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# **Damages under the CISG**

## **Selected problems**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

## **I. Introduction**

This paper addresses different contentious issues arising in the context of the right to damages under the CISG. The paper will therefore start with a brief description of the CISG, Art. 74 CISG et seq. as the basic provision on damages in the Convention and Art. 7 CISG as the provision regulating the interpretation and gap-filling of the Convention. Subsequently, selected specific problems of damages will be examined in Chapter III. Where thought appropriate, the paper will give a brief outline of how the specific question is regulated in domestic laws, followed by an overview of the debate on the issue under the CISG among courts and scholars, ending with the author's own position.

## **II. Damages under the CISG in general**

### **1. The CISG**

The United Nations Convention on Contracts for the International Sale of Goods, CISG, is an international convention stipulating a harmonised contract law. It is intended to function autonomously, that is independent from the national laws. The CISG is applicable to international sales of goods, it regulates the formation of the contract, the resulting rights and obligations of the seller and the buyer and the remedies in cases of breach of contract.

The Convention entered into force for the first time in 1988 and has by now been adopted by 64 countries.<sup>1</sup> Notably neither the United Kingdom nor Japan have signed the Convention.

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<sup>1</sup> Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon (entry into force only on 1 January 2006), Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia and Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela, Zambia.

Neither is South Africa a signatory, even so the ratification was on the political agenda several times. But beside these states all major trading countries in the world have joined the Convention, including the United States of America and most of continental Europe. Thereby two-thirds of the world's trade is probable to be governed by the CISG.



Source: website of the Pace University<sup>2</sup>

The goal of the Convention is to facilitate and stimulate international trade by providing predictability for the contractors. Such predictability can, however, only be reached, if the jurisdictions all over the world find a common approach in applying the uniform rules and endeavour to interpret them in a similar way considering the Convention's international scope. Therefore Art. 7 of the Convention, regulating the methods for interpretation and gap-filling, is crucial to the functioning of the Convention and the attainment of its aim. A perfectly uniform interpretation is unachievable of course; even within the jurisdiction of one single state. Judgements are made by humans with differing views and approaches. But the goal is to reach a state, where the interpretation of the Convention is consistent with the requirements of Art. 7 CISG. That is an interpretation that respects - not only in its outcome but especially in its means to reach a decision and in its reasoning - the international

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<sup>2</sup> Chart taken from the Pace University Institute of International Commercial Law CISG database, available at: <<http://cisgw3.law.pace.edu/cisg/cisgintro.html>>.

character of the Convention, that considers foreign decisions and resists the temptations of the so-called 'homeward trend'.<sup>3</sup> The specific requirements set out by Art. 7 CISG are described in paragraph II 3 of this paper.

## 2. Art. 74 CISG et seq.

Art. 74 CISG is the basic provision for the recovery of damages under the CISG and is applied together with Art. 45 paragraph 1 (b) (remedies of the buyer) or Art. 61 paragraph 1 (b) (remedies of the seller).

Art. 74 CISG reads as follows:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Thus, Art. 74 CISG establishes the requirement of causality between the breach of contract and the loss suffered. As to the breach, a claim for damages does not require any fault of the party in breach; the CISG chose the principle of strict liability. Neither is it necessary that the breach be of any specific quality, such as for the right to avoidance which requires a fundamental breach, Art. 49, 25 CISG. Any breach of any obligation under the contract of the

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<sup>3</sup> See Flechtner 'Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*' (2002) 22 *Northwestern Journal of International Law & Business* 121-159, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/flechtner4.html>>; Keily 'How Does the Cookie Crumble? Legal Costs under a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods' (2003) 1 *Nordic Journal of Commercial Law*, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/keily2.html>>.

buyer or the seller leads to a right to damages of the aggrieved party. The compensation due shall be 'equal to the loss'. The main principle underlying Art. 74 CISG is therefore the general principle of full compensation. Beside thus stating that the aggrieved party shall be placed in the same economic position it would stand if the contract had been appropriately performed, the Convention does not indicate how the damages are to be calculated.<sup>4</sup> The loss of profit has been expressly mentioned because some legal systems do not include loss of profit in the term of 'loss' standing alone.<sup>5</sup> Art. 74 CISG also formulates the main limitation of the right to damages: foreseeability of the loss for the party in breach. This notion is also used in most common law systems as well as in the Spanish and the French law of damages, where it originally came from.<sup>6</sup> Whereas the German law, for instance, uses a slightly wider notion, the adequate causation, justified because the right to damages under German law does in general require fault and is not based on strict liability.<sup>7</sup> Under the CISG not only the nature of loss but also its approximate extent must have been foreseeable. The scale is firstly an objective one, as Art. 74 CISG also speaks of the loss that the party in breach 'ought to have foreseen'. However, there is also a subjective part, as any special knowledge of the party in breach will be considered. Thus, a party will always be deemed to have foreseen or ought to have foreseen a loss that occurs in the usual course of business. But any special losses that are, for instance, due to exceptional usage of the goods are only foreseeable if the aggrieved party pointed out the special circumstances or the extraordinary risk to the party in breach.<sup>8</sup>

Art. 75 and 76 CISG, with which this paper will not be concerned in any further detail, provide for two specific forms of damages available in cases of avoidance of the contract. Art. 75

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<sup>4</sup> See Secretariat Commentary on Art. 70 of the 1978 Draft of the CISG, comment 4, available at: <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-74.htm>.

<sup>5</sup> See Secretariat Commentary *supra* note 4, comment 3.

<sup>6</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *Kommentar zum Einheitlichen UN-Kaufrecht* 4<sup>th</sup> ed. (2004) Art. 74 par. 21, 46; Achilles *Kommentar zum UN-Kaufrechtsübereinkommen* (2000) Art. 74 par. 6; Magnus in von Staudinger *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)* (1999) Art. 74 par. 5, 31.

<sup>7</sup> See Treitel *Remedies for breach of contract: a comparative account* (1991 Reprint of 1988) Chapter IV par.137 et seq.

<sup>8</sup> See Magnus in von Staudinger Art. 74 par. 33-37 *supra* note 6.

CISG stipulates the recoverability of the costs of a reasonable replacement purchase or sale. If such a replacement transaction has not been made, Art. 76 CISG provides for recoverability of the difference between the price agreed upon in the contract and a current price for the goods if existent. Both provisions do not exclude the compensation of any further damages under Art. 74 CISG of course.

Another important limitation to damages is laid down in Art. 77 CISG: that is the duty of the aggrieved party to mitigate its loss, else the damages will be reduced. In the following two sections the CISG provides for interest on sums in arrears, Art. 78 CISG, and states the exemptions of liability for the breach of contract, Art. 79 and 80 CISG.

### **3. Art. 7 CISG**

The goal of uniformity is stated in two places in the CISG: its preamble and its article 7.

The preamble reads:

..., BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,....

These uniform rules in a logical consequence shall also be interpreted in a uniform matter.

This is laid down in Art. 7 CISG that reads as follows:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Art. 7 CISG refers to the interpretation of the Convention in its paragraph 1 and to the settlement of questions that it leaves open in its paragraph 2. The interpretation shall accordingly be guided by three considerations:

- the Convention's international character,
- the need to promote uniformity and
- the observance of good faith in international trade.

Any recourse to national legislation or concepts is therefore excluded when a term of the CISG needs to be interpreted, as such a reasoning would be incompatible with the Convention's international character. In the contrary, in order to promote uniformity in cases where the CISG is applicable, any judge or arbitrator will have to consider previous decisions on the matter not only of his own country but of any other country's courts or arbitral tribunals. The evaluation of international case law is made possible mainly through the databases accessible on the internet, such as the 'CLOUT' database on the website of UNCITRAL<sup>9</sup>, i.e. the United Nations Commission on International Trade Law, the 'Unilex' - page<sup>10</sup>, a database of international case law and bibliography on the CISG as well as the UNIDROIT Principles of International Commercial Contracts, and finally the broad information one can find on the CISG-website of the Pace University<sup>11</sup>. Even though a doctrine of *stare decisis* can clearly not be derived from the Convention - due to the lack of a unifying court structure in the first place - a duty to consider not only domestic but also

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<sup>9</sup> <<http://www.uncitral.org>>.

<sup>10</sup> <<http://www.unilex.info>>.

<sup>11</sup> <<http://cisgw3.law.pace.edu>>.

international decisions is implied. The degree of authority that shall be attached to the international case law remains contentious in the details.<sup>12</sup>

Paragraph 2 of Art. 7 CISG refers to gap-filling as distinguished from the Convention's mere interpretation. It is not always necessary to draw an exact line of delimitation between interpretation and gap-filling, whose borders will be very loose in most cases, and it is therefore sufficient that a question is not expressly settled in the Convention.<sup>13</sup> However, it is important to distinguish between internal gaps or *lacunae intra legem* and external gaps or *lacunae praeter legem*. The latter are issues which are not governed by the CISG, i.e. issues that are outside of the Convention's scope. While external gaps will have to be filled by direct recourse to the rules of private international law, the internal gaps have to be filled in accordance with Art. 7 paragraph 2 CISG.<sup>14</sup> Art. 7 paragraph 2 CISG states that a question governed by but not expressly settled in the Convention must first be tried to be settled by referring to the general principles 'on which it [the Convention] is based' and only in the absence of such principles shall an internal gap be solved by applying domestic law. What are these general principles? The CISG does not provide an enumeration of any principles. They must therefore be found within the specific regulations of the Convention. The commentaries contain lists of principles that are regarded to be contained or to be the basis of certain rules or articles of the Convention.<sup>15</sup> Such widely recognised principles are for instance: party autonomy (derived mainly from Art. 6 CISG); *pacta sunt servanda* (derived from a number of articles, Art. 30, 53 CISG among others); good faith (derived from Art. 7 paragraph 1 CISG in particular); standard of reasonableness (found in different provisions of the CISG, e.g. Art. 39, 75 CISG); general duty to cooperate (derived from duties existing beside the main obligations, such as the duty to preserve goods which have to be returned,

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<sup>12</sup> See Felemegas 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (2000-2001) *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 115-265, Chapter 5 par. 3.(d)(iii), also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html>>.

<sup>13</sup> See Magnus in von Staudinger *supra* note 6, Art. 7 par. 39.

<sup>14</sup> See Ferrari 'Burden of Proof under the CISG' (2000) 5 *International Business Law Journal* 665-670, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/ferrari5.html>>.

<sup>15</sup> See for instance Ferrari in Schlechtriem/Schwenzer Art. 7 par. 48 – 56, *supra* note 6; Bonell in Bianca/Bonell *Commentary on the International Sales Law : The Vienna Sales Convention* (1987) Art. 7 par. 2.3.2.2.



Art. 85, 86 CISG, the duty to accept cure, Art. 34, 37, 48 CISG, and many more).<sup>16</sup> For the questions examined in this paper the general principle in respect to damages, the principle of full compensation, will be of major importance. Thus, only as a last recourse can a question governed by the CISG be settled in conformity with the national law applicable according to the rules of private international law.

Knowing that the interpretation of the Convention should be aimed at uniformity and that it should respect the international character of the Convention, the question arises, which methods of interpretation can and shall be used to reach that uniformity. The problem of avoiding recourse to domestic legal rules starts with the different means of interpretation that can be found in different jurisdictions. However, the widely assumed big division between the common law countries and the civil law countries is in fact not as harsh as it may seem. It has been demonstrated that the means of interpretation have grown closer and therefore the British are not as hostile anymore to a historical interpretation of legislation and the civil law countries widely refer to case law even if a *stare decisis* rule does not exist.<sup>17</sup> The common means of interpretation can therefore be described as the grammatical approach, looking at the wording; the systematic approach, looking at a rule's position in the whole context of the legislation; the teleological interpretation, trying to give regard to the purpose of a legislation; the historical approach, looking at the legislator's will and aim and finally the previous interpretation by other courts. Interpretation of legislation thus always refers to subjective (e.g. historical) as well as objective (e.g. grammatical) aspects of a statute. The problem that the CISG also require uniform and not merely national interpretation rules is therefore not as big a problem as might be asserted. In questions of interpretation we can refer to the travaux préparatoires, to the official commentary on the CISG and to international case law.<sup>18</sup> To a

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<sup>16</sup> See for an overview Magnus 'Die Allgemeinen Grundsätze im UN-Kaufrecht' [General Principles of UN-Sales law] (1995) 59 issues 3-4 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, also available in an English translation at: <<http://cisgw3.law.pace.edu/cisg/text/magnus.html>>.

<sup>17</sup> See Vogenauer *Die Auslegung von Gesetzen in England und auf dem Kontinent* (2001).

<sup>18</sup> The Secretariat Commentary. The Commentary on the Draft Convention on Contracts for the International Sale of Goods has in fact been prepared by the Secretariat on the 1978 Draft of the CISG, not on the Official Text. The final version of 1980 renumbered most of the articles in the 1978 Draft. The Commentary is available in a match-up for each article of the CISG at: <<http://cisgw3.law.pace.edu/cisg/text/secomm/>>.

certain degree we can also find help in looking at other international codifications, the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law (PECL). Such a recourse must, however, be taken cautiously with awareness of its limits. How far these principles can be of importance to the interpretation or gap-filling of the CISG will be described after a short introduction to the origin of the principles.

The UNIDROIT Principles have been adopted by the International Institute for the Unification of Private Law.<sup>19</sup> This is an independent intergovernmental organisation that has originally been set up in 1926 as an auxiliary organ of the League of Nations and is now based on a multilateral agreement, the UNIDROIT Statute. The members of the Institute are accordingly states. The UNIDROIT Principles have been developed by a special Working Group of experts from all major legal systems of the world.<sup>20</sup> The UNIDROIT Principles, promulgated in 1996, have no binding effect as they are neither a convention nor a model law. They only apply where the parties have chosen to have their contract governed by the UNIDROIT Principles or by the general principles of law or the *lex mercatoria*. Beside these cases the Principles form an important tool of interpretation and gap-filling. In this regard they are also valuable for the interpretation of the CISG. This is of course not simply justified because the UNIDROIT Principles state, as their purpose in the preamble, that ‘they may be used to interpret or supplement international uniform law instruments’, but because the UNIDROIT Principles are closely related to the CISG. The provisions are often the same or very similar. To the extent that the same issues are covered, ‘...the UNIDROIT Principles are normally taken either literally or at least in substance from the corresponding provisions of CISG...’<sup>21</sup> Most of the persons involved in the development of the Principles have also helped to

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<sup>19</sup> For further information see the organisation’s homepage: <<http://www.unidroit.org>>; the text of the integral version of the 1994 edition of the UNIDROIT Principles (‘black letter rules’ and official comments) is available there at: <<http://www.unidroit.org/english/principles/contracts/principles1994/fulltext.pdf>>.

