

Is it time for India to ratify The CISG? - The damages regime under The CISG

Introduction

This article, as it stood before, was only focused on understanding the regime of claiming damages under the United Nation Convention of International Sale of Goods, 1980 ('CISG'). But now this pandemic has compelled me to discuss another issue which exists in India in relation to the CISG, i.e. India has not ratified the CISG. While dealing transnationally, Indian buyers and sellers, are still bound by the Indian Sale of Goods Act, 1930 ; unless the Indian party has expressly opted for CISG being the relevant law governing the relationship of parties in a contract for international sale of goods.

Usually the countries which have ratified the CISG, have one set of rules governing the law of domestic sales in their country and another set of rules governing the law of international sales. The latter is effectuated through adoption of CISG in their domestic legislation for international sales. If India ratifies and subsequently adopts the CISG, India could only apply it to its domestic law of international sales.

This pandemic apart from causing immense pain and problems has also opened and will open many avenues for foreign investments and trade in India. Therefore, for the ease of trade and given the wide acceptance of CISG, it is probably time for India to ratify the CISG. As the same would result in both legal as well as trade advantages for India.

I would discuss in detail the pros and cons of ratification of CISG by India, in my next article. However, according to me, one the biggest pros of CISG is that the damages regime under the CISG is best suited for modern day international trade, as opposed to the Indian Sale of Goods Act which was enacted in the year 1930. Hence, the discussion in this article on the damages regime under the CISG becomes relevant.

Damages Regime under the CISG

There has been a stark increase in cross-border disputes due to globalization and the ever attenuating borders. Thus, the use of international conventions for governance of contract of international sale of goods such as CISG become increasingly useful, as they provides for a neutral law which can govern the contractual disputes between the parties as well as their rights and obligations.

Except to a very limited extent^[1], CISG only governs the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such contract, and does not govern the validity of the contract itself^[2].

This article provides a broad understanding of the damages regime under the CISG, therefore, for the purpose of this article, it is assumed that (1) CISG is applicable to the parties, (2) the

parties have entered into a valid contract of international sale of goods in terms of CISG, and (3) disputes have arisen between the parties.

There are 2 types of breaches under the CISG, (I) fundamental breach of contract^[3] and (II) any other/ordinary breach of contract i.e. any breach which is not fundamental. Therefore, this article is also divided into these 2 parts as the treatment of such breaches is different and the remedies available to either of the parties also differ:

(I) Fundamental Breach of Contract under CISG

A breach is fundamental if it results in such detriment to the other party so as to substantially deprive of what he is entitled to expect under the contract^[4].

For a breach of contract to be fundamental it must concern either the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties^[5]. Such a breach results in a *substantial deprivation* of what the aggrieved party expected to receive under the contract^[6].

For example, in an Austrian-Chinese dispute over unfit scaffoldings non-conforming to the sample, an ICC arbitral tribunal held it to be a fundamental breach of contract, since the costs for sorting out the defects would have been substantial compared to the total purchase price^[7]. This has been held to be the case even where the goods suffered from serious and irreparable defect although they were still useable to some extent^[8].

The Swiss Federal Supreme Court in a case where the applicable law was CISG, held the breach to be fundamental when even after numerous attempts to correct problems, packaging machine reached only one-third of the contractually agreed level of production; thus, resulting in substantial loss of production to the buyer of the machine^[9].

Therefore, for a breach to be fundamental it should be a breach of the most basic obligation of either of the For example, for a seller, non-supply of goods promised under the contract or supply of substantially defective/non-conforming goods is a fundamental breach of contract; whereas for a buyer non-payment of agreed sum is a fundamental breach of contract.

Fundamental breach of contract, gives the aggrieved party an additional^[10] right to avoid the performance of the contract^[11] and consequently, the remedy/claim of restitution^[12].

Avoidance of contract releases both parties from their obligations under it, subject to damages which may be due. Further, both parties must restate each other and return whatever benefit it incurred due to the contract performance by the other^[13].

Avoidance of contract may not be possible in certain circumstances^[14]. The buyer loses the right to declare 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 ^[15] One situation in which this general rule is not applicable is if the said impossibility is not due to the buyer's act or omission^[16].

Further, if the contract is avoided and if, in a reasonable manner and time, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable in terms of 74[17].

(II) Ordinary breach of Contract under CISG

45(1)(b) CISG stipulates that the buyer is entitled to request damages whenever the seller fails to perform *any* of his obligations[18].

Obligations of seller are detailed under the contract between the parties as well as CISG and include delivery of the goods, handover any documents relating to them and transfer the property in the goods, as required under the contract or CISG[19].

45(2) CISG clarifies that the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

Similarly, the 61 (1)(b) CISG stipulates that the seller is entitled to request damages whenever the buyer fails to perform *any* of his obligations.[20]

Obligations of the buyer are detailed under the contract between the parties as well as CISG and include payment of price and take delivery of the goods as required by the contract or CISG[21].

