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Content:

Remarks on the Damages Provisions in the CISG, Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (UPICC)*

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1. Damages in International Sales Law: CISG, PECL and UPICC

Contract law, whether national or international, is -- almost universally and entirely -- at the disposition of the parties when they are modeling their individual contractual situation; very few of its provisions are usually considered mandatory. The latter rules are confined to popular issues of validity due to immorality, illegality or incapacity as well as the rudimentary protection of the balance of the duties owed between the parties. Even in situations where the contract partners actively negotiate the terms of their contract and especially in the manifold situations in which they do not discuss the conditions, the commercial parties of cross-border transactions often do not consider the substantive law applicable to their contract. This holds true not only for the contract drafting stage, but also for the fulfillment by performing the duties owed under the contract. Somewhat prematurely, the parties (and their legal counsel) might even believe that their elaborate contract deals with all the issues of fulfillment and no reference to the underlying law must be made. Whatever the scenario, this view dramatically changes, when the relationship deteriorates and one or both of the parties deliberate about damages. In practice virtually all less extensively negotiated, elaborated and documented contracts -- and thus the vast majority of them -- do not provide any rules of either accounting or awarding damages. The pursuit of compensation almost invariably leads the parties to turn to the applicable law. In more and more cases, such a search will lead to the U.N. Convention on Contracts for the International Sale of Goods (CISG).

The success of the CISG since its creation at a diplomatic conference in Vienna in 1980 has fueled the hopes of uniform law supporters around the world that more global standardization of private law aspects would be possible. Even before the CISG came to see the light of day, various groups had been formed to measure the scope of international harmonization beyond the realm of sales transactions by focusing on nothing less than the general rules applied to all business transactions, i.e., the law of international commercial contracts. Albeit not anticipated, the political changes in Central and Eastern Europe and the former Soviet Union at the verge of the last decade of the last century provided additional stamina for the hard-working groups and made a possible formulation of such general contract law that much more likely -- especially now that the world was to seemingly unite behind the principles of democracy, market forces and capitalism. The 1990's therefore saw the presentation of the results of two such projects: the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL). The UPICC were released by the Institute for the Unification of Private Law (UNIDROIT) in 1993, were received with considerable laudatio and an unusually high level of promotion. Their first version of 1994 still stands ten years later, due to be updated by an extended version in 2004. The European-focused PECL were released in 1994, thus losing the first race against their global counterpart. However, the PECL were already updated in 1999, now covering more ground than their rival UPICC. Most recently, they have been called on by the European institutions as the centerpiece of a possible European-wide unification of contract law.

Should the CISG apply to a contract, a search for a claim for damages brings to light its Art. 74 and a few further provisions on damages. The result of a first scan, however, can hardly be satisfying, as more questions seem to be raised than answered. Unfamiliar and broad terminology is found in a surprisingly brief description of the legal mechanisms. By comparison, the provisions of the PECL and UPICC both display a higher degree of regulation on the matter of damages. As the latter two instruments deal with contractual agreements in general, not just contracts for the sale of goods, and since it is said that they have often been inspired by the CISG, it has been asserted that the UPICC and PECL could help to interpret certain provisions of the Sales Convention. This may also hold true for the provisions on damages, in particular its central provision contained in Art. 74 CISG. The following remarks will attempt to shed further light on this.
In line with the interpretive canon required by Art. 7(1) and (2) CISG, we will first examine matters that are expressly settled in the Convention (infra at 2). Then we will deal with those matters that are governed by the Convention, but are not expressly settled in it (infra at 3). Finally, we will provide an outlook at those matters that are not governed by the CISG, but may call for an application of the PECL or UPICC (infra at 4).

