Contract Damages: Domestic and International Perspectives BY DJAKHONGIR SAIDOV AND RALPH CUNNINGTON, eds. [Oxford: Hart Publishing, 2008. 532 pp. Hardcover: £85]

If evidence was ever required to refute the misconception that the law of contract damages was straightforward, one need look no further than between the covers of *Contract Damages: Domestic and International Perspectives*. This is a collection of papers delivered by contract law scholars from common law and civilian traditions at a conference on contract damages of that same title conducted at Birmingham University in June 2007. Unusually, the conference sought to bring together contract law scholars working primarily within the common law contract tradition, as well as scholars concentrating on international contract instruments, chiefly the Vienna Convention on Contracts for the International Sale of Goods ('CISG'). The confluence of these streams of learning certainly provides interesting insights into the strengths and weaknesses of each tradition. But before that, a thumb-nail sketch of the book.

This collection of essays focuses on current and contemporary concerns as to various aspects of contract damages in both the domestic (*i.e.* common law) and the international arena. The book is divided into four large parts, the first, on the purpose and scope of damages (with contributions by Professor Stephen A. Smith, Professor Daniel Friedmann, Professor Ingeborg Schwenzer, Mr. Pascal Hachem and Professor John Y. Gotanda); the second, on the measures of damages (featuring contributions by Professor Anthony Ogus, Professor Peter Jaffey, Professor Andrew Burrows, Professor Stephen Waddams, and Mr. Ralph Cunnington); the third, on

method of limiting damages (with contributions by Professor Alexander Komarov, Professor Jan Ramberg, Mr. Adam Kramer, Professor Franco Ferrari and Dr. Harvey McGregor); and the last, on the assessment of damages (featuring papers by Professor David McLauchlan, Dr. Djakhongir Saidov, Professor Michael Furmston, Professor Michael Bridge, and Professor Charles Proctor).

As mentioned at the outset, the pairing together of common law contract scholars and CISG scholars at the same conference is somewhat unusual. And with the collection of papers gathered in this book, it is certainly quite easy to see why that may have been the case. There is, of course, the political reality that the United Kingdom has chosen not to accede to the CISG (yet). But there may be a further reason. Put in such close proximity, the difference in the nature of academic enquiry and the contemporary concerns which continue to befuddle common law contract scholars and CISG scholars is starkly revealed. It all comes down to age.

Given that negotiations leading to the promulgation of the text of the CISG were only completed in 1980, it is probably not inaccurate to see it as a sort of junior upstart. And that "upstart" status is certainly reinforced by its mandatory nature, such that in the main, contracting parties within jurisdictions which have acceded to the convention may not opt out of the CISG scheme. As Article 1 tells us, that scheme applies to contracts of sale of goods between parties whose places of business are in different contracting states that have acceded to the CISG (Article 1, paragraph (1)(a)) or where the rules of private international law lead to the application of the law of a contracting state, of which the CISG forms a part (Article 1, paragraph (1)(b)). Unless the facts of the case involve a contracting state who has taken advantage of Article 95 which permits a contracting state to reject application of Article 1, paragraph (1)(b), there is no option for contracting parties to "opt out" of the CISG. But recourse to Article 95 by contracting states has been rare, some notable exceptions being the United States, the People's Republic of China, Singapore, the Czech Republic and Slovakia (based on the annotated text to Article 95 of the CISG available online: <http://www.cisg.law.pace.edu/cisg/text/e-text-95.html> - last accessed on 29 October 2008). So, by and large, the CISG has "mandatory" effect, displacing domestic contract law, once the prerequisites for its operation have been satisfied.

