the power to enter into international conventions for these two territories.

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[15] Subsequently, part of the Kowloon peninsula and Stonecutters Island were ceded to the British Crown in 1860, and in 1898 another treaty completed the process by granting to Britain a lease of the so-called New Territories "and a group of islands for the term of 99 years from 1 July 1898." *See* A. D. Hughes, *Hong Kong*, *in* Encyclopedia of Public International Law, Vol XII 138 (Rudolf Bernhardt ed., 1990).

[16] Walter Rudolf, *Federal States*, *in* Encycolpedia of Public International Law, Vol. XII 224 (Rudolf Bernhardt ed., 1990)

[17] *See* Andreas Zimmermann, Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen Völkerrechtlicher Kodifikation 444 (2000). The historical development of Macao's status from a Portuguese colony to an overseas province and then to a territory under Portuguese administration is in detail described by Rudolf, *supra* note 16, Vol. XII, at 223.

1. *Subsequent Development with Respect to Hong Kong*

Although during the following years most other members of the European Community ratified the CISG, the United Kingdom refrained from becoming a Contracting State.[18] Accordingly, no Hong Kong court was bound to apply the CISG as the United Kingdom was not a party,[19] and traders with their place of business in the British Crown Colony remained largely unaffected by the Convention, except under certain circumstances when disputes arose out of sales contracts with parties from Contracting States.[20] Indeed, a number of decisions by PRC courts (but none by Hong Kong courts) have been reported that applied the UN Sales Convention to sales contracts between parties from China and Hong Kong prior to 1997.[21]

On June 30, 1997, the United Kingdom transferred sovereignty over Hong Kong to China[22] in a ceremony commonly referred to as "the handover." The modalities of the handover and of Hong Kong's future after the act had been previously agreed upon in a treaty between China and the United Kingdom of 19 December 1984 entitled: the "Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong".[23] This Sino-British Joint Declara-

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[18] For an elaboration on the background of the UK's position *see* Robert G. Lee, *The UN Convention on Contracts for the International Sale of Goods: OK for the UK?*, J. BUS. L. 131 (1993); Johan Steyn, *A Kind of Esperanto?*, *in* THE FRONTIERS OF LIABILITY, Vol. 2 11-17 (Peter Birks ed., 1994). *See also* Jacob S. Ziegel, *The Future of the International Sales Convention from a Common Law Perspective*, 6 N.Z. BUS. L.Q. 336, 343 (2000).

[19] Lewis, *supra* note 10, at 248.

[20] *Id.* at 247-48.

[21] Lian Zhong v. Xiamen Trade [Xiamen Intermediate People's Court] 31 Dec. 1992 (China), *at* http://cisgw3.law.pace.edu/cases/921231c1.html; International Industrial Company C of Hong Kong v. Five Mines Machinery Industrial Chemicals and Chinese Medicine Import-Export Company [People's Court] 1993 (China), *at* http://cisgw3.law.pace.edu/cases/930000c1.html; Zhanjiang Textiles v. Xian Da Fashion [Guandong Higher People's Court] 7 Mar. 1994 (China), *at* http://cisgw3.law.pace.edu/cases/940307c1.html; Xiamen Trade v. Lian Zhong [Xiamen Intermediate People's Court] 5 Sept. 1994, *at* http://cisgw3.law.pace.edu/cases/940905c1.html (agreement by parties at trial).

[22] It is the PRC's contention that no transfer of sovereignty took place in 1997 since China merely "resumed" the exercise of sovereignty over Hong Kong; *see* Mushkat, *supra* note 14, at 191.

[23] 23 INTERNATIONAL LEGAL MATERIALS 1366 para. 33 (1984); *see* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 322-23 (2000).

tion *inter alia* stipulated that the Government of the United Kingdom would restore Hong Kong to the People's Republic of China with effect from 1 July 1997, that the PRC would establish a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty, and that the Hong Kong SAR will enjoy a high degree of autonomy to remain unchanged for 50 years. Since 1 July 1997, Hong Kong is thus under public international law a part of the People's Republic of China.[24]

### 2. *Subsequent Development with Respect to Macao*

Two and a half years later, Macao followed suit.[25] The procedure used in administering the change in sovereignty had been closely modelled on the example of Hong Kong.[26] On April 13, 1987, a "Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao" was signed, with most of its provisions resembling *verbatim* those of the Sino-British Joint Declaration. When the handover took place on December 20, 1999, Macao had thus similarly become a part of the People's Republic of China.

## B. *The Position According to the Two SARs Legal Order*

The position of Hong Kong and Macao with respect to international treaties to which the People's Republic of China was a party at the time of the handovers is laid down in two international instruments and the relating provisions in the two SARs' Basic Laws. As the rules applicable to Macao contained therein hardly differ from their counterparts applicable to Hong Kong,[27] the following elaborations address solely the situation of Hong Kong; but do *mutatis mutandis* apply to Macao?

The relevant approach of Hong Kong's legal system after the handover was first outlined in Annex I to the Sino-British

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[24] Lutz-Christian Wolff, *Übereinkunft zur Vollstreckung von Schiedssprüchen zwischen Hongkong und dem chinesischen Festland*, 40 RECHT DER INTERNATIONALEN WIRTSCHAFT (2000).

[25] Note that Portugal, the State until then responsible for the international relations of the territory of Macao, has also not ratified the CISG.

[26] *See* AUST, *supra* note 23, at 331; Hughes, *supra* note 15, at 140.

