

Internationalization of Malaysian SMEs and the Relevance of the UN Sale Convention

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Abstract: Aimed at 41% of contribution to GDP and employment growth of 62% by Small and Medium Enterprises (SMEs) by 2020, Malaysian government wants them to trade internationally. In this respect, SMEs have to face a strong legal barrier. They have to choose foreign law as applicable law for their contract. Because, they are not familiar with Foreign Law this creates uncertainties for them which may cost them money and time to educate themselves in that law, to understand its application, to negotiate and draft contracts and to have disputes if any, settled. The UN Convention on International Sale of Goods 1980 (CISG) has become a universal piece of law being ratified by a large number of states including all major trade partners of Malaysia except the UK which is presently considering its ratification. As such, this study argues for Malaysia to become a member of the convention which will place Malaysian traders on a level playing field with their counterparts in sale transactions internationally.

Key words: Barrier, law, GDP, draft, sale

INTRODUCTION

On 25th September 2010, Malaysia launched the Economic Transformation Programme (ETP) as part of her National Transformation Programme aimed at achieving a developed nation status by 2020. To reach that target, she has identified twelve National Key Economic Areas (NKEA) on which her development efforts will be focused as they have the most potentials to contribute to the Gross National Income (GNI). One of these NKEAs is “wholesale and retail”. Its aim is to globalize the local products produced/manufactured by the private sector. In line with this, Malaysia has adopted the Small and Medium Enterprises (SMEs) Master Plan 2012-2020 which includes, among other matters an initiative to increase SMEs’ export trade. That will increase their turnovers by selling their products in Foreign markets and can also contribute to the growth of employment. To facilitate this, the government needs to ensure that SMEs do not suffer from the uncertainties of “Foreign” law that they may choose to govern their contracts and the risk of litigation under that law which may cost them a lot of money and time. As such, Malaysia should join the harmonized international legal regime the UN Convention on International Sale of Goods 1980 (CISG) which has been ratified by almost all of her trading partners that control two-thirds of world trade. The main hypothesis of this

research is that the CISG has the potential to act as a catalyst for the economy of Malaysia by developing the SME sector in foreign trade and thereby to achieve the goals set out in the 2012-2020 SMEs Master Plan without any adverse legal and policy impacts.

MATERIALS AND METHODS

First, this study tests the above hypothesis by reviewing literature on SMEs’ potential contribution to national economy through foreign trade and the facilitative role of the CISG in this respect as a harmonized piece of international legislation. Then, it assesses if Malaysia should ratify the CISG from her national policy perspective taking into consideration the fact that most of her trading partners except the UK have ratified the CISG. The literature reviewed includes national and international policy documents and guidelines such as Malaysian SME Master Plan 2012-2020, UK Department of Business, Innovation and Skills (BIS) Green Paper, European Commission guidelines and scholarly writings from various jurisdictions of the world.

RESULTS AND DISCUSSION

Internationalization of SMEs and the relevance of CISG: In July 2012, Prime Minister of Malaysia, YAB Dato’ Sri

Haji Mohd. Najib launched the SME Master Plan 2012-2020. Its aim is to increase the SMEs' contribution to GDP from 32% (current) to 41%. It also targets an increase in employment to 62% through the expansion of SMEs' businesses (SME Corporation Malaysia, 2012). To this end, it has proposed six high impact programmes. One of them is the Going Export (GoEx) Programme which aims at expediting internationalization of SMEs (SME Corporation Malaysia, 2012).

The main reason behind is to increase revenue and business growth (Chelliah *et al.*, 2010). And most of such firms (74.3%) are engaged in export trade. Others are licensing (17%), joint venturing (5%), franchising (3%) and wholly owned subsidiary enterprises (3%) (Abdullah and Zain, 2011).

However, these firms face various difficulties and challenges, both internal and external (OECD 2012; Saleh and Ndubisi, 2006; Mahajar and Hashim, 2002). At the international level, most importantly they encounter high level of competition, especially from China and India. They have low bargaining power while contracting with big or Multinational Companies (MNCs) (SME Corporation Malaysia, 2012). This issue is exacerbated when a Foreign country law is chosen to govern the sale contract. They have to spend a lot of money, time and efforts to educate themselves in that law, to understand its application and regulation to negotiate and draft the terms of the contracts and to resolve disputes if any, arising from the contract (OECD, 2012; Huda, 2013; Mahajar and Hashim, 2002). Malaysia can surmount the problem, if she ratifies the international legislation-CISG. In that case, SMEs will be able to submit their sale contracts to the same law used by the trading parties from other States that are already members of the CISG such as United States, Canada, Mexico, Russia, UK, China, Australia, New Zealand, Japan, South Korea, Brunei and Singapore. Controlling two-thirds of the world trade, these States are the major trading partners of Malaysia.

Of course, one of her important partners, the UK has not become a member yet, albeit she is strongly considering the matter following the economic recession of the recent past. For recovery from this crisis, she takes SMEs as the "catalyst" because they constitute 99.9% of total businesses accounting for more than half of the country's private sector employment and turnover (BIS, 2010). Therefore, the Prime Minister, Mr. David Cameron and his cabinet have repeatedly emphasized the stimulation of the advancement of SME sector (Smale, 2011). In this respect, it may be noted, the European Commission (2010) underlines the need to internationalize SMEs and recommends to the EU Member States including the UK to take steps to remove the lack of legal information available to them that creates barriers to

their efficient performance in international trade. The Commission further recommends that the governments take steps to reduce time, cost and efforts that the SMEs incur to understand foreign law and to involve in foreign litigation. Goode (1998) suggests, these issues may be successfully handled through harmonization of national laws. The CISG, being the best example of such harmonization, is "most appropriate" for the UK to ratify at this moment (Nikolova, 2012).

Thus, SMEs, particularly the internationalizing ones are crucial for the development of any economy including Malaysia. And, for their successful performance, legal barriers created by discordance of national laws must be removed. To this end, CISG as emphasized above is the sustainable option. In this respect, it would be very much apt to quote Professor Castellani of the UN Commission on International Trade Law ("UNCITRAL") as follows: As small and medium sized enterprises have limited access to expert legal advice when drafting their contracts and little influence on the choice of the law applicable to the contract, they would take advantage correspondingly from the application of the CISG. Small and medium sized enterprises constitute the backbone of a modern and balanced economy. They support economic diversification and may therefore significantly contribute to achieving sustainable growth. In conclusion, they may play an important role in addressing those structural problems. The CISG may be instrumental in making this role effective (Castellani, 2009).

CONCLUSION

In light of the foregoing, it may be suggested that Malaysia ratify the CISG. This will in the first place, help the Malaysian SMEs trade internationally being governed by a uniform law without any fear of uncertainty of "Foreign Law". This will increase their trading which will in turn, make more turnovers and create more employment than now and may also make Malaysia's position among the top 10 trading nations as targeted by the government (MITI, 2008). Second, Malaysia will enjoy prestige among the trading nations that belong to a uniform legal regime. Last, this may also increase the possibility for Malaysia to be centre for dispute settlement, judicially or otherwise and may earn her foreign currency and good will internationally.

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