



ASSIGNMENT MEMORANDUM

SUBJECT : INTERNATIONAL TRADE LAW I (ITL1)

ASSIGNMENT : 1st SEMESTER 2010

[References in square brackets refer to the course notes]

QUESTION 1 [90]

1. The nature and definition of a contract

A contract may be defined as an agreement that is binding in law between two or more legal persons whereby the one or each one promises the other[s] to give something, to do something or to refrain from doing something

A legal contract is thus an agreement, which creates one or more legal obligations or duties between the parties to it. A contract creates a legally enforceable duty to render a performance and corresponding enforceable right to receive performance. [p. 68]

2. The requirements for entering into a valid contract

In order for two parties to enter into a valid contract, four requirements must be satisfied. The first two pertain to the formation of the agreement. The second two requirements are necessary to ensure that the agreement is binding in law. The four requirements are:

1. The parties must have the capacity to bind themselves contractually.
2. There must be agreement [consensus], that is, a meeting of minds between the parties.
3. Performance of the contract must be physically and legally possible at the time the contract is made.
4. The parties to the contract must comply with any formalities laid down by law for the conclusion of the contract in question. [pp. 69-70]

3. Misrepresentation and void vs. voidable contracts

Misrepresentation is a false statement of fact made by one party with the intention that the other party believe such and thus enter into a contract with the first party.

A misrepresentation can include a statement of opinion, which is not honestly held by the person making it. In such a case the misrepresentation is known as being fraudulent. A misrepresentation can be either clearly expressed in words or implied by conduct. It can even take place by silence if the court decides that the

silent party had a duty to speak up in order to correct a false impression he believed or knew the other contracting party to be under. A duty to speak would arise where one party knows that the other is labouring under a misapprehension as to the meaning or effect of the contract, but does nothing to correct his misapprehension, e.g. a minor knows that the other party thinks he is 21 but says nothing to correct this.

Alternatively, an exporter, who does not reveal, to his insurer, all material facts about the nature of the goods to be covered by the proposed insurance cover or who does not tell the truth about certain material circumstances, is guilty of misrepresentation.

To escape being held to the terms of a contract on the grounds of misrepresentation, a party must show that the misrepresentation caused him to enter into the contract. In other words, he must satisfy the court that, but for the misrepresentation, he would not have concluded the contract. [p. 87]

The distinction between a void and a voidable contract is an important one. A **void 'contract'** is in fact not a contract, and was never one – hence the inverted commas. A 'contract' is void when one of the four requirements for conclusion of a valid contract is absent (See part 2 above). [p. 90]

4. The actions that could give rise to the breach of a contract

A breach of contract can be described as a culpable [culpable means blameworthy] infringement of the contractual rights of one party by the other contracting party. Various acts or omissions – [omissions refer to the failure to perform a contractual duty] may constitute a breach of contract. A breach of contract is committed when a party unjustifiably does one of the four following things:

1. Repudiates the contract [i.e. deliberately refuses to perform as agreed or to accept the other party's performance]
2. Makes performance impossible [i.e. does something that makes it impossible for the other party to perform in terms of the contract]
3. Makes defective performance [i.e. is responsible for faulty performance]
4. Makes late performance [i.e. does not perform within the prescribed time.

[Known as *mora debitoris* in case of the debtor and *mora creditoris* in case of the creditor]

In order to commit a breach of contract, the guilty party must have failed to perform culpably, i.e. one must be able to blame the person who has committed the breach. In South African Law, to hold someone blameworthy, the person's actions must have been performed either intentionally or negligently. *Dolus* is the Latin term used for intention; *culpa* the term used for negligence.

For example: Exporter A contracts with freight forwarder B to ship the sold goods on Ship C to Maputo and the ship is hit by huge storm off the South African coast. The ship and all goods on board now rest on the ocean floor.

Has A failed to perform one of his contractual duties and has he breached the contract?

