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SECTION II
DAMAGES

Article 74

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

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I. History

Article 74 governs the scope of the buyer's or seller's claim to compensation for the breach of contractual obligations. The provision dates back to Article 82 ULIS and its wording has essentially remained unchanged. In contrast to its predecessor, however, Article 74 also



applies where the contract has been avoided. This renders the supplementary rules in Articles 86 and 87 ULIS unnecessary.¹

- 2 Article 74 contains two essential notions: the principle of full compensation (*principe de la réparation intégrale*) and limitation of liability by the foreseeability rule. Numerous domestic legal systems expressly provide for the principle of full compensation.² The foreseeability rule emanates from French law (Article 1150 Cc) and the English leading case *Hadley v Baxendale*,³ which has found its way into Anglo-American sales law codifications.⁴ Furthermore, the 2004 UNIDROIT Principles of International Commercial Contracts (Articles 7.4.2 and 7.4.4) and the 1999 Principles of European Contract Law (Articles 9:502 and 9:503), as well as international conventions on transport law expressly provide for the principle of full compensation and its limitation by the foreseeability rule.⁵

II. Basic principles and system

- 3 The principle stipulated in Article 74 is ‘brief but powerful’.⁶ The promisee has the right to be fully compensated for all disadvantages suffered as a result of the breach of contract.⁷ Following the Anglo-American system of strict liability, the promisor is liable for all losses arising from non-performance, irrespective of fault, unless he is exempted in accordance with Articles 79, 80 CISG.⁸ Article 74 is to be interpreted liberally. The compensation must satisfy not only the promisee’s expectation interest (ie obtaining the benefits arising from performance), but also the indemnity interest (ie not to suffer damage to other interests as a result of non-performance).⁹ Furthermore, Article 74 protects the reliance interest

¹ Details on the drafting history, Stoll, 3rd German edition of this work, Art 74, para 1.

² Cf Art 9:502 PECL, Comment 2; § 249 *et seq* BGB; Art 1149 French Cc; Art 1223 Italian Cc; Art 1106 Spanish Cc; Art 564(1) Portuguese Cc; § 1323 *et seq* ABGB; Art 6:96 Dutch BW. For a comparative overview see Stoll, *Haftungsfolgen*, pp 179–81, 323–41.

³ [1854] 9 Ex 341; on the origins of the foreseeability rule and a comparison between foreseeability under the CISG and domestic laws, see Ferrari, *Foreseeability*, p 305 *et seq*.

⁴ For an extensive discussion of internal US-American law cf Perillo, *Damages*, p 83 *et seq*.

⁵ Cf Vékás, *Foreseeability*, pp 170–2; Magnus, *FS Herber*, p 30 *et seq* on CMR and the Warsaw Convention.

⁶ Honnold/Flechtner, Art 74, para 403.

⁷ OGH, 14 January 2002, CISG-online 643, *IHR* 2002, 76, 80; OGH, 9 March 2000, CISG-online 573, *IHR* 2001, 39, 40; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft (Wien), 15 June 1994, CISG-online 691, *RIW* 1995, 590, 591; Secretariat’s Commentary, Art 70, No 3; CISG-AC, Op 6 Gotanda, Comment 1.1; P Huber/Mullis/P Huber, p 269; Staudinger/Magnus, Art 74, para 19; Bianca/Bonell/Knapp, Art 74, note 3.2.; Treitel, *Remedies for Breach*, p 82; Schlechtriem, *Gemeinsame Bestimmungen*, p 163; Audit, *Vente internationale*, note 172.; Saidov, *Limiting Damages*, I 1; similar Honnold/Flechtner, Art 74, para 403. With criticism Honsell, *SJZ* 1992, 361, 362, who, however, incorrectly equates this principle with the so-called ‘differential theory’ which has been developed by the Historical School in the 19th century.

⁸ Neumayer/Ming, Avant Art 74, note 2.; Weber, *Vertragsverletzungsfolgen*, pp 166, 191; Audit, *Vente internationale*, note 171.; Witz/Salger/Lorenz/Witz, Art 74, para 1; Herber/Czerwenka, Art 74, para 3; Roßmeier, *RIW* 2000, 407, 408; Karollus, p 206; Ryffel, pp 4–7, 37–41.

⁹ OGH, 14 January 2002, CISG-online 643, *IHR* 2002, 76, 80; Honsell/Schönle, Art 74, para 14; Karollus, p 214; Staudinger/Magnus, Art 74, para 20; Witz/Salger/Lorenz/Witz, Art 74, para 12; Weber, *Vertragsverletzungsfolgen*, p 192; Roßmeier, *RIW* 2000, 407, 408.





(ie expenditures made in reliance on the existence of the contract).¹⁰ The express reference to lost profit merely serves to clarify its recoverability.¹¹

According to the prevailing view, the foreseeability rule set forth in Article 74, sentence 2 4 counterbalances the parties' strict liability.¹² This limitation of liability enables both parties to estimate the financial risks arising from the contractual relationship and thus to insure themselves against possible liability.¹³ Furthermore, the foreseeability rule has the additional and economically beneficial effect of stimulating the exchange of information between the parties by urging them to disclose any unusual risks to the other party when concluding the contract.¹⁴

1. Principles

While the principle of full compensation is undisputed, its precise meaning is yet to be 5 determined.¹⁵ Many German authors draw on the so-called 'differential theory' (*Differenzhypothese*) used in Germanic laws and apply it indiscriminately to the CISG.¹⁶ However, this principle, which is unknown to all other legal systems, cannot be applied to the Convention, as this would endanger its uniform interpretation.

As in domestic legal systems, the claim for damages is primarily directed at compensation. 6 Additionally, however, today there is an increasing emphasis on the preventive role of damages. This is accompanied by a shift of focus in regard to contract damages from purely mathematical economic benefits to the interest of the promisee in performance as required by the contract ('performance principle').¹⁷

This changed perception in domestic legal systems needs to be reflected when interpreting 7 the Convention. Such developments must be taken into account in order to prevent courts from feeling the need to apply domestic law in addition to the Convention. This would undermine unification in a core area.

The outlined developments lead to significant differences between the interpretation of the 8 CISG and the Germanic legal systems in particular. Firstly, the strict distinction made in

¹⁰ OGH, 14 January 2002, CISG-online 643, *IHR* 2002, 76, 80; CISG-AC, Op 6 Gotanda, Comment 1.1; Saidov, *Limiting Damages*, I 1; Neumayer/Ming, Art 74, note 1.; Schneider, (1997) 9 *Pace Int'l L Rev* 223, 228; doubtful Karollus, pp 215, 216; with reservations Witz/Salger/Lorenz/Witz, Art 74, para 12 (frustrated expenses recoverable only within the scope of the interest in performance). For the compensation of frustrated expenses when unwinding the contract see Schmidt-Ahrendts, *IHR* 2006, 67 *et seq.*

¹¹ Cf Secretariat's Commentary, Art 70, No 3; Stoll/Gruber, 4th German edition of this work, Art 74, para 2; Witz/Salger/Lorenz/Witz, Art 74, para 15; Farnsworth, (1979) 27 *Am J Comp L* 247, 249.

¹² Witz/Salger/Lorenz/Witz, Art 74, para 2; U Huber, *Leistungsstörungen*, p 729 ('theoretically and practically inseparable'); Vékás, *Foreseeability*, p 159.

¹³ Schlechtriem/P Butler, *UN Law*, para 302; Schlechtriem, *Gemeinsame Bestimmungen*, pp 166, 167; Staudinger/Magnus, Art 74, para 31; Witz/Salger/Lorenz/Witz, Art 74, para 27; Karollus, pp 217, 218; Weber, *Vertragsverletzungsfolgen*, p 198; different approach, influenced by the economic analysis of law by Faust, p 216 *et seq.*

¹⁴ Cf Faust, p 225 *et seq.*

¹⁵ See Schwenzler/Hachem, *Scope of Damages*, p 93.

¹⁶ Cf Staudinger/Magnus, Art 74, paras 26, 27; Critical Honsell, *SJZ* 1992, 361, 362; cf also Brölsch, *Schadensersatz*, pp 47, 48.

¹⁷ Coote, (1997) 56 *CLJ* 541, 542 *et seq.*; Pearce/Halson, (2008) 28 *Oxford J Legal Stud* 79, 80.





domestic law between pecuniary and non-pecuniary loss cannot be indiscriminately applied to the Convention. This is all the more true as the CISG does not contain an exclusion of liability for so-called non-pecuniary loss. Furthermore, the notion that the promisee must not be overcompensated cannot strictly be applied in the context of the Convention either. However, although an actual claim for the disgorgement of profits cannot be drawn from Article 74, benefits which the promisor obtains from his breach of contract may be taken into account when calculating and assessing damages. In this context, penal elements can also play a role despite the fact that the Convention does not allow awarding punitive damages.

2. Relationship to other provisions of the CISG

- 9 Article 74 requires the existence of a claim for damages on the part of the buyer pursuant to Article 45(1)(b) or on the part of the seller pursuant to Article 61(1)(b), both of which in turn require the breach of a contractual obligation. Being a general provision, Article 74 is supplemented by Articles 75 and 76, which in case of contract avoidance base the calculation of damages for non-performance on an actual or hypothetical cover transaction. The promisor's liability is limited by Article 77 according to which the promisee is obliged to mitigate his losses. Furthermore, Article 44 is to be given due regard. According to this provision the buyer who has a reasonable excuse for not having complied with his duty to give notice of non-conformity under Article 39(1) remains precluded from recovering lost profit in any case.

3. Relationship to other remedies

- 10 A claim for damages pursuant to Article 74 *et seq* may be raised concurrently with other remedies, such as a claim for specific performance (Articles 46(1), 62),¹⁸ for reduction of the purchase price (Article 50) or for avoidance of the contract (Articles 49(1), 64(1)). However, the amount of the recoverable loss depends on whether and, if so, which other remedies are asserted. The promisee cannot bring a claim for damages if another remedy has been exercised successfully, thereby partly or entirely redressing the loss suffered. The possibility of cumulating claims for damages and avoidance provides the promisee with a comprehensive remedy for non-performance.¹⁹ The promisee can alternatively claim damages for his reliance interest, ie compensation for expenditures incurred based on his reliance on the due performance of the contract.²⁰

III. Scope of application of Article 74

1. Breach of contractual obligations

- 11 Liability for damages pursuant to Articles 74 to 77 arises when the buyer or seller 'fails to perform any of his obligations under the contract or this Convention' (Articles 45(1), 61(1)).

¹⁸ The claim for specific performance is—of course—subject to Article 28.

¹⁹ See also U Huber, *Rechtsbehelfe der Parteien*, p 216. This concept was also adopted in the revision of the German law of obligations (see § 281 BGB); cf Lorenz/Riehm, para 207; Schlechtriem/Schmidt-Kessel, *SchuldR AT*, para 618 *et seq*.

²⁰ See in more detail para 38 below.





The breach of contract does not have to be ‘fundamental’ within the meaning of Article 25.²¹ The breach of the obligation to make restitution when unwinding the contract upon avoidance (Article 81(2)) also leads to liability under Article 74,²² for example where the seller refuses to take back the goods.²³

The mere breach of a contractual obligation is sufficient to trigger liability.²⁴ It suffices that, upon being due, an obligation has either not been performed at all or has been performed inadequately; the promisor need not be at fault or be put into default, for example by a warning or by fixing an additional period of time (*Nachfrist*).²⁵ The promisor’s final and definite refusal to fulfil an obligation not yet due (cf Article 72)²⁶ or his refusal to provide security, where the required security is in accordance with trade usage or practice between the parties also constitutes a breach of contract leading to liability for damages.²⁷ 12

2. Breach of non-actionable duties

The CISG at various points obliges the parties to carry out certain actions to preserve their rights. Compliance with such provisions is in the interest of the respective party and cannot be enforced by the other party. It follows that the breach of such ‘non-actionable duties’ does generally not result in liability for damages; rather, it entails legal disadvantages for the party under such duties, for example, the loss of remedies.²⁸ These duties include, in particular, the duty of the party affected by a breach of contract to undertake all reasonable measures to mitigate damages (Article 77) and the buyer’s obligation to examine the goods and to give notice of any defects pursuant to Articles 38 and 39. Regarding the latter, the parties are free to agree upon liability for damages instead of the loss of all remedies in case the buyer does not give timely notice of non-conformity.²⁹ However, the seller’s duty to give notice pursuant to Article 32(1) and to provide 13

²¹ Bamberger/Roth/Saenger, Art 74, para 3; Witz/Salger/Lorenz/Witz, Art 74, para 5; Weber, *Vertragsverletzungsfolgen*, p 193.

²² *Roder Zelt- und Hallenkonstruktionen v Rosedown Park Pty Ltd and Reginald R Eustace*, Fed Ct Aust (Adelaide, SA), 28 April 1995, CISG-online 218, [1995] FCR 216–40; Honsell/Schönle, Art 74, para 19; Achilles, Art 74, para 2; Staudinger/Magnus, Art 74, para 9.

²³ Cf OLG München, 17 November 2006, CISG-online 1395.

²⁴ Cf Farnsworth, *Farnsworth on Contracts II*, pp 448, 449; Treitel, *Law of Contract*, pp 746–57; Witz/Salger/Lorenz/Witz, Art 74, para 4; Audit, *Vente internationale*, note 171.; Weber, *Vertragsverletzungsfolgen*, p 193.

²⁵ KG Berlin, 24 January 1994, CISG-online 130, *RIW* 1994, 683; Asam/Kindler, *RIW* 1989, 841; Weber, *Vertragsverletzungsfolgen*, p 193; see also Lando/Beale, *Part I and II*, PECL Art 9:501, Comment 3(a). LG Flensburg, 19 January 2001, CISG-online 619, *IHR* 2001, 202, 203, incorrectly relied on domestic law for the conditions to put a party into default.