2. Matters governed by CISG Art. 74 and expressly settled in it

A number of matters that are governed by Art. 74 and expressly settled in the Convention can be reaffirmed by turning to the UPICC and PECL as persuasive authority:

(a) Breach of contract: right to damages

While Art. 74 CISG does not define the term "breach of contract", it can be interpreted as any nonperformance of a contractual obligation as reflected in Art. 9:501(1) PECL and Art. 7.4.1 UPICC, each providing that damages can be claimed for by the other party's "non-performance". Also, neither PECL nor UPICC demand that the aggrieved party is only entitled to damages if the non-performing party was at fault.

(b) Measure of damages: full compensation

The general principle of full compensation, which is generally held to be an underlying principle of the CISG, is expressly laid down and defined in Art. 9:502 PECL and Art. 7.4.2(1) UPICC. Hence, both the latter instruments follow the same principle which will be useful when addressing some issues not expressly settled in the CISG.

(c) Foreseeability of loss

A foreseeability test as contained in Art. 74 CISG is also applied in both Art. 9:503 PECL and Art. 7.4. UPICC. Like Art. 74 CISG, both other instruments do provide for a subjective and objective test of foreseeability. Art. 9:503 PECL and Art. 7.4.4 UPICC require, however, that the loss suffered is a "likely result" of the non-performance. The CISG seems to apply a wider standard by providing that the loss must have been foreseen as a "possible consequence" of the breach. There is a distinct difference in the wording resulting in a different standard to be applied by the CISG, on the one hand, and the UPICC and PECL, on the other. Hence, the UPICC and the PECL cannot serve as a persuasive authority to clarify a real question concerning a matter which, despite being expressly settled in the Convention, arguably remains ambiguous.

3. Matters governed by the Convention, but not expressly settled in it

Turning to other matters which are governed by the Convention, but are not expressly settled in it, one could find a number of ways in which both PECL and UPICC might aid in the interpretation of CISG Art. 74.

(a) Offsetting losses with gains

The Convention does not expressly stipulate whether the amount of damages should be reduced by any advantages which the breach brings for the promisee. However, by applying the principle of full compensation, which is a general principle underlying the Convention, this question is generally answered in the affirmative. Whereas the UPICC address this issue in Art. 7.4.2(1), second sentence in the same manner, the PECL do not provide for an express rule on the issue. However, the Official Commentary on Art. 9:502 PECL highlights the same principles by stating that "[t]he aggrieved party must bring into account in reduction of damages any compensating gains which offset its loss". Hence the mechanics of both PECL and UPICC can be used as persuasive authority in confirming the solution predominantly favored under the regime of the CISG.
(b) Loss partly attributable to aggrieved party

Another matter not expressly settled in the CISG is that of joint responsibility for losses. Most legal scholars agree that it falls into the scope of the Convention.\textsuperscript{30} The correct legal approach is to turn to the underlying principles of the CISG.\textsuperscript{31} The amount of damages is thus to be apportioned between the parties in accordance with the degree of causation by the respective parties. This result is also found expressly in both PECL (Art. 9:504) and UPICC (Art. 7.4.7). Both regimes require an apportionment of damages that reflects the parties' contribution to causation. PECL and UPICC are therefore again persuasive authority for resolving this issue.

(c) Proof of non-pecuniary loss

Courts and arbitral tribunals face immense difficulties with claims for non-pecuniary losses. Especially the proof of harm and the extent of it seem to cause problems for judges and arbitrators, in particular when loss of reputation or good will is at stake and the economic disadvantages are not quantifiable.\textsuperscript{32} The different approaches taken by legal scholars do not really clear up the problem, but rather contribute to more confusion.\textsuperscript{33}

To deny such claims altogether seems to be the wrong approach here. Both PECL (Art. 9:501(2)(a)) and UPICC (Art. 7.4.2(2)) acknowledge the recoverability of such losses, including loss of good will and reputation. The same should apply cases governed by the CISG, especially since the principle of full compensation is underlying the Convention.\textsuperscript{34}

