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An Interpretation and Application of Uniform Laws for International Trade by Principles for Achieving Uniformity

Kim, Sung-hoon* · Choi, Seong-wook**

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Ⅰ. Introduction

Trading partners in the international community have sought some degree of uniformity in international business transaction for many years. this is particularly true with regard to contracts for the sale of goods. In 1930, the international institute for the unification of private law("UNIDROIT") decided to create two drafts on this subject which were then distributed to government for comment through the League of Nations. The work was interrupted from 1939 to 1951 by the Second world war but two draft text were finally presented to the Hague Conference. One draft was an Uniform

* 동의대학교 겸임교수(법학박사)
** 경남정보대학 경영정보계열 교수

Law on the formation of contracts for the International Sale Of Goods. ("ULF") The other was an Uniform Law On The International Sale Of Goods.("ULIS") These Uniform Laws were adopted by the Hague Conventions. Although both were consequently entered into force, they were never widely adopted. In 1965, the United Nations established the United Nations Commission on International Trade Law.(UNICITRAL) Among it's charges, UNICITRAL was authorized to create a uniform law for the international law for the international sale of goods to activate the international a trade. Initially, the working group on the international sale of goods first prepared a Draft Convention that omitted rules on formation; in 1977 at Vienna, at UNITRAL's tenth session, the working group then prepared a separate draft on formation. In 1978, at it's eleventh session, UNCITRAL produced the 1978 Draft Convention On Contracts For The International Sale Of Goods. In April 1980, after a remarkably increased level of participation in the draft of CISG, it was adopted at the United Nations Conference On Contracts For The International Sale Of Goods. As a result of the United States' ratification of the CISG, contracts among the ratifying countries after January 1, 1988 are now subject to the uniform rules for international sales. However, thee are only minimal differences between 1978 Draft provisions on formation of contract contained in CISG.

This paper considers the interpretation and application of uniform laws for international trade by adopting principles to promote uniformity based on the 1978 Draft Convention. Particularly, with respect to the process of contract formation. The Draft Convention's legislative history will be discussed in order to provide a basis for predicting and understanding how the relevant provisions of Draft Convention reflected to address the foundation of United Nations Convention On Contracts For The International Sale Of Goods. This paper will demonstrate how the relevant provisions of uniform law may be interpreted by courts and perhaps more importantly, the courts of countries with different legal system.

Ⅱ. Overview the Draft Convention

At an early in the Sales Conventions prepared by the Rome Institute (UNIDROIT) work on the law of international contracts of sale addressed both the formation of contracts and other provisions governing sales. In 1956, UNIDROIT appointed a new commission to prepare uniform rules on the formation of contracts of sale. This draft was completed in 1968, and served as the basis of the discussion at the 1964 convention, which produced an Uniform Law on Formation (ULF) plus an Uniform Law on International Sales. (ULIS) Initially, ULIS omitted rules on formation; in 1977 the sales was approved. The working group then prepared draft on formation. In 1978, UNCITRAL decided to produce the Draft Convention On Contracts For The International sale Of Goods. In terms of legislative history of the Sales Convention, the legislative process during the decade of UNCITRAL's preparation of the 1978 Draft for Sales Convention should be taken into consideration. The significant features of this work was enacted on provision without taking a formal vote. Summaries of the discussions were fully recorded. In preparing the 1978 Draft Convention, UNCITRAL made a significant addition to earlier general rule on interpretation of the convention.

Ⅲ. Interpretation and Application, Especially Using "Good Faith"

In the application of the provision of the Draft Convention, the observance of good faith in international trade should be taken into consideration to promote uniformity. This "good faith clause" was drawn from Draft Convention on formation of the contract the parties must observe the principles of fair dealing s and good faith.

The "good faith" faith provision could be supported on two grounds. One

ground was that "good faith" was required under the U.C.C., and the same requirement should be extended to international trade.

Such an extension by individual countries had been opposed on the ground that this would give aliens greater protection in domestic courts than they would receive from foreign courts. This objection, however, is inapplicable to the inclusion of such rules because Convention's rules should become mutually applicable those people who opposing the insertion of the "good faith" provision agreed that such general clause were vague and yet were not applicable in modern law. Proponent argued that one know, in most cases, what conduct was inconsistent with such rules in domestic law showed that even vague provision were clarified by judicial development.

The good faith requirement by the parties in the formation of the contracts was approved by the majority of the working group, but was rejected by UNCITRAL. An uneasy compromise was reached between them; The general provision on interpretation of the convention would be expanded to mention not only "The observation of good faith in international trade." The effect of such rule for interpreting the convention might lead to a conclusion that the communications conflicting with the good faith requirement would be ineffective. In conformity with the objectives of the United Nations, the work of UNICITRAL and it's body has been characterized by the search for compromise. However, the attempt to develop a compromise between the two systems has inherent difficulties. Furthermore, the search for a compromise is often complicated to find a compromise that favors one's own system. Also much time is lost because of difficulties of communication. A person well takes it for granted in one system may found it difficult to grasp the agreement of a representation of the other system. Each will, as a matter of course, present his arguments in his system and often sill not be understood by those with different legal background.

