Damages Principles under the Convention on Contracts for the International Sale of Goods (CISG)

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Application of the CISG (especially Article 1 CISG)

In regard to the application of the CISG to business-to-business international sale of goods contracts by an arbitral tribunal, three scenarios have to be distinguished (Article 1 CISG).First, and uncontroversially, an arbitral tribunal will generally respect the choice of the CISG by commercial parties as the governing law of their sale of goods contract.Second, it is also uncontroversial that Article 1(1)(b) CISG can be applied by an international arbitral tribunal.Article 1(1)(b) dictates the application of the CISG when the rules of the private international law of the forum lead to the application of the law of a CISG Member State. Article 1(1)(b) is not a choice of law rule. It gives the CISG domestic law status and prevents any possible renvoi. Third, it is controversial, however, whether an arbitral tribunal can apply the CISG by virtue of Article 1(1)(a) CISG, which stipulates the application of the CISG if parties have not agreed on an applicable law to their contract but do have their businesses in two CISG Member States. The prevailing view is that Article 1(1)(a) of the CISG does not apply in the context of arbitration. This view is based on the understanding that the CISG is an international treaty and as such only binds the states and its organs. In other words, Article 1(1)(a) is a direction to the courts alone and not (international) arbitral tribunals.

Entitlement to damages

The buyer's entitlement to damages under Article 45(1)(b) and the seller's entitlement to damages under Article 61(1)(b) stem from the respective duties of the parties imposed by the contract, particularly the duties stated in Articles 30 and 53. Any kind of breach, even the most minor one, of a contractual duty can trigger the entitlement to damages. Also, a breach of the obligation to make restitution when unwinding the contract upon avoidance (Article 81(2)) leads to liability under Article 74.

To ascertain the particular obligations that the parties have agreed upon, arbitral tribunals are required to consider not only any written contract but also pre-contractual and post-contractual behaviour of the parties (Article 8(3) CISG) as well as trade usages between the parties and usages in the relevant industry (Article 9 CISG). The seller's duty to deliver goods in conformity with the contract (Article 35 CISG) has generated considerable jurisprudence by courts and arbitral tribunals. 'Lack of conformity' includes not only differences in quality, but also differences in quantity, delivery of an altogether different good and defects in packaging.

It should be noted that, unlike in some legal systems, the remedy of damages is available irrespective of the breaching party's fault.

Damages

Under the CISG, the obligee can choose either specific performance, price reduction, avoidance or damages as the primary remedy for a breach of the sales contract. Articles 74 et seq. do not provide a basis for an aggrieved party to claim damages. The requirements of Articles 45 and 61 have to be met for an obligee to be entitled to damages. The extent of the damages an obligee is entitled to is set out by Articles 74 et seq. In the majority of cases the remedy sought will be damages, often in addition to other remedies. The award of

damages is dealt with in four provisions of the CISG (Articles 74–77). These provisions provide the framework for the recovery of economic loss. The CISG does not contain specific guidelines for the calculation of damages. Interest is dealt with separately in Article 78. Article 79 sets out the requirements when a party is excused of its performance as a result of force majeure or hardship.

The purpose of a damages award under the CISG is clearly stated by Article 74 to be compensatory. The obligee is entitled to a sum equal to the loss caused by the breach of contract. The obligee is entitled to be put in the economic position as if the contract had been fully and correctly performed. The obligor is liable for all losses arising from non-performance, irrespective of fault, unless the obligor is exempted in accordance with Articles 79 and 80 CISG. Article 74 encompasses two principles: full compensation and limitation of liability by the foreseeability rule, and thereby strives to marry the civil law and common law traditions.

Compensation

That full compensation is the underlying damages principles is undisputed. However, the precise meaning of full compensation has yet to be determined. Jurisprudence and academic commentary have established that compensation under the CISG comprises the obligee's expectation interest (i.e., gaining the benefits from the performance), their indemnity interest (i.e., not to suffer damage to other interests as a result of non-performance), but also their reliance interest (i.e., the expenditure made in reliance on the existence of the contract). It is generally accepted that the CISG does not differentiate between pecuniary and non-pecuniary loss and that the CISG does not *per se* prohibit overcompensation (i.e., that the damages claim exceeds the performance interest).

Loss

Loss is not defined, except for Article 74 stating that loss includes loss of profits. It follows that future losses are included in the concept of loss. In accordance with the underlying core principle of the CISG, to leave the contractual relationship between the parties intact as long as possible, punitive damages are not included in the concept of loss.

Article 74 gives tribunals broad authority to award damages 'in a manner best suited to the circumstances'.

