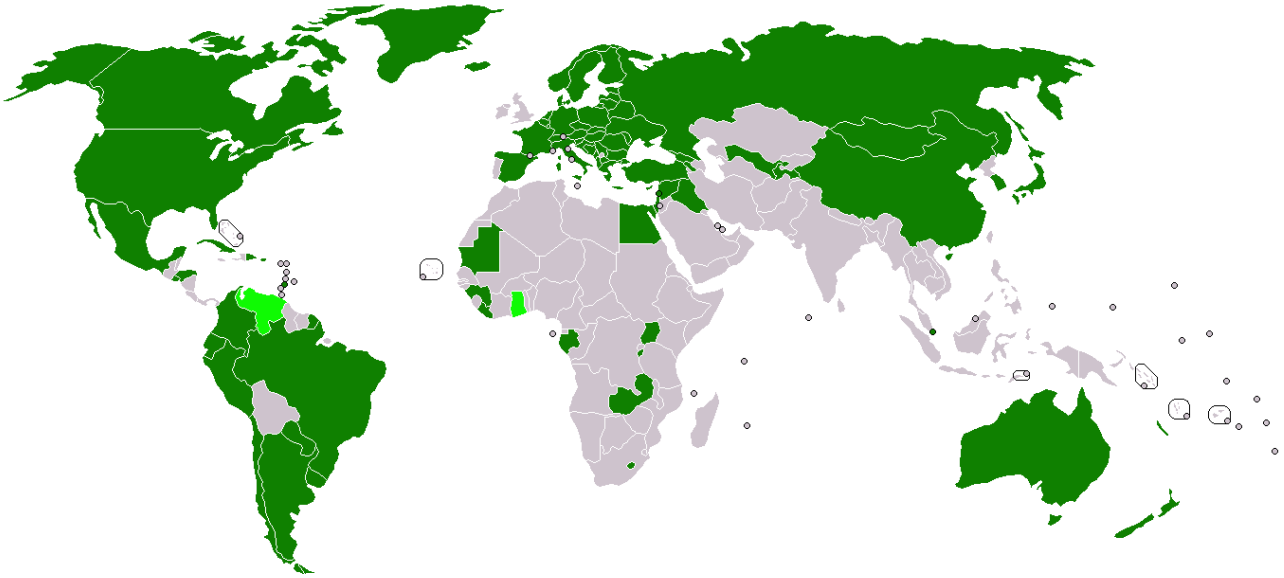
Master's Thesis

Damages under Article 74 of the CISG

An analysis of the different types of damages that can be claimed under Article 74 of the CISG as a consequence of a breach.



Master's Thesis 2022, Aalborg University

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Resumé

Formålet med dette speciale er at analysere og redegøre for de enkelte skadestyper som kan søges godtgjort under Artikel 74 af den internationale købelov. Specialet følger den retsdogmatiske metode samt metodikken som er foreskrevet i den internationale købelovs Artikel 7, hvilken skal benyttes til fortolkning af tvivlsspørgsmål som loven ikke udtrykkeligt tager stilling til. Afhandlingen gør derfor brug af relevante internationale juridiske kilder, herunder international retspraksis, soft-law instrumenter, forarbejder og litteratur af anerkendte eksperter inden for den internationale købelov. Specialet starter med at undersøge formålet med og hensigterne bag Artikel 74, dennes anvendelsesområde og begrænsninger, samt metodikken for at fastslå hvorvidt en skadestype kan kræves godtgjort. Hernæst analyserer specialet hvorvidt enkelte skadestyper kan kræves godtgjort under Artikel 74, herunder direkte skader, tabt arbejdsfortjeneste, hændelige skader, følgeskader eller indirekte skader, ikke-økonomisk tab, prækontraktuelle skader og udligning af fortjeneste ved kontraktbrud. Specialet undersøger derefter hvorvidt nogle skadestyper kan anses for generelt at være forudseelige for den misligholdende part. Afslutningsvist konkluderes det hvilke skadestyper der kan kræves godtgjort under Artikel 74.

1. Introduction

Man have been trading for as long as there has been profit to gain. While trading evolved from simple exchanges of coin and cattle at the local fair, to complex international transactions concerning equally complex goods, so too did the domestic legislation which govern such transactions. However, as international trading has become a part of everyday life and being that the provisions and wording of domestic trade laws of different nations seldom align, merchants risk being caught off guard because a particular trade is governed by foreign rules. As a result, choice of law clauses is an important part of everyday contracts and often heavily negotiated between the parties, each trying to gain an advantage or to simply reduce risk and uncertainty. While such clauses and negotiations might suit one party just fine, they might also have a discouraging effect, rendering negotiations obsolete. One solution to the legal barriers of domestic legislation and the uncertainty connected herewith is uniform legislation governing the international sale of goods.

The United Nations Commission on International Trade Law, also referred to as UNCITRAL, created the United Nations Convention on Contracts for the International Sale of Goods[1] in 1980. The CISG, effective as of 1988, is the first international sales law to be recognized on a global scale and as of September 24, 2020, 94 states have adopted the international law, which for the purpose of this thesis will be referred to as both the CISG and the Convention.[2] The purpose of the CISG is stated in its preamble, which is to promote friendly relationships among nations by removing legal barriers through uniform rules and promote international trade.[3] Furthermore, providing a uniform set of rules accommodates the high level of uncertainty connected with international commercial contracts when such contracts are based in private international law. Especially merchants from developing countries stand to gain from the Convention, as such typically have limited access to legal assistance and resources and will thus benefit from the application of fair and uniform rules which govern the contractual relationship.[4] As defined in Article 1(1)(a) and 1(1)(b), the Convention applies to contracts regarding the sale of goods when:

[1] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)
[2] Gizem Alper, CISG: Table of Contracting States, https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states, visited April 28, 2022
[3] Lookofsky, Understanding the CISG, p. 1
[4] UNCITRAL, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg, visited April 28, 2022

(1) the contracting parties both have places of business in a contracting state, and (2) when the rules of private international law leads to the application of the law of a contracting state. As a last option, the contracting parties can, even when they are not obliged to, decide to opt-in to the CISG.[5]

The Convention is divided into four parts, containing a total of 101 articles. Part 1 concerns the sphere of application and general provisions and include certain requirements which must be fulfilled in order for the CISG to apply, hereunder the requirements of international trading and commercial aspect of the goods, as well as important provisions regarding interpretation of the Convention itself and the contracts to which it applies. Part 2 governs formation of contract, in particular offer, acceptance, revocation, and conclusion of contract. Part 3 contains provisions regarding the obligations, rights, and remedies of both the buyer and seller, hereunder the definitions of proper performance by each party, conformity, passing of risk and damages. Finally, part 4 regulate the access to making reservations or deviations to the articles of the Convention.[6]

Even though the CISG has a broad scope, and thus concerns itself with many different topics, it also contains a lot of gaps. As a result, there are various issues which are governed by and mentioned in the CISG, but not expressly settled by it.[7] One of those particular issues is the types of damages that can be claimed in relation to Article 74, according to which '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.' While Article 74 in of itself provide the notion that the amount of the damages which can be claimed shall be equal to the loss suffered as a consequence of the breach, subject to the foreseeable nature of such loss, it does not provide a clear scope in regard to the different types of loss, aside from loss of profit, that may be claimed as damages. It could therefore be interesting, and in line with the goal of uniformity and certainty purpose of the CISG, to examine the reach as to what can be claimed as damages under Article 74.

[5] Lookofsky, Understanding the CISG, p. 1-5
[6] Lookofsky, Understanding the CISG, p. 5-7
[7] Lookofsky, Understanding the CISG, p. 38

Due to the necessary delimitation of the subject, this thesis will focus primarily on Article 74 of the CISG, and less on the damage provisions of cover transactions of Articles 75 and 76, and the mitigation rule in Article 77.

2. Research Question

Based on the considerations mentioned above, the following research question will be examined:

What are the types of damages that can be claimed under Article 74 of the CISG?

3. Methodology

3.1 Procedure

In order to answer what types of damages that can be claimed under Article 74 of the CISG, the procedure of this thesis will be to first examine the purpose and intend behind Article 74 in order to provide an understanding of the thought process that went into formulating the provision, as well as its intended applicability and principles. Following the determination of purpose and intent, the scope of application of Article 74 will be examined in order to establish the reach of Article 74 as well as the procedure for determining whether a certain type of loss can be claimed as damage. When the scope of application and procedure for determining whether a certain type of loss can be claimed as damage have been established, the thesis will examine what types of damages that can be claimed with reference to Article 74, hereunder direct damages, loss of profit, incidental damages, consequential or indirect damages, non-pecuniary loss, pre-contractual damages, and disgorgement of profit. Given the limitation set forth in the second sentence of Article 74, it will then be examined whether some types of damages can be deemed as being generally foreseeable to a party in breach. Finally, the answer to the research question will be summarized in a conclusion.

3.2 Legal Method

To answer the research question in accordance with the procedure described above, this thesis will follow the legal dogmatic method. The purpose of the legal dogmatic method is to analyze and describe applicable law. Where the goal of traditional legal method is solving a concrete legal dispute, the legal dogmatic method deals with the practical methods of judicial life, determining the legal situation in a given area.[8] The starting point of the legal dogmatic method is to include all types of relevant data, in order to ensure the validity of the research. However, the method does allow for a delimitation of data, insofar as this does not compromise said validity.[9] Given the extensive international scope of the CISG, the relevant legal sources of data must be determined. It cannot in this regard be ruled out that national case law, legislation and interpretation methods could be relevant as to answering the research question. However, such domestic legal sources must be viewed in light of the specific national legal tradition and

[8] Munk-Hansen, Retsvidenskabsteori, p. 204
[9] Munk-Hansen, Retsvidenskabsteori, p. 206

legislation which, given the international aspect of the CISG, may not be relevant as the legal traditions and legislation will wary depending on the domestic legislation of the country in question.[10] Attention, in regard to the relevant legal sources, must therefore be focused on the CISG and the guidelines provided in Article 7, after which the convention must be interpreted with regard to its international character and the principles of uniformity and good faith. Furthermore, questions as to matters governed by but not settled in the CISG must be settled in conformity with the principles on which the Convention is based, and as a last resort, in accordance with the rules of private international law.

3.3 Internationality, uniformity, and good faith

The interpretation requirement of Article 7(1) in regard to the Conventions 'international character', requires that the provisions of the CISG is interpreted autonomously and independently without recourse to domestic law. Even though certain terms of the CISG may origin from principles of specific domestic doctrine, one must not generally use case-law and doctrine of such to interpret provisions of the CISG, as this would promote a homeward-trend which can potentially subvert uniform interpretation.[11]

International uniform interpretation cannot be achieved unless the courts and arbitral tribunals of the different contracting states have regard to the CISG decisions and arbitral awards made by foreign courts and tribunals. International CISG case-law is thus of paramount importance, and various online databases are dedicated to collecting and documenting such, hereunder the CLOUT-case system,[12] CISG-online,[13] and several other online databases. The Digest of CISG Case Law,[14] created by experts enlisted by UNCITRAL, summarizes CISG case-law in relation to different CISG provisions, in an effort to make such widely available. Consideration must however be had to the fact that not all case-law can be included or reduced to practical information, and the creators, due to the neutrality policy of UNCITRAL, are confined to objective case-reporting. The value of case-law available, though voluminous, would be reduced

[10] Schlechtriem & Schwenzer, Commentary, p. 122
[11] Brunner, Gottlieb, Commentary, p. 83-84; Schlechtriem & Schwenzer, Commentary, p. 122; Lookofsky, Understanding the CISG, p. 32
[12] UNCITRAL, Case Law on UNCITRAL Texts (CLOUT), https://www.uncitral.org/clout/, visited on April 28, 2022
[13] Schroeter G., Ulrich, CISG-Online, https://cisg-online.org/, visited on April 28, 2022
[14] Pace Law School Institute of International Commercial Law, The UNCITRAL Digest of Case Law on the CISG, https://iicl.law.pace.edu/cisg/page/uncitral-digest-case-law-cisg, visited on April 28, 2022

if the respective courts chose to solve the same CISG issues differently. In the absence of a clear procedure for the precedent which must be given to foreign decisions, such should depend on the reasoning, soundness of result, prominence of court and the support of the decision in foreign jurisdictions. In addition to case-law, the CISG Advisory Council, a collection of legal experts issuing opinions on controversial topics within the Convention with the goal of establishing a uniform interpretation and application of Article 7(1), can be considered a persuasive authority as the council's opinions have been cited in various court decisions.[15] While scholarly opinion is certainly ranked below that of case-law, such have previously had clear impact on CISG court decisions. When consulting scholarly opinion, one must however keep in mind that such seldom reflect the opinion of more than one or two authors, and that some CISG states have shown tendency to favor or even rely on works created by domestic scholars.[16]

In addition to the internationality and uniformity principles, the CISG must be interpreted in a way which 'promotes the observance of good faith in international trade'. The good faith principle applies not only to interpreting the articles of the CISG, but also to the contractual relationship between parties, and is well regarded as a gap-filling principle applicable to Article 7(2). The good faith principle has been cited as a general CISG principle, effecting all matters between parties in regard to rights and obligations. However, good faith cannot be applied to establish rights and obligations outside of the scope of the CISG provision with which it is used to interpret.[17]

3.4 Methods of interpretation

A methodology for interpretation cannot be found directly in the CISG, but Article 7(2) requires that all interpretive efforts be focused on the principles on which the Convention is based before resorting to the rules of private international law. The starting point of any interpretation of the CISG is always the black letter wording of provision in question. The authentic text of the CISG is available and can be interpreted in Arabic, Chinese, English, French, Russian and Spanish, but the English version is to be held in special regard as English was the language used for the preparatory versions of the Convention as well as by the drafting committee in 1980. The

[15] Brunner, Gottlieb, Commentary, p. 84; Lookofsky, Understanding the CISG, p. 32-33; Schlechtriem & Schwenzer, Commentary, p. 123-126
[16] Lookofsky, Understanding the CISG, p. 35-36
[17] Lookofsky, Understanding the CISG, p. 36-37; Schlechtriem & Schwenzer, Commentary, p. 127-128

systematic position of a given provision must also be considered, as its position in relation to the different parts and chapters of the Convention will give merit to its purpose. As the CISG was created by the international legislator UNCITRAL, it is only natural that the legislative history of the Convention be consulted to better understand legislative intend. Such intend may be found in the secretariat commentary of the preliminary 1978 draft. One must however keep in mind that the secretariat commentary is not a conclusive authority on legislative intend nor an official commentary as such was rejected in 1980.[18] Nevertheless, courts and arbitrators do consult the preparatory works as well as uniform projects such as the Unidroit Principles.[19] Finally comparative law can be an important interpreting tool which must be used with caution, so as to avoid the pitfalls of reverting to and be influenced by domestic preconceptions.[20]

3.5 Gap-Filling

Article 7(2) of the CISG provides a two-step procedure with which to settle matters which are governed by but not expressly settled in the Convention. For Article 7(2) to apply there must first be gap in the Convention in the form of a matter which is governed but not settled in it. Secondly, principles on which the Convention is based must be used to fill the gap. Matters which can be solved using this method is called 'internal gaps' whereas matters which cannot be solved using the method is called 'external gaps', also referred to as issues which does not fall within the sphere of application of the CISG. In addition to the principles of uniformity and good faith, examples of general principles include reasonableness, estoppel, and freedom of form. Courts and scholars must be careful in their interpretation of gaps in the Convention by way of Article 7(2) and try not to abuse the general principles of the Convention to solve seemingly insoluble matters. On the contrary, a too narrow interpretation might lead to an interpretation which might be contrary to the uniformity principle of Article 7(1).[21] In addition to the widely accepted general principles cited above, scholarly opinion disagrees as to whether the Unidroit Principles, however frequently cited in case-law, constitute general CISG principles. According to Brunner & Gottlieb the Unidroit Principles are *"[…] "excellent evidence" of an*

[18] Brunner, Gottlieb, Commentary, p. 85-86; Lookofsky, Understanding the CISG, p. 29-31; Schlechtriem & Schwenzer, Commentary, p. 129-132
[19] UNCITRAL CISG Case Law Digest (2016), Article 7, paragraph 6 and note 18
[20] Schlechtriem & Schwenzer, Commentary, p. 130-131
[21] Brunner, Gottlieb, Commentary, p. 86-87; Lookofsky, Understanding the CISG, p. 38-42; Schlechtriem & Schwenzer, Commentary, p. 132-133

internationally accepted solution which should be followed, as long as no persuasive reasons suggest otherwise."[22], whereas Schlechtriem & Schwenzer, in light of the fact that the Unidroit Principles were created primarily by European scholars, claim that the principles "*[…] may, if at all, only come into play in case no general principles 'on which [the CISG] is based' are discernible and, thus, an external gap is given.*"[23] Despite this scholarly dispute, the Unidroit Principles will be consulted if relevant for the sake of answering the research question.

