DOES THE CISG PUT TOO MUCH EMPHASIS ON PROMOTING PERFORMANCE OF THE CONTRACT? A COMPARISON WITH THE ENGLISH LAW

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Abstract- The CISG was known as significant convention for international sale of goods and it's widely accepted by most of countries in the world. Interestingly, as the original contractual country the UK, didn't ratify the CISG. This article tries to make an attempt to clarify the preference of the CISG, and to search the different preference between the CISG and the English law. The researches in this field were not uncommon in the international law, but this article will share the special views at this permanent but practical significant issue. The article will focus on specific performance of the contract when existing a breach by the seller.

Keywords- The CISG, specific performance, seller's cure.

I. INTRODUCTION

The United Nations Convention on Contract for the International Sale of Goods ("CISG") governs international goods sales between the parties who are private parties and placed in different nations, with the state of contracting parties of the Vienna Convention. The day of the CISG came into force was on 1 January 1988, has 74 Contracting States by far, which represents achieved wide-spread recognition in the world.

The United Kingdom's government has not ratified the Convention, mainly reason that "the Convention will result in a diminished role for English law within the international trade arena." Indeed, the English law has long historical experience and numerous cases of international sale of goods, especially the Sale of Goods Act, and there are lots of different approaches of legal issues undertaken by the CISG.

This essay will intercept a difference of the remedies from the CISG and the English law, more specifically the essay will mainly focused on the analysis of "specific performance" under the CISG, by comparing with the English law. In time of the discus, I will not make detailed and systematic critics on the CISG or the English law, since this important issue should under the critics of influential scholars to deal with, that would not a meaningful study form me.

This essay attempt to clarify the difference approaches of performance in relation with breaches of seller's duty, under both of English law and the CISG, try to answer the question of whether the CISG prefer prompting performance the contract or not. First of all, I will distinguish the different remedies for breaches of seller's duty under English law and the CISG, then I will analysis the remedy of performance from the mainly three categories of remedies, which are terminate or avoid the contract, compel performance and claiming damages. Then, I will move to seller's cure, which is also a clear reaction for the Attitude of enforce performance. Finally, that will be a summary for the position of performance in the CISG.

II. CRITICAL ANALYZE THE APPLICATION OF SPECIFIC PERFORMANCE

Specific performance was treated as an important

measure of remedies in the international trade. In international trade, the innocent buyer may consume a lot of time and money in looking for alternative seller, although he can get from the first seller of compensation, but lost the contract to bring stability to trade facilitation.

Specific performance as a remedy for contract breaches, known as a self-help remedies, it is more than generous to the court for relief, generally civil aw countries prefer specific performance than common law countries. For instance, relating to international sale of goods, the difference is slight. Even though, there are no significant differences on specific performance, particularly the provisions on this issue between English law and the CISG, but in practice, there are some ambiguities which are worthy to discuss.

A. Specific Performance in English Law

In English law, specific performance rarely appeared as a remedy, even under strict conditions, such as section 52 (1). It stated that "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

According to the provision, the sentences of the English law and the Sale of Goods Act in the description are uncertain. Section 52 (1) stipulated the specific performance replaced with specific goods. That section 52 (1) only can be applied in the specific sale of goods, however, the classification of such goods did not specified. So, the court will use discretion to decide. If the innocent party's claims of specific goods, whether it can be supported by the court support is unclear.

In the English case law, e.g. Sky Petroleum [1974], the two parties have a long-term supply contract for oil sales. The seller failed to fulfill the contract, which situation lead to serious consequences to the buyer. The court made a discretionary decision requires specific performance, and whether the buyer is not able to find an alternative seller is uncertified by the court. In this case, How to fulfill the section 52? The case law of English did not make a clear settlement on these points, and the English law does not provide the scope of precise use of discretion, when the court makes a judgment of specific performance.

