



ASSESSMENT OF DAMAGES UNDER THE
CONVENTION ON CONTRACTS FOR
INTERNATIONAL SALE OF GOODS (CISG)

BY

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ABSTRACT

In the international sale of goods, once a contract is breached, damages are one of the most common remedies that the injured party claims from the breaching party. The injured party would require the breaching party to remedy the damages resulting from the breach of contract. Therefore, the knowledge of the damage rules under the applicable law is crucial to the interests of the contracting parties. An effective damage rule should offer the contracting parties with a predictable outcome. In other words, it should be clear to the contracting parties about what damages are recoverable and when they are recoverable. The aim of this thesis is to explore the remedy of damages under the international convention on contracts in the international sales of goods (CISG). The United Nations Convention on Contracts for the International Sale of Goods (CISG) is one of the most successful international instruments that provide uniformity in the rules for international trade. The issue addressed in this thesis include: the basis for the right to claim damages, the idea of limitation of damages, causation, foreseeability and mitigation, principle underlying the award of damages; classification of losses and how to recover damages. Also this thesis draws to how the interest will calculate. This thesis attempts to provide justification for the existing rule of damages, highlights the problems in their interpretation and application of provision, and proposes solutions to the existing problem in the light of relevant policies and goals pursued by the international instrument to fill the gap the is existing in the CISG. The problems associated with remedies under the Convention arise because the provisions concerning the payment of damages and interest set forth only very general rules. In such situations, the Convention states that, in interpreting the Convention, “regard is to be had to its international character and to the need to promote uniformity in its application and observance of good faith in international trade.” It further states: Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Despite these provisions, many courts and tribunals simply apply domestic rules to fill gaps in the Convention. This is especially true where it has been unclear whether the matter is governed by substantive law or procedural law

خلاصة البحث

في المعاملات الدولية لبيع البضائع، عندما يتم خرق العقد، يعتبر التعويض واحداً من أكثر الحلول التي يطالب بها المتضرر من الطرف المخل بالعقد. حيث يقوم الطرف المتضرر من الطرف المخل بتعويضه عن الأضرار التي لحقت به جراء إخلاله بالعقد. وعليه فإن معرف قوانين الضرر تحت ضوء القانون المختص هو شئ أساسي لمصلحة طرفي العقد. ووجود قوانين "قواعد" للضرر يقدم لطرفي المتعاقدين حصيلة متوقعة. بمعنى آخر، يجب أن يكون واضحاً للطرفين الأشياء القابلة للإعادة ومتى تعاد في حال وجود إخلال بالعقد. الهدف من هذه الدراسة هو معرفة التعويض الملائم تحت المعاهدات الدولية للعقود في العقود الدولية لبيع البضائع. حيث تعتبر معاهدة الأمم المتحدة للعقود الدولية لبيع البضائع واحدة من أنجح الوسائل الدولية التي تقدم انتظاماً لقواعد التجارة الدولية. القضايا التي تعتبر موضعاً لهذه الدراسة هي: مبادئ الحق في المطالبة بالتعويض، فكرة تحديد الضرر، السببية، التنبؤ والتخفيف، المبادئ التي تمنح عليها تعويض للأضرار، تصنيف الخسائر وكيفية إعادة الأضرار، وكذلك كيفية حساب الأرباح. هذه الدراسة تحاول أن تقدم مبررات لقواعد الأضرار الموجودة حالياً، تحديد المشاكل وترجمتها، واقتراح حلول للمشاكل الحالية في ضوء السياسات ذات العلاقة والأهداف التي يراد أن تتحقق من خلال الآلية الدولية المملئ الفراغ الموجود في العقود الدولية لبيع البضائع. تظهر المشكلة المرتبطة بالتعويض تحت معاهدة الأمم المتحدة بسبب الفقرات المتعلقة بدفع الأضرار والفوائد حيث أنها مذكورة بشكل عام فقط. في هذه الحالة تذكر المعاهدة بأن، بما معناه في الترجمة، "فيما يتعلق بالشخصية القانونية والاحتياج إلى تسويق النظام في شكله والمراقبة بحسن النية في التجارة الدولية" بما معناه: الأسئلة المتعلقة بأحكام هذه المعاهدة والتي لم تذكر فأنها ستناقش بالمبادئ العامة، أو إذا لم يتواجد هكذا مبدئ فأنه يناقش بالقانون الواجب التطبيق بمساعدة القانون الدولي الخاص. بالإضافة إلى هذه المواد، فأن العديد من المحاكم تقوم بتطبيق القانون المحلي المملئ الثغرة الموجودة في المعاهدة. خاصة في المواضيع التي لم يذكر فيها أي القوانين تطبق، القانون الموضوعي أو القانون الاجرائي.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Rahand Raouf Ali

Signature

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- MINPO (Japan); Civil Code (P.R.C.).
- Principle of Europeans Contract law (PECL)
- The United Nations Convention on Contracts for the International Sale of Goods CISG. 1988.
- UNIDROIT principle for international commercial contracts

