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Contemporary Legal Analysis of the International Sale Contract in the Vienna Convention: A Narrative Review

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Abstract

The UN Convention on Contracts of the International Sales of Goods (CISG) streamlined the cross-border sales process when it was signed on 11 April 1980 in Vienna. The contract established the obligation of the buyer and seller regarding the place, time and other aspects related to the delivery of the goods. The purpose of the exploratory study is to analyze contemporary legal aspects of the convention grounded on geopolitical events. The findings of the study will help academics and businesses understand the nuances of international sales contract in the light of the Vienna Convention.

Keywords

Vienna convention, time of goods delivery, place of goods delivery, legal analysis, international sales contract

1. Introduction

The Vienna Convention for the International Sale of Goods (CISG) is a multilateral treaty that was adopted on April 11th, 1980. The ontological basis of the convention was creating a framework for a uniform set of rules for international sales of goods with the goal of equality and mutual justice and promoting friendly relations between countries (United Nations Commission on International Trade Law, 1980). The treaty aims to create a compromise on legal positions regarding contested issues related to the sales of goods at an international level (Keily, 1999). The international contract law aimed to achieve legal uniformity regarding the sales of goods between private parties all over the world.

Most existing literature looks at CISG in terms of its applicability and relevance. The study is a unique endeavor in that it represents a contemporary analysis of the obligation and risk associated with the delivery of goods as per the Vienna Convention for the International Sale of Goods. The findings of this study will be helpful for academicians and corporate executives in understanding the concepts of risk transfer and the obligation to deliver the goods as per the rules of the CISG.

2. Theoretical Framework

Different theories have been put forward by scholars for identifying the legal framework that governs the Vienna Convention on International Sale of Goods. The Good Faith principle is the main theory that underpins the international treaty that is mentioned in Article 7(1) of the legislation. This concept refers to fairness and reasonable standards in dealing with contracts (Keily, 1999).

The other related theoretical framework is the principle of the *pacta sunt servanda* which refers to agreements that must be kept (Lukashuk, 1989). This principle is a fundamental legal principle that reflects honesty, reasonable actions, and loyalty regarding contractual obligations. The principle has a moral influence on the actions of parties regarding a commercial contract. The principle guarantees the protection of the rights of parties through equitable solutions and prohibits abuse in the legal contexts by private and government actors.

3. Methodology

The qualitative narrative research method is used to analyze the topic in the legal context. The narrative research method involves analyzing the meaning people attribute to their worlds (Joyce, 2015). Narratives explore and analyze socially constructed stories through an interpretive framework (Joyce, 2015). Using electronic data management systems allow quick and accurate analysis of visual and textual data (Joyce, 2015).

Narrative research design captures and narrates experiences within specific contexts (Knowlton, 2007). The narrative is presented in a written format with an account of the researcher's findings supported by quotes from individuals (Joyce, 2015). Data for narrative research is collected through textual or visual analysis among other methods (Joyce, 2015). The analysis of existing literature will be used to extrapolate provisions and protection concerning risk transfer and obligation of risk under the Vienna Convention on International Sale of Goods.

The research study involves the pragmatic paradigm to assess reality. The pragmatic involves determining what is practical in a given situation to address an issue. The epistemological basis of the paradigm is meeting specific research goals (Morgan, 2007). According to Kowalczyk-Walędziak (2015), paradigm influences the efforts of a researcher in exploring a topic, gathering the required research material, classification, organization, and verification of the results to gain an

understanding of the reality. Gaining an understanding of different paradigms is of importance for the researchers; it will help in selecting the correct methods (Davies & Fisher, 2018). A paradigm selected by a researcher will influence how an issue is addressed and how data is interpreted (Davies & Fisher, 2018). Paradigms are the frame of reference through which the researcher observes and interprets reality.