²⁶ Fountoulakis, Art 72, para 34 above; Witz/Salger/Lorenz/Witz, Art 74, para 5; Karollus, p 163; Stoll, *RebelsZ* 52 (1988), 617, 627; Weber, *Vertragsverletzungsfolgen*, p 194.

²⁷ Staudinger/Magnus, Art 74, para 10; Herber/Czerwenka, Art 74, para 2; Enderlein/Maskow/Strohbach, Art 74, note 1.; for details see Stoll, *RebelsZ* 52 (1988), 617, 627, referring to § 2–609 UCC; but see Schlechtriem, *Gemeinsame Bestimmungen*, p 159; according to Article 72(2) the promisor has a right to provide security, but the Convention does not oblige him to do so; also dissenting Neumayer/Ming, *Avant Art 74*, note 2., who, in case of a breach of Article 72, only want to permit avoidance of contract.

²⁸ See the wording of Article 39(1): ‘[t]he buyer loses the right to rely on a lack of conformity of the goods, if he does not give notice to the seller [...]’.

²⁹ Cf Art 39, para 35 above.





information pursuant to Article 32(3) are genuine—and thus actionable—contractual obligations.³⁰

3. Death and personal injury

- 14 Death and personal injury caused by defective goods do not fall within the scope of Article 74 *et seq.* According to Article 5, liability for such damage is governed by the applicable domestic law.³¹ Matters are different, however, where the buyer seeks compensation for his liability towards his customers for death or personal injuries caused by the goods. This case is no different from incurring any other financial loss and is thus also governed by the Convention.³² Article 74 also applies to property damage. Where this damage is the typical result of the breach of contract, recourse to domestic law is excluded.³³ Where, however, general duties of care towards the public are breached, recourse to domestic remedies is allowed.³⁴

4. Persons entitled to damages and third party losses

- 15 Only the contracting party affected by the breach of contract is entitled to claim damages. The contract's effects can be extended to third parties by way of agreement, which may, however, also be formed implicitly or by way of an undisclosed agency. The Convention itself does not contain legal concepts such as the contract with protective effects for third parties (*Vertrag mit Schutzwirkung zugunsten Dritter*) under German and Austrian domestic law or third party beneficiaries according to § 2-318 UCC or the French direct action³⁵ (*action directe*).³⁶ In domestic law, as well, their primary function is to balance out weaknesses in tort law.³⁷

³⁰ Widmer, Art 32, paras 11 and 31 above; Enderlein/Maskow/Strohbach, Art 74, note 1.; still doubtful Stoll, *Schadensersatzpflicht*, p 260.

³¹ Schwenger/Hachem, Art 5, para 4 above; Schlechtriem/P Butler, *UN Law*, para 39; Honsell/Schönle, Art 74, para 2.

³² See Schwenger/Hachem, Art 5, para 10 above; for detailed reasoning Koller, *FS Wiegand*, pp 422, 425; probably also Schlechtriem/P Butler, *UN Law*, para 39.

³³ Cf in particular Herber, *FS Schlechtriem*, p 207 *et seq.*; *idem*, *IHR* 2001, 187–90; Köhler, *Spannungsverhältnis*, p 151; D Schneider, *UN-Kaufrecht und Produkthaftungspflicht*, p 228 (tort claims are pre-empted by the CISG); OLG Thüringen, 26 May 1998, CISG-online 513; Bianca/Bonell/Khoo, Art 5, note 3.2.; Honnold/Flechtner, Art 5, para 73; Herber/Czerwenka, Art 5, para 5; Enderlein/Maskow/Strohbach, Art 5, note 1.2.; Kuhlen, *Produkthaftung*, p 114; Schmid, *Lückenfüllung und Normenkonkurrenz*, p 55; Mather, (2001) 20 *J L & Com* 155, 161. But see *Miami Valley Paper, LLC v Lebbing Engineering and Consulting GmbH*, US Dist Ct (SD Ohio), 10 October 2006, CISG-online 1362; Stoll/Gruber, 4th German edition of this work, Art 74, para 7; Ferrari, *RabelsZ* 71 (2007), 52, 74; Schlechtriem, previous edition of this work, Art 4, para 23a; probably also Schlechtriem/P Butler, *UN Law*, para 40; Lookofsky, *Understanding the CISG*, pp 24, 25, 76 *et seq.*; *idem*, (2003) 13 *Duke J Comp & Int'l L* 263, 285. Cf on this issue also Ferrari, 5th German edition of this work, Art 5, para 11 *et seq.*; *ibid.*, Art 90, para 3.

³⁴ See on this issue also para 35 below; Schwenger/Hachem, Art 5, para 6 above.

³⁵ Cf Cass civ 1er, 5 January 1999, CISG-online 431, *D* 1999, 383 *et seq.*, with note by Cl Witz, *Rev crit dr int privé* 1999, 519 *et seq.*, with note by Heuzé.

³⁶ Cf also P Huber/Mullis/P Huber, p 280. This does, however, not preclude the Convention from governing claims which are brought on the basis of such domestic concepts, see Schwenger/Hachem, Art 4, para 23; for detailed reasoning see Schwenger/Schmidt, (2009) 13 *VJ* 109, 115 *et seq.*; cf also Schlechtriem/Cl Witz, *Convention de Vienne*, para 66.

³⁷ See Ebers/Janssen/Meyer, pp 3–73 for a comparative study on the ultimate buyer's direct claims against the producer in Europe.





A contracting party may, however, claim third party damage as its own in cases of a purely coincidental shift of such damage.³⁸ No problems arise when the same amount of damage could just as easily have been caused to the actual counter-party. This is particularly the case where the defect of the goods leads to a drop in value since this loss is calculated using objective criteria. However, when the amount of damage is based on the specific situation of the injured third party, it is whether or not the promisor could have known that the promisee was pursuing the interests of that third party that is decisive. This question becomes particularly relevant in dealing with multi-national corporations, where a subsidiary company often acts as the contracting party while the damage actually occurs to the parent or an affiliated company. **16**

IV. Form of compensation

Compensation must be made in money; the Convention does not establish the right to restitution in kind.³⁹ The wording of Article 74 ('[d]amages [...] consist of a sum equal to the loss [...]') leaves no room for doubt. The exclusion of restitution in kind also implies that indemnification from an obligation generally cannot be demanded as form of compensation.⁴⁰ However, since the third party claim constitutes a liability loss, indemnification may be replaced by payment.⁴¹ **17**

V. Extent of damages

1. General

While the Convention provides for the compensation of losses suffered from a breach of contract, including loss of profit, it does not define in greater detail which losses are recoverable. Therefore, recoverability has to be determined in accordance with the overall objective of the CISG to achieve full compensation in view of the particular purpose of the contract. More than under the domestic laws of the Germanic legal system but in line with recent English developments the main focus must lie on the performance principle—ie the purpose of the damages provisions to protect the promisee in obtaining performance as required by the contract (cf paragraph 6 *et seq* above). Cross-border sales contracts regularly serve commercial purposes. Common goods generally have a market value; the same applies to the possibility to actually use the goods. Nowadays, a company's reputation and that of its products (goodwill) must regularly also be considered to have economic value. The same applies for chances to contract, which are often 'bought' with high expenditures. **18**

³⁸ Honsell/Schönle, Art 74, para 9; Achilles, Art 74, para 3; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 7; Bamberger/Roth/Saenger, Art 74, para 2; Witz/Salger/Lorenz/Witz, Art 74, para 10; Staudinger/Magnus, Art 74, para 14; Weber, *Vertragsverletzungsfolgen*, p 195.

³⁹ Bianca/Bonell/Knapp, Art 74, notes 2.3. and 3.1.; Enderlein/Maskow/Strohbach, Art 74, note 4.; Honsell/Schönle, Art 74, para 31; P Huber/Mullis/P Huber, pp 269, 270; Neumayer/Ming, Art 74, note 1.; Staudinger/Magnus, Art 74, para 24; Karollus, p 213; Schlechtriem, *Internationales UN-Kaufrecht*, para 286; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 9.

⁴⁰ P Huber/Mullis/P Huber, p 270.

⁴¹ Cf para 32 below.





19 The traditional distinction made particularly in Germanic legal systems between pecuniary and non-pecuniary damage cannot be upheld in the same way under the Convention. Rather, a new line must be drawn with regard to the protection international sales contracts seek to offer. However, even when losses are recoverable under this test, questions of foreseeability (cf paragraph 45 *et seq* below) and proof (cf paragraph 64 *et seq* below) remain to be decided.

2. Categories of loss

- 20 Recoverable types of loss include non-performance loss, incidental loss, and consequential loss resulting from breach of contract. The notion of non-performance loss also encompasses loss of use. Therefore, in case of late performance or until a cover transaction is carried out respectively, rental costs may be concretely or abstractly calculated as damages.⁴²
- 21 (a) **Non-performance loss.** Damages for non-performance consist in the promisee's primary or direct loss.
- 22 The actual non-performance loss refers to the buyer not receiving an adequate counterpart for payment of the purchase price. If the contract is avoided, non-performance loss is calculated pursuant to Articles 75 and 76, ie based on the costs of a cover transaction or abstractly based on market value. Even if the contract has not (yet) been avoided, damages can be calculated under Article 74 based on the costs of a substitute transaction.⁴³
- 23 If the delivered goods are defective, the damage consists of the difference between the objective value of the defective goods and the value which they would have had at the time of the calculation had they been in conformity with the contract.⁴⁴ The buyer can claim the difference in value irrespective of whether or not this difference has materialized in a resale.⁴⁵ Thus, for example, where the buyer purchases textiles with the requirement that they not be manufactured by child labour, he can demand the difference between the price for goods manufactured under humane conditions and the price for goods manufactured in violation of human rights. In cases where the market value is difficult to assess, the

⁴² For the example of an NGO, which did not receive the purchased trucks in time, see Schwenger/Hachem, *Scope of Damages*, p 94.

⁴³ Cf the seminal discussion by Schlechtriem, *FS Georgiades*, pp 383, 387 *et seq*; CISG-AC, Op 6 Gotanda, Comment 8.1; Honnold/Flechtner, Arts 75, 76, para 410.2; OLG Graz, 29 July 2004, CISG-online 1627 with a critical comment by Bach, *IPRax* 2009, 299, 301, 304; Audiencia Provincial de Palencia, 26 September 2005, CISG-online 1673; cf also Chamber of National and International Arbitration of Milan, 28 September 2001, CISG-online 1582 where the Tribunal awarded damages based on substitute transactions entered into prior to the avoidance of the contract even though in its eyes the buyer by carrying out these transactions had not strictly abided by the directions of the Convention; but see P Huber/Mullis/P Huber, p 282.

⁴⁴ Audit, *Vente internationale*, note 172.; Heuzé, note 449.; Bianca/Bonell/Knapp, Art 74, note 3.12.; Karollus, pp 156, 223; Schlechtriem, *Gemeinsame Bestimmungen*, p 167; Witz/Salger/Lorenz/Witz, Art 74, para 18. On American law see § 2–714(2) UCC; similarly also SGA 1979, s 53(3); cf also Rabel, *Recht des Warenkaufs*, vol 1, p 513.

⁴⁵ For details see Schwenger/Hachem, *Scope of Damages*, p 94 *et seq*; but see Schlechtriem, (2007) 19 *Pace Int'l L Rev* 89, 98 *et seq*.





manufacturing costs which were saved due to the breach of contract can be used as minimum damages.⁴⁶

If the delivered goods are curable, the non-performance loss can be calculated according to the necessary expenses.⁴⁷ This includes costs for replacing objects which the buyer has already installed.⁴⁸ Even if the buyer does not actually have the defects cured, he must be allowed to calculate the damages based on abstract repair costs. It is to be noted, however, that in both cases the seller retains the right to remedy the defects himself according to Article 48, if he is willing to do so and if it is reasonable to expect the buyer to accept this offer pursuant to the criteria of Article 48.⁴⁹ Concrete or abstract costs of cure can—naturally—only be claimed as far as they are reasonable. This follows from the general duty to mitigate damages pursuant to Article 77.⁵⁰

The promisee's delay in the performance of the contract also entitles the promisor to compensation for loss resulting from the delay. If the seller is late in delivering the goods, the buyer is entitled to recover expenses for reasonable measures taken to bridge the time gap until the arrival of the goods and to avoid consequential loss.⁵¹ In particular, rental costs for a replacement object may be claimed irrespective of whether or not a replacement was actually obtained.⁵² In case of late delivery, the additional costs of a cover purchase are also recoverable (cf paragraph 22 above). The seller's damages for late payment by the buyer are also to be calculated based on the CISG and not—within the European Union—based on the Late Payment Directive.⁵³ Under the CISG, the seller is generally entitled to have the costs of a bridging loan reimbursed⁵⁴ or to recover lost profit because of having missed out on an investment opportunity⁵⁵ if the buyer is late in making payment. According to the

⁴⁶ Cf Schwenzler/Hachem, *Scope of Damages*, pp 99, 100.

⁴⁷ BGH, 25 June 1997, CISG-online 277; *Delchi Carrier SpA v Rotorex Corp*, US Ct App (2nd Cir), 6 December 1995, CISG-online 140; OLG Hamm, 9 June 1995, CISG-online 146; AG München, 23 June 1995, CISG-online 368; Stoll/Gruber, 4th German edition of this work, Art 74, para 15; MünchKomm/P Huber, Art 74, para 35; Bianca/Bonell/Knapp, Art 74, note 3.12.; Witz/Salger/Lorenz/Witz, Art 74, para 18; Honsell/Schönle, Art 74, para 13; Audit, *Vente internationale*, note 172.; Heuzé, note 449.; Bianca/Bonelli, Arts 74–77, note 6.; Karollus, p 223.