Given its youthfulness, unsurprisingly, much of the scholarly work on the CISG set out in this volume focuses on issues as to contract damages which have become settled law (more-or-less) within the common law. For example, Professor Ferrari sets out to expand on the meaning of the remoteness requirement within Article 74 CISG, emphasising particularly on the need to develop this in an autonomous fashion, while Professor Ramberg explores the dichotomy between limitation of liability and delineation of one's promissory undertaking. Most interesting, perhaps, is Professor Schwenzer and Mr. Hachem's jointly written paper on "The Scope of the CISG Provisions on Damages" which discusses the appropriate scope of the wording of Article 74 CISG. That article provides that damages "… consist of a sum equal to the loss, including loss of profit, suffered … as a consequence of the breach". This phraseology, the two authors report, "generally includes economic losses; [but] damages are generally not recoverable for any distress, frustration, anxiety, displeasure, vexation, tension and aggravation caused by breach of contract." The two authors note, however, that though this form of wording clearly allows for compensation of what we in the common law would call expectation and reliance losses, it remains an

open question (so far as judicial authority is concerned) as to whether the upheavals in common law contract law learning in the last two decades wrought by seminal cases such as *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] A.C. 344 (H.L.), *Attorney-General v. Blake* [2001] A.C. 268 (H.L.) and *Farley v. Skinner* [2002] 2 A.C. 732 (H.L.) are capable of being captured by this wording. Indeed, the authors note that international instruments crafted subsequent to the putting forward of the CISG for ratification have gone beyond the wording of Article 74. So, the UNIDROIT Principles of International Commercial Contracts ('PICC') and the Principles of European Contract Law ('PECL') go beyond the CISG in expanding the meaning of "loss" for their purposes to include "non-pecuniary loss", as well as providing guidelines as to the recovery of future losses. Similarly, there is a concern as to whether the contemporary preoccupation with a promisee's "performance interest" and the potential for gain-based or "disgorgement"-type remedies focussed not on the financial loss of the promisee but the financial gain of the promisor resulting from its breach of contract may or may not be captured by Article 74. Unsurprisingly, the two authors make a strenuous case that it may, for if Article 74 is not "modernised", the CISG would risk falling back into obscurity.

The unavoidable gap created by the relative (and unavoidable) "newness" of CISG learning and that available within the common law is made particularly obvious by the juxtaposition of an absolutely fascinating collection of essays exploring various possible attempts at rationalising these very same issues highlighted by Professor Schwenzer and Mr. Hachem. There is a cluster of three papers setting out differing views as to the basis of the type of "damages" in *Wrotham Park Estate Co. Ltd. v. Parksite Homes Ltd.* [1974] 1 W.L.R. 798 (namely the papers presented by Professor Burrows, Professor Waddams and Mr. Cunnington), two papers addressing how some understanding of economics may illuminate our understanding of specific performance and the bases of quantification of damages (being the papers presented by Professor Friedmann and Professor Ogus), Dr. McGregor's scrutiny of mitigation, Professor Mitchell's examination of the so-called "market rule" of assessing damages, and Professor Proctor's analysis as to how fluctuations in the value of money itself ought to be accounted for in the assessment of damages.

As though this feast of riches for the contract scholar was not enough, there are also two papers concerned with how the remoteness rule ought to be understood and to be developed which should be of interest to both scholar and practitioner, being the contributions of Mr. Kramer and Professor Furmston. Professor Furmston's paper, examines the thorny issue of damages for loss of a chance in light of *The Golden Victory* [2007] UKHL 12, [2007] 2 W.L.R. 691; while Mr. Kramer's paper further develops his attempt to re-invigorate the rationalisation of remoteness of damages as being premised on an implied assumption of risk – this being of particular interest given the seeming approval by Lord Hoffmann and Lord Walker of Gestingthorpe of his earlier paper on "An Agreement-Centred Approach to Remoteness and Contract Damages" in his contribution to Cohen and McKendrick's *Comparative Remedies for Breach of Contract* (Oxford: Hart Publishing, 2005) in their Lordships' speeches in *Transfield Shipping Inc. v. Mercator ("The Achilleas")* [2008] UKHL 48 (at paras. 11 and 79).

The difficulty with a book of this nature is, of course, that it is impossible (and unrealistic) to demand a truly coherent theme. And, as noted above, given the

widely differing stages of development of the CISG in contrast to domestic contract law (whether that law be the common law, or, indeed, the civil law of any of the great commercial hubs on the European continent), this difficulty is made even more pronounced. But the contrast is itself illuminating, for it throws into high relief what is at stake when one is subject to the CISG: one necessarily gives up the development and learning accrued within one's own domestic contract law. Where one's own domestic contract law is in an uncertain state of development, that may be an easy choice to make. However, that is not always the case. Even so, this is certainly a collection of essays worth having in one's library.

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