Positivists view that there is one reality that can be empirically verified using quantitative methods. Interpretivism/constructivists believe that reality is subjective that can be verified using qualitative methods. Critical theory is also based on the assumption that reality is subjective that can be assessed using qualitative research methods. The pragmatists believe that reality can be analyzed subjectively and objectively depending on a given situation. The beliefs of a researcher influence both the research methods used for carrying out research. A researcher needs to know about the strengths and weaknesses of each paradigm. The research paradigm selected will influence the researcher's effort involved in gathering data for understanding reality. If no effort is made to understand the different paradigms, a researcher will have difficulty in understanding the context of publications. There must be congruity between the paradigm and research methods and methodology. Not understanding the paradigms will result in incongruity between paradigm and the process of assessing reality. The research study is based on an objective assessment of relevant information. It endeavors to understand the topic by creating objective criteria for evaluation regarding the international sales contract provisions of the United Nations Vienna Convention.

4. Definitions

Transfer of Risk – The concept of risk transfer in the context of commercial contracts refers to an implicit or explicit business agreement of transfer of risk of loss from one party to another upon delivery of goods.

Goods in Transit – The term refers to goods that have left the warehouse of the seller but have not reached the buyer.

Breach of Contract – The term regarding a commercial contract can be defined as a violation of the terms of a business agreement.

5. Problem Statement

According to Grove et al. (2014), a research problem refers to an area of concern regarding which there is a gap in the literature. Grove et al. (2014) state that research purpose often follows the problem statement that is developed based on the research problem.

A research problem and research purpose can be a sentence or several sentences making up a paragraph (Mertier, 2010). Researchers need to describe the purpose and the potential usefulness in solving the research problem (Ary et al., 2009). This implies that the research problem drives the purpose statement. The problem statement should be created first after reviewing the literature. This

will help in formulating the research purpose. The two concepts are connected and sequential in that the problem statement comes before the purpose.

A lot of studies have examined and analyzed the properties of CISG in unifying the commercial law. But the problem is that no existing study has analyzed the UN convention regarding international sales based on contemporary legal context.

A good problem statement is not easy to formulate. Gygi et al. (2012) stated that a good problem statement identifies the problem and its severity. Moreover, Hernon and Schwartz (2007) suggested that a problem should be clear and contribute to the literature related to the field. The research problem needs to be organized, defended, and evidenced. Ellis and Levy (2008) had stated that research should have an impact on future research. In this context, the research problem should be of interest to other researchers.

Based on the literature review regarding the good characteristics of a research problem, it can be surmised that the good characteristics of a research problem are a clear and concise statement. Moreover, the research problem should address relevant issues that are interesting for the researcher. The study addresses the problem by analyzing different dimensions of the international sales such as transfer of risk, time consideration in risk transfer, sales of goods in transit, and criteria for significant breach of a contract. The study will address the gap in knowledge regarding the obligation and risk transfer as per the CISG.

6. The Effect of Delivery: The Transfer of Risk to the Buyer

Goods can be damaged during transportation. The transfer of risks as per the Vienna Convention on International Sale of Goods depends on the terms of the agreement. The time of transfer of risk is important to understand as per the convention on the international transactions. As per article 67 of the Vienna Convention on international sale of goods, the risk of delivery is borne by the buyer when the seller is not bound to transfer the goods to the buyer at a "particular place". However, if the terms of the sales bound the seller to transport goods to a particular place, the seller bears the risk of delivery of goods. In this situation, the risk transfers to the buyer when the seller hands over the goods to the seller. The transfer of risk is not affected by the possession of the documents regarding ownership status. The physical transfer of goods is the decisive factor in determining the transfer of risk upon delivery of goods.

Complexities in risk transfer can arise in the case of potential disagreements regarding the transfer of risk. This can happen when the parties interpret the words of the contract differently. For instance, the terms like 'transfer of goods to a safe place' or 'transfer of goods to point B within a reasonable time'. These vague terms create confusions and subsequently disagreements regarding the transfer of risk. The disagreement can occur between the parties of the contract as well as between local and international courts. In the case of the latter, the International Court of Justice deals with disputes regarding the international sales of goods.

Another complexity regarding the transfer of risk arises in case of extraordinary losses during transportation. Insurance companies charge sellers a premium based on losses of a certain amount. Suppose that the limit of loss of goods insured is \$1 million. If the losses are more than the expected amount, does the loss pass to the buyer? The answer is that the additional risk is borne by the insurance company of the seller. The insurance companies generally insure extraordinary loss through a reinsurance company. So, the risk of extraordinary loss during transit will also be borne by the seller through the insurance company.

