NEAR EAST UNIVERSITY

GRADUATE SCHOOL OF SOCIAL SCIENCES

MASTER OF LAW IN INTERNATIONAL LAW PROGRAMME (LL.M)

MASTER'S THESIS

THE EFFECTS OF THE INTERNATIONAL CONTRACT FOR SALE OF GOODS AND THE GRANTING OF DISGORGEMENT

Daban Zrng Sleman

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ABSTRACT

The study provides an assessment of the effects of the international contract for sale of goods on international trade and the granting of disgorgement. The undertaking of this study follows observations that were made that trade between Iraq and other States was declining and possible reasons were established to be related to the fear of unjust enrichment. This study therefore sought to ascertain how the international contract for sale of goods have influenced international trade patterns and how granting disgorgement can be used to warranty protection to trading partners with Iraq, and resultantly leading to an improvement and growth in international trade. The results showed that the international contract for sale of goods has managed to unify and harmonise domestic legal systems and this has led to a reduction in transaction costs, reform laws and remove other legal barriers which were affecting international trade. The study concludes that the international contract for sale of goods plays an important role in international trade but is still being surrounded by interpretation and uniformity problems.

Key Terms: Contract on international sale of goods, international sale of goods, international trade, Iraq.

ÖZ

Araştırma uluslararası mal satım sözleşmesinin uluslararası ticaret ve illegal yollarla elde edilen paranın iade edilmesi hakkında bir değerlendirme sağlıyor. Bu araştırmanın amacı Irak ve diğer ülkeler arasındaki reddedilişle alakalı gözlemleri ve haksız zenginleştirmeye bağlı korkuya neden olabilecek sebepleri ortaya koymak. Bu araştırma ayrıca uluslararası mal satım sözleşmesinin nasıl uluslararası ticaret rotalarını etkilediğini ve illegal yollarla elde edilen paranın iadesinin nasıl garanti koruma şeklinde kullanılabileceğini, ve sonuç olarak bunun uluslararası ticarette nasıl bir büyümeye yol açacağını gün yüzüne çıkarmaya çalıştı. Sonuçlar gösterdi ki uluslararası mal satım sözleşmesi domestik yasal sistemleri birleştirmeyi ve harmanlamayı başardı ve bu işlem masraflarında düşüşe, yasa düzenlemelerine ve uluslararası ticareti etkileyen diğer yasal bariyerlerin kaldırılmasına sebep oldu. Araştırma uluslararası mal satım sözleşmesinin uluslararası ticarette önemli bir rolü olduğu fakat yorumlama ve tekdüzelik problemleriyle çevrelendiği kararına varıyor.

Anahtar Kelimeler: uluslararası mal satımı hakkındaki sözleşme, uluslararası mal satımı, uluslararası ticaret, Irak.

ACKNOWLEDGEMENTS

In the Name of Allah, the Most Merciful, the Most Compassionate all praise be to Allah, the Lord of the worlds; and prayers and peace be upon Mohammed His servant and messenger.

Firstly, I would like to express my sincere gratitude to my supervisor Assoc. Prof. Dr. Resat Volkan Gunel for the continuous support of my study.

Secondly, I would like to express my special thanks Mr. Hamza Ruso for being my advisor for his patience, motivation and immense knowledge. I would also like to thank those teachers who taught me in International Law Programme.

Finally, I would like to thank my family and my friends for their constant support during the time I studied. I have travelled far and crossed many boarders to seek knowledge and contribute to international law studies. I hope many months of study and many days of hard work will put a dot on many lines of research that has been made to improve and regulate the living of mankind.

I am grateful not only by obtaining this degree but also for the journey and the knowledge I have obtained not only from studying but also from knowing so many great people and living in such beautiful county. I am thankful and I appreciate all your support and consideration.

DEDICATION

I come from a family where I have been taught to seek knowledge and apply this knowledge for the better condition of our societies and communities. My grandfather was a law student in the 30s today he will be very proud of me. My religion has taught me to seek knowledge even it was far away as far as China at the time. It has also taught me that whoever teach me a letter will make me appreciate him or her all my life time.

I would not be able to travel this journey without the support of my Father, I appreciate all you do for us dear dad.

I would like to dedicate this master degree to the soul of my Mother "Chnar" who left us six years ago. My mum was a great teacher and she taught us and many other children, I hope her soul rest in peace in heaven and this master degree will make her proud of her son.

I would also like to dedicate this study to my family and friends who have played an essential and great role in my academic studies. With that I just want to say, “Thank you very much”.

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ABBREVIATIONS

CISG Convention on Contracts for the International Sale of Goods.

FOSFA Federation of Oil Seeds and Fats Association.

GAFTA Grain and Feed Trade Association.

INCONTERMS International Commercial Terms.

ISL International Sales Law.

ISOG International Sale of Goods Contract.

PICC UNIDROIT Principles of International Commercial Contracts

UNCITRAL United Nations Commission on International Trade Law.

UNIDROIT International Institute for the Unification of Private Law.

WTO World Trade Organisation

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

The level of international interaction between businesses has grown extensively and more and more goods and services are being exchanged beyond international borders. According to the World Trade Organisation (WTO), international trade grew from 2.4% in 2016 to 3.6% in 2017 with merchandise trade and commercial services accounting for 3% and 0.4% of the trade volume in 2016[1]. This implies that the amount of economic and business contracts that have been engaged into between international buyers and sellers has also risen. Thus by definition of the International Sale of Goods Contract (ISOGC) or becomes a contract that binds international buyers and sellers together for the fulfilment of transfer of goods and services from one State to another in exchange for payment[2].

Meanwhile, economies such as Iraq have been going through periods of severe economic and political instabilities and the use of the Contract for International Sale of Goods (CISG) in international trade between Iraq and other economies will play an essential purpose towards lowering costs and uncertainties. The presence of uncertainties and instabilities in an economy tends to affect both the buyer and seller in international trade and insights have shown that parties are more liable to breach a contract in CISG[3]. If such a circumstance occurs, then there is need to examine how the CISG deals with possible losses that may be incurred and how the CISG incorporates prevailing global and economic changes to identify a party which bears both the risk and costs in the event of a contract breach. Moreover, the issue of disgorgement is presumed to change for economies that are characterised by political and economic instabilities such as Iraq and this study will therefore look at these issues and how the CISG can be positioned to handle such cases. Irrespective of these concerns, the CISG is still considered to be an effective international statutory instrument that harnesses

[1] World Trade Organisation 2016.
[2] Bradford Stone, 'Contracts for the International Sale of Goods' (2014) 10.
[3] Ibid, 2.

trade benefits between economies and lower uncertainties and transaction costs associated with the movement of goods and services from one State to another[4].

On the other hand, trading patterns with Iraq have been established to be on the decline and cited reasons have pointed to a relatively extent towards unjust enrichment. Most traders are not fully informed of the role that is played by the CISG towards dealing with unjust enrichment[5]. Such can be dealt with by using restitution or by granting disgorgement. However, it is contended that granting disgorgement is more effective and hence can result in improved and growth in international trade[6].

1.2 Problem of the study

The main emphasis of the CISG is built on the premise of avoiding uncertainties in international commerce and lower transactions costs through the use of uniform legal guidelines and instruments[7]. However, with the rate at which the world economy has been going through drastic and dramatic changes which are associated with high volatile economic outlooks, it is therefore questionable as to whether the CISG will be able to achieve its purposes. This can be noted from observations which have been made which hinted that the rate at which economic misfortunes such as economic crisis have increased the level of uncertainty in international business and both sellers and buyers have come up with business strategies and legal frameworks that are aimed to hedging against risks.

Such strategies and legal frameworks have been established to be posing an influence on CISG and outlined that the effects of such things on the CISG have not yet been explored. Other have however outlined that the CISG is hampering positive developments that are required to enhance international business[8]. This stems from ideas which have shown that technological and economic developments have increased at a fast rate and require that changes be made to the CISG to accommodate such developments since the CISG has not been fully and effectively able to account to and accommodate such changes[9].

[4] Legal Guidance and FOR Doing, 'Model Contracts for Small Firms Legal Guidance for Doing'.
[5] Rudanko Martins, 'Pohjoismainen sopimusoikeusajattelu ja kansainvälistyvä sopimusoikeus' (2014) 7–8 Lakimies 1006.
[6] Van A. M, 'Dynamic Treaty Interpretation (1998) 146 University of Pennsylvania Law Review 687.
[7] Ibid, 4.
[8] Eastern Europe and United States, 'The Uniform Law on International Sale of Goods : A Constructive Critique'.
[9] Ibid, 6.

In as far as the issue of unjust enrichment, one can argue that they are conditions which govern compensation that is made to injured parties and it is not always the case that full compensation is awarded to injured parties[10]. Yet on the other hand, it is contended that international traders ate much interested in knowing that their profits and goods are secured and hence will be entitled to full compensation in the event of losses, damages or unjust enrichment[11]. The issue to consider is how granting disgorgement will be made in such circumstances.

Questions are therefore being asked as to whether the CISG is still servicing its purpose in a world where everything is changing at a fast rate and how granting disgorgement will protect international traders from unjust enrichment[12]. The CISG is also being criticised on the basis of its failure to lower transaction costs while other continue to down weigh its purposes citing that its use has not been able to lower transaction costs since there are a lot of external economic factors such as production, transaction and transport costs which the CISG is not fully capable of influencing. This is because the CISG is contended to be an instrument which helps to determine who bears the risks and costs in international transportation or carriage of goods from the seller to the buyer[13]. One can also question whether the use of the CISG will have a profound positive effect on economies such as Iraq which are characterised by political and economic instabilities, to boost international trade in petroleum products and other commodities.

On the other hand, issues of disgorgement caused by the CISG and how breaches of a contract affects profits made have to be looked at especially under drastic and volatile economic and political conditions. Most studies that look at these aspects were done at a time when the global economy was considered to be stable and hence their application to current issues might not provide adequate and effective deductions.

It therefore remains unclear as to whether economic changes have influenced the CISG or whether the CISG has had an effect on international business and trade. It also unclear as to what factors influence the effectiveness of the CISG in achieving its purpose of reducing uncertainty and lowering transaction costs in international trade especially for economies like

[10] Walt Samuel, 'For Specific Performance under the United Nations Sales Convention' (1991) 26 Texas International Law Journal 211.
[11] Ibid
[12] Daniel Berlingher, 'The Effects of the International Contract for Sale of Goods' (2017) 19 Journal of Legal Studies 96 <http://www.degruyter.com/view/j/jles.2017.19.issue-33/jles-2017-0007/jles-2017-0007.xml>.
[13] Ibid, 8.

Iraq which are characterised by political and economic instabilities. Moreover, it still remains to be figured out what measures can be used to enhance the effectiveness of the CISG in a modern day global economy which is now being characterised with a lot of economic changes and uncertainties. This study therefore seeks to examine the effects of the assessment of the effects of the CISG in relation to Iraq.

1.3 Aims of the study

The study is motivated by the need to assess the effects of the CISG in international business law and will also attempt to;

i. Determine whether the CISG will be able to warranty effectiveness in international business and trade to economic like Iraq when the global economy is increasingly being characterised by a lot of political and economic instabilities.
ii. Examine factors that can influence the effectiveness of the CISG in international business in accomplishing its task to reduce uncertainty and transaction costs.
iii. To examine how granting disgorgement will help alleviate unjust enrichments problems.
iv. Determine possible measures that can be adopted and amended to the CISG so as to ensure that it remains timely and up to date in addressing modern day international business challenges.

