The Guide to Damages in International Arbitration - Fifth Edition

Damages Principles under the Convention on Contracts for the International Sale of Goods
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This fifth edition of Global Arbitration Review's Damages in International Arbitration Guide is designed to help all participants in the international arbitration community understand damages issues more clearly and to communicate those issues more effectively to tribunals to further the common objective of assisting arbitrators in rendering more accurate and well-reasoned awards on damages.

The book is a work in progress, with new and updated material being added to each successive edition. In particular, this fifth edition incorporates updated chapters from various authors and contributions from new authors. This edition seeks to improve the presentation of the substance through the use of visuals such as charts, graphs, tables and diagrams; worked-out examples and case studies to explain how the principles discussed apply in practice; and flow charts and checklists setting out the steps in the analyses or the quantitative models. The authors have also been encouraged to make available online additional resources, such as spreadsheets, detailed calculations, additional worked examples or case studies, and other materials.

We hope this revised edition advances the objective of the earlier editions to make the subject of damages in international arbitration more understandable and less intimidating for arbitrators and other participants in the field, and to help participants present these issues more effectively to tribunals. We continue to welcome comments from readers on how the next edition might be further improved.
Damages Principles under the Convention on Contracts for the International Sale of Goods

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Summary
INTRODUCTION

The Convention on Contracts for the International Sale of Goods (CISG) provides a neutral set of rules for international sale of goods transactions. It encapsulates the modern understanding of the key legal contract principles in regard to international sales and is heralded as a successful amalgamation of common and civil law contract principles. According to World Trade Organization trade statistics, the 10 largest export and import nations are CISG contracting states. Those 10 countries account for more than 50 per cent of world trade. It follows that international sale of goods contracts account for a large majority of international contracts relating to trade. It is essential, therefore, to be aware of the application of the CISG as the most widely accepted uniform international sales law, and its damages regime.

The major advantage of the CISG is that it provides a uniform and neutral set of substantive rules specifically drafted for international sale of goods contracts. Importantly, unlike some national contract laws that favour either the buyer or the seller, the CISG balances the rights and obligations of both equally. The CISG provides for the substance of an international sale of goods dispute in regard to procedure: a neutral regulatory framework, independent of any domestic law. Parties who want their international sale of goods disputes decided in a truly international manner should choose the CISG as the applicable law, and international arbitral tribunals should apply the CISG to an international sale of goods dispute whenever they have a mandate.

APPLICATION OF CISG (ESPECIALLY ARTICLE 1)

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

ENTITLEMENT TO DAMAGES

The buyer’s entitlement to damages under Article 45(1)(b) and the seller’s entitlement to damages under Article 61(1)(b) stem from the respective duties of the parties imposed by the contract, particularly the duties stated in Articles 30 and 53. Any kind of breach of a contractual duty, even the most minor, can trigger the entitlement to damages. Also, a breach of the obligation to make restitution when unwinding the contract upon avoidance (Article 81(2)) leads to liability under Article 74.
To ascertain the particular obligations that the parties have agreed, arbitral tribunals are required to consider not only any written contract but also pre-contractual and post-contractual behaviour of the parties (CISG, Article 8(3)) as well as trade usages between the parties and usages in the relevant industry (CISG, Article 9). The seller’s duty to deliver goods in conformity with the contract (CISG, Article 35) has generated considerable jurisprudence by courts and arbitral tribunals.

‘Lack of conformity’ includes not only differences in quality but also differences in quantity, delivery of an altogether different good and defects in packaging.

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

DAMAGES

Under the CISG, the obligee can choose specific performance, price reduction, avoidance or damages as the primary remedy for a breach of the sales contract. Article 74 et seq. do not provide a basis for an aggrieved party to claim damages. The requirements of Articles 45 and 61 have to be met for an obligee to be entitled to damages. The extent of the damages to which an obligee is entitled is set out by Article 74 et seq. in the majority of cases, the remedy sought will be damages, often in addition to other remedies. The award of damages is dealt with in four provisions of the CISG (Articles 74 to 77). These provisions provide the framework for the recovery of economic loss. The CISG does not contain specific guidelines for the calculation of damages. Interest is dealt with separately in Article 78. Article 79 sets out the requirements when a party is excused of its performance as a result of force majeure or hardship.

GENERAL PRINCIPLE – ARTICLE 74

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

COMPENSATION

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

LOSS

Loss is not defined, except for Article 74 stating that ‘loss’ includes loss of profits. It follows that future losses are included in the concept of loss. In accordance with the underlying core
principle of the CISG, to leave the contractual relationship between the parties intact as long as possible, punitive damages are not included in the concept of loss.\[31\]

Article 74 gives tribunals broad authority to award damages ‘in a manner best suited to the circumstances’.\[32\]

It should be noted that the CISG does not adhere as such to the doctrine of efficient breach of contract. If the obligee has the right to avoid the contract, damages will be awarded under Article 74, despite any assertion that certain future losses would not have accrued but for the avoidance of the contract.\[33\]

HYPOTHETICAL ON HEADS OF DAMAGES

A German seller sold a French buyer glue to affix ceiling boards. The parties agreed that the glue had certain characteristics in regard to its adhesive qualities and its weight-bearing capacity. Both qualities had been specified by the seller.

The buyer affixed the ceiling boards, using the glue, to the ceiling of the manufacturing plant the buyer built for its customer. However, the glue did not have the adhesive characteristics needed. As a consequence, the ceiling boards crashed down and caused damage to the buyer’s production belt, which resulted in:

- substantial damage to the production belt (replacement needed);
- loss of seven working days’ worth of manufactured goods;
- loss of opportunity to enter into a major contract;
- damage to a piece of necessary manufacturing equipment that belonged to the customer; and
- injury to 10 workers, who required medical attention and were on sick leave for a week.

The principle of full compensation means that the buyer can claim all heads of damages listed (i.e., damages caused to the buyer and the buyer’s customer caused by the non-conforming good and loss of profit and loss of opportunity). However, full compensation under the CISG does not cover personal injury and death (Article 5).

CATEGORIES OF LOSS

DIRECT LOSS

Direct loss is measured by ‘the difference between the value to the injured party of the performance that should have been received and the value to that party of what, if anything, actually was received’.\[34\] If the contract is avoided, direct damages are calculated pursuant to Articles 75 and 76 (i.e., based on the costs of a cover purchase or based on the market value of the goods). If the obligee undertakes measures to place itself in the same position that it would have been in had the contract been properly performed, the obligee is entitled to recover the costs of those measures, provided that they were reasonable.\[35\]

EXAMPLES:

- If the delivery of the goods is unjustifiably delayed and the buyer carries out reasonable measures to overcome the temporary loss and to avoid consequential damages, the buyer may be entitled to recover the expenses incurred.\[36\] In particular,
rental costs for a replacement good can be claimed irrespective of whether or not a replacement was actually obtained.\[27\]

- If the buyer is in possession of the defective goods but has not avoided the contract, the buyer can recover damages pursuant to Article 74 for substitute transactions. The value of the non-conforming goods has to be deducted.\[38\]

- If the non-conformity of the delivered goods can be remedied, the loss can be calculated according to the necessary and reasonable expenses for the cure.\[39\]

- The seller is generally entitled to reimbursement of a bridging loan if the buyer unjustifiably does not pay the purchase price in time.\[40\]

- The seller is entitled to damages if, as a result of the buyer’s late payment, the seller suffers loss because of change of exchange rates or currency devaluation.\[41\]

- The loss of value of the purchase price caused by inflation cannot generally be recovered.\[42\]

**INCIDENTAL LOSS**

Expenses that were incurred by the obligee to avoid any additional disadvantages are recoverable under Article 74 and are referred to as incidental loss.\[43\] Generally, additional costs incurred by a party as a result of another party's unjustified refusal to perform are recoverable.\[44\] Article 77 (mitigation of damages) must be taken into account for all incidental losses.\[45\]

Examples:

- The buyer's expenses for storing and preserving goods that have been delivered late or that are defective and are returned to the seller.\[46\]

- The buyer's expenses for the expedited shipment of alternative goods.\[47\]

- The buyer's reasonable expenses incurred in ascertaining whether the goods are in conformity with the contract, but only if the non-conformity is actually established and notice is given to the seller.\[48\]

- The seller's expenses for storing and preserving goods that the buyer has unjustifiably rejected or has not taken delivery of to avoid greater loss.\[49\]

- The seller's expenses as a result of the buyer's late payment.\[50\]

- The seller's expenses as a result of the shipping space provided by the buyer being unsuitable for the loading of the goods because it is dirty.\[51\]

- The seller’s expenses as a result of damage to the goods from having been stored because the buyer had not paid in time.\[52\]

**CONSEQUENTIAL LOSS**

Consequential loss comprises losses other than those caused by non-performance as such. Typically, consequential loss arises because of the obligee's liability to third parties as a result of the breach.

