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On Substantive Changes to Contracts Under the United Nations Convention on Contracts for the International Sale of Goods

Yuqing Wang[1]

[1] Graduate Student, School of Law, Guangdong University of Foreign Studies, Guangzhou, China
Correspondence: Yuqing Wang, Graduate Student, School of Law, Guangdong University of Foreign Studies, Guangzhou, China.

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Abstract

First of all, it is important to clarify the premise that the most fundamental basis for the sale and purchase of goods between the international community and countries is in fact the contract for the sale and purchase of goods concluded between the buyer and the seller, and that this contract is the basis for the clarification of their rights and obligations between the parties and for the act of performance. The contract shall be formed on the basis of the act of offer and promise between the parties, so that the validity of the offer and promise has a direct influence on the formal formation of the contract and the subsequent act of sale and purchase of goods.

National laws differ as to whether a promise must be identical to an offer. For example, in the common law system there is the well-known "mirror image principle", which requires a high degree of conformity. Article 19 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), however, provides for this in three main clauses. [1]Even though national laws and international treaties such as the CISG contain specific provisions on offers, promises and material changes to contracts, there is still much uncertainty in practice.

This essay will extend the discussion of material change in contracts through a specific international trade case and will focus on the CISG provisions on material change in contracts and their content. Chapter 3 will provide reflections on material change based on the first two papers.

Keywords: offer, promise, material change, international contract for the sale of goods

1. Introduction

In recent years, due to the serious impact of the epidemic, the number of imports and exports in international trade has been on the decline, but still at a very high transaction frequency, and also because of the New Crown epidemic has led to many transactions and contractual problems in many international trade activities, this article will focus on the issue of changes in international sales contracts, especially when the offeree changes part of the offer does it constitute a promise? Or what changes to the contract constitute a new offer rather than a promise, which will have a direct impact on the

formation of an international contract for the sale of goods. A good system of material change can facilitate the transaction and effectively protect the rights and interests of both parties to the transaction. Conversely, a vague system of contractual change can cause a lot of problems for both parties, and it is therefore particularly important to establish the criteria for material change.

2. Case and Problem Formulation

2.1 Brief Description of the Case

On 5 June 2000, the Respondent in this case offered to sell 10,000 metric tons of rapeseed meal to the Claimant, with quality standards of 38% or more oil protein and less than 12.5% moisture, at a unit price of US$78 per tonne FOB Zhangjiagang, China. On 7 June of the same year, the applicant accepted the respondent's offer and requested the respondent to fax the contract and the terms of the letter of credit to the applicant, and the respondent faxed the SF0610 sales contract with its official seal to the applicant on 9 June.

After the applicant received the faxed sales contract from the respondent, the applicant deleted the requirement of "not accepting vessels over 20 years old" from the original contract and amended the phrase "freight paid" to "freight paid in accordance with the charter party". On 14 June, the respondent faxed to the applicant's Hong Kong office that the applicant had unilaterally amended the contract, which the respondent could not confirm and would suspend the execution of the contract, and requested the applicant to suspend the issuance of the L/C. On 22 June, the respondent sent a letter to the applicant stating that the contract between the two parties. The contract was null and void and the letter of credit issued by the applicant could only be voided. On 23 June of the same year, the applicant wrote back to the respondent to further explain that since the contract was on FOB terms, the amendment to the age of the vessel and the payment of freight would not have any effect on the respondent's performance of the contract; at the same time, the respondent was informed that the applicant had resold the goods under the contract to an underhand buyer in Italy and reminded the respondent that failure to perform the delivery obligation would constitute a breach of contract. On the same day, the respondent wrote back insisting that the contract between the parties was null and void. As a dispute arose between the parties over the formation and performance of the contract, which could not be resolved through negotiation, the claimant applied to CIETAC for arbitration on 23 July 2001.

In response to the above classic case, what are the legal consequences, according to CISG, of the offeree in this case making a change to the offeror's offer? Or does such an acceptance by the applicant in this case constitute a promise? In order to answer the above two legal questions, it is actually necessary to look at the substantive changes to the content of international trade contracts, i.e., what exactly constitutes a substantive change under the law.

