CISG as a Catalyst for Law Reform: The Case of Japan

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Preliminary Remarks

• The Goal of CISG: Uniformity of Law
  – Uniformity through Application
  – Uniformity through Assimilation
    • Interpretive Assimilation (of existing law)
    • Legislative Assimilation

• Purpose of this Presentation
  – Illustration of Assimilation: Japan
  – Especially with respect to “favor contractus”
CISG and Japan

• Japan is a Newcomer
  – Japan acceded 20 years later in 2008; in force August 1, 2009

• Failure of first attempt in 1990s
  – MOJ tied up: bad economy required urgent legislations
  – Business hesitant: uncertainty about how CISG will be applied

• Success of the second attempt in 2000s
  – Legislative agenda cleared
  – Global Success of the CISG
  – Increase of trade with Asia (30% of Japan’s trade)
  – “Indirect assimilation” through academic discourse and Civil Code Reform
Uniformity through Application?

• 2009-2012 Worldwide: more than 300 cases
• 2009-2012 Japan: No published cases
  – Opting out (Article 6)?
  – Arbitration?
  – Little number also for domestic sales cases
• Little success in Japan so far
Legislative Assimilation: Civil Code Reform

– Civil Code Reform
  • Japanese Civil Code of 1896
  • Semi-official “Draft Proposal” (April, 2009)
    – Law of Obligations (excluding tort law), defects in consent (mistake, fraud, duress, etc), Agency, Prescription Period
    – Drafting of the Proposal undertaken 2006-2009
    – Work towards Accession to the CISG 2006-2008
  • Legislative Council within the Ministry of Justice, 2009-
    – Interim Draft expected February 2013

– Why a reform?
  • Modernization of the Civil Code
  • Enhancing the Visibility of Law
    – Incorporation of special legislations and case laws
  • Global Convergence of Contract Law
Principle of “Favor Contractus”

• The Concept:
  – “… the aim of preserving the contract whenever possible, thus limiting the number of cases in which its existence or validity may be questioned or in which it may be terminated before time.” (Bonell, 1994 [re UNIDROIT Principles (PICC)])

• Favor Contractus in the CISG
  – Facilitation of contract formation (Art 19(2))
  – Denial of invalidation due to “initial impossibility”
  – Limitation of avoidance of contracts (fundamental breach, seller’s right to cure)
Example 1:
Facilitation of contract formation

Relaxation of the Mirror Image Rule

• Article 19(2) CISG and the Draft Proposal 3.1.1.24

[3.1.1.24](Acceptance adding modifications to the offer)

(1) If the offeree adds modifications to the offer and then accepts it, it is deemed that the original offer was rejected and a new offer was made; provided, however, that if in light of the intention of the parties and the nature of such contract, no substantive modifications have been made to the offer, the contract is formed through the contents excluding the parts which were modified. .... Knock-Out Rule (an improvement from Article 19(2)CISG?)

(2) The proviso of (1) does not apply in the following cases. ....

(a) The offeror manifests an intention beforehand rejecting the modifications by the offeree be made into the contents of the contract.

(b) The offeror states an objection to the offeree without delay after the arrival of the acceptance.

(c) The offeree manifests an intention that if the modifications made by it do not become the contents of the contract, it will not conclude the contract.
Example 2:
Denial of invalidation due to initial impossibility

- CISG: denial of “Impossibilium nulla obligatio est”; initial impossibility is simply a breach of contract
- Draft Proposal 3.1.1.09
  (Impossibility of performance/impossibility of expectation existing at the time of conclusion of the contract)
  Even if the performance of the contractual obligation was already impossible to perform at the time of conclusion of the contract or it was otherwise unreasonable to expect the obligor to perform as such in light of the intent of the contract, such contract is valid provided that the parties have not agreed otherwise.
Example 3: Limitation of Avoidance

• Pre-Assimilation Japanese Law on Avoidance
  – General Rule: Nachfrist Procedure (Art 541)
    • “Fault” required
  – Exception 1: No-fault Immediate Avoidance
    • when time is of essence (Art 542)
    • impossibility (Art 543)
    • failure of the purpose of contract due to hidden defects in goods (Arts 570 & 566), etc
  – Exception 2: Case Law Limitation of Nachfrist avoidance
    • breach of ancillary obligations: avoidance allowed only when purpose of contract fails
Example 3: Limitation of Avoidance

- Interpretive Assimilation (1)
  - Impact of the CISG (before accession): Study of “Fundamental Breach” (1990s)
    - following entering into force of the CISG in 1988, but prior to Japan’s accession to the CISG
    - Re-evaluation of the function of avoidance: from “sanction on the breaching party” to “release of the aggrieved party”
    - failure of “purpose of the contract”
      - Cf. denial of “fault” as a requirement of Nachfrist avoidance
Example 3: Limitation of Avoidance

- Interpretive Assimilation (2): Reorganization
  - “Failure of Purpose of the Contract” as a general requirement
  - Explicit requirement:
    - when time is of essence (Art 542 CC)
    - hidden defects (Arts 570 & 566 CC)
    - ancillary obligations (case law on Art 541 CC)
  - Implicit requirement (by definition)
    - Impossibility (Art 543 CC)
    - Non-ancillary obligations (case law on Art 541 CC)
Example 3: Limitation of Avoidance

• Legislative Assimilation
  – Draft Proposal on avoidance (Art 3.1.1.77)
  – Fundamental Breach as a general requirement ... 
    • Impact of Interpretive Assimilation
  – Fundamental Breach Defined
    • Breach is fundamental if “as a result [of non-performance] the other party loses reasonable expectation with regard to the contract.”(DP 3.1.1.77(1)(a)) ... “failure of purpose”
    • Note: lack of “foreseeability” requirement (cf. Art 25 CISG) ... emphasis on “failure of purpose”
Another Example of a Variation

• Scope of damages includes loss foreseeable at the time of non-performance (3.1.1.67(2))
  – 【3.1.1.67】(Scope of damages)
    (1) […] the obligee may make a demand to the obligor for compensation of damage as the result of non-performance which, at the time of conclusion of the contract, both parties foresaw or should have foreseen.
    (2) Even in cases where the obligor foresaw or should have foreseen the damage after the conclusion of the contract up until the point of non-performance of the obligation, if the obligor did not take reasonable measures to avoid the damage, the obligee may make a demand to the obligor for such compensation.

• Emphasis on “mitigation of the other’s loss” … cooperation
Variations of “favor contractus”

- **CISG**
  - Emphasis on “Presentation” and predictability: Foreseeability (at the time of contract)
    - Fundamental Breach (Art 25)
    - Scope of Damages (Art 74)
  - Strong “presentation”, mild “favor contractus”

- **Japan**
  - Lack of or limited role of foreseeability requirement
    - Fundamental Breach: Emphasis on “failure of purpose”
    - Scope of damages: includes loss foreseeable at the time of non-performance
  - Mild “presentation”, radical “favor contractus”
    - Cf. adaptation due to changed circumstances (3.1.1.91)
Conclusion

• CISG as a catalyst toward law reform
  – Impact in a non-contracting state
  – *Lingua franca* (not as applicable law but as a common platform)

• Variations of “Favor Contractus”
  – On the scale, mild “favor contractus” in CISG;
    radical “favor contractus” in Japan’s Draft Proposal
Thank you!

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