It should be noted that the CISG does not adhere as such to the doctrine of efficient breach of contract. Where the obligee has the right to avoid the contract, damages will be awarded under Article 74, despite any assertion that certain future losses would not have accrued but for the avoidance of the contract.

Categories of loss

- Direct loss – Direct loss is measured by 'the difference between the value to the injured party of the performance that should have been received and the value to that party of what, if anything, actually was received'. If the contract is avoided, direct damages are calculated pursuant to Articles 75 and 76 (i.e., based on the costs of a cover purchase or based on the market value of the goods). In cases where the obligee undertakes measures to place itself in the same position that it would have been in had the contract been properly performed, the obligee is entitled to recover the costs of those measures, provided that they were reasonable.Examples:
    - If the delivery of the goods is unjustifiably delayed and the buyer carries out reasonable measures to overcome the temporary loss and to avoid consequential damages, the buyer may be entitled to recover the expenses incurred. In particular, rental costs for a replacement good can be claimed irrespective of whether or not a replacement was actually obtained.
    - If the buyer is in possession of the defective goods but has not avoided the contract, the buyer can recover damages pursuant to Article 74 for substitute transactions. The value of the non-conforming goods has to be deducted.

- If the non-conformity of the delivered goods can be remedied, the loss can be calculated according to the necessary and reasonable expenses for the cure.
- The seller is generally entitled to reimbursement of a bridging loan if the buyer unjustifiably does not pay the purchase price in time.
- The seller is entitled to damages if, as a result of the buyer's late payment, the seller suffers loss because of change of exchange rates or currency devaluation.

- Incidental loss – Expenses that were incurred by the obligee to avoid any additional disadvantages are recoverable under Article 74 and are referred to as incidental loss. Generally, additional costs incurred by a party as a result of the other party's unjustified refusal to perform are recoverable. Article 77 (mitigation of damages) must be taken into account for all incidental losses. Examples:
  - The buyer's expenses for storing and preserving goods that have been delivered late or that are defective and are returned to the seller.
  - The buyer's reasonable expenses incurred ascertaining whether the goods are in conformity with the contract, but only if the non-conformity is actually established and notice is given to the seller.
  - The seller's expenses for storing and preserving goods that the buyer has unjustifiably rejected or has not taken delivery of to avoid greater loss.
  - The seller's expenses as a result of the shipping space provided by the buyer being unsuitable for the loading of the goods because it is dirty.
  - The seller's expenses as a result of damage to the goods from the goods being stored because the buyer had not paid in time.
- Consequential loss – Consequential loss comprises losses other than those caused by non-performance as such. Typically, consequential loss arises because of the obligee's liability to third parties as a result of the breach.
- It is controversial whether damages resulting from the buyer's liability to third parties for death or personal injury caused by the seller's defective products can be recovered under the CISG. Some courts and academic literature deny the applicability of the CISG to the recourse of the buyer in accordance with Article 5 CISG. Others, and the CISG Advisory Council, allow the buyer's claim for a consequential damage that is a result of the seller's defective product injuring a third party or his or her property. The latter view is arguably preferable since it allows the buyer to be compensated under one damages regime (i.e., that of the CISG). It avoids unnecessarily distinguishing between separate heads of the buyer's liability, namely contract, tort or property. Having to claim under different heads of damages would mean that a mixture of international law (the CISG with regard to contractual claims) and applicable domestic law (with regard to tort or property claims) would be applicable for a breach of the contract. The application of those different damages regimes has the potential to either overcompensate or undercompensate the buyer. In regard to compensating for the consequences of a breach of an international sales contract, the CISG comprises a modern damages regime that amalgamates common and civil law principles and is, therefore, preferable.Academic literature and jurisprudence are not unanimous as to whether domestic tort law may be applied concurrently with the CISG. Some support leaving this decision to the applicable domestic law. Others argue for the exclusion of domestic tort law in these cases. A third view distinguishes between damage caused by the defective performance of the good, in which case the CISG is exclusively applicable, and damages caused because the goods did not adhere to general safety expectations and standards, in which case the buyer has a course of action under the CISG and the applicable domestic tort law concurrently available to them.Examples:

- Time (e.g., visiting customers) and cost spent in trying to rectify defective goods are only recoverable if extra staff had to be employed or additional workload was caused.
- Reputational loss and loss of goodwill as a result of breach of contract can be recovered. The calculation of the loss of reputation should take into account, for example, the size of the company, the market, the value of the trademark and the necessary costs to re-establish the reputation.
- If the buyer has agreed to a contractual penalty in a subsequent contract, this penalty can generally also be recovered from the seller.