Before a general issue is solved by virtue of the general principles upon which the CISG is based, it is important that one first examine whether the question or gap can be solved by virtue of the parties' intentions (Article 8) or the parties' previous trade practices (Article 9). A party may, through negotiations or statements, have made it clear to the other party that certain additional obligations were to apply, thus potentially removing the need for gap-filling.[24] One must also not forget the general rule of Article 6, after which the parties may derogate from CISG provisions or exclude the CISG entirely, rendering its provision obsolete.

3.6 Legal sources

For the purpose of answering the research question, and taking into account the methodology for interpreting the Convention as set forth above, this thesis will explore all relevant international legal sources, including CISG case-law, Advisory Counsel opinions, legislative history, Unidroit Principles, UNCITRAL Digest of Case Law, secretariat commentary and scholarly opinion created by renowned experts in the field of CISG, having regard to the material on which the scholarly works are based as well as the relevance of the scholarly works in regard to the research question.

Given the language barriers associated with foreign domestic legal sources, and to further promote uniformity by interpreting the provisions of the CISG autonomously and independently without recourse to domestic doctrine, this thesis will not include foreign, nor domestic contract law or principles derived from such when examining the research question.

[22] Brunner, Gottlieb, Commentary, p. 88
[23] Schlechtriem & Schwenzer, Commentary, p. 137-138
[24] Schlechtriem & Schwenzer, Commentary, p. 134; Lookofsky, Understanding the CISG, p. 43

4. Damages under Article 74 of the CISG

4.1 Purpose and intend

In order to examine what types of damages that can be claimed under Article 74 of the CISG, one must first explore the purpose and intend of the provision. An examination of the purpose and intent could provide an understanding of the thought process that went into formulating the provision, as well as its intended applicability and principles.

The wording of Article 74 is almost identical to Article 82 of the ULIS[25]. Damages can be claimed with regard to Article 74 whether the contract has been declared avoided or not, in case of any breach of the obligations of either the buyer or the seller, and the injured party must be placed in the same position that he would have enjoyed if the contract had been properly performed (a sum equal to the loss).[26] There are no described or specific methods which must be followed when calculating loss suffered, and as a result, when confronted with difficult calculations, courts and arbitral tribunals must calculate loss with reference to the relevant circumstances of the specific case in question. The principle of full compensation in the first sentence of Article 74 is subject to the conditions that a loss must actually have occurred, and the foreseeability limitation in the second sentence of Article 74, according to which the recoverable damages shall be limited to 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'. Unusual or exceptionally heavy losses, which might not generally have been foreseeable to the party in breach, may thus be recoverable if such party have been informed of the possibility of such loss by the injured party at the time of conclusion of the contract.[27] The right to claim damages is based on no-fault liability with regard to the objective failure of the buyer or seller to fulfill their respective obligations in relation to what has been agreed in the contract or the obligations of the CISG as referenced in Article 45(1) and 61(1).[28]

The principle of full compensation has been supported and cited in numerous CISG court and arbitral tribunal cases. In the Hewlett-Packard France v. Matrox Graphics Inc. case, the Superior

[25] Uniform Law on the International Sale of Goods (1964)
[26] Honnold, Documentary, p. 449; CISG, Article 74(1)
[27] Honnold, Documentary, p. 449; Honnold, Uniformity, p. 576
[28] Honnold, Documentary, p. 427 and 438

Court of Quebec cited that the principle of full compensation "*[…] should be liberally construed so as to compensate the aggrieved party for all disadvantages suffered as a result of the breach.*"[29] Other examples include the Integrated Logistics Co. v. Trading Company P. van Adrighem B.V. case, wherein the Advocate General at the Dutch Supreme Court cited that "*Under Article 74 of the Treaty, [defendant] is in principle entitled to full compensation in money for the damage actually suffered by it as a result of ILC's default, in particular the loss of profit*",[30] and a case regarding the sale of industrial plants wherein the ad hoc Arbitral Tribunal in Spain considered several CISG principles to apply, hereunder the principle of full compensation.[31] The principle of full compensation is further substantiated by the CISG Advisory Council and UNCITRAL CISG Case Law Digest.[32]

The foreseeability limitation has also been cited in several cases. In a Swizz case regarding the sale of German wood, the District Court of Willisau cited that "*The strict objective liability of the debtor under the CISG is mitigated by the limitation to the compensation of the foreseeable damage. It is decisive whether at the time of the conclusion of the contract the debtor could have foreseen that - if the contract was breached in the respective way - these consequences of the damage could have taken place. It is irrelevant, whether the debtor had to foresee the breach of contract.*"[33] In the aforementioned Hewlett-Packard France v. Matrox Graphics Inc. case, the Superior Court of Quebec cited that "[…] *pursuant to Article 74 CISG, the damages must be foreseeable and result from the seller's breach.*",[34] and in a Hungarian apparel case, the Court of Appeal Szeged cited that Article 74 "*[…] limits the risk of the contracting party relating to any breach of contract to damages known or discoverable and foreseeable by such party at the time of contract conclusion.*"[35] The foreseeability limitation in Article 74 were on one occasion even referred to as a general principle of the CISG.[36] Furthermore, in the aforementioned Hungarian

[29] CISG-online 4876, Superior Court of Québec, Canada, 10 January 2020, (Hewlett-Packard France v. Matrox Graphics Inc.), p. 5, section 25
[30] CISG-online 2681, Advocate General at the Dutch Supreme Court, Netherlands, 16 October 2015, (Integrated Logistics Co. v. Trading Company P. van Adrighem B.V.), section 2.5.2
[31] CISG-online 5221, Ad hoc Arbitral Tribunal, Spain, 17 December 2019, (Industrial plants case)
[32] See CISG-AC, Opinion 6, Comment 1.1; UNCITRAL CISG Case Law Digest (2016), Article 7, p. 44, paragraph 21 and note 67.
[33] CISG-online 961, Court of First Instance Willisau, Switzerland, 12 March 2004, (German wood case), section 35
[34] CISG-online 4876, Superior Court of Québec, Canada, 10 January 2020, (Hewlett-Packard France v. Matrox Graphics Inc.), p. 35, section 241
[35] CISG-online 1937, Court of Appeal Szeged, Hungary, 22 November 2007 (Apparel case), p. 3; for another example, see CISG-online 705, ICC International Court of Arbitration, June 1999, (Coke case), in which the foreseeability limitation is further discussed and analyzed
[36] UNCITRAL CISG Case Law Digest (2016), Article 7, p. 44, paragraph 21 and note 69.

appeal case, it was stipulated that "*The Convention determines [as] unforeseeable damages those which a reasonable person of the same kind in the same circumstances would not have foreseen (Art. 25).*"[37] When answering the research question, the starting point must therefore be full compensation, subject to the foreseeability limitation.

4.2 Sphere of application and interpretation of Article 74

In addition to the purpose and intend of Article 74, one must understand the reach of Article 74, as well as the procedure for determining whether a certain type of damage can be claimed under the CISG.

As described above, the starting point of Article 74 in regard to the reach of damages is no-fault liability and full compensation for any sum equal to the loss suffered as a consequence of the breach. The loss must be proven beyond reasonable certainty, as well as the extend of such loss, however, not with mathematical precision, as was stated by the Superior Court of Quebec in the Hewlett-Packard France v. Matrox Graphics Inc. case mentioned above.[38] Article 74 does however require that damages have been claimed in relation to Article 45(1)(b) by the buyer or under Article 61(1)(b) by the seller. As a result, the buyer or seller will become liable for any breach of contractual obligations or obligations under the CISG, except for non-actionable obligations of which neglection will usually result in loss of remedies for the aggrieved party.[39] Contractual obligations must therefore be sought out in the contract, and attention must in this regard be brought to Articles 8 (intent of the parties) and 9 (trade practices of the parties) of the CISG. Subjective terms could perhaps be taken into consideration, and pre-contractual negotiations may also have an impact on the foreseeability limitation.[40]

Death or personal injury incurred as a result of defective goods does not fall within the scope of the CISG, and as a consequence, Article 74. Such loss is governed by the applicable domestic law.[41] The seller can however be held liable for property damage,[42] as well as pecuniary loss

[37] CISG-online 1937, Court of Appeal Szeged, Hungary, 22 November 2007 (Apparel case), p. 3
[38] CISG-AC, Opinion 6, Comment 2.1-2.9; UNIDROIT Principles, Article 7.4.3; For the statement made by the Superior Court of Quebec see: CISG-online 4876, Superior Court of Québec, Canada, 10 January 2020, (Hewlett-Packard France v. Matrox Graphics Inc.), p. 6, section 35.
[39] Schlechtriem & Schwenzer, Commentary, p. 1061
[40] Zeller, Damages, p. 70
[41] See CISG-AC, Opinion 12, Comment 1.2; CISG Article 5
[42] See CISG-AC, Opinion 12, Comment 3.1.1

suffered by the buyer as a result of death or personal injury caused by the goods to the buyer's customers.[43] The access to claim such recourse as damages under Article 74 is however disputed by CISG commentators and will be further examined below. Third party claims are excluded unless the contract have been extended to such third-party by way of agreement, intent, trade practices or a purely coincidental shift of damage. However, the latter depending on whether the seller could have known that the buyer were pursuing the interests of the third party, which is often the case with multi-national corporations.[44] In any case, the damage claimed by the aggrieved party must not place him in better position than the one he would have enjoyed if the contract had been duly performed.[45] As the damage claimed must be a sum equal to the loss, punitive damages are excluded from the scope of Article 74, the very nature of punitive damages being a form of punishment consisting of sums in excess of compensatory damage.[46]

Whether or not a specific type of loss can be claimed as damage shall be determined in accordance with the principle of full compensation and the purpose of the contract.[47] The type of loss must however pass the foreseeability limitation in the second sentence of Article 74.

[43] See CISG-AC, Opinion 12, Comment 2.3
[44] Schlechtriem & Schwenzer, Commentary, p. 1062-1063, section 15-16
[45] See CISG-AC, Opinion 6, Comment 9
[46] See CISG-AC, Opinion 6, Comment 9.5; Schlechtriem & Schwenzer, Commentary, p. 1064, section 20; Brunner, Gottlieb, Commentary, p. 517, section 18
[47] Schlechtriem & Schwenzer, Commentary, p. 1063-1064; Zeller, Damages, p. 72

4.3 Types of damages

Considering the purpose, intend and sphere of application of Article 74, the different types of damages that may be claimed under Article 74 will be examined below.

4.3.1 Direct damages

Direct damages are damages which result naturally from a breach of contract, and are thus considered to be foreseeable and imputable to the party in breach.[48] In case of non-performance or lackluster performance, the aggrieved party must be put into the same position he would have enjoyed if the contract had been properly performed.[49] This can also be referred to as the market value of the unrealized contractual expectation, which can be calculated as the gap between the value of the performance which has actually been received and the value of that which should have been received.[50] The market value of the unrealized contractual expectation can be based on whether the contract has been avoided or not.