It is controversial whether damages resulting from the buyer’s liability to third parties for death or personal injury caused by the seller's defective products can be recovered under the CISG. Some courts and academic literature deny the applicability of the CISG to the
recourse of the buyer in accordance with Article 5. Others, and the CISG Advisory Council, allow the buyer’s claim for a consequential damage that is a result of the seller’s defective product injuring a third party or that party’s property. The author submits that the latter view is preferable because it allows the buyer to be compensated under one damages regime (i.e., that of the CISG). It avoids unnecessarily distinguishing between separate heads of the buyer’s liability, namely contract, tort or property. Having to claim under different heads of damages would mean that a mixture of international law (the CISG with regard to contractual claims) and applicable domestic law (with regard to tort or property claims) would be applicable for a breach of the contract. The application of those different damages regimes has the potential to either overcompensate or under-compensate the buyer. In regard to compensating for the consequences of a breach of an international sales contract, the CISG comprises a modern damages regime that amalgamates common and civil law principles and, therefore, is preferable.

Academic literature and jurisprudence are not unanimous as to whether domestic tort law may be applied concurrently with the CISG. Some support leaving this decision to the applicable domestic law, whereas others argue for the exclusion of domestic tort law in these cases. A third view distinguishes between damage caused by the defective performance of the good, in which case the CISG is exclusively applicable, and damage caused because the goods did not adhere to general safety expectations and standards, in which case the buyer has a course of action under the CISG and the applicable domestic tort law concurrently available to them.

Examples:

- Time (e.g., visiting customers) and cost incurred in trying to rectify defective goods are only recoverable if extra staff had to be employed or additional workload was caused.
- Legal costs (extrajudicial or procedural) incurred by the obligee in disputes with third parties are recoverable.
- Reputational loss and loss of goodwill as a result of breach of contract can be recovered. The calculation of the loss of reputation should take into account; for example, the size of the company, the market, the value of the trademark and the necessary costs to re-establish the reputation.
- Damage to the buyer’s own property as a result of the defective goods can be recovered.
- If the buyer has agreed to a contractual penalty in a subsequent contract, this penalty, generally, can also be recovered from the seller.
- The seller might incur consequential loss if the buyer refused to take delivery of the goods (Article 53).

**LOSS OF PROFITS**

Article 74 explicitly provides that damages for breach of contract include lost profits. Lost profits are awarded to place the aggrieved party in the same pecuniary position it would have been in but for the breach. It has to be emphasised that, in line with the view advanced for standard of proof, lost profits do not have to be calculated with mathematical precision. Lost profits need to be established with reasonable certainty. The buyer cannot claim lost
profits if the buyer failed to give notice pursuant to Article 44. Whether or not the buyer has a reasonable excuse for not having given notice is irrelevant.\[69\]

The obligee is not only entitled to recovery for lost profits incurred prior to the judgment or award, but also for future lost profits. Future lost profits are limited by the requirements that they have to be proved with reasonable certainty, that there has to be a causal connection between the breach and the future profits, and that they be foreseeable.\[70\]

Examples:

- Lost profits include losses resulting from the inability to keep a business running caused by the breach of contract.\[71\]
- Lost profits also include fixed costs (i.e., general expenses) on a pro rata basis that have to be reduced by the expenses that would have been incurred when realising those fixed costs.\[72\]
- The loss of chance of winning is recoverable.\[73\]
- Frustrated expenses are recoverable. They constitute the minimum loss incurred.\[74\]
- The seller is entitled to lost profits that are as a result of having missed out on an investment opportunity.\[75\]

**CALCULATION OF LOSS**

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

As regards concrete and abstract calculation, the principle of full compensation necessitates the admissibility of the loss being calculated abstractly to achieve equal outcomes for all obligees. As Professor Ingeborg Schwenzer explains:

> It cannot be justified that a truck seller is to compensate a commercial carrier for the costs of vehicles the carrier rents in case of non-delivery, while the same breach of contract remains without consequences when the buyer is an NGO which intends to use the trucks to deliver food to conflict areas and cannot rent substitute vehicles. The loss due to the loss of use can be easily calculated abstractly since rental markets exist for nearly all types of goods.\[76\]

However, it should be noted that if the buyer purchases substitute goods, Article 75 mandates a concrete calculation of loss.\[77\]

As regards accounting for gain, the obligee has to offset the loss from the breach by any gains resulting from the non-performance. It is important to note that only the gain that has an adequate connection to the breach is to be subtracted.\[78\]

**DELCHI CARRIER SPA V. ROTOREX CORP, 71 F.3D 1024**

The US seller manufactures compressors. The Italian buyer purchased compressors from the seller for use in its air conditioners after receiving a sample compressor from the seller and accompanying written performance specifications. The compressors were scheduled to be delivered in three shipments. The buyer found that the first shipment did not conform while the second was en route. The non-conformity resulted in lower cooling capacity and consumed more power than the sample model and specifications. After several attempts to cure, the buyer asked the seller to supply new compressors conforming to the original
sample and specifications. The seller refused. The buyer claimed damages from the seller for:

- lost profits resulting from a diminished level of sales of the air-conditioning units;
- expenses that the buyer incurred in attempting to remedy the non-conformity of the compressors;
- costs of expediting a shipment of compressors from a third party;
- costs for handling and storing rejected compressors;
- shipping, customs and incidentals relating to the two shipments of the seller’s compressors;
- cost of obsolete insulation and tubing buyer purchased for use with the seller’s compressors;
- cost of obsolete tooling purchased only for production of units with the seller’s compressors;
- labour costs for four days when the buyer’s production line was idle because it had no compressors to instal; and
- prejudgment interest.

The buyer could recover all heads of damages listed, except:

- lost profits resulting from a diminished level of sales of the air-conditioning units because the buyer did not prove the loss; and
- labour costs because the buyer’s labour costs incurred during the four-day shutdown were fixed costs and therefore not part of the damages calculation or variable costs and payable.

**TIME**

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

**PLACE**

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

**CURRENCY**

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

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

**FORESEEABILITY**

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

**LIMITATION ON DAMAGES**

**LIMITED TO MONETARY RELIEF**

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

**LIMITED TO MATERIAL LOSS**

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

**PUNITIVE DAMAGES**

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

**SPECIAL CASES**

**DISGORGEMENT OF PROFITS**

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

- the seller sells the goods a second time and realises a higher profit than agreed to under the contract with the first buyer (i.e., efficient breach);
• the seller, who is contractually obliged to manufacture the goods in accordance with ethical or human rights standards, lowers its production costs by resorting to production mechanisms that are in breach of the agreement, and thereby increasing its profits; or

• the buyer supplies a defined market, such as the European Union, NAFTA (replaced by the USMCA) or Mercosur, against an express stipulation in the contract with the purchased goods, and thus makes a profit.\[95\]

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

LEGAL COSTS

A uniform application of the CISG requires that the question of recoverability of legal costs cannot depend on its classification as substantive or procedural by the relevant lex fori. That would lead to a non-uniform interpretation and application of the CISG. Uncontroversially, attorney fees and costs can be awarded when the contract provides for their payment. The majority of academic literature is in agreement that extrajudicial costs may be recovered as incidental damages under Article 74 (especially if extrajudicial activity mitigates damages).\[96\] Extrajudicial costs include legal costs incurred in connection with preventing the breach or pursuing rights under the contract, such as a demand for performance.\[97\] However, the majority of academic literature and courts' jurisprudence does not support litigation costs being recoverable under Article 74.\[98\] Arbitral tribunals do not present a unified picture. Often it is hard to ascertain whether the tribunal has awarded costs under the applicable rules or under Article 74.\[99\]