1.4 Justification and significance of the study

The study fulfils partial requirements of a Master's degree in international law and its importance lies in its ability to highlight prevailing challenges that are undermining CISG. It also positions States and International organisations such the United Nations in coming up with effective amendments to the CISG so as to enhance its effectiveness in international trade. This study also serves an important purpose as it offers solutions on how best to apply the CISG in international trade involving economies which are characterised by a lot of political and economic instabilities so as to foster trade and development. This study looks at the CISG on a different perspective and hence it has a created a new avenue to formulate future studies.

1.5 Structure of the study

This study was accomplished by following a four chapter outline in which the initial chapter gives general considerations regarding the CISGC while the second chapter deals with the influence of the CISG on international trade. Chapter three offers an outline of issues surrounding the granting of disgorgement. The fourth chapter provides a discussion of findings, conclusions and recommendations that can be made in the study.

CHAPTER TWO

INFLUENCE OF THE CISGC IN INTERNATIONAL TRADE

2.1 Introduction

This chapter looks at the effects of the CISG in international trade and hence it outlines positive and negative effects that have been experienced from the inception and use of the CISG. Such assessment will be based on harmonisation and influence on international transaction. This chapter will also look at formation of the contract, the rights and obligations of the contracting parts and problems with the application of the CISG.

2.2 Overview of the CISG

The establishment of the CISG was as result of strong effort to develop uniform a sales law that would apply on international scale[14]. As a result, existing legal frameworks that included the 1964 Hague Formation Convention and the 1964 Hague Sales Convention also known as the International Institute for the Unification of Private Law, (UNIDROIT) were modified by the United Nations Commission on International Trade Law, (UNCITRAL) to form what is known as the Convention for International Sale of Goods, (CISG)[15]. This was as result of a series of a legal challenges that were undermining international trade and a major problem was that having different domestic laws was creating widespread problems which undermined trade growth and development[16]. This is because contracting parties to an international sales were not always familiar with a foreign law and had to spend time and effort learning it and this resulted in an increase in transactions costs[17]. Furthermore, there was no common way of handling disputes and the issue of having different domestic laws made it difficult to settle disputes between parties[18]. Moreover, other parties which had a huge bargaining power were established to be taking advantage of other parties to an

[14] Anca Lazar, Petru Dan and Joandrea Moga, 'RULES APPLICABLE TO THE INTERNATIONAL SALE' 1.
[15] Ibid.
[16] 'The International Sale of Goods Revisited' 266 <http://books.google.com/books?id=VCEePwb0IWcC&pgis=1>.
[17] Christiana Fountoulakis, 'Remedies for Breach of Contract under the United Nations Convention on the International Sale of Goods' (2011) 12 ERA Forum 7.
[18] Ibid.

international sales agreement[19]. As these problems led to a decline in international trade activities and this called for a solution that would harmonise existing State laws into a unified international sales law that would facilitate trade growth and development. The CISG thus came into effect in 1988 following amendments that were made to The Hague 1968 convention in Vienna 1980[20].

The notable focus was to ensure that the international sales law (ISL) would conform to economic, social and legal systems of different countries around the world. Since its inception, the CISG has had a membership of 80 countries including Iraq, Germany and of course the USA. This implied that once member States adopt the CISG, it implies that the CISG immediately takes effect and becomes superior to the national law. Alternatively, it can be said that the CISG takes precedence of private international laws and a State's domestic laws and becomes the dominating law of governing both parties to a CISG agreement. This played an essential role towards addressing disputes that were arising and in such cases in the event of a dispute, the CISG would take effect on the condition that the contractual agreement does not contain a choice-of law clause and this would also be applicable irrespective of the place which the litigation has taken place[21].

2.2.1 The Aim of the CISG

One can strongly contend that the chief aim behind the establishment of the CISG was to establish what can be considered to be a harmonised, fair and uniform legal system that accounts for legal system, economic and social differences between States[22]. The application of the CISG takes effect when the contractual agreement has been concluded and the place of business has been disclosed in the contractual agreement. This reduces the need to use private international law to determine the applicable law and this is important because results certainty in CISG. As a result, there is a high level of predictability that can be made concerning the use and work of international sales contract[23].

By choice, parties to a contractual agreement can also choose to explicitly allow the convention to apply to their agreement even when the private international rules highlights

[19] Ibid.
[20] Ingeborg Schwenzer (Ed .), Schlechtriem & Schwenzer , Commentary on the UN Convention on the International Sale of Goods (CISG), 3 Rd Ed ., © Oxford University Press 2010.
[21] Ibid.
[22] Ibid, 14.
[23] Jan Ramberg, 'To What Extend Do Incoterms 2000 Vary Articles 67 (2), 68 and 69' (2005) 25 JL & Com. 219

which State law is applicable to the contract[24]. Thus convention seeks to offer neutral legal systems that are conducive to both States irrespective of the differences in States.

Due to the idea that the CISG results in certainty and an increase in the level of predictability in the use of contracts, it can be established that such a move or outcome results in an increase in international trade development and growth. This is also because it deals with legal challenges that act as barriers to international trade[25]. There is a belief that conducting international trade agreements is more complicated than domestic agreements and this is because contracting parties are from different State background[26]. Choices have to be made between contracting parties about the choice of law which must be used and this takes a series of negotiations[27]. Considerations must also be given to the parties that when choice has been made to use one of the foreign laws, translations costs are to be incurred and that there are consequences of such a move. However, such is avoided by the use of the CISG and hence there is no costly translations nor the need to determine through negotiations which law is applicable to a contractual agreement.

2.2.2 An Influential Convention

The inception and use of the CISG is widely regarded as a huge success in international trade[28]. This is because it is has managed to gunner supported from several States and with a membership of 80 States, it is regarded that member states of the CISG now constitute more than 60% of international trade agreements[29]. The widespread membership of the CISG includes Eastern European, South American countries and NAFTA, that is, North American Free Trade Area.

Another notable area the CISG can be regarded to have strongly influenced is domestic and international trans-border commerce. This can be attributed to the idea that the CISG is now being used as a framework upon which national sales laws are being modified and such

[24] JE Bailey, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1998) 32 Cornell International Law Journal 273.
[25] Setting Rules, FOR International and Settling Disputes, 'United Nations Commission on International Trade Law (UNCITRAL)' 2016. Europe and States.
[26] Ibid, 14.
[27] Ibid, 17.
[28] Ingeborg Schwenzer & Pascal Hachem, supra note 3, p. 457-478.
[29] Ibid.

include the new German law of obligations of 2002, the 1988 uniform Nordic Sale of Goods Act etc.[30].

The convention is also considered to have played an essential role towards the measures enacted by Principles for International Commercial Contracts (PICC) and towards Consumer Sales by the European Union[31].

2.2.3 The Structure and the Application of the CISG

The CISG is composed of four parts and these can be listed as follows[32];

- **Part I:** Outlines the general provisions as well as the sphere of application of the convention.
- **Part II:** Controls how contracts should be formed.
- **Part III:** Highlights the obligations and rights of the parties to a contractual agreement.
- **Part IV:** Focuses on the signatory States and this is one of the most important aspect of the CISG and determines its applicability. Hence, contracting parties should place huge consideration to this part otherwise the contractual agreement might be rendered invalid.

2.2.4 Application of the CISG

The application of the CISG is confined to two scenarios. Foremost, its application is determined by the location of the parties who must be in two different signatory States. Lastly, if the State which is part of the CISG has its State law applied to the contractual agreement by reason of reference of private internal law[33]. It must however be noted that the application if the CISG is conditional to the willingness of the parties (optional). This implies that they may choose not to apply it or may choose to apply a specific part of the CISG to their contractual agreement[34].

Though the CISG does not offer a definition of the terms contract of sale of goods, goods nor sale, its application is however restricted to contract on sale of goods. The following items are excluded from application of the CISG;

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[30] Schwenzer & Hachem, supra note 3, p. 477.
[31] M G Bridge, supra note 10, p. 467 paragraph 10.01.
[32] Ibid.
[33] Peter Schlechtriem and Ingeborg Schwenzer, 'Introduction' in Schwenzer I (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG) (3rd edn, Oxford University Press 2010 pp. 1–12), 1.
[34] Ibid.

- Compulsory a sales,
- Auction and ,
- Consumer sales.
- Electricity.
- Aircraft.
- Ships.
- Securities.

The CISG influences how contracts are formed and outlines the obligations and right of the parties to a CISG. Thus, it can be said that it does not control the impact of the contract on property in the goods acquired, provisions and validity of the contract. Recommendations made by the CISG highlight that any interpretation that is to be done must be based on the need to promote good faith and uniform applicability of the convention[35]. This is important because it avoids courts from what is known as 'homeward interpretation'

2.3 Formation of the Contract

The CISG asserts that a contract is concluded when an offeror's offer has been accepted by the offeree[36]. Thus what makes a proposal a contract is if the proposal clearly highlights the willingness of the offeror and that it is definitely certain that obligations will be fulfilled[37]. In such a case, decisions can be made that the proposal is definite when both the price of the goods as well as the quantity to be sold are explicitly disclosed[38]. Offers can be revoked before a contract is concluded but cannot be revoked on the condition that it clearly mentions that it is irrevocable and that the offeree depends on the offer as uncancellable[39].

What therefore consists as an acceptance of an offer is when the offeree has disclosed assent to the proposal, made a direct conduct or a statement[40]. However, when an offeree remains silent, this will not be treated as acceptance of an offer[41]. On the other hand, an acceptance is considered to be in effect when the offeror has received a statement of indication of

[35] Lisa Lundgren, 'The United Nation ' S Convention on Contracts for the International Sale of Goods'.
[36] Stone.
[37] Article 14 of the CISG.
[38] Ibid, 31.
[39] Article 16 of the CISG.
[40] Ibid.
[41] Ibid, 33.

acceptance of[42] an offer or by an indication of an assent[43]. This must however be done within the prescribed period of time otherwise if not then the offer is considered to be invalid. But it may also be accepted when the offeror has highlighted that late acceptance are considered. Oral offers on the other hand, are considered as well to be in effect immediately when they have been accepted. The offeree may withdraw acceptance of the offer before the made acceptance reaches the offeror and it not then the contract is considered to be valid[44].

2.4 The Rights and Obligations of the Contracting Parts

Both the seller and the buyer are obligated to perform their obligations by the CISG and the seller is obligated to make sure that the goods are delivered to the buyer. This also includes ensuring that the required documents are also transferred to the buyer as stipulate by the contractual agreement[45]. The buyer on the other hand, is mandated to ensure that the stipulated price is paid to the seller. Thus whether international sales have been made to or from Iraq, whoever the buyer is, he must still pay the required price to the seller and this includes demonstrating compliance to the given stipulations.

The other responsibility of the buyer is to assume ownership when goods have been made available for collection by the seller. At this stage, the buyer is the buyer must check if the goods are matching the specified description, package, quantity and quality. This is because once the buyer accepts the goods and discoveries are made that the goods are damaged, the risk will be borne by the buyer because the convention contends that risk would have been transferred from the seller to the buyer[46]. Risk can also be considered to have been transferred to the buyer when the seller had dispatched the goods to a carrier and the buyer has been made aware of it[47].