Loss of profits

Article 74 explicitly provides that damages for breach of contract include lost profits. Lost profits are awarded to place the aggrieved party in the same pecuniary position it would have been in but for the breach. It has to be emphasised that, in line with the view advanced for standard of proof, lost profits do not have to be calculated with mathematical precision. Lost profits need to be established with reasonable certainty. The buyer cannot claim lost profits if the buyer failed to give notice pursuant to Article 44. Whether or not the buyer has a reasonable excuse for not having given notice is irrelevant.

The obligee is not only entitled to recovery for lost profits incurred prior to the judgment or award, but also for future lost profits. Future lost profits are limited by the requirements that they have to be proved with reasonable certainty, that there has to be a causal connection between the breach and the future profits, and that they be foreseeable.

Examples:

- Lost profits include losses resulting from the inability to keep a business running caused by the breach of contract.
- Lost profits also include fixed costs (i.e., general expenses) on a *pro rata* basis that have to be reduced by the expenses that would have been incurred when realising those fixed costs.
- The seller is entitled to lost profits that are as a result of having missed out on an investment opportunity.

Calculation of loss

When calculating the loss, two positions have to be taken into account: concrete versus abstract calculation and whether to account for any gain made.

- Concrete and abstract calculation – The principle of full compensation necessitates the admissibility of the loss being calculated abstractly to achieve equal outcomes for all obligees. As Schwenzer explains:

> *It cannot be justified that a truck seller is to compensate a commercial carrier for the costs of vehicles the carrier rents in case of non-delivery, while the same breach of contract remains without consequences when the buyer is an NGO which intends to use the trucks to deliver food to conflict areas and cannot rent substitute vehicles. The loss due to the loss of use can be easily calculated abstractly since rental markets exist for nearly for all types of goods.*

However, it should be noted that if the buyer purchases substitute goods, Article 75 mandates a concrete calculation of loss.

- Accounting for gain – The obligee has to offset the loss from the breach by any gains resulting from the non-performance. It is important to note that only the gain that has an adequate connection to the breach is to be subtracted.

Time

Article 74 does not provide a specific time for the calculation of damages. A tribunal, therefore, has broad discretion to determine the appropriate moment in time to calculate the damages. The principle of full compensation, however, means that damages should be assessed at the latest possible point in time. That allows compensation for all possible consequences that may arise.

Place

The CISG does not provide for where damages have to be paid. Schwenzer argues that damages should be paid at the place where the breached obligation was to be performed. Others contend that damages should be paid at the obligee's place of business. The latter view is in line with the general principle of Articles 57 and 74 of full compensation.

Currency

General jurisprudence and academic opinion is that to fully compensate an obligee, damages should be calculated under the currency of the loss.However, the actual payment of the damages may be in a different currency. In the case that a different currency in regard to the damages is chosen, the tribunal will have to determine the appropriate exchange rate.

Causation

The obligee must establish that the loss was caused by the breach of the contract. It is necessary, but generally also sufficient, for the breach to have been the *conditio sine qua non* (i.e., the precondition for the occurrence of the detriment). It is immaterial whether the breach caused the damage directly or indirectly.

Foreseeability

The loss has to be foreseeable at the time of contract conclusion. It is not the exact size of the loss, but only the possibility of such loss that must be foreseeable. The foreseeable loss must be assessed in light of the facts that the party in breach knew (subjective assessment) or ought to have known (objective assessment). What is relevant is what in that sector of trade normally could have been foreseen, taking into account the information the contracting party had at its disposal.

Limitation on damages

Limited to monetary relief

It is well accepted that relief under Article 74 must be in the form of a monetary payment.

Limited to material loss

The CISG does not expressly exclude liability for non-pecuniary loss. However, given the nature of the CISG regulating international sales of goods between businesses, the CISG's ambit does not extend to damages for pain and suffering, mental distress and loss of amenities. Loss of reputation and loss of chance are classified under the CISG as pecuniary loss. Schwenzer argues that non-pecuniary damages may be recoverable under Article 74 if the intangible purpose of the performance became part of the contract and, therefore, making the incurred loss a typical consequence of the non-performance. Including non-pecuniary damages under Article 74, if the parties have so agreed, conforms with the CISG's underlying principle of party autonomy.

Punitive damages

Article 74 does not permit the recovery of punitive damages. Article 74 expressly limits damages to 'a sum equal to the loss'.[92] The prevailing view is that the application of the CISG excludes the award of punitive damages under the applicable domestic law. However, the parties are free to stipulate the provision of punitive damages in their contract.

