Title: Damages under CISG: Scope and Implication within the Structure of Remedies

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Introduction

Damages are very important integral part of the remedy system under CISG. It settles the dispute and make up for the parties' expectations with real money and therefore is of most concern for the parties in practice.

This work aims to exam the mechanisms provided by the Convention to delimit the scope of damage award. Before entering detailed analysis of these mechanisms, it will first look at damages within the system of remedies under CISG, including the characteristics of each of the primary remedies and in particular, how they are related to damages.

Then the present work will focus on three mechanisms. The overarching guidelines about the legal scope of damages are contained in Article 74, which speaks of principle of full compensation and principle of foreseeability. On the other hand, it is also of interest to exam to what extent the contractual freedom and parties' autonomy as a general principle of the Convention can potentially modify the scope of damages under Article 74. Lastly, the mitigation of loss is also an influencing factor on the scope of recoverable damages. The debated legal nature of mitigation will be discussed in detail and, as a factor that is in principle only applicable to damages, how mitigation would step out of the arena of damages to interact with other remedies.

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Chapter 1. Damages as one of the remedies for breach of contract.

1.1.General remarks

In a sale contract, the parties exchange promises by creating mutual rights and obligations which are intended to bind the future. Those rights and obligations, in turn, generate problems of performance. However, neither of the parties can anticipate whether the obligations owed by the other will be fulfilled or to what extent they will be fulfilled. Therefore, they need to adjust their expectations and corresponding business choices, taking into account the remedies that are available to them in all kinds of situations of non-fulfillment of the contract.

The major purpose of the remedy system is not directed at compulsion of promisors to prevent breach; rather, it is aimed at relief to promisees to redress breach.[1] It is also not primarily aimed to punish the breaching party for not honoring his promise, but to boost confidence and trust between the parties so to encourage celebration of contracts. The remedies, as long as they are legally and factually compatible one and another, it is the party's total autonomy to choose the remedies as they see fit for the situation. Hence the choosing of remedies is very much strategic after weighing all the relevant interests that come into play.

Therefore, it is noteworthy that remedies offered by the Convention are interrelated with each other and it is impossible to understand damages without considering how it is related with other remedies.

Considering that the in the practical context of international sale of goods, and under the Convention of Vienna, the buyer enjoyed more comprehensive set of remedies than the seller, as the buyer is obtaining the goods and seller is primarily interested in receiving the price, the present paper will emphasis on the remedies on the side of the buyer.

The starting point for studying the buyer's remedy structure under CISG is Article45(1), which provides: "if the seller fails to perform any of his obligations under the contract of this Convention, the buyer may (a) exercise the rights provided in Article46 to 52; (b) claim

[1] E Allan Farnsworth, 'Legal Remedies for Breach of Contract' (2024) 70 Colombia Law Review, 1145-1216, at. 1147.

damages as provided in Arts.74 to 77."[2] This is to say that the obligee can choose among specific performance, price reduction, avoidance of contract and damages as the primary remedy for breach of contract.

In the meantime, Article45(2) states that the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.[3] This provision indicates a wild compatibility of damages and other remedies in case of breach and offers legal basis for the analysis below.

1.2. Damages and specific performance

Specific performance can be viewed as particularly important in the context of international trade. After a breach of an obligation by the seller, the buyer's principal concern is often that the seller performs the contract as he originally promised since the legal actions for damages cost money and may take a considerable period of time.[4] What's more, given the long-distance characteristic of the sale contract, the buyer may not be able to make substitute purchases in the time necessary.[5]

Article 46 governs the buyer's right to claim performance from the seller, which includes substitute delivery (only in case of fundamental breach) and repair in the case that the good delivered do not conform with the specifications of the contract.

Article46 (1) provides that a buyer may require performance of the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.[6] From the wording of this article, it seems that the only limitation on the buyer's ability to demand specific performance is having resorted to a remedy that is inconsistent with specific

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[2] Commonwealth Secretariat, 'United Nations Convention on Contracts for the International Sale of Goods' in Muna Ndulo, *The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* (Commonwealth 1991), Article45(1).

[3] Ibid, Article45(2)

[4] 'CISG Article 46: Secretariat Commentary' (*Institute of International Commercial Law*, 16 July 2013) <https://iicl.law.pace.edu/cisg/page/cisg-article-46-secretariat-commentary> accessed 6 March 2024.

[5] Ibid.

[6] Supra.2, Article46(1).

performance. And, according to the Secretariat Commentary, such remedies that are "inconsistent with specific performance", include, for example, declaring the contract avoided under Article49 or by requiring a price reduction under Article.50.[7] The Secretariat Commentary also affirmed that, in addition to the right to require specific performance, Article.45(2) ensures that the buyer can recover any damages he may have suffered as a result of the defect in the seller's performance.[8] Therefore, we can conclude that damages is perfectly compatible with specific performance.

However, when it comes to application, it is worth noting that Article.28 of CISG contains a substantial limitation on the ability of the parties to obtain specific performance. It states: "If, ……one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention".[9]

On that basis, it seems that the Convention allows the courts space of discretion to look at their respective national law first in order to decide whether to in fact apply the remedy of specific performance. If such remedy is, according to the discretion of the court, not to be granted under their national law, the court are not obliged to grant it even when the contract is governed by the Convention.

For example, Spanish Civil Code explicitly permits the aggrieved party to choose between specific performance and avoidance of contract.[10] Therefore, when a CISG case is trailed in Spanish courts, specific performance will be granted without problem.

On the contrary, under English law, specific performance is an extraordinary remedy granted in very limited circumstances.[11] The Sale of Goods Act (SOGA) 1979 stands for the

[7] Supra.4.

[8] Ibid.

[9] Supra.2, CISG, Article28.

[10] Civil Code of Spain, Article 1124.

[11] Peter A Piliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?' (2000) 12 Pace International Law Review 1.at.10.

predominant English law position on this point, which states "in any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, …… direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.[12] The English law limits the scope of application of specific performance to where ascertained goods are in question and an English court, when deciding whether to grant specific performance, will exercise its discretion and will be subject to provisions of SOGA. The impact of such legal practice, since specific performance is not very much appreciated in English courts, would be that other remedies will be given more value. This explains the relatively free approach under English law for avoidance and strong dependence on damages to compensate the aggrieved party *ex post*.

When Articles 28 and 46 are read together, there is clearly a compromise among the primary remedy of damages under common law systems, the primary remedy of performance in civil law systems, and the remedies in those jurisdictions where a court is prohibited from awarding specific performance.[13] Subsequently, it has raised concern of commercial uncertainty and of the inconsistency in the rules of remedies available in different jurisdictions.

As far as I'm concerned, even though CISG failed to clarify the rules relating to specific performance, it seems to be the best it could do. The CISG made a great effort to reconcile the international sales law in various jurisdictions all over the world and there are some of them, like England, that are more conservative and are generally more reluctant to departure from their traditional legal approach. If the Convention leaves no room for customary national legal practice to play, certainly it will not receive much welcome world wild, and parties may very often exclude contractually the Convention to adopt the set of rules they are more learned of. This would in turn, compromise the unification of contract law and the application of the Convention.