As far as the proof of the existence and the extent of the harm is concerned, the foreseeability test contained in Art. 74 CISG could be made more compatible when supplemented with the rules of Art. 7.4.3 UPICC. According to that provision, compensation for harm is only to be granted for such harm that is established with a reasonable degree of certainty. The PECL do not explicitly address the question of proof for harm; Art. 9:501(2) PECL only specifies the foreseeability test for future loss. The test contained in Art. 7.4.3(1) UPICC, however, applies to both the existence and the extent of the harm. It is thus also helpful in cases where the harm is difficult to quantify, e.g., when non-material harm is at stake. Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court (or arbitral tribunal), pursuant to Art. 7.4.3(3) UPICC. The application of Art. 7.4.3 UPICC would thus allow for compensation of commercial damages even in cases where the degree of damages is difficult to quantify and the applicable procedural law does not provide for an abstract sum to be granted.\textsuperscript{35} As a consequence, however, domestic procedural rules on proof and certainty of loss would find no application -- a result that is in line with the position taken by most legal scholars. This result is justified if one does not qualify questions of certainty of loss and other similar questions as procedural, but as substantive matters, which are to be settled by substantive rather than procedural law.\textsuperscript{36} The application of the UPICC then helps to further the ultimate goal of fostering uniformity in the application of the CISG.

(d) Currency of damages

Art. 74 CISG does not provide for the currency in which the damages are to be paid. The predominant view is that damages are payable in the currency in which the loss was suffered or in which a particular profit would have been made.\textsuperscript{37} Art. 9:510 PECL points to the same direction as it provides that damages are to be measured by the currency which most appropriately reflects the aggrieved party's loss. A similar, yet more specific solution is offered by Art. 7.4.12 UPICC which provides that damages are to be assessed either in the currency in which the monetary obligation was expressed or in which the harm was suffered, whichever is more appropriate. This suggests that under the Convention damages should generally be measured in the currency which most appropriately reflects the aggrieved party's loss. This may in single cases be the currency in which the monetary obligation was expressed.
(e) Loss of profit

The CISG does not provide for specific rules as to the degree of probability to be applied when assessing whether a certain profit would have been made and what the amount of that profit would be. As a consequence thereof courts and arbitral tribunals take recourse to the general law of evidence of the lex fori or reject damages for future loss, including the loss of a chance altogether. Here similar problems are faced as in the case of non-pecuniary losses and losses of good will. Again, the approaches taken in both PECL and UPICC suggest that such recourse to domestic law is not necessary. Art. 9:501(2)(b)

PECL provides that recoverable loss comprises future loss that is reasonably likely to occur. This means that the judge or arbitrator would have to evaluate both the likelihood that the future loss will occur and its likely amount. Such future loss may also take the form of the loss of a chance. The UPICC apply a similar test by providing in their Art. 7.4.3(1) that was mentioned earlier in the context of proof of existence and extent of harm that had already accrued. The provision applies the same rule to future harm by demanding that it is recoverable only when established with a reasonable degree of certainty. If there is no sufficient degree of certainty, the assessment is at the discretion of the court or tribunal, Art. 7.4.3(3). Moreover, compensation may be due for the loss of a chance in proportion to the probability of its occurrence, Art. 7.4.3(2). As has been shown before, when asked to assess the existence and the extent of loss, including future loss, the user of the CISG is called upon to apply either the UPICC or the PECL to avoid recourse to domestic law for promoting uniformity in the application of the CISG.

