NON-MATERIAL DAMAGES - RECOVERY UNDER THE CISG?

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I. INTRODUCTION

Codes age. So do Conventions promulgating Uniform Law. Provisions on interpretation and gap-filling, like the CISG's Article 7 (Art. 7),[1] may be used to prevent petrification. However, there are limits to the creative development of a Convention, for it might not only be contrary to the drafters' views and policies, but also – and in some instances more importantly – contrary to the intentions of national legislators who have ratified the Convention. The national legislators might not have done so if certain issues left open or decided in a certain way – although not very definite and, therefore, open to interpretation – were regulated the way later proposed by scholars as a matter of development of the Convention by interpretation and gap-filling.

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[1] United Nations Convention on Contracts for the International Sale of Goods, art. 7, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html [hereinafter CISG].

Compensation without pecuniary loss is such an issue. Allan Farnsworth, one of the authors of the Convention on Contracts for the International Sale of Goods (CISG) and also a member of the CISG's Advisory Council (CISG-AC),[2] certainly would have given us definite answers to the questions raised by this problem. It is to commemorate humbly an outstanding jurist, scholar and teacher of contract law, and friend that I dare to deal with this topic here.

Most commentators agree that non-pecuniary damages ("immaterial" damages) cannot be compensated under the damages provision of the CISG.[3] Even scholars from countries with legal systems generally allowing *dommage moral*, compensation of non-pecuniary damages, agree.[4] The CISG-AC[5] in its

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[2] The CISG-AC is the Advisory Council on the CISG. The Advisory Council on the CISG is a private initiative consisting of experts on the CISG. It issues expert opinions on controversial issues of the CISG either "on request or on its own initiative" in order to promote a "uniform interpretation of the CISG." *See* Dr. Loukas Mistelis, *CISG-AC Publishes First Opinions*, 15 PACE INT'L L. REV. 453, 453-56 (2003).

[3] *See, e.g.*, PETER BASENGE ET AL., KOMMENTAR ZUM BÜRGERLICHES GESETZBUCH [COMMENTARY ON THE GERMAN CIVIL CODE] (C.H. Beck ed., 65th ed. 2006); Karl. H. Neumayer, Emptio-Vendito internationes: Convention de Vienne sur la vente Internationale de Marchandise [United Nations Convention on Contracts for the International Sale of Goods] (1997); *see also* 13 Soergel et. al., Schuldrechtliche Nebengesetze 2: Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG) [Commentary on the CISG as part of this Commentary on the German Civil Code] (13th ed. 2000) (specifically referencing Article 74 of the CISG, para. 6); Cesare Massimo Bianca & Michael Joachim Bonell, Commentary on the International Sales Law – The Vienna Sales Convention (Giufree ed., 1987); Fritz Enderlein & Dietrich Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods (Oceana, 1992); ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT, KOMMENTAR ZU DEM Übereinkommen der Vereinten Nationen Vom 11. April 1980 über den Internationalen Warenkauf (1991); *see also* Wolfgang Witz, Internationales Einheitskaufrecht, Schriftenreihe Recht der internationalen Wirtschaft [Unified Sales Law series: Law of the International Economy] (Hanns-Christian Salger & Manuel Lorenz eds., 2000).

[4] *See, e.g.*, Vincent Heuze, *La Vente Internationale de Marchandises*, *in* COLLECTION DE TRAIT DES CONTRATS SOUS LA DIRECTION DE J GHESTIN 252 (2000). BERNARD AUDIT, LA VENTE INTERNATIONAL DES MARCHANDISE (Librairie Générale de Droit et de Jurisprudence [L.G.D.J.] ed., 1990) para 171.

[5] *See* CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74 (2006). Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA, *available at* http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html [hereinafter CISG-AC Opinion No. 6].

sixth opinion has confirmed this prevailing view.[6] A minority opines that, as an exception, non-material damages may be recoverable if a non-material purpose of the contract has been expressly agreed upon.[7]

However, other projects of unification and/or harmonization of contract law on an international or regional level allow monetary compensation of non-pecuniary infringements more liberally. There are also voices advocating a similar interpretation of the CISG, raising concerns that breach of contract could not be adequately addressed in all cases if only economic losses could be claimed as damages. Are they to be followed?

