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UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods*

Chapter V

Provisions Common to the Obligations of the Seller and of the Buyer

Section II

Damages

1. Articles 45 and 61 provide that the aggrieved buyer and the aggrieved seller, respectively, may claim damages as provided in articles 74 to 77 if the other party "fails to perform any of his obligations under the contract or this Convention". CISG articles 45 (1) (b); 61 (1) (b). Articles 74 to 77, which comprise Section 2 of Chapter V, set out the damage formulas that apply to the claims of both aggrieved sellers and aggrieved buyers. These damage provisions are exhaustive and exclude recourse to domestic law[1].

[1] CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (recourse to national law on damages excluded).

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

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Overview

2. Article 74 establishes the general formula applicable in all cases where an aggrieved party is entitled to recover damages. It provides for the recovery of all losses, including loss of profits, caused by the breach to the extent that these losses were foreseeable by the breaching party at the time the contract was concluded. An aggrieved party may choose to claim under article 74 even if entitled to claim under article 75 or 76[2]. The latter articles explicitly provide that an aggrieved party may recover additional damages under article 74.

3. Articles 75 and 76 apply only in cases where the contract has been avoided. Article 75 calculates damages concretely by reference to the price in a substitute transaction, while article 76 calculates damages abstractly by reference to the current market price. Article 76 (1) provides that an aggrieved party may not calculate damages under article 76 if it has concluded a substitute transaction under article 75[3]. If, however, an aggrieved party concludes a substitute transaction for less than the contract quantity, both articles 75 and 76 may apply[4].

4. Pursuant to article 77 damages recoverable under articles 74, 75 or 76 are reduced if it is established that the aggrieved party failed to mitigate these damages. The reduction is the amount by which the loss should have been mitigated.

5. Several courts have deduced general principles from the articles of Section 2. One decision concludes that full compensation to an aggrieved party is a general principle on which the Convention is based[5]. Another decision states that the Convention prefers "concrete" calculation of damages by reference to actual transactions or losses over abstract calculation by reference to the market price[6].

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[2] CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under art. 74 even if it could also claim under arts. 75 or 76).

[3] See ICC award No. 8574, September 1996, Unilex (no recovery under art. 76 because aggrieved party had entered into substitute transactions within the meaning of art. 75). See, however, CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (damages calculated under art. 76 rather than art. 75 where aggrieved seller resold goods for one-fourth of contract price and for less than current market price).

[4] CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. See also ICC award No. 8740, 1996, Unilex (aggrieved buyer unable to establish market price not entitled to recover under art. 76 and entitled to recover under art. 75 only to the extent it had made substitute purchases); but compare CIETAC award, China, 30 October 1991, available on the Internet at http://cisgw3.law.pace.edu/cases/911030c1.html (aggrieved buyer who had made purchases for only part of the contract quantity nevertheless awarded damages under art. 75 for contract quantity times the difference between the contract price and the price in the substitute transaction).

[5] CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (citing art. 74 for general principle within meaning of art. 7 (2)).

[6] CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (CISG prefers concrete calculation of damages to the reference to market price in the art. 76 formula) (see full text of the decision). See also CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (damages not calculated under art. 76 because damages could be calculated by reference to actual transactions).

Relation to other articles

6. Article 6 provides that parties may agree to derogate from or vary the provisions of the Convention, including the damage provisions set out in Section 2 of Chapter V. Several decisions implicitly rely on article 6 when enforcing contract terms limiting[7] or liquidating[8] damages. One decision concluded that where the parties had agreed that an aggrieved party was entitled to a "compensation fee" if the contract was avoided because of the acts of the other party, the aggrieved party was entitled to recover both the compensation fee and damages under article 75[9]. Another decision concluded that a post-breach agreement settling a dispute with respect to a party's non-performance displaces the aggrieved party's right to recover damages under the damage provisions of the Convention[10]. The validity of these terms is governed by applicable domestic law rather than the Convention. CISG article 4 (a).

7. A breaching party is not liable for damages if he proves that article 79 or article 80 is satisfied. Under article 79, the breaching party must show that "the failure was due to an impediment beyond his control" and "that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences". CISG article 79 (1). The breaching party will, however, be liable for damages resulting from the other party's non-receipt of a timely notice of the impediment and its effects. CISG article 79 (4). Under article 80, an aggrieved party may not rely on a breach by the other party to the extent that the breach was caused by the aggrieved party's act or omission.

8. Article 44 provides that a party who fails to give due notice of non-conformity as required by articles 39 or 43 nevertheless has the option to recover damages "except for loss of profit" if he establishes a reasonable excuse for his failure.

9. Article 50 authorizes an aggrieved buyer to reduce the price according to a stated formula when it receives and keeps non-conforming goods. The buyer may waive its right to damages under articles 74 to 76 by claiming instead for the reduction of the price under article 50[11].