[27] ZIMMERMANN, *supra* note 17, at 444-45.

Joint Declaration of 1984 (Joint Declaration).[28] The relevant provision in this document declares that the application to the Hong Kong SAR of international agreements to which the PRC is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong SAR, and after seeking the views of the Hong Kong SAR Government. The Basic Law of Hong Kong that entered into force on July 1, 1997, the day after the handover, repeats this position. Article 13 of the Basic Law[29] stipulates as a general rule that the Central People's Government is responsible for foreign affairs relating to the Hong Kong SAR, but it authorises the Hong Kong SAR to conduct the relevant external affairs in accordance with the Basic Law. The handling of external affairs of the Hong Kong SAR is then elaborated upon in other Basic Law provisions, namely Article 153,[30] which essentially repeats the conditions for an extension of international agreements to which China is or becomes a party to Hong Kong that were listed in the Joint Declaration.[31] It appears that as far as the CISG is concerned, no decision in favour of an extension of this Convention to the Hong Kong SAR was made. When the Government of the People's Republic of China on June 20, 1997 deposited with the Secretary-General of the United Nations a "Letter of notification of treaties applicable to Hong Kong after July 1, 1997" this instrument referred to the provisions in the Sino-British Joint Declaration and the Hong Kong Basic Law already cited and submitted an extensive list of treaties to be applied to the Hong Kong SAR with effect from July 1, 1997.[32] This list, however, made no mention of the UN Sales Convention.

The formula employed in the Joint Declaration and Article 153 of the Hong Kong Basic Law has been criticized as being

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[28] SINO-BRITISH JOINT DECLARATION OF 1984, § XI (China 1984), *available at* http:www.hkbu.edu.hk/~pchksar/JD/jd-full3.htm (last visited Sept. 13, 2004); *see also* SINO-PORTUGUESE JOINT DECLARATION OF 1987, Annex 1 § 7 (China 1987).

[29] *See also* Macao Basic Law, *supra* note 1, at art. 13.

[30] *See also id.* art. 138.

[31] *See* AUST, *supra* note 23, at 322-23, 331.

[32] SINO-BRITISH JOINT DECLARATION OF 1984, *supra* note 28, at Annex I. *See also* Letter of notification of treaties applicable to Macau after 20 December 1999, deposited by the Government of the People's Republic of China with the Secretary-General of the United Nations on 13 December 1999, [hereinafter Letter of notification of 13 December 1999] at Annex I.

less than satisfactory, as it does not take into account treaties and agreements which by their nature or express provisions apply to the whole territory of a Signatory State, unless that State declares at the time of ratification or afterwards to exclude certain part or parts of its territory from the scope of application. "For these types of agreements, their automatic extension of application to a newly recovered territory does indeed not depend upon a decision to that effect by the central government of the State concerned."[33] Other authors have furthermore pointed out a strong deviation from the accepted "moving treaty frontiers rule"[34] and questioned the solution's binding effect on third parties.[35]

To the present author, however, it seems premature to conclude that the UN Sales Convention can *de facto* not be regarded as in effect in the Hong Kong and Macao SARs.[36] Support for a more differentiating approach can be found in the PRC's Letter of notification of June 20, 1997 itself, which includes the following clause:

> With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application. *For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State.*[37]

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[33] Jianming Shen, *Cross-Strait Trade and Investment and the Role of Hong Kong*, 16 WIS. INT'L L.J. 661, 666-67 (1998).

[34] YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER 482 (1999); ZIMMERMANN, *supra* note 17, at 442.

[35] GHAI, *supra* note 34, at 483; Mushkat, *supra* note 14, at 194; Slinn, *supra* note 14, at 288.

[36] For a statement to this end, *see* Alexander Zinser, *Änderungen der Rechtsordnung in der Sonderverwaltungszone Hong Kong seit dem* 1.7 1997, RECHT DER INTERNATIONALEN WIRTSCHAFT 941, 944-45 (1998) (although without explicit reference to the CISG).

[37] Letter of notification of 20 June 1999, at IV (emphasis added). Note that the Letter of notification of 13 December 1999 reads somewhat differently: "With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, the Government of the People's

This express statement illustrates that it is necessary to first look to the provisions of the CISG in order to determine the status of the Hong Kong SAR under the said Convention.

### C. *Are Hong Kong and Macao "Contracting States" According to Articles 89-101 CISG?*

Articles 89-101 of the UN Sales Convention contain a number of provisions dealing with the question of when a State is to be regarded as a Contracting State in the sense employed by Article 1 of the CISG.

The usual path provided for a territorial entity to become a Contracting State to the Convention is by accession, Article 91(3) of the CISG.[38] Although Article 151 Hong Kong Basic Law[39] allows the Hong Kong SAR, "using the name 'Hong Kong, China,' to maintain and develop relations and conclude and implement agreements with foreign States, regions and international organisations" on its own, in such matters as *inter alia* economic affairs and trade, Article 152(2) of the Hong Kong Basic Law makes clear that the SAR may only participate in international organizations and conferences *not limited to States* and is otherwise restricted to dispatch representatives as members of the PRC's delegations.[40] The latter provision takes into account the fact that "many multilateral treaties are not open to full participation by a non-state administrative entity like the Hong Kong SAR."[41] As the UN Sales Convention is likewise only open for accession by States (Article 91(3) of the CISG),

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Republic of China will go through separately the necessary formalities for their application to the Macao Special Administrative Region if it is so decided." Letter of notification of 13 December 1999, *supra* note 32.