<sup>20</sup> For a list of the members of the UNIDROIT Working Group see Kritzer ‘General observations on use of the UNIDROIT Principles to help interpret the CISG’, available at: <<http://cisgw3.law.pace.edu/cisg/text/matchup/general-observations.html>>.

<sup>21</sup> See Bonell ‘The UNIDROIT Principles of International Commercial Contracts and CISG - Alternatives or Complementary Instruments?’ (1996) *Uniform Law Review* 26-39, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/ulr96.html>>.

establish the CISG.<sup>22</sup> However, caution should be applied in consulting the UNIDROIT Principles. Art. 7 paragraph 2 CISG refers to general principles 'on which it [the CISG] is based'. Therefore one cannot just resort to the UNIDROIT Principles because they are general principles of international commercial contracts. Only where the UNIDROIT Principles express, specify or are based on a general principle that is at the same time a principle that can be found in the CISG itself, is it justified to utilise them to interpret the CISG.

So far it has been each judge's or arbitrator's task case by case both to determine those general principles [as mentioned in Art. 7 paragraph 2 CISG] and from the general principles to derive the solution for the specific question to be settled. This latter task could be facilitated by resorting to the UNIDROIT Principles. The only condition which needs to be satisfied is to show that the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying CISG....<sup>23</sup>

It shall not remain unmentioned, however, that other authors are less hesitating and hold that the UNIDROIT Principles may be used as 'additional' general principles, because 'they vastly correspond both to the respective provisions of the CISG as well as to the general principles which have been derived from the CISG' and that the UNIDROIT Principles 'to the extent that they formulate general principles which cannot be derived directly from the CISG, can be utilized for filling gaps in the Convention...'.<sup>24</sup>

The recourse to the PECL is justified with similar reasons.<sup>25</sup> The PECL are also, as the UNIDROIT Principles, no binding law, but principles that are only applicable by choice of law by the parties to a contract. Different from the UNIDROIT Principles, however, they only reflect the European contract law and they do not merely treat the issue of international but

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<sup>22</sup> See Kritzer *supra* note 20.

<sup>23</sup> See Bonell *supra* note 21.

<sup>24</sup> See Magnus *supra* note 16.

<sup>25</sup> For the principles and for further information see the webpage of the Copenhagen Business School available at: <[www.frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law](http://www.frontpage.cbs.dk/law/commission_on_european_contract_law)>.

also of domestic contracts and include rules for consumer contracts as well as commercial contracts. The PECL are also known as the 'Lando-Principles' as they were developed by the Commission on European Contract Law under the chairmanship of Professor Ole Lando. The Commission is an independent body of experts from each member state of the European Union and is funded by the European Union and other organisations. It started its work in 1982 with the ambit to draft a European Restatement of Contract Law and published its Part 1 in 1995, Part I and II in 1999 and Part III in 2003. The PECL are also closely related to the CISG, even if they are confined to European law. Where the PECL are inspired by the CISG or where their provisions are based on the same general principles as the provisions of the CISG, it is justified to use them for the interpretation of the CISG, thus also giving due regard to the requirement of considering the international character of the Convention.

Finally reference to scholarly writing beyond national borders can help to achieve a uniform interpretation of the Convention.

### **III. Specific problems in the context of damages in the CISG**

#### **1. Attorney's Fees**

One area of disagreement about Art. 74 CISG is the question whether attorney's fees or litigation costs shall be regarded as part of the damages one party can recover from the other after a breach of contract.

a) The differing national rules: the 'English Rule' and the 'American Rule'

In purely national cases, where the CISG is not applicable, there are two different approaches to the question of recoverability of attorney's fees.

While European courts differ when it comes to the question in how far judicial costs may be split between the parties if the claimant is only partly successful, they do agree that judicial costs are generally recoverable and the loser of a claim will therefore generally be ordered to reimburse the winning party's expenses, especially its attorney's fees. This rule has been adopted by the majority of countries around the world and it is called the 'loser-pays'-principle, the 'English Rule' or the 'cost follow the events' approach.

The United States and Japan have chosen another approach. The principle of the so-called 'American Rule' is that every party bears its own costs. There is no reimbursement or recovery of the expenses encountered by the parties, neither for the successful plaintiff nor for the successful defendant. This rule is opened to exceptions though and a reimbursement is possible in the United States, if there is 'a statute or enforceable contract providing therefor'.<sup>26</sup> The rationale behind this regulation is said to be that

...one should not be penalised for merely defending or prosecuting a lawsuit, and ... the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.<sup>27</sup>

b) The ruling in the Zapata cases

In 2001, in the Zapata case, a U.S. District Court had to decide upon the question of recoverability of attorney's fees as part of the consequential damage based on Art. 74 CISG.<sup>28</sup> The court awarded the winning plaintiff his attorney's fees based on two arguments independent from each other. Firstly it held that Art. 74 CISG in its plain wording clearly encompassed litigation costs, saying that:

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<sup>26</sup> See *F.D. Rich Co. v. United States f/u/o Industrial Lumber Co.* (1974) 417 U.S. 116, 126, cited in *Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company*, available at: <<http://cisgw3.law.pace.edu/cases/010828u1.html>>.

<sup>27</sup> See Davis 'The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in how it pays its lawyers' (1999) 16 *Arizona Journal of International & Comparative Law* 361, 401, cited in Keily *supra* note 3.

<sup>28</sup> See *Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* U.S. District Court of Illinois, Eastern Division, No. 99 C 4040, 28 August 2001, available at: <<http://cisgw3.law.pace.edu/cases/010828u1.html>>.

When the searchlight of analysis is thus properly focused on the language of the Convention ... the question becomes a simple one.

The court argued that

...the award of attorneys' fees has really been agreed to,...., by the combination of [buyer's] stipulation and Article 74.

Before the trial both parties had entered into a Stipulation providing, that

[t]he amount of litigation costs, including attorneys' fees, to be assessed as consequential damages in this case, if any, will be for the Court to determine on a fee petition, rather than for the jury to decide.

With regard to the exceptions to the 'American rule' the court argued that 'a treaty calls for an a fortiori application' of the notion of statute and that therefore the American rule did not apply to the case, as Art. 74 CISG constituted an exception. Secondly the court based its decision on an inherent power doctrine to award attorney's fees in cases where the opponent acted in bad faith. This second string is, however, not relevant to our question of interpretation of Art. 74 CISG and it shall therefore not be dealt with any further.

In its ruling the District Court considered the aim of the Convention to achieve uniformity of its interpretation and certainty for the contractors.

However, this decision has been reversed.<sup>29</sup> Judge Posner argued in the appeal that the question of reimbursement of attorney's fees was a procedural one. He held so, because the 'American rule' as well as the 'English rule' were

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<sup>29</sup> See *Zapata Hermanos Sucesores S.A. v. Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Company* U.S. Circuit Court of Appeals (7th Circuit), No. 01-3402, 02-1867, 02-1915, 19 November 2002, available at: <<http://cisgw3.law.pace.edu/cases/021119u1.html>>.

not specific to a certain field of law but rules of general applicability. He followed that the question was not covered by the Convention, stating that '[t]he Convention is about contracts, not about procedure.' He also held that the CISG was not an exception to the 'American rule' as the question of attorney's fees was neither 'expressly settled' in the Convention nor 'even mentioned'. Then stating, without any further analysis however, that there were no principles that could be drawn out of the provisions of the Convention to determine whether the term 'loss' included attorney's fees, Judge Posner reasoned that the question was to be settled by domestic law in accordance with the rules of private international law.

Another argument of the District Court of Appeal for rejecting the interpretation of the meaning of 'loss' in the District Court decision was that it would produce anomalies. The plaintiff would be able to recover his attorney's fees under the Convention. But what would be the situation of the defendant? The court asked whether the defendant, if he prevails, could invoke domestic law to get reimbursement in countries with the 'loser pays' principle. If the defendant could do so, could accordingly the plaintiff waive his right under Art. 74 CISG in favour of a maybe more generous domestic provision, which might not be limited by the requirement of foreseeability? Finally the court doubted how likely it was that the United States would have signed the Convention if they had known that it meant to renounce to the 'American rule'.

Thus, the Court of First Instance based its decision on

- the wording of Art. 74 CISG and
- the requirement of uniformity and certainty,

while the Court of Appeal brought forward

- the distinction between procedural and substantive law,
- the lack of clarity of Art. 74 CISG in regard to inclusion of attorney's fees and
- the anomalies an inclusion of attorney's fees in Art. 74 CISG would produce.

The case has been contested in a petition for a writ of certiorari to the Supreme Court of the USA. The petition was denied, however.

c) Scholarly writing

The Zapata case entailed a debate among scholars about the question at issue. Both positions found followers.<sup>30</sup> However, the supporters of the opinion that attorney's fees should not be awarded based on Art. 74 CISG do not all base their outcome on the same arguments and reasoning as the court of appeal in Zapata. Indeed some agree with the ruling of the court of appeal and hold that treating the question as a procedural one beyond the scope of the Convention was convincing and consistent with the purposes and principles of the CISG.<sup>31</sup> Others, however, get to the same result, but hold that the distinction between procedural and substantive law was not the key, but that it was rather the imbalance between plaintiff and defendant pointed out by the court of appeal as an anomaly that provided the answer. As such an imbalance 'was not something that the CISG drafters intended to create'.<sup>32</sup> A further similar approach is that labelling a question as procedural or substantive according to domestic law endangers a uniform interpretation of the CISG and courts should rather decide whether a problem is governed by the CISG through an interpretation in accordance with Art. 7 CISG.<sup>33</sup>

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<sup>30</sup> Holding Art. 74 CISG does not encompass litigation costs: Flechtner *supra* note 3; Flechtner and Lookofsky 'Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal' (2003) 7 *Vindobona Journal of International Commercial Law and Arbitration* 93-104, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/flechtner5.html>>; Vanto 'Attorneys' fees as damages in international commercial litigation' (Spring 2003) *Pace International Law Review* 203-222, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/vanto1.html>>; Keily *supra* note 3; Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6 Art. 74 par. 20; Holding that Art. 74 CISG does encompass litigation costs: Felegemas 'An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals' (Spring 2003) 15 *Pace International Law Review* 91-147, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/felemegas4.html>>; Zeller 'Interpretation of Article 74 – Zapata Hermanos v. Hearthside Baking – Where Next?' (2004) 1 *Nordic Journal of Commercial Law*, available at: <[http://www.njcl.fi/1\\_2004/commentary1.pdf](http://www.njcl.fi/1_2004/commentary1.pdf)>; Herber/Czerwenka *Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf* (1991) Art. 74 par. 7.

<sup>31</sup> See Flechtner *supra* note 3; Flechtner and Lookofsky *supra* note 30.

<sup>32</sup> See Vanto *supra* note 30.

<sup>33</sup> See Keily *supra* note 3.



d) Statement

To base the solution to the problem of recoverability of attorney's fees on the distinction between procedural and substantive law is not satisfying for several reasons. Such a distinction is always hard to draw. Substantive and procedural law are interlinked and litigation costs are an example of the double nature of some issues that are neither merely substantive nor merely procedural. For instance in German law, the recovery of litigation costs is regulated by the code of civil procedure. However, these costs are still regarded as being part of the consequential loss of a party after a breach of contract. The provision in the code of civil procedure, however, is a *lex specialis* to the substantive provisions for damages. And a claim based on the substantive right to damages is barred as far as it is identical to the procedural right, as the claimant has no legitimate interest in the legal proceeding.<sup>34</sup>

There is obviously good reason to treat the litigation costs of the parties as a procedural matter in a merely national case: the imbalance between plaintiff and defendant that has been mentioned by the court of appeal in Zapata, the problem that the parties cannot name the exact amount of their loss in attorney's fees at the beginning of a trial and further reasons. But the double nature shows how justified it is to question whether 'it really matters, if a national law calls an issue "procedural" or "material"'.<sup>35</sup> Such an approach would logically need to be a preliminary one and would mean to recourse to national law before even having considered, if a question is governed by the CISG. It is therefore detrimental when trying to reach a uniform interpretation as required by Art. 7 CISG.

As the question of attorney's fees can accordingly not be answered by recourse to the national distinction between procedural and substantive law, the first method of interpretation has to be the wording of the Convention. In looking at the plain meaning of the Convention

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<sup>34</sup> See German Supreme Court, BGH, VI ZR 98/75, 09.03.1976, available in: BGHZ 66, 112; German Labour Law Court, LAG Hamm, 15 SA 437/91, 28.08.1991, available in: DB 92, 431; Schiemann in von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (1998) §. 251 par. 114 et seq.; Heinrichs in Palandt *Kommentar zum Bürgerlichen Gesetzbuch* (2004) § 249 par. 38 et seq.

<sup>35</sup> See Vanto *supra* note 30.

one should bear Honnold's words in mind that the Convention consciously '...root[ed] out words with domestic legal connotations in favour of non-legal "earthy" words to refer to physical acts.'<sup>36</sup> Insofar, the District Court in Zapata stated correctly and aptly that, '...focused on the language of the Convention ... the question becomes a simple one'. Attorney's fees are a 'loss' for the party that has to pay them. There can't be any doubt that this loss is a consequence of the breach of contract in any given dispute. Neither can one argue that such costs – at least in a reasonable amount – were not foreseeable for the party breaching the contract, as it is a typical and logical reaction to institute legal proceedings in case of a dispute about correct performance of a contract. Flechtner, however, argues that the wording of Art. 74 CISG was at least ambiguous, because it was broad enough to encompass attorney's fees but equivalent language in U.S. domestic sales law, the UCC<sup>37</sup>, has not been so interpreted. The language was therefore not specific enough.<sup>38</sup> However, as the same author himself acknowledges, the CISG can't be interpreted from a purely national point of view. And when the Circuit Court of Appeals points out that attorney's fees have neither been expressly settled nor even mentioned in the Convention, this observation does not help to solve the issue as no specific category of loss is mentioned in the CISG with the exception of loss of profit. Nevertheless, these critics are correct in so far as an examination of the problem cannot stop by simply stating that the wording of the CISG encompasses attorney's fees. There might still be stronger arguments in the travaux préparatoires or strong policy considerations that call for another interpretation of the notion of loss in Art. 74 CISG.

