CISG AC Opinion 6 Damages

CISG Advisory Council Opinion No. 6 [*]

Calculation of Damages under CISG Article 74

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Article 74 CISG

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.

OPINION

1. **Article 74 reflects the general principle of full compensation.**

2. **The aggrieved party has the burden to prove, with reasonable certainty, that it suffered loss. The aggrieved party also has the burden to prove the extent of the loss, but need not do so with mathematical precision.**

3. **The aggrieved party is entitled to non-performance damages, which is typically measured by the market value of the benefit of which the aggrieved party has been deprived through the breach, or the costs of reasonable measures to bring about the situation that would have existed had the contract been properly performed.**

   A. **The aggrieved party is entitled to any net gains prevented as a result of the breach.**

   B. **Lost profits recoverable under Article 74 may include loss of profits that are expected to be incurred after the time damages are assessed by a tribunal.**

   C. **Lost profits include those arising from lost volume sales.**

4. **The aggrieved party is entitled to additional costs reasonably incurred as a result of the breach and of measures taken to mitigate the loss.**

5. **Under Article 74, the aggrieved party cannot recover expenses associated with litigation of the breach.**

6. **The aggrieved party is entitled to damages for pecuniary loss resulting from claims**

by third parties as a result of the breach of contract.

7. **The aggrieved party is entitled to damages for loss of goodwill as a consequence of the breach.**

8. **If there has been a breach of contract and then the aggrieved party enters into a reasonable substitute transaction without first having avoided the contract, the aggrieved party may recover damages under Article 74, that is, the difference between the contract price and the substitute transaction.**

9. **Damages must not place the aggrieved party in a better position than it would have enjoyed if the contract had been properly performed.**

    A. **In calculating the amount of damages owed to the aggrieved party, the loss to the aggrieved party resulting from the breach is to be offset, in principle, by any gains to the aggrieved party resulting from the non-performance of the contract.**

    B. **Punitive damages may not be awarded under Article 74 of the Convention.**

COMMENTS TO CISG ADVISORY COUNCIL OPINION NO. 6

1. Article 74 reflects the general principle of full compensation.

1.1 Article 74 does not provide specific guidelines for calculating damages.[1] Instead, it gives the tribunal the authority to determine the aggrieved party's "loss suffered ... as a consequence of the breach" based on the circumstances of the particular case. The purpose of Article 74 is to place the aggrieved party in the same pecuniary position it would have been in had the breach not occurred and the contract been properly performed.[2] In other words, it is designed to give the aggrieved party the "benefit of the bargain."[3] Accordingly, Article 74 is to be liberally construed to compensate an aggrieved party for all disadvantages suffered as a result of the breach. However, all claims for damages, including under Article 74, are subject to limitations imposed by the doctrines of foreseeability and mitigation.[4]

1.2 The principle of full compensation for breach of contract established by Article 74 is expressed in many national laws.[5] In addition, the principle is set forth in both the UNIDROIT Principles and the Principles of European Contract Law (PECL).[6] It is also consistent with decisions of many international tribunals.[7]

1.3 It should be noted at the outset that parties may agree upon the remedies available for breach of contract.[8] For example, they may limit the scope of liability in the event that a party terminates the contract because of certain events. In addition, they may include a liquidated damages provision, which provides for a specified amount of damages to be paid by a party who repudiates the agreement. However, some jurisdictions may refuse for public policy reasons to enforce such a clause.[9]

2. The aggrieved party has the burden to prove, with reasonable certainty, that it suffered a loss. The aggrieved party also has the burden to prove the extent of the loss, but need not do so with mathematical precision.

2.1 Article 74 does not explicitly address to what extent aggrieved parties must prove that they have suffered a loss in order to recover damages under that provision.[10] As a result, there has been controversy over whether this matter is implicitly addressed by the Convention or whether it is a procedural matter to be resolved according to domestic law. Some courts and tribunals have held that the issue is a procedural matter beyond the scope of the Convention.[11] However, relying on such an approach could be counterproductive and lead to differential treatment of similarly situated parties.

2.2 In order to recover damages for breach of contract, the aggrieved party must prove that it has suffered a loss as a result of the breach. In common law countries, the requisite level of proof is often found in the requirement that the claimant prove "certainty of damages." This typically means the aggrieved party must prove with reasonable certainty that a loss was sustained or will be sustained.[12] Some civil law countries also require that damages be reasonably certain in their existence but not in amount,[13] while others impose a higher standard of proof to recover damages, particularly with respect to claims for lost profits.[14]

2.3 The existence of differing rules concerning the proof of damage could lead to the differential treatment of similarly situated parties. For example, buyers attempting to prove future losses often rely on assumptions about market prices and the amount of future sales. If a seller wrongfully refuses to deliver a new product or a product that the buyer had not previously been in the business of selling, there may be little concrete evidence on which the aggrieved buyer can base its damages claim, which would mainly consist of loss of profit.[15] In such a case, countries requiring a high level of proof with regard to the fact that the aggrieved party suffered a loss would likely not allow the recovery of lost profits under Article 74. However, in countries that have a more relaxed level of proof, the aggrieved party may be able to recover such damages under Article 74. This result would be unfair and undermine the goal of the Convention to provide a uniform law on the sale of goods. In addition, the former approach would be contrary to the principle of full compensation. It also could provide an incentive for a party to breach its contractual obligations. As one arbitral tribunal, in a non-CISG case, explained:

> "[I]f recovery were limited to what a claimant has spent in reliance on a contract which has been breached, an incentive would be created which is contrary to the contractual morality: obligors would generally find it in their interest to breach contracts which turn out to be valuable to their co-contractant. Parties do not enter into contracts involving risk in order to be repaid their costs. To limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is intolerable when that party was full risk for the amount of the investments made on the strength of the contract."[16]

2.4 Furthermore, from a policy perspective, the breaching party should not be able to escape liability because the breaching party's wrongful act caused the difficulty in proving damages with absolute certainty.[17] As one United States court noted, "it is particularly in the area of quantifying the amount of lost profits that courts impose the risk of uncertainty on the breaching party whose breach gave rise to the uncertainty."[18]

2.5 Moreover, relying on applicable procedural law to resolve this issue may be counterproductive.[19] This is because whether a matter is considered substantive or procedural may vary from jurisdiction to jurisdiction and may depend on the circumstances of a particular case.[20] Instead, the analysis should focus on whether the matter is governed by the Convention by examining "the purposes and policies of individual provisions as well as the Convention as a whole" and giving due regard to the need for a uniform interpretation.[21]

2.6 Given the need to promote the Convention's international character and the need to promote uniformity in the Convention's application, and in light of the purposes and policies of Article 74, the aggrieved party bears the burden of proving with reasonable certainty such party has suffered a loss as a result of the breach. The imposition of a "reasonable" standard should not be viewed as radical. Rather, it is consistent with the Convention as a whole. As one commentator notes:

> "[O]n several occasions the Convention refers to the parties as 'reasonable' persons (*see, e.g.*, Articles 8(2) and (3); 25; 35(1)(b); 60; 72(2); 75; 77; 79(1); 85; 86; 88(2)), requires that a particular act must be accomplished or a notice given within a 'reasonable time' (see, *e.g.*, Articles 18(2); 33(3); 39(1); 43(1); 47; 49; 63; 64; 65; 73(2)), and distinguishes between 'reasonable' and 'unreasonable' expense, inconvenience or excuse (*see, e.g.*, Article 43; 37; 48; 87; 88(2) and (3)). These references demonstrate that under the Convention the 'reasonableness' test constitutes a general criterion for evaluating the parties' behavior to which one may resort in the absence of any specific regulation."[22]

2.7 Requiring the aggrieved parties to prove, with reasonable certainty, that that party suffered a loss is consistent with the UNIDROIT Principles and the PECL.[23] The UNIDROIT Principles states: "[c]ompensation is due only for harm, including future harm, that is established with a *reasonable degree of certainty*."[24] The comments further provide that this "reaffirms the well-known requirement of certainty of harm . ..."[25] The PECL states: "[t]he loss for which damages are recoverable include: (a) non-pecuniary loss; and (b) future loss which is *reasonably likely to occur*."[26]

2.8 This requirement is also in accord with many national laws.[27] Furthermore, it is consistent with the decisions of a number of courts and tribunals that have imposed a requirement that damages be proved with reasonable certainty.[28]

2.9 If aggrieved parties are able to meet the burden of proving damages with reasonable certainty, they then have the burden to prove the extent of damages, but need not do so with mathematical precision.[29] The aggrieved party must only provide a basis upon which a tribunal can reasonably estimate the extent of damages. An aggrieved party may be able to do this through, for example, the use of expert testimony, economic and financial data, market surveys and analyses, or business records of similar enterprises.[30] This requirement strikes a balance between the need for evidence upon which tribunals may base an award of damages and the recognition that the difficulty of proving that any damages in fact stem from the breaching party's wrongful act.[31]

3. The aggrieved party is entitled to non-performance damages, which is typically measured by the market value of the benefit of which the aggrieved party has been deprived through the breach, or the costs of reasonable measures to bring about the situation that would have existed had the contract been properly performed.

3.1 Under Article 74, an aggrieved party is entitled to be compensated for the value of its unrealized contractual expectation in order to receive the benefit of the bargain. This loss is sometimes termed non-performance loss, direct loss, or loss in value. It is often measured by "the difference between the value to the aggrieved party of the performance that should have been received and the value to that party of what, if anything, actually was received."[32]

3.2 In other cases, the aggrieved party may undertake measures to place it in the same position that it would have been in had the contract been properly performed. In such circumstances, the aggrieved party is entitled to recover the costs of those measures, provided that they were reasonable.[33] For example, when a seller delivers defective goods and the buyer repairs them, tribunals have awarded the aggrieved buyer, among other things, the expenses incurred in repairing the goods.[34] In addition, where a seller is unjustifiably delayed in delivering the goods and the buyer undertakes measures to overcome the temporary loss of the goods, tribunals have awarded the aggrieved buyer the expenses it incurred in overcoming the loss of the benefit of performance. For example, in the decision of the Oberlandesgericht Köln, 8 January 1997, the seller of tanning machines did not return by the agreed upon date machines that it had taken back to adjust. The buyer then hired a third party to treat its leather goods. The Provincial Court of Appeal ruled that, under Article 74, the buyer was entitled to recover the sum paid to the third party because the hiring of that party was viewed as reasonable under the circumstance.[35]

3.3 The Secretariat Commentary provides the following additional example:[36]

> "The contract provided for the sale of 100 tons of grain for a total price of $50,000 FOB. When the delivered grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. The extra cost to Buyer of drying the grain was $1,500. If the grain had been as contracted, its value would have been $55,000, but because of the deterioration caused by the moisture after it was dried the grain was worth only $51,000.

