

DAMAGES UNDER CISG AND UNIDROIT PRINCIPLES

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I. Introduction

To start, I would like to clarify the CISG and UNIDROIT Principles that will be used to discuss damages.

CISG is the United Nations Convention on Contracts for the International Sale of Goods of April 1, 1980. This convention has been in force since January 1, 1988. More than 40 states have already adhered to this convention. Because of its character as an international convention, CISG forms (a binding) law on international sales contracts for the contracting states.

CISG consists of four parts: part one deals with the sphere of application of the convention and its general provisions. Part two deals with the formation of contract. Part three addresses the rights and duties of the contracting parties. Part four includes final provisions.

The UNIDROIT Principles are those made by UNIDROIT (i.e., International Institute for the Unification of Private Law,, Rome) on international commercial contracts. Not only the international sale of goods, but also other international commercial contracts (especially service contracts) are addressed by the UNIDROIT Principles. The first publication of these Principles, which also includes comments, came in 1994.

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The UNIDROIT Principles were prepared by a group of very learned law professors from different countries. In their preparation of the Principles, the authors benefited from the CISG - rules. Some provisions are actually the same in CISG⁽¹⁾. They also include some Principles, which CISG does not acknowledge⁽²⁾. In fact, the Principles provide a good example of the unification of private law. However, they do not take the form of a binding (uniform) law⁽³⁾.

Concerning the Principles' sphere of application, they address - in addition to the formation of contracts and the rights and duties of parties. - other matters, such as the validity⁽⁴⁾ and the interpretation of contract⁽⁵⁾.

A validly concluded contract should be performed. Both CISG and the UNIDROIT Principles cover non-performance of the contract. They also address the legal effects of non-performance, i.e., the remedies the aggrieved party may demand. Of the different remedies the aggrieved party has, this paper will only address damages. Damages will first be dealt with in general (II.). It would also be clarified how damages may be estimated when a contract is declared avoided (III.). The obligation to mitigate damage will also be discussed (IV.).

Finally, the manner of paying damages and the currency in which damages are assessed will be addressed (V.).

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- (1) For example, UNIDROIT Principles, articles 2.6 - 2.11 and CISG, articles 18 - 22 on acceptance.
 - (2) For example, articles 6.2.1 - 6.2.3 on hardship, article 7.1.6 on exemption clauses, article 7.4.9 on the rate of interest for failure to pay money, and article 7.4.13 on the agreed payment for non-performance.
 - (3) According to their preamble, the UNIDROIT Principles are merely general rules for international commercial contracts that can be applied when the parties explicitly or implicitly agree that their contract will be governed by them. They may apply when it is impossible to find the relevant rule of an applicable law. The UNIDROIT Principles may help when interpreting or supplementing uniform laws. They may also serve as a model for national and international legislators.
 - (4) On the validity of the contract, see articles 3.1 - 3.20.
 - (5) On the interpretation of the contract, see articles 4.1 - 4.8.

II. Damages in General

First of all, it should be mentioned that a contract on the international sale of goods might include a liquidated damages clause or a penalty clause⁽⁶⁾. It may also include an exemption clause, which is often for the benefit of the seller. In such cases the legal provisions on damages cannot be applied, as the contractual agreement has priority in application, CISG, article 6, UNIDROIT Principles article 1.5.

The aggrieved party may be compensated for any damage resulting from all forms of non-performance, unless the other party is exempt. He may demand damages either exclusively or in conjunction with any other remedy, CISG, Articles 45, 61, UNIDROIT Principles, article 7.4.1.

Unlike the Jordanian Civil Law (hereinafter: JCL), article 361, CISG does not require the aggrieved party to serve warning to the other party, before he claims damages. In respect to the non-conformity of the goods and the goods charged with rights or claims of others, the buyer shall however notify the seller of the concerned lack of conformity or claims of third persons relating to the goods delivered, CISG articles 39, 43. Otherwise, the buyer will - subject to CISG, article 44 - lose his remedies under CISG, including damages.

1. **Full compensation:** In order to get compensation, the aggrieved party should actually have suffered harm as a consequence of non-performance by the other party. Compensation shall redress both the

(6) These matters are not governed by CISG. Rather, they should be decided according to applicable domestic law. Thus, there is always the danger that a court (in a state of the common law) will consider the so-called penalty clause invalid when, for example, the English law is applicable.

Fortunately, the UNIDROIT Principles, articles 7.1.6 and 7.4.13 clearly govern these matters. According to article 7.4.13/1, not only liquidated damages clauses, but also penalty clauses are in principle valid, the agreed payment may however under paragraph 2 of this article be reduced. The penalty clause is also under the JCL, article 264/1 possible. Under article 264/2 however, the court may at the request of either party amend the agreed sum to equal to the damages actually suffered. This means that the court may - in light of the given circumstances - increase or decrease the sum agreed by the parties.

suffered loss and the missing profit⁽⁷⁾. In the following section, it will be made clear whether non-pecuniary harm may also be redressed.

a. *Suffered loss and missing profit*: According to both CISG, article 74 and UNIDROIT Principles, article 7.4.2/1 the aggrieved party may demand compensation for harm suffered as a consequence of non-performance. Costs incurred by the aggrieved party in the preparation or performance of the contract shall also be redressed⁽⁸⁾. The costs resulted from the reminder, which a lawyer sent to the non-performing party before the legal action, may also be redressed⁽⁹⁾. The judgment would however be otherwise if the aggrieved party breaches his duty to mitigate harm, such as when he authorizes a lawyer with a seat abroad⁽¹⁰⁾. Besides, the attorney's fees of the succeeded aggrieved party⁽¹¹⁾ as well as the costs of arbitration⁽¹²⁾ should be compensated. In making a decision

(7) It should be noted that CISG, article 78 and the UNIDROIT Principles, articles 7.4.9 and 7.4.10 entitle the creditor to ask for interest. While the rate of the interest is not defined by CISG and shall therefore be determined according to applicable domestic law, it is expressly determined by UNIDROIT Principles, article 7.4.9/2 which provides:

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

(8) Knapp, in: Bianca/Bonell, article 74, n. 3.10. Schoenle, in: Honsell, article 74, n. 15, article 75, n. 6. Shafik, p. 239, fn. 389.

