PROVING THE QUANTUM OF DAMAGES

Sieg Eiselen[*]

1. INTRODUCTION

One of the concerns with conventions unifying or harmonizing law internationally is that such legislation will, despite using a single text, fail in its aims as courts in different countries will interpret and apply the provisions of such a convention differently.[1] This may be compounded by the fact that certain issues, such as procedural issues, will usually fall outside the scope of the unifying legislation leading to further discrepancies and disunity of international decisions. These concerns were also raised in respect to the CISG.[2]

Article 74 deals with damages in general whereas Articles 75 (in the case of cover sales) and 76 (market price in the case of avoidance) provide specific methods of establishing or proving damages which may be used by the non-defaulting party. In all other cases, a party must seemingly prove the actual extent of its damages.[3]

In some legal systems, a party need not prove the actual extent of its damages in all cases to be successful. It must merely prove that it has suffered damages and that there is some difficulty in establishing the exact quantum.[4]

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* Department of Private Law, University of South Africa.

1. Hein Kötz, *Rechtsvereinheitlichung—Nutzen, Kosten, Methoden, Ziele*, 50 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1 ff. (1986); Ulrich Magnus, *Die Allgemeinen Grundsätze im UN-Kaufrecht*, 59 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 469 (1995); Chiara G. Orlandi, *Procedural Law Issues and Uniform Law Conventions*, 5 UNIFORM L. REV. 23 (2000), *available at* http://cisgw3.law.pace.edu/cisg/biblio/orlandi.html.

2. Arthur Rosett, *The International Sales Convention: A Dissenting View*, 18 INT'L LAW. 445 (1984); Arthur Rosett, *CISG Laid Bare: A Lucid Guide to a Muddy Code*, 21 CORNELL INT'L L.J. 574, 585 (1988).

3. JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN SCANDINAVIA 139 (2d ed. 2002); ULRICH MAGNUS & JULIUS VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZE: WIENER UN-KAUFRECHT (CISG) art. 74 n.25-27, art. 75 n.3-4, art. 76 n.5-8 (Ulrich Magnus & Julius von Staudinger eds., 13th ed. 1994); Hans Stoll, *Analysis of Arts. 74-77, 79, 80*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 74 n.7, art. 75 n.2, art. 76 n.4 (Peter Schlechtriem ed., 2d ed. 1998).

4. As would be possible under Section 287 of the German ZIVILPROZESSORDNUNG (ZPO); or in South African law see RICHARD H. CHRISTIE, THE LAW OF CONTRACT 634-35 (4th ed. 2001); *Esso*

In these cases courts may award a sum of damages, estimated to the best of its abilities. There is no such provision in the CISG.

In a number of decisions dealing with this issue, there seems to be a clear dividing line, with some courts adopting the approach that they will make an award, even if damages are not proven with exactitude, whereas other courts seem to adopt the approach that where the burden of proof has not been sufficiently acquitted, then no award will be made.

In this article, the approaches in the decided cases will be analyzed against the backdrop of the unifying purpose of the CISG and its underlying principles. Regard to the question of whether the issue raised above constitutes a gap in the CISG or whether it falls outside its scope will be addressed.

2. THE CASES

2.1. CLOUT Case No. 217: Commercial Court Aargau, Switzerland, 26 September 1997[5]

A German plaintiff (seller) had produced sets of cutlery ordered by a Swiss defendant (buyer). Some parts of the cutlery were specifically embossed for the buyer. The buyer refused to accept the delivery and claimed that no contract had been validly concluded or that it was entitled to declare the contract avoided because of a violation of exclusive rights granted by the seller. The seller declared the contract avoided and sued the buyer for damages.

The seller argued that apart from the covering sale under Article 75, the exact determination of the damages under the circumstances required an unreasonable or disproportionate expense. The majority of the court held that the non-defaulting party is entitled to the damages as proven under Article 75, i.e. the difference between the actual contract price and the covering sale and all other damages incurred. The majority further held that although these

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Standard S.A. (Pty.) Ltd. v. Katz, 1981 (1) SA 964(A) at 969H-970H; or in American law see 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACT ¶ 12.15, at 266-68 (2d ed. 1998); BRIAN A. BLUM, CONTRACTS: EXAMPLES & EXPLANATIONS ¶ 18.6.5, at 608 ff. (2d ed. 2001); or in English law see JACK BEATSON, ANSON'S LAW OF CONTRACT 560 (27th ed. 1998); Chaplin v. Hicks, (1911) 2 K.B. 786, 792 (U.K.).