Therefore, it is up to each jurisdiction to take steps that would bring them closer to the rules contained in the Convention instead of the Convention itself trying to juggle around. Taking

[12] Sale of Goods Act 1979, Article52(1).

[13] Supra.10, at 16.

English law as an example, it is said that the provision of section 52(1) of SOGA was originally introduced in the mid-nineteenth century to encourage more liberal granting of specific performance.[14] Looked at now, this provision is way behind times and can no longer fulfill its original purpose.

With that said, it is submitted that courts in jurisdictions like England should use the wording of Article. 28 of the Convention stating "not bound to" instead of one mandatory, to expand the doctrine of specific performance. Specific performance should in general be given a more liberal approach and applied more flexibly for its simplicity and the reduction of damages to minimum.

1.3 Damages and price reduction

Article 50 deal with the buyer's right to require a price reduction if the goods do not conform with the contract, whether or not the price has already been paid. This provision also stipulates that the buyer's right to reduce the price should concede to the seller's right to cure.

According to Article 45, it is of no doubt that the buyer can combine the remedies of price reduction and damages. The only limitation, absent express exclusion in the contract, seems to be, as indicated in case law, that damages can only be awarded for loss other than the reduced value, since this loss is already reflected in the price reduction. In general terms, they cannot be used to compensate the same type of loss.

However, it is also worth noting that price reduction is not a common remedy for common law systems, but one developed in civil law traditions based on the Roman *Actio quanti mimoris*.[15] Accordingly, some commentators tend to not attach much importance to this remedy. Among them, Macqueen opined "whether there is anything to be gained from not simply regarding such a remedy as damages claim, other than a continuation of the Civilian tradition, is an open question; perhaps its advantage would be the 'self-help' element in deducting sums from

[14] G.H. Treitel, Specific Performance in the Sale of Goods J.B.L. 211, (1966), at. 217.

[15] Ivo Bach, Article 50, in UN Convention On Contract For The International Sale Of Goods (CISG) 748, 748–67 (Stefan Kröll et al. eds., 2011), at 749.

payments due, a remedy often explicitly provided for in commercial contracts".[16]

Macqueen seems to hold that since price reduction and damages overlap in their function, damages alone can do the job of compensating the parties as well, rendering price reduction unnecessary.

Nonetheless, price reduction is a very important remedy that complements damages in its own way. First of all, as Macqueen also admitted, price reduction distinguish itself for its "self-help" merit, which means it can be implemented by the buyer unilaterally without any requirement to have the determination upheld by a court, expert or other tribunal.[17] Especially when the price is not paid and provided that the notice is given under Article 43, the declaration will take effect directly and if the seller disagrees, such unilateral declaration and the unpaid price will force him to file suit and hence subject the case to the examination of the court.

Secondly, even when the price reduction is examed judicially, which is mostly the case, the buyer only needs to prove, provided he has satisfied all the conditions of application, the existence of lack of conformity of the goods and the reduction in value. While in order to obtain damages, the buyers need to substantiate his actual loss, which is subject to him having fulfilled his own duty to mitigate the loss under Article.77.

Thirdly, price reduction and damages differ in terms of their foundations of responsibility. Price reduction is independent of whether or not the loss of value is imputable to the debtor's breach while damages require the loss to be objectively imputable to the debtor: the principle of foreseeability in Article.74.[18] Therefore, when the foreseeability requirement is not satisfied, or the exemption circumstances under Article 79 occur, damages are in principle not allowed. In this case, as stipulated in Article.79(5), other remedies such as price reduction can still be applied.

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[16] Hector L MacQueen, 'Remedies for Breach of Contract: The Future Development of Scots Law in Its European and International Context' (1997) 1 Edinburgh Law Review 200.at 225.

[17] Liu Chengwei, 'Remedies for Non-Performance - Perspectives from CISG, UNIDROIT Principles and PECL'.(2d ed.2005), at.102.

[18] Ángel Fernando Pantaleón Prieto, 'Las nuevas bases de la responsabilidad contractual' (1993) 46 Anuario de derecho civil 1719, 1739.

Lastly, as pointed out by Jansen, the goals of damages and price reduction differs fundamentally.[19] Damages compensate the loss of expectation interests of the buyer intending to put him in the same position as if the breach had not occurred. A price reduction, on the other hand, does not put the buyer in the same position as if he had received conforming goods. Rather, it aims to put the buyer in a fair position as if he had bought the non-conforming goods and the price would have been set accordingly.[20] In this sense, a price reduction would be based on a moral background and points to the right to the buyer to preserve the bargain and to maintain the promise of the seller.[21]

To summarize, the price reduction is not merely a facilitated claim for damages as it may sound from some commentators.[22] By contrast, it stands out for its easy application, being able to be applied unilaterally and extrajudicially. Besides, it offers a chance for the parties to readjust the contract financially first between themselves depending on the performance. The relationship between price reduction and damages is one of complementation instead of substitution. With this said, to avoid potential overlap between the two remedies, it goes without saying that the aggrieved party cannot demand both the price reduction and damages for the reduction in value, without prejudice to other losses recoverable through damages. This submission is also affirmed by the PECL.[23]

1.4. Damages and avoidance of contract

It is a general rule that damage claims naturally follow the avoidance of contract, as other damages which presuppose that the contract remains in force, such as performance and price reduction, are no longer applicable. Article 81 also states: “avoidance of the contract releases

[19] Sanne Jansen, ‘PRICE REDUCTION UNDER THE CISG: A 21ST CENTURY PERSPECTIVE’ (2014) 32 Journal of Law and Commerce 325. at. 377.

[20] Eyal Zamir, ‘Remedies for Breach of Contract: Expectation, Reliance, Restitution, Disgorgement, and Restoration of the Contractual Equivalence’. at.9.

[21] Ibid, at. 378.

[22] Supra.17, Liu, at. 103.

[23] ‘Principles of European Contract Law - PECL | Trans-Lex.Org’ <https://www.trans-lex.org/400200/_/pecl/#head_0> accessed 1 March 2024. Article 9.401(3).

both parties from their obligations under it, subject to any damages which may be due".[24]

Avoidance is in no doubt the most drastic remedy among all. Therefore, to avoid the abuse of avoidance, the application of this remedy is not without conditions. According to Article. 49, the central requirement for avoidance is the fundamentality of the breach. Article 25 further defines that a breach is fundamental if "it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such result."[25]

Besides the requirements of foreseeability, the Convention also set out the potential obstacles that, for instance, the aggrieving party may be given an "additional period of time" (in case of non-delivery) before the other party can declare the contract avoided; and that where the seller has delivered the goods, the buyer loses the right to avoid.[26]

Even though these limitations are subject to a complicated regime of time limits, compared to some jurisdictions, such as Section 2-616 of UCC of the United States, Article 1.124 of Spanish Civil Code, where no preconditions are attached except those of fundamentality and notice, it evidenced that avoidance under CISG is a remedy of last resort, or an *ultima ratio* remedy, which should not be granted easily.[27]

1.4.1. Avoidance and seller's right to repair

The Convention has the preference towards preserving the contract over avoiding the contract. For that purpose, Article 48 gives the seller right to remedy his breach, so far as it can be done in a reasonable way. However, according to the wording of Article 48 "subject to article 49…", it seems that in case of a fundamental breach, the seller's right to repair cannot override the buyer's right to avoid the contract. In other words, when the breach amounts to a fundamental

[24] Supra, 2, CISG, Article81(1).

