

# CHAPTER 15

## THE PHILIPPINES' PERSPECTIVE ON UNITED NATIONS CONVENTION ON CONTRACTS OF INTERNATIONAL SALES OF GOODS

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First, I would like to express gratitude for the invitation extended by the *UNCITRAL Regional Centre for Asia and the Pacific (UNCITRAL-RCAP)* to participate in the *2014 Asia-Pacific Fall Conference* jointly hosted with the *University of Macau*, with the support of the *Comite Maritime International*. The experiences and learnings from the conference shall truly contribute to the government's efforts to diminish legal obstacles to promote international commercial transactions.

As the theme of the conference is designed to explore the question of how trade development can be enhanced through harmonization of commercial laws, and unification of instruments in the Asia-Pacific region, aiming to promote international dialogue on six (6) tracks, one of which is on international sale of goods, allow me to share the Philippine perspective on the UN Convention on Contracts for the International Sale of Goods, its comparison with Philippine laws, and the views regarding the country's accession to the Convention.

### ***I UN CONVENTION ON CISG***

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted in Vienna, Austria on April 11, 1980, and entered into force on January 1, 1988. The purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. In essence, it aims to provide a uniform set of rules so that parties engaged in international sales transactions can be certain about the law to which their transaction is subject, thus

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contributing significantly to introduce certainty in commercial exchanges and reduce an important barrier to cross-border trade.<sup>1</sup>

As of date, there are 80 state parties to the UN Convention on CISG.<sup>2</sup> In the ASEAN region or the Association of Southeast Asian Nations, only Singapore has ratified the CISG. Singapore ratified it in February 1995 and came into effect in March 1996. Thus, 9 out of 10 ASEAN Member States<sup>3</sup> have not signed the CISG, although there are States, like Vietnam,<sup>4</sup> who are starting their accession process to CISG.

## ***II PHILIPPINES' STATE OF PLAY ON CISG***

Philippines is not yet a signatory to the UN Convention on CISG. But discussion among relevant departments in the government is in a preliminary stage on the possible accession of the Philippines to CISG.

In 2008, the Department of Justice came up with a comparative analysis of the Convention's salient provisions with that of the Philippine law on contracts and sales to determine the merits of the possible accession of the Philippines to the CISG and to highlight the existing differences, if any, and to determine whether or not those differences are likely to impair the co-existence of national and international rules within the Philippine legal order.

At the outset, the Philippines does not have a specific law on contracts for the international sale of goods. The provisions of the Civil Code, regarding sales contract, is the principal law that generally applies to international sale of goods, and for other similar transactions. Other laws that may also apply to such similar transactions are: The Bulk Sales Law;<sup>5</sup> The Consumer Act of the Philippines;<sup>6</sup> The

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1 United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). CISG Preamble provides: "The adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems, would contribute to the removal of legal barriers in international trade and promote the development of international trade."

2 United Nations Convention on contracts for the international sale of goods. Concluded at Vienna on 11 April 1980 Treaty Series Vol. 1489 No. 25567 (1980) at 3.

3 Composed of ten states, namely: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

4 Presentation of Pham Dinh Thuong, Deputy Director General, Legal Department, Ministry of Trade and Industry of Viet Nam in the Workshop on UNCITRAL Texts on E-Commerce and Sale of Goods in Manila on 16-17 October 2013.

5 Act No. 3952, December 1, 1972, otherwise known as the Bulk Sales Law which seeks to regulate the sale of goods, wares, merchandise, or materials in bulk.

Price Act;<sup>7</sup> The Retail Trade Liberalization Act of 2000;<sup>8</sup> and The Electronic Commerce Act of 2000.<sup>9</sup>

Among the results of the comparative analysis are the following.

### **A *Formation of Contracts***

Under the CISG, acceptance of the offer binds the offeror "at the moment the indication of assent reaches the offeror."<sup>10</sup> The word "reaches", as defined in the CISG, means that the acceptance or any other indication of intention was made orally to the addressee or was delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.<sup>11</sup>

Under the Philippine law on contracts, acceptance of the offer binds the offeror "from the time that it came to his knowledge".<sup>12</sup> According to our Civil Law commentators, Philippine law on contracts follows the "cognition theory" of the Spanish Civil Code<sup>13</sup>, wherein a contract is perfected from the moment acceptance comes to the knowledge of the offeror. As a general rule, what is required by our law is "actual" knowledge of the acceptance.

Thus, it would appear that the CISG presents a more comprehensive provision as to how an acceptance would bind the offer, by taking into consideration the different systems of contract formation around the world.

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6 Republic Act No. 7394, April 13, 1992, otherwise known as The Consumer Act of the Philippines – enacted to protect consumers against deceptive, unfair and unconscionable sales, acts and practices.

