CHAPTER 14

THE PRINCIPLE OF FREEDOM OF CONTRACT OF CISG NEEDS TO BE RESTRICTED FOR THE INTERESTS OF THE MSMEs: A PERSPECTIVE OF DEVELOPING COUNTRIES

Jiang Zuoli*

I INTRODUCTION

The UN Convention on Contracts for the International Sale of Goods (CISG) has successfully unified international sales laws and has been the most successful international document so far. However, the principle of the freedom of contract in the CISG could create legal obstacles to the protection of the interests of the MSMEs, in particular, in developing countries.[1] Accordingly, the principle of freedom of contract of the CISG needs to be restricted.

The principle of freedom of contract was established on the basis of a series of abstract assumptions: all subjects involved are of abstract equality where all persons are assumed to be an abstract existence, neglecting the economic, political and cultural differences among them; "economic reasonable persons" who are self-reliant individual units with respect to their economic, political, legal and moral status; the full competitive market environment where contracts are binding on only the parties to the contract without involving any third parties, the information is full and there are enough partners for free choices; and persons of the equal capacity who

---

* Professor of International Economic Law, Shandong University, PR China, Dr iur, Shandong University, PR China; LLM SISU Shanghai, 1990.

1 For example, under the anticipatory repudiation doctrine the subjective standard, the avoidance provision and cancellation of a contract without notice imposes harsh and unpredictable penalty on the developing countries with weak bargaining power and reinforce their weaker status in comparison with the industrialized countries. See Shinichiro Michida "Cancellation of Contract" (1979) 27 AJCL 270 at 281; M Gilbey Stryb "The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries" (1989) 38(3) ICLQ 475 at 501.

are supposed to be of equal bargaining power and no one is entitled to any special and different treatment. As the world is being globalized into one market, it is becoming clearer that these assumptions are not true because the subjects of market can not be of equal bargaining capacity and freedom of contract often leads to bigger gap between the strong enterprises in the developed countries and the poor ones in the developing countries. In other words, the principle of freedom of contract deviates more and more from the value of substantive justice.

As result of legal developments in the recent decades, there are enough justifications for the restrictions on freedom of contract such as the principle of contract substantive justice, the principle of good faith, principle of pre-contractual liability, public policy, principle of change of circumstances, rules of contract interpretation, and regulations of standard form terms. These principles can be applied to amend the CISG for the protection of the interests of the MSMEs of the developing countries in particular.

This paper will endeavor to analyze the concerns in the light of the principle of freedom of contract in the CISG, the justifications for the restrictions, and will also offer some specific proposals both legislatively and judicially.

II AN OVERVIEW OF THE PRINCIPLE OF FREEDOM OF CONTRACT

Jurisprudence of contract guides contractual systems, and naturally results in contractual systems. In the ancient contractual laws of the most of the civilizations, we can hardly find any reflections of freedom of contract. For example, the Hammurabi Codes in 1762 as the earliest civil code ever recorded in the history of mankind has as many as 150 articles of contract taking 53% of the code, but followed the principle of strict formalism rather than the freedom of contract.[2] Neither can we find any displays of freedom of contract in the Egyptian civilizations. Roman law as the most influential and complete law in the legal history of the world followed also the strict formalism at the early period. For example, the writing contract (*stipulatio*) as the earliest and most important contractual form in early Roman law attached importance to forms of contractual conclusion. Obviously, forms of contract were considered more important than nature of contract, and became the general feature of early contractual system of human society. As a result, the principle of freedom of contract enjoyed no place in the old legal systems.[3]

---

2 Zheng Yunrui "The Origins of Jurisprudence of Contract in the West" (1997) 3 JCL 259 at 259.

3 At 264.

The promised contract in the *Ius Gentium* (public international law) originated in the Roman law began to demonstrate the idea of freedom of contract where the consensus of contractual parties became the most essential element of the formation of contract, and give up the requirements of forms. Just as Henry Maine commented that the promised contract in Roman law opened a new era in the history of contract, and all concepts of modern contract law are originated from this period.[4] Due to the development of the Roman simple economy, the old contractual system failed to meet the economic development and resulted in the appearance of promised contract which emphasized the importance of freedom of contract. However, the development of freedom of contract in this period remained only as the early development rather than the fundamental principle of contract. It was only from 16th century where feudal system in Europe began to collapse and capitalism began to develop, the 18th century where the commercial revolution which pushed forward the industrial revolution, and the 19th century where the market economy, democratic system and humanism and liberalism gained establishment through the industrial revolution that the principle of freedom of contract started to be recognized by most of the European countries as a basic principle of contract. [5]