LIST OF ABBREVIATIONS

CISG	Convention on Contracts for the International Sale of Goods
ICC	International Chamber of Commerce
PECL	Principles of European Contract Law
UNIDROIT	International Institute for the Unification of Private Law
ULIS	Uniform law on the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of private Law
UPICC	Principle of International Commercial Contracts
CIETAC	China International Economic and Trade Arbitration Commission

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

From time immemorial, people have been buying and selling all sorts of goods. Whereas, in ancient times, merchants managed to trade without a universal law applicable in an area larger than their homeland and neighboring countries, This will not be possible in the present globalized world. Since the CISG which has been adopted by 70 states went into force on January 1, 1988, the content of this document must surely be a result of lengthy discussions and compromises. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is one of the most successful international instruments that provide uniformity in the rules for international trade. It has been adopted by seventy-three countries and has been in force for twenty-three years. In this respect, the CISG is far more successful having been ratified as at the time of writing. As noted, the CISG is routinely applied by courts and arbitration tribunals as the source of law for international sale contracts. Also the CISG has been the source of inspiration for many transplants. Aspect of the CISG has been adopted not only into domestic law but also into other conventions. It is for these reasons that the CISG must be consider an important development in the harmonization of commercial law worldwide.

1.1.1 Drafting History of the Convention

The drafting history of the Convention lends perspective to its rules on damages and to the manner in which these rules will be interpreted. The Convention represents the culmination of over fifty years of negotiation.¹

This process of obtaining consensus on an international sales law proceeded in two stages. The first stage began in 1928 at the Sixth Session of the Hague Conference on Private International Law.² In the 1920s and 1930s, the participants in the effort came from the industrialized countries of Europe.³ During this Eurocentric phase of the drafting, the primary disagreements centered on the differences between the common law and civil law traditions of the various participants.⁴ The second stage of the Convention's drafting history began after World War II. In the years after the Second World War, the voices of a much more diverse group of countries -- developed and undeveloped, socialist and capitalist, colonized and colonizing -- contributed to what would become the final draft of the Convention. In 1964, a conference of twenty-eight countries at the Hague Convention adopted (1) the Convention on the Formation of the Contract and (2) the Convention on the Sales Contract. Negotiations focusing on these two conventions led to approval by the United Nations Commission on International Trade Law (UNCITRAL) in 1978 of a draft sales convention, which was finally adopted in 1980 in Vienna. The 1980 Vienna Convention went into effect on January 1, 1988.

The UNCITRAL body responsible for drafting the CISG was widely represented. It consisted of nine countries from Africa, seven from Asia, five from Eastern Europe, six from Latin America, and nine from Western Europe and "Others"

¹ J. Honnold, *A Uniform Law for International Sales*, 1986, p. 266.

² *Uniform Law for International Sales under the 1980 United Nations Convention*, 1982, 29-34.

³ *Ibid.*, p. 282.

⁴ *Ibid.*, p. 287.

(including the United States).⁵The final draft of the Convention reflects this diversity of legal traditions, as well as the world's "balance of affluence and need."⁶ Although this diversity was necessary in order to create a truly international sales law, the Convention necessarily includes many areas of compromise that point to a lack of consensus.⁷

1.1.2 Scope of Application of the Convention

The Convention applies to all contracts for the sale of goods between parties whose places of business lie in different contracting countries.⁸ The sphere of application of the convention is controlled by article 1(1): "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."⁹The Convention also excludes several types of international sales contracts that would otherwise fall under article 1(1) (a).¹⁰Articles 2(5) lists specific exclusions from the Convention. Among the more significant exclusions are the following. First, the Convention does not govern sales of consumer goods (for 'personal, family or household use') or of stocks, money, investment securities, or negotiable instruments.¹¹Second, it does not govern

⁵ See Eorsi, A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods, 1983, 31 *AM. J. COMP. L.* 333.

⁶ Dore & DeFranco, "A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code," *HARV.INT'L L.J.*, 1982, 23, p.49.

⁷ CISG, art. 1(1) (a); J. Honnold, *Ibid.*, p. 77.

⁸ CISG, *Ibid.*, art. 1(1).

⁹ The Convention states: "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention." CISG, *supra* note 1, art. 95.

¹⁰ See generally Winship, "The Scope of the Vienna Convention on International Sales Contracts," in N. Golston & H. Smit (eds.), *International Sales: The United Nations Convention On Contracts For The International Sale Of Goods*, 1984, 1-1-1-53.