(f) Incidental losses

It is widely assumed that incidental losses are only recoverable if they prove to be reasonable. Such restriction, however, is not to be found in the wording of Art. 74 CISG. It is submitted that the artificial bar imposed by the reasonableness test serves no purpose and should be abandoned. This position is supported by looking at the PECL and UPICC counterpart regimes, both of which do not apply a reasonableness test. It is a false concern that without the reasonableness requirement doors would open for the compensation of losses that would otherwise not be recoverable. The foreseeability test, which is entrenched in the CISG, enables the user to achieve the same results as with such a reasonableness test. The inclusion of the reasonableness test stems primarily from the writings of American scholars. However, in American law incidental losses need to pass only the test of reasonableness, but are not subject to a foreseeability test. The requirement of reasonableness makes the foreseeability test redundant as reasonable expenses are always foreseeable. The same, however, can also be said to be true of the reverse situation. Unreasonable expenses must generally be considered as not foreseeable according to Art. 74 CISG. Such analysis of the CISG receives persuasive backing from the PECL and the UPICC. Both instruments only provide for the foreseeability test in Art. 9:503 PECL and Art. 7.4.4 UPICC. Both sets of Principles get by without the additional requirement of a reasonableness test. The same arguably could be held for the CISG.

4. Matters not governed by the Convention

Finally, we turn to matters that are not governed by the CISG, but require to be dealt with in the complete assessment of damage claims. Turning to PECL and UPICC is possible in these cases, when the general conflicts of laws provision allows for the application of "rules of law" to the contract. Conversely, if the application of "law" is required, the courts and tribunals may be barred from applying either set of Principles.

(a) Civil liability for personal injury

The compensation covered by Art. 74 CISG comprises both expectation interest and indemnity interest. However, Art. 5 CISG states that the CISG does not deal with any liability issues for death or personal injury caused by the goods. Damages claims in these circumstances are beyond the scope of the CISG, since the Convention was not intended to intervene with the rules and regulations that signatory states had in place for such situations. In particular, the European Union member States had incorporated an EU directive on defective goods into national law. The PECL and UPICC also do not seem to deal with this matter. Although they govern certain damage claims that some jurisdictions may qualify as tort claims, such as damages for negotiations contrary to good faith, for incorrect information or for fraud and threat during the formation of
the contract, neither framework deals with damages for death or personal injury caused by the goods. Neither the wording of the provisions nor the commentaries by either group of authors leads to the assumption that such damage claims should be addressed through the general damages provisions. On the contrary, while the UPICC authors do not even discuss this question in their commentary, the PECL authors state that “[t]he Principles may be applied to claims which arise out of the contract, even if under some national systems the claim might be qualified as delictual rather than contractual”. They list the issues which they deem to cover, but that list does not include the situation of a damage claim for personal injury or death from defective goods. Hence, the arbitral tribunal or court will not find grounds in the PECL or UPICC to decide such a claim, but will have to rely on applicable national laws.

(b) Reliance interest

The intensely debated matter of reliance interest may fall outside the scope of the Convention and may thus be addressed by the PECL and UPICC. The two private codifications themselves suggest that damages to compensate for the reliance interest must be seen as different and separate from the damages awarded with respect to a contractual non-performance. Both Art. 4:117 PECL and Art. 3.18 UPICC explicitly deal with damage claims to put the aggrieved party in the same position in which it would have been, if it had not concluded the contract. The authors of both works emphasize the need to differentiate between this claim and those concerning non-performance that are dealt with in very different parts of the codifications. Hence, the PECL and UPICC may -- firstly -- serve as persuasive authority to suggest that a damage claim based on the reliance interest is not covered by the CISG. Following that, both sets of rules will -- secondly -- apply with their respective provisions to cover those claims.

(c) Punitive damages and penalty clauses

It is generally assumed that punitive damages and penalty clauses can be agreed upon by the parties, whereas the admissibility and validity of such clauses is not governed by the CISG. In contrast, both PECL, in Art. 9:509, and the UPICC, in Art. 7.4.13, deal with this matter and both frameworks are coherent as to the way they deal with it. Where the contract provides for a specified sum of damages for non-performance, this sum is to be awarded irrespective of the actual sum that the aggrieved party has suffered. Despite any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss or harm resulting from the non-performance and the other circumstances. As both the PECL and the UPICC provide a complete set of regulations on the issue of penalty clauses and liquidated damages, both may be applied by the courts and tribunals rather than turning to any domestic law when dealing with agreed arrangements for non-performance.

