



REMARKS ON THE MANNER IN WHICH THE PRINCIPLES OF EUROPEAN  
CONTRACT LAW MAY BE USED TO INTERPRET OR SUPPLEMENT  
ARTICLE 75 OF THE CISG

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## 1. INTRODUCTION

Article 75 of the Convention is part of the set of rules and principles that provide the law of damages in the CISG.<sup>1</sup> CISG article 75 regulates the operation of a substitute transaction, which is adopted in most legal systems as well as in basic multilateral instruments such as the CISG and the PECL.<sup>2</sup> Pursuant to CISG art. 75, as a result of a breach of contract the aggrieved party may carry out a substitute transaction in a reasonable manner and within a reasonable time after avoidance and may recover the difference between the contract price and the price of the substitute transaction.

The same issue is regulated in substantively identical terms in PECL art. 9:506. However, the drafters of the PECL go further and in other provisions of the European Principles define terms that may help the interpretation and application of PECL art. 9:506 and its counterpart CISG provision.

CISG article 75 provides a method for measuring damages when a party avoids a contract, usually due to a fundamental breach by the other party. This provision represents a specific application of CISG art. 74, which states the general rule for the measurement of damages.<sup>3</sup> Both CISG art. 75 and PECL art. 9:506 stipulate the same basic premises that have to exist before the substitute transaction takes place.

- Firstly, one of the contracting parties must breach the contract and in consequence the innocent party must undertake action for the termination of the contract. As far as it concerns this premise, a problem may arise in respect of the determination of the moment when the contract is declared avoided.
- Secondly, there must be a substitute transaction effected by the aggrieved party. Here the issues that have to be discussed are in respect of the substitute transaction's characteristics and aspects.
- Thirdly, the substitute transaction must be performed in a reasonable manner and within a reasonable time after avoidance. Specific attention must be drawn to the concept of "reasonableness".

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<sup>1</sup> See also the text of CISG articles 74, 76, 77 and 78.

<sup>2</sup> See Vilus, *Provisions Common to the Obligations of the Seller and the Buyer*, Petar Sarcevic & Paul Volken eds., International Sale of Goods: Dubrovnik Lectures, Oceana (1986), also available online at <http://cisgw3.law.pace.edu/cisg/biblio/vilus.html>.

<sup>3</sup> See Sutton, *Measuring Damages Under the United Nation Convention on the International Sale of Goods*, 50 Ohio State Law Journal (1989), 737-752, also available online at <http://cisgw3.law.pace.edu/cisg/biblio/sutton.html>. See also the following case decisions [All decisions cited in this note and the subsequent notes are available in original language and English translation at the citations indicated]:

- Austria 6 February 1996 Supreme Court, <http://cisgw3.law.pace.edu/cases/960206a3.html>;
- Austria 9 March 2000 Supreme Court <http://cisgw3.law.pace.edu/cases/000309a3.html>;
- Russia 22 October 1998 Arbitration 196/1997 <http://cisgw3.law.pace.edu/cases/981022r1.html>;
- Austria 28 April 2000 Supreme Court <http://cisgw3.law.pace.edu/cases000428a3.html>,

where it is stated that CISG art. 75 is a specific provision about the calculation of damages in the case of avoidance of a contract following a breach.

- Fourthly, the amount of the damages claimed by the aggrieved party must be assessed. The method for measuring damages stipulated in CISG art.75 is seemingly clear but still needs elucidation.
- Finally, CISG art. 75 CISG, like PECL art. 9:506, provides for the possibility of recovery of further damages.

## 2. SCOPE OF APPLICATION

CISG article 75 and PECL art. 9:506 deal with the issues of substitute transaction and the amount of recoverable. The basic contractual obligation imposed on both the buyer and the seller is the obligation that each contracting party must perform all of its obligations required by the contract.<sup>4</sup> Logically, the remedy stipulated in CISG art. 75 is applicable to both contracting parties – the buyer and the seller depending on which party breaches the contractual agreement.<sup>5</sup>

## 3. WHEN IS THE CONTRACT IS DEEMED AVOIDED

In the interpretation of CISG art. 75, the issue of determining the time of avoidance is important because it substantiates the moment from which the “reasonable” time period starts to run. The other provisions which regulate the law of damages in the CISG and the PECL cannot contribute to the clarification of this issue because no clear determination of that issue can be found either explicitly or impliedly. However, article 72(1) of the 1978 Draft Convention, corresponding to art. 76 of the CISG, refers to the time of avoidance as the time when the injured party first could have declared avoidance.<sup>6</sup> The purpose for the creation of such rule had been the desire to prevent the injured party from speculating at the other's expense. The drafters of the final text of the Convention did not elect to include that in this text because of its controversial nature and uncertainty.<sup>7</sup>

In the interpretation of CISG art.75, it must be emphasized that the problem in determining the time of avoidance appears especially in the event of delayed or non-conforming performance. In this situation, the aggrieved buyer cannot undertake a substitute transaction until the moment of avoidance is defined. Some scholars<sup>8</sup> propose that the provision of CISG art. 49(2) be used for identifying the time of avoidance. But especially in the case of art. 49(2)(b)(i), the identification of the exact time of avoidance is difficult and a matter of subjective judgment, because the initial moment from which the reasonable time period starts to run precedes the moment when the buyer could avoid the contract since at that moment the

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<sup>4</sup> See CISG arts. 30 and 53, stating the principal obligations of the parties.