¹¹ CISG. *Ibid.*, art.2.

the validity of the contract, its provisions, or its usage,¹² which suggests that questions of duress, illegality, fraud, unconscionability, and mistake are controlled by domestic law.¹³ Third, the Convention does not control the seller's liability "for death or personal injury caused by the goods to any person."¹⁴ Finally, and perhaps most importantly, contracting parties may alter the effect of the Convention or exclude altogether its application.¹⁵ The freedom of parties "to draft their way out of any undesirable provisions"¹⁶ demonstrates the Convention's emphasis on freedom of contract; its "dominant theme . . . is the role of the contract made by the parties.

1.2 RESEARCH QUESTIONS

To fulfill the purpose of the thesis, the following questions will be dealt with:

1. Article 74 does not specify what types of losses are included in a claim of damages except loss of profit. It is a broad definition for Damages
2. Are there exemptions to damages for non-conforming goods under CISG?
3. What level of proof is required in order to recover damages?
4. Whether attorneys' fees and costs may be recovered as damages under the Convention?
5. How interest rate should be calculated because the Convention does not explicitly address these issues?
6. Whether Article 79 governs circumstances of hardship?

¹² Ibid., CISG. Art 4.

¹³ Rosset, comment on CISG, pp. 255-277, 1997.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

1.3 HYPOTHESIS

1. Article 74 explains the extent of damages that can be claimed in case of a breach of contract.
2. A gap in the CISG is filled with the Convention's general principles or with national law. Article 7(2) of CISG provides for gap filling. Especially in case of exemption article (79).
3. CISG requires that attorneys' fees be recoverable under the substantive term "loss" in Article 74. The substantive term "loss," when interpreted in conformity with the "general principles" on which the Convention is based also requires that attorneys' fees are a recoverable "loss."
4. The purposes and policies of article 74, as well as the Convention as a whole, lead to the conclusion that, under article 74, an aggrieved party must show, with reasonable certainty, that it has suffered damage as a result of the breach of contract.

1.4 THE OBJECTIVE OF THE STUDY

The purpose of this study is to clarify the content of the articles on damages under the Convention on Contracts for the International Sale of Goods (hereinafter CISG). Damages are the most important remedy under the Convention, available to the aggrieved party whenever there is an objective breach of contract. Damages are a remedy that is independent from, and can be utilized irrespective of, other remedies the Convention may offer. This thesis closely analyzes damages under the CISG. The emphasis is on the basic rule for damages contained in article 74 of the CISG. Through case law the study provides the reader with an overview on how the articles on damages have been interpreted. At the same token the study may give the reader

ideas on how an individual case could be resolved. The study gives a picture of what kind of criteria a claim for damages should fulfill, what types of damages have been allowed under the CISG, what limitations there are and how the articles on damages are placed under the framework of CISG as a whole. Clarification to the content of the articles is given mostly by means of legislative history and case law dealing with the articles. The thesis contains case law from numerous jurisdictions, different legal cultures, courts of first instance, superior courts and arbitration tribunals. Incorporation of these cases into this thesis was done with regard to, and in the interest of, article 7 of the CISG, which provides that in the interpretation of the Convention regard is to be had to its international character and the need to promote uniformity in the application of the Convention. Given the comparative aspect of this study, different issues of articles on damages have been examined in the light of both civil law and common law. Internationally agreed principles. Cases in this thesis have been selected on the basis of their significance which is established by their appearance in literature on CISG, on the basis of the way in which these cases address the issues involved in articles on damages and because of the way these cases have been cited in other cases where issues on damages have been dealt with.

1.5 THE SCOPE AND LIMITATION OF THESIS

The scope of this thesis does not allow for a thorough look into other articles that are of relevance in terms of damages. However, the most relevant of them have been briefly commented on and will provide guidelines to a reader interested in the international aspects of the Convention. This study has not made use of any particular national law as a source of comparative examples. There are examples given on national laws but the intent here has been to give a picture of the articles on damages

as independent entities, as much as reasonably possible detached from the sphere of influence of national laws and in that sense remaining faithful to the international character of the convention.

1.6 SOURCES AND METHOD USED IN THIS THESIS

The CISG as such has been a subject to a multitude of studies ranging from commentaries dealing with the Convention as a whole to studies with a narrower scope dealing with just one particular aspect of the Convention. Damages as a part of the variety of remedies under the convention are included in all the commentaries dealing with the Convention as a whole, but no lengthier studies have been published dealing solely with the subject of damages under the CISG. Use has been made of CISG-literature, literature on damages in general, websites dealing with the CISG and case law material available from a multitude of sources. In particular the Pace Institute of International Commercial Law- website¹⁷ has been extensively used in the course of research work for this study.

The approach to the subject of the study has been a combination of theory and practice. Theoretical aspects of law and principles on damages in general have been touched. The emphasis is on practical applications of the articles on damages and analyzes case relating to the application of CISG. The result of the analyses will be synthesised to give opinions and a brief conclusion.

1.7 LITERATURE REVIEW

International trade needed uniform rules to settle legal disputes arising between parties whose places of business are in different countries and in different legal cultures. This

¹⁷ <http://www.cisg.law.pace.edu>