วารสารนิติศาสตร์
มหาวิทยาลัยธรรมศาสตร์
THAMMASAT LAW JOURNAL

ชื่อเรื่อง: The Harmonisation of ASEAN Sales Law: A Comparative Study with Thai Sales Law and CISG

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การอ้างอิงที่แนะนำ : Jumpita Ruangvichathorn, “The Harmonisation of ASEAN Sales Law: A Comparative Study with Thai Sales Law and CISG,” Thammasat Law Journal, Vol. 49, No.1, 131 (2020)

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คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ เลขที่ 2 ถนนพระจันทร์ แขวงพระบรมมหาราชวัง เขตพระนคร กรุงเทพมหานคร 10200 โทร. 02 613 2169 อีเมล tu.lawjournal@tu.ac.th

การบูรณาการกฎหมายซื้อขายของอาเซียน: ศึกษาเปรียบเทียบกับกฎหมายซื้อขายของประเทศไทยและ CISG

The Harmonisation of ASEAN Sales Law: A Comparative Study with Thai Sales Law and CISG

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วันที่รับบทความ 15 พฤศจิกายน 2562; วันแก้ไขบทความ 23 กุมภาพันธ์ 2563; วันตอบรับบทความ 4 มีนาคม 2563

บทคัดย่อ

ประชาคมอาเซียนก่อตั้งขึ้นเมื่อปี พ.ศ. 2510 ปัจจุบันประกอบด้วยชาติสมาชิกทั้งหมดรวม 10 ประเทศ อันได้แก่ อินโดนีเซีย มาเลเซีย ฟิลิปปินส์ สิงคโปร์ ไทย บรูไน เวียดนาม ลาว เมียนมา และกัมพูชา มีประชากรรวมประมาณมากกว่า 620 ล้านคน และมีวัตถุประสงค์ที่สำคัญประการหนึ่ง คือ การร่วมกันพัฒนาและบูรณาการในหลาย ๆ ด้าน เพื่อลดอุปสรรคต่าง ๆ ภายในประชาคม โดยหนึ่งในนั้นคือ การจัดทำกฎหมายกลางเพื่อใช้ร่วมกัน อาทิ กฎหมายที่เกี่ยวข้องกับสัญญาซื้อขายข้ามพรมแดน หรือสัญญาซื้อขายสินค้าระหว่างประเทศ

อนุสัญญาสหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศ (The United Nations Convention on Contracts for the International Sale of Goods) หรืออนุสัญญาซื้อขาย

กรุงเวียนนา (Vienna Sales Convention) หรือในชื่อย่อสั้น ๆ ว่า “CISG” เป็นอนุสัญญาระหว่างประเทศที่ถูกจัดทำขึ้นโดยคณะกรรมาธิการสหประชาชาติว่าด้วยกฎหมายการค้าระหว่างประเทศ (The United Nations Commission on International Trade Law หรือ “UNCITRAL”) ตั้งแต่ปี พ.ศ. 2523 โดยในปัจจุบัน CISG มีภาคีสมาชิกที่เป็นชาติสมาชิกองค์การสหประชาชาติ รวมทั้งสิ้น 93 ประเทศทั่วโลก ในจำนวนดังกล่าวมีประเทศในประชาคมอาเซียนรวมอยู่ด้วย 2 ประเทศ คือ สิงคโปร์และเวียดนาม และอีก 1 ประเทศ คือ ลาว ที่ CISG จะมีผลบังคับใช้ในวันที่ 1 ตุลาคม พ.ศ. 2563 ที่จะถึงนี้

จากการที่ CISG เป็นอนุสัญญาระหว่างประเทศซึ่งได้รับการยอมรับจากประชาคมโลกว่าประสบความสำเร็จอย่างกว้างขวาง ทั้งจากจำนวนของภาคีสมาชิกและมูลค่าการซื้อขายที่อยู่ภายใต้การบังคับใช้ของ CISG มาตลอดระยะเวลามากกว่า 35 ปี ผู้เขียนจึงมีความเห็นว่า แทนที่ชาติสมาชิกอาเซียนจะร่วมกันจัดทำกฎหมายกลางสำหรับการซื้อขายในระดับภูมิภาคที่ต้องใช้ทั้งเวลาและความมุมานะอย่างยิ่งยวดขึ้นมา ชาติสมาชิกอาเซียนทั้งหมดที่เหลือซึ่งยังไม่ได้เข้าเป็นภาคีสมาชิกของ CISG รวมทั้งประเทศไทย ควรพิจารณาเข้าเป็นภาคีสมาชิกของ CISG โดยการดำเนินการดังกล่าวอาจถือได้ว่าเป็น “ทางลัด” ของชาติอาเซียนในการที่จะมีกฎหมายซื้อขายกลางขึ้นมาใช้ร่วมกัน และกฎหมายซื้อขายดังกล่าวเป็นกฎหมายที่ได้รับการยอมรับในระดับสากล เสมือนการยิงกระสุนเพียงนัดเดียวแล้วได้นก 2 ตัว