II. Reasons to Reconsider the Prevailing Opinion: Other International or Regional Projects of Unification of Contract Law

As mentioned above, the prevailing opinion reads the damages provisions of the CISG as limiting the compensation of damages (as indicated by the wording of Article 74 CISG – *a sum equal to the loss*)[8] to material damages, while other international or regional projects and instruments for the unification

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[6] *Id.* cmt. 7.1 (citing Hans Stoll & Georg Gruber, *Article 74*, *in* Commentary on the U.N. Convention on the International Sale of Goods (CISG) 558 ¶ 12 (Schlechtriem & Schwenzer eds., Geoffrey Thomas trans., Oxford Univ. Press 2d ed. 2005) (1998) [hereinafter Stoll & Gruber].

[7] In exceptional circumstances, pure non-material loss may be compensable if the contract has an express non-material purpose and the loss is a typical consequence of the breach of contract. *See* Stoll & Gruber, *supra* note 6; *see also* Julius von Staudinger, Kommentar zum Bürderlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen [Commentary on the German Civil Code with all other Relevant Laws] (Ulrich Magnus ed., Dr Arthur L. Sellier & Co., 2005) [hereinafter von Staudinger, Commentary] (discussing the example of goodwill in context of Art. 74, para. 27). *See also* Rolf H. Weber, *Vertragsverletzungsfolgen: Schadensersatz, Rückabwicklung, vertragliche Gestaltungsmöglichkeiten* [*Consequences of breach of contract: damages, winding up, options for structuring contracts - in German*], *in* Wiener Kaufrecht 165-210, 195 (Bucher ed., 1991). *See generally* P. Huber, *in* Müncher Kommentar zum Bürgerlichen Gesetzbuch (Rebmann et al. eds., 4th ed., vol. 3 2004) (regarding Article 74 para. 22).

[8] *See* CISG, *supra* note 1, art. 74. Article 74 of the CISG states:

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

Id.

or harmonization of law expressly provide for the recovery of non-material damage.[9] For example, the Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL), which may become the blueprint of a European Law of Obligations, both allow the recovery of non-economic losses.[10] Article 7.4.2 PICC states:

> (1) The aggrieved party is entitled to full compensation for harm sustained as a result of non-performance. Such harm includes both any loss which it suffered and any gain which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.
>
> (2) *Such harm may be non-pecuniary and includes, for instance, physical sufferings or emotional distress.*[11]

Similarly, Article 9:501 PECL provides in its Paragraph (2):

> The loss for which damages are recoverable includes: (a) *non-pecuniary loss*; and (b) future loss which is reasonably likely to occur.[12]

Since it is the aim of the PICC to "interpret or supplement international uniform law instruments,"[13] it raises the question whether the CISG should be developed by a liberal interpretation of damages along the line of the PICC and the PECL.

Leaving aside the intricate question of the extent to which development by interpretation within the framework of Article 7 (1) and (2) CISG is legitimate and allowed – a topic far exceeding the space allotted to me, and probably my competence, too – it must be asked first, whether and for what reasons such a development could be advocated. As far as I can see, there are three principal motives of policy for allowing compensation of non-pecuniary harm: 1) satisfaction for the party aggrieved by a

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[9] *See, e.g.*, Commission on European Contract Law, The Principles of European Contract Law, art. 9.501 (1) (1998), *available at* http://www.jus.uio.no/lm/eu.contract.principles.1998/doc.html (emphasis added) [hereinafter PECL]; UNIDROIT Principles of International Commercial Contracts with Official Commentary, art. 7.4.2 (1994), *available at* http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.1994.commented/ (emphasis added) [hereinafter UNIDROIT].

[10] *Id.*

[11] *See* UNIDROIT, *supra* note 9, art. 7.4.2 (emphasis added).

