REVISTA JURÍDICA
EDITORA MIZUNO

HARMONIZATION OF CONTRACT LAW IN INTERNATIONAL TRADE

HARMONIZAÇÃO DO DIREITO CONTRATUAL NO COMÉRCIO INTERNACIONAL

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ABSTRACT

With the enactments of different contract laws, misunderstandings or various interpretations that existed in subsequent international trade practices. Moreover, we can find many related cases in different contract law classifications. For example, to compare similar stipulations of contract laws and rules to help better the application of international trade law between different subjects and harmonize the understanding of terms used in international trade law and different contracts are necessary.

Keywords: Harmonization, International Law of Contracts, International Trade, Interpretation

RESUMO

Com a promulgação de diferentes leis contratuais, surgiram mal-entendidos ou várias interpretações nas práticas subsequentes de comércio internacional. E podemos encontrar muitos casos relacionados a diferentes classificações sobre leis contratuais. Comparar cláusulas e regras similares de leis contratuais para ajudar a aplicação do direito do comércio internacional entre diferentes sujeitos e harmonizar a compreensão dos termos utilizados no direito do comércio internacional e em diferentes contratos é necessário.

Palavras-chave: Harmonização, Direito Contratual, Comércio Internacional, Interpretação

1. Introduction

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Harmonizing contract law in international Trade aims to conform understanding of different terms, rules and contracts and to ease conflicts and contradictions between different subjects in international Trade.

This paper focuses on the general context of international contract laws and rules, contracts, rules, and different terms and some related issues.

In this sense, we use comparative methodology for the objectives of this paper to (i) present the origin of international trade law and its subsequent development and (ii) make comparisons between different contracts and rules applied to them.

Finally, the first aspect to be mentioned to achieve these objectives is the International Sale in Indian and English laws and its contracts. The second part is U.N. Convention on Contracts, commonly used in international Trade. The third part concerns maritime carriage rules and comparisons. Lastly, part four will summarize the discussed points and close the paper with a proper conclusion.

2. International Sale in Indian and English: General aspects

2.1. Laws related

Harmonization may address three different problems. The first is externalities. Firms or countries may engage in activities that impose costs on others for which the actor does not have to pay. The second problem harmonization may address is unnecessary transaction costs, and the third is interdependence.[2]

Concerning contracts of sale in India and England, they are governed by special branch law and general law of contract. The sale of goods law originated from mercantile customs in lex mercatoria. The Sale of Goods Act

[2] Fox EM. Harmonization of Law and Procedures in a Globalized World: Why, What, and How? Antitrust Law Journal. 1991;60(2):593-8.

1893 became the first codification of English law of sale of goods and was adopted by many common law countries like India, Canada, and USA.

In India, though SoGA 1930 governs the sale of goods, the provisions of the Indian Contract Act, of 1872 continue to govern it only when they are inconsistent with the SoGA 1930, and any rule of the law that is inconsistent with SoGA 1930 will be saved too.

In the U.K., the Sale of Goods Act of 1979 is the primary enactment governing the sale of goods transaction even though it is declared to consolidate the 1839 Act rather than being a codifying Statute. Gradually, to respond to a strong consumer movement, the law of consumer protection has passed.

2.2. **Contract of sale**

In SoGA 1930 and SoGA 1979, a contract of sale refers to a present sale and an agreement to sell. Contract of sale in English and Indian law denotes a contract and a conveyance which seems confusing.

Furtherly, where under a contract of sale, the property in the goods is transferred from the seller to the buyer is a sale; however, where the transfer of the property is to take place at a future time or subject to some condition thereafter to be fulfilled is an agreement to sell. The former result in the transfer of property in the goods from seller to buyer, while the latter has no such effect and gives rise only to personal remedy.

The distinction between the sale of goods and other related transactions:

i. A contract of carriage is an example of a bailment contract. In bailment, goods are delivered by the bailor to the bailee for a limited purpose. Where goods are delivered for hire or lent or given for the security of a loan is a bailment, while the sale of goods involves the transfer of unique property in the goods to the bailee.

ii. The pledge is a bailment of goods by one party to another for securing a debt owed to the pledgee.

iii. A mortgage resembles a pledge. The two distinctions are there. The mortgagor transfers general property in goods, while in a pledge, the pledgor transfer only special property in the goods and remains general property. Secondly, the pledgor is bound to transfer possession of goods while the mortgagor is not.

iv. In a sale of goods, ownership of one thing is exchanged for money; however, one thing or goods is exchanged for another corresponds to the exchange transaction. In International Trade, the effects of the sale purchase agreement concretize into the obligations resulting in the parties' tasks and the risks.[3]

v. It is only where a contract is predominantly a contract for the supply of skill and labor, and it will be termed as a contract for service. In contrast, where the transfer of goods element is predominant, and the goods supplied are incidental for the purpose, the contract will be a contract of sale.

vi. Work and materials is a contract for the supply of services as well as goods which is composite and indivisible into one for the sale of goods and the other for the supply of labor and services.

vii. As for the hire-purchase agreement, if the hirer exercises the option to purchase, the hire-purchase agreement converses into a sale of goods. This is the main distinction between a hire-purchase agreement and the sale of goods.