In practice, there are some cases, which the seller may be required to continue to sell goods to the buyer, rather than find other alternative buyers, and then claim damages for the first buyer. Professor Treitel indicated that the seller seek for specific performance is possible in international commercial sales. In that case, the seller would continue to seek for specific performance under English law, but English court will make such a decision or not are unclear.

B. Specific Performance in the CISG

In the CISG, the provision of Article 46 is corresponding with section 52 (1). The difference is that with the English law, Article 46 of CISG expressly provides the seller a clear right to seek for specific performance. Therefore, the difference by comparison with the English law only reflected on the buyer's right for requirement of specific performance. First of all, the provisions of the CISG try to avoid the uncertainty of sale of goods act. The drawback is that, the remedy which the buyer can exercise for specific performance was limited. The buyer, in the English law, have the right to claim damages excepting the requirement of specific performance, however, the buyer haven't the right of avoidance, reduction price under the CISG. Moreover, another difference from section 52 (1) to article 46 is that rights have been granted to the different object. In section 52 (1), the court is granted by discretion to determine whether allow specific performance or not, while the CISG granted the option to the buyer, intending the necessity of resort to the court.

Despite the different wording, the Secretariat Commentary held that the different styles of legislation does not affect the possibility achieve the same result. Generally, the main difference exist in the stage before resort to the court, the buyer may require the seller for performance before resort the court, under the CISG. Similarly, the termination and

damages are the main remedies in English law, so delivery specific goods will not adopt by the English court, unless the plaintiff required.

Under the CISG, the buyer may require specific performance when the seller breaches his obligation such as the provisions of Article 39 and Article 46. The remedy of specific performance in common law systems is not very common, only in exceptional circumstances, such as economic compensation for loss was limited. In sale of goods act of English law, specific performance is usually not adopted, because the buyers can purchase goods from other sellers. English courts do not tend to make a judgment as specific performance, even it would cost 9 months to buy goods from other sellers, which is stated in the case of Societe des Industries Metallurgiques SA v Bronx Engineering Co..However, there are limitations of CISG on this issue. Professor Carr indicated that Article 28 of the CISG "curtails the uniform availability of specific performance". It is stipulated as an exception of remedial measures in common law systems. It provided that when a party is authorized to require the other party to fulfill contractual obligations, the Court is not bound to make specific performance of the decision. Unless the court in accordance with national law, in dealing with similar contract for the sale, and is not bound by the convention, can make specific performance of the decision. Professor Bridge stated that this shift "from requiring performance to specific performance is a clear indication that this compromise was designed for the benefit of common law systems". This subtle shift, in practice there is an extensive meaning, e.g., in the English law of sale of goods act, the seller can sue for goods payable only when the ownership of the goods has been passed to him. However, when the CISG can be invoked, the seller may sue in English courts claim for goods payable, even without to consider whether to obtain ownership of the goods or not. Another example, if there is a contract of sale with CIF term, the buyer refused the documents which tendered by the seller, consequently, the property of the goods hasn't passed to the buyer, under the CISG. If the Article 28 contains much more directly specific performance, when the English court invokes the provisions of CISG, in this case there may have a damage existing, which the buyer should undertake because of non-acceptance. To avoid these problems, the meaning of specific performance of Article 28, needs to be defined as a remedy for fairness, when it was invoked by the English court.

II. THE SELLER'S CURE IN RELATION WITH PERFORMANCE

The difference of promoting performance under both of the CISG and the English law reflected in which measures be taken to compel or prohibit the seller to cure his breaches relating to non-conformity, i.e. forcing the unwilling sellers to perform the contract, allowing the willing sellers to cure his breach. That is because, if the legislation prefers to promote performance, the stipulations will allow the sellers to cure his breach. In the CISG, the provisions provide several approaches allowing the seller to cure his breach, i.e. reducing the possibility of the contract going to null and void. If there is no fundamental breach, the CISG usually require the seller to cure his breach and to promote the performance. While, the English law hasn't made it clear on seller' cure, the reason may because English law prefers termination.