[12] *See* PECL, *supra* note 9, art. 9.501 (emphasis added).

[13] *See* UNIDROIT, *supra* note 9, pmbl, ¶ 5.

breach of contract, 2) alleviation of showing and proving loss, and 3) moral convictions, which drive the desire to punish (for example, sellers marketing goods produced under ethically objectionable circumstances, such as child labor).

III. Policy Reasons

1. *Satisfaction*

Breaches of contract, as well as torts, may not always result in pecuniary losses that can be shown and proven. In breach of contract cases in particular, the party aggrieved by a breach may fulfill its duty to mitigate damages so perfectly that in the end there is no loss and there may even be a gain. Avoidance of a bad bargain on which the aggrieved party might have lost money may be a benefit rather than a pecuniary disadvantage. Other circumstances can turn the breach of contract into an advantage for the aggrieved party. For example, during the Spanish American War of 1898, the delayed delivery of four torpedo boats to the Spanish Navy saved them from being sunk by American warships in Havana.[14] Nevertheless, the aggrieved party, although perhaps better off financially due to the breach, may have undergone severe distress caused by the breach. Not only the aggrieved party, but others too will feel that it is wrong that the party in breach or a wrongdoer in tort should not be accountable in court for his failure to comply with contractual or other obligations and duties. Therefore, in legal systems allowing compensation for non-pecuniary losses,[15] the wrongdoer or non-performing obligor is often condemned by courts to pay a small, rather symbolic, amount of money, *un franc symbolique*, thereby giving the aggrieved party the satisfaction of a court

[14] *See* Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda, [1905] A.C. 6 (H.L.) (stating where a penalty was upheld as a liquidated damages clause, the (lost) value of the use being not easily measured).

[15] *See generally* Friedrich Blase, *Guide to Article 74: Comparison with Principles of European Contract Law (PECL), Comment and notes on PECL 9:501*, http://www.cisg.law.pace.edu/cisg/text/peclcomp74.html (follow "PECL comment and notes on the Principles cited" hyperlink; then follow "Comment and notes on PECL 9:501" hyperlink) (discussing how various countries treat damages for contractual breaches) [hereinafter Guide to *Article 74*]. France, Belgium, and Portugal are the countries where awards for non-pecuniary losses in case of breach of contract are awarded generally, while other countries, such as Germany, allow compensation of such losses only in case of certain contracts, for example package travels. *Id.* subsec. "Notes" 1-5.

stating that the other party's behavior was wrong.[16] The satisfaction may be enhanced by the fact that this statement of the court was achieved more or less free of charge, since in most legal systems the breaching party has to pay the costs of litigation. Such a judgment or arbitral award may also have the function of a declaratory decision stating that there was a wrongdoing or breach of contract where a declaratory judgement is unavailable for procedural reasons.

However, compensation for non-pecuniary loss may also be awarded in situations where there is or might be a pecuniary loss that cannot be shown and/or proven by the aggrieved party. Reading the comments to Article 7.4.2 (2) of PICC,[17] one finds that non-pecuniary damages may be awarded as compensation for harm resulting from "contracts concluded by artists, outstanding sportsmen or women and consultants engaged by a company or organization."[18] For example, a young architect, having a contract the performance of which would greatly enhance his reputation, is to be compensated in case of breach not only for the material loss suffered "but also for harm to [his] reputation and the loss of the chance of becoming better known which the commission would have provided."[19]

It is obvious that in all these cases the harm to the reputation of the aggrieved parties – artists, sportsmen and women, consultants, or to the chance of enhancing the architect's reputation – can very well be pecuniary, for instance, the loss of future employment and contracts. However, these prospective losses are hard to show and to prove, because they will materialize only in the future and are contingent on many factors. Reputation is a commercial asset, and the real problem is the evaluation of its pecuniary value in a given case. Translated into sales contract, the pecuniary value is the harm to the goodwill of a party aggrieved by a breach. For example, when a

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[16] *See generally* Guide to *Article 74, supra* note 15, subsec. "Notes" 4 – 5 (discussing how various countries treat non-pecuniary losses). It is telling that the Principles on International Commercial Contracts states in the comments to Article 7.4.2 (2) that the court may also order "the publication of a notice [of the breach] in a newspaper" as a form of redress. *See* UNIDROIT, *supra* note 9, art.7.4.2 (2), subsec. "Illustration."