The freedom of contract includes two essential aspects: first, it demonstrates that contract forms on the mutual consensus of all parties; second, it emphasizes that the formation of contract is free from any legislative interference of governments and other forces and is the fruit of free choice of all parties.[6] More specifically, freedom of contract contains at least five meanings: freedom of contract conclusion under which all enjoy the right to conclude contracts, freedom of choice of anyone with whom to conclude contracts, freedom of determining contents of contracts, freedom of forms of conclusion and freedom of changes of contract.

---

4 Zhou Nan *Roman Law* (1st ed, the Commercial Press, 2002) at 724.

5 Yao Xinhua *Freedom of Contract* (1st ed, China Legal Publishing House, 2004) at 547; Su Haopeng "On the Historical Background and Values of the Development of Freedom of Contract" (1999) 5 JLS 85 at 87; Huang Mingshu *Study of Roman Contract System and Modern Contract Law* (1st ed, China Procuratorial Press, 2006) at 126.

6 Mingshu, above n 5 at 115.

III THE PRINCIPLE OF THE FREEDOM OF CONTRACT AND SUBSTANTIVE JUSTICE AND NECESSARY RESTRICTIONS UNDER THE CURRENT ECONOMIC GLOBALIZED WORLD

3.1 The Principle of Freedom of Contract Deviates from the Value of Substantive Justice

The civil codes of the civil law system in the 19th century was founded on a liberal social system under the idea that a reasonable person can govern his own fate, be independent of governance of traditional feudal, political or religious dictatorship, and freely be responsible for his circumstances of life. As a result, all subjects are granted the freedom of contract. Therefore, the classic freedom of contract was established on the basis of a series of abstract assumptions: first, all subjects involved are of abstract equality. In other words, all persons are assumed to be an abstract existence, neglecting the economic, political and cultural differences among them. All persons are self-reliant individual units with respect to their economic, political, legal and moral status, and thus all persons are the best judges and defenders, known as "economic reasonable person". Second, the market environment is a free competitive one where contracts are binding on only the parties to the contract without involving any third parties, the information is full and there are enough partners for free choices. Third, all persons are of the equal capacity. These persons are supposed to be of equal bargaining power and no one is entitled to any special and different treatment.

The historical development of mankind proves again and again that the above abstract assumptions are not always true because the differences among the persons always exist, not all persons are 'reasonable economic persons' and a full competitive market has never existed. In the west, liberal capitalism began to enter into transition toward monopoly capitalism from 1871, and caused great changes to the society: the basic individuals in the market turned into great enterprises, even monopoly organizations which were powerful enough to dominate the market. Accordingly, these changes have shaken the foundations of the abstract assumptions of the classic freedom of contract. That's to say, the differences among the persons become obvious, and the gap between the economically strong subjects and the weak subjects are widened. To the weak, freedom of contract only becomes forms. Consequently, subjects to contract are under bigger pressures, and these pressures and legal obligations forced the disadvantaged to avoid concluding contracts. Clearly, the phenomena of monopoly destroys people's wishes to choose the partners for contract freely, the unequal bargaining status of the parties to a contract also

knock out their illusion of classic contract to determine freely the contents of contract and contract law will not come into play in the social governance. [7]

From the perspectives of contractual substantive justice, the legal idea in the 19th century that "contracts mean freedom" and "contracts are equal to justice" have already turned into the idea in the modern globalized times that freedom of contract is the order of the strong, and thus deviates from the substantive justice in the contract law. In other words, contracts are no longer the tool to realize freedom but the tool for the strong to tread on the weak and to grab improper benefits. Consequently, this contract system will result in an unacceptable and unfair outcome, and accordingly the weak and the poor need legal protection.