Direct damages when the contract has not been avoided

If the received goods are defective and the contract has not been avoided, the value of the unrealized contractual expectation that can be claimed as damage will be based on the objective value between the non-conforming goods, and the value that the goods would have had if they were conforming with the contract.[51] In a case between an Iranian buyer and a German seller, concerning double-roll mills and filters produced by the German seller, the goods delivered did not conform with what was originally agreed in the contract. The buyer did not avoid the contract, but instead sought damages for non-conformity. The court stated in this regard that the damages had to be measured by *"[…] the difference between the value of components as specified in the contract and the components delivered by the seller."*[52] The damages does not have to be materialized in resale and manufacturing costs, which have been saved by the party

[48] Brunner, Gottlieb, Commentary, p. 520, section 22; Schlechtriem & Schwenzer, Commentary, p. 1080, Section 54
[49] Honnold, Documentary, p. 449
[50] See CISG-AC, Opinion 6, Comment 3.1, Honold, Uniformity, p. 571
[51] Schlechtriem & Schwenzer, Commentary, p. 1065, Section 24; Honnold, Uniformity, p. 575
[52] UNCITRAL CISG Case Law Digest (2016), Article 74, p. 335, paragraph 16 and note 27; CLOUT case No. 596, Oberlandesgericht Zweibrücken, Germany, 2 February 2004

in breach as a result of delivering non-conforming goods, can be used as a baseline for calculating damages in cases where market value can be difficult to assess.[53]

Direct damages when the contract has been avoided

If the received goods are defective and the contract has been avoided, the value of the unrealized contractual expectation that can be claimed as damages must be calculated in accordance with Articles 75 and 76 of the CISG. The damages will thus be based on either: 1) the difference between the contract price and an actual cover transaction made within reasonable time of avoidance (Article 75) or, 2) the difference between the contract price and the reasonable market price of a theoretical cover transaction which could have been made at the time of avoidance (Article 76). In case the party claiming damages has avoided the contract after taking over the goods, the current market price at the time of such taking over shall be applied instead of the current market price at the time of avoidance.[54] Even if the breach of contract does not merit avoidance, the aggrieved party can calculate damages based on Article 75 insofar as a reasonable cover transaction was made because such was required in order to mitigate damages in accordance with Article 77, or as a precautionary measure to secure continued production or the performance of other contractual obligations.[55] In an case regarding the sale of 3 different construction pieces, the buyer refused to take delivery of 2 out of the 3. The seller threatened with avoidance and damages if the buyer did not take over the goods, and the buyer opted for avoidance. When the seller then sold the 2 construction pieces to another buyer and claimed the difference between the contract price and the resale price as damages, the buyer opposed the claim on the basis that a formal avoidance declaration had never been sent. However, since the buyer refused performance, the court declared the requirement of a formal avoidance declaration redundant, and that the seller could claim damages for the cover purchase pursuant to Article 74.[56] In a case regarding the sale of glass, a Dutch buyer had ordered a batch of glass from a German seller in accordance with the sellers offer. However, the seller refused to deliver and disputed that the order was made before the offer was withdrawn. The buyer had to make a cover purchase at a higher price than that which was offered by the seller and claimed damages consisting of the price difference. The seller claimed that no such

[53] Schlechtriem & Schwenzer, Commentary, p. 1065, Section 24; See also section 4.3.7 which further examines disgorgement of profit
[54] Second sentence of Article 76(1)
[55] See CISG-AC, Opinion 6, Comment 8.1; Brunner, Gottlieb, Commentary, p. 520, section 25
[56] CISG-Online 1627, Oberlandesgericht Graz, Austria, 29 July 2004, (Walter Bau AG et al. v. General Kommerz Handelsges. mbH)

damages should be awarded, as the cover transaction had been made before the contract was avoided, and thus not in accordance with Article 75 of the CISG. The court cited sided with the buyer and stated that the basic principle of full compensation of Article 74 should always be followed, and that the seller had to pay the claimed damages, if not based directly on Article 75, then on the basis of Article 74.[57]

Repair costs

In case the damaged goods are repairable, the direct damages will be the costs associated with repairing or replacing the non-conforming goods.[58] This was underlined in a German case in which the seller had delivered 19 doors and windows, some of which were found to be defective. The seller agreed to replace the defective windows, and the buyer claimed that the cost incurred with the replacement should be set-off in the outstanding balance. Though the right to set-off could not be granted under the CISG, the court found that the seller had to bear the cost incurred with the replacement in accordance with Article 48(1) of the CISG.[59] A similar conclusion was reached in another German case, where it was found that the buyer's claim for damages in accordance with Article 74 encompassed all loss suffered, including that of substitute performance in regard to the expenses of remedying the non-conformity of the goods.[60] If the goods are not actually repaired, damages can still be awarded based on the costs that would have been spend if the goods had been repaired. However, damages based on theoretical repair costs is limited to that which is reasonable in accordance with the mitigation duty of Article 77.[61]

Performance delay

In case of performance delay by the seller, the direct damages will be the costs resulting from the delay. This includes costs incurred for reasonable measures taken to avoid loss, as was found by in a case regarding tannery machines. Following sale and delivery, the seller had requested the return of the tannery machines for the purpose of making some adjustments. Having recovered the machines, the seller fixed a date on which the machines had to be returned to the buyer. When the machines were not returned on the agreed date, the buyer sought the

[57] CISG-Online 2542, District Court Limburg, Netherlands, 16 April 2014, (Scheldebouw B.V. v. Hero Glas GmbH)
[58] Brunner, Gottlieb, Commentary, p. 520, section 24; Honnold, Uniformity, p. 575
[59] CISG-Online 146, Court of Appeal Hamm, Germany, 09 June 1995 (South Tyrolian windows case)
[60] CISG-Online 368, Local Court Munich, Germany, 23 June 1995 (Tetracycline HCL case)
[61] Schlechtriem & Schwenzer, Commentary, p. 1065, Section 25; Brunner, Gottlieb, Commentary, p. 520, section 24

services of a third party for the treatment of his goods in order to avoid loss which would otherwise have incurred as a result of the delay. When the machines were returned, the buyer claimed compensation for the third-party expenses. The court came to the conclusion that the performance obligations of Article 45 of the CISG also applies to the lack of performance of secondary obligations, and that the buyer's reasonable expenses in regard to actions taken to avoid the loss that would otherwise incur as a result of the delay, could be claimed as damages under Article 74.[62] Furthermore, costs associated with rental expenses for temporary replacement of non-conforming goods can be claimed as damages. This applies even if a temporary replacement have not been rented, as the claim for damages can be based on the reasonable theoretical rental price.[63] Financial loss incurred as a result of delay, herein interest on loans taken in order to make advanced payment for goods, is also recoverable as direct damages under Article 74, as was the case in a dispute where the goods remained undelivered by the seller even after an additional delivery period was set by the buyer. In the particular case, it was known to the seller that the buyer would take out a loan to meet the advance payment, and that the buyer might incur interest loss in case the deal for whatever reason did not go through. As a result, the damages awarded to the buyer included compensation for the interest loss.[64]

Currency and exchange rate

In case the buyer for whatever reason have not paid the agreed price at the agreed time, the seller may claim loss associated herewith as damages under Article 74, including damages in relation to currency devaluation in case of late payment, as was the situation in Swizz case where the seller suffered exchange rate loss due to late payment.[65] However, in a German case in which the seller claimed exchange rate loss due to the fact that the buyer did not pay or furnish security for payment of the goods as demanded by the seller, the court stated that damages for the exchange rate loss could not be claimed as damages. The reason for the court decision being that the seller could not prove that the exchange of money paid in the local currency to a foreign one was the seller's usual practice.[66] The seller must thus be able to prove that an actual exchange rate loss has been suffered, and that the exchange of money paid in local currency to

[62] CISG-online 217, Court of Appeal Cologne, Germany, 08 January 1997 (Tannery machines case)
[63] Schwenzer & Hachem, Scope of Damages, pp. 94-96
[64] CISG-online 782, Court of Appeal Helsinki, Finland, 27 March 1997 (Butter case)
[65] Schlechtriem & Schwenzer, Commentary, p. 1065, Section 27; CISG-online 2025, Court of Appeal Canton Valais, Switzerland, 28 January 2009 (Glass fibre case II)
[66] CISG-online 119, Court of Appeal Düsseldorf, Germany, 14 January 1994 (Italian shoes case XIII)

a foreign one is the seller's usual practice. However, if the currency in which remuneration must be paid in accordance with the contract is foreign to the seller, it can be assumed that the seller would exchange the payment if said payment had been received on the agreed date.[67] In addition hereto, in a Swizz case regarding the delivery of sunflower oil, in which the seller failed to ship the goods to the agreed place of performance, the court stated that while the seller had to refund the price paid and pay damages for profits that the buyer could have realized if the goods had been shipped in accordance with the contract, the buyer could not claim damage for loss suffered because of the fluctuating rate of the currency in which the price was paid. The court stated that although currency losses could be claimed as damages under Article 74, such damages could not be awarded in the particular case because the future losses could not be estimated.[68]

4.3.2 Loss of profit

Loss of profit is the only type of loss which is specifically mentioned in Article 74 and will be examined separately even though it is usually categorized as consequential loss. The reasoning behind the specific reference in Article 74, is that some legal systems does not include loss of profit as a concept of loss.[69] When examining what can be claimed as loss of profit, one must take into account the principle of full compensation and the prevention of any increase in profit in connection with the breach of contract. This includes profits that the aggrieved party could have realized in resale, but also profits which is lost if the aggrieved party could not keep his business running because of the breach.[70] In a case concerning the sale of a crane, the seller sold the crane to a third party even though he had contracted with the buyer. The seller believed that he was entitled to do so because he deemed the contract with the buyer to be invalid. However, the court found that such was not the case, and granted the buyer damages in the form of loss of profits, the value of which was determined as *"[…] the difference between the amount of the resale and the price of the crane acquired by the buyer, in addition to the buyer's*

[67] Schlechtriem & Schwenzer, Commentary, p. 1065, Section 27; UNCITRAL CISG Case Law Digest (2016), Article 74, p. 335, paragraph 20.
[68] CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; UNCITRAL CISG Case Law Digest (2016), Article 74, p. 335, paragraph 20 and note 37.
[69] Honnold, Documentary, p. 449
[70] Schlechtriem & Schwenzer, Commentary, p. 1072, Section 37; Zeller, Damages, p. 121; CISG-AC, Opinion 6, Comment 3.12; Honnold, Uniformity, p. 577-578

costs."[71] A claim for loss of profit can sometimes be difficult to calculate, since the calculation will be based on an estimate of how the business would have performed had there been no breach of contract. However, if loss of profits can be calculated with reasonable certainty, the aggrieved party can claim the damages as was done in a case regarding the sale of compressors for air conditioners. The buyer claimed that the compressors were non-conforming with the contract and was awarded loss of profit for the diminished volume of sales on the grounds that he had provided "*[…] sufficient evidence to estimate the amount of damages with reasonable certainty.*"[72]

Future profit and loss of chance

The principle of full compensation entitles the aggrieved party to seek damages for not only loss of profit calculated based on resale price, but also predictable achievable and calculable future profits. Such claims will however be limited to those that can be calculated with reasonable certainty and subject to the principles of foreseeability and mitigation.[73] The mere chance of a profit can also be awarded as loss of profit under Article 74, subject to the degree of probability.[74] This is supported by the UNIDROIT Principles, which state that "*Compensation may be due for the loss of a chance in proportion to the probability of its occurrence*".[75] While calculating the value of loss of chance can be difficult, such claim be flatly denied as the main difference between loss of chance and loss of profit lies in the difficulty with which it is to prove. Nevertheless, the probability of claiming loss of chance as damages can be significantly increased insofar as the aggrieved party have entered into a contract with the purpose of obtaining a chance of earning a profit, as the chance of profit in such case will have become an asset. If a buyer thus has purchased a racehorse with the purpose of attending a specific race, and should the seller then fail to deliver the racehorse for said race, the buyer would miss his chance at winning. Had the seller delivered the racehorse, the win would of course not be

[71] CISG-online 2130, Court of Appeal Murcia, Spain, 15 July 2010 (Krane-Maschinen-Service GmbH & Co. Handels-KG v. Grúas Andaluza, S.A.)
[72] CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994]
[73] UNIDROIT Principles, Article 7.4.3(1); Lookofsky, Understanding the CISG, p. 142; UNCITRAL CISG Case Law Digest (2016), Article 74, p. 337, paragraph 30 and note 97; Schlechtriem & Schwenzer, Commentary, p. 1072, Section 38; Zeller, Damages, p. 122; CISG-AG, Opinion 6, Comment 3.19; Brunner, Gottlieb, Commentary, p. 518, section 19
[74] Brunner, Gottlieb, Commentary, p. 518, section 19
[75] UNIDROIT Principles, Article 7.4.3(2)

guaranteed, but there would certainly have been a probability of winning, especially if the racehorse was a favorite.[76]

Fixed costs

Fixed costs can also be claimed as loss of profit, as was done in a case regarding the sale of jeans. Having received the jeans, the buyer found them to be of incorrect quantity, quality and non-conforming with the contract. The buyer declared the contract avoided but the seller refused to take back the non-conforming jeans, which the buyer then sold. The court awarded damages in accordance with Article 74 of the CISG and found that the buyer's loss of profit included fixed costs (general expenses) and that the seller had to prove that the fixed costs in case of performance would have exceeded the fixed costs in case of non-performance.[77]

Lost expenses paid

As an alternative to loss of profit, damages can be claimed for lost expenses incurred by the aggrieved party in relation to the contract, insofar as such expenses were spend in order to gain a profit. In a case concerning the sale of black melon seeds, the buyer had made a down payment in order to take delivery, but the seller failed to deliver even after the delivery dates had been postponed. The arbitral tribunal awarded the buyer with the foreseeable loss of profit, as well as the interest the buyer had incurred on the down payment.[78] Should the buyer have arranged for the storage of goods in order to take delivery and should that storage be useless if the seller fails to deliver, the buyer can claim those expenses as damages.[79] In a case concerning plastic waste, the buyer claimed monetary loss incurred in relation to the import of prepaid goods that the seller never delivered. In addition to a payment refund, the arbitral tribunal awarded the buyer damages for foreign exchange procedure fees, letter of credit procedure fee, remittance agency fee and import agency fee.[80] Similar damages were awarded in a case regarding an imported heat transfer oil furnace that exploded after delivery was made. The buyer was awarded damages pursuant to Article 74 for not only the contract price, but also for import

[76] Lookofsky, Understanding the CISG, p. 142; Schlechtriem & Schwenzer, Commentary, p. 1072, Section 38, CISG-AG, Opinion 6, Comments 3.15-3.18; Schwenzer & Hachem, Scope of Damages, pp. 97-98; Zeller, Damages, p. 125

[77] CISG-online 515, Court of Appeal Hamburg, Germany, 26 November 1999 (Shamo jeans case)

[78] CISG-online 1660, China International Economic & Trade Arbitration Commission, China, 04 April 1997 (Black melon seeds case)

[79] Schlechtriem & Schwenzer, Commentary, p. 1073, Section 40; Brunner, Gottlieb, Commentary, p. 521-522, section (3)

[80] CISG-online 1715, China International Economic & Trade Arbitration Commission, China, 31 October 2005 (Waste plastic case)

inspection fee, transportation and insurance fee, documents exchange fee, inland transportation and storage fee, supervision fee, unpacking and detention fee, wire transfer fee and letter of credit fee.[81]

Lost volume sales

Finally, a party may claim damages for lost volume sales. If a seller has entered into a contract with a buyer regarding standard building materials of $1000, and the buyer then fails the take delivery, the seller might have to sell the contracted goods to a third party. However, if said third party would have bought the goods either way, the seller is deprived of a $1000 sale because he would have made the sale regardless of the buyers failure to take delivery, and can thus seek damages for the full $1000 from the buyer even though a cover transaction was made. Because the seller would be able to sell the standard building material to multiple buyers, this third-party sale is not really a substitute sale, but simply a second sale.[82] In a case regarding the sale of jewelry, the buyer failed to pre-pay the purchase price as was stipulated in the contract. As a result, the seller claimed damages for breach of contract. The court held that the seller could recover the profit margin due to the fact that he regularly concluded similar transactions.[83] A seller cannot however claim damages for lost volume sales in addition to damages under Article 75 of the CISG (cover purchase), as the seller in such case would receive double recovery.[84]