Goods are divided into specific, unascertained, and ascertained goods. Specific goods are identified and agreed on when a contract of sale is made. Unascertained goods may be those separated from the bulk, but when identified or sufficiently appropriated, unascertained goods can become ascertained but not specific.

[3] Berlingher D. The Effects of The International Contract For Sale of Goods. Journal of legal studies. 2017;19(33):96-109.

3. U.N. Convention on Contracts for the International Sale of Goods (CISG)

3.1 UNIDROIT' s great efforts and features

The goal of the CISG, as with any uniform or model law, is to promote the harmonization of law across jurisdictions.[4] The main contribution of the Uniform Laws lies in preparing the grounds for further negation, which eventually led to the adoption of the U.N. Convention on contracts for the international sale of goods.

CISG endeavors to forge common ground on many contentious issues and tries to address the gap between civil law and common-law rules on the acceptance and revocation of the offer. Some helpful provisions are incorporated in CISG. In general, the Convention is to be interpreted in the light of the principle of good faith. Recourse to the principle of good faith may be helpful to in many ways. It can give the courts sufficient flexibility in applying the provisions of the Convention.

Harmonization of International Sales Law set forth, in its article V, that,

> The answer is an equivocal conclusion that it has been partially successful in accomplishing its stated goal of creating a uniform international sales law. On the surface, at the level of adoption, it has been extremely successful with its adoption by seventy-eight countries to date. (…).[5]

On the other hand, the adoption of the CISG has led to a number of unintended, but beneficial consequences. It has been used as a template in the revision of a number of national contract and sales laws.(…).

3.2 Harmonization Through International Restatements

[4] DiMatteo LA. Harmonization of International Sales Law. Commercial Contract Law2012. p. 559-80.
[5] Ibid.

One of the most important characteristics of the modern movement toward harmonization is that it does not just rely on the binding instruments but also places considerable reliance on the non-state norms" or found in the soft-law, non-binding instruments.

The objective of the UNIDROIT is to provide a balanced set of rules covering virtually all the most important topics of general contract law. Also, they are designated for use throughout the world irrespective of the differences in the legal traditions and the economic and political domestic laws.

3.3 **Non-Mandatory Nature of Principles**

UNIDROIT principles are a non-binding codification or "restatement" of the general part of international contract law prepared by an independent group of experts. However, these principles cannot bind the parties to an international contract unless they agree that these principles will govern their contract.

3.4 **Scope of application**

International and domestic law instruments in defining an international contract use various criteria in determining the character of a contract. UNIDROIT applies commercial contracts while they do not cover consumer contracts. However, the Principles limit their sphere of application to contracts considered to be commercial. From this point of view, the Principles are an integral part of the Uniform Law, which tries to obtain substantive uniformity in international commercial contracts. Even though the Principles refer to commercial contracts, they do not specify what kind of contracts would be included within their scope.[6]

[6] See UNIDRO1T Principles, supra note 1, § 2 at 2 (pointing out that, nevertheless, the concept of "commercial" contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services but also other types

3.5 **Grounds of Invalidity**

Article 3.1.3 under UNIDROIT Principles provides that the pure fact that at the time of the contract's conclusion, the obligation's assumed obligation was impossible does not affect the contract's validity. The grounds of invalidity include serious mistakes, fraud, threat, and gross disparity.

3.6 **Exemption Clauses**

Exemption clauses refer to terms that limit or exclude one party' s liability for non-performance or permit one party to render performance. Nevertheless, the exemption clauses differ from those limited to defining the obligations undertaken by the party in question.

3.7 **Hague Principles and Applicability**

The 2015 Hague Principles set forth general principles concerning the choice of law in international commercial contracts. Even though they are not binding, they are useful in many ways. For example, HCCH encourages states to incorporate them into their domestic law in a manner appropriate for each state's circumstances.

They only apply to the principle of choice of law in international commercial contracts. The Hague Principles are just that-a set of principles adopted through the deliberative and diplomatic processes of the Hague Conference on Private international law as embodying that organization's

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of economic transactions, such as investments and/or concession agreements, and contracts for professional services) Id.; E. Allan Farnsworth, Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws, 3 TUL. J. INT'L & COMp. L. 47 (1995) (correctly indicating, in relation to this question, that the UNIDRO1T Principles are likely to have their greatest impact in connection with international contracts for services, because the Convention occupies the field of the international sale of goods). Id.

preferred statement of basic principles regarding agreements by parties as to the law that will govern their international commercial contracts. As such, they are 'soft law,' not envisioning a mandatory regime, as in the case of a convention, or linguistic harmonization, as in the case of a model law.[7] And the Hague Principles do not apply to consumer contracts or employment contracts.