The legislative history of the Convention does not reveal a clear answer to the problem. The issue seems not to have been considered in the drafting process, as it does not appear in the

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<sup>36</sup> See Honnold 'Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth' (Australia 1995) 1 *International Trade and Business Law Journal* 1-10, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/honnold3.html>>.

<sup>37</sup> See Art. 2 of the Uniform Commercial Code. In the United States commercial sale contracts are governed by the UCC while non-commercial sale contracts fall under the common law.

<sup>38</sup> See Flechtner *supra* note 3.

travaux préparatoires.<sup>39</sup> However, one has to bear in mind that the aim of full compensation has clearly been the purpose of the drafting parties.<sup>40</sup> Thus, the Secretariat Commentary explains that the 'basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed'.<sup>41</sup> Flechtner regards this omission in the text of the CISG and in the travaux préparatoires as an indication that the drafting parties did not consciously consider that the Convention might include compensation for attorney's fees. According to him, the fact that the parties did not address an issue where no international consensus exists, suggested that the United States didn't expect or intend the CISG to change their domestic regulations. However, Flechtner himself acknowledges that a country to a treaty is also bound if its representatives did not realise the whole consequences of what they ratified.

The international case law seems to be divided on the question. Flechtner produced a detailed examination on several cases.<sup>42</sup> His article shows how difficult it is to consider international case law even though big efforts have been made to improve availability of such judgements and how manifold the dangers of misinterpretation are. The examination revealed that many cases, mostly German, seemed to award attorney's fees when one reads the English abstracts. However, verifying the abstracts by reading the German full version thereof shows that the courts had only awarded pre-litigation fees based on Art. 74 CISG and had in fact decided upon the litigation costs by applying the national procedural rules, which do not govern the recovery of expenses incurred outside the litigation.<sup>43</sup> But there are also decisions granting reimbursement of litigation costs based on Art. 74 CISG.<sup>44</sup> However,

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<sup>39</sup> See Honnold *Documentary History of the Uniform Law for International Sales. The Studies, Deliberations and Decisions that led to the 1980 United Nations Convention with Introductions and Explanations* (1989) 1, 1, cited in Flechtner (note 82) *supra* note 3.

<sup>40</sup> See Keily *supra* note 3.

<sup>41</sup> See Secretariat Commentary *supra* note 4, comment 3.

<sup>42</sup> See Flechtner *supra* note 3.

<sup>43</sup> See German Appellate Court Düsseldorf, OLG Düsseldorf, 6 U 152/95, 11 July 1996, available at: <<http://cisgw3.law.pace.edu/cases/960711g1.html>>; German Lower Court Alsfeld, AG Alsfeld, 31 C 534/94, 12 May 1995, available at: <<http://cisgw3.law.pace.edu/cases/950512g1.html>>; German Lower Court Augsburg, AG Augsburg, 11 C 4004/95, 29 January 1996, available at: <<http://cisgw3.law.pace.edu/cases/960129g1.html>>.

<sup>44</sup> See Arbitral Tribunal of the Chamber of Commerce Hamburg, Schiedsgericht der Handelskammer Hamburg, 21 June 1996, available at: <<http://cisgw3.law.pace.edu/cases/960621g1.html>>; Swiss Commercial Court

Flechtner correctly pointed out that one must also bear in mind that the majority of decisions on Art. 74 CISG probably just remain silent on the issue of recovery of litigation costs based on Art. 74 CISG and simply award them based on their national procedural law.<sup>45</sup> It is therefore justified to conclude that one can hardly speak of a consensus in international case law that Art. 74 CISG covers the reimbursement of litigation costs.<sup>46</sup>

Finally one must consider the principles on which the Convention is based, and whether the spirit and purpose of the Convention is best served by including or by excluding attorney's fees from Art. 74 CISG. One such principle has already been mentioned above, the principle of full compensation, which is the main principle underlying Art. 74 CISG. The principle says that the injured party must be placed in the same economic position it would have been in if the contract had been performed properly.<sup>47</sup> This principle surely argues for an inclusion of attorney's fees in Art. 74 CISG as otherwise the successful plaintiff might not be made whole entirely. On the other hand, there is also the principle of equality of the parties that has to be considered.<sup>48</sup> The CISG regulates the rights and obligations of the seller and the buyer without favouring one side and thereby without favouring exporting or importing nations. The principle is also contained in the preamble of the Convention, where it says: 'CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States.' Here lies the most persuading argument for an exclusion of attorney's fees from Art. 74 CISG, as the anomaly described by the Circuit Court of Appeal does infringe the equality of the parties. At the same time, if litigation costs were part of the damages due under Art. 74 CISG, the question of how this loss has to be measured arises. The elaborate national provisions that can be found in the 'loser pays' – jurisdictions with schedules or percentage rules might not be applicable any more. One author considers this as the decisive argument in the whole debate, stating that

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Aargau, Handelsgericht Aargau, OR.97.00056, 19 December 1997, available at: <<http://cisgw3.law.pace.edu/cases/971219s1.html>>; Court of Arbitration of the International Chamber of Commerce, no. 7585 of 1992, available at: <<http://cisgw3.law.pace.edu/cases/927585i1.html>>.

<sup>45</sup> See Flechtner *supra* note 3.

<sup>46</sup> See Flechtner *supra* note 3.

<sup>47</sup> See Secretariat Commentary *supra* note 4, comment 3.

<sup>48</sup> See Keily *supra* note 3, at 6.2 (b).

certainty and uniformity would best be achieved by interpreting Art. 74 CISG as excluding attorney's fees.<sup>49</sup> Similarly, another author who rejects the solution based on the distinction between procedural and substantive law, holds that litigation costs are not included in Art. 74 CISG, as the CISG drafters would not have intended to create the resulting imbalance between plaintiff and defendant.<sup>50</sup>

Another solution has been suggested by Felemegas, arguing that the described anomaly alone cannot frustrate an interpretation in accord with the Convention in all other respects. However, also holding that such an inequality between the parties can not have been intended by the drafters of the Convention, the suggestion is to construe a duty of loyalty to the contract, which would be breached by a party taking a legal action for breach of contract that fails. Thereby the successful defendant will also be able to recover his attorney's fees based on Art. 74 CISG due to the plaintiff's breach of his obligation of loyalty to the contract.<sup>51</sup> This solution, however, seems to be quite factitious.<sup>52</sup> It has been rejected as a 'result-oriented jurisprudential stretch', that 'does not recommend itself'.<sup>53</sup>

There is also a further, level-headed solution proposed by Zeller. He holds that the Circuit Court of Appeal has simply discovered a gap, namely that attorney's fees are recoverable only for the claimant under Art. 74 CISG but not for the defendant under the CISG.

Accordingly, this gap should to be dealt with in accordance with domestic law.<sup>54</sup> This solution has a lot of merits. It does not twist the Convention in either direction. In view of the lack of any consideration of the question in the travaux préparatoires, this seems to be the correct answer. The drafting states did not pay attention to the issue. The wording they chose for Art. 74 CISG, however, does, as has been demonstrated above, clearly encompass attorney's fees. It is much more probable that the parties were simply not aware of the problem than that they were convinced Art. 74 CISG would unambiguously not apply to attorney's fees. Had they been aware of the problem, a simple clarification would have recommended itself.

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<sup>49</sup> See Keily *supra* note 3.

<sup>50</sup> See Vanto *supra* note 30.

<sup>51</sup> See Felemegas *supra* note 30.

<sup>52</sup> See Keily *supra* note 3.

<sup>53</sup> See Flechtner *supra* note 3.

<sup>54</sup> See Zeller *supra* note 30.

A further consideration argues for this solution: is the result really as unfair as the Circuit Court of Appeals holds? If Art. 74 CISG encompasses litigation costs, plaintiff and defendant in one proceeding are indeed treated differently, if the case is decided in a country where the 'American Rule' applies. However, both parties may recover their costs in a case of breach of contract by the other party, independent from the question in which country legal proceedings are initiated. As the Convention deals with international sales, as far as the parties have not chosen any common place of jurisdiction in their contract, the plaintiff will normally have to sue the defendant in the defendant's country's courts. Interpreting Art. 74 CISG as not covering attorney's fees the result in a case where one party comes from an 'American Rule' country and the other from a 'loser-pays'-jurisdiction would be that seller and buyer will recover unequal amounts of loss in case of a breach by the other party. While the party residing in the U.S.A. will sue the other party in a 'loser-pays'-country and recover its attorney's fees, the other party will not be able to be reimbursed for these expenses. This is also an unequal treatment. Surely one could argue that this imbalance is being equalised by the fact that the plaintiff from the U.S.A. will himself bear the risk of paying the opponent's litigation costs, when bringing an action abroad and vice versa - the other party will not have to bear such a risk by initiating legal proceedings in the United States. However, an unequal situation remains as the fact that one party would be able to recover its litigation costs in case of an unjustified claim against it cannot compensate this party for the disadvantage that it will not be able to be fully compensated for a breach of contract by the party from the United States. The party from the United States, however, will be so compensated. If Art. 74 CISG is interpreted not to encompass litigation costs, an inequality results due to the different domestic rules for the parties in their role as claimant for damages under the CISG and the amount they will be able to recover. If, however, Art. 74 CISG is interpreted to encompass litigation costs, an inequality arises, equally due to differing domestic rules, for the parties in their procedural position as defendants. This is an issue not governed by the CISG, namely the general recoverability of litigation costs as a procedural matter. At least each party will then have to live with their own domestic rules as they will be sued in their

own place of business. As to the problem of difficulty in determining the appropriate amount of compensation, this problem occurs in any claim for damages. Furthermore, it might well be possible to still take recourse to the national rules in determining what a reasonable amount of fees is and what was thus foreseeable, even if the claim itself is based on Art. 74 CISG. Art. 74 CISG must therefore be interpreted as encompassing litigation costs.

## **2. Contributions to the occurrence of damages by the aggrieved party**

The occurrence of a loss and the amount of the damages is often not the result of a single cause. Both parties could have contributed to the occurrence of the loss or its amount and both might have acted in negligence. Before examining how the CISG deals with these cases, we shall have an exemplary look at the approaches in English common law and in German law.

### a) English law and German law

Under English common law it was long held that a party who suffered damages partly or wholly due to its own fault, could either recover the full amount of its damages or no damages at all, dependent on the question of causation whether the claimant or the defendant set the predominant cause. A reduction of damages was not possible. This 'all or nothing' principle was replaced by the introduction of apportionment of damages with the Law Reform (Contributory Negligence) Act 1945. The act was passed, however, with regard to tort rather than to contract. Therefore, initially the courts in England differed about the question whether it was also applicable to the law of contract. Finally in 1989, in *Forsikringaktieselskapet Vesta v. Butcher*<sup>55</sup> the court of appeal made it clear that the Act

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<sup>55</sup> [1989] A.C. 852, cited in McGregor *McGregor on Damages* (2003)17<sup>th</sup> ed., par. 5-009.

should also apply to damages resulting from a breach of contract, under the condition that this breach also constitutes a liability in tort. The Court, however, also held that the Act could not apply where the liability in contract did not correspond to a liability in tort. For instance, in cases where the breach of contract does not depend on negligence at all or where the contract calls for a modified degree of care. Jurisdiction has settled thus. However, the British Law Commission in its Report on *Contributory Negligence as a Defence in Contract*<sup>56</sup> recommended that an apportionment should also be made possible in cases, where the defendant acted against a contractual duty of care without his negligence amounting to a liability in tort at the same time. Beforehand in the preceding Consultation Paper on *Contributory Negligence as a Defence in Contract*<sup>57</sup> the Commission had even provisionally recommended to apply the Act to cases of strict contractual liability, which means to cases where the debtor did not act negligent.<sup>58</sup> At the same time, English law always knew the doctrine of mitigation, which allows for an apportionment of damages. However, the distinction between a failure of the aggrieved party to mitigate a loss caused by the other party on the one hand, treated under the notion of mitigation, and on the other hand a failure of the aggrieved party that partly caused the loss, treated as contributory negligence, is often difficult to draw. Thus, many cases in the context of the law of contract can be dealt with as cases of mitigation so that an apportionment is made possible also where the failure of the debtor does not equate a liability in tort.<sup>59</sup>

In the German law the duty to mitigate as well as the concept of contributory negligence are dealt with in the same provision of the civil code, § 254 BGB.<sup>60</sup> Thus, contributions to the emergence of the harm as well as contributions to the extent of loss by lack of mitigation are treated identically. The legal consequences are the same in both situations. § 254 BGB provides for an apportionment of the damages according to the circumstances, especially the preponderant cause and the blameworthiness of the respective behaviour of the parties. The judge has a wide discretion in his estimation of the appropriate apportionment. Contrary to

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<sup>56</sup> See Law Com. 219 (1993), cited in McGregor *supra* note 55, par. 5-012.

<sup>57</sup> See No. 114 (1990), cited in McGregor *supra* note 55, par. 5-013.

<sup>58</sup> See McGregor *McGregor on Damages* (2003) 17<sup>th</sup> ed. par. 5-001 et seq.

<sup>59</sup> See Treitel *supra* note 7, Chapter IV par. 145.

<sup>60</sup> BGB means Bürgerliches Gesetzbuch, the German Civil Code.



Art. 77 CISG the claim for damages will not automatically and necessary be reduced by the amount the claimant could have mitigated it. The judge will have to weigh the different contributory factors set by claimant and defendant.<sup>61</sup>

b) Articles 77 and 80 CISG

In the CISG there are two articles that address the problem of contributions of the aggrieved party: Art. 77 and 80 CISG. They do not solve it in its entirety, however. Art. 77 CISG deals with the situation where the party that suffers a loss due to its opponent's breach of contract does not mitigate this loss. The provision states that a party is obliged to take all reasonable measures to keep its loss as little as possible. If the party fails to do so, the award of its damages will be reduced to the extent that corresponds to the amount the aggrieved party could have avoided by taking appropriate steps of mitigation. Art. 77 CISG reads:

A party who relies of a breach on 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.