ในการสนับสนุนความเห็นของผู้เขียนดังกล่าว ผู้เขียนได้นำเสนอข้อมูลและข้อเท็จจริงต่าง ๆ ที่ได้จากการค้นคว้าและวิจัย จากแหล่งที่มาซึ่งเป็นสากลและเชื่อถือได้ไว้ในบทความนี้อย่างเป็นลำดับง่ายต่อการอ่าน และด้วยความหวังว่า บทความนี้จะเป็นประโยชน์ต่อประชาคมอาเซียนของเราต่อไป

คำสำคัญ: บูรณาการ อาเซียน กฎหมายซื้อขาย อนุสัญญาสหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศ

Abstract

The Association of South East Asian Nations (“ASEAN”) consists of 10 Nations, i.e. Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Lao PDR, Myanmar and Cambodia with total population of more than 620 Million people. As one of ASEAN’s objective is to jointly develop and unify the community in various aspects in order to reduce obstacles within it, to join hand in harmonizing the laws regarding crossed-border or international sales is thus one of its aim.

The United Nations Convention on Contracts for the International Sale of Goods, or Vienna Sales Convention, or “ CISG” is an international sales convention currently consisted of 93 member states. CISG is the product of the United Nations Commission on International Trade Law, or “ UNCITRAL” which was adopted in a

diplomatic conference at Vienna, Austria in 1980. Among CISG's current member states are 2 nations in ASEAN i.e. Singapore and Vietnam. Another nation in ASEAN is Lao PDR in which CISG will become effective on 1st October 2020.

CISG is an international convention that has been renounced as worldwide accepted and successful, both by the number of its member states and the volume of sale transactions governed by it for more than 35 years. Accordingly, the writer is in the opinion that, for ASEAN, instead of harmonizing its sales law at a regional level which will certainly takes time and enormous efforts, all ASEAN nations which have not yet been CISG's member states should consider acceding to it. This can be regarded as a "short cut" of the harmonization of ASEAN sales law. Additionally, CISG is the law which has already been widely accepted at a global level.

In supporting the writer' s opinion, information presented throughout this Article has been obtained from international and reliable sources whereby ASEAN could use them for its own benefit in the future.

Keywords: Harmonization, ASEAN, Sales Law, CISG

Introduction

The Association of South East Asian Nations ("ASEAN"), currently consisted of 10 member states, was established in Bangkok, Thailand on 8th August 1967 by five original member states, i.e. Indonesia, Malaysia, Philippines, Singapore and Thailand. The other five member states are Brunei Darussalam (joined 8th January 1984), Vietnam (joined 28th July 1995), Lao PDR (joined 23rd July 1997), Myanmar (joined 23rd July 1997) and Cambodia (joined 30th April 1999) respectively. ASEAN is currently one of a potential emerging market with the population[1] of over 622 Million people.

As one of the purposes of ASEAN under its Charter is "to create a single market and production base which is stable, prosperous, highly competitive and economically integrated with *effective facilitation for trade and investment* in which there is *free flow of goods, services and investment*; facilitated movement of business persons, professionals, talent and labor; and free flow of capital",[2] the harmonization of its laws including sales is thus a challenging issue because sales transaction is fundamentally backbone of trades and businesses either domestically or globally.

Irrespective of the fact that, in 2009, all ASEAN member states have approved the ASEAN Trade in Goods Agreement ("ATIGA" / effective on 17th May 2010), together with some Free Trade Agreements ("FTA") beyond the borders of ASEAN, e.g. AIFTA (with India), ACFTA (with China), ASKFTA (with Korea), AANZFTA (with Australia and New Zealand) and with Japan as an economic partnership (AJCEPT), these treaties do not yet contain rules to be applied to international trade contracts.[3] As the preamble of the ATIGA which states "to provide a legal framework to realize free flow of goods in the region", a uniformed regulation of international sales has thus been driven by a number of scholars known as the Principles of Asian Contract Law ("PACL").[4] However, PACL is expected to demand long development times and could encounter political obstacles to its implementation because "[a]s ASEAN is a microcosm of the world's

[1] "2020 Word Population by Country," World Population Review," Worldpopulationreview, accessed 12 March 2019, from https://www.worldpopulationreview.com.