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[7] Hovioikeus [Court of Appeal] Turku, Finland, 12 April 2002, available (in English translation) on the Internet at http://cisgw3.law.pace.edu/cases/020412f5.html (warranty term limiting recovery of damages enforceable).

[8] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 302/96, Russia, 27 July 1999, published in Rozenberg, *Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy Moscow* (1999–2000) No. 27 [141–147] (liquidated damages substantiated; aggrieved buyer's damages calculated on basis of lost profits); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 251/93, Russia, 23 November 1994, Unilex (damages for delay granted only to extent of contract clause stipulating penalty for delay).

[9] CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992].

[10] CIETAC award No. 75, China, 1 April 1993, Unilex.

[11] CLOUT case No. 474 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 54/1999 of 24 January 2000].

10. If the contract is avoided, the aggrieved party who claims damages under article 75 or 76 is also subject to articles 81 to 84 on the effects of avoidance. Although avoidance generally releases the parties from their obligations under the contract, a party's right to any damages due survives avoidance[12]. CISG article 81 (1).

11. Other articles of the Convention may require a party to take specific measures to protect against losses. Articles 85 to 88 state, for example, when and how a buyer or seller must preserve goods in their possession[13]. The party taking such measures is entitled by these articles to recover reasonable expenses[14].

Burden of proof

12. Although none of the damage formulas in articles 74, 75 and 76 expressly allocates the burden of proof, one court has concluded that the Convention recognizes the general principle that the party who invokes a right bears the burden of establishing that right and that this principle excludes application of domestic law with respect to burden of proof[15]. Thus, the aggrieved party claiming damages under articles 74, 75 and 76, as well as the breaching party claiming a reduction in damages under article 77[16], will bear the burden of establishing his entitlement or amount of damages or the reduction in damages. The same opinion concludes, however, that domestic law rather than the Convention governs how a judge should reach his opinion (e.g. the weight to be given evidence) as this is a matter not covered by the Convention[17].

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[12] CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (damage provisions prevail over consequences of avoidance under arts. 81–84).

[13] CIETAC award, China, 6 June 1991, available on the Internet at http://www.cietac-sz.org.cn/cietac/index.htm (cost of freight for return of goods split between buyer who failed to return goods in a reasonable manner and seller who did not cooperate in return).

[14] See, e.g., CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (awarding damages under art. 74 for expenses incurred to preserve goods under arts. 86, 87 and 88 (1)). See also CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (damages for expenses incurred in preserving perishable goods even though not required to do so by arts. 85 to 88) (see full text of the decision).

[15] *FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch. See also CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (aggrieved party has burden of establishing loss); ICC award No. 7645, March 1995, Unilex ("Under general principles of law" the party claiming damages has burden of establishing existence and amount of damages caused by the breach of the other party). See generally CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (deriving general principle that claimant has burden of establishing its claim from art. 79).

[16] Article 77 of the Convention expressly provides that the party in breach may claim a reduction if the other party fails to take measures to mitigate the loss.

[17] *FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch (construing art. 8 of Swiss Civil Code). See also CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (domestic law, rather than Convention, determines how damages are to be calculated if the amount cannot be determined); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (domestic law determines whether estimate of damages for future losses is

Set off

13. Although the Convention does not address the issue of whether a counterclaim may be set off against a claim under the Convention[18], the Convention does determine whether a counterclaim arising from the sales contract exists[19]. If it does exist then the counterclaim may be set off against a claim arising under the Convention[20].

Jurisdiction; place of payment of damages

14. Several decisions have concluded that, for the purposes of determining jurisdiction, damages for breach of contract are payable at the claimant's place of business[21]. These decisions reason that there is a general principle on which the Convention is based that a creditor is to be paid at its domicile unless the parties otherwise agree.

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sufficiently definite).

[18] CLOUT case No. 288 [Oberlandesgericht München, Germany 28 January 1998] (applicable law, not Convention, determines whether set off permitted); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (applicable domestic law determines whether set off allowed).

[19] CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (set-off permitted under applicable national law; counterclaim determined by reference to Convention). But see CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (counterclaim arose under Convention; set off permitted under Convention).

[20] CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (buyer's counterclaim offset against seller's claim for price); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (buyer damages set off against price); CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (buyer's counterclaim would have been allowable as set off but seller had not breached). See also CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (implicitly recognizing the possibility that buyer's tort claim could be raised to set off against seller's claim for the price, court applies CISG notice provisions to bar tort claim).

[21] CLOUT case No. 205 [Cour d'appel, Grenoble, France, 23 October 1996] (deriving general principle from art. 57 (1) that place of payment is domicile of creditor); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (deriving general principle on place of payment from art. 57 (1)).