3.2 Amendments to the Traditional Freedom of Contract

Mainly due to the deviation of freedom of contract from substantive justice resulted from the rapid economic and political developments, there occurred in 20th century numerous and wide-spreading civil movements such as democratic movement, civil right movement, feminist movement, consumer movement, environmental protection movement, as produced important impact on theories of freedom of contract and orientation of equality of opportunity substantive justice in contract law. Therefore, amendments as restrictions have been made in recent decades to the freedom of contract both jurisprudentially, legislatively and judicially.

Jurisprudentially, greater attention has been paid to some theories such as the principle of good faith, principle of pre-contractual liability, public policy, principle of change of circumstances, rules of contract interpretation, and regulations of standard form terms. The principle of good faith originated from the ancient Roman law and became thrive again in the Switzerland Civil Code of 1911 of which Article 2 provides explicitly that all people must exercise their rights and fulfill their obligations in good faith. Later, this principle was incorporated into the civil codes in Italy, Greece and Japan, etc. The principle of good faith is definitely a restriction on the intention and even mutual consensus of the parties to contract.

In accordance with classic contract law in civil law system, contractual liability co-exit with contract based on mutual consensus of both parties. However, this traditional idea was changed since the publication of Jhering's paper in 1861 advocating that contract law protects not only an existing contractual relationship but also insures that the party to contract will not become victim of the negligence of

7 Mingshu, above n 5 at 123.

the other party. This principle was later accepted and incorporated into the German Civil Code, Switzerland Civil Code and Greek Civil Code.[8] Similarly, the principle of estoppel, principle of collateral obligation of contract and principle of reliance interest in contractual remedies are also amendments to the freedom of contract.

The principle of change of circumstances means that in the case of change of circumstances after the conclusion of contract which has fundamentally changed the fair balance, the relevant party is granted by law the right to change the terms or declare the contract avoided. It is clear that the principle of change of circumstances interferes with the mutual consensus and re-allocates the risks and benefits of the parties and pursues the substantive justice in contract law.

Legislatively, many states have made new rules and regulations to restrict the freedom of contract. In the legislature of labor law, regulations aim to force employers to pay the laborers not less than that provided by laws; in the field of consumer law, rules are devoted to protect the interests of the consumers because they are not capable of keeping proper balance with bigger enterprises.

Judicially, judges are empowered in many states to restrict the principle of freedom of contract in their judicial activities on the basis of the principle of good faith, public policy, principle of change of circumstances, rules of contract interpretation, and regulations of standard form terms. Practically, judges usually undermine the principle of freedom of contract by means of enforcing some specific trade terms beneficial to the parties of special social status, or decline to enforce some terms freely added in the contract. This indicates that courts tend to interpret reasonable claims in the contractual obligations in order to make fair the contractual terms reached by parties under freedom of contract.[9]

IV THE JUSTIFICATIONS FOR THE RESTRICTIONS OF THE PRINCIPLE OF THE FREEDOM OF CONTRACT IN THE CISG

As history of the mankind develops, particularly the economic globalization deepens and the multinational enterprises dominate gradually the world economy more rapidly, more and more defects of the principle of freedom of contract are becoming noticeable: the equality of subjects of contract are unrealistic because it neglects the diversity of subjects and changing circumstances; the loss of objective conditions of the freedom of contract (perfect free market, sufficient information, enough partners for free choice) makes the principle of privity of contract unrealistic, and the monopolies of the world markets by powerful enterprises force

8 Ibid.

9 Li Yongjun "The status of the principle of freedom of contract in modern contract law" (2002) 4 JCL 12 at 15.

people to lose their right to free choice in their business activities. In conclusion, the principle of freedom of contract ignores the objective facts of the MSMSs of the developing countries, as characterized with weak capacity (for instance, lack of finance support, inefficient economic system, weak political and legal system, ignorance of modern laws, low legal skills for managing contract and legal affairs), and fails to protect the lawful interests of the MSMEs of the developing countries.