5. CLOUT Case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 Sept. 1997], *available at* http://cisgw3.law.pace.edu/cases/970926s1.html.

further damages had been proven, the exact extent of such damages was not capable of exact proof.[6]

Accordingly, the majority, using the expert knowledge of the court, came to the conclusion that damages in the amount of ten percent of the sales price would normally be suffered by any party in a similar situation. The minority of the court rejected the damages claims because insufficient proof had been put before the court to prove the damages, although such proof was available.

Although not clearly stated in the report of the decision, it would seem that the rules applied by the majority and the minority were fully based on domestic Swiss law. This was done without any reference as to the possible applicability of the CISG to resolve this issue.

2.2. Appellate Court Antwerp, Belgium, 18 May 1999 (Vandermaesen Viswaren v. Euromar Seafood)[7]

In this case, the plaintiff ordered an amount of seafood from the defendant for delivery on a specific date and time. The defendant indicated to the plaintiff that delivery would take place later on that day, but then failed to make any delivery whatsoever.

The court *a quo* had awarded the damages on the basis of the extra costs incurred on a replacement purchase, extra delivery costs and an amount of 25,000 Belgian Francs for the extra effort and trouble of the plaintiff to acquire the replacement goods. This amount was awarded *ex aequo et bono* as the exact amount of the costs incurred by the extra effort was not easily determinable.

The court of appeal agreed with the court *a quo* that an amount *ex aequo et bono* should be awarded as there was no exact quantification of the damages under this head.[8] The court however increased the amount to 100,000 Belgian Francs.

Once again, no closer account is given of the origin of these principles in the decision. It is clear that these principles are not contained in the CISG and one is therefore left with the deduction that they are specific principles,

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6. "Nach Auffassung der Mehrheit des Gerichts lassen sich sämtliche diesbezüglichen Aufwendungen zahlen- bzw. betragsmässig nicht exakt nachweisen." *Id.*

7. Hof van Beroep Antwerpen, Belgium, 18 May 1999, *available at* http://cisgw3.law.pace.edu/cases/990518b1.html.

8. "Overwegende dat bij gebrek aan juiste becijfering en nauwkeurige opgave, deze schade ex aequo en bono kan bepaald worden op 100.000 BE F." *Id.*

applicable in Belgian law, where a party has proved that it had suffered damages, but is unable to prove the exact extent of the damages.

3. CLOUT CASE NO. 318: APPELLATE COURT CELLE, GERMANY, 2 SEPTEMBER 1998[9]

In this case, the seller sold a batch of "no-name" vacuum cleaners to the buyer along with batches of branded vacuum cleaners. The buyer alleged that the vacuum cleaners did not perform up to standard, declared the contract avoided and asserted that as a result it had suffered damages.

The buyer failed to return the defective vacuum cleaners and was ordered to pay the purchase price. Its counterclaim for damages was dismissed because it had failed to properly prove its damages. The court held that under Article 74 the plaintiff must exactly calculate its damages.[10] Under the circumstances, the loss of profit relied on was not properly substantiated.

It would seem that the court recognized that some damages had been suffered, but that it had been insufficiently proved as required under Article 74.[11] No mention was made of the possibility under Section 287 of the German *Zivilprozeßordnung* (ZPO) that the court could have accepted a less than exact calculation in the face of evidential difficulties. However, the plaintiff probably failed to provide the best evidence possible.

4. INTERNAL OR EXTERNAL GAP

The absence of a provision dealing with the failure to prove the exact extent of the damages in the CISG may either constitute a gap, if it is considered to be an issue within its scope, or it may be an issue which is not covered by the Convention. If it is a gap it must be filled in accordance with the provisions of Article 7; if it falls outside its scope, then the applicable domestic law must be applied.[12] The former solution should lead to more

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9. CLOUT Case No. 318 [Oberlandesgericht Celle, Germany, 2 Sept. 1998], *available at* http://cisgw3.law.pace.edu/cases/980902g1.html.

10. *With reference to* MAGNUS & STAUDINGER, *supra* note 3, art. 74 n.61.

11. In this German decision, Landgericht Düsseldorf, Germany, 5 Mar. 1996, *available at* http://cisgw3.law.pace.edu/cases/960305g1.html, the court was also faced with a situation where insufficient evidence had been put forth to properly substantiate the proof of any damages whatsoever. Likewise in this decision, Landgericht Hamburg, Germany, 17 June 1996, *available at* http://cisgw3.law.pace.edu/cases/960617g1.html.

12. MAGNUS & STAUDINGER, *supra* note 3, art. 7 n.9, n.38-39; Rolf Herber, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 77 n.27 ff. (Peter Schlechtriem

harmonized international applications of the CISG, whereas the latter will of necessity lead to conflicting and disharmonized results.