5. Conclusions

The furtherance of international trade law is no easy business. Despite intense debate and increasing practical use of the CISG, many questions remain unresolved. In fact, it is most likely that more debate and more practice will increase the number of questions in doubt as it will shed light on previously unconsidered situations requiring judgment. The PECL and the UPICC are both very able legal instruments that can be used to fill or to assist in filling some of the gaps of the Convention. With respect to damage claims under the Convention there are several questions, towards the resolution of which the Principles could provide practical assistance.

*Adapted version of a research paper on the use of the UNIDROIT Principles on International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL) to help interpret regulations of the Convention on

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1 Cf. for these fundamental principles the regulations in the sets of rules discussed here: CISG Art. 6; UPICC Arts. 1.1, 1.4, 1.5; PECL Arts. 1.102, 1.103.

2 See the reference by the arbitral tribunal in ICC Award No. 7375 of 5 June 1996, reprinted in Mealey's Publications, Document # 05-961223-101, at 85: "In many international disputes, the question of the law which is applicable to a contract is of rather peripheral importance only, as the dispute will be decided on the basis of the relevant contract and, as far as necessary an interpretation thereof, such that in most cases it will not be necessary to resort to an underlying applicable law for obtaining 'legal guidance'; see also Berger, "The Relationship Between the UNIDROIT Principles of International Commercial Contracts and the New Lex Mercatoria", 5 Uniform Law Review (2000), at 153, 164: "The contract becomes the 'substitute law' for the parties by virtue of its self-sufficient character"; Lundmark, Die detaillierten Natur anglo-amerikanischer Kaufverträge, in Festschrift Otto Sandrock, at 623, 625; cf. also Merkt, Grundsatzfund. Praxisprobleme der Angloamerikanisierungstendenzen im Recht des Unternehmenskauf, in Festschrift Otto Sandrock, at 657, 659.

3 For an interesting observation on the detailed nature of investment contracts, see Berger, "Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators", 36 Vanderbilt Journal of Transnational Law (2003), at 153 et seq.

4 Two issues are more frequently dealt with in respect of damages: 1) the inclusion of liquidated penalty clauses and similar concepts of penalties and abstractly calculated damages, on this see also Berger, Vertragsstrafen und Schadenspauschalierungen im Internationalen Wirtschaftsvertragsrecht, Recht der internationalen Wirtschaft (1999), at 401 et seq.; 2) clauses on the method of determining the amount of damages (often through arbitral tribunals or expert reports).


6 However, it should not be forgotten at this point that the political changes also brought a similar project started by representatives of socialist and communist countries to a premature end: the Project of the Former Council for Mutual Economic Assistance for a General Law on International Commercial Contracts, cf. Berger, Creeping Codification of the Lex Mercatoria, at 123 et seq.

7 The fall of communism in Europe and the Soviet Union also meant that a number of legal systems and laws, namely those of the socialist/communist nature, would no longer be significantly taken into consideration. The Chinese, as the only remaining considerable economic power with communist rule, has recently changed its contract law, drawing substantially on the CISG and further international sources", for a brief overview see Will (ed.), CISG and China -- An Intercontinental Exchange, passim; see also for a review of this book Blase, "CISG and China -- An Intercontinental Exchange", 4 Vindobona Journal (2000), at 95 et seq.


9 The abbreviation for the Principles is not universally applied. However, it conforms to the typical method of abbreviation for many laws and Conventions and is based on the English version of the Principles' name.


11 Supra note 9.

12 For more information on the work of the Institute see .


14 For some observations on support for and activity around the UPICC, see Blase, "Leaving the Shadow for the Test of Practice -- On the Future of the Principles of European Contract Law", 3 Vindobona Journal (1999), at 3 et seq.

