

THE LAW OF INTERNATIONAL SALES

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Introduction

International trade is an important sector of the Singapore economy, as the export of goods and services alone constitutes about half of Singapore's gross domestic product (GDP). Our largest trading partner is the United States, followed closely by Malaysia and Japan. Given the international nature of such trading transactions, the parties to these international contracts have to deal with other legal concerns in addition to the basic legal issues addressed in domestic sales transactions. The key feature of an international sales transaction is the fact that it is a sales transaction that crosses national borders. An exporter may sell goods directly to an importer abroad or he may set up a marketing organisation abroad and transact business through distributors, agents, branch offices or subsidiary companies. For example, a Singapore trader may import kiwi fruits from an Australian exporter. Some of the legal concerns of both parties remain the same as in a domestic sales transaction - what their respective rights and obligations are and what remedies are available in the event of breach. However these legal issues are further complicated by the following additional concerns:

- In the event of a dispute, should the parties sue in Singapore, Australia or elsewhere?
- As far as their respective legal rights, obligations and remedies are concerned, should the parties be bound by Australian sales law or Singapore sales law or some international sales law that may be applicable?

The answers to these questions are not easily determined. In fact they may be further complicated if the other contracting party originates from a country with a different legal system. Singapore and other Commonwealth countries share the same legal tradition based on the English common law system. The common law system of these countries originates from England and is largely embodied in case law. Its legal principles are developed through the doctrine of precedent from judgments handed down by the courts. Other countries in Asia, for example South Korea, the Philippines, Indonesia and Thailand are civil law systems. Civil law has its origins in ancient Roman law and its distinguishing feature is the emphasis on codified law. The various codes of law in the civil law countries contain the legal principles that are to be enforced and upheld by the courts. Then there are the emerging economies of China, Vietnam and Cambodia, which have had to build up a legal framework virtually from scratch and in doing so, they have borrowed heavily from the civil law system but also incorporated some common law principles, where it was feasible or suitable.

The purpose of this paper is to provide a summary of some of the issues relevant to international sales: jurisdiction and applicable laws, in particular, the UN Convention on Contracts for the International Sale of Goods, Vienna 1980 as well as Incoterms. This

paper will also include a discussion of the legal issues surrounding parallel imports in Singapore.

Jurisdiction

The first question of where the parties to an international sales transaction should be sued is that of jurisdiction, namely, which country's court has the power to adjudicate disputes. In this sense, jurisdiction means the place where the parties can refer the dispute to litigation. Hence jurisdiction can sometimes refer to the court's power or competency to hear and decide cases. At the same time it can also refer to the territorial limits within which the court has such power. Sometimes the court to which the dispute should be brought is also referred to as the "forum" of the dispute.

Jurisdiction can attach to the subject matter of the dispute or the parties to the dispute. A court can have jurisdiction over a person. This can be based on presence: that is, the party can be sued (the defendant) if he is present within the court's jurisdiction. This presence can arise because the person (an individual) is resident or domiciled there. Domicile refers to the place where a person is physically present with the intention of making it his permanent residence. A company's presence on the other hand arises from their business activities within the jurisdiction; for example, the company is incorporated within the jurisdiction. Alternatively, a court can have jurisdiction over a defendant because of the physical presence of the defendant's property within the court's jurisdiction. As an example, the Supreme Court of Judicature Act stipulates that the Singapore High

Court will have jurisdiction where the defendant resides or has his place of business or has property in Singapore.¹

A court's jurisdiction can also be based on consent. For example, the Supreme Court of Judicature Act states that the Singapore High Court has jurisdiction where the defendant consents (agrees or submits) in writing to have the proceedings tried in Singapore.² This consent can be given prior to any dispute arising in the sales contract itself which can include a jurisdiction clause stating that in the event of dispute, both parties agree to submit to the jurisdiction of the courts of Singapore. A jurisdiction clause can be either exclusive or non-exclusive. The exclusive jurisdiction clause is self-explanatory while the non-exclusive jurisdiction clause allows the parties to bring an action in another jurisdiction. A court can also have jurisdiction over the subject matter of a dispute. The courts usually have the right to regulate activities within the territory (national borders). For example, the Supreme Court of Judicature Act provides that the Singapore High Court has jurisdiction where the cause of action arose in Singapore or the facts on which the proceedings are based exist or are alleged to have occurred in Singapore.³

In addition, some courts may have extra territorial jurisdiction. This involves the exercise of a court's power to regulate activities occurring outside its jurisdiction (national borders). An example is the extra territorial effect of the US Sherman Act relating to antitrust activities.⁴ The Singapore High Court has jurisdiction over a foreign defendant⁵ provided a writ or other originating process can be served outside Singapore under the

¹ Section 16(1).

² Section 16(2).

³ Section 16(1).

⁴ See Chapter 15.

⁵ Alternatively, the court may have jurisdiction over a foreign defendant who has consented or submitted to the court's jurisdiction.

Rules of Court. In this context, service out of the jurisdiction may be allowed⁶, among other things, where

- the subject matter of the case is immovable property situated in Singapore; or
- the action is being brought against a person who is ordinarily resident in or carrying on business in Singapore; or
- the case involves a contract that was made in or breached in Singapore, or made through an agent trading or residing in Singapore; or
- the case involves a tort committed in Singapore or where the plaintiff is seeking an injunction against the defendant to do or refrain from doing anything within Singapore.