One of the dividing lines which is usually regarded as fairly clear cut, not only in respect to the CISG, but also in other disciplines such as private international law, is the difference between procedural and substantive rules.[13] Substantive rules are usually regarded as those rules dealing with the rights and obligations of parties, whereas procedural rules are merely concerned with the process of having the substantive rules enforced.[14] Of course, not all legal rules allow themselves to be classified clearly according to this neat arrangement.[15] It is submitted that the rules under discussion may fall into this latter class.[16]

A convention may contain certain provisions impacting on procedural issues such as admissible evidence or the burden of proof explicitly as one may find in Article 11 of the CISG, which provides that the existence and content of a contract may be proven by "any means, including witnesses" and in Article 79 requiring a party to prove *vis maior* or *force majeure*;[17] or it may do so tacitly as one will find in Articles 2(a), 25 and 74.[18] In none of these instances does the CISG give any indication of the extent of the proof that is necessary to satisfy the burden of proof. This is obviously something to be determined by the procedural rules of the *lex fori*.

4.1. Arguments Favouring an Internal Gap

It is generally accepted that the burden of proof in respect to damages and the extent of damages rests on the non-defaulting party.[19] Article 74 only requires that concrete damages must be proven, but it does not deal with the

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ed., 2d ed. 1998); LOOKOFSKY, *supra* note 3, at 40-44.

13. PETER NORTH & JAMES J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 67-68 (13th ed. 1999); GERHARD KEGEL, INTERNATIONALES PRIVATRECHT 197-98 (6th ed. 1987); CHRISTOPHER F. FORSYTH, PRIVATE INTERNATIONAL LAW 21 ff. (4th ed. 2003).

14. NORTH & FAWCETT, *supra* note 13, at 70; Poyser v. Minors, (1881) 7 Q.B.D. 329, 333 (U.K.); FORSYTH, *supra* note 13, at 21; McKain v. R.W. Miller & Co. S.A. (Pty.) Ltd. (1991) 174 C.L.R. 1, 26-27 (Austl.).

15. NORTH & FAWCETT, *supra* note 13, at 70-71; FORSYTH, *supra* note 13, at 21.

16. *See* FORSYTH, *supra* note 13, at 22 n.118, 313 n.116.

17. Stoll, *supra* note 3, art 79 n.50-51; MAGNUS & STAUDINGER, *supra* note 3, art. 79 n.65.

18. Orlandi, *supra* note 1, at 23-41; Herber, *supra* note 12, art. 2 n.15, art. 4 n.22, art. 25 n.16, art. 74 n.45.

19. MAGNUS & STAUDINGER, *supra* note 3, art. 74 n.62; Herber, *supra* note 12, art. 74 n.45; CLOUT Case No. 318, *supra* note 9.

way in which the extent of the damages must be proven.[20] It is clear that the manner of proving whether damages have been suffered and the manner of proving the extent or quantum of those damages, should *prima facie* be determined by the *lex fori* as these are clearly issues of procedural law.[21]

However, it is submitted that the question of what the legal consequences should be in the case of a failure to prove the exact extent of the damages is not so clear cut. Articles 75 and 76 deal with the quantification of damages claims in specific instances, making it easier for the plaintiff to prove certain kinds of damage. It can therefore be argued that the quantification of claims is an issue that falls within the scope of the CISG and should therefore be dealt with in accordance with its general principles.[22]

The general principles that would be applicable in this instance should be the principle of international harmony of decision[23] and the principle of full compensation.[24] It is obvious that including the issue under discussion in the scope of the CISG would better serve international harmony of decision and a uniform application of the CISG than leaving the issue to the domestic law of the *lex fori*. This, however, is reliant on a circular argument and does not resolve the question on whether the issue falls within or outside the scope of the CISG.

The principle of full compensation would require that where a party has proven a breach of contract and that it has suffered damages, then it should be compensated in so far as it was foreseeable. If the non-defaulting party has difficulties in proving the exact extent of the damages, it should be assisted by providing the court with a general discretion to award the damages it estimates as reasonable under the circumstances.

However, this situation should be clearly distinguished from the situation where the non-defaulting party has simply failed to put before the court all the evidence that could reasonably have been required to put the court in a position to quantify the damages. In such an instance, the claim should be dismissed in accordance with the procedural provisions of the *lex fori*.

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20. MAGNUS & STAUDINGER, *supra* note 3, art. 74 n.61; Stoll, *supra* note 3, art. 74 n.45.

21. MAGNUS & STAUDINGER, *supra* note 3, art. 74 n.61; Stoll, *supra* note 3, art. 74 n.45. That this issue is not so clear-cut is apparent from Forsyth's discussion of these principles in the realm of private international law. FORSYTH, *supra* note 13, at 22 n.118.