Special cases

Disgorgement of profits

Given the considerable divergence of jurisprudence and academic literature in civil and common law jurisdictions regarding the question of whether disgorgement of profits is a remedy, a head of damages or not recoverable at all, tribunals should arguably consider granting damages based on disgorgement of profits only in narrow circumstances. In practice, international sale of goods cases where the obligee has suffered no loss at all, while the obligor was able to make a profit, will be rare. Schwenzer has identified three scenarios where the obligee should be entitled to disgorgement of profit under Article 74 (i.e., as a head of damage):

- the seller sells the goods a second time and realises a higher profit than agreed to under the contract with the first buyer (i.e., efficient breach);
- the seller, who is contractually obliged to manufacture the goods in accordance with ethical or human rights standards, lowers his or her production costs by resorting to production mechanisms that are in breach of the agreement, and thereby increasing their profits; or
- the buyer supplies a defined market, such as the European Union, NAFTA or Mercosur, against an express stipulation in the contract with the purchased goods, and thus makes a profit.

The commonality in all three cases is that common damages under Article 74 are difficult, if not impossible, to prove. Therefore, tribunals may be open to calculate damages as disgorgement of profits in cases where damages under Article 74 are otherwise impossible to prove but the obligor would gain a clear windfall otherwise.

Legal costs

A uniform application of the CISG requires that the question of recoverability of legal costs cannot depend on its classification as substantive or procedural by the relevant *lex fori*. That would lead to a non-uniform interpretation and application of the CISG. Uncontroversially, attorney fees and costs can be awarded when the contract provides for their payment. The majority of academic literature is in agreement that extrajudicial costs may be recovered as incidental damages under Article 74 (especially if extrajudicial activity mitigates damages). Extrajudicial costs include legal costs incurred in connection with preventing the breach or pursuing rights under the contract, such as a demand for performance. On the other hand, the majority in the academic literature and courts' jurisprudence does not support that litigation costs are recoverable under Article 74. Arbitral tribunals do not present a unified picture. Often it is hard to ascertain whether the tribunal has awarded costs under the applicable rules or under Article 74.

The majority opinion holds that the recovery of litigation costs is a matter of the applicable domestic law or the applicable arbitration rules respectively. The main rationale advanced is that allowing for litigation costs to fall under the ambit of loss under Article 74 would violate the principle of equality between the parties embodied in the CISG.If recovery of litigation costs was possible under Article 74, it would lead to an unjustifiable preferential treatment of the successful plaintiff over the successful defendant, since the defendant would not be able to claim litigation costs. However, this view misinterprets the CISG's equality principle. The CISG's equality principle relates to seller and buyer and not claimant and respondent. Buyer and seller will not be treated differently in regard to the recovery of litigation costs under Article 74. The buyer, as well as the seller, is able to claim litigation costs as part of his or her damages if he or she is the plaintiff. To achieve global uniformity for parties to a contract to which the CISG applies, the better view to take is that litigation costs are incidental damages under Article 74. The recoverability of litigation costs will be limited by the foreseeability and causation requirements inherent in Article 74.

It seems less controversial that legal costs may indirectly be recovered as damages if they accrue in regard to a sale to a third party.

Penalty clauses/liquidated damages

If the contracting parties have agreed in advance the amount of recoverable damages through a penalty clause or a liquidated damages clause, if the amount agreed falls below the foreseeable amount of loss or if the amount agreed is in excess of any loss caused by the breach of contract, then this is not regulated by the CISG. Whether or not an agreed damages clause is valid in accordance with Article 4 is a matter of the applicable domestic law to the contract 'it has to be noted that tribunals have to fill the gap in the CISG finding an internal solution in accordance with Article 7 instead of resorting to domestic law'. Agreed damages clauses, which are valid under the applicable domestic law, are compatible with the CISG since an agreed damages clause may encourage performance of the contract and deter a breach, thereby fostering a basic value underlying the CISG as a whole. In the event of a breach of contract, the agreed damages clause may encourage the parties to settle their differences and avoid legal costs. In addition, a clause will provide clearer guidance for recovery than often the foreseeability requirement can provide. An agreed damages clause can therefore aid dispute resolution.

Third-party claims

Only the contracting party can seek damages under Article 74. Third parties must pursue their claims under applicable domestic law.

Loss of volume

To allow for full compensation in the case of a lost volume seller, damages under Article 74 should encompass the recovery of lost profits that the seller would have made but for the buyer's breach, irrespective of any subsequent transactions by the aggrieved party. The calculation of the lost profit may present, in some cases, a considerable forensic challenge.

Child labour/human rights standards

It has been argued that human rights standards can be an inherent characteristic of goods. In particular, there seems to be a general opinion that it is an inherent characteristic of any good that a good be manufactured without child labour. If a good is manufactured with child labour or contrary to a contractually agreed ethical or human rights standard, the buyer can demand the difference between the price for the goods manufactured under ethical or human rights compatible conditions and the price for goods manufactured in violation of those conditions. In cases where the market value is difficult to assess, the manufacturing costs that were saved as a result of the breach of contract can be used as minimum damages.

