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CONTRACTUAL CHOICE AND GOOD FAITH UNDER THE CISG

The role of contractual choice is identified in the general principle of Article 6, which provides that: «The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary any of its provision».

The limitation of Article 12 identifies that derogation or limitation will not be allowed if the contracting Member State makes an Article 96 declaration to this effect [16]. However, as the CISG is both international in nature and within the text allows leeway within its provisions for party autonomy, the effect of Article 12 CISG does not remove contractual choice in its entirety [14]. The impact of Article 12 simply requires that the CISG is the binding set of principles for contract, which overall provides a broad model of choice [15, p. 258]. In fact, the only mandatory Article in the whole of the CISG is Article 12 if one considers the text of Article 6 [15, p. 261]. There are inferences that there are other mandatory elements under the CISG, of which Article 7 is considered an important balance to freedom of contract [1].

The question of balance is an important consideration when dealing with an international regime that upholds the primacy of contractual freedom [13, p. 781]. The rationale for this is that having principles, such as good faith or fair dealing ensures that both parties really have freely engaged in and agreed to the given contractual terms [13, p. 790]. The problem present in cross – border contracting there is that there will always be a conflict of laws, unless there is international agreement that international laws and norms will take precedent (i.e. an international law merchant (lex mercatoria)) [9, p. 133]. The concept of lex mercatoria dates back to Medieval Europe, in which freedom to contract is the key underpinning with pact sunt servanda [9]. In this period «international trade

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was largely governed by transnational commercial law», as opposed to domestic regimes [10, p. 178].

The implication is that the creation of the CISG, which upholds party autonomy, is a return to traditional principles. There are arguments that the CISG was preceded by the Hague Uniform Sales Law 1964, which created the foundation for the transnational law [7, p. 326]. This predecessor was unsuccessful, which is due to its inflexibility. The lex mercatoria of medieval times was based on flexibility, in which the freedom to contract was balanced by canon law (i.e. fair dealing principles of the state) [11, p. 199–200]. Arguably, during the late 19th and 20th Century the traditional transnational law was lost, which conventions such as the Hague Uniform Sales Law 1964 tried to revive [7]. The problem experienced is that the domestic regimes of commercial law stood as an obstacle to a truly transnational law [4]. The CISG is identified as being able to find this balance once again. The inference is that the CISG tries to provide a difficult balance between a gap – filling legal regime for domestic law and retaining an international «standalone» character [4]. Felemagas argues that:

«The adoption of the CISG is only the preliminary step towards the ultimate goal of unification of the law governing the international sale of goods. The area where the battle for international unification will be fought and won, or lost, is the interpretation of the CISG's provisions. Only if the CISG is interpreted in a consistent manner in all legal systems that have adopted it, will the effort put into its drafting be worth anything» [5].

The issue of interpretation that Felemagas is pointing at is that there needs to be a unified set of principles at the international level, in order to provide certainty without the intentions of the contracting parties falling foul of the conflict of laws. The development of a good faith principle falls within this application, because there is a general trend for such a framework on the outset [4]. The fundamental problem that exists is that the common law system rejects such a principle, unless there has been an express provision in the contract or it has been confirmed within the given legal system. Thus, unlike the civil law system the principle of bonne foi is simply not a natural principle.

The inference is that in the civil law application there will be support for a general good faith principle, which is less applicable in the common law systems [8, p. 181]. The US system, which incorporates the CISG in its Uniform Civil Code (UCC), has experienced problems with respect to the application of the CISG as a whole (i.e. to what extent it is self – executing) [2, p. 119]. The issue of self – execution is important, because the text of Article 7(1) refers to the requirement that the CISG be interpreted through its international character [2].

The inference of this is that if the good faith principle is accepted part of the law merchant then it cannot be derogated from. However, this is not clear, because the commentary implied that different domestic jurisdictions applying the CISG approach the good faith principle from different angles [8, p. 181].

In some systems, the good faith principle is seen as an international norm (i.e. the essential bonne foi concept from the civil law). In fact, arguably the preparatory documents of the CISG appear to suggest that the entirety of its text is more geared towards civil law than the common law [12, p. 122]. On the other hand, the good faith principle is linked to the contractual choice of the parties (i.e. it can be opted out or in), which is the prevalent approach under the common law applications [12, p. 121]. The fact that there are different applications and assumptions indicates that the application of the good faith principle may result in a framework where there are different weightings, as opposed to the permanent self – executing principle [8, p. 181]. The good faith principle seems to be a particular problem for the incorporation of the CISG in Anglo – Common law systems, especially that of English law [3]. The implication present is that the treatment of this principle is important to the validity of Article 7 as part of international lex mercatoria. It is recognised that the civil law principle of bonne foi makes the CISG more compatible with the civil law system [6, p. 150]. However, as identified earlier there are different interpretations within the civil law system of bonne foi. This indicates that such a common/civil law application may be overly simplistic.

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СУЧАСНІ АКТОРИ МІЖНАРОДНОЇ БАНКІВСЬКОЇ СИСТЕМИ

Вихід банківського капіталу за національні межі – об'єктивний процес, який є наслідком змін в економіці держав, процесів конкуренції, інтернаціоналізації світового виробництва. Транснаціональний рух фінансових коштів здійснюється в межах розрахункових, валютних, кредитних операцій. І міжнародні розрахунки, і міжнародні валютні операції в формі купівлі-продажу валюти, цінних паперів, і кредитні операції – це основні функції міжнародних банків. Поряд з цими операціями міжнародні банки надають займи та гарантії, здійснюють прийом депозитів, випускають чеки, платіжні картки, надають інвестиційні послуги. Міжнародна банківська діяльність здійснюється в межах сучасної міжнародної банківської системи, яка на сьогодні

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