50 years ago, Pound already asserted that the law of the parties of contract was formed on their free will, but this concept has already vanished from the world. In the current world, can the freedom of contract still be the central principle of the legal system? In the current international commerce, if one party with strong bargaining power breaks the balance between both parties and results in the loss of the disadvantaged party, do we have to restrict the freedom of contract? It is clear that the modern transition of civil law from the classic civil law results in the transition from formal justice to substantive justice. Along with the development of capitalism and economic globalization, the contradiction between laborers and employers, large enterprises and consumers, lessors and hirers began to become acute, and the interests of economic disadvantaged people are injured under the principle of the freedom of contract. In comparison with the developed countries, the disadvantaged people in the developing countries are even more disadvantaged. Therefore, the freedom of contract is confronting severe challenges. In other words, the freedom of contract fails to protect the disadvantaged people, and is running counter to legal justice in the changed world. Therefore, it is urgent to restrict the principle of freedom of contract for the protection of the lawful interests of the MSMEs in the developing countries.

The restrictions of the freedom of contract can be justified by the following jurisprudence:

4.1 Pursuit of Value of Contract (Substantive) Justice

The value of law refers to the active significance of law for individuals and society, and the satisfaction given by the existence, role and change of the law to the needs and interests of those subjects. As the value of law is closely correlated with the needs and interests of those subject that are usually diverse, the value of law correspondingly varied in different levels, such as the supreme value being justice, civilization, good and human progress, normal value being freedom, equality, human rights, order, security, peace, democracy, and the self-value being uniformity, stability, reasonableness, definiteness and efficacy. Among those values, justice is recognized as the art of good and fairness. From the perspective of law, justice means the distribution of rights and obligations reasonably between the

parties by means of due process, and that all the parties get what they are entitled to. Substantive justice in international trade refers to the pursuit of happiness and development of most of the people, and distribution of resources according to people in different positions. Just as Rawls claimed that a global distributive justice should be designed to ensure that the inequalities arising from the contingent distribution of the world's resources optimize the share of the worst-off individual.[10] Although the principle of equality refers to treat all equally, it does not mean to remove all inequalities. Inequalities between states are limited to those which work to the benefit of the least advantaged.[11] The social and economic consequences of the inequalities identified in the smaller economy studies are therefore not just, unless the international economic law system is designed to ensure that these inequalities work to the advantage of the smallest economies.[12] The global distribution of natural resources is manifestly unequal. This fact of inequality in natural resources leads, through a complex variety of domestic and international private and public actions and institutions, to social inequalities, inequalities in wealth, privileges, rights and opportunities. Together, these inequalities don not work for benefit of the least advantaged states —quite the reverse. Smaller economies are the most vulnerable to adverse changes in their trade, in the global economy, and in the international economic law system. Thus, they face the most obstacles to economic development and effective competition. In this way, special and differential treatment plays a key role in justifying inequalities in the international allocation of social goods.[13] Accordingly, the MSMEs of the developing countries should be granted the right to enjoy special and preferential treatment in contract law.

Just as Article 7 of the Contract Law of the People's Republic of China provides that in concluding and performing a contract, the parties shall comply with the laws and administrative regulations, respect social ethics, and shall not disrupt the social and economic order or impair the public interests, the freedom of contract also must be restricted by social ethics and public interests.

4.2 Principle of Good Faith

The meaning of the principle of good faith is not yet definitely defined, however, its legal functions are generally recognized: to specify the laws, to ensure substantive

10 John Rawls *A Theory of Justice* (1st ed, Harvard University Press, 1999) at 56.

11 Anthony D'Amato and Kristen Engel "State Responsibility for the Exportation of Nuclear Power Technology" (1988) 74 VLR 1011 at 1047; F J Garcia "Trade and Inequality: Economic Justice and the Developing World" (2000) 21 MJIL 975 at 1014.

12 Thomas W Pogge *Realizing Rawls* (1st ed, Cornell University Press, 1989) at 242.

13 Garcia, above n 11 at 1024.

justice by reference of non-statutory rules or moral rules as equity rule, to correct the current laws and to make rules for new issues according to requirements of the changed situations.[14]

The principle of good faith embodies the transformation of individuals to social standard, and the transformation of formal justice to substantive justice in contract law.