The majority opinion holds that the recovery of litigation costs is a matter of the applicable domestic law or the applicable arbitration rules, respectively. The main rationale advanced is that allowing for litigation costs to fall under the ambit of loss under Article 74 would violate the principle of equality between the parties embodied in the CISG.\[100\] The argument is that, if recovery of litigation costs were possible under Article 74, it would lead to an unjustifiable preferential treatment of the successful plaintiff over the successful defendant, because the defendant would not be able to claim litigation costs.\[101\] However, the author submits that this view misinterprets the CISG's equality principle, which relates to equal treatment of the buyer and the seller, not equal treatment of the plaintiff and the defendant in a litigation or to the claimant and the respondent in an arbitration. The buyer and the seller will not be treated differently in regard to the recovery of litigation costs under Article 74. The buyer, as well as the seller, is able to claim litigation costs as part of its damages if the buyer is the plaintiff. To allow litigation costs to be claimed as incidental damages under Article 74 will achieve global uniformity for parties to a contract to which the CISG applies. The recoverability of litigation costs will be limited by the foreseeability and causation requirements inherent in Article 74.\[102\]

It seems less controversial that legal costs may be recovered indirectly as damages if they accrue in regard to a sale to a third party.\[103\]

PENALTY CLAUSES AND LIQUIDATED DAMAGES

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

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

THIRD-PARTY CLAIMS

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

LOSS OF VOLUME

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

CHILD LABOUR AND HUMAN RIGHTS STANDARDS

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

BURDEN OF PROOF AND STANDARD OF PROOF

The CISG does not explicitly address either the burden of proof or the level of proof required. Jurisprudence and academic commentary generally agree that "a party who asserts a claim has to prove all circumstance or facts advantageous to him" (i.e., the party claiming damages bears the burden of proving the damage suffered). Jurisprudence and academic literature do not present a unified picture of the level of proof required. First, tribunals have to fill the gap in the CISG, finding an internal solution in accordance with Article 7, instead of resorting to domestic law. Some courts and tribunals have required a specific ascertainment of damages, some have required that the damages be reasonably proved and others have required sufficient proof of damages. Belgian courts, in particular, have determined the amount of damages often
ex aequo et bono. The CISG Advisory Council reasons that the requisite standard should be one of ‘reasonable certainty’ without the need for ‘mathematical precision’. The reasonable certainty standard is supported by and consistent with the CISG as a whole, which generally applies the reasonableness standard. It is also consistent with the UNIDROIT Principles of International Commercial Contract (PICC).

LIMITATION PERIOD

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

DAMAGES IN CASE OF SUBSTITUTE TRANSACTION – ARTICLE 75

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

AVOIDANCE

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

SUBSTITUTE TRANSACTION

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

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

REASONABLE TIME AND MANNER
To avoid the obligee speculating on the development of the market, at the expense of the obligor, Article 75 requires that the cover purchase is made in a reasonable manner and within a reasonable amount of time. Those requirements do not exclude, however, that the obligee waits to avoid the contract to take account of market developments.\[135\]

Jurisprudence has determined that the standard for acting in a reasonable manner is whether a party has acted as a 'careful and prudent businessman' who observes the relevant trade practices.\[136\] Being a 'careful and prudent businessman' can entail reselling the goods substantially below the contract price.\[137\]

The substitute transaction also has to be done within a reasonable time. The period for a reasonable substitute transaction commences when the obligee declares the contract avoided.\[138\] What is reasonable depends on the circumstances and the good in question. For goods that are subject to market price fluctuations, a reasonable period will be relatively short,\[139\] whereas for goods that are seasonal or unique, it will be longer.\[140\]

If the obligee has not made an identified substitute transaction in a reasonable manner or time frame, the obligee is free to claim damages in accordance with Articles 74 and 76, which allow for an abstract calculation of damages.\[141\] Conversely, if an obligee who pursues a damages claim under Article 76 makes a substitute transaction after initiating litigation, but before a reasonable time has elapsed since avoidance, then damages may be calculated pursuant to Article 75.\[142\]

**CALCULATING DAMAGES**

Damages in accordance with Article 75 are measured by the difference between the price of the substitute transaction and the contract price. The contract price is the price either agreed expressly or impliedly between the parties in the contract, or the price as determined by Article 55 if the parties did not agree expressly or implicitly on a price.\[143\] The price of the substitute transaction is the price paid for the substitute goods plus extra expenses incurred from having to make the substitute transaction, such as costs associated with transport or changed market conditions, minus saved expenses.\[144\]

**FURTHER DAMAGES RECOVERABLE UNDER ARTICLE 74**

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

Examples:

- Costs associated with the substitute transaction under Article 75.\[145\]
- Loss caused by the delay in locating a substitute transaction.\[146\]
- Loss caused by a change in the interest rates or in the currency exchange rate between the date that the transaction was supposed to have occurred under the contract and the substitute transaction.\[147\]
- Costs of an unsuccessful tender of goods or their necessary storage by the seller.\[148\]
- Costs associated with the failed transaction.\[149\]

**FORESEEABILITY**
‘Foreseeability’ is not a requirement of Article 75, according to its wording. This is not surprising because loss resulting from a substitute transaction is generally foreseeable.\[150\]

**BURDEN OF PROOF**

The onus is on the obligee to prove that the avoidance of the contract was justified and that the obligor was correctly notified of the avoidance. The obligee must also show that the substitute transaction was reasonable and within a reasonable time after the avoidance of the contract. If the obligor asserts that the substitute transaction could have been made sooner, the obligor also implicitly invokes a breach of the duty to mitigate damages (Article 77), for which the obligor carries the burden of proof.\[151\]

**CONCRETE CALCULATION OF DAMAGES WITHOUT SUBSTITUTE TRANSACTION – ARTICLE 76**

Like Article 75, Article 76\[152\] is *lex specialis* to Article 74. Article 76 allows for the calculation of damages to be based on the current price of goods when the obligee has avoided the contract without entering into a resale or cover purchase. The difference between Article 76 and Article 75 is that, under Article 76, the damages are calculated abstractly without the need to show a concrete measure of actual loss. Therefore, the advantage is that the obligee can recover damages simply based on a straightforward calculation.

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

**AVOIDANCE OF THE CONTRACT**

The application of Article 76 requires that the obligee has avoided the contract. In addition, the prevailing view applies Article 76 to cases in which the obligor unambiguously and definitively refuses to perform.\[153\]

**CURRENT PRICE**

**NATURE OF CURRENT PRICE**

Article 76 requires a current price for the goods – ‘the price prevailing at the place where delivery of the goods should have been made’ – but if no current price is available then ‘the price at such other place serves as a reasonable substitute’. The current price must be for goods of the same kind as the avoided contract, under comparable terms. Article 35(2) stipulates factors that can give guidance to determine which goods conform to the contract and whether they can be used to set a comparable price.\[154\] An adjustment should be made for any differences in terms or circumstances between the contract terms and those associated with the market price.\[155\]

A current price can exist without being officially quoted.\[156\] As one court has observed:

> it is sufficient for the existence of a market price in the sense of Article 76(1) CISG if, owing to regular business transactions for goods of the same type at a particular trade location, a current price has been established.\[157\]

If there is no current price, then an abstract calculation cannot be performed and the obligee may resort to Article 74.\[158\] For subjectively valued goods or goods made on special order, it
might be impossible to ascertain a current price. The obligee thus has to resort to Article 74.

**TIME OF DETERMINATION**

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

**LOCATION OF GOODS**

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

**PRICE FIXED BY THE CONTRACT**

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

**NO SUBSTITUTE TRANSACTION**

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

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

**FORESEEABILITY**
The wording of Article 76 clarifies that foreseeability is not a requirement of Article 76.\[^{172}\] It would be contrary to the principle of full compensation if the obligor were able to argue unforeseeable changes in the price, after the conclusion of the contract, that the obligor did not take into account.\[^{173}\]

**RECOVERY OF FURTHER LOSS**

In addition to damages based on the difference between the current price at the time of avoidance and the price fixed by the contract, the obligee may recover further damages under Article 74. Article 76 allows a party to claim compensation for incidental and consequential damages that occurred as a result of voiding the contract under Article 74. The requirements of Article 74 have to be met, especially the requirement that further damages must have been foreseeable.\[^{174}\] Care has to be taken that when the obligee claims additional damages under Article 74, the obligee is not placed in a better position than it would have been in if the contract had not been avoided.