⁴⁸ OLG Hamm, 9 June 1995, CISG-online 146; MünchKomm/P Huber, Art 74, para 35; Schlechtriem, *IPRax* 1996, 256, 257.

⁴⁹ Karollus, *ZIP* 1993, 490, 491; *idem*, p 144; Bamberger/Roth/Saenger, Art 74, para 5. The recoverability of damages for delay and incidental damages remains unaffected, see Müller-Chen, Art 48, para 21 above; Staudinger/Magnus, Art 48, paras 31, 33.

⁵⁰ Bianca/Bonell/Will, Art 46, note 2.2.2.2.

⁵¹ Cf OLG Köln, 8 January 1997, CISG-online 217 (the buyer needed to contract with a third party for the tanning of hides because the seller was in delay with the delivery of tanning barrels).

⁵² Cf Schwenzler/Hachem, *Scope of Damages*, p 96.

⁵³ Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions. According to the prevailing opinion, the CISG prevails over EC directives in general, cf Schwenzler/Hachem, Art 90, para 4 *et seq* below. With regard to the Late Payment Directive in particular, see Perales Viscasillas, (2007) 19 *Pace Int'l L Rev* 125, 127 *et seq*.

⁵⁴ MünchKommHGB/Mankowski, Art 74, para 29; Herber/Czerwenka, Art 74, para 12; Neumayer, *RIW* 1994, 99, 106; Appellate Court of Eastern Finland, 27 March 1997, CISG-online 782.

⁵⁵ LG Stuttgart, 31 August 1989, CISG-online 11, *RIW* 1989, 984, 985; AG Oldenburg, 24 April 1990, CISG-online 20, *IPRax* 1991, 336, 338; Asam, *RIW* 1989, 942, 946.





prevailing view, this loss or loss of profit must be specifically proven.⁵⁶ However, courts use a rather generous standard of proof for establishing the loss due to delay.⁵⁷ Yet, also in these cases an abstract calculation of damages should be possible based on average market refinancing costs, because the fact that the promisee is not using bank credit due to fortunate circumstances cannot redound to the promisor's advantage.

- 26 As a result of late payment the seller may also suffer loss due to change of exchange rates or currency devaluation.⁵⁸ It is disputed in this case whether or not the promisee's damages are only to be recognized in so far as he can actually prove that a timely payment would have yielded a higher monetary value than was possible as a result of the delay.⁵⁹ The correct view recognizes the possibility of abstract calculation here as well. This particularly applies to cases where the currency of the contract is a foreign currency for the promisee. Here it can be generally assumed that, had he received the payment on time, he would have swiftly exchanged it for his domestic currency.⁶⁰ If the currency of the contract is the promisee's

⁵⁶ Cf LG Frankfurt a M, 16 September 1991, CISG-online 26, *RIW* 1991, 952, 954; OLG Frankfurt a M, 18 January 1994, CISG-online 123, *NJW* 1994, 1013, 1014; LG München, 6 April 2000, CISG-online 665; LG Oldenburg, 9 November 1994, CISG-online 114, *RIW* 1996, 65, 66; OLG Düsseldorf, 24 April 1997, CISG-online 385; LG Kassel, 15 February 1996, CISG-online 191; cf also Herber/Czerwenka, Art 74, paras 6, 9; Karollus, p 224; Staudinger/Magnus, Art 74, para 25; Witz/Salger/Lorenz/Witz, Art 74, para 20; Bamberger/Roth/Saenger, Art 74, para 6; Piltz, *NJW* 2000, 553, 560 with further references.

⁵⁷ LG Hamburg, 26 September 1990, CISG-online 21, *RIW* 1990, 1015, 1019, *IPRax* 1991, 400, 403, with a concurring note by Reinhart, *IPRax* 1991, 376, 377 (loss of interest incurred by the Italian seller estimated under § 287 ZPO in the amount of the contended Italian discount rate); ICC Ct Arb, 7197/1992, CISG-online 36, *JDI* 1993, 1028, 1034, CLOUT No 104 (communication issued by the bank of the claimant according to which the bank demanded at least 12% interest on loans was considered sufficient evidence); Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft (Wien), 15 June 1994, CISG-online 691, *RIW* 1995, 590, 591 (bank interest common in the seller's country); similarly OLG Düsseldorf, 14 January 1994, CISG-online 119 (16.5% interest common in Italy), thereby confirming LG Krefeld, 28 April 1993, CISG-online 101; LG Berlin, 6 October 1992, CISG-online 173; LG Aachen, 3 April 1990, CISG-online 12, *RIW* 1990, 491, 492; HGer Zürich, 10 July 1996, CISG-online 227, *SZIER* 1997, 131, 132. In the same sense generally also Asam/Kindler, *RIW* 1989, 841, 843–5 who consider the alleviation of the burden of proof established by German case law as estimation of damages according to § 287 ZPO or as *prima facie* evidence and thereby exclude it from the scope of the CISG.

⁵⁸ Against the classification as damage within the meaning of Art 74 CISG, McMahon, *FSKritzer*, pp 347, 353 *et seq*, who, however, bases his opinion on the position of domestic US law.

⁵⁹ OLG Düsseldorf, 14 January 1994, CISG-online 119, reversing LG Krefeld, 28 April 1993, CISG-online 101; Gerichtshof Arnhem, 15 April 1997, *NIPR* 1998, No 101, UNILEX; Asam/Kindler, *RIW* 1989, 841, 846, 847; Honsell/Schönle, Art 74, para 29; Piltz, *Internationales Kaufrecht*, para 5-549; Staudinger/Magnus, Art 74, paras 48, 49; Witz/Salger/Lorenz/Witz, Art 74, paras 21, 22 (interest needs to be taken into account); for references to German and French law see Gruber, *Geldwertschwankungen*, pp 118–22. For decisions which accept an exchange rate loss in the payment currency during the period of delay as recoverable loss without any further proof see OLG München, 18 October 1978, Schlechtriem/Magnus, Art 82 EKG, No 11, *NJW* 1979, 2480; RB Roermond, 6 May 1993, CISG-online 454; in a broad sense Soergel/Lüderitz/Dettmeier, Art 74, paras 7, 19.

⁶⁰ HGer Zürich, 5 February 1997, CISG-online 327, *SZIER* 1998, 75 *et seq* (denying recovery of the exchange rate loss in a foreign currency on the grounds that payment had not yet been effected and the future exchange rate was uncertain); OLG München, 9 December 1987, *RIW* 1988, 297, 299; Asam, *RIW* 1989, 841, 846, 847; Honsell/Schönle, Art 74, para 29; Witz/Salger/Lorenz/Witz, Art 74, para 15; Magnus, *RabelsZ* 53 (1989), 116, 138; Piltz, *Internationales Kaufrecht*, para 5-549; *idem*, *NJW* 1994, 1101, 1106, n 89; Staudinger/Magnus, Art 74, para 49; Stoll, *Schadensersatzpflicht*, pp 266, 267; Weber, *Vertragsverletzungsfolgen*, p 201; with criticism Soergel/Lüderitz/Dettmeier, Art 74, para 7.





domestic currency, damages due to loss of value through inflation generally cannot be compensated.⁶¹

(b) Incidental loss. Incidental losses are expenses incurred by the promisee which are not related to the realization of his expectation interest, but rather are incurred in order to avoid any additional disadvantages.⁶² The recoverability of incidental losses is not explicitly mentioned in Article 74. In view of the principle of full compensation, however, it is beyond debate.⁶³ Examples of recoverable incidental loss include the additional costs incurred by a party as a result of the other party's unjustified refusal to perform⁶⁴ as well as the seller's expenses for tendering the goods in vain⁶⁵ or for preserving and storing the goods, if the buyer rejects them without justification,⁶⁶ refuses to make payment upon delivery of the goods as agreed in the contract⁶⁷ or if the shipping space provided by the buyer is unsuitable for loading because it is dirty.⁶⁸ If delivery of the goods is delayed because the buyer fails to provide a bank guarantee as agreed to in the contract, then the buyer is generally also liable for any damages to the goods due to them being stored.⁶⁹ The seller is also entitled to claim the costs arising from the bank's refusal to honour a bill of exchange or cheque given in payment by the buyer.⁷⁰ Conversely, the buyer is entitled to reimbursement for additional transport costs incurred due to late delivery or delivery of unusable goods by the seller.⁷¹ Equally, he can claim the expense of storing goods which have been delivered late or which are defective and which he returns after avoiding the contract⁷² as well as additional expenditures due to the delivery of substitute goods⁷³ and compensation for additional costs of sorting out defective goods.⁷⁴ Also, the buyer is entitled to reimbursement for reasonable

⁶¹ OLG Düsseldorf, 14 January 1994, CISG-online 119; MünchKomm/P Huber, Art 74, para 52; Witz/Salger/Lorenz/Witz, Art 74, para 22.

⁶² Cf § 2-710 and § 2-715(1) UCC.

⁶³ Schneider, (1997) 9 *Pace Int'l L Rev* 223, 226; Murphey, (1989) 23 *Geo Wash J Int'l & Econ* 415, 459.

⁶⁴ OLG Hamm, 23 March 1978, in Schlechtriem/Magnus, Art 82 EKG, No 8, Art 83, No 4 (loss in value of the materials bought for manufacturing of the goods and expenses for special tools). This also encompasses cases in which the buyer does not call off the goods as required by an instalment contract, BGH, 10 December 1986, *NJW-RR* 1987, 602, 603, *MDR* 1987, 491.

⁶⁵ Heuzé, note 449.; Witz/Salger/Lorenz/Witz, Art 74, para 23; see already OLG Hamm, 6 April 1978, in Schlechtriem/Magnus, Art 6 EAG, No 4, Art 82 EKG, No 9.

⁶⁶ OLG Braunschweig, 28 October 1999, CISG-online 510, *TranspR-IHR* 2000, 4, 6 (costs for storage of venison in a refrigerated warehouse and additional costs for a cover sale such as premiums, phone costs and transportation costs).

⁶⁷ Mohs, Art 63, para 6 above; ICC Ct Arb, 7197/1992, *JDI* 1993, 1029, 1033, 1034, CLOUT No 104; Int Ct Russian CCI, 9 September 1994, UNILEX; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft (Wien), 15 June 1994, CISG-online 691, *RIW* 1995, 590, 591, UNILEX; ICC Ct Arb, 7585/1994, *JDI* 1995, 1015, 1019, UNILEX. In the case last mentioned in the text, the liability is already given pursuant to Article 85.

⁶⁸ Cf OLG Karlsruhe, 8 February 2006, CISG-online 1328.

⁶⁹ But see ICC Ct Arb, 7197/1992, *JDI* 1993, 1028, 1035, 1036, CLOUT No 104 because risk had already passed.

⁷⁰ Cf also LG Konstanz, in Schlechtriem/Magnus, Art 82 EKG, No 3, Art 90 EKG, No 1; OLG Hamm, 14 November 1983, in Schlechtriem/Magnus, Art 82 EKG, No 27, Art 8 EKG, No 8.

⁷¹ Cf CIETAC, 9 November 2005, CISG-online 1444; OLG Köln, 14 August 2006, CISG-online 1405.

⁷² *Delchi Carrier SpA v Rotorex Corp*, U S Ct App (2nd Cir), 6 December 1995, CISG-online 140, 10 F 3d 1024; LG Landshut, 5 April 1995, CISG-online 193.

⁷³ LG Oldenburg, 9 November 1994, CISG-online 114, *RIW* 1996, 65, 66 (travel costs, toll fees, and freight costs even if costs for cure of defects cannot be claimed due to lack of notice of non-conformity).

⁷⁴ OLG Köln, 14 August 2006, CISG-online 1405.





expenses made in assessing, averting, or mitigating damages.⁷⁵ The costs of inspecting the goods to determine whether they are in conformity with the contract (Article 38) are only recoverable, if the contract is avoided or if they are incurred a second time due to the delivery of substitute goods.⁷⁶ Article 77 must be taken into account for all incidental losses; expenses incurred due to the delay are only recoverable, if they are reasonable under the circumstances.

- 28** Particular problems arise with regard to the recovery of costs incurred when pursuing rights. This includes litigation costs (court costs and attorneys' fees), on the one hand, and extra-judicial costs of asserting legal rights, on the other hand. It is primarily left to the parties to make a specific arrangement concerning the allocation of such costs in the contract⁷⁷ or implicitly provide for a suitable rule on allocation of costs by way of a forum selection clause. In absence of an express agreement, the question of whether these costs are recoverable as damages on the basis of Article 74 cannot depend on their classification as substantive or procedural by the relevant *lex fori*,⁷⁸ because this classification diverges in national legal systems. Using this classification as a basis would lead to a non-uniform interpretation and application in a core area of the Convention.
- 29** Today, it is widely agreed that litigation costs cannot be claimed on the basis of Article 74.⁷⁹ The recovery of these costs is a matter of the applicable domestic rules on allocation of costs or the applicable arbitration rules respectively.⁸⁰ The main reason for this approach

⁷⁵ BGH, 25 June 1997, CISG-online 277, NJW 1997, 3311, 3313; Bianca/Bonell/Knapp, Art 77, note 2.6.; Witz/Salger/Lorenz/Witz, Art 74, para 13; Staudinger/Magnus, Art 74, para 54 and Art 77, para 20; for a comparative study see Stoll, *Haftungsfolgen*, p 429 *et seq*; cf also Art 6:96(2) NBW.

⁷⁶ More liberal Stoll/Gruber, 4th German edition of this work, Art 74, para 19, who advocate recovery of inspection costs already in case of delivery of defective goods. Also MünchKomm/P Huber, Art 74, para 35; Staudinger/Magnus, Art 38, para 27; Audit, *Vente internationale*, note 172.; Herber/Czerwenka, Art 74, para 12; cf further § 2–513(2) UCC: 'Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.' As here MünchKomm/Gruber, Art 38, para 66; Brunner, Art 38, para 14.