Article 74

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

Overview

1. Article 74 sets out the Convention's general formula for the calculation of damages. The formula is applicable if a party to the sales contract breaches its obligations under the contract or the Convention[22]. The first sentence of article 74 provides for the recovery of all losses, including loss of profits, suffered by the aggrieved party as a result of the other party's breach. The second sentence limits recovery to those losses caused by the breach that the breaching party foresaw or could have foreseen at the time the contract was concluded. The formula applies to the claims of both aggrieved sellers and aggrieved buyers.

2. The Convention determines the grounds for recovery but domestic procedural law may apply to the assessment of evidence of loss[23]. Applicable domestic law also determines whether a party may assert a right to set off in a proceeding under the Convention (see paragraph 37 below). Domestic substantive law may also govern relevant issues for the determination of the amount of damages, such as the weighing of evidence[24].

3. One tribunal has derived from the damage formula in article 74 a general principle of full compensation. Pursuant to article 7 (2) the tribunal used this general principle to fill the gap in article 78, which provides for the recovery of

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[22] Articles 45 (1) (b) and 61 (1) (b) provide that the aggrieved buyer and the aggrieved seller, respectively, may recover damages as provided in articles 74 to 77 if the other party fails to perform as required by the contract or the Convention.

[23] Helsingin hoviokeus [Helsinki Court of Appeals], Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (grounds of recovery under CISG but calculation of damages under art. 17 of the Finnish Law of Civil Procedure); CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (applicable domestic law determines how to calculate damages when amount cannot be determined); CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] ("sufficient evidence [under common law and law of New York] to estimate the amount of damages with reasonable certainty"), *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

[24] See, e.g., CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999] (aggrieved seller recovers damages under art. 74 for losses caused by the buyer's delay in payment but applicable domestic law determines whether payment delayed because Convention is silent on time of payment).

interest in stated circumstances but does not indicate how the rate of interest is to be determined[25].

4. In accordance with article 6 a seller and buyer may agree to derogate from or vary article 74. Several decisions enforce contract terms limiting[26] or liquidating[27] damages. The validity of these contract terms is, by virtue of article 4 (a), governed by applicable domestic law rather than the Convention[28].

Relation to other articles

5. An aggrieved party may choose to claim under article 74 even if entitled to claim under articles 75 and 76[29]. The latter provisions explicitly provide that an aggrieved party may recover additional damages under article 74.

6. Damages recoverable under articles 74 are reduced if it is established that the aggrieved party failed to mitigate these damages as required by article 77. The reduction is the amount by which the loss should have been mitigated. See commentary on article 77.

7. Article 78 expressly provides for the recovery of interest in specified cases but states that its provisions are "without prejudice to any claim for damages recoverable under Article 74". Several decisions have awarded interest under

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[25] CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994] (deriving general principle from art. 74 for purpose of filling gap in art. 78 in accordance with art. 7 (2)). See also CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (art. 74 is "designed to place the aggrieved party in as good a position as if the other party had properly performed the contract") (see full text of the decision).

[26] Hovioikeus Turku, Finland, 12 April 2002, available (in English translation) on the Internet at http://cisgw3.law.pace.edu/cases/020412f5.html (contract term limiting recovery of damages enforceable).

[27] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 27 July 1999, published in Rozenberg, *Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy Moscow* (1999–2000) No. 27 [141–147] (liquidated damage clause displaces remedy of specific performance; liquidated damages reasonable and foreseeable under art. 74 as measure of expected profit); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 251/93, Russia, 23 November 1994, Unilex (damages for delay granted only to extent of contract penalty for delay clause).

[28] See CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (term in seller's general conditions limiting damages not validly incorporated into contract) (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (validity of standard term excluding liability determined by domestic law but reference in domestic law to non-mandatory rule replaced by reference to equivalent Convention provision).

[29] CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under art. 74 even if it could also claim under arts. 75 or 76). See also CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995] (citing art. 74, tribunal awards buyer difference between contract price and price in substitute purchase) ; CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (awarding seller, without citation of specific Convention article, difference between contract price and price in substitute transaction).

article 74[30]. Interest has been awarded as damages in cases not covered by article 78 because such damages were not due for sums in arrears[31].

8. An aggrieved seller may require the buyer to pay the price pursuant to article 62. An abstract of an arbitral opinion suggests that the tribunal awarded the seller the price as damages under article 74[32].

Right to damages

9. Article 74 provides a general formula for the calculation of damages. The right to claim damages is set out in articles 45 (1) (b) and 61 (1) (b). These paragraphs provide that the aggrieved buyer and the aggrieved seller, respectively, may claim damages as provided in articles 74 to 77 if the other party "fails to perform any of his obligations under the contract or this Convention". Thus, the article 74 formula may be used for calculating damages for breach of obligations under the Convention as well as breach of the sales contract[33].