Yet another complexity regarding transfer of risk upon delivery arises in the case of non-conformity of goods transferred at the place specified in the terms of contract. The nonconformity means that the quantity or quality of goods does not meet the criteria of the buyer. The problem of nonconformity of goods cannot be assessed independently of the contract of sales as per the CISG. The conformity of goods can present uncertainty in determining the liability of the seller. Some of the factors that determine the nonconformity of goods in international transactions include contract law, international and domestic standards, and principle and the principles of *caveat emptor and caveat venditor* (Djieufock, 2016). The two principles refer to the buyers and sellers taking precautions before entering into a contract.

CISG does not define conformity in specific terms. The English definition of the term is to agree with. As a result, the term conformity implies that the goods should agree with the terms of the international transaction. Conformity implies that there should not be any difference between the actual condition of the goods delivered and the condition of the goods agreed when signing the terms of the contract. The seller is obligated to transfer the goods while ensuring functional and material conformity. Functional conformity means that the goods should be fit for the ordinary purpose for which similar goods are used, while material conformity means that the goods should be in the agreed quality, quantity, and specification.

The application of provisions of the risks regarding transfer of goods in case of international transactions is difficult if the business is characterized by false pretense and promises. For example, suppose that a seller sell counterfeit goods that becomes evident after the payments are made after delivery. The example shows that the application of the transfer of risk upon delivery depends on the applicability of the law more so than the conformity to the sales agreement.

7. The Time of the Contract in the Transfer of Risks

The consideration of time is also important regarding transfer of risk that determines the obligation of the parties to bear the loss of goods. As per the CISG, the seller is obligated for conform to the rules of contract until the time that the risk transfers to the buyer. The buyer is responsible for the goods as per the CISG when the payment is made. This implies that the time of the transfer of risk depends on the contract terms regarding payment for goods. If the goods are damaged by accident during the time between the performances of the contract, the seller is not obligated to deliver the goods.

Transfer of risk can occur at three points of time. It can occur when the contract is signed. In addition, the transfer of risk can occur at the time of transfer ownership documents of the goods are transferred to the buyer. The third time that the risk can be transferred is when the physical goods are transferred to the buyer. The contract terms will specify the time when the risk is transferred from the seller to the buyer.

Goods can be distinguished depending on whether they are present goods, future goods, or uncertain goods. The transfer of risk in the context of present goods occurs when the possession of goods in terms of ownership documentation or physical goods transfer occurs from the seller to the buyer. In contrast, the transfer of risk of future goods occurs at the time the goods have been manufactured or procured by the seller in any other way. The risk transfer of goods of unspecified goods occurs at the time that they are identified through a generic goods. .

The timing of the risk transfer as per the CISG will follow the owner of the goods unless specified in the contract terms. The temporal risk transfer does not affect the obligations and rights of the seller and buyer. The buyer will bear damage of any type when the ownership is transferred from the seller. The terms of the contract will determine the exact time when the risk is transferred. For instance, the transfer of risk in CIF (Cost, Insurance, and Freight) happens when the goods are delivered to the transport company. In contrast, the transfer of risk in the case of FOB (Freight on Board) happens when the product reaches the specified destination. As per the CISG, the buyer of goods will have to bear the partial loss of goods received and the seller will not be responsible for the damage. The seller will also not be responsible in case of accidental loss of goods. The buyer has to pay the price as per the contract as the risk has passed when the goods reach the destination. In other words, the time the risk has passed to the seller will determine whether the buyer or the seller shall bear the loss of the goods. When the seller has fulfilled the obligation for the transfer of goods, the risk passes from the seller to the buyer. The seller is not liable for damages when the buyer receives the goods.

As per the articles 66 to 70 of the CISG, the burden of proof relating to the transfer of risk depends on proving the timing and the obligation of the seller. The time and place of handing over the documents as per Article 34 of CISG is the same as that of the delivery of the goods. In case the documents are lost during delivery, the risk transfer is treated similar to the physical transfer of goods. The seller will not be responsible if the documents are lost or damaged during the transit. The buyers will bear the loss of the documents in international trade. In addition, the seller will be responsible for ensuring that the documents comply with agreed terms.

