

The Adoption of the CISG in Iran: Practical Difficulties in Implementing the CISG

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Abstract: The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a successful story of uniform law. It has been ratified by 84 states representing all legal traditions and economic systems. Leading trading states worldwide whose combined economies make up nearly two-thirds of all world trade are parties to the CISG.

The CISG has been used as a model for regional and national contract law reform in various parts of the world. The benefits of adoption of the CISG for traders in terms of predictability of applicable law and ease of choice of law are undeniable; nevertheless, Iran has not yet adopted the CISG.

Iran should seriously consider adoption of the CISG, given that the Iranian Civil Code, the main source of sale of goods, is not suitable for international trade. Therefore, the author's fieldwork in Iran concerning the practical difficulties that may arise in implementing the CISG in Iran can provide answers as to why Iran has not adhered to the CISG and how to overcome those difficulties.

1. Introduction:

The United Nations Convention on Contracts for the International Sale of Goods has been ratified by 84 states¹ that account for a significant proportion of world trade. Despite the declaration in the Preamble about contributing to the achievement of a New International Economic Order (NIEO) and promoting the development of international trade on the basis of equality and mutual benefit, a disproportionate number of developing countries, including Iran, have not ratified it.

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¹ As of 29 December 2015, UNCITRAL reported that 84 states have adopted the CISG.

'CISG: Table of Contracting States' <<http://www.cisg.law.pace.edu/cisg/countries/cntries.html>> accessed 7 March 2017.

The Iranian Civil Code, the main source of the law of contract, was first prepared in 1928 and then completed in 1935–36.² This code has remained untouched for 80 years. During that time the volume, complexity and international character of commercial transactions have changed and the Iranian Civil Code is no longer suitable for modern international trade. The language of the Code and its terms are not suitable for international sales in the sense that there are elements of ambiguity and uncertainty in the provisions of the Iranian Civil Code. On top of that, the fact that it is not a well-established and well-known body of law might discourage Iran's trading partners from adhering to the Iranian Civil Code. This could put Iranian commercial traders in a disadvantageous position at the time of choice of applicable law during contract drafting. While each contractual party typically wishes to apply its national law, this may lead to choosing the law of Iran's trading partner (owing to the unpopularity of the Iranian Civil Code and/or unfamiliarity with it). In that case, if a dispute should arise, additional research at significant cost would be necessary to ascertain the actual content of the law chosen.³ That is where the adoption of the CISG might be beneficial to Iran. The CISG, which is a more modern document developed in the light of the international character and complexity of current trade practices, responds better to international commerce. Therefore, it could be used by Iran to embark on updating its own domestic law of sale.

2. Fieldwork Summary in Iran

In 2011/2012, the writer conducted a survey in Iran. The aim of the fieldwork was to conduct unstructured interviews with leading figures in business, law and Government in Iran with regard to the area of international trade. The goal was to determine: (i) whether they are familiar with the CISG; (ii) whether they support/oppose its introduction, with reasons why; and (iii) whether there are any other insights/observations on the potential difficulties of implementation.

² Hamid Bahrami-Ahmadi, 'A Historical Overview on the Development of Civil Code.' (Available in Persian.)

<http://www.isu.ac.ir/publication/research-quarterly/research-quarterly_24/Research-Quarterly_2402.htm> accessed 7 March 2017.

³ 'CISG-Brazil interview with UNCITRAL Legal Officer Luca Castellani' (April 2010).

The writer issued 60 documents and received only nine responses. The small number of responses means it is important to be cautious in interpreting results. However, three tentative conclusions can be drawn:

I. Lack of Awareness

Although it is arguable that the low level of response might reflect the technical nature of the subject, the lack of awareness of and familiarity with the CISG could be considered as one of the major factors potentially hindering accession. The implications of this lack of awareness are discussed below.

This is supported by interviews/questionnaires. One example is the 'Mega Motor Company,' whose managing director admitted his unfamiliarity with the CISG. It is worth mentioning that, with the exception of three that came from academia or the legal community, other endorsements for accession came from organisations whose level of familiarity with the CISG was either low or non-existent. In other words, despite unfamiliarity, they were not opposing accession to the CISG.

II. Direct Opposition

With the exception of one vote against, the majority were in favour of adoption. However, the opposition is significant because, although it did not focus on trade issues, for instance on the fact that it is not yet evident whether the CISG would promote trade or reduce legal business (as in the UK), it focused instead on the secular nature of the CISG. A highly influential organisation that was against ratification was the Trade Promotion Organisation of Iran, which is a subset of the Iran Chamber of Commerce, Industries and Mines. Their main objection was the incompatibility of the CISG with Islamic jurisprudence.

