

Conceptualization of Breach of Contract under the Vienna Sales Convention and Sale of Goods Act of Pakistan

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Abstract: *The Vienna Sales Convention or CISG is an amalgamation of civil law and common law. Moreover, it is relatively a modern document when compared with the Sale of Goods Act, 1930 (SOGA) of Pakistan, which is an offshoot of common law. The remedial measures available to the parties contracting for the sale of goods under both regimes are somehow different. Because, the basic concept of a breach in a contract is a major variable in each instrument, if evaluated from various angles. The fundamental scheme applied here is to find the common legal provisions, similarities and differences on the concept of the breach. The comparative analysis shows that similar contractual obligations lead to dissimilarities in remedies under different laws.*

Key Words: CISG, SOGA, Sales Law, Breach, Contract

Introduction

The United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention or CISG) is deliberated to act as a global statutory code for such transactions involved the sales of goods when the transactions take place between persons based in countries with differences in location. [Koehler et al, 2008] As international sales are concerned, the CISG was intended to substitute the national law of sales in each endorsing jurisdiction. The general objective of unification has been seen to, facilitate the enduring expansion of global trade with countries that are developing to help them in adjustment for differences in bargaining powers among business players, enhance certainty in international transactions, and advance a variety of such other commendable endeavors. [Butler, 2011]

The CISG has not yet been ratified by Pakistan, and ninety-two years old, the Sale of Goods Act, 1930, which is primarily based on the English law then, is the applicable law in Pakistan as sales law. There will be some reasons for a country if it does not ratify a Convention. [Magnus, 2008] There may be some express or obvious reasons which may be observed easily on their face. The transposition of the CISG into effective legislation within the legal order of Pakistan and involved in this study enables us to examine the situation currently prevailing on the subject with the objectives focusing on evolving valid conclusions. The meaning of valid conclusion refers here to certain original and 'genuine' findings resulting from the study. The development of the CISG in 1980 and in its evolutionary progress is the main ranges of the time frame in the perspective of the Convention, while the other part related to SOGA may differ. [Butler, 2005]

However, if the reasons are implied or hidden, then a comparative study of the existing domestic legislative framework with that specific Convention or Treaty may ascertain or find out such reasons. Therefore, to dig out the dissimilarities between the two and on such outcome of these differentiations the extent of the changes in obligations of the sellers or buyer in international contracts for the sale of goods, the suitable way to determine the reasons for avoiding the CISG by Pakistan by conducting a comparative analysis of conceptual aspects related to CISG and the Sale of Goods Act, 1930. Hence, this effort is placed to discuss the conceptual differences of breach of contract in the two regimes, which is the core value deriving the remedies and or compensations on such breach.

Research Methodology

The main approach for this study is employed as the documentary analysis method. It is a type of qualitative research [Coutin, 2009] where the researcher gives denotation and opinion around an assessment topic. [Grix, 2010] All such involved specific texts are documents to a certain degree come into the ambit of evidence here. [Flick, 2006] The range from simple reading text to technical discourse analysis aiming to gain information on the viewpoint or policy of a person or organization is involved in

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determining the level. [\[Golafshani, 2003; Grix, 2010\]](#) The saving up time and preventing the research from diversion towards the wrong pathway, the omission of irrelevant and unnecessary information comes under the umbrella of qualitative analysis. [\[Hale et al., 2011\]](#) This study engaged primary sources of data collection via two different paths: (i) official legal instruments and (ii) the decisions of courts (case law). Furthermore, searching on the internet for evidence of previously failed or successful implementations of the CISG is a part, as well as Lookofsky said. [1999; 2002] The examination records, study artifacts, or social processes created or formed by such methods and have a discussion with the people who are involved or affected by the procedures being studied are usually termed as qualitative research by the law researchers. [\[Coutin, 2009\]](#)

This study decides to analyze the documents proceeds for a comparison of the provisions of CISG with the corresponding content enshrined in SOGA, and a few places, the insight from English law is also ascertained. Alongside, the views are supplemented with the examination in a comparative mode throughout the globe and the implementation of the CISG, respectively.

Factors of Contractual Breach Under the Cism and Soga

The breach of contract is under the focus of examination herein a comparative perspective between the two regimes, i.e. CISG and SOGA. This comparison is categorized on the following fundamental questions. 1) What are the common legal provisions in both instruments? 2) What are their similarities and differences? The study analyses how similar contractual obligations lead to dissimilarities in remedies under different laws.

