Critical Analysis of the International Commercial Law

Research Essay

Introduction

The United Nations Convention on Contracts for the International Sales of Goods- the CISG- took effect in 1980 and since then it has been closely examined by the scholars all around the world. There are scholars who commend the Convention for its successes, while there are others who hold a pessimistic view about the achievements of CISG. (Felemegas, 2007) Just like other international formal documents of conventions, this also begins with a preamble, where the formal introductory statement aims at explaining the purpose of this convention.

In 1980, CISG was considered by the representatives of sixty-two nations at the renowned Vienna Conference. At the end, forty-two states nominated in the favour of the Convention. The convention has English, French, Arabic, Chinese, Spanish and Russian as official languages. In 1982, a German translation was agreed by Switzerland, Germany, and Austria. (HACHEM, 2007)

The first paragraph of the preamble highlights that Convention has been set up by UN General Assembly to begin a New International Economic Order. The NIEO comprises of various economic resolutions which were adopted during the UN General Assembly’s sixth special sitting. The purpose to establish CISG was that a need was felt by the world to revise the economic system which would advance the constant and speedy economic growth and enhance the living style of people living in all the nations, focusing especially on the population of less developed countries.

The paragraph two of the Convention lays emphasis on the establishment of fundamentals of international trade which would ensure ‘uniformity and common good’. (Nwekwo, 2015) Having such a fundamental principle means that nations would be able to deal with each other peacefully and thus spreading prosperity and on the other hand this principle also help the nations in conflict to resolve their matters which may arise from international agreements of sale between various parties.

The third and the final paragraph of the preamble blends the notion of the previous two principles and keeps it in a favourable position. It talks about the declaration that those nations which adopt and endorse this convention as unanimous law on International sale of goods, would pass through their legal, economic or social orders. It also focuses on the advancement of international trade by applying the laws of uniformity, which would eliminate any sort of legal obstructions to carry out international trade.

The main body of United Nations which was responsible for drafting the Convention of CISG was United Nations Commission on International Trade Law (UNCITRAL) and the convention was enacted in a diplomatic conference held in Vienna in 1980 and entered into action in January 1988. The CISG convention came into being through an agreement between the member states from all regions for the purpose of governing their international sales based on the rules of this convention. With the evolution and steady rise of globalization, national trade has been a subject of state’s control whereas the international trade revolves around agreements.

The International Nature of CISG

The CISG is an international convention, not a prototypical law. One of the major distinctive feature of a convention is that its global, not bound to only one state. This means that the convention would standardize the laws at the level that is above national law. It would also help in avoiding conflicts between states caused due to different trade laws. (DiMatteo, 2005)

The international conventions like CISG in short term often tend to produce a problem. For instance, CISG, is not incorporated into the legal system of USA but it is applied by national courts. In USA, CISG, has a separate jurisdictional domain as it is incorporated as a separate, independent statue. This means that two separate sales laws in USA exist within a single legal system, which can give rise to conflict. (DiMatteo, The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings, 1997)

The world-wide nature of CISG is also exhibited in its Article 10 (a), where the nationality of the parties, or their headquarters, is totally irrelevant and such details are not taken into consideration when it has to be determined whether CISG is applicable or not. (Joseph F. Morrissey, 2008)So, it can be said that CISG is also applicable when a transaction is carried about between the nationals of the same country, but it entails a transnational shipment, and the other party has its business place in some other country.

CISG: Soft law

When reviewing a case law or any arbitral decision, it is vital to regard that the scope of CISG is not restricted toward its implementation as a mandatory law of dispute but in many cases courts or arbitral panels have it as customary international law or what may be called as soft law. Two usages have been indicated of using CISG as soft law, (a) using CISG by parties is a voluntary option and it does not automatically subject to CISG jurisprudence, (b) law court and arbitral panels can use it as customary law. (Dimatteo, 2002)

The significance of using CISG as soft is that it enhances its goals of “relative uniformity” in international sales law and thus can be applied to a larger number of cases, also it can provide more incentives to the merchants, trader or businesspeople.

The Harmonization of CISG at Global and Regional Level

Globalization in 20th and 21st century has been catalyst for the development of global trade. Since trade has become globalized, it increased the urgency to harmonize all the existing and applicable commercial laws to produce a single law which would regulate international trade. In the context of international trade, two trends are observed. The very first one is the establishment of CISG, while the second trend encompasses the regional organizations which are set up to unify and regulate the regional trade, for instance, ASEAN, OHADA, CAFTA-DR are few examples.

In a meeting on UN on the Convention of International Sales of Goods, Ingeborg Schwenzer, said that CISG has been the prototype for many regional organizations which are pursuing the goal of unifying the regional sales law. This convention has been highly adopted in European as well as South American states, which the pace of acceptance in Asia and Africa is comparatively slow. A significant fact is that the adoption of CISG by these regions has also had an impact in developing new rules that govern sales transactions regionally. For instance, “Common European Sales Law for European States”, has been included in Africa’s OHADA.

The CISG has 40 European states as members, 13 members are from Asia, 12 states from Africa, 9 South American countries, 7 states from North America, New Zealand and Australia make up 83 countries as members of CISG out of 193 countries in the world.