The answer? While A has failed to perform one of his contractual duties, his failure to do so was not culpable. He did not intend the ship to sink, and was also not negligent in using Ship C. If A had on the other hand been aware that Ship C was not in a good seaworthy condition and could well sink if a bad storm came, then a court of law might well find that he was negligent in using Ship C and deem A to have committed breach of contract. [pp. 110-111]

5. The importance and purpose of including the following clauses in an international sales contract (examples of clauses should be given)

Choice of law. The parties should stipulate which country's law will govern the contract. In the absence of an express or implied choice of law, the applicable law is determined with reference to so-called 'connecting factors'. The effect is that the rule of a national legal system, which has the greatest or closest connection to the contract in question, is the applicable law.

For example: "The validity, construction and performance of this contract shall be governed by the law of South Africa." [pp. 166-167]

Choice of Forum: A jurisdiction clause. A clause should be inserted specifying which country's courts shall have jurisdiction to hear any disputes which may arise from the contract. Such a clause must not be confused with a clause describing which country's laws will be applicable in case of disputes arising from the contract. The parties are free to stipulate the court ('choice of forum') in which they wish a potential dispute to be litigated. In South Africa, the judge president would appoint a judge well-versed in commercial matters to preside over the court hearing.

An example of a 'choice of forum' clause is: "If, at any time, any dispute or difference shall arise between the parties hereto concerning the interpretation or liabilities of any party hereto under, the same shall, failing any agreement to settle it in any other way, be referred to the Gauteng local division of the High Court of South Africa for settlement." [p. 167]

Dispute Resolution: Arbitration, Mediation and Litigation. It is advisable for the parties to decide in advance whether possible disputes should first be referred to either arbitration or mediation [*arbitration and mediation are dealt with in International Trade Law II*] before either of the parties begins litigation, i.e. takes the matter/dispute to a court of law. An arbitration clause can stipulate where arbitration should take place, which legal system should govern the arbitration and who should conduct the arbitration proceedings.

An example of an arbitration clause is: "All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the set of Rules. The arbitration shall be held in London and shall be in the English language." [p. 167]

Language of the contract. The South African international trader should attempt to ensure that all signed copies of the contract are in English, and that it be stipulated that the language medium of the whole trade transaction shall be English; that all corresponding contracts should be in English as well. [p. 165]

6. Overview of the CISG rules and what bearing they have on SA traders who enter into international sales contracts

The **United Nations Convention on Contracts for the International Sale of Goods** (abbrev. **CISG**) is a treaty offering a uniform international sales law that, as of early 2008, had been ratified by 70 countries that account for a significant proportion of world trade. The CISG allows exporters to avoid choice of law issues as the CISG offers 'accepted substantive rules on which contracting parties, courts, and arbitrators may rely'.

The CISG was developed by the United Nations Commission on International Trade Law (UNCITRAL) and was signed in Vienna in 1980. The CISG is sometimes referred to as the **Vienna Convention**. It came into force as a multilateral treaty on 1 January 1988, after being ratified by eleven countries.

CISG has been regarded as a success for UNCITRAL as the Convention has since been accepted by States from 'every geographical region, every stage of economic development and every major legal, social and economic system'. Countries that have ratified the CISG are referred to within the treaty as 'Contracting States'. Unless excluded by the express terms of a contract, the CISG is deemed to be incorporated into (and supplant) any otherwise applicable domestic law(s) with respect to a transaction in goods between parties from different Contracting States. Of the uniform law conventions, the CISG has been described as having 'the greatest influence on the law of worldwide trans-border commerce'.

The CISG has been described as a great legislative achievement and the 'most successful international document so far' in unified international sales law, due in no small part to its flexibility in allowing contracting states the option of taking exception to some specified articles. This flexibility was instrumental in convincing states with disparate legal traditions to subscribe to an otherwise uniform code. A number of countries that have signed the CISG have made declarations and reservations as to the Treaty's scope, though the vast majority has chosen to accede to the Convention without any reservations.

South Africa has not yet acceded to the CISG. This does not however mean that the substantive rules of the CISG concerning international sales contracts cannot be applicable to your international sales agreement as a South African international trader. Obviously one case where these rules would be applicable would be where you and your contracting party have specifically provided in your written contract that these written rules should be applicable. [p. 160]

Further information can be found in Van Niekerk, J.P., and Schulze, W.G. 2000. *The South African Law of International Trade: Selected Topics and Supplement*. Saga Legal Publications. Pp. 71-73.