[25] Supra.2, CISG, Article25.

[26] Ibid, CISG, Article49(2).

[27] Ulrich Magnus, 'THE REMEDY OF AVOIDANCE OF CONTRACT UNDER CISG—GENERAL REMARKS AND SPECIAL CASES' 25 JOURNAL OF LAW AND COMMERCE. 423-436, at.424.

breach, even though the seller offers to remedy the breach, for example, by delivering substitute goods, the buyer can simply deny this request and avoid the contract.

This interpretation, for me should be the correct way to understand the relationship between Articles 48 and 49, for there has been enough mechanisms to limit the right to avoid the contract and this right should not be further conditioned by the seller's chance to cure the breach.

Nonetheless, this can raise issues when it comes to damages claims. In the Acrylic blankets case, where the German buyer rejected the Dutch seller's offer to remedy the non-conformity by delivering substitute goods and declared the contract avoided. The Appellant court held that the buyer was not entitled to avoid the contract based on lack of conformity, because in order to determine the occurrence of a fundamental breach regard is to be had…… also to the readiness of the seller to remedy the non-conformity without unreasonable delay and unreasonable inconvenience to the buyer.[28] Regarding the buyer's damage claim, the court also held that the buyer lost his right to damages as it had hindered the seller's cure of non-conformity. [29]

The German court's approach seems extremely unfair for the buyer. Based on the submission presented before, can be said that the court's analysis of the fundamentality of the breach is wrongly stated. However, the court's decision on damage gives out a warning sign that even though the seller's right to cure cannot prevail over the buyer's right to avoid, it can have implication in detriment for the buyer in damage claims. It may cause the buyer to lose his right to damages or at least affect the quantity of damages, for the seller may submit that such loss could have been reasonably mitigated by accepting his offer to cure under Article 77.

1.4.2. Loss of the right to avoid under Article 82

The Convention's preference to preserving the contract can also be found in Article.82. Despite of under the heading of "effects of avoidance", it stipulates that the buyer loses the right to declare the contract avoided……if it is impossible for him to make restitution of the goods

[28] CLOUT Case No. 282 [Bundesgerichtshof, Germany, 31 Janary 1997].

[29] Ibid.

substantially in the condition in which he received them".[30] Even though this provision is subject to exceptions provided in Article.82(2), it is still, in my point of view, too hash a limitation on the buyer to exercise the right of avoidance. Let alone this provision seems to only have dealt with situations where the goods have suffered deterioration in value but not where the buyer has improved the goods.[31] In that case, the buyer cannot return the goods in the same condition as he received it and none of the exception applies. By strict wording of CISG, the buyer will lose the right to avoid and restitute the contract, even though that is a more efficient solution for both parties.

It is notable that the principle that the right of avoidance is excluded unless full restitution is possible is one of the few rules of CISG that is not adopted by the UNIDROT Principles and the Principles of European Contract Law and in both set of Principles the buyer is allowed to terminate even if he cannot return the goods intact.[32]

The above-mentioned rules contained in CISG on avoidance of contract indicates the clear orientation of CISG to preserving the contract on foot instead of giving loose way to termination and then relying on damages to compensate the lost value.

However, it is submitted in the present paper that the doctrine of CISG on avoidance should be expended and should not be subject to restrictions more than necessary. Because in many cases, the most efficient arrangement can be achieved through damages alone.

Typically, in situations stipulated in Article.82, when the goods have been deteriorated for whatever reason that is not covered in the exception, after restitution the deteriorated part of the goods can be deducted from the damages claimed by the buyer. Hence the buyer doesn't have to hold the goods that he no longer wants, and the seller can be properly compensated for the lost value.

In an opposite case where the buyer has increased the value of the goods, there's more reason

[30] Supra.2, CISG, Article82(1).

[31] CLOUT Case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

[32] See, for example, UNIDROIT Principles of International Commercial Contracts Article 7.3.6 (2004).

to grant the buyer's right of avoidance and restitute the contract. The added value can be compensated by the seller by way of damages, following the principle of good faith.

In above-mentioned scenarios, damages after avoidance and restitution of the contract may seem as a more efficient solution for both parties than to keep the contract on foot and try to set off damages by finding cover transactions. In any case, it should be the question of parties' free choice after evaluating cost and profit in each particular case, without legal instruments attaching more hinderance to the resort to some remedies more than to others.

This chapter focus on the interaction between damages and other primary remedies under CISG. All specific performance, price reduction and avoidance are compatible with damages, and each has their own specific ways of interaction with damages. The aggrieved party can choose strategically among these remedies to serve their best interest and ideally, can always count on damages to recover their monetary losses suffered in trying to retain their contractual expectations. It is concluded from this chapter that the current framework of remedies under CISG is still in need of further adjustment and updated perspective of interpretation to make the most of each remedy to when combined with damages to solve practical issues. But it does offer valid reference for nations, contracting or not, to modernize their internal law, in order to step forward towards the unification of international sales law.

Chapter 2. Scope of damages under Article 74 and parties' autonomy

This chapter will focus on the general principles delimiting the scope of damages under CISG, primarily the principle of full compensation and principle of foreseeability stipulated in Article.74. It considers how to interpreter the relationship between these two principles related to damages in how they should complement and balance each other.

The modern rule on compensation was originated from Common law. In *Robinson v Harman*, it was held that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[33] The rule on damages was further developed in the famous case *Hadley v. Baxendale*. It was established that the damages the other party ought to receive should be such as may fairly and reasonably be considered as arising either: a) naturally, i.e. according to the usual course of things from such breach of contract itself; or b) as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.[34]

Even though the *Hadley* case is nowadays the most cited authority for the scope of damages, the concept of limiting the recovery of contractual damages which are foreseeable can be traced to French law, as Baron Parke referred in the judgment in Hadley to Articles 1149-1151of the French Civil Code, which pre-dated *Hadley*. Hence, the "foreseeability" rule of *Hadley v. Baxendale* was influenced greatly by, if not outright adopted from, the French civil law of contracts.[35]

The Hadley approach speaks of the compensation of expectation damages and that the damages should be consequential of the breach and foreseeable for the parties. The Convention does not depart from this position.