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[30] See, e.g., *Van Dongen Waalwijk Leder BV v. Conceria Adige S.p.A.*, Gerechtshof 's-Hertogenbosch, the Netherlands, 20 October 1997, Unilex (interest awarded under both arts. 74 and 78); Pretura di Torino, Italy, 30 January 1997, Unilex (aggrieved party entitled to statutory rate of interest plus additional interest it had established as damages under art. 74); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (seller awarded interest under art. 74 in amount charged on bank loan needed because of buyer's non-payment); Amtsgericht Koblenz, Germany, 12 November 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/400.htm (bank certificate established that aggrieved seller was paying higher interest rate than official rate under applicable law); Käräjäoikeus of Kuopio, Finland, 5 November 1996, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap6.html (breaching party could foresee aggrieved party would incur interest charges but not actual rate in Lithuania); CLOUT case No. 195 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1995] (seller entitled to higher interest under art. 74 if he established damages caused by non-payment); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (damages includes interest paid by aggrieved seller for bank loans); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (interest awarded at commercial bank rate in Austria); Landgericht Berlin, Germany, 6 October 1992, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/173.htm (assignee of aggrieved party's claim entitled to recover 23% interest rate charged by assignee); CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (seller recovered price and interest at the statutory rate in Italy plus additional interest as damages under art. 74). See also CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999] (right to recover damages under the Convention for losses resulting from delay in payment but applicable domestic law determines when delay becomes culpable); CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996] (failure to establish additional damages under art. 74); CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (claimant awarded statutory interest rate under art. 78 but it failed to establish loss of higher interest rate under art. 74).

[31] See, e.g., Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (aggrieved buyer entitled to recover interest on reimbursable costs it incurred following sub-buyer's rightful rejection of goods).

[32] ICC award No. 8716, February 1997, (Fall 2000) *ICC International Court of Arbitration Bulletin*, vol. 11, No. 2, pp. 61–63 (damages awarded in amount of price).

[33] See, e.g., CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (seller's failure to notify the buyer that the seller was suspending performance in accordance

10. Article 74 states that damages may be awarded for "breach of contract" that causes loss without any qualification as to the seriousness of the breach or the loss. An abstract of one arbitral award suggests nevertheless that damages may be recovered under article 74 for "fundamental non-performance"[34].

11. Under articles 45 and 61 an aggrieved party is entitled to recover damages without regard to the "fault" of the breaching party. Several decisions consider whether claims based on a party's negligence is covered by the Convention. An arbitral award concluded that an aggrieved buyer failed to notify the seller of non-conformity in a timely manner and the tribunal applied domestic civil law to divide the loss equally between the seller and the buyer on the ground that the Convention did not govern the issue of joint contribution to harm[35] A court decision also concluded that the Convention did not cover a claim that the alleged seller had made a negligent misrepresentation inducing the conclusion of the sales contract[36].

12. When the aggrieved party fails, without excuse[37], to give timely notice to the breaching party in accordance with articles 39 or 43 the aggrieved party loses its right to rely on the non-conformity when making a claim for damages[38]. If excused from giving timely notice, the aggrieved party may nevertheless recover damages other than lost profits in accordance with article 44[39].

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with art. 71 (3) itself a breach of the Convention entitling buyer to damages).

[34] ICC award No. 8716, February 1997, (Fall 2000) *ICC International Court of Arbitration Bulletin,* vol. 11, No. 2, pp. 61–63.

[35] Bulgarian Chamber of Commerce and Industry arbitration case No. 56/1995, Bulgaria, 12 April 2002, Unilex (50/50 division of the 10 percent of price held back by buyer because of non-conformity of goods).

[36] *Geneva Pharmaceuticals Tech. Corp. v. Barr Laboratories, Inc.,* United States, 10 May 2002, Unilex (domestic law "tort" claim of negligent misrepresentation not preempted by Convention). See also CLOUT case No. 420 [Federal District Court, Eastern District of Pennsylvania, United States, 29 August 2000] (Convention does not govern non-contractual claims).

[37] See CISG arts. 40 (buyer's failure excused when seller could not have been unaware of non-conformity) and 44 (excuse for failure to notify). See also CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (buyer need not declare avoidance when seller stated it would not perform); CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (seller estopped from asserting buyer's failure to give timely notice).

[38] See, e.g., CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999] (failure to give sufficiently specific notice); CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (failure to give sufficiently specific notice); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (failure to satisfy art. 39 bars both CISG and tortious claims for damages); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (failure to give sufficiently specific notice); CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (failure to give timely notice); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (failure to give timely notice); CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (failure to notify); CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (failure to notify); CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (failure to give timely notice of non-conformity); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (failure to examine and notify of non-conformity of goods).

[39] CLOUT case No. 474 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 54/1999 of 24 January 2000].