Legal Provisions on Categorization of the Breach

In the CISG, 'fundamental breach' is categorized under Article 25, which conceptualizes the remedial system. [\[Ishida, 2020\]](#) Because the remedies are dependent upon the nature of breaches which result in different consequences, that is, specific performance, damages or avoidance of the contract. The provision for the fundamental breach emphasis on 'substantial detriment of material interests' and breaches the party's 'foreseeability' for his exemption. [\[Schlechtriem, 2005\]](#) However, the derogation from the "fundamental breach" defined under Article 25 of the CISG is probable if the parties do not agree to its finality and are convinced for some other criteria in their contract as authorized by Article 6 of the Convention. [\[Williams, 2000-2001\]](#)

The common law categorizes the breach of contract in three kinds [\[Andrews, 2016\]](#); breach of intermediate terms, warranties, or conditions. [\[Zhao, 2019\]](#) The SOGA accept two types of breaches: conditions and warranties. [\[Section 12 of the SOGA\]](#) A condition reflects as the stipulation essential in a contract which, if breached, would accrue a right to repudiate at the option of the aggrieved party. Warranty is a stipulation, a breach of which creates a right to claim damages but not to reject the goods or to repudiate the contract. [\[PLD 1955 Lah 52\]](#) Condition is either expressly provided by words or implied by meaning. [\[1990 CLC 1419 \[Lahore\]\]](#) The remedy of breach of warranty or condition is explained in Section 59 of SOGA, where a buyer may choose to set up for diminution or extinction of the price or suit for damages as the only remedy. [\[AIR 1930 Bom 249\]](#) The other kinds of relief are mentioned in section 59 of the SOGA. [\[AIR 1955 Pat 215\]](#) The diminution or extinction of price for the buyer against breach of warranty is available under section 59 of SOGA and section 73 of the Contract Act, 1872 (CA). [\[2014 SCMR 922\]](#) The remedy of damages is an award for actual loss against the breach of quality of goods. [\[PLD 1957 \(WP\) Kar 747 and PLD 1973 Kar 361\]](#) On the other hand, compensation is awarded against consequential loss. [\[PLD 1973 Kar 361\]](#) It is observed here that the concept of "fundamental breach" under SOGA deals with an entirely different matter from its use in CISG. The fundamental breach doctrine in SOGA deals with the impact of the exclusive clause, which is believed to be no longer operational except as a tool of interpretation based upon the contract. [\[2000 CLC 729 \[Lahore\]\]](#)

Homogeneity in the Categories of Breach under the Two Regimes

The breach of contract in both regimes is somehow similar in the following three features. The first breach is with respect to a precondition of a breach in the obligation of a contract. Second is the remedial perspective of the performance of the contract and damages. Third depends upon the circumstantial seriousness of the breach for its discharge.

Infringement of the Contractual liabilities

The "breach of contract" depends upon the violation of an obligation in both regimes. The "breach of contract" is not defined in Article 25 of the CISG; however, it may be inferred by other articles of the convention that such breach depends upon the failure of parties to conclude the contract by the performance of any of his obligation. For that cause, if the seller fails for his obligations, then according to Article 45(1), the buyer may exercise his rights under Article 46 to 52, claim damages via Articles 74 - 77. And if the buyer does not succeed for his obligations, then the seller may, under Article 61(1), claim his rights under article 62 to 65 or claim damages under Articles 74 to 77 of the convention. [\[Viscasillas, 2017\]](#) According to Article 9 of the convention, the contract, practices between the parties or a usage of general nature accepted by the signatories in routine international trade may prescribe the nature of non-performance, defective or delayed performance of any obligation. The non-delivery or non-payment, late payment or late delivery and delivering the substandard goods or documents entail the respective examples. [\[H M \(Danish Buyer\) v Joint Stock Company as S \(Polish Seller\)\]](#)

The English law entails a breach of contractual obligations either by expressed agreement of the parties or impliedly by law so, as is the case in SOGA. The sale of goods by implied warranties, contractual description, and the samples subject to the quality and fitness for buying purposes oblige the sellers in the eye of law. [\[Sections 15, 16, and 17 of the SOGA\]](#) The breach of condition normally will apply in a model of the sale in which goods are offered as 'is where is' basis and sale by description. [\[2007 CLD 1445\]](#) The merchantable quality is treated as the implied condition in the sale of goods. [\[PLD 1970 Kar 125\]](#) However, for the examined goods no implied condition shall apply. [\[1990 CLC 1419\]](#) The sample part of the bargain creates an express warranty that would confirm the whole of the bulk of goods. [\[2010 SCMR 1162\]](#) It is commonly understood that there are no damages without defects in goods. [\[2002 CLD 813\]](#) Moreover, the seller is bound to disclose the defects in his goods in accordance with section 16-A of the SOGA.

