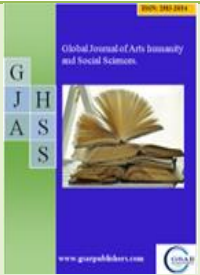


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THE CISG BETWEEN THE SUCCESS AND FAILURE.

By

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Abstract

This paper aims to discuss the United Nations Convention on Contracts for the International Sale of Goods (CISG) and its effectiveness in the achievement of its goal of establishing uniformity in the laws governing international sales. This paper will give an account of the evolution of the CISG, the objectives and the subjects covered by the Convention as well as the principles of good faith and Lex Mercatoria. This paper also aims at to identify the criticisms that have been levelled against the CISG such as those concerning the interpretation, translation and the opt-out provisions. This paper will also discuss the British reluctance in to ratify the convention and the American experience in the application of the convention. Although, this paper points out the weaknesses of the CISG as a means to achieve total uniformity, it is argued that the CISG has gone a long way in establishing certainty in the law of international sales and encouraging convergence of laws despite the difficulties experienced in its adoption and application in various legal systems

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INTRODUCTION

In the 20th century, globalization was an important point, drawing this way for business expansion. Furthermore, it has reduced the importance of national boundaries to a cross border, which called for an international agreement, represented in 1988 by the United Nations Convention of Sales of Goods (CISG), thus allowing the trader the opportunity to overtake national distinction in favor of international commercial law. In other words, the CISG came to help the merchants. However, it is a controversial treaty that raised issues among practitioners and scholars who believe that the CISG has been one of the most successful international instruments that uniformed the International Law of Sales of Goods. By the end of 2015, 84 states ratified the Convention .¹ It has clearly achieved one of its main goals and objectives: the creation of a uniform body of international sales law with almost universal acceptance. On the other hand, many commentators state that the CISG may fail to achieve its goal of creating uniformity as well as the predictability

of the law that governs the international sales of goods contracts. In addition, it might be caused the harm of these aim .²

This assignment analyzes the significant issues related to the CISG. First, we highlight the history and development of the CISG. Second, address the aims and scopes of the CISG as well as briefly discuss the Lex Mercatoria principles that will draw the reader's attention to the most important principles of CISG as contained in Article 7 (1). The fourth part contains the other side of the CISG, which is, did the CISG achieve its goal? With the example of the USA as a common-law jurisdiction experience. Furthermore, the United Kingdom refused to ratify the CISG.

The History of CISG.

The development of CISG took many years of work and effort until it notified more than two-thirds of the world. In 1928, there was an inauguration in Rome: Ernis Rabel strived for the unification of international law. He suggested an initial report on

¹ United Nations Convention on Contracts for the International Sale of Goods available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=X-10&chapter=10&lang=en access 9 March 2016

² Philip Hackney,(2015) *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?* LA. Law Review 61 (2000/2001) 473-490



the possibilities of uniform sales law in the code in 1992. Then 1935 the first draft of uniform sales law was produced after comparing almost all the legal systems at that period of time and published as "Das Recht des Warenkaufs." Then, during the Second World War, the work was suspended until the fifties, in 1956, 1963 two further revised versions were followed, and an additional draft dealing with the unification of international sales law was prepared. In the Netherlands, the UNIDROIT conference was held at The Hague in 1964 and adopted two conventions: the Convention relating to a Uniform Law of International Sales (ULIS) and the Convention related to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) (ULF), ("the Hague Conventions"). However, both conventions failed because they did not fulfil their high hopes and expectations, and only nine countries ratified them. The first draft was in 1976, and UNCTRAL distributed another draft including the rules of contract formation. In 1980, 62 states negotiated the CISG as a treaty, after which the CISG came into force in 1988.³

The aims of CISG.