4.3.3 Incidental damage

Incidental damages are all the reasonable expenses incurred by the aggrieved party as a result of the other party's breach of contract. Such are usually the loss associated with measures taken by the aggrieved party to mitigate damages or pursue rights.[85] Incidental damages are just as recoverable as direct damages, as stipulated by the supreme court of Austria in a case regarding the sale of tiles, where a major part of the tiles was non-conforming with the contract. As the seller could not deliver substitute goods within the agreed deadline, and since the buyer had to

[81] CISG-online 1744, China International Economic & Trade Arbitration Commission, China, 26 December 2005 (Heat transfer oil furnace case)
[82] CISG-AG, Opinion 6, Comment 3.20; UNCITRAL CISG Case Law Digest (2016), Article 74, p. 337, paragraph 32; Schwenzer & Hachem, Scope of Damages, p. 97
[83] CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000]; For further examples see UNCITRAL CISG Case Law Digest (2016), Article 74, p. 343, note 100
[84] CISG-AG, Opinion 6, Comment 3.22
[85] Brunner, Gottlieb, Commentary, p. 522, section 29 (4); Schlechtriem & Schwenzer, Commentary, p. 1080, Section 55

fulfill his own contractual obligations towards a third party, the buyer made a cover purchase. Some of the non-conforming tiles had been laid down, and these had to be replaced, the cost for which was claimed as damages along with the cost associated with the cover purchase. The court found that "*Since it is only the foreseeability of the damage that matters, the nature of the damages, whether resulting directly or indirectly from the breach of contract, is irrelevant.*" The buyer was thus awarded damages on the grounds that the all the damages claimed, even though some of these damages were incidental, could have been foreseen by the seller.[86] Incidental damages are generally to be claimed when the contract has been avoided as any expense associated with the contract, even those that would have legitimately occurred in the contractual relationship, must be reimbursed in order to place the aggrieved party in the same position he would have enjoyed had the contract been duly performed. This includes any expense spent by the aggrieved party when trying to avoid any additional harm. However, if the contract has not been avoided and the aggrieved party have opted for repair of the non-conforming goods, only the costs associated with such repair can be claimed as any other expenses in relation to the contract, be it shipping or insurance costs, have incurred due to normal circumstances.[87]

Buyer's non-performance

Incidental damages can be awarded in the form of expenses spent by a seller on additional transportation costs or storing the goods in case a buyer refuse to take delivery,[88] as was done in a case regarding the sale of dear meat. In the particular case the buyer refused to make pre-payment for the goods as had been agreed in the contract, and the seller incurred additional costs for storing the meat in a refrigerated warehouse. The costs were subsequently awarded to the seller as damages.[89] In a case concerning the delivery of winter rapeseed, where the seller and the buyer had agreed that payment should be made upon delivery (Incoterms 2000 – Ex Works (EXW)), the buyer failed to make such payment. The seller made a cover sale and claimed damages for the difference in the cover sale price and that which was agreed in the contract, the transportation costs associated with the cover sale, and costs associated with storing the winter rapeseeds. Damages were awarded for the cover sale and transportation costs, but not

[86] CISG-online 2398, Austrian Supreme Court, Austria, 15 January 2013 (Indian glass mosaic tiles case)
[87] Zeller, Damages, p. 117-118; Brunner, Gottlieb, Commentary, p. 522, sections 29-32; Schlechtriem & Schwenzer, Commentary, p. 1067, Section 28; Lookofsky, Understanding the CISG, p. 140 and note 189
[88] Schlechtriem & Schwenzer, Commentary, p. 1067, section 28
[89] CISG-online 510, Court of Appeal Braunschweig, Germany, 28 October 1999 (Venison case)

for the storage costs since storage was not prescribed in the contract and thus not foreseeable for the buyer.[90] In a case regarding the delivery of Hungarian wheat, the buyer claimed lack of conformity a month following the delivery of the wheat due to contamination. The buyer could not prove lack of conformity, a burden he had to bear since he took delivery of the goods without complaining about defects and was thus denied damages. On the contrary, the seller was awarded damages in the form of the purchase price, interest and storage charges.[91] It is also possible for a seller to claim the expenses associated with a banks rejection of a cheque provided by the buyer, as was done in a case regarding the delivery of living pigs. When terms of payment were discussed, the parties agreed that payment was to be made in part cash and part cheque. When the cheques were rejected, the seller claimed damages for the outstanding purchase price. The court awarded the seller damages for not only the purchase price, but also the cost associated with the rejected cheques.[92] Finally, costs associated with preserving or modifying an undelivered machine so that said machine can be sold to another buyer can be claimed and awarded as incidental damages, as was done in a case regarding the sale of a machine for the production of foamed boards. As the buyer failed to make payment, the seller had to preserve and modify the machine in order to sell it to another buyer, and claimed damages associated with said preservation and modification. The arbitral tribunal found that the damages claimed were considered as foreseeable as such damages were usual in case of avoidance and thus claimable under Article 74 of the CISG.[93]

Seller's non-performance

On the buyer side, incidental damages can be awarded for additional transport cost due to delivery of unusable goods, as was done in a case regarding the sale of potatoes which was non-confirming in regard to quality.[94] In a case regarding the sale of DVD players, the buyer claimed that the seller had been late in delivering the goods and that the method with which the goods were delivered were non-conforming to what had been agreed in the contract. As a result, the buyer had suffered heavy losses and claimed damages including those of additional shipping costs. The arbitral tribunal found that the shipping method used by the seller was indeed a

[90] CISG-online 2584, District Court Tukums, Latvia, 05 May 2010 (Winter rapeseed case)
[91] CISG-online 1328, Court of Appeal Karlsruhe, Germany, 08 February 2006 (Hungarian wheat case)
[92] CLOUT case No. 376 [Landsgericht Bielefeld, Germany, 2 August 1996]
[93] CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)]
[94] CISG-online 1444, Court of Appeal Cologne, Germany, 14 August 2006 (Spanish potatoes case)

breach of contract and awarded the buyer damages for additional shipping costs.[95] The buyer can also claim as damages the costs associated with delivery of substitute goods, costs associated with sorting out the non-conforming goods and reasonable expenses in relation to assessing, averting, or mitigating damages.[96] In a case regarding the delivery of stainless-steel wire, the buyer claimed that the goods were non-conforming and of sub-standard, placed them at the seller's disposal and refused to pay the purchase price. While the court found that the buyer was indeed entitled to avoid the contract, he was not entitled to set-off expenses associated with refacing a grinding machine for processing the non-conforming goods, as the expenses associated herewith were not reasonable in relation to the claim for the purchase price. Taking the amount of the claim for expenses associated with refacing the grinding machine into consideration, the court noted that the buyer should have returned the goods and claimed the expenses as damages under Article 74 instead.[97] The costs of storing and preserving non-conforming goods can also be claimed by and awarded to the buyer, as was done in the already cited above case regarding compressors for air conditioners. In the particular case, the buyer was awarded damages not only for lost profits, but also for expenses incurred when trying to remedy the non-conforming goods, sums paid to mitigate the losses from orders that the buyer could not meet as a result of the non-conformity, and costs for storing and handling the non-conforming goods.[98] Further examples include costs associated with installing substitute goods (as awarded in a case where a non-conforming printing machine had to be replaced),[99] sales and marketing costs (as awarded in a case regarding the sale of plastic carpets, where the buyer was granted damages in relation to sales and marketing efforts when he could not sell the goods due to the seller's breach of contract),[100] fees associated with wasted payment because of non-conformity (a buyer was awarded damages for value added tax paid in connection with the purchase of an Aston Martin automobile, which the buyer had to take back from his customer and sell to a third party due to registration date disputes),[101] third party costs of processing goods (as awarded in the aforementioned printing machine case, where the printing

[95] CISG-online 1444, China International Economic & Trade Arbitration Commission, China, 09 November 2005 (DVD machines case)
[96] Schlechtriem & Schwenzer, Commentary, p. 1068, section 28; Brunner, Gottlieb, Commentary, p. 522, sections 29(4)
[97] CISG-online 277, German Supreme Court, Germany, 25 June 1997 (South Korean stainless wire case)
[98] CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994]
[99] CLOUT case No. 732 [Audiencia Provincial de Palencia, Spain, 26 September 2005]
[100] Unilex-726, Helsinki Court of Appeals, Finland, 26 October 2000 (Plastic carpet case)
[101] CISG-online 1620, District Court Berlin, Germany, 13 September 2006 (Aston Martin case)

machine had to be replaced and the expenses charged to the buyer for replacing the machine were awarded the buyer as damages),[102] costs in relation to opening a line of credit (awarded as damages in a case regarding non-conforming scaffold fittings, in which also costs, expenses and losses associated with preserving the goods were allowed as damages),[103] delivering to or taking back goods from a subsequent buyer (in a case concerning non-conforming vacuum cleaners, the buyer were awarded damages for handling complaints, costs of unwrapping, loading and unloading returned goods from his customers. In a case concerning non-conforming steel bars where the buyer's customer returned the goods due lack of quality, the buyer was awarded damages regarding the costs for freight, insurance, duties, storage, expert examination of the goods and interest),[104] reimbursing subsequent buyers (In a case regarding the sale of 40 tons of steam treated paprika powder which were to be included in the buyer's products, it was found that the powder had been treated with radiation instead of steam. The buyer had to pull his products from the market and were awarded as damages the compensation paid to his customers for recalling the products. The buyer was also awarded damages for buyback expenses, expenses related to the destruction of the recalled goods, inventory write-down, examination expenses, travel expenses, freight costs and chemical analysis costs.)[105], travel expenses associated with going to the seller's place of business and indemnification expenses.[106]

Unreasonable costs

As already mentioned above, the foreseeability limitation is the main limitation to the reach of damages under Article 74 of the CISG. However, some courts have refused to award incidental damages on the basis that these were unreasonable as was the case in the previously above mentioned South Korean stainless steel-wire case.[107] In a case regarding the sale of a custom-made cooling device, the court stated that all foreseeable loss could be claimed as damages, and that "*the foreseeability requirement is met if, all the circumstances of the case considered, a reasonable person could have foreseen the consequences of the breach of contract, even if not in all details and in their final amount*".[108] While reasonableness might be a reason for not

[102] CLOUT case No. 732 [Audiencia Provincial de Palencia, Spain, 26 September 2005]
[103] CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)]
[104] CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998]; Unilex-726, Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 1998 (Steel Bar Case)
[105] CLOUT case No. 1182 [Hovioikeus hovrätt Turku Finland, 24 May 2005]
[106] UNCITRAL CISG Case Law Digest (2016), Article 74, p. 336, section 22 and note 57
[107] UNCITRAL CISG Case Law Digest (2016), Article 74, p. 335, section 21
[108] CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002]

awarding damages, the principle cannot stand alone and is closely tied to the foreseeability requirement.[109] However, mitigation expenses must always be reasonable and not go beyond that which is needed to mitigate damages.

Litigation expenses

Scholarly opinion disagrees as to whether court costs and attorney's fees in relation to arbitration or trial can be claimed as damages under Article 74 of the CISG.[110] Some believe that such costs fall outside the scope of the Convention, stating that "*The recovery of these costs is a matter of the applicable domestic rules on allocation of costs or the applicable arbitration rules respectively.*",[111] and that *"[…] litigation costs are not damages in the meaning of Art. 74. Rather they are compensable only according to the provisions of the applicable procedural law or law applicable to the arbitration proceedings."*,[112] while others argue that the CISG must be interpreted autonomously, that recourse to domestic law should be an absolute last resort, and that "*It is time that the CISG is taken to the next level and a more adventurous approach is adopted. Such an attitude would support a more robust and perhaps pragmatic approach and include attorney's fees into the full compensation principle as expressed in Article 74*".[113] A general support of the latter statement would mean that the principle of full compensation should indeed lead to recovery of all expenses, including court costs and attorney's fees.[114] Case law is as indecisive of scholarly opinion as some decisions have awarded attorney's fees citing Article 74,[115] some without indicating whether the fees were awarded under Article 74 or pursuant to domestic rules,[116] and some have flat out denied the right to claim attorney's fees as damages.[117] In the Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Comp case, attorney's fees were awarded to the aggrieved plaintiff in the District Court, but then later reversed in the Federal Court of Appeal, which stated that "*[…] it seems apparent that 'loss' does not include attorney's fees incurred in the litigation for a suit for breach of contract*".[118] If one were to view litigation fees objectively, it can be hard to see how these differ from any other

[109] See also section 4.3.4 Consequential or indirect damage – *Disproportionate loss*
[110] CISG-AC, Opinion 6, Comment 5.1
[111] Schlechtriem & Schwenzer, Commentary, p. 1069, section 30
[112] Brunner, Gottlieb, Commentary, p. 523-524, sections 31
[113] Zeller, Damages, p. 160
[114] CISG-AC, Opinion 6, Comment 5.1
[115] UNCITRAL CISG Case Law Digest (2016), Article 74, p. 336, section 27 and note 77
[116] UNCITRAL CISG Case Law Digest (2016), Article 74, p. 336, section 27 and note 81
[117] UNCITRAL CISG Case Law Digest (2016), Article 74, p. 336, section 22 and note 83
[118] CISG-online 684, U.S. Court of Appeals, USA, 19 November 2002, Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Comp

type of incidental damages. After all, if litigation costs are associated with a breach, and should they not be recovered as damages, the aggrieved party certainly would not be placed in the same position he would have enjoyed if the contract had been properly performed. However, the problem with awarding litigation expenses, and the reason for indecisive case law and scholarly opinion, is the question of "what if the defendant won", as was asked in the Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Comp case mentioned just above. If litigation costs were recoverable as damages under Article 74, and a defendant were successful in winning a case, the defendant would not be able to claim litigation expenses as damages as the plaintiff had not breached the contract, which is the very basis for claiming damages under the CISG. This anomaly is thus in breach with the equality principle of Article 45 and 61, after which the buyer and the seller shall be entitled to the same remedies in case of non-performance. As a prevailing defendant would not have the same remedies available if litigation expenses were awarded under Article 74, and because unequal remedies to the buyer and seller is contrary to the design of the Convention, the prevailing view is that litigation expenses are not recoverable under Article 74.[119] Some scholars dispute this view, stating that if a successful defendant cannot rely on Article 74, nor any principle upon which the CISG is based, then the inequality situation in regard to litigation expenses must be solved with recourse to domestic law. The successful defended would thus be able to claim litigation expenses as damages under applicable domestic legislation, rendering the inequality concerns obsolete. As litigation fees would thus be generally recoverable as damages (at least for the successful plaintiff) under the Convention, it is argued that this would strengthen uniformity and harmonization of the CISG and provide distance to the homeward trend.[120] Whether or not litigation expenses are generally recoverable is thus still undecided, however, the prevailing sentiment is that such costs are not recoverable under Article 74.