An important consideration regarding the time of transfer of risk is whether the legal risk passes at the time of physical transfer of goods and the associated documents. The legal risk includes the right of intervention, confiscation, and prevention of the transfer of goods. The legal risk arises due to governmental rights to deprive rogue elements from transferring goods. The CISG does not include terms or concepts for legal risks. But the activities of custom clearance and permission for

and quotas included in the CISG. The buyer bears the loss limited to the price as per Article 66 of the treaty at the time when the goods reach the destination. The loss of the buyer is reduced in case there is a breach in the terms of agreement as per the Article 70 of the CISG. Delay in transfer of goods can be considered a breach of contract that will prevent the transfer of risk from the seller to the buyer. The delayed delivery is not a legal risk but an actual risk that is associated with the time when the goods are transferred from the buyer to the seller.

The delay in delivery due to unavoidable situations such as COVID-19 warrants special consideration. As per the CISG, the seller is responsible for delays in the normal course of business. The seller will not be responsible for delays that are caused due to unavoidable circumstances such as a pandemic. Most business contracts have force majeure clauses under which the obligation of the performance of duty is voided in the case of force majeure events. The clauses may include termination of the contract in case of extraordinary events. A force majeure event has been addressed in Article 79 of the CISG that defines the event as 'an impediment beyond a party's control'. The seller is not responsible for damages due to extraordinary events if a notice of the failure to perform is given to the buyer within a reasonable time. The underlying purpose of the advance notice is to allow the buyer sufficient time to minimize the damage done due to nonperformance of the contract. ICC No. 2478/1974 can be cited as an example here whereby a French company that contracted to buy fuel from a Romanian company was allowed to claim compensation for cancellation of the contract. The Romanian company cancelled the contract since its export license had expired. While the event was considered a Force Majeure the Romanian company was still obligated for non-performance since it did not give notice to the French company within a reasonable time and waited over six months to send a notice for the nonperformance of the contract. Another similar case occurred in 2011 when a Thai company won the claim against Glencore as the tribunal judges stated that the company's notice of force majeure was ineffective and invalid (Karadelis, 2011). This shows that the time element is important when it comes to the transfer of risk as per the CISG.

Another important case regarding the time element for transfer of risk is that the date of signing of the contract also determines whether the force majeure event section of the CISG. As an example, an award of the tribunal in 2005 denied the claim of the seller that SARS was the cause of the non-performance of the contract since the contract was signed a few months prior to the SARS outbreak (Lak, 2020).

This shows that under the CISG the doctrine of exemption applies whereby the seller is not automatically discharged in the force majeure event. This is different than the doctrine of frustration that applies in the English law whereby the seller is automatically discharged of all contractual obligations in the extraordinary events such as SARS, COVID-19 and other natural and artificial events. According to Treitel (1994), the articles 79 of the CISG are similar to the excuse for non-performance as per the English law rather than a cause of

frustration. The extraordinary events are considered on an individual basis and the context of the contractual performance determines whether Article 79 of the CISG is applicable to the parties. This shows that a causal link between force majeure and nonperformance of contractual obligations is not easy to establish as per the CISG. The foreseeability principle is important for establishing the obligation of parties in extraordinary events. The parties should not have known about the occurrence of the event 'after' signing of the contract.

9. Separating the Obligation to Conform the Goods from the Obligation to Deliver the Goods

The Vienna Convention obliges the seller to deliver the goods and transfer the property as per the conditions specified in the contract. The obligation to transfer the goods as per the CISG involves three aspects including the place of delivery, the time of delivery, and the meeting obligations as specified in the terms of contract. The obligation to deliver the goods is mentioned in Chapter II of the CISG. The convention regarding the delivery of goods is applicable for all international sales transactions that occur between parties in two different locations. The seller's obligations to deliver the goods applies as per the convention irrespective of the private laws regarding sales of goods in respective countries of the parties.

The obligation regarding the international sale of goods as per the CISG includes both the sellers and the buyers obligations that are interdependent. Each of the obligations is enforceable legally in the respective countries of the contracting parties. The parties have the legal recourse in case of nonfulfillment of the obligations. The contracting parties have the legal right to enforce the contract of sales in good faith.

