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A Potentially Greater Role of Arbitral Awards in Shaping the CISG Case Law: Could We Be Witnessing the Beginning of a New Dawn?

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The United Nations Convention on Contracts for the International Sale of Goods ('CISG') epitomises the UNCITRAL's endeavour to progressively unify and harmonise commercial law across the boundaries of nation-states. While the mere adoption and wide acceptance of the CISG are milestones in and of themselves, we should also not overlook the rich body of the CISG case law that has been produced over the course of approximately thirty years.

Up until now, the landscape of the CISG case law has been dominated by court decisions. Namely, the available CISG court decisions vastly outnumber the available CISG arbitral awards. Even more importantly, the vast majority of landmark cases on the CISG have been court decisions. This post will examine whether in the future we could expect a greater role of arbitral awards in shaping the CISG case law.

The Role of the CISG Case Law

The role of the CISG case law is twofold. First, the CISG is a relatively short legal instrument. It purports to provide legal rules for a rather extensive and complex area of international commerce – international sale of goods – in what are 101 short and succinct articles. Many of these articles do not provide clear-cut rules but embody legal standards whose practical meaning and scope can only be developed through case law. Examples of such legal standards are fundamental breach, reasonable person, reasonable time, unreasonable inconvenience, etc.

Second, the CISG is a so-called uniform law instrument. That is, the CISG is the uniform sales law for countries that have adhered to it. However, it is widely accepted that a mere adoption of a uniform legal text is not sufficient on its own. There has to be a genuine endeavour towards uniform application as well.[1]

Article 7(1) of the CISG provides as follows:

In the interpretation of this Convention, regard is to be had […] to the need to promote uniformity in its application […].

The scholars have mostly interpreted the quoted part of Article 7(1) of the CISG to imply that the decision-maker (be they a judge or an arbitrator) needs to take into account the case law rendered

in other jurisdictions. At the same time, there is an overwhelming convergence of opinions amongst the scholars that the CISG case law in this manner ought to be used based on its persuasive value, and not as a binding precedent.

Dominance of Court Decisions over Arbitral Awards

A respectable body of case law has been developed under the CISG. One look at the databases that collect and report on the CISG case law from all over the world illustrates this quite vividly. CLOUT, a database maintained by UNCITRAL, has thus far reported 959 cases. UNILEX, another database that contains CISG case law, boasts 1034 CISG cases as of this writing. The highest number of cases, however, can be found in the CISG Pace Database (more than 3000).

It is interesting to note, however, that court decisions significantly outnumber arbitral awards in these databases. For example, UNILEX has reported 88 arbitral awards. This, in essence, represents a rather small portion of the total number of cases that UNILEX offers. Similar pattern can be observed in other databases as well.

In addition to their dominance in terms of numbers, court decisions have also proven to be much more significant in their substantive contribution to the CISG case law. More precisely, the vast majority of landmark CISG cases have come from the judicial realm, including the well-known and controversial cases such as the New Zealand mussels case, Zapata Hermanos v. Hearthside Baking, Scafom International BV v. Lorraine Tubes S.A.S., etc.

Arbitration as a Preferred Dispute Resolution Method in International Trade

For decades now, arbitration has been the preferred dispute resolution method in international trade. While it used to be quite permissible to place international commercial arbitration in the context of alternative dispute resolution, today that approach is outdated, and simply does not go hand in hand with the realities on the ground. Arbitration is no longer an alternative in the international setting. It has become mainstream, and in large part thanks to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (better known as the New York Convention). More precisely, the New York Convention has greatly facilitated recognition and enforcement of arbitral awards across the boundaries of 161 countries that have adhered to it. In contrast, no similar convention with a matching degree of international acceptance exists to fuel the recognition and enforcement of court decisions between different countries.

A Case for Greater Availability of Arbitral Awards in Relation to the CISG

It is against the background of dominance of arbitration over litigation in the international commercial context that the role of arbitral awards in the development of the CISG case law ought to be assessed. Namely, it would only be natural, and dare I say, desirable, if the landscape of the CISG case law were to be shaped more palpably by arbitral awards, both in terms of numbers and impact.

Commercial law in general is an area of law that has primarily been developed through practice and usage, with the legislator mostly codifying the solutions developed by the commercial actors themselves. However, even with the more active role of the legislator in setting the legal rules for commercial activities, it has been noted that “a law cannot embody the special patterns that now are current let alone those that will develop in the future”. That is why special importance has been given to usages in many national sales laws as well as the CISG. For instance, the CISG in its

Article 9 states that the "parties are bound by any usage to which they have agreed […]". In addition, if the parties do not define the role of usages in their contractual relationship, they will be considered "to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known […]". Occasionally, a dispute will arise between the parties whether a particular usage exists. When that happens, the party alleging its existence will have to prove it before the decision-making authority, be that a court or an arbitral tribunal. Thus, even though commercial actors get to play a leading role in the development of commercial law, they are occasionally in need of assistance of courts and arbitral tribunals which then through case law shed light on complex matters and bring clarity where clarity is lacking. Of course, specifically in relation to the CISG, the importance of case law is further augmented, as noted above, with the need to promote uniformity in its application, and the fact that many of the CISG's provisions comprise open-ended standards that are to be developed through case law.

Here it ought to be noted that arbitration provides a high degree confidentiality as compared to litigation. While court decisions are, more often than not, made public, the same cannot be said of arbitral awards. The latter are kept away from the beady eye of the public. Although confidentiality certainly has numerous advantages on an individual level, in collective terms, the commercial community is at a loss because so many arbitrators' contributions to the CISG through case law are left confined to the oblivion. We can only speculate as to how many arbitral awards have discussed novel issues under the CISG and various usages, and have made innovative observations in regards to different CISG provisions.

Potential for Change

In 2019, the International Chamber of Commerce ('ICC') issued its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration ('ICC Note'). As per this ICC Note, the new default approach for arbitrations under the auspices of the ICC's International Court of Arbitration ('ICC Court') is that, in the interest of the development of trade worldwide, the arbitral awards may be published. However, parties still retain extensive autonomy in this respect as the approach embodied in the ICC Note is essentially an opt-out approach. That is, a party who does not wish the award to be published, or simply wishes that the award be in whole or in part anonymised or pseudonymised, will be able to request so. If that happens to be the case, "the [arbitral] award will not be published or will be anonymised or pseudonymised".

Will this new approach of the ICC to publication of awards lead to their wide dissemination in the public domain? In practical terms, the parties will probably, and quite frequently, seek to make use of the opt-out option. Nevertheless, the inherent difference between any opt-out and the alternative opt-in option is such that the former requires active seeking of a subject to be excluded from some scheme whereas the latter requires a prospective subject to actively seek participation in a scheme. Given this stark difference in the starting position, it is safe to assume that an opt-out scheme generally results in higher numbers in terms of participation than the opt-in option, and the same will probably hold true for the ICC arbitral awards.

While it is too early to make any conclusive determinations, one would hope that the opt-out approach to publication will result in more ICC arbitral awards on the CISG being publicly available. Furthermore, the ICC Court is a leading arbitral institution, and in many respects has been the trend-setter in the area of international arbitration. Hence, it is certainly not unimaginable that other arbitral institutions might end up following its example in terms of publication of arbitral awards. All things considered, the new ICC approach has the potential to be a catalyst for elevating

the role of arbitral awards in shaping the views and narratives on the CISG. Whether this potential will be fulfilled, only time will tell.

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References[+]

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