22. This submission is supported by the approach to this question in private international law. *See* FORSYTH, *supra* note 13, at 22 n.118, 313 n.116.

23. Herber, *supra* note 12, art. 7 n.30; Orlandi, *supra* note 1, at 23-41.

24. Stoll, *supra* note 3, art. 74 n.2.

4.2. Arguments Favouring an External Gap

As indicated in the previous subsection, the burden of proof and the manner of proving whether damages have been suffered and the manner of proving the extent or quantum of those damages, should *prima facie* be determined by the *lex fori* as these are clearly issues of procedural law. It follows that it must also mean that the consequences of not proving the extent of the damages fully should also be dealt with by the procedural law of the *lex fori*. It is procedural law and, therefore, falls outside the scope of the CISG, unless it can be shown that the CISG deals with the issue directly or by necessary implication.

As a result, when faced with a situation where the non-defaulting party has difficulty in proving the extent of its damages, the court should follow its own rules to determine whether it has a discretion to award damages upon an estimation[25] or *ex aequo et bono* as was done in the cases discussed above. There is no doubt that there will be different approaches to this question in different jurisdictions. The seemingly liberal approach adopted by the Belgian courts outlined above can be contrasted with the much more restricted approach under American doctrine of reasonable certainty.[26] Even under American law itself, there would seem to be differing approaches, with some courts applying the doctrine strictly, whereas others have more or less abandoned it.[27]

4.3. Conclusion

Herber expresses a word of caution in respect of extending the scope of the CISG by employing Article 7.[28] Although uniformity of decision is an important principle underlying the CISG, and a resort to domestic law usually represents a move away from uniformity, the principle cannot be abused to extend the scope of the CISG beyond its own wording.

Prima facie the consequences of a failure to prove the extent of damages would seem to be a procedural matter to be dealt with by the domestic law of

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25. As would be possible under Section 287 of the German ZPO, see MAGNUS & STAUDINGER, *supra* note 3, art. 74 n.61; or in South African law, see CHRISTIE, *supra* note 4, at 634-35; *Esso Standard*, *supra* note 4.

26. *See* FARNSWORTH, *supra* note 4, ¶ 12.15, at 266-68; BLUM, *supra* note 4, ¶ 18.6.5, at 608 ff.

27. *See* FARNSWORTH, *supra* note 4, ¶ 12.15, at 267-68.

28. Herber, *supra* note 12, art. 7 n.30.

the *lex fori*. For instance, the court could dismiss the claim for damages, or refer it back to the court of first instance for further evidence, or provide absolution from the instance. All of these orders are clearly procedural and fall outside the scope of the CISG.

However, as indicated above, a court could also award an estimated amount of damages as a further alternative. This decision is not such a clear-cut procedural decision as the other alternatives mentioned above. The award is more akin to the remedies provided under Articles 75 and 76 of the CISG dealing with the calculation of damages, than purely with issues of proof. The non-defaulting party has already proven that it has suffered damages and provided all reasonable proof available. In this case, it can be strongly argued that the remedy is an internal gap and should be filled according to the dictates of Article 7.

The issue is a difficult one with arguments on both sides having a lot of persuasive power. On a balance however, it is submitted that the issue should be treated as an internal gap, rather than an external gap. In filling this gap, courts obviously should have regard to the equitable way in which this matter is treated in various national legal systems. The provisions of German law, Belgian law, Swiss law, and even South African and English law, to name but a few, could provide valuable assistance in formulating the rules to fill this gap.

5. Final Remarks

Where a non-defaulting party has proven that it has suffered damages, but has failed to fully prove the extent of those damages, the consequences of that failure should be determined by the *lex fori* as these are procedural questions. Where the court has found however, that an award should be made, the question on how that award should be calculated should be regarded as an issue falling within the scope of the CISG.

The CISG does not deal with this problem explicitly and therefore leaves a gap that needs to be filled according to the principles of Article 7. A rule similar to that applied in the Belgian and Swiss cases discussed should be formulated for general application under the CISG to deal with these cases. Courts can fruitfully employ a comparative approach to formulate a uniform approach to this issue for contracts falling within the scope of the CISG leading to a uniform approach on this question.

There is one more issue illustrated by the decisions discussed above. It is important that courts dealing with CISG issues should realize that their decisions are not only relevant for that particular jurisdiction, but that they are

playing on the international stage. They should, therefore, take care in formulating their decisions to give a clear indication of the principles that they are relying on to come to their decisions in order to make the decisions more comprehensible to practitioners from other jurisdictions. One should not be forced to have to resort to a study of foreign law in order to properly understand the decisions.