From this point of view it is not incorrect to oppose adoption of the CISG, on the grounds that the Convention specifies provisions with regard to interest that seem

to be incompatible with Islamic and Iranian law.⁴ For example, Article 84 of the CISG states that in the event that the seller is bound to refund the price, he must pay interest on it from the date the price was paid. Also, under CISG Article 78, it is clear that interest must be paid to the aggrieved party.

But this does not in fact introduce a radical change, since Iranian law recognises late payment compensation (Articles 515(2) and 522 of the Iranian Civil Procedure Code 1379 (2000)), which is very similar to the notion of interest.⁵ Moreover, when an action is brought outside Iran, Iranian authorities do request interest in their dealings and litigation arbitration proceedings with foreign corporations.⁶

Hence it could be very difficult politically to promote access to the CISG in Iran. Those who prefer secular law may feel that it is unwise to promote the Convention, as it may invite closer scrutiny of the Civil Code. It is only speculation, but it may explain the low rate of return of the questionnaires.

III. There Is Some Support for the CISG

Several respondents stated their willingness to adhere to the CISG, but one went a step further and explained that Iran's accession to the New York Convention (1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) on 15 October 2001⁷ implies that accession to the CISG is feasible. Those respondents who were very familiar with the CISG and in favour of accession put forward their arguments as follows:

⁴ 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, Report of the First Committee.' <<http://cisgw3.law.pace.edu/cisg/1stcommittee/summaries78,84.html>> accessed 7 March 2017. Egyptian Delegate proposed 'it would be advisable to provide for reservations which would permit any country, particularly those where the concept of interest was incompatible with their religion, to apply the relevant clauses in a different manner.' 'LEGISLATIVE HISTORY 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 34th meeting.'

<<http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting34.html>> accessed 7 March 2017.

⁵ H Safai, M Adel, M Kazemi, and A Mirzanejad, *The Law of International Sale of Goods – A Comparative Study* (2nd edn, University of Tehran Press 2008) 446. (Available in Persian.)

⁶ Sayed Hassan Amin, 'Banking and Finance Based On Islamic Principles – Law and Practice in Modern Iran' (1989) 9 *Islamic and Comparative Law Quarterly* 1.

⁷ The New York Convention came into force on 13 January 2002.

1. Iran's accession to the Convention would appear to have benefits for Iran at an international level. It is believed that it would promote Iran's international trade and be beneficial for its economic growth and development. Iran's trading partners would be able to predict the governing law of the contract. This governing law, which is familiar to them and derived from international customs and trade usages, would enable them to enter into contracts with Iran with a higher degree of certainty, which would in turn lead to the building of stronger relations.
2. Accession to the Convention would not mean that our own national law would be neglected or abandoned. Since the Convention governs only international sales contracts between parties whose places of business are in two different countries, the Iranian Civil Code would still govern contracts of sales made nationally.
3. A comparative study of the CISG and the Iranian Civil Code does not suggest any radical departure from our Civil Code.

3. Future Action

The three points made above suggest the following areas of action:

I. Awareness

There is clearly a great need for further awareness. The outcome of this survey shows that there is a lack of familiarity with and awareness of the CISG within the business community in particular. The problems this brings include not only a lack of support for the CISG but also the likelihood that the transition to the CISG would be more difficult. Although the writer in her thesis submitted for the degree of Doctor of Philosophy in 2013/14⁸ has discussed that the CISG is preferable in many ways to the Civil Code, and that there are not that many incompatibilities between the two legal systems, many of the benefits would not be obtained if the legal and business

⁸ Mona Ahadi, 'The United Nations Convention on Contracts for the International Sale of Goods: Should Developing Nations Such As Iran Adopt the CISG?' (PhD thesis, University of Durham 2013). <http://etheses.dur.ac.uk/16/1/Completed_Thesis.MA.pdf?DDD19+> accessed 7 March 2017.

community lacked the knowledge to take advantage of the CISG. Moreover, there is a risk that their lack of knowledge might increase the cost of doing business rather than reduce it, as the CISG is intended to do.