3.8 **Scope of the chosen law**

According to Article 9, unless the parties do otherwise, the law chosen by the parties governs all aspects of their contractual relationship.

4. **Maritime Carriage Rules**

4.1 **Key Terms**

There are some important terms relating to the maritime carriage. A contract of affreightment refers to a contract between a ship owner/carrier and the cargo owner/shipper. Such a contract may be a charter party or a contract of shipment. A charter party takes three main forms: voyage charter party, time charter party and demise charter party. Besides, there are also many other terms.

i. A voyage charter party is featured by a specified voyage, while a time charter party by a specific duration.

ii. Demise charter party is less common now where the ship-owner transfers the possession to the charter, who is fully responsible for the charter.

iii. Bill of lading refers to a document issued by the carrier/master of the ship after the goods are loaded on board the ship.

[7] Drobnig, 'Vereinheitlichung von Zivilrecht durch soft law' in Basedow (ed), 75 Jahre Max-Planck-Institut fur Privatrecht (2001) 745.

iv. A carrier has two divisions: the actual carrier and the contractual carrier. Apart from the ship owner or charter, other parties like a freight forwarder and a ship's manager may also be included in the carrier's definition.

v. The duty to proceed with due dispatch for the carrier is to ensure that the ship proceeds on the voyage, load, and discharge the goods in accordance with the contract of carriage.

vi. Seaworthiness means the fitness of the ship for the purpose of carriage of goods. If a ship cannot encounter the sea's perils, it cannot be taken as a seaworthy ship.

4.2 Comparison of Hague-Visby Rules and Hamburg Rules

Hague Rules and Hague-Visby Rules aimed to protect cargo owners from the widespread exclusion of liability by sea carriers. This objective was achieved by incorporating standard clauses into the bills of lading, defining the carrier's risks, and specifying the maximum protection he could claim from the exclusion and limitation of liability clauses.[8]

Hague-Visby Rules provide that the carrier shall properly and carefully load, handle, and care for the goods carried. However, the carrier will not be liable for loss or damage resulting from the seaworthiness. Meanwhile, the Hague Rules provide for financial limits on the carrier's liability and a time limit on the liability of a contract.

In contrast to the Hague-Visby Rules, the shipper does not have to request a bill of lading to invoke the Hamburg Rules' liability provisions. Also, it draws a distinction between the contractual carrier and the actual or performing carrier. It places a limit on the liability of the carrier as well.

The Hamburg Rules constitute a new Convention on maritime transport agreed upon under the auspices of the United Nations at a conference in Hamburg on 31st March 1978. Their official title is the United Nations

[8] Wanigasekera A. Comparison of Hague-Visby and Hamburg Rules. 2011.

Convention on the Carriage of Goods by Sea 1978. The Rules were devised with the intention that they should supersede the 1924 Hague Rules together with the 1968 Visby amendments

4.3 **Rotterdam Rules and Comparisons to Hague Rules and Hamburg Rules**

The international scope of the Rotterdam Rules is to be found in Article 5 (1): The Rotterdam Rules apply to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract, any one of the following places is located in a Contracting State: (a) the place of receipt; (b) the port of loading; (c) the place of delivery; or (d) the port of discharge.[9]

With respect to their comparisons, The Rotterdam Rules - Scope of Application and Freedom of Contract set forth, in its article III, that,

> The Hague and the Hague-Visby Rules are mere liability Conventions. Their sole purpose is to regulate carriers' liability and the exemptions thereof. They do not attempt to regulate the contract of carriage in its entirety. In particular, they do not touch upon the shipper's obligations, duties and liabilities. Even the Hamburg Rules do not go beyond that, and are confined to a mere Convention on liability. The Rotterdam Rules take a giant leap forward in this regard and go way beyond regulating liability. [10] They present a harmonising instrument addressing and regulating nearly the entire contractual relationship between parties to a contract of carriage."

Obviously, Rotterdam Rules are making a remarkable shift of focus. This change of focus might even have repercussions and a great bearing on the way liability issues are dealt with.

5. **Conclusion**

[9] In the following, Articles without further specification are Articles of the Rotterdam Rules.
[10] Alexander von Ziegler, 'The Liability of the Contracting Carrier', Texas Int'l. L.J. 44 (2009), 329 at 331.

With the introduction of the origin of international trade law and contracts that are applied to the U.N. convention and specific rules applied to different contracts, comparisons between different rules, we could see the development of contract law in international Trade, and there are still many contradictions between rules.

We can also perceive that laws develop as practices to adapt to changing trade environments and different actors while we know its essence if we research it from its beginning.

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