[42] Michiel Buydaert, 'THE PASSING OF RISK IN THE INTERNATIONAL SALE OF GOODS A Comparison between the CISG and the Incoterms'.
[43] Ibid.
[44] Article 22 of the CISG.
[45] Ibid, 35.
[46] CLOUT case No. 428 [AUSTRIA Oberster Gerichtshof, 7 September 2000].
[47] Ibid.

However, when discoveries are made that there is lack of conformity by the seller or acts of misrepresentations, then considerations can be made that the seller is liable for damages or losses irrespective of the fact that risk had passed to the buyer[48].

In the event that breaches have been observed, then the court will determine if such a breach can be considered to be a fundamental breach and such a circumstance the injured party can avoid contractual obligations and press claim for damages[49]. What is considered a fundamental breach is a situation that occurs when the resultant action of a party results in detrimental effects being suffered by another party[50]. This usually occurs when confirmations are made that it was highly impossible for the injured to have foreseen the breach. Avoidance, therefore calls for the release of both parties. However, when a party had totally or partially committed part of the obligations then he is entitled to compensation or reimbursement[51]. In the event that the court has ruled the breach as not fundamental then remedies will be made in the form of damages[52].

2.5 Problems with the Application of the CISG

As noted from this study, it has been established that the CISG seeks to ensure uniformity in the application of an ISL. But the question is, "*Will or does the CISG always guarantee uniformity or can such uniformity be considered to be totally possible'*? Observations can be made that uniformity can be attained when arbitral tribunals and courts have uniformly applied the convention[53]. Furthermore, it can also be established that provisions made by the CISG are outcomes of negotiations made by member States and if nations such as Iraq are not comfortable with the established provisions then they might opt out and this compromises the applicability and uniformity of the convention.

Ideas have also been established that the formulation of the convention was done in an abstract and general manner and yet was made to control a wide number of economic and legal events. As a result, conclusions are made that the convention is vague and this extends

[48] UNCITRAL Digest of case law on the United Nations Convention on Contracts for the International Sale of Goods,
[49] Ibid
[50] Ibid, 42.
[51] Article 81 of the CISG.
[52]. Ibid, 50.
[53] Ibid.

to include its provisions as well[54]. Implications can therefore be made that if nations such as Iraq and other States are to apply the convention in any international trade agreement, then chances are high that disputes or conflicts will occur as a result of such vagueness.

Secondly, it can also be noted that recommendations are made that the interpretation of the convention be done in a manner that represents international character. However, we can ask questions like *"Will the interpretation of the convention be uniform?"* with such a question in mind, answers can be said to be *NO* and this can be as a result of the following reasons;

There is a huge lack of a common authority that can enforce such uniformity among members and examples relate to the availability of courts such as the Supreme Court. This can be supported by findings which revealed that though the conventions are of significant value, they are not binding in other jurisdiction[55]. This problem is common a lot in States that have a Common Law background and interpretation has been done based on the context of the Sates' legal tradition, then uniformity in the context of the CISG can be said to have not been upheld[56].

Recommendations are thus made that courts ought to examine how the convention has been performing in foreign courts in as far as the matter of interpretation is concerned. This also requires that reference be made to researches that have been made by other scholars and examine how they have proposed and handled the situation.

2.6 Positive effects of the CISG in international trade

Foremost, an assessment of the CISG can be made based on its purposes upon which it is intended to serve. Hence, from the onset, it broadly and strongly outlined that the inception of the CISG was to deal with problems that were experienced in international trade. This can further be supported by findings which were made that without the CISG, it was very difficult to handle problems such as non-performance and international trade disputes[57]. Moreover, we can also deduce that international trade agreements were often characterised by losses as a result of breaches or non-performance. This called for a balanced legal system that would

[54] James E. Bailey, Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales, 32
[55] Ibid, 49.
[56] Clayton P. Gillette and Robert E. Scott, The Political Economy of International Sales Law, International Review of Law and Economics, (September 2005), p. 473.
[57] Ibid.

deal with non-performance amicably by improving the level of interaction between the seller and the buyer[58].

Such greatly undermined the growth and development of international and hence this necessitated the establishment of a common law that would broadly govern all international trade agreements. Thus, we can thus contend that the CISG has positively contributed towards dealing with uncertainty issues and international trade disputes. Moreover, we can also deduce that international trade agreements were often characterised by losses as a result of breaches or non-performance.

2.6.1 Harmonization effects of international sale law

Major issues which were being experienced in international trade include the lack of uniform and standardised laws that can facilitate the development and growth of international[59]. This is because international trade transactions were being conducted using different State laws and hence leading to different interpretations, complications and uncertainties[60]. The CISGC through the CISG help to deal with divergent outcomes that can take place as a result of failure or inability to determine an appropriate applicable law. Thus CISG provided a platform upon which a neutral and uniform legal framework. This is because Article 1(1)(a) when parties to a contractual agreement are based in one State while Article 1(1)(b) applies when a description has been made that the applicable law of a State be made applicable to the CISG[61]. Such is also important when the concerned parties do not have access to professional legal services. As a result, small businesses that are engaging in international trade stand to benefit from the inception and use of the CISG. This also serve to protect an injured party from exploitation that would take place in an international trade transaction where one party has significant bargaining power[62].

2.6.2 Legal certainty

Many scholars have shown strong support towards the use of the CSIG citing that it formulation has unified existing legal systems and harmonise international sales law[63]. Such support is based on the argument that it enhances certainty as applying diverse States laws

[58] RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller, New Zealand 30 July 2010 High Court of New Zealand.
[59] Ibid.
[60] Luca G Castellani, 'The Adoption of the CISG in Portugal : Benefits and Perspectives' 2013, p1-16.
[61] Ibid, 54.
[62] Mathias Siems, 'Disgorgement of profits for breach of contract: a comparative analysis' (2003) 7(1) Edinburgh Law Review 27, 28.
[63] Ibid, 56.

has adverse effects of impeding trade. Thus it can be contended that the CISG has contributed towards improving international trade through the introduction of legal improvements that facilitate international trade. However, other studies argue that the idea of outlining that the CISG has brought legal certainty in international trade is subjective[64]. The arguments are that it is in most cases difficult to ascertain the laws which govern a contract. In addition, the applied law can be also be imprecise or unclear which makes it uncertain[65].

However, the element of the CISG improving certainty can be illustrated by the idea that contracting parties to an international trade agreement are located in different States and can opt to use the rule of law will be applicable to their contractual agreement.

2.6.3 Law reforms

The use if the CISG has greatly brought so much legal reforms and this can be based on the idea that domestic laws are unfit for use in international trade agreements[66]. Thus adopting the CISG offers contractual parties to an international trade agreement with the potential to use unquestionably better laws. This is however questionable as to how exactly is the CSIG superior to domestic sales laws[67]. Insights have also on the other hand established that the formulation of the CISG was done using laws that are borrowed from domestic or national laws[68]. Also the ability to formulate and uses how preference of another rule of law is not a sign that it is superior in use[69].

2.6.4 Reduction of transaction costs

In economics, the harmonisation of economic activities such as international trade is meant to reduce transaction costs[70]. When considerations are put on the magnitude of costs that are incurred in international trade, one can contend that international trade activities are more costly as compared to domestic trading. This is as a result of the differences in geographical distances between the contracting parties and this will result in the parties incurring transport costs, information and search costs and legal costs. As a result, establishing contracts in

[64] Ibid, 58.
[65] Heidi Stanton, How to Be or Not to Be: The United Nations Convention on Contracts for the International Sale of Goods, Article 6, 4 CARDOZO J. INT'L & COMP. L. 423, 428 (1996).
[66] Ibid, 59.
[67] Ibid, 60.
[68] Ibid, 62.
[69] Ibid, 65.
[70] Christiana Fountoulakis, 'Section I. Effects of avoidance. Arts. 81–84' In Schwenzer, Ingeborg (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG) (Oxford University Press 2010 pp. 1095–1145) 1106, para 17.

international trade is more sophisticated as compared to domestic trading[71]. This can also be because of the idea that when drafting a contractual agreement, trading partners may opt to use one of the domestic laws and the other party has to learn how those laws work and thus suffering from the learning effect[72]. Thus it can be stablished that the CISG has managed to reduce transaction costs in the following ways;

- It deals with the issue of having to determine which applicable law will be used to govern the contractual agreement. This saves time and transaction costs of having to bargain to have a certain law applied as part of the contractual agreement.
- Both parties will be familiar to the law and none of the parties has to learn about how it functions.

However, discoveries were made that the effect of an international towards lowering transaction costs is subject to a number of factors[73]. This has led to the establishment that the extent to which an international towards lowering transaction costs is determined by the extent to which their legal systems are sophisticated[74]. This implies that the more sophisticated the legal systems are the more costs are incurred and hence having an international law might not exactly lower transaction costs.

Studies have also been conducted which have outlined that the extent to which international law will have an impact on transaction costs is determined by the awareness of the parties to a contractual agreement of the existence if the international law[75]. This will extend to include the ability of the parties to be aware of the consequence of including the international law as part of their contractual agreement. In most cases, parties are mainly interested is using the agreement as a way of avoiding and dealing with disputes but they are in most cases not aware that they can use it avert certain contractual provisions. They can even utilise some of the provisions made by the applicable law to avert negotiation costs behind the drafting of the contractual provisions. Others have outlined that it is the importance of the parties attach to

[71] Ibid, 70.
[72] Robert Hillman, 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' [1995] Cornell Review of the Convention on Contracts for the International Sale of Goods 21, 21.
[73] Lord Nicholls of Birkenhead even termed Blake a 'notorious self-confessed traitor'. See Attorney-General v. Blake (House of Lords, England) para 275.
[74] Ibid.
[75] Melvin A. Eisenberg, 'The Disgorgement Interest in Contract Law' (2006) 105(3) Michigan Law Review 559.

the international law that plays an important role on how international law will influence transactions costs[76].

Deductions can thus be made that unsophisticated parties are less likely to use lawyers to undertaken negotiations. This is because they consider it unnecessary for them to use lawyers when negotiating huge contractual agreements. Huge international contractual agreements are often characterised by a lot of substantive requirements towards certain clauses, deciding on the jurisdiction to conform to as well as the clause to govern them and such may be required to be completed on a short period of time[77]. As a result, parties often try to avoid such things and hence they try not to engage in such contractual agreements but the problem is that they will not be able to see what they can obtain from such negotiations. They instead they may end up seeking a neutral position and this can include using a law of another State that is not of the state of origin or use the law of another third party to govern their agreement. As part of attaining consistency, the parties may sometimes opt to use a third party as arbitrators or give the jurisdiction of the third party's court[78]. In such a circumstances, engaging in international contractual agreements will be very low and in most cases lower than those of domestic contractual agreements. Moreover, there is no need for the parties to spend much effort and time trying to learn

It is however important for the parties to be fully aware of the consequences that will be fall them if they fail to perform or if they breach the agreement. Moreover, they must ensure that the mandatory rules do not conflict with the chosen applicable law. If it happens that conflicts have been observed between the applicable law and the international law those contractual provisions will not be enforceable[79]. It is in this kind of cases that costs will be found to be high when parties try to bargain for provisions which have been considered to be unenforceable and this is highly evident in times of a dispute when parties have failed to agree[80]. During disputes, a party can take advantage of the unenforceability clause and this will have an influence on the level of costs that are to be incurred. Thus, it can be said that transaction and bargain costs are also a function of the ability of a party to take advantage of the unenforceability clause.