**ANTICIPATORY BREACH**

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

>To address the risk that the market will change to the detriment of the obligee, Article 75 provides the option to proceed with a substitute transaction and calculate damages concretely rather than proceeding abstractly under Article 76. By choosing to proceed under Article 76, the aggrieved party accepts the risk of inadequate compensation.\[^{175}\]

**BURDEN OF PROOF**

The obligee has to prove the calculation of damages under Article 76 (i.e., the price fixed by the contract as well as the current price).\[^{176}\] However, the obligor has to prove that the obligee has, or should have, carried out a more favourable substitute transaction (Article 77).\[^{177}\]

**MITIGATION OF DAMAGES – ARTICLE 77**

Article 77(1) obliges the party that wants to claim damages because of the breach of contract by another party to take reasonable measures to mitigate the damage caused by the breach of contract. Under Article 77(2), a breach of this obligation will result in a decrease in the amount of damages that can be claimed. The obligation to mitigate damages exists only in regard to damages claims and not in regard to other remedies, such as claims in regard to the performance of the contract.\[^{178}\]

**OBLIGATION TO MITIGATE**

What the obligation to mitigate damages entails depends on the circumstances in the particular case: the threshold is a reasonable person in the shoes of the obligee.\[^{179}\] Trade usages and practices, as well as special habits that exist between the parties, have to be taken into account.\[^{180}\] In general, a cover transaction is reasonable if it is ‘made in such
a manner as is likely to cause a resale to have been made at the highest price reasonably possible in the circumstances or a cover purchase the lowest price reasonably possible. [181] Cover transactions that are identical to the terms of the original contract are more likely to be considered reasonable. [182] However, cover transactions that differ in terms such as quantity, credit or time of delivery may still be considered reasonable, with all circumstances taken into account. [183]

Examples of factors that have been taken into account are:

- timeliness of a cover purchase or sale; [185]
- seasonal nature of goods; [187]
- potential consequences of a defect; [188]
- desirability to stop performance; [189] and
- ability to preserve and store goods. [190]

LOST VOLUME SALES

Article 77 does not impose on a lost volume seller an obligation to find a substitute buyer for the contracted goods following a breach. This is because, in the case of a lost volume seller, the second sale would have been made even if there had been no breach of contract. The second sale is thus not a substitute transaction. [191]

BURDEN OF PROOF

The obligor has the burden of proof in regard to the facts that establish the obligee’s duty to mitigate. [192] In practice, the obligor may find it difficult to meet its burden because evidence concerning mitigation efforts is often within the knowledge and control of the obligee. [193] Some tribunals have placed an obligation to prove the requirements of Article 77 on both parties when a failure to mitigate defence has been raised under Article 77. [194]

INTEREST – ARTICLE 78

Interest is due under Article 78 regardless of proof of loss. [195] Interest can be claimed pursuant to Article 78 independently from the damages under Articles 74 to 76. [196] It applies to the purchase price and to ‘any other sum in arrears’. Most courts and tribunals have held that ‘any other sum in arrears’ includes damages. [197] The preponderant opinion also presumes that the liability to pay interest arises under Article 78, even if the precise amount owed has to be determined by a tribunal. [198] Article 78 is silent on the most important questions in regard to interest: the accrual period and the rate of interest. Both questions have to be answered relying on general CISG principles to achieve uniform and congruent application of the CISG.

ACCRUAL PERIOD

Interest starts to accrue the moment a payment is in arrears, without any further requirement, such as a request or demand for payment or default having to be met or any compliance with formalities being necessary. [199] Interest ceases to accrue when the obligation to pay is extinguished.

OBERLANDESGERICHT WIEN, 1 R 207/16T (27 FEBRUARY 2017), CISG-ONLINE 2814
A seller operates a biodiesel production plant, where one of the by-products is pharmaceutical glycerine. In 2012, the parties concluded a contract for 100 tonnes of pharmaceutical glycerine and agreed a price of €690 per tonne. The buyer was supposed to take delivery of the goods in the first quarter of 2013 but did not do so.

The seller sought damages, which included the loss incurred when the glycerine was resold after the contract was avoided. The seller asserted that its warehouses had been full and, therefore, avoidance of the contract and a resale had been necessary. However, the price realised in the substitute sale was lower than the price agreed with the original buyer, resulting in the loss. The buyer claimed that the seller had breached its mitigation obligation under Article 77 of the CISG and that, in accordance with Article 77, the seller had an obligation to negotiate with the buyer, including in respect of the reduction of the purchase price as long as the price was above what could be realised by a substitute sale. The buyer argued that if the seller did not take advantage of this opportunity, the seller was only entitled to the difference between the contractually agreed purchase price and the price offered by the buyer. The court agreed with the buyer and opined that the seller's duty to mitigate meant that the seller had to accept a lower purchase price than the contractually agreed price if the new price offered by the buyer was above the price that could be realised by a substitute sale. However, that duty only existed if the buyer did make a new offer (Paragraphs 4.2 and 4.3.). The seller was not obliged to renegotiate the contract under Article 77 (Paragraph 4.3).

**INTEREST RATE**

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

- the current interest rate at the creditor’s place of business;
- the current interest rate at the debtor’s place of business;
- the current rate of interest relating to the particular currency of the claim;
- an internationally or regionally applied interest rate, such as Euribor (Euro Interbank Offered Rate); and
- the application of Article 7.4.9 of the PICC.

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

**SIMPLE VERSUS COMPOUND INTEREST**

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

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

**ARTICLES 78 AND 79**

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

**EXEMPTIONS UNDER ARTICLES 79 AND 80**

**ARTICLE 79 UNFORESEEABLE IMPEDIMENT AND HARDSHIP**

**UNFORESEEABLE IMPEDIMENT**

The contractual ethos underlying the CISG is that the contractual relationship between the parties is preserved for as long as possible. Hence the CISG places a strong emphasis on the principle of *pacta sunt servanda*: once the parties have concluded the contract, subsequent developments, in principle, will not allow either party to avoid or modify its contractual obligations unilaterally. The exception to this principle is stipulated in Article 79. An obligor will be exempt from paying damages, but not from other remedies for non-performance, if the obligor is not able to perform its obligation under the contract because of an unforeseeable impediment beyond the obligor's control (Article 79(1)). Regarding the seller's obligation to deliver goods, Article 79(1) is applicable not only to the non-delivery of goods but also to defective goods.

To date, parties have rarely succeeded in invoking Article 79, because the threshold imposed by Article 79(1) to exempt the obligor is high. However, the covid-19 outbreak put the spotlight on this Article.

Article 79(1) sets out several requirements for a party to be exempt from liability for damages:

- an impediment to the performance of a contract has arisen;
• the party’s non-performance was caused by the impediment;
• the impediment was beyond the control of the party claiming the exemption;
• the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; and
• the party could not reasonably be expected to have avoided or overcome the impediment or its consequences.

There are a number of circumstances that are widely accepted to constitute the core requirement of an impediment within the meaning of Article 79(1): natural disasters such as earthquake, fire, flood, drought, hurricane, epidemic or pandemic. Financial constraints, on the other hand, are generally regarded as surmountable.

The unforeseeability of the impediment at the time of concluding a contract will often not be controversial between the parties. At the time the contract is concluded, the parties must not have foreseen the impediment.

The party relying on Article 79(1) has to prove a causal link between the party’s non-performance and the impediment. Article 79(2) complements Article 79(1) by clarifying that the obligor cannot avoid liability by relying on third parties to fulfil the obligor’s duties. Furthermore, Article 79(3) exempts the obligor from liability only for the period for which the impediment exists.

Article 79(4) requires that the obligor should inform the other party of the impediment and the effects on its ability to perform within a reasonable time after it has or should have become aware of the impediment. Otherwise the liability remains in force.

The wording of Article 79(1) clearly stipulates that the party who fails to perform is under the duty to prove that the requirements for the exemption are met.

Article 79 only regulates the consequences of the failure to perform by one party in regard to the party’s liability for damages resulting from the failure to perform (Article 79(5)) and the exemption from liability for damages of the contracting party, not the question of whether and how the contract is continued. Article 79 is silent on the fact that it is not possible to finally dissolve the contract by termination or withdrawal.