The wording might suggest that only a loss that has already occurred needs to be mitigated. However, the provision is regarded to call for mitigation of loss already suffered as well as for avoidance of the occurrence of loss in the first place; the aggrieved party has to mitigate as soon as it could foresee the danger of breach and resulting damage.<sup>62</sup> Thus, Art. 77 CISG does not lead to an apportionment of damages as does § 254 BGB in the German law. The claim for damages will be reduced by the full amount of loss which the claimant could have avoided. Fault is irrelevant in this context, the contribution by the claimant needs not to be

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<sup>61</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 77 par. 12.

<sup>62</sup> See Bianca/Bonell *supra* note 15, Art. 77 par. 3.11.; Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 77 par. 3; Magnus in von Staudinger *supra* note 6, Art. 77 par. 8.

negligent.<sup>63</sup> However, one has to bear in mind that Art. 77 CISG only requires the claimant to take reasonable measures, which works similarly to a requirement of fault in so far as an omission to take reasonable steps will mostly be negligent behaviour. Thus, the judge has no discretion as to the division of the damages between the parties once he has stipulated the amount of loss imputable to the failed mitigation.

Art. 77 CISG only addresses the issue of behaviour concerning the effects of the other party's breach of contract but not any contribution to the non-performance itself. This situation of contributions to the non-performance itself is dealt with in Art. 80 CISG, which stipulates:

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

In the negotiation process of the CISG this provision has been criticised for stating a self-evident corollary to the strict liability of the CISG which follows from the principle of good faith in Art. 7 paragraph 1 CISG in any way, or more precisely from the prohibition to contradict one's own behaviour, *venire contra factum proprium*, based on the principle of good faith. Still, the parties decided to include the provision, stating that it was preferable not to leave too many questions to be solved by recourse to the general provision of Art. 7 paragraph 1 CISG so as to not overextend this provision.<sup>64</sup> The legal consequence of Art. 80 CISG is the loss of all remedies of the aggrieved party, not only the remedy of damages. Thus, in cases in which the non-performance is solely caused by the claimant, the defendant is not liable at all. However, Art. 77 and 80 CISG leave two questions contentious: what shall be the consequences when both parties caused either the non-performance jointly or the resulting loss and damages?

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<sup>63</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 77 par. 2.

<sup>64</sup> See Maskow in Enderlein/Maskow/Strohbach *Internationales Kaufrecht: Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention* (1991) Art. 80 par. 1.1, the parts on CISG and the Limitation Convention are also available in English translation at: <<http://cisgw3.law.pace.edu/cisg/biblio/enderlein>>.

As to joint contribution to the non-performance, different scenarios are possible. The first uncertainty lies in the question of causation. When is the non-performance 'caused by the first party's act or omission'? Only when non-performance was a stringent consequence of the first party's behaviour or also when it was a foreseeable or legitimate reaction of the party in breach? It is submitted that the non-performance need not be an absolutely necessary consequence, as the debtor was not obliged to overcome a hindrance set up by the creditor. What efforts could be expected from the debtor in a specific case, for instance to overcome incomplete instructions given by the creditor, was a question of good faith.<sup>65</sup> But the obstacle set by the creditor must be causative and not only a trigger to the debtor's non-performance.<sup>66</sup> Thus, when the buyer fails to pay the price or arrears from a previous contract, the seller can only invoke his rights from Art. 71-73 but not Art. 80 CISG.<sup>67</sup>

There are therefore cases in which the non-performance cannot be imputed solely to the creditor or solely to the debtor. It is contentious whether Art. 80 CISG applies to these cases of joint causation and what the legal consequences shall be.

The main indication is the word 'to the extent' in Art. 80 CISG. However, if there is no causal link between the contribution of the creditor and the debtor, but two independent contributions to the non-performance, Art. 80 CISG seems not to fit at all. Furthermore, the cases of joint contribution to the harm but not to the non-performance are not expressly dealt with in Art. 77 and 80 CISG. How the wording 'to the extent' in Art. 80 CISG may be interpreted and what general principles might be construed from the two provision will be dealt with further under paragraphs f) and g).

### c) UNIDROIT Principles and PECL

A comparison with the UNIDROIT Principles and the PECL makes it apparent that the provisions of Art. 77 and 80 CISG do not deal with the problems of joint contributions in an

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<sup>65</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 80 par. 5; Maskow in Enderlein/Maskow/Strohbach *supra* note 64, Art. 80 par. 3.3.

<sup>66</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 80 par. 5-6; Achilles *supra* note 6, Art. 80 par. 3; differing: Maskow in Enderlein/Maskow/Strohbach *supra* note 64, Art. 80 par. 5.2.

<sup>67</sup> See German Appellate Court Köln, OLG Köln, 27 U 58/96, 8 January 1997, available at: <<http://cisgw3.law.pace.edu/cases970108g1.html>>; Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 80 par. 6.

exhaustive way. Indeed both codifications of principles contain - in addition to provisions mainly identical to Art. 77 and 80 CISG – provisions dealing with the situation of joint causation of the harm. While Art. 7.4.8 of the UNIDROIT Principles corresponds to Art. 77 CISG and Art. 7.1.2 corresponds to Art. 80 CISG, the UNIDROIT Principles include a further Art. 7.4.7, that provides:

#### Article 7.4.7 – Harm Due in Part to Aggrieved Party

Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

In the PECL Art. 9:505 corresponds to Art. 77 CISG and Art. 8:101 (3) corresponds to Art. 80 CISG. A further Art. 9:504 reads as follows:

The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects.

The official UNIDROIT Comments on the Principles explain the distinction between Art. 7.4.7 and Art. 7.4.8 on mitigation of harm. While Art. 7.4.7 is 'concerned with the conduct of the aggrieved party in regard to the cause of initial harm, Art. 7.4.8 relates to that party's conduct subsequent thereto.'<sup>68</sup> The illustrations in the official comments give examples of situations to which Art. 7.4.7 of the UNIDROIT Principles will apply. In the one case party A breached an exclusivity clause in the contract by acquiring stock from a third party. This breach of contract, however, was provoked by the aggrieved party B's prior behaviour, as B claimed immediate payment despite another agreement in the contract. Thus, there is a causal link between the two parties' contributions to the harm. But it would be problematic to apply Art.

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<sup>68</sup> See Official Comments on the UNIDROIT Principles *supra* note 19, comment no. 4 on Art. 7.4.7.

80 CISG, as it is unclear in how far A was obliged and/or legitimated to breach the exclusivity clause by B's unjustified claim for immediate payment. The example also shows that Art. 7.4.7 shall not only apply to contribution to the loss suffered due to the breach of contract but also where the aggrieved party contributed to the non-performance itself. The second example given states a case of cumulative causation, where the two contributions to the harm are independent from each other without any causal link between them:

A, a passenger on a liner effecting a luxury cruise, is injured when a lift fails to stop at the floor requested. B, the shipowner, is held liable for the consequences of A's injury and seeks recourse against C, the company which had checked the lifts before the liner's departure. It is proved that the accident would have been avoided if the floor had been better lit. Since this was B's responsibility, B will not obtain full recovery from C.<sup>69</sup>

The legal consequence Art. 7.4.7 provides for is an apportionment of damages. The comments state that the determination will depend upon judicial discretion and that the judge shall give due regard to the parties' conduct as expressly provided in the article.

Art. 9:504 PECL also expressly applies to contributions of the aggrieved party to the non-performance itself as well as to the loss suffered in consequence of the breach of contract. The distinction from Art. 9:505 covering mitigation is that Art. 9:504 PECL applies to cases where the aggrieved party 'exacerbated' the 'loss-producing effects' of the non-performance. Whereas failure to mitigate relates to omissions of the aggrieved party to reduce or extinguish the loss.<sup>70</sup> The legal consequences of an application of Art. 9:504 are categorically different from those of Art. 7.4.7 UNIDROIT Principles. The non-performing party is 'not liable', thus an apportionment is not provided. Rather the consequence is the same as in a case of failure to mitigate: the right to damages will be reduced to the extent that the loss is

<sup>69</sup> See Official Comments on the UNIDROIT Principles *supra* note 19, comment no. 4 on Art. 7.4.7

<sup>70</sup> See Official Comment A on Art. 9:504 PECL, available at: <http://cisgw3.law.pace.edu/cisg/text/peclcomp80.html>.

due to the aggrieved party's behaviour. However, the stipulation of this extent will often be associated with a large degree of judicial discretion. But it is still an important distinction as the judge is not allowed to take the conduct of the parties into consideration in a valuing way as to the blameworthiness for instance.

d) Travaux préparatoires

The travaux préparatoires seem not to provide any help to the solution of the problem. At least it is not discussed in the Report of the First Committee, neither to article 77 CISG<sup>71</sup> nor to article 80 CISG<sup>72</sup>. A Secretary Commentary on Art. 80 CISG does not exist, the one on Art. 77 CISG, or more precisely on Art. 3 of the 1978 Draft, does not mention the issue.

e) International Case law

Research on the Pace University website's 'Search Form for Cases of Interest' did only reveal one case which deals with the problem of joint contribution outside the express scope of Art. 80 CISG.<sup>73</sup> In this case, decided by a Bulgarian arbitration, the tribunal apportioned damages in a 50/50 correlation.<sup>74</sup> However, the decision concerned a reduction of price under Art. 50 CISG for lower quality of the goods and not an award of damages. The tribunal held that buyer and seller had contributed to the harm in equal shares, but that the problem of joint contribution wasn't settled in the Convention. Therefore the tribunal argued national Bulgarian law was to be applied in accordance with Art. 7 paragraph 2 CISG and the applicable rules of private international law.

The case does not provide convincing arguments for a debate about apportionment of damages. Firstly, it is not about damages but about price reduction. Secondly, it does not really deal with joint contribution to harm but rather with failure to fulfil additional obligations,

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<sup>71</sup> See Document A/CONF.97/11, Report of the First Committee, available at: <<http://cisgw3.law.pace.edu/cisg/1stcommittee/summaries77.html>>.

<sup>72</sup> See Document A/CONF.97/11, Report of the First Committee, available at: <<http://cisgw3.law.pace.edu/cisg/1stcommittee/summaries79,80.html>>.

<sup>73</sup> The search form has been searched with the notions: 'art 80', 'contributory fault', 'contributory negligence', 'cumulative causation', 'alternative causation', 'apportionment', 'nothing' (for 'all or nothing principle'), 'Law and Reform and Act and 1945'.

<sup>74</sup> See Bulgarian Chamber of Commerce and Industry, Arbitration Case 56/1995, 24 April 1996, available at: <<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960424bu.html>>.

that is the obligation under CISG not only to examine the received goods (art. 38 CISG) but also to inform the buyer of the result of that examination (Art. 39 CISG) – else the buyer loses his right to rely on any lack of conformity. In the case at hand the seller knew about the lack of conformity even though the buyer had not informed him about the results of the examination. The tribunal, after considering Art. 38 to 40 CISG, simply stated that this was a case of joint contribution and that such a problem was not settled in the Convention. The tribunal did neither try to interpret the CISG provisions nor consider any case law or scholarly writing.

Similarly, the Israeli Supreme Court relied on domestic law to apportion damages in a case under ULIS, which also refers to the CISG 'by way of analogy'.<sup>75</sup> A Belgian buyer had bought boots from an Israeli seller, who manufactured the shoes and attached a symbol to them, which had been predetermined by the buyer. The symbol, however, was a trademark of Levi's Jeans and the boots were confiscated upon importation into the United States. Finally, the Belgian trader had to remove the symbols and he sold the boots for a much lower price than intended. He claimed for damages against the Israeli seller. The Israeli Court held that according to Art. 42 CISG, applied by way of analogy, the seller was not responsible for the defectiveness of the boots since the buyer knew about the infringement of Levi's trademark. However, instead of relying on this result the Court held that the seller had infringed the good faith obligation arising from Israel's contract law. As both parties acted in bad faith the Court shared the damages between the seller and the buyer in equal shares.

Neither of the two cases is highly persuasive, as they do not rely on CISG provisions in reaching the outcome of an apportionment of damages respectively price reduction.

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<sup>75</sup> See Israeli Supreme Court *Eximin S.A.v. Textile and Footwear Italstyle Ferrari Inc.*, 3912/90, 22 August 1993, abstract available at: <<http://cisgw3.law.pace.edu/cases930822i5.html>>.

f) Scholarly writing / Commentaries

The problem of joint causation of non-performance is also contentious among scholarly authors. The suggested solutions differ widely as to the correct grounds, but much more agreement can be observed in the results.

It is submitted that Art. 80 CISG only applies to cases in which the creditor has caused the non-performance alone<sup>76</sup> or in which the creditor's contribution is at least of significant preponderance<sup>77</sup>. Representatives of this opinion hold that Art. 80 CISG stipulated an 'all or nothing' rule, which was not suitable for cases of joint causation. Thus, it is argued that Art. 80 CISG could only lead to a full loss of any remedy and that Art. 80 CISG did not allow for any apportionment, not even in cases of divisible remedies such as damages.<sup>78</sup> Whereas others hold that in cases of a significant preponderance of the creditor's cause, Art. 80 CISG shall apply with the specification that the creditor shall only be granted divisible remedies such as damages which will be proportionally reduced.<sup>79</sup> It is also suggested to apportion divisible damages in cases of joint contribution as the idea of apportionment could be derived from Art. 77 and 80 CISG as a general principle.<sup>80</sup>

Others point to the wording 'to the extent'. Thus, it is held that Art. 80 CISG clearly excluded the Anglo-American 'all or nothing' principle for the CISG.<sup>81</sup> Representatives of this opinion argue that Art. 80 CISG indicated that the contributions must be apportioned. While some hold that the likelihood of causation and the blameworthiness of the behaviour shall be considered<sup>82</sup>, others hold that this subjective approach has been rejected by the Convention which does not revert to the notion of fault. Therefore the apportionment had to be done exclusively according to the degree of probability of causation.<sup>83</sup>

Stoll and Gruber point to the argumentation that in cases where the creditor alone caused the non-performance, the debtor would already be exempted by Art. 79 CISG. Thus, Art. 80

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<sup>76</sup> See Witz and Salger in Witz/Salger/Lorenz *International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG* (2000) Art. 77 par. 5, Art. 80 par. 3.