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[33] Robinson v Harman (1848) 1 Ex Rep 850, per Parke B, at 855.

[34] Hadley v. Baxendale (1854) 9 Exch 341, per Alderson B, at 354.

[35] Wayne Barnes, ´Hadley v. Baxendale and Other Common Law Borrowings from the Civil Law´ (2005) 11 Tex. Wesleyan L. Rev. 627, at 632.

2.1. Principle of full compensation

The first part of Article 74 stipulates: "Damages for breach of contract ……consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." [36] According to the Advisory Council Opinion, it reflects the principle of full compensation.[37]

By specifically including "loss of profit", it seems that the purpose of Article74 is to place the aggrieved party in the same pecuniary position it would have been in had the breach not occurred and the contract been properly performed.[38] It is designed to compensate the aggrieved party's loss of expectation interests. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived.[39]

Since the general approach to assess damages is one hypothetical based on individual subjective expectations, it poses a high degree of uncertainties regarding what would eventually accounts for damages under Article74, especially when the Article 74 does not provide more specific rules. More detailed conditions for damage award will be given in following texts but the principle of full compensation itself implicitly speaks of an observation that damages must sufficiently compensate the aggrieved party and in the meantime, cannot place the aggrieved party in a better position than it would have enjoyed if the contract had been properly performed.[40]

This position indicates that the loss recoverable must be actual consequential loss. It should have been caused by the breach and it should reflect the actual amount of the loss suffered by the aggrieved party.

The wording "as a consequence of the breach" establishes a common condition for damage

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[36] Supra.2, CISG, Article74.

[37] 'CISG Advisory Council Opinion No. 6: Calculation of Damages under CISG Article 74' (*Institute of International Commercial Law*, 30 January 2015) <https://iicl.law.pace.edu/cisg/scholarly-writings/cisg-advisory-council-opinion-no-6-calculation-damages-under-cisg-article-74> accessed 11 March 2024.

[38] Ibid.

[39] 'Principles of European Contract Law - PECL | Trans-Lex.Org' (n 23). Article 9.502.

[40] Ibid.

claims that the damages must bear a causal link with the breach. The assessment of causation is one that only requires an objective consideration of how events are related. The test for causation may vary from jurisdictions but they are similar in substance. Among them, the "but-for" test could be the correct approach, meaning "but for the breach, the other party would not have suffered the loss and would have gained all the benefits he had expected from the contract.[41]

Besides, the Advisory Council also proposes that the aggrieved party bears the burden of proving with reasonable certainty that such party has suffered a loss as a result of the breach.[42] The UNIDROIT Principles also states: "compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty".[43] Put it in simpler terms, the causation between the loss and the breach needs to be proven with reasonable certainty.

Here the imposition of the test of reasonable certainty on standard of proof is necessary as it serves to avoid differential treatment of similarly situated parties and to promote uniformity of the application of the Convention, considering that the standard of proof for damage award may vary among jurisdictions.[44]

As to the amount of the actual loss, the AC admits that precise calculation of such damages may not be possible.[45] The amount, in my opinion, also only needs to be proven subject to the test of reasonable certainty. However, the AC did provide some specific guidelines by referring to the Comment on PECL in support of their view that the aggrieved party is entitled to any net gains prevented as a result of the breach.[46]

The actual loss recoverable, in the Comment to Article 9.502 of the PECL, is described as "net loss" or "net gain deprived". This Comment states: "The aggrieved party must bring into

[41] Yasutoshi Ishida, 'What Does "Foreseeable" Mean? The Scope of Damages Under CISG Articles 74-77: Reasonability Principle of Foreseeability - We Don't Need a Crystal Ball' (2022) 40 Journal of Law and Commerce, 235-280, at. 241.

[42] Supra. 37.

[43] Supra.32, Article7.4.3.

[44] Supra.37.

[45] Ibid.

[46] Ibid.

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."[47]

Then the same Comment explains the following: "Compensating gains typically arise as the result of a cover transaction concluded by the aggrieved party. ... A compensating saving occurs where the future performance from which the aggrieved party has been discharged as the result of the non-performance would have involved the aggrieved party in expenditure."[48]

The concept of "net loss" indicates that the meaning of "loss" under CISG must be understood in a wide sense.[49] It may cover a reduction in the aggrieved party's assets or an increase in its liabilities.[50] On the other hand, in presence of any savings or gains for the aggrieved party which result from the breach of contract, they should be reduced from the damages.

2.2. Principle of foreseeability

2.2.1. Content of principle of foreseeability

The second sentence of Article.74 CISG states the test for foreseeability of damages, namely 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 which he then knew or ought to have known, as a possible consequence of the breach of contract".[51]

Clearly Article 74 provides for both subjective and objective tests for foreseeability of a loss by wording of "foresaw or ought to have foreseen". To properly evaluate foreseeability, one should take into consideration "the facts and matters of which he then knew or ought to have known". In this effect, there are two types of knowledge under Article74 that can serve as reference for

[47] PECL. Article9.502 cmt.C.

[48] Ibid.

[49] Supra. 17, Liu, at.187.

[50] Ibid.

[51] Supra. 2, CISG, Article74.

assessment. One is imputed knowledge, which every reasonable person is taken to be known in the ordinary course of things; and the actual knowledge that the party in breach actually has at the time of entering contract.[52]

It's hard to say whether it is easier for the aggrieved party to establish the subjective ground or the objective ground. Since Article 74 requires the timing of examinate foreseeability is "at the time of conclusion of the contract", logically the only way to make sure the other party has actual knowledge of the risk is to remind him during negotiations. As Sutton submitted, a party who fears suffering an extraordinary loss as a consequence of the breach of contract by the other party should make this known to the latter at the conclusion of the contract so as to enable him to calculate the risk and insure against it, and more importantly, to implicate the subjective prong of the Article 74 foreseeability test.[53]

On the other hand, the objective ground may have wider indicators than the subjective one. It will be imputed to be within the knowledge of the breaching party what merchants in general know. For instance, it is common sense in international commodity sales that a buyer purchases the products with the purpose to resell, either directly or after manufacturing. Therefore, the loss of profit in subsequent sales due to the seller's non-performance would amount to recoverable losses, which, of course, is subject to mitigation.

Trade usage as established in Article 9 may also serve to evaluate foreseeability. Article.9 admits the binding effect of any trade usage either agreed expressly or implied from trading practice. If parties agree with the usage in the contract, it will satisfy the subjective ground of foreseeability; if the usage is implied from their trading history or trading practice in general, the parties would be objectively imputed with such information.

What's more, as technology advances, more extensive sources of information and spontaneous methods of communication certainly make the knowledge more accessible to the parties and therefore, a potential breacher may "ought to have known" a far wider range of facts concerning

[52] Supra. 17, Liu, at.197.

[53] Jeffrey S Sutton, 'Measuring Damages under the United Nations Convention on the International Sale of Goods' 50 OHIO STATE LAW JOURNAL, 737-752, at. 744.

the contract than he would have known in the past century.