2.2 What Is a Material Change Under the CISG Framework

The contract itself is the most important type of legal act, and in practice most legal acts are contracts. In order to form a valid contract, the parties to the contract must agree on the content regarding the contract, in other words, the contract is formed when the parties agree on their intentions. Generally, the parties to a contract express their intentions in the following way: one party makes an offer, and the other party makes a promise. Of course, in concrete legal practice it is often difficult to distinguish which party is making an offer and which is making a promise, but it is necessary to distinguish between an offer and a promise, then the only way to do this is to determine the chronological order of the signatures of the parties, with the first signatory making the offer and the second signatory making the promise. There are many similar and even more complex transactions that can be encountered in real life but offer and promise remain the main traditional method of concluding contracts.

A contract should comply with the principles of "good faith and good faith subjective mind, trustworthy and objective conduct, fairness and reasonableness". The result of the benefit of the offer". (Zhang Cheng, 2013) Since the material change in the offer is the true psychology of the promisor, it should be respected. As mentioned above, in the absence of a promise by the counterparty, the promise has no effect as a promise and the contract is not formed. A materially altered promise is therefore not so much an altered promise as it is a new offer, not the end of a round of negotiations but the beginning of a new one. In the case of a contract,

a promise means the beginning of the contract, the formal commencement of the commercial conduct of the parties, while a non-substantial change of promise, like a promise, generally means that the parties have set aside their dispute and are moving forward with their business, while the contract itself has begun to operate normally. However, this is not the case with a materially altered undertaking, which implies a repudiation of the original offer, while the formation of the contract is remote and dependent on the intention of the party making the original offer, who may well repudiate the counter-offer and make the contract impossible to form. Therefore, although a material change has a negative impact on the formation of the contract, it is an alternative route for the development of the contract. In addition to its effect on efficiency, a material change is deemed to protect the rights of the original offeror. It follows that whether or not a promise has been materially altered is directly related to the formation of a contract, so it becomes very important to determine whether or not the alteration is material. As mentioned above, in practice, new cases may have an impact on the determination of whether a material change has been made, and there is uncertainty due to possible contradictions between them. It is important to find a principle in this, or a way in which a layman or at least a legal person can infer, in the normal way, whether the court will find the change to be substantive or not.

An important provision of the CISG for determining whether a promise is materially or immaterially varied is Article 19(3), which provides that any addition or variation of conditions relating to the price of the goods, payment, quality and quantity of the goods, place and time of delivery, extent of liability of one party to the other party or settlement of disputes, etc., is deemed to be a material variation conditions of the offer. This clause has made it very clear which changes to the offer are material and which changes other than these are to be considered as non-material. In other words, changes within these limits will have the effect of a material change, but not those outside them.

3. Analysis and Reflection on the Material Change Clause In CISG

It should be clear from the outset that the clause in the CISG which provides for matters relating to material changes to the contract is the third paragraph of Article 19: "Additions or different conditions relating to the price of the goods, payment, quality and quantity of the goods, place and time of delivery, the extent of liability of one party to the other or the settlement of disputes, etc., are deemed to vary the terms of the offer in substance." [2]This clause has very clearly enumerated that the types of material changes to the contract include inconsistencies in the price, quantity and quality of the goods, as well as in the manner of payment, the place and time of delivery, and also in the scope of liability, and the conditions for the settlement of disputes. It can further be understood that when the offeree makes a promise that changes one of these elements, it constitutes a material change.

A material change to a promise is in essence a material change to the contractual offer and its effect under CISG. The force is to create a counter-offer which does not result in the formation of a contract and does not have the effect of an ordinary promise. On this point the present, the text has been highlighted in the text. And in response to the uncertainty in practice regarding the determination of material change, the criteria for determining.

The first step is to find the cornerstone in jurisprudence, and only in jurisprudence can the law of substantive change be found. This is the only way to better consider the question of what is and is not material on a rational basis. Legal theory is the bridge to practice, and in this section, I will attempt to construct a legal theory to better understand the practice of Qualitative change for understanding.