(9) Decision of the Provincial Appellate Court of Duesseldorf - Germany, no. 6 U 152/95, dated 11.7.1996, in: CISG Online.

(10) Decision of the Petty District Court of Alsfeld - Germany, no. 31 C 534/94, dated 12.05.1995, in: CISG Online.

In this case the reminder was sent to the German non-performing party from the lawyer's office in Italy though he has another office in Germany.

(11) Decision of the Provincial Appellate Court of Duesseldorf - Germany, no. 17 U 146/93, dated 14.01.1994, in: CISG Online. An English abstract of it is in: CLOUT (A/CN.9/SER. C/ABSTRACTS/10), case no. 130. (In this decision the court assured that the attorney's fees could generally be recovered. However, it rejected the seller's allegation of these fees, as the attorney himself had already demanded them in the special procedure for fixing costs. The court noted, there would be otherwise a double compensation).

See also: CLOUT (A/CN.9/SER.C/ABSTRACTS/12), case no. 166. Decision of the Arbitration Court of the Chamber of Commerce and Industry of Budapest, no. VB 96074, dated 10.12.1996. An English translation of this decision may be seen in: CISG Database.

(12) Id.

on these fees, the tribunal must take into account, the complexity, the value of the claim as well as the outcome of the process^{“(13)”}.

Similarly, the interest the seller has to pay to a bank on the loan he made use of due to the buyer's non-payment of the sale price should be redressed⁽¹⁴⁾. On the other hand, the expenses the buyer incurred in attempting to remedy the non-conformity of the goods supplied should also be reimbursed⁽¹⁵⁾. By contrast, damages under CISG, article 74 do not include the restitution of the price the buyer already paid to the seller⁽¹⁶⁾; such restitution may rather be claimed according to CISG, articles 81 ff.

Contrary to some domestic laws,⁽¹⁷⁾ the aggrieved party may - under CISG, article 74 and UNIDROIT Principles, article 7.4.2/1 - demand redress for missing profit. In the case the goods are to be re-sold by the buyer, the lost profit is normally determined[”] by calculating the hypothetical revenues to be derived from unmade sales less the hypothetical variable costs that would have been, but were not, incurred^{“(18)”}. The variable costs are defined as[”] those costs that fluctuate with a firm's output, and typically include labor (but not management) costs⁽¹⁹⁾. Obviously, the fixed costs, that would have been incurred whether or not there was a breach, are of no importance when calculating the lost profits⁽²⁰⁾.

(13) Id.

(14) Decision of the Provincial Appellate Court of Duesseldorf - Germany, no. 6 U 152/95, dated 11.7.1996 and decision of the District Court of Kassel - Germany, no. 11 O 4185/95, dated 15.02.1996, both in: CISG Online.

(15) Decision of the USA Court of Appeals for the Second Circuit, Nos. 185, 717 August Term, 1995, dated 6.12.1995, in: CISG Database. Decision of the Provincial Appellate Court of Hamm - Germany, no. 11 U 191/94, dated 09.06.1995. An English translation of the later decision is in: CISG Database.

(16) Decision of the Court of Arbitration of ICC, no. 7660 of 1994, in: CISG Database.

(17) For example, in cases of non-performance of the contract the compensation may under JCL, article 363 only be granted for the harm suffered. In addition to the harm suffered, the loss of profit may however be redressed if the damage results from an injurious act, article 266.

(18) Decision of the USA Court of Appeals for the Second Circuit, Nos. 185, 717 August Term, 1995, dated 6.12.1995, in: CISG Database.

(19) Id.

(20) Id.

Non-performance must have caused the harm suffered. This causality is in fact the reason for and, at the same time, the limit of the liability for damage. It makes no difference whether the damage directly or indirectly results from non-performance⁽²¹⁾. However, the damage suffered should result from the non-performance of an obligation under the sale contract. Thus, the buyer's "damage claim for lost profit owing to the termination of the business relation with the [seller]" may not be answered. This loss clearly resulted from the non-performance of the general agreement for the exclusive delivery and distribution made between the parties, not from the breach of their sale contract⁽²²⁾. Under this criterion, the aggrieved party will clearly be placed in the economic position in which he would have been had the sale contract been performed.

In the estimation of damages to be paid, the gain the aggrieved party has as a result from avoiding cost or harm shall under UNIDROIT Principles, article 7.4.2/1 be taken into consideration, too. This should also be the case under CISG, as it is inconceivable to talk about damage suffered by the aggrieved party when he gains from the non-performance by the other party⁽²³⁾.

Taking into account the causal link between non-performance and damage, so-called punitive damages may neither under the UNIDROIT Principles nor under CISG be redressed. This should also be the case even if such damage may be redressed under the otherwise applicable domestic law⁽²⁴⁾.

The provisions mentioned above normally apply in cases of defective or late performance. In addition, both the UNIDROIT Principles and CISG include special provisions for cases of non-performance in the strict

(21) Stoll, in: v. Caemmerer/ Schlechtriem, article 74, n. 12. Reinhart, article 74, n. 33. Knapp, in: Bianca/ Bonell, article 74, n. 2.6. Ziegler, p. 206. Schoenle, in: Honsell, article 74, n. 13.

(22) CLOUT (A/CN.9/SER.C/ABSTRACTS/12), case no. 166.

(23) Stoll, in: v. Caemmerer/Slechtriem, article 74, n. 32. Magnus, in: Staudingers Kommentar, article 74, n. 22. Schoenle, in: Honsell, article 74, n. 11.