Problematically, there may be cases where the breaching party is imputed with the knowledge but in fact, he does not actually know due to miscommunication or negligence. However, under Article 74 the proof of an objective element will be sufficient to make the party liable for loss.[54] This may facilitate the claim of the aggrieved party because in practice, the parties may not be so thoughtful to make potential risks known to the other, and the breaching party will deny to have knowledge of the relevant facts, hence the subjective mind of the breaching party is very hard to establish. In this sense, what matters in practice may not be the actual foreseeability, rather, it is the foreseeability which can be expected from a reasonable party in the same situation.[55]

2.2.2. Relationship with principle of full compensation

These two basic principles as contained in the same Article 74 that governs the whole section of damage awards, principle of full compensation and the foreseeability should supplement and balance each other. The principle of foreseeability is to be understood as an additional limitation on damages which would be otherwise recoverable under principle of full compensation. In this sense, principle of foreseeability is closely interconnected with principle of full compensation.

Principle of full compensation requires the aggrieved party to establish with reasonable certainty that he has suffered a loss as a result of the breach. This criterion aims to screen out irrelevant or frivolous claims of loss which has nothing to do with the breach and only give way to grounded claims of loss duly arising from the breach.[56]

For Ishida, if this criterion of reasonability is satisfied, the breaching party always ought to have foreseen it as a possible consequence of the breach.[57] In his reasoning, Ishida refers to the foreseeability requirement as a "larger hole" than the reasonable certainty test and opined that anything that can go through the larger hole can go through the smaller hole. He further

[54] Ibid.

[55] Ibid.

[56] Supra.41, Ishida, at.248.

[57] Ibid, at.245.

concludes that if something will happen with reasonable certainty, it is a foreseeable result.[58]

Following this logic, it seems that the fulfillment of the reasonable certainty test, and subsequently the principle of full compensation, would automatically imply the fulfillment of the foreseeability limitation. This potential overlap of the two basic principle under Article 74 bears the risk of rending foreseeability nullified by full compensation.

To avoid this potential risk, Ishida proposed a seemingly persuasive approach. He formulated that the reasonable certainty test may function well not as a test for the first threshold, i.e. the causation, but as a test for foreseeability.[59] In other words, the foreseeability should be construed by standard of reasonability. Under this formulation, to assess whether a loss is foreseeable, the court should look at whether both the type and the amount of the loss are reasonable by merchant standard in light of the facts and matters available at the time of conclusion of the contract.[60]

Nonetheless, the approach of Ishida that extends the test of reasonability to the principle of foreseeability still implies, in essence, that the principle of full compensation gets the scope of foreseeability covered and thus renders the latter unnecessary. It reflects no more than the widely alleged view that the principle of reasonableness has be regarded as a general principle underlying the Convention.[61] Although Ishida's approach provides valuable insight for the construction of foreseeability, the problem remains unsolved.

For the purpose of Article 74, I would refrain from extending the reasonable certainty test to that of foreseeability, but merely regard the former as an intent to unify the standard of proof for proving losses and the amount of it. This may raise the concern that all procedural issues are not within the scope of CISG. However, as Saidov submitted, it would be ideal to see the CISG being applied in the same way as the UNIDROIT Principles, which explicitly provide that the losses need to be proved with a reasonable degree of certainty. This approach

[58] Ibid.

[59] Ibid, at.246.

[60] Ibid, at.279.

[61] Djakhongir Saidov, 'Damages: The Need For Uniformaty' 25 Journal Of Law And Commerce, 393-403,401.

recognized that the issue of standards of proving losses is directly connected with the exercise of the injured party's right to damages.[62] Following this line, it can be argued that the standard of proof can be deemed as substantive law as "there exists no systematic abstract criterion that would enable a given case to be classified unequivocally and rationally as being either of procedural or a substantive nature".[63]

Lastly but not less important, the principle of foreseeability contains both subjective ground and objective ground, whereas the reasonable certainty of the causation between the loss and the breach is one merely objective. The way a person had actually foreseen or been in the position to foresee the potential development of events, at the time of the conclusion of the contract, does not necessarily coincide with the way such development has, in fact, taken place.[64] Even though in practice, the subjective ground may not be as effective as the objective one to establish foreseeability, this distinction remains important in theory. Therefore, it would be incorrect to hold that the full compensation principle can exclude that of foreseeability.

2.3. Principles on damages subject to parties' autonomy?

Despite of the dogmatical discussion on the two basic principles that are decisive on the scope of damages, it should be born in mind the dispositive nature of the Convention. According to Article 6, the parties may exclude the application of the Convention or derogate from or vary the effect of its provisions.[65] These provisions, of course, includes Article 74. In other words, the principle of parties' contractual freedom can override the principles contained in Article 74 and can potentially alter the actual scope of damages.

One issue that Article 74 and Article 6 come into conflict is that of penalty clause.

By penalty, we refer to the contractually fixed sum of that exceeds any reasonable estimate of actual damages. In general, jurisdictions hold substantially different views towards penalty clause. In civil law jurisdictions a penalty clause is valid and enforceable, even though excessive

[62] Ibid, at.400.

[63] Ibid, at.399.

[64] Supra. 17, Liu, at.200.

[65] Supra.2, article 6.

sums are subject to reduction. For instance, the Spanish Civil Code stipulates that the judge can modify the amount in the penalty clause when the primary obligation has been partly or irregularly fulfilled.[66] This means the courts can intervene taking into account the actual gravity of breach and adjust the corresponding amount that they see fair in the specific situation. On the contrary, in common law jurisdictions penalty clause is distinguished from liquidated damages, which stands for an amount intended as a good faith estimate that would reflect the genuine pre-estimate of damages. Liquidated damages are in principle enforceable in Common law courts, but a penalty clause is not.

Considering the divergent positions worldwide the CISG does not directly settle this issue. For many, the starting point to analyze this issue would be to consult Article 4 of the Convention. Article 4 states that the Convention is not concerned with the validity of the contract or of any of its provisions or of any usage, except as otherwise expressly provided in the Convention.[67] The traditional view, upheld by the Advisory Council, is that the penalty clause, or generally fixed sums is an issue of validity and thus according to Article 4, the validity of such clause would depend on the applicable national law and domestic protection mechanisms (such as court reduction) remain applicable to agreed sums in CISG contracts.[68]

However, this traditional view has been challenged by commentators that suggest resolving this issue by reference to the CISG. For example, Enderlein and Maskow believe that national law on validity will not apply if the CISG can provide a functionally adequate solution to the problem.[69] Zeller proposed an even broader argument that if there is a general principle contained in the CISG, the Convention would prevail in case of conflict, thus restricting the application of Aritcle.4.[70] Zeller also distinguished "invalidity" from "unenforceability",

[66] Supra.10, CC, Article 1154.

[67] Supra. 2, CISG, Article4(1)(a).