3.1 Inconsistency Between the Judge's Discretion and Judgment

Substantial modification of an offer is an important institution, which has been set out in considerable detail in the CISG, but I believe that the interpretation of the law is more of a human test, as the decisions of Chinese judges are not consistent with the spirit of contract law. The reason why many judges' decisions are not in line with the spirit of contract law seems to be because the judge is more familiar with US law, so he uses US commercial law to determine whether a contract has been concluded, i.e., he uses the "mutual knockdown rule", but in reality, China should apply the "last shot" rule. (Wang Min, 2007)

For example, in the common law system, England still adheres to the 'mirror image principle', but this idea has been abandoned in

the United States by the Uniform Commercial Code. In civil law systems, Germany still insists that an offer can never be altered. In civil law systems, Germany still insists on the immutability of the offer,[3] but China has fully accepted the relevant provisions of the CISG. Due to the differences between countries, there is a risk of bias in the decisions of judges. For example, such a situation as described above is likely to arise in the United States, which has its own principle of material change of the offer, unlike the CISG. In the US, there is its own unique principle of material change to the offer, but it differs from the CISG, which may lead to deviations in understanding, and it is these deviations that lead the judge to give an ambiguous interpretation of the clause itself in the final decision. Whether or not this decision is correct, it sometimes appears in essence to be an expansive interpretation of the CISG rules. It did not specify which changes were non-material, but merely stated that all non-material changes were non-material. By an act of power, the judge expands the meaning expressed by the law. The meaning of the law has been expanded. How can a trader tell which changes are substantive? How can a trader know which changes are substantive?

Therefore, when determining whether a change is a "material change", we need to grasp the content of the change on the one hand, and the quantitative extent of the change on the other. (Zhou Yueping Lawyer Team, 2018)

3.2 The Relationship Between Substantive Change and Efficiency

The relationship between efficiency and fairness is a dynamic rather than a static one, and as a jurist, it is all the more important to have a conviction that the most harmonious proportional relationship in terms of the whole is to be found at a given point in time to achieve a good deal of efficiency and fairness. Moreover, there is a relationship between the two in that efficiency also determines the quality of fairness, and the speed with which this relationship moves from the real to the real and the importance attached to the value of efficiency in law equally marks the degree of modernisation and scientification of our jurisprudence. (Qi Yanping, 1996)

On the other hand, the value of efficiency is equally important in CISG. The same is true of the value of the application of law as a sub-concept of law, to summarise in detail, efficiency is specific to CISG. For CISG, the value of 'efficiency' is concentrated in the nature of its self-interest and is reflected in the expansion of international trade. The reason for this is that, as mentioned above, the nature of the economy is also about expanding the pie, and its sub-cell, trade, is also about economic interests. Therefore, the CISG itself, which aims to protect international trade, should support the core values of trade. (Lu Yipin, 2000) Efficiency is one of the values that the CISG should be guided by. the participants in the CISG are essentially businessmen, as is the case with commercial law in national laws. In the international sale of goods, there are very few cases where both parties are non-traders. This is because, according to the objective theory of Commercial Law, the participants in a sale are persons pursuing their own interests and are businessmen in every sense of the word. As for the commercial activities carried out by merchants, Mr. Yu Lei argues: "Commercial activities themselves require efficiency, safety and fairness." (Yu Lei, 2006)

Efficiency is efficiency, so the pursuit of commercial activity (or in the case of international trade in goods) is itself a pursuit of efficiency in terms of security and fairness. This is why it is important to ensure that the principle of expediency is applied. As mentioned above, commercial transactions are conducted in the pursuit of profit, but only in the pursuit of expediency. In order to make a profit, the profit cycle should be as short as possible and the second round of investment should be quicker, which is why, as mentioned above, delivery times and payment terms are fundamental concerns for both parties in international trade. The principle of trade facilitation is therefore enshrined in many provisions of the CISG. (Zhang Cheng, 2013)

3.3 Relationship Between Substantive Change and Facilitation

Song Wisdom scholars have mentioned that security without efficiency is worthless, and similarly, efficiency without security always puts rights at risk. (Song Wisdom, 2005) Thus, while maintaining ease of transaction is a principle that CISG should consider, security must also be taken into account. The distinction in the importance of provision also echoes the need for efficiency and security. In terms of efficiency, as noted above, it is clear that an overly mechanical