The discrepancies between common law and civil law were the principle block in preparing uniform rules on the formation of international sales. The difficulties included the doctrine of consideration, the conflict idiom between

the dispatch theory and the problem of the binding power of the other.

Ⅳ. Doctrine Of Consideration

The Draft Convention makes no mention of consideration. It might be argued that promise in this area cannot arise, since "consideration" is supplied by the exchange of promise to deliver and to pay. There may be supplementary covenants where consideration is missing, in the interest of business relations the seller may promise to replace parts and components when he s not obliged to do so under the contract or by law. What does the silence of the Draft Convention on the issue of consideration mean? The Draft Convention expressly states that it is not concerned with the validity of contract. It could be argued that a challenge to enforcement of a promise for lack of consideration is an issue of "validity" and there by dropped under conflict rules to the applicable national law. But it could be argued that recourse to a national law that makes promises unenforceable for lack of consideration would be inconsistent with the Draft Convention.

Ⅴ. Receipt Vs Dispatch Theory

A classic instance of conflict between common law is posed by the following case; A mails an offer to B. immediately sends a letter of acceptance to A, but B's letter is seriously delayed (or lost) in transmission. Are the parties bound by th contract? The classic common law rule is that these circumstances a contract was completed when the offeree (B) mails the acceptance under the classic mail box rule; the risk of delay or losses in transmission falls on the offeror(A). When the offeree dispatches an acceptance by a medium expressly or implicitly authorized by the offeror. Most civil law system take the apposite view. Closer studies reveals

variations among the approaches of common law and civil law countries; and one also must take into account rules on the revocation of offers which, under both legal systems. minimize the practical consequences of any difference between rules on moments of acceptance. Nevertheless, the classic conflict between "receipt" and "dispatch" theory complicated UNCITRAL's work on uniform formation rules. Behind the debate over the receipt and dispatch theories set this situation; for sometime one party knows something the other party doesn't know; during this time both parties are exposed to the risk of an irregularity beyond their control. In the specific setting of contract formation, under the dispatch theory, their regularity does not affect the effectiveness of the declaration, while the receipt theory will not affect it's effectiveness. Both alternatives have substantially equal justification. In fact, either of the parties acting in good faith might be a disadvantage.

For the most part, Draft Convention, in accordance with civil law tradition, applies the receipt theory. The offer, the revocation of an offer, and the acceptance by declaration all become effective when they reach the other party. Draft Convention makes clear a declaration must be presumed to have reached the addressee. This is ground for objecting to the rule of provision. Art 18(1) states that when the offeror by letter fixes a period of time for acceptance that is, firm offer or option contract, the period begins to run from the date shown on the envelope. The significant point is that date on the letter. When there is a discrepancy of several days between the dates on the letter and the envelope that the date is authentic. The offeror either antedated his letter or negligently it only after the several days. If offeree follows the provision he might find himself at considerable disadvantage for shortening the period of time of acceptance.

In one situation the Draft Convention does not follow the receipt theory, such ass one relating to dispatch of the goods or payment of the prices, without notice to the offeror, the acceptance is effective upon the performance of act provided that the act is performed within the specified time. Here, something like the dispatch theory is followed; the offeree may be dispatches the goods, although not be protected by dispatching a letter of

acceptance if the letter is delayed in the mails and reaches the offerer late. The adopted of the dispatch theory in the case might be justified by the receipt of the goods as soon as possible would be in the interest of the buyer. moreover, the declaration of acceptance might involve a waste of time and it is not importance to a buyer.

Ⅵ. Revocation of Offer or Acceptance

Under the receipt theory, since an offer or acceptance is not effective on dispatch it is still subject to withdrawal The Draft Convention restricts "revocation" of offers, but these restrictions do not apply to the withdrawal is barred where the dispatch theory is applied; the declaration become effective on dispatch. The offer can not be withdrawn, nor is there need to apply rules restricting revocation. Performance of the act is an acceptance of the offer, and the contract has been made. On the other hand, where the receipt principle is applied, the written offer or it's acceptance is not effective unless it reaches the other party. it can therefore be withdrawn before it has reached the other party. Draft Convention declared "an offer may be revoked if the revocation reach the offer before offeree has dispatched an acceptance." However, This general rule favoring revocation is subject to two exceptions: civil law and common law in nature, Draft Convention, is more likely, inclined to the common law. The basic question under the general rule is this: How long will offer be revocable? The answer appears to be one: the offer revocable until the contract is made, in other words, the offer revocable until the acceptance is effective. However, in the event of revocation by a letter or telegram, the application of this rule is very complicated. Thus, a revocation may reach the offeree when he has already dispatched the acceptance, but the acceptance has not reached the offeror. At that point, the Draft Convention favors the moment of dispatch Therefore, it declared " an offer may be revoked if the revocation reaches the offeree before he has dispatched the acceptance. The Draft

Convention clearly states that the mere dispatch of an acceptance does not conclude a contract but does end the offeror's power to revoke his offer where the revocation reaches offeree before he has dispatched the acceptance. The requirement that the parties act in good faith would be helpful in dealing with such problems: it is doubtful whether the good faith clause would helpful where the offeror is required to give the notice if the revocation has reached him late; it is doubtful whether the good faith clause could be fully effective.

