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Why Malaysia should Ratify the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG): An Explanation

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Abstract

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty in international sales and good law which is enforced on 1st of January in 1988 and has been approved by 89 states in 18 countries as signatories but Malaysia does not ratify this convention. This paper refers why Malaysia should ratify the CISG and how can remove the legal barrier. If Malaysia does not be

members of the CISG, the customer protection problem and additional opportunities with contracting states will overwhelming be loosed. This study also argues that if Malaysia is a member of the CISG, the trader of Malaysian will remain on a level playing field with their counterparts in sales contacts universally.

Keywords: CISG, Acts, Jurisdiction, Goods, Cases

1. Introduction

The 1980 (CISG) applies between two countries where country business places are different. The freedom of contract is then considered by way of a fundamental principle of this convention and parties may alter the effects of its provisions^[1]. The aim of this CISG is to afford a uniform contemporary and fair regime for contracts in transnational sale and goods which contributes pointedly to present for commercial exchanges and reducing business prices^[2]. Another purpose is a different legal system, social, economic with progressing development of international trade and remove the legal barrier. Nonetheless, the agreement of sale is the pillar in international business for all countries. The CISG is then considered one of the central international trade law conventions where worldwide implementation is wanted. On the contrast, according to Wu Min Aun^[3]

“The SGA 1957 does not provide a complete law and operates against the background of the law of contract that are not inconsistent with its express provisions.”

However, this paper will discuss distinguishing between Malaysian law and the CISG with important issues for joining the CISG and whether Malaysia should join to the CISG and why Malaysia will be obligated to consolidate in this treaty.

2. What is the difference between Malaysian sale and goods law 1957 and the 1980 (cig)

2.1 Difference of Features:

Malaysian sale and law provide 64 articles with total chapter 7 but 101 articles are discussed in the CISG including 4 parts. Most of the chapters in Malaysia have been allied about contact of sales, implied conditions, transfer property, international sales, but the statutory issue in Malaysian sale law is mostly problematic. According to ahamded masum *et al.*^[4]

“The statutory remedies in Sales of Goods Act 1957 (SOGA 1957) and Consumer Protection Act 1999 (CPA 1999) These statutory remedies in the Acts appear to be rather confusing and conflicting against one another, hence failed to enforce

¹ Germain, C. M. (1996). United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature. Int'l. J. Legal Info., 24, 48. at 48.

² United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). (1980, 04 11). Retrieved from <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> Accessed on 11.04.2018

³ Aun, W. M. (1994). Legal Aspects of Sale of Goods. Darwin, Australia: Longman Malaysia SDN. BHD.

⁴ Chin, O. T., & Yusoff, S. S. A. (2016). Remedy as of Right for Consumer Protection. Mediterranean Journal of Social Sciences, 7(2), 142.

the consumer rights accordingly, as such, it should be reflected in its remedies so as to protect the consumer.”

The CISG differs independently from The Hague conventions. The latter instruments have been separated the rules governing formation and those issues which are the substantive aspects of the contract.

2.2 Terms of contact on sale and goods

Statutory remedies of SOGA 1957 and CPA 1999 should serve the purpose of balancing the imbalance of bargaining power between the consumers and the traders to achieve contractual justice. As such, it should be reflected its remedies to protect the consumer. In Malaysia law, there are two terms as conditions of the right of the party and warranty. According to article 12, it clearly said that

(2) A condition is a requirement which includes vital for the purpose of the contract, the breach of which gives increase to a right to treat the contract as repudiated.

to section 4 of this act there is a right seller and buyer, but it is the limited legal competency of the parties, legality of powers of attorney, set off etc.

(3) A warranty is a stipulation collateral in contact the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. According to article 14 (b) of 1957, there is an implied warranty where the buyer shall have and enjoy quiet possession of the goods^[5]. There is a case of Lee Heng and Co V Melchers and Co,^[6] whereas the appeal court held the decision that the measures of damages was estimated directly for breach of warranty and appellant refused to accept delivery and make a suit for damages but the CISG permits to seller to reject all implied warranties^[7]. So, I think that there is a dissimilarity between that acts accordingly and CISG law is better than SGA 1957.

2.3 Limitation on sale and goods law

Consumers arrive into different types of contracts for supplying goods for their purpose. Generally, most of the contact holds terms and conditions which are being unfair to the consumers. These terms are limited to the consumer rights in Malaysia. On next, the familiar of the Consumer Protection Act since 1999, Malaysian consumers have been crushed with this issue although such issue is not being tackled by this act. This law is involved with the contact issue of sales of goods law although the Malaysian consumer protection law has just been corrected by the CPA (Amendment) Act 2010 which divisions the unfairness into 'procedural' and 'substantive' unfairness^[8]. Besides it, The SGA 1957 does not distress the commercial law relating area including contact law^[9].

The CISG preserves the party autonomy to impose the content of their contact but there are three exceptions as follow:

1. When x and y derogate the section 6 expressly or impliedly
2. If parties think this convention is appropriate, this convention may limit its applicability.
3. If any person dies or personal injury, trial will be by their domestic consumer law.

2.4 Traders Liability Under the contact:

According Yusoff et al.,^[10] In its current state,

“The Malaysian sale of Goods act 1957 does not adequately protect consumers when entering into a sale of goods transaction.”

The Malaysian Sale of Goods Act holds some requirements on the obligations of traders under a bond for the sale of goods. From article 12- 14 of Malaysian law, the terms and conditions of sale and goods law unintended. On the contrary, this CISG has proper contributions on all places except the seller's accountability for death or individual injury. In addition, the seller is responsible to the buyer for compensations according to section 45 (1) (b) of the CISG and the buyer is permitted to get the whole compensation issue to the limitations as said in article 74.