The Vienna Convention or the CISG regulates the obligations of the seller to deliver the goods as per the terms of the contract. The seller makes sure that the conditions in the contract are adhered to in delivering the product and the related ownership documents. The content of Article 30 of the convention includes explicit validity of the contract as the fundamental part of determining obligations of the seller. The section also makes it explicit that the contracting parties have the freedom of modifying the terms of the contract that will be used to determine the obligations of the contracting parties. The parties of the contract have autonomy in deciding the obligations without an agreement regarding the obligation of delivery and form of goods. The contractual agreements take priority over the provisions of the CISG.

The distinction between delivery and form of goods in the Vienna Convention is provided in Article 4 that specifies that the effect of the contract on the property of the goods is not a concern. But the Article implicitly states that the seller has to deliver the goods without any claim from another party unless the buyer agrees to take the goods irrespective of the claim on the property.

The Convention regulates the obligations of the seller to conform that is further expanded to include the guarantee of free from defects, eviction, and preservation of goods. On the other hand, the delivery of goods includes the physical transfer of goods to a place that is agreed by the buyer. The obligation to deliver the goods as per the Vienna Convention includes multiple aspects including obligations that are adjacent to the place of delivery and the time of delivery.

The delivery of the goods in international sales can be done either implicitly or explicitly by inserting terms in the contractual agreement. The geographical location must be established at the time of conclusion of the contractual agreement. The place of delivery is sometimes established implicitly as in the case of Ex Works terms. The delivery obligation includes the transfer of risk at the place specified in the contract.

The seller is not obliged to deliver the goods in any other location other than that specified in the contract. But what if the delivery location mentioned in the article cannot be reached due to an event such as the Ukraine-Russia war. According to the CISG or the Vienna Convention, the seller is obliged to deliver the goods if the sales contract mentions the delivery of the items mentioned in the contract to the transport company of the buyer. The solution is applicable in situations where the parties have stipulated expressly that the goods will be transported by a third party logistic agency. In this situation, the obligation of the seller to deliver the goods ends when the goods are handed to the independent transport agency. The obligation to deliver to the seller as per the CISG ends when the goods and the ownership documents are handed over to the transport company. The handing of goods or the ownership document by itself does not constitute meeting the obligation.

A specific condition is when the goods mentioned in the contract are not in possession of the seller at the time of concluding the sales contract. In such a situation, the provisions of the CISG regarding obligation of delivery does not apply unless the parties know where the goods are to be manufactured. The provision of the Vienna Convention regarding the obligation of the seller to transfer the goods applies only if the goods to be delivered are mentioned in the document and the parties know the exact place of the manufacture of the goods.

Article 3 of the Vienna Convention regulates goods that are to be manufactured by the seller. As per the regulation, the goods must specify irrespective of whether they are being manufactured or in transit. According to Article 68 of the convention, the obligation of the seller to transport goods ceases for goods that are in transit the moment that the contract is concluded.

A special consideration regarding the sellers obligation for delivery of goods arises when the sellers and buyers have different registered offices. In this case, the conventional norm is that the place closest to the area where the sales contract is concluded is considered as the place of origin and delivery. Moreover, if the parties of the contract do not have a registered office, the place of residence of the buyer and seller is to be accounted for when determining the obligation of delivery of goods.

The sellers' obligation to deliver the goods depends on certain latent obligations related to the contract. The seller must include a consignment note in case the goods are not specifically mentioned in the contract of agreement as per the Article 27 of the CISG. Another latent obligation of the seller is to select a specific transport medium. The seller has the right to select any reasonable transport for the delivery of goods to the specific location.

10. Criteria for Fundamental Breach of Contract

Information literacy refers to the ability to identify when information is required and the ability to locate, analyze, and use the required information (American Library Association, n.d.). The concept is highly relatable to fundamental breach of contract regarding the CISG since the implementation of practical academic techniques requires the collection and critical evaluation of information. It is important to evaluate and generate knowledge through applied research that will influence corporate practice.

Incorrect data often leads to wrong conclusions. Researchers and leaders can make the wrong assumption about the breach of contract through selective observation. It is important to carry out extensive idiographic research that involves examining an issue extensively. A researcher needs to critically analyze extensive data to examine actions that result in a fundamental breach of contract.