Contract price	$50,000
Value the grain would have had if as contracted	$55,000
Value of grain as delivered	$51,000
	$ 4,000
Extra expenses of drying the grain	$ 1,500
Loss arising out of the breach	$ 5,500"

3.4 This approach is in accord with the UNIDROIT Principles and the PECL.[37] UNIDROIT Principles Article 7.4.2(1) provides: "The aggrieved party is entitled to full compensation for harm sustained as a result of non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived . ..."[38] Similarly, PECL Article 9:502 states: "The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived."[39]

3.5 An aggrieved party also may recover losses resulting from declining exchange rates if the aggrieved party can prove that it would have received a higher monetary value if the breaching party had paid the money owed pursuant to the contract.[40] The aggrieved party's loss in this situation can be measured by the difference between the converted value of the currency at the time payment was due under the contract and the value of the converted currency at the time of payment.[41]

3.6 The following example illustrates this point. Assume that a contract calls for a buyer to pay U.S. $10,000 upon delivery of goods to a seller in country X where the currency is the Euro and the rate of exchange (at the time of delivery) for U.S. $10,000 is Euro $10,000. The buyer then wrongfully refuses to pay the seller and the seller files a suit in an American court to collect. However, by the time that the court enters judgment in favor of the seller, US $1 is worth only Euro $0.7692. Thus, awarding the seller U.S. $10,000 would, in effect, give the seller only Euro $7692. The seller is thus entitled to its payment under the contract (U.S. $10,000), plus an additional U.S. $3,000, which would give the seller the equivalent of Euro $10,000.

3.7 While the Convention does not explicitly address how courts and tribunals should treat the issue of loss resulting from fluctuating exchange rates, it is consistent with the principle of full compensation that the aggrieved party be compensated for the loss.[42] There has been some confusion over whether loss resulting from the devaluation of currency may be recovered under the Convention, primarily because of the principle of nominalism and the rule that a creditor ordinarily bears the risk of declining exchange rates.[43] While a creditor/aggrieved party may indeed bear the risk of fluctuating exchange rates over the course of the contract, such party does not continue to bear the risk after the debt has matured.[44] If this were the case, the aggrieved party would be assigned a risk that it did not intend to assume under the contract and, when the currency of payment is in steady decline, a debtor would have an incentive to delay payment for as long as possible.[45]

3.8 Numerous courts have awarded damages for exchange rate losses under Article 74.[46] However, they have limited compensation to situations in which the creditor/aggrieved party can show that if it had received payment when due, the aggrieved party would have obtained a higher value by converting the money into its local currency.[47] But when a creditor of a foreign currency debt usually conducts its business in a different currency, presumably such party would immediately convert the foreign currency and therefore be entitled to the value determined by the exchange rate at maturity of the obligation.[48] Losses may also arise from the devaluation of currency when the currency of agreement is also the creditor's local currency. This situation is distinct from losses resulting from declining exchange rates; generally these losses have not been regarded as compensable.[49]

3.9 Many national laws and courts have compensated aggrieved parties for exchange rate losses.[50] In addition, both the UNIDROIT Principles and the PECL also provide aggrieved parties a remedy for declining exchange rates after maturity of the debt.[51] However, they do so through requiring that payment be made according to the applicable rate of exchange prevailing either when the payment is due or at the time of payment. In other words, instead of awarding the loss from the devaluation of currency as damages, the UNIDROIT Principles and the PECL explicitly provide for essentially the same result by allowing a tribunal to fix the damages according to an appropriate exchange rate so that the aggrieved party does not suffer a loss because of a change in the exchange rate post-breach.[52] Since the Convention does not contain an explicit provision governing this issue, it is appropriate to consider the loss as damages recoverable under Article 74.[53]

A. The aggrieved party is entitled to any net gains prevented as a result of the breach.

3.10 Lost profits are the only type of damages specifically mentioned in Article 74.[54] Article 74 provides that a claimant may recover for breach of contract, "a sum equal to the loss, including loss of profit, suffered ... as a consequence of the breach."[55] The Secretariat Commentary explains that specific reference to lost profits was included because "in some legal systems the concept of 'loss' standing alone does not include loss of profit."[56]

3.12 The Convention does not provide specific guidance on calculating lost profits. Individual tribunals are given the authority to calculate damages on a case-by-case basis.[57] Damages for loss of profit are to be calculated in accordance with Article 74's principle of full compensation -- that is, the goal is to place the aggrieved party in the same position it would have been in economically if the contract had been performed.[58] Domestic practices that limit damages for lost profits are not to be applied.[59]

3.13 Determining lost profits is not an exact science, and some of the methods used to calculate lost profits are complicated.[60] Therefore, precise calculation of such damages may not be possible. Moreover, in some cases, the breach may prevent an aggrieved party from being able to prove damages with precision. In these circumstances, the breaching party should not be able to escape liability on the ground that lost profits are uncertain.[61] Thus, an aggrieved party is not required to prove with exact certainty and precision the amount of profits it lost as a result of the breach; it needs only to prove the loss with reasonable certainty.[62]

3.14 Under Article 74, an aggrieved party is entitled to net gains prevented, that is, net profits lost as a result of the breach of contract. In general, net profits are calculated by subtracting from gross profits the expenses saved as a result of the aggrieved party being excused from performance.[63] This practice is consistent with both the UNIDROIT Principles and the PECL.[64] In particular, the Comment to Article 9:502 of the PECL provides:

> "The aggrieved party must bring into account in reduction of damages any compensating gains which offset its loss; only the balance, the net loss, is recoverable. Similarly, in computing gains of which the aggrieved party has been deprived, the cost it would have incurred in making those gains is a compensating saving which must be deducted to produce a net gain. Compensating gains typically arise as the result of a cover transaction concluded by the aggrieved party. ... A compensating saving occurs where the future performance from which the aggrieved party has been discharged as the result of the non-performance would have involved the aggrieved party in expenditure."[65]

3.15 In certain cases, aggrieved parties may seek damages for the loss of chance or opportunity to earn a profit.[66] This may occur when, following a breach of contract, an aggrieved party claims to have suffered a loss from a missed opportunity to engage in an opportunity for gain.[67] What separates a loss of chance from the general category of loss of profits is the existence of some contingency or unknown fortuitous event between the promisor's performance and the promisee's realization of gain. In this circumstance, a breach by the promisor prevents the promisee's chance of profit from coming to fruition.[68] Because a contingency must occur before profits will be realized, an aggrieved party typically is unable to prove with reasonable certainty that a profit would have been made if the contract had been properly performed. Accordingly, damages for the loss of a chance or opportunity to profit ordinarily are not recoverable under Article 74.[69]

3.16 The prohibition on damages for loss of chance or opportunity does not apply when the aggrieved party purposely enters into a contract in order to obtain a chance of earning a profit.[70] In such a case, the chance of profit is an asset,[71] and, when a party chooses to enter into a contract to obtain such a chance, the party is entitled to compensation when the promisor unjustifiably does not perform. Otherwise, a promisor could breach that contract with impunity [72] and avoid "liability solely on the basis of the [aggrieved party's] difficulty of proving loss where it was clear at the time of formation that such loss would be impossible to prove with reasonable certainty."[73] Moreover, allowing recovery in this circumstance would be consistent with the full compensation principle of Article 74. It also finds support in Article 7.4.3 of the UNIDROIT Principles, which provides for recovery of damages for the loss of chance to profit.[74] In addition, allowing damages for loss of chance would be consistent with the practice of a number of countries.[75]

B. Lost profits recoverable under Article 74 may include loss of profits that are expected to be incurred after the time damages are assessed by a tribunal.

3.19 Under Article 74, an aggrieved party is entitled to recovery of not only profits lost prior to the judgment, but also for future lost profits, to the extent that such lost profits can be proved with reasonable certainty and subject to the principles of foreseeability and mitigation.[76] While the Convention does not expressly state that future losses are recoverable, its recovery is consistent with the principle of full compensation. This approach is in accord with the PECL Article

9:501(2)(b) and UNIDROIT Principles Article 7.4.3, which allow for recovery of future losses. In particular, the Comment to Article 9:501(2)(b) explains:

> "The loss recoverable by the aggrieved party includes future loss, that is, loss expected to be incurred after the time damages are assessed. This requires the court to evaluate two uncertainties, namely the likelihood that future loss will occur and its amount. As in the case of accrued loss before judgment ... this covers both prospective expenditures which would have been avoided but for the breach and gains which the aggrieved party could reasonably have been expected to make if the breach had not occurred."[77]

C. Lost profits include those arising from lost volume sales.

3.20 Under Article 74, an aggrieved party may be able to recover lost profits in a lost volume situation. Traditionally, when a buyer fails to uphold its obligations under the contract, the seller's damages are measured by the difference between the contract price and the price at which the goods can be resold in the market (or the price of the substitute transaction). If the seller resells the goods at the same price, however, it is presumed that the seller suffered no damages. Nevertheless, if the seller was capable of selling to multiple buyers, then the second transaction would not be a substitute for the first, but simply a second sale. Therefore, damages measured under the traditional formula would be "inadequate to put the seller in as good a position as performance would have done," and the aggrieved party should be able to recover damages for lost sales volume.[78]

3.21 The following example illustrates the rationale for awarding lost profits in a lost volume situation:

> "If a private party agrees to sell his automobile to a buyer for $2,000, a breach by the buyer would cause the seller no loss (except incidental damages, that is, the expense of a new sale) if the seller was able to sell the automobile to another buyer for $2,000. But the situation is different with dealers having an unlimited supply of standard-priced goods. Thus, if an automobile dealer agrees to sell a car to a buyer at the standard price of $2,000, a breach by the buyer injures the dealer, even though he is able to sell the automobile to another for $2,000. If the dealer has an inexhaustible supply of cars, the resale to replace the breaching buyer costs the dealer a sale, because, if the breaching buyer had performed, the dealer would have made two sales instead of one. The buyer's breach, in such a case, depletes the dealer's sales to the extent of one, and the measure of damages should be the dealer's profit on one sale."[79]

3.22 Accordingly, it is consistent with the principle of full compensation for an aggrieved party to recover lost profits for lost volume sales. However, an aggrieved party may not recover lost profits for lost volume under Article 74 and, in addition, damages under Article 75's substitute transaction formula because, in that circumstance, the aggrieved party would receive double recovery.[80]

4. The aggrieved party is entitled to additional costs reasonably incurred as a result of the breach and of measures taken to mitigate the loss.

