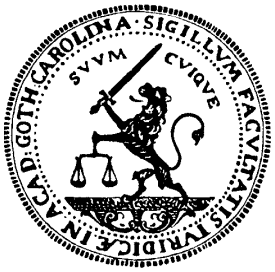


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# The CISG and its provisions on damages

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# Foreword

Since the very beginning of my law-studies I have had a particular interest in different kinds of sales transactions, and especially the international ones. It is because of this that I have chosen to write my graduate thesis on this subject. The reason to way I choose to write about CISG is because in my opinion it is the most important regulation for the international sale of goods and I believe that its importance will grow even more. The fact that the paper is concentrated on damages according to the Convention is due to that most international disputes, that are settled by a court, involves damages in one way or another and that it is uncertain in some aspects exactly how CISG shall be interpreted. My intentions with the paper is to clarify as much as possible how damages according to the Convention works and also give suggestions on how some parts should be interpreted.

I would like to take the opportunity to thank my tutor, Professor Hans Henrik Lidgard, for letting me write about the subject and also for letting me perform an individual work without trying to control its result too much. I would also like to thank the colleague of my tutor, Mr Philip Horowitz, for taking his time to make sure my English is understandable and for giving me valuable comments on the paper in general. Another person that has meant a lot to my work is Ann-Marie Bjerström who has read the paper several times along the way, giving me an outsider's view of both the language and the content in general. At last but not least I would like to thank Mr Jimmy Hansen at the Faculty of Law in Lund for the technical support he has given me during the process of writing the paper.

# Abbreviations

| | |
|---|---|
| BGB | Bürgerliches Gesetzbuch |
| BGH | Bundesgerichtshof (German Federal Supreme Court) |
| C.c. | Code Civil |
| CISG | The 1980United Nations Convention on Contracts for the International Sale of Goods |
| EC | European Community |
| ECJ | European Court of Justice |
| EEC | The European Economic Community |
| EFTA | The European Free Trade Association |
| ICCA | Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry |
| ICC | International Chamber of Commerce in Paris |
| KöpL | Köplag (1990:931) |
| LG | Landgericht (German District Court) |
| OLG | Oberlandesgericht (German Provincial Court of Appeal) |
| Prop | Riksdagsproposition |
| U.C.C. | Uniform Code of Commerce |
| ULFC | The Uniform Law on the Formation of Contracts for the International Sale of Goods |
| ULIS | The Uniform Law on the International Sale of Goods |
| UNCITRAL | The United Nations Commission for International Trade Law |
| UNIDROIT | The International Institute for the Unification of Private Law in Rome |

# 1 Introduction

## 1.1 Purpose

During the 30s, the world experienced a growing need for harmonisation of laws governing international trade. This led to the start of preparations for an international sales law. In 1964, the first convention, ULIS entered into force. ULIS failed in its task of governing international trade, which led to the preparation of a new sales law. The result was the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), which entered into force in 1988. The Convention has been signed by some 50 states today and is considered an important measure regulating the international sale of goods.

The purpose of the paper is to describe the provisions in the CISG governing damages and how the rules are applied and interpreted in doctrine and in practice. I will study decisions from various national courts and arbitral bodies to investigate if they interpret the CISG differently and if the do I will analyse why. A uniform application of the Convention is very important. Due to this I aim to investigate different possibilities for a court, or arbitral body, to find guidance on how to interpret the Convention.

## 1.2 Limitation

The CISG contains 101 articles and is divided into four main parts. To investigate the whole Convention would be impossible due to the limitation of this paper. Due to this, I have chosen to deal mainly with questions concerning damages.

## 1.3 Method

In order to describe the general part of the CISG I have studied books and different articles. I have used the same method when writing the chapter on damages according to national legislation. Books and articles were also used to locate the relevant parts and problems in each provision governing damages. Case law, doctrine and case-analysing articles have been studied when analysing how the Convention has been interpreted in practice. When trying to explain differences in different national decisions I have compared the decision with the national law of the court. It is very difficult to find

relevant material and case law on the CISG why I have worked with some Internet material and especially with the Pace University database.

## 1.4 Outlines

The outline of the paper is the following; chapter 2 contains a general description of the CISG and its history. It also contains a part on jurisdiction and guidance on interpretation. The purpose of this chapter is to give the reader information on how the CISG was created and what it includes so he can better understand the paper. A description of different national laws governing damages is found in chapter 3. This chapter is meant to increase the reader's knowledge of some national laws and to allow him better to understand the problems and differences when interpreting the CISG. Chapter 4 is the main chapter. Here I present in detail how damages are regulated by the Convention, when the Convention is applicable, problems arising from it and so on. The last chapter, chapter 5, is the conclusion. A summary of the paper, and particularly of the main chapter, is also made here.

# 2 The CISG in general

## 2.1 Pre-CISG conventions

Preparations for a uniform international sales law began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. The first draft for a convention came in 1939, the Rome-draft, but it did not result in a final convention since it was interrupted by the Second World War[1]. The draft, in a modified version, was submitted to a diplomatic conference in the Hague in 1964, which adopted two conventions on the sale of goods[2]. One of these conventions was the Uniform Law on the International Sale of Goods (ULIS) and the other one was the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC). These conventions were not a success. There were various reasons for this but one of the more important was that when the conventions entered into force in 1972 there were only nine states that had implemented them[3]. Out of these nine states only two were non-European (Gambia and Israel) while the others belonged to the European Economic Community (EEC)[4]. When ratifying the convention it was common to combine the ratification with different kinds of reservations. Apart from these reservations the importance of the Conventions were negatively affected by the fact that the applicability of the convention was often excluded by clauses in standard agreements[5]. The small number of states ratifying the Conventions was caused by the fact that the preparation of the conventions was made by a limited number of states. This led to many states, mostly developing countries, not wanting to sign the conventions since they could not influence the content[6].

Even before the conventions entered into force it was clear that they would be of limited importance for international trade. Because of this the United Nations Commission for International Trade Law (UNCITRAL) set up a special Working Group in 1968. Its task was to investigate whether it would be enough to modify the two existing conventions to render wider acceptance or if it was necessary to elaborate a new text for the same purpose[7]. Their work resulted in a decision to draft a new convention that would regulate both the formation of an international contract of sale and the

[1] Hellner, J., Tidsskrift for Rettsvidenskap, 105, Oslo 1992, p. 2
[2] Garro, A. - Zuppi, A., La Convención de las Naciones Unidas Sobre los Contratos de Compraventa Internacional de Mercaderias, p.1, (Internet article).
[3] Schlechtriem, P., Commentary on the UN Convention on the International Sale of Goods (CISG), 1998, Oxford, p. 1
[4] Bianca, C.M.- Bonell, M.J., Commentary on the International Sales Law, Milan 1987, p. 4
[5] Hellner, J., Oslo 1992, p. 5
[6] Prop 1986/87:128, p. 86
[7] Bianca, C.M.- Bonell, M.J., p. 5

substantive rules for international sales[8]. A draft proposal in 1978 ultimately resulted in the United Nations Convention on Contracts for the International Sale of Goods, CISG.

## 2.2 CISG

### 2.2.1 CISG

The United Nations Convention on Contracts for the International Sale of Goods was adopted by a diplomatic conference in Vienna on the 11 April 1980 and it entered into force on the 1 January 1988. Although the CISG does not represent a formal revision of the two Hague Conventions of 1964, it replaces them both. Today it is the only instrument governing international sales contracts at a world-wide level[9]. The CISG was considered a success from the beginning. The original eleven States, in which the Convention came into force on the 1 January 1988, included States from every geographic region, every stage of economic development and every legal, social and economic system[10]. Today some fifty countries have ratified the Convention and these Contracting States account for more than two-thirds of world trade[11]. One explanation to its wider acceptance is that countries from different regions were involved in its drafting[12]. Nevertheless, since the United Kingdom, which traditionally has an important role in international trade, has not (yet) signed the Convention it does not entirely dominate international trade law[13].

The main purpose of the Convention is to cure the uncertainty as to which law is applicable in international disputes. This uncertainty was considered to have a negative effect not only on the parties themselves but also on international trade in general[14]. Another objective of the Convention is to offer rules that are more responsive, than traditional national laws, to the effective needs of international trade[15].

[8] van Houtte, H., The Law of International Trade, London 1995, p. 125
[9] Bianca, C.M.- Bonell, M.J., p. 7
[10] Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, p. 1, (Internet article).
[11] Lookofsky, J., Understanding the CISG in Scandinavia, Copenhagen 1996, p. 1
[12] van Houtte, H., p. 126
[13] Hellner, J., Köp och avtal – uppsatser 1980-1992, Stockholm 1992, p. 253
[14] Prop 1986/87:128, p. 86
[15] Bianca, C.M.- Bonell, M.J., p. 9

### 2.2.2 The content of the CISG

The CISG is divided into four parts and contains 101 articles. The purpose of this paper is not to give a complete description of the Convention. This is why only a short presentation of each part is given solely in order to give the reader an overview of its content.

Part I establishes the scope of application of the Convention and the general provisions of when and how to use the substantive rules in Parts II and III. Apart from the possibility whereby the signing States can make certain reservations when ratifying the Convention, the Convention in itself contains limitations. In Article 1 it states that the CISG shall be applied on contracts concerning the sale of goods between parties whose *places of business* are in different countries even if there has been no international transport[16]. The Convention is not to be applied on all kinds of contracts that involve international sales of goods. A further list of what is excluded is found in article 2. Furthermore the Convention only regulates the situation between the parties of the contract (Art 4) and they may exclude the application of the Convention, derogate from it or vary the effects of any of its provisions (Art 6). Article 7 gives guidelines on how to interpret the Convention. The purpose is to prevent Member States using national principles of interpretation when interpreting the Convention and thus putting a national character on the Convention[17].

The second part deals with the formation of a contract and when a valid contract is to be considered concluded. For an offer to be valid article 14 stipulates that it must be addressed to a specific person and it must be sufficiently determined. The offer has to indicate the goods and expressly or implicitly fix or make provisions for determining the quantity and price. Article 16 contains rules on how to revoke an offer and Articles 18-22 deals with acceptance. The Nordic countries have chosen to use the right of reservation (contained in Article 92) and to declare themselves not bound by this second part of the Convention. The main reason for the reservation is that these rules are strongly affected by the rules of the common-law countries[18]. The author Joseph Lookofsky even goes so far as saying that it appears as if Article 92 was made specifically with the Scandinavian countries in mind[19].

The third part contains articles about the actual sale of goods and the first chapter establishes general provisions, for example the definition of a fundamental breach (Art 25). Most articles in this part govern the obligations of the parties. The seller's main obligations are to deliver the right goods to the right place at the right time (Art 31-35) while the buyer's

[16] Hellner, J. – Ramberg, J., Speciell avtalsrätt I, Köprätt, Stockholm 1991, p. 293
[17] Hellner, J. – Ramberg, J., p. 297
[18] Prop 1986/87:128, p. 88-89
[19] Lookofsky, J., Internationale köb, Köbenhavn 1989, p. 47

main obligations are to receive the goods and to pay the price (Art 54). If one of the parties fails to perform any of its obligations the aggrieved party may require performance of the other parties' obligations, claim damages or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform to the contract[20]. Apart from this it states when the risk of the goods passes from one part to the other (Art 66-70), how to calculate damages (Art 74-78) and exemption from liability (Art 79-80).

The fourth and final part contains the final provisions including that relating to the UN Secretary-General as depository for the Convention (Art 89). In this part the articles giving a contracting State the right to make reservations concerning the applicability of certain articles or whole parts are found.

### 2.2.3 Jurisdiction in cases concerning the CISG

The CISG does not contain any provisions governing when a court has jurisdiction and I have not been able to find any direct guidelines in the preparatory works of the Convention. However, in the preparatory works there is a discussion on how national courts and arbitral bodies should interpret the Convention where a point is not directly settled by its text. By the reference to national courts and arbitral bodies one can draw the conclusion that both, in general, are competent to settle disputes where the CISG is applicable. The question whether national courts and arbitral bodies have jurisdiction or not is not a disputed issue, but both doctrine and practice consider them competent.