Ⅶ. Exceptions from the general rule of revocation set force by the Draft Convention

In this case where the offer states a fixed period for acceptance, the common law would interpret this to mean not only that the offer would terminate at the end of this period but also that during period the offer was revocable at any time. The first exception from the general rule of revocation set force by the Draft Convention provision is when the seller and buyer s of common law countries state a fixed time for acceptance, this in itself would not necessarily indicate that the offer was irrevocable. The second exception from the general rule of revocation set force by the Draft Convention-an exception of common law feature based on reliance. "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer." The main significant of this rule is the protection, which gives an offeree who had to carry out investigation or make inquires before deciding whether to accept an offer. the civil law affords such protection by prohibiting revocation in bad faith.

Ⅷ. The Conclusion

In conclusion, we now turn to the effect of mismatch between the terms of offer and acceptance-so called battle of the forms. The Draft Convention indicates general rule that an "acceptance" containing addition, limitations or other additions is a rejection but it lays down an important exception: A reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. In UNICITRAL, some thought that an acceptance must be complete agrement with the offer and, that in any event, the words "materially alter" were too vague. The Draft Convention, therefore, tried to minimize the vagueness by the modification of wording. The result was compromised by adding a new provision: Additional or different terms relating, inter alia, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's ability to the other or the settlement of disputes are considered to alter the terms of offer or the particular circumstances of the case has reason to believe that they are acceptance to the offeror.

As may be seen, the new provision reduces the vagueness the exception at the end of the paragraph("unless the offeree by virtue of the offer or the particular circumstances of the case has reason the believe that they are acceptable to the offeror") does not appear in the CISG; it was deleted at the 1980 Vienna Diplomatic Conference. There is no fair unification of law without compromises. This may well be the most appropriate procedure. What must be avoided is to commingle the solutions of different legal systems within the formation of element of rule. Each element in a unit might raise the level of complexity of the draft beyond tolerable limits. Within each issue, the compromises have produced provisions of much greater complexity than would have resulted from the set of free compromise.

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국 문 요 약

통일사법협약의 원칙에 의한 국제거래 통일준거법의 제정과 적용 고찰

김성훈 · 최승욱

국제물품매매계약은 당사자간의 합의에 의해서 이루어진다. 그러나 국제간의 물품매매에 관련하여 모든 상황을 특정계약에 반영하는데는 한계가 있다. 따라서 특정계약에 대한 해석과 판단의 기준이 되는 하나의 보편적이며 합리성에 기초를 둔 준거법이 필요하게 된다.

이러한 준거법은 어느 특정국가의 사법으로 충분할 수도 있지만 국제거래가 안전하고 원활하게 실행되기 위해서는 그것이 세계 어느 나라에 있어서도 같은 내용의 통일적인 법에 의하여 규율되는 것이 바람직하다.

특히 경제적 합리성에 기초를 둔 거래법의 분야에서는 이론적으로 법의통일은 가능하며 실제적으로는 로마의 사법통일협회(UNIDROIT)나 국제연합 국제상거래위원회(UNIDROIT)에 의하여 지금까지 어느 정도 통일사법 제정의 필요성이 꾸준히 제기되어 왔다.

이러한 목적을 수행하기 위하여 UNICITRAL(국제연합 국제상거래위원회)이 1980년에 발표한 국제물품매매계약에 관한 UN 조약-비엔나협약(CISG)은 국제간의 물품매매에 관한 계약법으로서 중요한 역할을 수행하고 있다.

비엔나협약(CISG)의 법리적인 근거는 "자주적인 준거법의 제정 및 그 적용상의 통일성"에 있다는 것이다. 또한 그 내용을 보면

첫째, 지역적 의미를 가지는 법률용어의 사용을 피하고 대신 격지간의 계약시 실제로 발생하는 현실적 사례의 관점에서 법안을 작성하고자 하였고

둘째, 그 내용을 달리하고 있는 각국의 사법을 통일하는 것에 의해 모든 사법적 법률관계에 같은 내용의 사법을 적용하는 방법, 즉 세계통일사법의 제정이라 하겠다.

본 연구는 비엔나협약(CISG)의 입법취지와 배경을 고찰하였으며 또한 통일사법으로서 협약상의 "일반원칙의 통용"을 계약성립(Formation of Contract)의 과정별로 정리하였다.