(24) Schoenle, in: Honsell, article 74, n. 10.

meaning; e.g. the non-delivery of the goods contracted for, in which the contract is generally declared avoided by the aggrieved party. It should not however be forgotten that articles 74 and 7.4.2 may also be applied in cases of avoidance of the contract (see, *infra*: III.).

b. *Non-pecuniary harm*: UNIDROIT Principles, article 7.4.2/2 explicitly provides that the non-pecuniary harm can be redressed. Such harm may be physical suffering. Damage that affects pride or good will belongs to this kind, too⁽²⁵⁾.

Besides damages, the aggrieved party may demand other kind of redress, e.g. "publication of a notice in newspapers"⁽²⁶⁾.

According to one opinion, non-pecuniary harm may also under CISG be compensated for if it can be estimated in money⁽²⁷⁾. This opinion cannot actually be justified. A contract on the international sale of goods normally fulfills a commercial purpose. Thus, non-pecuniary harm may in principle not be compensated for⁽²⁸⁾, unless the contract itself provides for a non-pecuniary purpose. In such a case, non-pecuniary harm may be foreseen "as a possible consequence" of non-performance⁽²⁹⁾. In any event, cases of non-pecuniary harm are actually very seldom under CISG.

2. Foreseeability of harm:

a. *Foreseeability of harm under CISG and UNIDROIT Principles*: The non-performing party will not be liable for all damage resulted from breach of contract by him to the other party. Rather, he shall pay compensation only for the damage he foresaw or ought to have reasonably foreseen at the time of conclusion of the contract⁽³⁰⁾. For example, the seller

(25) UNIDROIT Principles, article 7.4.2, Comment 5, paragraph 1, P. 197.

(26) UNIDROIT Principles, article 7.4.2, Comment 5, p. 198.

(27) Magnus, in: Staudingers Kommentar, article 74, n. 27.

(28) Stoll, in: v. Caemmerer/ Schlechtriem, article 74, n. 11. Ziegler, p. 210. Schoenle, in: Honsell, article 74, n. 7.

(29) Compare: Stoll, in: v. Caemmerer/ Schlechtriem, article 74, n. 11.

(30) It should not be forgotten that the creditor may also not ask for damages if the non-performance by the debtor was due to an impediment (CISG, article 79 and Unidroit Principles, article 7.1.7).

delivered a defected machine, which in turn completely interrupted the process of producing in the buyer's factory. As the seller could not have foreseen this severe result, he does not have to compensate all the damage resulted to the buyer. Under CISG, article 74 and UNIDROIT Principles, article 7.4.4, the seller is only liable for the harm foreseeable as "a possible consequence of" of "being likely to result from" non-performance.

Concerning the profit the buyer could have had had the goods been re-sold by him, it should always be considered foreseeable, as long as the buyer is a dealer who consistently works in the market, i.e., buys and sells goods of the same kind⁽³¹⁾. In such a case, the damages paid by the buyer to his customer owing to the lack of conformity of the goods may also be reclaimed against the seller⁽³²⁾.

When deciding the foreseeability of harm, it is of no importance whether or not the non-performing party was at fault and how serious this fault was⁽³³⁾. Thus, the seller shall be liable for the harm resulted from the delivery of defective goods regardless of whether he did not know about this.

Foreseeability of harm is obviously an elastic criterion which gives the court great possibility of discretion. It should however be noted that both articles 74 and 7.4.4 are different from national law, e.g. French civil law, which, in cases of intentional or reckless non-performance - also provides for the compensation of unforeseeable damage⁽³⁴⁾. When applying article 74 or article 7.4.4, the court does not need to examine whether or not non-performance was intentional or reckless⁽³⁵⁾. In all cases, the non-performing party is only liable for foreseeable harm.

(31) Stoll, in: v. Caemmerer/Schlechtriem, article 74, n. 41.

(32) CLOUT (A/CN.9/SER.C/ABSTRACTS/12), case no. 168.

(33) Stoll, in: v. Caemmerer/Schlechtriem, article 74, n. 35. Karollus, p. 217. Piltz, p. 291. Magnus, in: Staudingers Kommentar, article 74, n. 32.

(34) It should be mentioned that a former draft of the UNIDROIT Principles has included such a provision, (Ferrari, Louisiana L. Rev. 53 (1993), p. 1263, fn. 44).

(35) For this opinion, see also: UNIDROIT Principles, Comment on article 7.4.4, p. 200. Ferrari, Louisiana L. Rev. 53 (1993), p. 1263. Knapp, in: Bianca/Bonell, article 74, n. 2.15. Garro, Tulane L. Rev., Vol. 69 (1995), p. 1185.

b. *Foreseeability of harm and similar terms in national law*: Some national laws also limit the damages to the part of harm foreseeable by the non-performing party. This is, for instance, the case under French and Egyptian civil laws, articles 1150 and 221, respectively. According to these laws, only the direct damage can be compensated, articles 1151, 221⁽³⁶⁾. In fact, it is questionable whether there is a real difference between foreseeable and direct damage⁽³⁷⁾.

The foreseeability test of CISG corresponds to the contemplation rule of common law. According to *Hadley v. Baxendale* the party in default shall pay compensation for damage “either arising naturally... or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”⁽³⁸⁾. In its decision Nos. 185, 717 August Term, 1995, the United States Court of Appeals for the Second Circuit interpreted the test of foreseeability set forth in article 74 of CISG in the light of *Hadley v. Baxendale*. The Court argued, “[compensation] includes, but is not limited to, lost profits, subject only to the familiar limitation that the breaching party must have foreseen, or should have foreseen, the loss as a *probable consequence*”⁽³⁹⁾.

It should however be noted that there are some difference between the foreseeability test and the contemplation rule. While the damage shall - under common law - be in the contemplation of both parties, it would be enough under CISG, Article 74 if the damage was not foreseen either by the non-performing party or by a reasonable person. Besides, the

= To the contrary, you may see: Tallon, Am. J. Comp. L., Vol. 40 (1992), p. 669: “A French judge may consider that it is contrary to public policy to allow a party having committed a deliberate breach to resort to foreseeability in order to limit his ability”. Khair, p. 59, 90. Shafik, p. 240: (in this field, there is a gap in CISG which should under CISG, article 7/2 be filled by resource to applicable domestic law).