[38] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. DOC. A/CONF. 97/18, art. 91(1), *available at* http://cisgw3.law.pace..edu/cisg/text/treaty.html. Those States that had signed the Convention on or before September 30, 1981 had the option to either ratify, accept or approve the Convention, Article 91(2) of the CISG. *Id.* at art. 91(2).

[39] Hong Kong Basic Law, *supra* note 1, art. 151. For Macao, see Macao Basic Law, *supra* note 1, art. 189.

[40] *Id.* art. 152.

[41] AUST, *supra* note 23, at 328; Slinn, *supra* note 14, at 288. According to ZIMMERMANN, *supra* note 17, at 433, the Hong Kong SAR has the status of a "limited" subject under public international law; *See also* Yongping Ge, *Völkerrechtssubjektivität und Vertragsschlusskompetenz von Hongkong*, 41 ARCHIV DES VÖLKERRECHTS 220, 228 (2003).

Hong Kong and Macao cannot accede to the Convention in their own name.[42]

### 1. *Hong Kong and Macao as parts of the People's Republic of China, a Contracting State*

Since the handover, however, the Hong Kong and Macao SARs form part of the Chinese State, with the Government of the PRC holding responsibility for the international relations of the territories.[43] Accordingly, Article 1 of the respective Basic Laws characterizes each SAR as "an inalienable part of the People's Republic of China".

Notwithstanding academic discussions about the (primarily terminological) question as to whether the trade relationship between Hong Kong/Macao and the rest of China should be characterized as inter-regional domestic or cross-system domestic rather than domestic or intra-national,[44] the example of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 sheds some light upon the effect that the handover had on the applicability of uniform law conventions. As both the United Kingdom and the PRC are Contracting States to the New York Convention, the Convention - prior to July 1, 1997 - applied to the enforcement of arbitral awards between Hong Kong and Mainland China according to its Article 1(1), which declares its provisions to be applicable "to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought"[45]. Since the handover, however, awards from Hong Kong failed to meet the requirement of being awards made in a State *other than* the Enforcement State, as the SAR and the territory of Mainland China now formed part of one and the same State, the People's Republic of China.[46] In order to compensate for this development, a special "Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong

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[42] Shen, *supra* note 33, at 668.

[43] SINO-BRITISH JOINT DECLARATION OF 1984, *supra* note 28, Annex I Sec. I; SINO-PORTUGUESE JOINT DECLARATION OF 1987, *supra* note 28, §§ 1 and 3(2).

[44] Shen, *supra* note 33, at 662-63.

[45] Wolff, *supra* note 24, at 40.

[46] *Id.* at 41; Zinser, *supra* note 36, at 945.

Special Administrative Region" was concluded on June 21, 1999, which takes the place formerly occupied by the New York Convention.[47] The effect of the handover upon the applicability of international uniform law conventions is thus not limited to the UN Sales Convention.

### 2. *Impact of the Public International Law Rules on Succession of States*

There has been some discussion on how the handover should be dealt with under the rules of public international law on the succession of States. Particular reference has been made to the "moving treaty frontiers rule" enshrined in Articles 15(b), 31(1) of the Vienna Convention on Succession of States in Respect of Treaties of August 23, 1978[48] that could *ipso jure* lead to the extension of the geographic sphere of application of the PRC's treaties to the new SARs.[49] Apart from the question whether the Vienna Convention on Succession of States can be regarded as expressing established customary norms or articulating law grounded in consistent State practice, judicial precedent or juristic opinion,[50] the Convention should not be *per se* discarded for one practical reason. The Secretary-General of the United Nations, who according to Article 89 of the CISG acts as the depository of the UN Sales Convention, considers the Vienna Convention on Succession of States to be the codification of customary public international law.[51]

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[47] The Arrangement was declared to be retroactively applicable to any award made after July 1, 1997. For a brief discussion of its content, see Wolff, *supra* note 24, at 41-42. For a discussion of the general need for bilateral agreements with the Mainland on issues of conflict of laws, *see* Mushkat, *supra* note 14, at 200. Note that this Hong Kong-Mainland instrument on the enforcement of arbitral awards as well as the CEPAs have been entitled "Arrangement," not "Agreement" - a difference that might be supposed to distinguish intra-China instruments from international treaties. CEPA, *supra* note 3, Preamble.

[48] The Convention entered into force on November 6, 1996, shortly before the handover of Hong Kong. Note that neither the People's Republic of China nor the United Kingdom is a party to this Convention.

[49] *See* GHAI, *supra* note 34, at 480-82; ZIMMERMANN, *supra* note 17, at 433. For authority against the applicability of the "moving treaty frontier rule," see Mushkat, *supra* note 14, at 192; Zinser, *supra* note 36, at 944.

[50] This is strongly disputed by Mushkat, *supra* note 14, at 181. For the contrary opinion, see GHAI, *supra* note 34, at 481; ZIMMERMANN, *supra* note 17, at 179.

[51] ZIMMERMANN, *supra* note 17, at 755.

In determining the status of the territories of Hong Kong and Macao under the CISG, however, no detailed elaboration on the general rules of public international law is needed because those rules are of a supplementary character, as can be seen from Articles 15(b) and 31(3) of the Vienna Convention on Succession of States. These provisions clearly give priority to any rule laid down in the respective treaty itself (" . . . unless it appears from the treaty . . . ").[52] The UN Sales Convention, in Article 93, indeed contains a rule to this end.