7 The Price Act – provides protection to consumers by stabilising prices of basic necessities and prime commodities.

8 Republic Act No. 8762, March 7, 2000, otherwise known as Retail Trade Liberalization Act of 2000, law which liberalises the retail trade business to encourage Filipino and competitive retail trade sector to become globally competitive.

9 Republic Act No. 8792, June 14, 2000, otherwise known as Electronic Commerce Act of 2000, was enacted to facilitate domestic and international transactions and contracts thru the use of electronic technology; and applies to any kind of commercial, including domestic and international transactions and contracts.

10 CISG, above n 1, at Article 18 (2).

11 CISG, above n 1, at Article 24.

12 Civil Code (Philippines), at Article 1319, para. 2.

13 D. Jurado *Comments and Jurisprudence on Obligations and Contracts* (11<sup>th</sup> revised edition, 2002) at 398.

### ***B Revocation of Offer***

Under the CISG, for the offeror to revoke his offer, his revocation must "reach" the offeree before the offeree has dispatched his acceptance. However, the offeror cannot revoke his offer if: (a) it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable, or (b) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.<sup>14</sup>

Under the Philippine law on contracts, the offeror can revoke his offer any time before his knowledge of the acceptance, by "communicating" his withdrawal or revocation. However, the offeror cannot revoke his offer if he allowed the offeree a certain period of time to accept which is supported by a consideration paid or promise to be paid by the offeree.<sup>15</sup>

While there is some point of similarity between the Philippine law on contracts and the CISG with regard to the revocability of an offer, under Philippine law, the option to accept the offer within a certain period must be supported by a consideration paid or promised to be paid by the offeree.

### ***C Interpretation of Contracts***

Under the CISG, statements or conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. If this is not applicable, statements or conduct of a party shall be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.<sup>16</sup>

While under the Philippine law on contracts, if the words of the contract appear to be contrary to the evident intention of the parties, the latter shall prevail over the former. In order to judge the intention of the contracting parties, their contemporaneous and subsequent acts shall be principally considered.<sup>17</sup>

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14 CISG, above n 1, at Article 16.

15 Civil Code, above n 12, at Article 1324.

16 CISG, above n 1, at Article 8.

17 Civil Code, above n 12, at Articles 1370 and 1371.

Hence, while the CISG successfully fused civil and common law traditions, by adding an objective approach to contract interpretation, that is, the standard of how a reasonable person of the same kind as the other party would understand the contract,<sup>18</sup> the Philippine rule on contract interpretation is based on civil law tradition wherein the approach is subjective. In this aspect, CISG and Philippine law do not really have much difference.

### ***D Form of Contract***

Under the CISG, a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.<sup>19</sup>

In contrast, under the Philippine law on contracts, contracts are obligatory on the parties, in whatever form they may have been entered into, provided all essential requisites for their validity are present. However, when the law requires that a contract be in some form in order that it may be valid or enforceable or that a contract be proved in a certain way, that requirement is absolute and indispensable.<sup>20</sup> Thus, pursuant to the Philippine Statute of Frauds, an agreement for sale of goods at a price of more than P500 must be in writing. Evidence of the agreement cannot be received without writing or secondary evidence of its contents.<sup>21</sup>

There is therefore a seeming conflict between Philippine law and CISG on this point. Though admittedly, this Philippine law provision has to be amended considering the obsolescence of the amount indicated.

### ***E Price***

The CISG provides that "where a contract has been validly concluded but does not expressly or implicitly fix or make a provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."<sup>22</sup>

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18 Lecture of Professor Gary F. Bell, Director of the Asian Law Institute, Faculty of Law, National University of Singapore in the 5<sup>th</sup> ASEAN Law Forum in Bangkok, Thailand on May 7-8, 2008.

19 CISG, above n 1, at Article 11.

20 Civil Code, above n 12, at Article 1356.

21 Civil Code, above n 12, at Article 1403.

22 CISG, above n 1, at Article 55.

Under the Philippine law on contracts, a contract of sale is null and void and produces no effect if the same is without cause or consideration.<sup>23</sup> Thus, there should be agreement between the parties with regard to the price. The price agreed upon may be with reference to the price of a thing sold on a definite day or a particular exchange or market, or to an amount above or below the price on such day or in such exchange or market.<sup>24</sup>

It would seem that, unlike the Philippine law on contracts, CISG allows a contract of sale to have effect even without agreement by the parties on the price. This is in conformity with common law tradition.<sup>25</sup> It appears that there is conflict on this point between CISG and the Philippine law on contracts.