[76] Ibid.
[77] Schwenzer, Hachem and Kee (n 5) 34–35, para 3.07.
[78]Ari Hirvonen, Mitkä metodit? Opas oikeustieteen metodologiaan (Yleisen oikeustieteen julkaisuja 17 2011) 39
[79] Ibid.
[80] Larry DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer and Marisa Pagnattaro, International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence (Cambridge University Press 2005), 11.

Chances of a dispute arising in international trade are assumed to be higher but others have considered this to be not so and pointed that focus should be place on the probability that the mandatory rule will be infringed[81]. Hiring litigation officers and lawyers which can reduce the chances of having invalid clauses especially when they agree to use domestic laws of a third party and this will have an effect of increasing international contracting costs[82].

There is also an issue of sophisticated parties that can be considered to be a major determinant on the extent to which international contracting will lower transaction costs. This follows ideas which point to the notion that sophisticated parties have full knowledge of the statutory instrument influencing their contract[83]. Such knowledge include the ability to understand that the applied law may render the contract void and may restrict certain aspects or provision of the contract from being enforceable. Cases can occur when an unfamiliar legal regime or foreign law regulates the contractual agreement and in such a situation, parties will be obligated to learn about the applicable law. This requires that they engage lawyers on how they can use the applicable law and costs will be borne by one of the parties to whose the applicable law is of his State[84]. The costs can or will be considered to be borne by both parties on the condition that the applicable law is of a third party and both parties are not accustomed to it[85]. Thus, additional costs will be incurred by both parties as a result of the learning effect.

Care must also be placed on highlighting that the decision to use an applicable law will also result in obligations to use other contractual clauses which have an effect of increasing costs which must be met by either of the two parties. For example, courts may seek to avoid misinterpreting laws which they are not familiar with and hence they may require that the applicable law be applied by an adjudicator[86]. Such a law will no longer be unfamiliar and foreign to the court and it will thus consider it to be sufficient and if not, then it might not be proven to be in satisfaction of the court and deemed to be distorted[87]. This shows that there

[81] Ibid.
[82] Ibid, 77.
[83] Ibid, 78.
[84] Daniel Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' (1980) 80(3) Columbia Law Review 504, 558.
[85]E. Allan Farnsworth, 'American Provenance of the UNIDROIT Principles' (1998) 72(6) Tulane Law Review 1985, 1986.
[86] Ibid.
[87] Preamble, UNIDROIT Principles 2010.

are costs that will be incurred as a result of having an indeterminable legal regime[88] and establishing the foreign law's content[89]. This forces one if the parties to bear the foreign litigation costs and this is because the language used in the litigation process is foreign and this requires that all documents be translated to the litigation language. This represents another set of costs and more so, if evidence is required by the courts, then

2.7 Exclusion of the CISG

It is important to establish that the application of the CISG is not mandatory and Parties to an international agreement can opt not to use it even though it has been incorporated in State laws. In certain circumstances, Parties can choose to use certain provisions of the Convention[90]. The application of the CISG is characterised by the satisfaction of two conditions and such conditions require that the signatory State's laws be applied when international laws requires that they be applied and contractual Parties to an international agreement are located in two geographical locations[91]. With most nations adopting the CISG, it therefore places a mark on whether Parties to an ISOG are compelled to apply the CISG and if not then what are the conditions that are required for them to exclude the CISG from their contractual agreements. This sections therefore seeks to examine factors that must be looked into before parties can choose to exclude the convention from their agreement, the possible procedures they must follows and possible consequences that may befall them in the event of a fundament breach, loss or damage.

2.7.1 CISG exclusion methods

The CISG can be excluded in three different ways and these are[92];

- When the forum implicitly chooses to exclude it because it is a non-contracting State but Parties are desiring that the State laws from the forum's nation be used to govern the agreement[93].
- When the need to make a choice between a law clause results in the implicit exclusion of the CSIG. This is usually when done when the State involved is considered to be a

[88] Ibid.
[89] Ibid, 78.
[90] Ibid, 80.
[91] Ibid, 84.
[92] Ernst J. Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chicago-Kent Law Review 55, 57.
[93] 'The International Sale of Goods Revisited', 2011.

non-contracting State but when the State is a contracting State the CISG can highly be applied though Parties are opting not to use it. Which implies that Iraq merchants are part of the contracting members but can opt not to use in preference of another law clause.

- When Parties explicitly choose to exclude the CISG from the contract.

The notable method that Parties can use to mention in their contractual agreement that they intended or opt not to include the CISG as part of their agreement. However, when such a case in made, it may be required that the parties highlight which statutory instrument or clause would be applicable in the event that they have disclosed that the CISG has been excluded as part of the contractual agreement[94]. There are observations that were made that can result in a ruling be made that the CISG has been explicitly excluded from the contractual agreement. For instance, when Parties have chosen one of the State's law as a clause to their contractual agreement, such is considered to be an act of exclusion of the CISG[95]. This can be evidenced by insights drawn from a case in which one of the contractual Parties had but arguments were raised that the need to choose an external clause should not always be considered to be an act of exclusion[96]. Similar conclusions can be made from a case in which it was implicitly highlighted that Rhode Island clauses were to be made applicable to the international agreement[97]. Conclusions were made that the inclusion of this clause was enough to render conclusions that the CISG had already being excluded from the agreement. Despite the fact that this case took place in the United States which is main player in the ratification of the CISG, Supreme Court rulings made considered the CISG to take precedence over State laws of Rhode Island[98]. Furthermore, what are known as "the Drafter intentions" were considered to be inapplicable by the Supermen Court[99]. But there are also cases were Courts have made rulings supporting the "Drafters' intentions" in which the contracting Parties were among the signatory States and hence the decisions was that the inclusion of a clause of interest was insufficient to exclude the application of the CISG[100].

[94] Article 15 of the CISG.
[95] Christopher Kee and Edgardo Munoz, 'In Defence of the CISG' (2009) 14 Deakin Law Review 99, 105.
[96] Ibid.
[97] American Biophysics v. Dubois Marine Specialists, a/k/a Dubois Motor, C.A. 05-321-T, 30 January 2006.
[98] Ibid, 95.
[99] Ibid, 96.
[100] Easom Automation Systems Inc v. Thyseenkrupp Fabco Corp, No. 06-14533, 28 September 2007.

The ruling also highlighted that the agreement did not specify that the CISG was to be excluded from the contractual agreements[101].

2.7.2 Frequency of exclusion

Several attempts have been made to gather information about the extent to which the CISG has been excluded and the results have not yet managed to establish a solid foundation upon which accurate deductions can be made. This can be evidenced by insights which has shown that the obtained findings of such results cannot be declared to be absolutely true[102]. However there are surveys which exhibit that a lot of Court Judges in Germany and USA tend to exclude the application of the CISG[103]. These surveys also establish that 44.4%, 72.7% and 70.8% of the Jurists in China, USA and Germany have excluded the application of the CISG from certain international contracts[104]. With such differences in views, deductions can be made that the application and adoption of the CISG is surrounded with perceptions. That is, to say that the application of the CISG dependents on the views and principle of the ruling on what he feels best for him or her. But with a lot of references being made in Courts Cases, chances are very high that this will continue to influence future studies, cases and trails. One can also contend that other States such as Iraq which have been surrounded with international disputes are more likely to alter the application of the CISG in line to what is better for them. Challenges are therefore that the differences on the decisions for exclusion of the CISG might in most cases create problems especially when conditions under which such exclusions are to be made are not satisfied. More so, it can generally be established that a lot of incidences are showing that a strong favour has been attracted towards explicitly excluding the CISG with only a limited number favouring implicit methods that include the use of non-signatory State laws[105]. Figures released about Austria showed that about 55% jurists have opted not to use the CISG while those for Switzerland indicated that a high number of Jurists amounting to 62% have strongly excluded the CISG and instead opted for other clauses[106]. To make matters worse, a study of 85 countries concluded that the CISG has been excluded from

[101] Ibid.
[102] Ibid, 97.
[103] Ibid, 100.
[104] Ibid.
[105] John D. McCamus, 'Disgorgement for Breach of Contract: A Comparative Perspective' (2002) 36 Loyola of Los Angeles Law Review 943, 948.
[106] Ibid.

application by more than 45% and 51% of the non-contracting States indicated that they also tend to exclude the CISG from application[107].

When looking at the issue of the exclusion of the CISG one can put questions on whether such exclusion is as a result of incompatibilities with Sate laws or not. This can also extend to include questions on whether such exclusions is as a result of the need by the contracting parties to avoid complexities that follow from using the CISG. Either way, one can thus say that the decision to exclude the CISG from application can sometimes affect and impair or undermine the usefulness of the CISG. This therefore shows that such reasons need to be determined and a necessary course of action be taken to further amend the necessary clauses as well as continued support and efforts towards the CISG to encourage widespread adoption and use. But when Courts and Jurists have deemed it necessary to exclude the CISG in line with what is proper and just, then such a decision to exclude the CISG from application can be considered to be fair and just[108]. In addition, contracting Parties that opt to exclude the CISG are therefore recommended to ensure that they choose a suitable method of exclusion and this must also be disclosed in the contractual agreement made.

2.7.3 Relevant factors when excluding the CISG

With the decision to exclude the CISG in mind, effort must also be placed on looking at the conditions that must be looked into when considering the need to exclude the CISG.

2.7.3.1 Differences depending on legal tradition

The extent to which the CISG will be excluded from contractual international agreements is determined by the nature of legal systems that are prevalent in the States. From observations that have been in earlier deductions, it has been noted that familiarity to the CISG varies between States and this influences the decision to exclude or include the CISG as part of the contractual agreement[109]. Some countries which have high and better Civil Laws which improves the use and inclusion of the convention in contractual agreements. Notable agreements can be drawn from States such as USA, China and Germany. However, observation can be made that the CISG is closely related to Civil Law. That is, its formulation has been based on precepts and concepts derived from Civil Law which makes it deviate from legal sources that are widely used in nations such as USA, Germany, France and

[107] Article 18 of the CISG
[108] Koehler & Yujun, supra note 6.
[109] Andrew Botterell, 'Contractual performance, corrective justice, and disgorgement for breach of contract' (2010) 16(3) Legal Theory 135, 136.

possibly Iraq too.[110]. the problem is that when such conventions deviate from what Jurists are accustomed to, it creates further problems for them and hence they try to avoid such problems but not including the Conventions as part of the analysis. Though the CISG may be considered as part of a contractual agreement, care is placed to note that its interpretation is independent[111]. Hence, interpretative problems that are surrounded with the use of the CISG do not require that one make a reference to domestic laws[112].

