

Applicability of United Nations Convention On Contract for The International Sale of Goods (CISG) On Non-Contracting States

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Abstract - CISG is the main international sales contract uniform treaty ratified by a significant proportion of world trade. Can courts of a non-contracting party be compelled, as propounded by some writers, to apply CISG impliedly or by default or acquire the status of force of law to be justiciable?

Index Terms - Compulsion, Contracting States, Default, Enactment, Justiciable.

I INTRODUCTION

The United Nations Convention for Contracts on International Sale of Goods (CISG) is an international trade agreement adopted in 1980 at the Vienna Convention for the International Sale of Goods. Its purpose is to eliminate any ambiguity caused by different domestic laws concerning the international sales of goods.¹ The CISG applies to contracts for sales² between companies located in different countries. CISG is currently in force in almost 89 countries as at 2018, which account for more than 75%³ of world trade, making it one of the most successful international uniform laws.

The Convention for the Uniform Law of International Sales (ULIS) and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods⁴ (ULF) were adopted in previous years. They were not accepted by many countries for material deficiencies specified within the contracts, the lack of participation on the part of European countries in the ratification process and the fact that the two conventions were not ratified by United States.⁵ CISG is noted for its simplicity and was ratified by the United States in 1988, which in turn prompted other countries to ratify the convention but for some other countries like Nigeria under its article 1(1)(b)⁶ and section 12 of the 1999 Constitution of the Federal Republic of Nigeria (Fourth Alteration) 2010 respectively. The laws within CISG supersede domestic trade laws. Even if CISG is not mentioned specifically within a contract between two companies in countries that have ratified the Convention, the companies are bound by the agreement.

In order to have parts of the Convention excluded, the contract has to explicitly mention the Convention or the parts of it that do not apply.⁷

II LEGAL BASIS OF CISG

By the combined readings of articles 30 and 53 of CISG,⁸ sale contracts can be described as reciprocal exchange of goods against price. Generally, under articles 2 and 3, its scope of application is limited but applies to contracts of sales⁹ for the supply of goods to be manufactured or produced, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production excluding labour or other services by the party who furnishes the goods.¹⁰ Article 1 applies in both contracting states where the buyer and seller have their respective places of business¹¹ or the rules of private international law lead to the application of the law of a contracting state. Article 6 provides that contracting parties may opt out of CISG or any of its provisions, otherwise will apply in a variety of situations, primarily *inter alia* to contracts where parties have chosen (party autonomy) the proper law of a CISG state to govern the contract.¹² With regard to choice of law, courts and arbitration tribunals have generally found that CISG will apply when chosen by the parties unless expressly excluded¹³ or the domestic law of a state is specifically referred to.¹⁴

Also, in certain cases, an arbitral tribunal may apply CISG on its own initiative, as part of the *lex mercatoria*.¹⁵ Successful implementation of CISG requires more than countries to adopt it but that courts and arbitral tribunals must interpret CISG in a uniform manner and not through the lens of domestic laws. Otherwise, divergent precedents will be created and the benefits of a harmonized regime will not be realized as parties will incur transaction costs for endless assessment interpretation of the Convention.¹⁵ This issue is buttressed in article 7 of CISG, by creating a public international law obligation for States, via their courts, to interpret the Convention autonomously with regard 'to its international character and the need to promote in its application some uniformity', taking into account foreign case law and scholarly writings.¹⁷ For many national courts, it is not typical to consider foreign case law instead of domestic judicial precedent (except *mutatis mutandi*) or legislation.

III CISG AND JURISDICTIONAL APPLICATION IN NATIONAL COURTS

In general, one of the most important developments in private international law and maritime law benefitting international

commerce was the recognition¹⁸ of the concept of party autonomy to determine the applicable law.¹⁹ Hague Principles on Choice of Law in International Commercial Contracts approved on 19 March 2015²⁰ (Hague Principles) in its preamble set forth general principles concerning choice of law in international commercial contracts²¹. The Hague Principles *inter alia* (a) affirm the principle of party autonomy with limited exceptions under its article 11; or (b) may be used as a model for national, regional, supranational or international instruments;²² or (c) may be used to interpret, supplement and develop rules of private international law;²³ or (d) may be applied by courts and arbitral tribunals.²⁴

Party autonomy has been a common principle in contract law, thus it has been drafted into one of the most international convention²⁵ in contract law. Article 19 of CISG states that, 'a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer'. Therefore it provides bargaining power to parties by letting them to negotiate the terms of contract in line with their²⁶ interest. It represents all characteristic of party autonomy such as freedom of contract by deciding the contractual terms and equal bargaining power by letting parties negotiate the terms as to what they give their consents.²⁷ In the same vein, article 6 CISG which is synonymous with article 2(2) of the Hague Principles, provides freedom to parties²⁸ to decide which law of the country will govern their contract. The freedom of contract has also been stipulated into The Principles of European Contract Law as:

- (1) Parties are free to enter into contract and to determine its contents, subject to the requirement of good faith and fair dealing, and the mandatory rules established by these Principles.
- (2) The parties may exclude the application of the any of the principles or derogate from or vary their effects, except as otherwise provided by these principles.²⁹

However, party autonomy has not been implemented to provide parties a complete freedom to decide contractual terms, because some other legislation set some limitation to protect public or individual interests.³⁰ On the other hand, the most common limitation is mandatory rules especially in conflict of law which prone to give courts authority to decide as to what extent the terms would be enforceable.³¹ Choice of law agreements should be distinguished from jurisdiction clause, forum selection clauses or choice of court clauses,³² all of which are synonyms for the parties' agreement on the forum that will decide their dispute.³³ Choice of law agreements should be also distinguished from arbitration clause that denotes the parties' agreement to submit their dispute to an arbitral tribunal. All which are collectively referred to as dispute resolution agreements.³⁴

This therefore transcends to the issue of jurisdiction of a court or arbitration tribunal approached to adjudicate on international contract of sale of goods.³⁵ From the perspective of private international law, it is imperative to ascertain whether a contract contains a valid choice of law and forum selection clauses. If the parties fail to select an applicable law, a court accepting to exercise jurisdiction of the dispute will have to apply the relevant conflict rule³⁶ of law to determine which law is applicable to the contract. The contracting parties may agree to completely or partly exclude the application of CISG by virtue of its article 6. The question may arise whether a choice of law clause referring

to the law of a contracting state, implies an exclusion of CISG. The majority view in both the legal literature and case law is that a choice of law clause that refers to the law of a contracting state will lead to the application of CISG.³⁷ This may be different if the choice of law clause expressly refers to the application of the national law of a contracting state.

Be that as it may, the Brussel Convention of 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and regulation (CE) No. 44/2001, provides which courts have jurisdiction in international contracts.³⁸ Article 2 of the Convention provides that persons domiciled in a member state shall be sued in the courts of that state. Thus, the court of the place of business of the defendant will generally have jurisdiction if it is within a member state. In addition, article 5 of the Convention which contains a very similar provision of article 5(1) of CISG, provides that in matters relating to a contract, a legal person domiciled in a member state may be sued in the courts of another member state for the place of performance of the obligation³⁹ in question. Thus, if a dispute arose concerning the payment of the purchase price and delivery of goods respectively in a contract governed by CISG, the places of performance were determined by the application of articles 57 and 31 of CISG respectively.⁴⁰

It is pertinent at this juncture to consider the relevant provisions of CISG⁴¹ in relation to its application in a national court. Article 1(1) of CISG provides:

This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- a) When the States are Contracting States; or
- b) When the rules of private international law lead to the application of the law of a Contracting State.**

(Emphasis mine)

From the unambiguous wordings of article 1(1) of CISG, it can be deciphered that the provisions can be applied either by sub-paragraph (1)(a) or (1)(b) of article 1 by national courts. Does that mean that a non-contracting state can apply CISG in its national courts by virtue of sub-paragraph (1)(b) of article 1 when the rules of conflict of law leads to the application of the provisions of a CISG contracting state, as propounded by some writers? To attempt an answer to this question, some writers' works will be of significant assistance. Ndubuisi Nwafor⁴² asserts that the effect of article 1(1)(b) of CISG on the Nigeria's conflict of law rules will effectively lead to the application of the Convention in Nigeria albeit by default particularly by compulsion, as a matter of law, by invoking the provision of article 95 of CISG, the country not a Contracting State to CISG notwithstanding.

However, it is more pertinent to note that article 95 of CISG impacts upon the Convention scope of application and this provision's interpretation therefore is of paramount importance for correct application of the Convention. In the light of the fact that almost world-wide accession to CISG, courts in contracting and non-contracting states alike are regularly faced with questions concerning its application. Therefore Nigerian courts need to pay heed to the correct interpretation of article 95 of CISG which provides thus:

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or

accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

Even though the meaning of article 95 appears relatively clear and unambiguous at first glance, it has given rise to much controversy for its interpretation and application have generated considerable scholarly debate.⁴³ A reservation under article 95 of CISG is intended to limit the application of CISG only to situations governed by article 1(1)(a) of CISG (direct application) and exclude its applicability by virtue article 1 (1)(b) of CISG (indirect application). Assuming the other requirements are met, CISG is applicable to transactions involving the sale of goods between parties that have, at the time of the conclusion of the contract, their relevant place of business in different contracting states.

Pursuant to its article 1(1)(b) however, CISG has also applies when the rules of private international law of the forum state lead to the application of the law of a contracting state; unless the forum state has made an article 95 reservation. However, recently CISG Advisory Council has published an Opinion⁴⁴ on its interpretation and is hereby reproduced for considerations as follows:

1.A declaration under article 95 excludes the declaring contracting state's obligation under public international law to apply the Convention in accordance with article 1(1)(b). However, it does not prevent the courts of such a state from applying the Convention when the rules of private international law lead to the application of the law of a contracting state.