4.3 Principle of Change of Circumstances

The freedom of contract requires that all parties to a contract must strictly observe the contract for his rights and obligations, even though the circumstances have changed after the conclusion of the contract. In other words, the change of circumstances does not have impact on the validity of the contract, known as the principle of *pacta sunt servanda*. However, in the current rapid-changing society, people usually can not reasonably predict at the time of the conclusion of the contract all the issues arising from the changed circumstances which are beyond their control.[15] The same changed circumstances may lead to different consequences to the enterprises in the industrialized countries and those in the developing countries because the latter's weak capacity and disadvantaged status will not be able to manage the difficulties. If the court under this circumstance still forces the party to perform his contractual obligations which result in profoundly unfair consequences, this obviously contradicts with the requirement of contractual justice and consequently undermine the interests of the smaller economies and disadvantaged subjects. Therefore, in order to avoid this unfair consequence, the parties should be granted to revoke the contract or the judge or arbitrator in judicial hearings correct the rules or add new rules in the contract. Many countries have made specific laws particularly to deal with this problem.

4.4 Principle of Objective Interpretation of the Contract

In accordance with the classic theory of contract law, the essence of freedom of contract requires that the intention of the parties governs the establishment of the rights and obligations, and thus requires judges in interpretation of the contract to probe into the subjective intention of the parties, as the only principle of

---

14 Liang Huixing "The Principle of Good Faith and Gap-fillings" (1994) 2 CJL 22 at 26.

15 The definition of the changed circumstances may be arguable, but it is generally recognized that it refers to the fundamental change in these circumstances that, if the parties had known of this change, they would not have concluded the contract. In this case, the party disadvantaged by these new circumstances is entitled to propose to the other party reasonable adjustments of the contract to the new circumstances. See Heinz Strohbach "Filling Gaps in Contracts" (1979) 27 AJCL 479 at 483.

interpretation. However, since 19th century and along with the transformation of individual to social standard, sovereign states gradually employ the principle of objective interpretation of the contract, for the safety of transactions and the requirements of social justice.

France is the best representative country in the civil law legal system. In the judicial practices in France, judges usually do not deliberately seek the true intention of the parties embodied in the contract, but rather pay due attention to the legal effects that judges hope for on the basis of substantive justice. Actually, if the intention of the parties is ambiguous or incomplete in the contract, judges would interpret the contract in accordance with the presumption that the intention of the parties is to conclude a contract in conformity with substantive justice and social interests. In addition, in hearing contract disputes, judges in France also refer to certain moral rules and economic rules directly, and make decisions to settle disputes in line with the principle of justice and the maximum protection of safety of transactions. It is obvious that the principle of will autonomy no longer enjoys the sacred and dominating positions.

Jurisprudentially and judicially, all rules must be interpreted. Interpretation for the CISG as the uniform law is even more important. All the efforts to reach a uniform law would be reduced to nothing if the national judges interpreted the Vienna Convention in differing ways. However, the CISG remains quiet on the very methods of interpretation, but sets directions – taking into account the international character of the Convention, the uniformity of the application and the observance of good faith.[16] Consequently, the absence of definite rules of interpretation in the CISG gives rise to uncertainties and must be amended.

V PROPOSALS FOR RESTRICTING THE PRINCIPLE OF FREEDOM OF CONTRACT IN THE CISG

Compared with the European Contract Law, the UNIDROIT Principles of International Commercial Contract and other national contract laws, the CISG came into effect much earlier. The international market situation has undergone rapid changes in recent three decades. One of the major concerns of the CISG is that its principle of the freedom of contract may not be able to protect the interests of the disadvantaged MSMEs in the developing countries, and the only solution to this issue is to restrict the principle by revising the rules of the CISG.

16 Claude Witz "CISG: interpretation and non-covered issues" (2001) 3/4 IBLJ 253 at 254.

5.1 Concerns on the Principle of Freedom of Contract in the CISG

Although the principle of freedom of contract has been recognized and incorporated into national contract laws in many countries centuries ago, international consensus favoring party autonomy is evidenced by the 1986 Hague Convention on the Law Applicable to Contracts for the International Sales of Goods.[17] Article 6 of CISG lays down this principle which says that the parties are free to exclude the application of the Convention either entirely or partially. This means that even with respect to a contract of sale in which the conditions for the applicability of the Convention as provided under Article 1 are fulfilled, the Convention applies only to the extent that no contrary intention of the parties can be established. As a matter of fact, during the preparation of the present CISG, some states expressed concern that the strong states may abuse the freedom of contract by imposing its national laws or contractual terms far less balanced than those contained in the CISG. A proposal to provide for some restrictions on the freedom of the parties received wider support. In particular, it was suggested that the parties, when excluding the Convention in its entirety or derogating from any of its provisions, should be required in indicate what other law or rules should govern their contract. However, at the 1964 Hague Conference the majority of delegations was against such a restriction. Similarly, the prevailing view in UNCITRAL was in favour of the widest possible recognition of the parties' autonomy.[18]