[2] "The ASEAN Charter," Ministry of Foreign Affairs, accessed 12 March 2019, from http://www.mfa.go.th/asean/en/organize/62210-The-ASEAN-Charter.html.

[3] Angelo Chianale, "The CISG as a Model Law: A Comparative Law Approach," Singapore Journal of Legal Studies, Vol. March 2016, 29, p.38 (2016).

[4] *Ibid,* p.39.

different legal systems, any attempt to harmonize international trade law from scratch is a herculean task".[5]

The United Nations Convention on Contracts for the International Sale of Goods, or Vienna Sales Convention, or "CISG" is an international sales convention, currently consisted of 93 member states.[6] CISG is the product of UNCITRAL[7] which was adopted in a diplomatic conference at Vienna, Austria in 1980. Given the growing number of its member states, CISG has been renounced as widely accepted during the last three decades. As nine out of ten leading trade nations are currently its member states, "it can be estimated that about seventy to eighty percent of all international sales transactions are potentially governed by the CISG".[8]

The globalization of trade is inevitably concerned with the discussing of regional and global unification of sales law where overall development of international trade over the last half century is startling and it is no longer that the highest growth is found in North America, Europe and Japan, but instead it is the transition economies from different points of the globe particularly China, Brazil, Russia and some African countries including.[9] As different sales laws have always been an obstacle to trade,[10] be it on domestic or international level, the increasing globalization of trade thus needs the harmonization and unification of relevant sets of

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[5] *Ibid,* p. 39. The quoted wordings were referred from Singapore Academy of Law, " The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980): Should Singapore Ratify?," (Law Reform Committee Report 1994).

[6] "United Nations Commission on International Trade Law," accessed 27 February 2020, from https://www.uncitral.un.org.

[7] "UNCITRAL" or The United Nations Commission on International Trade Law which was established by the United Nations ("UN") on 17 December 1966. CISG was prepared and drafted with the collaboration of lawyers from countries all around the world that are members of UN.

[8] Ingborg Schwenzer and Pascal Hachem, "The CISG - Successes and Pitfalls", American Journal of Comparative Law, Vol. 57, No. 2, 457, p.457 (2009). At the time of this Article's publication, only 72 states were reported as CISG's member states and it was also mentioned therein that "[E]ven though much has been written about the skepticism of commercial practice towards the Convention and of the CISG's allegedly minor role in the legal community, today this position may be regarded as by and large *disproven*".

[9] Ingeborg Schwenzer, " Regional and Global Unification of Sales Law", European Journal of Law Reform, Vol. 13, 370, p.370 (2011).

[10] For example, they are not specifically designed for international or crossed –border sales and need time to negotiate between parties. See more in Ingborg Schwenzer and Pascal Hachem, *supra note* 8, pp.465-467.

rules governing international trade and from a global perspective. Accordingly, there are two different trends, (1) the accession to CISG, or (2) the regional harmonization such as the efforts undertaken by OHADA[11] in Africa, the Draft Common Frame of Reference and the Draft Common European Sales Law in Europe, as well as, similar endeavors undertaken in *South East Asia*.[12]

To the writer, however, the preference of ASEAN should be the accession to CISG by all of its member states[13] with the following reasons.

1. The familiarity and suitability

CISG is not too remote to ASEAN as it is actually a product of both Common Law and Civil Law legal doctrines and traditions[14] which are familiar to all ASEASN nations. While the common law legal doctrines and traditions spread throughout former British colonies in Myanmar, Malaysia and Singapore (former part of Malaysia), the same of the Civil Law spread throughout former French colonies in Indochina i.e. Vietnam, Lao PDR and Cambodia. Thailand, the only remaining independent state in the continent, had also experienced the Common law legal doctrines and traditions before accepting the Civil law.[15] Islander states which are Indonesia, Philippines and Brunei were also influenced by both legal doctrines and traditions i.e. the Civil Law (derived from Roman law and Dutch Law) in Indonesia, the combination of Common Law and Civil Law (derived from Roman Law and Spanish Law) in Philippines and the Common Law in Brunei.[16]

CISG celebrated its 35th anniversary in 2015 after being developed outside any national system and presented as a new model containing a consistent summary of rules regulating the sale of goods.[17] In other words, CISG is a mixture between

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[11] 'The Organisation for the Harmonisation of Business Law in Africa', or in French,' l'Organisation pour l'harmonisation en Afrique du Droit des Affaires'.

[12] Ingeborg Schwenzer, *supra note 9,* p.370.