Extra-judicial expenses

Extra-judicial expenses are pre-litigation costs which occur before the case is brought to court. These costs can be recovered as incidental damages under Article 74 insofar as they consist of

[119] CISG-AC, Opinion 6, Comment 5.4; Schlechtriem & Schwenzer, Commentary, p. 1069, section 30; Schwenzer & Hachem, Scope of Damages, p. 104-105; Honnold, Uniformity, p. 579-581

[120] Zeller, Damages, p. 150-151; William Diener, Keith, Recovering Attorneys' Fees under CISG: An Interpretation of Article 74, Nordic Journal of Commercial Law, January 2008, s. 51-2 and 63 – available at: https://www.researchgate.net/publication/325542081_Recovering_Attorneys'_Fees_under_CISG_An_Interpretation_of_Article_74, visited May 5, 2022

reasonable and justified acts of the aggrieved party which had to be taken in order to assert his rights and mitigate damages in regard to the breach.[121] Possible recoverable extra-judicial expenses include costs of sending a formal reminder, costs associated with debt collection or hiring foreign debt collection agencies, and foreseeable attorney's fees in relation to objectively necessary expenses taken in order to safeguard the aggrieved party's rights. In a case regarding the sale engines for lawn mowers, the seller were awarded damages for attorney's fees associated with a reminder that was sent out before the lawsuit.[122] Furthermore, in a case regarding the notice of non-conforming shoes, the seller were awarded damages for reminders and debt collection costs.[123] In a case regarding missing payment for delivered suits, the aggrieved seller were awarded damages for the cost of debt collection.[124] In a case regarding rechargeable batteries, the aggrieved seller could have been awarded damages for the cost of debt collection if the debt collection agency had been foreign to the country of the seller, because it would thus have been more helpful to collecting the debt.[125] In the already mentioned Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Comp case, the court noted that attorney's fees associated with pre-litigation might be recovered as incidental damages if such were a result of an effort to mitigate damages.[126] While the amount of case law in support of awarding extra-judicial costs might seem voluminous, one must consider that the majority of cases wherein extra-judicial costs were actually awarded as damages are German cases, and that awarding extra-judicial costs as damages is the domestic approach under German law.[127] Furthermore, several decisions have denied awarding the aggrieved seller the costs associated with the use of a debt collection agency because such were either unreasonable or not covered by the provisions of the Convention.[128] The reasoning behind the possibility of recovering extra-judicial costs as damages is that, as opposed to litigation costs, extra-judicial costs can be difficult to separate from the costs of mitigating damages. However, if the extra-judicial costs can be

[121] Schlechtriem & Schwenzer, Commentary, p. 1069-1070, section 31; Brunner, Gottlieb, Commentary, p. 523, section 31; Schwenzer & Hachem, Scope of Damages, p. 104-105
[122] CISG-online 201, Court of Appeal Düsseldorf, Germany, 11 July 1996 (TORQMOTOR lawn-mower engines case)
[123] CISG-online 2799, Court of Appeal Munich, Germany, 26 October 2016 (Notice regarding non-conforming shoes case)
[124] CISG-online 1532, Court of Appeal Canton Valais, Switzerland, 23 May 2006 (Suits case)
[125] CISG-online No. 2583, District Court Munich II, Germany, 15 March 2012 (Rechargeable batteries case); See also CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999] in which the recovery of costs spend on debt collection were allowed.
[126] CISG-online 684, U.S. Court of Appeals, USA, 19 November 2002 (Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Comp.)
[127] Schlechtriem & Schwenzer, Commentary, p. 1069-1070, section 31 and note 98
[128] UNCITRAL CISG Case Law Digest (2016), Article 74, p. 336, section 25 and note 72

separated from the costs of mitigating damages, such will fall into the same inequality conundrum of actual litigation costs and the issue is in such case disputed on the same grounds as that of litigation expenses as described above.[129]

4.3.4 Consequential or indirect damage

Indirect or consequential damages are based on losses which incur in addition to those caused directly by the non-performance. In addition to damages for loss of future profit or loss of chance as examined above, consequential damages includes loss suffered as a result of the aggrieved party's liability to third parties and are just as recoverable under the CISG as direct or incidental damages subject to the foreseeability limitation.[130] This has been substantiated in the already mentioned Indian glass mosaic tiles case, where the Austrian Supreme Court noted that "*Since it is only the foreseeability of the damage that matters, the nature of the damages, whether resulting directly or indirectly from the breach of contract, is irrelevant.*"[131]

Before the different types of consequential damages that may be recovered under Article 74 of the CISG is examined, it must be noted that such damages will often be excluded in commercial contracts by way of a limitation of liability clause. First and foremost, the Convention does not concern itself with the validity of such restrictions. Secondly, whether a certain type of damage in a particular contractual relationship is considered consequential or direct must be determined in accordance with the parties' mutual intend, i.e. Article 8 of the CISG. The reason for the above distinction being that every contract is entered into on the basis of different circumstances and some damages may be considered as consequential under one contract opposed to as direct under another, the decisive aspect being the intended purpose of the goods and whether this has been described clearly in the contract. If a party have clearly described that time is of the essence, and that it is crucial for said party to receive the goods in order to meet contractual obligations to his customers and that he would be penalized if such obligation was not met, then damage suffered as a result of the liability to said third parties would more easily be considered

[129] Schlechtriem & Schwenzer, Commentary, p. 1069-1070, section 31; Schwenzer & Hachem, Scope of Damages, p. 105
[130] Schlechtriem & Schwenzer, Commentary, p. 1070, section 33; Brunner, Gottlieb, Commentary, p. 524, section 33; Zeller, Damages, p. 118; CISG-AC, Opinion 6, Comments 6.1-6.2
[131] CISG-online 2398, Austrian Supreme Court, Austria, 15 January 2013 (Indian glass mosaic tiles case)

as direct. Clear and coherent contract terms are thus of the essence when drafting contracts.[132] That being said, there will always be circumstances which the parties did not anticipate, and the different consequential damages that may generally be recovered under the CISG will thus be examined below.

Third party liability of the buyer

It is quite customary in commercial contract law that a buyer has already resold the goods to another customer at the time when said buyer made the original purchase. In such case the buyer will be liable toward his customer in case of the seller's non-performance as were the case in a protective foil case, where a buyer had bought 7.500 square meters of protective foil which were to be incorporated into products which the buyer had to deliver to one of his customers. The protective foil later turned out to be non-conforming. The buyer paid his customer for the expenses of curing the products and directed a claim for reimbursement towards the seller. The claim was granted in first instance but subsequently dismissed by the appellate court. Finally, the German Supreme Court reversed the appellate court's decision, granting the buyer's claim. The seller could thus not escape the buyer's claim for reimbursement, as it was foreseeable for the seller that the protective foil were to be incorporated into the buyer's products.[133] In the already above mentioned case regarding the sale of plastic carpets, in which the buyer were awarded damages for sales and marketing costs, the buyer were also awarded damages for his loss resulting from third party liability because he could not deliver goods. The court reasoned that such damages could be claimed because the buyer, during the duration of the import agreement, which was abruptly and unjustly cancelled by the seller, had committed himself to delivering the goods to a third party and the seller was aware of this commitment.[134] When goods are sold to commercial traders, it can generally be assumed that the seller will be aware that delivery of defective goods will lead to the buyer becoming liable to his customers.[135] However, the seller will only become liable towards the buyer for third party damages if the purpose of the goods were perceptive to the seller, and in case the buyer were indeed liable toward a third party.[136]

[132] Brunner, Gottlieb, Commentary, p. 524, section 33-34; Schlechtriem & Schwenzer, Commentary, p. 1080-1081, section 56 and 60
[133] CISG-online 353, German Supreme Court, Germany, 25 November 1998 (Foil case I)
[134] Unilex-726, Helsinki Court of Appeals, Finland, 26 October 2000 (Plastic Carpet Case)
[135] Schlechtriem & Schwenzer, Commentary, p. 1080, section 58
[136] Brunner, Gottlieb, Commentary, p. 528, section 42

Penalties

It is not unusual that a buyer will have entered into a subsequent contract with a customer, in which the customer has the right to apply penalties if the buyer does not meet his contractual obligations. It is possible that such penalties could be recovered as damages under Article 74 insofar as such were foreseeable to the seller.[137] Furthermore, contractual penalties must be reasonable, in accordance with the trade usage of the parties or in accordance with the trade practices of the particular industry.[138] In a case regarding the sale of natural stones, the seller was sued for damages in relation to a disagreement on the time of delivery. The buyer had incurred penalties from a third-party contractual relationship and sought to claim these penalties as damages, stating that the penalties had occurred because of late delivery by the seller. The court cited that "*[…] consequential damages of a non-compliance can include so-called liability damages, which result from the breach of contract making the credible third party liable, which in the case of delays may also include the effect of a contractual penalty*."[139] However, even though third-party contractual penalties would thus generally be recoverable in this case, such could not be awarded because the penalty clause contained in the subsequent construction contract was too disadvantageous to the buyer.[140] In another case regarding the sale of cereals and cereal preparations, penalties claimed by the buyer were deemed to be unforeseeable to the seller, because these penalties were incurred by a trading company which had entrusted the buyer to conclude sales contracts with the seller on the trading companies behalf. The reasoning for the above being that the contractual relationship in which the trading company had incurred penalties were concluded following the conclusion of contract between the buyer and the seller, and the penalties were thus not foreseeable to the seller at the time at which the contract were concluded.[141] While contractual penalties suffered by a buyer thus generally can be considered recoverable, all circumstances regarding the case must be taken into consideration.

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[137] Schlechtriem & Schwenzer, Commentary, p. 1070, section 33; Brunner, Gottlieb, Commentary, p. 528, section 42

[138] Schlechtriem & Schwenzer, Commentary, p. 1080, section 58; Brunner, Gottlieb, Commentary, p. 528, section 42

[139] CISG-online 1092, District Court Hamburg, Germany, 21 December 2001 (Natural stones "Serpentin Classico" case), section 45

[140] CISG-online 1092, District Court Hamburg, Germany, 21 December 2001 (Natural stones "Serpentin Classico" case)

[141] Schlechtriem & Schwenzer, Commentary, p. 1080, section 58, note 192; CISG-online 1600, China International Economic & Trade Arbitration Commission (CIETAC), Arbitration, 29 September 2004 (India rapeseed meal case)

Third party liability of the seller

As mentioned above, it is possible that the buyer can claim third-party liability as damages if he cannot deliver goods in case of late delivery by the seller or in case the seller has delivered non-conforming goods. However, the possibility of claiming third-party liability as damages applies vice versa should the buyer refuse to take delivery of goods. In such case the seller might become liable toward his suppliers in case he is forced to terminate supplier contracts. In a case regarding the sale of hearing implants, the buyer failed to take delivery even after the delivery period had been extended. The seller was forced to pay compensation to his supplier because the buyer refused to take delivery, and the court subsequently allowed the seller to claim the compensation as damages being that the buyer "*[…] was also able to foresee that the plaintiff would be liable to pay compensation to its own supplier if the implants were not accepted.*"[142]

Third party liability for death or personal injury caused by the goods

As noted in the above section regarding the scope of application of Article 74, death or personal injury caused by defective goods does not fall within the scope of the CISG. Article 5 of the CISG explicitly state that 'This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.' However, it is disputed whether the seller can be held liable for pecuniary loss suffered by the buyer as a result of death or personal injury caused by the goods to the buyer's customers. At first glance, indemnification of such damage may be considered to be death or personal injury caused by the goods to 'any person'.[143] This initial view and opinion is supported by several scholars.[144] The opposing view is that indemnification of such damage is indeed claimable under Article 74, being that the aggrieved buyer in such a situation would simply be claiming pecuniary damages on the basis of a economic loss. It is argued that such interpretation is not in dispute with Article 5, being that the third party have already been compensated by the buyer for his loss and is thus not in need of further protection.[145] In a particular case which support the latter view, a buyer had purchased a veneer cutting machine which were to be installed at a veneer processing unit of a third-party sub-purchaser. After the machine was put into operation, an accident occurred in which a worker died, and several others were injured. In addition to the costs of repairing the defect machine, the buyer held that the seller was to indemnify him for all damage claims raised by the sub-

[142] CISG-online 86, District Court Aachen, Germany, 14 May 1993 (Hearing implants case)
[143] CISG-AC, Opinion 12, Comment 2.3.1
[144] CISG-AC, Opinion 12, Comment 2.3.1, note 15
[145] CISG-AC, opinion 12, comment 2.3.2

purchaser. The court noted that the claim was keyed to the payment of money, and it was thus determined that the seller had to reimburse the claim for indemnification of personal injury caused by the goods to the buyer's sub-purchaser.[146] The opinion that third party liability for death or personal injury caused by the goods should be recoverable as damages is further supported by the fact that it offers a simple way of determining recourse, i.e. one is simply to determine whether a balance sheet loss have occurred or not.[147] While the above represent the current majority view, and definitely show that third party liability for death or personal injury may be claimed as damages under Article 74, further case law in support of this view is needed to determine that such claims are generally recoverable as damages.

