CALCULATING DAMAGES UNDER THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS

II Ibero-American Congress of International Business Law
"360° of international sales of goods"
-CISG 35th anniversary -
(Bogotá D.C., Colombia)

John Y. Gotanda
Arthur J. Kania Dean and Professor of Law
Villanova University School of Law

Example

- Contract for Buyer to purchase goods from Seller.
- Contract for Buyer to resell goods to Third Party Buyer for $1 million profit.
- Before the sale materialized, the cost of the goods doubled.
- Seller breaches contract and informs Buyer.
- Buyer informs Third-Party Buyer, who releases Buyer from its obligations.
- Seller immediately resells goods for $10 million more than the original contract price.

Options Under the CISG

- **Article 74: Lost Profit Damages**
  - Buyer would be awarded $1 million;
  - Seller would profit $9 million.

- **Article 76: Market Damage**
  - Buyer would be awarded $10 million;
  - Seller would profit the same amount as if the original contract was completed.

Overview of CISG Damages Provisions: Articles 74 - 77

- Article 74 - Basic Damages Provision for Breach of Contract
  - Measurement: "damages for breach of contract … consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."

Articles 75 and 76

- Article 75
  - Applicability: Avoidance + Substitute Transaction
  - Damages = contract price - the price in the substitute transaction + "further damages recoverable under article 74"

Articles 75 and 76 cont.

- Article 76
  - Applicability: Avoidance; No Substitute Transaction
  - Abstract Calculation
    - Damages = price fixed by the contract - the current price at the time of avoidance + any "further damages" recoverable under article 74

Article 77

- An aggrieved party must take appropriate measures to mitigate its loss.
- Failure to do so may preclude that party from recovering damages for loss that it could have avoided.
- Scope: "Reasonable" Mitigation Efforts
- Reasonable Expenses Recoverable

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Text and Purposes of CISG Damages Provisions

- CISG does not mandate Article 74 prevail over Article 76
    - Preference for concrete calculation over abstract calculation inapplicable here
- Allowing recovery under Article 76 will not prevent mitigation
    - Purposes of Article 77 are inapplicable

Parties' Allocation of Risk

- **Parties who engage in fixed-price contracts hedge their risks against fluctuating market prices.**
  - A seller covers its risk against falling prices, but assumes the risk that prices will increase.
  - A buyer, on the other hand, insures against the risk of rising prices, but assumes the risk that market prices will decline.

- **Awarding lost profits under Article 74 does not reflect what was bargained for in the contract.**

Encouraging Performance of Contracts

Allowing recovery of market damages under Article 76 would:

- encourage performance of contract and deter breaches; and
- lead to a more predictability

Concerns with Market Damages

- Would use of market damages here result violate the principle of full compensation?
  - No; market damages reflect the value of the opportunity that the aggrieved party has been denied
- Would the use of market damages undermine efficient breaches?
  - Perhaps, but there may be high transaction costs and other policy reasons favor market damages approach

CONCLUSION

Aggrieved buyer should be allowed to recover market damages under Article 76 even though such damages may exceed its actual loss

- Result is consistent with the text of the CISG damages provisions
- Result effectuates parties' allocation of risk in their contract
- Result encourages performance of contract and deters breaches
- Result promotes a more predictable contract regime

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Villanova University School of Law
299 North Spring Mill Road, Villanova, PA, 19085, USA
Email: Gotanda@law.villanova.edu