In addition to the jurisdiction to hear and determine a case, the court also has the power to stay an action that has been legitimately brought before it if there is another (foreign) court having competent jurisdiction, which is the more appropriate forum.⁷ This is the doctrine of *forum non conveniens*, which recognises that a foreign court may be a more appropriate forum or venue to hear and decide the case. Further, the court has the additional power to restrain a party, who is subject to its jurisdiction, from initiating or continuing a claim in a foreign court, by ordering a stay of the foreign action. In this latter scenario, the court has to be persuaded that the proceedings in the foreign court are vexatious and oppressive.⁸ The restraint on a party against foreign proceedings is called an anti-suit injunction.

⁶ Rules of Court, Order 11 rule 1.

⁷ *Spiliada Maritime v Cansulex Ltd* [1987] 1 AC 460 and *Brinkerhoff Maritime Drilling Corporation & Anor v PT Airfast Services Indonesia & Anor* [1992] 2 SLR 776.

⁸ *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871.

Arbitration

As an alternative to litigation, which is often inconvenient, costly and time-consuming, the parties to an international commercial dispute may refer the matter to arbitration. Arbitration is the method of settling disputes between two or more parties by the referral to a third party who acts in a quasi-judicial capacity and is empowered to make a final and binding decision (called an award). Arbitration is contractual in nature, that is, the parties must agree to submit disputes to arbitration, either before or after the dispute has arisen. It is common for parties to insert an arbitration clause in their contract stipulating that in the event of a dispute arising, such dispute is to be dealt with by arbitration. Arbitration clauses have been upheld by the courts as they are neither contrary to public policy nor do they oust the jurisdiction of the courts.⁹ The parties to an arbitration have a right to choose the arbitration system and the arbitration venue. In this part of the world, there are International Arbitration Centres in Hong Kong, Tokyo, Sydney and Singapore as well as a Regional Arbitration Centre in Kuala Lumpur, Malaysia. Further afield are the traditional International Arbitration Centres of London, New York, Paris and Geneva.

The Singapore International Arbitration Centre (SIAC) was set up in 1991 and the International Arbitration Act 1994 was enacted to provide a legal framework for the resolution of international arbitrations.¹⁰ Parties to an international arbitration may submit

⁹ *Scott v Avery* (1856) 5 HLC 811.

¹⁰ For further details of the statute, see “International Arbitration Act – A Model to Follow” Lawrence GS Boo, (1995) 7 *Asia Business Law Review* 69 or “Alternative Dispute Resolution in Singapore”, Andrew Chan (1998) 19 *Asia Business Law Review* 53.

their disputes to the SIAC. An international arbitration¹¹ is an arbitration, inter alia, where one of the parties has a place of business outside Singapore; or performance of the contract is outside the state of the parties' places of business or where the parties have agreed that the subject matter of the arbitration agreement relates to more than one country.

Proper Law of the Contract

Where a sales transaction has connections with more than one country, the next question is which country's law will govern the contract. This may be significant because the laws of each country may be different. For example, the common law applied in England and Singapore differs from the civil law of other European countries. Even with countries from the common law tradition, such as England, the United States and Australia, their contract laws are not identical. The answer to the question of which country's law applies is determined through the use of a set of rules called the conflicts of laws rules (also known as rules of private international law).

The common law recognises the parties' freedom to contract and upholds their choice of the applicable law. Hence the parties can incorporate an express choice of law clause specifying that the contract and disputes arising therefrom shall be governed by Singapore law. In practice, the parties can, and often do, specify the law governing the contract, and the parties' choice of law is usually upheld by the courts.¹² This means that the courts will give effect to the parties' choice of law. Sometimes, however, the parties may not have made an express choice of law for various reasons: ignorance, oversight or

¹¹ International Arbitration Act, section 5(2).

inability to come to a mutual agreement. In that case, the court will decide on the proper law of the contract based on conflicts of law rules.

Conflicts of law rules differ from country to country. According to common law conflicts of law rules, in the absence of an express choice of the parties, the law governing the contract is the law of the place with which the contract has the closest and most real connection.¹³ When the court has to determine the proper law of the contract, it will take into account all surrounding circumstances at the time the contract was made. Factors that are relevant for determining the closest and most real connection include the currency and place of payment,¹⁴ the choice of a particular forum as contained in an express jurisdiction clause, the language of the contract and the use of standard form contracts originating from a particular country.

The proper law of the contract has to be determined by a court. This means that there has to be a legal proceeding to decide which law governs the contract even before the dispute can begin to be resolved by the courts. This may result in delay and uncertainty (as to which is the governing law) and for these reasons, parties to international sales transaction are encouraged to include an express choice of law clause in their contract.

Enforcement of Foreign Judgments and Arbitration Awards

Even when the plaintiff in an internal sales dispute has obtained a court judgment, the judgment has still to be enforced. If the defendant or judgment debtor has assets in the

¹² Lord Diplock in *Amin Rasheed v Kuwait Insurance Co* [1984] 1 AC 50, said that, “English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed.”