The significant goals and aims of the CISG are found in the treaty's preamble. First, the unification of sales law should remove legal barriers in international trade to facilitate business between traders from different states, as well as to promote uniformity of international sales law by understanding that both national (sales) contracts and international contracts are different in many aspects.⁴ The second point is to strengthen international trade "on the basis of mutual benefit and equality" which seems a considerable factor in promoting good relations between countries. In addition, it is not concerned with the validity of the contract or its effect on the property of the goods.⁵ Furthermore, going back to the first goal, which is the unification of sales law in addition to the uniformity it seeks to serve and maintain peace among countries. Consequently, these aims or features make CISG one of the most important legal documents in globalized trade. So far, about 84 states have ratified the Convention, such as the USA, China, and Australia. Once ratified by the state, it automatically governs the contract unless both parties want to exclude it from their contract. Also. In international cases, it is commonly used by state courts and arbitration tribunals. Therefore CISG has turned into the most effective source for legislation on both domestic and international grades in the area of private law, especially those countries that improved their legal system after the political change in 1990.⁶

³ Rogers V, Lai K. *History of the CISG and Its Present Status*. In: DiMatteo LA, ed. *International Sales Law: A Global Challenge*. Cambridge University Press; 2014:8-22.

⁴ Ulrich Magnus, *The Vienna Sales Convention (CISG) between Civil and Common law – Best of all Worlds?*, 3 J. Civ. L. Stud. (2010) Available at: <http://digitalcommons.law.lsu.edu/jcls/vol13/iss1/6>

⁵ Franco Ferrari, *REVISITED IN THE LIGHT OF RECENT EXPERIENCES* (2003).

⁶ Franco Ferrari, *The CISG and its Impact on National Legal Systems*, (2008) available online / http://www.beck-shop.de/fachbuch/leseprobe/9783866530782_Excerpt.pdf access 4 Mar 2016.

The scope of CISG.

As mentioned, the purpose of the CISG is to ensure uniformity in international sales law. Thus, the CISG first applies to contracts between parties from different states. "The Convention applies to contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State" which means that it only applies to the sales contract and does not apply to sales of ships, aircraft consumer goods⁷

as well as it, does to service contract article 3, furthermore, some types of sales are excluded from the convention such as goods bought for Personal, family or household use, sale by auction, on execution or otherwise by law) o (stocks, shares, investment securities, negotiable instruments, money .⁸ In addition, CISG is not concerned with the validity of the contract and its impact on the property of the seller's liability for injury or death . Another feature of the CISG is that the parties have the right to exclude the application of the CISG on their contract, which is the importance of the principle of contractual freedom. Articles 1,2,3,4,5,6.

The significant principles under Article 7 (1) (International interpretation).

"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." The aim of the Convention is to promote international trade by removing legal barriers to international trade, and the CISG has spent many years unifying international trade. Therefore, to achieve uniformity of interpretation, Article 7 takes charge of the responsibility and the hard mission as a guidance judge. The three main considerations of the CISG objective are as follows:

- 1- International characteristics
- 2- Uniformity.
- 3- Good faith between parties.⁹

These principles are read clearly in the light of Article 7 (2) of the convention, which means the CISG is the initial source of interpretation, accordingly "To read the words of the Convention with regard for their 'international character' requires that they be projected against an international background."¹⁰ The meaning here is that reading the CISG under national legal principles may breach or violate Article 7(1) necessity of taking into account its international character, as underlined in the draft of the convention by the secretariat "[n]ational rules on the law of sales of goods are

⁷ See note 2

⁸ Ibid.

⁹ Evelien Visser, *Gaps in the CISG: In General and with Specific Emphasis on the Interpretation of the Remedial Provisions of the Convention in the Light of the General Principles of the CISG* *Pace Law School Institute of International Commercial Law 1998*,

¹⁰ Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 *Minnesota Journal of Global Trade* (1997) 105-152 .



subject to sharp divergences in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum."¹¹

The principle of uniformity is the main or the real value of CISG because the initial drafters did not attempt to create new rules for international sales, but, it was working on the uniform the previous rules for international sales, which was known among traders as so as to supplant the difficult and component to create a system that subjected international sales to differ terms of national law.¹²

Good faith.

It is a significant principle of almost every legal system, even though it might be treated differently in common law than in civil law. For instance, in the majority of civil law systems in France, which is a leading civil law jurisdiction, the principles of good faith were expressed in the formation and interpretation of the contract. Furthermore, there are a number of terms in the CISG that represent these principles and conform to its (general principle) under CISG. Thus, the observance of good faith should be given a wide interpretation by the individual contractor to the CISG itself.¹³

Lex Mercatoria.