15 UNIDROIT Principles 2004 contains 5 new chapters (Authority of Agents; Third Party Rights; Setoff; Assignment of Rights, Transfer of Obligations and Assignment of Contracts; Limitation Periods) as well as an expanded Preamble and new provisions on Inconsistent Behavior and on Release by Agreement. Moreover wherever appropriate the 1994 edition of the Principles was adapted to meet the needs of electronic contracting.

16 For an extensive description of the PECL see Blase, Die Grundregeln des Europäischen Vertragsrechts als Recht grenzüberschreitender Verträge (2000).

17 Experts involved in the drafting of both UPICC and PECL stress the common elements of both sets of rules and the mutual benefit that the drafters received from the work of the other group. See particularly the publications by the two respective chairmen, Ole Lando and Michael Joachim Bonell. Cf. Bonell, "The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?", 1 Uniform Law Review (1996), at 229, 233. For a detailed comparison of the two sets of rules see Bonell, An International Restatement of Contract Law -- The UNIDROIT Principles of International Commercial Contracts, at 88 et seq.; Blase, Die Grundregeln des Europäischen Vertragsrechts (2000), at 125. On the existence of such a race see Blase, "Leaving the
The PECL also contain rules on direct as well as indirect agency in the formation of contracts, whereas the UPICC have rules on direct as well as indirect agency in the formation of contracts, whereas the UPICC have
The PECL deals with Damages and Interest in Arts. 9:501 -- 9:510.
The UPICC deals with Damages and Interest in Arts. 7.4.1 -- 7.4.13.
For substantive work on this, see the results and ambitions of the Study Group on a European Civil Code (SGEEC) at , which in many ways has inherited the role of the Commission on European Contract Law, drafters of the PECL.
The PECL also contain rules on direct as well as indirect agency in the formation of contracts, whereas the UPICC have Damages and Interest in Arts. 7.4.1 -- 7.4.13.
Cf. Lando/Beale (ed.), Principles of European Contract Law -- Parts I and II, at 439. Official Comment on Art. 9:502 PECL. Comment C, also available online at . reads: "The aggrieved party must bring into account in reduction of damages any compensating gains which offset its loss; only the balance, the net loss, is recoverable. Similarly, in computing gains of which the aggrieved party has been deprived, the cost it would have incurred in making those gains is a compensating saving which must be deducted to produce a net gain [...]."

For detailed research on this interaction see Burkart, Interpretatives Zusammenwirken von CISG und UNIDROIT Principles (2000), passim.
See relevant case law: - Austria 14 January 2002 Oberster Gerichtshof [Supreme Court], case presentation including English translation available at ; - Austria 28 April 2000 Oberster Gerichtshof [Supreme Court], case presentation including English translation available at ; - Germany 26 November 1999 Oberlandesgericht [Appellate Court] Hamburg, case presentation including English translation available at ; - Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318, case presentation including English translation available at ; and - Austria 15 June 1994 Vienna Arbitration proceeding SCH-4366, case presentation including English translation available at ; See also Stoll/Gruber, in Schlechtriem/Schwenzer (ed.), UN-Kaufrecht (2004), Art. 74 para 2; Knapp, in Bianca/Bonell (ed.), The 1980 Vienna Sales Convention (1987), Art. 74, note 3.2; Enderlein/Maskow (ed.), International Sales Law (1992), Art. 74, note 4, also available online at ;
See, for instance, Austria 14 January 2002 Oberster Gerichtshof [Supreme Court], case presentation including English translation available at , see relevant excerpt: "Generally an objective standard is applied for foreseeability here. The obligor must reckon with the consequences that a reasonable person in his situation (Art. 8(2) CISG) would have foreseen considering the particular circumstances of the case. Whether he actually did foresee this is as insignificant as whether there was fault [...]. Yet, subjective risk evaluation cannot be completely ignored: if the obligor knows that a breach of contract would produce unusual or unusually high losses, then these consequences are imputable to him." See also Enderlein/Maskow (ed.), International Sales Law (1992), Art. 74, note 8 and 10, also available at .
Stoll/Gruber, in Schlechtriem (ed.), UN-Kaufrecht (2004), Art. 74, para 35; Ferrari, "Comparative Ruminations on the Foreseeability of Damages in Contract Law", 53 Louisiana Law Review (1993), at 1257, 1268; see also Faust, Die Vorhersehbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht (CISG)(1996), at 50 et seq. and 71, 72, who proves that not only the wording but also historical considerations speak in favor of a wider interpretation.