The goods must be delivered at the time agreed by the contracting parties. But certain conditions prevent the seller from delivering the goods as per the agreed timeframe that leads to a major breach of the contract. The Article 81 of the Vienna convention can be applied to the current geopolitical conditions resulting in supply chain disruptions. Restrictions on travel due to COVID have presented special circumstances for which the seller will not be responsible for a fundamental breach of contract. Moreover, the Russian-Ukraine war and the subsequent sanctions on Russia have created complexities regarding the breach of contract terms. The risk of goods passes to the buyer in extraordinary circumstances unless the breach of contract is due to the seller's actions or inactions. In case the seller has delivered the goods to the transport agency, the buyer is responsible for delay or non-arrival of goods as per the Vienna Convention.

According to the Vienna Convention, the seller is obligated to deliver the goods within a reasonable period. This means that the seller is obligated to transfer the goods at the end of the extraordinary circumstances if allowed in the contract. The delay in transfer of goods will not be regarded as a breach of the contract. The seller must deliver the goods when the supply chain disruptions end unless specified in the sale contract. The contract terms may also specify the party that can specify the time for the delivery of the goods. Without explicit provision, the right to set the new delivery date rests with the seller of goods as per the principle of *in dubio pro debitori*. The party that has the obligation to transfer the goods is responsible for notification regarding the delivery of the good within a reasonable time.

The nature of the transaction also determines the specific time for the notification and delivery of goods. Goods that are perishable or have seasonal demand should be delivered in good faith with full consideration of the damage to the other party in case of non-delivery of the good. The general norm and custom regarding commercial contracts will determine the reasonable time in case the goods are not perishable and don't have seasonal demand.

Another situation where a fundamental breach of contract as per the CISG occurs when a buyer or seller does not carry out an action required for completion of the transaction. For instance, if the goods must be delivered on advance payment, a fundamental breach of contract occurs if the payments are not made in advance by the buyer. One contemporary situation regarding the payment of goods is when the buyer encounters a hacker when trying to make the payment. In this situation, the local cybersecurity laws apply. The seller is generally responsible to ensure protection of confidential payment information of buyers. Local laws punish the seller in case the buyer suffers a loss due to the nonconformance to security laws. The non-conformance to data security laws represents a fundamental breach of the sales contract.

The parties of a contract generally specify the time limit for the goods delivery in international sales. The time limit can be established as prompt shipment within 15 days of the sales contract. In addition, the contract terms may specify duality that the goods should be delivered as soon as it is ready but not exceeding 90 days. The seller is obliged to meet the conditions otherwise it will result in a fundamental breach of the contract. It is important that the time of delivery must be established based on the capacity of the transporter. A fundamental breach of contract due to non-delivery on a specific time will not occur if the duration mentioned in the contract is not reasonable. As mentioned previously, the nature of the goods and the circumstances surrounding the contract determine reasonable time for the delivery of the goods. The buyer and seller in international sales contract may specify a tolerance clause whereby the buyer has to make payment based on the delivery of goods within the specified limit agreed by both the parties.

11. Conclusion

The knowledge about the contemporary legal aspects of the sales contract provisions of the Vienna Contract will help in understanding the nuances involved in international contracts. The study includes insight into different aspects of international trade under the context of the CISG's purpose and scope that will help in understanding the fundamental issues involved in international trade in the 21st century.

Organizations are facing rapid changes in strategic competence, technology, and trends relating to geopolitical factors. Legal analysis of the Vienna convention can facilitate the evaluation of obligations of parties involved in international sales transactions.

Companies are indeed facing grave challenges due to the supply chain disruptions caused by coronavirus and recently the Ukraine-Russia war. The geopolitical events are creating cost pressures particularly for multinational organizations to meet contractual obligations. The remedies allowed to parties affected by the supply chain disruptions must be understood through the current legal analysis of international sales contracts.

Contract activity evaluation is the key that can help in solving many of the problems related to the breach of international sales contracts. There is a need for objective, evidence-based evaluation that is not biased by political or economic factors for determining remedial actions allowed to each party. It is important to create a shared leadership function where parties are encouraged to collaborate and encourage each other in addressing issues (Bergman et al., 2012).

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