When a dispute arises in a contractual relation the competent court has to be identified. The principle of freedom of contract is one of the general principles in the CISG and makes it possible for the parties in a contract to provide for the court which is to have jurisdiction over future disputes. This excludes the jurisdiction of other courts[21]. When the parties have not chosen a specific court there are different rules that a court in the country where a party has initially been sued can apply to decide whether it has jurisdiction in the case or not. In Europe there are two different conventions governing jurisdiction. The first is the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (the Brussels Convention) between the Member States of the European Community. This Convention settles questions of jurisdiction when it comes to international matters of a civil or commercial nature and when the parties to the contract are domiciled in two different Member States. The second Convention is the Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (the Lugano Convention). The Members States of the Lugano Convention are the Member States of the EU and EFTA. This

[20] Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, p. 5, (Internet article).
[21] Lookofsky, J., 1996, p. 15

Convention is applicable when the contracting parties have their domicile in a Contracting State and the Brussels Convention is not applicable. The content of the Lugano Convention and the latest version of the Brussels Convention have many similarities[22].

The general rule on jurisdiction in both Conventions is found in Article 2 where it states that persons domiciled in a Contracting State shall be sued in the courts of this State. This means that if a buyer, domiciled in Germany, breaches the contract the seller may sue him for damages in a German court. There are various exceptions to the general rule in the Conventions; the CISG has some impact on these.

According to Article 5 (1) in both the above mentioned Conventions a party to a contract domiciled in a Contracting State may be sued in the courts of the place of performance of the obligation in question. If the buyer does not pay the price the seller may sue him for the price, and for damages, in the place where the buyer was supposed to pay the price. If the place of payment has not been settled in the contract, Article 57 of the CISG states that it is in the seller's place of business. The consequence is that the courts of the seller's place of business will have jurisdiction in the case. Note that if a party has more than one place of business, Article 10 of the CISG gives guidance on how to choose the relevant one in the particular case. If a party does not have a regular place of business, reference is to be made to his habitual residence (Art 10(b) CISG). Similarly, if a seller does not deliver, or delivers defective goods, Article 31 of the CISG states where the place of performance for the seller is. The buyer may then sue the seller for performance and damages in the courts of this place. However, if the parties in the contract derogate from the provisions in the CISG and choose an alternative place of performance, jurisdiction should not automatically be given to the courts of this place. It is important to find out whether the parties intended for the jurisdiction to alternate too or not. If in doubt, such agreement ought not to be interpreted as relating to matters of jurisdiction[23].

If no international convention is applicable, jurisdiction is to be settled in accordance with the court's rules on jurisdiction in international disputes. If the court find itself competent by these rules it should equally be considered as having jurisdiction to settle a dispute where the CISG is applicable law. An arbitral court is only competent when the parties refers to it as the forum for the settlement of disputes arising from the contract.

### 2.2.4 Interpretation of the CISG

Once it is decided that a court has jurisdiction in a case it will have to apply the CISG. When interpreting the Convention it is important not only to look at the article in question but also at the whole document and its purpose.

[22] Bogdan, M., Svensk Internationell Privat- och Processrätt, Lund 1995, p. 123
[23] Schlechtriem, P., 1998, p. 236

This means that consideration should be taken of its international character and to the observation of good faith in international trade[24]. When a court is to rule on a question not expressly settled by the Convention it is to be done in conformity with the general principles on which the Convention is based or in conformity with the law applicable by virtue of the rules of private international law[25].

When Sweden discussed the ratification of the CISG a special request was made. It was considered that the creation of a system for collecting and spreading the decisions of the different national courts would be of great value [26]. The information would be used to help the courts to interpret the CISG and lead to a uniform application of the Convention. In the 21st session of the UNCITRAL the same point was discussed[27]. The Member States should be invited to assist in the gathering of the court decisions and the arbitral awards relating to the CISG and the secretariat of the Commission (UNCITRAL) was meant to function as the focal point. The decisions and awards were to be sent to the Commission in full and in their original language and be available to any person interested. Due to lack of resources available, this could not be organised by the UNCITRAL. Instead, it was decided that national correspondents designated by states would prepare abstracts or headnotes of all national decisions. These where to be translated into one of the official languages and sent to UNCITRAL. The abstracts can be found on the Internet under the address www.un.or.at.uncitral. The problem with the abstracts is that they are too short to give proper, if any, guidance on how to interpret the CISG.

Apart from the database of UNCITRAL the University of Freiburg has created a database called "CISG online"[28], which mainly contains German case law referred to in the German language. It also contains references to other courts' decisions but they are, if given in full, provided in the original language of the relevant courts. Another database available on the Internet is the "CISG database" of the Institute of International Commercial Law at the Pace University (N.Y.)[29]. In these two databases it is possible for a court, and other interested persons, to find guidance, to some extent, on how to interpret different provisions of the CISG. Not all cases are cited in full but some are (in the "CISG database" they are in English). Even though some help is to be found in these databases it is not sufficient to ensure a uniform interpretation of the Convention. In the search for relevant case law a court may find the work of Michael R Will, "International Sales Law under CISG – The First 444 or so Decisions", to be valuable[30]. In this work Mr Will has

[24] See Article 7(1), CISG
[25] See Article 7(2), CISG
[26] Prop. 1986/87: 128, p. 163
[27] UNCITRAL Yearbook Volume XVIII: 1987, p. 15f
[28] Internet address: www.jura.uni-freiburg.de/ipr1/CISG/
[29] Internet address: www.cisg.law.pace.edu/
[30] Will, M. R., International Sales Law under CISG – The First 444 or so Decisions, Geneva 1998

listed cases on the CISG settled by national courts and arbitral bodies and in each case he points out the articles of the CISG involved.

When an article of the CISG is substantively identical to an article in the ULIS, case law from this Convention can give some guidance on how to interpret the CISG. If a court chooses to study case law from the ULIS it is important to bear in mind that this Convention was only ratified by a few number of States and that it was not considered successful in its task. Due to this the guidance a court can find in the case law of the ULIS is limited.

Could a European national court turn to the European Court of Justice for guidance? The ECJ only has the powers conferred upon it by the Treaty of Rome. These are to ensure consistency in the interpretation and application of the Treaty of Rome. As long as the CISG does not fall within the scope of the Treaty the ECJ does not have jurisdiction to rule in questions concerning the provisions of the CISG. Because of this a national court cannot turn to the ECJ for guidance on how to interpret the CISG. However, it is not impossible that the ECJ in the future will be considered competent to rule in cases concerning the sale of goods.

One can conclude that it is difficult for a court, or an arbitral body, to find relevant material when interpreting the CISG. Despite the efforts of UNCITRAL and some private databases the problem remains.

### 2.2.5 The implementation of the CISG in Sweden

The CISG became law in Sweden on the 1 January 1989. It was implemented in Swedish law by the Law (1987:822) on the International Sale of Goods. The reservation concerning the second part of the CISG is found in its Article 1 which states that only Articles 1-13 and 25-88 shall be considered valid law in Sweden. This is not the only reservation made by Sweden. In Article 2 Sweden provides that the Convention shall not be applied in trade between the Nordic countries. The reason for this was the belief that since the inter-Nordic sales laws are created in co-operation between the countries, they are more or less identical[31]. It can be questioned whether the Nordic sales laws are more like each other than the CISG, as example can be mentioned that Sweden has changed its sales-law in order to correspond better with the Convention.

[31] I.e. Bogdan, M., Utrikeshandelsn civilrättsliga grundproblem, Stockholm 1994, p. 15

# 3 Damages according to national legislation

## 3.1 Introduction

The purpose of this chapter is to give a short description of some national laws that governs damages in contractual relations. The countries to be examined are Sweden, USA, Germany and France. The examination will focus on monetary damages and leave out other actions an aggrieved party may take against the breaching party. The knowledge found from this will later be used when analysing damages under the CISG and different situations involving it.

## 3.2 Sweden

### 3.2.1 General

The purpose of damages in Swedish law[32], as in the CISG, is to compensate the aggrieved party[33] and place him in the same financial position he would have been in if the contract had been properly performed (positiva kontraktsintresset). Damages may include, among other things, expenses, differences in price and loss of profit (KöpL § 67)[34]. Special to Swedish law is the way losses are divided into direct and indirect losses. It can be said that direct losses are those that are typical and foreseeable consequences of the breach of a contract and indirect losses are those that are not[35]. An exhaustive list of indirect losses is found in § 67. It is important to know the difference between the two since they are recoverable under different circumstances. Recovery of a direct loss follows the principal of impediment within control (kontrollansvar) while it takes negligence, culpa, or specific commitment, in the case of non-conforming goods, for the recoverability of indirect loss.

The KöpL judges damages depending on the kind of breach present and according to the party that commits it. Despite this the law strives towards

[32] Contractual relations in Sweden are governed by the Swedish Contract Act (Köplagen 1990:931)
[33] Ramberg, J., Köpavtal, Stockholm 1993, p. 106
[34] If not specified references to sections means sections in the KöpL
[35] Herre, J., Ersättning i köprätten, Stockholm 1996, p. 422

co-ordinating the rules for damage so that the responsibility is the same independent of the kind of breach and which of the parties that committed it[36]. This makes it very much like the CISG and the likeness between the two is bigger than the differences[37]. Just as in the CISG it is also possible for a party to both cancel a contract and seek damages for the losses incurred.

As with most laws, the KöpL contains limitations to liability. For instance, a seller is not responsible for damages due to impediment beyond his control, *force majeure*, which he could not reasonably have foreseen at the time of the conclusion of the contract (§ 27). The foreseeability is objective and not according to what the party in question was able to foresee[38]. Apart from this there has to be a causal connection between the breach of contract and the loss incurred (kausalitet) and the breach shall be of the kind that it is reasonable to consider in a judicial review (adekvans)[39]. In two situations the conduct of the injured party can limit the responsibility of the breaching party. One is in the case of contributory negligence (§ 22) and the other is if the party fails to mitigate his damages (§ 70). The law also limits damages so as not to cover injuries on persons, cp., Article 5 CISG, or damages regarding other things than the sold goods (§ 67).

### 3.2.2 Buyer's remedies

The seller shall deliver the goods on time and in accordance with the contract. If he breaches these obligations the buyer may seek the compensation listed in § 22. A seller also has to deliver on time and if he does not, or does not deliver at all[40], the buyer may recover damages incurred unless the seller can show that the damages are a result of an impediment beyond his control (§§ 27 and 40). Furthermore a seller may be held liable for damages caused by workers who he has contracted unless they in their turn are free from responsibility according to § 27. Once it is clear that the seller will not be able to perform on time he has an obligation to notify the buyer (§ 28) or he will be liable for losses, both direct and indirect losses, which the buyer could have prevented if he had been notified. Once the buyer has decided to claim damages for loss he shall notify the seller in reasonable time or he will lose his right to be compensated (§ 29).

According to § 40 the buyer also has, as mentioned above, the right to claim damages if the goods do not conform to the contract. If the goods are specified it may include recovery for indirect loss. Even cases where a third party has legal right to the sold goods are covered by this rule. The difference is, that the liability is strict, unless the buyer knew of it or should

[36] Ramberg, J., 1993, p. 106
[37] Bogdan, M., p. 14
[38] Ramberg, J., Köplagen, Göteborg 1995, p. 351
[39] Ramberg, J., 1993, p. 119
[40] Ramberg, J., 1993, p. 105

have known about it, if the goods had the defect by the time of the Conclusion of the contract and it includes both direct and indirect damages (§41)[41]. If the defect arises after the conclusion of the contract the seller is responsible according to the principal of impediment within control. Apart from this the same rules are to be applied as in the case of late performance (§§ 27 and 28).

If the contract has been cancelled the buyer may buy the goods from another seller and is than entitled to damage corresponding to the difference in price (§ 68). The buyer may choose between using the contract price or the market price as a base when calculating the difference in price[42].

### 3.2.3 Seller´s remedies

The buyer shall contribute, i.e. pay the price in advanced if agreed, so that the seller can fulfil his obligations plus collect or receive the goods. If he does not comply with his obligations the seller may seek the remedies listed in § 51. The remedies are different if the breach is non-payment and non-contribution or if the buyer does not collect or receive the goods. The reason is that in the two latter cases, the buyer performs in his own interest.

§ 57 stipulates that the seller may be awarded damage for loss suffered due to late payment of the price. What makes this section special is that it has listed what is to be considered as impediment beyond control. If the buyer can show that the breach is the result of law, interruption in the public communication or other similar obstruction that he could not reasonably have foreseen by the time of the conclusion of the contract he will be free from liability. If the breach consists of the buyers non-contribution to the buy the seller also may recover damages if it stated in the contract or shown in another way that the seller had a special interest in being relieved of the goods on time. The limitations of liability are the same as in § 27. In § 58 are found the same rules of notification as in the § 28 and in § 59 the same rules as in § 29 about notifying the intention to claim damages.

If the breach is of the kind where the seller is entitled to cancel the contract the seller may resell and recover damages corresponding to the difference in the price between price obtained and contract price (§ 68). Even though the seller does not resell he may recover damages if there is a market value on the goods. The quantum is then the difference between market value and contract price (§ 69).