(36) It should be noted that - under these laws - the direct causality limitation does not apply in cases of deceit or gross default.

(37) Treitel, p. 153.

(38) 156 Eng. Rep., p. 151, referred to by: Ferrari, Louisiana L. Rev. 53 (1993), p. 1266 - 1267.

(39) See this decision in: CISG Database. Emphasis added.

damage shall - under common law - be the probable result of the breach of the contract⁽⁴⁰⁾. By contrast, it suffices under CISG that the damage was foreseeable as a possible consequence of the breach of the contract⁽⁴¹⁾. Obviously, the contemplation rule is stricter (and consequently worse to the non-performing party) than the foreseeability test. Thus, the above quoted argument of the USA Court should not be protected when interpreting CISG, article 74.

Under JCL the condition of causality works to limit the compensation: The aggrieved party shall establish that the damage suffered by him is a result of non-achievement of the promised purpose (in case of the duty of best efforts: the fault) by the other party. The debtor can however establish that an extraneous cause caused the damage and thereby interrupt the causal link, JCL, articles 261, 247 and 448.

Under the so-called *Adaequanztheorie* of German law, i.e. the theory of adequate causality, the party in default shall pay compensation for any damage that normally results from non-performance. To say it in a negative way, the non-performing party should only not redress the damage which is “*ausser aller Wahrscheinlichkeit*”, i.e. that which is absolutely improbable⁽⁴²⁾. Where the causal link between non-performance and damage is available, the party in default is liable even if the objective probability of the damage exceeds the damage actually suffered by the other party⁽⁴³⁾. In order to decide whether this is the case or not, the German court use the (optimal) observer test: If the observer, who is of the same kind as the debtor, could have foreseen the damage at the time of non-performance, the party in default shall pay compensation⁽⁴⁴⁾.

(40) It should be mentioned that this is also the case under UNIDROIT Principles, article 7.4.4. Insofar it does not therefore correspond to CISG, article 74.

(41) Ferrari, Louisiana L. Rev. 53 (1993), p. 1268. Stoll, in: v. Caemmerer/Schlechtriem, article 74, n. 34.

(42) Heinrichs, in: Palandt, Vorbemerkung § 249 BGB, n. 60.

(43) Treitel, p. 163.

(44) Treitel, p. 163. Heinrichs, in: Palandt, Vorbemerkung § 249 BGB, n. 60.

There is a difference between the adequate causality theory and the foreseeability test in the time in which each criterion may be applied. Under German civil law, the important point is that of non-performance, under CISG that of the conclusion. The adequate causality theory is therefore better for the aggrieved party than the foreseeability test, as the observer may foresee more damage than the reasonable person⁽⁴⁵⁾. Also, there can be an adequate causal link between non-performance and damage when the probability of the damage is too little⁽⁴⁶⁾. Such damage may, by contrast, not be considered foreseeable as a possible consequence of non-performance of the contract⁽⁴⁷⁾.

3. *Certainty of harm*: According to UNIDROIT Principles, Article 7.4.3 the harm shall be certain. Thus, the aggrieved party may also be compensated for future damage if this is certain to a reasonable degree.

In contrast, only the damage already suffered may be redressed under CISG. The formula of CISG, article 74 supports this conclusion “Damages... consist of a sum equal to the loss, including loss of profit, *suffered* by the other party”⁽⁴⁸⁾. Concerning future damage, it can only be redressed when the aggrieved party already suffers it later on⁽⁴⁹⁾. This also requires the establishment of other conditions, especially the causal link between non-performance and (future) damage. In any event, future hypothetical damage may neither under the UNIDROIT Principles nor under CISG be redressed⁽⁵⁰⁾.

It should be mentioned that damage must be certain concerning

(45) For this opinion, you may also see: Treitel, p. 165.

To the contrary, see: Knapp, in: Bianca/Bonell, article 74, n. 2.8. Ferrari, Louisiana L. Rev. 53 (1993), p. 1262, fn. 38.

(46) Heinrichs, in: Palandt, Vorbemerkung 249 BGB, n. 60. Decision of the Provincial Appellate Court of Munich - Germany, no. 7 U 3758/94, dated 08,02,1995, in: CISG Online.

(47) To the contrary, you may see: Schoenle, in: Honsell, article 74, n. 27, (both the adequate causality theory and the foreseeability test lead to the same result).

(48) Emphasis added by the present writer.

(49) For this opinion, you may also see: Knapp, in: Bianca/Bonell, article 74, n. 3. 5.. To the contrary, see: Khair, p. 60.

(50) Tallon, Am. J. Comp. L., Vol. 40 (1992), p. 678.

both its coming to existence and its extent⁽⁵¹⁾. Nevertheless, it sometimes suffices if the extent of the damage can be defined later on, as the case with non-pecuniary harm. In such a case, the court will define the exact extent of the damage suffered, UNIDROIT Principles, article 7.4.3/3.

Under the JCL, article 268, future damage may also be redressed if its extent is certain. If this is not the case, the court may however decide the extent of the damage temporarily. The aggrieved party may, in such a case, ask for reconsideration of the estimation of the damage within a limited period of time defined by the court.

It should not be forgotten that non-performance by the creditor should be the reason for damages suffered by the debtor. The damage which did not result from non-performance may be considered neither certain nor foreseeable⁽⁵²⁾.

III. Damages and Avoidance of the Contract

Under both CISG and the UNIDROIT Principles, the damages may be estimated concretely or abstractly.

1. ***Concrete estimation of damages***: Normally, the aggrieved party makes a substitute transaction when the contract is declared avoided by him, especially if there is no current price for the goods concerned. This is always the case when the buyer has ordered goods of specific description. It should be mentioned that the creditor is not, in principle, obliged to make a replacement transaction⁽⁵³⁾. If he makes it, he shall however fulfill the conditions set forth in CISG, article 75 and UNIDROIT Principles, article 7.4.5.