Property damage

Article 5 of the CISG does not expressly exclude claims for damages caused by the goods to the buyer's property, and damages for such loss are thus claimable under Article 74.[148] Property damages are generally foreseeable insofar as the goods were used for their intended purpose, and no extraordinary events occurred for which the seller had no liability.[149] In a case regarding the sale of a container filled with salt water for weightless floating, the buyer claimed that the container had leaked and thus caused damage to his house. The buyer refused to pay the agreed sales price and the seller sued the buyer for the outstanding balance. The court found that the buyer, even though property damage was generally claimable under the CISG, could not claim said damages because he had failed to do so within reasonable time.[150] Other examples of claimable property damage include loss of production facilities due to fire caused by a machine, loss resulting from the deterioration of semi-finished products caused by a faulty machine or loss of raw material that has been combined with non-conforming materials.[151]

Cost associated with hiring additional staff

If the seller has delivered non-conforming goods and additional staff must be hired in order to deal with and handle the non-confirming goods, the expenses associated herewith may be

[146] CISG-online 74, Court of Appeal Düsseldorf, Germany, 02 July 1993 (Veneer cutting machine case); The decision is also mentiond in UNCITRAL CISG Case Law Digest (2016), Article 74, paragraph 17
[147] Schlechtriem & Schwenzer, Commentary, p. 1070-1071, section 33
[148] CISG-AC, Opinion 12, Comment 3.1.1; UNCITRAL CISG Case Law Digest (2016), Article 74, p. 335, section 18
[149] Brunner, Gottlieb, Commentary, p. 530, section 46
[150] CLOUT case No. 196, Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995 (Floating Centre Case)
[151] Brunner, Gottlieb, Commentary, p. 530, section 46; Schlechtriem & Schwenzer, Commentary, p. 1071-1072, section 37

claimed as consequential damages insofar as the need for additional staff is caused by the breach of contract and this was foreseeable to the seller.[152] In a case regarding defective Toshiba products, in which the buyer claimed damages for additional expenses in relation to handling the defective goods, the Federal Judge cited: "*I accept that the costs of rectifying defective or non-conforming goods can be a head of damage under Article 74 of the CISG, either because they operate to reduce the profit on the goods or because they are incurred as a consequence of the breach.*"[153] The judge found that time spend by the permanent staff in relation to visiting customers to rectify or recover the defective goods could not be claimed as a loss, because the buyer failed to prove that said time would have been spend on other profitable activities. However, the expenses incurred in relation to hiring 28 additional staff members needed to handle complaints generated by epidemic faults could be claimed as damages, because these expenses would not have incurred but for the non-conforming products.[154]

Third party procedural or extra-judicial costs

Legal costs associated with third party disputes are generally foreseeable and claimable as damages under Article 74 if such costs represent a loss suffered by the aggrieved party as a result of the breach of contract. The principle of equality of the CISG, after which the same remedies must be available to the buyer and the seller, is not violated in this case because the contract is breached whether the defendant is successful or not.[155]

Loss of goodwill or reputation

A breach of contract may force the aggrieved party to eliminate subsequent contracts for which he may not only incur third party liability but also a loss of goodwill or reputation. It is not impossible to imagine that possible customers would be reluctant to enter into a new contract with the aggrieved party, or that word would spread in the particular industry that the aggrieved party is unreliable and cannot be trusted which could reduce future business volume. According to the principle of full compensation upon which Article 74 of the CISG is based, such loss may indeed be recoverable insofar as the loss was foreseeable to the party in breach. It is hard to argue that loss of goodwill or reputation as a result of a breach would have been unforeseeable

[152] Schlechtriem & Schwenzer, Commentary, p. 1071, section 34
[153] CISG-online 2158, Federal Court of Australia, Australia, 28 September 2010 (Castel Electronics Pty Ltd v. Toshiba Singapore Pte Ltd), section 174
[154] CISG-online 2158, Federal Court of Australia, Australia, 28 September 2010 (Castel Electronics Pty Ltd v. Toshiba Singapore Pte Ltd)
[155] Schlechtriem & Schwenzer, Commentary, p. 1071, section 35

to the breaching party at the time of conclusion of contract, given that the basic purpose of all business transactions is to make a downstream profit. Such loss is thus at first glance arguably foreseeable to the party in breach and recoverable as damages.[156] The recovery of loss of goodwill or reputation as damages is further supported by Article 7.4.2 of the UNIDROIT principles, according to which the aggrieved party must be compensated for 'any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.'[157]

Loss of goodwill and reputation can be difficult to measure, and because Article 74 only allow for the compensation of 'a sum equal to the loss', the aggrieved party must be able to prove, with reasonable certainty, that he has suffered a financial loss because of the breach.[158] In a case regarding the sale of a specific brand of shoes, the seller had breached the contract as he refused to deliver the goods in accordance with the contract. The buyer was late in supplying his retailers and over 2.000 shoes were therefore returned to the buyer who filed a claim towards to seller for the unsold shoes and loss of brand image. The buyer was awarded damages for the unsold shoes and brand image by the Commercial Court of Vienne but the seller appealed. The Court of Appeal upheld the damage claim regarding the unsold shoes, however, the damages awarded for loss of brand image was overturned because no loss of business could be proved.[159] The buyer was thus not entitled to loss of goodwill because he could not prove that the breach of contract had led to a financial loss of business. In a case regarding the supply of art books the court cited: "*While the «good will-damage» suggested by the buyer can certainly be compensated under the CISG, it also needs to be substantiated and explained concretely. However, a connection between the binding costs and a «good will-damage» was neither submitted by the buyer, nor is it in any way evident.*"[160] Finally, in a case regarding non-conformity of textile dye, in which the buyer claimed damages for loss of reputation, the Appellate Court noted that reputational damages could indeed be claimed under Article 74 of

[156] Zeller, Damages, p. 123; Schlechtriem & Schwenzer, Commentary, p. 1071, section 36; Schwenzer & Hachem, Scope of Damages, p. 98; Brunner, Gottlieb, Commentary, p. 519, section 21; CISG-AC, Opinion 6, Comment 7.1; UNCITRAL CISG Case Law Digest (2016), Article 74, paragraph 18
[157] UNIDROIT Principles, Article 7.4.2(1)
[158] CISG-AC, Opinion 6, Comment 7.2
[159] CISG-online 574, Court of Appeal Grenoble, France, 21 October 1999 (Calzados Magnanni v. Shoes General International S.a.r.l.)
[160] CISG-online 488, Commercial Court Canton Zurich, Switzerland, 10 February 1999 (Art books case)

the CISG, however, the buyer did not provide evidence of any loss of clients or deterioration of image. For this reason, the claim was "*[…] doomed to failure.*"[161]

Not only is financial loss suffered in the form of loss of goodwill or reputation hard to prove, it is also very difficult to define. Examples of loss of goodwill or reputation include loss of future profits, loss of business reputation, loss of commercial image and customer retention or loss of business interest.[162] Because loss of goodwill or reputation is so hard to define, some courts have demanded a high level of proof, as could be seen in the above described art books case where the loss of goodwill had to be explained concretely.[163] The demand for a high level of proof was further substantiated in a case regarding the sale of video recorders, in which the buyer claimed damages for loss of reputation. Such losses could however not be awarded because the buyer could not prove that the damaged reputation had harmed his sales quotas, and because the buyer was not able to calculate the exact loss caused by the damaged reputation. Furthermore, the court cited that "*A damaged reputation is completely insignificant as long as it does not lead to a loss of turnover and consequently lost profits. A businessperson runs its business from a commercial point of view. As long as it has the necessary turnover, it can be completely indifferent towards its image.*"[164] Loss of reputation or goodwill is thus of little concern to the aggrieved party if the loss does not convert to financial damage. A claim for loss of goodwill or reputation should however not be denied simply because such a claim is too hard to prove as this would conflict with the principle of full compensation and place an insurmountable burden upon the aggrieved party. As mentioned in the previously examined Hewlett-Packard France v. Matrox Graphics Inc. case, any loss must indeed be proven beyond reasonable certainty, as well as the extend of such loss, however, not with mathematical precision.[165] Certain elements that can be considered when calculating loss of reputation or goodwill is the size of the company, the applicable market, the trademark value of the company and the calculated costs of re-establishing the lost goodwill or reputation.[166]

Loss of profit from lost business transactions can serve as a way of calculating loss of goodwill or reputation, however, the aggrieved party cannot be awarded both as damages as such would

[161] CISG-online 338, Court of Appeal Barcelona, Spain, 20 June 1997 (Dye for clothes case)
[162] CISG-AC, Opinion 6, Comment 7.3
[163] CISG-online 488, Commercial Court Canton Zurich, Switzerland, 10 February 1999 (Art books case)
[164] CISG-online, 560, District Court Darmstadt, Germany, 09 May 2000 (Video recorders case), p. 5
[165] CISG-online 4876, Superior Court of Québec, Canada, 10 January 2020, (Hewlett-Packard France v. Matrox Graphics Inc.), p. 6, section 35
[166] Schlechtriem & Schwenzer, Commentary, p. 1071, section 36

result in double compensation.[167] In the above-mentioned video recorders case, the court cited 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 in reputation.*"[168] Faced with the possibility of claiming both heads of damage, the aggrieved party must thus chose upon which he wishes to build his claim. Specific circumstances may however allow an aggrieved party to claim loss of goodwill or reputation in addition to loss of profit. In particular, it has been suggested that if a seller's breach of contract causes the buyer's business to fail, then the buyer might be able to recover lost profit up until the date of failure, and then damages associated with the destruction of the business which may include lost profits and goodwill.[169] While the above present an interesting conundrum, such has not yet been tried and tested in CISG cases.

Disproportionate loss

According to the black letter wording presented in Article 74 of the CISG, an aggrieved party must be compensated for a sum equal to the loss suffered. If one were to assume that extraordinary losses could be proven with reasonable certainty and that the probability of extraordinary losses were clearly foreseeable to the party in breach at the time of conclusion of contract, the principle of full compensation must apply.[170] However, if full compensation is always a foregone conclusion, a disproportionate (but justified) compensation claim for lost profit equal to 15-20 times the value of the sale might make the party in breach go bankrupt. While the black letter wording of the Convention would generally allow such a claim, the final court ruling and result might differ depending on the jurisdiction in which the case is to be decided because the outcome is highly dependent on the judicial philosophy of the court in question.[171] All circumstances considered, most courts or arbitrators would be reluctant to force the party in breach to shoulder such a claim even if the possibility of such a claim was clearly foreseeable at the time of conclusion of contract. It has been suggested that the matter be solved by way of four different possibilities: 1) Award the disproportionate compensation and comply with the black letter wording of Article 74, 2) use 'covert tools' to characterize a part of the otherwise foreseeable loss as unforeseeable or otherwise require that disproportionate loss

[167] Brunner, Gottlieb, Commentary, p. 519, section 21
[168] CISG-online, 560, District Court Darmstadt, Germany, 09 May 2000 (Video recorders case), p. 5
[169] CISG-AC, Opinion 6, Comment 7.5
[170] Brunner, Gottlieb, Commentary, p. 516, section 13
[171] Lookofsky, Joseph M., Consequential Damages in CISG Context, 19 Pace International Law Review (Spring 2007/1), p. 78-80

be proven with higher certainty, 3) consider liability for disproportionate loss as a matter which is governed by but not expressly settled in the CISG, thereby solving the issue by way of the principles on which the CISG is based or finally, 4) solve the conundrum by way of private international law.[172]

It is argued that particularly German jurists would be inclined to follow possibility 1 insofar as the loss could be proven with reasonable certainty. However, the CISG mentions nothing about the amount of certainty required, allowing courts and arbitrators to draw their own conclusions on the subject. Most courts and arbitrators, some German jurists notwithstanding, would therefore likely still want to split the disproportionate loss by way of using whatever tools available because full compensation, in most instances, would neither be just nor right.[173]

The second option of using covert tools to characterize a part of the otherwise foreseeable loss as unforeseeable or otherwise require that disproportionate loss be proven with higher certainty has been used in at least one instance. In the art books case mentioned above, the court the cited that "*The [party in breach] is only liable for further, extraordinary loss of profit if [the aggrieved party] has pointed out the risk of that particular type of loss and if it was ascertained that the [party in breach] is willing to bear this additional risk.*"[174] The loss was thus limited not because it was completely unforeseeable, but because the buyer had failed to make the necessary submissions.

Considering the matter as governed by but not settled by the CISG seems like a straightforward option. Afterall, it could be argued that the principle of reasonableness could be easily applied to most cases. However, being that the principle of reasonableness is not the only principle upon which courts are arbitrators could draw to settle disproportionate claims, and that courts and arbitrators of different jurisdictions might choose different principles upon which to base their decision, the above solution would hardly promote uniformity.

Finally, while solving the conundrum by way of private international law seems counter-intuitive as to the very purpose of the CISG, and has furthermore been ruled out as a possibility by German doctrine, it nevertheless might seem like the opportune solution to some courts or arbitrators. In a case regarding the non-conformity of a large block machine, the buyer

[172] Lookofsky, Consequential Damages, p. 80
[173] Lookofsky, Consequential Damages, p. 82
[174] CISG-online 488, Commercial Court Canton Zurich, Switzerland, 10 February 1999 (Art books case), p. 12, section h

demanded damages for the cost of repair and loss of production. While the arbitral tribunal held the seller liable for the buyer's repair costs and loss of profit, the repair costs were limited to some extend because the buyer failed to fully mitigate his loss. Furthermore, the foreseeable loss was reduced by reference to the Danish Liability Act which allows for the limitation of liability for disproportionate loss in article 24.[175]

While all the above options present different solutions to the same conundrum, there can be no clear conclusion as to the most favorable. Such depend on whether the one's feet is firmly planted in the CISG or whether one would rather resort to domestic law and each option thus present a possible solution.[176] Although the above can seem unsatisfactory, the CISG have no supranational Court of Justice which can make preliminary rulings and cases are thus concluded by courts and arbitrators which may resort to and rely on different judicial philosophy. As a result, the national courts and arbitral tribunals in the CISG contracting states sometimes resemble members of an orchestra without a conductor, and while there have been examples of uniform problem solution, the CISG musicians do not always play the same tune.[177] Disproportionate loss is therefore both awardable and limitable under the CISG in one way or another, however, no conclusion can be drawn as to a definitive approach which must be used to solve a disproportionate loss conundrum.