When looking at reasons why the CISG is excluded from contractual agreements as a result of lack of concern[113]. Based in a study that was done on France, Germany and USA courts on 181 issues pertaining to the CISG, it was established that more than 60% of the cases that were looked into had not included the CISG[114]. The observations also showed that these cases had no slight indication of the possible clause or law that was to be used or considered applicable[115]. A similar number of studies were also conducted to establish if examined cases were characterised by the inclusion of the CISG. This includes studies conducted in France and German showed respective exclusion percentages of 75% and 63%[116]. The striking difference is that little attention was paid to the demarcation of an applicable law. It is however, insufficient to make conclusions based on these figures because there are a huge number of CISG cases that take place every day and it might be difficult to get access to other CISG cases. The exclusion of the CISG is deemed possible or necessary when it chances are so high that it will heighten disputes between Parties[117].

2.7.3.2 Standard terms and standard form contracts

This ids another major reason why parties have often been excluding the CISG from their contractual agreement. Such is tied to ideas which contend that the establishment of the CISG has been determined by standardised form of contracts developed by industrial bodies[118]. Notable example of such bodies include the Grain and Feed Trade Association (GAFTA) and the Federation of Oil Seeds and Fats Association (FOSFA). The implication is that when parties decides to use standard terms or forms of contracts established by these bodies, it limits their room for negotiation and it becomes so obvious and unavoidable since it has

[110] Ibid.
[111] Ibid, 105.
[112] United Nations Convention and others, 'WHITHER THE CISG ? CASE FOR ITS ACCEPTANCE IN NIGERIA'.
[113] Ibid, n, 100.
[114] Gilles, Cuniberti, supra note 18, 102, p237.
[115] Ibid.
[116] Ibid.
[117] Article 21 of the CISG.
[118] Ibid.

already been determined in advance. With reference to standard contracts, this idea tends to impose huge restrictions on nations such as Iraq which are part and parcel of major oil commodity bodies. Such bodies often have a high tendency to come up with incomprehensible terms that are only understood by only their members. Such bodies also tend to have their own uniform laws which makes it difficult to apply the CISG and the main emphasis is to offer protection to their members. Hence, the inclusion of other external laws such as the CISG will be considered to be posing threats to their members. As a result, they tend to exclude the CISG from their contractual agreements.

Contractual agreements made as a result of the influence of external bodies such as GAFTA often state that the place where future disputes are to be settled in the event of a breach is the country in which the contract was signed and recommendations are that any owing or pending obligations will be settled in that place of contract[119]. Thus it can be said that having standard contract or terms tends to impair the use of the CISG and thereby giving more room for to exclude the CISG from the agreement.

Considerations can be made that CISG legal issues that are being handled in Iraq are limited and hence practitioners have limited experiences to drawn from CISG. Hence little experience and references can be made and practitioners are sometimes forced to make references from cases that have taken in other States such as USA. As a result, there will be a lot of uncertainties towards the application of the CISG and chances are very high that it will be excluded from international sales agreements. But the view is certainly the same among Iraq's legal practitioners that the use of the CISG in international trade agreements helps to safe guard international trade relations. The problem of a limited number of CISG cases that have been recorded is not only prevalent in Iraq but it also affects other nations as well. This can be evidenced from contentions made that a total of 2951 have been recorded in the CISG statistical databases[120].

But the idea to say that about 3000 CISG case are few might on the other hand prove to be a wrong perception. This is because such a number is in most cases enough for practitioners to make references and draw conclusions from. It is therefore important that these available case be judged based on their ability to cover a wide number of issues about the CISG. It is better to make an argument that the available number of CISG cases that have been recorded do not cover a significant amount of ground and only cover a limited number of issues. This can also

[119] Marco Torsello, Common Features Of Uniform Commercial Law Conventions 1–2 (2004).
[120] CISG statistical database retrieved from http://www.cisg.law.pace.edu/cisg/text/casecit.html.

be supported by ideas given by Torsello who contends that the CISG must be assessed based on its content and that there are a wide number of CISG cases that deal with applicability issues while other cases deal with substantive law matters[121]. Hence, we can say the available 3000 CISG cases are in most cases enough for practitioners to understand how CISG issues have been handled by Courts in the past. Such is therefore important because it helps to deal with unfamiliarity problems which helps to reduce chances of the CISG being excluded from international contractual agreements. There are however arguments which look at the idea of the scarcity of the cases in terms of ability to interpret substantive law. It is argued that the cases must be capable of offer an interpretive ability of the nature of obligations and possible rights contracting parties are entitled to[122]. Thus the in ability of the cases to undertake such a responsibility is considered to be scarcity or limitedness of the available cases. This is because they will not be able to offer sufficient ideas and guidelines on how the required interpretation is to be made, and how contractual Parties' obligations and rights are to be regulated. Such therefore constitute an important reason why most legal practitioners have a tendency to exclude the CISG.

With the reference to the number of CISG cases, one can attempt to relate it to the practical importance of the CISG as they can offer an indication of the extent to which the CISG is being made use of. The challenge is that such cases are considered to be a fraction of what arbitral awards and Courts have handled[123]. It is important to note at this stage that knowing the exact number of CISG cases that have been handled by Courts, is not an actual reflection of the actual number of CISG contracts that have been governed. This is because most CISG contractual agreements that have been entered have been successfully performed leaving no room for disputes and the involvement of arbitral bodies and Courts[124].

2.7.3.3 Negotiation strength

The CISG has been excluded from application because of lack of negotiation strength and this is because applying the CISG limits their negotiating power as opposed to cases were domestic laws are applied[125]. Also when given a choice between the CISG and domestic laws, a practitioner can in most cases prefer to use domestic laws possibly because he or she is more familiar with domestic laws. Alternatively, when one party desires to use the CISG

[121] Ibid.
[122] Article 30 of the CISG.
[123] Ibid, 119.
[124] Omni Rostila, 'Disgorgement and the CISG – Comparative and Future Perspectives' (University of Lapland 2016).
[125] Ibid, 120.

but because the Party has a limited choice or bargain power in the transaction, the party might end up using another different state law or clause[126].

Several ideas have been given to justify exclusion of the CISG and practitioners have in most cases blamed this on their business counterparts whom they consider to be difficult to convince to use the CISG and this consideration has been established to be more common among Germany practitioners as opposed to practitioners in USA and China[127]. A similar conclusions was made about Swiss practitioners and it was noted that they are unwilling to apply it as their counterparts consider it to be unacceptable[128]. The observations are numerous and it can be pointed out that trade agreements between US and Mexico merchants do not include the use of the CISG as Mexican traders often desire to exclude the CISG based on lack of negotiation strength[129].

2.7.3.4 Unfamiliarity with the CISG

Though the CISG has played a great role of unifying international trade agreements and has been applauded for such a notable accomplishment, its adoption and use have however been subjected to a lot of exclusion incidences. This major reason why a lot of players have a tendency to exclude the CISG from application is considered to be lack of unfamiliarity[130]. The idea of unfamiliarity entails that not only contracting members are unfamiliar with the use and application of the CISG but also non-contracting parties. This follows ideas which have shown that the ability to harmonise international laws has also resulted in uncertainties in Court decisions[131]. This is because the CISG has some clauses which have been considered to have remained unclarified and most of them have considered to be undisclosed on unaddressed by the CISG[132]. Hence, by including the CISG into analysis Jurists will be faced with an obligation to examine all the contractual bases upon which the contractual agreement has been made. This will include maybe an examination of the State law which Parties have agreed to be part of the laws that are to govern their contractual agreement.

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[126] Ibid.
[127] Ibid, 122.
[128] Martin A. Hogg, 'Disgorgement of Profits in Scots Law' in Hondius E and Janssen A (eds), Disgorgement of Profits: Gain-Based Remedies throughout the World (Springer International Publishing Switzerland 2015 pp. 325–344) 341.
[129] Ibid.
[130] Ibid.
[131] KS Cohen, 'Achieving a Uniform Law Governing International Sales: Conforming the Damage Provisions of the United Nations Convention on Contracts for the International Sale' (2005) 139 U. Pa. J. Int'l Econ. L. 1.
[132] Ibid, 128.

Meanwhile, unfamiliarity has been discovered to be taking a huge toll among factors that contribute to the exclusion of the CISG. For instance, it was established that unfamiliarity with the CISG is so high in the USA with more than 44% practitioners indicating that they are not familiar with the CISG[133]. However, countries such as Australia and Canada tend to have low levels of practitioners who are unfarmiliar with the CISG[134]. But studies also showed that familiarity with the CISG is very high among Civil Law practitioners especially in Switzerland, Austria and Germany[135]. With this kind of evidence or ideas that are being established which are showing that there are familiarity differences about the CISG that can be observed among practitioners. What it therefore means is that there are possibly reasons that are triggering the unfamiliarity differences. Can such unfamiliarity be attributed to lack of motivation or incentives by practitioners to enrich their knowledge and understanding about the CISG? This can on the other hand, possibly suggest that there is little value that is being placed by legal practitioners towards the extent to which they use and place value on the CISG. One can also consider the idea that *"If you can easily exclude it the law from application, then why bother applying it"*.

One can also reckon with the idea that the level of unfamiliarity relates to the number of cases surrounding the CISG issues and events. This can be supported by findings made which showed that countries which have a high familiarity rate are associated with a high number of disputes involving the CISG[136]. This also follows establishments which were made that more than 18% of Jurists in German are devoted more than 25% of their time towards dealing with CISG Court cases[137]. The other nation which is characterised by a high rate of familiarity with the CISG is China and insights also shows that China has a high familiarity rate because its educational system has made compulsory for students to learn about the CISG[138]. Lessons can therefore be drawn from China that if other States are to improve their familiarity with the CISG then they need to make it compulsory for the education system to CISG deliver materials and lessons. China has made it mandatory that if one wants to be a lawyer he or she has to be learn and master the CISG[139].

[133] Buydaert.
[134] John McEnvoy, "Canada" in F Ferrari, supra note 103, p.64.
[135] Ibid.
[136] Ibid.
[137] Ibid, 131.
[138] F Ferrari, General Report, supra note 103, p42.
[139] Ibid.

There is a high level of unfamiliarity that occurs when practitioners do not fully understand the fundamental principles of the CISG and how it works. Such cases will render the CISG totally applicable and this is because neither implicit nor explicit exclusions are made by the Jurists[140]. There are instance of were practitioners may have an insight about the CISG but lack sufficient information about on whether it is reasonable to apply it or not[141]. The major challenge with the issue of familiarity lies in the manner one may choose to define unfamiliarity. This is because the term unfamiliarity is subjective. Such can be noted from a survey that was conducted among US practitioners in which they were tasked with a mandate to determine if the CISG would apply in the condition that there is need to make a choice to use a clause. The findings showed that 40% of the practitioners agreed that the CISG should be applied while 48% considered it inapplicable[142].

There are high chances that exclusion of the CISG will decrease in the foreseeable future and scholars argue that in the future legal practitioners will increase their knowledge and understanding of the CISG following estimated continued future growth in international trade agreements[143]. There are studies which support ideas that modern legal studies have taken a different twist and more scholars and academic institutions are now acknowledging the role played by international trade in both legal, economic, social and political spheres[144]. But it still remains a major concerning that lack of familiarity often leads to high cases of exclusion of the CISG and this leaves a huge need to improve legal knowledge dissemination in legal academic institutions and professional legal bodies.