⁷⁷ Schlechtriem, *IHR* 2006, 51 recommends including a penalty clause to avoid difficulties in the recovery of legal costs.

⁷⁸ Cf in particular CISG-AC, Op 6 Gotanda, Comment 5.2; Gotanda, (2005) 37 *Geo Wash J Int'l L & Econ* 95, 120 *et seq*; Schlechtriem, *IHR* 2006, 49, 51; Schwenger/Hachem, (2009) 57 *Am J Comp L* 457, 471, 472; cf also Orlandi, 5 (2000) *Uniform L Rev* 23 5 (2000), *et seq*; Dixon, (2006) 38 *U Miami Inter-Am L Rev* 426, 427; but see *Zapata Hermanos Sucesores, SA v Hearthside Baking Company, Inc d/b/a Maurice Lenell Cooky Company*, US Ct App. (7th Cir), 19 November 2002, CISG-online 684; Flechtner/Lookofsky, (2003) 7 *VJ* 93, 96; Lookofsky/Flechtner, (2006) 26 *J L & Com* 5 *et seq* defending the substantive-procedural distinction as a method to determine the intent of the drafters of the CISG; MünchKomm/P Huber, Art 74, para 43; Zeller, *Damages*, p 156 *et seq*.

⁷⁹ So expressly *San Lucio et al v Import & Storage Services et al*, US Dist Ct (DNJ), 15 April 2009, CISG-online 1836 ('the CISG is silent with respect to the payment of attorneys' fees'); *Norfolk Southern Railway Company v Power Source Supply, Inc*, US Dist Ct (WD Pa), 25 July 2008, CISG-online 1776 ('Plaintiff is not [...] allowed attorney's fees under Article 74 or any other part of the CISG'); cf also CISG-AC, Op 6 Gotanda, Comment 5.1 *et seq*; Honnold/Flechtner, Art 74, para 408; P Huber/Mullis/P Huber, p 278.

⁸⁰ Mullis, *RabelsZ* 71 (2007), 35, 44, 45; MünchKomm/P Huber, Art 74, para 43; Brunner, Art 74, para 31; Brölsch, *Schadensersatz*, p 69; Stoll/Gruber, 4th German edition of this work, Art 74, para 20; Schwenger, *FS Tercier*, pp 417, 423; Staudinger/Magnus, Art 74, para 52; AAA Interim Award, 23 October 2007, CISG-online 1645; CIETAC, 7 July 2003, CISG-online 1593; ICC Ct Arb, 20 December 1999, CISG-online 1646; but see probably LG Düsseldorf, 28 August 2003, CISG-online 1619 (claim for reimbursement of attorneys' fees apparently only denied for lack of proof); unclear CIETAC, 11 February 2000, CISG-online 1529; unclear also Hamburg Chamber of Commerce, 21 March 1996, CISG-online 187; ICC Ct Arb, 7585/1992, CISG-online 105





is that the recoverability of such costs based on Article 74 would usually only be available to successful plaintiffs while successful defendants would regularly not be able to recover such costs as they could not show a breach of contract on the side of the plaintiffs as basis for contract damages.⁸¹ This would violate the principle of equality between the parties which is embodied in the CISG.⁸² Costs which are in excess of what can be recovered under the applicable rules on allocation of costs cannot be recovered under Article 74 either.

It is, however, controversial whether extra-judicial costs incurred in pursuing rights can be recovered under Article 74. In accordance with their domestic approach, it is mainly German courts and authors who advocate the reimbursement of attorneys' fees which arose outside of court.⁸³ A US court⁸⁴ by way of *obiter* stated that pre-procedural costs incurred in pursuing rights were recoverable as incidental damages in cases where they serve to mitigate loss. The justification of the general recoverability of extra-judicial costs is based on the difficulties in separating them from the costs of mitigating damages and on the fact that many domestic legal systems do not distinguish such costs.⁸⁵ The argument ultimately rests on a substance-procedure dichotomy, which in the author's opinion is not a proper solution of the problem. Here as well, it is the fact that recovery based on Article 74 would lead to an unjustified preferential treatment of the successful plaintiff over the successful defendant which is decisive. For this reason, whether or not and to what extent extra-judicial costs are recoverable must also be left to the applicable procedural rules on allocation of costs.⁸⁶ Domestic law on damages, however, remains inapplicable as long as the subject matters are not frivolous claims, as these are governed by domestic tort law.

(awarding 'costs and expenses (legal costs, arbitration)' under Article 74); probably deviating from the position advocated here Dixon, (2006) 38 *U Miami Inter-Am L Rev* 405 *et seq.*

⁸¹ See *Zapata Hermanos Sucesores, SA v Hearthside Baking Company, Inc d/b/a Maurice Lenell Cooky Company*, US Ct App (7th Cir), 19 November 2002, CISG-online 684 where J Posner expressly asked 'what if the defendant won?'; cf also Schwenzer, *FS Tercier*, pp 417, 423.

⁸² See Schwenzer/Hachem, 'Preamble', para 8 and Art 7, para 34 above; cf also Schwenzer, *FS Tercier*, pp 417, 423.

⁸³ OLG München, 5 March 2008, CISG-online 1686; AG Landsberg, 21 June 2006, CISG-online 1460, confirmed by OLG München, 17 November 2006, CISG-online 1395; OLG Köln, 3 April 2006, CISG-online 1218; OLG Düsseldorf, 22 July 2004, CISG-online 916; OLG Düsseldorf, 11 July 1996, CISG-online 201; OLG Düsseldorf, 14 January 1994, CISG-online 119; LG Coburg, 12 December 2006, CISG-online 1447; LG Bayreuth, 10 December 2004, CISG-online 1131; LG Frankfurt a M, 16 September 1991, CISG-online 26; AG Alsfeld, 12 May 1995, CISG-online 170; AG Augsburg, 29 January 1996, CISG-online 172; HGer Aargau, 19 December 1997, CISG-online 418; Gerichtshof Arnhem, 15 April 1997, *NIPR* 1998, No 101, UNILEX; RB Zutphen, 27 February 2008, CISG-online 1692; RB Rotterdam, 15 October 2008, CISG-online 1899; RB Breda, 16 January 2009, CISG-online 1789; RB Rotterdam, 21 January 2009, CISG-online 1815; P Huber/Mullis/P Huber, p 279; Staudinger/Magnus, Art 74, para 52; Witz/Salger/Lorenz/Witz, Art 74, para 13; Herber/Czerwenka, Art 74, para 7; different Stoll, *Schadensersatzpflicht*, pp 267, 268.

⁸⁴ *Zapata Hermanos Sucesores, SA v Hearthside Baking Company, Inc d/b/a Maurice Lenell Cooky Company*, US Ct App (7th Cir), 19 November 2002, CISG-online 684; in agreement Flechtner/Lookofsky, (2003) 7 *VJ* 93 *et seq.*

⁸⁵ Stoll/Gruber, 4th German edition of this work, Art 74, para 20; LG Frankfurt a M, 16 September 1991, CISG-online 26; Staudinger/Magnus, Art 74, para 52; Witz/Salger/Lorenz/Witz, Art 74, para 13; Herber/Czerwenka, Art 74, para 7.

⁸⁶ In detail Schwenzer, *FS Tercier*, pp 417, 424, 425.





- 31 According to the prevailing view, the costs for the employment of a debt-collection agency are also not recoverable under Article 74,⁸⁷ as this is considered to be an unreasonable measure of enforcing payment, which violates Article 77. Under the approach advocated here, these costs also have to be considered as extra-judicial costs which are generally not recoverable as damages.
- 32 (c) **Consequential loss.** The notion of consequential damages encompasses additional losses beyond those caused by the non-performance as such. These mainly include the promisee's liability to third parties as a result of the breach. The buyer may have already re-sold the goods and therefore be liable to his customers for non- or defective performance due to the seller's non- or defective performance.⁸⁸ If the buyer has agreed to a contractual penalty in a subsequent contract, this penalty can generally also be recovered from the seller pursuant to Article 74 (cf on foreseeability paragraph 56 below). It is controversial, whether damages resulting from the buyer's liability to third parties for death or personal injury caused by the seller's defective products can be recovered under the Convention or whether these claims are excluded from the CISG by Article 5. The probably (still) prevailing opinion among German authors denies the applicability of the Convention to the recourse of the buyer in these cases.⁸⁹ Recently, however, there is a growing tendency which favours admitting claims for recourse on the basis of the Convention as part of the buyer's financial damage.⁹⁰ This opinion is convincing particularly because it offers one comprehensive mechanism for the buyer's recourse, thus rendering it unnecessary to distinguish between separate heads of the buyer's liability. As regards the seller, consequential losses may be incurred where the buyer refuses to take delivery of the goods (Article 53), eg if the seller is thus forced to terminate contracts with suppliers resulting in liability.⁹¹
- 33 According to the basic principles of liability loss, legal costs—be they extra-judicial or procedural—incurred by the promisee in disputes with third parties can generally be recovered from the promisor under Article 74.⁹² The arguments for denying recovery of such costs as damages under Article 74 in the relationship between promisee and promisor⁹³ do not apply here.

⁸⁷ OLG Köln, 3 April 2006, CISG-online 1218; LG Frankfurt a M, 16 September 1991, CISG-online 26; LG Berlin, 6 October 1992, CISG-online 173; LG Düsseldorf, 25 August 1994, CISG-online 451; AG Tiergarten, 13 March 1997, CISG-online 412, with affirmative note by Peter, *IPRax* 1999, 159–61; Stoll/Gruber, 4th German edition of this work, Art 74, para 20; P Huber/Mullis/P Huber, p 279 ('rarely' compensable); but see Soergel/Lüderitz/Dettmeier, Art 74, para 6; Staudinger/Magnus, Art 74, para 52; Witz/Salger/Lorenz/Witz, Art 74, para 39; Brunner, Art 74, para 31; Brölsch, *Schadensersatz*, p 72.

⁸⁸ BGH, 25 November 1998, CISG-online 353, *NJW* 1999, 1259, 1261 confirming the first instance decision of LG Heidelberg, 2 October 1996, CISG-online 264; OLG Köln, 21 May 1996, CISG-online 254; ICC Ct Arb, 20 December 1999, CISG-online 1646: costs of cover purchase conducted by buyer's customer recoverable due to long-standing commercial practice between the parties; Staudinger/Magnus, Art 74, para 45.

⁸⁹ Stoll/Gruber, 4th German edition of this work, Art 74, para 25; Ferrari, 5th German edition of this work, Art 5, para 8; Brunner, Art 5, para 1; Witz/Salger/Lorenz/Lorenz, Art 5, para 5; Staudinger/Magnus, Art 5, para 8; MünchKomm/H P Westermann, Art 5, para 3.

⁹⁰ See Schwenzer/Hachem, Art 5, para 10 above; Schlechtriem/P Butler, *UN Law*, para 39 even consider this to be the majority opinion; Koller, *FS Wiegand*, p 441 *et seq*; OLG Düsseldorf, 2 July 1993, CISG-online 74.

⁹¹ LG Aachen, 14 May 1993, CISG-online 86.

⁹² Cf MünchKomm/P Huber, Art 74, para 44; Staudinger/Magnus, Art 74, para 52; LG Berlin, 13 September 2006, CISG-online 1620, *IHR* 2006, 168, 169.

⁹³ See paras 29, 30 above.





Furthermore, consequential loss may be incurred where the seller's breach of contract in turn leads to the buyer breaching his contracts with his customers thus damaging his reputation (loss of reputation, loss of goodwill). It is widely accepted that such damages to reputation are generally recoverable under Article 74.⁹⁴ The only remaining controversy is, whether these losses are pecuniary or non-pecuniary in nature, the latter of which would be recoverable as exception to the general rule that non-pecuniary losses are not recoverable under the CISG.⁹⁵ Considering the economic importance of goodwill, it can hardly be doubted that the loss is pecuniary, even though calculation and the required standard of proof are uncertain and controversial.⁹⁶ Loss of reputation must not be confused with a claim for loss of profit, as the former constitutes an additional damage. However, loss of profit resulting from loss of business transactions indicates, and may serve as proof, that there has been a loss of reputation. The calculation should take into account the size of the company, the market, the value of a trademark and the necessary costs of re-establishing the reputation. 34

Consequential losses also include damage to the buyer's own property as result of defective goods, eg the deterioration of semi-finished products resulting from defects in the delivered machine, the loss of raw material due to processing in combination with unsuitable materials, or the destruction of the buyer's factory by fire caused by a defect in the delivered machine.⁹⁷ While the general recoverability under Article 74 is undisputed, there is disagreement in practice and doctrine as to whether domestic tort law may be applied concurrently to the Convention. While some advocate leaving this decision to the applicable domestic law,⁹⁸ others advocate excluding domestic tort law in these cases.⁹⁹ A middle ground approach seems preferable:¹⁰⁰ damage to objects which are typically affected by the defective performance, such as materials to be processed by or incorporated into the 35

⁹⁴ Cf CISG-AC, Op 6 Gotanda, Comment 7.1; Stoll/Gruber, 4th German edition of this work, Art 74, para 12; Schlechtriem/P Butler, *UN Law*, para 299a; Schlechtriem, (2007) 19 *Pace Int'l L Rev* 89, 95; P Huber/Mullis/P Huber, p 270; Staudinger/Magnus, Art 74, para 27; Witz/Salger/Lorenz/Witz, Art 74, para 14; MünchKomm/P Huber, Art 74, para 39; Brunner, Art 74, para 20; Honsell/Schönle, Art 74, para 7; Saidov, (2006) 25 *J L & Com*, 393 *et seq*; *idem*, *Damage to Business Reputation and Goodwill*, p 389 *et seq*; but see LG München, 30 August 2001, CISG-online 668; Honsell, *SJZ* 1992, 361, 364.