<sup>5</sup> See Sutton, *op. cit.*

<sup>6</sup> The legislative history of CISG art. 76 and its match-up in the 1978 Draft is available online at <http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-d76.html>.

<sup>7</sup> See Schlechtriem, *Extent and Measure of Damages (CISG Arts. 74-76)*, in *Uniform Sales Law – The UN-Convention for the International Sale of Goods*, Vienna: Manz (1986), also available online at <http://cisgw3.law.pace.edu/cisg/biblio/slechchtriem-76.html>.

<sup>8</sup> See Schlechtriem, *op. cit.*

buyer is still not aware of the breach. To draw a general conclusion, the substitute transaction can be made within a reasonable time limit, beginning to run not until the aggrieved party had in fact declared the contract avoided, which must be proved undeniably by the party's conduct.<sup>9</sup>

#### 4. SUBSTITUTE TRANSACTION

Although using slightly different wording, CISG art. 75 and its counterpart PECL provision are substantively similar. It might be said that CISG art. 75 uses a more descriptive method, while the corresponding PECL art 9:506 applies more general terminology that emphasizes the essence of the substitute transaction.

According to the text of the Convention, the remedy provided in CISG art. 75 applies to cases where the initial contract has been avoided and replacement goods have in fact been purchased or the seller has in fact resold the goods. The basic characteristic of the purchase and the resale is their substitute, replacement function. All the other elements of the transaction must be subordinated to this primary function and to the reasonableness criterion. To this effect, the substitute transaction may occur in a different location or have different terms compared to the original transaction, but should not be so different from it in value or nature as not to be a reasonable substitute.<sup>10</sup> Such lack of complete correspondence to the initial transaction may not influence the right to receive the remedy provided in CISG art. 75 if the substitute transaction corresponds to the other premises outlined in it, but may lead to the adjustment of the exact amount of the damages, so that any increase in costs or expenses saved could be taken into consideration.<sup>11</sup> Neither CISG art. 75 nor PECL art. 9:506 provide any other details or specifications concerning the substitute transaction beyond requiring that it should be made in a reasonable manner and within a reasonable time after avoidance.<sup>12</sup>

#### 5. REASONABLENESS

Although "reasonableness" is considered to be a general principle of the CISG and is mentioned in thirty-seven provisions of the Convention,<sup>13</sup> there can be found no legal

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<sup>9</sup> See the texts of the following decisions stating that the substitute transaction may be performed only after the contract have been properly avoided:

- Germany 14 January 1994 Appellate Court Düsseldorf <<http://cisgw3.law.pace.edu/cases/940114g1.html>>;
- ICC Arbitration Case No. 8574 of September 1996 <<http://cisgw3.law.pace.edu/cases/968574.html>>;
- Russia 24 January 2000 Arbitration 54/1999 <<http://cisgw3.law.pace.edu/cases/000124r1.html>>;
- Germany 6 April 2000 District Court München <<http://cisgw3.law.pace.edu/cases/000406g1.html>>;
- Germany 13 January 1999 Appellate Court Bamberg. <<http://cisgw3.law.pace.edu/cases/990113g1.html>>.

See also the text of Austria 6 February 1996 Supreme Court decision, *supra* note 3, according to which "the intention of the buyer not to adhere to the contract anymore has to be obvious beyond any doubt".

<sup>10</sup> See Sutton, *op. cit.* See also the legislative history of CISG art. 75 and its match-up in the 1978 Draft Convention, which is available online at <<http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-d-75.html>>; the Secretariat Commentary on the 1978 Draft provision of CISG art. 75 is available online at <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-75.html>>.

<sup>11</sup> See *Text of Secretariat Commentary on article 71 of the 1978 Draft Convention*, available online at <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-75.html>>.

<sup>12</sup> See Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 *Journal of Law and Commerce* (1988) 53-108, also available online at <<http://cisgw3.law.pace.edu/cisg/biblio/flecht.html>>.

definition of the concept in the text of the Convention. Such a definition exists in the PECL, article 1:302, where it is said that “reasonableness” is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. All relevant factors should be taken into consideration when deciding what is reasonable.<sup>14</sup>

The concept of “reasonableness” outlined in art. 1:302 PECL can be applied to the definition of this issue as regards CISG art. 75. In relation to the interpretation and application of that article of the Convention, it should firstly be determined what is a reasonable period for waiting before the conclusion of the substitute transaction, i.e., what is meant by the expression “within a reasonable time”. Next, the nature and the purpose of the avoided contract and respectively the characteristics of the substitute transaction should be examined, i.e., what is meant by the expression “in a reasonable manner”.