### ***F Rescission and Fundamental Breach***

Under the CISG, both the seller and the buyer have the option to rescind the contract, if the failure of the other party to perform his obligations under the contract or the Convention amounts to a fundamental breach.<sup>26</sup> A breach of contract is considered fundamental "if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."<sup>27</sup>

Under the Philippine law on contracts, the obligation to pay the price by buyer is correlative to the obligation of seller to deliver the thing sold. Non-performance by a party authorises the other to demand the performance of obligation or its rescission.<sup>28</sup> As interpreted in jurisprudence, the rescission of a contract is not permitted for slight or casual breach. There should be substantial breach as would defeat the very object of parties in making the contract.<sup>29</sup> Whether or not a breach of contract is substantial depends upon the attendant circumstances.<sup>30</sup>

23 Civil Code, above n 12, at 1318 and 1352.

24 Civil Code, above n 12, at Article 1458 and 1472.

25 Lecture of Professor Gary F. Bell, Director of the Asian Law Institute, Faculty of Law, National University of Singapore in the 5<sup>th</sup> ASEAN Law Forum in Bangkok, Thailand on May 7-8, 2008.

26 CISG, above n 1, at Articles 49 and 64.

27 CISG, above n 1, at Article 25.

28 Civil Code, above n 12, at Article 1191.

29 *Song Fo & Co vs Hawaiian-Phil Co*, 47 Phil. 821. Particular provisions of the Law on Sales show that rescission may be exercised by the seller if the buyer refused to receive the goods upon the expiration of the period fixed for their delivery, or having received it, failed to tender the price at the same time (Article 1593). Where the goods have not been delivered to the buyer and the buyer has repudiated the contract of sale or has manifested his inability to perform his obligations thereunder, or has committed a breach thereof, the seller may totally rescind the contract of sale

Thus, the CISG and the Philippine law are in agreement that, as a general rule, rescission will be permitted only for such breaches as are substantial or fundamental in nature.

### ***G Specific Performance***

Under the CISG, an injured party may also file a case for specific performance<sup>31</sup>. However, it limits this right by providing that "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention".<sup>32</sup>

Under the Philippine law on contracts, an injured party, in case of breach of reciprocal obligations, may choose, as a matter of right, between specific performance and rescission of contract, with payment of damages in either case.<sup>33</sup>

The CISG, therefore, leaves to the proper court the determination of whether or not to grant to an injured party the remedy of specific performance, as a matter of right.<sup>34</sup> By virtue of this provision, Philippine courts are allowed to use domestic law, allowing for specific performance, as a matter of right, in cases involving international sales contract. Thus, in this regard, there is no incompatibility between the CISG and Philippine law on contracts.

### ***H Anticipatory Breach***

The CISG provides that a party (buyer or seller) may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of (a) a serious deficiency in his ability to perform or in his creditworthiness, or (b) his conduct in preparing to perform or in performing the contract.<sup>35</sup> Deficiency in the ability to fulfil the contract may result from strikes, a drop in production due to fire or some other catastrophic event, or legal or political impediments, such as an

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by giving notice of his election so to do to the buyer (Article 1597). The buyer, on the other hand, may rescind the contract of sale if the seller has breached his warranty (Article 1599).

30 *Corpus vs. Alikpala*, 22 SCRA 104; *Angel vs. Calasanz*, 135 SCRA 323.

31 CISG, above n 1, at Articles 46 and 62.

32 CISG, above n 1, at Article 28.

33 Civil Code, above n 12, at Article 1191.

34 This is because civil law and common law traditions differ in the grant of this remedy: In the civil law tradition, specific performance is a matter of right, while in common law tradition, it is not (Lecture of Professor Gary F. Bell, Director of the Asian Law Institute, Faculty of Law, National University of Singapore in the 5<sup>th</sup> ASEAN Law Forum in Bangkok, Thailand on May 7-8, 2008).

35 CISG, above n 1, at Article 71.

embargo.<sup>36</sup> Deficiencies in a party's creditworthiness can manifest themselves in insolvency proceedings against the party.<sup>37</sup>

Under the Philippine law on sales, there can be suspension of payment by the buyer on account of anticipatory breach of the seller of his obligations under their contract of sale of goods.<sup>38</sup> However, there is no corresponding remedy on the part of the seller, in case of anticipatory breach of the buyer.

It may be felt that the CISG rules on suspension of a party's obligation in anticipation of the other party's breach is too subjective and open to mischief. However, after a careful study, it appears that the subjective provision for suspension of performance in case of anticipatory breach of the other party must be read in conjunction with the "reasonable person" test of the CISG, which relies more on objective, common-sense analysis than on the parties' subjective intentions.<sup>39</sup> Moreover, an abuse of right of suspension or a wrongful suspension can lead to substantial liability as a breach of contract. Such breach allows the party affected by the wrongful suspension to avoid the contract under Article 72 of the CISG.<sup>40</sup>

### ***I Stoppage in Transit by Seller***

The CISG has a provision for stoppage of goods in transit by the seller, in case of a serious deficiency in (a) the buyer's ability to perform or in his creditworthiness, or (b) his conduct in preparing to perform or in performing the contract.<sup>41</sup>

Under the Philippine law on sales, in case of insolvency of the buyer, an "unpaid seller" has the right of stopping the goods *in transitu* after he has parted with its possession.<sup>42</sup>

Compared to Philippine law, the CISG provides a more comprehensive enumeration of grounds for stoppage in transit, considering that while the Philippine law on sales has adopted the common law rule of stoppage in transit, it

36 A. von Ziegler "The right of Suspension and Stoppage in Transit (and Notification Thereof)", (2005-06) 25 J.L. & Com. 353 at 360.