4.3.5 Non-pecuniary loss

Non-pecuniary loss is non-economic loss which still affect the individual's enjoyment of life. The Convention does not expressly exclude non-pecuniary loss and immaterial losses may thus be recoverable if such have become part of the contract and if such have been subsequently suffered as a consequence of a breach. As examined above, immaterial damages like loss of goodwill or loss of chance which at first glance might seem to be non-pecuniary may indeed be pecuniary after all.[178] However, traditional non-pecuniary damages such as pain and suffering, mental distress, psychological injury and loss of amenities cannot be claimed as damages under

[175] Lookofsky, Consequential Damages, p. 84; CISG-online 2154, Ad hoc Arbitral Tribunal, Denmark, 10 November 2000 (Construction Acton Vale Lteé v. KVM Industrimaskiner A/S)
[176] Lookofsky, Consequential Damages, p. 85
[177] Lookofsky, Understanding the CISG, p. 35
[178] Schlechtriem & Schwenzer, Commentary, p. 1073, section 41; Schwenzer & Hachem, Scope of Damages, p. 100

Article 74, being that these flow from death or personal injury for which recovery of damages is excluded in Article 5.[179]

4.3.6 Pre-contractual liability and damages

General pre-contractual liability

Pre-contractual liability occurs when a party to negotiations is held liable for matters which have occurred before the parties have entered into a contract. A party to negotiations might suffer a loss if the other party suddenly brake of negotiations after having acquired confidential knowledge about the aggrieved party's trade practices. Such unjustified withdrawal from negotiations is recognized and delt with differently in domestic law systems depending on the jurisdiction of the aggrieved party in question. However, it has been sparsely discussed whether pre-contractual damages can generally be claimed under the CISG.[180] It has been argued that the scope of the Convention must be allowed to reach as far as possible, hereunder allowing pre-contractual damages to be claimed, in order to fulfill the purpose of uniformity by way of removing the legal uncertainty connected with resorting to the domestic laws of the different contracting states.[181] On the contrary, it has also been stated that such expansion of scope "*[…] could result in the CISG being unduly stretched or worse, unwittingly stretched beyond its scope.*"[182] Furthermore, considerations has been made as to whether good faith as mentioned in Article 7(1) of the CISG, and the principles of good faith and fair dealing applied in relation to Article 7(2) of the CISG, can be used as a basis for generally allowing for pre-contractual damages to be claimed under the CISG.[183]

Pre-contractual liability and the ability to claim pre-contractual damages is a topic neither explicitly governed nor excluded by the CISG. It is thus doubtful that the principle of good faith may be extended to pre-contractual liability without further consideration, being that the pre-contractual phase of contract formation is not clearly governed by the Convention. Furthermore, a provision regarding pre-contractual liability was originally suggested, considered, and

[179] Schlechtriem & Schwenzer, Commentary, p. 1074, section 41; Schwenzer & Hachem, Scope of Damages, p. 100; Brunner, Gottlieb, Commentary, p. 518-519, section 20
[180] Rossen et al., p. 3
[181] Rossen et al., p. 5
[182] Spagnolo, Good Faith and Precontractual Liability, p. 306-307
[183] Rossen et al., p. 5; Goderre, Internatioal Negotiations, chapter 3; Spagnolo, Good Faith and Precontractual Liability, chapter 3-4

subsequently rejected by the drafters of the CISG, further supporting that the scope of the CISG does not include pre-contractual liability.[184]

The scarce case law decisions which comment on the conundrum have also not been in favor of solving pre-contractual liability with regard to the CISG. In a case regarding an offer for special screws, the court found that no contract had been concluded being that the acceptance had deviated from the original offer, thus constituting a new offer. When the court had to decide on the issue of pre-contractual liability, it did so with reference to domestic law.[185] In a case regarding the sale of clathrate, in which clathrate was needed to develop and manufacture a generic anti-coagulant drug to treat blood clots, the seller had supplied the buyer with samples of clathrate as well as a reference letter in support of the buyer's FDA application. When the FDA application was approved, the buyer placed a purchase order for clathrate which was subsequently rejected by the seller who denied that he was obliged to supply the buyer. While it was concluded that the CISG did apply to the contractual relationship of the parties, the court referred to domestic law when determining whether a pre-contractual claim could be made.[186] Based on the above, courts have not yet shown willingness to support that pre-contractual liability should be governed by the CISG, resorting to domestic law whenever dealing with the conundrum.

Allowing general pre-contractual damages to be claimed under the CISG will thus require a rather extensive interpretation of the CISG based on scope and principles. It is thus widely accepted that general pre-contractual liability is not currently governed by the CISG, and that mere withdrawal from negotiations may never in of itself impose pre-contractual liability.[187] Additionally, it has been stated that *"Precontractual liability only will become an issue if courts impose a duty to act in good faith not only during the performance of a contract, but during the negotiations process as well.",*[188] and that "*Ultimately, however, it is likely that common-law theories will step into the place of the civil-law doctrine of good faith and precontractual liability will nevertheless exist under the Convention.*"[189] While no decisive conclusion as to general pre-contractual liability can be drawn, the prevailing sentiment is that such is not currently governed

[184] Rossen et al., p. 29-30
[185] CLOUT case No. 121, Oberlandesgericht Frankfurt a.M., Germany, 04 march, 1994 (Special screws case)
[186] CLOUT case No. 579, U.S. [Federal] District Court for Southern District of New York, 10 may, 2002 (Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al.)
[187] Rossen et al., p. 29-30
[188] Goderre, Internatioal Negotiations, p. 281
[189] Goderre, Internatioal Negotiations, p. 281

by the CISG. However, given the fact that the CISG is a living instrument which evolve over time, it is possible that general pre-contractual liability may be governed by the CISG in the future.

Revocation of an irrevocable offer

As opposed to general pre-contractual liability, circumstances change when dealing with revocation of an irrevocable offer which is governed by Article 16(2) of the CISG. If a seller has presented a buyer with a clearly irrevocable offer in accordance with Article 16(2)(a) or an implied irrevocable offer in accordance with Article 16(2)(b) and the seller then revokes the irrevocable offer, a general right is breached which implies that there must be an available remedy. The question thus become whether the aggrieved party can claim damages with regard to the CISG being that no contract has yet been formed.[190]

According to Article 4 of the CISG, the Convention only governs the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. Being that an irrevocable offer is just that, an offer, no contract has yet been formed after such have been presented. However, since the revocation of an irrevocable offer is a legal nullity, the buyer may ignore an unjust revocation, accept the offer, and proceed to claim damages in case of non-performance.[191] The problem now become that the buyer cannot claim damages for the revocation of the irrevocable offer, because the provisions of CISG Articles 71-77 require breach of contract. As no clear remedy is provided by the Convention, the gap must thus be filled by way of Article 7(2) and the principles upon which the CISG is based or by way of domestic law.[192]

Since the seller in the above-mentioned situation have showed unwillingness to perform the contract by way of trying to revoke the offer, the aggrieved party may resort to Article 72(1) of the CISG, after which he may declare the contract avoided being that it is clear that the other party would commit fundamental breach of contract by way of non-performance. Having avoided the contract, the aggrieved party can thus proceed to recoup losses in accordance with Article 81(2) of the CISG, after which a party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. Being that the aggrieved party has partially performed the contract by way of accepting the offer, the costs associated with acceptance can thus be claimed as damages. By ignoring the unjust revocation, the aggrieved party can rely on all options as to contract

[190] Rossen et al., p. 3-4; Zeller, Walters, Precontractual Damages, p. 44
[191] Zeller, Walters, Precontractual Damages, p. 50
[192] Rossen et al., p. 4; Zeller, Walters, Precontractual Damages, p. 50-51

formation and full compensation. The aggrieved party is thus able to claim pre-contractual damages for the revocation of an irrevocable offer, because said revocation does not barre the aggrieved party from accepting the offer and thereby relying on the provisions of the CISG.[193]

4.3.7 Disgorgement of profits

Disgorgement of profits concerns a situation where the party in breach is stripped of any gains in profit that said party has accrued as a result of breach of contract. While traditional damages awarded under Article 74 of the CISG is concerned with the position of the aggrieved party, disgorgement of profits is thus concerned with economic position of the party in breach. Being that the CISG is concerned with compensating the aggrieved party and that disgorgement can be viewed as a punitive measure of which the CISG is not concerned, it has been debated whether a claim for disgorgement of profits can be granted under Article 74, or whether disgorgement should be excluded from the scope of the Convention entirely. However, disgorgement can be viewed not only as punitive measure but also as a method for calculating gain-based damages.[194]

Disgorgement of profits is thought to motivate a contracting party to fulfill his contractual obligations and thereby safeguard the principle of pacta sunt servanda.[195] It can be argued that disgorgement of profit as a remedy is in line with the interpretation principles of Article 7 of the CISG regarding the observance of good faith, and Article 7 can thus be considered as an argument in favor of allowing disgorgement of profits to be claimed under the Convention. Furthermore, while it might seem that disgorgement of profit is in conflict with Article 74 of the CISG, being that Article 74 is concerned with the loss of the aggrieved party and disgorgement of profit is concerned with punishing the breaching party, circumstances may arise where it is necessary to target the profits of the party in breach in order to calculate loss.[196]

First, if the seller breaches a contract by selling the same goods to another buyer, but at a higher price and thus realizing a profit, the loss suffered by the aggrieved buyer will generally be

[193] Zeller, Walters, Precontractual Damages, p. 50-51
[194] Baş-Süzel, Kurtulan-Güner, Disgorgement of Profits, p. 21-22; Schlechtriem & Schwenzer, Commentary, p. 1075, section 45; Schwenzer & Hachem, Scope of Damages, p. 100-101; Brunner, Gottlieb, Commentary, p. 518, section 18
[195] Breach of contract must not pay
[196] Baş-Süzel, Kurtulan-Güner, Disgorgement of Profits, p. 23; Schlechtriem & Schwenzer, Commentary, p. 1076, section 45; Schwenzer & Hachem, Scope of Damages, p. 101

calculated as the price of a cover transaction or the current market price of the goods. However, if such price is incalculable without taking the second sale into account due to unique or non-substitutable goods, disgorgement of profits could be a starting point for calculating the loss of the aggrieved party. Secondly, if a seller is contractually obliged to manufacture goods under certain standard quality conditions and the seller subsequently produces the goods in conditions which are considerably worse than what has been agreed, thereby lowering his production costs and increasing profit, it is possible that the buyer can claim a sum equal to the amount saved by the seller. Finally, if it has been agreed that the buyer must not sell the acquired products in Europe because the seller has exclusive contracts with its European customers, and the buyer then sells the goods in Europe anyway, the seller may seek the proceeds of the buyer as damages for breach of contract. It is argued that the Convention must not prevent recovery of the proceeds of the breaching party in the above-described situations because the proceeds may be a resemblance of what the aggrieved party has actually lost. In the first situation, the second sale can used as a resemblance of the actual current market price. In the second situation, the manufactured goods resemble goods produced under lessor conditions and thus should therefore be valued at less, the difference which could be the basis of a claim. In the third situation, the unjustified sale in the European market can be viewed as loss of profit of the seller, and the profits made can therefore be used as a starting point for calculating damages. It is therefore possible that disgorgement of profits can be used in the above-mentioned situations as a subsidiary procedure to calculate damages in accordance with Article 74 and the principle of full compensation.[197]

In addition to the above, it is argued that if one were to claim that disgorgement of profit could not be claimed under the CISG, this would severely undermine the goal of uniformity insofar as "*[…] courts might resort to concurring domestic remedies in order to solve these currently virulent issues*".[198] Some scholars also argue that "*[…] claiming that there is an external gap in the CISG that should be filled in accordance with national law rules should be considered the very last resort. If an alternative solution can be found within the limits of the Convention, this should be the principal path to take. […] Therefore, considering the issue of disgorgement of profits as a question governed by (but not expressly settled by) the Convention would be in*

[197] Baş-Süzel, Kurtulan-Güner, Disgorgement of Profits, p. 33-35; Schlechtriem & Schwenzer, Commentary, p. 1076, section 45; Schwenzer & Hachem, Scope of Damages, p. 101-102
[198] Schwenzer & Hachem, Scope of Damages, p. 102

line with the goal of promotion of uniformity."[199] Finally, if a party in breach were allowed to keep the gains associated with breach of contract in cases where a loss is difficult or perhaps impossible to calculate, the only remedy available to the aggrieved party would be avoidance of contract, which would not only be unjust and legitimate wrong, but also be against the principles of equality and good faith.[200] While it thus can be argued that disgorgement of profit could be within the grasp of the CISG's scope, this needs to be backed by future case law.

4.4 Generally foreseeable damage

While all types of damages that an aggrieved party suffer as a consequence of a breach of contract is claimable under Article 74, said damages will be limited to the foreseeability limitation in Article 74(2), after which the damages will be limited to those which the party in breach foresaw or ought to have foreseen at the time of conclusion of contract. All claims for damages must pass the foreseeability limitation, but some types of damages have been deemed to be generally foreseeable, i.e. the damages ought to have been foreseen by the party in breach, whilst others require deeper analysis of the contractual circumstances. However, even if some damages have been deemed to be generally foreseeable, one must never disregard the particular circumstances of each case.[201]

Direct damages, hereunder non-performance loss which result directly from a breach, are generally foreseeable and imputable to the party in breach. As described in previous sections above, direct damages can be defined as the market value of the unrealized contractual expectation, which can be calculated as the gap between the value of the performance which has actually been received and the value of that which should have been received.[202] Direct damages include the reduction in value of damaged goods, but also costs associated with reasonable measures taken in order to place the aggrieved party in the same position that he would have enjoyed if the breach had not occurred, hereunder repairing the goods, rental expenses associated with renting substitute goods and costs associated with taking out a loan in case of down payment. Generally foreseeable direct damages also include exchange rate or currency loss suffered by seller in case of late payment.[203] Direct damages or non-performance

[199] Baş-Süzel, Kurtulan-Güner, Disgorgement of Profits, p. 36
[200] Baş-Süzel, Kurtulan-Güner, Disgorgement of Profits, p. 36-37
[201] Schlechtriem & Schwenzer, Commentary, p. 1079, section 53
[202] See section 4.3.1 Direct Damages
[203] Schlechtriem & Schwenzer, Commentary, p. 1080, section 54

loss is generally foreseeable because the party in breach almost always would have been able to foresee that such would have been a possible consequence of a breach at the time of the conclusion of contract. First and foremost, the seller will generally be aware that a commercial buyer will have contractual expectations in relation to the conformity of the goods. Even if the quantity and quality of the goods have not been discussed between the parties, delivered goods must be fit for the purposes for which goods of the same description would ordinarily be used in accordance with Article 35(2)(a) of the CISG. If the seller thus delivers damaged goods, or goods of lessor quantity or quality which cannot be used for the purposes for which such goods of the same description would normally be used, it is indisputable that the seller ought to have foreseen that the buyer would suffer a loss.

In addition to direct damages, incidental damages may be deemed as being generally foreseeable insofar as these were reasonable under the particular circumstances.[204] According to Article 77 of the CISG, 'the 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. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.' Being that the aggrieved party might lose his right to claim full damages in case of breach insofar as he does not take reasonable measures to mitigate damages, it is indisputable that such reasonable measures ought to be foreseeable and thus claimable as damages by the aggrieved party. Furthermore, "*Measures taken by the promise which were not foreseeable are likely to already violate the duty to mitigate losses under Article 77*".[205] Reasonable mitigation cost spent by an aggrieved party by repairing defect goods, renting substitute goods in case of late delivery, or taking out a loan in case of late payment, are thus generally foreseeable to the party in breach because the aggrieved party are obliged to spend these costs or forfeit a part of his claim.[206]

While direct and incidental loss is generally deemed to be foreseeable to the party in breach, circumstances change when dealing with consequential damages. The foreseeability limitation is of utmost importance when dealing with consequential damages because the extend of such damages is highly dependent on the contextual circumstances.[207] However, taking such contextual circumstances into account, there are certain situations where different types of

[204] Schlechtriem & Schwenzer, Commentary, p. 1080, section 55
[205] Schlechtriem & Schwenzer, Commentary, p. 1080, section 55
[206] See section 4.3.3 Incidental damage
[207] Schlechtriem & Schwenzer, Commentary, p. 1080, section 56

consequential damages may be deemed as being generally foreseeable. If merchantable goods are sold to a commercial trader, and the contract is breached because goods are not delivered on time or the delivered goods are non-conforming with the contract, the breaching seller then ought to have been aware that such goods were to be resold at a profit. Loss of profit can thus in some situations be deemed as being generally foreseeable to the party in breach, not only because the goods themselves imply that such were to be resold, but also because of the fact that the general motive behind commercial trading is to make a profit. Additionally, being that loss of profit is expressly mentioned in Article 74, such is always claimable as damages insofar as the loss can be calculated with reasonable certainty.[208] Other types of consequential loss, hereunder third party liability or penalties incurred by the buyer or the seller as a result of a breach, property damages caused by the goods, cost associated with hiring additional staff, third party procedural or extra-judicial costs and loss of goodwill or reputation are all types of consequential loss that may be deemed to be foreseeable depending on the particular circumstances of the case.[209]

[208] Schlechtriem & Schwenzer, Commentary, p. 1080, section 57, see also section 4.3.2 Consequential or indirect damage

[209] Schlechtriem & Schwenzer, Commentary, p. 1081, section 58-59, see also section 4.3.4 Consequential or indirect damage

5. Conclusion

The purpose of this thesis was to examine what types of damages that could be claimed under Article 74 of the CISG. As a starting point, Article 74 allow the aggrieved party to claim full compensation in the form of damages for any sum equal to the loss suffered as a consequence of a breach subject to the foreseeability limitation. The loss, as well as the extend of such loss, must be proven beyond reasonable certainty, but not with mathematical precision. The answer is thus not all black and white, as the ability to claim certain types of damages will depend solely on the particular circumstances surrounding each case. However, damages which flow from death or personal injury as a result of defective goods, punitive damages, and third-party claims, are not claimable under Article 74 due to restrictions of the additional provisions of the Convention.[210]

The types of damages that may be claimed under Article 74 can generally be divided into groups of direct, incidental and consequential damages, hereunder loss of profit.