⁹⁵ For the former see CISG-AC, Op 6 Gotanda, Comment 7.1; Schlechtriem/P Butler, *UN Law*, para 299a; Witz/Salger/Lorenz/Witz, Art 74, para 14; for the latter Honsell/Schönle, Art 74, para 7; Staudinger/Magnus, Art 74, para 50; MünchKomm/P Huber, Art 74, para 39; Brunner, Art 74, para 20.

⁹⁶ Cf para 64 *et seq* below.

⁹⁷ Cf the examples in Schlechtriem/P Butler, *UN Law*, para 40.

⁹⁸ See *Miami Valley Paper, LLC v Lebbing Engineering and Consulting GmbH*, US Dist Ct (SD Ohio), 10 October 2006, CISG-online 1362; Stoll/Gruber, 4th German edition of this work, Art 74, para 7; Ferrari, 4th German edition of this work, Art 5, para 12; *idem*, *RabelsZ* 71 (2007), 52, 74; Schlechtriem, previous edition of this work, Art 4, para 23 a; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 14; Soergel/Lüderitz/Fenge, Art 5, para 4; Staudinger/Magnus, Art 5, para 14; Bamberger/Roth/Saenger, Art 5, para 3; Brunner, Art 5, para 2; Honsell/Siehr, Art 5, para 4; Witz/Salger/Lorenz/Lorenz, Art 4, para 28; Lookofsky, *Understanding the CISG*, pp 25, 26, 76 *et seq*; *idem*, (2003) 13 *Duke J Comp & Int'l L* 263, 285.

⁹⁹ See OLG Thüringen, 26 May 1998, CISG-online 513; Bianca/Bonell/Khoo, Art 5, note 3.2.; Honnold/Flechtner, Art 5, para 73; Herber/Czerwenka, Art 5, para 5; Enderlein/Maskow/Strohbach, Art 5, note 1.2.; Kühlen, *Produkt Haftung*, p 114; Schmid, *Lückenfüllung und Normenkonkurrenz*, p 55; Mather, (2001) 20 *J L & Com* 155, 161.

¹⁰⁰ See already Schwenzler, (1989) 9 *Tel Aviv University Studies in Law* 127 *et seq*; accord from Schlechtriem/P Butler, *UN Law*, para 40.





purchased goods, must remain subject to sales law exclusively. However, the buyer can concurrently resort to the Convention and domestic tort law where the seller breaches general safety expectations and it is merely by coincidence that the buyer, instead of a third party, suffers damage to his property—for instance damage to fixtures caused by an exploding machine.¹⁰¹

3. Loss of profit

- 36** While the term ‘loss’ within the meaning of Article 74 envisages detriment to the assets existent at the time of the conclusion of the contract, the notion of ‘loss of profit’ covers every increase in assets which was prevented by the breach. Generally both types of loss are treated equally. However, where the buyer fails to give notice of the lack of conformity—even when having a reasonable excuse—pursuant to Article 44 he cannot claim loss of profit.¹⁰² Loss of profit envisages firstly the profit which the buyer could have realized in a resale but which he has lost due to the seller’s breach of contract. Furthermore, loss of profit includes losses resulting from the inability to keep business running caused by the breach of contract. It follows from the principle of full compensation that not only those profits are recoverable which have been lost up until the decision of the court or arbitral tribunal respectively, but also predictably achievable and calculable future profits.¹⁰³ The notion of loss of profit not only envisages the net profit, but also fixed costs (so-called general expenses) on a *pro-rata* basis.¹⁰⁴
- 37** In line with a recently advocated view the loss of a chance of winning is generally to be recognized as recoverable loss under Article 74.¹⁰⁵ It is beyond doubt that such chances have economic value.¹⁰⁶ Article 7.4.3(2) of the UNIDROIT Principles also stipulates the reimbursement for loss of chances. The calculation of the loss incurred and the requirements regarding proof are different matters.
- 38** Instead of claiming lost profit, the promisee can also claim recovery of frustrated expenses based on Article 74.¹⁰⁷ If, for example, the buyer has built a warehouse for the

¹⁰¹ See also Schwenger/Hachem, Art 5, para 14 above.

¹⁰² Cf ICC Ct Arb, 9187/1999, CISG-online 705; Weber, *Vertragsverletzungsfolgen*, p 196; Witz/Salger/Lorenz/Witz, Art 74, para 15; Heuzé, note 449.

¹⁰³ Bianca/Bonell/Knapp, Art 74, note 3.5.; Ziegler, p 209; express reference in Art 9:501 PECL; but see Witz/Salger/Lorenz/Witz, Art 74, para 15 (issue of the applicable procedural rules).

¹⁰⁴ OLG Hamburg, 26 November 1999, CISG-online 515, *IHR* 2001, 19, 21, 22, with concurring note by Piltz; *Delchi Carrier SpA v Rotorex Corp*, US Ct App (2nd Cir), 6 December 1995, CISG-online 140; Bianca/Bonell/Knapp, Art 74, notes 3.10., 3.11.

¹⁰⁵ CISG-AC, Op 6 Gotanda, Comment 3.15; Saidov, (2006) 22 *J Cont L* 1, 39 *et seq*; *idem*, (2006) 25 *JL & Com* 393, 400 *et seq*; Schwenger/Hachem, *Scope of Damages*, p 98; probably also Brölsch, *Schadensersatz*, p 61; but see *Delchi Carrier SpA v Rotorex Corp*, US Ct App (2nd Cir), 6 December 1995, CISG-online 140; Stoll/Gruber, 4th German edition of this work, Art 74, para 23; Neumayer/Ming, Art 74, note 1.; for comparative analysis see Stoll, *Haftungsfolgen*, pp 41, 42.

¹⁰⁶ See Schwenger/Hachem, *Scope of Damages*, p 98.

¹⁰⁷ Cf Schlechtriem/P Butler, *UN Law*, para 308; Schmidt-Ahrendts, *IHR* 2006, 63 *et seq*, 68; Stoll/Gruber, 4th German edition of this work, Art 74, paras 5, 18; P Huber/Mullis/P Huber, p 278; Bamberger/Roth/Saenger, Art 74, para 16; LG Berlin, 30 September 1992, CISG-online 70; CIETAC, 4 April 1997, CISG-online 1660: ‘normal expense[s] for gaining the foreseen profit’ are ‘contained in the foreseen profits’ and therefore not recoverable where lost profits are awarded, whereas those expenses which ‘should not have been paid [...] for gaining the foreseen profit’ are recoverable in addition to lost profits. Wrongly awarding loss of





goods ordered which turns out to be useless on account of non-delivery, he can claim these costs as damages. In commercial trade it is to be assumed that parties calculate in a way that the profit expected will at least cover the expenses made in connection with the contract. Therefore, frustrated expenses constitute the minimum loss incurred, the recovery of which is of particular importance for the buyer where a higher loss of profit cannot be proven.¹⁰⁸

4. Non-pecuniary loss

The Convention does not expressly exclude liability for non-pecuniary loss. Therefore, damages which are purely non-pecuniary may be recoverable where the intangible purpose of performance became part of the contract, rendering the loss incurred a typical consequence of non-performance.¹⁰⁹ If one, however, shares the preferable view that damage incurred, eg due to loss of reputation or loss of chance are pecuniary in nature, it is hardly conceivable that there remain any non-pecuniary losses against which sales contracts intend to protect. In particular, damages for pain and suffering, mental distress and loss of amenities cannot be claimed on the basis of Article 74. Parties to international sales contracts do not contract and pay for undisturbed enjoyment of life.¹¹⁰

5. Causation

Only loss caused by the breach of contract is recoverable. It is necessary—but generally also sufficient—for the breach to have been the precondition for the occurrence of the detriment (*conditio sine qua non*, ‘but-for rule’).¹¹¹ It is irrelevant whether the breach caused the damage directly or indirectly. The Convention leaves no room for theories on causation which limit the liability for damages to probable or not too remote sequences of events. Excluding the promisor’s liability for remote damage outside of his sphere of responsibility may only be done by virtue of the foreseeability rule in Article 74, sentence 2.¹¹²

profit and additionally the full amount of interest the buyer had to pay for a bank loan in order to make the down payment for the contract which was later avoided: Serbian Chamber of Commerce, 1 October 2007, CISG-online 1793. For a comparative analysis see Stoll, *FS Neumayer*, p 313 *et seq*; Schackel, *ZEuP* 2001, p 248 *et seq*.

¹⁰⁸ For a case where the seller was awarded damages based on frustrated expenses such as foreign exchange procedure fee, remittance fee, import agency fee and letter of credit procedure fee, cf CIETAC, 31 October 2005, CISG-online 1715; cf also CIETAC, 26 December 2005, CISG-online 1744.

¹⁰⁹ Stoll/Gruber, 4th German edition of this work, Art 74, para 12; Stoll, *FS Neumayer*, pp 313, 327; generally agreeing Magnus, *FS Herber*, p 28; Weber, *Vertragsverletzungsfolgen*, p 195; Staudinger/Magnus, Art 74, para 27; disapproving Honsell/Schönle, Art 74, para 7; Schlechtriem/P Butler, *UN Law*, paras 299, 299a; Ryffel, pp 50, 51; P Huber/Mullis/P Huber, p 279 (immaterial damages ‘as a rule’ not recoverable).

¹¹⁰ Cf Schwenzler/Hachem, *Scope of Damages*, p 100.

¹¹¹ Honsell/Schönle, Art 74, paras 20, 21; Staudinger/Magnus, Art 74, paras 28, 29; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 6; Witz/Salger/Lorenz/Witz, Art 74, para 26.

¹¹² Bianca/Bonell/Knapp, Art 74, note 2.6.; Honsell/Schönle, Art 74, para 21; Heuzé, note 451.; Bianca/Bonell, Arts 74–77, note 2.; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 6; Witz/Salger/Lorenz/Witz, Art 74, para 26; Achilles, Art 74, para 5; Weber, *Vertragsverletzungsfolgen*, p 197.





VI. Calculation of loss

1. Concrete and abstract calculation of loss

- 41** The promisee's loss arising from a breach of contract must generally be calculated concretely.¹¹³ With regard to the actual non-performance loss, Article 76, however, stipulates an abstract calculation of the damages when the contract has been avoided. This is done by taking the difference between the contract price and the market price of the goods while precluding the promisor from invoking that in fact no substitute transaction was carried out. Notably German speaking authors consider Article 76 to be an exception and deny an abstract calculation of damages under Article 74.¹¹⁴ At least with regard to the actual non-performance loss this view cannot be followed. Taking a comparative perspective reveals the emergence of strong tendencies in most jurisdictions to compensate abstractly calculated loss of use.¹¹⁵ The principle of full compensation (cf paragraph 6 *et seq* above) in itself demands the admissibility of abstract calculation also under the CISG. It cannot be justified that a truck seller is to compensate a commercial carrier for the costs of vehicles the carrier rents in case of non-delivery, while the same breach of contract remains without consequences when the buyer is an NGO which intends to use the trucks to deliver food to conflict areas and cannot rent substitute vehicles where they are needed.¹¹⁶ The abstract damages from loss of use can easily be calculated due to the fact that nowadays rental markets exist for practically every type of goods.¹¹⁷

2. Betterment

- 42** Should the promisee obtain benefits from the breach of contract or from the damages he receives, it is questionable whether or not these must be deducted.¹¹⁸ The principle of avoiding overcompensation is especially emphasized by German authors by way of strict application of the 'differential theory' (*Differenztheorie*).¹¹⁹ In contrast, other jurisdictions accept a possible overcompensation as a by-product to the performance principle

¹¹³ OLG Hamburg, 26 November 1999, CISG-online 515; Stoll/Gruber, 4th German edition of this work, Art 74, para 29; P Huber/Mullis/P Huber, p 271; Herber/Czerwenka, Art 74, para 9; Neumayer/Ming, Art 74, note 2.; Staudinger/Magnus, Art 74, para 25; Schneider, (1997) 9 *Pace Int'l L Rev* 223, 229, 230; see also Art 7.4.3 PICC; but see Honsell/Schönle, Art 74, paras 35, 36.

¹¹⁴ Stoll/Gruber, 4th German edition of this work, Art 74, para 29; Staudinger/Magnus, Art 74, para 25; MünchKomm/P Huber, Art 74, para 21; MünchKommHGB/Mankowski, Art 74, para 10; Brunner, Art 74, para 8; Herber/Czerwenka, Art 74, para 9; Soergel/Lüderitz/Dettmeier, Art 74, para 1; Reinhart, Art 74, para 3; Brölsch, *Schadensersatz*, p 47.

¹¹⁵ See for domestic German law Wagner, *Gutachten*, A 25 *et seq*, A 32; for the previous legal situation GrS BGH, 9 July 1986, *NJW* 1987, 50; MünchKomm/Oetker, § 249 BGB, para 58 *et seq*. For domestic Swiss law see BaslerKomm/Wiegand, Art 97 OR, para 38; Schwenger, *OR AT*, para 14.06. For English law McGregor, para 20–022; *Vanda Compania Limitada of Costa Rica v Societe Maritime Nationale of Paris*, (*The 'Ile aux Moines'*) [1974] 2 Lloyd's Rep 502.

¹¹⁶ See for details Schwenger/Hachem, *Scope of Damages*, p 95 *et seq*.

¹¹⁷ Cf Schwenger/Hachem, *Scope of Damages*, p 96.

¹¹⁸ On the question of offsetting losses and profits, see Spoorenberg/Fellrath, *IPRax* 2009, 357 *et seq*.