Just as Honnold commented that the Convention does not interfere with the freedom of sellers and buyers to shape the terms of their transactions. Nations can control their domestic commerce and can exclude or restrict the flow of trade but international trade depends on agreement.[19]

One of the concerns on CISG with respect to its restrictions on freedom of contract is that only a few legal doctrines for the justification are incorporated in the CISG. For example, the principle of good faith is incorporated into CISG, however, its scope of application is explicitly limited only to the interpretation of the Convention (Article 7 (1)).

Another concern is that CISG has not made definite stipulations on the application of good faith in the following articles: Article 21(2) (about the

---

17 John O Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed, Kluwer Law International, 1999) at 83.

18 CM Bianca and MJ Bonell *Commentary on the International Sales Law* (1st ed, Giuffrè, Milan, 1987) at 53.

19 Honnold, above n 17 at 3.

effectiveness of late acceptance), Article 29(2) (about one party's reliance upon another's conduct concerning modification or termination of the agreement), Article 37 (about the seller's conduct to deliver the missing parts or make up any deficiency in the quantity of the goods delivered before the date for delivery which should not cause the buyer inconvenience or unreasonable expense), Article 40 (about the seller's right to rely on Article 38 and 39 if he knew or could not have been unaware the lack of conformity), Article 48 (about the seller's right to remedy at his own expense any failures to perform his obligations), Article 49(2) (about the buyer's loss of declaring the contract avoided after the seller has already delivered the goods), Article 64 (2) (about the seller's loss of declaring the contract avoided after the buyer has already paid the price), Article 82 (about the buyer's loss of declaring the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them), Article 85 (about the seller's obligation to preserve the goods and his right to retain them until he has been reimbursed his reasonable expenses by the buyer), and Article 88 (about one party's right to sell the goods and his obligation to give a notice if the other party delayed the payment).[20] The failure of CISG to provide expressively the application of good faith on these articles leads to difficulty and controversy in its application by both judges and contractual parties.

The last but not the least, the CISG already excluded the application of some transactions and issues. In order to ensure the degree of freedom of contract, the Convention does not apply to consumer purchases (Art. 2(a)) or liability for death or personal injury (Art. 5). Nor does the Convention displace domestic rules with respect to the validity of the contract or prejudice the rights of third persons.[21] One of the main reasons for the CISG's exclusion is that many countries have already made rules and regulations to restrict the freedom of contract for those transactions and issues, and the CISG was unable to harmonize and uniform them at the time of drafting.

5.2 Proposals for Amendments to the Freedom of Contract

The principle of freedom of contract was established on the assumption that all the parties in contracts are of the equal capacity and bargaining powers. However, the social reality proves that this assumption is not true and that the interests of the MSMEs (particularly in the developing countries) can hardly be protected by the

20 Li Wei *Commentary on the Interpretation of United Nations Convention on Contracts for the International Sale of Goods* (1st ed, Law Press, 2002) at 35.

21 Honnold, above n 17 at 77.

freedom of contract. Therefore, from the perspective of contract substantive justice, the CISG must be amended for a better protection of the MSMEs.[22]