protection of the so-called security of the transaction and a strict prohibition on altering the offer would result in the parties spending a great deal of time finalising the terms of the contract and unnecessarily prolonging the transaction. The CISG distinguishes between material alterations to the offer and changes to the offer. The CISG distinguishes between material alterations to the offer and considers material alterations to be valid undertakings, allowing the parties to parties to identify the unchanged parts of the offer and facilitate the rapid progress of the transaction. As insignificant changes generally do not affect the substance of the contractual transaction, CISG considers that if the disputed elements are more significant, they can continue to be argued, or if they are not argued and the other party does not respond, the contract offered by the promisor prevails. This ensures that the contract is completed as quickly as possible so that the dispute can be resolved. The value of efficiency is the driving force behind changing the offer system. On the other hand, "security" is as important as the expression of "fairness" and therefore CISG considers the commitment to significantly change the offer to be a counter-offer, thus enhancing the protection of both parties in terms of the security of the transaction.

It is therefore important to distinguish the substance of the change. And how to distinguish whether a change is material requires an examination of the purpose of the contract. (Zhang Cheng, 2013)

4. Determination of Material Change Under CISG

Recall the part of the case given in the first chapter that involved changes: after the applicant received the faxed sales contract from the respondent, the requirement of "no ships over 20 years old" was deleted from the original contract, and "freight paid" was amended to "freight paid under charter party". "Based on the above two changes, this paper only concentrates on the issue of the time of payment and the method of payment."

4.1 Change in Time and Manner of Payment

Firstly, the timing of payment refers to the time when the buyer pays the seller the consideration, including when it is paid, whether it is paid in instalments and in what proportion. The timing of payment is also important to both parties as the seller does not really receive the most essential benefit from the contract until after payment has been made. If the buyer is able to pay in instalments, this is the case if the goods are defective or if the seller fails to perform its contractual obligations in a timely and effective manner. In such cases, the outstanding amount becomes its most important asset. In the case of large transactions, there may also be significant interest payments to be made, which play an important role in the liquidity of the parties. If the buyer can pay later, the pressure to pay is significantly reduced and if the seller can receive the money earlier, it can be used for other purchases or manufacturing transactions. The timing of payments is therefore very important to both the buyer and the seller.

Payment methods refer to the means and methods of payment used by the buyer, such as remittances, promissory notes or letters of credit. Similarly, the method of payment is very important to trade, for example, the formulation and fulfilment of the terms of a letter of credit is directly related to the smoothness of the letter of credit settlement method and the ability of the seller to obtain payment for the goods. The method of settlement is therefore of great importance in protecting both parties to a trade contract. In light of the above, it is clear that payment terms (including the manner and timing of payment) should also be described as a material change.

4.2 Conclusion of Material Change

Therefore, based on the above analysis of the types of material change listed above, in conjunction with question (2) of the case, we can make the following analysis: In this case, the Chinese applicant, after receiving the faxed sale contract from the respondent, deleted the requirement of the original contract: "No ships over 20 years old" and amended the contract from the applicant, after receiving the faxed sale contract from the respondent, deleted the requirement of "no ships over 20 years of age" from the original contract and amended the phrase "freight paid" to read "freight paid according to the charter party". The applicant's approach was clearly aimed at "acceptance", but it was not a unanimous and unqualified "acceptance", in which definite modifications were proposed. In other words, if the purported acceptance by the offeree contains additions, limitations or other changes to the content of the offer, the purported acceptance is a counter-offer

with legal consequences equivalent to a rejection of the offer, reflecting the traditional doctrine that the content of the acceptance must be consistent with the content of the offer, i.e., the "mirror image rule" of common law.

However, Article 19 CISG also provides for an exception, which must satisfy two conditions: first, the addition or modification must be "material"; and second, the offeror must not have objected to it in a timely manner. Even if the offeree's addition or modification is not material, if the offeror objects to the addition or modification, either orally or by written notice, within a period that is not unduly extended, the purported acceptance becomes a rejection of the offer and a counter-offer, and the contract is not formed. Therefore, in the present case, the applicant deleted the clause in the respondent's original offer which stated that it would not accept vessels over 20 years old and amended the phrase "freight paid" to read "freight to be paid in accordance with the charter party". In this case, whether the applicant's deletion of the clause "not to accept ships over 20 years old" and the amendment of "freight paid" to "freight paid under the charter party" constituted a counter-offer and thus had the legal effect of rejecting the original offer, the key is to clarify two issues: firstly, whether the applicant's amendment was substantive; secondly, whether the respondent had made a timely objection.

