





# **Damages under the CISG**



# Economic provisions of the CISG

Art. 74 - Damages

Art. 78 - Interest

## Three controversial issues

Whether or not an aggrieved party may recover attorney's fees and costs under CISG

Whether or not an aggrieved party must show a requisite level of proof to recover damages under the CISG

How is interest to be calculated under the CISG?



# **Economic Remedies under the CISG**

If a party fails to perform, it has a broad range of remedies available, including damages.

Art. 74 - basic principles of damages framework

Art. 78 - payment of interest

Purpose of the framework:

Place the aggrieved party in the same economic position it would have been in had the contract not been breached

*Benefit of the bargain*

## Art. 74 - Basic rules of recovery

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.

No specific guidelines for recovery, but allows for recovery of:

Direct loss

Incidental loss

Consequential loss



**Losses recoverable under Art. 74 CISG**

# Direct loss

Aggrieved party is entitled to recover loss in a value as a result of a breach

Direct loss

=

value that party should have received

—

value (if any) that the aggrieved party received

*Principle:* putting the aggrieved party in the same position it would be in had the contract been performed

The aggrieved party *may recover costs of measures* it had to undertake to put itself in a position it would be in had the contract been performed



# Incidental loss

Loss suffered in addition to losses in value

When the aggrieved party incurs additional costs to avoid additional loss - e.g., storage costs

# Consequential loss

Economic losses suffered when dealing with third parties

*e.g., losses suffered by a seller for his buyer's termination of contract with third parties*



## **Basic Principles of Awarding Damages under Art. 74**

## Basic Principle:

An award of damages must not put the aggrieved party in a better position than it would be had the contract been performed

## Reasoning:

This approach prevents the aggrieved party from obtaining *a windfall*

## Formula:

Damages = (direct loss + incidental loss + consequential loss) - any gains

## Art. 74 - Foreseeability Limitation

Subjective test: *"...[f]oresaw or ought to have foreseen at the time of the conclusion of the contract [...]"*

Objective test: *Reasonable party in the same situation could expect to suffer the loss in the same position as the aggrieved party*

# Additional provisions to be considered

- Art. 75** Damages = (Contract price - price in the substitute transaction) + further damages needed to make the party whole
- Art. 76** Damages = (Fixed price - market price at the time of the avoidance) + further damages needed to make the party whole
- Art. 77** Mandatory obligation to mitigate damages: taking reasonable measures to prevent further damages
- No affirmative liability; if a party fails to take those measures it cannot claim losses that could have been avoided
- Recoverable even if the attempts to mitigate turn out to be fruitless
- Art. 78** The aggrieved party is entitled to award of interest as a compensation for loss of a use of money



# Unsettled issues



# Recovery of attorney's fees and costs

*Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*

Litigations costs are matters of procedure and, thus, outside of the scope of CISG

This matter should be resolved by virtue of the applicable domestic law

**Not recoverable**

Other jurisdictions

CISG must be interpreted autonomously, without regard to the domestic law

Broad interpretation of Art. 74 in accordance with the principle of full compensation

**Recoverable**



## Proving damages

CISG does not address the requisite degree of certainty and burden of proof

### Two approaches



If not proven with *mathematical provision*, the courts would not award damages

If proven with a *reasonable certainty*, the courts allowed recovery of damages

# Determining the rate of interest

CISG is silent on the rate to be applied when awarding interests

Various methods



Applicable domestic statutes

Commercial rate under CISG

Difference between the two approaches can be significant

Substance vs. procedure approach

Lack of agreement = Award of damages that seem inconsistent and arbitrary

Result: Undermines predictability, purpose and legitimacy CISG

Discard the substance v. procedure distinction

- Distinction varies from jurisdiction to jurisdiction
- Relying on distinction where jurisdictions offer different solutions can be counterproductive
- Distinction is artificial
- It is an easy path to application of domestic law, instead of the CISG

# Proposed interpretative process

I. Whether an issue can be decided according to the literal, plain and natural reading of a CISG article

II. Whether an issue has been deliberately left to national law



If not, then it should be resolved under Art. 7.2 by virtue of general principles underlying the CISG

If yes, only then can a court resort to a domestic law



# Applying the interpretative approach

# Attorney's fees and costs

Aggrieved party would not be entitled to recover attorney's fees and costs associated with it

## Guiding principles of interpretation

- The principle of full compensation under Art. 74
- The principle of equality between a seller and a buyer
- Legal costs are not a result of a breach of a contract
- Legal costs can be awarded for other reasons than breach of contract
- Applicable policies in other jurisdictions in this matter are not suited for CISG

## Proving damages with a degree of certainty

Aggrieved party must prove damages with a reasonable degree of certainty

### Guiding principles of interpretation

- Art. 74 requires certainty of loss to be proved
- Reasonableness is a general principle underlying the CISG
- More exacting standard would be contrary to the principle of full compensation

# Interest rate

Rate corresponding to that of the commonly used saving vehicle in the country where the payment is to be made

## Guiding principles of interpretation

- Art. 78 = general rule free from vagueness of domestic law
- Art. 74 and 78 = same principle of full compensation
- Using a statutory interest rate may be contrary to the purpose of Art. 78 and the CISG as a whole

## Using the proposed solution would

- Compensate the aggrieved party for the loss of using money
- Prevent the debtor from being unjustly enriched
- Provide a uniform, easily applied, rule





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