The CISG allows contracting parties to opt out of its provisions and choose the application of a different body of law. The source of this autonomy is contained in Article 6 of the Convention, which permits signatories to 'opt out' of the Convention in its entirety or to derogate from or vary the effect of any of its principles. The reasoning behind this was that parties could always opt out of the provisions they wanted to avoid, and this is very useful, in particular for persuading sceptics to adopt the CISG. For example, in Iran those contracting parties that did not wish to apply the provisions on interest could declare that such provisions did not apply to their contract. However, anecdotal evidence suggests that, in taking advantage of Article 6, the legal profession fails to apply the CISG in cases where it could be very useful.⁹ The statistics show that the rate of opt-out by lawyers in the US stands somewhere in the region of 55% to 71%. The figures for Germany, Switzerland, Austria and China are 45%, 41%, 55% and around 37% respectively.¹⁰ But the question is, why do the lawyers opt out of the CISG? But, though the answer to this could be much extended, one of the main reasons is, again, lack of awareness and knowledge of the CISG. For instance, in the US, although it is a signatory state to the CISG, some 44% of lawyers are not at all familiar with the Convention.¹¹

So how does one compensate for this lack of awareness? It seems that the most important resources through which one can raise awareness are law schools and the publication of scholarly writings, commentaries and court decisions in specialised and general law reviews. Time, cost and effort are indeed required at the start to become familiar with the CISG, but, given the position of Iran in the international community, such expenditure would seem to be of vital importance. It is then up to

⁹ Bruno Zeller, 'The CISG – Getting off the Fence' (2000) 74(9) *The Law Institute Journal* 73.

¹⁰ Lisa Spagnolo, 'A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)' (2009) *Vindobona Journal of International Commercial Law and Arbitration* 135, 140.

¹¹ *ibid.*

the legal and business communities to make their desire to ratify the CISG clear to the Government.

There is also an issue with the transition from the Civil Code to the CISG, but this should not create serious difficulties, as education would focus on ensuring that lawyers and professionals were comfortable with the CISG and could see its advantages. The writer acknowledges that there are some valid objections to the CISG that are related not to its usefulness but to its compatibility with Islamic principles. Therefore, this issue will need to be addressed separately.

II. Concern Over Anti-Islamic Elements

The one vote against ratification registered during the writer's fieldwork came from the Trade Promotion Organisation of Iran. This Governmental organisation appears to reflect the Government's view. However, the Government of Iran has never published any statement to express its direct and/or indirect opposition to ratification of the CISG.

The prohibition of interest by the *Qur'an*, which seems to be an impediment to accession to the CISG for Islamic countries, has to a certain extent been avoided by interpretation. Taking Egypt as an example, Article 226 of the Egyptian Civil Code awards interest.¹² Iraq also took a similar approach and applied award of interest to its law.¹³ More importantly, as noted above, Articles 515(2) and 522 of the Iranian Civil Procedure Code 1379 (2000) introduce compensation for late payment, which is similar to the notion of interest.

¹² Article 226 of Egyptian Civil Code reads:

'When the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made, the debtor shall be bound, in case of delay in payment, to pay the claimant, as damages for the delay, interest . . .'

¹³ Fatima Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (2001) 13 *Pace International Law Review* 1.

Such interpretations perhaps explain why those Islamic countries that are party to the CISG¹⁴ have not made reservations on Article 78, which deals with interest. One could however argue that the reason these countries can apply interest is that the Western legal structure has had a great impact on their legal systems, and the same approach may not apply to other Islamic countries. Although this is true, there is still Article 6 of the CISG, which formulates safety for Islamic countries, should they decide to avoid application of Article 78 of the CISG. Article 6 of the CISG, which provides that ‘the parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions,’ exemplifies the fundamental principle of freedom of contracts given to the parties.

III. The Community That Would Probably Overcome (I) and (II)

It is the duty of this group – the community that is aware and in support of accession – to further facilitate accession to the CISG. It could be achieved by raising greater awareness and knowledge of the CISG through the use of the CISG database. ‘The database is a collaborative effort between the Institute of International Commercial Law and the Pace Law Library.’¹⁵ It accommodates over 2,900 cases and 1,600 full texts of commentaries. Besides, one of the main functions of the CISG Advisory Council, where a jurisdiction has not ratified it, is to encourage and help them to adopt and implement it.¹⁶ More in-depth analysis and comparative study of the two legal systems (the CISG and Iranian law) would also enable Iran to overcome any apprehension over the anti-Islamic element of the CISG. An investigation into the compatibility of the CISG with Iranian law has shown that the two legal systems are by and large similar, and, where there are differences, sufficient principles can be found within Iranian law to bridge the gap.

¹⁴ Bahrain, Egypt, Iraq, Syria and Mauritania are parties to the CISG.

¹⁵ See ‘CISG Database.’ <<http://cisgw3.law.pace.edu/>> accessed 7 March 2017.

¹⁶ Interview with Dr Loukas Mistelis, former Secretary of the CISG-AC between 2001 and 2007, (June 2004) in Joshua D H Karton and Lorraine de Germigny, ‘Has the CISG Advisory Council Come of Age?’ (2009) 27 Berkeley Journal of International Law 448, 451.
< <http://ssrn.com/abstract=1509761>> accessed 7 March 2017.