

ABSTRACT

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“DISGORGEMENT OF PROFITS AS A POSSIBLE REMEDY UNDER CISG”

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In the traditional contract law doctrines of both civil and common law the liability of the party who breaches a contract is limited to paying compensatory damages for the injured party's provable loss. However, disgorgement allows the injured party to strip the profits that were made by the other party through the breach. The contractual remedy of disgorgement has increasingly gained acceptance in international legal practice. Disgorgement of profits can result from a situation in which contractual breach is incentivised due to its financial superiority over the proper fulfilment of the initial contract. In this situation, the aggrieved party can raise a claim for disgorgement of profits, meaning it can claim the profits that the breaching party has made as a result of breach. The calls for acceptance of disgorgement damages as an acceptable remedy under the United Nations Convention on Contracts for the International Sale of Goods (CISG) specifically do not only stem from emerging international case law, but disgorgement as an applicable remedy under Article 74 CISG and Article 84(2) CISG. However, it is ambiguous whether disgorgement of profit is allowed under CISG especially under Article 74 and 84(2). Furthermore, the lack of precedent cases further complicates whether disgorgement of profit exceeds the scope of CISG. To understand disgorgement of profit and its possible operability within the CISG, this research analyses different viewpoints and interpretations regarding disgorgement of profits under the CISG. Based on the analysis of Article 74 CISG and Article 84(2) CISG, the Author concludes that disgorgement of profit exceeds the scope of Article 74 CISG since disgorgement of profit would cause overcompensation which will contradict the principle of full compensation under Article 74 CISG. However, disgorgement of profit can be granted under Article 84(2) as a restitution if the contract has been avoided.

References: 34 (1980–2017)

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