13. Article 79 excuses a breaching party from the payment of damages (but not from other remedies for non-performance) if he proves that the conditions of paragraph (1) of article 79 are satisfied. Paragraph (4) of article 79 provides, however, that the breaching party will be liable for damages resulting from the other party's non-receipt of a timely notice of the impediment and its effects.

14. Article 80 provides that an aggrieved party may not rely on a breach by the other party to the extent that the breach was caused by the aggrieved party's act or omission.

Types of losses

15. The first sentence of article 74 provides that an aggrieved party's damages consist of a monetary sum to compensate him for "loss, including loss of profit, suffered . . . as a consequence of the breach". Except for the explicit inclusion of lost profits, article 74 does not otherwise classify losses. Decisions sometimes refer to the classification of damages under domestic law[40].

– Losses arising from death or personal injury

16. Article 5 provides that losses arising from death or personal injury are excluded from the Convention's coverage. However, when deciding on its jurisdiction, one court implicitly assumed that the Convention covers claims by a buyer against its seller for indemnification for claim by sub-buyer for personal injury[41].

– Losses arising from damage to other property

17. Article 5 does not exclude losses for damage to property other than the good purchased[42].

– Losses arising from damage to non-material interests

18. Article 74 does not exclude losses arising from damage to non-material interests, such as the loss of an aggrieved party's reputation because of the other party's breach. Some decisions have implicitly recognized the right to recover damages for loss of reputation or good will[43], but at least one other has denied such

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[40] See, e.g., CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (loss of profit in case was "positive damage") (see full text of the decision); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit United States 6 December 1995] ("incidental and consequential" damages) (see full text of the decision) affirming CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994].

[41] CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993].

[42] See CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland 26 April 1995] (recovery for damage to house in which container for weightless floating installed).

[43] Helsingin hoviokeus, Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (recovery of good will calculated in accordance with national rules of civil procedure); CLOUT case No. 331 [Handelsgericht des

recovery under the Convention[44]. One court found claims for both loss of turnover and loss of reputation to be inconsistent[45].

– Losses arising from change in value of money

19. Article 74 provides for recovery of "a sum equal to the loss" but does not expressly state whether this formula covers losses that result from changes in the value of money. Several courts have recognized that an aggrieved party may suffer losses as a result of non-payment or delay in the payment of money. These losses may arise from fluctuations in currency exchange rates or devaluation of the currency of payment. The courts differ as to the appropriate solution. Several decisions have awarded damages to reflect devaluation[46] or the changes in the cost of living[47]. On the other hand, several other decisions refused to award damages for such losses. One decision concluded that in principle a claimant is not entitled to recover losses from currency devaluation but went on to suggest that a claimant might recover damages if it carried out transactions in foreign currency which it exchanged immediately after receiving the currency[48]. Another court stated that while devaluation of the currency in which the price was to be paid could be damages under the Convention no damages could be awarded in the case before it because future losses could be awarded only when the loss can be estimated[49].

Expenditures by aggrieved party

20. Many decisions have recognized the right of the aggrieved party to recover reasonable expenditures incurred in preparation for or as a consequence of a contract that has been breached. The second sentence of article 74 limits recovery to the total amount of losses the breaching party could foresee at the time the contract was concluded (see paragraphs 32–34 below). Although the Convention does not

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Kantons Zürich, Switzerland, 10 February 1999] (art. 74 includes recovery for loss of good will but aggrieved party did not substantiate claim) (see full text of the decision); CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (no recovery under CISG for loss of good will unless loss of business proved); CLOUT case No. 210 [Audienca Provincial Barcelona, Spain, 20 June 1997] (aggrieved party did not provide evidence showing loss of clients or loss of reputation) (see full text of the decision).

44 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, award No. 304/93, Russia, 3 March 1995 ("moral harm" not compensable under CISG).

45 CLOUT case No. 343 [Landgericht Darmstadt, Germany 9 May 2000] (damaged reputation insignificant if there is no loss of turnover and consequent lost profits) (see full text of the decision).

46 *Gruppo IMAR S.p.A. v. Protech Horst BV*, Arrondissementsrechtbank Roermond, the Netherlands, 6 May 1993, Unilex (damages in amount of devaluation because payment not made when due).

47 See, e.g., *Maglificio Dalmine s.l.r. v. S.C. Covires* Tribunal commercial de Bruxelles, Belgium, 13 November 1992, Unilex (failure to pay price; court allowed revaluation of receivable under Italian law to reflect change in cost of living).

48 CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (seller did not establish its loss from devaluation of currency in which price was to be paid).

49 CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (citing general principle of tort law).

expressly require that expenditures be reasonable several decisions have refused to award damages when the expenditures were unreasonable[50].