Article 7: “Principle of Good Faith”

In conformity to CISG’s Article 7, it is required that the understandings should be assessed with respect to “the observance of good faith in international trade”. (CISG, 1980) The previous debates on of article 7 reveals that embodiment of the principle of responsibility of good faith has been due to the polemical debates in the past. Courts and Arbitral panels have implied it as a duty to deal with good faith with the other stakeholders. (Honnold, 1989) The good faith principle has been articulated by the Columbia’s Constitutional Court as its “own Magna Carta”. (Case law on UNCITRAL texts, 2000)In another arbitration by the Hungarian Court, the judge ruled the principle of good faith not only to be the criteria for the explanation of CISG, but he also advised it to serve as a standard between the parties while signing any contract. (APPLICABLE CISG PROVISIONS AND ISSUES, 1995)

There are also other articles in CISG which confine with the axiom of good faith. Such a point can also be found in Article 54, which urges the buyer to take such measures and to conform with such formalities, when required to carry out the payments to the seller. It is seen that courts have generally perceived this article to be compelled on buyer and seller both. The buyer must, with good faith, work towards satisfying the requirements of business contract and should not use his lack of inaction as defence for any failure, while the seller, on the other hand, must not hinder the efforts made by the buyer to comply with his demands.

It is imperative to note that this article is not without ambiguities which leads to the problems opposing acceptance. Article 7 is said to give rise to issues which are often thought to be a cause low level of uniformity and has been debated by the scholars from a long time. This article in question is said to be the most important one in the convention and thus it is fundamental to the failures and achievements of the convention.

The deficiencies are said to rise in this article because it fails to provide the definition of good faith and the mechanism for determining the application of good faith. These deficiencies upsurge the questions like who has the responsibility of determining good faith and where. This is the reason why sometimes Article 7 is given different various interpretations.

The Successes and Pitfalls of the CISG

It won’t be wrong to estimate that CISG governs around 70% to 80% of international sales dealings. The prominent role of CISG which is evident in almost 2500 published decisions of courts, the arbitral awards, colossal scholarly work, many conferences, and not to forget the “Annual Willem C. Vis International Commercial Arbitration Moot. (HACHEM, 2007) This all shows how significant is CISG in practice, academia legal or educational. But despite all this, the success is fragile. The uniform understand, interpretation and application of Article 7 has still not been achieved.

The CISG over the period of last two decades has demonstrated to be a mannequin for local legislators as well. Sweden, Finland and Norway have enacted new laws for domestic sales of goods and these new laws are highly reliable on CISG. (Lilleholt, 2009)In the post-Cold War era, Eastern European states looked at the structure and laws of CISG when the formulated their own civil laws. This is not only true for the Independent States of Commonwealth but also for Baltic States amongst which the most eminent one is Estonia. China, which is emerging economic power of 21st century also closely follow CISG for its international trade contracts.

Mostly accepted in the industrialized western states that the business parties are permitted to select the law that is pertinent to their contracts, yet this is not how it is practiced in other parts of the world. In developing countries there’s a fear among the parties that western powers will be given too much advantages thus they refused to recognize the choice of law clause. For instance, in Brazil the choice of law clause is extremely provocative. So when an American buyer acquires goods from Brazilian market and has contracted on the basis of “Uniform Commercial Code”, but still would find himself in a risky place if he tries to sue the Brazilian seller in the local court. (Stringer, 2005)

The shortcomings of domestic law in international trade can be easily avoided through the application of CISG, as the convention is available in six languages and has been translated into various other languages. The decisions of courts, arbitral panels decisions, writings of scholars, have been written into present worlds lingua franca i.e. English of international trade. The material is easily accessible on various websites, in books and articles. (UNICTRAL, 1989)

Criticism

Though few but gains and benefits of the CISG are undeniable, yet the criticism regarding its application is persistent. The very first criticism is faced in the application of uniform law. Several questions ascend regarding the relationship amid uniform law’s application and the existing simultaneous domestic law. Main criticism of CISG has always revolved around the interpretation of CISG, i.e. for the ambiguous terms such as reasonable. This criticism usually comes from the side of lawyers. (Peter Huber, 2007)Indeed, CISG does not follow the common law tradition rather it is stimulated the continental civilian codes.

Second shortfall of the CISG is that unlike its counterparts in European communities or even OHADA, the CISG lacks a common supreme court or an authority for its member states, which could be held responsible for interpreting and harmonizing the uniform law. This can be called as a severe discrepancy in the CISG. (Schlechtriem, 1986)There’s no doubt that the foreign legal decisions lack the binding effect on the national courts, regardless of the situation in which the domestic legal system is in.

Other issue that can be said to jeopardize the uniformity is the existence of simultaneous remedies. (Kruisinga, 2004) The CISG is wholly concerned around the buyer and seller’s contractual relationship. But under many lawful systems, only the existence of contractual remedies does not avert the parties from depending on on other means, particularly the wrong and illegal ones.

Lastly, the CISG also faces criticism due to incomplete nature. According to Article 4 of the CISG, its mere concern is the formation of contracts, rights, obligations, of parties involved. And it does not have any rules or laws about the legitimacy of the contract or any law that encompasses its requirements. (Bridge, 2007)The criticism by authors is that the term “validity” is undistinguishable, which leads to an unpredictable application of the Convention and this eventually results in legal uncertainties.

Conclusion

The evaluation of the CISG suggests that the Convention has successfully reduced the costs of transactions, inspired law reforms, created a unified sales law and ensured legal certainty. And as a result, it has been adopted by many countries, which includes big trades as well. The CISG is said to manifest itself as effective convention. But a problem remains, as discussed above too, that CISG has not yet been successful in attaining its foremost goal of uniform sales law, which is due to deviating understandings of the convention. Though Article 7 exists, yet the courts and tribunals take different paths to interpret the convention, which as a outcome hinders the achievements of CISG as “uniform sales law”.

CISG help to boost legal certainty because domestic courts are expected to apply the rules of convention in the right way as compared to the foreign laws. There are many successes of the CISG but many holdbacks too which keep it from achieving the statues of ultimate law of international trade.

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