[17] *See* UNIDROIT, *supra* note 9, art. 7.4.2. (2), cmts. 1-5.

[18] *See* UNIDROIT, *supra* note 9, art. 7.4.2 (2), subsec. "Illustration."

[19] *Id. See also generally* VON STAUDINGER, COMMENTARY, *supra* note 7.

buyer/retailer has been delivered non-conforming goods harmful to his reputation, thereby hurting business relations with sub-purchasers and other customers, the future business, profits from future business, and their evaluation are at stake.

2. *Compensation for Harm to Goodwill*

Some advocates of compensation of non-pecuniary losses refer to an infringement of goodwill as an example of the need to compensate non-pecuniary damages.[20] This is misleading because harm to goodwill may result in pecuniary losses as well, as previously mentioned.[21] The CISG-AC, in a recent expert opinion on damages, clearly stated in its black letter rules that an infringement of goodwill is a pecuniary loss to be compensated under Article 74 of the CISG if the prerequisites of this provision, in particular the foreseeability of such losses, are met.[22] This is in conformity with the opinion of most legal writers.[23] As mentioned above,[24] future profits and gains are often contingent on many factors, and the causal connection between their loss and an infringement of goodwill – and the infringement itself – will often be uncertain and a matter of speculation and guesswork. "Therefore, recovery of damages for loss of goodwill is available *only* if the aggrieved party can establish *with reasonable certainty* that it suffered financial loss because of a breach of contract."[25] The difficulties in establishing the prerequisites of pecuniary losses in the case of harm to goodwill of a buyer are illustrated by a case decided by the German Supreme Court[26] and the court's application of Article 82 of the Uniform

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[20] *See* VON STAUDINGER, COMMENTARY, *supra* note 7; Huber, *supra* note 7.

[21] *See* UNIDROIT, *supra* note 9, art.7.4.2 (2), subsec. "Illustration." *See also supra* Part III.1. While, hypothetically, harm to good will is only a possibility, practically, harm to good will often result in pecuniary loss.

[22] CISG-AC Opinion No. 6, *supra* note 5, cmt. 7 (as appears in the Comments to the Advisory Council Opinion). It is a black letter rule that "[t]he aggrieved party is entitled to damages for a loss of goodwill as a consequence of the breach." *Id.* subsec. "Opinion" No. 7.

[23] *Id.* n.111; *see also* WITZ, *supra* note 3; HERBER & CZERWENKA, *supra* note 3; VON STAUDINGER COMMENTARY, *supra* note 7.

[24] *See supra* Part III.1.

[25] CISG-AC Opinion No. 6, *supra* note 5, cmt. 7.1 (emphasis added).

[26] Bundesgerichtshof [BGH] [Federal Supreme Court] Oct. 24, 1979, VIII ZR 210/78 (F.R.G.) (discussing the dispute between a German cheese importer who entered into a contract to purchase cheese from a Dutch exporter and the court's application of foreseeability limitation at the time of contract formation), *available*

Law on the International Sale of Goods (ULIS).[27] A seller, having his place of business in the Netherlands, had delivered Gouda cheese to a wholesale retailer in Germany.[28] Three percent of the cheese was rotten, and the buyer claimed damages for the loss of four important customers, among other items.[29] While the Court of Appeals had held that this loss was not foreseeable, the Supreme Court emphasized that the cheese trade in Germany was a highly competitive and, therefore, a very volatile market reacting to the slightest malperformance of a dealer.[30] The claimant could have met his burden of proof by submitting expert opinions of the German-Dutch Chamber of Commerce and of the Chamber of Commerce and Industry, if the basis of the experts' results (interrogations of firms, etc.) had been disclosed and, therefore, could have been analyzed by the defendant.[31] Such testimonies not only would help in establishing "foreseeability" of such losses, but they could also help in showing "with reasonable certainty"[32] the causal connection between the malperformance and the loss of customers, i.e. the loss of goodwill and its pecuniary consequences.

