DOES THE VIENNA CONVENTION FOR THE INTERNATIONAL SALE OF GOODS (CISG) ACHIEVE THE GOALS OF ITS FRAMEWORKERS .....?

The basic formular of a Sale of Goods contract is ,a seller promises to deliver a specific goods or a specific quantity of goods for the buyer for an agreed price or for a money consideration .In the context of the Common law a contract of sale is for a sale of tangible movable assets or chattels called goods. Transferring the title of the goods may be either international or domestic wise and it may also arise between merchants or between merchants and private individual or between private individuals.

The main features of international commercial contract differ from a domestic contract. In such matters generally buyer and seller are in different countries .Then it may difficult to ascertain applicable law of the contract with problem regards to the recognition and enforcement of the judgments. Here the uncertainty and unpredictability is unavoidable.In domestic contractual matters generally buyers and sellers are in same country. Neither difficulty to ascertain applicable law nor problem regards to the recognition and enforcement of the judgments. In domestic wise various types of trade terms are used by different legal regimes .But the question deals with is any uniformity of the interpreting those words and practices.

The different interpretations may be a reason for building a misunderstand between the parties. This may be a reason to the parties to discourage cross boarder commercial deals or transactions. This problem may arise a situation where a contract between the counties with Common law and Civil law countries .In common law the obligations are required by the law based on the judicial precedent supplemented by statutory law. Here the special feature is the law largely made by judges and developed from time to time. Since the principle of just and equity applies the common law claims seems very flexible. When we compare with civil tradition ,here the law exclusively made by the legislation. The law absolutely depends on the judicial interpretation codes or legislation.

Between these two traditions the formalities of the general contract is also differ. The common law tradition contract requires consideration is most vital. But in the context of the civil law this concept is not valid . Also the instances where the issue is to determine whether the acceptance made by a certain party the applicable laws and rules seems contrast.However during last few decades the local economic market has gradually expanded to international arena. The different countries having different legal systems are encourage to the cross boarder commercial transactions due to developed communication systems and speedy transport facilities.

Since all the countries involve in commercial transactions now it has become very competitive. This is identified as the concept of globalization ,the economic theory would translate in to the conceptualization of world as one legal entity with regional subdivisions. Nature of economic globalization leads to easy rapid low cost exchange of information and transfer of money. Also it does lay the foundation of an open financial market.All these circumstances leads towards to reduce the practical barriers of international trade and creates a global market.

Then the concept of harmonization and unification of international trade law were recognized. Harmonization may conceptually be thought of as process through which domestic laws may be modified to enhance predictability in cross border commercial transactions. Rosett argues that harmonization is driven not by legislative means but by a shared commercial culture, legal literature and education .Further he suggests that effort should be direct at removing the underlying differences in economic, cultural and political settings and the cultures within which these rules operate before the legal rules are unified.

Unification is more advanced step comparing to harmonization. This may be seen as adoption by state of a common legal standard governing particular aspects of international business transactions.

Vienna convention for the international sale of goods generally known as CISG, introduced in April 1980 ,the unified law in this area .A convention is an international instrument which is adopted by state for the unification of the law at the international level. The Issue has to concern is that the CISG consists the rational of unification. The special features of the convention are it governs only international sales., applies only to commercial sale of goods, does not apply to certain questions often encountered in sale of transactions and finally the parties are free to exclude the application of the convention or vary the effects of its provisions.

This has been broadly described in the preamble of the CISG.

" Bearing in mind the broad objectives in the resolution adopted by the 6 th special session of the General Assembly of the UN on establishment of a new international economic order;

Considering that the development of international trade on the basis of equity and mutual benefit is an important element in promoting friendly relation among the states;

Being of the option that the adoption of the uniform rules which govern contracts for the international sale of goods and take in to the account that the different social ,economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of the international trade ;

Have agreed as follows, ... "

The rational behind this unification is consists with few factors. Mainly that has to concern is the territorial nature of the law .No any other country binds in some other country's law ,since its force within a specific national boundaries. But there is some instance where one can apply law of another country, example is conflict of law rules or choice of law rules. It may cause less problems if one applies the proper law of the contract to the issue. But uncertainties of conflict of law rules may effect in these situations. Its true that the choice of law clause may solve this problem for some extend, but if an unified system had been introduced those critic issues may not arise.

Even though an issue may arise for the contractual parties in case of deciding their contractual obligations on a total strong legal regime. As Rabel stated the provisions of a unified law of sale was aimed at simplifying this situation by providing one applicable law for all international sale.
In the practice of trade usages and existence of standard contract mostly they do not cover all areas of formation of contract , rights and duties of the parties or availability of the remedies .