[41] Ramberg, J., 1995, p. 443
[42] Herre, J., p. 469

## 3.3 USA

### 3.3.1 General

The law applicable on sales contracts is the Uniform Code of Commerce (U.C.C.) and like the Swedish law it seeks to place the aggrieved party in the same economic position he would have been in if the contract had been performed as agreed (U.C.C. § 1-106). This is called "expectation damages" and involves monetary compensation for loss less any savings made from not having to perform his own obligations under the contract[43]. In order to receive expectation damages the aggrieved party has to show probative evidence of lost benefits[44] or he may only recover reliance damage, which only includes compensation for expenses or loss incurred in reasonable reliance upon the contract[45].

The U.C.C. has chosen to divide the remedies available depending on the breach involved and which of the parties that makes it. This may be seen as a limitation of damages. The U.S. Courts have also developed three substantial legal doctrines that limit damage awards: avoidability, foreseeability and certainty[46]. They are mostly applied on cases concerning seller's breach and are found in section 2-715 in the U.C.C. If a party claims a loss, he has to be able to prove loss with a certain degree of certainty both in respect of its nature and of the causes from which it proceeds[47]. Absolute certainty is not required; reasonable certainty suffices. The requirement of certainty is generally imposed when the court is to judge in cases involving lost profit on transactions other than, i.e. when the buyer sub-sales to a second buyer, the transaction in which the breach was made (consequential damages)[48].

Once the facts of damages are established, its amount does not have to be shown with precision. Even though the injured party has been able to prove loss he also has to show that he has not been able to avoid it. A more frequent used name for such avoidability is mitigation of loss. The law states that no recovery for damage is allowed for damages that reasonably could have been prevented. A damage can be reasonably prevented when the injured party could have avoided it without undue risk, burden or humiliation[49]. Even though the effort to avoid loss was unsuccessful the injured party may still go on to recover damages.

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[43] Schaber, G.D., -Rohwer, C.D., Contracts, St Paul, Minnesota 1990, p. 247
[44] Calamari, J.D. -Perillo, J.M., Contracts, St Paul, Minnesota 1987, p. 592
[45] Schaber, G.D., -Rohwer, C.D., 1990, p. 242
[46] Schneider, E. C., Consequential damages in the international sale of goods: analysis of two decisions, p. 3, (Internet article).
[47] White, J.J .-Summers, R.S., Uniform Commercial Code, St Paul, Minnesota 1995, p. 379
[48] Calamari, J.D.- Perillo, J.M., p. 600
[49] White, J.J.-Summers, R.S., p. 382

As far as foreseeability is concerned this rule goes as far back as 1854 and the English case Hadley v. Baxendale[50]. This rule has developed over time and today a party is only liable for damages, resulting from a breach, that he had reason to foresee at the time of contracting. To establish whether damages could have been foreseen or not the majority of the U.S. Courts today use an objective approach.

### 3.3.2 Buyer´s remedies

In common law each contractual obligation is considered a warranty or condition and if, for example, the seller delivers non-conforming goods it generally entitles the buyer compensation or even the right to avoid the contract[51]. If the buyer chooses to rescind from the contract he loses his right to claim damages since, according to American law, there no longer exists a contract that can be breached[52]. The remedies available can also depend on whether the buyer has accepted the goods and justifiably revoked acceptance or not[53]. If he has not done so, and the seller does not cure the breach, the buyer may seek recovery (U.C.C. §2-711(1)).

If a buyer covers by buying substitute goods, damages equals the difference between the cost of cover and the contract price[54]. When covering the buyer has to act in good faith and in a commercially reasonable manner. Apart from the difference in price the buyer also may recover incidental damages and consequential damages, less expenses saved in consequence of seller's breach (U.C.C. §§ 2-711(1)(a), 2-712, 2-715). Even though the buyer does not cover he may receive damages for non-delivery or repudiation. In this case the damage corresponds to the difference between the market price and the contract price plus incidental damages and consequential damages less expenses saved (U.C.C. §§ 2-711(1)(b), 2-713, 2-715). In general the market price shall be calculated at the time when the buyer learned about the breach and of the place of performance.

If the buyer has accepted the goods and the time for revocation of acceptance has passed he may still recover damages for non-conformity, of the seller's warranties, in performance[55]. The sum recoverable is the loss resulting in the ordinary course of events from the seller's breach (U.C.C. § 2-714(1)) and equals the difference between the value of the goods accepted and the value they would have if they had been as warranted (U.C.C. § 2-714(2)). The value shall be calculated according to the time and place of

[50] White, J.J.-Summers, R.S., p. 372
[51] Gorton, L., Nationell rätt och internationella köpavtal, Lund 1995, p. 62
[52] Gorton, L., p. 59
[53] Schaber, G.D.,-Rohwer, C.D., Uniform Commercial Code, St Paul, Minnesota 1989, p. 126
[54] Schaber, G.D.,-Rohwer, C.D., 1989, p. 128
[55] Schaber, G.D.,-Rohwer, C.D., p. 133

acceptance[56]. In this case the buyer also has the right to incidental damages and consequential damages (U.C.C. § 2-714(3), 2-715). In opposition to both Swedish law and the CISG consequential loss includes not only economic loss but also injury to person and/or property (U.C.C. § 2-715(2)(a) and (b)).

### 3.3.3 Seller´s remedies

A buyer can breach a contract by; (1) wrongfully rejecting goods, (2) wrongfully revoking acceptance of goods, (3) failing to make payment on or before delivery, or (4) repudiation[57]. If a buyer breaches the contract the seller may seek the remedies listed in U.C.C. § 2-703. The availability of monetary actions depends on whether the buyer breaches the contract before or after accepting the goods. If before, the seller may resell the goods in question observing good faith and in a commercially reasonable manner[58]. Damages in this case corresponds to the difference between the contract price and the price for the resale plus incidental expenses, less expenses that could have been avoided (U.C.C. §§ 2-706, 2-710). If the seller, for some reason, can not resell the goods he may recover the difference between the contract price and the market price by the time and place of performance plus incidental expenses, less expenses that could have been avoided (U.C.C. §§ 2-708(1), 2-710).

Where the buyer has accepted the goods or if the goods have been destroyed after the passing of the risk to the buyer and he does not pay the price the seller may maintain an action for the price (U.C.C. § 2-709(1)(a) and (2)). The seller may also recover the price if he had identified the goods to the contract and thereafter is unable to resell them at a reasonable price (U.C.C. §§ 2-704, 2-709(1)(b)). In the case where the seller sues the buyer for the price he must hold the identified goods for the buyer (U.C.C. § 2-709(2)). The action for the price is not to be considered an action for damage[59].

## 3.4 Germany

### 3.4.1 General

The BGB (Bürgerliches Gesetzbuch) consist of five different parts. The second of these is called “the Law of Obligations” (Schuldrecht) and covers the rules concerning contracts[60]. A party may claim damages as a result of a

[56] Schaber, G.D.,-Rohwer, C.D., 1989, p. 134
[57] Schaber, G.D.,-Rohwer, C.D., 1989, p. 117
[58] Schaber, G.D.,-Rohwer, C.D., 1990, p. 274
[59] Calamari, J.D.- Perillo, J.M., p. 630
[60] Ebke, W. F.- Finkin, M.W., Introduction to German Law, The Hague 1996, p. 174

breach of contract. To calculate the relevant loss of a breach the Germans use a method called the differential method (Differenzhypotese)[61]. This means that they compare the difference between an estimated economic situation, the financial situation without the damaging event, and the actual economic situation. Relevant loss to be compensated is the difference between the two situations.

In Germany they differ between “positive” and “negative” interest. When the positive interest is to be recovered the aggrieved party shall be put in the same financial position as if the contract had been fully performed. Positive interest is used when there is a breach of contract. If negative interest only is to be given in compensation, the aggrieved party shall be put in the same position as if the contract had never been entered into force. This is normally used when a contract is invalid due to a mistake, lack of authority or culpa in contrahendo[62].

For a loss to be compensated there has to be a causal link between the breach and the loss which also has to be "adequate" (adäquater Kausalzusammenhang) which, among other things, means that it has to be shown that the breach was a condition for the loss. A further limitation is that if the injured party has contributed to the loss or violated his obligation to minimise the loss the claim for damages is reduced or even excluded (§ 254 BGB). As in the U.C.C. an injured party has to choose between avoiding the contract or claiming damages since one excludes the other.

A very important principle in German law, which also works as a limitation, is the Principle of Fault. According to this principle, damages, in case of default in performance, can only be awarded if the breaching party is at fault. He is then responsible for both intentional conduct and negligence (§ 276 BGB) as well as for the fault of all persons helping him to perform the obligation (§278 BGB). This also includes independent contractors. There are however some exceptions to the Principle of Fault. One worth mentioning is that a seller of an unidentified thing of a kind (Gattungsschuld) is liable for damages resulting from his non-performance, even without personal fault, as long as it is possible for someone to supply the goods (§ 279 BGB). Despite this principle German law does not contain an uniform concept of default in performance, it differentiates according to the aspects of default: impossibility, delay and insufficiency of performance.

### 3.4.2 Impossibility, delay and insufficient performance

If an obligation is impossible to perform and it is not imputable to the breaching party, he is excused from his obligation to perform (§ 275 BGB). But if the impossibility arise from circumstances imputable to the aggrieving

[61] Ebke, W. F.- Finkin, M.W., p. 183
[62] Ebke, W. F.- Finkin, M.W., p. 184

party he can be held responsible for damages for non-performance (§§ 280 and 325 BGB). The loss to be recovered in this case is the positive interest. Similar to impossibility is the doctrine of frustration that has been developed by the courts and is therefore not to be found in any paragraph in the BGB[63]. Frustration is when a radical, unforeseeable, change in conditions appears after the formation of the contract and the parties have proceeded from an assumption not corresponding to this change. The change in question can be of an economic, political or social nature. The affected party may, if this arise, demand that these radical changes, if they affect the contract, are taken into consideration when estimating the contractual obligations.

In delay in performance the aggrieved party may extend the original term for performance (Nachtfriest) and/or claim damages for loss caused by it (§ 286 BGB). If the breaching party has not performed within the grace period the injured party may claim damages for non-performance (§326 BGB). An additional consequence of setting a grace period is that the aggrieved party loses his right to claim performance during this time. If the delay will from the start have the effect that the goods are of no use for the buyer he may seek damages for non-performance without extending the time for performance. In these cases he receives the positive interest.

Since the rules for insufficient performance has been developed by the courts and commentators they are not treated in the BGB[64]. They are used when a breach of contract is not actionable under any of the basic claims in the BGB[65]. To decide the consequences of an insufficient performance the courts have applied remedies available for impossibility and delay by analogy. In the case of a breach of a contract of sale of goods the paragraphs applicable are §§ 325-326 BGB and the breaching party can be responsible for damages corresponding to damages for non-performance of obligation. One exception to this is if a seller sells defective goods. He can then only be responsible to the extent of the negative interest and not for non-performance because the main duty has already been performed (§ 467 BGB).

## 3.5 Similarities and differences in the national sales-laws

One reason why so many States have adopted the Convention is that it contains many sensible compromises between various doctrines held by the legal families adhering to it. The liability rules in particular are a

[63] Ebke, W. F.- Finkin, M.W., p. 181
[64] Ebke, W. F.- Finkin, M.W., p. 180
[65] Foster, N., German Legal Systems & Laws, London 1993, p. 259

compromise between, mostly, Civil and Common law[66]. From the Common law the Convention seems to have adopted the no-fault rule and placed it in Article 45. The no-fault rule gives the injured party the right to damages even though the breach was not the fault of the breaching party. In this way Article 45 gives the buyer the right to claim damages if the seller does not perform *any* of the obligations laid upon him according to the contract *or* the Convention. The use of *any* in Article 45 (1)(b) makes it a no-fault type of rule where the ground to liability is the actual breach in itself. But, as will be shown in 4.5, this does not make the liability strict. The Civil law side prevailed on the impact of a "legal excuse". When Common law totally discharges the relevant obligations in the case of impossibility, the Civil law, and the CISG only views it as providing an exemption from liability for damages. However, as Lookofsky points out[67] the result of applying the one or the other results in basically the same solution.

The countries described in this chapter have considerable resemblances in their national legislations but also some differences. Common is that they, like the CISG, compensate an injured party in accordance with the principle of full compensation but also provide that damages can be limited if the breached party does not mitigate his loss. One of the most important differences is the effect of declaring a contract voided. In both American and German law the possibility of claiming damages is excluded if the breached party declares the contract voided while according to Swedish law, and the CISG, it is possible to first declare the contract voided and then demand damages. American law also differs in the way that a loss has to be foreseeable by *both* parties by the time of the conclusion of the contract to be compensated. Another difference is that the U.C.C. includes personal injury in consequential loss.