The prerequisite of "reasonable certainty of establishing financial losses"[33] from an infringement of goodwill raises, however, some questions about the scope of the CISG and its application by local courts. First of all, there is the question of burden of proof: Is it a matter regulated by the CISG or by some other set of – perhaps local law – rules? The question is often phrased as a problem of the borderline of substantive (CISG)

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at http://cisgw3.law.pace.edu/cases/791024g1.html (follow "Case Digest" hyperlink) [hereinafter BGH, Oct. 24, 1979].

[27] *See* Convention Relating to a Uniform Law on the Sale of Goods (ULIS), art. 82, 834 U.N.T.S 107 (July 1, 1964). The Uniform Law on the International Sale of Goods (ULIS) is a predecessor of the CISG, which was enacted on the basis of the Convention Relating to a Uniform Law on the International Sale of Goods of 1964 in only 9 countries; specifically, Article 82 of the ULIS is a predecessor of Article 74 of the CISG. *See* CISG, *supra* note 1, art. 74.

[28] *See* BGH, Oct. 24, 1979, *supra* note 26.

[29] *Id.*

[30] *Id.*

[31] *See* PETER SCHLECTRIEM & ULRICH MAGNUS, *Bundesgerichtshof of October 24, 1979, Art.* 82 EKG No. 1, *in* INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG 410-15 (Nomos 1987). The decision of the Court of Appeals was reversed mainly for procedural reasons.

[32] *See* CISG-AC Opinion No. 6, *supra* note 5, cmt. 7.1.

[33] *Id.* cmts. 6-7.

rules and the procedural law of the forum, but this is avoiding the real issue in favor of a conceptual approach, resulting in solutions quite different from country to country.[34] In my mind, there can be no doubt that the CISG in some of its provisions clearly allocates the burden of proof, and that this is a matter of substantive law, regulating, for example, as in the case of Article 79 (1) of the CISG, *if he proves*, the degree of strict liability. The only questions are whether and to what extent such allocations of the burden of proof can be found in or derived from other provisions of the CISG not as clear on this point as Article 79 (1).[35] The issue of burden of proof should be decided according to the directives of Article 7 (1) of the CISG, in particular regarding the CISG's international character and "the need to promote uniformity in its application,"[36] by developing uniform rules on the burden of proof by interpretation of the respective provisions of the CISG. Matters are different, however, if it comes to the evaluation of evidence by courts, judges or juries, and to the degree of certainty required for proof, as well as in regard to the discretion that judges or juries have in estimating damages that have not been proven fully, as is allowed by § 287 of German Code of Civil Procedure.[37] This is hardly a matter regulated by the CISG, and to state that losses from infringement of goodwill have to be established with *reasonable* certainty only – and not with certainty bordering on, say, 99% conviction – is indeed broadening the scope of application of the CISG.

3. *"Ethically Tainted" Goods – Recovery of Non-Pecuniary Loss?*

"Ethically tainted" goods are a rather new phenomenon. Rugs manufactured by children, flowers grown by employees under working conditions with grave health hazards on account of the generous application of pesticides, oranges harvested by illegal immigrants under conditions amounting to slave labor,

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[34] *Id.* cmt. 2.5.

[35] The question cannot be treated here thoroughly. *See* PETER SCHLECHTRIEM, INTERNATIONALES UN-KAUFRECHT ¶ 50 (Mohr Siebeck, 3d ed. 2005) (stating this author's opinion); *see also* Stoll & Gruber, *supra* note 7, art. 4, ¶ 22.

[36] *See* CISG, *supra* note 1, art. 1.