<sup>77</sup> See Achilles *supra* note 6, Art. 80 par. 4; Magnus in von Staudinger *supra* note 6, Art. 80 par. 13 et seq.

<sup>78</sup> See Witz and Salger in Witz/Salger/Lorenz *supra* note 76, Art. 77 par. 5, Art. 80 par. 3.

<sup>79</sup> See Achilles *supra* note 6, Art. 80 par. 4.

<sup>80</sup> See Magnus in von Staudinger *supra* note 6, Art. 80 par. 13 et seq.

<sup>81</sup> See Herber/Czerwenka *supra* note 30, Art. 80 par. 8.

<sup>82</sup> See Herber/Czerwenka *supra* note 30, Art. 80 par. 7-8.

<sup>83</sup> See Tallon in Bianca/Bonell *supra* note 15, Art. 80 par. 2.5.



CISG would constitute a redundant provision if it is held to be applicable only in cases of single causation. But the same authors state that the correct dogmatic reasoning was not as important in the end. At least the principle could be derived from Art. 80 CISG that the contribution of the creditor has to be taken into account. For remedies in money the claim shall be reduced according to the respective causes set by the parties. Thereby one had to consider the importance of the respective contributions, the likelihood of causation of loss and the blameworthiness of the behaviour with the courts enjoying a great degree of discretion in the question of correct apportionment.<sup>84</sup>

The difficult further question of what effects the joint contribution has on other remedies that are not divisible, lies beyond the scope of this paper.

g) Statement

Art. 77 and 80 CISG both contain provisions for cases, in which both parties of a contract contribute in different ways either to the breach of contract of the one party or to the loss resulting from it. However, as we have seen, the two articles do not deal with the issue exhaustively. The correct distinction between the different forms of contribution can be difficult and the borders of applicability of a provision can become blurred. As the issue is partly solved in Art. 77 and 80 CISG and general principles can be derived, a recourse to domestic law, as has been taken by the two courts in the cases stated above, is barred. In the CISG there is a distinction between contributions to the non-performance, Art. 80 CISG, and contributions to the loss resulting. While contributions by acting and by omitting are equated in Art. 80 CISG, Art. 77 CISG only expressly refers to omissions.

A system of apportionment can not truly be derived from the two articles. Both articles provide for the consideration of the contribution by the creditor. However, they do not allow for a judgemental apportionment of the respective contributions with a wide discretion of the judge, as does § 254 BGB in domestic German law. In fact, both articles provide for the

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<sup>84</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 80 par. 7 and 10.

contribution of the creditor to be fully deducted from his remedy. Thus, it is true that under the CISG one should not apply the 'all or nothing' principle. Therefore, as far as this is possible, the contribution of the creditor shall be considered to reduce the creditor's remedy in the full amount of its causation. Only where this is not possible, because the respective contributions are so closely interlinked that it cannot be determined to which extent the contribution of the creditor caused the non-performance or the loss, shall a judgemental apportionment be made.

Some specific cases can easily be solved by analogy. Thus, cases of positive contributions to the emergence of the harm by acting in an unreasonable way and not by an unreasonable omission, will have to be treated according to Art. 77 CISG by way of analogy. This is also stated for the correspondent Art. 9:505 PECL in the official comments, where it is said that the aggrieved party is expected to 'refrain from action which is unreasonable'.<sup>85</sup>

The obligation to mitigate the loss must also be considered, where the creditor acts reasonable from an *ex ante* perspective, but in fact his behaviour leads to an increase of the loss in the end. To reduce the creditor's damages would not be compatible with the principle of good faith, on which Art. 77 and 80 CISG are based. Thus, he will be awarded his full damages despite his contribution to the loss.<sup>86</sup>

Where the two contributions to non-performance can easily be delimited from one another, Art. 80 CISG can be applied only to the part which the creditor caused, which constitutes a case of denial of a remedy 'to the extent' the creditor caused a breach himself. This can especially occur in cases of delay, for instance when the creditor caused a delay of the other party, because he indicated an incomplete address, but the delivery is further delayed because the debtor chose a slow mean of transport.

In cases of alternative causation, where both contributions would have sufficed to cause the non-performance or the loss, there is no room for an apportionment. Art. 77 and 80 CISG are

<sup>85</sup> See Official Comment A on Art. 9:505 PECL, available at: <http://cisgw3.law.pace.edu/cisg/text/peclcomp77.htm>.

<sup>86</sup> See for Art. 9:505 PECL: Official Comment D on Art. 9:505 *supra* note 85.

both unambiguous in that the causation by the creditor shall reduce its remedies by the full extent of its consequences. Assume the seller of technical parts delivers the wrong parts, but the buyer installs them in his machine in an inappropriate way not giving regard to the instructions of the seller and in consequence the machine of the buyer is destroyed. If the breakdown of the machine would have happened for any of the two reasons, that is if it would have been destroyed as well if the seller had supplied the correct parts for reason of the wrong installation or if the buyer had installed the parts in an appropriate way for reason of the parts being wrong, then the buyer will not be able to recover any damages.<sup>87</sup>

The cases of cumulative causation finally are the most difficult to solve. When both contributions have caused the loss jointly, the creditor is fully responsible for the loss in its entire amount according to the 'but for' rule. An example can be constructed by slightly changing the case described above. Assume the buyer's machine would not have broken, if one of the contributions is eliminated, that is it would still be working if the seller had delivered the correct parts or if the buyer had not installed the parts inappropriately. By acting reasonable, that is building in the parts correctly, the buyer could have avoided the loss. If Art. 77 CISG is applied by way of analogy the buyer's damages would be reduced to zero. Lookofsky gives a similar example stating that

...although CISG article [77] seems designed mainly to post-breach mitigation, the Convention does not bar recognition of the pre-breach (prevention) aspect of avoidability. ... For example, where the harm caused by seller's delayed delivery of a simple standard part is aggravated by the fact that buyer keeps no such spares on hand, such a failure to take precautionary measures, if judged unreasonable, will prevent the recovery of compensation for avoidable loss.<sup>88</sup>

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<sup>87</sup> See similarly Maskow in Enderlein/Maskow/Strohbach *supra* note 64, Art. 80 par. 6b).

<sup>88</sup> See Lookofsky 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (1993) *International Encyclopaedia of Laws - Contracts* 127-128, cited at: <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-77.html>>.

However, this result does not seem to be consistent with all general principles of the CISG. The basic rule that the creditor's contribution shall be considered to the full amount of its consequence must be reviewed in such cases. Several general principles can be invoked and shall be given due consideration: the general principle of good faith which is derived from Art. 7 paragraph 1 CISG and on which Art. 77 and 80 CISG are based; the principle of full compensation on which the section on damages is based; as well as the principle of fairness and equality between the parties. If Art. 77 and 80 CISG are based on the reason that it would be unjust for the aggrieved party to recover loss it has caused himself, than it would also be unjust and an infringement of the principle of full compensation, if the party in breach was exempted entirely from its liability, because his contribution was causative according to the 'but for' rule but only jointly with a contribution of the aggrieved party.

Thus, in cases that are not expressly settled in Art. 77 and 80 CISG the general rule derived from these provisions must be that the remedy of the aggrieved party is reduced according to the amount of loss his contribution caused, without space for judicial discretion as to the weighing of the respective causes. However, the result of applying this general rule must always be reviewed with regard to the general principles of full compensation, good faith, equality and fairness. In these cases, especially in cases of cumulative causation, as well as in situations where the amount of loss due to the contribution of the aggrieved party can not be assessed, this review may lead exceptionally to an apportionment of damages with consideration of the probability of causation and the blameworthiness of the respective behaviour.

### 3. Non-pecuniary loss and loss of goodwill

The CISG does not expressly mention the issue of non-pecuniary loss. However, the issue must be regarded as governed by the CISG as it forms part of damages for a breach of contract. The wording of Art. 74 CISG, 'a sum equal to the loss, including loss of profit', does not expressly exclude the recovery of non-pecuniary loss. Clearly excluded from the applicability of the Convention is only any damage, therefore also non-pecuniary damage, 'for death or personal injury caused by the goods...', Art. 5 CISG. This provision has been inserted in the CISG because the negotiating states wanted to avoid any concurrence between their national provisions as to product liability and the CISG.

#### a) Domestic laws

The issue of non-pecuniary loss is treated differently in different jurisdictions. In Germany, for instance, the recovery of immaterial loss in general is expressly excluded in the civil code; exemptions have to be expressly provided for by statute.<sup>89</sup> Accordingly non-pecuniary loss shall be granted in cases of injury of the body, health, freedom and sexual self-determination of a person or in cases of a holiday booking, if the holidaymaker has taken leave in vain for the holiday was severely impaired.<sup>90</sup> In England the general rule is also that non-pecuniary loss is not recoverable.<sup>91</sup> Only when a case falls into one of the recognized exemptions shall non-pecuniary loss be awarded. Such exemptions are contracts of which one of the objects is to provide some sort of mental benefit, e.g. holidays, and cases of physical inconvenience or discomfort.<sup>92</sup> In France damages can be recovered for 'préjudice moral' in cases of an attack on a person's honour or reputation, specific sorts of physical harm and the loss of a closely related person.<sup>93</sup>

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<sup>89</sup> See § 253 par. 1 and § 651f Bürgerliches Gesetzbuch (BGB).

<sup>90</sup> See § 253 par. 2 Bürgerliches Gesetzbuch (BGB).

<sup>91</sup> See *Addis v. Gramophone Co Ltd.* [1909] A.C. 488 (HL).

<sup>92</sup> See *Farley v. Skinner* [2002] 2 A.C.732.

<sup>93</sup> See Notes 4.(a) to Art. 9:501 PECL, available at: <<http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html>>.

b) Commentaries

The Secretariat Commentary does not address the issue. The non-official commentaries are divided about whether Art. 74 CISG includes damages for non-pecuniary loss.<sup>94</sup> However, the only example given for such a loss is regularly the loss of goodwill. And indeed one cannot think of any other cases of immaterial loss, which would be likely to occur as a result of a breach in a sale of goods. Therefore, it has to be noted that the commentators, who argue that the Convention does not cover immaterial loss, also argue that loss of goodwill is in fact a case of material loss that is merely difficult to evaluate.<sup>95</sup> The merit of this argument will be examined further with the international case law. Finally, it can be recorded that even though they differ in their reasoning all commentaries agree that a damage to goodwill can be claimed under Art. 74 CISG.

c) UNIDROIT Principles and PECL

Before turning to the jurisprudence the value of the UNIDROIT Principles and the PECL to contribute to the question of inclusion or exclusion of immaterial loss in the CISG shall be examined. Both the UNIDROIT Principles and the PECL contain express provisions stating that the award of damages shall also encompass non-pecuniary loss. Art. 7.4.2 of the UNIDROIT Principles states:

Article 7.4.2 – Full compensation

- (1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

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<sup>94</sup> Advocating the inclusion of immaterial loss: Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 74 par. 21, 46; Achilles *supra* note 6, Art. 74 par. 6; Magnus in von Staudinger *supra* note 6, Art. 74 par. 27, 50; advocating the exclusion of immaterial: Witz in Witz/Salger/Lorenz *supra* note 76, Art. 74 par. 14; Schönle in Honsell *Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)* (1997) Art. 74 par. 7.

<sup>95</sup> See Witz in Witz/Salger/Lorenz *supra* note 76, Art. 74 par. 14; Schönle in Honsell *supra* note 94, Art. 74 par. 7.

- (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

The PECL Article 9:501 reads:

- (1) The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108.
- (2) The loss for which damages are recoverable includes: (a) non-pecuniary loss; and (b) future loss which is reasonably likely to occur.

Surely both articles are based on the general principle of full compensation as is Art. 74 CISG and one could therefore hold that they indicate that the CISG also encompasses immaterial loss. However, when weighing their significance for the question of inclusion or exclusion of non-pecuniary loss in Art. 74 CISG, it is important to remember that they have a considerably broader scope than the Convention. None of the codes of principles is restricted to sale of goods and the PECL is not even limited to commercial contracts. They therefore apply to contracts where the occurrence of non-pecuniary loss is by far more likely and mostly more significant than in a commercial contract on sale of goods. Accordingly in the official comments to the UNIDROIT Principles the rule is said to possibly 'find application, in international commerce, in regard to contracts concluded by artists, outstanding sportsmen or women and consultants engaged by a company or by an organisation'.<sup>96</sup> The example given in the official comments on the PECL article refers to a spoiled holiday.<sup>97</sup> Furthermore, the specific and express mentioning of non-pecuniary loss – in a separate paragraph – can just as well be used to justify the reverse conclusion that, if the CISG didn't mention non-pecuniary loss, the drafters didn't want to include it. Thus, neither the UNIDROIT Principles nor the PECL are of significant help in the interpretation of the CISG in this specific aspect.

Whereas Eiselen argues as follows: he states correctly that the reason for the exclusion of

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<sup>96</sup> See Official Comments on the UNIDROIT Principles *supra* note 19, comment 5 on Article 7.4.2.

<sup>97</sup> See Official Comment E on Article 9:501 PECL, available at: <http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html>.

death and personal injury from the Convention in Art. 5 CISG was not so much due to a difference in the basic approach between the CISG and the UNIDROIT Principles than to the decision to remove the field of product liability from the sphere of the CISG. Therefore, he concludes, the existence of the provision about non-pecuniary loss in the UNIDROIT Principles did provide 'good grounds for arguing that the provisions of article 5 CISG should be restrictively interpreted and only the liability for personal injury or death should be excluded, but not other personal damages such as damage to reputation'.<sup>98</sup>

d) International case law

It shall be noted, that in the international case law the question of non-pecuniary loss has only occurred in form of claims for damages of goodwill, sometimes called damages to the reputation of a firm or the reputation of goods.

Some of the decisions deny the recoverability of such a loss under the CISG and seem to differ from other decisions granting damages for loss of goodwill. Thus, the French Appellate Court Grenoble partly overturned a decision of the first instance in that the Appellate Court refused to grant compensation for a loss of the claimant's brand image, holding that 'deterioration of commercial image [reputation] is not compensable damages in itself if it did not entail proved pecuniary damages'.<sup>99</sup> To demonstrate its loss of brand image, the claiming buyer, a French company trading with shoes, had simply produced affidavits of two representatives that illustrated dissatisfaction of the retail dealers and the difficulties which the company would encounter to keep them in future. In a Russian Arbitration case the tribunal denied a counterclaim for compensation for 'moral harm', stating that the Convention did not contain provisions for such a compensation in 'such cases'.<sup>100</sup> However, the decision cannot be evaluated neatly as no translation is available but only a case commentary, in

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<sup>98</sup> See Eiselen 'Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 74 of the CISG' (2004) comment d., available at: <<http://cisgw3.law.pace.edu/cisg/principles/uni74.html>>.