Burden of proof and standard of proof

The CISG does not explicitly address either the burden of proof nor the level of proof required. Jurisprudence and academic commentary generally agree that 'a party who asserts a claim has to prove all circumstance or facts advantageous to him' (i.e., the party claiming damages bears the burden of proving its damages).

Jurisprudence and academic literature do not present a unified picture of the level of proof required. First, it has to be noted that tribunals have to fill the gap in the CISG finding an internal solution in accordance with Article 7, instead of resorting to domestic law. Some courts and tribunals have required a specific ascertainment of damages. Others have required that the damages be reasonably proved, and others have required sufficient proof of damages. Belgian courts, especially, have determined the amount of damages often *ex aequo et bono*. The CISG-Advisory Council reasons that the requisite standard should be one of 'reasonable certainty' without a need for 'mathematical precision'. The reasonable certainty standard is supported by and consistent with the CISG as a whole, which generally applies the reasonableness standard. It is also consistent with the PICC.

Limitation period

The CISG does not cover limitation periods. If the Convention on the Limitation Period in the International Sale of Goods 1974 is applicable to the contract, damages fall under the four-year limitation period under Article 8 of the Limitation Convention. In all other cases, the choice of the parties' dispute resolution mechanism will become highly relevant. Civil law jurisdictions generally characterise statute of limitation issues as matters of substantive law and, therefore, as a matter of *lex contractus*. In many common law jurisdictions, statute of limitation issues are considered a matter of procedural law and, therefore, a matter of *lex fori*.Tribunals should consider whether to apply Articles 10.1 et seq. PICC, which stipulate a relative limitation period of three years and an absolute limitation period of 10 years.

Article 75 allows, in case of the avoidance of the contract, a concrete calculation of damages in the form of the difference between the contract price and the price of a cover purchase (buyer) or the resale of the goods (seller). Further damage that is not already part of the calculation under Article 75 can often be claimed under Article 74 (see Article 76). Article 75 does not replace Article 74. It supplements and works in conjunction with it. The application of Article 75 is not mandatory. Parties that have avoided the contract can choose whether to seek damages pursuant to Article 75 or whether they only rely on the abstract calculation of damages under Article 74.

Avoidance

To claim damages in accordance with Article 75, the obligee has to avoid the contract (i.e., it must have dissolved its contractual obligation) before making a substitute purchase. Jurisprudence and academic commentary also concur that Article 75 is applicable if the obligor unequivocally and finally refuses to perform.

Substitute transaction

A sale or purchase by an aggrieved party qualifies as a substitute transaction under Article 75 if two requirements are satisfied. First, the aggrieved party has to have undertaken the purchase or sale as a substitute for the avoided transaction. Second, the cover purchase or sale has to be commercially reasonable. It is generally accepted that the price of the cover purchase or sale will minimise the loss of the breaching party to the extent reasonably possible. If the difference between the avoided contract and the substitute transaction results in reduced costs, an adjustment to the damage amount may be warranted to account for expenses saved by the obligee.

The wording of Article 75 makes it clear that it is not applicable if the obligee does not transact with a third party to fulfil the avoided contract. Article 75 is also not applicable when the buyer uses goods in substitution for the non-conforming goods that have been purchased before the avoidance of the contract.

Reasonable time and manner

To avoid the obligee, at the expense of the obligor, speculating on the development of the market, Article 75 requires that the cover purchase is made in a reasonable manner and within reasonable time. Those requirements do not exclude, however, that the obligee waits to avoid the contract to take account of market developments.

Jurisprudence has determined that the criteria for acting in a reasonable manner is whether a party has acted as a 'careful and prudent businessman' who observes the relevant trade practices. Being a 'careful and prudent businessman' can entail reselling the goods substantially below the contract price.

The substitute transaction also has to be done within a reasonable time. The time period for a reasonable substitute transaction commences when the obligee declares the contract avoided. What is reasonable depends on the circumstances and the good in question. For goods that are subject to market price fluctuations, a reasonable time period will be relatively short, whereas for goods that are seasonal or unique the period will be longer.

If the obligee has not made an identified substitute transaction in a reasonable manner or time frame, the obligee is free to claim damages in accordance with Articles 74 and 76, which allow for an abstract calculation of damages. Conversely, if an obligee who pursues a damages claim under Article 76 makes a substitute transaction after initiating litigation, but before a reasonable time has elapsed since avoidance, then damages may be calculated pursuant to Article 75.