[37] *See* VON STAUDINGER, COMMENTARY, *supra* note 7.

etc. have caused concern in our countries. These concerns were taken up, for example, by campaigns advocating "fair trade" and banning or boycotting goods produced in circumstances violating our moral convictions and social standards. It is easy to agree with these concerns, and it is tempting to meet them by interpreting the CISG's damages provisions as allowing claims for non-pecuniary loss, thus providing a tool to "punish" sellers of such "ethically tainted" products by granting claims for damages without pecuniary loss. However, there are doubts as to whether the CISG is the right instrument to promote our convictions. First, it should be analyzed whether the CISG and the background to its application, such as the applicable domestic law, do not have already sufficient remedies to take care of such concerns. Second, it should be considered whether and to what extent the public at large, in the setting of global trade, shares certain ethical values clearly and overwhelmingly, or whether the condemnation of certain production methods only reflect social standards of affluent minorities wanting to do good, and whose members can easily do without the goods in question. It is also uncertain to what extent all members of this group share the same convictions and are willing to act accordingly. I, as a conscientious member of this group, would like to regard cosmetics developed by using animals for testing, often cruelly killed by this testing, as "ethically tainted" and to bring pressure on the firms marketing them by "translating" my moral conviction into an interpretation of Article 74 of the CISG allowing damage claims regardless of pecuniary loss. However, my righteousness somewhat weakens and wanes when it comes to the developing and marketing of cancer drugs. "Ethical values" may reflect often a very subjective conviction of these groups, bordering on zealotry and may not be shared by society in general. For example, Whole Foods, a firm marketing organic food on a large scale in the United States, allegedly has a policy of limiting the compensation of its highest paid executives to fourteen times the amount of the average employee salary[38] (instead of 800 times as in some other enterprises), which is an "ethical policy" highly appealing to me and probably to many others, too, but not yet to everyone in the U.S. or in Germany. If someone bought from a firm with standards similar to

[38] *See* Stephen Shapin, *Paradise Sold*, THE NEW YORKER, May 15, 2006, at 84.

those of Whole Foods where the contract refers expressly to the seller's wage policies, can the buyer who will later uncover that the seller failed to follow its own rules claim that the goods he bought are "ethically tainted" and, therefore, not in conformity with the contract? And could I, if acting as a judge or arbitrator, decree that, although the buyer did not suffer any loss, the seller has to pay punitive damages for the buyer's disappointment and hurt feelings, thereby imposing my moral convictions on others who might not share them? Finally, the allowance of recovery in such cases may be used to circumvent the burden of proof for pecuniary losses by reverting to the "penal" sanction of damages of non-pecuniary damages, which could result in extremely diverging awards around the globe and, in some instances, in "hometown justice." It would also be clearly in violation of the directives in Article 7 (1) of the CISG.[39] This leads us back to my first concern: Do we need such an interpretation of the CISG at all to cope with the causes of our concern?

4. *Remedies Under Domestic Law*

A seller, having stated in the context of contracting that the production of the goods will meet the buyer's standards in regard to, for example, selection and treatment of the labor force, may have lied. Domestic law will apply if such lies amount to misrepresentation and/or fraud and trigger remedies, such as avoidance.[40] The applicable domestic law may even allow for punitive damages in case of fraud or misrepresentation, which the CISG abstained from regulating.[41]

The applicable domestic law may require that certain standards of production and manufacturing of goods must be ob-

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[39] CISG, *supra* note 1, art. 7 (1). Article 7 (1) states: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." *Id.*

[40] *See, e.g.*, Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236 (S.D.N.Y. 2002), *remanded to* 2005 WL 2132438, 2005-2 Trade Cases P 75,046 (S.D.N.Y. 2005) (applying U.S. state law to anti-trust claims arising out of a supply agreement between two pharmaceutical manufacturers which involved misrepresentation allegations).