### 3. *Article 93 of the CISG as the Governing Provision*

While Article 93 of the CISG does not explicitly address the issue of succession of States, the provision "produce[s] what amounts to an alteration in the meaning of the term 'Contracting State' for purposes of the scope provision (Article 1) of the Convention."[53]

#### a. *Applicability of Article 93 of the CISG to the Cases of Hong Kong and Macao*

During the 1980 Vienna Diplomatic Conference, Article 93 CISG was included at the request of Canada and Australia, two *federal states*.[54] The provision is therefore often referred to as a "Federal State Clause"[55] or "federation clause."[56] This label alone, however, carries no significance for the interpretation of the clause. Although the so-called Greater China is neither a federal state nor a confederation[57] (with "the concept of one country, two systems being unprecedented and representing a

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[52] *Id.* at 756.

[53] Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 194 (1988); Rolf Herber, *Article 1*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS para. 11 (Peter Schlechtriem ed., 1998).

[54] FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW, art. 93 para. 1 (1992).

[55] Flechtner, *supra* note 53, at 194; Herber, *supra* note 53, para. 1.

[56] ENDERLEIN & MASKOW, *supra* note 54, para. 1. For an instructive elaboration on the development of "Federal State" clauses in UNCITRAL Conventions, *see* Peter Winship, *Final Provisions of UNCITRAL's International Commercial Law Conventions*, *in* THE INTERNATIONAL LAWYER 714, 722-23 (1990).

[57] GHAI, *supra* note 34, at 470-71.

new type of nation-state of its own"),[58] the scope of Article 93 of the CISG must be determined by paying regard to the wording, legislative history and purpose of the provision.[59]

Article 93(1) of the CISG presupposes that "a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with" in the UN Sales Convention.[60] Commentators have convincingly stressed that Article 93(1) of the CISG demands that a certain independence of the "territorial unit" is incorporated in the State's constitution itself,[61] while it is insufficient that the power to legislate on certain matters has merely been delegated to a territorial unit. This interpretation is supported by both purpose and legislative history of the provision, which was intended to enable a State to accede to the CISG with respect to individual units, even if it is unable to do so for all of its territorial divisions as it lacks sufficient competence over the legal matters governed by the CISG.[62]

In the case of Hong Kong and Macao, the basis for their constitutional independence is found in Article 31 of the Constitution of the People's Republic of China,[63] which provides for the establishment of Special Administrative Regions by the PRC. Both the Sino-British and the Sino-Portuguese Joint Declarations make express reference to Article 31 of the PRC's Constitution when outlining the basic policies of the PRC regarding Hong Kong and Macao.[64] The Basic Laws then establish that

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[58] Shen, *supra* note 33, at 663.

[59] *Cf.* HONNOLD, *supra* note 8, para. 65 (declaring "the substance rather than the label" to be decisive).

[60] Kazuaki Sono, *Commentary on the Convention on the Limitation Period in the International Sale of Goods, done at New York, 14 June 1974, in* THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 107, UNCITRAL, ed., 1986) (on Article 31(1) of the UNCITRAL Limitation Convention, which served as a model for Article 93 CISG).

[61] Malcolm Evans, *Article 93, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION para. 2.1 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); HERBER, *supra* note 53, para. 1; Sono, *supra* note 60.

[62] *See* HERBER, *supra* note 53, para. 1.

[63] Adopted at the Fifth Session of the Fifth National People's Congress and Promulgated for Implementation by the Proclamation of the National People's Congress on December 4, 1982, as amended in 1988 and 1993.

[64] SINO-BRITISH JOINT DECLARATION OF 1984, *supra* note 28, pt. 1; SINO-PORTUGUESE JOINT DECLARATION OF 1987, *supra* note 28, § 2(1).

the systems of law applicable in the SARs to *inter alia* the sale of goods are indeed different from those in force in Mainland China. Article 2 of both Basic Laws emphasizes that the SARs are authorized to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power. Article 8 of the Basic Laws more specifically provides that the rules of law previously in force in Hong Kong and Macao, i.e., "the common law, rules of equity, ordinances, subordinate legislation and customary law" (Hong Kong)[65] and "the laws, decrees, administrative regulations and other normative acts" (Macao)[66], shall be maintained subject to any amendment by the legislature of the SARs. Accordingly, the People's Republic of China is a Contracting State to the CISG within the meaning of Article 93(1) of the CISG that has territorial units (Mainland China, Hong Kong, Macao)[67] in which different legal systems are applicable to matters of the sale of goods (and will remain so for another 50 years.)[68]

For the sake of comprehensiveness, it may be added that the so-called *Special Economic Zones* (SEZs) established in Mainland China, as e.g., the Shenzhen SEZ (just across the border from Hong Kong) or the Zhuhai SEZ (just north of Macao), arguably lack the necessary degree of constitutional independence required under Article 93(1) of the CISG. Although the provincial government[69] has the power to promulgate its own law concerning business dealings of Chinese entities in the SEZ with foreign parties,[70] the SEZ is not a territorial unit in its own right under the Constitution of the PRC.[71]

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[65] Hong Kong Basic Law, *supra* note 1, art. 8.

[66] Macao Basic Law, *supra* note 1, art. 8.