Calculating damages

Damages in accordance with Article 75 are measured by the difference between the price of the substitute transaction and the contract price. The contract price is the price either agreed expressly or impliedly between the parties in the contract, or the price as determined by Article 55 if the parties did not agree expressly or implicitly on a price. The price of the substitute transaction is the price paid for the substitute goods plus extra expenses incurred from having to make the substitute transaction, such as costs associated with transport or changed market conditions, minus saved expenses.

Further damages recoverable under Article 74

An aggrieved party may recover further damages under Article 74. This allows the recovery of incidental and consequential damages in addition to the damages recovered under the Article 75 calculation.

Examples:

- Loss caused by a change in the interest rates or in the currency exchange rate between the date that the transaction was supposed to have occurred under the contract and the substitute transaction.

Foreseeability

'Foreseeability' is not a requirement of Article 75, according to its wording. This is not surprising, since loss resulting from a substitute transaction is generally foreseeable.

Burden of proof

It is on the obligee to prove that the avoidance of the contract was justified and that the obligor was correctly notified of the avoidance. The obligee must also show that the substitute transaction was reasonable and within a reasonable time period after the avoidance of the contract. If the obligor asserts that the substitute transaction could have been made sooner, the obligor also implicitly invokes a breach of the duty to mitigate damages (Article 77) for which the obligor carries the burden of proof.

Like Article 75, Article 76 is *lex specialis* to Article 74. Article 76 allows calculating damages based on the current price of goods when the obligee has avoided the contract without entering into a resale or cover purchase. The difference between Article 76 and Article 75 is that under Article 76 the damages are calculated abstractly without the need to show a concrete measure of actual loss. Therefore, the advantage is that the obligee can recover damages simply based on a straightforward calculation.

Article 76 allows when its requirements are met to abstractly calculate the performance loss as the difference between the contract price and the market price. The advantage for the obligee to claim under Article 76 is that concrete proof of the non-performance loss is unnecessary.

Avoidance of the contract

The application of Article 76 requires that the obligee has avoided the contract. In addition, the prevailing view applies Article 76 to cases where the obligor unambiguously and definitively refuses to perform.

Current price

Nature of current price

Article 76 requires a current price for the goods – 'the price prevailing at the place where delivery of the goods should have been made' – but if no current price is available then 'the price at such other place as serves a reasonable substitute'. The current price must be for goods of the same kind as the avoided contract, under comparable terms. Article 35(2) stipulates factors that can give guidance to determine what goods conform to the contract and whether they can be used to set a comparable price. An adjustment should be made for any differences in terms or circumstances between the contract terms and those associated with the market price.

A current price can exist without being officially quoted. As one court has observed:

> *it is sufficient for the existence of a market price in the sense of Article 76(1) CISG if, owing to regular business transactions for goods of the same type at a particular trade location, a current price has been established.*

If there is no current price, then an abstract calculation cannot be performed and the obligee may resort to Article 74. For subjectively valued goods or goods made on special order, it might be impossible to ascertain a current price.The obligee thus has to resort to Article 74.

Time of determination

The time at which to set the current price for the calculation is the time at which the obligee made the statement of avoidance. Basing the relevant time on the statement of avoidance leaves no room for tribunal discretion with regard to the timing, and avoids the obligee speculating at the obligor's expense. If the obligee unreasonably delays making a statement of avoidance, the obligor may seek relief under Article 77. Article 76 provides an exception for the setting of the current price if the obligee avoids the contract after the taking over of the goods. In that case, the current price is determined at the time when the party took over the goods rather than at the time of avoidance.

Location of goods

In determining the current price for the calculation of damages, first resort must be to the place where the seller should have delivered the goods. If a determination at the place of delivery is not possible, the tribunal can resort to a location that would be a reasonable substitute. In accordance with the CISG's underlying principles, 'reasonable' has to be evaluated from the perspective of a typical merchant under similar circumstances, including taking into account the cost of shipping to the substitute location.

Price fixed by the contract

To calculate damages under Article 76, the 'price fixed by the contract' has to be determined. It should be noted that Article 75 merely requires a 'contract price'. The latter means that to satisfy the requirement of Article 75, the price does not need to be fixed by the contract; instead it can be determined by means of Article 55. Therefore, if the price is not fixed by the contract and the obligee has not engaged in a substitute transaction, the obligee can only pursue damages in accordance with Article 74. An application of Article 55 would result in implying a contract price based on the market price at the time of the contract and then calculating abstractly based on the market prices at the time of avoidance. Such a damages calculation is undesirable since it would increase the uncertainty in the amount of damages.