[68] 'CISG Advisory Council Opinion No. 10: Agreed Sums Payable upon Breach of an Obligation in CISG Contracts' (*Institute of International Commercial Law*, 30 January 2015) <https://iicl.law.pace.edu/cisg/scholarly-writings/cisg-advisory-council-opinion-no-10-agreed-sums-payable-upon-breach> accessed 12 March 2024.

[69]Fritz Enderlein, Dietrich Maskow, 'International Sales Law" (1992) <https://iicl.law.pace.edu/sites/default/files/cisg_files/enderlein.html#limitations> accessed 12 March 2024.

[70] Bruno Zeller, 'Penalty Clauses: Are They Governed by the CISG?' (2011) 23 Pace International Law Review 1.at.8.

suggesting that a clause containing a sum of money to be paid in case of a breach is enforceable and valid; it is only the stated amount that is unenforceable.[71]

It seems that Zeller relies on the "functional equivalence test" by stating that the issue of penalty clause is not one of "validity" hence is governed by the Convention directly.[72] In applying this test, Zeller refers to the principle of full compensation under Article.74.

According to Zeller, the partis' autonomy on damages cannot prevail over the principle of full compensation, with the latter preventing over-compensation. For me, this observation is undoubtedly correct in the situation where the parties agreed to set the damages to zero without other remedies that can compensate financially, for instance, price reduction. This is not by reason of full compensation but simply damages and price reduction are the only remedies that can compensate the aggrieved party in monetary terms and in business world, a remedy without financial implications cannot be expected to serve its purpose. Even with avoidance available, which is the most drastic among all, the restitution only serves to restore the aggrieved party, if possible, to his position before the contract was made but without compensating the lost expectation suffered as a result of the breach. Thus, if damages or price reduction is not available, the financial position of the aggrieved party remains deteriorated after avoidance and restitution.

However, in case of penalty clause I would refrain from applying the observation of Zeller. First, a penalty clause, as unfair it may seem, increases the cost of breach and can push the other party to fulfill the contract. If the breaching party, knowing the existence of penalty clause, still chooses to commit breach, it indicates that the benefit of the breach exceeds the cost of compensation. The parties should be allowed to choose their actions as long as they agree to pay the consequence. Second, even if it is not the case, the amount of damages are totally foreseeable for the breaching party as it is expressly agreed, therefore the breaching party cannot claim it to be unreasonable. Third, with highly settled damages the parties may have made exchanges in other parts of the contract to balance the interests, and a radical approach of

[71] Ibid, at.9.

[72] Jack Graves, 'Penalty Clauses and the CISG' (2012) 30 Journal of Law and Commerce <http://jlc.law.pitt.edu/ojs/jlc/article/view/2> accessed 12 March 2024.

denying the effect of such damage clause may break the balance previously settled by the parties.

Therefore, the parties' autonomy and contractual freedom should be fully respected in delimiting the scope of recoverable damages. When the CISG is to be applied to damages, the effect a penalty clause should in principle be affirmed. The only exception should be where the parties exclude any financial compensation at all. Whether the court should intervene regarding the quantity of damages and to what extent will depend on the practice of each jurisdiction. In some jurisdictions the court may adjust the amount if they see the amount to be outrageously unfair whereas in others the court may leave it as the parties agree. For instance, the Spanish Tribunal Supremo seems to take a liberal approach in dealing with "abuse" in B2B contract, rejecting the extension of transparency test required in B2C contract to B2B contract.[73] Logically the Spanish court may take the same approach towards penalty clause in a CISG case, refraining from declaring a penalty clause null.

[73] See STS 367/2016, 3 de junio de 2016.

Chapter 3. Duty of mitigation as an influencing factor on the scope of damages

3.1. Nature of the duty

Another mechanism contained in CISG to limit the scope of damage award is Article 77, which stipulates that the party who relies on a breach of contract must take reasonable measures to mitigate the loss; and failure to take such measures will result in a reduction in the damages recoverable by which the loss should have been mitigated.[74]

The mitigation doctrine has its origin in the common law but it is not well established in the civil law. In England, it has been recognized as the duty for the creditor to adopt reasonable measures to minimize the damage he suffers when the debtor cannot fulfill his own commitments.[75] Nowadays the mitigation has become a general principle of international trade regardless of the jurisdiction where the case is disputed. For Mustill, the principle of mitigation constitutes the *lex mercatoria* in its present form and is now being treated merely as obvious.[76]

The central idea underlying the duty of mitigation is that the party who is true to the contract cannot sit and wait for the other party to breach the contract but must become active in order to minimize the loss or to prevent it at all.[77] It is among the very few obligations owned by the aggrieved party to the breaching party in the sense that even when the aggrieved party has not contributed to the breach or the consequential harm at all, he cannot recover the part of the loss that would have been avoided by reasonable measures.

One issue regarding the mitigation of loss is that of its legal character. Even though it is common referred to as a “duty” or “obligation”, the nature of this “duty is substantially different from

[74] Supra.2, CISG, Article77.

[75] Jorge Oviedo Albán, ‘Mitigation of Damages for Breach of Contract for the International Sale of Goods’ (2018) 67 Vniversitas <https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/22342> accessed 6 May 2024.

[76] Michael Mustill, "The New Lex Mercatoria: The First Twenty-Five Years" 4 Arb. Int'l (1988) 86 - 119, 113.

[77] Victor Knapp, ‘Comments on Article 77 [Bianca-Bonell Commentary]’ (*Institute of International Commercial Law*, 2 August 2013) <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-77-bianca-bonell-commentary> accessed 6 May 2024.

other obligations under the CISG.[78] For instance, Article 77 cannot be directly enforced, meaning that the debtor cannot demand the creditor to assume mitigating behavior; and failure to comply will not give rise to any primary remedies under the convention. [79]

Given the two reasons mentioned above, many conclude that the Article 77 is not a genuine contractual obligation. For Albán, the words "obligation" and "duty" need to be distinguished. According to the former, the mitigation is a behavior that the creditor should assumed and can be legally required by the debtor; while according the latter, the mitigation cannot be demanded but the creditor must execute the duty to protect his own interest, which, in this case, is his right to be fully compensated for the debtor's breach.[80] He went on to conclude that the mitigation is a duty and the non-performance of such duty will bring about negative consequence for the creditor in terms of his inability to claim complete damages.[81]

However, for others the Article 77 is open to a different interpretation. By the wording of this article, the first sentence is worded "must", as dictates a duty/obligation to mitigate the loss and the second sentence speaks of a liability placed on the injured party to compensate for damages in case of non-performance of the duty.[82] Under this interpretation, article 77 is construed as a genuine contractual obligation and the relevant remedy is the reduction of awardable damages.

Another interpretation invokes Article 77 analogously based on the principle of good faith following Article 7(1).[83] Others draw on the "general principles" provision of Article 7(2) to create a duty of "loyalty to the other party to the contract".[84] This approach, by referring to the general principle of the convention, also speaks of a duty owed by the creditor to the debtor and failure to mitigate damages may be a breach of this duty and result in recoverable damages.[85]

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[78] Ibid.