4.1 In some circumstance a breach of contract may cause an aggrieved party to incur additional costs in attempts to avoid further loss.[81] These expenses, which are sometimes referred to as incidental damages, are for loss in addition to the aggrieved party's loss in value from being deprived of performance under the contract. While Article 74 does not explicitly provide for the payment of incidental damages, an aggrieved party is entitled to recover these damages under the Article's principle of full compensation provided, among other things, that they are reasonable.

4.2 Article 74 provides no exhaustive list of incidental damages that may be recoverable. In the case where a buyer rejects the goods without justification or refuses to make payment upon delivery of the goods as agreed in the contract, additional costs incurred by an aggrieved party in order to avoid greater loss may include costs incurred in storing or preserving goods.[82] In the case of a breach by the seller, incidental damages may include costs incurred in storing or preserving goods that have been delivered late, or which are defective, and are to be returned to the seller,[83] as well as expenses for the expedited shipment of alternative goods.[84] Furthermore, an aggrieved buyer may be able to recover, as incidental damages, reasonable added expenses incurred in ascertaining whether the goods are in conformity with the contract insofar as a defect was actually established and notice to the other party was given.[85]

5. Under Article 74, the aggrieved party cannot recover expenses associated with litigation of the breach.

5.1 Article 74 does not explicitly address the payment of attorneys' fees and costs incurred by an aggrieved party in connection with seeking relief for the breach of contract from a third party, such as a court or arbitration tribunal ("litigation expenses"). Some courts and commentators believe that the recovery of litigation expenses is a procedural matter outside the scope of the Convention's substantive damages provisions.[86] However, other courts and commentators argue that based on Article 7(1), the Convention must be interpreted autonomously that characterizations of domestic law are irrelevant, and that recourse to domestic law should be made only as a last resort. Under this view, it is argued that Article 74 must be broadly interpreted in accordance with the principle of full compensation, which necessarily calls for the conclusion that an aggrieved party should be able to recover expenses associated with vindicating its rights. Otherwise, the aggrieved party would remain less than whole.[87]

5.2 The issue of whether litigation expenses should be considered as damages for purposes of Article 74 cannot be resolved through a substance/procedure distinction. Whether a matter is considered substantive or procedural may vary from jurisdiction to jurisdiction and may depend on the circumstances of a particular case.[88] Relying upon such a distinction in this context is outdated and unproductive.[89] Instead, the analysis should focus on whether the payment of litigation expenses is deliberately excluded from the Convention and, if not, whether the issue may be resolved "in conformity with the general principles on which [the Convention] is based or, in the absence of such principles, in conformity with law applicable by virtue of the rules of private international law."[90]

5.3 While Article 74 does not explicitly provide for the recovery of litigation expenses as damages, it does not prohibit their recovery. In addition, the history that led to the drafting of Article 74 is silent on the issue. Thus, the matter is not one that explicitly falls outside the Convention and it is appropriate to consider whether the issue may be resolved through a liberal interpretation of Article 74 or "an analogical application of specific provisions of the Convention."[91]

5.4 Although Article 74's principle of full compensation appears to support the view that litigation expenses should be recoverable in order to make the aggrieved party whole, such an interpretation would be contrary to the principle of equality between buyers and sellers as expressed in Articles 45 and 61.[92] If legal expenses were awarded as damages under Article 74, an anomaly would result where only a successful claimant would be able to recover litigation expenses.[93] The ability to recover damages under Article 74 is grounded on a breach of contract; thus, a successful respondent will not be able to recover its legal expenses if the claimant has not committed a breach of contract.[94] Therefore, the purpose of awarding attorneys' fees and costs, to make a prevailing party whole for costs incurred in litigation, will not be realized in those cases where the respondent prevails.[95] Remedies are the core of contract law, and to interpret Article 74 to create unequal recovery of damages between buyers and sellers is contrary to the design of the Convention.[96] However, Article 74 does not preclude a court or arbitral tribunal from awarding a party its attorneys' fees and costs when the contract provides for their payment or when authorized by applicable rules.

6. The aggrieved party is entitled to damages for pecuniary loss resulting from claims by third parties as a result of the breach of contract.

6.1 A breach of contract may not only cause an aggrieved party to suffer direct and incidental losses, but also losses from dealing with third parties. These losses are sometimes called consequential damages.[97] For example, in the case of a breach by the buyer, a seller may suffer consequential damages resulting from the termination of contracts with suppliers,[98] or fees resulting from a dishonored check.[99] A buyer may be able to recover consequential damages when the seller delivers defective goods, the buyer resells them to third parties, and the buyer incurs liability to the third parties for defective or non-performance.[100]

6.2 Like direct and incidental damages, these damages are subject to limitations of foreseeability and mitigation. However, these concepts may be more likely to limit the availability of consequential damages.[101]

7. The aggrieved party is entitled to damages for loss of goodwill as a consequence of the breach.

7.1 Pecuniary damages caused by a loss of goodwill also are, in principle, compensable under Article 74.[102] However, Article 74 does not permit recovery of non-material loss.[103] Therefore, recovery of damages for loss of goodwill is available only if the aggrieved party can establish with reasonable certainty that it suffered a financial loss because of a breach of contract.[104]

7.2 While Article 74 does not expressly provide for the recovery of loss of goodwill, such damages are permitted under the Article's principle of full compensation.[105] In addition, both PECL Article 9:501(2)(a) and UNIDROIT Principles Article 7.4.2 allow for recovery of goodwill.[106]

7.3 Goodwill, however, is notoriously difficult to define.[107] Thus, its loss is difficult to measure. Loss of goodwill can simply refer to a loss of future lost profits. Loss of goodwill also has been defined as a decline in business reputation or commercial image, quantified by the retention of customers. Alternatively, loss of goodwill has been defined as the decrease in the value of a business interest.[108] Because there is no uniform definition, some tribunals have required a higher level of proof for damages resulting from a loss of goodwill. For example, in the decision of Handelsgericht des Kantons Zürich, 10 February 1999, the Commercial Court stated that damages resulting from a loss of goodwill must be "substantiated and explained concretely."[109] In addition, in the decision of Landgericht Darmstadt, 9 May 2000, the District Court denied damages for loss of goodwill because the buyer was unable to "calculate the exact losses resulting from the damaged reputation."[110] However, the fact that goodwill may be difficult to measure should not result in a requirement of a higher level of proof to obtain such damages. Indeed, requiring that damages for loss of goodwill be calculated exactly would, in many cases, place an insurmountable burden on the aggrieved party and would thwart Article 74's principle of full compensation. It is consistent with Article 74 that, like other damages recoverable under the Article, damages for loss of goodwill may be awarded if, among other things, the aggrieved party can prove with reasonable certainty that its reputation has been damaged by the breach.[111]

7.4 In certain cases, the loss of goodwill may be measured by loss of profits. However, these cases present a potential for double recovery because of the overlap between goodwill damages and lost profits damages. Specifically, compensation for the decrease in the value of the aggrieved party's commercial interest may equal the compensation it would receive for the lost future profits.[112] In this circumstance, the aggrieved party cannot claim damages for the loss of return customers resulting from a loss of goodwill and future lost profits.[113] This situation occurred in the decision of Landgericht Darmstadt, 9 May 2000.[114] In that case, the buyer accused the seller of delivering defective goods and refusing to pay the contract price. In a counterclaim, the buyer claimed damages resulting from a loss of turnover and a loss of business reputation. The District Court explained that there was no basis for the buyer's claim for damages for a loss of goodwill. The court stated that "the [buyer] cannot claim a loss of turnover, on the one hand -- which could be reimbursed in the form of lost profits -- and then, on the other hand, try to get additional compensation for a loss of reputation."[115]

7.5 Nevertheless, there may be circumstances when an aggrieved party could recover damages for a loss of goodwill *and* lost profits. For example, when the promisor's breach eventually causes the promisee's business to fail, the promisee may be able to recover, *inter alia*, lost profits from the date of the breach until the day the when the business failed, and then damages for the destruction of its business, the value of which may include lost profits and lost goodwill.[116]

8. If there has been a breach of contract and then the aggrieved party enters into a reasonable substitute transaction without first having avoided the contract, the aggrieved party may recover damages under Article 74, that is, the difference between the contract price and the substitute transaction.

8.1 The aggrieved party can sometimes avoid part of its loss as a result of the breach by entering into a substitute transaction.[117] If the aggrieved party avoids the contract and, within a reasonable time and a reasonable manner thereafter enters into a substitute transaction, it may recover damages under Article 75 measured by the difference between the contract price and the substitute transaction together with any further damages.[118] Nevertheless, sometimes an aggrieved party may, either under a duty to mitigate or as a precautionary measure, or both, enter into a substitute transaction after a breach but before avoiding the contract. In this circumstance, the aggrieved party should be able to calculate damages using the same method for recovering damages under Article 75.[119] That is, when the aggrieved party enters into a substitute transaction without first having avoided the contract, the aggrieved party may recover as damages under Article 74 the difference between the contract price and the substitute transaction, provided that such transaction is reasonable.[120] The rationale for this approach has been explained as follows:

> "[A] buyer who has received non-conforming goods, the non-conformity not amounting to a fundamental breach of contract allowing avoidance, must be allowed to conclude a cover purchase in order to continue with his production and/or perform his contracts with his clients. Despite the absence of avoidance and, therefore, the inapplicability of Article 75 of the CISG, the buyer must be allowed to calculate its damages on the basis of the costs of the cover transaction."[121]

9. Damages must not place the aggrieved party in a better position than it would have enjoyed if the contract had been properly performed.