[13] Currently, only Singapore (effective on 1st March 1966) and Vietnam (effective on 1st January 2017) are CISG's member states. However, on 1st October 2020, CISG will also become effective in Lao PDR.

[14] See more details of these two legal systems in Angelo Chianale, *supra note* 3, pp.29-31.

[15] Jumpita Ruangvichathorn, The Japanese Civil Code: The Forerunner of Thai Civil and Commercial Code, (Bangkok: Sripatum University Printing House, 2015), pp.8-10. The Thai Civil and Commercial Code ("TCC") first came into force in 1923.

[16] King Phajadhipok Institute's, accessed 12 October 2019, from http://wiki.kpi.ac.th/index.php?title=รูปแบบรัฐบาลและระบบกฎหมายในประเทศสมาชิกอาเซียน.

[17] Angelo Chianale, *supra note* 3, p.30.

Common Law and Civil Law legal systems under which ASEAN countries are already familiar with one or both of them. Additionally, CISG was developed on the level of the global uniformity and its framework "originates from English Common Law (for example, the liability for breach of contract; and the termination of contract granted under restrictive conditions), from American Common Law (for example, the seller's right to cure if the cure is possible without delay and unreasonable inconvenience for the buyer), from the French system (for example, the ways the price is fixed; the price reduction as a contractual remedy; the specific performance as a general remedy for the breach of contract; and the foreseeability test for the amount of damages), and from the German system (for example, the buyer's duty to notify defective goods; and the additional time period for performance granted by a party to the other in some cases)".[18] These legal principles are not definitely alien to ASEAN community, on the contrary, they are very much acquainted with law professionals who will eventually take part in advising business people on CISG in their own jurisdictions. And, as more than 35 years have passed since CISG's first existence, there are approximately 2,500 published court decisions and arbitral awards together with a large number of scholarly writings and numerous conferences which not only show the prominent role of CISG[19] but also help as guide lines throughout the jurisdictions of new prospective member states. Moreover, both the increased number of court decisions to foreign cases and the establishment of the Advisory Council on the CISG in 2001 which is a private initiative of scholars from various legal systems currently help producing a great deal of opinions on central questions of CISG.[20]

In addition, as Professor Chianale[21] referred to the Preamble of CISG which states that "[T]he adoption of *uniform rules which governs contracts for the international sale of goods* and take into account of the *different social, economic and legal systems* would contribute to the removal of legal barriers in international

[18] *Ibid*, p.30.

[19] Ingborg Schwenzer and Pascal Hachem, *supra note* 8, p.458; see also "CLOUT" CISG case digests," United Nations Commission on International Trade Law, accessed 12 March 2019, from https://www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

[20] Ingborg Schwenzer and Pascal Hachem, *supra note* 8. Among others is Professor Dr.Hiroo Sono of Law Faculty, Hokkaido University, Japan whom the writer is very much indebted to regarding academic collaboration on CISG, including, the research access within Hokkaido University as an appointed Visiting Scholar from time to time since 2010.

[21] Angelo Chianale, *supra note* 3, p.39.

trade and promote the development of international trade", he thus expressed that this was in line with the purpose of ATIGA treaty and thereby CISG is undoubtedly a suitable tool for the harmonization of ASEAN sales law. And, bearing the fact that a number of countries that have signed FTA with ASEAN have also ratified CISG, e.g. Japan, China, Australia and New Zealand, free trade areas in South East Asia region would therefore immediately have legal instrument necessary to facilitate the circulation of goods.[22]

2. The harmonization at a global level

Harmonization of any law, either regional or global, undoubtedly takes time and efforts. UNCITRAL had spent 10 years,[23] starting from 1968 – 1978, in preparing the draft of CISG before it was finally adopted in 1980. Even so, CISG was not yet effective until the number of its member states had reached 10 states in 1988 according its provision.[24] Therefore, in order to save time and efforts, and, more importantly, given the fact that CISG is now widely accepted at a global level, ASEAN countries, all being member states of the UN,[25] can simply take the accession to CISG as the "short cut" in harmonizing its regional sales law. To reach a global level of harmonizing sales law, not regional, will be beneficial for ASEAN, and to comply with the need to promote uniformity of the UN will also be an impressive achievement of ASEAN globally.

It is well-known today that CISG has exerted significant influence on an international[26] as well as a domestic level[27] i.e. when the first set of the UNIDROIT Principles of International Commercial Contracts ("PICC") was launched in 1994, they closely followed CISG not only in its systematic approach but also mechanism of

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[22] *Ibid*. It is also mentioned that the adoption of the CISG as a useful step towards the integration of ASEAN. See Gary F. Bell, in " Harmonization in Contract Law in Asia: Harmonizing Regionally or Adopting Global Harmonization: The Example of the CISG", Singapore Journal of Legal Studies, 362, p.362 (2005).