(51) UNIDROIT Principles, article 7.4.3, Comment 2, p. 199. Tallon, Am. J. Comp. L., Vol. 40 (1992), p. 678. Garro, Tulane L. Rev., Vol. 69 (1995), P. 1185.

(52) UNIDROIT Principles, article 7.4.3, Comment 3, p. 200.

(53) However, he is obliged to mitigate the damage under CISG, article 77 and UNIDROIT Principles, article 7.4.8. Taking into account the surrounding circumstances, it will be decided whether or not the creditor could have mitigated the damage by making a replacement transaction. In fact, the creditor is always able to do that if he consistently buys and sells goods of the same kind. If he did not make a substitute transaction nevertheless, he will not be entitled to damages under CISG. (This means that he will not also avail himself of CISG, article 76 and UNIDROIT Principles, article 7.4.6).

For example: When the seller does not deliver the goods contracted for, the buyer may declare the contract avoided and seek to buy the goods from another seller. Also, the seller may resell the goods he has already produced to another buyer, if the original buyer does not pay the sale price. By making the replacement transaction, the buyer (in the first case) or the seller (in the second case) suffers damage, i.e. the difference between the contract price and the price of the replacement transaction. This damage shall - under CISG, article 75 and UNIDROIT Principles, article 7.4.5 - be redressed by the non-performing party.

The replacement transaction shall actually be made after the contract is already declared avoided. That the debtor did not attempt to perform his obligation does not suffice in this regard. Contrary to the Provincial Appellate Court of Hamburg - Germany⁽⁵⁴⁾, the principle of good faith (article 7/1 CISG) could not make the refusal to perform by the seller to be equivalent to a declaration of avoidance of the contract. This opinion is supported by another German court decision. In 1994, the Provincial Appellate Court of Duesseldorf found that “the plaintiff was not obliged to re-sell the shoes before the date of avoidance”⁽⁵⁵⁾.

Contrary to the Arbitral Tribunal - Vienna⁽⁵⁶⁾, the unsuccessful demand by the seller that the buyer takes delivery of the remaining goods does not also suffice in this respect. The seller should declare the contract avoided in order being entitled to make a substitute sale. Avoidance of the contract is normally declared under CISG, article 49 or UNIDROIT Principles, article 7.3.1. It may also be effected in cases of the anticipatory breach under CISG, article 72 and UNIDROIT Principles, article 7.3.3.⁽⁵⁷⁾

(54) Decision no. 1 U 167/95, dated 28.02.1997, in: CISG Online.

(55) CLOUT (A/CN.9/SER.C/ABSTRACTS/10), case no. 130.

(56) See its decision no. 6281, dated 26.08.1989, in: CISG Database.

(57) In its decision no. 17 U 146/93, dated 14.01.1994, the Provincial Appellate Court of Duesseldorf - Germany found that “the plaintiff was entitled to avoid the contract according to article 72 CISG and consequently granted the plaintiff the rights listed in articles 74 and 75 CISG”. (In this case, the seller, after having manufactured the shoes ordered, “demanded security for the sales price as the defendant still had other bills to settle with the plaintiff. The [buyer], however, did neither pay nor furnish security”). See an English - written abstract of this decision in: CLOUT (A/CN.9/SER.C/ABSTRACTS/10), case no. 130. The original decision in German may be seen in: CISG Online.

In addition, the replacement transaction shall substitute the interest of the aggrieved party under the contract that is lost by the non-performance by the other party⁽⁵⁸⁾. In fact, the complete substitution is not required; it would rather suffice if the cover transaction involves a lower quality than the goods that the seller should have delivered under the original contract⁽⁵⁹⁾. It would be however difficult to decide this in cases where the creditor consistently buys and sells goods similar to that contracted for. But fortunately, the creditor normally refers to the replacement transaction in his declaration of contract avoidance. Otherwise, the first transaction made by the creditor after declaring the contract avoided should be considered a substitute transaction⁽⁶⁰⁾. (According to another opinion, the damages shall in such a case be estimated abstractly⁽⁶¹⁾).

The opinion held above by the present writer is supported by CISG, article 75 and UNIDROIT Principles, article 7.4.5 according to which the replacement transaction shall be made “*within a reasonable time*” after declaring the contract avoided. Reasonableness of the time may be decided in the light of the surrounding circumstances of the given case. In the decision no.1 U 167/95, the Provincial Appellate Court of Hamburg - Germany held that two weeks, in which the substitute transaction was concluded, are reasonable⁽⁶²⁾. In another case, the Provincial Appellate Court of Duesseldorf - Germany also found that the re-sale of the shoes nearly two months after avoidance was in a reasonable time⁽⁶³⁾.

In addition, the aggrieved party shall make the substitute transaction in a manner reasonable in the light of commercial

(58) Stoll, in: v. Caemmerer/Schlechtriem, article 75, n. 3. Karollus, p. 219. Magnus, in: Staudingers Kommentar, article 75, n. 10. Schoenle, in: Honsell, article 75, n. 10. Decision of the Provincial Appellate Court of Hamburg - Germany no. 1 U 167/95, dated 28.02.1997, in: CISG Online. To the contrary, you may, however, see: Shafik, p. 242, fn. 398. Khair, p. 60.

(59) Decision of the Court of Arbitration of ICC, no 6281, dated 26.8.1989, in: CISG Database.

(60) Honnold, Uniform Law, articles 75, 76, n. 410.1 Schoenle, in: Honsell, article 75, n. 23.

(61) Reinhart, article 76, n. 3. Piltz, p. 285, n. 429, p. 287, n. 435.

(62) See this decision in: CISG Online.

(63) CLOUT (A/CN.9/SER.C/ABSTRACTS/10), case no. 130.

practice⁽⁶⁴⁾. Thus, the seller shall make the substitute transaction with the highest possible price, the buyer with the lowest price. In fact, this corresponds to the duty of the aggrieved party to mitigate harm. (See, *Infra*: IV.).