[67] *Compare* Ge, *supra* note 41, at 238 *and* GHAI, *supra* note 34, at 478 (similarly arguing in favour of applying federal State clauses to the Hong Kong SAR).

[68] For Hong Kong see Hong Kong Basic Law, *supra* note 1, art. 5 *and* SINO-BRITISH JOINT DECLARATION OF 1984, *supra* note 28, § 3(12); for Macao see Macao Basic Law, *supra* note 1, art. 5 *and* SINO-PORTUGUESE JOINT DECLARATION OF 1987, *supra* note 28, § 2(12).

[69] In case of both the Shenzhen SEZ and the Zhuhai SEZ, this is the Government of Guangdong.

[70] *See* Fisanich, *supra* note 10, at 105-06.

[71] *See* Ge, *supra* note 41, at 239.

*b. Declaration Requirement Under Article 93 of the CISG*

Article 93(1) of the CISG entitles a State consisting of more than one territorial unit to, at the time of signature, ratification, acceptance, approval or accession, "declare that the CISG is to extend to all its territorial units or only to one or more of them."[72] As far as the timing for a declaration under Article 93 of the CISG is concerned, the wording of the provision was designed to ensure that declarations could only be made at the times specifically mentioned therein, but not later[73] (compare the different wordings of, e.g., Articles 94 and 96 of the CISG, which allow declarations to be made "at any time").[74] The question arises as to whether this limitation was meant to apply to cases of State succession as well. As the PRC only became a State with more than one territorial unit in 1997 (and thus years after its approval of the UN Sales Convention in 1986), this reading of Article 93 of the CISG would render a declaration by China *per se* inadmissible. The answer should be in the negative, as the situation of a Contracting State which – after having acceded to the Convention – is enlarged by a territorial unit within the meaning of Article 93 of the CISG was never considered during the drafting process of the CISG. Neither this nor any other aspect of the effects of a succession of States (in a broader sense) are expressly settled in the Convention.

It seems arguable, however, that Article 93 of the CISG expresses a general principle in the sense of Article 7(2) of the CISG[75] on which the UN Sales Convention is based; with the

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[72] United Nations Convention on Contracts for the International Sale of Goods, *supra* note 38, art. 93 (1).

[73] ENDERLEIN & MASKOW, *supra* note 54, para. 3.

[74] United Nations Convention on Contracts for the International Sale of Goods, *supra* note 38, art. 94; *Id.* art. 96.

[75] It is a matter of dispute whether the rules laid down in Article 7 of the CISG also apply to the interpretation of the Convention's Final Provisions in Articles 89-101 of the CISG, or whether those provisions – and thus Article 93 – should be exclusively interpreted according to the rules in Articles 31-33 of the Vienna Convention on the Law of Treaties 1969 (in the latter sense, *see* ENDERLEIN & MASKOW, *supra* note 54, art. 7 para. 2.2; Richard Happ, *Anwendbarkeit völkerrechtlicher Auslegungsmethoden auf das UN-Kaufrecht*, *in* RECHT DER INTERNATIONALEN WIRTSCHAFT 376, 377 (1997)). It is submitted that the wording of Article 7(2) CISG itself – which refers to "this Convention" – makes clear that this provision also applies to Part IV of the CISG: Whenever articles in the UN Sales Convention pertain only to selected parts of the CISG, they expressly say so, as can, e.g., be seen in CISG Articles 12, 24, 27, 92(1), 96 and 101(1) .

principle being that States with a constitutionally guaranteed division of power among its constituent units should be given the chance to avoid the assumption of an unqualified obligation in international law to apply its provisions to contracts falling within the scope of Article 1 of the CISG, but rather to enable the Convention to be applied progressively to particular units of the State concerned. The implementation of this general principle requires a declaration under Article 93 of the CISG to be also admissible at the time a territory becomes part of a Contracting State and thus creates the situation of a non-unitary State addressed by Article 93 of the CISG. The same conclusion can be arrived at when relying on the general law on the succession of States, which accepts that a newly independent State may formulate a reservation when making a notification of succession establishing its status as a Contracting State to a multilateral treaty.[76]

While the People's Republic of China thus had the legal opportunity to make a declaration under Article 93 of the CISG stipulating that the UN Sales Convention is not to extend to Hong Kong and Macao, it did not do so. Although the PRC's Letters of notification of treaties applicable to Hong Kong and Macao after the handovers,[77] both met the formal requirements respectivly under Article 93 of the CISG—as they were made in writing (Article 97(2) of the CISG) and were deposited with the Secretary-General of the United Nations, the depositary of the CISG (Article 93(2) of the CISG). These Letters are, as has already been mentioned, silent on the issue of the UN Sales Convention.

### c. *Effect of the Lack of Declaration, Article 93(4) of the CISG*

The legal effect of a non-unitary State becoming or remaining a Contracting State without have made a declaration according to Article 93 of the CISG is expressly laid down in Article 93(4) of the CISG: "If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State." The clarity of this

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[76] ZIMMERMANN, *supra* note 17, at 756; *compare* Vienna Convention on Succession of States in Respect of Treaties, 1978, art. 20(2).

