English Commercial Law

Internationally the preferred governing law for business transactions is “English Law”. It has been prevailing all over the world because it has well established and well developed reputable jurisprudence. Historical evidence of English Law, it connects to the period of British Empire, which was one of the largest empires in history in conjunction with French Empire. The former colonies had established their legal systems as a legacy of the English Law. The System of Common law has been retained till date by several British colonies; it has been used by respective courts as a source of interpretation, guidance, rules and input, they refer to the judgments of the higher courts of England and Wales notably Privy Council for giving decisions or new and unusual issues. In the same manner the English court also seeks assistance from the judgments of court and other jurisdictions of universal laws to consider issues as and when arises.

Laws of USA are very much influenced by “English Common law system”. Historically, the lasting legacy of international law is based on the “East India Company”. The Royal Charter of 1600 is the foundation stone of “English Joint –Stock company to commence trade with East India and China and Indian Subcontinent. On behalf of English merchant the QueenElizabeth, I exercised her sovereign power and treasury fund to establish trade by creating the first-ever joint-stock corporation, which contained investors holding shares in the company. Base on some shares the company was providing them profit and dividend. The liability of the investors of East India Company was also limited by Queen Elizabeth due to making English joint-stock company as world’s first largest “limited liability corporation”. Which granted protection to the money of the investors against their initial investments. As a result, if the company went in a loss the outstanding debts were not divided among investors. Hence, a prototype was established for modern corporations as we practice nowadays by Queen Elizabeth by granting a charter to the East India Company. The high quality of UK law firms, judges, barristers, the reputation of judges and their experiences, as well as the independence of the judiciary, strengthened English laws. Individuals and businesses are given access to justices through HM courts and services of tribunals which tends to administer the work of the courts.

The matters of financial conflicts, rights of employment, family laws, administrative laws, are dealt with “magistrates of courts, Country Court, Crown and FAMILY courts as well as the Royal court of justices”. The arbitration claims, issues of banking and commercial services, commercial agencies, matters of insurance, trade, contracts and business documents professional and business disputes as well as financial conflicts are dealt by the “Mercantile court”. The English Law also received fame due to the provision of relative and speedy justices regarding commercial disputes.

The primary principle of judicial independence of UK constitution is based upon the careful selection, impartiality and experiences of English law judges and their professional skills in dealing complex cases. UK government do not pressurise judges to get a judgment of their interest, as well as judges, have been empowered to give decisions according to their judgments. The judicial Appointment commission makes appointment for judges on merit bases condition to having no political influence for holding the judicial office. Therefore, they are not pressurised and influenced by politicians or any other external forces in deciding cases, or maintaining integrity and independence of English courts. Hence, English Law dominates many sectors such as “international commercial contracts, financing, banking, maritime and shipping, mergers in acquisitions disputes and international arbitration”.

Indeed, it has four interrelated characteristics.

Firstly, it is “pragmatic” commercial law is all about getting things done, solving issues[1]. It tends to deal with meeting the legitimate requirements of the market, formulating contract structures and many legal tools.

Secondly, it is “responsive”. It provides a body of rules developed in response to commerce needs. According to Professor Goodee, “the totality of laws with regards to mercantile conflicts are represented by commercial law.[2], he further indicated that trading is impossible without commercial laws.

Thirdly, the role of commercial law is to facilitate the efficient operations of transactions rather than emphasising upon the content and forms of transactions.

Lastly, they are “consequentialist” rather than “normative”.

Commercial laws are said to be consequentialist because it provides determinate results without concerning that would it be achieved or not. Indeed these four characteristics are the caricature of commercial laws, and each of them is debatable because in few cases perceptions are different from interpreting in the process of decision making, for example, the interpretation of facilitating rule and mandate is not very clear.[3] It is mentioned by Ayres et al., (1989) “How do we categories a rule that says ‘there must be an offer by one party and acceptance of that offer by another party for a contract to be enforceable”. Besides, there are other key contemporary developments such as apprehensions about normative queries about “fairness and good faith”. Moreover, the perspective to define contemporary commercial law is the evaluation of the historical origin of commercial law.

Researchers believe that ancient laws which tend to govern merchants and traders’ disputes and practices formerly “credited or borrowed, absorbed and incorporated by common law”

which was initiated in the 17th century.[4]Hence, it laid down the foundation of current modern commercial law.[5] It is described by John Braithwaite and Peter Drahos, (2000) that the extraordinary evidence of transcontinental private rule is “Medieval Lex Mercatoria”. These laws were formulated by merchants and established policies to regulate commercial relations. In the domain of commercial life, the role of the court was to operate in a declarative model.[6] Significantly, the law merchant was applied internationally due to its’ composition, the ability of adaptability, flexibility and freedom from technical rules of evidence and procedure.