These similarities and differences, mostly the latter, can in some cases be used to explain and analyse decisions from national courts.

[66] Lookofsky; J., 1996, p. 92
[67] Lookofsky, J., 1996, p. 94

# 4 Damages according to the CISG

## 4.1 Generally

### 4.1.1 Introduction

As stated earlier, in the introduction in chapter 1, the purpose of this paper is to investigate damages according to the Convention and how it is used and interpreted in theory and in practice. The main article is Article 74 but it is also necessary to investigate Articles 75-79[68].

Damages are the most common remedy in case of a breach of contract but they are not the only one. Apart from damages an injured party may require performance, reduction of the price or even declare the contract void. These remedies, however, are only available in certain cases of breach. Damages are the general remedy that may be used in all kinds of breaches though a party may therefore, when possible, seek them in combination with one of the other remedies (Articles 45 (2) and 61 (2)). In some case damages is the only relief permitted under the Convention and, contrary both to German and American law, a party may for instance be awarded damages even if the contract is declared void.

### 4.1.2 The Principle of full compensation

According to the CISG, the purpose of damages is not to punish the breaching party but to protect the expectations of the parties and compensate the injured in the case of a breach[69]. The expectation to protect is the one the parties have in their relation when they enter into a contract. In the case of a breach damages are to put the injured party in the same financial situation, as he would have been in if the contract had been properly performed. Article 74 expresses in this way the principle of full compensation, which is also found in a number of national legislations[70]. To estimate the damages one compares the situation in which the injured party finds himself as a result of the breach with the situation in which he would have been if the contract had been fully performed[71]. Article 74 applies the principle even

[68] If nothing specified the articles mentioned in this chapter refers to the CISG
[69] Hillman, R. A., Applying the UN Convention on Contract for the International Sale of Goods: The Elusive Goal of Uniformity, (Internet article).
[70] USA has it in the U.C.C. § 1-106, Sweden in §67(1) of the Contracts Act and Germany in the case of a breach of contract (see 4.4.1. below).
[71] Schlechtriem, P., 1998, p. 553

when the contract has been avoided. To achieve the desired purpose it is important that the calculation is as correct as possible to prevent the breaching party from profiting by his breach[72].

### 4.1.3 How to interpret the article[73]

The case law on the Convention is still very limited. Since Article 74 is substantively identical to Article 82 of the 1964 Hague Uniform International Sales Law (ULIS) the case law from this Convention has been used as guidance when interpreting the CISG[74]. Case law under the ULIS will also be referred to in this paper to the necessary extent.

Since Article 74 originates from Anglo-American law (see 5.5.2), Herre is of the opinion that American case law, and English to some extent, ought to influence the interpretation of the article[75]. In my opinion, it would not be a good solution to let legal traditions from one member of the Convention (let alone those of a non-member) influence the interpretation of an article as important as Article 74. Contracting parties from non-common-law countries would be at a disadvantage since it is more difficult for them to find relevant facts on the case law. The positive in letting the common-law case law stand as a model on how to interpret the article is that it would be more uniformly interpreted. This is because of the fact that one developed national body of case law would be used for the interpretation and not because it is the American one as such.

## 4.2 Sphere of application of Article 74

### 4.2.1 General

The first matter a court has to settle is whether the Convention shall be applied or not. When this has been decided, and it is the Convention that is applicable, Article 74 settles questions on damages whenever, and to the extent that, the Articles 75 and 76 are not applicable[76]. The basic rule on damages according to Article 74 is that it only arises in case of a claim under Articles 45(1)(b) or 61(1)(b). These two articles states that if one party fails to perform any of his obligations under the contract or the Convention the other party may claim damages as provided in the Articles 74-77. Article 74 is, as mentioned under 5.1.1, applicable no matter whether the contract has

[72] Herre, J., p. 25
[73] This part shall be read in addition to the general part on interpretation in 2.2.4
[74] Shneider, Eric C., Measuring Damages under the CISG, (Internet article).
[75] Herre, J., p. 362
[76] Victor Knapp in C.M. Bianca & Michael Bonell, p. 539

been avoided or not[77]. This is one of the differences between Article 74 and its equivalents in ULIS, the Articles 82 and 83. ULIS strictly distinguished between damages when the contract was not avoided, Article 82, and when it was avoided, Article 83.

The claim for damages under Article 74 is available to either party of the contract, but only to them. This means that if another person suffers damages as a consequence of a contractual breach he or she has to turn to domestic law for compensation (see more under 5.2.3)[78].

Many different factors may affect the applicability of the Convention and some of them will be discussed below.

### 4.2.2 Culpa in contrahendo

Liability for a breach of obligation that arises during the negotiations of a contract falls outside the scope of the Convention. When negotiating the Convention it was discussed whether *culpa in contrahendo* should enter within the scope of the Convention or not and it was decided that it should not. The reason for this is that different legal systems have developed the doctrine of *culpa in contrahendo* in different ways, covering diverse groups of cases for which they have developed different legal remedies[79]

From the above it follows that even though a party relies upon a statement made by the other party during negotiations which turns out to be defective or inadequate, if it is not incorporated in the contract, liability lies outside the scope of the Convention. Although the Convention is not applicable, the injured party is not of course without legal remedies. He may still turn to domestic law for compensation.

### 4.2.3 Contract, loss and causality

As mentioned in 5.2.1, according to the Convention damages are only available to the parties of a contract. This is not a contentious statement since it is directly expressed in the Convention. The first part of the first sentence of Article 74 states that "Damages for breach of *contract* by one *party* consist of a sum equal to the loss…suffered by the *other party*…". For a party to be held liable for damages it is sufficient that an obligation due is unperformed, not performed in time or badly[80]. When a party refuses to perform an obligation that still is not due and it is clear that it is a definite and final refusal it is also considered a breach of contract[81]. In cases like this

[77] Secretary Commentary on the 1978 Draft on the CISG, (Internet article).
[78] Victor Knapp in C.M. Bianca & Michael Bonell, p. 539
[79] Schlechtriem, P., 1998, p. 557
[80] LG Heidelberg 23 September 1982, Matchup of CISG Article 74 with ULIS, p.2, (Internet article).
[81] Schlechtriem, P., 1998, p. 556

it is important that it has been clearly shown that the party does not intend to fulfil his obligations because if it is merely an assumption by the other party and he withholds his performance he may then be the party liable for breach of contract.

The existence of a contractual relation and a breach against this and/or the Convention is not sufficient. For the breaching party to be liable for damages the injured party also has to be able to show an actual loss on his side. It follows from the wording of Article 74 that damages are to be set equal to the *sum of the loss*. It is also the author's belief that support for this can be found in the general purpose of damages according to the Convention, which is to compensate for the loss of the aggrieved party and not to punish the party at fault.

To the two conditions above, the existence of a contract between the parties and a breach of this and/or the Convention and an actual loss for one of the parties, there is a third condition to be added for the applicability of Article 74. This third condition is causality. The injured party has to be able to show a link between the breach and the loss for it to be recoverable[82]. This is a *conditio sine qua non.* I have found that this condition is not normally argued in practice since the origin of most damages is obvious.

### 4.2.4 The principle of freedom of contract

One of the general principles of the Convention is the principle of freedom of contract. In Article 6 it is stated that the parties may exclude or vary the effects of the provisions in the Convention. This means that the parties may exclude the effect of CISG or vary its applicability. In ICC Case No. 7585 of 1992 an Italian seller and a Finish buyer agreed on a "compensation fee" of 30% of the contract price to be paid, even in a *force majeure* situation, in the event of a contractual breach. The court accepted this clause as providing for liability even in the case of an impediment beyond party's control otherwise excluded by Article 79. In this case the court awarded the compensation fee in addition to damages since the clause was not precise enough to be construed as a liquidation clause excluding any other claim for damages. There are however, some critics who feel that this principle is not to be applied unconditionally. As an example can be mentioned that in the above mentioned case it was said that "Even though the principle of contractual freedom requires that the free provision should be respected, it is nonetheless subject to the principle of good faith and fair dealing"[83].

[82] Victor Knapp in C.M. Bianca & Michael Bonell, p. 540
[83] The International Interpretation of the UN Convention on Contracts for the International sale of Goods: An Approach Based on General Principals, (Internet article)

### 4.2.5 Compensation for personal and material damages

Article 5 in the Convention completely excludes the applicability of the Convention for liability of the seller in the case of death or personal injury to any person caused by the goods. This includes both injuries to the buyer himself, to other persons participating in the contract and to non-participating third parties.

If a buyer sells on the goods and the second buyer gets injured because of defects and the first buyer has to compensate these damages a claim by him is still excluded by the Convention[84]. Despite this the OLG Düsseldorf awarded a German buyer of knife-cutting machines compensation from the American seller for personal injury that the buyer was held liable for due to personal injury to his customer's employees[85]. This they did without even mentioning Article 5 of the Convention. This decision has been criticised and the general opinion is that claims like this shall be compensated according to domestic law.

Claims for property damages on the other hand, according to many authors, falls within the scope of the Convention and shall be settled exclusively by its provisions[86]. According to Lookofsky the applicability of the Convention follows *e contrario* from Article 5[87] and Ramberg states that the advantage with an *e contrario* interpretation of Article 5 is that it stimulates a uniform application of the Convention according to Article 7[88]. This means that although property damages falls under different legislation according to domestic law it shall still be governed by the CISG. In Germany claims for product liability falls under tort or delict while in Sweden a special law governs them[89] and treated as damages arising from a non-contractual relation[90].

### 4.2.6 Exclusion from liability according to Article 79

According to Lookofsky the Convention deals with loss by imposing a limit which damages may not exceed[91]. He sees Article 74 as establishing a boundary that tells the judge where to stop in terms of foreseeability. However, before we decide where to stop it is essential, according to Lookofsky, that we know where to start. That means that we first have to deal with Article 79. This article excludes liability, in part or in whole, if two conditions are met. First of all the party has to prove that his failure to

[84] Schlechtriem, P., Commentary on Oberlandesgericht Düsseldorf 2 July 1993, (Internet article).
[85] OLG Düsseldorf, 2 July 1993
[86] Schlechtriem, P., 1998, p. 50
[87] Lookofsky, J., 1989, p. 284
[88] Ramberg, J., 1995, p. 652
[89] Produktansvarslag 1992:18
[90] Hellner, J., Speciell avtalsrätt II, Kontraktsrätt, Stockholm 1996, p. 223
[91] Lookofsky, J., 1989, p. 25-26

perform was due to an impediment beyond his control, this is comparable to *force majeure*[92]. Once this is proved he must prove that he could not reasonably be expected to have taken the impediment into account by the time of the conclusion of the contract. As in a national court, exclusions are treated as exceptions. *The time of the conclusion of the contract* is congruent with the "foreseeability test" in article 74[93]. If the above conditions are met, the party is not held liable for damages. In other words, the non-existence of an impediment beyond the breaching party's control is a condition for liability according to article 74. In my opinion the fact that the court first has to see if the breach was due to an impediment beyond the breaching party's control before discussing damages saves the parties both time and money.

## 4.3 Damages which can be compensated

### 4.3.1 General

The Convention only allows monetary damages[94]. Article 74 states that "Damages…consist of a *sum* equal to the loss,…". Even though it is clear that the Convention provides for damages for loss, including loss of profit, it is not entirely clear which losses shall be compensated since they are not specified in the Convention. When considering a loss there are two opposite principles that one shall keep in mind; the principle of full compensation and the rule of foreseeability, which functions as a limit to the first principle[95]. Once decided that a loss shall be compensated the question is where it shall be paid. This is not expressed in the Convention but it can be assumed that it shall be at the same place as where the price is payable according to Article 57(1)(a), namely at the obligee's place of business[96]. This is also in accordance with the general principles in Article 7(2). As far as I have been able to see there is no case even discussing where damage shall be paid.