"Seller to inform the buyer to defect in goods sold" --- "Notwithstanding anything contained in section 16, and save where the parties have entered into an agreement to the contrary, the seller shall be under an obligation to inform the buyer of any defect in the goods sold at the time of the contract, except in a case where the defect is obviously known to the buyer."

Hence, the breach of expressed terms or implied conditions is equally stood as the breach of contract.

Redressal against the Infringements

In both regimes, the main remedies for breaching a contract are either to claim damages or discharge the parties from the contract's further performance. If the contract is fundamentally breached in accordance with CISG, then Article 45(1) and (2) protect the buyer from any deprivation to claim damages while exercising other remedies in parallel. Similarly, the seller is protected under Article 61(1) and (2). [\[Brunner et al, 2019\]](#) However, subject to the due damages both the parties may invoke avoidance of contract under Article 81(1) to release from all other obligations. The nature of lacking of the conformity of goods on its revelation to the buyer or within a reasonable time from its discovery infers an obligation to confer a notice for lack of conformity to the seller. Otherwise, this right under Article 39(1) available for the buyer may be lost. [\[Bell, 2015\]](#) In the case of Pakistani law, when a contract is breached by way of a breach in condition or breach tent amounts to a repudiation of contract, the party injured may claim damages or treat the contract as discharged. [\[Ss. 13 and 57 of the SOGA\]](#) "Section 13 does not contemplate the case of seller failing to tender delivery of goods." [\[PLD 1958 Dacca 512\]](#) "Section 57, the buyer may revoke the contract and claim the damages against the failure of the seller for delivery of goods." [\[1987 CLC Karachi 83\]](#)

Section 13(2) gives an option to the buyer to waive of a condition obligatory on the seller. [\[PLD 1958 Dacca 512\]](#) Or may not elect it as a ground to treat the contract as repudiated but as a breach of warranty. [\[1990 CLC 1419\]](#) The non-fundamental breach under CISG, [\[Arts. 45\(1\) & 61\(1\) of the CISG\]](#) as referred in Seoul Central District Court Korea, *Singaporean company v Korean company*. [\[Case 1595 UN CLOUT\]](#) The buyer may avoid the contract on non-performance to the extent of impossibility from the seller [\[Arts. 45\(1\) & 49\(1\) CISG\]](#). In *German Company (the seller) v Swiss Company (the buyer)* it was decided that the buyer fundamentally breached the contract by refusing to accept delivery of goods dealing under the Arts. 61(1) and 64(1)[a] of CISG. Therefore, the seller may avoid the contract and can claim the damages and proportionate interests under Articles 74 and 75 of the CISG, respectively. [\[Case 629 UN CLOUT\]](#) Or breach of warranty under SOGA [\[Ss. 13, 56 & 57 of the SOGA\]](#) entitles an injured party to claim damages. Non-acceptance of goods would amount to damages for the aggrieved party

under section 56. [\[PLD 1964 \(WP\) Kar 133\]](#) The quantum of damages shall be measured in accordance with section 73 of the Contract Act, 1872. [\[2011 SCMR 1287\]](#)

Discharge of Contract

The "fundamental breach" under Article 25 of CISG [\[Ishida, 2020; Schlechtriem et al, 2009\]](#) is somehow similar to the breach of a condition leading to a repudiation of the contract reflected in Section 12(2) of SOGA. The stipulation condition may be called as warranty. [\[2000 CLC 729\]](#) The breach of the condition gives a right to repudiate or avoidance of the contract to the aggrieved party. [\[PLD 1955 Lah 52 \(DB\)\]](#) Though the language in both the laws are slightly poles apart, the requirement of the subject matter is more or less the same, which emphasis the breach of material interest or the purpose of the contract for the injured party.

Differences in the Categories of Breach under the Two Regimes

The breach of contract in both regimes is identified from three key differentiations. Firstly, precondition in CISG regarding the "fundamental breach" differs with the requirement of breach of the condition in a contract under SOGA and secondly their remedies. Thirdly, remedies for other breaches in CISG and remedies for breach of warranties under SOGA are different.