Camilla Baach Anderson, The uniform international sales law & global jurisconsultorium
(1938) 5 University of Chicago LR op cit note 10 at 546

(1938) 5 University of Chicago LR op cit note 10 at 546

In this scenario the importance of the unification comes forward since that type of law can fill out the gaps of established practices. Also when a problem arises the business community to refer their dispute to the arbitration rather than litigating. The decisions of arbitrators mostly depend on the equity not much concern about the law. When a uniform introduced the awards of the dispute may in the nature of globally accepted.Also national sales laws are mostly not in dynamic nature and sometimes seems bit uncomfortable with dealing international transactions. The law dealing with commercial matters must modernize and fashioned according to the changes of the global needs . To fulfill this intention the necessity of uniformed law seems most vital.

But unification has demerit points also. Specially jurists like Kotz, Mertens and Hobhouse presented their contradictory opinions. Grossman - Doerth believed the difficult to establish uniform law practices generally it Does not become mandatory including exclusion clauses. Also grant uncertainty is that parties has to believe the uniform law to ensure their trade usages and practices. On the other hand in the case of arbitration tribunal does consider neither foreign law nor national law when its decision making.

Kotz criticizes the unification based on statutory instrument. The unification has to be made very seriously concerning advantages ,disadvantages, cost and other socio economic grounds.

Since the earlier periods the efforts of unification were tested. in the middle age there was a uniform sale code applied universally called ,Lex mercatoria. Then the French code De commerce was introduced yet it was not fit in to what the legislature intended. Later international organizations formed for this purpose specially Institute Droit International and the International Law Association.

The main feature of the institute was to study the issue of unification while association tried to codify the law. As a result of the above effort two international conventions formed ,the Convention for the uniform law of international sales (ULIS) and the Convention for the uniform law on the formation of the contract for international sale of goods (ULE). But both ULIS and ULE were not supported by the counties as they expected. The UN commission for international trade found two main prospective for this issue. First was lack of participation by non European countries in the process of codifying. Second was developing and socialist countries were not ready to believe mainly what industrial countries had grafted. So the codified laws were complex and needed much transparent law. As a result of negotiations of the global community ,The CISG formed.

Our next step is to consider the advantages and disadvantages of adoption or ratifying CISG under three main areas. Legal reasoning adoption or ratifying CISG is important. Simplification ,reasonableness and equity are the principals that has to indicate in a balanced legislation. CISG as it is a unification of private international law and trade usages in the case of adoption the same applicable law will operate as a developed uniform legal system.

Also convention specifically try to ensure the balance of rights both seller and buyer ,risks and also awards in the context of equity. Also when CISG applicable ,the commercial transaction issues between different nations .The courts or tribunals may operate a established global law code. As well as in the case of interpretation of the CISG convention itself provides interpretation tools and principals. Then convention itself establishes an environment of uniform application and interpretation.

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2. G J Meijer ,International Commercial Arbitration in M Koppeonol Laforce (ed) International contracts (1996) 85- 94 p ,A Redforn & Hunter ,Law & practice of International Commercial Arbitration (London) 1-7p
Enderlein ,Mascow & Strohbach op cite note 7 at 23
Gross man Doerth op cit note 31 at 67
Hobhouse op cite note 7 at 533
op cite note 6 at 1-17

Once a country ratifies the convention ,then commercial transactions between international arena, generally covers under the CISG. Then no necessity arises of a application of choice of law .Courts can simply apply CISG as lex fori .CISG applies to a commercial contract unless parties expressly exclude it. This codification includes mixed up of many domestic trade laws and globally recognized usages to meet with he international standards. This can also consider as a tool for unified international relation and negotiations.Following paragraphs may describe the counter arguments on the above issue.

The compromise nature of the CISG leads the parties not to unified acceptance but raises confronting issues which divide legal regimes. Provisions like specific performance (s 28), validity of the contract ($ 4) , good faith (S 57) etc may make confusion in the context of interpretation.
Another argument that arose was ,convention does not has any underlying principles. Auther Rosett and Wool strongly support this argument. Example for this is the role of good faith. Even though it is an important requirement recognized in the most of the legal systems ,it act as separately apart from the legislature. But convention included this with remaining controversy.

Also there is an criticism for CISG is using different languages. This may effect on the genuine concepts of the law and no clear uniform interpretation can achieve. This scenario leads to a convention uncertainty. The drafters intention may effect using a translation for the purpose of interpretation. Also different economic, political and conceptual ideologies of different interpreters may effect on the basic core of CISG.

Further Rosett argued that convention draws an artificial division between national and international transactions. Article 1 distinguishes the scope of the application of convention using the business place as the major determining factor .In some cases it seems alright but on the basis of this factor it is not reasonable to determine the obligations or the duties of the contractual states. This seems unification is not absolute. If no business place in the contractual states the again parties has to refer the choice of law concept.