In this case, the applicant amended the "freight paid" clause in the respondent's original offer price to "freight paid according to the ship contract", which is a change to the "payment" clause, obviously one of the material changes listed in paragraph 3 of Article 19 of CISG. It seems that the applicant's amendment should be regarded as a material change to the original offer price based on this, so as to conclude that it constitutes a counter-offer on. We must note, however, that although the applicant did make an endorsement on the contract when it made its acceptance, the price terms agreed in the contract in question were executed on an FOB basis (i.e., delivery on board at the port of shipment). According to the provisions of INCOTERMS 2000, the seller of a FOB contract must load the goods onto the ship designated by the buyer at the designated port of shipment within the shipment period stipulated in the contract, and notify the buyer in time, and the risk is transferred from the seller to the buyer when the goods cross the ship's rail at the port of shipment. The buyer is responsible for booking the ship, paying the freight, arriving at the port of shipment for the period specified in the contract, and notifying the seller of the name of the ship and the date of shipment. In short, since the contract in this case provided that the applicant, as the buyer, had to contract for the shipment of the goods from the designated port of shipment at its own expense, the issue of the age of the ship and the payment of freight was not relevant to the respondent, as the seller. Therefore, the changes made by the applicant to the terms of the contract concerning the age of the ship and the payment of freight did not affect the respondent's rights and obligations in any way and did not constitute a material change to the terms of the contract. Therefore, the Chinese applicant deleted the requirement of "not accepting vessels over 20 years old" from the contract of sale faxed by the respondent, and amended the phrase "freight paid" to "freight to be paid according to the contract of settlement". The request was signed and sealed by the Italian company Milan and faxed to the respondent on 9 June 2000, but the respondent did not object in time. It was not until 14 June of the same year that the Respondent faxed to the intermediary's Hong Kong office that it was impossible for the Respondent to confirm the applicant's unilateral amendment to the contract and that it objected to it. This clearly did not satisfy the requirement of "objecting to the modification within an unduly late period, either orally or by written notice". Therefore, according to the CISG, the contract of sale between the applicant and the respondent had been established and entered into force, and the parties had to perform in accordance with the contract.

In a roundabout way, the final conclusion was actually on two levels: on the face of it, the amendment of the "freight paid" clause in the Respondent's original offer to "freight paid according to the contract of carriage" was a change to the "payment". However, on further analysis, the premise that the FOB mode of transport was applicable, coupled with the issue of time delay, ultimately led to the fact that even if the conditions for a material change were met, it did not constitute a counter-offer and the transaction should still be carried out in accordance with the original contract.

5. Conclusion

With the increase in the number of Contracting States, the CISG is playing an increasingly

important role in guiding litigation and arbitration proceedings in international trade disputes. However, legal traditions and fundamental differences in some legal concepts, value judgments and the CISG provisions themselves inevitably lead to differences in the interpretation and application of CISG provisions by adjudicating bodies. (Liang Xingbo, 2012) In the absence of an authoritative interpretative body or a unified judicial body, uniformity in the interpretation and application of the CISG will not be achieved unless academics engage in theoretical discussions based on the study and analysis of existing legal principles, while the judiciary focuses on academic results and refers to representative legal principles. Although the result of one adjudicatory body is not binding on other countries, the process of analysis and reasoning on the application and interpretation of the CISG in typical cases will guide other adjudicatory bodies in the correct understanding of the CISG.

In China, adjudicators often overlook the process of applying the CISG to the facts of a case, rarely analyse the meaning and components of CISG provisions, and the lack of a reasoning process is common. This article aims to provide theoretical guidance for judicial practice and international trade in goods practice by systematically analyzing and organizing the key issues related to Article 19 CISG through the specific application of Article 19 CISG. It is hoped that more scholars can join together to focus on and participate in this topic, in order to further improve the application and interpretation of the CISG rules on material change of contract.

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[1] See Article 19(3) of the United Nations Convention on Contracts for the International Sale of Goods.

[2] See article 19(3) of the United Nations Convention on Contracts for the International Sale of Goods.

[3] Recently, however, Germany has been slowly moving towards recognising partial variations of offers through its jurisprudence, and some judges have begun to use the "mutual knockout principle".