<sup>99</sup> See French Appellate Court Grenoble, CA Grenoble *Sté Calzados Magnanni v. SARL Shoes General International* 21 October 1999, available at: <<http://cisgw3.law.pace.edu/cisg/cases/991021f1.html>>.

<sup>100</sup> See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Case 304/1993, 3 March 1995, available at: <<http://cisgw3.law.pace.edu/cases/950303r2.html>>.



which the present question is not discussed in further detail. What was actually meant by the notion of moral harm therefore remains unclear.

All other examined cases do confirm the recoverability of loss of goodwill at least in general, even if they do not award it in the specific case for other reasons.<sup>101</sup> Thus, in a case decided by the German District Court Darmstadt the defendant asserted an irreparable damage to its reputation in Switzerland, which he claimed could not be calculated precisely but amounted at least to 500,000 SF or shall otherwise be estimated by the court.<sup>102</sup> Firstly, the court stated that the defendant could not at the same time claim for a loss of turnover as pecuniary loss and for a loss of goodwill expressed in money. It then went over to make an interesting comment, saying 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 his business from a commercial point of view. As long as he has the necessary turnover, he can be completely indifferent towards his image. [Buyer] does not prove that her allegedly damaged reputation harmed her sales quotas. ... It may very well be that if defective products are sold and marketed, the further development of the business does not correspond to the reasonable expectations. However, the Court expects at least a minimum of sufficiently substantiated submissions.

One decision at least granted damages for loss of goodwill on the basis of an estimation.

Thus, the Helsinki Court of Appeal approved the decision of first instance, which awarded the

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<sup>101</sup> See Swiss Commercial Court Zürich, Handelsgericht Zürich, HG 970238.1, 10 February 1999, available at: <<http://cisgw3.law.pace.edu/cases/990210s1.html>>; Spanish Appellate Court Barcelona, Audiencia Provincial de Barcelona, sección 16<sup>a</sup>, 755/95-C, 20 June 1997, available at: <<http://cisgw3.law.pace.edu/cases/970620s4.html>>; Swiss Supreme Court, Bundesgericht, 1. Zivilabteilung, 4C.179/1998/odi, 28 October 1998, available at: <<http://cisgw3.law.pace.edu/cases/981028s1.html>>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 54/1999, 24 January 2000, available at: <<http://cisgw3.law.pace.edu/cases/000124r1.html>>.

<sup>102</sup> See German District Court Darmstadt, Landgericht Darmstadt, 10 O 72/00, 9 May 2000, available at: <<http://cisgw3.law.pace.edu/cases/000509g1.html>>.

plaintiff damages for different losses, including the loss of goodwill.<sup>103</sup> The Court of First Instance had stated that,

[i]n estimating the loss resulting from loss of good will, the Court of First Instance has taken into consideration the fact that the [buyer] has not done business in this trade sector before the coming about of the business relationship now in question. ... the Court of First Instance has estimated the damage caused to [buyer] on the basis of a rule laid down [in] the Law of Civil Procedure (section 17).

This seems to be one decision that indeed awarded damages for loss of goodwill as an immaterial value, without requiring the demonstration of actual losses.

e) Summary and statement

Saidov states that the CISG does not generally encompass non-material loss.<sup>104</sup> He defines the notion of non-material loss as a loss 'flowing from an injury or damage to non-material values', such being values without economic content and 'inseparable from the personality of bearer of these values'. He correctly holds that the Convention does not generally cover such losses, as the legal relationships governed by the CISG are of a commercial nature with material purposes. However, Saidov describes two exceptions: firstly, where the purpose of a contract would be entirely non-material and the parties are aware of this and secondly, the damage to a business' reputation; further arguing that a damage to reputation in itself represents a non-material category of own value regardless of whether this damage has led to a loss of profit or not. Such damage, he holds, will entail 'non-material loss of the value that reputation had'.<sup>105</sup>

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<sup>103</sup> See Helsinki Court of Appeals, Helsingin hovioikeus, S 00/82, 26 October 2000, available at: <<http://cisgw3.law.pace.edu/cases/001026f5.html>>.

<sup>104</sup> See Saidov 'Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods' (2001), available at: <<http://cisgw3.law.pace.edu/cisg/biblio/saidov.html>>.

<sup>105</sup> See Saidov *supra* note 104.

Surely, the goodwill or the reputation of a company is a good of its own value, that is why it finds consideration for instance in the field of business acquisitions. However, this value is always appreciated for its transformation into pecuniary advantages. A damage to a business' reputation is not a damage because of the 'honour' or a 'vexation' of the company. As the German District Court of Darmstadt said, a businessperson can remain quite indifferent towards its reputation, as long as this does not affect the company's turnover.<sup>106</sup> In the end, a damage to reputation or goodwill can therefore be regarded as a loss of profit.

The difficulty normally lies in the calculation of this loss and for the claimant also in the fact that such damage must have been foreseeable for the other party. These two requirements on the other hand also provide the necessary safety for the party in breach of contract not to be burdened with the duty to provide an excessive compensation for damage to goodwill. Consideration of these requirements has not been established in the decision of the Helsinki Court of First Instance and Court of Appeal respectively.<sup>107</sup> However, it goes too far to hold that a damage to goodwill was generally only foreseeable if the buyer expressly pointed out the risk of such a damage to the seller.<sup>108</sup> Thus, in a case, where the buyer had claimed damages, because he lost clientele after an inferior consignment of 172 tonnes of meat, the Swiss Supreme Court correctly held that such loss of clientele was foreseeable for a seller, who knows that the buyer is a wholesale trader in a sensitive market.<sup>109</sup>

The analysis shows that the question, whether Art. 74 CISG does encompass non-pecuniary loss is mostly of academic nature. On closer examination of all cases – admittedly the case of the Helsinki Court of Appeal is an exception – as well as of all commentaries there exists a consensus that a loss of goodwill is recoverable if a monetary loss can be associated with it. Whether this is a pecuniary or non-pecuniary loss, can therefore be regarded as a question of subordinate interest. A loss of goodwill is therefore a recoverable loss under Art. 74 CISG,

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<sup>106</sup> See decision as of 9 May 2000 *supra* note 102.

<sup>107</sup> See decision as of 26 October 2000 *supra* note 103.

<sup>108</sup> Requiring such an express notice: Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 74 Rn.46.

<sup>109</sup> See decision as of 28 October 1998 *supra* note 101.

when a pecuniary loss follows from it which can at least be estimated and which was foreseeable for the other party.

#### **4. Interest rate**

The CISG provides for the right to interest on any sum in arrears in its Art. 78. However, the Convention remains silent about what shall be the interest rate or the right method of calculating the interest rate. Art. 78 CISG reads as follows:

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

##### a) Legislative history

The reason for the omission of an interest rate lies in the legislative history of the Convention. The negotiating parties were unable to reach a compromise on the interest rate; too wide were the different ideas represented, with some Arabic states best wanting to avoid any interest at all. While the antecessor ULIS<sup>110</sup> contained a specific interest rate ('at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%.')<sup>111</sup>, this approach, first also adopted by the Working Group, was rejected by the Commission. Thus, the Draft Convention did not include any general right to interest but only contained a provision about the duty of the seller to pay interest on the purchase price in case of refund after avoidance of the contract (Art. 69 of the Draft, corresponding to Art. 84 CISG). In the debate about inclusion of a general duty to pay interest at the conference no agreement could be reached as to an

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<sup>110</sup> ULIS is the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964.

<sup>111</sup> See the match-up of the ULIS provisions for each CISG article, available at: <http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-u-78.html>.

applicable interest rate. The opinions differed whether the cost of credit in the debtor's country or the creditor's country, and whether the official discount rate or the market rate should apply.<sup>112</sup> Some argued that no special provision on interest was necessary, as the lost use of capital was recoverable as damage under Art. 74 CISG. However, the purpose of a provision on interest was among others to prevent that a debtor could avoid the payment of interest on the ground that his failure was due to an impediment beyond his control, and he was therefore not liable for damages as an exemption under Art. 79 CISG. Thus, to avoid a complete defeat of the negotiations about this point, the parties agreed to imply a general duty to pay of interest in the CISG but to leave the question of the applicable rate opened.

b) International case law

Different solutions to the problem have been suggested. However, most of the courts held that the question of the applicable interest rate was to be solved according to the applicable national law found after recourse to the rules of private international law.<sup>113</sup>

c) Scholarly writing

Among scholarly writers other solutions have been searched for with the aim of finding a uniform solution within the CISG. The starting point of these reflections is regularly the purpose and nature of the duty to pay interest. Some argue it shall prevent the creditor's loss suffered due to the non-payment, therefore the interest rate at the creditor's place of business shall be applicable. Others argue that the provision to pay interest shall prevent unjust enrichment on the side of the debtor, therefore the interest rate at the debtor's place of business was deciding. Others again suggest to choose the interest rate at the place of performance or to choose an international rate of interest such as the LIBOR<sup>114</sup>. Another

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<sup>112</sup> See Document A/CONF.97/11, Report of the First Committee, available at: <<http://cisgw3.law.pace.edu/cisg/1stcommittee/summaries78,84.html>>.

<sup>113</sup> See with quotation of some recent cases: Mazzotta 'CISG Article 78: Endless disagreement among commentators, much less among the courts' (2004), available at: <<http://cisgw3.law.pace.edu/cisg/biblio/mazzotta78.html>>.

<sup>114</sup> London Interbank Offered Rate: the rate of interest at which banks borrow funds from other banks in the London interbank market. The rate is fixed every day and published in financial newspapers.

stream of thought wants to tie up the rate of interest to the currency in which the debt is owed and thereby consider the different inflation rates for different currencies.<sup>115</sup>

Opting for such a uniform solution, Corterier states that one could not follow from the omission of an interest rate in the Convention that the question was meant to be left outside the Convention and suggests to draw an analogy to Art. 76 CISG, comparing the non-delivery of goods to the non-payment of money. Art. 76 CISG awarded the 'hypothetical cost of a substitute purchase'. Such hypothetical costs for a substitute purchase of money fixed in a manner parallel to Art. 76 paragraph 2 CISG would be defined as equal to 'the market rate for the sum and currency owed at the time and place the payment should have been made.'<sup>116</sup>

d) UNIDROIT Principles and PECL

Indeed a similar solution has been inserted in the UNIDROIT Principles and the PECL.

Paragraph 2 of Art. 7.4.9 of the UNIDROIT Principles reads as follows:

'Article 7.4.9 – Interest for Failure to Pay Money

- (1) ....
- (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

The corresponding PECL Article 9:508 reads:

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<sup>115</sup> See Bacher in Schlechtriem/Schwenzer *supra* note 6, Art. 78 par. 28-31.

<sup>116</sup> See Corterier 'A New Approach to Solving the Problem of the Interest Rate Under Article 78 CISG' (2000) 5 *International Trade and Business Law Annual* 33-42, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/corterier.html>>.

- (1) If payment of a sum of money is delayed, the aggrieved party is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due.

e) Statement

However, as appreciable a uniform solution might be, it means to disregard the legislative history of the Convention.<sup>117</sup> The negotiating parties tried to reach a compromise and an express provision about the interest rate, but failed. So if the parties to the Convention were not able to derive a solution that is coherent with and imperative from the general principles they based the Convention on, how can the interpreters argue such a solution was contained in the general principles? The negotiating parties consciously renounced a provision on the interest rate, therefore the issue is a gap that cannot be filled by recourse to the general principles or by analogy, but must be filled by taking recourse to the applicable domestic law. And in the end, is this solution really as bad as followers of a uniform solution assert? They point out that a recourse to domestic law would lead to different solutions and that the statutory interest rates to which most laws refer – as opposed to market rates – vary widely. Corterier cites the example of rates ranging from 5% to 15% in the then countries of the European Union.<sup>118</sup> However, the market interest rate also varies broadly in different countries and depends on the purpose of a loan. Thus, even a uniform formula for the interest rate would still refer to different market places with different rates.

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<sup>117</sup> See Eiselen 'Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Art. 78 of the CISG' (2004) comment f and g, available at: <<http://cisgw3.law.pace.edu/cisg/principles/uni78.html>>.

<sup>118</sup> See Corterier *supra* note 116.

## 5. Burden of proof

The question who bears the burden of proof is not expressly settled in the CISG. No indication can be derived from the UNIDROIT Principles and the PECL. Neither of the principles contain express provisions on the burden of proof except in the two regulations which correspond to Art. 79 CISG, that is Art. 7.1.7 UNIDROIT Principles and Art. 8:108 PECL.

a) The views as to inclusion or exclusion in the CISG

Some courts and arbitration tribunals as well as some authors argue that the issue of burden of proof was not governed by the CISG and was to be solved in accordance with domestic law; either in accordance with the *lex fori*, if it is held that it is a procedural question, or in accordance with the law applicable pursuant to the rules of private international law.<sup>119</sup> This opinion, however, is rather in the minority.<sup>120</sup>

The broad majority in jurisdiction and scholarly writing hold to the contrary that the CISG does implicitly govern the question of burden of proof.<sup>121</sup> One argument brought forward in support of this position is that the Convention does not restrain from the topic in whole. In Art. 79 CISG it is expressly stated that the party invoking an exemption to liability has to prove the factual requirements for such an exemption. This implies by way of *argumentum e contrario* that the proof of the breach of contract shall be borne by the party claiming the damages.<sup>122</sup> Further indications can be found in several provision where the wording ‘...unless...’, calls for the burden of proof to be assigned to the party invoking the

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<sup>119</sup> See Swiss District Court Saane, Bezirksgericht der Saane, T 171/95, 20 February 1997, available at: <<http://cisgw3.law.pace.edu/cases/970220s1.html>>; Court of Arbitration of the International Chamber of Commerce (ICC) *Maaden v. Thyssen*, 6653 of 1993, 26 March 1993, available at: <<http://cisgw3.law.pace.edu/cases/936653i1.html>>.