2.7.3.5 Costs and time

The idea that there are costs and time elements that are tied to the use of the CISG are closely linked to the reasons why the CISG has been excluded from application[145]. The need by practitioners to learn or familiarise themselves to the interpretation and applicability of the CISG is often considered to be time consuming and hence practitioners have a huge incentive to exclude it[146]. But considerations are often made whether inclusions of the CISG will offer favourable outcomes and such is also tied with the need to maintain consistency in judicial

[140] Ibid, 137.
[141] Article 79 (1) of the CISG
[142] Eeva Riivari and Katri Havu, 'DOES BREACH OF CONTRACT PAY? UNIVERSITY OF HELSINKI FACULTY OF LAW Master's Thesis'.
[143] Ibid, 142.
[144] Cour d'appel Grenoble, (Gaec des Beauches v. Teso Ten Elsen), France, 23 October 1996.
[145] Ibid.
[146] HELENA JOCHEM, 'Damages under the CISG – Old and New Challenges' [2015] Laws 525: International Commercial Contracts

matter[147]. Practitioners have thus a huge tendency tom exclude the CISG from application in certain matters whenever they feel that its application will result in unfavourable outcomes and will offer inconsistencies in decisions made.

The issue of costs is based on the idea that practitioners are forced to learn more about the CISG in terms of concepts, interpretation and applicability[148]. This requires that time and money be spent towards learning it and one can also point out to the idea of opportunity costs[149]. This is because the number of CISG cases is considered to be very low that normal cases that are handled by Courts on a daily basis and hence it is in most cases better for practitioners to improve themselves on how to handle current, prevalent and dominating issues[150]. In a society where people get paid for the problems they solve, it is therefore worthy it for legal practitioners to spend much time learning about how to solve dominating legal problems so that they can get better rewards in the future.

There also studies which have established that CISG learning costs are positively related to its unfamiliarity[151]. This implies that an the CISG's learning costs increase people will be dissuaded from learning about the CISG to an extent that only a few are familiar with its interpretation and application. This also implies that the more jurists are exposed to education platforms that offer understanding about the CISG, the more legal practitioners are familiar with the CISG. Such can be supported by observations that have been made which showed that nations like Germany and China have high CISG familiarity because of their education systems which offer a platform upon which academic students and legal practitioners are taught about the CISG[152]. CISG education in these nations is mandatory and this ensures that almost jurists is totally equipped with the interpretation and application of the CISG. Furthermore, there are also insights which show that CISG cases have been handled by a high number of jurists and hence the presence of a high number of legal practitioner in a CISG Court session places a huge need to invest in efforts towards improving familiarity with the CISG[153].

[147] Ibid.
[148] Commencement Information, 'Sale and Supply of Goods Act 1994' [1995] Changes 1.
[149] Article 25 of the CISG.
[150] Ibid, 144.
[151] Ibid, 150.
[152] Stefan Kröll, 'Selected Problems Concerning the CISG's Scope of Application' (2005) 25 Journal of Law and Commerce (J. L. & Com.) 39.
[153] Ibid.

What strikes the difference here is the perception about costs that are associated with the CISG and how they influence its chances of exclusion from application. This is because ideas in this section have shown that high costs tend to force jurists and other legal practitioners to exclude the CISG as they will be dissuaded from familiarising themselves with its interpretation and applicability. But this is not always the case because the impact of costs is not the same for all nations. For instance, in Germany and China where CISG education is mandatory and the CISG has been modelled into domestic laws[154]. In such cases, learning costs can be said to be very low and hence the idea that high learning costs lead to a lot of CISG unfamiliarity and exclusion problems can be said to be relatively true to a limited extent.

In relation to this section, ideas can therefore be raised as to whether the exclusion of the CISG by legal practitioners will influence the decisions made when gains have been wrongly made. In the event that jurists have decided to exclude the CISG as a point of reference, what are therefore the possible sources of references that can be made to ensure that a fair trial or judgement is made, what can therefore been done when an existing CISG case provides a strong indication on how a prevailing case should be handled but has been excluded from application? All these ideas have a strong element of reinforcing the importance of the CISG in dealing with Court matters involving international transactions. It is therefore important that when a party to an ISOG has been fundamentally breached, arbitral bodies and Courts ensure that he or she is duly compensated and fairly represented by drawing similar judgements on similar matters from similar cases that have been handled in the past.

On the other hand, the exclusion of the CISG but legal practitioners is not enough to establish a logical conclusion that the CISG is not or will not be an important element to protect international Parties to an ISOG. This is because there are a lot of contractual agreements that have been successfully handled and hence they did not lead to the involvement of Courts. Under such circumstances it can be concluded that the CISG has been effective in handling ISOG disputes but legal practitioners and other jurists have a tendency to exclude it from settling ISOG matters because of their own individual abilities, limitations and expectations.

Furthermore, the idea of the CISG being excluded from ISOG because of lack of effectiveness can be nullified by the positive gains that have been made since the inception of the CISG. Since the adoption of the CISG, a lot of trade agreements have taken place and

[154] Ibid.

evidence strong point to the growth and development of international trade[155]. This has been coupled with strong ideas which show that the CISG an international convention has managed to harmonise different States laws into one common international[156]. With such aspects in motion, the CISG can to a greater extent has managed to instil a sense of certainty in ISOG and now major reforms have been undertaken or introduced since the adoption of the CISG into practice. The main important factor is the reduction in transaction costs. Such factors can therefore offer a description and a point of support that the exclusion of the CISG is not an effectiveness matter but an inherent State problem that is found with most legal institutions and statutory elements around the world.

Conclusions can therefore be made in this section that the CISG must not be excluded from dealing with ISOG disputes were one party has unjustly made over the other Party to an international agreement. Hence, the CISG remains an important tool in handling an ISOG dispute that may ensue between Iraq and its trading partners in the event that one of the parties has unjustly gained profitably from the other. The use of the CISG will therefore serve as protection measure that will be used to offer assurance to ISOG parties that their interests are protected in the event of an unjust enrichment. With the inclusion of the CISG in handling ISOG disputes, there is therefore a need to look at how the CISG will handle matters involving the unjust enrichment of parties to an international agreement. Thus the next chapter looks at efforts to handle unjust enrichments made from an ISOG agreement and how the CISG deals with such matters to ensure that the injured party is compensated for losses made. This therefore introduces the subject of disgorgement. Thus the next chapter looks at the how profits that have been unjustly made are repatriated to the injured party, the extent to which such compensation or restitution is made and factors that can be put into consideration before disgorgement can be granted to the injured party. The application of disgorgement will also be looked at in relation to the CISG.

[155] Ibid, 146.
[156] Ibid, 72.

CHAPTER THREE

CISGC AND THE GRANTING OF DISGORGEMENT

3.1 The notion of disgorgement

Foremost, if the effects of the CISGC or granting disgorgement are to be clearly outlined then it is important to lay a foundation by defining the term disgorgement. This is because this term has been associated with different interpretations or polysemy as supported by comments made in a case Attorney General V Blake by Lord Steyn that, *"Substance is much important than terminology"*[157]. Thus, it is strongly important that disgorgement be defined at this stage in this study. Hence, in this study disgorgement will be taken to mean an act in which gains are stripped off from holder for wrong doing[158]. This entails that in international trade involving Iraq and other international traders, either party to the international transaction can be stripped off gains made when it has been lawfully proved that there exist some wrong doings. Alternatively, this also implies that compensation by the defendant will be made to the plaintiff through what is termed disgorged profits. Assuming that there exist an international trade agreement between an Iraq oil exporter and a USA importer and that the Iraq oil exporter has been found or misrepresentation or any other wrong doings which necessitated either loss of the oil or contamination of the oil, the disgorgement order states that profits that have been made by the Iraq oil exporter be repossessed. This will also require that the USA oil importer be entitled to the disgorged profits.

Disgorgement is characterised by principle conditions that govern its application and the initial condition requires that awards be made in a contractual environment[159]. Secondly, disgorgement is not always available for application and its application is restricted to certain jurisdiction unlike damages which relatively found in most private jurisdiction. This puts a distinct separation of disgorgement from a breach of a contract and in the event that remedies have been disclosed, disgorgement often requires that it be supported by other circumstances that separate it from a normal contract breach[160].

There are several terms that can be used to describe a situation whereby a defaulting individual is asked to reimburse the made profits for breaching a contractual agreement.

[157] Attorney General v Blake [2001] 1 AC 268 (H.L.), at 291.
[158] Rostila.
[159] Ibid.
[160] Ibid, 12.

Firstly, it can be considered to be 'disgorgement profits'[161], 'restitutionary damages'[162] or 'an account of profits'[163].

One of the notable observation that has been made is that efforts has been placed towards systemising and theorising disgorgement and this shows strong evidence that there has been significant variation in disgorgement[164]. This therefore requires that diverse viewpoints be introduced in this study and this is highly necessitated by the idea that most of the concepts that are used to address the issue of disgorgement have been established to be overlapping[165]. This is because it applies to a significant number of parts in contractual law. As result, deductions have been made that disgorgement as a fluid concept whose examination is always changing and a concurrent restitution issue that deals with specified contractual breaches[166].

Other ideas have however established arguments that unjust enrichment and restitution are so distinguishable when compared to contractual damages such that these terms must not conflict or overlap with each other[167]. This is based on the idea that the doctrine of unjust enrichment and restitution apply in situations when a party to an international transaction has taken advantage of another party and has been unjustly enriched[168]. In addition, it can be established that disgorgement requires that losses that have been suffered by an injured party be covered by compensatory damages. Using the given Iraq oil exporter and USA importer, the USA will be reimbursed of losses made though compensatory damages. However, other scholars also argue that there are cases whereby unjust enrichment from a profitable breach of a contract results in other party suffering[169]. This has a problem of imposing questions on whether disgorgement should be applied based specific laws and thus a question can be asked that; '*is it relevant to strictly apply this idea to either contractual or restitutionary domain?'*

In other words, when an accused party has made a gain which he is not entitled to or was not supposed to obtain, then unjust enrichment is said to have taken place and such therefore calls

[161] Fountoulakis.
[162] Riivari and Havu.
[163] Peter Birks, 'An Introduction to the Law of Restitution' (Oxford: Clarendon Press, 1985); AS Burrows, 'The Law of Restitution' (London: Butterworths, 2nd ed, 2002).
[164] Pekka Viljanen, Konfiskaatio rikosoikeudellisena seuraamuksena (Edita Publishing Oy 2007) 63.
[165] Brian Coote, 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56 Cambridge Law Journal 537, 541.
[166] Ibid.
[167] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 462.
[168] Ewoud Hondius and André Janssen, 'Chapter 26. Disgorgement of Profits: Gain-Based Remedies throughout the World' in Hondius E and Janssen A (eds), Disgorgement of Profits: Gain-Based Remedies throughout the World (Springer International Publishing Switzerland 2015) 476.
[169] Christopher Kee and Edgardo Munoz, 'In Defence of the CISG' (2009) 14 Deakin Law Review 99, 105.

for compensatory damages to be given to the injured party. It is therefore important to put a separation between different doctrines of contract law and those of the law of restitution. This can be illustrated by a case whereby the USA importer gets an award from another source other that the accused (disgorgement) and a case involving enrichment between the claimant and the defendant (restitution). These two scenarios therefore provide strong evidenced of the existence of a distinct separation between disgorgement and restitution. Thus, in the event that the USA importer has sold the oil to another third party but is now reluctant to perform his contractual agreement, then awards can be made by the third party and it totally agreeable to accept that such a move was made possible as a result of contractual breaches. With this in mind we can thus define the term unjust enrichment as follows;

'…. a statutory obligation that applies to a situation that takes place when events that are deemed to be external to contract law domain are observed and requires that the defendant reimburse any gains that have been unjustly acquired'[170].