As a rule, non-material losses will not be compensated. According to Schlechtriem this is a rule with exceptions[97]. If a contract has a non-material purpose and the non-material loss is to be considered a typical consequence of a breach of this specific contract it may be compensated. It also has to be shown that both parties understood the purpose of the contract by the time of its conclusion. He gives as an example the case where the purpose of a

[92] I.e. Honnold, J., Uniform Law for International Sales, Philadelphia 1991, p. 529 and Lookofsky, J., 1996, p. 93. In ICCA, 17 October 1995, Case No 123/1992, the court denied exemption from liability based on Article 79 since the contract contained an exhaustive *force majeure* clause and the circumstance called upon was not included.
[93] Herre, J., p. 680
[94] Victor Knapp in C.M. Bianca & Michael Bonell,, p. 540
[95] Schlechtriem, P., 1998, p. 558
[96] OLG Düsseldorf, 2 July 1993
[97] Schlechtriem, P., 1998, p. 558

contract for the sale of a motor vehicle is to enable the buyer to undertake a holiday trip. If the seller does not perform according to the contract he may be held liable also for non-material losses. Foreseeable damages shall then be compensated as consequential damages.

As mentioned above in 5.2.3 a breaching party is only liable if there is an actual loss that can be proven and a causal relation between the breach and the loss. It is irrelevant whether the damage is caused directly or indirectly by the breach[98]. However, it can be more difficult to prove and foresee an indirect loss.

## 4.3.2 Categories of loss

### 4.3.2.1 Consequential damages

Any loss due to a breach of contract is normally compensated as consequential damages according to the wording of Article 74. By definition, consequential damages compensate those losses that flow from the particular situation of the particular contract. A typical example of this kind of loss is when a breach of the seller results in liability for the buyer as he has agreed on reselling the same goods to a third person. In this situation the first seller may be held responsible for the first buyers liability if he knew that the goods where to be resold[99]. Even in the case that a buyer suffers a loss of goodwill, because of defective goods, this loss may be compensated as a consequential loss according to Schlechtriem[100]. This statement can be debated. If it is to be compensated the buyer must have made the risk of this type of loss clear to the seller before concluding the contract. As I see it the principle of full compensation is pro compensation for lost goodwill but against is the difficulty of quantifying such a loss.

A seller can also suffer consequential loss and this often happens in the case of delay of payment. In a LG Aachen, 3 April 1990, where a seller had pre-financed the sale, and the buyer did not pay on time, the court awarded the seller damages corresponding to the interest incurred by him as a result of the delay. In another German case, the buyer did not pay the price since he, wrongfully, claimed that the goods were not as per the contract[101]. Because of this, the seller could not use the monies owing and the court awarded the seller damages, corresponding to the interest on the money owed, to compensate his loss. Costs for actions taken by the seller to receive payment, i.e. contracting a collecting agent, shall also be recovered as

[98] Schlechtriem, P., 1998, p. 558
[99] OLG Hamm, 29 January 1979, referred to in Schlechtriem, P., 1998, p. 561
[100] Schlechtriem, P., 1998, p. 562
[101] LG Stuttgart, 31 August 1989

damages if it contributes with legal proceedings that are superior to those of the seller[102].

Apart from these losses of interest and profit caused by delay in payment a seller can suffer a loss because of a fall in the rate of exchange during the period of delay[103]. Claims for compensation for such a loss shall only be recognised where the seller can prove an actual loss. If payment is to be made in a different currency than the home-currency of the creditor, it can be assumed that he immediately when receiving payment would have exchanged it for domestic currency. If the seller is to be paid in his local currency he may only be compensated for loss due to fall of exchange rate against a foreign currency if he can prove that as a general custom he changes to this currency[104]. In this case it must be assumed that the buyer knew of this custom or the damages would not have been foreseeable.

When judging in cases concerning consequential damages one should bear in mind that, in general, it is easier for a seller to borrow substitute capital, for a certain cost of interest, than it is for a buyer to find substitute goods[105]. Because of this the seller ought to be able to prevent consequential damages easier than a buyer.

Article 74 does not mention incidental damages. Incidental damages are expenses incurred when the aggrieved party tries to avoid further disadvantages from a breach. They may arise from various situations and are recovered as consequential damages under the same condition of foreseeability[106]. Despite this, it seems like the court in the Delchi case argued for consequential and incidental damages separately[107]. In this case an Italian buyer claimed damages from an American seller due to the fact that the compressors for air conditioners ordered had lower cooling capacity and consumed more power that agreed on. When determining if an expense, for Delchi due to the breach, was a foreseeable damage they did it to see if it legitimated incidental *or* consequential damage. The reason for this is probably that the two are separated in US contract law and incidental damages do not have to be foreseeable to be compensated[108].

Further examples on incidental damages are cost for the seller of tendering the goods in vain and seller's preserving and storing goods as a result of

[102] In LG Frankfurt, 16 September 1991, the court denied compensation for the costs of a collecting agent since he did not have access to legal proceedings superior to the ones available to the seller
[103] LG München I, 12 May 1978, , referred to in Schlechtriem, P., 1998, p. 562
[104] OLG Düsseldorf, 14 January 1994
[105] Murphey, A. G. Jr., Consequential damages in Contracts for the International Sale of Goods and the Legacy of Hadley, p. 14, (Internet article).
[106] Shneider, Eric C., Measuring Damages under the CISG, p. 2, (Internet article)
[107] Delchi Carrier, S.p.A. v. Rotorex Corp. U.S. Circuit Court of Appeal (2d. Cir.), Case No Nos. 185, 717, p. 17
[108] Shneider, Eric C., Measuring Damages under the CISG, p. 4, (Internet article).

buyers rejection of goods or refusal to make payment on delivery according to contract[109].

Apart from above a breaching party is liable for the injured party's expenses of ascertaining the damage, avoiding it or mitigating it. Costs for ascertaining damages may be costs for inspection of the goods and according to Schlechtriem, these costs shall be compensated as incidental damages[110]. As mentioned a party may be awarded damages for costs arising when trying to mitigate his loss. In the Delchi-case, the buyer was awarded compensation for trying to avoid damages, although the attempts failed. This is also according to US Contract law[111]. This last part is further discussed under 5.5.3.

#### 4.3.2.2 Loss due to non-performance

When a contractual performance is not performed, or performed but in a defective manner, the other party is entitled to take appropriate measures to put himself in the financial position he would have been in if the contract had been correctly performed (principle of full compensation). As a rule, the injured party is entitled to recover any eventual additional costs and losses due to the non-performance from the breaching party. In a non-performing situation, an appropriate step for a buyer would be a substitute transaction. These transactions will be discussed in 5.4.4.

The buyer may repair defective goods at the expense of the seller. But before repairing the goods the seller is to be given the opportunity of remedying the defect if it can be done without causing unreasonable delay and inconvenience to the buyer[112]. If the seller does not remedy the nonconformity and the buyer makes the repairs, personally or by contracting out, the costs must be reasonable or they will not be recoverable[113]. The buyer is not obliged to repair the defective goods. If he chooses not to repair them he may still be compensated but only for the lower value of the defective goods, as against non-defective ones.

When calculating the loss from a delay or defective performance, a concrete calculation is performed. It is concrete in the way that an actual cost is the base for the calculation. According to Article 76 it is not acceptable to use an abstract, estimating, calculation if the contract has not been avoided[114]. The reason for this is that the promisee still obtains benefits from the contract even if the performance is late. Loss due to non-performance is also a consequential loss but a specific kind as is loss of profit, discussed below.

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[109] Schlechtriem, P., 1998, p. 560-561
[110] Schlechtriem, P., 1998, p. 559
[111] Shneider, Eric C., Measuring Damages under the CISG, p. 4, (Internet article).
[112] Article 48 of the Convention
[113] To determine whether a cost is reasonable or not one looks at the relation between the cost and the purchase price of the goods. See 5.4.6
[114] Schlechtriem, P., 1998, p. 560

#### 4.3.2.3 Loss of profit

Schlechtriem interprets the actual loss to be compensated according to Article 74 as the reduction in the value of the assets that existed when the contract was concluded (reliance damages). According to the wording of the article, loss of profit shall also be compensated. Loss of profit is defined as any increase in value of assets that the breach of contract has prevented[115]. The Convention treats both actual loss and lost profit in the same way. There is however a condition precedent contained in Article 44, which states that to be able to claim compensation for lost profit, a buyer has to give proper notice to the seller of the breach.

As mentioned it is specifically expressed in the article that compensation shall be given for the loss of profit. The reason for this clarification is that some legal systems have special requirements that need to be fulfilled for there to be compensation for lost profit and some even exclude it totally. Schlechtriem believes that the reason for the latter is that calculation of lost profit involves a certain degree of speculation[116]. It is also possible that the states that restricted the recoverability of lost profit in their national legislation were not anxious to fight for it to be the same in the Convention. If they had, it is most likely that the point would have been the subject of an unsatisfactory compromise or even left out.

The party that claims a loss has to prove the amount and show that he has suffered it because of the other party's breach. What degree of probability the injured party has to show to be awarded compensation is not expressed in the Convention. This means that the judge has to interpret the Convention but since it is a question of evaluation of evidence, the law of evidence in the *lex fori* is to be applied[117]. This is discussed further under 5.4.1.

From the principle of full compensation it follows that all losses may be compensated and not only loss incurred before the date of the judgement. However, the courts or the arbitration tribunals' only award loss of profits that have been incurred by the time of the decision[118]. This is in my opinion reasonable since the loss is not an actual loss if it has not been incurred. If a further loss occurs after the first decision the injured party has the possibility of seeking further recovery if the conditions in Article 74 are present to justify such claim.

#### 4.3.2.4 Compensation for lost volume damages

[115] Schlechtriem, P., 1998, p. 563
[116] Schlechtriem, P., 1998, p. 563
[117] Schlechtriem, P., 1998, p. 563
[118] Victor Knapp, in C.M. Bianca & Michael Bonell, p. 544

A lost volume damage is also to be considered as a loss of profit. However, it is a special kind of lost profits and it is not clear if it should be awarded according to the Convention or not. Because of this, I have chosen to discuss it separately. A situation that can give rise to this type of damages is when a buyer cancels an order, of for example a machine, and the seller mitigates his loss with a compensation sale. Even if the seller obtains the same price, as agreed on in the first sale, the breach may have caused him a loss. Since there has been a compensation sale and he has obtained the same price, he may not seek compensation according to Articles 75 and 76. A subsequent sale of the same machine to another buyer and to the same price is however not always a substitute for the first[119]. The possibility is that he would have sold another of the same type of machine to the second buyer anyway.

Can this kind of lost profit be compensated under the CISG? As mentioned the answer to this question has not yet been answered. In the Delchi case the court awarded lost volume damages, but only as far as to unfilled orders, and both Honnold and Sutton supported the assertion that the CISG permits recovery for diminished sales volumes[120]. One reason why the American court awarded damages for lost sales volume may be that this is compensated according to their domestic law[121]. However, in order to be compensated under the U.C.C. five conditions must be fulfilled[122]. These are:

(i) the seller should have tried to sell equal goods to another buyer even though the first buy was completed
(ii) the seller would have tried to sell the goods to the buyer that bought it at the resale
(iii) the seller's efforts to sell the goods to the second buyer would have been successful
(iv) the seller would have the possibility of completing the second sale even if the first was completed
(v) the resale reduced the second buyer's ability or will to buy corresponding goods from the seller

If the above conditions are met the seller may be compensated for lost volume damages. Sutton finds support for his view that these damages may also be compensated by the Convention in the broad language of Article 74, "…loss, including loss of profit,…" and from the purpose of damages according to the same article, namely to put the injured party in the same

[119] Lookofsky, J., Consequential Damages in Comparative Context, Copenhagen 1989, p. 164
[120] Darkey, J.M., A U.S. Court's Interpretation of Damage Provisions Under the UN Convention on Contracts for the International Sale of Goods, p. 5, (Internet article).
[121] U.C.C. §2-708(2)
[122] Herre, J., p. 531

financial position he would have been in if the contract had been performed[123].

As in the Convention, it is not clear whether lost volume damages should be compensated or not according to Swedish law. In the preparation of the proposal for a new sales-law in 1976[124], it was suggested that it should be covered under certain conditions. First the possibility of sale should be limited and secondly the resale should have been within the sellers normal market[125]. If above conditions were met it should be presumed that the seller had suffered a loss of volume damages. Both Almén[126] and Rodhe[127] are of the opinion that it ought to be compensated. Herre also agrees with them but he sets up two specific conditions for it. According to him, the seller may be awarded compensation, even after reselling to the same price, if:

(i) his supply of goods exceeds his demand and
(ii) the seller actually had the capacity to make the second sale even though the first had been completed

Given both the interpretation of U.C.C. and the Swedish sales-law, and the fact that the latter is built on the CISG, I must agree that this type of damages ought to be compensated in cases settled by the CISG. According to my opinion the conditions for it should be a compromise between the American conditions and the ones of Herre. Since the first condition of Herre, and also a condition according to the Swedish proposal for a new sales-law, corresponds to the fifth (v) American condition it is only the second condition of Herre and conditions i-iv of the Americans that have to be negotiated. If for example the seller found out about the second buyer thanks to the first buyer can this first buyer still be held liable for lost volume damages? The answer to this question according to my opinion is that it is irrelevant. Only relevant is that the conditions for lost volume damages are met. If they are, the first buyer may be held liable.