**HARDSHIP**

The CISG does not contain a special provision dealing with questions of hardship. However, the CISG Advisory Council in its Opinion No. 20, published in February 2020, has stated that the CISG does cover hardship situations.

It is also the view of the CISG Advisory Council that to bring hardship into the fold of Article 79 is to broaden the meaning of impediment. Hardship only meets the threshold of an impediment if the performance of the contract has

**FOUR-LEAF CLOVER CASE, OLB DÜSSELDORF, I-6 U 2/19 (4 JULY 2019) CISG-ONLINE 4614**

The buyer ordered one million four-leaf clover bulbs from the seller for €5,200. A fire broke out in the warehouse of the horticulture business growing the four-leaf clover bulbs from which the seller had purchased the bulbs for the buyer. Approximately 90 per cent of the grower’s four-leaf clover bulbs were destroyed.
The German court dismissed the buyer’s claim for damages in accordance with Article 45(1)(b) and Article 74 et seq. CISG. Although the seller may not have fulfilled its obligation to deliver the bulbs, the court stated that the seller was exempt from paying damages in accordance with Article 79(1), CISG. The fact that almost ‘the entirety of the bulbs’ were destroyed by a fire in the grower’s warehouse, and that no replacement product was available on the market, constituted an obstacle that was beyond the seller’s control. Even if generally a seller is liable for the actions of its own suppliers, this only applies as long as the goods or replacement goods are still available on the market. A seller cannot overcome an obstacle in procuring replacement goods if the goods owed can no longer be obtained on the market, or only at considerable cost. In the opinion of the court, this was the case as the fire not only destroyed the goods that were to be delivered to the buyer, but around 90 per cent of the entire species of four-leaf clover bulbs available on the market. Therefore, there were no replacement goods available on the market that the seller could have procured. Furthermore, the court held that the claimant had not shown that the seller could have prevented the fire in any way. The appellate court dismissed the buyer’s appeal. The appellate court stressed that, in general, the seller bears the risk of procurement. An exception is made from this general principle when the goods cannot be procured on the market at all, or only at an unreasonable cost, and this could not have been foreseen when the contract was concluded; in such cases, the seller is not liable for its failure to perform under Article 79(1) CISG.

become excessively onerous or if the equilibrium of the contract has been fundamentally altered. [222] The CISG Advisory Council Opinion sets out the following rules regarding the obligations of the parties and how a court or arbitral tribunal should deal with a case of hardship:

The party affected by hardship must give notice to the other party of the circumstances and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party affected knew or ought to have known of the hardship situation, it is liable for damages resulting from such non-receipt.

In case of hardship, nothing prevents either party from exercising any right other than to claim damages and require performance of the obligation affected by hardship.

The exemption due to hardship has effect for the period during which hardship exists.

Under the CISG, the parties have no duty to renegotiate the contract in case of hardship.

Under the CISG, a court or arbitral tribunal may not adapt the contract in case of hardship.

Under the CISG, a court or arbitral tribunal may not bring the contract to an end in case of hardship.

ARTICLE 80

Like Article 79, Article 80 sets out an exception to the remedies’ regime set out in the CISG. Article 80 provides that an obligee may not rely on a breach by the other party to the extent that the breach was caused by the obligee’s act or omission. Unlike Article 79, Article 80 excludes not only claims for damages but all remedies. [223]

OTHER REMEDIES

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

CONCLUSION

Damages under the CISG can be claimed in addition to other available remedies for breach of contract, such as specific performance or avoidance of the contract. The CISG’s damages regime under Article 74 et seq. provides for the obligor to put the obligee into the position the obligee would have been in if the contract had been performed according to its terms. The CISG offers the obligee a choice, if the breach was so fundamental that the obligee could avoid the contract, to calculate the obligee’s damages either abstractly under Article 74 or concretely under Article 75 if the requirements of Article 75 are met. The obligee may prefer recovery under Article 75 (or recovery under Article 76 if no substitute transaction was done) if the obligee cannot prove with a requisite degree of certainty that it suffered damage as a result of the breach. In addition, the concrete calculation under Article 75 avoids the possibility of having to open a company’s ‘books, i.e., . . . disclose its internal calculations, its customers and other business connections, etc.’ to prove its loss.

Article 6 stipulates that the parties are free to derogate from the provisions of the CISG. The damages regime of the CISG generally provides for a comprehensive and best practice regime. Lacuna do exist regarding the actual rate of interest, lawyers’ fees and the legal significance of hardship. Parties might want to consider providing for those issues in their contract.

Endnotes

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Note that Hong Kong has ratified the CISG, which will come into force on 1 December 2022 (Zeyu Huang & Wenhui Chi, ‘The CISG applies to Hong Kong and Mainland China Now: Shall Macau Follow Suit?’, Conflict of Laws.net, 7 May 2022). 

See World Trade Statistical Review 2021, Chapter 5 (https://www.wto.org/english/res_e/statis_e/wts2021_e/wts21_toc_e.htm, last accessed 10 Aug 2022). The United Kingdom is one of the 10 leading importers whereas Belgium is one of the leading exporters. 


See below in regard to application of the CISG, in particular footnote 9.
8 See also for a more detailed discussion, I Schwenzer, P Hachem in Schwenzer Commentary, Intro to Articles 1 to 6, para. 12 et seq., U Magnus in J von Staudinger Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG) (Sellier-de Gruyter, Berlin, 2018) (hereinafter J von Staudinger Kommentar), Article 1, para. 12 et seq.

9 An arbitral tribunal will apply the CISG as the choice of the parties directly if the parties have chosen the law of a Member State without any specification because the CISG is part of its domestic law. However, the requirements of Article 1(1) have to be met. In addition, a tribunal will respect the direct choice of the CISG as applicable law if it is either acting as amiable compositeurs or if the lex arbitri permits or even requires the application of rules of law instead of (or in addition to) a particular domestic law. See I Schwenzer, P Hachem in Schwenzer Commentary, Introduction to Articles 1 to 6, para. 12. Note that issues of the application of mandatory rules or public policy in regard to the application of the CISG should arise only in exceptional circumstances (potentially in regard to interest if the seat of the arbitration is in an Islamic state) because the CISG was drafted with the aim of amalgamating the world’s legal regimes.


12 See Petrochilos (op. cit. note 10), 191; Kröll, ‘Arbitration and the CISG’ (op. cit. note 10), 59.


14 CISG, Article 30: ‘The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.’

15 CISG, Article 53: ‘The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.’

That means the parol evidence rule is not applicable under the CISG unless the parties have specifically agreed to the exclusivity of the written contract. It also should be noted that consideration is not required for a valid contract under the CISG.


See Oberster Gerichtshof (OGH) (Austria), 15 January 2013 (Glass mosaic tiles) CISG-Online 2398 (‘fault is not a requirement (for liability for damages under the CISG)’); Oberlandesgericht (OLG) Linz (Austria) 8 February 2012 (Safety belts) CISG-online 2444 (‘the CISG does not recognize any discharge of liability by proving lack of fault’); Polimeles Protodikio Athinon (Greece), 1 January 2009 (Bullet-proof vest) CISG-Online 2228; Arbitral Award, Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce T-14/07, 23 May 2008 (Seamless steel pipes) CISG-online 2272 (‘the buyer is obliged to pay the price even where it is not his fault that he is unable to do so. This is because such non-payment represents a breach of contract’).

A claim for specific performance is subject to Article 28.

See the jurisprudence in I Schwenzer in Schwenzer Commentary, Article 74 et seq.; J Gotanda and M Djordjevic in *UN Convention on Contracts for the International Sale of Goods* (2018), Article 74 et seq.

CISG, Article 74: ‘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.’

‘Der Gläubiger ist wirtschaftlich so zu stellen, wie wenn der Vertrag vollumfänglich korrekt erfüllt worden wäre’, *Handelsgericht Zürich* (17 September 2014) CISG-online 2656.

OGH (15 January 2013) CISG-online 2398; I Schwenzer in Schwenzer Commentary, Article 74, para. 3.

See section titled ‘Exemptions under Articles 79 and 80’, below.

I Schwenzer in Schwenzer Commentary, Article 74, para. 5.