When fulfilling these conditions, damages shall be estimated according to the price of the replacement transaction⁽⁶⁵⁾. It makes here no difference whether the estimation of the damage according to the market price would be better for the aggrieved party⁽⁶⁶⁾. Only if the aggrieved party did not fulfill the aforesaid conditions could the damage be estimated according to the market price (CISG, article 76 and UNIDROIT Principles, article 7.4.6)⁽⁶⁷⁾. This is, for example, the case when the aggrieved party made a substitute transaction whose kind or extent is completely different from the original contract.

Beside the difference between the contract price and the price of the replacement transaction, the aggrieved party may also claim damages under CISG, article 74 and UNIDROIT Principles, article 7.4.2. Examples of this would be the redress for delay in performance, of the expenses incurred by making the replacement transaction⁽⁶⁸⁾, of “the storage costs incurred as a result of the lateness in taking delivery of the goods or refusal to take delivery”⁽⁶⁹⁾, and the costs of dispatching part of

(64) Decision of the Provincial Appellate Court of Hamburg - Germany, no. 1 U 167/95, dated 28.02.1997, in: CISG Online.

(65) See the explicit formula of CISG, article 76/1 and UNIDROIT Principles, article 7.4.6/1. This is also emphasized by the case law on CISG. See for instance: Decision of the Provincial Appellate Court of Hamburg - Germany, no. 1 U 167/95, dated 28.02.1997, and the decision of the Provincial Appellate Court of Duesseldorf - Germany, no. 17 U 146/93, dated 14.01.1994, both in: CISG Online.

(66) Stoll, in: V. Caemmerer/Schlechtriem, article 75, n. 2. Schoenle, in: Honsell, article 75, n. 8.

(67) To the contrary, you may see: decision of the Court of Arbitration of ICC, no. 6281, dated 26.08.1989, in: CISG Database. In this decision, the court argued that where the substitute transaction is not made in a reasonable manner or within a reasonable time, damages should be estimated as though no such a transaction has been made, i.e. in conformity with CISG, article 74.

(68) CLOUT (A/CN.9/SER.C/ABSTRACTS/6), case no. 85.

(69) Decision of the Arbitral Tribunal - Vienna, no. SCH - 4366, dated 15.06.1994. See a translation into English of this decision in: CISG Database. See also the decision of the District Court of Landshut - Germany, no. 54 O 644/94, dated 05.04.1995, in: CISG Online.

the goods back to the seller⁽⁷⁰⁾.

2. ***Abstract estimation of damages:*** When the aggrieved party declares the contract avoided, but does not make a replacement transaction, the damages shall - under CISG, article 76 and UNIDROIT Principles, article 7.4.6 - be estimated according to the market price. In such cases, the aggrieved party is entitled to compensation for the difference between the contract price and the current price. For example: the seller delivered a defective machine whose repair would cost \$800,00. The buyer may ask for this sum even if he did not actually get the machine repaired.

It should however be mentioned that the sale price should be determined by the contract. In contrast, the determination of the price according to CISG, article 55 would not suffice to apply CISG, article 76⁽⁷¹⁾.

Similarly, damages may be estimated abstractly under JCL: In its decision no. 95/82⁽⁷²⁾, the Jordanian Court of Cassation decided that the creditor is entitled to ask for the difference between the contract price and the market price. The court made it also clear that the market price should be estimated at the time in which the aggrieved party served warning to the non-performing party, as from this time on the debtor must perform his obligation specifically.

Concerning CISG and the UNIDROIT Principles, they do not agree on the time in which the current price shall be estimated. While UNIDROIT Principles, article 7.4.6 only provides for the time of avoidance of the contract, CISG, article 76 mentions - besides the time of contract avoidance - the time of taking over the goods.

a. *Avoidance of the contract before taking over the goods:* When the aggrieved party declares the contract avoided before or at the time of taking over the goods, damages shall be estimated according to the market price

(70) Compare: Decision of the District Court of Landshut - Germany, no. 54 O 644/94, dated 05.04.1995, in: CISG Online.

(71) Stoll, in: v. Caemmerer/Schlechtriem, article 76, n. 9. Schoenle, in: Honsell, article 76, n. 6.

(72) M.N.M., 1983, p. 242.

prevailing at the time of avoidance. This is, for instance, the case when the creditor declares the contract avoided, as it appears - before the due date of performance - that the debtor will commit a fundamental breach of the contract, CISG, article 72/1, UNIDROIT Principles, article 7.3.3⁽⁷³⁾. This is also the case when the seller declares the contract avoided because the buyer did not pay the price before delivery of the goods. Similarly, if the buyer refused to take over seriously defective goods and for this reason declared the contract avoided, the damages will be estimated according to the market price prevailing at the time of avoidance.

b. *Avoidance of the contract after taking over the goods:* First of all, it should be noted that this case is only conceivable when the buyer declares the contract avoided⁽⁷⁴⁾. For Example: the buyer takes over the goods. When examining the goods, the buyer finds a serious lack of conformity. If he declares the contract avoided, but does not make a substitute transaction, his compensation shall be estimated according to the market price prevailing at the moment of taking over the goods. The reason is to prevent the buyer from delaying avoidance of the contract in order to take advantage of probable changes in the market price⁽⁷⁵⁾.

When declaring the contract avoided by the seller, the market price prevailing at the time of avoidance will normally be taken into account⁽⁷⁶⁾. In such cases, the seller normally declares the contract avoided when the goods are still in his possession. This is also the case even if he has already delivered the goods to the buyer. When he declares the contract in this case avoided, as the buyer did not for instance pay the price, the avoidance clearly takes place before the seller returns the goods sold according to CISG, article 81/2.

In all cases mentioned above, the market price prevailing at the place where the contract should have been performed shall be considered,

(73) Compare: Stoll, in: v. Caemmerer/Schlechtriem, article 76, n. 12.

(74) Honnold, Uniform Law, articles 75, 76, n. 412.

(75) Stoll, in: v. Caemmerer/Schlechtriem, article 76, n. 12. Reinhart, article 76, n. 5. Piltz, p. 288, n. 439. Schoenle, in: Honsell, article 76, n. 11. Shafik, p. 243, fn. 400.