> **A. In calculating the amount of damages owed to the aggrieved party, the loss to the aggrieved party resulting from the breach is to be offset, in principle, by any gains to the aggrieved party resulting from the non-performance of the contract.**

9.1 In some cases, a breach may provide monetary benefits to an aggrieved party by allowing it to avoid some loss or save expenses that it would otherwise have incurred. In that event, the compensable loss suffered by the aggrieved party as a result of the breach is to be offset by the benefits that the aggrieved party received because of the non-performance of the agreement. As commentators point out, "however, advantages gained are not to be taken into account if there is no adequate connection with the loss and are related to the injured party's own expenditure (*e.g.*, insurance); it would be contrary to the principle of good faith (Article 6(1)) for the liable party to be exempted by them."[122]

9.2 This approach is consistent with the practice in most countries,[123] as well as with the UNIDROIT Principles and the PECL. The UNIDROIT Principles Article 7.4.2 states that account must be taken of "any gain to the aggrieved party resulting from its avoidance of cost or harm."[124] The Comment to that article explains that the purpose of this language is to ensure that an aggrieved party is not enriched by damages for non-performance. Accordingly, "account must be taken of any gain resulting to the aggrieved party from non-performance, whether that be in the form of expenses which it had not incurred (*e.g.*, it does not have to pay the cost of a hotel room for an artist who fails to appear), or of a loss which it had avoided (*e.g.*, in the event of the non-performance of what would have been a losing bargain for it)."[125]

9.3 By contrast, the PECL does not explicitly state that any loss to the aggrieved party must be offset by any gain resulting from the breach. However, the Comment to PECL Article 9:502 states:

> "The aggrieved party must bring into account in reduction of damages any compensating gains which offset its loss; only the balance, the net loss, is recoverable. Similarly, in computing gains of which the aggrieved party has been deprived, the cost it would have incurred in making those gains is a compensating saving which must be deducted to produce a net gain. Compensating gains typically arise as the result of a cover transaction concluded by the aggrieved party. But it is for the non-performing party to show that the transaction generating the gains was indeed a substitute transaction, as opposed to a transaction concluded independently of the default. A compensating saving occurs where the future performance from which the aggrieved party has been discharged as the result of the non-performance would have involved the aggrieved party in expenditure."[126]

9.4 The Secretariat Commentary provides the following illustrations of the appropriate measure of damages under Article 74:

> "*Example* [A]: The contract provided for the sale for $50,000 FOB of 100 machine tools which were to be manufactured by the seller. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller would have had total costs of $45,000 of which $40,000 would have represented costs incurred only because of the existence of this contract (*e.g.*, materials, energy, labour hired for the contract or paid by the unit of production) and $5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated to *[the]* contract, Seller did not expend the $40,000 in costs which would have been incurred by reason of the existence of this contract. However, the $5,000 of overhead which were allocated to this contract were for expenses of the business which were not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the Seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of Buyer's breach Seller has lost the allocation of $5,000 to overhead which he would have received if the contract had been performed. Thus, the loss for which Buyer is liable in this example is $10,000. Contract price $50,000 [less]

expenses of performance which could be saved $40,000 [equals] loss arising out of breach $10,000.

"*Example* [B]: If, prior to Buyer's repudiation of the contract in Example [A], Seller had already incurred $15,000 in non-recoverable expenses in part performance of the contract, the total damages would equal $25,000.

"*Example* [C]: If the product of the part performance in Example [B] could be sold as salvage to a third party for $5,000, Seller's loss would be reduced to $20,000."[127]

B. Punitive damages may not be awarded under Article 74 of the Convention.

9.5 The Convention does not provide for the payment of punitive damages. Punitive damages, also called exemplary damages, are sums awarded in excess of any compensatory or nominal damages in order to punish a party for outrageous misconduct.[128] Such damages may not be awarded under Article 74 because it limits damages to "a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."[129] Furthermore, awarding punitive damages is precluded under the Convention even if domestic law permits them for breach of contract because the Convention does not provide for their payment.[130] However, parties may agree to allow a court or tribunal to award punitive damages, to the extent permitted under applicable law.[131]

FOOTNOTES

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Jan Ramberg, *Chair*
Eric E. Bergsten, Michael Joachim Bonell, Alejandro M. Garro, Roy M. Goode, John Y. Gotanda, Sergei N. Lebedev, Pilar Perales Viscasillas, Peter Schlechtriem, Ingeborg Schwenzer, Hiroo Sono, Claude Witz, *Members*.
Loukas A. Mistelis, *Secretary*.

The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Studies, Queen Mary, University of London, was elected Secretary. The CISG-AC has consisted of: Prof. Emeritus Eric E. Bergsten, Pace University; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford; Prof. Sergei N. Lebedev,

Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. At subsequent meetings, Prof. Jan Ramberg was elected as the Chair of the CISG-AC for the term June 2004 to June 2007 and the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III de Madrid, Prof. Ingeborg Schwenzer, University of Basel, and Prof. John Y. Gotanda, Villanova University School of Law.
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1. The Secretariat Commentary provides:

> Since article 70 [draft counterpart to CISG Article 74] is applicable to claims for damages by both buyer and the seller and these claims may arise out of a wide range of situations, including claims for ancillary damages to a request that the party in breach perform the contract or to a declaration of avoidance of a contract, no specific rules have been set forth in article 70 describing the appropriate method of determining "the loss ... suffered ... as a consequence of the breach." The court or the arbitral tribunal must calculate the loss in the manner which best suits the circumstances.

Secretariat Commentary, art. 70 [draft counterpart to CISG art. 74], ¶ 4, *reprinted in* HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES, Kluwer 1989, p. 449 [hereinafter "Secretariat Commentary"], *also available at* <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-74.html>. There exists no official commentary on the CISG. The Secretariat Commentary is on the 1978 Draft of the Convention. Nevertheless, the Commentary reflects that Secretariat's impressions of the purposes and effects of the Commission's work and provides a helpful analysis of official text of the CISG. *See* KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Kluwer, 1989, p. 2 ("[The Secretariat] Commentaries are the closest available counterpart to an Official Commentary on the Convention and, when they are relevant, constitute the most authoritative citations to the meaning of the Convention that one can find.").

2. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS, 2nd ed., Oxford, 2005, art. 74, ¶ 2; Honnold, Uniform Law for International Sales, 3rd ed., Kluwer, 1998, p. 445 (*citing* TREITEL, REMEDIES FOR BREACH OF CONTRACT, Oxford, 1998, p. 82).

3. *See* Farnsworth, *Damages and Specific Relief*, 27 Am. J. Comp. L. pp. 247, 249 (1979); Sutton, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 Ohio State L.J. pp. 737, 742 (1989).

4. CISG arts. 74, 77.

5. *See* HARRIS/TALLON, CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS, Oxford 1989, p. 274; Draetta, et al., *Transnational Contract Law in* THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS, Federation Press, 2003, § 4:50; Robinson v. Harman 1 Exch p. 850 (1848); The Unique Mariner [1979] 1 Lloyd's Rep. 37, 54; WADDAMS, THE LAW OF DAMAGES, Canada Law Book Limited, 1983, ¶ 536;

CORBIN, CORBIN ON CONTRACTS, West, 1952, p. 525; CANADA, *Asamera Oil Corp. v. Sea Oil & General Corp.*, Supreme Court of Canada, 1979, 1 S.C.R. p. 663.

6. UNIDROIT Principles art. 7.4.2; PECL art. 9:502.

7. *See Sapphire International Petroleums Ltd. v. National Iranian Oil Co*., Arbitral Award, 15 March 1963, *reprinted in* 35 I.L.R. pp. 136, 182 (1967); *Delagoa Bay and East African Railway Co. (U.S. and Great Britain v. Portugal)* (1900), *summarized in pertinent part in* WHITEMAN, DAMAGES IN INTERNATIONAL LAW, William S. Hein & Co., 1943, vol. 3, pp. 1694, 1697; *see also* WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-U.S. CLAIMS TRIBUNAL, Int'l. Law Inst., 1991, p. 190. The arbitrator in the celebrated *Sapphire* case explained this principle as follows:

> According to the generally held view, the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion. ... This rule is simply a direct deduction from the principle of *pacta sunt servanda*, since its only effect is to substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes loss suffered (*damnum emergens*), for example expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have produced.

Sapphire, 35 I.L.R. pp. 185-86.

8. CISG art. 6.

9. FARNSWORTH, FARNSWORTH ON CONTRACTS, Aspen, 2004, vol. 3, § 12.18.

10. Commentators have asserted that the CISG imposes a burden of providing evidence of damages on a claimant. *See* ENDERLEIN/MASKOW, INTERNATIONAL SALES LAW, Oceana Publications 1992, p. 298. However, the CISG does not expressly require that damages be proved with certainty. *See* Saidov, *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, § 5 (2001), *available at* <http://cisgw3.law.pace.edu/cisg/biblio/saidov.html> .

11. *See* UNITED STATES, *Delchi Carrier S.p.A. v. Rotorex Corp.*, U.S. Court of Appeals (2nd Circuit), 6 Dec. 1996, CISG-online.ch 140; *see also* FINLAND, Helsingin Hoviokeus, 26 Oct. 2000, CISG-online.ch 1078; SWITZ., Bezirksgericht der Saane, 20 Feb. 1997, CISG-online.ch 426; ARBITRATION, ICC Court of Arbitration, 23 Jan. 1997 CISG-online.ch 236. One commentator examining CISG cases in the Russian Federation concludes that arbitration tribunals there have consistently applied their own discretion to determine the level of proof necessary. *See* Saidov, *Cases on CISG Decided in the Russian Federation*, 7 VINDOBONA J. INT'L COM. L. & ARB. pp. 1-62, 50 (2003).