¹³ *Amin Rasheed v Kuwait Insurance Co*.

¹⁴ *The Assunzione* [1955] P 150.

jurisdiction in which judgment has been obtained, there will not be any problems in having the judgment enforced. However, if the judgment has to be enforced in another country other than the country in which judgment has been obtained, this raises various issues. In most jurisdictions, the basis of enforcing a foreign judgment is reciprocity of treatment, that is, the foreign court must accord the same treatment to judgments of the local court enforcing the foreign judgment. In some jurisdictions however, the enforcement of foreign judgments is not available and the judgment creditor has to commence a fresh action on the judgment debt in the jurisdiction where the defendant's assets are situated.

In Singapore, the registration of foreign judgments is regulated either by the Reciprocal Enforcement of Commonwealth Judgments Act¹⁵ or the Reciprocal Enforcement of Foreign Judgments Act.¹⁶ Once registered, a foreign judgment will have the same effect as judgments obtained from a Singapore court. Likewise, foreign arbitral awards can be enforced in Singapore pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁷

Uniform International Sales Laws

If the parties find it difficult to come to a mutual agreement on the particular national law that should govern the contract, they can opt for the contract to be governed by an international sales convention, such as the 1980 United Nations Convention on Contracts for the International Sale of Goods Vienna (also known as the Vienna Convention). These

¹⁵ Cap 264.

¹⁶ Cap 262. However, this legislation is not operative as the privileges therein have not been extended to any country as yet.

¹⁷ Singapore ratified the Convention in 1987.

international conventions have the advantage of neutrality and hence are more acceptable to parties in the global business community even though they come from different countries. Alternatively, the parties can resort to standard form contracts; for example in commodities trading like grain, metals or petrol, the traders can adopt the standard form contract of the Grain and Feed Trade Association, the London Metal Exchange or the International Petroleum Exchange (London), respectively. The purpose of these standard form contracts is to achieve a fair balance of the rights and interests of both parties, eliminate uncertainty and controversy over legal terms which may have different connotations in different legal systems. A further example is Incoterms, which is a set of trade terms developed by the International Chamber of Commerce (ICC) for the use of the international trading community. The next part of this chapter will discuss the Vienna Convention followed by a brief summary of the trade terms comprised in Incoterms.

Vienna Convention (CISG) – Application And Scope

The objective of the 1980 United Nations Convention on Contracts for the International Sale of Goods Vienna (CISG) is to harmonise laws governing international sales. It aims to serve as a code of uniform law for international sales and it incorporates principles of common law, civil law and Socialist law. Given that the CISG strikes a compromise between principles from different legal systems, numerous criticisms have been leveled against it.¹⁸ Nonetheless, despite its shortcomings, it should be applauded as a worthwhile attempt at harmonisation in place of the diversity that would otherwise prevail. Various

¹⁸ The CISG has been said to be ambiguous and inconsistent, R Goode, *Commercial Law* Penguin Books, 2nd ed, 1995 at p 927.

benefits or advantages of the CISG have been identified. It is more suitable for international sales as it takes into account modern trade practices and commercial realities.¹⁹ Unlike domestic or national sales laws, it has the advantage of being made specifically to fit the special needs of international trade.²⁰ For example, it recognises and allows for the incorporation of international trade usages such as Incoterms. At the same time, it is more flexible and practical as it focuses on the “preservation of the contract notwithstanding default or other non-compliance”.²¹

The CISG was approved by the UN Conference in 1980, and came into effect on 1 January 1988. To date it has been ratified by over 50 countries.²² Singapore acceded to CISG on 16 February 1995 and the Sale of Goods (UN Convention) Act 1995 was passed and came into effect on 1 March 1996. Hence the CISG applies to international sales contracts entered into after this date. To be precise, the CISG applies to a sale of goods between parties, whose places of business are in different contracting states, that is, states that have acceded to the CISG.²³ Nevertheless, the CISG does not apply to domestic sales in Singapore, as the Sale of Goods Act²⁴ provides adequate rules for domestic transactions. Neither does the CISG apply to all international sales. It applies only if each party’s place of business is in a different country and both have acceded to or ratified the CISG. If a party has more than one place of business, then the place of business shall be the place with the

¹⁹ Charles Lim Aeng Cheng, “Sale of Goods (UN Convention) Act 1995: A New International Sales Regime” 10 [1995] *Asia Business Law Review* 71 at p 73.

²⁰ See note 3 above.

²¹ See note 3 above, at p 74.

²² As at 16 October 1998, the countries that have ratified or acceded to the CISG include the US, China, Australia, and NEW Zealand but not the United Kingdom, Japan, nor ASEAN countries like Indonesia, the Philippines, Malaysia nor Thailand

²³ Article 1(1)(a), CISG.