¹¹⁹ Cf Stoll/Gruber, 4th German edition of this work, Art 74, para 31; Staudinger/Magnus, Art 74, paras 18, 22; Witz/Salger/Lorenz/Witz, Art 74, para 14; Brölsch, *Schadensersatz*, p 43.



(paragraph 6 above) and the principle of full compensation.¹²⁰ For example, the practice of deduction in case of ‘new for old’ is now accepted only in the Germanic legal systems.¹²¹ Therefore, a deduction of profits based on Article 74 of the Convention can only be approved of in so far as it does not contradict the performance principle and does not endanger full compensation of the promisee.

3. Disgorgement of profits

There is currently general agreement amongst German authors that Article 74 does not grant a claim for the disgorgement of profits acquired by the party in breach.¹²² However, also in this regard tendencies have developed in domestic legal systems affirming a disgorgement of profits.¹²³ Against the background of the paramount performance principle (paragraph 6 above), the general idea that a breach of contract must not pay also has to be upheld under the Convention. It is true that there are likely to be few cases in the international sale of goods in which the promisee has suffered no loss whatsoever while the promisor was able to make a profit.¹²⁴ However, targeting the profits of the promisor is possible and necessary in the following constellations: the seller sells the goods a second time and realizes a higher profit than agreed to under the contract with the first buyer;¹²⁵ the seller, who is contractually obliged to manufacture the goods under humane and environmentally friendly conditions, lowers his production costs by resorting to production mechanisms which are in breach of the agreement, thereby increasing his profit.¹²⁶ Against an express stipulation in the contract the buyer supplies the European market with the goods purchased and makes according profits. In all of these cases, the performance principle demands that the profits the promisor has obtained as a result of his breach of contract be disgorged. One may also simply view this as a way of calculating the promisee’s damages in cases where these are otherwise difficult or impossible to prove.

¹²⁰ Cf McGregor, para 1–027; for a comparative analysis Stoll, *Haftungsfolgen*, p 184.

¹²¹ Stoll, *Haftungsfolgen*, p 181.

¹²² Stoll/Gruber, 4th German edition of this work, Art 74, para 31; MünchKommHGB/Mankowski, Art 74, para 9; MünchKomm/P Huber, Art 74, para 16; Staudinger/Magnus, Art 74, para 18; Brölsch, *Schadensersatz*, p 44; Honsell, *SJZ* 1992, p 361.

¹²³ Cf Arts 6:78, 6:104 NBW; for English law *Attorney General v Blake* [2001] 1 A C 268 (HL); for domestic Canadian law Fridman, *Contracts*, p 765; for domestic German law Wagner, *Gutachten*, A 83.

¹²⁴ Cf the famous case *Attorney General v Blake* [2001] 1 AC 268 (HL): the spy Blake had defected into the Soviet Union and published an autobiography in 1989 in which he disclosed information which was not classified as ‘confidential’ anymore, but was nevertheless encompassed by the confidentiality clause in his contract. The British Crown claimed the remuneration Blake had agreed on with the publisher, the House of Lords decided in favour of the British Crown. Cf Jones, *FS Schlechtriem*, p 763 and the parallel case in the US *Snapp v United States*, US Supr Ct, 19 February 1980, 444 US 507.

¹²⁵ This constellation is often also labelled ‘efficient breach of contract’, ie the seller’s profit from the second sale exceeds the damages to be paid to the first buyer. Against this concept with convincing arguments already Friedmann, (1989) 18 *J Leg Stud* 1 *et seq*.

¹²⁶ Probably disagreeing Schlechtriem, (2007) 19 *Pace Int’l L Rev* 89, 100 *et seq* who considers the inclusion of a liquidated damages or penalties clause to be the only way for the buyer to obtain damages in such situations unless he indeed suffered a financial loss. Against this argument Schwenzet/Hachem, *Scope of Damages*, p 95.



4. Relevant time for calculation of loss

- 44** In cases of concrete calculation of loss, the damage may change over the course of time. In these cases, a distinction must be drawn between the time in which the damage occurs and the time for its assessment. With regard to the latter the date when the court or arbitral tribunal decides is relevant.¹²⁷ This also prevents a reduction in the value of compensation due to a rise in prices between the moment of the occurrence of the damage and the date of the final and binding decision by the court or arbitral tribunal on the damages claim.¹²⁸ In cases of abstract calculation of damages for actual non-performance loss, Article 76(1) determines the relevant time according to the market price rule. Where a loss of use is calculated abstractly, the relevant point in time is when the buyer should have received the goods as required by the contract.

VII. Foreseeability rule (sentence 2)

1. General

- 45** The promisor's strict liability for performance of contractual obligations is moderated by the fact that the Convention limits compensation to foreseeable loss. The foreseeability rule limits the promisor's liability and the extent of damages to the risks which he was able to foresee at the time the contract was concluded, taking into account the circumstances and the purpose of the contract. Rather than the liability as such, the foreseeability rule concerns only the consequences of liability independent of whether and to what extent the promisor is responsible for the breach.¹²⁹ It even applies where the promisor has intentionally breached his contractual obligations.¹³⁰ In this respect it differs from Article 9:503 PECL and Article III. – 3:703 DCFR, whereas Article 7.4.4 of the UNIDROIT Principles follows the model of the CISG.¹³¹

¹²⁷ Staudinger/Magnus, Art 74, para 55; Bamberger/Roth/Saenger, Art 74, para 2; Roßmeier, *RIW* 2000, 407, 412; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 12; Weber, *Vertragsverletzungsfolgen*, pp 203, 204; Ziegler, p 209; a contrary position is advocated by Neumayer/Ming, Art 74, note 2.: the procedural law of the *lex fori* is relevant in order to determine the point in time at which damages are to be assessed. See for a different view also Bianca/Bonell/Knapp, Art 74, note 3.16., who advocates an assessment of damages 'at an appropriate time' whereby he seems to refer primarily to the time of the occurrence of the damage and when it is ascertained; similarly Sutton, (1989) 50 *Ohio St L J* 743.

¹²⁸ On the classification of claims for damages as claims for value of compensation as opposed to claims for a certain sum cf Gruber, *Geldwertschwankungen*, p 105 *et seq* with further references.

¹²⁹ This has already been emphasized by Rabel, *Recht des Warenkaufs*, vol 1, p 509. See also Karollus, p 217; Piltz, *Internationales Kaufrecht*, para 5-545; Witz/Salger/Lorenz/Witz, Art 74, para 2; Staudinger/Magnus, Art 74, para 32; Bianca/Bonell/Knapp, Art 74, note 2.15.; Herber/Czerwenka, Art 74, para 11; for details Faust, pp 26, 27, 49, 50, 314 *et seq*. This also corresponds with the legal situation in England and the US, see Treitel, *Remedies for Breach*, p 89; Faust, pp 117, 118, also with references for different opinions in US literature and case law.

¹³⁰ Audit, *Vente internationale*, note 172.; Bianca/Bonell/Knapp, Art 74, note 2.15.; Bianca/Bonelli, Arts 74–77, note 2.; Vékás, *Foreseeability*, p 160; more restrictively Enderlein/Maskow/Strohbach, Art 74, note 9., who state that such a limitation can be derived from the general principles underlying the Convention; with doubts Heuzé, note 450. Romanic laws decide otherwise, cf Art 1150 French Cc, Art 1225 Italian Cc and Art 1107(2) Spanish Cc.

¹³¹ Comprehensively on the foreseeability rule in the CISG, PICC and PECL: Saidov, *Damages in Int'l Sales*, p 101 *et seq*.





Although the foreseeability rule was strongly influenced by the Anglo-American contemplation rule,¹³² there are significant differences in essential points.¹³³ For this reason, case law on domestic law of Anglo-American States cannot be used for the interpretation of Article 74, sentence 2.¹³⁴ **46**

2. Relevant persons and relevant point in time

In contrast to Anglo-American law, in which the ‘contemplation’ of both parties is decisive,¹³⁵ the foreseeability of loss pursuant to Article 74, sentence 2 is to be determined only by having regard to the perspective of the party in breach of contract. The decisive moment for determining foreseeability is the time of the conclusion of the contract. It is irrelevant whether or not the promisor became aware or ought to have become aware of additional risks after this point in time.¹³⁶ **47**

3. Standard of foreseeability

In contrast to the Anglo-American legal systems, which require that the occurrence of the damage be foreseen as a ‘probable consequence’, Article 74, sentence 2 requires only that the party in breach foresaw or ought to have foreseen the damage as a ‘possible consequence’ of the breach at the time of the conclusion of the contract. A certain amount of probability—as called for by a number of authors¹³⁷—is not required by the wording of Article 74, sentence 2. However, it must be noted that ‘possible consequences’ in any case only include those which were foreseeable under the particular circumstances of the individual case, which creates a sufficient normative limitation.¹³⁸ **48**

Generally, foreseeability is to be determined using an objective standard.¹³⁹ The decisive question is what a reasonable person in the shoes of the promisor and aware of the **49**

¹³² Cf *Hadley v Baxendale* [1854] L J Ex 179; § 2–715(2)(a) UCC; Faust, p 73 *et seq*; Brölsch, *Schadensersatz*, p 50 *et seq*; Saidov, *Limiting Damages*, II 2. Still of fundamental importance Rabel, *Recht des Warenkaufs*, vol 1, p 483 *et seq*.

¹³³ Cf paras 47, 48 below.

¹³⁴ Therefore wrong *TeeVee Toons, Inc & Steve Gottlieb, Inc v Gerhard Schubert GmbH*, US Dist Ct (SD NY), 23 August 2006, CISG-online 1272, where the court consulted cases on domestic US law.

¹³⁵ Treitel, *Remedies for Breach*, p 88, with further references; Ferrari, (1993) 53 *La L Rev* 1257, 1267–9; Vékás, *Foreseeability*, pp 159, 160; also Murphey, (1989) 23 *Geo Wash J Int'l L & Econ* 415–74.

¹³⁶ MünchKomm/P Huber, Art 74, paras 29, 33; Honsell/Schönle, Art 74, para 26; Neumayer/Ming, Art 74, note 3.; Staudinger/Magnus, Art 74, para 38; Bianca/Bonell/Knapp, Art 74, note 2.13.; Heuzé, note 450.; Faust, p 10 *et seq*; Brölsch, *Schadensersatz*, pp 52, 53; Saidov, *Limiting Damages*, II 2(a)(iii)(b); but cf *idem*, *Damages in Int'l Sales*, pp 119, 120, arguing that the ‘assumption of risk’ rationale may in some cases lead to a later time for assessing foreseeability being more appropriate, eg in cases of modification of contract or for long-term contracts.

¹³⁷ Stoll/Gruber, 4th German edition of this work, Art 74, para 35; Soergel/Lüderitz/Dettmeier, Art 74, para 15; Witz/Salger/Lorenz/Witz, Art 74, para 28. The measure ‘probable’ of the domestic US law assigned to the CISG: *Delchi Carrier SpA v Rotorex Corp.*, US Ct App (2nd Cir), 6 December 1995, CISG-online 140.

¹³⁸ So, correctly, Farnsworth, (1979) 27 *Am J Comp L* 247, 253.

¹³⁹ OGH, 14 January 2002, CISG-online 643; Staudinger/Magnus, Art 74, para 35; MünchKomm/P Huber, Art 74, para 30 *et seq*; Enderlein/Maskow/Strohbach, Art 74, note 10.; Witz/Salger/Lorenz/Witz, Art 74, para 32; Brunner, Art 74, para 12; Weber, *Vertragsverletzungsfolgen*, p 198; Heuzé, note 450.; Brölsch, *Schadensersatz*, pp 53, 54; Saidov, *Limiting Damages*, II 2(a)(iii)(d); Piltz, *Internationales Kaufrecht*, para 5-545.





circumstances at the time of the conclusion of the contract would have foreseen. Normative elements such as the allocation of risks according to the contract, the purpose of the contract, and the protection intended to be offered by specific contractual obligations must be taken into account.¹⁴⁰ The foreseeability rule is supplemented by a subjective element.¹⁴¹ Foreseeability can thus be extended, in particular by the promisee drawing the promisor's attention to special, objectively unforeseeable circumstances.¹⁴²

4. Object of foreseeability

- 50** Only the damage incurred must have been foreseeable, not the breach of contract which constitutes the basis for the damages claim.¹⁴³ The decisive question therefore is whether the possibility of the occurrence of the damage as well as the nature of the damage were foreseeable to the promisor at the time of the conclusion of the contract assuming that the contract were breached accordingly. Although it is not necessary for the party in breach to have foreseen the precise amount of the loss, the general extent must nevertheless have been foreseeable.¹⁴⁴ If the extent of the loss is significantly higher than foreseeable, the risk which has materialized differs from the risk which was foreseeable.¹⁴⁵

5. Examples

- 51** In order to facilitate the application of the foreseeability rule to individual cases, German-speaking authors in particular have developed several types of cases which are outlined below.¹⁴⁶ This seems legitimate insofar as the foreseeability is to be assessed objectively. However, identifying certain types of cases must not lead to disregarding the particular circumstances of the individual case.¹⁴⁷

¹⁴⁰ In this sense also U Huber, *RebelsZ* 43 (1979) 413, 469, 470; Schlechtriem/P Butler, *UN Law*, para 302; Ziegler, p 210; Staudinger/Magnus, Art 74, paras 35, 37; Soergel/Lüderitz/Dettmeier, Art 74, para 16; Witz/Salger/Lorenz/Witz, Art 74, paras 29, 30; P Huber/Mullis/P Huber, p 274; also already von Caemmerer, *AcP* 178 (1978), 121, 142, 143; against considering normative elements Faust, pp 34 *et seq.*, 273 *et seq.*, 331, 332.

¹⁴¹ OGH, 14 January 2002, CISG-online 643; Staudinger/Magnus, Art 74, para 37; Enderlein/Maskow/Strohbach, Art 74, note 8. According to Sutton, (1989) 50 *Ohio St L J* 743, 744, Article 74, sentence 2 differs insignificantly from § 2-715(2)(a) UCC.