12. *See* UNITED STATES, *Bagwell v. Middle S. Energy*, U.S.Court of Appeals (5th Cir.), 1986, 797 F.2d p. 1298; UNITED STATES, *Locke v. United States*, U.S.Court of Claims, 1960, 283 F.2d p. 521; UNITES STATES, *Kozlowski v. Kozlowski*, New Jersey Supreme Court,1979, 403 A.2d p. 902; CHITTY ON CONTRACTS, 24th ed., Sweet & Maxwell, 1977, vol. 1, §1562; CARTER/HARLAND, CONTRACT LAW IN AUSTRALIA, 4th ed.,

LexisNexis, 2002, ¶¶ 2117; *see also* RESTATEMENT, CONTRACTS (SECOND) § 352 (1981) (U.S.); DOBBS, LAW OF REMEDIES, West, 1993, §§ 12.4(3), 12.9(2); MCGREGOR, MCGREGOR ON DAMAGES, 14th ed., Sweet & Maxwell, 1980, § 261; *see also* WADDAMS, *op. cit.*, ¶ 1051; ARBITRAL AWARD, Final Award in Case No. 78445 of 1996, *reprinted in* XXVI Y.B. COM ARB. pp. 167, 175 (2001) (*citing* INDIA, *State of Kerala v. K. Bhaskaran*, AIR (1985) Kerala p. 55); ROBERT DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS, 5th ed., Cromwell-Smith, 1998, § 1.6; Gotanda, *Recovering Lost Profits in International Disputes*, 36 GEO J. INT'L L. p. 61 (2005).

13. *See* Simont, *Belgium, in* TRANSNATIONAL LITIGATION, Oceana, 2003, p. BEL-64; Vargas/Lira, *Brazil, in* TRANSNATIONAL LITIGATION, Oceana, 1997, p. BRA-11.

14. Wirth et al., *Switzerland, in* TRANSNATIONAL LITIGATION, Oceana, 1997, p. SWI-77.

15. The Helsinki Court of Appeals dealt with a similar scenario, where the seller had refused delivery of plastic carpets that the buyer had not previously been in the business of selling. *See* FINLAND, Helsingin hoviokeus, 26 Oct. 2000, CISG-online.ch 1078. In this case the buyer had entered into a requirements contract with a third party for the resale of the plastic carpets. *Id.* The court, in estimating the buyer's damage as a result of the seller's breach, held that the buyer's sales goal could not be used as basis for estimating lost profits. *Id.*

16. ARBITRAL AWARD, *Himpurna California Energy Ltd. V. P.T. (Persero) Perusahaan Listruik Negara*, Final Award of 4 May 1999, *reprinted in* XXV Y.B. COM. ARB. pp. 13, 83-84 (2000).

17. *See* UNITED STATES, *Southwest Battery Corp. v. Owen*, Texas Supreme Court, 1938, 115 S.W.2d p. 1097 ("A party who breaks his contract cannot escape liability because it is impossible to state or prove a perfect measure of damages."); UNITED STATES, *Super Valu Stores, Inc. v. Peterson*, Alabama Supreme Court, 1987, 506 So.2d p. 317 ("[T]he risk of uncertainty must fall on the defendant whose wrongful conduct caused the damages.")

18. UNITED STATES, *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, U.S.Court of Appeals (7th Cir.), 1996, 100 F.3d p. 1353.

19. *See* ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Oceana, 2005, pp. 158-59 (noting substance-procedure distinction allows courts to apply local law that they are familiar with and leads to forum shopping, and, in some cases where procedural law has been applied instead of an international convention, "the application of domestic procedural law disported the process of what could have been a uniform application of substantive law").

20, *See* Orlandi, *Procedural Law Issues and Law Conventions*, 5 UNIFORM L. REV. p. 23 (2000); *See also*, UNITED STATES, *Sun Oil Co. v. Wortman*, U.S. Supreme Court, 1998, 486 U.S. p. 717 ("Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn."); UNITED STATES, *Hanna v. Plumer*, U.S.Supreme Court,1965, 380 U.S. p. 460 ("The line between 'substance' and 'procedure' shifts as the legal context changes. Each implies different variables depending upon the particular problem for which it is used."); *see also* Gotanda, *Awarding Interest in International Arbitration*, 90 AM J. INT'L L. p. 40 (1996) (noting that "many countries regard the awarding of interest as substantive, while others deem rules concerning interest procedural").

21. *See* BIANCA/BONELL/Knapp, COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION, Giuffrè, Milano, 1987, art. 7, ¶¶ 2.2.1-2.3.1 (stating that in cases of ambiguities or obscurities in text and gaps, "courts should to the largest possible extent refrain from resorting to the different domestic laws and try to find a solution within the Convention itself" by looking "to the underlying purposes and policies of individual provisions as well as of the Convention as a whole").

22. BIANCA/BONELL/Bonell, *op. cit.*, art. 7, ¶ 2.3.2.2; *see* Saidov, *Standards of Proving Loss and Determining the Amount of Damages*, 22 J. CONT. L. p. 1 (Mar. 2006).

23. *See* Eiselen, *Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Article 74 of the CISG*, ¶ k, *available at* <http://cisgw3.law.pace.edu/cisg/principles/uni74.html>; Blase/Höttler, *Remarks on the Damages Provisions in the CISG, Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (UPICC)*, *available at* <http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html>.

24. Art. 7.4.3.

25. Art. 7.4.3 cmt. 1 (emphasis added).

26. Art. 9:501(2) (emphasis added).

27. *See* Hahnkamper, *Austria*, *in* TRANSNATIONAL LITIGATION, Oceana, 1999, p. AUS-88; Simont, *op. cit.*, p. BEL-63 (Belgium); Wirth, *op. cit.*, p. SWI-76 (Switz.) (*citing* GAUCH/SCHLUEP, SCHWEIZERISCHES OBLIGATIONENRECHT, ALLGEMEINER TEIL, Zürich, 6th ed., 1995, vol. 2, pp. 2624, 2630, 2726; RESTATEMENT, CONTRACTS (SECOND) § 352 (1981) (U.S.); *see also* Gotanda, *Lost Profits*, *op. cit.*, p. 87 ("[I]n general, the claimant must prove lost profits with reasonable certainty. In many countries though, the certainty rule applies only to the fact that the breach resulted in claimant's loss of future revenues and not to the amount of profits it lost.").

28. FINLAND, Helsingin Hoviokeus, 26 Oct., 2000, CISG-online.ch 1078; RUSSIA, ICA Arbitral Tribunal, 27 July, 1999, CISG-online.ch 779; UNITED STATES, *Delchi Carrier S.p.A. v. Rotorex Corp.*, U.S.Court of Appeals (2nd Circuit), 6 Dec. 1995, CISG-online.ch 140; *see also* TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00 Civ. 5189 (RCC) (U.S. Dist. Ct. S.D.N.Y. Aug. 23, 2006), *available at* <http://cisgw3.law.pace.edu/cases/060823u1.html>.

29. *Cf.* C.c. art. 1226 (Italy); BW art. 6:105 (Neth.); UNITED STATES, *California Lettuce Growers v. Union Sugar Co.*, California Supreme Court, 1955, 289 P.2d pp. 785, 793. Comments to the American U.C.C. "reject[s] any doctrine that damages must be calculable with mathematical accuracy," stating that "[c]ompensatory damages are often best approximate; they have to be proved with whatever definiteness and accuracy the facts permit, but no more." U.C.C. § 1-106 cmt. 1 (U.S.). The UNIDROIT Principles states that "where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court." UNIDROIT Principles art. 7.4.3(3).

30. *See* UNITED STATES, *Butler v. Westgate State Bank*, Kansas Supreme Court, 1979, 596 P.2d p. 156; UNITED STATES, *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, Nebraska Supreme Court, 1979, 281 N.W.2d p. 778; UNITED STATES, *Houston Exploration, Inc. v. Meredith*, Nevada Supreme Court, 728 P.2d p. 437 (1986); UNITED STATES, *Edwards v. Container Kraft & Paper Supply Co.*, California Court of Appeals, 1958, 327 P.2d p. 622; RESTATEMENT, CONTRACTS (SECOND) § 352 cmt. b (1981) (U.S.).

In one tribunal in a non-CISG case, the claimant calculated its claimed lost profits on the basis of detailed forecasts of expected results during the relevant time period, including the forecasted production capacity of a factory that the respondent failed to complete, the forecasted sales of the product that was to be made at the factory (based largely on statements from the claimant's customers that they would have bought certain quantities of the product at prices that were competitive with those offered by the claimant's competitors). The tribunal "accept[ed] that the claimed amount of loss of profit fairly represents what the claimant would have earned during the relevant period of time, if production according to the Agreement had been performed." SWEDEN, Arbitration Institute of the Stockholm Chamber of Commerce, Interim Award of 17 July 1992 and Final Award of 13 Jul. 1993, *reprinted in pertinent part in* XXII Y.B. COM. ARB. p. 197 (1997).

31. As the tribunal in Final Award in Case No. 8362 of 1995 pointed out, in a non-CISG case:

> With respect to the calculation of the amount of damages, counterbalancing factors are taken into account under the law: on the one hand, there must be a sound basis upon which alleged damages are to be calculated. They cannot be the product of sheer speculation unsupported by tangible evidence. On the other hand, the law will not reward a party in breach by depriving the other party of compensation merely because no precise basis for determining the amount of damages exists.

ARBITRAL AWARD, Final Award in Case No. 8362 of 1995, *reprinted in pertinent part in* XXII Y.B. COM. ARB. pp. 164, 177 (1977).

32. FARNSWORTH, *op. cit.*, § 12.9; *see, e.g.*, GERMANY, [LG Trier, 12 Oct. 1995], CISG-online.ch 160.

The Secretariat Commentary provides:

> If the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value of the goods would have had if they had been stipulated in the contract. Since this formula is intended to restore him to the economic position he would have been in if the contract had been performed properly, the contract price of the goods is not an element of the calculation of damages.