37 A. von Ziegler, above n 36.

38 Civil Code, above n 12, at Article 1590.

39 CISG, above n 1, at Article 8(2).

40 A. von Ziegler, above n 36, at 371.

41 CISG, above n 1, at Article 71 (2).

42 Civil Code, above n 12, at Articles 1526 and 1534.



limits its application to one ground: insolvency of the buyer. However, insolvency of the buyer does not mean that insolvency proceedings have been commenced against him; it only means that the buyer has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due.<sup>43</sup> The CISG, like the Philippine law does not require that insolvency proceedings have been commenced against the buyer.

### ***J Limitations for Warranty Claims***

Under CISG, the buyer has the remedy of specific performance or rescission in case of breach of warranty or conformity of the goods by the seller.<sup>44</sup> However, the prescriptive period for filing an action is 2 years from the time when goods were actually handed over to the buyer, unless the time-limit is inconsistent with a contractual period of guarantee.<sup>45</sup>

Under the Philippine law on sales, in case of breach of warranty of conformity of goods, buyer may elect between withdrawing from the contract and demanding a proportionate reduction of the price, with damages in either case. However, the buyer must bring the appropriate action within the 6 months from delivery of the thing sold.<sup>46</sup>

Considering that the Philippine period of limitation is shorter, conflict with CISG on this point therefore exists.

### ***K Passing of Risk***

Under the CISG, considering that countries have different rules as to when ownership is transferred, the allocation of risk does not depend on ownership or title over the goods. And considering further that the typical international sale is over distance, the CISG provides a uniform rule that the risk of loss transfers to the buyer when the goods effectively leave the control of the seller.<sup>47</sup> Simply stated, the risk passes to the buyer when the seller performs his obligation in accordance with the contract of sale and the Convention.<sup>48</sup>

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43 Civil Code, above n 12, at Articles 1526(2) and 1636 (2).

44 CISG, above n 1, at Articles 46 and 49.

45 CISG, above n 1, at Article 39(2).

46 Civil Code, above n 12, at Articles 1571 and 1567.

47 CISG, above n 1, at Articles 67, 68 and 69.

48 J. Erauw "CISG Articles 66-70: The Risk of Loss and Passing It", (2005) 25 J.L. & Com. 353 at 360.

Under the Philippine law on sales, because of the imperfect fusion of civil and common law in the drafting of the law, conflicting rules govern the allocation of risk. In general, the determination of who bears the risk of loss or deterioration of the goods depends on who owns the goods (*Res perit domino*). Thus, before perfection, it is the seller, being the owner of goods, who bears the risk of loss or deterioration. While after delivery, it is the buyer who bears the risk. Conflict arises on the period "*after perfection and before delivery*". Under Articles 1480 and 1538 of the Civil Code, it is the buyer who bears the risk of loss, even before the ownership is transferred to him by delivery. Upon the other hand, Art. 1504 provides that it is the seller who bears the risk of loss. The CISG provides for a simpler uniform rule.

### **III CONCLUSION**

The foregoing overview of pertinent CISG rules in comparison with that of the Philippine law on contracts and sales show that there are similarities and differences between them, but the differences are not of such extent as to represent clash between the solutions offered by each one to the legal problems of the sale of goods.

Secondly, considering that CISG was drafted to specifically govern the sales of goods that are international in nature, it leaves domestic relations on the sale of goods totally preserved. The solutions and uniform rules of CISG are more appropriate for sales of goods between parties situated in different countries with different legal traditions.

Also, based on the comparative analysis, we find nothing in the rules of CISG that would offend fundamental principles of Philippine contract law. There is nothing legally objectionable for the Philippine's accession to the Convention.

Considering that there is an on-going effort of ASEAN to harmonise the trade laws of Member States by considering, among others, their accession to CISG; and considering that the largest trading partners of the Philippines are all parties to CISG, namely, China, Japan, Singapore and USA; and considering further that CISG is the uniform international sales law of countries that account for over 3 quarters of world trade, it is our view that clearly it is to the advantage of the Philippines that it continue to take steps to accede to the UN Convention on CISG before it finds itself left behind by its Asian neighbours and other countries aiming to promote their international trade.