61 (2) CISG clarifies that the seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

The amount of damages requested under the CISG should be calculated, as a general rule, pursuant to 74 which stipulates that damages for breach of contract consist of a sum equal to the loss, including loss of profit, that the aggrieved party suffered as a consequence of the breach. Art. 74 is to be interpreted liberally to compensate an aggrieved party for all disadvantages suffered as a result of the breach, however, these are subject to limitations imposed by the doctrines of foreseeability[22] and mitigation[23].

The principle of full compensation for breach of contract established by Art. 74 is expressed in many national laws, set forth in both the UNIDROIT Principles and the Principles of European Contract Law (PECL). It is also consistent with decisions of many international tribunals[24].

Thus, in order to establish a claim for damages, the aggrieved party must prove that the following criteria are met, (1) there must be a financial loss, (2) there must be a causal link between acts/omissions giving rise to the claim and the aforesaid financial loss, (3) this causal link must be adequate, (4) that at the time of conclusion of the contract and in the light of the circumstances of the case, such losses were foreseeable, and (5) the party claiming breach had taken reasonable measures to mitigate its loss[25].

77 has been interpreted as a statement of “public policy against waste,” imposing a duty to mitigate losses and, according to commentator Vilus, a duty to cooperate in case of breach^[26]. Under Art. 77, the breaching party bears the burden of proving that party

claiming breach did not reasonably mitigate its losses. The party claiming breach must show that it mitigated avoidable losses as well as fulfilled its duty to cooperate in good faith by taking “reasonable” measures to mitigate loss.

(III) Conclusion

In view of the above, it becomes clear that depending upon the facts and circumstances, the aggrieved party can claim fundamental breach of contract giving rise to avoidance of contract and the consequential remedy of restitution or can claim an ordinary breach of contract and consequential damages for such a breach, or both. It also becomes clear that a claim of avoidance of contract due to fundamental breach of contract does not preclude a claim of damages for the very same breach. Therefore, a party can claim restitution for rightful avoidance of contract as well as damages for the loss resulting due to such a breach by the breaching party.

[1] Eg. Articles 8, 11, 12, 13 et al, CISG.

[2] Article 4, CISG.

[3] Article 25 of CISG.

[4] *Id.*

[5] Chengwei, Liu “The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT

Principles & PECL and case law, May 2005”; and Bundesgericht, Switzerland, 15 September 2000 (FCF

S.A. v. Adriaafil Commerciale S.r.l), available on the Internet at www.bger.ch.

[6] Leonardo Graffi, “Case Law on the Concept of 'Fundamental Breach' in the Vienna Sales Convention”: *Revue de droit des affaires internationales /International Business Law Journal*(2003) No. 3, 338-349 (Forum Europeén de la Communication) Paris, p. 338

<<http://www.cisg.law.pace.edu/cisg/biblio/graffi.html>>; and Cour de Cassation, 13 September 2011

Production line case, 09-70305, Available at: <http://cisgw3.law.pace.edu/cases/110913f1.html>.

[7] ICC, 1994, *Scaffold fittings case*, ICC Arbitration Case No. 7531 of 1994, Available at: <http://cisgw3.law.pace.edu/cases/947531i1.html>.

[8] Austria, Oberlandesgerich, 1 July 1994, CLOUT case No. 107, Innsbruck, Austria.

[9] Bundesgericht, Switzerland, 18 May 2009] [Federal Supreme Court], *Internationales Handelsrecht* 2010, 27 <http://cisgw3.law.pace.edu/cases/090518s1.html>.

[10] In addition to claiming damages for a breach as detailed in Section II of this article.

[11] Article 49 (avoidance by buyer) and Article 64 (avoidance by seller), CISG.

[12] Section V of Chapter V, CISG- Article 81-84, CISG.

[13] Article 81, CISG.

[14] Article 82, CISG.

[15] Article 82 (1), CISG.

[16] Article 82 (2)(a), CISG.

[17] Article 75, CISG.

[18] Section III of Chapter II, CISG.

[19] Chapter II of CISG, and Article 30, CISG.

[20] Article 61, CISG.

[21] Chapter III of CISG, and Article 53, CISG.

[22] Article 74, CISG.

[23] Article 77, CISG.

[24] Articles 74 and 77, CISG; Cl. 1.1 of CISG Advisory Council Opinion No. 6.

[25] *Id.*

[26] VILUS, Jelena, *Provisions Common to the Obligations of the Seller and the Buyer International Sale of Goods: Dubrovnik Lectures*, Oceana, 1986; and OPIE, Elisabeth, *Commentary on the Manner in which the UNIDROIT Principles may be used to interpret or supplement Article 77 of the CISG*, January 2005.