M Bridge, ‘Remedies and Damages’ in *International Sales Law* (op. cit. note 13), Chapter 19, para. 23; I Schwenzer in Schwenzer Commentary, Article 74, para. 3.


30 I Schwenzer in Schwenzer Commentary, Article 74, para. 8.  

31 See also section titled ‘Punitive damages’, below.  

32 Secretariat Commentary on the 1978 Draft, Article 70 (now Article 74), para. 4.  

33 This is implicit in Articles 75 and 76. M Bridge ‘Remedies and Damages’ in *International Sales Law* (op. cit. note 13), Chapter 19, para. 22.  

34 Handelsgericht Zürich (17 September 2014) CISG-online 2656; Landgericht Trier (12 October 1995) CISG-online 160; J Gotanda and M Djordjevic in *UN Convention on Contracts for the International Sale of Goods* (2018), Article 74, para. 17; see also Secretariat Commentary on 1978 Draft, Article 70 (now Article 74), para. 7. Note that in regard to the seller’s calculation of damages, Article 74 *et seq.* are applicable within the European Union instead of the domestic provisions of the Late Payment Directive (see I Schwenzer, P Hachem in Schwenzer Commentary, Article 90, para. 4 *et seq.*).  


36 OLG Köln (24 April 2013) CISG-online 2480 para. 46; OLG Köln (8 January 1997) CISG-online 217; see Secretariat Commentary on 1978 Draft, Article 70 (now Article 74), para. 7.  

37 Compare OLG Köln (8 January 1997) CISG-online 217.  

38 Handelsgericht Zürich (17 September 2014) CISG-online 2656; OLG Graz (29 July 2004) CISG-online 1627; Audiencia Provincial de Palencia (26 September 2005) CISG-online 1673; Chamber of National and International Arbitration of Milan (28 September 2001) CISG-online 1582.  

39 Bundesgerichtshof (25 June 1997) CISG-online 277; *Delchi Carrier SpA v. Rotorex Corp*, US Circuit Court of Appeals (2nd Cir) (6 December 1996) CISG-online 140; OLG Hamm (9 June 1995) CISG-online 146. It has to be noted that the seller keeps the right to remedy the defects pursuant to Article 48.
40. App Ct of Eastern Finland (27 March 1997) CISG-online 782.

41. Kantonsgericht Wallis (28 January 2009) CISG-online 2025; OLG München (18 October 1978) but see OLG Düsseldorf (14 January 1994) CISG-online 119; recognition only insofar as the seller can prove that a timely payment would have yielded a higher monetary value than was possible as a result of the delay; see overview J Gotanda, M Djordjevic in UN Convention on Contracts for the International Sale of Goods (2018), Article 74, para. 52 et seq.

42. OLG Düsseldorf (14 January 1994) CISG-online 119.

43. I Schwenzer in Schwenzer Commentary, Article 74, para. 28.


45. See also section titled ‘Mitigation of damages – Article 77’, below.

46. OLG Köln (14 August 2006) CISG-online 1405; CIETAC (9 November 2005) CISG-online 1444; Landgericht Landshut (5 April 1995) CISG-online 193; Arbitral Award, Vienna Arbitral Tribunal (15 June 1994) CISG-online 691; Arbitral Award, Arbitration Institution of the Stockholm Chamber of Commerce 107/1997, CISG-online 1301.


49. See Arbitral Award, ICC 7585/1992, CISG-online 105.


51. OLG Karlsruhe (8 February 2006) CISG-online 1328.

52. I Schwenzer in Schwenzer Commentary, Article 74, para. 28.

54 Supported by OLG Düsseldorf (2 July 1993) CISG-online 74; Handelsgericht Zürich (26 April 1995) CISG-online 248, para. 5.b.; CISG-AC Opinion No. 12 Rapporteur Sono, Comment 2.3.1; I Schwenzer, P Hachem in Schwenzer Commentary, Article 5, para. 10.  \( \sim \) Back to section


56 OLG Tübingen (26 May 1998) CISG-online 513; J Honnold and H Flechtner (op. cit. note 2), Article 5, para. 73.  \( \sim \) Back to section

57 See Castel Electronics Pty Ltd v. Toshiba Singapore Ptd Ltd, Fed Ct Aust (28 September 2010) CISG-online 2158.  \( \sim \) Back to section

58 I Schwenzer in Schwenzer Commentary, Article 74, para. 35, but in regard to the recovery of the obligee's legal costs under Article 74 from the obligor stemming from their relationship, see section titled 'Legal costs', below.  \( \sim \) Back to section

59 CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74, Rapporteur J Gotanda, Comment 7.1; Schlechtriem/Butler, para. 299a; U Magnus in Staudingers Kommentar, Vol. XIV, Article 74, para. 27; I Schwenzer in Schwenzer Commentary, Article 74, para. 36.  \( \sim \) Back to section

60 I Schwenzer in Schwenzer Commentary, Article 74, para. 36.  \( \sim \) Back to section

61 See examples in Schlechtriem/Butler, para. 40.  \( \sim \) Back to section

62 Article 74's foreseeability requirement, however, might limit the recoverability – see section titled 'Foreseeability', below.  \( \sim \) Back to section

63 See Landesgericht Aachen (14 May 1993) CISG-online 86.  \( \sim \) Back to section

64 Secretariat Commentary: the reference to loss profits was included because ‘in some legal systems the concept of “loss”standing alone does not include loss of profit’ (Secretariat Commentary on 1978 Draft, Article 70 (now Article 74), para. 3.  \( \sim \) Back to section

65 See Shenzen Synergy Digital Co., Ltd. v. Mingtel, Inc., US District Court for the Eastern District of Texas, 4:19-cv-00216 (29 March 2022) CISG-online 5845; Audiencia Provincial de Murcia (15 July 2010) CISG-online 2130.  \( \sim \) Back to section

66 See section titled ‘Calculation of loss’, below.  \( \sim \) Back to section

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68 J Gotanda and M Djordjevic in UN Convention on Contracts for the International Sale of Goods (2018), Article 74, para. 27.  ~ Back to section

69 Compare ICC Court of Arbitration Arbitral Award No. 9187/1999 CISG-online 705; W Witz in W Witz, H-C Salger, M Lorenz (eds), Internationales Einheitliches Kaufrecht (Beck, Munich, 2016) Article 74, para. 15; I Schwenzer in Schwenzer Commentary, Article 74, para. 38.  ~ Back to section


71 I Schwenzer in Schwenzer Commentary, Article 74, para. 38.  ~ Back to section


73 Compare Handelsgericht Zürich (22 November 2010) CISG-online 2160.  ~ Back to section


75 CIETAC (4 April 1997) CISG-online 1660; Serbian Chamber of Commerce (1 October 2007) CISG-online 1793; Schlechtriem/Butler, para. 308.  ~ Back to section


77 Compare Semi-Materials Co Ltd v. MEMC Material Electronics, Ed Mo (10 January 2011) CISG-online 2168.  ~ Back to section

78 I Schwenzer in Schwenzer Commentary, Article 74, para. 43.  ~ Back to section
79 See section titled 'Damages in case of substitute transaction – Article 75', below.  

80 Compare Secretariat Commentary on 1978 Draft, Article 70 (now Article 74), para. 5; J Gotanda, M Djordjevic in *UN Convention on Contracts for the International Sale of Goods* (2018), Article 74, para. 34.  

81 J Gotanda, M Djordjevic in *UN Convention on Contracts for the International Sale of Goods* (2018), Article 74, para. 27; see also I Schwenzer in Schwenzer Commentary, Article 74, para. 44.  

82 J Gotanda, M Djordjevic in *UN Convention on Contracts for the International Sale of Goods* (2018), Article 74, para. 29; see also I Schwenzer in Schwenzer Commentary, Article 74, para. 46.  

83 I Schwenzer in Schwenzer Commentary, Article 74, para. 63.  


86 Kantonsgericht Zug (14 December 2009) CISG-online 2026, para. 11.2.  

87 Bundesgerichtshof (25 November 1998) CISG-online 353 (seller delivered surface-protective film to buyer for use by the buyer's business partner. The buyer did not test the film, which had to be self-adhesive and removable. When the film was removed from polished high-grade steel products by the buyer's business partner, it left residues of glue on the surface. The buyer paid the expenses of removing the glue residue and claimed for reimbursement of these expenses against the seller); OLG Köln (21 May 1996) CISG-online 254. Court of Cassation (17 February 2015) www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT0000030270329&fastReqId=1445360440&fastPos=1 (last accessed 10 Aug 2022) – foreseeability not ascertainable, if damages cannot with certainty be established.  