21. Decisions have awarded incidental damages to an aggrieved buyer who had made reasonable expenditures in the following cases: inspection of non-conforming goods[51]; handling and storing non-conforming goods[52]; preserving goods[53]; shipping and customs costs incurred when returning the goods[54]; expediting shipment of substitute goods under an existing contract with third party[55]; installing substitute goods[56]; sales and marketing costs[57]; commissions[58]; hiring a third party to process goods[59]; obtaining credit[60]; delivering and taking back the non-conforming goods to and from a sub-buyer[61]; payments made to sub-buyers on account of non-conforming goods[62]; moving replacement coal from stockpiles[63]. Several decisions have awarded buyers who have taken over non-conforming goods the reasonable costs of repair as damages[64]. At least one decision implicitly

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[50] CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (expense of resurfacing grinding machine not reasonable in relation to price of wire to be ground); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, award No. 375/93, Russia, 9 September 1994 (recovery of storage expenses shown to be amounts normally charged).

[51] Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (examination).

[52] Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (storage); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (reversing CLOUT case No. 85 decision that denied recovery of storage costs).

[53] CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994].

[54] CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (reversing CLOUT case No. 85 decision that denied recovery of shipping costs and customs duties).

[55] CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (affirming CLOUT case No. 85 decision that awarded costs of expediting shipment of goods under existing contract).

[56] CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995].

[57] Helsingin hoviokeus [Helsinki Court of Appeal], Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (damages recovered for sales and marketing expenses of aggrieved buyer).

[58] CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (commissions) (see full text of the decision).

[59] CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997].

[60] CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994].

[61] CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (recovery allowed for handling complaints and for costs of unwrapping, loading and unloading returned non-conforming goods from sub-buyers); Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (freight, insurance and duties connected with delivery to sub-buyer; storage with forwarder; freight back to aggrieved buyer; storage before resale by aggrieved buyer; examination).

[62] CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (buyer entitled to damages in amount of compensation paid to sub-buyer for non-conforming good); Landgericht Paderborn, Germany, 25 June 1996, Unilex (damages for reimbursement of sub-buyer travel expenses to examine product, costs of examination, cost of hauling defective products, costs of loss on a substitute purchase). See also CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994] (no indemnity awarded because third party's pending claim against buyer not yet resolved).

[63] ICC award No. 8740, October 1996, Unilex (cost of moving replacement coal from stockpiles recoverable).

[64] CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States,

recognizes that an aggrieved buyer may recover incidental damages although in the particular case the buyer failed to establish the damages[65]. Another decision assumed that the Convention governed a buyer's claim for indemnification for personal injury caused to an employee of the sub-buyer[66].

22. Decisions may recognize that an aggrieved buyer may recover for particular types of expenditure but deny recovery in a particular case. Some decisions explicitly recognize the type of expenditure but deny recovery for failure to prove them, lack of causation, or their unforeseeability by the breaching party. Thus one decision recognized the potential recovery of a buyer's advertising costs but declined to award damages because the buyer failed to carry its burden of proof[67]. Other decisions may implicitly assume the right to recover particular expenditures. When deciding on its jurisdiction, one court implicitly assumed that the Convention covers claims by a buyer against its seller for indemnification of a sub-buyer's claim for personal injury[68].

23. An aggrieved seller recovered damages for the following incidental expenses: storage of goods at the port of shipment following the buyer's anticipatory breach[69]; storage and preservation of undelivered machinery[70]; cost of modifying a machine in order to resell it[71]; costs related to the dishonour of the buyer's cheques[72]. A

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6 December 1995] (expenses incurred when attempting to remedy the non-conformity*)* (see full text of the decision), *affirming* CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994]; *Nova Tool and Mold Inc. v. London Industries Inc.*, Ontario Court-General Division, Canada, 16 December 1998, Unilex (reimbursing expenses of having third party perform regraining overlooked by seller and repairing non-conforming goods); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (cost of repair).

65 CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (advertising costs not sufficiently particularized) (see full text of the decision).

66 CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (relying on the Convention but without analysis of art. 5, court concluded that it had jurisdiction in action by buyer against its supplier to recover cost of its indemnification of sub-buyer for personal injury caused by defective machine sold by supplier) (see full text of the decision).

67 CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (advertising costs not sufficiently particularized) (see full text of the decision).

68 CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993].

69 CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (storage expenses incurred because of lateness in taking delivery) (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, award No. 375/93, Russia, 9 September 1994 (recovery of storage expenses that were in amounts normally charged); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (recovery of cost of storage but not for damage to goods because of prolonged storage) (see full text of the decision).

70 CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (storage and preservation of undelivered machinery). See also CISG art. 85 (seller must take steps to preserve goods when buyer fails to take over the goods).

71 CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (cost of modifying machine in order to resell) (see full text of the decision).