The above definition thus provides a mark upon which differences between disgorgement and restitution can be established. This can be attributed to the idea that cases of restitution do not necessarily require that the defendant be held of wrong doing[171]. On the other hand, disgorgement takes straight effect when a defendant has made profits out of misconducts or acts contractual breaches. But still, other ideas also contend that unjust enrichment, law of restitution, contractual law and disgorgement law are not distinct and separate[172]. This thus continues to throw a lot of weight on arguments that can be established from this study that the idea of disgorgement has been subject to a lot of changes and differences in perceptions and interpretations. This therefore requires that parties to an international trade transaction be fully aware of the nature of contractual agreement they are entering into, what circumstances will characterise breaches as liable to disgorgement and under what circumstances should a plaintiff lay arguments for restitution. This can also be accompanied by the need to ensure that any disgorgement doctrines that have been used be supported by the necessary jurisdictional laws.

[170] Ibid.
[171] Ibid (n,97).
[172] EXW Ex Works and others, 'Transfer of Risk and Insurable Interest per Incoterms 2010 Rules for Any Mode of Transit Terms of Sale Transfer of Risk and Insurable Interest per Incoterms 2010 Rules for Sea and Inland Waterway Transport Terms of Sale' 1.

3.2 Traditional contract law approach

This approach is based on the view that parties are obliged to conform to stipulations made by a contractual agreement which they have entered and that failure to uphold such stipulations entails that the party has to pay[173]. This can be supported by ideas given by Oliver Wendell which established that parties to a contractual agreement are free to opt out of a contractual agreement but must be capable and liable of compensating the other party[174]. Drawing ideas from the oil example, it can thus be pointed out that both the Iraq oil exporter and the USA importer are free to opt out of the oil deal but the party that ought to opt out must be in a strong position compensate the other party.

This approach has led to several discussions concerning how international trade circumstances that may transpire between parties to an international transaction will handle disputes in the event of a breach or unjust enrichment. This has even to include other disciplines such as economics[175]. In modern events that are now characterising breaches of an international trade contractual agreement in CISG, the liability rule is now being extensively being applied[176]. This implies that Courts are no longer placing huge emphasis as to why an international trade contractual agreement has been breached and how such breach has transpired[177]. Thus various considerations are being made on ho[178]w remedies can be effected in CISG and such is also extending to its effects on other statutory apparatuses. For instance, it is contended that the need to impose obligations to an international trade party to reimburse profits through the use of disgorgement will alter contract law[179]. This is because proposed CISG corrective measures such as disgorgement and restitution are considered to be in disagreement with certain traditional law aspects. Consequently, compensation is thus viewed as a basic principle of handling damages.

In international trade agreements involving CISG, a breaching party is thus obligated to pay for damages suffered by an injured party. From this analysis, we can thus deduce that

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[173] Kourosh Majdzadeh Khandani, 'Does the CISG , Compared to English Law , Put Too Much Emphasis on Promoting Performance of the Contract despite a Breach by the Seller ?'
[174] The Incoterms Rules and others, 'Obligation as to Insurance , Transfer of Risk and Costs as per Incoterms 2010 Obligation as to Insurance , Transfer of Risk and Costs as per Incoterms 2010'.
[175] See Richard A. Posner, 'Economic Analysis of Law' (7th ed. 2007), at 118-126
[176] See also 13 Ct.Int'l Trade 866 (1989); 726 F. Supp. 1344 (Ct.Int'l Trade 1989); 11 I.T.R.D. 1991; Unilex database [excerpt]
[177] Ibid (n,105).
[178] John Honnol D, 'The Uniform Law for the International Sale of Goods : The Hague Convention of 1964'.
[179] UNCITRAL, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf%5Cnhttp://www.uncitral.org/uncitral/case_law/digests.html>.

compensation in international trade agreements involving CISG is somehow restricted to damages that are considered to be recoverable. This can be supported by the use of the expectancy rule which asserts that damages suffered in a contractual agreement as in our case in international trade agreements involving CISG must be calculated[180]. Such is also noted in a case involving Robinson v Harman in which the ruling required that the damages be determined and the injured party be compensated in such a case[181]. This had an implication of ensuring that the defendant had to pay an equivalent amount of money that will place the injured party is a position that would have occurred if the defendant had filly executed his duties or obligations. Such is known as the 'benefit of bargain' and this principle has widespread application which includes the CISG, common law and civil law[182].

On the other hand, we can as well consider that any form of compensation that will be considered under CISG is meant to address negative effects that have been suffered by an injured party. The basic idea is to determine how much has been lost by an international trading partner and then enact measures to ensure that such losses are covered and the injured part has been reimbursed. Thus, disgorgement will seek to protect either Iraq international traders or any trading partner that will engage in international trade agreements with Iraq or simply, the defendant's gain. This leads to the idea that disgorgement mainly deals with gains that have been unjustly acquired.

However, disgorgement can also be used to punish the offender and if such is the case, then the focus is not the defendant's gain. This can be based on the argument that disgorgement is not typically classified under 'compensatory damages' though it results in the injured party being compensated[183]. But when the remedies have been determined based on profits made by the breaching party it does not automatically make it an act of disgorgement. Rather it constitute a way of determining or quantifying losses or damages occurred as noted by made observations that may be made that the profits made are equating to losses suffered.

The application of the principle of disgorgement has been limited to certain aspects and has not been applicable to breaches[184]. Most countries consider that compensation must be made

[180] Robinson v. Harman, (1848) 154 Eng. Rep. 363, 365 (Exch.).
[181] Ibid.
[182] Ibid.
[183] Ernest J. Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chicago, Kent Law Review 55, at 71.
[184] Ibid

to cater for losses suffered and regard it as inappropriate to look at profits that have been made by the defendant[185].

Studies have been conducted to examine perceptions towards the use of the principle of disgorgement. For instance, Holmes consider the use of disgorgement as an ethical act which involves doing what is right and curb future unethical practices. Such is true when a breaching party has engaged in acts of unquestionable moral conduct. The problem with including such ethical consideration are incorporated into contract law, they would result in uncertainty. Others consider it on the basis good or bad moral culpability and that disgorgement should be determined on what is good or bad moral[186]. This can be supported by ideas given which showed that court decisions are increasingly being characterised by incidences of what can be deemed to be good faith[187].

3.3 The disgorgement debate

Disgorgement stems from common law and came into effect as a result of the need to have injured parties compensated for damages suffered (restitution). Both restitutionary claims and disgorgement claims

3.4 Interpretation of the CISG Regarding Disgorgement

3.4.1 Legislative history of Article 74 CISG

Article 74 of the CISG posits that the injured party is entitled to compensation that is equivalent to the loss as a result of the breach[188]. This Article thus places focus on the loss that has been suffered by the injured party and not the profit that has been unjustly acquired by the offending party. The term loss is considered not to have been explicitly defined by Article 74 and it is established that emphasis should be placed on the content of the CISG instead of the definition[189]. As noted, observations have established that the CISG Advisory Council highly outlines that the main drive behind the provision Article 74 is to reimburse

[185] Cohen.
[186] Shannon Kathleen O'Byme, Good Faith in Contractual Performance: Recent Developments, 74 CAN. BAR REv. 70, 93-94 (1995).
[187] Ibid.
[188] Prof Ingeborg Schwenzer, 'Sales Law and the Convention on the International Sale of Goods' (2012) 44 457.
[189] Kröll.

injured parties for inconveniences suffered from actions surrounding a contractual breach[190]. The general belief is that such damages must be calculated so as to fairly compensate the affected party[191].

It must however be noted that compensation of damages is subject to causation and feasibility. This implies that if a breach has been discovered between Iraq and its trading partners, the courts will first ascertain the causes of the breach and whether such was foreseeable or not. Thus, applying the principle of disgorgement in this circumstances will be subject to a lot of challenges. This is because the foreseeability doctrine outlines that when the events was beyond the foreseeability of the breaching party, then the breaching party cannot be held responsible for damages suffered as a result of the breach[192]. Assuming, that oil was sold to Russia from Iraq and the buyer had already acknowledged and accept possession of the goods, in the event of transportation fire guts the pipelines or the oil gets stolen. Then in such cases, it be said that these events were beyond the foreseeability of the Iraq oil seller and hence he is not liable for disgorgement. This rule is important because it forces contracting parties to first determine the risks involved in entering in the associated contract before finalising it[193]. This requirement however is not precise on how it approaches profits obtained by unjust enrichment. There are however ideas which assert that the disgorgement exercise should not hinder the contracting from evaluating the possible risks associated with the concerned contractual agreement[194]. This alternatively implies that any liability which is higher than what the concerned parties could have possibly have foreseen at the time of finalising the contract is not considered to be a liable remedy under Article 74 of the CISG.

[190] CISG-AC Opinion No. 6, para 1.1.
[191] Ibid.
[192] Marc A. Loth, 'Limits of Private Law: Enriching Legal Dogmatics' (2007) 35(4) Hofstra Law Review 1725, 1736, who also refers to differing opinions on the issue.
[193] Daniel Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' (1980) 80(3) Columbia Law Review 504, 558.
[194] Ernst J. Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chicago-Kent Law Review 55, 57.

When it comes to the issue of causality, a breaching party is said to be responsible for the damages or loss suffered when it can be proved that the breach party had a direct linkage to the breach[195].

The major issue here is determine when profits should be considered to be as a result of a breach or if it is as a result of the manipulative skills of the offending party. For example, assuming that an Iraq oil seller has made USD$500 000 from a contractual breach and invests the money in another business such as natural gas exploration. Say after one year of investment, the amount earned interest and grew to USD$1 000 000. Questions can therefore be asked if the USD$1 000 000 is due to a contractual breach.

The major determine factor is to establish how the doctrine of foreseeability addresses the influence or link of loss and breach[196]. The amount liable for disgorgement must not exceed an acceptable amount that is considered to be foreseeable and it it does exceed such expectations then disgorgement can be nullified.

3.4.2 Disgorgement in light of the general principles of the Convention

As noted with the above made deductions, the CISG does not explicitly deal with the idea of disgorgement. This is because it does not highlight the underlying principles that surround the idea of disgorgement[197]. Hence, this leaves interpreters with the responsibility of having to figure out what it implied by the convention especially considering the fact that the idea of remedies is governed by a lot of provisions that consider the entitlement of disgorgement. Such imposes a lot of risks to parties that are from different States and can obtain different ideas about the convention[198].meanwhile, not all members States were in support of the convention during its drafting period as ideas were so vast that courts would not accept its general principles[199].

[195] Ingeborg Schwenzer and Pascal Hachem, 'The Scope of the CISG Provisions on Damages' in Saidov D and Cunnington R (eds), Contract Damages. Domestic and International Perspectives (Hart Publishing 2008 pp. 91–106) 95.
[196] Convention and others.
[197] Cf. BRI Production "Bonaventure" v. Pan African Export, a case with similar facts.
[198] Sarah Worthington, 'Reconsidering Disgorgement for Wrongs' (1999) 62(2) Modern Law Review 218, 218.
[199] Ibid.