2.A declaration under article 95 is without any effect for the Convention's applicability in accordance with article 1(1)(a), in applying article 1(1)(a), it is irrelevant whether the forum state has made an article 95 declaration or whether one or both parties to the sales contract have their place of business in a state which has made an article 95 declaration.

3.When the forum is in a contracting state that has made no declaration under article 95, the Convention applies in accordance with article 1(1)(b) even when the rules of private international law lead to the application of the law of a contracting state that has made an article 95 declaration.⁴⁵

In essence, paragraph one of the Advisory Council Opinion⁴⁶ speaks to the effect that the reservation for courts in countries who have availed themselves under article 95 to exclude application of CISG in terms of article 1(1)(b) when ratifying or acceding to the Convention. The second paragraph of the Advisory Council (AC) Opinion emphasizes the fact that an article 95 reservation has no impact upon the Convention's application in terms of article 1(1)(a).⁴⁷ Making an article 95 reservation does not impact upon a state's status as a CISG contracting state.⁴⁸ But the AC Opinion emphasizes the fact that the reservation removes a reserving state's public international law the obligation to apply CISG under article 1(1)(b).⁴⁹

Additionally, the AC Opinion states that a court in a reservation state is still free to choose to apply the Convention under circumstances as provided for in terms of article 1(b).⁵⁰ In other words, making an article 95 reservation relieves a reservation state from the obligation to apply the CISG if the requirements for its application under article 1(1)(b) are met, but does not prohibit a court in a contracting state from applying the CISG in

terms of article 95 if it so chooses. In this regard, the AC Opinion provides that a forum in a reservation state may elect to uphold a parties' direct choice of CISG as governing law of their contract or the choice of a CISG contracting states.⁵¹

The rules relating to the validity of a choice of law clause form part of private international law and the forum would uphold such a choice in line with its principles of private international law. This view may possibly be disputed if the parties choose the law of a reservation contracting state as governing law of their contract. In such instances, it may be argued and correctly so, that the correct application of the proper law would require the domestic sales law of the chosen *lex causae* is to be applied.

Application of CISG under its article 1(1)(b) amounts to application of the Convention as part of the proper law of the contract, assuming of course that the *lex causae* is that of a CISG contracting state. It is also established that a state that made article 95 reservation remains a contracting state under CISG. It is widely accepted that the *lex causae* should be applied in the same manner as a forum if its state of origin would have applied it.⁵²

The AC Opinion also emphasizes the fact that a forum in a non-contracting state is under no obligation to refer to CISG directly.⁵³ A court in non-contracting state will be faced with possibly applying the CISG when its rules of private international law point to the law of a contracting state as *lex causae*. If the *lex causae* is that of a CISG contracting state that made article 95 reservation and the requirements for application of the CISG under article 1(1)(a) are not met, the AC Opinion states that the court would most probably apply the domestic law of the *lex causae* since a forum of the *lex causae* would have also applied its domestic law under these circumstances.⁵⁴

It is my humble view that the application of CISG under these circumstances is not appropriate as it negates the rules of interpretation of laws as well as due to the fact that the requirements for its application under article 1(1)(a) are not met as well as under article 1(1)(b) which is excluded by the proper law state. It should be noted that literal rule is a rule used in interpreting statutes. This rule explains what the law is rather than what the law means. When interpreting a statute, the courts generally apply the literal rule first before applying any other rules of interpretation. In literal rule, the words in a statute are given its plain, ordinary and literal meaning.⁵⁵ Moreover, article 1(1)(b) does not form part of the law of the forum, since the forum is situated in a non-contracting state. Application of CISG under the circumstances therefore, would not constitute correct application of the proper law.⁵⁶

IV CONCLUSION

It is safe to conclude that national courts of article 95 reservation states apply CISG once the requirements for its application are met since the AC Opinion stresses the fact that article 95 reservation relieves the reservation states from the public international law obligation to apply CISG under article 1(1) (b) but not prohibit them from applying it should they so wish to do. In effect, CISG applies to states that have ratified CISG which are referred within the Convention as 'Contracting States'. By necessary implication therefore, for CISG to be applied in non-contracting states national courts, it must first and foremost

ratify, accept, approve or accede to CISG, pursuant to and under either article 1(1)(a) or article 1(1)(b).

A non-contracting state cannot by any stretch of interpretation of the Convention, apply CISG and it remains non-justiciable in its courts, either impliedly or by default or by compulsion unless and until, for example in Nigeria, ratified under section 12(1) of the 1999 Constitution (Fourth

Alteration) as amended. The section is to the effect that no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

In the final analysis, parties to a contract cannot by virtue of party autonomy, agree to employ CISG as the governing law of their contract if their respective countries or one of the parties country is not a contracting state; and therefore lacks the jurisdiction to exercise and determine dispute brought before it for adjudication. More so, any judgment obtained in any contracting states of CISG, cannot be recognized and enforced in a non party state for not being party to any bilateral or multilateral convention on the recognition and enforcement of judgments.

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