5.2.1 Legislative Proposals for Restricting the Freedom of Contract

There are a number of legal gaps in relation with the freedom of contract in the CISG that were intentionally left during the drafting period, due to the difficulty to achieve further compromises between the members with diversified political, economic and legal systems. Therefore, revising and adding new rules to the CISG is definitely the most basic approach. First, we should add some important legal principles to the CISG such as (a) protection of social ethics and public interests. The CISG should provide that if a contract disrupts economic order, impairs the social ethics or public interests, either party may declare the contract avoided. (b) Principle of good faith. The CISG needs to define specifically the principle of good faith and its function, such as it should clearly provide that the principle of good faith is a fundamental principle in the CISG, this principle shall be applied to restrict the CISG and fill legal gaps on the basis of substantive justice. Also, the CISG should stipulate special and preferential rules particularly to restrict the power of the dominating parties of the developed countries and protect the interests of the MSMEs in the developing countries, for instance, it should provide that if one of the parties to a contract is a MSMEs in the developing countries, the other party of the developed countries should take into account the special circumstances of the first party. Another example, the CISG should provide that if one party from the developed countries misuses its dominating position and has caused unfair consequence to another party in the developing countries, the latter is entitled to declare the contract avoided and claim for damages. (There exist in the World Trade Organization a number of special and preferential treatment rules particularly for the developing countries that can be a good example for the amendments of the CISG). What is more, the CISG should make the rule that judges or arbitrators have the authority to construe the principle of good faith in line with the substantive justice. (c) Principle of the change of circumstances. The CISG needs to provide that in the case of substantial change of circumstances after the conclusion of the contract that will definitely break the reasonable balance between the parties one of which is a

22 It is generally recognized that the CISG does have shortcomings, but a consensus for the amendments to the CISG could not be reached. For example, some argued that it would be uncertain whether all states would ratify an amended CISG because it is an international convention. However, some others also proposed ways to change the CISG of which, one example is to widen its scope to all kinds of contracts. See Bruno Zeller "Recent Developments of the CISG: Are Regional Developments the Answer to Harmonization"? (2014) 18 VJ 111 at 113; Ingeborg Schwenzer and Pascal Hachem "The CISG – Successes and Pitfalls" (2009) 57 AJCL 457 at 469.

party of MSMEs from the developing countries, this party is entitled to revoke the contract, and provide that judges or arbitrators have the authority to revise or add new rules to the contract in line with substantive justice. (d) The principle of pre-contractual liability. Just as the UNIDROIT Principle of International Commercial Contract, the CISG should also make specific provision of pre-contractual liability so that the MSMEs can avoid the loss caused by strong enterprises with dominating status in the globalized world. (e) The objective principle of interpretation of the contract. The CISG shall grant the authority to judges and arbitrators to interpret the contract objectively so as to ensure the safety of transaction and the lawful interests of the MSMEs in the developing countries. Although the CISG already provides that the interpretation of the CISG must be of observance of good faith, the principle of objective principle of interpretation may be more specific than the principle of good faith so as to overcome the defect of the ambiguity and help the MSMEs in their easy application in judicial activities.

Second, the CISG should specify the rules of freedom of contract to ensure an easy application in the judicial and enforcing process. As the legal development in the world has been going on rapidly and the CISG has made fairly-well achievements in the harmonization and unification of international contract law of sales, it will be easier for the CISG to specify any ambiguous rules for an easier application of them. For example, to make specific provisions on what concrete situations the MSMEs should declare the contracts avoided and how judges can apply the principle of good faith, the principle of pre-contractual liability etc. in their judicial affairs.

Third, the CISG should empower the judges and arbitrators to interpret the CISG discretionarily in the case of ambiguous rules and legal loopholes.

5.2.2 Judicial Proposals for Restricting the Freedom of Contract

Judicially, judges and arbitrators should, under the above proposed provisions of the CISG, restrict the freedom of contract in pursuit of substantive justice. The basic role of the courts lies in interpreting the contract rules in the case of ambiguous contract terms, refusing to enforce contracts, and employing the principle of protection of economic order, the social ethics and public interests, good faith, the principle of change of circumstances and principle of objective interpretation, etc.

VI CONCLUSIONS

This paper sought to demonstrate that the principle of freedom of contract fails to protect the interests of the MSMEs in the developing countries because the early assumptions for the establishment of the freedom of contract proved improper in the globalized world which lead to the bigger gap between the enterprises of the developed countries and the MSMEs of the developing countries and the loss of

reasonable benefits of the latter from the globalized world. The hesitation of developing countries to approve the CISG is indicative of this fact.

This paper also made clear that there are numerous legal justifications for the restrictions on the principle of freedom of contract, and put forward some specific legislative and judicial proposals for amendments of the CISG to promote the harmonization and unification of international trade law and protect the interests of the MSMEs in the developing countries.