Secretariat Commentary, *op. cit.*, art. 70 [draft counterpart to CISG art. 74, ¶ 7.

33. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 14. The Secretariat Commentary states:

> Where the seller delivers and the buyer retains defective goods, the loss suffered by the buyer might be measured in a number of different ways. If the buyer is able to

> cure the defect, the loss would often be equal to the cost of the repairs. If the goods delivered were machine tools, the buyer's loss might also include the loss resulting from lowered production during the period the tools could not be used.

Secretariat Commentary, *op. cit.*, art. 70 [draft counterpart to CISG art. 74], ¶ 6.

34. *See* AUSTRIA, OGH, 14 Jan., 2002, CISG-online.ch 643; *see also* CANADA, *Nova Tool and Mold Inc. v. London Industries Inc.*, Ontario Court, 16 Dec. 1998, CISG-online.ch 572; GERMANY, AG Mchen, 23 June 1995, CISG-online.ch 368. Failed attempts to repair goods may also be compensated. *See* UNITED STATES, *Delchi Carrier S.p.A. v. Rotorex Corp.*, U.S.Court of Appeals (2nd Circuit), 6 Dec. 1995, CISG-online.ch 140.

35. *See* GERMANY, OLG Köln, 8 Jan., 1997, CISG-online.ch 217.

36. Secretariat Commentary, *op. cit.*, art. 70 [draft counterpart to CISG art. 74], ¶ 7.

37. For a discussion of the differences between the CISG damages provisions and the American Uniform Commercial Code, which has been adopted in some form by most states, *see* Flechtner, *Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. pp. 53, 97-107 (1988).

38. UNIDROIT Principles of International Commercial Contracts art. 7.4.2 (2004). For a comparison of the damages provisions of UNIDROIT Principles and the Convention, *see* Eiselen, *op. cit.*; *see also* Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TULANE L. REV. pp. 1149, 1152 (1995).

39. Principles of European Contract Law (PECL) art. 9:502 (prepared by the Commission on European Contract Law, Ole Lando and Hugh Beale eds., 2000). For a comparison of the damages provisions of the PECL, *see* Blase/Höttler, *op. cit.*

40. An aggrieved party may suffer losses resulting from the devaluation of currency when a debtor fails to make a payment when due and, in the interim between the maturity of the obligation and the receipt of payment, the exchange rate between the currency of the agreement and the aggrieved party's local currency declines. Then, upon conversion into its local currency, the aggrieved party does not receive the value that it expected under the contract. *See* UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/V04/555/63/PDF/V0455563.pdf>; *see also* F.A. MANN, THE LEGAL ASPECT OF MONEY, Oxford, 4th ed., 1982, p. 286.

41. *See* SWITZERLAND, HG Zürich, 5 Feb. 1997, CISG-online.ch 327; NEW ZEALAND, *Issac Naylor & Sons Ltd. v. New Zealand Cooperative Wool Marketing*, 1981, 1 N.Z.L.R. p. 361; *see also* Vroegop, *Exchange Losses on an International Sale of Goods*, 1982 N.Z.L.J. pp. 3-4.

42. *See* Eiselen, *op. cit.*; Saidov, *Cases on CISG Decided in the Russian Federation*, 7 VINDOBONA J. INT'L COM. L. & ARB. pp. 1, 44-45 (2003); *see also* ENDERLEIN/MASKOW, *op. cit.*, p. 298.

43. *See*, GERMANY, LG Heidelberg, 27 Jan. 1981, *available at* <http://cisgw3.law.pace.edu/cases/810127g1.html> (ULIS precedent); RUSSIA, Tribunal of

International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (ICAC), 21 Apr. 1994, *summarized in pertinent part in* Saidov, *op. cit.*, p. 44 n.197; *see also* Saidov, *op. cit.*, pp. 44-5 (examining cases and concluding that ICAC has generally rejected recovery of exchange rate losses under theory that loss is creditor's domestic issue and risk should not be shifted to debtor). In general, the principle of nominalism applies only to single currency transactions and is not inconsistent with the recovery of exchange rate losses in multi-currency international contracts. *See* Brand, *Exchange Loss Damage and the Uniform Foreign-Money Claims Act: The Emperor Hasn't All His Clothes*, 23 LAW & POL'Y INT'L BUS. pp. 1, 44 (1992).

44. *See* MANN, *op. cit.*, pp. 108, 286; Brand, *op. cit.*, p. 44.

45. *See also* Brand, *op. cit.*, pp. 43-44.

46. *See* SWITZERLAND, *DT Ltd. v. B. AG*, HG St. Gallen, 3 Dec. 2002, CISG-online.ch 727; SWITZERLAND, HG Zürich, 5 Feb. 1997, CISG-online.ch 327; NETHERLANDS, *Gruppo IMAR v. Protech Horst*, District Court Roermond, 6 May 1993, CISG-online.ch 454; *see also* GERMANY, OLG Düsseldorf, 14 Jan. 1994, CISG-online.ch 119.

47. *See* GERMANY, OLG Düsseldorf, 14 Jan. 1994, CISG-online.ch 119; *see also* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 17.

48. *See* SWITZERLAND, *DT Ltd. v. B. AG*, HG St. Gallen, 3 Dec. 2002, CISG-online.ch 727; *see also* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74,¶ 17.

49. *See* ITALY, *Tessile v. Ixela*, District Court Pavia, 29 Dec. 1999, CISG-online.ch 678; GERMANY, OLG Düsseldorf, 14 Jan. 1994, CISG-online.ch 119; *see also* ENDERLEIN/MASKOW, *op. cit.*, p. 302. In *Tessile v. Ixela*, an Italian seller brought a claim for the remainder of the unpaid purchase price of high fashion textiles, where the contract called for payment in Italian lira. The seller claimed damages due to monetary devaluation of the Italian lira. However, the court stated that "[n]othing is due by right of greater damages from monetary devaluation because, in the period of time involved here, the legal interest rates have always been greater than the rate of inflation." *Id.* Thus, according to the court, ordinary currency devaluation is intended to be compensated through the awarding of interest.

50. *See* NEW ZEALAND, *Issac Naylor & Sons Ltd. v. New Zealand Cooperative Wool Marketing*, 1981, 1 N.Z.L.R. p. 361; UNITED KINGDOM, *Milliangos v. George Frank (Textiles) Ltd.*, 1976 A.C. pp. 443, 465; MANN, *op. cit.*, pp. 286-87.

51. *See* UNIDROIT Principles art. 6.1.9(4); PECL art. 7:108(3).

52. *See* PECL art. 7:108 cmt.; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823(2) (1986) (U.S.). PECL art. 9:510 cmt.

53. Relying on national laws to compensate an aggrieved party for loss due to a change in the exchange rate would result in similarly situated parties receiving different results because such laws differ from country to country. *See generally* GOTANDA, SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW, Kluwer, 1998, § 4 (surveying national laws on damages in foreign currencies and noting that there are three general dates on which the convention should be performed: date of breach, date of judgment, and date of payment). *But cf.* UNITED STATES, *Delchi Carrier S.p.A. v.*

[Rotorex Corp.](#), U.S.Court of Appeals (2nd Circuit), 6 Dec. 1995, CISG-online.ch 140 (applying New York Breach-Date rule to convert Italian lira to U.S. dollars); UNITED STATES, *Schmitz-Werke v. Rockland*, U.S.Court of Appeals (4th Circuit), 21 Jun. 2002, CISG-online.ch 625.

54. *See* CISG art. 74; *see also* Secretariat Commentary, *op. cit.*, art. 70 [draft counterpart to CISG art. 74], ¶ 3.

55. *See* CISG art. 74.

56. *See* Secretariat Commentary, *op. cit.*, art. 70 [draft counterpart to CISG art. 74], ¶ 3.

57. *See id.*

58. *See id.*, ¶ 3; SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 22.

59. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, 2.

60. *See* Gotanda, *Lost Profits*, *op. cit.*, p. 99.

61. *See*, UNITED STATES, *Southwest Battery Corp. v. Owen*, Texas Supreme Court, 1928, 115 S.W.2d pp. 1097, 1099; UNITED STATES, *Super Valu Stores, Inc. v. Peterson*, Supreme Court of Alabama, 1987, 506 So. 2d pp. 317, 330.

62. *See* ¶¶ 2.1-2.13.

63. *See* DUNN, *op. cit.*, § 6.1. The most common form of expenses saved are variable costs, which include all "charges composing an essential element in the cost of manufacture or ... service. Essential elements in such cost[s] ... are confined to expenditures that would necessarily have been made in the performance of the contract." *Id.*, § 6.5 (*quoting* UNITED STATES, *Oakland California Towel Co. v. Sivils*, California Court of Appeals, 1942, 52 Cal. App. 2d pp. 517, 520).

64. UNIDROIT Principles art. 7.4.2; PECL art. 9:502.

65. PECL art. 9:502 cmt. C.

66. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 22; *see also* UNIDROIT Principles art. 7.4.2(1) cmt. 2.

67. The classic example involves breach of a contract denying a contestant the chance to win a beauty pageant. *See* UNITED KINGDOM, *Chaplin v. Hicks*, 1911, 2 K.B. p. 786.

68. One commentator asserts that loss of chance can be treated in two ways - as an issue of "recoverability of losses" or as a "standard of proving losses" issue. *See* Saidov, *Damages: The Need for Uniformity*, paper presented at 25 Years United Nations Convention of Contracts for the International Sale of Goods (CISG) § 3.4, p. 9 (Vienna Mar. 15-16, 2005). *Cf.* MURRAY, MURRAY ON CONTRACTS, LexisNexus, 4th ed., 2001, § 121[C].

69. *See* Saidov, *Damages: The Need for Uniformity*, *op. cit.*, § 3.4, p. 10; SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 22.

70. SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, 22, n.98.

71. *See Saidov, Damages: The Need for Uniformity*, *op. cit.*, § 3.4, p. 9; Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. pp. 1005, 1049 (1998).

72. In such a situation the breaching party could still be liable for other damages incurred by the aggrieved party as a result of the breach.