90 J Gotanda, M Djordjevic in *UN Convention on Contracts for the International Sale of Goods* (2018), Article 74, paras. 38, 39 with further references; I Schwenzer in Schwenzer Commentary, Article 74, para. 41 with further references.  


93 OLG Düsseldorf (2 July 1993) CISG-online 74.


95 I Schwenzer in Schwenzer Commentary, Article 74, para. 45.


100 I Schwenzer in Schwenzer Commentary, Article 74, para. 30; CISG-AC Opinion No. 6, Calculation of Damages under CISG, Article 74, Rapporteur J Gotanda, Comment 5.1.
101 I Schwenzer in Schwenzer Commentary, Article 74, para. 31 with further references.

102 See section titled ‘Legal costs’, above. Stemcor USA, Inc. v. Miracero, S.A. de C.V., 66 F. Supp. 3d 394, 395 (S.D.N.Y. 2014); in regard to foreseeability and causation, see section titled ‘The foreseeability requirement’ in Chapter 1.

103 See M Bridge ‘Remedies and Damages’ in International Sales Law (op. cit. note 13), Chapter 19, para. 55. Goods are sold by A to B under a CISG contract. The same goods are sold by B to C, whether under the CISG or domestic law. A breaches the contract with B by delivering defective goods. B, who on-sells those defective goods, is in breach of its contract with C. B ends up having to pay damages to C as well as its own legal costs and a contribution to C’s legal costs. When B sues A for breach of contract under the CISG, B’s loss will include not just its damages liability to C but also both sets of legal costs in the B-C proceedings.

104 See, in contrast, PICC, Article 7.1.6: ‘A clause which limits or excludes one party’s liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.’

105 Article 4 states: ‘This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; see in regard to the application, OLG München (8 February 1995), cisgw3.law.pace.edu/cases/950208g2.html; Hof Arnhem (22 August 1995), http://cisgw3.law.pace.edu/cases/950822n1.html; ICC Court of Arbitration, Arbitral Award No. 7197/1992, cisgw3.law.pace.edu/cases/927197i1.html; CISG AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, Rapporteur P Hachem.

106 M Bridge, ‘Remedies and Damages’ in International Sales Law (op. cit. note 13), Chapter 19, para. 72.


108 A lost volume seller is a seller who can produce as much of certain goods as they can sell. That means that a lost volume seller loses out on an opportunity to sell extra goods if the buyer breaches the contract.

109 Oberster Gerichtshof (28 April 2000) CISG-online 581; for an extensive analysis, see M Bridge, ‘Remedies and Damages’ in International Sales Law (op. cit. note 13), Chapter 19, paras. 48 to 50.
110 See example by M Bridge, ‘Remedies and Damages’ in International Sales Law (op. cit. note 13), Chapter 19, para. 50.  

111 For an in depth discussion of human rights standards as inherent characteristics of goods, see (Article 35): P Butler, ‘The CISG – a secret weapon in the fight for a Fairer World?’ in I Schwenzer (ed), C  


114 M Bridge, ‘Remedies and Damages’ in International Sales Law (op. cit. note 13), Chapter 19, para. 39; CISG-AC Opinion No. 6, Calculation of Damages under the CISG, Article 74, Rapporteur J Gotanda, Comment 2.1.  


CISG-AC Opinion No. 6, Calculation of Damages under the CISG Article 74, Rapporteur J Gotanda, Comment 2.9; see Court of Cassation (17 February 2015), www.legifrance.gouv.fr/affichJuriJudi.do?idAction=rechJuriJudi&idTexte=JURITEXT000030270329&fastPos=1 (last accessed 12 Aug 2022) and Delchi Carrier SpA v. Rotorex Corp, US Circuit Court of Appeals (2nd Cir) (6 December 1996) CISG-online 140, which refer to 'sufficient certainty' albeit without discussion. ~ Back to section

J Bonell in C M Bianca, J Bonell, Commentary on the International Sales Law (Giuffrè: Milan, 1987), Article 7, para. 2.3.2.2. ~ Back to section

PICC, Article 7.4.3. The Principles of International Commercial Contract are soft law (devised by UNIDROIT (International Institute for the Unification of Private Law)) and designed to be an elaboration of an international restatement of general principles of contract law. They can be found at https://www.unidroit.org/eng/principles/contracts/principles2016/principles2016-e.pdf (last accessed 12 Aug 2022). ~ Back to section


PICC, Article 10.2(1) and Article 10.2(2), respectively. ~ Back to section

CISG, Article 75 states: ‘If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.’ ~ Back to section


See Articles 49, 64, 72, 73 in regard to the requirements of avoidance for buyer and seller, respectively. ~ Back to section

OLG Bamberg (13 January 1999) CISG-online 516; CISG-AC Opinion No. 8, Calculation of Damages under the CISG Articles 75 and 76, Rapporteur J Gotanda, Comment 2.3.3. ~ Back to section
130 Handelsgericht des Kantons Zürich (17 September 2014) CISG-online 2656; OLG Brandenburg (5 February 2013) CISG-online 2400; Supreme Court Poland (27 January 2006) CISG-online 1399; OLG Hamburg (28 February 1997) CISG-online 261 (where the Court held that in the case of the seller seriously and finally refusing to perform the principle of good faith mandated that the buyer did not have to avoid the contract before making the cover purchase); I Schwenzer in Schwenzer Commentary, Article 75, para. 5.  

131 See Secretariat Commentary on 1978 Draft, Article 71, para. 4.  


135 Schlechtriem/Butler, para. 311.  


137 OLG Düsseldorf (14 January 1994) CISG-online 119.  

138 Secretariat Commentary on 1978 Draft, Article 71, para. 5.  

139 Compare OLG Hamburg (28 February 1997) CISG-online 261 – period of two weeks considered reasonable for cover purchase for iron-molybdenum.  

140 Compare OLG Düsseldorf (14 January 1994) CISG-online 119 – period of three months considered reasonable for seasonal goods.  

141 The wording of Article 76 does not seem to support the view that an unreasonable substitute transaction can be claimed under Article 76 because the Article assumes that no substitute transaction has been made. However, in practice, a substitute transaction will be reasonable as to the market price (the market price is generally reasonable under Article 77 – see section titled ‘Mitigation of damages – Article 77’, below) of the goods, which is what can be claimed as damages under Article 76. Therefore, in practice, it will make little difference whether to base one’s claim on Article 75 or Article 76 in the case of an unreasonable substitute transaction (see N Schmidt-Ahrendts, *Das Verhältnis von Erfüllung, Schadensersatz und Vertragsaufhebung im CISG* (Mohr Siebeck, Tübingen, 2007), 84, 85; I Schwenzer in Schwenzer Commentary, Article 75, para. 10).
142 Oberster Gerichtshof (28 April 2000) CISG-online 581.  

143 Article 55 provides that when a contract has been validly concluded but does not expressly or implicitly fix the price, the price will be the generally charged price for those goods at the time the contract was concluded, unless the parties provide otherwise.  


146 *Delchi Carrier SpA v. Rotorex Corp*, US Circuit Court of Appeals (2nd Cir) (6 December 1996) CISG-online 140.  

147 Landgericht Krefeld (28 April 1993) CISG-online 101.  

148 Handelsgericht Aargau (26 September 1997) CISG-online 329.  


150 See I Schwenzer in Schwenzer Commentary, Article 75, para. 8.  

151 Compare Hof van Beroep, Gent (20 October 2004) CISG-online 983.  

152 CISG, Article 76 states: ‘(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance. (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.’  

153 OLG München (15 September 2004) CISG-online 1003; I Schwenzer in Schwenzer Commentary, Article 76, para. 3 with further references; but formal avoidance needed to have certainty in regard to the time for establishing the market price. OLG Graz (29 July 2004) CISG-online 1627; J Gotanda, M Djordjevic in *UN Convention on Contracts for the International Sale of Goods* (2018), Article 76, para. 7.
CISG, Article 35(2) states: ‘(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.’