A. The Seller'S Cure in English Law

In English law, particular in commercial sale of goods, English court usually would not enforce the seller for performance, which is because specific performance is seen as a discretionary remedy, if damages can be the remedy for the breaches and if similar goods can be found on the market, the English court prefer to end the contract, which is discuss in the last part of specific performance. The leading judgment on this issue was available in the case Societe des Industries Metallurgiques SA v Bronx Engineering Co.. The Court of Appeal held the courts will not enforce the unwilling seller to performance, since the buyer can find similar goods in the market. For the situation of willing seller, the right is not clear in English law, which will depend on the circumstances of the case and the attitude of the buyer.

B. The Seller's Cure in the CISG

In the article 46 of the CISG, it is clearly that the buyer has the right to impose the requirement upon the seller to performance, or delivery of substitute

goods, and requiring repair. The seller also has a clear right to cure his breach relating to the goods, within a reasonable period provided by the contract, if there would not lead to "unreasonable inconvenience "and "unreasonable expense", under Article 37. Even after the period of contact, if the buyers haven't avoided the contact and there is also no "unreasonable inconvenience", the sellers were allowed to cure his breach, which is in article 48. Certainty right of cure also allowed in the case of documentary breaches, to deal with non-conformity in the documents, within the period of tender in article 34.

In the CISG, the most important purpose of setting the right of cure is to save the contract, but not indulge the contract to breach the fundamental breach and going to avoidance, while this measure is a good starting point, but it is difficult to really work. Although there is no clear the right of cure, English law is also working to prevent the goods were rejected and contract was terminated by the buyers. Some series of cases shows that, to the extent that the seller may be correct, to tender a non-conformity documents, instead of undertake a non-conformity delivery. For the right of cure, the attitude of the law commission is negative. It pointed out in the consultation paper that, such a right led the fairness Lever tilt at the seller, while lead to the detriment of buyers; in addition, it indicated that this right may lead to uncertainty in trade contracts.

In the CISG, the seller was entitled to cure even the period of delivery has passed, in Article 48(1), the seller may cure 'any failure to perform his obligations.' However, the cure on this point may be meaningless in practice. After the period for delivery, the cure can be made if the contract hasn't been avoid by the buyer and also no fundamental breach, in fact, on the circumstances it is no necessary to cure. Furthermore, there is an agreement that when to decide the breach is fundamental or not, the seller's cure can be seen as a reference. In other words, the seller's cure should not be repealed by the right of avoidance of buyer. How to define the relationship between seller's cure and a voidance is not easy. Where the cure can be applicable, the question of the breach is fundamental or not cannot be answered, unless firstly answered the question of the seller will cure the breach or not. To some extent, because of the relationship between cure and fundamental breach, the seller's cure will affect the performance of the contact.

III. DOES THE CISG PREFER PROMOTE TO PERFORM THE CONTRACT

English law and the CISG put different views on the remedies for breach of seller's duty, which reflected on the two different approaches of remedy relating to performance of the contract. As a similar approach with civil law systems to deal with the remedies for the breach, the CISG is quite different with the approach which the English law adopted. Some commentator said the CISG prefer favor the Buyer and prefer performance of the contract. Does it a truth?

A. Compromision Under The CISG

Most civil law countries tend to stipulate that, each injured party has the right to compel the other party to performance the contract. Such kind of remedies focuses on protecting the injured party, by forcing the breaching party to fulfill the contract. Due to long time historical reasons, most of common law countries have the view that, the injured party cannot compel the defaulting party to actual performance, despite providing monetary compensation from the defaulting party. The two different systems insist the different process of right relief, for most cases, the results are much the same, however in some cases, the difference could be obviously.