[23] Ingborg Schwenzer and Pascal Hachem, *supra note* 8, p.460.

[24] The United Nations Convention on Contracts for the International Sale of Goods, art.99.

[25] "Member of the UN", Department of International Organizations Ministry of Foreign Affairs, accessed 12 October 2019, from https://www.mfa.go.th/thai_inter_org/th/organize/6450.

[26] The writer understands that this also includes 'Regional Harmonization' because it is another type of crossed-border transaction.

[27] Such as, in all Scandinavian countries, except Denmark, whereby their national Sales of Goods Act were revised during 1988-2000 and they are very much in line with CISG. Angelo Chianale, *supra note* 3, p.34.

remedies, including, the Principles of European Contract Law ("PECL") which was published in 1999 and the EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantee.[28] Moreover, in Africa, the sixteen member states of OHADA have adopted the *Acte uniforme sur le droit commercial gdndral* ("AUDCG"), and, in Europe, the Draft Common Frame of Reference have been published in the beginning of 2008, both of which are based on CISG or heavily indebted to CISG.[29] This situation was also the case occurred in Thailand (see below).

The comparative study between global and regional harmonization can take example from OHADA and its adopted AUDCG in the form of regional harmonization as mentioned above. According to Professor Schwenze[30], there are still many reasons favoring global harmonization. Firstly, even though AUDCG has been based on CISG but not entirely and thereby left major differences[31] between them in core areas of sales law that are of significant practical importance. Secondly, in term of international scale, there is still a need for CISG in OHADA member states for a sales contract between a member of OHADA states and its third states. Thirdly, CISG is most suitable for parties coming from developing countries because its system and concepts are clear and easily understandable particularly to a trader who is not sophisticated and has no own in-house counsel. Lastly, the easy accessibility of CISG i.e. (1) its availability in six official languages[32] and (2) its translation into many other languages together with its other published cases, arbitral awards and scholarly writings from all over the world which are mostly available on databases in the internet free of charge.

Another example[33] can be seen from a so called "[A]n Unsuccessful Attempt: The European CESL Project" that was eventually withdrawn by the European Commission after CESL[34] had been started in 2011. It was the initial intention of the

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[28] Ingeborg Schwenzer, *supra note* 9, p.372. It is also mentioned that "[I]t took its definition of conformity of goods from Article 35 CISG and thus introduced this concept into the domestic sales laws of the EU member states".

[29] *Ibid*.

[30] *Ibid*, pp.377-378.

[31] Such as, in the field of 'Remedies' and 'Avoidance'. See more details in *ibid*.

[32] Certainly, English language is one of CISG's official languages and the most largely used (and ASEAN's official language is also English). The rest of CISG's official languages are French, Spanish, Russian, Arabic, and Chinese.

[33] Angelo Chianale, *supra note 3*, pp.36-38.

[34] The Draft of 'Regulation on a Common European Sales Law'.

European Commission that CISG[35] and CESL should co-exist in business to business international sales whereby CISG is the default regime for international sales while CESL could be explicitly chosen by the parties on an opt-in concept according its design. However, in reality, the existence of two different uniform systems of law governing international sales can confuse businesses making a negotiation on the applicable law more difficult and a transaction cost more expensive. As a result, this could bring to the situation where there will be three systems for a sale of movable goods in European Union ("EU") i.e. national laws and two uniform laws of CESL and CISG under which Professor Schwenze states that " having but one sales law for domestic, regional, and international transactions greatly facilitates trade especially for trader who do not have nor can afford to pay for legal advice and [t]hat this single sales law must be the CISG ... , having regard to the CISG's worldwide success".[36]

Accordingly, CISG is a very significant role model of sales law, particularly in a crossed-border transaction according to its design and can be used both at global and regional basis because they basically bear similar nature. In the case of ASEAN, therefore, to harmonize at a global level, not a regional one, by acceding to CISG is a very interesting and challenging issue.

3. The popularity

CISG is not the first attempt in harmonizing international sales law as the trade communities all around the world have long been facing problems concerning a so called 'governing law', or the application of a domestic sales law. Its history[37] began in 1926 after the International Institute for the Unification of Private Law ("UNIDROIT") was founded in Rome and in the same year of its inauguration in 1928, Ernst Rabel[38] proposed to work towards a unification of international sales law. Following a committee consisting of representatives from different legal systems was founded in 1930, the first draft of a uniform sales law was published in 1935 and in 1936. Professor Rabel later published the first volume of his seminal work *"Das Recht des*

[35] All countries in European Union (EU) are member states of CISG except the UK, Ireland, Malta and Portugal.