No substitute transaction

Abstract calculation of damages is only possible if the obligee has not engaged in a substitute transaction. It has to be noted that fixing damages concretely based on a substitute transaction takes precedence over an abstract calculation. The primacy of concrete calculation supposes that a substitute transaction will generally be the most cost-effective resolution after the avoidance of a contract.

Whether the obligee has made a substitute transaction or not is assessed in accordance with the requirements under Article 75. Thus, if the obligee made a 'substitute' transaction that fails to meet the requirements stipulated under Article 75, the obligee is free to claim abstractly calculated damages under Article 76. Abstract calculation might also be appropriate when the obligee has made a separate transaction similar to the avoided one and where the obligee cannot show that a particular transaction replaced the avoided one.

Foreseeability

The wording of Article 76 clarifies that foreseeability is not a requirement of Article 76. It would be contrary to the principle of full compensation if the obligor were able to argue unforeseeable changes in the price, after the conclusion of the contract, that the obligor did not take into account.

Recovery of further loss

In addition to damages based on the difference between the current price at the time of avoidance and the price fixed by the contract, the obligee may recover further damages under Article 74. Article 76 allows a party to claim compensation for incidental and consequential damages that occurred as a result of voiding the contract under Article 74. The requirements of Article 74 have to be met, especially the requirement that further damages must have been foreseeable. Care has to be taken that when the obligee claims additional damages under Article 74, the obligee is not placed in a better position than it would have been in if the contract had not been avoided.

Anticipatory breach

If it is clear that one party will commit a fundamental breach, Articles 72 and 73 allow for the avoidance of the contract before the date that performance was due. These provisions may impact the determination of damages under Article 76 in a fluctuating market. In such a market, it is uncertain whether the market price at the time of performance would be the same as or even similar to the market prices at the time of avoidance. As Gotanda observes:

> *To address the risk that the market will change to the detriment of the obligee, Article 75 provides the option to proceed with a substitute transaction and calculate damages concretely rather than proceeding abstractly under Article 76. By choosing to proceed under Article 76, the aggrieved party accepts the risk of inadequate compensation.*

Burden of proof

The obligee has to prove the calculation of damages under Article 76 (i.e., the price fixed by the contract as well as the current price). However, the obligor has to prove that the obligee has or should have carried out a more favourable substitute transaction (Article 77).

Mitigation of damages – Article 77

Article 77(1) obliges the party that wants to claim damages because of the breach of contract of the other party to take reasonable measures to mitigate the damage caused by the breach of contract. Under Article 77(2), a breach of this obligation will result in a decrease in the amount of damages that can be claimed. The obligation to mitigate damages exists only in regard to damages claims and not in regard to other remedies, such as claims in regard to the performance of the contract.

Obligation to mitigate

What the obligation to mitigate damages entails depends on the circumstances in the particular case. The threshold is a reasonable person in the shoes of the obligee. Trade usages and practices, as well as special habits that exist between the parties, have to be taken into account. In general, a cover transaction is reasonable if it is 'made in such a manner as is likely to cause a resale to have been made at the highest price reasonably possible in the circumstances or a cover purchase the lowest price reasonably possible'. Cover

transactions that are identical to the terms of the original contract are more likely to be considered reasonable. However, cover transactions that differ in terms such as quantity, credit or time of delivery may still be considered reasonable, all circumstances taken into account.

Examples of factors that have been taken into account are:

Lost volume sales

Article 77 does not impose on a lost volume seller an obligation to find a substitute buyer for the contracted goods following a breach. This is because, in the case of a lost volume seller, the second sale would have been made even if there had been no breach of contract. The second sale is thus not a substitute transaction.

Burden of proof

The obligor has the burden of proof in regard to the facts that establish the obligee's duty to mitigate. In practice, the obligor may find it difficult to meet its burden because evidence concerning mitigation efforts is often within the knowledge and control of the obligee. Some tribunals have placed an obligation to prove the requirements of Article 77 on both parties when a failure to mitigate defence has been raised under Article 77.

Interest – Article 78

Interest is due under Article 78 regardless of proof of loss. Interest can be claimed pursuant to Article 78 independently from the damages under Articles 74 to 76. It applies to the purchase price and to 'any other sum in arrears'. Most courts and tribunals have held that 'any other sum in arrears' includes damages. The preponderant opinion also presumes that the liability to pay interest arises under Article 78, even if the precise amount owed has to be determined by a tribunal. Article 78 is silent on the most important questions in regard to interest: the accrual period and the rate of interest. Both questions have to be answered relying on general CISG principles to achieve uniform and congruent application of the CISG.

Accrual period

Interest starts to accrue the moment the payment is in arrears, without any further requirement, such as a request or demand for payment or default, having to be met or any compliance with formalities being necessary. Interest ceases to accrue when the obligation to pay is extinguished.