<sup>120</sup> See Ferrari *supra* note 14.

<sup>121</sup> See Ferrari *supra* note 14; Magnus *supra* note 16.

<sup>122</sup> See Italian District Court Vigevano, Tribunale di Vigevano, *Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A.*, no. 405 as of 12 July 2000, available at: <<http://cisgw3.law.pace.edu/cases/000712i3.html>>.



exception.<sup>123</sup> Finally, another consideration is that the issue of burden of proof is closely linked to the substantial law and the substantial provision at issue.<sup>124</sup> The bearer of the burden of proof, can often only be decided after a close examination of the provision of which the requirements are to be proven.

b) The general principles as to burden of proof

The general principle that has thus been derived from the Convention is that *ei incumbit probatio, qui dicit, non qui negat*, i.e. the one who affirms bears the burden of proof, not the one who denies.<sup>125</sup> More specifically three general principles follow:

- (a) Each party generally has to prove the existence of the factual prerequisites contained in the legal provision from which that party wants to derive beneficial legal consequences.
- (b) The party asserting an exception in her favour generally has to prove the existence of the factual prerequisites of that exception.
- (c) Facts lying in a party's own sphere of responsibility and therefore better known to that party have to be proven by the party exercising control over that sphere.<sup>126</sup>

c) The burden of proof in a claim for damages

However, there is not always agreement as to how these principles are to be applied. In the context of damages there is only a consensus that the party claiming damages has to prove its damages and the causal link between the breach of contract and the damage.<sup>127</sup> It is also understood that if the defendant asserts that the aggrieved party failed to mitigate its loss, the defendant will have to prove the failure to mitigate as it is an objection to the claim.<sup>128</sup>

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<sup>123</sup> See Magnus *supra* note 16.

<sup>124</sup> See Ferrari *supra* note 14.

<sup>125</sup> See Italian District Court Vigevano, 12 July 2000, *supra* note 122; Ferrari *supra* note 14.

<sup>126</sup> See Magnus *supra* note 16; very similar Ferrari *supra* note 14.

<sup>127</sup> See Ferrari *supra* note 14; Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 74 par. 51; Magnus in von Staudinger *supra* note 6, Art. 74 par. 62.

<sup>128</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 77 par. 12; Magnus in von Staudinger *supra* note 6, Art. 77 par. 22.

But there is some disagreement about the question of who has to prove the breach of contract and who has to prove the foreseeability of the loss. While it seems to be the prevailing opinion that the claimant has to prove the breach of the other party in accordance with the first of the general principles stated above, some rather hold that the defendant has to prove that he fulfilled his obligations appropriately except where the claimant accepted the goods without reservation<sup>129</sup>. Thus, the Swiss Commercial Court Zürich stated that the liability for defects was a specific form of the obligation to fulfil the contract, and that it was therefore generally the seller who had to prove the conformity of his goods with the contractual requirements at the time of passing the risk. This burden only shifted to the buyer, once he accepted the goods without giving notice of non-conformity.<sup>130</sup>

However, the dissent might not be as wide as it seems. Firstly, once the buyer accepted the goods without any notice of non-conformity there is agreement that he will bear the burden of proof for any defect of the goods. Stoll and Gruber cite a decision of the German Appellate Court Munich for their assertion that it was the seller who has to prove his correct fulfilment of the contract.<sup>131</sup> However, in this case the claimant asserted that the buyer had not paid for the goods. The court held that it was the buyer, i.e. the defendant, who had to prove that he had in fact fulfilled his obligation to pay the purchase price. The assertion that the goods have not been delivered at all or that the purchase price has not been paid is a negative fact, which can hardly be proven. This is a special case and it is understood that the fact that a party has delivered goods or paid the price, has to be proven by the party stating the fulfilment, as the party claiming non-delivery or non-payment naturally does not have any means to prove this 'non-fact'.

There remains the situation, in which the goods have been delivered and the buyer has given notice of non-conformity. In this case the general principle, that the claimant must prove the

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<sup>129</sup> See Swiss Commercial Court Zürich, Handelsgericht Zürich, HG 930634/O, 30 November 1998, abstract in English and link to German full text available at: <<http://cisgw3.law.pace.edu/cases/981130s1.html>>; Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 74 par. 51.

<sup>130</sup> See decision as of 30 November 1998, *supra* note 129.

<sup>131</sup> See German Appellate Court München, OLG München, 7 U 5460/94, 8 March 1995, abstract and link to the German full text available at: <<http://cisgw3.law.pace.edu/cases/950308g1.html>>.

factual prerequisites of the provision he bases his claim on, must prevail and it is the claimant's burden to prove any non-conformity of the goods.<sup>132</sup> The reasoning that delivery without defects was to be proven by the seller as it was an objection<sup>133</sup> or because the liability for defects was a specific form or corollary of the right to performance of the buyer<sup>134</sup> is not persuasive. Firstly, such an allocation of the burden of proof does not correspond to the general principles stated above. Furthermore, after delivery of the goods the seller might encounter major difficulties to prove that he supplied goods without defects as the buyer is in possession of the goods. Thus, for instance, in a case decided by the Italian District Court Vigevano the buyer asserted non-conformity of the goods, sheets of vulcanised rubber intended to be converted into shoe soles, but he had not kept a single shoe with the soles he claimed to be defective. Thus, there was no way to prove conformity of the goods.<sup>135</sup>

The second contentious prerequisite is the foreseeability of the damage. While some state, according to the first principle stated above, that the party claiming the damages has to prove the foreseeability of its loss,<sup>136</sup> others hold that this is generally to be proven by the party in breach.<sup>137</sup> While the reasoning of the latter opinion is that a lack of foreseeability was an exception from the established causality between the breach and the loss beneficial to the debtor,<sup>138</sup> the former argue that there was no unlimited liability and thus the creditor had to prove to what extent the debtor assumed liability.<sup>139</sup> The question is difficult to decide in a general manner without the facts of a specific case. Foreseeability is rather an assessment of facts than a fact in itself. The court will have to consider the breach of contract and the loss caused by it and state if it holds that the loss was foreseeable or not. There will only be

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<sup>132</sup> See Magnus in von Staudinger *supra* note 6, Art. 74 par 62; Achilles *supra* note 6, Art. 74 par. 12; Ferrari *supra* note 14; Italian District Court Vigevano, 12 July 2000, *supra* note 122; Swiss Commercial Court Zürich, Handelsgericht Zürich, HG 920670, 26 April 1995, available at: <<http://cisgw3.law.pace.edu/cases/950426s1.html>>.

<sup>133</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 79 par. 53.

<sup>134</sup> See Swiss Commercial Court Zürich, 30 November 1998, *supra* note 129.

<sup>135</sup> See Italian District Court Vigevano, 12 July 2000, *supra* note 122.

<sup>136</sup> See Swiss Commercial Court of Zürich, 26 April 1995, *supra* note 132; Italian District Court Vigevano, 12 July 2000, *supra* note 122; Ferrari, *supra* note 14; Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 74 par. 51.

<sup>137</sup> See Magnus in von Staudinger *supra* note 6, Art. 74 par. 62; Achilles *supra* note 6, Art. 74 par. 12.

<sup>138</sup> See Achilles *supra* note 6, Art. 74 par. 12.

<sup>139</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 74 par. 51.

additional facts that need to be proven specifically in connection with foreseeability if one side claims special circumstances as otherwise the facts are the breach of contract, the loss and the causal link. Thus, for instance, the claimant might assert that a generally not foreseeable loss was indeed foreseeable for the other party in the specific circumstances of the case at issue, as the claimant gave special information to the defendant. Or the defendant might argue that a generally foreseeable loss was not foreseeable for him because of special circumstances. Whichever party asserts a situation which would allow asserting foreseeability deviating from the ordinary and average situation, will have to prove the facts thus beneficial to it.

#### d) Summary

The burden of proof is a matter regulated in the CISG and the general rules as stated above are applicable. In the context of damages the general principles signify that normally the claimant has to prove the breach of contract, the loss resulting from it and the causal link between them. However, in case of assertion of a negative fact, the other party will bear the burden of proof. No additional facts will normally have to be proven to establish the foreseeability of the loss. If, however, one party claims special circumstances, this party will have to prove them.

The defendant bears the burden to prove any exemption to his liability as well as a failure to mitigate the loss by the aggrieved party.

## 6. Future Loss

The CISG does not expressly mention the issue of future loss. As we have seen beforehand, however, Art. 74 CISG does not refer to any kind of specific loss besides the loss of profit.

The question is whether or rather with which requirements and limits future loss, that has not yet occurred at the time of a court's or tribunal's decision, but might well be suffered thereafter, shall be awarded. The issue is crucial for the claimant, as once he initiated legal proceedings for recovery of damages, he might be denied to bring a second action against the same defendant, when more loss occurs at a later stage.

### a) The 'once and for all' rule in English law

In English law for instance, and thereby in other jurisdictions based on the English common law as well, the 'once and for all' rule applies to claims for damages. According to this rule a claimant has to recover all his damages, including contingent damages, in his first claim against the defendant. He is barred from initiating a second claim based on the same cause of action at a later stage, when he suffers further losses he has not yet been compensated for in the first claim.<sup>140</sup> This rule has been applied in a couple of English cases. These included such cases in which the future damage was evident or ought to have been evident at the time of the first claim,<sup>141</sup> as well as other cases in which the prospective loss could not have been foreseen at the stage of the first claim and in which the denial of a second claim therefore amounted to hardship for the claimant.<sup>142</sup> There are of course some exceptions or ways for the claimant to avoid that he ends up without a full compensation. They are restricted to specific circumstances however. Thus, a declaration of rights can be awarded, the court can postpone the assessment of items of loss, and it can allow an interim award or

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<sup>140</sup> See McGregor on Damages *supra* note 58, par. 9-030 et seq.; Christie 'The Once and For All Rule and Contractual Damages' (2003) 120 (3) *South African Law Journal* 445-52.

<sup>141</sup> See *Rowntree v. Allen*, (1936) 41 Com.Cas.90; *Furness Withy & Co v. Hall*, (1909) 25 T.L.R.233; *Conquer v. Boot* [1928] 2 K.B. 336, CA; all cases cited in McGregor *supra* note 58, par. 9-031.

<sup>142</sup> See *Fetter v. Beale* [also occasionally *Fitter v. Veal*] (1701) 12 Mod. 542; in South Africa in *Kantor v. Welldone Upholsteres* (1944) CPD 388; all cases cited in Christie *supra* note 140.

provisional award.<sup>143</sup> But the most important tool to avoid the claimant being left without a full compensation is the possibility to award damages for future loss.

b) Relevance under the CISG

It is problematic whether the 'once and for all' rule of English law would be applicable in a CISG case. If the rule is considered to be part of the domestic substantive law of contract or law of damages, a court or a tribunal cannot apply it in a dispute governed by the Convention. However, despite the distinction between substantive and procedural law being of doubtful value in the context of the CISG,<sup>144</sup> one might argue that the 'once and for all' rule is of procedural nature and therefore applies as part of the *lex fori* governing the procedure of a dispute. But even if the 'once and for all' rule would not be applicable, one must bear in mind that the rule is related and very similar to the *estoppel per res judicata* and the problem of availability of a second legal proceeding will always encounter this latter barrier, which is an immanent rule in any jurisdiction, not only the ones based on the English common law.

However, for instance in German law, a court might take future loss into account in its decision under condition that it is sufficiently certain.<sup>145</sup> But the claimant will always be allowed to bring a second claim for further damages at a later stage.<sup>146</sup> The *res judicata* principle does not hinder him to do so as his proceeding is not considered to be identical to a previous one if he claims for another loss resulting from the same cause.

c) UNIDROIT Principles and PECL

The UNIDROIT Principles and PECL both address the issue of future loss expressly. Article 7.4.3 UNIDROIT Principles states:

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<sup>143</sup> See McGregor on Damages *supra* note 58, par. 9-033; Christie *supra* note 140.

<sup>144</sup> See above in the context of recoverability of attorney's fees, Chapter III 1.

<sup>145</sup> The limits and details are contentious. See German Supreme Court, BGH, VI ZR 82/57, 29 April 1958, available in BGHZ 27, 181; Gottwald '*Schadenszurechnung und Schadensschätzung: zum Ermessen des Richters im Schadensrecht und im Schadensersatzprozeß*' (1979) 126.

<sup>146</sup> See Heinrichs in Palandt *supra* note 34, Vorb v § 249 par. 174; Mertens in Soergel '*Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*' (1990) Vor § 249 par. 292.

#### Article 7.4.3 – Certainty of harm

- (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.
- (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.
- (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

Paragraph 2 of Article 9:501 PECL reads:

- (1) ...
- (2) The loss for which damages are recoverable includes: (a) non-pecuniary loss; and (b) future loss which is reasonably likely to occur.

Eiselen appraised the UNIDROIT Principle as providing a practical, reasonable and equitable approach for the determination of future damages, suitable also for the CISG.<sup>147</sup>

The official comments on the PECL correctly set forth that a court deciding about future loss has to surmount two uncertainties: the likelihood of the occurrence of the future loss and the probable amount of this loss. This confirms how closely the issue of recoverability of future loss is related to the problem of certainty of harm, which is not expressly dealt with in the Convention either.

#### d) International case law

A search for international case law only reveals a few cases. The Swiss Commercial Court Zürich has denied a remuneration for loss due to currency fluctuation.<sup>148</sup> Though it held that such a loss was generally recoverable, in the case at hand it denied it on the ground that the

<sup>147</sup> See Eiselen *supra* note 98, comment 1.

<sup>148</sup> See Swiss Commercial Court Zürich, HG Zürich, HG 95 0347, 5 February 1997, abstract and link to the German version available at: <<http://cisgw3.law.pace.edu/cases/970205s1.html>>.

money had not yet been paid and the court could therefore not calculate the amount of loss concretely as it could not foresee the future exchange rate at the time of payment. The court further said that an estimation of the loss was not possible either at that time. It stated that, according to general principles, future loss could only be regarded, if the future course of events could be foreseen as certain and the loss therefore could be expected with certainty. In another case an ICC Arbitration tribunal refused to indemnify the claimant for damages that would possibly arise from a pending third party claim on the ground that the claimant had not suffered these damages yet.<sup>149</sup> An arbitration tribunal of the Zürich Chamber of Commerce awarded damages for the loss of future earnings over a period of eight years, the intended duration of the contract that had been breached, assessed with recourse to the presentation of a party appointed expert.<sup>150</sup>

e) Statement

The latter case points to a necessary distinction. There are losses for which the amount will never be known with certainty as they are based on the assumption of future positive development that might have occurred if the contract had not been breached. This is a hypothetical scenario which will not become easier to assess at a later time. The loss of a chance is such a case. These kinds of losses must be encompassed in Art. 74 CISG to embrace the principle of full compensation, and awarded in the first claim with the judge having to assess their amount with a considerable degree of discretion and requiring a reasonable degree of certainty. Indeed Art. 7.4.3 UNIDROIT Principles might be a well justified point of reference. No more specific rules can unfortunately be laid down in this regard, and the details remain to be solved from case to case with the judge's discretion.