3.4.3 Full compensation

The basic idea behind this section is that it seeks to deal with matters suggesting if compensation exceeding the risk of loss should be granted or not. Article 74 of the CISG however advocates that full compensation be made[200]. This entitles the injured party to total compensation for all the losses suffered from the breaching of the contract. However, in some cases different States tend to approach this matter differently and this can be supported by ideas that entitlement is made to compensate losses that appear in a balance sheet other than that, they are considered to be non-compensable[201]. This can also be supported by ideas given by the PICC 2010 which contends that non-pecuniary damage is subject to compensation[202].

There are several factors that can help to explain why compensation can be underestimated. The most obvious reasons is that it is in most cases difficult to determine the exact quantities of all losses suffered and there is no substantial theory that can be to help in quantifying such losses[203]. This can cause the responsible party to come up with damages that are actually lower than the actual losses suffered. The other reason can be attributed to the idea that losses that are actually considered to be compensable under Article 74 of the CISG are sometimes unforeseeable[204]. Hence it can be said that the nature of losses suffered by the injured party are unforeseeable. The other reason is that it is in most cases difficult to provide prove of the entire loss[205].

3.4.4 Protection of the economic benefits in contrast to contractual performance

The law of damages protects the economic position of both parties and this follows the idea that the parties have entered in to a contractual agreement so as to make an economic profit[206]. With this idea in mind, the concept of compensation is therefore regarded as a different aspect which is aimed at preventing contractual breaches[207]. As a result, the basic idea of entering into a contractual agreement is to obtain monetary or economic gain not monetary compensation. Thus, the idea of economic performance considers damages not to

[200] Ibid
[201] CISG-AC Opinion No. 6, para 2.6.
[202] Allan E. Farnsworth, 'Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract' (1985) 94(6) The Yale Law Journal 1339, 1341; Hondius and Janssen (n 1) 475.
[203] Art. 7.2.4. PICC 2010.
[204] Brian Coote, 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56 Cambridge Law Journal 537, 541.
[205] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 462.
[206] Trade usage case (Court of Appeals, Cologne); UNCITRAL Case Digest, p. 43, para 13; a declaration is required by Arts. 26, 49 and 64 CISG.
[207] Ibid.

be effective when the breaching party has made gains out of a breach. Article 74 thus highlights that damages must equal what the injured party has suffered as losses

3.4.5 Good faith in international trade

Every economic or CISG requires that the contractual agreement be conducted on the principle of utmost good faith. Good faith therefore becomes a governing principle that governs the interpretation of the Article 74 of the CISG[208]. The problem is however based on the idea that the principle of good faith is subjective to a lot of different meanings and this possibly offers suggestions as to why difficulties are encountered in explaining the CISG.[209]

Also is can be argued on the basis of whether the CISG imposes obligations on the parties to act in a manner that is considered to be of good faith. The PICC 2010 therefore recommends that any interpretation activities by the parties by done in good faith. The principle of good faith has in most cases been linked to what has been considered to be morally acceptable[210]. This implies that any act or activity that is considered to be immorally unacceptable is considered not to be in good faith.

[208] Ibid (n, 133).
[209] Ibid (n.134).
[210] Joseph Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 8 Journal of Law and Commerce 289, 289.

CHAPTER FOUR

DISCUSSIONS AND CONCLUSIONS

4.1 Discussions

It can also be noted that the effectiveness of the CISG to effect international trade between Iraq and other States is hugely determined by its foundation upon which it was formulated. This can be pointed to the idea that the formulation and establishment of the CISG is considered to be too general and vague[211]. Hence, this can cause potential conflicts and disputes in application as parties to a contractual agreement will be bargain for clauses or provision that favour them.

Also it can be considered that the issue of uniformity of interpretation of the CISG is subjective. This is because the formulation of the CISG is as a result of negotiations that have been made between made States which led to an agreement on the provisions and clauses that should be enforced[212]. As a result, members though they are part of the convention may be in disagreement with certain provisions and may act against such provisions and yet they are part and parcel of the convention. This implies that there is no guarantee that being a member of the CISGC will warrant uniform interpretation by members.

On the other hand, we can establish that the effectiveness of CISG is determined by a numerous number of factors such as sophistication of legal system and the interplay of international bodies. The more sophisticated the legal system is the greater the nature of transaction costs involved in bargaining for certain provisions of the convention[213]. This is also made worse by the problem that such sophistication requires a lot of translations and learning which imposes more costs on both parties and assuming that parties have agreed that the adopted applicable be of another State say German, then implications are that the Iraq party will have to learn the German statutory frameworks and translate their own into German.

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[211] Joseph Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 8 Journal of Law and Commerce 289, 289.
[212] Michael Bridge, The International Sale of Goods. Law and Practice (2nd edn, Oxford University Press 2007), 506, para 11.01.
[213] Nils Schmidt-Ahrendts, 'CISG and Arbitration' [2011] Annals of the Faculty of Law in Belgrade – International Edition 211, 212.

From this analysis, we can thus deduce that compensation in international trade agreements involving CISG is somehow restricted to damages that are considered to be recoverable. This can be supported by the use of the expectancy rule which asserts that damages suffered in a contractual agreement as in our case in international trade agreements involving CISG must be calculated

Furthermore, though the injured party of a contractual agreement is entitled to disgorgement on the condition that he has suffered a loss as result of as contractual breach. Article 74 of the CISG therefore stipulates that an equivalent amount of compensation that equals the loss suffered be granted to the injured party. However, it is important to note that the granting of disgorgement is subjective and in most cases disgorgement will not be granted. This is because of two specific principles of foreseeability and causality[214]. In the event that the risk, damage or loss was beyond what the seller could foresee, then such a loss will not be considered to be liable for disgorgement[215]. Hence, we can thus contend that any circumstance surrounding international trade agreements between Iraq and other international players will be subject and entitled to disgorgement when the breach is as a result of foreseeable circumstances. In addition, we can thus contend that a breaching party is said to be responsible for the damages or loss suffered when it can be proved that the breach party had a direct linkage to the breach[216]. Hence, it denotes that any party to an international sale with Iraq will be liable and obligated to grant disgorgement to the injured party in the event that the court has proven that the offending party had a direct link to the breach. Disgorgement must also be in line with expectations of what is foreseeable and if it does exceed such expectations then the decision to grant disgorgement will be nullified.

Deductions can also be made that the application of the CISG is subject to exclusion and Parties to an international agreement may opt not to include as part of the contractual agreement. If thus the case, Parties to an agreement are required to ensure that whatever decision they have taken to exclude the CISG is must be followed by an appropriate method of exclusion. If not, then such exclusion might be considered to be invalid[217]. Hence, they can suffer from damages or losses when a decision has been made revoking the exclusion aspect. What strikers a major role on the issue of exclusion is the idea that there are familiarity

[214] Marc A. Loth, 'Limits of Private Law: Enriching Legal Dogmatics' (2007) 35(4) Hofstra Law Review 1725, 1736, who also refers to differing opinions on the issue.
[215] Ibid.
[216] Ibid.
[217]

differences about the CISG that can be observed among practitioners and that there are possibly reasons that are triggering the unfamiliarity differences. We can thus question whether such unfamiliarity be attributed to lack of motivation or incentives by practitioners to enrich their knowledge and understanding about the CISG. Moreover, this can also possibly suggest that there is little value that is being placed by legal practitioners towards the extent to which they use and place value on the CISG. This is because some legal practitioners are free to exclude it and hence they have no obligations or mandate whatsoever to devote time and effort trying to gather knowledge and understanding so as to improve their familiarity with the CISG[218]. Major reasons why legal practitioners opt not to include the CISG can thus be outlined to be as a result of differences in legal backgrounds, the existence of standard terms and contracts, lack of negotiating power, unfamiliarity with the CISG principles, interpretation and application and costs that are incurred in the process of using or making references to the CISG.

When it comes to the issue of full compensation that must be made to the injured party, it can be noted that there are cases when such compensation may be underestimated. This implies that it is not every moment when full compensation will be made. This can be explained by the idea that it is in most cases difficult to determine the exact quantities of all losses suffered and this can further be supported by the idea that there is no substantial theory that can be to help in quantifying such losses[219]. In addition, given the fact that some of the circumstances that are considered to be compensable are in most cases considered to be unforeseeable under Article 74 of the CISG and this implies that the nature of losses suffered by the injured party are unforeseeable. Moreover, in the event that the injured party has failed to provide sufficient evidence of the actual loss that has been suffered. This leads to an underestimation of the compensation that is to be paid by the offender.

4.2 Conclusions

With regards to the above mentioned and discussed ideas the following conclusions can therefore be made;

[218]

[219] Daniel Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' (1980) 80(3) Columbia Law Review 504, 558.

- Foremost, it can be concluded that the CISGC has managed to harmonise the various and different States laws in a common law. This has significantly increased the ability of the convention to deal with the problem of uncertainty in international trade and this has positively led to the growth and development of trade. This is as a result of the establishment of insights which showed that ISL contracts became more predictable and legal barriers to international trade were also being hugely eliminated as a result of a common ISL.
- Conclusions can also be made that the CISG has managed to contribute positively and effect a number of positive changes in international trade. Such aspects relate to the idea that the convention has managed to bring the much needed law reforms in approaching international legal matters, applying international private law, settling disputes and determining how and whom is responsible for damages suffered in the event of a contract breach, damage or loss of goods.
- With respect to international trade, conclusions can be made that the CISG has led to an increased growth and development of international trade as noted by observations which showed that the 80 member States now account for huge international trade agreements and transactions. This can also be supported by the idea that the convention has significantly led to moves that lowers transactions costs.
- Conclusions can also be made that the decision by legal practitioners to exclude the CISG from application does not mean that CISG is not effective. The exclusion of the CISG from applying in handling ISOG disputes is mainly as a result of reasons that have nothing to do with its effectiveness. Such reasons point to differences in legal backgrounds, existence of standard terms and contracts, lack of negotiating power, unfamiliarity, and costs and time.
- Conclusions can also be made that fear of States of being unjustly enriched by engaging in international trade with Iraq can be dealt with through the use of disgorgement which requires that the offender reimburses profits which have been unjustly enriched. Furthermore, it can also be concluded that this fear can also be dealt with the application of the principle of restitution.
- Conclusions can also be made that the CISG still plays an important role but still faces a number of challenges which need to be addressed. In line with such an idea, it can thus be concluded that there is a lack of uniformity in interpretation as well of legal courts that can regulate uniformity of interpretation.

4.3 Recommendations

With the above conclusions in mind, recommendations can therefore be made that;

- In order to ensure continued corporation and conformity and use of the convention, recommendations can be made that there is need to continue amendments must be made to address emerging economic, legal and social issues that are currently affecting international trade.
- There is need to establish and promote the increased role of legal courts such as the Supreme Courts to regulate uniform interpretation of the convention.
- Recommendations are thus made that courts ought to examine how the convention has been performing in foreign courts in as far as the matter of interpretation is concerned. This also requires that reference be made to researches that have been made by other scholars and examine how they have proposed and handled the situation.
- There is need to increase member participation in ratifying the convention so that there is increased use and abidance to the convention as members can easily corporate and use the convention for common good without significantly bargain for self-interests or motives.
- Effort must also be placed towards encouraging practitioners to engaging in learning and development activities towards improving their understanding about the CISG so as to deal with unfamiliarity problems.

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