Direct damages, defined as the market value of the unrealized contractual expectation, calculated as the gap between the value of the performance which has actually been received and the value of that which should have been received, are always foreseeable and imputable to the party in breach. A reduction in value of damaged goods and costs associated with reasonable measures taken in order to place the aggrieved party in the same position that he would have enjoyed if the breach had not occurred, hereunder repairing the goods, rental expenses associated with renting substitute goods and costs associated with taking out a loan in case of down payment are all examples of direct damages.[211]

Incidental damages, defined as all the reasonable expenses incurred by the aggrieved party as a result of the other party's breach of contract, hereunder the loss associated with measures taken by the aggrieved party to mitigate damages or pursue rights, are recoverable insofar as they were foreseeable to the party in breach. However, being that the aggrieved party, in accordance with Article 77 of the CISG, would lose his right to claim full damages in case of breach insofar as he does not take reasonable measures to mitigate damages, it is indisputable that such reasonable measures ought to be foreseeable and thus claimable as damages by the aggrieved

[210] See: Section 4.1 Purpose and intend and section; Section 4.2 Sphere of application and interpretation of Article 74
[211] See: Section 4.3.1 Direct damage

party. Expenses spent on tendering goods in vain, expenses spent on storing the goods in case a buyer refuse to take delivery, expenses associated with a bank's rejection of a cheque, costs associated with preserving or modifying an undelivered machine so that said machine can be sold to another buyer are all examples on incidental damages which can be claimed in case of the buyer's non-performance. Additional transport cost due to delivery of unusable goods, costs associated with delivery of substitute goods, costs associated with sorting out the non-conforming goods, costs of storing and preserving non-conforming goods, costs associated with installing substitute goods, sales and marketing costs, fees associated with wasted payment because of non-conformity, third party costs of processing goods, costs in relation to opening a line of credit, costs in relation to delivering to or taking back goods from a subsequent buyer, costs associated with reimbursing subsequent buyers, travel expenses associated with going to the seller's place of business and indemnification expenses are all examples of incidental damages which can be claimed in case of the seller's non-performance. The ability to claim litigation expenses as damages under Article 74, hereunder attorney's fees and court fees, is disputed. The prevailing sentiment is that such costs are not recoverable as damages. Extra-judicial expenses can be recovered as damages insofar as they consist of reasonable and justified acts of the aggrieved party which had to be taken in order to assert his rights and mitigate damages in regard to the breach.[212]

Consequential damages, defined as losses which incur in addition to those caused directly by the non-performance, are just as recoverable under Article 74 of CISG as direct or incidental damages subject to the foreseeability limitation. As opposed to direct and incidental damages, whether a consequential loss may be awarded as damages is solely dependent on the contextual circumstances. Third party liability and penalties, incurred by the buyer because of the seller's non-performance, may be awarded as damages under Article 74 insofar as the purpose of the goods were perceptive to the seller, and in case the buyer was indeed liable towards a third party. Furthermore, the penalties must be reasonable, in accordance with the trade usage of the parties or in accordance with the practices of the particular industry. The possibility of claiming third-party liability as damages applies vice versa should the buyer refuse to take delivery of goods. While death or personal injury caused by defective goods does not fall within the scope of the CISG, it is disputed whether the seller can be held liable for pecuniary loss suffered by the buyer as a result of death or personal injury caused by the goods to the buyer's

[212] See: Section 4.3.3 Incidental damage

customers. While, the majority opinion is that indemnification of such damage is indeed claimable under Article 74, being that the aggrieved buyer in such a situation would simply be claiming pecuniary damages on the basis of his economic loss, further case law in support of this view is needed to determine that such claims is generally recoverable as damages. Property damages are generally foreseeable and claimable under Article 74 insofar as the goods were used for their intended purpose, and no extraordinary events occurred for which the seller had no liability. If the seller has delivered non-conforming goods and additional staff must be hired in order to deal with and handle the non-confirming goods, the expenses associated herewith may be claimed as damages insofar as the need for additional staff is caused by the breach of contract and this was foreseeable to the seller. Legal costs associated with third party disputes are generally foreseeable and claimable as damages if such costs represent a loss suffered by the aggrieved party as a result of the breach of contract. Finally, loss of goodwill or reputation may be recovered as damages insofar as the loss was foreseeable and the aggrieved party will be able to prove, with reasonable certainty, that he has suffered a financial loss. Loss of profit from lost business transactions can serve as a way of calculating loss of goodwill or reputation, however, the aggrieved party cannot be awarded both as damages as such would result in double compensation.[213]

Loss of profit is the only type of loss, which is specifically mentioned in Article 74 and is thus always claimable as damages subject to the foreseeability limitation. Loss of profit includes profits that the aggrieved party could have realized in resale, profits which is lost if the aggrieved party could not keep his business running because of the breach, predictable achievable and calculable future profits, chance of a profit (subject to the degree of provable probability), fixed costs, lost expenses paid and lost volume sales. Loss of profit, hereunder loss of chance, must however be calculated with reasonable certainty.[214]

Non-pecuniary loss is not expressly excluded by the Convention and immaterial losses may thus be recoverable if such have become part of the contract. However, traditional non-pecuniary damages such as pain and suffering, mental distress, psychological injury, and loss of amenities cannot be claimed as damages, being that these flow from death or personal injury for which recovery is excluded in Article 5.[215]

[213] See: Section 4.3.4 Consequential or indirect damage
[214] See: Section 4.3.2 Loss of profit
[215] See: Section 4.3.5 Non-pecuniary loss

General pre-contractual liability is not currently governed by the CISG, and mere withdrawal from negotiations may never in of itself impose pre-contractual liability. However, in case of revocation of an irrevocable offer, the aggrieved party can claim damages with regard to the CISG even though no contract has yet been formed because the revocation of an irrevocable offer is a legal nullity. By ignoring the unjust revocation and accepting the offer, the aggrieved party can rely on all options as to contract formation and full compensation.[216]

It cannot be concluded that disgorgement of profits, which is in conflict with Article 74 by way of being concerned with the position of the party in breach, can be awarded as damages. However, disgorgement of profits can be used in certain situations as a subsidiary procedure to calculate damages under Article 74.[217]

In conclusion, apart from direct damages, the ability to claim certain types of damages in relation to Article 74 of the CISG will depend on the particular circumstances surrounding each case, foreseeability of the damages being the main limiting factor. A party can thus significantly improve the possibility of claiming certain damages insofar as he has foreshadowed the risk of loss and voiced his concerns in the contract.

[216] See: Section 4.3.6 Pre-contractual liability and damages
[217] See: Section 4.3.7 Disgorgement of profits

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CISG-Online 2542	District Court Limburg, Netherlands, 16 April 2014, (Scheldebouw B.V. v. Hero Glas GmbH)
CISG-Online 146	Court of Appeal Hamm, Germany, 09 June 1995 (South Tyrolian windows case)
CISG-Online 368	Local Court Munich, Germany, 23 June 1995 (Tetracycline HCL case)
CISG-online 217	Court of Appeal Cologne, Germany, 08 January 1997 (Tannery machines case)
CISG-online 782	Court of Appeal Helsinki, Finland, 27 March 1997 (Butter case)
CISG-online 2025	Court of Appeal Canton Valais, Switzerland, 28 January 2009 (Glass fibre case II)
CISG-online 119	Court of Appeal Düsseldorf, Germany, 14 January 1994 (Italian shoes case XIII)
CLOUT case No. 214	Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997
CISG-online 2130	Court of Appeal Murcia, Spain, 15 July 2010 (Krane-Maschinen-Service GmbH & Co. Handels-KG v. Grúas Andaluza, S.A.)
CLOUT case No. 85	U.S. District Court, Northern District of New York, United States, 9 September 1994
CISG-online 515	Court of Appeal Hamburg, Germany, 26 November 1999 (Shamo jeans case)
CISG-online 1660	China International Economic & Trade Arbitration Commission, China, 04 April 1997 (Black melon seeds case)
CISG-online 1715	China International Economic & Trade Arbitration Commission, China, 31 October 2005 (Waste plastic case)
CISG-online 1744	China International Economic & Trade Arbitration Commission, China, 26 December 2005 (Heat transfer oil furnace case)
CLOUT case No. 427	Oberster Gerichtshof, Austria, 28 April 2000
CISG-online 2398	Austrian Supreme Court, Austria, 15 January 2013 (Indian glass mosaic tiles case)

CISG-online 510	Court of Appeal Braunschweig, Germany, 28 October 1999 (Venison case)
CISG-online 2584	District Court Tukums, Latvia, 05 May 2010 (Winter rapeseed case)
CISG-online 1328	Court of Appeal Karlsruhe, Germany, 08 February 2006 (Hungarian wheat case)
CLOUT case No. 376	Landsgericht Bielefeld, Germany, 2 August 1996
CLOUT case No. 301	Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)
CISG-online 1405	Court of Appeal Cologne, Germany, 14 August 2006 (Spanish potatoes case)
CISG-online 1444	China International Economic & Trade Arbitration Commission, China, 09 November 2005 (DVD machines case)
CISG-online 277	German Supreme Court, Germany, 25 June 1997 (South Korean stainless wire case)
CLOUT case No. 85	U.S. District Court, Northern District of New York, United States, 9 September 1994
CLOUT case No. 732	Audiencia Provincial de Palencia, Spain, 26 September 2005
Unilex-726	Helsinki Court of Appeals, Finland, 26 October 2000 (Plastic Carpet Case)
CISG-online 1620	District Court Berlin, Germany, 13 September 2006 (Aston Martin case)
CLOUT case No. 732	Audiencia Provincial de Palencia, Spain, 26 September 2005
CLOUT case No. 304	Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)
CLOUT case No. 318	Oberlandesgericht Celle, Germany, 2 September 1998
Unilex-726	Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 1998 (Steel Bar Case)
CLOUT case No. 1182	Hovioikeus hovrätt Turku Finland, 24 May 2005
CLOUT case No. 541	Oberster Gerichtshof, Austria, 14 January 2002
CISG-online 684	U.S. Court of Appeals, USA, 19 November 2002 (Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Comp)

CISG-online 201	Court of Appeal Düsseldorf, Germany, 11 July 1996 (TORQMOTOR lawn-mower engines case)
CISG-online 2799	Court of Appeal Munich, Germany, 26 October 2016 (Notice regarding non-conforming shoes case)
CISG-online 1532	Court of Appeal Canton Valais, Switzerland, 23 May 2006 (Suits case)
CISG-online 2583	District Court Munich II, Germany, 15 March 2012 (Rechargeable batteries case)
CLOUT case No. 327	Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999
CISG-online 353	German Supreme Court, Germany, 25 November 1998 (Foil case I)
CISG-online 1092	District Court Hamburg, Germany, 21 December 2001 (Natural stones "Serpentin Classico" case)
CISG-online 74	Court of Appeal Düsseldorf, Germany, 02 July 1993 (Veneer cutting machine case)
CISG-online 86	District Court Aachen, Germany, 14 May 1993 (Hearing implants case)
CLOUT case No. 196	Handelsgericht des Kantons Zürich, Switzerland, 26 april, 1995
CISG-online 2158	Federal Court of Australia, Australia, 28 September 2010 (Castel Electronics Pty Ltd v. Toshiba Singapore Pte Ltd)
CISG-online 574	Court of Appeal Grenoble, France, 21 October 1999 (Calzados Magnanni v. Shoes General International S.a.r.l.)
CISG-online 488	Commercial Court Canton Zurich, Switzerland, 10 February 1999 (Art books case)
CISG-online 338	Court of Appeal Barcelona, Spain, 20 June 1997 (Dye for clothes case)
CISG-online, 560	District Court Darmstadt, Germany, 09 May 2000 (Video recorders case)
CLOUT case No. 121	Oberlandesgericht Frankfurt a.M., Germany, 04 march, 1994
CLOUT case No. 579	U.S. [Federal] District Court for Southern District of New York, 10 may, 2002 (Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al.)

6.3 Table of International Law and Soft Law

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980
UNCITRAL CISG Case Law Digest (2016)	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition
Unidroit Principles	UNIDROIT Principles of International Commercial Contracts 2016, International Institute for the Unification of Private Law (UNIDROIT), Rome, 2016
ULIS	Uniform Law on the International Sale of Goods, The Hague, 1964
CISG-AC	The CISG Advisory Council, established in Paris, France in 2001

6.4 Table of Webpages

CISG Case Law Webpages	
Pace Law School Institute of International Commercial Law	https://iicl.law.pace.edu/
Clout case	https://www.uncitral.org/clout/
CISG-online	https://cisg-online.org/
Unilex	http://www.unilex.info/instrument/cisg
Additional webpages and specific links which have been referred too	
https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg	
https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states	
https://iicl.law.pace.edu/cisg/page/uncitral-digest-case-law-cisg	
https://www.researchgate.net/publication/325542081_Recovering_Attorneys'_Fees_under_CISG_An_Interpretation_of_Article_74	


Ordoptælling
?
Statistik:
Sider 51
Ord 18.363
Tegn (uden mellemrum) 93.748
Tegn (med mellemrum) 112.015
Afsnit 135
Linjer 1.340
Medtag tekstfelter, fodnoter og slutnoter
Luk