²⁴ See Chapter 1.

closest relationship to the contract and its performance; and if a party does not have a place of business, then reference is to be made to his habitual residence.²⁵

Another noteworthy point is the fact that the contracting parties can exclude the application of or derogate from, or vary the effect of, provisions of the CISG.²⁶ This means that the CISG will govern the international sales contract made between parties in different contracting states unless the parties have expressly excluded the application of the CISG by exercising the option of contracting out of the CISG. This is an important point for Singapore traders to bear in mind since Singapore is a contracting state and hence the CISG will automatically apply if a local trader deals with a trader from another contracting state, unless the CISG is expressly excluded from the transaction. In other countries, the CISG may also normally be applicable when the rules of private international law lead to the application of the law of a contracting state.²⁷ However, this alternative is not applicable here as Singapore has expressly elected, under a reservation allowed in Article 95, not to be bound by that provision. There are other alternative ways (aside from those provided for in the Sale of Goods (UN Convention) Act 1995) by which the CISG may be applicable to an international sales contract. The CISG can have effect by the choice of the parties as expressed through an incorporation clause, by trade usage and as part of the *lex mercatoria*.²⁸

The CISG provides uniform rules to govern international sales of goods. So it would not apply to contracts for labour or services, leases, or licences, joint ventures or foreign investment agreements. Having said that, it does not apply to all transactions

²⁵ Article 10, CISG.

²⁶ Article 6, CISG.

²⁷ Article 1(1)(b), CISG.

²⁸ R Goode, *Commercial Law* Penguin Books, 2nd ed, 1995 at p 929.

involving international sales of goods. It is not applicable in consumer transactions (goods bought for personal, family or household use); sale by auction; sale on execution or otherwise by authority of law; sale of stocks, shares, investment securities, negotiable instruments or money; sale of ships, vessels, hovercraft, aircraft or sales of electricity. The CISG also does not apply where the preponderant part of the obligations of the party who furnishes the goods consists of the supply of labour or other services.

The CISG governs only the formation of the contract of sale and the general rights and duties of buyer and seller. In these matters, the CISG has altered the law of sales as we know it. However, the CISG is not all-encompassing as it does not provide²⁹ for the validity of the contract or its terms or usage (which will have to be determined by the proper law of the contract, or Incoterms, if it has been incorporated); nor the passing of property in the goods, nor the liability of the seller for death or personal injury caused by goods to any person (so product liability is excluded from the CISG). The CISG is silent on the question of capacity to contract, and vitiating factors such as fraud, illegality, duress and undue influence, all of which will be dealt with under the proper law of the contract or the *lex situs*, the law of the place of performance of the contract. Where there is a lacuna in the CISG, the gaps will have to be determined according to the proper law of the contract.³⁰ For example, if the parties had expressly chosen Singapore law as the proper law of the contract, then these issues will be resolved with reference to the Sale of Goods Act. Formalities are not required, and the contract of sale need not be in writing³¹ unless a contracting state makes a declaration otherwise.³²

²⁹ Articles 4 & 5, CISG.

³⁰ Article 7(2), CISG.

³¹ Article 11, CISG.

³² Pursuant to Article 96.

Before taking a closer look at the articles contained in the CISG, it should be borne in mind that the aim of the CISG is that of harmonisation of international sales law. It expressly states that its interpretation should take into account its international character and the need to promote uniformity in its application. To achieve uniformity and consistency in the fullest sense, courts faced with questions of interpretation should refer to decided cases from other jurisdictions.³³ For this purpose, UNCITRAL provides abstracts of cases relating to the CISG.³⁴

Formation of Contract

The CISG rules relating to offer and acceptance are a mixture of civil law and common law, hence those of us familiar with the common law will find that there are some deviations.³⁵ The first difference to note is that consideration and intention to create legal relations are apparently unnecessary elements for the formation of the contract since the CISG makes no reference to such concepts. The CISG does, however, adopt the common law concept of the invitation to treat where a proposal is made to the public at large.³⁶ An offer, on the other hand, must be sufficiently clear as to the goods and the price and the offer must reach the offeree. An offer may be revoked prior to acceptance, unless it was an irrevocable offer. It is observed that an offer can be made irrevocable without being supported by consideration. An offer can be made irrevocable simply by stating that it is so

³³ Locknie Hsu, "Remedies Available for Breach of Contract under the UN Convention on Contracts for the International Sale of Goods" (1996) 8 *Singapore Academy of Law Journal* 113.

³⁴ These abstracts can be found at the UNCITRAL's website at <http://www.un.or.at/uncitral/english/clout/abstract/>.

³⁵ CISG, Articles 14 – 24. See also note 3 above at p 74 and Chan Leng Sun, "Sale of Goods (United Nations Convention) Act 1995", (1996) 8 *Singapore Academy of Law Journal* 104 at p 106.

³⁶ Article 14(2), CISG.

or merely by fixing a time for its acceptance or if it was otherwise reasonable for the offeree to rely on it as being irrevocable.³⁷

Next, the CISG gives effect to the concept of the counter-offer, but it deviates from the common law in the sense that a non-material discrepancy is capable of taking effect as an acceptance of the offer provided the offeror does not object to the discrepancy.³⁸ To provide greater clarity and certainty and to minimise uncertainty as to the exact scope of what constitutes a non-material alteration of an offer, the CISG elaborates that additional requirements or variations in terms of price, payment, quality and quantity of the goods, place and time of delivery and liability of the parties are considered as material alterations. The CISG further requires acceptance of the offer to reach the offeror, and in this context does not adopt the postal acceptance rule³⁹ as it provides that the acceptance is effective only when it reaches the offeror's mailing address.