[41] Also not expressly excluded as in Article 89 of the ULIS, the prevailing opinion holds that fraud and fraudulent misrepresentation are not covered by the CISG and, therefore, remain in the domain of domestic law. *See* Stoll & Gruber, *supra* note 7, arts. 14-24, ¶ 1.

served, and may prohibit the marketing of goods manufactured in contravention of such standards. A violation of such regulations, therefore, may render a contract void, domestic law superseding the CISG.[42] The correct way for those who want to make their moral convictions legally operative is, therefore, to campaign or lobby in their countries to have legislators ban certain production methods by rendering contracts to market such products illegal and void. This, of course, is hard work, and it is more convenient to propagate ethical convictions by interpreting the CISG in scholarly essays and papers.

5. *Remedies Provided for by Stipulation*

A prospective buyer troubled by the prospect that the production of the goods, which he intends to order, will violate his or her ethical convictions, can and should try to stipulate that certain standards of production have to be observed. Such standards then become requirements of quality, i.e. conformity under Article 35 (1) of the CISG.[43] Goods produced in violation of these standards are non-conforming. The purchaser of rugs, for example, can demand to stipulate that the weavers should not be younger than sixteen and should work no more than forty-eight hours a week.

In addition to obliging the seller to keep certain standards, or get the goods from sources adhering to these standards, the buyer can contractually try to sharpen the remedies in cases of non-conformity.[44] For instance, the threshold for avoidance can be lowered by qualifying the standards of ethical production methods as being "of the essence," a violation constituting a fundamental breach allowing immediate avoidance under Article 49 (1)(a) of the CISG.[45] Since claims for damages may be unavailable because of a lack of losses – the rugs in question may sell nicely and profitably in the buyer's country – the buyer may insist on liquidated damages clauses or penalties if valid and

[42] *See* CISG, *supra* note 1, art. 4 (specifically referencing sentence two).

[43] *See id.* art. 35 (1).

[44] *Id.* art. 6 (Article 6 provides "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

[45] *Id.* art. 49 (1)(a) ("The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract.").

enforceable under the law applicable to the contract, besides the CISG.[46] A choice of law clause designating a domestic law allowing such clauses may supplement the contractual toolbox.

Of course, the seller may not be willing to accept such clauses defining conformity as conformity of production standards based on ethical commandments dear to the buyer, and to agree with tougher remedies in the case of non-conformity. But if the buyer was deeply convinced of his ethical values, could it then not be expected that he abstain from contracting and that he forego the profits hoped for by importing rugs, flowers, or oranges if the other party is not willing to accede to his ethically motivated demands? The global application of the CISG will very often bring together merchants with quite different ideological and ethical beliefs, resulting in sometimes extremely diverging social standards for productions methods. The objection of a seller to accede to the purchaser's expectations in regard to certain standards of production may be based on convictions of what is right, which are as strong and deeply rooted as those of the buyer. This clash of convictions, however, brings us to the heart of the matter: Should the CISG or, more precisely, the interpretation of the CISG in light of ethical convictions of *one* party with a particular cultural background be used to impose this party's convictions on other parties who do not share the same beliefs and who are not willing to accede to them by accepting a contract term proposed to protect the first party's ethical convictions? This would not only be an inappropriate, missionary bending of the function of the CISG's interpretation, but would open the floodgates for diverging results and decisions: Not only the social labor standards of affluent societies, but also religious and ideological beliefs in a Contracting State – or in certain segments of its populations, which may be only minority groups, but influential and/or very vociferous – could then influence issues of conformity and available remedies. It should suffice to remember that only recently goods from a certain country were the object of mass protests, demanding boycotts because of the buying country's supposed political or religious tendencies and its constitutionally pro-

[46] CISG, *supra* note 1, art. 49 (1)(a). This would take care of the concern of scholars advocating compensation of non-pecuniary losses in cases, where the "express purpose of the contract" was the protection of immaterial expectations.

tected freedom of the press. The consequence of such interpretation of conformity and the CISG's provisions on remedies, in particular the recognition of claims for damages without loss according to one's own ethical convictions, would be that the neutrality and objectivity of the CISG's set of rules, on which its claim for worldwide acceptance rests, and the uniformity of its application would be lost. This cannot be advocated.