[36] Ingeborg Schwenzer, *supra note* 9, p.379.

[37] Ingborg Schwenzer and Pascal Hachem, *supra note* 8, pp.457–478.

[38] An Austria-born but American Scholar (1874-1955) – the founding Director of the Kaiser Wilhelm Institute for Foreign and International Private Law in Berlin & famous scholar in the field of sale of goods since 1928.

Warenkaufs" providing an analysis, the *status quo* of sales law on a broad comparative basis. However, in 1937, Professor Rabel was forced to emigrate from Berlin to the United States and World War II interrupted the unification efforts until they were resumed again in 1951 when the Dutch government held a diplomatic conference on the unification of sales law in The Hague by establishing a special commission to make further progress in the unification process. Such the commission had since met several times and finally presented a first draft on substantive sales law in 1956 followed by efforts to create a law applicable to the formation of international sales contracts until its first draft was presented in 1958, both of which were then distributed among governments. In 1964, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) were finalized at The Hague but they did not fulfill the high hopes and expectations as only nine countries[39] became member states while important economic countries such as France and the United States did not participate, including many socialist and developing countries as they speculated that these uniform laws favored sellers from industrialized western economic countries.

After UNCITRAL was established in 1966, it continued the work on the unification of sales law in 1968 by using both ULFIS and ULIS as its basis.The first draft of a uniform law was finalized in January 1976 and in 1978 UNCITRAL circulated a subsequent draft containing rules on contract formation as well as the substantive sales law among the governments of the UN members until between 10th March and 5th April 1980, delegates from sixty-two nations deliberated CISG at the Vienna Conference and thereby forty-two countries voted in favor of it. Finally, on 11th December 1986, the necessary number of ten ratifications (Article 99, CISG) was reached and CISG entered into force on 1st January 1988 with its six official languages i.e. Arabic, Chinese, French, English, Russian and Spanish. Back then, at the time of this referred Article,[40] CISG had seventy-two member states which included nine out of the ten leading trade nations in 2006 (except for the United Kingdom) and in 2008, eight out of the ten major trading partners of the United States of America were also its member states. And, within the ever increasing market of the European Union

[39] One of which is the UK – however, the reason why the UK has not yet become a member states of CISG is beyond the scope of this Article.

[40] Ingborg Schwenzer and Pascal Hachem, *supra note* 39, pp.457–478.

(“EU”), twenty-three out of the twenty-seven members are also member states of CISG[41] with a huge development of international trade, e.g. between 2005 – 2006 there was a report stating that (1) some 18 million containers made over 200 million trips per year and there were also ships that could carry 15.000 20-foot equivalent units which was said to be cheaper to ship a bottle of wine from Australia to Hamburg than to bring it from Hamburg to Munich and (2) worldwide merchandise export trade amounted to USD 11.783 billion.[42]

Moreover, according to Professor Schwenzer[43], it is certainly clear that the existence of CISG is generally known among lawyers working in international trade although there is a tendency to recommend their clients to exclude CISG’s application from the transactions[44] and choose their own domestic sales laws if they have more bargaining power than the other parties, while, the clients themselves are not also convinced of the advantages of the CISG compared to domestic sales law. This argument, however, is unconvincing because to insist on domestic sales laws faces several practical problems e.g. (1) it may lead to a situation where a party is confronted with a law that is hardly foreseeable, not understandable and even not accessible, (2) a party insisting thereon may encounter serious difficulties when litigating before the court of a foreign country or even before an arbitral tribunal because the problem of proving domestic laws still exists and (3) the opinion of experts that may be needed is often expensive. Six official languages of CISG and its translations into other languages including court decisions, arbitral awards, scholarly writings and several websites[45] could also help judges and arbitrators apply CISG in a predictable fashion.

However, to the writer, it is fair to also present the negative side of CISG. For instance, according to the expressions of Professor Schwenzer which are “[A]lthough the overall advantages of the CISG are now undisputable, there remain several criticisms regarding the application of the CISG to international commercial transactions which still seem to nourish a strong adverse view on the Convention …”, and “[H]aving a closer look at these criticisms, however, reveals that it is in part

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[41] The missing countries are Ireland, Malta, Portugal, and the United Kingdom (“UK”).

[42] Ingborg Schwenzer and Pascal Hachem, *supra note* 8, p.461.

[43] *Ibid*, pp.463-467.

[44] The principle of “Freedom of Contract” under Article 6, CISG.