As unified law it has to adjust according to the social ,commercial and cultural changes of the world. But in the convention itself has no any facilitating provisions for any amendments or modifications of the basic structure. It does behave as a permanent structure. Once a country ratifies he CISG ,even with reservations ,it has no other choice than practicing this law.

Also there is a problem of practicing and recognizing the decisions of individual courts and tribunals of the different countries. Application or non application of principle of stare decisis of common law and civil law countries do effect of functioning the adjudication process. This idea was discussed by Lord Denning in James Buchanan & co V Babco forwarding & shipping (UK) Ltd.

Next we are going to discuss advantages and disadvantages of adopting CISG on trade related reasons.Adopting CISG as unified law it really makes commercial transaction of goods certainty. Also the countries do not have fantastic codified law on sale of goods ,the CISG seems very helpful. As son as a country became a party to the CISG, they can enjoy its formalities. Even there is a strong argument that CISG is unable to create a totally unified law .However Lord Goff ,an English judge criticized above issue and further mentioned generally disputed between parties based on breach of contract ,the remedies and interpretation of the convention .For above instance CISG contains better provisions.

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7 Sieg Eiselen,,South African Law journal ,part 2 (1996)323p,Adopton of CISG in South Africa
8Mertens & Rehbinder op cit note 54 at 82-3
9 Peter Winship ,international sales contracts under the Vienna convention (1984) 17 Uniform Commercial Code LJ 58
Camilla Baach Anderson, The uniform international sales law & global jurisconsultorium.
Sieg Eiselen,,South African Law journal ,part 2 (1996)323p,Adopton of CISG in South Africa, Cheshire & North op cit note 12 at 459 -60
Peter Winship, The Legal regime for international sales contacts.(1988) 2 Review of International Business Law 108
Sieg Eiselen,,South African Law journal ,part 2 (1996)323p,Adopton of CISG in South Africa, Cheshire & North op cit note 12 at 459 -60 Also (1977) 3 ALR 1048 HL ,(1981) AC 251 (HL) at 281p

Since CISG translated in to six official languages which are very much equal and provide a nice frame of common understanding between parties. Parties do not much familiar with or less experienced of international trade can easily adopt to this proceeding. Also it is very important to remain as it forms a very useful checklist of issues ,that are needed to address by the parties during negotiations.

Also CISG provides a sound balanced set of rules in the part of both buyer and seller. It also diminishes the conflict between parties on choice of law rules. Further it does contain the common trade practices and usages of the commercial arena, while incorterms also operate. Unification of the trade law is a fact, to develop a better competition in global market.

As a counter argument ,adopting CISG is irrelevant because of trade practices and standard contracts . Most of the countries exclude CISG from their contracts in the terms of their standard formed contact system. But as earlier mentioned some times convention do cover wider area of practices or standards and sometimes that can be seen transactions are not covered neither. On the other hand one can argue that ,codifying CISG is complicating the present situation rather than simpler.

Next fact we have to consider is adoption of CISG causes any advantages or disadvantages on the basis of policy reasons. CISG can define as a collective agreement of the world community on international sale of goods. A vast criticism of ULIS etc was that those had been formulated with almost exclusively on Western European ideology. It is important to compare this with CISG main elements whether it has codified considering general political ,legal and economic principles. At the moment , CISG has ratified by reasonable number of developed and developing countries all over the world. It has also given privileges to the countries to adopt favorable rules for themselves of the convention .But also this privilege may be a path uncertainty of unification.

The convention includes some main parts. Part I (Articles 1-13) defines the Convention's sphere of application and contains provisions as to interpretation, usages and requirements of contractual form. Part II (Articles 14-24) deals with the Formation of the Contract and Part III (Articles 25-88) contains the main body of rules on Sale of Goods. Part IV (Articles 89-101) provides the public international law framework.

The most vital fact that has to consider is that ,whether the CISG has achieved the goals set by it's draftsmen? As we discussed above ,mostly it does. In following examples are instances where it contains misrepresentations, non defined terms , doubts and loopholes of the law that diminish the draftsmen unification efforts.The CISG has its own applicable limitations .CISG governs only international sales. It applies where if the parties to the contract have their business place in different contracting states ,where a party has a more than one business place ,the relevant place of the business is the one most closely connected to he sale transaction .And also one party has its business place in a contracting state neither parties has his place of business in a contracting state.