[123] Sutton, J.S., Measuring Damages Under the UN Convention on the International Sale of Goods, p. 7, (Internet article).
[124] SOU 1976:66
[125] SOU 1976:66, p. 277
[126] Almén, T., Om köp och byte av lös egendom, Stockholm 1934, p. 463f
[127] Rodhe, K., Obligationsrätt, Stockholm 1956, p. 511

## 4.4 Calculating loss

### 4.4.1 General

When calculating the loss of a party, Articles 74-78 of the Convention are applicable for losses on both the seller's and buyer's side[128]. This is different from both Swedish, American and German laws where different provisions are used for the seller and buyer. The calculation is to be done according to the principle of full compensation but, as a rule, one only takes into account actual and definable losses and makes a concrete calculation of a party's loss. An exception is Article 76, which calculates a loss by taking the difference between market price and contract price when the contract is avoided. This allows a more abstract calculation. It is abstract in the way that a calculation is made on the base of the market price and the promisor cannot object that the injured party did not make an actual substitute action[129]. Apart from this exception, the loss has to be established and proved in a more concrete way to be compensated. A buyer must for example prove that he would have made a profit from a sub-sale and a seller must prove that his loss is a result of late payment. A loss of profit can be proven by i.e. showing a contract for the sub-sale. If the price is set by the contract this shall be used to calculate the loss but in the case that it is not, and there is no substitute transaction, the market price can be used for the calculation. In this last example the calculation is to be considered concrete even though it is based on the market price since the sale has been proven.

To what degree of certainty it has to be proved is not clear. Lookofsky stated that "…problems of proof and certainty of loss are procedural matters which remain within the provision of national law…"[130]. This is in accordance with the Legislative History of the CISG[131]. The Delchi court held, in accordance with the relevant national law, that a loss had to be proven with reasonable certainty and only awarded damages for loss of actual orders[132]. The court did not award damages for indicated orders supported only by speculative testimony since it was not considered proven with reasonable certainty. Another reason why the court used domestic law was that there was no U.S. case law on the CISG. Sharing Lookofsky's opinion I see no wrong committed by the American court when using national law to determine this question.

The Convention does not state in which currency damages shall be paid. One solution is that the payment can be made in the same currency as the

[128] Sutton, J.S., p. 3
[129] Schlechtriem, P., p. 565
[130] Lookofsky, J., Consequential Damages in Comparative Context, 1989, p. 181-187
[131] Legislative History – CISG and Antecedents, p. 5, (Internet article).
[132] Delchi case, p. 5

party entitled to damages suffered his loss in or in which the profit would have been made. Expenditure to avoid loss shall be reimbursed in the currency in which it was made. If damages are to compensate for a deficit in performance the substance of the contract may determine the currency. In this case it can be the currency in which the price, according to the contract, should be paid or in the currency of the country in which the goods should be delivered. When studying cases on the CISG the currency in which damages shall be paid does not seem to create many problems. Where to pay the damages is not expressed in the Convention either. Kritzer states in the editorial remarks to a German case[133] that it shall be in the same place as the payment of the price should be paid according to Article 57(1)(a) – the place of business of the seller. This is based on the general principles of the Convention according to Article 7(2). Both the ECJ and the German Supreme Court have decided that the place of payment of damages shall be the same place as the goods were to be delivered[134]. Unless the parties decides otherwise the first solution seems like the most logical solution to me. Many years may pass between the transaction and the outcome of a trial and there is no guarantee that the seller still has any business in the place of delivery.

### 4.4.2 Time and place for measuring damages

What moment shall be relevant for the calculation of damage and according to what rules shall it be done? There is no general rule laid down by the Convention but Article 76 gives guidelines on time and market for measuring damages when the contract had been avoided and no substitute action has been taken[135]. According to a footnote to the 1978 Commentary of Article 70 (Article 74 in the CISG) the place for measuring damages shall be where the seller delivered the goods and the time shall be an appropriate one[136]. The appropriate time can be the moment when the goods were delivered or the moment when the buyer learned of the non-conformity and that the seller would not remedy it. Bianca agrees with this but makes an amendment to the appropriate time to include the time when the buyer learned of the breach. Schlechtriem adds to this that the relevant moment to carry out the calculation, where the calculation is concrete, is as late as possible and preferably the date of the judgement[137]. This is probably the best time for it since most losses have incurred by that time. I find the place to measure damages of less importance since all damages shall be compensated if proven.

[133] OLG Düsseldorf , 2 July 1993
[134] Schlechtriem, P., Commentary on Oberlandesgericht Düsseldorf 2 July 1993, (Internet article).
[135] See 5.4.5
[136] Sutton, J.S., p. 4
[137] Schlechtriem, P., p. 566

### 4.4.3 Article 74

Article 74 provides the general rule for calculation of damages whenever and to the extent that Articles 75 and 76 are not applicable.

If the seller delivers defective goods, the buyer's loss can be measured in different ways. In the case that the buyer is able to cure the non-conformity the loss equals the price of the repair. What if the goods are not repaired? In the case that the goods had a recognised value, the loss equals the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract[138]. In this particular case, the contract price is not an element in the calculation since this formula intend to restore the economic position the buyer would have had if the contract had been properly performed[139]. If the seller sells the goods to a third party at a higher price the CISG does not recognise that the loss is presumed to equal the difference between obtained price and contract price. The Supreme Court of Israel stated that the fact that a defaulting seller had sold the goods to a third buyer at a higher price than agreed on with the first buyer, did not in itself prove that the buyer had suffered a loss to the corresponding amount[140]. That statement must be seen as reasonable. However, the buyer still has to be compensated according to the principle of full compensation to the extent of proven loss. This is an exception to what I said in 5.1.2 about the calculation being done so the party in breach does not profit from his own breach. If the buyer is fully compensated and the seller makes a bigger profit the financial result of the non-transaction is higher than if the transaction would have taken place. Economically speaking this is correct but one has to bear in mind that there are other losses than financial ones and these are not compensated. This way of calculating, whether a party profits or not from breaking an agreement, is more accepted in American business than in European. In my opinion, it has a negative affect on trade since a party can not be sure if the counter party will perform his obligations or breach the contract as soon as he think he might profit from so doing.

The ICC held in a case where the buyer was entitled to restitution of the price that restitution should not be considered as damages under Article 74[141]. Since the Convention states the principle of full compensation one can think that this statement is without importance. However, it can make a difference in the case that the parties have a clause in the contract limiting damages to a certain amount. In that case, the restitution of the price does not consume a part of the damage allowed. If a loss is to be considered compensable as damages or not is also important when a loss of interest is to be compensated and the parties have inserted a clause in the contract

[138] Secretariat Commentary, p. 2-3, (Internet article).
[139] Victor Knapp in C.M. Bianca & Michael Bonell, p. 547
[140] OG, 10 October 1981, referred to in Schlechtriem, P., 1998, p. 566
[141] ICC Case No 7660/1994

limiting damages. If the injured party can show an actual loss of interest of, for example, 12% and the law deciding the rate only allows 8%, he may claim the full 12% as damages. Since interest is not considered as damages[142], the best would be to claim the 8% as interest and only the excess of 4% as damages. In this way, he does not use up more that is necessary of the fixed damage amount.

If a buyer breaches his obligations before the seller has finished manufacturing the goods the seller would be able to recover the profit which he would have made on the contract plus any expenses that have been incurred in the performance of the contract[143]. The profit is any contribution to overhead that would have resulted from the performance of the contract.

If compensation results in an additional profit for the promisee, the additional part might be seen as a penal sum. These are not recognised by the CISG[144]. To ensure the payment of a penal sum the parties may include a clause in the contract allowing punitive damages. But even in this case it is not sure that the injured party will be awarded penal damages since not all courts enforce penal clauses. As a rule, Common-law courts do not enforce them because of public policy reasons[145] and this is normally the case in European courts too. However, it is not totally excluded that they will not be enforced, as it depends on how they are formulated and the sum agreed. In ICC case[146], see 5.2.4, the parties had agreed on a *compensation fee* of 30%, of the contract price, in case of a breach of obligation. The buyer was obligated, according to the clause, to pay the compensation sum even if his breach was due to a force majeure situation. The court accepted the clause and awarded the seller the compensation fee in addition to damages. Even though the parties calls it a compensation fee it is in my opinion not unthinkable that it could be seen as a penal clause. No matter to what name the parties and the court referred to it, the court found the clause to be reasonable in this case.

As mentioned earlier in the paper the foreseeability test puts a limit to what can be compensated and the amount recoverable. Because of this, a party who knows that a breach by the other party may lead to an exceptionally severe loss should make this clear no later than when the contract is concluded. If not the promisee runs the risk of not being compensated for these losses since they might not have been foreseeable. The other party has then the chance to cover for his bigger risk by paying less or charging more for example.

### 4.4.4 Article 75 – Measurement of Damages Through

[142] LG Hamburg, 26 September 1990. In OLG Frankfurt, 18 January 1994 and OLG Hamm, 8 February 1995, the court denied an additional interest cost to be recovered as damages but only for the reason that the plaintiff could not prove the additional loss.
[143] Secretariat Commentary, p. 2, (Internet article).
[144] Sutton, J.S., p. 5
[145] Sutton, J.S., p. 5
[146] ICC Case No: 7585/1992

## Substitute Transactions

Either party may use Article 75 to measure damages when the contract has been avoided and a substitute transaction has been made. The action involved may be either a resale, if made by the seller, or a substitution buy, if made by the buyer. The losses in these cases are the difference between the price under the contract and the price of the substitute transaction. As a rule this amount of damages is slightly altered to reflect any increased costs or expenses saved. This is specifically the case if the transaction occurs in a different location than the one provided for in the contract[147]. Although a substitute transaction should be reasonable, a party has no obligation to perform it. If he chooses not to, he runs the risk of not being compensated for loss avoidable by such a transaction due to failure to mitigate his loss[148].

However, there is a limitation to damages compensated by Article 75. A substitute transaction will only be compensated to the extent it has been made in a "reasonable manner and within a reasonable time after avoidance". What is to be understood as a *reasonable manner*? According to Schlechtriem this occurs if "the promisee acted as a careful and prudent businessman and observed the relevant practice of the trade concerned"[149]. Thus it is permitted for the substitute goods to deviate somewhat from the original goods as long as it stays within what is reasonable. As far as concerns limitation in time, the only thing certain is that it does not start to run until the contract actually has been avoided[150]. Thereafter it has to be decided for each case separately depending on, for example, the type of goods. In a German case, settled by OLG Düsseldorf[151], a German buyer of shoes did not resell until two month after the avoidance of the contract. The court found this to be within a reasonable time. If these demands of reasonableness are not met the injured party must resort to Article 76, and get his damages measured according to the current market price, or to the general calculation in Article 74.

### 4.4.5 Article 76 – Measurement of Damages on the Basis of the Market Price

To measure damages on the basis of the market price is another method of calculation that may be used if the contract has been avoided. For this to be possible there has to be a current market price for the goods involved and no purchase or resale under Article 75. The damages recoverable under Article 76 is the difference between the price fixed by the contract and the current market price at the time of avoidance or when the contract could have been

[147] Sutton, J.S., p. 5
[148] See 5.4.6.
[149] Schlechtriem, P., 1998, p. 576
[150] I.e. OLG Düsseldorf , 14 January 1994
[151] OLG Düsseldorf , 14 January 1994

avoided[152]. If the buyer has the goods, the relevant time to decide the market price corresponds to the time when he took over the goods from the seller. The relevant market is the market where delivery of the goods should be made or, if there is no current price on this market, another place that serves as a reasonable substitute (Article 76(2)). In traditional sales contracts, the place of delivery is the port of the first carrier for transportation to the buyer. From this it follows that the necessary market information is more difficult for the buyer to obtain, since it normally is not his home market. In the case of a destination contract, the problem is the opposite. This is not a problem if the goods and the buyer are in the same market from the beginning. The CISG is applicable as long as the contracting parties have their regular places of business in separate states.

To eliminate the burden of establishing the relevant market price the burdened party may, if possible, seek compensation according to Articles 74 or 75. The parties may also include a more predictable reference point for measuring the current market price in the contract. This can not be done when the goods are unique or when there is no market for the goods.