For example, there is a contract between a manufacturer and a buyer, which is a special contract to supply special goods. The manufacturer refuses to supply the special goods, before the time of delivery. Under any law system, the most satisfactory approach is, the buyer can get substitute goods from other manufacturers in the market, which is the best remedy for the injured party. However, in some situation, alternatives goods may be difficult to find, even if found there may a long production process to wait, or the price of substitute goods is much higher than the contract price. At this point, the most adequate compensation to the buyer could be enforced the seller to performance. Buyers may be

more willing to compel the seller to perform the contract, even if should resort to the court. In this case, most of common law countries would require the seller for actual performance, and most common law countries would do not so.

The CISG does not ultimately solve the conflict between the common law countries and civil law countries. The CISG adopted the similar approach of civil law countries tend to build a system that is clarify the right of actual performance. For example, Article 46 stated that, the buyer could require the seller to fulfill its obligations; Article 62 ordered that payment the seller may require the buyer to receive goods or perform other obligations. However, the CISG also provides a number of exceptions, which may try to respect the willing of common law countries, such as Article 28 stated that, under the situation of do not conflict with the CSIG, the court may decide specific performance in accordance with the provision of applicable national law.

B. Limits And Scope of The Provisions Under The CISG

The CISG does not simply grant the right of the party seeking specific performance, but also clarify the variety of situations of specific performance in some detailed provisions. This was reflected in articles of 28, 46, and 62. In Article 28, that is mainly grant national court the free implementation of specific performance, where the applicable national laws do not conflict with the CISG. We have already discussed the Article 28 compared with English law above. For article 46 and article 62, the CISG stipulated the applicability of specific situations, in other detailed provisions:

Article 46 and Article 62 provides that if the injured party has taken other remedies, then the right of specific performance cannot be enforced. For example, if the buyer exercises the right of avoidance under Article 49, he will lose the right of actual performance, but he can also sue for damages. In addition, if the buyer reduced the price payable under Article 50, he cannot continue requires specific performance.

According to Article 79, if the party cannot perform the contract because of reasons which beyond his control, then he was not liable. Such a provision impose limit on article 46 and article 62.However, Article 79 (5), further defined that, the party can resort to any other remedies except claim damages. In other words, the party allowed resort to specific performance, even if the other party in the case of not fault.

Article 7 stated that, the party requires specific performance should obey the principle of good faith. i.e., where one party imposes specific performance upon the other party, he cannot act with malicious. For example, by requiring specific performance, to maliciously harass the other party, or cat with the aim of intentional delay in order to the benefit of commercial.

CONCLUSION

By analyzing a variety of remedies, we clarify that the remedy of terminate the contract is preferred by English law, while performance the contract is preferred by the CISG. Therefore, from this comparison, to some extent, the CISG can be said more focus on performance the contract than the English law. More pacifically, for the remedy of specific performance, the English law seems like do not settled in theory, but in practice specific performance can be adopted by English court; the provisions of the CISG involved more details of regulations on specific, prima facie can be said that, the provisions of the CISG more focused on specific performance than English law. On the issue of whether allowed the seller to cure his breach, the CISG seems to provide even more approaches to promote the cure; from the other side, this can be seen as a evidence that the CISG prefer performance the contract when the seller breaches his obligation. In English law, it is ambiguous on this issue, can be allowed in practice, but may be stricter than under the CISG.

However, this is clouded from the surface and the theory, the provisions of the CISG seems like more focused on specific performance than English law, but in practice, this distinction does not seem so obvious.

Since many countries have ratified the CISG for many years, the practice shows that, Article 28 of the CISG did not cause conflict with laws of domestic trade law, the future would not also. For a long period of theory the debate of specific performance in different legal systems lead to the compromises has been made, however in fact, their different approach to regard the specific performance 'both led to the same place'.

Clearly, Article 28 is now far from a political compromise, as professor Honnold stated that 'perhaps the work to develop the compromise between competing legal theories was useful primarily to let the program of unification move on to problems of greater practical significance.'

To the end, I would like to invoke Lord Mansfield's famous remark to end this essay, and it will be the appropriate answer to this subject: "The mercantile law, in this respect, is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same."

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