[77] Letter of notification of treaties applicable to Macao after December 20, 1999, *supra* note 32.

provision, which establishes the CISG's "automatic application-unless approach,"[78] leaves nothing to be desired.[79] Furthermore, its content conforms to Article 29 of the Vienna Convention on the Law of Treaties of 1969.[80]

The effect of Article 93(4) of the CISG is that the UN Sales Convention extends to Hong Kong and Macao.[81] Parties to international sales contracts with their place of business in one of the SARs are thus residing in a "Contracting State" under Article 1 CISG.[82] For the purposes of determining the status of Hong Kong and Macao under the CISG, the position of the internal legal order of the Special Administrative Regions is in so far without relevance, as Article 93(4) of the CISG is part and parcel of the Convention the People's Republic of China has acceded to.[83] It should furthermore be kept in mind that the PRC, in its Letter of notification to the Secretary-General of the United Nations of June 20, 1997, expressly confirmed its intention to honour the obligations arising from treaties which – like the UN Sales Convention due to Article 93(4) of the CISG – owing to their provisions, must apply to the entire territory of a State.[84] Finally, two central goals of the UN Sales Convention – to foster predictability for international merchants[85] and legal certainty in international trade[86] – can only be achieved if the status of Hong Kong and Macao under the CISG is determined

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[78] Shen, *supra* note 33, at 669.

[79] *See* HERBER, *supra* note 53, para. 4.

[80] *Contra* ENDERLEIN & MASKOW, *supra* note 54, para. 5; *see also* Ge, *supra* note 41, at 238; GHAI, *supra* note 34, at 478.

[81] Shen, *supra* note 33, at 668.

[82] Index Syndicate Ltd. v. NV Carta Mundi, Rechtbank van Koophandel Turnhout [District Court] u. A/00/691, 18 Jan. 2001 (Belgium), *available at* http://cisgw3.law.pace.edu/cases/010118b1.html (noting that both Belgium and the PRC, of which Hong Kong is again part, ratified the Convention).

[83] To this end, Article 142(2) of the General Principles of the Civil Law of the People's Republic of China as effective of 1 January 1987 stipulates that "[if] any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations." This provision accordingly transfers the *pacta sunt servanda* principle into the domestic law of the PRC; *Cf.* Ge, *supra* note 41, at 237-38.

[84] Letter of notification of treaties applicable to Macao after December 20, 1999, *supra* note 32.

[85] *See* Fisanich, *supra* note 10, at 101.

[86] *See* ENDERLEIN & MASKOW, *supra* note 54, para. 1.

through interpretation of the Convention's uniform rules alone, and without reference to the SARs' own law and the complex construction of legal doctrine surrounding the two handovers. To expect courts and arbitral tribunals in the numerous other Contracting States to look to the intricate legal aspects described in the present article when interpreting the Convention would mean to give up on the order to attain uniformity in application, as prescribed in Article 7 CISG.

## IV. Practical Conclusions

Regarding the status of Hong Kong and Macao under the CISG, which conclusions can be drawn from the point of view of the practitioner who is faced with an international contract of sale involving a party from Hong Kong or Macao? In answering this question, four scenarios need to be distinguished:

### A. *Applicability of the Convention According to Article 1(1)(a) CISG When a Party from Hong Kong or Macao is Involved*

When faced with the task of determining the law applicable to a contract between one party having its place of business in either the Hong Kong SAR or the Macao SAR and another party from a different Contracting State,[87] the solution for any court in any Contracting State to the CISG is the same. The UN Sales Convention applies according to Article 1(1)(a) CISG, as both parties are from different Contracting States.[88] In considering the position of the party from Hong Kong/Macao, it is important to bear in mind that Article 93(4) of the CISG is similarly binding for the courts in each State that has ratified the Convention.

For courts in the Hong Kong SAR and the Macao SAR, the situation seems nevertheless somewhat more complicated.[89] The reason is that although both territories now form part of the People's Republic of China and thus of a Contracting State, there is currently no Hong Kong or Macao legislation implementing the UN Sales Convention. "The Hong Kong SAR re-

[87] The special situation involving a contract of sale between one party from the Hong Kong or the Macao SAR and another party from Mainland China will be considered below in subsection C.

[88] Index Syndicate v. NV Carta Mundi, *supra* note 82.

[89] *See* Ghai, *supra* note 34, at 478-79.

tains the dualist approach to giving effect to treaties in domestic law."[90] Accordingly, the Central People's Government should have been seeking the views of the SAR government so that Hong Kong implementing legislation could have been made[91] – a step that was apparently not taken. In Mainland China, on the contrary, the UN Sales Convention was given effect in 1989 by way of a judicial directive of the Supreme People's Court ordering all Chinese courts to apply the CISG.[92] This judicial directive, however, cannot to be taken into account by courts in Hong Kong or Macao, as Article 18(2) of the Hong Kong Basic Law[93] expressly stipulates that "no national law shall be applied in the Hong Kong SAR except for those listed in Annex III to the Basic Law" (which does not list any law pertaining to matters governed by the CISG).[94]

The practical result is that courts in Hong Kong and Macao are currently unlikely to apply the Convention to contracts involving a party from one of the SARs. The courts are in fact even likely to be unaware of the CISG's applicability, and would in any way not be entitled to ignore that the legislature of the two SARs has not made the necessary implementing legislation. This unfortunate situation means that the same contractual dispute will be subjected to different sets of rules when decided in a Hong Kong/Macao court as opposed to a court in any other Contracting State – a result that is in direct contradiction to the very purpose of the unification of commercial law[95] and thus

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[90] *See* AUST, *supra* note 23, at 330; Slinn, *supra* note 14, at 288-89.