Denial of Substantial Interests

The "fundamental breach" under Article 25 of CISG demands the impairment of material interest, which is a core requirement in this case. And the breach of the condition under SOGA does not demand it. As discussed earlier that the condition may arise impliedly by the operation of law or from the express terms of the contract. The breach of a condition empowers a buyer to terminate the contract even without an assessment of the gravity of loss. [\[Ss. 13 & 57 of the SOGA\]](#) However, the rejection by the buyer is subjective for the reasons of quality, fitness by purpose and sample or description of the commodities, which are enshrined in Ss. 15, 16 and 17 of SOGA.

Test Involving Foreseeability

Although the foreseeability test is rarely observed by the courts, for its superfluous nature, in practice yet, it is defined under Article 25 of the CISG to assess the gravity of a breached obligation. Whether the infringement to the interest of the injured party would have been foreseen or was foreseen as substantial by an ordinary prudent individual in the identical situation, then such breach would be tantamount to a fundamental breach. However, unforeseeability does not exempt the breaching party from his liability.

Furthermore, Art. Twenty-five of CISG left open the time of assessing the foreseeability for the breaching party suppose on the breach of contract or its conclusion. [\[Ishida, 2020\]](#). The SOGA in comparison, does not require a foreseeability test in the breach of conditions. The insignificance of this test in CISG makes a literal and not of the substantive nature of the difference between the two regimes.

Redressal against the Infringement

The remedies in both regimes have few differences. Specific performance, avoidance of a contract, the substitution of the goods, and damages are the remedies for fundamental breach in CISG; the price reduction [\[Gardazi et al, 2021\]](#), repair, and damages are available for non-fundamental breaches. SOGA provides termination of contract and damages as remedies for a breach of the conditions of contract and damages for the breach of warranties of contract. [\[PLD 1957 PC 61; 2002 CLD 813\]](#) Subject to the provisions of Chapter II of the Specific Relief Act, 1877 of Pakistan, the grant of specific performance is another remedy provided in section 58 of the SOGA but available in very limited circumstances, especially where the relief of damages is insufficient, for example; soled goods are unique. [\[PLJ 1980 Kar 329; PLJ 1997 Kar 212; PLD 1998 Kar 1; 2004 CLD 603; 2009 CLD 1524 \(DB\)\]](#) The award of damages is the basic remedy in SOGA. The purpose of CISG is the harmonization of international trade and ultimately the preservation of bargain [\[Obeidat, 2018\]](#); hence it focuses on specific performance as a basic remedy to conclude the contract rather to avoid it in comparison with SOGA. The breach of similar contractual obligation may hold a different category leading to different remedies in two regimes.

Conclusions

The CISG categorizes the breach of contract relying on the fundamental breach criteria. Traditionally, the observation of the conformity of the goods and documents and the time agreement in the international documentary sale are observed by the contract makers with high value. Article 25 of the CISG does not agree with the time breach, and description agreements amount to a "fundamental breach". The 'substantial detriment' invoked by the delay or nonconformity is a matter of fact, depends upon the judicial discretion. This flexibility in the categorization of the breach, which ultimately moves for an award of remedy, brings uncertainty for the injured parties. Therefore, it is difficult for the contracting party to make decisions, quickly and accurately, to avoid the contract in response to the delay of performance from the other party. The objective of the CISG, however, is achieved to some extent for uniformly enforcing the contract performance and the prevention of its avoidance. Consequently, the obligation of timely performance under the CISG may not be taken seriously by the parties. [\[Flechtner, 1998\]](#) In comparison, the SOGA is much more certain in time description.

The CISG stresses upon the performance of the contract rather than its avoidance and encourages its specific performance as a remedy. The fundamental breach, therefore, includes the delivery of defective goods or tender of defective documents even with serious defects, if such faults can be addressed by substitution or repair from the seller without causing uncertain expenses, inconvenience, or unreasonable delay to the buyer. On the other hand, the SOGA, straight after a contract is breached, emphasizes terminating the contract and encouraging the injured person to mitigate the loss by buying or selling the substitute goods in the market, which is quite certain. This law enables the buyer to reject of the faulty documents in following the principle of strict compliance whether or not such documents cause substantial detriment. Regarding the CISG, the Incoterms if incorporated in the contract, reduce the discrepancy of documents by providing the right to reject to the buyer irrespective of any detrimental loss.

The CISG and the SOGA while considering non-payment or non-delivery as the circumstances of non-performance both consistently allow avoiding the contract due to the failure of core objective. The preceding comparison shows that the emphasizing the contract performance by the CISG creates somehow uncertainty which may be countered by incorporating the required essentials of description in the contract to enhance the obviousness of the remedies against a breach including avoidance of the contract which will definitely serve as a detriment to ensure the required performance.

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