It is a different problem if the claimant wants to recover loss that might occur in future, such as further physical injuries caused by an accident, and which will – some time in future – be

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<sup>149</sup> See Court of Arbitration of the International Chamber of Commerce (ICC), No 7660 of 1994, 23 August 1994, abstract and editorial remarks available at: <<http://cisgw3.law.pace.edu/cases/947660i1.html>>.

<sup>150</sup> See Zürich Chamber of Commerce, ZHK 273/95, 31 May 1996, available at: <<http://cisgw3.law.pace.edu/cases/960531s1.html>>.



clearly definable. The case mentioned above decided by the ICC arbitral tribunal deals with such a form of future loss.

If there are, in different jurisdictions, different rules as to the possibility to recover future loss at a later stage in a second claim, the requirements as to the certainty of future loss must also differ. A court in a jurisdiction, where the possibilities for the claimant to search to recover his loss at a later stage or through an affirmative action are very limited, will have to be less exigent with regard to the certainty of occurrence of future loss than a court can be in a jurisdiction where such options are more easily available for the claimant. For instance, Knapp submits that a court may only award the loss of profit that has already been suffered, stating that this would 'not exclude the injured party's later claim for profit lost after the first decision if other conditions justifying such a claim under Article 74 are present.'<sup>151</sup> This means that the questions of recoverability of future loss, the appropriate degree of certainty and the access to further legal protection cannot be treated completely separately.

A detailed result as to how to treat this problem cannot be presented in this paper. The problem of which degree of certainty to require is highly depending on the actual circumstances of a specific case. A description that is more concrete than the one found in the UNIDROIT Principles is hardly possible. The aim must be to embrace the principle of full compensation. However, there is no way to get around the applicability of the *lex fori* and thus, in the different signatory states the rules as to the availability of further legal protection after a first claim for damages do indeed differ. These differences will have to be taken into account when attempting to define whether future loss is included and what degree of certainty is required in Art. 74 CISG. Any attempt to answer this question without consideration of the differing *lex fori* will endanger the full compensation of the claimant. Even though the question of inclusion of future loss is a question of substantive law of the CISG, uniformity in the outcome might well be achieved best in this specific issue if each

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<sup>151</sup> See Knapp in Bianca/Bonell *supra* note 15, Art. 74 par. 3.5.

country does apply its national standard which will be complementary to its *lex fori*. Thus, the question should be left to the national law in order to achieve the best result of uniformity. Otherwise the resolution of the problem of recoverability of future loss will require a more thorough examination of the regulations and the *lex fori* of the signatory states then can be submitted within the limits of this paper.

## 7. Loss arising from changes in the value of money

In an international contract of sale, if one party is in arrear with the payment of money, the question arises, if the other party can claim for a loss suffered due to changes in the value of the money due. This loss can be an unfavourable drop in the exchange rate between different currencies or the normal devaluation of money, which is the inflation. It is contentious whether these losses can be recovered, but courts have repeatedly recognised that damages due to fluctuations in the exchange rate were generally compensable.<sup>152</sup>

### a) Changes in the exchange rate

With regard to fluctuating exchange rates one has to distinguish whether the payment is made in the creditor's, the debtor's or another third currency.

Thus, if the payment was due in the creditor's currency, a fluctuation in the exchange rate does normally not lead to a loss for the creditor, as he usually doesn't convert the payment into another currency. Therefore no damages are normally recoverable.<sup>153</sup>

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<sup>152</sup> See German Appellate Court Hamm (on Art. 82 ULIS), OLG Hamm, 2 U 28/80, 26 June 1980, available at: <<http://cisgw3.law.pace.edu/cases/800626g1.html>>; Swiss Commercial Court Zürich, 5 February 1997, *supra* note 148.

<sup>153</sup> See German Appellate Court Düsseldorf, OLG Düsseldorf, 17 U 146/93, 14 January 1994, available at: <<http://cisgw3.law.pace.edu/cases/940114g1.html>>; German Appellate Court Hamm (on Art. 82 ULIS), 26 June 1980, *supra* note 152; Witz in Witz/Salger/Lorenz *supra* note 76, Art. 74 par. 21; Magnus in von Staudinger *supra* note 6, Art. 74 par. 49.

In the opposite case, however, if the payment is made in the debtor's currency, the creditor would normally convert the currency immediately. If the exchange rate has worsened between the date payment was due and payment is made, the creditor suffers a loss. Some courts and most commentaries hold that such a loss was foreseeable to the debtor and thus the damage had to be compensated.<sup>154</sup> Whether the same can be said in case of a payment in a third currency, depends on the circumstances of the case at issue, especially on whether the currency was customary in that trade and whether the debtor had to foresee that the creditor would convert the currency. This result is, however, not undisputed. Saidov evaluated the jurisprudence of the International Commercial Arbitration Court (ICAC) at the Russian Federation Chamber of Commerce and Industry.<sup>155</sup> He reports of an ICAC case, in which the claimant requested damages on the ground that the exchange rate of his national currency to the US dollar, the contract's currency, had been substantially raised by the government. The ICAC, however, denied recovery of the resulting loss, holding that this modification in the internal rate of the national currency was a 'domestic affair'. This reasoning had been followed by the ICAC in a number of other cases. Saidov objects to this approach, stating that it can't be made a legal principle and that the loss should be recoverable as long as it is proven and the requirements of limiting the damages, i.e. especially the foreseeability, are met.

#### b) Inflation

Another question is whether a devaluation of money due to the rising cost of living can be reimbursed under Art. 74 CISG. The Belgium District Court Brussels awarded a compensation of fr 10,000.- for revaluation proportional to the rise of the costs of living on a main obligation in the amount of fr 38,442.-, payment of which had been delayed for

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<sup>154</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 74 par. 17; Witz in Witz/Salger/Lorenz *supra* note 76, Art. 74 par. 21; Magnus in von Staudinger *supra* note 6, Art. 74 par. 49.

<sup>155</sup> See Saidov 'Cases on CISG Decided in the Russian Federation' (2003) 7 *Vindobona Journal of International Law and Arbitration* 1-62, also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/saidov1.html>>.

something over two years.<sup>156</sup> In a German case the court denied the award of any damages due to inflation.<sup>157</sup> However, only on the ground that the claimant asserted to use bank credit and consequently did not suffer any losses due to inflation as the amount of his debt is not affected by the inflation rate. Whether any compensation for loss due to inflation should at all be granted is in contest. It is submitted that such losses are generally covered by the right to interest and that only where the claimant can demonstrate that he did suffer an additional loss which is not covered by the interest damage or other damages, he shall be entitled to reimbursement.<sup>158</sup> Thus, the German Appellate Court Hamm, which had recognised the general recoverability of losses due to unfavourable changes in the exchange rate, stated in the same decision that the delay itself of a payment was compensated by the creditor's right to interest on the debt and that the depreciation of a currency did not generally lead to a loss of the creditor.<sup>159</sup>

c) Statement

For several reasons loss due to a change in the value of money shall not be generally recoverable under Art. 74 CISG. In a decision on the principally identical predecessor of Art. 74 CISG, Art. 82 ULIS, the German District Court Heidelberg disclaimed the recoverability of losses arising from a drop in the exchange rate.<sup>160</sup> The court correctly distinguished between monetary debts that refer to a nominal value and others referring to a sum's actual value. If a fixed sum in a specific currency is agreed upon, this is a debt in nominal value, i.e. 'an abstract unit of value which stays true to its identity even if the currency value changes'. The compensation for the delay, the court argued, was granted by the payment of interest and the risk of an undesirable change in the exchange rate was a risk to be borne by the seller.

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<sup>156</sup> See Belgian District Court Brussels, Tribunal commercial de Bruxelles, *Magificio Dalmine S.r.l. v. S.C. Covires*, A.R. 2700/90, R.G. 4.825.91, 13 November 1992, available at: <<http://cisgw3.law.pace.edu/cases/921113b1.html>>.

<sup>157</sup> See German Appellate Court Düsseldorf, 14 January 1994, *supra* note 153.

<sup>158</sup> See Witz in Witz/Salger/Lorenz *supra* note 76, Art. 74 par. 22.

<sup>159</sup> See German Appellate Court Hamm (on Art. 82 ULIS), 26 June 1980, *supra* note 152.

<sup>160</sup> See German District Court Heidelberg, LG Heidelberg, O 116/81, 27 January 1981, available at: <<http://cisgw3.law.pace.edu/cases/810127g1.html>>.

The court, thus, concluded that the creditor did indeed suffer a loss, but that this loss was not attributable to the debtor.

The theory of the nominal value of money has a lot of credit. Indeed, also other courts that hold that a loss due to a fluctuating exchange rate was generally recoverable, did not fail to notice that such a compensation actually means to grant payment not in the currency agreed upon by the parties but in the other currency, to which the exchange rate is hold decisive. Thus, if a debt is owed in Euro, but losses are recovered because the exchange rate into, say, British Pounds has deteriorated, and accordingly the sum owed in Euro is increased proportionally, this means nothing else than that the agreement of the parties on a sum in Euro is converted into an agreement on a sum in British Pounds. Or to be absolutely correct the agreement is modified into a sum X in Euro corresponding at the date of actual payment to the sum Y in British Pounds, which corresponded on the due date of payment to the amount fixed in the contract.

And there are further arguments besides the nature of a debt referring to the nominal value of money for not granting compensation for such a loss. Firstly, the albeit minor, practical question arises, to the exchange rate of which date the rate actual at the time of the decision shall be compared to. A debt is usually not owed on a specific date, but can be paid within a time of, say, thirty days from delivery. How are fluctuations in the exchange rate within this period of time dealt with? Admittedly, an easy solution would be to take the average rate during that period.

More important therefore is the consideration of fairness and equality between the parties and the principle that the aggrieved party shall be fully compensated but not enriched by the award of damages.<sup>161</sup> If an unfavourable fluctuation in the exchange rate must be considered, then logically a favourable must be considered too. That means that the party who is known to convert the payment into its own currency directly after payment might have an advantage in cases of delayed payment compared to its situation at the time when the debt was actually due. The recovery of damages shall, however, not enrich the aggrieved

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<sup>161</sup> See Stoll/Gruber in Schlechtriem/Schwenzer *supra* note 6, Art. 74 par. 31, 32.

party. Thus, this gain would have to be offset against the loss the aggrieved party suffered due to the delay in payment. This result does neither appear to be very practical nor very fair either. It seems to be good luck for the creditor if the exchange rate changed in a way which is favourable to him. The comparison, thus, shows that the District Court Heidelberg was right in stating that the risk of an unfavourable change in the exchange rate is a risk that the creditor has to bear.<sup>162</sup> Finally, the same shall apply to losses due to money depreciation, i.e. the rising costs of living.<sup>163</sup> Under CISG the sum due shall be regarded as a nominal value and the inflation as covered by the right to interest.

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<sup>162</sup> See German District Court Heidelberg, 27 January 1981, *supra* note 160.

<sup>163</sup> See German District Court Heidelberg, 27 January 1981, *supra* note 160; German Appellate Court Hamm (on Art. 82 ULIS), 26 June 1980, *supra* note 152; Witz in Witz/Salger/Lorenz *supra* note 76, Art. 74 par. 22.

# Table of content

- I. Introduction ..... 1**
- II. Damages under the CISG in general ..... 1**
  - 1. The CISG.....1
  - 2. Art. 74 CISG et seq.....3
  - 3. Art. 7 CISG .....5
- III. Specific problems in the context of damages in the CISG..... 11**
  - 1. Attorney’s Fees ..... 11**
    - a) The differing national rules: the ‘English Rule’ and the ‘American Rule’ ..... 11
    - b) The ruling in the Zapata cases ..... 12
    - c) Scholarly writing ..... 15
    - d) Statement ..... 16
  - 2. Contributions to the occurrence of damages by the aggrieved party ..... 22**
    - a) English law and German law ..... 22
    - b) Articles 77 and 80 CISG ..... 24
    - c) UNIDROIT Principles and PECL ..... 26
    - d) Travaux préparatoires ..... 29
    - e) International Case law ..... 29
    - f) Scholarly writing / Commentaries ..... 31
    - g) Statement ..... 32
  - 3. Non-pecuniary loss and loss of goodwill ..... 36**
    - a) Domestic laws ..... 36
    - b) Commentaries ..... 37
    - c) UNIDROIT Principles and PECL ..... 37
    - d) International case law ..... 39
    - e) Summary and statement ..... 41
  - 4. Interest rate ..... 43**
    - a) Legislative history ..... 43
    - b) International case law ..... 44
    - c) Scholarly writing ..... 44
    - d) UNIDROIT Principles and PECL ..... 45
    - e) Statement ..... 46

|   |           |
|---|-----------|
| <b>5. Burden of proof</b> .....                                 | <b>47</b> |
| a) The views as to inclusion or exclusion in the CISG.....      | 47        |
| b) The general principles as to burden of proof.....            | 48        |
| c) The burden of proof in a claim for damages.....              | 48        |
| d) Summary .....  | 51        |
| <b>6. Future Loss</b> .....                                     | <b>52</b> |
| a) The 'once and for all' rule in English law .....             | 52        |
| b) Relevance under the CISG .....                               | 53        |
| c) UNIDROIT Principles and PECL .....                           | 53        |
| d) International case law.....                                  | 54        |
| e) Statement.....   | 55        |
| <b>7. Loss arising from changes in the value of money</b> ..... | <b>57</b> |
| a) Changes in the exchange rate .....                           | 57        |
| b) Inflation.....   | 58        |
| c) Statement.....   | 59        |



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