[79] Ibid.

[80] Supra.75, Albán, "Mitigation of damages", ob.cit.

[81] Ibid.

[82] Supra.69, Frtiz & Dietrich, "International Sales Law", ob.cit.

[83] Ibid.

[79] Peter Schlechtriem, Recent Developments in International Sales Law, 18 Israel L.R. 320-321 (1983), pp.320-321.

[85] Eric C. Schneider, 'Measuring Damages under the CISG' (*Institute of International Commercial Law*, 15 June 2015)

The observation that the duty of mitigation should be fulfilled by the creditor to avoid the deterioration of his own interest seems to be in line with the English law approach, which is submitted by Saidov. His position has been formulated as follows: "A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests."[86]

Saidov in his work rebutted both the approach of treating mitigation as contractual obligation and that of treating it as a duty that stems out of good faith. He seems to have taken a more liberal approach, denying the existence of a "duty" at all and holding that the creditor has the freedom the decide whether, when and how to mitigate as he sees fit to minimize his actual loss. He does so not because he owns such duty to the other party, but simply that fits best his own interest. However, the law needs to make it clear for the non-breaching party that if he does not set out to mitigate the loss, what is lost that could have been avoided would run in his own account. It requires the existence of a duty to clarify such situation.

Considering the diverse ways of interpreting Article 77, it seems that the parameters of duty to mitigate under the convention are still unclear. It would be farfetched to deem the mitigation as a genuine contractual obligation as other primary obligations covered in chapters II and III of the Convention since, by the place Article 77 is situated in the Convention and by the wording of this article, it only affects the quantity of damage award.

On the hand, Saidov's English law approach does not appear to be persuasive either, at least under the context of the Convention. It seems to be the intention of the Convention to make Article 77 a duty/obligation coupled with legally imposed consequence to affirm such duty/obligation. It is impossible to say that a party "owes a duty/obligation to himself" to act in his best interest, which would contradict the essence of the concept of "duty" or "obligation".[87] Absent a "duty" or "obligation" and corresponding penalty to affirm it, we cannot not expect

<https://iicl.law.pace.edu/cisg/page/cross-references-and-editorial-analysis-article-74> accessed 7 May 2024.

[86] Djakhongir Saidov, 'Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods' (*Institute of International Commercial Law*, 2 August 2013) <https://iicl.law.pace.edu/cisg/scholarly-writings/methods-limiting-damages-under-vienna-convention-contracts-international> accessed 6 May 2024.

[87] McGregor on Damages, 15th Edition, 1988, p. 172.

a party to put effort to minimize his loss if he can always count on such loss to be compensated by the breaching party. Therefore, Saidov's approach for me is way too liberal that goes against the mere purpose of Article 77, which is to encourage efforts to minimize the loss.

As far as I'm concerned, it is more appropriate to consider Article 77 as imposing a general duty/obligation which derives from the general principle of good faith, which to date has become part of the general trade usage in international trade. The function of Article 77 can be better explained by socioeconomic reasons, such as the promotion of diligent use of resources and to disincentivize passive attitudes that would allow expansion of losses which could have been reasonably avoided.[88] This approach of understanding mitigation under Article 7 and Article 9 will explain the worldwide presence of the duty of mitigation and complies with the context of the Convention itself. Another argument in support of this view is that in the duty to mitigate cannot be waived by the parties and has to be taken into account by the courts *ipso iure* in damages claims.[89]

3.2. Relationship with other remedies

3.2.1 Test of Reasonableness as a guiding principle

Having settled the legal nature of mitigation of loss as a duty based on general principle of good faith instead of a contractual obligation, and as a mechanism of limiting the scope of damages, it is now relevant to look at how it interacts with other remedies.

By the structure of the Convention, this article is put under the section titled "damages", which indicates that the obligation to mitigate damages exists only in regard to damages claims arising from the breach and not in regard to claims in regard to the performance of the contract.[90]

However, even though the duty of mitigation should not, in principle, affect the party's exercise of other remedies, it does serve as an incentive for party's choice of remedies after the breach

[88] Ana Soler Presas, Comentario de los artículos 75, 76 y 77 de la Convención de Viena sobre compraventa internacional de mercaderías, in Luis Díez-Picazo Ponce de León (Coord.), p.622.

[89] Hans Stoll in Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG), art77, para.12.

[90] Peter Schlechtriem, Petra Butler, *UN Law on International Sales* (Springer Berlin Heidelberg 2009) <http://link.springer.com/10.1007/978-3-540-49992-3> accessed 11 March 2024.

or when a breach is imminent, if they are aiming for damage claims after all.

The starting point is still the wording of the Article.77. According to the Article 77, the aggrieved party must take measures "as are reasonable in the circumstances". In other words, the aggrieved party cannot recover damages with respect to loss which he could have reasonably avoided.

Therefore, the type of measures that need to be undertaken depends on the criterion of reasonableness.[91] The latter, in turn, depends on and will be construed in the light of the circumstances in question. In general, it has been said that a measure is reasonable if under the particular circumstances, it could be expected to be taken by a person acting in good faith, or if it is "adequate and preventive" with respect to the loss.[92] In the evaluation of the situation, regard should be also had to the party's skills and position as a businessman, such as, ingenuity, experience, and financial resources, etc.[93]

On the other hand, the aggrieved party is not, in any way, obliged to take measures, which, in the circumstances concerned, are excessive and entail unreasonably high expenses and risks. If the party refrains from such measures, he will not be considered as not having complied with Article 77.[94]

Although it is not possible to list every single measure that is to be deemed as "reasonable" under Article 77, the test of reasonableness should always be bored in mind when assessing the party's choice of remedies in the given situation.

One challenging issue is the applicability of Article 77 in case of anticipatory breach, in particular, concerning the controversial effects it would bring about when the remedies of specific performance and avoidance come into play.

3.2.2. Mitigation in anticipatory breach

[91] Supra.69, Fritz &Dietrich, "International sales Law", ob.cit.

[92] Supra.77, Victor Knapp, "Comments", ob.cit.

[93] Supra.86, Saidov, "Methods", ob.cit.

[94] Ibid.

It is already covered in the foregoing discussion that the aim of Article 77 is to encourage mitigation of the loss. To this end, measures directed at mitigating the loss are to be taken as soon as the party to the contract could foresee the danger of breach of the contract by the other party and of his consequent potential loss.[95] Hence, it is undoubted that the duty to mitigate the loss applies not only to a breach of contract in respect of an obligation whose performance is currently due, but also to an anticipatory breach of contract under article 71.[96]

In the case of anticipatory breach, the buyer notified the seller before the performance was due that he was no longer in need of the goods and would not take delivery. The seller, however, disregards the buyer's information and continues to manufacture the goods. If the seller later sued for damages, Article 77 certainly is applicable, and seller cannot be granted full damages since he could have reasonable avoided the loss by suspending the performance or by finding cover sales.