[91] *See* AUST, *supra* note 23, at 330; Mushkat, *supra* note 14, at 193. For the important role of Hong Kong's Department of Justice in drafting implementing legislative acts, see Ge, *supra* note 41, at 237.

[92] Memorandum of the National Working Meeting on Adjudication of Economic Cases involving Foreign, Hong Kong or Macao Elements in Coastal Regions, part III, Ch. 5 (June 12, 1989).

[93] For Hong Kong, see Hong Kong Basic Law, *supra* note 1, art. 18; for Macao, *see* Macao Basic Law, *supra* note 1, art. 18.

[94] Slinn, *supra* note 14, at 289.

[95] In addition, attention is drawn to the fact that the current government of the United Kingdom has indicated its willingness to make the UN Sales Convention part of British sales law when parliamentary time can be found for the legislation. *Cf.* Jacob S. Ziegel, *The Future of the International Sales Convention from a Common Law Perspective*, 6 N.Z. BUS. L.Q. 336, 343 (2000). By refusing to implement the CISG, the Hong Kong SAR would thus run the risk of remaining isolated from both the current trends in Chinese and in British sales law. *See id.*

should be rectified by the Hong Kong and Macao legislatures at the earliest possible date.

### B. *Applicability of the Convention According to Article 1(1)(b) CISG*

Is the UN Sales Convention applicable according to Article 1(1)(b) when the rules of private international law of the forum lead to the application of the law of Hong Kong or Macao?

If the dispute is brought in front of a court in Hong Kong and Macao (leaving the issue of the lacking implementing legislation aside for the moment), the answer is nevertheless in the negative. The PRC has made use of the reservation in Article 95 CISG, declaring that it will not be bound by Article 1(1)(b) CISG, and the effect of this reservation must be considered to extend to the two SARs.[96] While in the case of the Article 95 declaration made by the CSSR, there is no agreement among commentators if the reservation continues to have effect for the Czech and the Slovak Republics[97] although they did not expressly confirm the reservation in their declarations of succession notified to the depositary.[98] There should be no similar doubt in the case of Hong Kong and Macao, as these two territories have become part of a Contracting State which continues to exist.

A difficult and much disputed question arises when a contractual dispute comes before the courts of a Contracting State which itself has not made a declaration according to Article 95 of the CISG, but whose rules of private international law (being applied under Article 1(1)(b) of the CISG) invoke the law of

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[96] In respect of those treaties listed in the Letters of notification sent by the PRC to depositaries, the reservations and declarations which apply to the Hong Kong resp. the Macao SAR were usually specified. Declarations made by China were not extended to the SARs, except where this had been agreed upon by the British/Portuguese and Chinese Governments. *See* AUST, *supra* note 23, at 324-25.

[97] On May 28, 1993, the Slovak Republic deposited with the United Nations an instrument of succession with effect from January 1, 1993, the date of succession of this State and of the Czech Republic. The Czech Republic deposited a similar instrument on September 30, 1993.

[98] Fritz Enderlein, *Vienna Convention and Eastern European Lawyers*, INT'L SALES Q. 12 (1997); Willibald Posch, *Anmerkung zu OGH, Urteil vom 12.2.1998 – 2 Ob 328/97*, ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG, INTERNATIONALES PRIVATRECHT UND EUROPARECHT 68-69 (1999). From the point of view of general public international law, see ZIMMERMANN, *supra* note 17, at 768.

Hong Kong and Macao. Should this lead to the application of the UN Sales Convention, although Hong Kong and Macao themselves would not apply the Convention as they are affected by the PRC's Article 95-reservation?[99] No certain answer in this matter seems possible, as no internationally prevailing opinion in the affirmative[100] nor in the negative[101] is discernible. Suffice it to say that the practical relevance of this constellation should not be overestimated, as yet no case law on this issue has emerged. As one commentator has aptly remarked, "The Article 95 problem is a dying one, the victim of the success of the CISG . . ."[102]

### C. *Applicability of the Convention to Contracts Between Parties from Hong Kong/Macao and the PRC*

A scenario that requires special treatment is the trade in goods conducted between Hong Kong, Macao and Mainland China. Taking particularly into account the tremendous volume of import-export trade conducted by Hong Kong with China,[103] it is not difficult to imagine that a substantial portion of the international sales contracts involving a party from the Hong Kong SAR will be concluded with parties from either Mainland China or Macao. These intra-China trade relations, however, are not as such governed by the UN Sales Convention, which is made clear by Article 1 of the CISG, which declares the Convention to be applicable to contracts "between parties whose places of business are in different States."[104] Similarly, the wording of Article 93(3) of the CISG was chosen so as to avoid giving the misleading impression that the Convention might apply to a

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[99] The same question does, of course, occur when the law of any other Contracting State which has made a declaration under Article 95 CISG (as currently Singapore, St. Vincent and the Grenadines and the United States) is invoked. It has already been pointed out that the situation with respect to the Czech and the Slovak Republics is not entirely clear.

[100] *See* MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE para. 2.44 (1999).

[101] *See* Evans, *supra* note 61, para. 3.4; Schlechtriem, *supra* note 13, at 345.

[102] BRIDGE, *supra* note 100, at para. 2.45. In the vast majority of cases, the Convention nowadays applies according to Article 1(1)(a) of the CISG.

[103] *See* Lewis, *supra* note 10, at 251.