¹⁴² Cf Faust, p 13; Staudinger/Magnus, Art 74, para 36.

¹⁴³ OGH, 14 January 2002, CISG-online 643, *IHR* 2002, 76, 80; Herber/Czerwenka, Art 74, para 10; Honsell/Schönle, Art 74, para 22; P Huber/Mullis/P Huber, p 272; Witz/Salger/Lorenz/Witz, Art 74, para 33; Roßmeier, *RIW* 2000, 407, 411; U Huber, *Haftung des Verkäufers*, pp 28, 29; Karollus, p 217; Piltz, *Internationales Kaufrecht*, para 5-544; Stoll, *Schadensersatzpflicht*, pp 260, 261; Vékás, *Foreseeability*, p 161; Weber, *Vertragsverletzungsfolgen*, p 198.

¹⁴⁴ OGH, 14 January 2002, CISG-online 643; Stoll/Gruber, 4th German edition of this work, Art 74, para 39; Honnold/Flechtner, Art 74, para 406; Staudinger/Magnus, Art 74, para 34; MünchKommHGB/Mankowski, Art 74, para 23; Brunner, Art 74, para 12; Brölsch, *Schadensersatz*, p 53; Saidov, *Limiting Damages*, II 2(a)(iii)(e); *idem*, *Damages in Int'l Sales*, pp 114, 116 *et seq.*; Enderlein/Maskow/Strohbach, Art 74, note 8.; Audit, *Vente internationale*, note 172.; Vékás, *Foreseeability*, pp 163, 164; Murphey, (1989) 23 *Geo Wash J Int'l L & Econ* 415, 469 *et seq.*; but see Faust, pp 28, 29, 238 *et seq.*

¹⁴⁵ Cf also Art 7.4.4 PICC; Mullis, *RebelsZ* 71 (2007), 35, 48.

¹⁴⁶ Cf eg Schlechtriem/P Butler, *UN Law*, para 303 *et seq.*; Stoll/Gruber, 4th German edition of this work, Art 74, para 40 *et seq.*; Staudinger/Magnus, Art 74, para 31 *et seq.*; MünchKomm/P Huber, Art 74, para 25 *et seq.*

¹⁴⁷ Advocating caution in handling typefied groups of cases: Saidov, *Damages in Int'l Sales*, p 106 *et seq.* with further examples.





(a) **Non-performance loss.** Non-performance loss is generally foreseeable.¹⁴⁸ This includes the reduction in value caused by the non-conformity of the goods, but also the costs for reasonable measures to place the promisee in the position he would have been in had the contract been properly performed, eg repair or rental costs.¹⁴⁹ In cases of late payment, the costs arising from a loan are generally foreseeable.¹⁵⁰ The same applies to exchange rate losses.¹⁵¹ Market changes that are unfavourable to the party breaching the contract are deemed to be foreseeable; their risk may not be shifted to the other party for lack of foreseeability.

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(b) **Incidental loss.** Incidental loss, as well, is generally foreseeable. Measures taken by the promisee which were not foreseeable are likely to already violate the duty to mitigate losses under Article 77.¹⁵²

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(c) **Consequential loss.** The foreseeability rule has its greatest relevance in the context of consequential losses since these are regularly influenced by the promisee's particular circumstances, arrangements he has made or the economic environment.

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When merchantable goods are sold to commercial traders, profits from resale of the goods are regularly foreseeable.¹⁵³ However, where business processes are interrupted, foreseeability depends entirely on the specific circumstances of the case.¹⁵⁴ Where the buyer refuses to take delivery of the goods, the common trading margin is foreseeable profit of the seller.¹⁵⁵ Frustrated expenses are at least foreseeable up to the amount of the expected profit.¹⁵⁶

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When merchantable goods are sold to commercial traders the seller must anticipate that a delivery of defective goods may lead to liability of the buyer to his customers¹⁵⁷ or that he may at least incur costs of taking back the goods (liability loss).¹⁵⁸ Contractual penalties of a

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¹⁴⁸ OGH, 14 January 2002, CISG-online 643; Honsell/Schönle, Art 74, para 29; Schlechtriem/P Butler, *UN Law*, para 303; Neumayer/Ming, Art 74, note 4. (who speak of '*dommage direct*'); Roßmeier, *RIW* 2000, 407, 411; Staudinger/Magnus, Art 74, para 40; Stoll, *Schadensersatzpflicht*, p 262; Weber, *Vertragsverletzungsfolgen*, p 199.

¹⁴⁹ OLG Köln, 8 January 1997, CISG-online 217; AG München, 23 June 1995, CISG-online 368; Honsell/Schönle, Art 74, para 29; Staudinger/Magnus, Art 74, para 41; see also P Huber/Mullis/P Huber, pp 274, 275 who correctly emphasizes the need to respect the seller's right to cure under Article 48 in this context.

¹⁵⁰ See para 16 above; Roßmeier, *RIW* 2000, 407, 411; Staudinger/Magnus, Art 74, para 44 with further references; with criticism Neumayer/Ming, Art 74, note 6. Foreseeability of the interest payable by the buyer for the bank loan needed to finance the down payment generally given: Serbian Chamber of Commerce, 1 October 2007, CISG-online 1793. In case of unusually high interest rates foreseeability may not be given, see Appellate Court of Eastern Finland, 27 March 1997, CISG-online 782 (7% per month and 0.5% on arrears); Witz/Salger/Lorenz/Witz, Art 74, para 31.

¹⁵¹ Therefore wrong: Legfelsőbb Biróság (Supreme Court of Hungary), 2000, CISG-online 1687.

¹⁵² On the relationship between foreseeability and mitigation of damages cf Saidov, *Damages in Int'l Sales*, p 110.

¹⁵³ *Delchi Carrier SpA v Rotorex Corp*, US Ct App (2nd Cir), 6 December 1995, CISG-online 140; OGH, 6 February 1996, CISG-online 224; P Huber/Mullis/P Huber, p 276; Witz/Salger/Lorenz/Witz, Art 74, para 34; Bamberger/Roth/Saenger, Art 74, para 9; Herber/Czerwenka, Art 74, para 12; Neumayer/Ming, Art 74, note 5.; Stoll, *Schadensersatzpflicht*, p 263; Vékás, *Foreseeability*, p 166.

¹⁵⁴ OGH, 28 April 2000, CISG-online 581; HGer Zürich, 10 February 1999, CISG-online 488; Herber/Czerwenka, Art 74, para 12; Vékás, *Foreseeability*, p 166; Schlechtriem/P Butler, *UN Law*, para 305; entirely disapproving von Caemmerer, *AcP* 178 (1978), 121, 147.

¹⁵⁵ OGH, 28 April 2000, CISG-online 581; Kranz, p 220; Staudinger/Magnus, Art 74, para 43.

¹⁵⁶ Schlechtriem/P Butler, *UN Law*, para 308; Schmidt-Ahrendts, *IHR* 2006, 63, 68.

¹⁵⁷ Agreeing for cases of long-standing business relationships: Saidov, *Damages in Int'l Sales*, pp 108, 109.

¹⁵⁸ OGH, 6 February 1996, CISG-online 224; BGer, 28 October 1998, CISG-online 413; OLG Köln, 21 May 1996, CISG-online 254; LG Landshut, 5 April 1995, CISG-online 193; P Huber/Mullis/P Huber, p 277;





reasonable amount are generally foreseeable, as far as they are in accordance with the practices of the parties or usages of the particular trade concerned (Article 9).¹⁵⁹ The loss of goodwill is at least foreseeable when the buyer is visibly a distributor in a sensitive market.¹⁶⁰

- 57 According to the prevailing view¹⁶¹ consequential damages inflicted on other property¹⁶² of the buyer is always foreseeable, except in cases where the buyer uses the goods not in the way intended, thereby causing the damage.¹⁶³

VIII. Contractual stipulations on liability

1. General

- 58 Article 74 *et seq* are not mandatory rules. It follows that the parties are permitted to regulate the scope of their liability contractually (Article 6). They may stipulate either agreed sums payable upon breach of an obligation or limitations of liability. If such clauses are contained in the standard terms and conditions of sale, their incorporation into the contract is not determined according to domestic law. Rather, this is determined by Articles 14 and 18 which regulate the conclusion of contracts, and is to be interpreted according to Article 8.¹⁶⁴ The effectiveness of such agreements is based on the subsidiarily applicable domestic law (*lex causae*).¹⁶⁵ However, the standards of the Convention must be observed in the process.¹⁶⁶

Witz/Salger/Lorenz/Witz, Art 74, para 34; Herber/Czerwenka, Art 74, para 12; Neumayer/Ming, Art 74, note 5.; Vékás, *Foreseeability*, p 167; Karollus, pp 215, 217; Staudinger/Magnus, Art 74, para 45.

¹⁵⁹ Int Ct Russian CCI, 23 December 2004, CISG-online 1188; but see CIETAC, 29 September 2004, CISG-online 1600 (contract penalties unforeseeable because they were incurred by trading company entrusting buyer to conclude sales contract with seller and respective contracts were only concluded after conclusion of contract between seller and buyer); see LG Hamburg, 21 December 2001, CISG-online 1092 for a case where contract penalties, though considered foreseeable in general, were unforeseeable due to the clause in the buyer's contract being too disadvantageous to him.

¹⁶⁰ Cf BGH, 24 October 1979, WM 1980, 36 on ULIS; Schlechtriem/P Butler, *UN Law*, para 306; more restrictively P Huber/Mullis/P Huber, p 279.

¹⁶¹ MünchKomm/P Huber, Art 74, para 41; Staudinger/Magnus, Art 74, paras 45, 46; P Huber/Mullis/P Huber, p 277.

¹⁶² Cf para 35 above.

¹⁶³ BGH, 24 March 1999, CISG-online 396; Stoll/Gruber, 4th German edition of this work, Art 74, para 47; MünchKomm/P Huber, Art 74, para 41; P Huber/Mullis/P Huber, p 277; Neumayer/Ming, Art 74, note 5.; Karollus, p 218; Schlechtriem/P Butler, *UN Law*, para 306; Staudinger/Magnus, Art 74, para 47; Weber, *Vertragsverletzungsfolgen*, p 200; Vékás, *Foreseeability*, p 162.

¹⁶⁴ BGH, 31 October 2001, CISG-online 617; OLG Zweibrücken, 31 March 1998, CISG-online 481; Schroeter, Art 14, para 33 *et seq* above; Stoll/Gruber, 4th German edition of this work, Art 74, para 48; Staudinger/Magnus, Art 14, para 40; Soergel/Lüderitz/Fenge, Art 14, para 10; Frense, pp 44, 88–90; but see Teklote, p 81 *et seq*.

¹⁶⁵ ICC Ct Arb, 7197/1992, JDI 1993, 1028, 1032, 1033; OLG München, 8 February 1995, CISG-online 143; OLG Zweibrücken, 31 March 1998, CISG-online 481; insofar affirmed by BGH, 24 March 1999, CISG-online 396; Gerechthof Arnhem, 22 August 1995, CISG-online 317; RB Hasselt, 21 January 1997, CISG-online 360; Berger, *R/W* 1999, 401, 402; Heuzé, note 450.; for liquidated damages and penalties cf also Honnold/Flechtner, Art 74, para 408.1. But see Stoll/Gruber, 4th German edition of this work, Art 74, paras 49, 50. See on this issue in more detail Hachem, (2009) 13 *VJ* 217, 222 *et seq*; Mohs/Zeller, (2006) 21 *Mealey's Int'l Arb Rep* 1 *et seq*.

¹⁶⁶ Cf Schwenger/Hachem, Art 4, para 38 *et seq* above; Ferrari, 5th German edition of this work, Art 4, para 20 with numerous references.



2. Agreed sums

Traditionally, a distinction is made between liquidated damages clauses and contractual penalties.¹⁶⁷ This differentiation is of importance for domestic laws in so far as contractual penalties are not permitted at all¹⁶⁸ or at least can be reduced by the court upon request of the burdened party.¹⁶⁹ However, the modern view tends towards abandoning the conceptual distinction between liquidated damages and penalties.¹⁷⁰ Under this view agreed sums payable upon breach of an obligation are generally considered permissible.¹⁷¹ However, in cases where the agreed sum is grossly disproportionate in relation to the actual loss, the court or arbitral tribunal may reduce the sum stipulated.¹⁷² These rules should also apply to a contractual clause modifying Article 74 by way of stipulating an agreed sum.¹⁷³ Whether or not an agreed sum is exhaustive in regard to the availability of other remedies is to be determined by interpretation of the respective agreement.¹⁷⁴

3. Limitations of liability

The parties may limit liability to a certain amount of money, certain types of losses, certain types of breaches or certain types of conduct; they may even exclude damages altogether. In determining the validity of such clauses, the principles of the Convention, in particular the principle of full compensation, are to be taken into account when applying domestic tests of validity.¹⁷⁵ Certain consistent parameters can be found in comparative law. For example, the promisee must not be completely deprived of all rights; he must retain at least a minimum adequate remedy.¹⁷⁶ Also, an advance waiver of liability for gross negligence and intentional acts is consistently viewed as invalid.¹⁷⁷

¹⁶⁷ Cf in regard to the terminology in domestic laws Steltmann, *Vertragsstrafe*, p 22 *et seq.*

¹⁶⁸ This is especially true for common law countries. Cf for England the leading case *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1915] AC 79 and the analysis by McGregor, para 13–019; for the US Perillo, p 395 *et seq.* But cf also § 309 No 5, 6 BGB for differences when dealing with standard terms.