In the given example, undoubtedly the aggrieved party can choose to declare the contract avoided according to Article 72 (1). When the seller notified the buyer of his incapability to perform the contract, the former is merely proposing to the buyer to avoid the contract by mutual consent so that they could both avoid unnecessary costs.

However, the buyer under the Convention is not obliged to accept the repudiation as he has the freedom to choose to accept the proposal or not. If, as described in the given scenario, the buyer affirms the contract claims specific performance asking for the full price, in principle Article 77 will not apply because he sued for the price not the damages.[97] Therefore the seller would have the right to claim full price without any reduction. Here a tricky situation occurred where the party may escape his duty of mitigation by strategic choosing of remedies.

Interestingly, the same concern was raised in the Vienna Conference and some delegations proposed to extend the application of Article 77 to allow the party in breach to claim not only a reduction in damages, but also "a corresponding modification or adjustment of any other

[95] Supra.77, Knapp, "Comments", ob.cit.

[96] Ibid.

[97] Ibid.

remedy".[98] However, this proposal was rejected as it shakes the whole system of remedies under the Convention and allows too much leeway for the parties. So, Article 77 was adopted as it now stands.

Although for the sake of legal certainty, it is in principle correct to not allow Article 77 to expend to other remedies, the legal dilemma is still present and in need of proper solution.

For many commentators, there's simply no solution to this dilemma since the duty to mitigate damages should not override the party's right to performance in the first place.[99] Despite of holding this view, Knapp agrees that it was the intention of the Vienna Conference (the *ratio legis*) that Article 77 be broadly interpreted, but not so broadly as to enable or encourage a party to the contract to abrogate his obligations thereunder.[100]

Knapp went on to conclude that in case of an anticipatory breach, like in the given example, avoidance of contract and a subsequent resale of goods are considered reasonable measures under Article 77.[101] If the injured party does not suspend his performance or avoid the contract but insists on specific performance of the contract, he risks, on claiming damages, being found to have failed to take appropriate measures to mitigate the threatened loss.[102]

Knapp's observation indeed holds true but left untouched the scenario where the aggrieved party only insists on specific performance without claiming damages at all, where Article 77 and the reasonableness test may not even have the chance to be applied.

Similarly, authors like Stoll, also holds that the basic idea of Article 77, i.e. that the obligee should have taken measures to mitigate losses, must not be lost because of his choosing of other remedies.[103]

Although they all seem to agree that the spirit of Article 77 should remain regardless of the

[98] See Official Records, II, 396-398.

[99] Supra.77, Knapp, "Comments", ob.cit..

[100] Ibid.

[101] Ibid.

[102] Ibid.

[103] Supra. 88, Stoll, para.16.

choice of remedies, they refrain from giving a concrete solution as it may go against the existing position implied by the wording of the article.

Saidov, on the other hand, opines that the duty to mitigate may represent the basis for refusal to enforce the party's right to specific performance.[104] He founded this submission on the ground of "legitimate interest", namely if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself.[105]

Following this line, in the given scenario the legitimate interest on the part of the seller to insist on performance of the contract is totally absent, therefore specific performance should not be granted by the court. The seller then, in order to recover his loss, has to resort to damages and Article 77 will apply.

Even though the concept of "legitimate interest" is developed under English law, it can serve as a good lens to solve the dilemma under CISG. For me the essence of "legitimate interest" bears a lot of similarity to that of reasonableness. One can simply say that there's a total lack of legitimate interest therefore it is completely "unreasonable" for the party to do so. However, if we assume that Article 77 does not apply to remedies except damages, and it is arguable whether the principle of reasonableness can be seen as a general principle of Convention, it may be hard to incorporate this concept into the framework of CISG.

Based on the aforementioned approaches, for me it is certainly correct to restrict the application of Article 77 to merely damages, as it conforms with the wording of the article itself. Nonetheless, specific performance can be treated as an exception to this general rule, applicable in case of anticipatory breach in absence of legitimate interest. One possible theoretical basis could be, if not against the principle of reasonableness, that it is against the principle of good faith under Article 7.

[104] Supra. 86, Saidov, "Methods", ob.cit.

[105] White and Carter (Councils) Ltd. v. McGregor, [1962] 2 A.C. 428, at 431.

Conclusion

The main function of damage award is to compensate the party' lost contractual expectations in monetary terms in case of breach of the other party. Due to this unique feature, it is and should be perfectly compatible with other primary remedies provided under the Convention. The parties have the freedom to choose among the remedies together with damages. Since damages have real financial implications, how the exercise of one remedy may affect damage award will in turn, cast influence on parties' choosing of remedies in the first place.

Both specific performance and price reduction serve to preserve the contract while reducing the damages that are to be claimed afterwards, even though the Convention reserves the plain application of specific performance by subjecting it to the court's discretion according to the practice their national law. The avoidance, on the other hand, releases the parties from obligation to perform the contract in order to later restore the parties' position as before the contract was made via damages. However, the difficulty in avoiding contracts under the Convention and its potential implications on damages may render the aggrieved party in dilemma whether to exercise his right of avoidance, especially when the seller is in breach. It is submitted by the present work that the buyer's right of avoidance cannot be conditioned by the seller's opportunity to cure, despite of its potential effects on damages. The avoidance under the Convention should be given a more liberal approach trusting the parties' own calculating of cost and benefit in case of breach, which will be reflected later in payable damages.

Regarding the damage itself, the Convention offers mechanisms to delimit the scope of it. The general guidance is provided in Article 74 establishing the principle of full compensation and that of foreseeability. The former focuses on the existence of casual link between the loss and the breach and an amount that reflects the actual loss. The latter emphasizes on both subjective and objective aspects of the parties' knowledge when the contract is formed. It is rebutted by this work that the "reasonable certainty" test required to establish the casual link under principle of full compensation would render the principle of foreseeability vain, for this test is seen only as a procedural requirement for proving the casual link and as an objective standing of facts.

The principles of full compensation and foreseeability can be overridden by partis' express

agreement amending the scope of damages, as contractual freedom is one of the basic principles of the Convention. A penalty clause that exceeds the actual amount of loss can in principle be allowed under the Convention, so can one that reduces the damages below the actual amount. However, the bottom line is that the breach must have considerable financial implications.

Another element that will affect the scope of damages is the duty of mitigation. Despite of various theories concerning the legal nature of mitigation, it is concluded from this work that it is a duty imposed on the creditor based on the principle of good faith and has become a form of trade usage of which the parties ought to have known.

In principle the duty of mitigation is only applicable to damages and should not affect the parties' exercise of other remedies. The exception to this general rule is analyzed to be in case of anticipatory breach, absent legitimate interest, the aggrieved party claims for specific performance instead of choosing the avoid the contract. Because it goes against principle of good faith and arguably, principle of reasonableness under Article 77.

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