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Loss of Profit in Breach of Contract; Comparative Study Between Iran and Convention of International Sale of Goods (1980)

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Abstract: The aim of this article is to survey loss of profit in Iran and Vienna convention (hereinafter CISG) procedures in the case of breach of contract by one of the parties which would be of a great benefit for finding a better understanding of obstacles which leads to the differences and also in order to realize that part of the international regulations which refer to compensatory damages in the case of breach of contract.

Keywords: Loss of profit, breach , contract , Iran , CISG.

1. Introduction

Trade is one of the most common ways of communication between different nations which leads to exchange in cultural, social and political relations. Many countries have joined to the international convention of sale of goods and the new global economic discipline has achieved a strong boost with establishing the world trade organization (WTO) and the membership of many countries in it. when a country decides to join the CISG, the CISG becomes part of its domestic law and as a result, contracts between parties with businesses in different contracting countries are automatically covered by the CISG.[1]

On the other hand, it should be mentioned that although every country has its own rules and regulations, due to its special historical, cultural, social and economic background, great deal of these differences can be removed with the development of humans' knowledge which provides a closer relationship between them. The principles and provisions of compensating damages of a contract in Vienna convention does not have any significant differences with Iran' law and it means that there is not any striking barrier in front of a country like Iran to join the convention.

Iran's law also in order to join to the Vienna convention needs to survey its similarities and differences with this convention more seriously and try to find remedies for removing the obstacles.

2. General Characteristics of A Compensatory Damage

The meaning of general characteristics is the ones which can be found in almost all the legal systems around the world and also the CISG has considered these definitions.

The main principle about measuring damages which is accepted by most of legal systems around the world is considering the interest that the innocent party should have had if the contract was preformed properly and completely. So this is the interest that has been expected by the aggrieved party to gain from the contract. Some other phrases have been used to define this interest:

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“Expectation measure is the natural measure of recovery, since it accords directly with the underlying morality of promise keeping.” [2]

A recoverable damage is the damage that certainly and for sure has happened. This is one of the rational principles and there is no need for any argument to recognize and admit this fact. It is quite obvious that no one can be responsible for a damage that has not happened yet.

There is not any written implication to this fact in CISG and it seems that the law makers did not find any need to allocate any article to it and this is because of its obviousness.

In Iran’s ex law of civil procedure, article 728 had expressed this obvious principle:

- “……in order to recover the damages the plaintiff has to prove to the jury that there is some actual loss”
- In the current Iran’s law of civil procedure the legislator did not imply to this principle and it is because of the rationality of it.

3. Components of Damage under CISG and Iranian law

Article 74 of CISG states that: 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. 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.[3]

In a contract governed by the CISG, a failure to perform any obligation entitles the injured party to seek, under Articles 45 and 61, various remedies, all of which include consequential damages under Article 74[4] .Considering article 45(1) (b) we can see that the buyer can claim his damages under articles 74-77. Also the same is possible for the seller under article 61 (1) (b).

Concluding from this article, the basic rule is to put the aggrieved party, from economic point of view, in the position that he could have if the contract was performed.

So article 74 defines the general rules for measuring damages in the case of the breach of contract. This rule is applicable for two general types of damages:

- All kinds of damages and losses to the property
- Loss in profit

Analyzing the recoverable damages in article 74 makes it possible to categorize the losses in some specific definitions:

- Actual damages: which means tally any decrease in the innocent party’s property as this property may have been if the breach did not occurred.
- Loss in profit: as can be seen loss of profit has been separated from the actual loss. It means, whereas actual loss generally means the diminution in the assets of an injured party at the time of the conclusion of the contract, loss of profit means the loss of any increase in the assets caused by the breach. So it means that if the contract has been done and the responsibilities have been fulfilled, the injured party would gain some profit from it. [5]

4. Discussing Loss OF Profit Under CISG and Iran Legal Regulations

The Commentary to the Convention explains that the specific reference to loss of profit was included, because in some legal systems the concept of 'loss' standing alone does not include loss of profit. Iran can be one of the examples of not including loss of profit in the category of damages. [6]

Regarding Iran’s procedures, actual loss has been accepted by the legislator and can be claimed by the plaintiff. However, there are some conflicts and disagreements amongst specialists about claiming the loss of profit and it should be mentioned that these conflicts have got their roots in the verdicts of the Imamieh jurists.