¹⁶⁹ Cf eg § 343(1) BGB; Art 160(3) OR; Art 1150 French Cc; for a comparative overview see Hachem, (2009) 13 *VJ* 217 *et seq.*

¹⁷⁰ Cf Art 7.4.13(1) PICC; Art 9:509(1) PECL.

¹⁷¹ Cf Art 7.4.13 PICC, Comment 2; Lando/Beale, *Part I and II*, note A.; Berger, *RIW* 1999, 401, 403, 404; CIETAC, 9 November 2005, CISG-online 1444.

¹⁷² Cf Art 7.4.14(2) PICC; Art 9:509(2) PECL.

¹⁷³ See also Hachem, (2009) 13 *VJ* 217, 227.

¹⁷⁴ ICC Ct Arb, 7585/1992, CISG-online 105, *JDI* 1995, 1015, 1019; Staudinger/Magnus, Art 74, para 60; Berger, *RIW* 1999, 401, 409; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 13; Mohs/Zeller, (2006) 21 *Mealey's Int'l Arb Rep* 1, 2.

¹⁷⁵ See also Schwenzler/Hachem, Art 4, para 38 above.

¹⁷⁶ See Schwenzler/Hachem, (2009) 57 *Am J Comp L* 457, 474.

¹⁷⁷ OLG Zweibrücken, 31 March 1998, CISG-online 481, insofar affirmed by BGH, 24 March 1999, CISG-online 396, *BGHZ* 141, 129, 135; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 13; Staudinger/Magnus, Art 74, para 59; Witz/Salger/Lorenz/Witz, Art 74, para 42; for details Frense, pp 121–35; Teklote, pp 242–4; Schwenzler/Hachem, (2009) 57 *Am J Comp L* 457, 473, 474 with references to domestic provisions in this regard.



IX. Individual matters

1. Place of payment

- 61** Damages are to be paid at the place where the breached primary obligation was originally to be performed.¹⁷⁸ Relying on the promisee's domicile pursuant to Article 57¹⁷⁹ would mean a further extension of a general place of jurisdiction in favour of the plaintiff.¹⁸⁰

2. Limitation periods

- 62** Within the sphere of application of the 1974 Limitation Convention, claims for damages also fall under the four-year limitation period under Article 8. Otherwise, the question of the applicable statute of limitations to international transactions is highly uncertain.¹⁸¹ In continental legal systems, the limitation of actions by time periods is regularly considered to be a matter of substantive law and therefore subject to the *lex contractus*.¹⁸² However, in many common law systems, limitation of actions by time periods is still considered to be a matter of procedural law and therefore governed by the *lex fori*.¹⁸³ In international arbitration, there are good reasons favouring the application of the limitation periods established by the UNIDROIT Principles (Article 10.1 *et seq*)¹⁸⁴ which stipulate a relative limitation period of three years (Article 10.2(1)) and an absolute limitation period of ten years (Article 10.2(2)).

3. Currency of compensation

- 63** The parties will only rarely have agreed on the currency of compensation. It cannot indiscriminately be assumed that the currency agreed upon for payment of the purchase price is necessarily also the currency in which compensation by one or the other party is to be paid.¹⁸⁵ Rather, the aim of Article 74 *et seq*, ie to fully compensate the promisee's losses, must be observed. Damages are therefore generally to be calculated in the currency in which the injured party suffered its loss or in which the lost profit would otherwise have been realized.¹⁸⁶ This will usually be the currency at the promisee's place

¹⁷⁸ Soergel/Lüderitz/Dettmeier, Vor Art 74, para 11; Staudinger/Magnus, Art 74, para 57; Roßmeier, *RIW* 2000, 407, 409; Achilles, Art 74, para 9; for restitution of damages as legal remedy of the buyer, cf Müller-Chen, Art 45, para 35 above.

¹⁷⁹ So OLG Düsseldorf, 2 July 1993, CISG-online 74; P Huber/Mullis/P Huber, p 281; Herber/Czerwenka, Art 57, para 14; Piltz, *Internationales Kaufrecht*, para 5-565; Hackenberg, p 151 *et seq*; Witz/Salger/Lorenz/Witz, Art 74, para 41.

¹⁸⁰ Cf also Staudinger/Magnus, Art 74, para 57.

¹⁸¹ Cf in detail Schwenger/Manner, (2007) 23 *Arb Int'l* 293 *et seq*.

¹⁸² OLG Braunschweig, 28 October 1999, CISG-online 510; LG München, 6 April 2000, CISG-online 665; LG Heidelberg, 2 October 1996, CISG-online 264; Achilles, Art 74, para 9; Piltz, *Internationales Kaufrecht*, para 5-567; Staudinger/Magnus, Art 74, para 58; Schwenger/Manner, (2007) 23 *Arb Int'l* 293, 296, 297.

¹⁸³ Cf Schwenger/Manner, (2007) 23 *Arb Int'l* 293, 296, 297.

¹⁸⁴ Cf Schwenger/Manner, (2007) 23 *Arb Int'l* 293, 301 *et seq*.

¹⁸⁵ Remien, *RabelsZ* 53 (1989), 245, 280; Zmij, *ZfRVgl* 1998, 21, 28; different LG Berlin, 30 September 1992, CISG-online 70 (always currency of the contract).

¹⁸⁶ OLG Hamburg, 28 February 1997, CISG-online 261; Magnus, *RabelsZ* 53 (1989), 116, 134, 135; Remien, *RabelsZ* 53 (1989), 245, 264 *et seq*; P Huber/Mullis/P Huber, p 280; Achilles, Art 74, para 6; Zmij, *ZfRVgl* 1998, 21, 27 *et seq*. *Contra*: and in favour of a general application of the currency at the promisee's





of business.¹⁸⁷ However, in particular cases damage may be incurred in a different currency and must then be compensated for accordingly. Allowing the promisor to replace payment in the currency in which the damage was incurred by payment in the currency of the place of payment of the purchase price generally contradicts the principle of full compensation.¹⁸⁸

X. Questions of proof

1. Burden of proof

Today, it is nearly undisputed that the allocation of the burden of proof, though not explicitly stipulated, is governed by the Convention.¹⁸⁹ According to the prevailing opinion, the promisee at least bears the burden of proof for the extent of his loss as well as for its causation by the breach of contract.¹⁹⁰ The burden of proof regarding the breach of contract itself is disputed.¹⁹¹ Generally, it must also be placed with the promisee; it seems, however, appropriate to make a distinction in regard to the delivery of goods which do not conform to the contract (cf Article 35, paragraph 52 *et seq* above). The burden of proof regarding foreseeability of loss is also disputed. The correct point of view is that the

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place of business Piltz, *Internationales Kaufrecht*, para 5-564; Staudinger/Magnus, Art 74, para 56; Soergel/Lüderitz/Dettmeier, Vor Art 74, para 9; Roßmeier, *R/W* 2000, 407, 412; Bamberger/Roth/Saenger, Art 74, para 2, n 2 advance the argument that the opposing view entails practical difficulties when calculating the conversion of the sum to be paid. Since the promisee will usually remedy his loss at his place of business, the difference in opinions will hardly lead to different results. Art 7.4.12 PICC provides the court or arbitral tribunal with the right to choose the most appropriate currency among the currency in which the monetary obligation was expressed and the currency in which the harm was suffered ('whichever is more appropriate'); Art 9:510 PECL provides judges and arbitrators with even more discretion according to the English standard (*The Despina R & the Folias* [1979] AC 685 (H L)) ('currency which most appropriately reflects the aggrieved party's loss').

¹⁸⁷ MünchKomm/P Huber, Art 74, para 53; Staudinger/Magnus, Art 74, para 56; P Huber/Mullis/P Huber, p 280.

¹⁸⁸ Cf Mohs, Art 53, para 8 above; but see Stoll/Gruber, 4th German edition of this work, Art 74, para 30.

¹⁸⁹ BGH, 9 January 2002, CISG-online 651 (the CISG does not govern the effects of the seller's written recognition that the goods were non-conforming); CISG-AC, Op 6 Gotanda, Comment 2.1; Stoll/Gruber, 4th German edition of this work, Art 74, para 51; Ferrari, 5th German edition of this work, Art 4, para 49; *idem*, *IPRax* 2001, 354, 357; Staudinger/Magnus, Art 4, paras 63–70; MünchKomm/P Huber, Art 74, para 58; Brunner, Art 74, para 58; Reimers-Zocher, p 128 *et seq*; for a detailed analysis cf Antweiler, pp 44 *et seq*, 71–4; T M Müller, *Beweislast*, p 26 *et seq*.

¹⁹⁰ OLG Zweibrücken, 31 March 1998, CISG-online 481; Trib Vigevano, 12 February 2000, CISG-online 493, *IHR* 2001, 72, 77, with approving note by Ferrari, *IPRax* 2001, 354, 357; Stoll/Gruber, 4th German edition of this work, Art 74, para 52; P Huber/Mullis/P Huber, p 281; MünchKomm/P Huber, Art 74, para 58; Baumgärtel/Laumen/Hepting, Art 74 WKR, para 2; Honsell/Schönle, Art 74, para 33; Staudinger/Magnus, Art 74, para 62; Witz/Salger/Lorenz/Witz, Art 74, para 40; Jung, pp 237, 238.

¹⁹¹ Arguing that the promisee should bear the burden of proof, CISG-AC, Op 6 Gotanda, Comment 2.2; HGer Zürich, 22 December 2005, CISG-online 1195, note III 4 c (aa); Staudinger/Magnus, Art 74, para 62; MünchKomm/P Huber, Art 74, para 58; Honsell/Schönle, Art 74, para 33; Brunner, Art 74, para 58; arguing that the promisor should bear the burden of proof, Stoll/Gruber, 4th German edition of this work, Art 74, para 51.





proof of the foreseeability of the damage must be left with the promisee.¹⁹² This allocation, however, does not exclude an alleviation of the burden of proof by establishing certain types of cases, in particular in cases of actual non-performance loss (see paragraph 21 above).

2. Standard of proof

- 65** A number of courts and authors consider the question of the necessary standard of proof to be a matter of procedural law and therefore to be governed by the *lex fori*.¹⁹³ However, the mere qualification of rules of proof as procedural or substantive cannot be decisive.¹⁹⁴ Allowing different domestic rules on the standard of proof would undermine the uniform interpretation and application of the Convention as well as the general principle of full compensation itself. As with the burden of proof, the standard of proof must therefore also be derived from the Convention. The standard of ‘reasonableness’ is suggested here.¹⁹⁵ Not only does the Convention draw on the standard of a ‘reasonable person’ at various points,¹⁹⁶ but also the UNIDROIT Principles and PECL favour such a standard.¹⁹⁷ The promisee must therefore prove his damage and loss of profit with a reasonable degree of certainty. As a preventive measure, one might reduce the necessary standard of proof in cases of intentional breach of contract. This is of particular importance regarding loss of profit, loss of reputation, and loss of chance.

3. Furnishing evidence

- 66** The way in which evidence may be furnished, in particular the admissibility of evidence, is, on the other hand, determined by procedural rules of the *lex fori*.¹⁹⁸ Whether Articles 8(3) and 11, sentence 2 according to which declarations, as well as the conclusion of the contract in particular, may be proved by any means, including witnesses, express a general principle ‘on which [the CISG] is based’ (Article 7(2)) is doubtful.

¹⁹² OLG Bamberg, 13 January 1999, CISG-online 516; Audiencia Provincial de Barcelona, 20 June 1997, CISG-online 338; Stoll/Gruber, 4th German edition of this work, Art 74, para 51; P Huber/Mullis/P Huber, p 281; Brunner, Art 74, para 58; MünchKomm/P Huber, Art 74, para 58; Witz/Salger/Lorenz/Witz, Art 74, para 40; Faust, pp 324, 325; Schlechtriem/P Butler, *UN Law*, para 302; Brölsch, *Schadensersatz*, p 50; but see Staudinger/Magnus, Art 74, para 62; MünchKommHGB/Mankowski, Art 74, para 46; Enderlein/Maskow/Strohbach, Art 74, note 10.; Herber/Czerwenka, Art 74, para 13.

¹⁹³ *Delchi Carrier SpA v Rotorex Corp*, US Ct App (2nd Cir), 6 December 1995, CISG-online 140; for Switzerland cf BezGer Saane, 20 February 1997, CISG-online 426, note 6.4.; Schlechtriem, (2007) 19 *Pace Int'l L Rev* 89, 97; Stoll/Gruber, 4th German edition of this work, Art 74, para 53; Staudinger/Magnus, Art 74, para 61; MünchKomm/P Huber, Art 74, para 57; Herber/Czerwenka, Art 74, para 13.

¹⁹⁴ Cf in particular CISG-AC, Op 6 Gotanda, Comment 2.3; Schwenzel/Hachem, *Scope of Damages*, p 99; Gotanda, (2005) 37 *Geo Wash J Int'l L & Econ*, 95, 120 *et seq*; Orlandi, *Uniform L Rev* 5 (2000), 23.

¹⁹⁵ CISG-AC, Op 6 Gotanda, Comment 2.1 *et seq*; Saidov, (2006) 22 *J Cont L* 1, 5 *et seq*; Mullis, *RabelsZ* 71 (2007), 35, 49 *et seq*; Schwenzel/Hachem, *Scope of Damages*, p 99; P Huber/Mullis/P Huber, pp 281, 282; but see Schlechtriem, (2007) 19 *Pace Int'l L Rev* 89, 97.

¹⁹⁶ Article 8(2), (2), 25, 35(2)(b), 60, 72(2), 75, 77, 79(1), 85, 86, 88(2).

¹⁹⁷ Cf Art 7.4.3 PICC; Art 9:501(2) PECL.

¹⁹⁸ Stoll/Gruber, 4th German edition of this work, Art 74, para 53; Staudinger/Magnus, Art 74, para 61; MünchKomm/P Huber, Art 74, para 57.