3. Importance of the 1980 (CISG)

According to article 6, CISG provides party autonomy where most of the contractual country's rules are existed in the CISG rule. At this point, a party can choose their choice of law^[11] but problem is that article 6 does not express implied exclusion. However, The CISG collects ideas for further application. These ideals may be achieved widely using the unification, filtration, flexibility and practicability. The CISG influenced reform of domestic laws and development through several channels and implementation of EC directives^[12]. This influence overcomes outside the border of Europe. By its very nature, if one analysis the new-fangled code of obligation china, one can find numerous lawful ideas with institutions familiar from the CISG^[13]. The CISG allows avoiding the serious case issue including fundamental breach except minor issue^[14]. I think that Malaysia should join the CISG because all domestic rules are protected naturally. As such, according to Ingeborg Schwenzer and Pascal Hachem *“All these shortcomings of domestic laws are prevented by applying the CISG”*^[15].

4. Why malaysian government should ratify the ciscg

4.1 Jurisdiction Issue

If neither party is chaired in contacting state, the CISG can be applied but according to article 1(b) which focuses private international law and it will be applied if the rules of forum state maintain to the submission of the rule of a member state of CISG. For instance, Malaysia is a non- contacting state and Australia is a contracting state. Consequently, the private international law will be applied in Australia as a contracting

⁵ Article 14(b) of the sale of goods act, Malaysia. 1957

⁶ Lee Heng and Co V Melchers and Co.

⁷ Longobardi, L. E. (1984). Disclaimers of implied warranties: the 1980 United Nations Convention on Contracts for the International Sale of Goods. *Fordham L. Rev.*, 53, 863. at 868.

⁸ Amin, N. (2013). Protecting consumers against unfair contract terms in Malaysia: the Consumer Protection (Amendment) Act 2010. *Malayan Law Journal*, 1, 1-11.

⁹ Aun, op. cit., 05.

¹⁰ Yusoff, S. S. A., Ismail, R., Markom, R., & Zakuan, Z. Z. M. (2015). Consumer protection and the Malaysian Sale of Goods Act 1957. *International Business Management*, 9(4), 452-459.

¹¹ Schlechtriem, P., & Butler, P. (2008). *UN Law on international sales: The UN Convention on the international sale of goods*. Springer Science & Business Media. At 20.

¹² Schiechtriem, P. (2005). Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations. *Juridica Int'l*, 10, 27. at 30

¹³ Ibid

¹⁴ Id 30

¹⁵ Schwenzer, I., & Hachem, P. (2009). *The CISG-A Story of Worldwide Success*, 119-240.

state which stated in the article 1 (1). So, as my view if Malaysia joins to the CISG he will not deprive of such rights, although it depends on contact in many times. But there is a contradictory issue between article 95 and 1 (1) in CISG. Nevertheless, The CISG signifies an achievement history of uniform law, consuming been instigated by 80 states illustrating more than 80 of worldwide trade ^[16].

4.2 Deficiency of Contractual Remedies for Consumer Sale of Goods Contract in Malaysia

The dominant of the caveat emptor has been created more unfair practices in the consumer dealings in Malaysia which means that 'let the buyer beware' causes numerous illegal practices in the consumer businesses. In the modern market, this regulation is not used and most of the consumers are not aware their terms of conditions which have been elegantly drafted out by the great saleable rule and cannot be utilized in the up-to-date market economy.

4.3 The Internal problem of Small Medium Enterprises in Malaysia

Malaysian government wants to do the trade internationally because by 2020 it is aimed at 41% of contribution to GDP and employment growth 62% by small and medium enterprises (SMEs) ^[17]. Therefore, SMEs may face strong legal barrier where they must select foreign law and have to apply applicable law for their contact. For this reason, they are not familiar with foreign law. Besides it, it bears money and time cost to edify themselves in that law to understand its draft contracts, application, negotiation even a dispute. According to "Mahajan and Hasin ^[18]

"Malaysia can surmount the problem, if she ratifies the international legislation- CISG."

In that case, SMEs can submit to their sale contracts using the sale law by trading parties from other states that have been become members of the CISG as such Canada, Russia, United States, Japan, South Korea, Brunei, United States, New Zealand, Japan, China, Australia and Singapore. These states are the major trading partners of Malaysia monitoring two thirds of the world trade. If Malaysia is later a contracting party in international trade, he can get innumerable opportunity like above countries.

5. Conclusion

In the light of the foregoing, it can be suggested by me that this will be most helpful for Malaysian trade service globally if he ratify the 1980 (CISG). Secondly, this will be governed by the uniform law without any fear of ambiguity of foreign law. Thirdly, it can make more employment than now and create more turnover situations in Malaysia. Fourthly, there is a good scope for Malaysian government for ratifying to 1980 (CISG) when the consumer protection problem in Malaysia for halal product are observed enormously ^[19]. Moreover, the Malaysian government will get additional

facility like contracting state than the non- contracting state.

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¹⁶ Castellani, L. G. (2013). The adoption of the CISG in Portugal: benefits and perspectives. *RED. Revista Electrónica de Direito*, (2), 2-13. at 03.

¹⁷ Zahid, A. (2015). Internationalization of Malaysian smes and the relevance of the un sale convention. *International Business Management*, 9(6), 1234-1236.

¹⁸ Id

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