At least one court interpreting CISG Article 74 has denied the recoverability of the loss of chance. *See* SWITZERLAND, HG Zürich, 10 Feb., 1999, CISG-online.ch 488. In this case, the court addressed whether a buyer could set off the seller's claims of damages with, among other claims, a claim that the seller's failure to deliver art books to an exhibition on time prevented the buyer from receiving more offers. The buyer contended that, "as one of three European publishing houses specializing on the production of such catalogues, buyer would have received at least a third of the commissions." The court held that such a chance of profit was not recoverable, stating that "buyer's loss of profit must be considered normal for the buyer's kind of business and the seller at the time of conclusion of contract, must have been in the position to foresee such a consequence." *Id.* However, the court acknowledged that, had the seller been aware of this potential type of loss, such loss would have been recoverable.

73. MURRAY, *op. cit.*, § 121 ("These depa rtures from the reasonable certainty requirement are explicable only on the basis that courts are simply unwilling to permit a breaching party to avoid liability solely on the basis of the plaintiff's difficulty of proving loss where it was clear at the time of formation that such loss would be impossible to prove with reasonable certainty.").

74. UNIDROIT Principles art. 7.4.3(2).

75. *See* UNITED KINGDOM, *Chaplin v. Hicks*, 1911, 2 K.B. p. 786; UNITED STATES, *Kansas City, M & O. Ry. Co. v. Bell*, Tx. Ct. of Civil Appeals, 1917, 197 S.W. p. 322; UNITED STATES, *Wachtel v. National Alfalfa Journal Co.*, Iowa Supreme Court, 1920, 176 N.W. p. 801; *see also* RESTATEMENT (SECOND) ON CONTRACTS § 348(3) (U.S.); MURRAY, *op. cit.*, § 121; Simont, *op. cit.*, p. BEL-64 (Belgium); NICHOLAS, *op. cit.*, p. 228.

76. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 22.

77. PECL art. 9:501(2)(b) cmt. F. The Comment provides the following illustration:

> E is appointed sales manager of F's business under a three-year service contract. She is to be paid a salary and a commission on sales. After 12 months E is wrongfully dismissed, and despite reasonable efforts to find an alternative post she is still out of work when her action for wrongful dismissal is heard six months later. E is entitled to damages not only for her accrued loss of six months salary but also for the remaining 18 months of her contract, due allowance being made for her prospects of finding another job meanwhile. She is also entitled to damages for loss of the commission she probably would have earned.

Id., Illustration 8.

78. *See* U.C.C. § 2-708(2) (U.S.) (lost volume seller exception). For more information on how the lost volume seller exception operated under the U.C.C., *see* ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE, West, 2nd ed., 2003, § 2-708:14.

79. UNITED STATES, *Neri v. Retail Marine Corp.*, New York Court of Appeals, 1972, 285 N.E.2d p. 311 (*quoting* HAWKLAND, SALES AND BULK SALES, ALI, 1958 ed., pp. 153-54).

80. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 75, ¶ 11. Allowing an aggrieved party to recover lost profits in addition to damages already including lost profits would place that party in a better economic position than if the contract had been performed. *See* GERMANY, LG München 6 Apr. 2000, CISG-online.ch 665.

81. *See* Korpela, *Article 74 of the United Nations Convention on Contracts for the International Sale of Goods*, § 3.3.2, PACE REV. OF THE CISG 2004-05 [Sellier, European Law Publishers (2006) 73-168]; *cf.* U.C.C. § 2-710 (U.S.).

Under Article 77, "[a] party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach." CISG art. 77. *See generally* HONNOLD, *op. cit.*, pp. 456-64; *see also* Saidov, *Methods of Limiting Damages Under the Vienna Convention for the International Sale of Goods*, (Dec. 2001), *available at* <http://cisgw3.law.pace.edu/cisg/biblio/saidov.html>.

82. *See e.g.*, ARBITRATION, ICC Arbitration Case No. 7585, 1 Jan., 1992 CISG-online.ch 105; *see also* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 18.

83. *See* GERMANY, LG Landshut, 5 Apr., 1995, CISG-online.ch 193; AUSTRIA, Vienna Arbitral Tribunal, 15 Jun. 1994 CISG-online.ch 691; SWEDEN, Arbitration Institute of the Stockholm Chamber of Commerce Case No. 107/1997, *available at* <http://cisgw3.law.pace.edu/cases/980107s5.html>.

84. *See e.g.*, UNITED STATES, *Delchi Carrier S.p.A. v. Rotorex Corp.*, U.S.Court of Appeals (2nd Circuit), 6 Dec. 1995, CISG-online.ch 140.

85. *See, e.g.*, SWEDEN, Arbitration Institute of the Stockholm Chamber of Commerce Case No. 107/1997, *available at* <http://cisgw3.law.pace.edu/cases/980107s5.html>; GERMANY, BGH, 25 Jun. 1997, CISG-online.ch 277; *see also* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 19; Korpela, *op. cit.* § 3.3.2; *cf.* U.C.C. § 2-715(1) (U.S.).

86. *See* UNITED STATES, *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, U.S. Court of Appeals (7th Circuit), 2002, 13 F.3d pp. 385, 388; Flechtner/Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, VINDOBONA J. INT'L COM. L. & ARB. p. 93 (2003). Under this view, as a matter of procedural law, the recovery of litigation expenses is to be determined by reference to domestic law or applicable rules for resolving the dispute. *See* Zapata, *op. cit.*, 313 F.3d p. 388; *see also* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, op. cit., art. 74, ¶ 20 ("The compensation of costs of litigation ... is governed exclusively by the relevant *lex fori*."); but *cf.* SCHLECHTRIEM/SCHWENZER/Schlechtriem, *op. cit.*, Introduction, p. 7 ("If national courts simply qualify the recoverability of litigation costs and lawyers' fees as a procedural

matter to be decided under their own lex fori, thereby circumventing Article 74 and the analysis of whether such costs are a risk to be borne by any party having to litigate in the U.S., there will soon be more enclaves of domestic law, which for the deciding judge may seem self-evident and which conform to his or her convictions, formed by historic rules and precedents, but which will not be followed in other jurisdictions and, thereby, will cause an erosion of the uniformity achieved.").

87. *See generally* Felemegas, *The Award of Counsel's Fees under Article 74 CISG, in Zapata Hermanos Sucesores v. Hearthside Baking Co.* (2001), *available at* <http://cisgw3.law.pace.edu/cisg/biblio/felemegas1.html>; Zeller, *Interpretation of Article 74 - Zapata Hermanos v. Hearthside Baking - Where Next?*, 2004 NORDIC J. COM. LAW 1, *available at* <http://www.njcl.utu.fi>.

88. *See* ¶ 2.5. One commentator has proposed an outcome determinative test to be applied by courts in judging whether an issue is substantive or procedural. *See generally* Orlandi, *Procedural Law Issues and Law Conventions*, 5 UNIFORM L. REV. p. (2000). Use of an outcome determinative test in the United States has generated much confusion, particularly with respect to the applicability of the Federal Rules of Civil Procedure in situations where it conflicts with state law. As a result, the United States Supreme Court eventually ruled that the outcome determinative test did not determine the validity of the Federal Rules of Civil Procedure in cases where the rules conflicted with state law. *See* UNITED STATES, *Hanna v. Plumer*, *op. cit.*; *see also* CHEMERINSKY, FEDERAL JURISDICTION, Aspen, 4th ed., 2003, p. 321 (noting that "problem with the outcome determinative test is that virtually any rule can determine the outcome of a case").

89. *See* Carruthers, *The Substance and Procedure Distinction in Conflict of Laws: A Continuing Debate in Relation to Damages*, 53 INT'L & COMP. L.Q. p. 691 (2004).

90. CISG art. 7(2). One commentator notes:

> There is strong opinion in favor of the view that the label given by domestic law is not conclusive as to whether a particular matter ... falls within the Convention (HONNOLD, Uniform Law, 97). The substance rather than the label or characterization of competing rule of domestic law determines whether it is displaced by the Convention. In determining such questions, the tribunal, it is submitted, should be guided by the provisions of Article 7, and give to the Convention the widest possible application consistent with its aim as a unifier of legal rules governing the relationship between parties to an international sale.

BIANCA/BONELL/Khoo, *op. cit.*, art. 4, ¶ 3.3.5.

91. HONNOLD, *op. cit.*, p. 109; *see also* SCHLECHTRIEM/SCHWENZER/Schlechtriem, *op. cit.*, art. 7, ¶¶ 27-29.

92. Articles 45 and 61 provide equivalent remedies to both buyer and seller, respectively, following a failure of the other party to perform its obligations. *See* CISG arts. 45, 61; *see also* Liu, *Comparsion of CISG Article 45/61 remedial provisions and counterpart PECL articles 8:101 and 8:102*, 2004 NORDIC J. COM. L. pp. 1, 2 *available at* <http://cisgw3.law.pace.edu/cisg/text/anno-art-61.html> (discussing parallel remedies available to buyer and sellers).

93. *See* Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 22 NW. J. INT'L L. & BUS. pp. 121, 151 (2002); Keily, *How Does the Cookie Crumble? Legal Costs Under a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods*, 2003 NORDIC J. COM. L. 1, § 5.6, *available at* <http://www.njcl.utu.fi>; Vanto, *Attorneys' Fees as Damages in International Commercial Litigation*, 15 PACE INT'L L. REV. pp. 203, 221 (2003).

94. *See* Vanto, *op. cit.*, p. 221; *see also* Flechtner, *op. cit.*, p. 151; Keily, *op. cit.*, § 6.2(b). One commentator has argued that the gap identified by the anomaly would be filled by domestic law in accordance with Article 7(2). *See* Zeller, *op. cit.*, p. 10. This, however, would not resolve the problem as successful respondent may still not be able to recovery their litigation costs. Another commentator argues that a claimant breaches a duty of loyalty when it files a breach of contract action, but the tribunal determines that the respondent was not in breach. He argues that, in such case, attorneys' fees and costs may be awarded under the Convention. *See* Felemegas, *op. cit.*, p. 126. This proposal, however, stems from an overly strained interpretation of the Convention. Neither the language nor the structure of the Convention supports the imposition of liability for attorneys' fees and costs on the claimant in such circumstance. *See* Flechtner, *op. cit.*, p. 152.