Nonetheless, the desire to uniform sales law is not something new, while, the tendency can be drawn back to the 17th century.

Berthold Goldman defines *Lex Mercatoria* as "a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law."

This law had five qualities: "1) it was transnational; 2) its principal source was mercantile customs 3) it was administered not by professional judges but by merchants themselves

4) Its procedure was speedy and informal; and 5) it stressed equity, in the medieval sense of fairness, as an overriding principle."¹⁴

A few practitioners state that the *Lex Mercatoria* might be viewed as a recovery of older traditions, 'since today's *Lex Mercatoria* alludes to transnational exchange relations. Nevertheless, in spite of this concept has been criticized by legal scholars and it has been recognized also by arbitration tribunals and courts, for instance, in China the general principles of transnational commerce the applicable when there is no choice of law clause, this term has been considered as a statutory reference to the *Lex mercatoria*.

¹¹ See note 12

¹² 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) Reproduced with permission of 17 Journal of Law and Commerce (1998).*

¹³ *Ibid.*

¹⁴ Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 *HARV. INT'L L. J.* 221, 225 (1978).

Article 5 (3) by statute of 1985 on Transnational Economic Contracts.

The problems of CISG.

Some practitioners and scholars argue that after many years in force, CISG may fail to achieve goals that are uniform and predictable to international sales law. However, others believed that the CISG might cause harm to their aims.¹⁵ Therefore, it is impossible to discuss all the problems with this treaty; thus, we will examine some of them.

Although Article 7 is the most important Article in the CISG, it has been the center of the conflict as a result of the vagueness of its provisions, which leads to misinterpretation in relation to the observance of good faith.¹⁶ CISG fails to provide a detailed definition of good faith and thus may lead to problematic issues in relation to the interpretation of the article itself. For instance, the duty of the court (in other words, the judges' interpretation) may vary considerably, depending on whether it is applied in reference to the conduct of the parties or to the international transaction as a whole, here an inability due to the absence of an international tribunal to resolve such a problem. Another drawback of the convention is the translation of the terms; in other words, the meanings of the terms will not be the same in all languages when they are translated. In addition, the CISG had given the parties the right to exclude the application of the convention in the contract or may exclude certain provisions, which will make uniformity impossible if the parties have this right (Article 6). Additionally, the issue of reasonable time in Article 39 which makes the provision endangers the main aims of the CISG. Furthermore, one of these reasons which lead to put out the convention is that the CISG does not govern the validity of the contract and that the treaty does not contain a definition of "validity"¹⁷ Also in some terms, CISG is not suited to the subsequent development such as electronic contract. Thus, parties might prefer to choose a domestic law to govern their contract.¹⁸

The UK and their reluctance to ratify the CISG.

There are a few reasons why the UK is hesitant to embrace the convention. One of the reasons is that the ratification of the convention may endanger London's venerable role as a legislation centre as well as an international arbitration, moreover, Thus, CISG is less suitable for commodity sales.¹⁹ The English Sale of Goods

¹⁵ See note 2.

¹⁶ Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law*.2007

¹⁷ Ziegel J., *The Future of the International Sales Convention from a Common Law Perspective*, *New Zealand Bus. L.Q.* 6 (2000) 336-346

¹⁸ *Ibid.*

¹⁹ Zeller, Bruno, "A commodity sale is a sale of basic resources or agricultural products" Camilla B. Andersen and Ulrich G. Schroeter(eds), *Source Sharing International Commercial Law across National Boundaries*, London: Wildy, Simmonds & Hill,2008.