[104] Erik Jayme, *Article 1*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION para. 2.2 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987) (citing the example of a contract between a Scottish and an English party).

contract concluded between parties with their places of business in different territorial units of the same Contracting State.[105] At the same time, the provision was designed to "dispel any implication that territorial units of a federal Contracting State could be deemed as having any international personality, in other words that they could be regarded as "Contracting States" for the purposes of the [CISG]."[106]

Although intra-China contracts of sale thus do not fulfill the Convention's application requirements, these contracts would, of course, be subject to the CISG's rules if and when either the government of the PRC or the SARs should declare them to be applicable.[107] In this case, it would be an application of the uniform sales law based on an autonomous decision of these governments, not upon the legal obligations enshrined in the Convention itself. However, until an explicit provision to that effect has been made in the domestic legislation of either Mainland China, the Hong Kong SAR, or the Macao SAR, it will be difficult to assert the exact legal rules applicable to contracts of sale between parties from the SARs and the rest of the PRC.[108]

### D. *Applicability of the Convention by Way of a Choice-of-Law Clause Selecting the Law of Hong Kong or Macao*

The last situation to be discussed here is the frequent case of an explicit contractual choice-of-law clause. Naturally, no problems arise if such a choice-of-law clause directly calls for the UN Sales Convention to be the law applicable to the contract.[109] It has already been mentioned that a clause invoking the law of a Contracting State to the CISG is similarly consid-

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[105] *See* Evans, *supra* note 61, para. 2.4.

[106] *See* the explanation by the Canadian delegate Low, United Nations Conference on Contracts for the International Sale of Goods, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, (Vienna, 10 March – 11 April 1980), at 445, U.N. Doc. No. A/CONF. 97/19 (1981) (United Nations ed., 1981).

[107] Such a possibility was also envisaged by the drafters of the Convention; *see id.* at 445.

[108] *See* Shen, *supra* note 33, at 669-70 (stating that "[c]larification is needed by the relevant authorities").

[109] *See* Lewis, *supra* note 10, at 251 (calling upon Hong Kong lawyers in 1988 to strongly advise their clients engaged in PRC sales and purchase transactions to press for incorporation of a CISG choice-of-law clause); *see also* Ding, *supra* note

ered to be leading to the application of the Convention, as the CISG's rules form an integral part of the law of each Contracting State and, containing special rules for the international sale of goods, have priority over non-uniform national sales law.[110] It should, however, be noted that a number of courts have indicated that, as an exception, a different interpretation of such a contractual clause would apply where another "indication of the intent of the parties is made evident"[111] or "the choice-of-law clause at issue . . . evince[s] a clear intent to opt out of the CISG."[112]

In this respect, the question arises as whether a clause declaring e.g. "the law of Hong Kong" to be the law governing the contract should be read as indicating such a contrary intent, as it seems clear that currently neither the public authorities nor the legal practitioners in the Hong Kong SAR and the Macao SAR are likely to consider the UN Sales Convention to be a part of the respective municipal legal order. Bearing in mind that choice-of-law clauses invoking Hong Kong law will usually have been drafted by parties from Hong Kong, does this suggest that an application of the SAR's domestic, non-uniform sales law was envisaged? It is submitted that, in the final analysis, this is not the case. A valid choice of domestic Hong Kong law instead of the CISG needs to be based on the parties *common* intent, with just one of the parties' preference for its "home law" being insufficient. To this end, it is difficult to see how a foreign contracting partner should be aware of the ambiguous position of Hong Kong's legal order towards the SAR's status under the UN Sales Convention.[113] From a practitioner's point of view, it thus seems only reasonable to accept that a trader from outside the Hong Kong SAR rightfully relied on the application of the Convention when he agreed to a clause in favor of "the law of Hong Kong," the law of a Contracting State.

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11, at 36 (reporting that it is nowadays a common practice for foreign traders to include such clauses into their contracts with parties from the PRC).

110 *See Asante Technologies*, *supra* note 6.

111 *Company Ceramique Culinare de France*, *supra* note 6; *see also* BGH VIII ZR 259/97, *supra* note 6.

112 *Asante Technologies*, *supra* note 6, at 1150.

113 For a practical example on how difficult it can be for a European court to assert the state of the Hong Kong sales law, *compare Italdecor S.a.s.*, *supra* note 14.

## V. Conclusion: "One Country, Two Systems" Under Uniform International Sales Law

It has been established in this article that both the Hong Kong SAR and the Macao SAR form part of a Contracting State under the UN Sales Convention since the respective handover of their territories to the People's Republic of China took place. For the purposes of the applicability of the Convention, parties from Hong Kong and Macao thus have their places of business in "Contracting States" referred to in Article 1 of the CISG.[114]

From a policy point of view, this situation reflects the increasing global acceptance of the UN Sales Convention. Its extension to two important trading entities further enhances the territorial uniformity of the international sales law and, at the same time, brings the benefits of the Convention within the reach of both Hong Kong's and Macao's trading and legal communities.[115] In doing so, the example of the two Chinese Special Administrative Regions touches upon two of the UN Sales Convention's cornerstones. Its uniform rules on the sale of goods were designed to suit "the different social, economic and legal systems" practised throughout the world.[116] In determining the Convention's applicability, however, we must – in the interest of clarity and certainty – look to the country, not the system.

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[114] Index Syndicate v. NV Carta Mundi, *supra* note 82.

[115] *See* Lewis, *supra* note 10, at 253.

[116] *Cf.* United Nations Convention on Contracts for the International Sale of Goods, *supra* note 38, Preamble.