In general, both aspects of the required “reasonableness” – the reasonable time and the reasonable manner – must be examined within the concept of the “reasonable person”,<sup>15</sup> because the manner and the time of acting is a manifestation of a personal and, consequently, subjective choice. To make the determination of the issue more impartial, it should be emphasized that the criterion of a “reasonable person” should be assessed in conformity with the conduct of a person “of the same kind”, engaged in the same kind of business or in the same trade, etc.<sup>16</sup>

Examining the “reasonable manner”, it must be said that the reasonable person’s behavior should be to perform the substitute transaction at the most favorable conditions, i.e., the resale to be made at the highest price reasonably possible in the circumstances, or the cover purchase to be made at the lowest price reasonably possible.<sup>17</sup> The same criteria should be applied for the determination of the fairness of the substitute transaction terms and conditions.

As far as the “reasonable time” is concerned, the concept of the reasonable person must also be applied. In the first place, account should be taken of the nature and the purpose of the avoided contract and respectively of the substitute transaction; secondly, the circumstances of the particular case should be examined; and thirdly, the behavior of the reasonable person is reflected by the usages and the practices of the trade or profession in which he is engaged.

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<sup>13</sup> For a discussion of the concept of “reasonableness” in the CISG, see the editorial comments available online at <<http://cisgw3.law.pace.edu/cisg/text/reason.html>> and see also the following case decisions:

- Germany 14 January 1994 Appellate Court Düsseldorf, *supra* note 9;
- Italy 11 December 1998 Appellate Court Milan <<http://cisgw3.law.pace.edu/cases/981211i3.html>>;
- Netherlands 15 October 2002 Netherlands Arbitration Institute Case No. 2319 <<http://cisgw3.law.pace.edu/cases/021015n1.html>>.

<sup>14</sup> PECL art. 1:302 provides the following definition of “reasonableness”: “Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account.”

<sup>15</sup> See Schlechtriem, *op. cit.*

<sup>16</sup> See Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 3d ed., Kluwer Law International (1999).

<sup>17</sup> See *Text of Secretariat Commentary on article 71 of the 1978 Draft Convention*, *op. cit.*

## 6. DAMAGES

The damages recoverable under CISG art. 75 amount to the difference between the contract price and the price in a reasonable substitute transaction.<sup>18</sup> PECL article 9:506 defines the remedy provided for a substitute transaction in a similar fashion.

Both counterpart articles use the so-called “concrete” method<sup>19</sup> of establishing damages, which accomplishes the common law goal of having contract remedies lead to the “relief of the promisee” instead of the “compulsion of the promisor”.<sup>20</sup> This method of establishing damages eliminates the burden of having to prove the market price of the goods and instead applies a more pragmatic criterion.

Under this basic formula for measuring damages, the aggrieved party often may not be able to recover all the damages that it suffered by the breach of the contract – such as additional expenses caused by: receipt of non-conforming goods; necessity to search for substitute goods; advertisement expenses for the resale of the goods under the original contract; losses caused by the later delivery of the substitute transaction goods compared to the original contract date, etc.

Considering the possibility that such additional expenses may occur, plus the desire to restore the aggrieved party into the position that it should have been if the original contract had not been breached, both CISG art. 75 and PECL art. 9:506 stipulate that the injured party may seek further damages under the basic rule for recovery of full compensation. The calculation of these additional damages is based on the principle of foreseeability.<sup>21</sup> This regulation confirms the statement that CISG art. 75 represents a specific application of art. 74 CISG, although a detailed analysis of the latter provision is not a subject of this study.

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<sup>18</sup> National courts and arbitral tribunals apply very consistently the method for measuring damages provided in CISG art. 75, which leads to the conclusion that this part of CISG art. 75 generates no controversy. In confirmation of this statement, see the following case decisions:

- Switzerland 20 February 1997 District Court Saane <<http://cisgw3.law.pace.edu/cases/970220s1.html>>;
- Spain 28 January 2000 Supreme Court <<http://cisgw3.law.pace.edu/cases/000128s4.html>>;
- Germany 6 April 2000 District Court München, *supra* note 9;
- Germany 30 July 2001 District Court Braunschweig <<http://cisgw3.law.pace.edu/cases/01730g1.html>>;
- Austria 28 April 2000 Supreme Court, *supra* note 3.

<sup>19</sup> See, Sutton, *op. cit.*; see also Saidov, *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, 2001, available online at <<http://cisgw3.law.pace.edu/cisg/biblio/saidov.html>>. In a similar manner, the Switzerland 15 September 2000 Supreme Court decision, <<http://cisgw3.law.pace.edu/cases/000915s2.html>>, describes as “concrete” the method of establishing damages used in CISG art. 75.

<sup>20</sup> See Farnsworth, *Damages and Specific Relief*, 27 Am.J.Comp.L. 247 (1979), also available at <<http://cisgw3.law.pace.edu/cisg/biblio/farns.html>>.

<sup>21</sup> In confirmation of the aggrieved party’s right to obtain full compensation including the additional costs, see Germany 13 January 1999 Appellate Court Bamberg decision, *supra* note 9.