See OLG Celle (2 September 1998) CISG-online 506.


Oberster Gerichtshof (28 April 2000) CISG-online 581. Note that Article 31 determines the place of delivery.

See section titled ‘Mitigation of damages – Article 77’, below.


See OLG Hamm (22 September 1992) CISG-online 75.

Secretariat Commentary on the 1978 Draft, Article 72 (now Article 76), para. 11.

See OLG Hamburg (4 July 1997) CISG-online 1299; CISG AC-Opinion No. 8, Calculation of Damages under the CISG, Articles 75 and 76, Rapporteur J Gotanda, Comment 4.5.
CISG, Article 55 provides: ‘Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.’ The drafting history of Article 76 clarifies that Article 76 was drafted to exclude any price calculation on the basis of Article 55 (Summary of Records of Meetings of the First Committee, 37th Meeting, Consideration of Report of the Drafting Committee to the Committee (7 April 1980) 1980 Vienna Diplomatic Conference, paras. 59 to 69).


OLG Hamm (22 September 1992) CISG-online 75; OLG Graz (29 July 2004) CISG-online 1627.


Secretariat Commentary on 1978 Draft, Article 72 (now Article 76), para. 2.

See OLG Hamm (22 September 1992) CISG-online 75. Alternatively, in that situation, the obligee may seek damages under Article 74. A claim under Article 74 may be particularly appropriate in the case of a lost volume seller.


See section titled ‘Foreseeability’, above.


OLG Celle (2 September 1998) CISG-online 506; CIETAC, Arbitral Award (5 February 1996), [http://cisgw3.law.pace.edu/cases/960205c1.html](http://cisgw3.law.pace.edu/cases/960205c1.html).

OLG Hamm (22 September 1992) CISG-online 57.

Compare Article 8(2): ‘If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.’

Schlechtriem/Butler, para. 315; see Article 9: ‘(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.’

Secretariat Commentary on the 1978 Draft, Article 71 (now Article 75).


Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade (1 January 2005) CISG-online 1372; OLG Celle (2 September 1998) CISG-online 506; OLG Hamburg (28 February 1997) CISG-online 261: cover purchase three times the contract price, reasonable given it was the market price in the available time; Schlechtriem/Butler, para. 315.


OLG Düsseldorf (14 January 1994) CISG-online 119.


190 ICC Court of Arbitration, Arbitral Award 7585/1992, CISG-online 105. "Back to section"

191 Oberster Gerichtshof (28 April 2000) CISG-online 581. "Back to section"

192 Handelsgericht Zürich (17 September 2014) CISG-online 2656. "Back to section"

193 See Handelsgericht des Kantons St Gallen (3 December 2002) CISG-online 727: ‘The Court appreciates that it might be extremely burdensome and difficult to prove [buyer’s] allegations to the satisfaction of the Court, because [seller] only is in the position to give notice about its particular measures to mitigate.’ "Back to section"

194 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitral Award (23 December 2004) CISG-online 1188. "Back to section"

195 ICC Court of Arbitration, Arbitral Award 8962/1997, CISG-online 1300. "Back to section"

196 OLG Frankfurt (18 January 1994) CISG-online 123; Landgericht Hamburg (26 September 1990) CISG-online 21; K Bacher in Schwenzer Commentary, Article 78, para. 5. "Back to section"


198 J Gotanda, Y Atamer in UN Convention on Contracts for the International Sale of Goods (2018), Article 78, para. 10; CISG-AC Opinion No. 14, Interest under Article 78, Rapporteur Y Atamer, Comment 4, both with further references. "Back to section"


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204 Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich, Arbitral Award (15 June 1994) CISG-online 691; ICC Court of Arbitration, Arbitral Award No. 7331 (1 January 1994) CISG-online 106; Landgericht Frankfurt am Main (16 September 1991) CISG-online 26; Rechtbank van Koophandel, Hasselt (20 September 2005) CISG-online 1496; Serbian Chamber of Commerce Arbitration (19 October 2009) CISG-online 2265.
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205 OLG Graz (13 June 2013) CISG-online 2458; Landgericht Berlin (21 March 2003) CISG-online 785; Tribunal Cantonal Vaud (11 April 2002) CISG-online 899; Yugoslav Chamber of Commerce Arbitration, Arbitral Award (28 January 2009) CISG-online 1856; Rechtbank van Koophandel Oudenaarde (10 July 2001) CISG-online 1785; Landesgericht Heidelberg (2 November 2006) CISG-online 1416.
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206 Rechtbank van Koophandel Ieper (18 February 2002) CISG-online 764; Rechtbank van Koophandel Oudenaarde (10 July 2001) CISG-online 1785.
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209 CISG-AC Opinion No. 14, Interest under Article 78, Rapporteur Y Atamer, Comment 3.36.
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211 CISG-AC Opinion No. 14, Interest under Article 78, Y Atamer (Beijing 2013), Comment 3.45.
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214 Successful cases include, for example, District Court Berlin-Charlottenburg, CISG-Online 386 (4 May 1994); Commercial Court Besançon, CISG-Online No 557 (19 Jan 1998); ICC Court of Arbitration, Case No. 8790/2000, CISG-Online 1172 = CLOUT Case No. 1085 (1 Jan 2000); District Court Willisau, CISG-Online No. 961 = CLOUT Case No. 893 (12 March 2004); *Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG*, No. 03 C 1154, 2004 WL 1535839, at *1 (N.D. Ill. July 7, 2004); Belgian Court of Cassation, CISG-Online Nr. 1963 (19 June 2009); U Magnus in *J von Staudinger Kommentar*, Article 79, para. 7.; see also I Schwenzer in Schwenzer Commentary, Article 79, para. 1.  ~ Back to section

215 Y Atamer in *UN Convention on Contracts for the International Sale of Goods* (2018), Article 79, para. 46; A Janssen states that pandemics are classical examples of an impediment under Article 79 (A Janssen, ‘Der internationale Warenkauf in Zeiten der Pandemie’ EuZW 2020, 393, III.1.a); however, the arbitrators in a CIETAC arbitration held that the seller could not invoke Article 79 due to the SARS outbreak because at the time of contracting SARS was already known (CIETAC Arbitration proceeding (5 March 2005) (log-in required to access [https://cisgw3.law.pace.edu/cases/050305c1.html](https://cisgw3.law.pace.edu/cases/050305c1.html)).  ~ Back to section

216 See, e.g., Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (17 October 1995) CISG-online 207 (holding that the lack of free convertible bank credit of the Russian buyer/payment debtor did not relieve the buyer from paying the purchase price to the seller); Civil Court Monza (14 January 1993) CISG-online 540 (holding that the rise of the market price of steel by 30 per cent since the conclusion of the contract was not unreasonable hardship); but regarding the view that financial constraints might constitute an impediment, see U Magnus in *J von Staudinger Kommentar*, Article 79, para. 24, citing, *inter alia*, Peter Huber in *MünchKomm*, Article 79, para. 21, Peter Mankowski in *MünchKomm/HGB*, Article 79, para. 81; OLG Hamburg ForInt 1997, 168. However, Magnus does not elaborate what those circumstances might be. See below for discussion on hardship.  ~ Back to section


For a fuller discussion, including the requirements of Article 79, see Y Atamer in *UN Convention on Contracts for the International Sale of Goods* (2011), Article 79; I Schwenzer in Schwenzer Commentary, Article 79; Schlechtriem/Butler, para. 288 *et seq.*  


CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Professor Dr Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2 to 5 February 2020; see also Hof van Cassatie, 19 June 2009, CISG-online 1963 (granting a right to renegotiate the contract to a seller in light of a 70 per cent price increase in steel after the conclusion of the contract); I Schwenzer, E Muñoz, ‘Duty to renegotiate and contract adaptation in case of hardship’, 24 (2019) *Uniform Law Review*, 149, 152, 153.  


For an instructive case on Article 50 (price reduction), see *China Railway No. 10 Engineering Group Co. Ltd. v. Triorient LLC*, AAA/ICDR case 01-19-0003-0137 (CISG-online 5639).  

I Schwenzer in Schwenzer Commentary, Article 74, para. 10. The claim for specific performance is subject to Article 28.  