Duties of Buyer and Seller

Under the CISG, the duties of the seller⁴⁰ basically involve the delivery of goods and the handing over of documents, while the buyer's duties⁴¹ are to pay the price and take delivery of the goods.

Remedies under the CISG are very different from remedies under the Sale of Goods Act. A breach of contract occurs when either party fails to perform their obligations under

³⁷ Article 16, CISG.

³⁸ Article 19, CISG.

³⁹ The postal acceptance rule provides that an acceptance of an offer is valid upon posting of the letter of acceptance.

⁴⁰ Articles 30 – 44, CISG.

⁴¹ Articles 54 – 60, CISG.

the contract or under the CISG. The buyer's remedies depend on whether the seller's breach was a fundamental breach. That phrase is defined⁴² as a breach that results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. Aside from this concept of fundamental breach, the CISG does not endorse the common law dichotomy between a breach of condition and a breach of warranty. The doctrine of frustration of the contract is also embodied in the CISG,⁴³ but the effect is not as extensive as that available under the Frustrated Contracts Act. Frustration under the CISG operates only as a defence to a claim for damages and does not terminate the entire contract.

The buyer's remedies for breach include, but are not limited to, a claim for damages, rescission and specific performance (in cases where damages are inadequate as a remedy). The buyer may require specific performance by the seller of his obligation unless the buyer has resorted to a remedy that is inconsistent with this requirement.⁴⁴ However, a court is not bound to give judgment for specific performance unless the court would do so under its own law in respect of contracts not governed by the CISG.⁴⁵ Hence specific performance is not automatically available and depends on the law of the forum. The buyer may reject a delivery of non-conforming goods and require the delivery of substitute goods, provided the non-conformity constitutes a fundamental breach of the contract and a request for substitute goods is made either in conjunction with notice given under Article

⁴² Article 25, CISG.

⁴³ Article 79, CISG.

⁴⁴ Article 46, CISG.

⁴⁵ Article 28, CISG.

39 or within a reasonable time thereafter.⁴⁶ Alternatively, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstance.⁴⁷ However, a buyer will lose his right to rely on non-conformity⁴⁸ if he does not give the seller notice specifying the defects within a reasonable time, and in any event he loses that right if he does not give notice within 2 years from the date when the goods were handed over, unless a longer guarantee was given. The buyer also has the option of fixing an additional time period for the seller's performance of his obligations.⁴⁹

In addition to specific performance, the buyer may avoid the contract if the seller's failure amounts to a fundamental breach or if the seller fails to deliver within the extended period of delivery.⁵⁰ The buyer is also entitled to damages,⁵¹ which includes loss of profits and the difference between the price of substitute goods and the contract price. The innocent party who is claiming damages has to take measures to mitigate his loss. The buyer may reduce the price in proportion to the value of the goods delivered if the goods do not conform to the contract.⁵²

The seller's remedies for breach of contract include the options of specific performance (that is, requiring the buyer to pay the price, taking delivery or performing his other obligations),⁵³ fixing an additional time period for the buyer's performance of his obligations,⁵⁴ declaring the contract avoided where there is a fundamental breach or where

⁴⁶ Article 46, CISG.

⁴⁷ Such request for repair must be made either in conjunction with notice given under Art 39 or within a reasonable time thereafter.

⁴⁸ Article 39, CISG.

⁴⁹ Article 47, CISG.

⁵⁰ Articles 49 & 72 – 73, CISG.

⁵¹ Articles 45, 74 – 77, CISG.

⁵² Article 50, CISG.

⁵³ Article 62, CISG.

⁵⁴ Article 63, CISG.

the buyer fails to pay or take delivery within the extended period of delivery⁵⁵ and claiming damages.⁵⁶

Either party is also entitled to suspend the performance of its contractual obligations if it becomes apparent that the other party is not going to perform a substantial part of his obligations due to inability to perform, or lack of creditworthiness or conduct.⁵⁷ This remedy of suspension of one's performance in an event of anticipatory breach does not exist in common law

Passing of Risk

The CISG also makes provisions relating to the passing of risk.⁵⁸ Unlike the position under the Sale of Goods Act, risk does not pass with property, but passes instead with delivery. Hence risk vests generally in the party who has control over the goods. In a contract of sale involving a carriage of goods the risk passes to the buyer when the goods are handed over to the carrier, provided the goods have been clearly identified. If goods are sold in transit, risk passes to the buyer at the time of contract, subject to agreement otherwise. In all other cases, risk passes to the buyer when he takes over the goods. If the buyer does not take over the goods in due time, risk passes when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery. It should also be noted that loss of or damage to the goods after risk has passed does not discharge the buyer from his

⁵⁵ Article 64, CISG.

⁵⁶ Articles 61, 74 – 77, CISG.

⁵⁷ Article 71, CISG.