The opposite view -- i.e., that the foreseeable test should be interpreted narrowly as in the case of PECL and UPICC -- is held by Prof. Sieg Eiselen; see Eiselen, "Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 74 of the CISG", para h., available at . For further points of view on both sides of this issue, see: - Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (July 1981), available at ; : "The test of foreseeability in art. 74 is substantially broader than the test in Hadley v. Baxendale, as refined by the House of Lords in The Heron II (1969 1 A.C. 350. In the latter case Lord Reid expressly rejected the test of possible damages adopted in art 74. Its retention in art. 74 could lead to the admissibility of damage claims that have hither-to been rejected and enlarge the seller's already very substantial exposure to liability." - E. Allan Farnsworth, Damages and Specific Relief, 27 American Journal of Comparative Law (1979) 247-253, available at ; : "The requirement of foreseeability, known throughout the common law world as 'the rule of Hadley v. Baxendale, appears as the second sentence of art. [74] ... Any such formula is inevitably imprecise. It comes close to blending the [U.S.] Restatement of Contracts § 330, which allows recovery for 'injuries that the defendant had reason to foresee as a possible result of his breach when the contract was made and UCC 2-715(2)(a), which allows the buyer recovery for 'any loss Friedrich Blase and Philipp Hotter 16.02.16, 14:00 resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know." Although the use in art.[74] of "possible consequences" may seem at first to cast a wider net than the Restatements probabil result", the preceding clause ('in the light of the facts ...') cuts this back at least to the scope of the Code language."

Cf. Lando/Beale (ed.), Principles of European Contract Law -- Parts I and II, at 439. Official Comment on Art. 9:502 PECL. Comment C, also available online at , reads: "The aggrieved party must bring into account in reduction of damages any compensating gains which offset its loss; only the balance, the net loss, is recoverable. Similarly, in computing gains of which the aggrieved party has been deprived, the cost it would have incurred in making those gains is a compensating saving which must be deducted to produce a net gain [...]."

See Tallon, in Bianca/Bonell (ed.), The 1980 Vienna Sales Convention (1987), Art. 80, note 2.5; Herber/Czerwenka,


32Courts have rejected claims for loss of good will as no actual loss was proven. See, for instance: - Germany 9 May 2000 Landgericht [District Court] Darmstadt, case presentation including English translation available at A similar approach is to be found in the following cases: - France 21 October 1999 Cour d'appel [Appellate Court] Grenoble (Calzados Magnanni v. Shoes General International), case presentation including English translation available at; and - Switzerland 10 February 1999 Handselgericht [Commercial Court] Zürich, case presentation including English translation available at.


34Cf. Eiselen, "Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 74 of the CISG", paras d. and e., available online at.


40Cf. Land/Beale, Principles of European Contract Law, Parts I and II, at 436.

41These are qualified as expenditures suffered by the aggrieved party which have occurred as a consequence of the breach of contract.