72 CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998] (dishonoured cheque); CLOUT case No. 376 [Landgericht Bielefeld, Germany, 2 August 1996] (buyer responsible for dishonoured cheques drawn by third party).

seller who has delivered non-conforming goods and subsequently cures the non-conformity is not entitled to recover the cost of cure[73].

– Expenditures for debt collection; attorney's fees

24. Decisions are split on whether the cost of using a debt collection agency other than a lawyer may be recovered as damages. One decision awarded the seller the cost[74], but several other decisions state that an aggrieved party may not recover compensation for the cost of hiring a debt collection agency because the Convention does not cover such expenses[75].

25. A number of courts and arbitral tribunals have considered whether an aggrieved party may recover the costs of a lawyer hired to collect a debt arising from a sales contract. Several decisions award damages to compensate for legal fees for extra-judicial acts such as the sending of collection letters[76]. One decision distinguished between the extra-judicial fees of a lawyer in the forum and similar fees of a lawyer in another jurisdiction, including the fees of the former in the allocation of litigation costs under the forum's rules and awarding the fees of the latter as damages under article 74[77].

26. Decisions are split as to whether attorney's fees for litigation may be awarded as damages under article 74[78]. Several arbitral tribunals have awarded, citing

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[73] CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (citing arts. 45 and 48 but not art. 74, court concluded that breaching seller must bear cost of repair or delivery of replacement goods).

[74] CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999] (recovery of debt collection costs allowed).

[75] CLOUT case No. 296 [Amtsgericht Berlin-Tiergarten, Germany, 13 March 1997] (costs of collection agency and local attorney in debtor's location not recoverable because not reasonable); CLOUT case No. 228 [Oberlandesgericht Rostock, Germany, 27 July 1995] (CISG does not provide for expenses incurred by collection agency).

[76] CLOUT case No. 254 [Handelsgericht des Kantons Aargau, Switzerland, 19 December 1997] (extra-judicial costs); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996] (reminder letter); Landgericht Aachen, Germany, 20 July 1995, Unilex (pre-trial costs recoverable under art. 74); Kantonsgericht Zug case No. A-3-1993-84, Switzerland, 1 September 1994, Unilex (expenses for non-judicial requests for payment reimbursable if payment overdue at time of request). See also CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (seller failed to mitigate loss in accordance with art. 77 when it hired a lawyer in buyer's location rather than a lawyer in seller's location to send a collection letter); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (although in principle legal costs incurred before avoidance of the contract are recoverable under art. 74, they are not recoverable here because the fees were recovered in special proceedings); *De Vos en Zonen v. Reto Recycling,* Gerechtshof 's-Hertogenbosch, the Netherlands, 27 November 1991, Unilex (construing ULIS art. 82, predecessor of art. 74, court allowed extrajudicial costs). See also *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.* [Federal] Court of Appeals for the Seventh Circuit, United States, 19 November 2002, Unilex (leaving open whether certain prelitigation expenditures might be recovered as damages when, e.g., expenditures were designed to mitigate the aggrieved party's losses).

[77] CLOUT case No. 254 [Handelsgericht des Kantons Aargau, Switzerland, 19 December 1997] (reasonable prelitigation costs of lawyer in seller's country compensable; prelitigation costs of lawyer in buyer's country [the forum] to be awarded as part of costs).

[78] Many decisions award attorneys' fees but support the award by citation to domestic law on the allocation of litigation costs.

article 74, recovery of attorney's fees for the arbitration proceedings[79]. In a carefully reasoned award, another arbitral tribunal concluded that a supplemental interpretation of the arbitration clause by reference to both article 74 and local procedural law authorized the award of attorney's fees before a tribunal consisting of lawyers[80]. Another court stated that, in principle, legal costs could be recovered although the court in that case did not award them[81]. Many cases award attorney's fees without indicating whether the award is for damages calculated under article 74 or pursuant to the court's rules on the allocation of legal fees[82]. Several decisions have limited or denied recovery of the amount of the claimant's attorney's fees on the grounds that the fees incurred were unforeseeable[83] or that the aggrieved party had failed to mitigate these expenses as required by article 77[84]. An appellate court reversed a decision awarding attorney's fees as damages under article 74 on the ground, *inter alia*, that the Convention did not implicitly overturn the "American rule" that the parties to litigation normally bear their own legal expenses, including attorneys' fees[85].

Lost profits

27. The first sentence of article 74 expressly states that damages for losses include lost profits. Many decisions have awarded the aggrieved party lost profits[86]. When

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[79] CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (supplemental interpretation of arbitration clause provided compensation for attorney's fees when arbitral tribunal composed exclusively of lawyers) (see full text of the decision); CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (damages for expenses for attorneys and arbitration).

[80] CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (referring, *inter alia*, to inconclusive survey of local trade practice with respect to attorney's fees in arbitral proceedings) (see full text of the decision).

[81] CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (legal costs incurred in actions to enforce claims under two different contracts).

