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Original Research Paper

Law

COMPARATIVE STUDY OF INDIAN CONTRACT ACT 1872 AND CISG ON THE LAW RELATING TO DAMAGES

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ABSTRACT

This paper provides a comprehensive understanding of the legal framework for damages under the Indian Contract Act and the CISG, and aims to identify areas where the two regimes converge or diverge in their approach to the award of damages. The objective of this comparative study is to analyze the similarities and differences between the two legal frameworks in terms of the principles governing damages and their practical applications. The study sheds light on the legal principles governing damages under the Indian Contract Act and CISG, providing valuable insights into their application in practice. By identifying the similarities and differences between these two legal regimes, this study aims to assist businesses and legal practitioners in understanding the implications of these laws on the resolution of disputes arising from international commercial transactions.

KEYWORDS :

INTRODUCTION

The law of contracts is an essential aspect of commerce and trade as it regulates the rights and obligations of parties engaged in transactions (Bedjaoui, 1991). Two of the most prominent legal frameworks governing international commercial contracts are the Indian Contract Act and the United Nations Convention on Contracts for the International Sale of Goods (CISG). Although these laws share common principles, there are significant differences in their approach to damages, which can have a profound impact on the outcome of disputes (Castellani, 2013). This paper aims to provide a comparative analysis of the Indian Contract Act and the CISG on the law relating to damages. Specifically, it will examine the key principles and provisions of each law, with a focus on Articles 74-77 of the CISG and Sections 73-74 of the Indian Contract Act, 1872, and the rules governing the calculation and assessment of damages (Castellani, 2008).

General Principles Governing Measure of Damages

Section 73 ICA affirms the rule of the Common Law of England as laid down in Hadley v. Baxendale. The law laid down by Hadley forms the cornerstone of any analysis of the damage provisions in India. They may be stated in the form of three rules: Damages naturally arising from a breach of contract according to the usual course of things are always recoverable (general damages). Damages which do not arise in the usual course of things from a breach of contract, but which arise in special circumstances are not recoverable except when the special circumstances are known to the person who has broken the contract (special damages). damages). Where the special circumstances are known (or have been communicated to the person who breaks the contract) and where the damage flows naturally from the breach of contract, in those special circumstances, such special damage must be supposed to have been contemplated by the parties to the contract and is recoverable (special damages).

In some cases damages have been awarded for injured feelings. Damages have also been awarded for mental anguish (Gharleghi et al., 2018; Etemadi et al., 2022; Hakkak et al., 2022a; Takalo et al., 2013). However, it must be noted that these are not applicable in contracts of sale generally. There is no such provision in the CISG. In India the duty to mitigate the damages has been recognized and laid down in the explanation attached to s. 73 ICA which reads: In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

Section 73 ICA provides that an aggrieved party is entitled to receive compensation for loss or damage which the parties knew, at the time of entering into the contract, to likely to result from the breach of it. However, it must be noted that s. 73 does not refer to knowledge of special circumstances. It speaks only of knowledge in respect of loss or damage that is likely to result from the breach. It also does not refer to any undertaking, express or implied, to bear special or exceptional loss. It follows that is both parties knew that a particular kind of loss would be likely to result from the breach, the defaulting party will have to make good that particular loss, and it is not necessary to show that he has undertaken to make it good to the party suffering. Therefore, mere notice or knowledge is sufficient to fix responsibility though no undertaking to bear the loss is given.

The Secretariat Commentary on the 1978 Draft states that Art. 74 applies whenever the contract has not been declared avoided by the party claiming damages, whether or not it could have been. It also applies where the contract has been avoided but there are damages in addition to those that can be calculated under Arts. 75 or 76 CISG. The basic philosophy of the action for damages under Art. 74 CISG is to place the injured party in the same economic position he would have been in if the contract had been performed.

The principle of recovery of the full number of damages suffered by the party not in breach is subject to the qualification that the number of damages that can be recovered by the party not in breach 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 which he then knew or ought to have known, as a possible consequence of the breach of contract. However, if a party at the time of the conclusion of a contract consider that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered, they may be recovered. The provision is exactly the same under Indian law.

Breach of warranty claims would probably be covered under the exclusion in Art. 5 and therefore the correct position of law is that personal injury is excluded from the scope of the convention. In addition, the language of Art. 74 CISG appears to authorize only commercial measures of damages. Under Indian law, however the position is different and damages for personal injury can be claimed if they are the natural consequence of the breach of contract and therefore reasonably in the contemplation of the parties. It should also

be borne in mind that the Convention does not have a rule concerning punitive damages. The position is the same in India unless there is a clause in the contract providing for such damages in which case such damages will be available.

When the contract is avoided, damages generally amount to the difference between the contract price and the costs of a cover transaction, together with any further damages. The cover transaction must be undertaken within a reasonable time after avoidance. This is in keeping with the duty to mitigate damages in Art. 77 CISG. The requirement of mitigation is present under Indian law as well. Article 75 of the Convention, however, does not specify the adjustment for expenses saved by the party claiming damages as a result of the breach such as transportation expenses saved by the aggrieved party in a substitute transaction (Gotanda, 2007; Gheitarani et al., 2022b; Vafaei-Zadeh et al., 2022; Afshar Jahanshahi et al., 2018). A similar result can be reached under Art. 75 CISG by construing the phrase price in the substitute transaction to permit such adjustment. Equitable considerations demand this construction, given that increased transportation costs and similar items of extra expense associated with a substitute transaction would constitute losses suffered as a consequence of breach and thus would be recoverable under Art. 74 CISG. The position, if Art. 75 is so construed would be the same as Indian law.

Further Art. 77 CISG provides that, if it is clear that one party will commit a fundamental breach of the contract, the other party cannot await the contract date of performance before he declares the contract avoided and takes measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise (Gheitarani et al., 2023; Gheitarani et al., 2022c; Dehghanan et al., 2021; Taherinia et al., 2021). This position is very different from Indian law where the duty does not arise till the breach of contract. Article 74 CISG provides for damages for loss suffered as a consequence of the breach' for both the buyer and the seller. This should cover the losses caused by expenses and other inconvenience which the parties could be reasonably expected to foresee (Hakkak et al., 2022b; Jahanshahi et al., 2020; Vafaei-Zadeh et al., 2021; Hanifah et al., 2022; Gheitarani et al., 2022a). Thus, if the seller fails to deliver, a buyer who elects not to avoid the contract and who seeks specific performance under Art. 46(1) CISG can also claim damages under Art. 74 of the Convention for losses caused by the delay in receiving the goods provided the losses were foreseeable when the contract was formed and could not have been avoided by reasonable attempts to mitigate. Art. 74 damages can also be recovered by the buyer if it reduces the price under Art. 50, seeks substitute goods under Art. 46(2), or demands repair of defective goods under Art. 46(3) CISG. The position is the same under Indian law.

CONCLUSION

We can conclude that both legal frameworks recognize the importance of damages in contract law, the CISG provides a more comprehensive and flexible approach to the calculation and recovery of damages. This suggests that parties to international contracts may benefit from choosing the CISG as the governing law of their contract, especially if they anticipate the possibility of disputes arising that could result in damages claims.

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