Act, 1979. To some extent, the CISG's tough terms on contract evasion in case of non-conforming goods, for instance, Articles 25 and 49 of the CISG, show that significant violation is a precondition for the avoidance of agreement, while as per the English Sale of Goods Act, any non-similarity would be considered as a breach of condition and subsequently a ground to end the agreement.²⁰ Moreover, the incompatibility of the CISG's conditions on the passing of risk (CISG Articles 66-70) with the International Commercial Terms ("INCOTERMS") FOB and CIF. Under CISG Article 6, party self-governance is a hidden rule of the CISG. The agreement stipulates that non-conforming goods or records should be grounds for evasion or whether it includes an INCOTERM.²¹ Another problem is the vagueness of some articles, such as Article 7, as mentioned earlier. There is a huge difference between the previous English case law, in which many cases were decided by the CISG. Therefore, English lawyers are careful about using the CISG because they do not know how the court would deal with the application and interpretation of the provision.²² Finally, the application of CISG might include a huge number of disputes.²³

The USA and Vienna convention.

The USA is one of many countries that ratified the CISG from its early stages. Legal scholars have predicted that CISG might be enormously adopted by the international community as well as it may even triumph over domestic law. However, this hope has disappeared recently as a result of the neglect and ignorance of the application of CISG. The CISG is still uncommonly used in the USA for many reasons, on one hand, American lawyers often advise their customers to opt out of CISG as a result of the uncertainty of outcome in contrast with UCC, therefore, UCC has been commonly used in the USA courts and the outcome under UCC is more predictable than that under CISG.²⁴ On the other hand, there are some points showing the differences between Germany and the USA through the application of CISG. Briefly, these factors are represented by cultural factors, economic factors and legal factors endemic to the Convention, going back to issues when the lawyers and parties avoid or ignore as well as exclude

²⁰ Nathalie Hofmann *Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe 2010 145-181*

²¹ Ingeborg Schwenzer, *The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Document*, 36 *Vict. U. Wellington L. Rev.* 795, 807 (2005) available at / <http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-36-2005/issue-4/cisg-schwenzer.pdf> access 5 MAR 2016

²² See note 20

²³ Sally Moss, *Why the United Kingdom Has Not Ratified the CISG*, (2005-06) 483-485 available at / <http://www.cisg.law.pace.edu/cisg/biblio/moss.html> access 6 Mar 2016

²⁴ Meredith Kolsky, *Comments on Luke Nottage's Paper, University of Wellington Law Review (2005/4) 859-862*

even that could happen because the parochialism or a lack of familiarity.

These are some examples to prove that the court of appellate noticed that a few cases applied the convention even though its wide scope in USA *MCC-Marble Ceramic*.

Centre, Inc. v. Ceramica Nuova D'Agostino. Nevertheless, sometimes the court unintentionally ignores the application of CISG although it is the applicable law *Interag Company Limited v. Stafford Phase Corp. And GPL Treatment Ltd v. Louisiana Pacific Corp.*

Therefore, in *Delchi Carrier S.p.A. v. Rotorex Corp*, the court observed that there is no case law under CISG.

The unusual thing is that since 2000 only 20 reported decisions referred to the CISG and half of them held CISG not applicable.²⁵ Compared with other states that ratified CISG, such as Germany, between 1988 to 1998 only 10 years the database of CISG reported 250 adjudicated CISG decisions some of which were arbitrations, Germany had the biggest part which was 100 and 100 between France, Switzerland, and Netherland, while the other 50 were shared between all the rest of the world including the USA.²⁶

Conclusion.

Since its establishment, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has made substantial progress toward providing uniformity to international sales law. By 2015, 84 states had ratified the Convention, reflecting its broad acceptance as a significant source of domestic and international private law. To completely achieve its objectives of consistency and predictability, the CISG must overcome a variety of barriers.

The confusing clauses in Article 7, which relate to good faith and the challenges of translating and interpreting the Convention in many languages and legal systems, as well as the ability of parties to choose to reject the Convention, are important concerns. Concerns regarding the effectiveness and application of the CISG are still present in some states, such as the United States and the United Kingdom, which have been reluctant to ratify the convention.

Even though, the CISG has not achieved entire uniformity in international sales law, it has contributed to more certainty and convergence in this field, although its limitations, the CISG is still a significant step towards harmonizing international trade practices. The CISG's objectives of facilitating international commerce and fostering good relations between nations must be the future efforts by wea experts in order to identified weaknesses that prevent the achievement of previous goals.

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²⁶ *Ibid.*



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