According to Gunther and Teubner, (1983) the merchant law comprised of broader principles which possess the potential of changing their application case to case. Indeed it is more about the law of values rather than the law of rules and structures and procedure.[7] Thus, the most important feature is the “commitment to good faith” which is the superseding need of making agreements.[8] In recent years, globally, the commercial lawyer's emphasis upon the idea of good faith principles rather than rules though there are conflicts with regards to contemporary consequence. Hence all these features are useful to comprehend the meaning of commercial law. In the 19th century, the lawyers laid down importance upon the role and significance of commercial law , the research of Ferguson’s revealed that lawyers were the driving force behind raising the concerns with perspective of the interest of “men of business”. [9]

In 1889 the barrister responsible for the “Bills of Exchange Act 1882, the Sale of Good Acts 1893, and the Marine insurance Act 1906 , Mr. Mackenzie D Chalmers augmented that mercantile laws are not meant for lawyers, though they are made by lawyers or laymen to regulate the conduct of business with relation to rules mentioned by the law.[10] The categorisation was made to provide legal certainty to people in business and support them to refrain from litigation[11]. Briefly, speaking the “commercial law codes were commercial laws for commercial lawyers”. Thus the closer examination of history reveals that the relationship between commercial law and commercial practices should be explained cautiously and in a simple framework. Thus, it could be assumed that complex series of modifications and connections among self-regulation of commerce and law of mercatoria is revealed in the history of regulation of commercial activity.

Nevertheless, nowadays the commercial law is perceived as important and practical meaning it is the law for getting things done. Cranston observes, it is the vital concerns for researchers of commercial law and also the practitioners required to investigate it.[12], it is also believed that it has no relevance for practitioners and it is also noticed that leading law agencies judging through their websites[13] are not using the term “commercial law” to define the services offered by them although they use the specialisations attached to commercial law such as banking and finance or competition law”. Hence, it seems to be the matter of academics and needs to expand to the element of the diminishing capacity of cross-pollination among the categories of commercial law.[14]

Risk factors There are various wide categories of commercial contract risks such as “Liability risk; breach of contract issues; claims; problems of warranty; terminations; intellectual property breach charges, supposed confidentiality disclosures, disputes and allegations.” The international and English courts concentrated upon “tort law and warranted the potential liability of successor corporations primarily by the desirability of spreading the risk of accidents” while considering the issue of successor liability as a matter of corporate or commercial law.[15] Traditionally, the contractual expectation is perceived as promises made for receiving the benefits. The operational standards of good faith performance are based upon the costs perspectives articulated in the jurisdiction of common law. The perspective of good faith could be implemented when one party workout the discretion in performance and another party controls the projected benefit the risk arises when discretion is used in bad faith to recapture the predetermined opportunities.[16] Another risk factor is revelations of supposed confidentiality leads to an information leak. Companies implement innovations and inventions which serves as legal protection against copying inventions because they are not protected by charters and copyrights because their process involves to the public and may disclose the information, and as a result, a company would not be able to defend the intellectual property. unlawful if it is related to the acquisition of the investment that is relevant to the jurisdiction of the tribunal; unlawful conduct ex-post the establishment of investment is instead a question for the admissibility.”

However some tribunals deny jurisdiction after finding establishment illegality (Fraport I, II, Metal-Tech Ltd. v. the Republic of Uzbekistan), other tribunals find such claims inadmissible (Plama v. Bulgaria, World Duty-Free v. The Republic of Kenya, SGS v. Republic of the Philippines Breach of international law jurisdiction is and another issue. Investment treaties are meant to encourage and protect foreign investors, but mostly they are not respected. Nevertheless, many investment treaty cases have ruled that foreign investment by foreign national in host countries not be protected in front of investment arbitration tribunals. It has been debated that whether the illegal considerations are the issue of jurisdiction, the research reveals that it is considered Moreover, in the era of globalised business, industries are commissioned to select governing law for cross-border business contracts.

English law is mainly preferred because they are adaptable to allow and implement limitations of the “cause of liability, waivers of consequential loss, liquidation of assumed damages, time and procedural bars on claims”. Further, clauses of “knock to knock” and pay when paid” are favourable elements to choose English Law.[17] The BERTIX incidence also did not have a negative impact on the England and Wales jurisdiction, specifically related to international commercial contracts as mentioned by “Law Society of England and Wales”.[18] It has not been affected by EU law because it is formulated on the perimeters of global standards and derived from common law as well as the flexibility of English contract law enable the contract to be adapted therefore it does not tend to have any commercial risk. The bottom line is that

English solicitors, law agencies and judges are the best in the world and English contract law is being used internationally because it offers “certainty, stability and predictability.[19] Moreover, the sanctions imposed by EU are ambiguous, but it lays major obligations on commercial entities with relation to compliances and might affect the performance of existing contracts, workable limits etc. are a matter of risk for firms. However, the UK’s new office of “Foreign Sanctions Implementations” is providing a high level of quality services to the private sector but it cannot eliminate the risk which is imposed through EU sanctions.

It is essential to consider the element of risk of sanctions under below-mentioned aspects Risk of breaching sanctions.Signing a contract because of connected to the current breach of sanctions. Risk imposed or extended due to sanctions to an extent to interfere with the parties potential to operate as per original commitments mentioned in the contract. Change in status is also a risk which is a result of sanctions although it was not indicated in the original contract before sanctions. Frustration is another doctrine of the risk factor; the contract can come to an end if the contractual parties are unable to oblige to the commitments made in the contract, or are incapable of delivering because of unfavourable circumstances.[20] Dependency on frustration and illegality may refrain the contractual, parties to avoid liability caused due to a breach of contract resulted from the imposition of sanctions.

Conclusion

English law is predictable and transparent; it provides freedom of contract, a pro-business approach. There is no implied rule of duty of good faith in commercial law, unlike other jurisdictions. According to English law, a “duty of faith requires neither party to take advantage of the other”. In the context of foreign investors agreements, the parties are obliged to inform each other the fundamental aspects and rules if the parties are unable to comprehend. Hence, the law bound both parties to be reasonably persistence about contractual obligations and observe moral and ethical behaviours as mentioned in the contract. [1]

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