[45] Such as the ones operated by UNCITRAL and Pace University Law School, USA in respect of CISG.

unfounded because it results from general misunderstandings" .[46] These criticisms include (1) CISG's general problems in its application, i.e. the uniform interpretation and concurrent remedies, (2) CISG's incompleteness i.e. the issues of validity and hardship, (3) CISG's content i.e. the lack of neutrality between the parties and the necessities of trade.[47] It is, however, concluded that "[C]riticism that has been put forward can largely be either rejected as unfounded to begin with or met by a correct interpretation of the Convention" and "[A]t the end of the day, most criticism boils down to the reluctance of old dogs to learn new tricks" .[48] Another view is from Professor Kashiwagi[49] who emphasizes on the practical aspects of CISG towards Japan's accession to CISG[50] and criticisms presented therein are e.g. (1) the lack of interest from the business world in the CISG's application to actual disputes, (2) the lack of CISG's foreseeability and (3) the lack of CISG's compatibility with commodity trades and (4) the allegation of CISG's advantages to sellers. Irrespective hereof, Professor Kashiwagi concludes that "CISG provides Japanese companies with a more convenient tool to make the governing law of international transactions more fair and equal, thereby avoiding the application of underdeveloped legal system or law which the other parties is much more familiar with" and "[J]apanese companies need to think twice before opting out of CISG in terms of their printed general terms and conditions or from negotiated contracts".[51]

4. The obsolescence and inappropriateness of national sales law: comparative study with Thai law relevant to CISG

As presented above, CISG might not always been welcomed by businesses or companies who are direct players in CISG's member states resulting which they may

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[46] Ingborg Schwenzer and Pascal Hachem, *supra note* 8, pp.467-478.

[47] *Ibid*.

[48] *Ibid*, pp.467-478.

[49] Noboru Kashiwagi, "Is There Any Reason for Japanese Companies to Welcome CISG?", in Special Issue in Commemoration of the 120-Year History of the Nihon University College of Law, (Tokyo: Nihon University, 2009), pp.2-7 (See also details of all criticisms). Professor Kashiwagi used to work in a large trading company at the time he joined a study group for Japan's decision in joining CISG formed by the government in late 1980s (consisting of representatives from various sectors and one prominent person was Professor Kazuaki Sono – former Secretary General of UNCITRAL).

[50] Effective on 1 August 2009.

[51] Noboru Kashiwagi, *supra note* 49, p.10.

opt out CISG from their ready-made contracts or negotiated contracts. It is reveled, for example, from an American study[52] that there are three main reasons of opting out CISG i.e. (1) the lack of understanding of CISG among practitioners who intern stick to their own familiar laws, (2) the tendency of parties with strong bargaining powers to insist that their own laws are to be governing laws and (3) the lack of confidence in CISG compared to their own laws.

However, according to Professor Kashiwagi[53], in respect of the 2nd reason above, he views that there has been a strong disagreement towards this tendency in Japan because the current Japanese Civil Code ("JCC")[54] became effective since 1898 and it was much influenced by the German draft Civil Code and the French Civil Code. More importantly, JCC is now " obsolete and needs professional interpretive skill in order to apply it to modern sales transactions".[55] Additionally, JCC is also too dogmatic and has many traits of Roman Law that are hard for lay person to understand.[56] Therefore, in comparison with JCC, CISG is "much easier for lay people to understand and fits better with modern transaction business".[57] Thai sales law, accordingly, is not also an exception because its obsolescence and inappropriateness to govern international sales can be seen below.

Movements in Thailand regarding CISG started more than 20 years ago. CISG was, from time to time, addressed by a number of government offices, e.g. Ministry of Commerce, Ministry of Foreign Affairs, the Council of State and the late Law Reform Commission[58]. The Council of State has hired a number of researchers conducting researches about CISG in order to propose to the government that whether or not Thailand should accede to CISG and the answer during 2011-2013 seemed to be

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[52] *Ibid*, p.4. CISG was effective in the United States of America since the early stage, i.e. on 1 January 1988.

[53] *Ibid*.

[54] The JCC has now been revised and the revised one will come into force on 1st April 2020. However, the largest part of revision is " Law of Obligation" , not entirely conform to international sales, thus, thereby CISG should not still be excluded from international sales contracts by Japanese companies. (The writer obtained this information from Professor Hiroo Sono; during our research co-operations from time to time.)

[55] Noboru Kashiwagi, *supra note* 49, pp.4-5.

[56] *Ibid*, p.5.

[57] *Ibid*.