Interest rate

The most controversial issue presented by Article 78 is at what rate interest on a sum in arrears is to accrue, since Article 78, although providing an obligation to pay interest whenever a payment is in arrears, does not specify an interest rate or the means to determine the interest rate. Therefore, interest rates are one of the most discussed issues by courts and tribunals in regard to the CISG.Various methods of determining the interest rate have been used by courts and tribunals. The attempts can be roughly categorised into two broad clusters: those preferring a uniform approach and those giving domestic law primacy. The former interprets the lacuna in Article 78 as inviting tribunals to define the applicable interest rate by way of resorting to general principles deduced from the CISG (Article 7(2)). The latter interprets Article 78 as excluding the question of the interest rate from the sphere of application of the CISG, and therefore, as an express invitation to tribunals to resort to the applicable domestic law. However, those who favour the uniform approach are not unified in regard to the general principle that should be applied to determine the rate of interest. The following approaches can be found in the jurisprudence of courts and tribunals:

The CISG Advisory Council suggests that the interest rate applicable to any mature sum should be determined according to the law of the state where the creditor has its place of business. The major purpose of an interest claim is compensating the time value of money for the creditor. Therefore, the interest claim in Article 78 is akin to a damages claim. Thus, the full compensation principle underlying CISG damages should also be applied to interest claims and the focus should be on compensating the creditor's loss.

Simple versus compound interest

The CISG does not address whether interest should accrue on a simple or compound basis. Most courts and tribunals have awarded simple interest. Parties are free to agree on the payment of compound interest. If the parties have not addressed the issue of compound interest in their contract, the CISG Advisory Council takes the view that the question of whether compound interest should be awarded be resolved in accordance with the domestic law of the creditor.Gotanda points out that awarding compound interest is in line with modern economic and financial principles and practices, and the CISG's underlying principle of full compensation.

More generally, it should be noted that a party may also be able to seek compound interest as damages under Article 74. Article 78 provides for a claim to interest on a sum in arrears without the proof of loss; such an interest claim is, therefore, independent from any claim for damages (and, as noted above, only simple interest is awarded on such a claim by most courts and tribunals). If, however, the obligee can prove under the standard required for loss by Article 74 that a consequential loss resulting from the obligor's breach of contract was the loss of compound interest, compound interest should be recoverable in accordance with Article 74.

Article 78 and Article 79

The obligation to pay interest under Article 78 remains, notwithstanding an exemption from paying damages under Article 79 (discussed below). However, interest does not accrue when and insofar as the failure to pay the monetary obligation was caused by the act or omission of the obligee or when the obligor has exercised its right to suspend performance.

Exemptions under Articles 79 and 80

An obligor will be exempt from paying damages, but not from other remedies for non-performance, in accordance with Article 79(1). Article 79(1) requires that because of an unforeseeable impediment beyond the obligor's control, the obligor is not able to perform the obligor's obligation under the contract. Article 79 has not been of great practical importance, since the threshold imposed by Article 79(1) to exempt the obligor is high and parties have rarely succeeded in invoking Article 79. For example, financial constraints are generally regarded as surmountable. Article 79(2) complements Article 79(1) by clarifying that the obligor cannot avoid liability by relying upon third parties in order to fulfil the obligor's duties.

Article 80 provides that an obligee may not rely on a breach by the other party to the extent that the breach was caused by the obligee's act or omission.

Other remedies

As stated earlier, it lies within the party's choice which remedy or remedies the party wishes to pursue. In addition to damages, the CISG provides for specific performance (Articles 46(1), 62, 28), avoidance of the contract (Article 49(1), 64(1)), and price reduction (Article 50). A claim for damages pursuant to Article 74 can be made concurrently with all three other remedies. The amount of the recoverable damages depends on whether and to what extent the other remedy has redressed the loss suffered.

Conclusion

Damages under the CISG can be claimed in addition to other available remedies for breach of contract, such as specific performance or avoidance of the contract. The CISG's damages regime under Articles 74 et seq. provides for the obligor to put the obligee into the position the obligee would have been in if the contract had been performed according to its terms. The CISG offers the obligee a choice, if the breach was so fundamental that the obligee could avoid the contract, to either calculate the obligee's damages abstractly under Article 74, or concretely under Article 75 if the requirements of Article 75 are met. The obligee may prefer recovery under Article 75 (or recovery under Article 76 if no substitute transaction was done) if the obligee cannot prove with a requisite degree of certainty that it suffered damages as a result of the breach. In

addition, the concrete calculation under Article 75 avoids the possibility of having to open a company's 'books, i.e., . . . disclose its internal calculations, its customers and other business connections, etc.' to prove its loss.