### 4.4.6 Article 77 – the Duty to Mitigate Loss

According to Article 77 an injured party has a duty to mitigate his loss. This includes all kinds of loss, even consequential loss and losses that will result from prospective breach[153]. This is not an absolute duty since the injured party is only required to take reasonable measures to mitigate his loss. If, however, a measure is considered reasonable and the party does not make it, it may be considered a failure to mitigate. Such a failure does not lead to elimination of recovery but it can reduce the amount of damages recoverable. In order not to fail in mitigating a loss the injured party should act and take proper precautions once it is clear that the other party will breach the contract. The injured party does not have to notify the counterpart of his intention to mitigate[154]. A party can mitigate by a resale, by buying from another merchant, preserving the goods etc, etc.

What shall be considered as a reasonable measure to take? In the Delchi case the court did not award damages, (under Article 74), to cover costs that Delchi had incurred in expediting the shipment of previous ordered Sanyo

[152] Sutton, J.S., p. 6
[153] Lookofsky, J., 1996, p. 99
[154] In the ICC Case No 6281/1989 the seller breached a contract by refusing a second delivery to the buyer because the market price had gone up. The seller claimed that the buyer had to notify him before making a substitute buy so that he could offer him the goods, not according to contract price but at least at the lower price the buyer paid for the substitute goods. The court held that the buyer did not have to notify the seller. If the buyer had given notice of his intention to buy the goods from elsewhere and instead would have bought from the seller at a higher price than the contract price, the seller could have claimed that the price had been changed due to novation.

compressors since the order was placed before the break[155]. The additional costs for expediting the shipment was instead seen as a reasonable manner to mitigate the loss and awarded as such a cost. Since what should be considered reasonable has to be decided according to each individual situation, it is impossible to clarify it by case law. It is for the injured party that has to evaluate different ways of mitigation and chose the way that best mitigates his damages in order to be fully compensated. In a case from BGH in Germany the court stated that when determining whether a party has taken reasonable measurements to mitigate his loss one looks at the relation between costs of adaptation and purchase price of the goods[156]. In this case the court did not award a buyer compensation for expenses incurred adapting equipment to process defective metals since the cost was not reasonable in relation to the purchase price. If the injured party acts according to his best knowledge, and this is what a reasonable person would have done in his position, it is my opinion that he should be considered to have mitigated his loss in a reasonable way.

### 4.4.7 Interest

As we know by now the CISG is not very precise in its rules. Article 78 is no exemption, rather a perfect example for it. Article 78 simply states that:

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

It is clear that a party has the right to claim interest on a sum that the other party owes and that this does not affect the possibility of claiming damages under Article 74. However, not all sums are entitled to be awarded interest on. In an ICC case, the court held the sum to claim interest on can not be interest owed since the CISG does not recognise interest on interest[157]. What the Convention does not tell is how, at what rate and under what circumstance interest shall be computed. Because of this "gap" different courts apply different rates as they either interpret the article in accordance with the international character of the Convention or they use their domestic laws to fill the "gap". The reason for this "gap" is that this article was affected more than any other by the diverse legal traditions of its drafters. There were not only legal aspects to consider but also political and religious[158]. Article 78 should be read in conjunction with Article 84(1) of the Convention. This article clearly allows a buyer to recover interest from a seller in the case where the latter is obligated to refund the price.

As for the circumstances in which interest should be awarded it can be said that in general it should be awarded every time a party is entitled to damages

[155] Shneider, Eric C., Measuring Damages under the CISG, p. 4, (Internet article).
[156] BGH, 25 June 1997
[157] ICC Case No 8611/1997
[158] Sutton, J. S., p. 8

because of a breach of contract. According to what law shall interest be awarded? This question has been answered in many different ways. The Swedish proposition 1986/87:128 suggested that the law applicable to the contract should determine the rate of interest[159]. German case law has decided that both the domestic law of the injured party[160] and the law governing the contract[161] may set the rate. The ICC on the other hand has applied the law of the country in which currency the contract should be paid in one case[162] and according to the substantive law applicable to the contract[163] in another. In the Delchi case, the American court used the law of the forum without even mentioning Article 7 of the Convention. Normally it does not matter what rate is applied since the difference to the actual loss may be compensated as damages according to Article 74. As said in 5.4.3 it does matter in the case that the parties have limited the damages recoverable by a clause in the contract.

The less disputed factor for interest is from what time it shall be computed. As a rule, interest starts to run from the date the actual damage appeared and it seems like most courts agree on this[164]. However, in one case, the ICC decided that interest should be paid from the date when the injured party, the seller, notified the buyer that he was going to claim interest on due payment[165]. This should not be seen as if the ICC does not agree on the starting point since the reason for it was that the claimant specifically claimed interest from this point in time. There is, however, a genuine exception to the above. In a case settled by LG Heidelberg, the seller set out an additional period of time for the buyer to pay the price[166]. Due to this, the court held that interest does not start to run until the set period expires although the actual damage incurred before. Is it fair that a injured party shall lose interest because he gives the breaching party extra time to perform? The answer to this is in my opinion yes. Normally an injured party does not set out a grace period to be nice to the breaching party but to get the advantages of it. According to Articles 49(1)(b), (2)(b)(ii-iii) and 64(1)(b), (2)(b)(ii) a injured party may declare a contract void after the grace period has expired even if the breach is not fundamental.

Another factor for the courts to decide is in what currency interest shall be paid. Most court awards interest in the same currency as the price has been set to in the contract. If not decided in the contract, it is set to the currency of the country in which payment should be made according to Article

[159] Prop. 1986/87:128, p. 152
[160] I.e. Landgericht Stuttgart, 31 August 1989
[161] I.e. OLG Frankfurt, 18 January 1994 and OLG Hamm, 8 February 1995, 11 U 206/93
[162] ICC, Case No 7585/1992
[163] ICC, Case No 7197/1992
[164] I.e. from the date payment of the price was due (ICC Case No 7885/1992), if non-conforming goods from the date buyer should have resold to his customers (ICC Case No 7565/1994) or simply from the date of the wrong (Federal Court, South Australian District, Adelaide, 28 April 1995).
[165] ICC, Case No 7331/1994
[166] LG Heidelberg, 3 July 1992

57(1)(a)[167]. I believe that it is because of this that one does not find the currency is discussed much in practice.

Where can a court find guidance in how to judge in cases involving interest? In ULIS it was expressed how interest should be decided, so one could ask why this is not used to interpret the CISG? The reason is probably that if the contracting states wished for interest to be settled according to the same rules as in ULIS this would have been expressed in the CISG. Since this is not the case interest should not, in my opinion, be decided in accordance with ULIS. Another possible way of solving the ambiguity of solutions could be to look at the 1977 UNCITRAL Sales Draft and its rules on interest. According to its Article 58 interest was to be computed at the higher of either the official discount rate plus one percent in the country of the seller's principal place of business or the rate for "unsecured short-term commercial credits" in that same country[168]. This rule was made for the seller but may be used to award interest to the buyer too. Sutton holds that this rule can be used when calculating interest according to the CISG. The injured party's principal place of business and this market would be the accurate reference point for determining the costs and rate of interest.

A clause in the contract that clarifies the method to be used for calculating interest and that stipulates on what occasions interest may be included in a damages award would eliminate much of the uncertainty. If the parties have inserted a clause in the contract pointing out a country whose laws shall govern the contractual relation then interest ought to be awarded in accordance with the laws of this country too[169]. In my opinion, this should even be the case when these laws do not allow interest. This follows from the principle of freedom of contract in Article 6, which is one of the general principles of the Convention. Critics says that letting laws that do not allow interest decide in cases about it, and rule it out, is against the principle of full compensation, which also is a general principle of the Convention. I believe that the principle of freedom of contract prevails since both parties are merchants and ought to know what they are doing. If the contract does not contain any clause pointing out the law to govern the contract, or points out CISG as this law, the relevant law to apply on interest is, in my opinion, the law of the injured party. Both a German court and ICC have argued for this[170]. The reason for it is that this is where the damages are suffered. If a damage is suffered elsewhere, the law of this place can be used. Should any of these laws prohibit the payment of interest and the parties have not expressly declared that no interest shall be paid than the principal of full compensation should prevail. In this case, the court has to choose another law suitable for the purpose, i.e. the law of the contract according to national international private laws.

[167] I.e. the case OLG Koblenz, 17 September 1993
[168] Sutton, J. S., p. 8
[169] I.e. ICC Case No 7565/1994. The court turned to Article 73 of the Swiss Code of Obligation and set the rate of interest according to this, p. 4
[170] ICC Case No 7331/1994, LG Stuttgart, 31 August 1989

## 4.5 Limitation of compensation

### 4.5.1 General

Although an injured party is able to prove a loss this does not necessarily mean that the sum awarded by the court as damages equals the sum proved. The reason for this is that there are certain limitations to the liability, which can limit or totally exclude liability. A limitation can for example follow because the damages could not have been foreseen by the promisor or because the promisee did not act as required of him, before or after the breach, or it can follow as a circumstance originating from outside of the contractual relation. In addition, the general principles of the Convention may work to limit liability[171].

The parties may limit the liability by a clause in the contract stating a maximum sum or that damage shall be compensated according to a certain percentage of the contract price. If the parties wish to limit their liability in this way, it is important that it is clearly expressed in the contract. In the ICC Case No 7585/1992, commented on in 7.4.3, the arbitrator held that the clause awarding a "compensation fee" of 30% was not clear enough to exclude liability under Article 74. This led to the injured party receiving what was meant to be the total recoverable amount as an additional sum to damages.

### 4.5.2 The foreseeability test

From the wording of Article 74 it follows that damage for loss may not exceed what the party in breach foresaw or ought to have foreseen as a possible result of his breach. This rule originates from the Anglo-American concept of "remoteness of damages"[172] that has its origin in the English case Hadley v. Baxendale from 1854. Although it originates from Common law it also accords well with Civil law and Scandinavian traditions. German and Scandinavian jurists refer to it as the corresponding principle of adequate loss[173]. The phrase "*ought to have foreseen"* puts an objective side to the test and is likely to correspond to what a "*reasonable person"* would have foreseen in the same situation[174]. Van Houtte expressed it as what a trader in the same sector of trade normally could have foreseen under the same

[171] In OLG Köln, 21 May 1996, a buyer was considered negligent in his inspection of the goods but since the seller acted fraudulently the court stated that "even a very negligent buyer deserves more protection than a fraudulent seller". This was in accordance with the general principles of the Convention.
[172] van Houtte, H., p. 146
[173] Lookofsky, J., 1996, p. 95
[174] Herre, J., p. 400

circumstances[175]. "*Reasonable person"* was also the expression used by the Hadley v. Baxendale court[176]. A reasonable person test means that a party in breach may be held liable even if he himself did not foresee the consequences of a breach but a reasonable person in his position would have. Article 74 differs from the English and American law in that under CISG rules it is only damages the party in breach foresaw or ought to have foreseen that may be compensated. The American court in the Delchi case discussed what was reasonable to envision by *both* parties[177]. When, as mentioned before, there is a risk that a breach of contract can lead to a special kind of loss, the party in risk ought to point out this risk to the counter party before concluding the contract. The reason for this is that the loss can be hard to foresee and if the court finds that it could not been foreseen the breached party will not be compensated for it.

One aspect of foreseeability that is undisputed is the relevant time for judging it. The time to foresee the possibility of a loss is when the parties conclude the contract. If a party learns of circumstances, which indicates a risk of loss, for his counter-party, after concluding the contract and before the breach, it does not influence the liability of the breaching party. A party is not obligated, according to the Convention, to take measurements, based on these circumstances, in order to avoid damages. The contract price normally reflect the distribution of the risk and an obligation to act to avoid damages in this case could alter this risk to the disadvantage of one party[178]. That such a circumstance should not influence liability is, for example, in accordance with Common Law. Swedish law, on the other hand, demands certain activity[179]. According to Swedish law, a party shall act to avoid loss even if it derives from a situation arising after the conclusion of the contract. Even in the case that a party acts fraudulently, with the purpose to harm, it should not have any effect on the calculation of damages according to the foreseeability test[180]. However, in my opinion there is one possible way to make the breaching party liable for damages incurred due to his fraudulent behaviour. In Article 7, it states that when interpreting the Convention it shall be done while observing good faith in international trade. To act in good faith is in my opinion a general principle of the Convention (and probably implicit in most contracts). If fraudulent behaviour can be seen as a breach of good faith the party in breach has failed to perform the obligations laid down on him in the Articles 45 (if seller) or 61 (if buyer) "…obligations under the contract *or* this Convention,…". The breaching party knew that acting in bad faith is against the Convention and that it may cause damages. The possibility of damages is foreseeable and, if they are not extraordinary, the extent of them shall also be considered foreseeable.