[58] The Law Reform Commission had been established in 2010. But, unfortunately, it was resolved in 2016 not long after its proposal regarding CISG above.

positive but later faded away due to some legislative burden.[59] Most recently, the Law Reform Commission, after its establishment in 2010 has set up a CISG working group consisting of government officials, law academics and legal practitioners and later proposed to the government, with a draft of CISG's implementing law, that Thailand should accede to CISG. Despite the fact that this latest movement was made some 5 years ago but no final decision from the government has come out yet. However, to the writer, such proposal of the late Law Reform Commission should still be regarded as valid and official. Most importantly, this could help identifying that Thailand is in the position of becoming a member state of CISG in the near future.

Regarding Thai sales law, there is a so called 'inefficiency of laws governing international sale transactions' which reveals the obsolescence and inappropriateness of Thai sales law following a highly controversial Supreme Court Judgment No. 3046 in 1994 (B.E.2537). This case indicates that the only set of Thai law which is available for a court to apply to a sale contract, whether it be domestic or international including civil or commercial, is the Law of Sales ("Book III, "Specific Contract: Sales") of Thai Civil and Commercial Code ("TCC") under which, according to its nature, is rather civil than commercial (and absolutely not international) because TCC was enacted long time ago[60] when commercial and international sales were basically unknown to Thai society. This can be seen from the facts in the above Supreme Court Judgment No. 3046 starting when an international sale contract between Thai seller and foreign buyer was concluded via telex and the Thai seller was later sued by such the foreign buyer in Thai court after refusing to deliver goods.

Thai court eventually decided in favor of the Thai Seller. This was because Section 456, Subsection 3 of TCC provides that " a contract of sale of movable property where the agreed price is 500 Thai baht (THB) or upwards (this was amended in 1992 to be currently 20,000 THB) is not enforceable unless (1) there is some written evidence signed by the party liable, or (2) unless earnest is given, or (3) there is part performance" and, unfortunately, any of these three requirements was ruled to be found by the court even though the court did not deny that there was actually a concluded contract and such a contract was breached by the Seller. These three

[59] One requirement in Thai legislative process is the identification of a Ministry responsible for any proposed Act in which the Council of State is not eligible to do so.

[60] The first one was in force in 1923.

requirements under Section 456, Sub-Section 3 of TCC clearly reflect the nature of a sale which is not between merchants.

Since then, such the Supreme Court Judgment No. 3046 has been subjected to vast criticism especially by law academics[61] and, as a result, development of Thai sales law has been called for in various forms. In 2004, for instance, the Ministry of Justice has set up a committee to principally decide whether or not Thailand should consider separating laws governing civil matters from commercial matters, including sales. This could mean (1) the separation of TCC into two codes (i.e. Civil Code and Commercial Code) similarly to many other countries in the Civil Law system and Japan, and (2) the separation of Civil Court and the Commercial Court.[62] One initial project in 2005 was the setting up of a working group responsible for drafting a new sales law applying only to international sales, namely "(Draft) Act on International Sales of Goods" and, not so surprisingly, the working group has relied so much on the provisions of CISG and also gave opinion that Thailand should become a member state of CISG and without making any reservation.[63] Later, this draft law was adjusted to be "(Draft) Act on Commercial Sales" and conceptually specified therein that it will also apply to international sales while Thailand is not yet joining CISG.[64] However, this draft law has never been enacted into law and no other potential movements in developing Thai sales law including the decision to accede to CISG are clearly spotted. If Thailand accedes to CISG, to the writer, Thailand will have another new law applying only to international sales and Thai courts do not need to turn back to Section 456, Subsection 3 of TCC. In addition, such the new law will be the law implemented from form CISG which is now worldwide accepted as earlier mentioned.

Conclusion

The harmonization of ASEAN sales law, at global not regional level, in the form of acceding to CISG by the rest of non-CISG member states within ASEAN is very

[61] Kumchai Jongjakpan, "Comments on the Supreme Court Judgment No. 3046.," Dulapaha, Vol. 2, No. 47, pp.55-66 (2000).

[62] Jumpita Ruangvichathorn, "Japanese Commercial Code: The Compatibility with 1980 Vienna Sales Convention as Compared with Thai Civil and Commercial Code," (Research Report submitted to Sripatum University, 2017), pp.2-3.

[63] *Ibid*.

[64] *Ibid.*

much convincing. All reasons presented above i.e. (1) the familiarity and suitability of CISG to ASEAN, (2) the popularity of CISG after more than 35 years of its existence, (3) the harmonization at a global level of CISG and (4) the obsolescence and inappropriateness of national sales law are form international and reliable sources. In addition, the examples of other regional harmonization also presented herein can be served as vital information for ASEAN in deciding its framework on harmonization of sales law in the future.