42See relevant case law: - Germany 25 June 1997 Bundesgerichtshof [Supreme Court], case presentation including English translation available at; - Germany 8 January 1997 Oberlandesgericht [Appellate Court] Köln, case presentation including English translation available at; - Russia 9 September 1994 Arbitration proceeding, Award No. 375/93, CISG online case No. 450 cited in by Peter Winship, in Ferrari/Flechtner/Brand (ed.), The Draft UNCITRAL Digest and Beyond (2004), at 784 (Fn. 29); case presentation also available at. See case Abstract available on Unilex database at: The seller performed the contract in accordance with its terms and conditions and delivered the goods to the buyer. The buyer did not present any claims with regard to the goods nor did it pay the price of these goods. The seller requested the buyer to pay for the goods as well as compensation for the loss sustained as a result of the buyer's breach of contract. This loss included the cost of storage of the goods at the port of loading on account of the delay of the ship which was to be provided by the buyer. The seller presented to the tribunal the bills it had paid for storage. The amount indicated on these bills corresponded to the charges usually made for this kind of operation. The Tribunal decided in favor of the seller and ordered the buyer to pay the price of the goods as well as damages as provided in Art. 74 CISG. The Tribunal also awarded, on the basis of Art. 78 CISG, interest on all the sums the seller owed at the rate provided for by the law of the seller's country. For concrete examples of such expenditures, see Winship, at 784; see also Magnus, in Staudinger, Wiener UN-Kaufrecht (CISG) (1999), Art. 74, para 53; Stoll/Gruber, in Schlechtriem/Schwenzer (ed.), UNKaufrecht (2000), Art. 74, para 18. See also Austria 14 January 2002 Oberster Gerichtshof [Supreme Court], case presentation including English translation available at. See excerpt from case Abstract available on Unilex database at: As to the amount of damages claimed by the buyer, the Court held that, according to Art. 74 CISG, the aggrieved party is entitled to full compensation of the losses suffered as a result of the other party's non-performance, including loss of profit, provided that the losses were foreseeable at the time of the conclusion of the contract. However, in the case at hand the seller's standard terms expressly excluded the compensability of the so-called consequential damages. As a consequence the buyer was entitled to recover the expenses it had incurred in repairing the goods, but not the other losses it had suffered in its relationship with its costumer as a consequence of the seller's non-performance. For the role of reasonableness as
a general principle of the Convention, see Kritzer, Editorial remarks, which include further citations and references, at :
"Reasonableness is specifically mentioned in thirty-seven provisions of the CISG and clearly alluded to elsewhere in the Uniform Sales Law. Reasonableness is a general principle of the CISG. [...] Although not specifically defined in the CISG, reasonableness is so defined in the Principles of European Contract Law. Moreover, the PECL definition of reasonableness [Art. 1:302] also fits the manner in which this concept is used in the CISG. This definition can help researchers apply reasonableness to the CISG provisions in which it is specifically mentioned and as a general principle of the CISG. [...] regarding reasonableness as a fundamental principle of the CISG and reading reasonableness into every article of the CISG, whether specifically mentioned in the article or not... is required by virtue of the good-faith and uniform-law mandate recited in Article 7(1) of the CISG."


44 Anderson, op. cit.


47 Lando/Beale (ed.), Principles of European Contract Law, Parts I and II, at xxv.

48 Reliance interest does generally call for placing the party in the position in which it would have been if it had not relied on the due performance of the contract. But not only the recoverability of reliance interest under the CISG is a fairly unresolved issue, but it also seems to be unclear which losses fall under it and what preconditions need to be met for such claims to be successful; see e.g., Stoll, in Schlechtriem (ed.), UN-Kaufrecht (2000), Art. 74, para 3.


50 See relevant case law: - ICC Arbitration Case No. 7197 of 1992, case presentation available at : see excerpt from case Abstract available on Unilex database at : In the court's opinion, as CISG does not contain any provision concerning penalty clauses, Austrian law had to be applied pursuant to Art. 7(2) CISG. Applying Austrian law, the court held that the seller had the right to recover all damages suffered notwithstanding the limit fixed by the penalty clause. - Germany 8 February 1995 Oberlandesgericht [Appellate Court] München, case presentation including English translation available at

51 The opposing view is held by Prof. Eiselen, see Eiselen, "Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 74 of the CISG", para o., available online at .

Referring Principles:

- VII.1 - Damages in case of non-performance
- VII.2 - Principle of foreseeability of loss
- VII.3.2 - Calculation of damages