⁵⁸ Articles 66 – 70, CISG.

obligation to pay the price, unless loss or damage was due to an act or omission of the seller.⁵⁹

Incoterms – Documentary Sales

Parties to international sales transactions have developed certain special trade terms used commonly to allocate rights and duties between themselves. These trade terms have been expressed through various standard abbreviations and each type of term carries with it specific legal consequences. The most common trade terms are CIF and FOB. However, uncertainties may still exist because the interpretation of these terms can vary depending on the law governing the contract. For example, the definitions of these trade terms under the US Uniform Commercial Code are different from their definitions in English common law, so to avoid controversy, the parties should specify which set of definitions are to apply. Parties to an international sales transaction can choose to adopt the definitions set out in Incoterms: International Rules for the Interpretation of Trade Terms, which is a set of international rules for the interpretation of trade terms published by the International Chamber of Commerce, the latest of which is the 1990 edition. Parties who wish to use Incoterms must specify that the provisions of Incoterms govern the contract. Article 9 of the CISG provides that parties are also bound by practices established between themselves or those widely used in international trade, which they knew or ought to have known. Hence a sales transaction governed by CISG can incorporate Incoterms as well. Where trade usage or practice conflicts with CISG, the former will prevail.

⁵⁹ Article 66, CISG.

Incoterms deal with rights and duties of the parties relating to methods of delivery and obtaining import and export clearance, and allocation of costs (in terms of calculation of the price), title and risk. For the sake of convenience, they are classified into 4 groups.

Group E

In this group, the seller's obligations are the simplest. In an EXW (Ex Works) contract, the seller has to make goods available to the foreign buyer at the seller's own premises which is usually a factory or warehouse. Hence the seller need not be involved in shipping the goods. The buyer bears all the costs as well as risks involved in the transportation of the goods from the seller's premises. The buyer under this term should ensure that he can carry out either directly or indirectly the export formalities for the goods, otherwise the FCA term may be more appropriate.

Group F

In this group, the seller has to deliver goods to a carrier (appointed by the foreign buyer) at a named port. In an FOB (Free on Board) contract, the seller fulfills his obligation to deliver when the goods have passed over the ship's rail at the named port of shipment and the buyer has to bear all costs (eg import clearance costs and cost of shipping and transportation) and risks of loss or damage to the goods thereafter. In an FOB contract, the seller has to clear goods for export and pay export clearance costs and other costs until goods have passed ship's rail. However, the seller is not responsible for contracting

carriage or insurance for the goods. The buyer's duties on the other hand, are to pay the contract price, clear the goods for import, contract for the carriage of goods, give sufficient notice to the seller of the name of the ship nominated, the loading port and required delivery time, take delivery of the goods on board the ship at the port of shipment and bear the risk of loss or damage henceforth.

The FOB contract can only be used for sea or inland waterway transport. For roll-on/roll-off or container traffic, the FCA term is more appropriate. The seller in a FCA (Free Carrier) contract fulfills his obligation when he delivers goods into the custody of the carrier (carriage can be by rail or by air) at a named point. Another variant is the FAS (Free Alongside Ship) contract where the seller's obligation is to deliver the goods alongside the nominated ship at the loading place or in lighters at the named port of shipment. Henceforth the buyer has to bear all costs and risks of loss or damage to the goods.

Group C

In this group, the seller contracts for carriage but is not liable for the risk of loss or damage to goods or additional costs incurred due to events happening after shipment and dispatch of the goods. The CIF (Cost, Insurance & Freight) contract is the most common type of international sale of goods contract. In a CIF contract, the price of the goods includes the cost of the goods, cost of marine insurance and freight. The seller will arrange transportation or carriage of the goods as well as insurance during transportation and obtain the documents (bill of lading, insurance policy) from the carrier and the insurer. Upon fulfillment of his obligations, the seller will present the documents (bill of lading, marine

insurance policy and invoice showing the price) to the buyer for payment. Hence CIF contracts have been described as contracts for the sale of documents because the seller fulfills his obligation by delivery of the proper documents. The seller must arrange for delivery of the goods on board ship at the named port of shipment at the specified time or period and pay cost and freight up to the port of destination, obtain export clearance at his expense, and contract and pay for marine (cargo) insurance (on minimum coverage) against risk of loss or damage during shipment.

Risk of loss or damage to the goods passes to the buyer when the goods have been delivered on board the named ship (when the goods pass the ship's rail). The buyer's duties are to pay the price of the goods, obtain import clearance at his expense, give the seller sufficient notice of the time of shipment and/or port of shipment and/or port of destination, and take delivery of goods on board ship at the named port of shipment at the specified time or period and pay the costs relating to goods after delivery.

Variations of the CIF contract include CFR (Cost & Freight); CPT (Carriage Paid to), which requires the seller to pay the cost of carriage to a named point and CIP (Carriage and Insurance Paid to) which requires the seller to pay the cost of carriage and insurance to a named point.

Group D

In this group, the seller has to pay the costs as well as bear the risks involved in bringing the goods to the country of destination (usually the buyer's country). In a DAF (Delivered at Frontier) contract, the seller has the obligation to deliver the goods, cleared for export at

the named point and place at the frontier, before the customs border of the adjoining country. In a DES (Delivered Ex Ship) contract, the seller's obligation is to deliver the goods on board ship and bear all the costs and risks involved in shipping the goods to the named port of destination. The seller need not however, clear the goods for import. The seller in a DEQ (Delivered Ex Quay) contract has to deliver the goods to the buyer on the quay at the named port of destination and clear the goods for import, hence this term should not be used if the seller is not able to obtain, either directly or indirectly, import clearance. Under a DDU (Delivered Duty Unpaid) contract, the seller has to deliver goods to the named place in the country of importation. In this respect, he has to bear all costs and risks thereto. However, he is not liable for duties, taxes and other charges payable for the import of the goods. In a DDP (Delivered Duty Paid) contract, the seller has to bear the additional charges of duties, taxes and other import charges.