Michal Stonberg ,Drafting considerations under the CISG ,1988

Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods ,*Univ. Prof. Dr. Peter Schlechtriem*]

18Michael Bridge ,International Sale of goods law & practice..1999, p36-9

18Michael Bridge ,International Sale of goods law & practice..1999, p44-6, Barry Nicholas, Law quantity Review (1989)

Axel H Baum,Guide to practical Applications of CISG ,Kluwer Law International 1994

18Michael Bridge ,International Sale of goods law & practice..1999, p 62-9,Barry Nicholas, Law quantity Review (1989)

Convention is only applicable to the commercial sale of goods. But here no any specific definition found for the sale of goods. Then reader has to determine the parameters of the phrase. As article 2 mentioned ,it expressly exclude the coverage of consumer sales, security transactions , sale of ships, aircraft and electricity .This is similar to ULIS section 5.In the scenario of goods as it is uncertain one can argue either convention also covers the sale of items as body parts ,software etc or on the other hand those items do not cover under the convention, since it has made specific exclusions. Also CISG is not given an interpretation for word sale even. But it includes the provisions not to rise any questions on determining ,what does a sale mean.

Also article 3 excludes sales apart from manufacturing or production goods, labour or other. Services constituted a preponderant part manufacturing contracts whole the buyer supplies a substantial portion of the material. Here a question arises what are the interpretations that can be given to substantial and preponderant part?. The convention is silent at this point.

Today the global commercial transactions function in very competitive manner and faster. Mostly money is not exchangeable between parties .Apart from that letters of credits ,methods of perfecting security interest in goods and other commercial subjects mostly relevant to sale of goods may adopt by the parties. But the question is whether any provision relating to above issue .CISG does not contain such provisions .But it describes the regime of formation of sale contracts ,rights and obligations of both buyer and seller. Section 4 does not speak the validity of the contract or any of its provisions or of any usage & the effect which the contract may have on the property in the goods sold. Then again the Domestic laws have to deal with the excluded matters

Here no provisions on passing of property .Since it is difficult to reconcile national differences and the subject flows over into other areas outside the law of contract .But it does contain provisions relating to the seller's obligation to deliver goods free of third party claims and the passing of risk. When the Domestic laws play the part on excluded matters ; the forms of words ,interpretations of contractual liabilities may differ. Situations like illegality, mistake, fraud etc, are some of the examples for different approaches. Then in this scenario no any options available other than excluding the validity concept. The situation arises whether any particular issue is one of the validity or one which is expressly provided for in the Convention. , Honnold suggests by applying the test of "whether the domestic rule is invoked by the same operative facts that invoke a rule of the ConventionArticle 5 deals with non applicability of the convention on death or personal injuries caused by the goods to any person .

This proposal sponsored by Finland, France, and the United States .As the purpose of this law is to deal with rights and obligations arising from the contract of sale between the parties .Question arises how does the seller can escape from his liabilities under the tort law. Here a conflict arises in general concept between tort ,strict liability ,fault based liability and CISG rules. In some instances buyer can maintain an action under either tort or CISG article 39.But some instance it seems that article 5 helps to determine the scope between CISG national precedent liability laws. Also convention recognizes article 6 as the limitation clause for the applicability. party autonomy over both the conflict rules and the substantive law. If a certain party exclude the applicability of the convention again the rules of private international law comes and this directly attack the idea of unification.

Article 7 states :

"(1) 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 section actually needs to interpret the convention provisions accordance with its international character and promoting uniformity of the application .

The question arises whether this could be a reality with the different global legal systems. The phrase good faith is also subject to considerable controversy as earlier mentioned .However the established formula is that good faith defines on the basis of consequences contract itself. This formulation would have approximated to the well-known "general clause" of the German Civil Code (B.G.B., s.242), which requires performance in good faith and which has been used in a very creative way by the German courts as a "maid of all work" to adapt and develop the law. This seems to be a controversial issue.

"(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

This Section provides the facility of filling the legal gaps of the convention. If no provision includes in the convention then he court have discretion of settling the issue with reference to the domestic legal regime or practices. This can also argue that filling the gaps using different approaches may also cause legal uncertainty. The German jurist may regret this rejection of a "good faith rule" corresponding to § 242 of the German Civil Code in its present day meaning. However, the function of such a general clause can probably be fulfilled by the rule that the parties must conduct themselves according to the standard of the "reasonable person," which is expressly described in a number of provisions and, therefore, according to Article 7(2), must be regarded as a general principle of the Convention.

Also convention does not mentioned about any jurisdiction and venue. It has left that be decided upon domestic legal systems. Again the problem of favorable forum or forum shopping comes in to the contract the concept of unification diminished. Also a state can exclude or can make reservation to the convention 's provision is a serious task..May be this has been introduced to attract the state to be a party to the convention .But it directly damages the core elements of unified law.

Convention does have six official languages, Arabic, English, French ,Russian and Spanish. Even one can argue it has broad up the application of the convention. But this has been a mostly discussed issue, since it has and it can arise different in shades of meaning of the CISG provisions.

The practice of the convention may be difficult with these obstacles.

It is true that the unification of law in a certain area is a grate effort with hard proceedings. Alover the world most of the states had been a party to the CISG and practicing this unified law. In that sense CISG seems much perfect since it does indicate all the main areas of the international sale of goods contacts.

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