In the ex-civil procedure act article 728 and also in article 6 of the civil liability act, loss of profit has been in the group of damages which should have been compensated by the party in breach. But, in the new civil procedure act (2000), in articles 297 and 515(2), the legislator has explicitly expressed that demanding loss of profit is not accepted. However article 90 f new criminal procedure law (1999) states that also profits can be claimed. To answer to this question that why in the new civil procedure act claiming loss of profit is not accepted we should say that in the Imamieh jurisprudence almost all the jurists believe that loss and damages to the profit cannot be classified as loss in property and so, it cannot be claimed. Therefore, if a person prevent somebody from selling his product in any way and this causes a decrease in the price of that product, that person would not be liable the loss in profit. [7]

These jurists allege some factors as their reasons for such opinion:

- First, in a case like this no usurpation has happened. So nobody can be liable in terms of a usurper. The reason is that they only accept the loss to the property itself.
- Second, this case does not include in the juridical rule of causation. This rule states that when somebody waste or destroy somebody's property directly or indirectly he would be liable for that and in this case no waste has occurred. Due to their opinion, this rule is applicable if we assume a profit as a property. Because this rule is applied only to properties and they believe that a property is something that is already existed. So, if profit is not an existed property, it cannot be claimed under this rule.
- Third, loss in profit does not include in the famous juridical rule of "la zarar". The basis of this rule is a hadith by Prophet Muhammad and it says that when someone has not damaged someone's property, he cannot be liable for compensating damages. So, in interpreting this rule, these jurists state that loss in profit cannot be claimed. They explain that the word "la" here has an injunctive meaning and it means that nobody is allowed to harm other people's properties. So, when there is no damage to a person's property, he cannot claim the loss to the profit. [8]

On the other hand and in contrast of the view given above, some jurists do not accept this opinion and they refer to some facts as their reasons: [9]

First, they believe that the profit which has the potential to come into existence is like a profit which is already existed. So the person who has caused this kind of loss should be liable.

Second, regarding the causation rule, these jurists believe that one of the reasons which can justify the inclusion of causation rule in the case of the possibility of claiming profits is some verses of Quran lik Bagharah Surah versus 194 or Shora Surah Versus 54 and they mean that when a person prevents somebody from gaining legitimate profit, he should be liable.

Third, in contrast to what the first group said, these jurists believe that the "la" rule is applicable for claiming profits. They explain that the word "la" in "la zarar" hadith means the legislator (here Prophet Muhammad) does not impose rules which cause harm to people. In other words, in Islam all the harms should be compensated and any person who causes damage should compensate it.

5. Conclusion

Finally to compare Iran and CISG procedures in the case of claiming loss of profits, we can say that in CISG there is no doubt that this kind of damage can be claimed and article 74 has clearly expressed this issue. Also if we take a look at international courts' sentences, which has been issued on the basis of CISG rules, we see that they all admitted the legitimacy of claiming damages to profit. But, in Iran, the situation is different and whether a person can claim losses in his profit or not, is not clear. On the one hand, there are articles which explicitly state that loss of profit can be claimed. On the other hand, in the newest ratifications (article 515(2) of public and evolutionary courts in civil law procedure) loss of profit is not accepted. Although, in accepting the loss of profit as a chargeable damage, we can interpret the loss of profit in article 515(2) of civil procedure as a probable profit and we can say that the profit that may happen and there is no certainty for happening cannot be claimed. But, if with fulfilling the contract, for sure a profit will happen for one of the parties, in this case the party in breach should be liable for compensating that loss. At the end and beside all the reasons given above, if we look at this issue rationally, we will find that it is completely wise

that when somebody destroys other person's property or prevent him from gaining profit which has been expected to gain by that person, he should be liable for recovering the damage.

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