[175] van Houtte, H., p. 146
[176] Herre, J., p. 373
[177] It was only the District Court that measured damages according to what was envisioned by both parties. The Circuit Court simply refers to "reasonably foreseeable" damages.
[178] Herre, J., p. 693
[179] Herre, J., p. 680
[180] Herre, J., p. 697

The foreseeability rule is most relevant when judging on limitation of recovery for consequential losses, including loss of profit[181]. A seller who does not perform in accordance with the contract is liable for loss of profit from resale only if he reckoned with the resale by the time of the conclusion of the contract[182]. OLG Köln held, in a decision from 21 of May 1996, that when a car dealer sold a car to another car dealer it could be assumed that the buyer would resell the goods since it was tradable goods. Since the car did not correspond to the description in the papers, the seller was held liable for damages paid by the first buyer his purchaser.

It is difficult for a breaching party to escape liability arguing that he could not foresee the loss. Karollus has found in his research that no court in Germany between the years 1988-1994 denied a claim for damages because of non-foreseeability[183]. A possible explanation is that German law uses causality in the same way that the CISG uses the foreseeability test. This means that if there is causality between breach and damages it is considered foreseeable. However, in ICC Case No. 7531/1994 an Austrian buyer avoided a contract with a Chinese seller due to a fundamental breach of contract. All claims for damages but one was awarded by the court. The court did not award compensation for travelling costs for an employee of the buyer's customer since these costs was not considered foreseeable by the seller. Liability can depend on special circumstances like an inserted clause in the contract or a guarantee given by the buyer to a second buyer. If the loss suffered by the buyer is to be considered unusual due to these special circumstances the seller shall only be held liable if he knew or ought to have known of them[184]. The loss of goodwill is treated in the same way and should only be recovered in as far as the buyer specifically pointed out the possibility of this particularly type of loss before the conclusion of the contract. In the case of non-performance, the breaching party is normally only liable for normal increases. If they are extraordinary, Article 74 might limit the extraordinary part as non-foreseeable.

Clauses that excludes liability, penal clauses and clauses awarding liquidated damages may be inserted in the contract. Whether they are admissible or not is decided by the applicable domestic law. If the court dismisses the clauses, the promisee has to prove, as in general, that the promisor at least was objectively in a position to foresee the possible loss.

[181] Schlechtriem, P., 1998, p. 570
[182] LG Dortmund, 23 September 1981
[183] Karollus, M., Judicial Interpretation and Application of the CISG in Germany 1988-1994, no 13 under Article 74, (Internet article).
[184] OLG Hamm, 29 January 1979, referred to in Schlechtriem, P., 1998, p. 571

### 4.5.3 Partial failure to mitigate loss

Parts of what is discussed below have already been mentioned in the paper before. Despite this I have chosen to discuss it under this part too since it is an important limitation of liability. A breached party's failure to mitigate his loss can limit the breaching party's liability according to Article 77 of the Convention. In order to do this the breaching party has to claim the reduction of liability and prove the aggrieved party's failure to mitigate his loss[185]. The obligation to mitigate is limited in that the aggrieved party is only obliged to mitigate if it can be done with reasonable measures without involving extraordinary or unreasonable costs. A reasonable measure may be to preserve the goods according to the Articles 85-86 or to make a substitute transaction according to Article 75.

When an aggrieved party takes necessary measures, he may claim compensation for costs arising from it. These cost can be compensated even in the case that the attempt to mitigate is not successful. In the Delchi case, the court awarded compensation for these costs, in accordance with US Contract law[186], although the buyer failed to mitigate his loss. The Delchi court was in my opinion right in awarding compensation for these costs. What would be the consequence of only compensating costs for mitigation measures when they succeed? In my opinion, it could not be asked of a party to attempt to mitigate his loss whenever there is a slight risk of not succeeding since it would lead to costs that would not be compensated. No complete answer to when a party has to act in a certain way to mitigate his loss can be given. The answer can vary from one case to another and the important is to view each individual case and draw a conclusion from what one find. In some cases a substitute transaction should be made in order to mitigate loss while in other cases it should not. However, since the CISG does not oblige a party to avoid a contract the promisee's insistence on performance of the contract cannot therefore, in general, be criticised as failure to mitigate loss[187].

In contracts where a seller is manufacturing an item for a buyer the seller is not obliged to avoid the contract and cease manufacturing in order to relieve the buyer. However, if there is no ready market for the manufactured goods, besides the buyer, and the buyer does not want the seller to complete the goods the seller mitigates his loss by not carry out the work[188]. In this situation, it is sufficient to ensure that the seller's interest is fully satisfied. This means that he may claim the contract price but deduct his benefits, i.e. price obtained for the scrap, from it.

[185] German case LG Heidelberg, 30 January 1979, referred to in Schlechtriem, P., 1998, p. 590
[186] See under 5.3.2.1
[187] Schlechtriem, P., 1998, p. 587
[188] Schlechtriem, P., 1998, p. 588

### 4.5.4 Exemption from liability

This form of limitation will only be considered briefly since it already has been up discussed in section 5.2.6 As mentioned then the non-existence of an impediment beyond the breaching party's control first has to be established before liability under Article 74 is relevant. The reason why I have chosen to bring this point up here is that the exemption in itself is limited in its effect to breaches that happen during the period during which the impediment existed (Article 79(3)). Once the impediment ceases, the promisor has to perform according to the contract in the best way possible. If he fails to do this, he will be held liable for damages but only to the extent that it happened outside the period of the impediment. In the case where an impediment is present the counter party shall be notified of this within a reasonable time (Article 79(4)). If a party fails to notify, he will be held liable for damages although they were due to a genuine impediment beyond his control.

As mentioned in 5.2.6 the limitation of liability due to an impediment beyond a party's control is awarded subject to restrictions. I have not been able to find one single case where the court has limited or excluded liability because of an impediment beyond a party's control, only where limitation has been denied. In the ICC Case No 6653/1989, a seller was held wrong to refuse delivery for the reason that the market price had gone up 13,16%. The court did not see it as an impediment beyond the seller's control. An Italian court denied liberation from liability due to hardship, where the market price had gone up 30%, since the CISG did not contemplate such a remedy in Article 79[189]. In another case settled by the ICC, the court did not see the suspension of payment of foreign debts by buyer's government as an appropriate exemption[190]. A party is furthermore expected to have control over third-party contractors. This means that in the case of a breach due to non-performance on the side of this third party the party in the main contract will still be liable for damages[191]. A general rule is that for the party to be liberated from liability due to non-performance by a sub-contracting company this company in its turn must be liberated from liability due to an impediment beyond its control.

[189] Tribunale Civile di Monza, 29 March 1993
[190] ICC Case No 7197/1992
[191] I.e. Schiedsgericht der Handelskammer Hamburg, 21 March 1996, and ICCA Case No 155/1994 from 16 March 1995, Hamburg Chamber of Commerce, 21 March 1996, Council for Commercial Arbitration, Yearbook, Commercial Arbitration, Vol. XXII-1997, p. 39

# 5 Conclusions

In this chapter a short summary will be given of the paper and I will also give my opinion on different aspects of the paper and of the CISG. The Convention has been widely accepted by different States but considering the available amount of case law it seems as if it has not been so successful in practice.

It must be considered clear that **personal injuries are not to be compensated** by the Convention. The fact that the OLG Düsseldorf awarded them in one case should be seen as an incorrect decision. The main reason to why personal injury does not fall within the scope of the Convention is that it is expressed very clearly in Article 5 that it does not. Many national laws also have special laws regulating this matter.

A court is to calculate loss according to the principle of full compensation. This is not disputed. To what **degree of certainty a loss has to be proven** does vary in different states. This is because it is a question of proof that according to Lookofsky, among others, should be settled in accordance with national law. I agree on this because it is, if not impossible, at least meaningless to stipulate in an international law or convention to what degree of certainty a loss has to be proven in order to be compensated. The reason for this is that if the Convention says that a loss has to be proven within "reasonable certainty" the court would still have to use national law, and legal tradition, to determine what is to be understood by "reasonable certainty".

When it comes to **what kinds of damages are to be compensated** national laws and courts agree in most cases. Whether a loss is to be considered as incidental, consequential or due to non-performance should be of less importance since they should all be compensated as consequential damages according to the CISG. Furthermore, they should be compensated in accordance with the principal of full compensation. However, there is some dispute on whether the type of damages referred to as **lost volume damages are to be compensated or not**. One reason for this is that they are also contentious in purely domestic situations in many countries. I am of the opinion that they should be compensated by the Convention but the problem is under what conditions. The conditions used by the courts and authors are more or less the same. For a uniform application of the Convention, it is important that they are more certain. Otherwise, the courts still will have to deal with the question when lost volume damages are to be awarded.

The rules on **limitation of liability** of the breaching party are not very contentious because of the fact that they are also found in most national legislations. They include both foreseeability, duty to mitigate and impediment beyond a party's control (force majeure). One rule that does

create problems is Article 78 on interest. Different courts use different methods to determine the law applicable on interest. The subject was extensively discussed in the negotiations leading to the Convention but there is no sign that the different courts will apply the same rules to determine interest in the future.

As the reader has noted, **the American Delchi case** is the case most frequently referred to in the paper. The reason for this is that it is the only case settled by an American court concerning damages under the CISG. It is furthermore interesting in the way that the court uses national rules not only when **interpreting the CISG** but also in making findings contrary to it. This case has been very much criticised because of this, by American scholars among others, so it is in my opinion reasonable to believe that the American courts will use **a more international approach** in the next case. There is however no guarantee for that. This knowledge and the fact that German courts, as a rule, use a more international interpretation of the Convention have made me come to the conclusion that it is easier for a party to predict the out-coming a case settled by a German court than by an American one. No case has yet been settled on the subject by a Swedish court but I hope that when the time comes the Swedish court will interpret the provisions of the CISG in accordance with its international character. It is, however, possible that cases concerning the CISG have been settled in Sweden by the Stockholm Chamber of Commerce, but since their policy is to not publish any of the material concerning cases settled by them it is impossible to know for sure. Another possible reason why a national court in Sweden has not yet settled a case concerning the Convention is that inter-Nordic cases are settled in accordance with national legislation. In my opinion this is not a disadvantage for the Nordic parties since the different Nordic sales laws were made in co-operation between the countries and they are fairly familiar with each other's laws.

Furthermore I do not believe that it is a good idea for Sweden to replace the national sales-law with the CISG. The reason for this is first of all that the second part of the CISG, concerning the formation of the contract, is influenced by common law and differs widely from the present provisions in the Swedish sales law. Secondly, the existing case law on the CISG is very limited which creates difficulties when interpreting the Convention.

As shown in the paper, many of **the problems with applying the Convention** arise because of the fact that it often has to be interpreted by the tribunal concerned. The reason for this is that some articles do not give precise guidelines, which is due to the many compromises in the Convention. It can be mentioned that Sweden in its commentary to the preparatory works of the Convention criticised the lack of clarity and precision in the Convention[192]. The uncertainty on how to interpret the CISG explains, to some extent, the different results that different courts have

[192] UNCITRAL Yearbook, Volume VIII: 1977, p. 128

come to when applying it. Article 7 states that the Convention shall be interpreted in accordance to its international character and with observance of good faith in international trade. In my opinion this means that a court, as far as possible, shall try to identify relevant international trade customs for guidance and not use its national legislation if not absolutely necessary. This is important for the uniform interpretation of the Convention. Due to the character of the Convention this can not be forced on to the courts, but it is the duty of every court to respect the international character of the Convention.

Further more I am of the opinion that it is important to extend the **publication of case law** and that the cases shall be reported in more detail than is done today. It is not sufficient that national correspondents prepares abstracts or headnotes of the national decisions and send them to UNCITRAL. It would also benefit a uniform interpretation and application of the CISG if one international organisation or arbitral body were given the right to interpret the CISG. UNCITRAL would, in my opinion, be the most appropriate organisation for this but since they do not have the necessary means to collect and translate the national decisions on the CISG it is doubtful that they would be capable to perform this task. Another organisation that could be considered is the ICC of Paris. The Convention would also benefit if its members met and discussed the development of the CISG to see if it would be possible to agree on **adding or amending some provisions** where that seems appropriate.

Because of the uncertainty on how some of the provisions shall be interpreted, it is important to **settle as much as possible in the individual contract**. The parties may for example stipulate in the contract at what rate interest shall be awarded or according to what national legislation, if lost volume damages shall be compensated and so on. In this way, they may prevent some unpleasant surprises when the court ruling comes.

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# The CISG and its provisions on damages

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