Parallel Imports: The Controversy between Distributors and Importers

In international sales of goods that are protected by intellectual property laws, an issue may arise as to the legality of these goods in the country of import. There has been an increasing trend of parallel imports⁶⁰ into Singapore, in particular, of cosmetics, luxury cars and music compact discs. The question of the legality of parallel imports requires an appreciation of economic and trade policy issues as well as a knowledge of intellectual property laws.

A parallel import scenario involves goods that are lawfully (in terms of compliance with intellectual property laws) put on the market in the country of export. An importer then brings the goods into Singapore. The distributor of the goods in Singapore (country of

import) objects to the importation, basically because the importer is competing for his share of the market and very often, the importer's goods are sold more cheaply. Hence the imports are said to be imported parallel to the authorised distribution network.

It is apparent that the question of the legality of parallel imports involves the legality of the means of distribution of the goods, which is essentially a trade issue. However, the issue is not isolated to one of trade alone, as the legality of the goods and transactions with them concern intellectual property rights. This is because the grounds on which the Singapore distributor relies to oppose the parallel import is based on intellectual property laws because these laws allow owners of goods to prohibit the import and sale of goods in certain circumstances. Yet, there is no such thing as the law of parallel imports, and they are indirectly governed by intellectual property rules relating to restrictions on imports of goods. This has led one commentator⁶¹ to allude to the fact that parallel importing is a negative right, that is, it is allowed unless expressly prohibited by statute.

In order to comprehend the law applicable to parallel imports, the reader first needs to have an appreciation of the circumstances in which parallel imports come about as well as the trade and economic policy considerations surrounding parallel imports. So how do parallel imports come about? They come about because there is an incentive for the local trader to import the goods for sale even though the goods are already available locally through a local distributor. This incentive is the profit margin for the exporter that comes from the price differential in the exporting country and the importing country. This enables the importer to sell the goods at competitive prices, thus passing some of the benefits to the

⁶⁰ Also known as gray market goods in the United States.

⁶¹ Simon Horner, *Parallel Imports*, Collins Professional Books, 1987, at p 169.

consumer. Understandably, local distributors are opposed to parallel imports as they disrupt their distribution network and undercut their pricing.

Proponents of parallel imports advance some basic arguments in favour of their activities. It is said that parallel imports entail greater consumer choice and price competition, hence it is an economically efficient way of getting the cheapest goods to the consumer. In short, the consumer benefits. In addition, parallel imports break down the manufacturers' practice of price discrimination, which is viewed by some as having been prompted by efforts to create a monopoly situation. Hence the argument is that the restriction of parallel imports is anti-competitive.

Opponents of parallel imports, on the other hand, also have various arguments for banning or restricting parallel imports. First, the short-term advantages of parallel imports, which are the twin benefits of competition and efficiency, are said to be illusory. In the longer term, parallel imports give rise to disincentives for research and product development and innovation because the parallel importer is a free-rider in the system. Essentially it is argued that parallel imports will prejudice the protection of intellectual property rights. The intellectual property rights owner needs exclusive distribution rights in order to capitalise on his creation rights to the fullest, so he should have the right to control what is released into each national market and on what terms. It is also feared that the entry of parallel imports will open the floodgates to the import of pirated goods, which are prohibited under intellectual property laws. The rights granted under the respective intellectual property laws in each country may not be equivalent; for example, the country of export may not recognise intellectual property rights hence the argument of opening the door to the importation of counterfeit (pirated) goods arises. However as countries race to

enact or upgrade their intellectual property laws to conform to TRIPS (agreement on Trade –Related Aspects of Intellectual Property Rights) by the year 2005, the basis for this fear would have been eradicated. It is further argued that price differentiation exists because of product differentiation, that is, the imported goods are different from the domestic product, in terms of customer service or support. Sometimes, the size of domestic market is smaller than that of the foreign market, and the unit cost of the good in the domestic market may be higher where the domestic market has its own production plant. Price differentiation is hence justified because of the different costs of marketing the goods in the domestic market. Thus additional promotion and marketing efforts are required to overcome local consumers' lack of knowledge about new products. Such efforts at promotion will be undermined by parallel imports. If consumers can get these services without paying for them by buying from the parallel importer, the authorised distributors will lose the incentive to provide such services and will stop doing so. In the long term, it is argued that the consumer will suffer.

