LIABILITY FOR DAMAGES FOR THE BREACH OF CONTRACT FOR THE INTERNATIONAL SALE OF GOODS

Key Issues

by:

Ljubica Tomic & Jelena Bogdanovic
www.tomic-stevic.co.rs & www.akb.co.rs

Belgrade, Serbia
Liability for Damages for the Breach of Contract for the International Sale of Goods – Key Issues

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Liability for Damages for the Breach of Contract

Liability for damages for the breach of contract of the international sale of goods shall be reviewed in this presentation within the sphere of CISG application (Art. 1-6 CISG) and the Convention on the Limitation Period in the International Sale of Goods.

If the seller / buyer fails to perform any of his obligations under the Contract or CISG, the buyer/seller may claim damages (Art. 45.1, 61 CISG).

Thus, the right to claim damages shall exist when:

- the non-performing party is the seller (Art. 45.1 CISG) or the buyer (Art. 61 CISG), in cases of
- breach of contract (non-performance, partial performance, performance not in conformity with contract) or
- avoidance of contract.

» There is no requirement for fundamental breach of contract in the sense of Art. 25 CISG (which constitutes grounds for avoidance of contract) for a claim for damages to be valid!

» Damages may be claimed separately from a request for contract performance, price reduction or avoidance of contract!
Liability on No-Fault Basis

Under CISG, fault on part of the non-performing party is not a requirement for his liability for damage, a causal connection between breach and loss suffices.

...this represents a compromise between Civil and Common law views...to replace the key Civilian conception of fault as the general basis of liability for breach with no – fault liability, as in Common law. That particular decision might have been too hard for German jurists to swallow, had it not been for the foreseeable loss limitation in Art.74...which represents a counterbalancing step...“ (Consequential damages in CISG Context, Joseph M. Lookofsky).

Fault is not a requirement for liability, except in cases of:

1. Exemptions of liability in the sense of Art. 79, 80 CISG, and
2. When parties have explicitly provided for fault as a requirement for liability (in view of the CISG's dispositive character).

As illustrated in Forestry equipment case – Turku Court of Appeal, Finland, 2002.
Damages – Art. 74

- 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. (*Full Compensation*)

- Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract. (*Foreseeability of Loss*)
**Principle of Full Compensation**

Damages consist of:

a. *loss (damnum emergens)*

   and

b. *loss of profit (lucrum cessans)*

What about:

- Court fees and attorneys’ fees!
- Incidental damages (such as costs of transport, warehousing costs) - YES
- Consequential damages (e.g. Buyer had to pay liquidated damages to its customers as a consequence of the lack of conformity of goods) - YES
- Loss of reputation, Loss of goodwill – YES, if there is economic loss
- Loss of chance to profit / opportunity loss – different views!

Yes, Damages certainly include the costs incurred by the aggrieved party in order to avoid or mitigate the loss, in the sense of Art. 77 CISG.

Yes, The purpose is to place the aggrieved party in the same economic position it would have enjoyed if the contract had been performed (performance principle).

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Tomic Stevic Dulic Law Office  
www.tomic-stevic.co.rs

Bogdanovic Law Office  
www.akb.co.rs
Principle of Foreseeability of Loss

Foreseeability of loss means that damages may not exceed the loss which the party in breach foresaw or ought to have foreseen, at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.
Foreseeability of Loss

- Foreseeability of loss is required even in cases of gross negligence or willful misconduct on part of the non-performing party – contrary to most national legislations!

- Is the foreseeability of the type of loss sufficient, or the extent of loss needs to be foreseeable as well? The answers in practice vary:


**Finland:** District Court of Kuopio, Finland, Mo. 95/3214, available at http://cislaw.pace.edu/cases/961105f5l.html — EXTENT OF LOSS NEEDS TO BE FORESEEABLE!
Obligation to mitigate the loss – Art.77 CISG

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach.

If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.
Various CISG Limitations of and Exemptions from Liability

- The buyer loses the right to claim damages if he does not give timely notice of the lack of conformity of goods or the right or claim of a third party within prescribed time – Art.39. 43. 44 CISG
Various CISG Limitations of and Exemptions from Liability

- A party is exempted from liability due to an impediment beyond his control and failure by a third person engaged to perform, under the conditions prescribed in Art.79 CISG.

- A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission. (Art.80 CISG)
Limitation Period

- Limitation Period for claims for damages is not a matter regulated under CISG.

- Legal source is either the national law or the Convention on the Limitation Period in the International Sale of Goods ("Limitation Convention", concluded at New York on 14 June 1974) which determines when claims, including claims for damages, of a buyer and a seller against each other arising from a contract of international sale of goods (its breach, termination or invalidity) can no longer be exercised by reason of the expiration of a period of time.

- The limitation period is 4 years and it commences on the date on which the claim accrues:
  1. a claim arising from a breach of contract accrues on the date on which such breach occurs.
  2. a claim arising from a defect or other lack of conformity accrues on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.
  3. a claim based on fraud committed before or at the time of the conclusion of the contract or during its performance accrues on the date on which the fraud was or reasonably could have been discovered. (Art.8,9,10 Limitation Convention)
Contractual Provisions on Exclusion and Limitation of Contractual Liability

- The parties may exclude the application of CISG, derogate from or vary the effect of any of its provisions – including the provisions related to exemption from and limitation of the liability for damages. (Art. 6 CISG).

- However, CISG is not concerned with validity of such clauses (Art. 4 CISG). Their validity is governed by national laws.

- National laws find themselves caught between the principle of prohibition to cause damage and the principle of freedom of negotiations, and provide differently for the issue of validity of clauses concerning the exclusion and limitation of liability for damage: some countries adhere to the principle of good faith and fair dealing, and prohibit unreasonable clauses, while most legislations explicitly provide that liability may not be excluded in cases of willful misconduct on part of the non-performing party and some extend this rule even to the cases of gross negligence.

Tomic Stevic Dulic Law Office  
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DISCUSSION

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