Interpreting Article 74 to provide for the recovery of litigation expenses incurred by a successful claimant also may conflict with otherwise applicable procedural laws and rules that regulate the amount of attorneys' fees that may be recovered. For example, in a number of countries, awards of attorneys' fees are calculated pursuant to a fixed fee schedule that may result in an award amounting to less than the actual fee incurred. If Article 74 were interpreted to allow for the recovery of litigation expenses, then these laws and rules presumably would be preempted by the Convention because they would be inconsistent with the principle of full compensation. Such preemption would, however, would result in disuniformity between the claimant and respondent. Due to the anomaly discussed above, a successful respondent would be forced to recover expenses associated with litigation under domestic laws, but because of preemption such laws would not apply to successful claimants. Such an unequal treatment is patently unfair and contrary to the Convention. Of course, one may argue that the ability to recover attorneys' fees and costs is a substantive matter that is governed by the Convention, but the determination of the amount is a procedural matter that is subject to applicable local law and rules. This distinction is highly artificial and would be contrary to the principle of full compensation and the need for uniformity, particularly because recovery of litigation expenses would vary depending on the applicable procedural law or rules.

95. Other policy reasons for awarding attorneys' fees and costs include deterrence and punishment. *See* Reinganum/Louis L. Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 17 RAND J. ECON. p. 557 (1986) (discussing the deterrence function awarding attorneys' fees serves); Wetter/Priem, *Costs and Their Allocation in International Commercial Arbitrations*, 2 AM. REV. INT'L ARB. p. 249, 329 (1991) (arguing that courts awarded costs and fees in order to punish an unsuccessful plaintiff for bringing a false claim or to fine a losing defendant for unjustly refusing the plaintiff's right). The later is clearly not a policy to be furthered by Article 74.

Moreover, interpreting the CISG to provide for one-way fee shifting would not serve the goals behind such a regime. One-way fee shifting statutes are typically enacted to encourage law suits in certain areas because it is in the public interest to do so or to equalize the litigation strength between the parties, particularly in suits between governments and private parties of modest means. *See generally* Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. p. 2039 (1993). Claimants in CISG suits do not need one-way fee shifting as incentive to bring suit. Nor do such suits as a routine matter involve claimants of modest means suing governments. Thus, the purposes for construing the CISG as providing for a one-way fee shifting scheme are not compelling.

96. *See* Keily, *op. cit.*, § 6.2(b); *see also* BIANCA/BONELL/Bonell, *op. cit.*, ¶ 2.2.1 (stating that, in interpreting the Convention, "courts are expected to take a much more liberal attitude and to look, wherever appropriate, to the underlying purposes and policies of individual provisions as well as the Convention as a whole").

97. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 21.

98. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 21 (citing cases).

99. *See* GERMANY, OLG München, 28 Jan. 1998, CISG-online.ch 339; GERMANY, LG Bielefeld, 2 Aug., 1996.

100. *See* GERMANY, BGH, 25 Nov. 1998, CISG-online.ch 353.

101. *See* ANDERSON, *op. cit.*, § 11.3; SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 21.

102. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 12; Blase/Höttler, *op. cit.*; Djakhongir Saidov, *Methods of Limiting Damages Under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE INT'L L. REV. pp. 307, 328 (2001). *but see* GERMANY, LG München, 30 Aug. 2001, CISG-online.ch 668 (holding that damages due to loss of goodwill are not available under Convention). Commentators argue, however, that the reasoning in that case was unsound. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 12, n.55; *see also* WADDAMS, *op. cit.*, p. 535 (noting "no cogent reason why damages should not be given for loss of reputation in a contract case"); MCGREGOR, *op. cit.*, § 38 (same).

103. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, 12; *but see* Saidov, *op. cit.*, pp. 329-32 (arguing for category of non-material damages for injury to business reputation).

104. *See* FRANCE, *Sté Calzados Magnanni v. SARL Shoes General International*, CA Grenoble, 21 Oct. 1999, CISG-online.ch 574; SWITZERLAND, HG Zürich, 10 Feb. 1999, CISG-online.ch 488; GERMANY, LG Darmstadt, 9 May 2000, CISG-online.ch 560.

105. Blase/Höttler, *op. cit.*

106. *See* UNIDROIT Principles art. 7.4.2 cmt. 5; PECL art. 9:501(2) and n.4; *see also* Blase/Höttler, *op. cit.*

Numerous jurisdictions applying the American Uniform Commercial Code also permit recovery of damages due to loss of goodwill. *See* ANDERSON, *op. cit.*, § 11:31.

107. Commentators explain:

> Many businesspeople think of goodwill in terms of a company's relationship with its customers; that is, a company with good service generates goodwill among its customers. Although this is an accurate interpretation of goodwill, there are several others. For example, under the so-called excess earnings method for estimating business value, a company is worth the sum of the FMV [fair market value] of its tangible assets and its goodwill. In this scenario, goodwill is calculated as the capitalized value of the company's "above average" earnings or rate of return. In other words, the goodwill is a reflection of the fact that the subject company is earning a return greater than the norm for investments of a similar risk. Thus, goodwill in this instance is the company's ability to earn above-normal profits ... .
>
> The final interpretation of goodwill relates to a company's balance sheet. GAAP [Generally Accepted Accounting Principles] does not allow a company to estimate the value of its goodwill and then place this figure on the balance sheet. The historical cost principle makes such an entry impossible under GAAP. However, in the case of a business acquisition, goodwill can be placed on the postacquisition balance sheet, reflecting the excess purchase price paid over the FMV of the identifiable tangible assets. In practice, this excess may be allocated to other intangible assets besides goodwill (*e.g.*, customer base, trade name).

GABEHART/BRINKLEY, THE BUSINESS VALUATION BOOK, A.M.A., 2002, pp. 116-17.

108. *See* ANDERSON, *op. cit.*, § 11:31; Saidov, *op. cit.*, p. 330.

109. *See* HG Zürich 10 Feb. 1999, *op. cit.*

110. *See* GERMANY, LG Darmstadt, 9 May 2000, CISG-online.ch 560.

111. *See* ¶¶ 2.1-2.9 (discussing level of proof/certainty requirement); *see also* ANDERSON, *op. cit.*, § 11.3 (rejecting any "stringent standard of certainty" for damages due to loss of goodwill) (*quoting* MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, West, 1935, p. 677; Saidov, op. cit., p. 330.

Of course, the aggrieved party will still have to prove, among other things, that such damages were foreseeable. In fact, some have asserted that there exists a stricter foreseeability test for loss of goodwill. *See* SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 46.

112. WADDAMS, *op. cit.*, p. 628; LG Darmstadt, 9 May 2000, *op. cit.*; *see also* ANDERSON, op. cit., § 11.3 (stating that "lost future profits that are not attributable to an erosion of the customer base do not constitute a loss of goodwill").

113. *See* LG Darmstadt, 9 May 2000, *op. cit.* (citing danger of double recovery).

114. *Id.*

115. *See id.*

116. *Cf.* UNITED STATES, *Lewis River Golf v. O.M. Scott & Sons*, Wash. Supreme Court, 1993, 845 P.2d p. 987 (awarding U.S. $664,340 in damages for breach of contract and U.S.

$1,026,800 in damages for loss on subsequent sale of business, which included loss resulting from damage to its reputation or goodwill).

117. *See generally* FARNSWORTH, *op. cit.*, pp. 216, 225.

118. CISG art. 75.

119. *Cf*. GERMANY, OLG Hamburg, 28 Feb. 1997, CISG-online.ch 261.

120. *See* Schlechtriem, *Damages Avoidance of the Contract and Performance Interest under the CISG*, FESTSCHRIFT APOSTOLOUS GEORGIADES, ATHENS (forthcoming 2006); *see also* FARNSWORTH, *op. cit.*, pp. 224-27. In this situation, the aggrieved party is also entitled to any incidental and consequential damages.

121. Schlechtriem, *op. cit.*, p. 4. In calculating the amount of damages owed to the aggrieved party, the loss to the aggrieved party resulting from the breach must be offset by any gains to the aggrieved party resulting from the non-performance of the contract. Professor Schlechtriem notes:

> If the buyer liquidates the contract by claiming performance interest without avoiding the contract, he has to keep the non-conforming goods, the value of which has to be taken into account in the computation of the buyer's total damages. If he resells the goods - even at a high discount because of their non-conformity - the proceeds have to be accounted for in the calculation of damages. Likewise, if he claims performance interest because the seller was in delay in delivering the goods, but then tenders, although late, and the buyer has to take delivery, because he cannot avoid (since the delay might not amount to a fundamental breach or an additional period of time was not set), the value of the goods bought as cover, if and insofar as they can be utilized, or the proceeds from reselling them, have to be taken into account.

Id., p. 6.

122. SCHLECHTRIEM/SCHWENZER/Stoll/Gruber, *op. cit.*, art. 74, ¶ 32.

123. *See* FARNSWORTH, *op. cit.*, § 12.9; TREITEL, *op. cit.*, §§ 149-50; *see also* PECL art. 9:502 n.4 (citing numerous cases and authorities).

124. UNIDROIT Principles art. 7.4.2.

125. *Id.*, cmt. 3.

126. PECL: art. 9:502 cmt c.

127. Secretariat Commentary, *op. cit.*, art. 70 [draft counterpart to CISG art. 74], ¶ 5.

128. For a comparative study of punitive damages, *see* Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. p. 391 (2004). The prohibition on punitive damages does not, in principal, apply to claims for liquidated damages.

129. CISG art. 74.

130. *Id.*

131. *See* ENDERLEIN/MASKOW/Knapp, *op. cit.*, p. 544. It should be noted that an award of punitive damages may violate an applicable mandatory rule of law. In such case, the award or the portion of the awarding punitive damages may be invalid or unenforceable. *See generally* Gotanda, *Awarding Punitive Damages in International Commercial Arbitration in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc.*, 38 HARV. INT'L L.J. p. 59 (1997).