(76) Honnold, Uniform Law, articles 75, 76, n. 412. Karollus, p. 221.

CISG, article 76/2, UNIDROIT Principles, article 7.4.6/2. When the contract does not provide for the place of performance, this should be defined by reference to the rules laid down in CISG, article 31 (at least paragraphs 1 & 2 thereof) and in the UNIDROIT Principles, article 6.1.6/1-b. Thus, the price current in the place where the goods are handed over to the first carrier for transmission to the buyer (CISG, article 31/1) or the place where the seller has his place of business (UNIDROIT Principles, article 6.1.6/1 letter b) should be considered, CISG, article 76 and UNIDROIT Principles, article 7.4.6/2. Otherwise, the current price in the place that serves as a reasonable substitute should be considered. In such a case, the difference in the cost of transporting the goods should however be taken into account when estimating damages. If there is absolutely no such price, damages shall be estimated under CISG, article 74 and UNIDROIT Principles, article 7.4.2⁽⁷⁷⁾.

Normally, the price current in the place of performance is good for the seller. For this reason, the buyer should make a replacement transaction under CISG, article 75 and UNIDROIT Principles, article 7.4.5.

In addition to the difference between the contract price and the market price, the aggrieved party may also ask compensation for any additional damage according to CISG, article 74 and UNIDROIT Principles, article 7.4.2. Examples of this would be delay in performance, missing profit... etc.

It should finally be remembered that damages should be estimated under CISG, article 74 and UNIDROIT Principles, article 7.4.2 if this is not possible according to the price of the replacement transaction or the current price.

IV. Mitigation of Harm

Each of the parties shall pay compensation for harm he caused to the other party by non-performance. If the damage is due in part to the conduct

(77) Compare; Stoll, in: v. Caemmerer/Schlechtriem, article 76, n. 9.

of the aggrieved party, the amount of compensation shall be reduced to the extent that the aggrieved party's conduct has contributed to the harm. This is the case when the aggrieved party has contributed to causing non-performance by the other party or to causing its result, i.e. the harm. Similarly, the amount of damages shall be reduced to the extent that harm could have been reduced by the aggrieved party's taking reasonable steps.

1. ***Harm caused by the aggrieved party:*** If the aggrieved party has caused by his act or omission the non-performance of the other party, he may not, among other things, ask for damages, CISG, article 80, UNIDROIT Principles, article 7.1.2. By analogy, the amount of damages will be reduced to the extent the aggrieved party has contributed to non-performance by the other party⁽⁷⁸⁾.

The aggrieved party may also not be compensated for the part of harm he himself has caused. It would here make no difference whether or not he has contributed to the non-performance by the other party. To argue otherwise would illegally enrich the aggrieved party at the expense of the other party.

Likewise, the amount of damages shall be reduced to the extent of that part of harm caused by an event that the aggrieved party bears as its risk. This would be the case when the representative of the aggrieved party or his workers has contributed to the harm.

In such cases, the court shall take into account the conduct of both parties when deciding whether and how much the aggrieved party has contributed to any harm.

Unlike the UNIDROIT Principles⁽⁷⁹⁾, CISG does not deal with this case explicitly. However, the foreseeability of the harm leads to the same end. The normal aggrieved party can not reasonably wait for compensation from the other party for the part of harm he has caused. In addition, there is no causal link between non-performance by the other party and the part of damage caused by the aggrieved party.

(78) Tallon, in: Bianca/Bonell, article 80, n. 2.5.. Stoll, in: v. Caemmerer/Schlechtriem, article 80, n. 5. Garro, Tulane L. Rev., Vol. 69 (1995), p. 1185.

(79) See article 7.4.7. thereof.

2. *Mitigation of harm by reasonable measures:* I have discussed above the contribution of the aggrieved party's conduct to the non-performance or its result. I will now turn to discussing the conduct of the aggrieved party after non-performance by the other party. In such cases, the aggrieved party should, by taking reasonable measures, not only reduce the damage already suffered by him, but also prevent any possible future damage⁽⁸⁰⁾. CISG, article 77 and UNIDROIT Principles, article 7.4.8 address this case. In principle, these provisions may not be applied in cases of a replacement transaction that the aggrieved party makes within a reasonable time and in a reasonable manner. Nor could these provisions apply in cases where the buyer declares the contract avoided after taking over the goods. As the price current at the time of avoidance shall in this case be considered under CISG, article 76/2, the buyer may not exploit changes in the market price. In all these case, there are conditions to be fulfilled which lead to the same result intended by CISG, article 77 and UNIDROIT Principles, article 7.4.8.

Nevertheless, the duty of the aggrieved party to mitigate harm is very important in cases where the buyer terminates the contract under the UNIDROIT Principles after he takes over the goods. Because the amount of damages shall, in this case, be estimated according to the market price prevailing at the time of termination (article 7.4.6/1), the buyer has an excellent opportunity to take advantage of changes in the market price.

It is also important in cases when the aggrieved party asks compensation under CISG, article 74, UNIDROIT Principles, article 7.4.2. The aggrieved party shall, as long as it is possible, reduce the damage resulting from non-performance by the other party. Otherwise, he will not be compensated for harm he could have reduced by taking reasonable measures. the reasonableness of the measures shall be tested under an objective criterion: The measures should be considered

(80) Ziegler, p. 214. Magnus, in: Honsell, article 77, n. 5. Magnus, in: Staudingers Kommentar, article 77, n. 8.

reasonable if the prudent person in the same situation of the aggrieved party would have taken them⁽⁸¹⁾. In any event, the aggrieved party shall take these measures - as long as this is reasonable in the given circumstances - within a short time after learning of non-performance by the other party.