The debate is an on-going one and governments have the unenviable task of adopting one view for the purposes of formulating their trade policy in relation to parallel imports. In this context, the choice depends on which rights are considered more important and therefore worth protecting at the expense of the interests of another group. When the government proposes to make a stand one way or another, lobbying pressure from the affected sector of the industry can be expected. For example, when the Australian Parliament proposed in 1997 to amend the Copyright Act to allow the parallel importation of music tapes and compact discs, written submissions were made to the Senate Legal and Constitutional Inquiry Committee by the Australasian Mechanical Copyright Owners'

Society (AMCOS), the Australian Music Publishers Association Limited (AMPAL) and the Australian Performing Rights Association (APRA), in addition to numerous press releases opposing the proposed amendment. However the Act was amended regardless of the opposition.

In Singapore, the government policy is one that is in favour of free trade and hence parallel imports are upheld and allowed. According to the Copyright (Amendment) Act 1994⁶², parallel imports of copyright goods are allowed provided that the goods had been manufactured with the consent of the copyright owner in the country of manufacture. Where there is no copyright owner in the country of manufacture, the goods can only be imported with the consent of the local copyright owner. This will prevent the import of counterfeit or pirated goods. This provision adopts the exhaustion doctrine. Once the copyright owner (manufacturer) has put the copyright good onto the market and received the price for it, the copyright-owner is deemed to have received the benefit of his exclusive right, that is, his rights have been exhausted. The Singapore Patents Act 1994 also gives effect to the doctrine of exhaustion of rights. It provides that the import of a patented product shall not constitute an infringement of the patent if the product has been produced by or with the consent of the proprietor of the patent or his licensee.

Another example of the exhaustion doctrine can be found in the European Union Law⁶³, where goods that have been manufactured and sold in one Member State by a rights owner, or with his consent, cannot be barred entry into another Member State by invoking national laws. This is because the first marketing of the goods (with the consent of the

⁶² For background information leading to the amendment of the Copyright Act, see Erin Soen Yin Goh-Low, "Parallel Imports of Copyright Goods in Singapore – The Role of Government and Public Policy" October 1996 30 *Journal of World Trade* 5 at pp 165 – 176. See also "New law ensures continued import of cheaper goods" Brendan Pereira, *The Straits Times*, August 28, 1994.

rights owner) within a Member State has exhausted those rights in such a way that they can no longer be enforced against subsequent owners of the goods. This doctrine of exhaustion of rights embodies also the free movement of goods within the European Union.

The doctrine of common origin is another justification for parallel imports. According to the doctrine of common origin, there is no infringement of intellectual property rights in the sale and import of goods that have been manufactured by different rights owners in different countries where their rights have been derived from the same source - the original rights owner. Since the goods have a common origin, there is no justification for distinguishing between the goods of the local distributor as being more legitimate than the parallel imports. As noted by Clauson J in an English trade mark case,⁶⁴ a trade mark is a “badge of origin” and not a “badge of control”.

Since parallel imports have been allowed in Singapore, the response of local distributors has been varied.⁶⁵ Some distributors advertised aggressively in the media casting doubts on the quality of the cheaper parallel imports or the after sales services provided by the parallel importers, but this unfortunately achieved little in terms of results. Other distributors resorted to price wars, much to the ultimate benefit of consumers. However, the best results were probably achieved by those local distributors who had sufficient clout to put pressure on their principal to stem the flow of these “unauthorised” imports. Distributorship agreements invariably include contractual covenants on the part of the licensees not to sell outside their designated national boundaries. Hence it is possible for the principal to trace the origin of the imports and take action against the offending

⁶³ Articles 30 – 36.

⁶⁴ *Champagne Heidsieck et Cie v Buxton* (1930).

⁶⁵ “Parallel imports: Copyright owners fight back” Lim Li Hsien, *The Straits Times*, Monday August 12, 1996.

licensee for breach of covenant. This alternative mode for the protection of distribution rights has prompted the view that parallel importing is in reality an issue concerning the rights inter se of intellectual property rights owners, their licensees, sales agents and distributors, and that it is not essentially an intellectual property law issue at all.⁶⁶

Since the legalisation of parallel imports, parallel importers in Singapore have gained an awareness of their legal rights. In *Sin Heak Hin Pte Ltd & Anor v Yuasa Battery Singapore Co Pte Ltd*,⁶⁷ the local authorised distributor of “Yuasa” batteries sent a circular to all its dealers containing a warning that there were imitation “Yuasa” batteries being sold. The parallel importers succeeded in a defamation suit against the authorised distributors who failed to prove that the made-in-China imports were imitation goods.

Conclusion

While contract law remains the essential backbone of international sales transactions, an international sales contract has further implications because of its cross-border nature than the usual concerns of buyers and sellers in a domestic sale. When negotiating cross-border contracts, the parties have to be aware of issues that arise because they are dealing in the international arena. It is appropriate and advisable for issues such as the choice of forum or jurisdiction for litigation or arbitration of disputes and the choice of applicable law to be resolved at the contract stage so as to ensure an element of certainty in the event of dispute. Other relevant matters to take into consideration in international trade contracts include

⁶⁶ Erin Goh-Low Soen Yin, “Parallel Imports and the Copyright Act in Singapore: *PP v Teoh Ai Nee & Anor*” (1994) 5 *Asia Business Law Review* 52 at p 55.

⁶⁷ [1995] 3 SLR 590.

financing through documentary letters of credit, the rights and liabilities in relation to the contract of carriage as well as import and export restrictions and procedures.