The aggrieved party will not be redressed for unreasonable or unnecessary expenses incurred by him when curing the lack of conformity of the goods delivered: A bought a second hand machine from B for \$ 5000,00. B guaranteed that the machine is still in good repair. When examining the machine, A discovered a technical defect in it whose repair would cost \$ 2000,00. Despite the fact the a machine of the same kind and in good repair costs \$ 6000,00 only, A has gotten the machine repaired. In such a case, the damages B shall pay are only \$ 1000,00. B can't redress the other \$ 1000,00, as they are unreasonable expenses.

The amount of damages shall be reduced to the extent the harm has been mitigated by the aggrieved party. It should, I argue, be of no importance whether damage has been mitigated by taking reasonable or *unreasonable* measures, as the aggrieved party may - under CISG, article 74 and UNIDROIT principles, article 7.4.2 - be compensated only for the damage actually suffered by him. However, the aggrieved party may, under UNIDROIT Principles, article 7.4.8, recover the expenses reasonably incurred when attempting to mitigate the damage. This would also be the case even if he could not actually reduce the damage. This is the case under CISG, too⁽⁸²⁾: The right of the aggrieved party to recover such expenses is implicitly provided for in CISG, articles 77, 74.

V. Manner and Currency of Damages

1. ***Manner of Damages:*** Under CISG, article 74 and UNIDROIT Principles, article 7.4.2 the aggrieved party is entitled to recover a certain

(81) Stoll, in: v. Caemmerer/Schlechtriem, article 77, n. 9. Magnus, in: Honsell, article 77, n. 6.

(82) Stoll, in: v. Caemmerer/Schlechtriem, article 74, n. 19, 38, article 77, n. 3. Magnus, in: Staudingers Kommentar, article 74, n. 54, article 77, n. 20. Knapp, in: Bianca/Bonell, article 77, n. 2.6. Magnus, in: Honsell, article 77, n. 14. Ziegler, p. 208.

See also CLOUT (A/CN.9/SER.C/ABSTRACTS/6), case no. 85, (it should be noted that, in this case, the buyer could mitigate the loss).

sum of money. The *restitutio in integrum* is not possible⁽⁸³⁾.

Under UNIDROIT Principles, article 7.4.11/1 damages shall generally be paid in a lump sum. In providing for this, the UNIDROIT Principles take into account the nature of the international commercial contract. In exceptional cases however, the non-performing party could pay the damages in installments if the nature of the damage makes this appropriate. This is the case, for instance, when the damage is still on going⁽⁸⁴⁾. It should not be forgotten that this case is inconceivable under CISG, as the non-performing party has only to pay the damage already suffered by the aggrieved party.

According to UNIDROIT Principles, article 7.4.11/2 the “[d]amages to be paid in instalments may be indexed”. In so doing, it would be possible to take inflation into account.

In any event, the claim of damages shall be made in the state in which the debtor has his place of business. According to the Provincial Appellate Court of Duesseldorf - Germany, this is actually a general principle indicated by CISG, article 57 (1)(a)⁽⁸⁵⁾.

2. *Currency of damages:* Unlike CISG, the UNIDROIT Principles expressly provide for the currency in which the damages to be assessed⁽⁸⁶⁾. This currency is important, especially in cases where damage is suffered in different countries. In such a case, the non-performing party shall - under article 7.4.12 - pay damages in the currency in which the price was expressed or in the currency in which the damage was suffered.

In this context, there is a gap in CISG which should first be filled by reference to the general principles on which CISG is based (CISG, article 7/2). As the principle of full compensation is one of the CISG general

(83) CISG, article 74 clearly provides for this: “*Damages... consist of a sum*”. This is also emphasized by the decision of the District Court of Kassel - Germany, no. 11 O 4185/95, dated 15.02.1996, in: CISG Online.

(84) UNIDROIT Principles, article 7.4.11, Comment 1, p. 211.

(85) CLOUT (A/CN.9/SER.C/ABSTRACTS/3), case no. 49.

(86) In addition, the UNIDROIT Principles define the currency in which the payment of the monetary obligation shall be (article 6.1.9).

principles⁽⁸⁷⁾, one may come to the same end of UNIDROIT Principles, article 7.1.12. The non-performing party should pay damages in the currency in which the sale price shall be paid or in the currency in which the damage is suffered. In the decision no. 1 U 167/95, the Provincial Appellate Court of Hamburg - Germany held that the damages are to be paid in Dollar, which was the currency of the replacement transaction⁽⁸⁸⁾. In fact, a judge may also decide that the damage should be paid in another currency (mostly the currency of his country) taking into account the rate of this currency to the currency in which the damage has been suffered. The currency, which leads to full recovery, shall always be considered appropriate.

It should be noted that this result is reached by applying CISG itself. In particular, the direct reference in this regard to the UNIDROIT Principles (article 7.1.12) is not allowed⁽⁸⁹⁾ as this would clearly contradict the autonomous nature of CISG. In fact, it is well known that each law, be it national or uniform, shall be interpreted according to its own criteria. According to CISG, article 7/1, the terms used by CISG shall be interpreted autonomously, i.e., according to their meaning in CISG itself, and not for instance according to the meaning attached to similar terms in other (uniform) laws.

VI. Conclusion

In conclusion, it is worth mentioning the following remarks:

- Both CISG and the UNIDROIT Principles are based on the principle of full compensation: Damages shall redress the loss the creditor suffers as a consequence of non-performance by the debtor, including missing profit. Nevertheless, this principle is limited by two means. First, the test of foreseeability: the non-performing debtor foresaw or ought to have foreseen the damage caused by his non-performance. Second, the duty to mitigate harm: the creditor

(87) Bonell, p. 113. CLOUT (A/CN.9/SER.C/ABSTRACTS/7), case no. 93.

(88) See this decision in: CISG Online.

(89) To the contrary: Bonell, p. 113. 114.



should not reasonably be able to mitigate the damage caused to him by the debtor's non-performance.

- According to both CISG and the UNIDROIT Principles the damages can be estimated either concretely or abstractly.
- Damages could be assessed in the currency that normally redresses the harm of the aggrieved party completely, such as the currency in which the price is expressed or that in which the loss was suffered.



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