[82] See, e.g., Hovioikeus Turku [Court of Appeals], Turku, Finland, 12 April 2002, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/020412f5.html (without citing art. 74, court provides for recovery of attorneys' fees).

[83] Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (attorney's fees in dispute with freight forwarder about storage not recoverable because unforeseeable).

[84] CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (seller failed to mitigate loss in accordance with art. 77 when it hired a lawyer in buyer's location rather than a lawyer in seller's location to send collection letter).

[85] *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.* [Federal] Court of Appeals for the Seventh Circuit, United States, 19 November 2002, Unilex (leaving open whether certain prelitigation expenditures might be recovered as damages). (The United States Supreme Court denied certiorari on this case on 1 December 2003.)

[86] Helsingin hoviokeus [Helsinki Court of Appeals], Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (lost profit calculated in accordance with national law of civil procedure); CLOUT case No. 476 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 406/1998 of 6 June 2000] (aggrieved buyer entitled in principle to recover for lost profit from sale with sub-buyer); CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (aggrieved buyer entitled to recover difference between value that contract would have had if seller had performed and costs saved by buyer); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (buyer entitled to lost profits); CLOUT case No. 168 [Oberlandesgericht Köln,

calculating lost profits, fixed costs (as distinguished from variable costs incurred in connection with fulfilling the specific contract) are not to be deducted from the sales price[87]. One decision awarded a seller who had been unable to resell the goods the difference between the contract price and the current value of those goods[88].

28. The second sentence of article 74 limits the damages that can be awarded for losses caused by the breach to the amount that the breaching party foresaw or should have foreseen at the time the contract was concluded. One decision reduced the recovery of profits because the breaching seller was not aware of the terms of the buyer's contract with its sub-buyer[89].

29. Damages for lost profits will often require predictions of future prices for the goods or otherwise involve some uncertainty as to actual future losses. Article 74 does not address the certainty with which these losses must be proved. One decision required the claimant to establish the amount of the loss according to the forum's "procedural" standards as to the certainty of the amount of damages[90].

30. Evidence of loss of profits, according to one decision, might include evidence of orders from customers that the buyer could not fill, evidence that customers had ceased to deal with the buyer, and evidence loss of reputation as well as evidence that the breaching seller knew or should have known of these losses[91].

– Damages for "lost volume" sales

31. In principle, an aggrieved seller who resells the goods suffers the loss of a sale when he has the capacity and market to sell similar goods to other persons. In the absence of the buyer's breach he would have been able to make two sales. Under

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Germany, 21 March 1996] (breaching seller liable in amount of buyer's lost profits when buyer had to reimburse sub-buyer); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (buyer's lost profits), affirming CLOUT case No. 85, 1994; CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (seller's lost profits measured by art. 75). See also CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999] (buyer did not produce evidence of lost profits) (see full text of the decision).

87 CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (fixed costs not costs aggrieved buyer saved when calculating lost profits); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (in absence of specific direction in Convention for calculating lost profits, standard formula employed by most US courts appropriate) (see full text of the decision).

88 CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

89 CLOUT case No. 476 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 406/1998 of 6 June 2000] (buyer's damages for lost profit reduced to 10 per cent of price because breaching seller did not know terms of sub-sale; 10 per cent derived from Incoterms CIF term which provides that insurance should be taken out in amount of 110 per cent of price).

90 CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] ("sufficient evidence [under common law and law of New York] to estimate the amount of damages with reasonable certainty"), *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

91 CLOUT case No. 210 [Audienca Provincial Barcelona, Spain, 20 June 1997] (aggrieved party did not provide any evidence to show his profits in previous years or the loss it suffered, such as orders given to him that could not be filled, loss of clients or loss of reputation) (see full text of the decision).

these circumstances a court concluded that the seller was entitled to recover the lost profit from the first sale[92]. Another court, however, rejected a claim for a "lost sale" because it did not appear that that the seller had been planning to make a second sale at the time the breached contract was negotiated[93]. An aggrieved buyer may have a similar claim to damages. A court concluded that a buyer could recover for damages caused by its inability to supply the market demand for its product because of the non-conforming components supplied by his seller[94].

Foreseeability

32. The second sentence of article 74 limits recovery of damages to those losses that the breaching party foresaw or could have foreseen at the time the contract was concluded might be a possible consequence of its breach.

33. Decisions have found that the breaching party could not have foreseen the following losses: rental of machinery by buyer's sub-buyer[95]; the processing of goods in a different country following late delivery[96]; exceptionally large payments to freight forwarder[97]; attorney's fees in dispute with freight forwarder[98]; the cost of resurfacing grinding machine where cost exceeded price of wire to be ground[99]; lost profits where breaching seller did not know terms of contract with sub-

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92 CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved seller may recover profit margin on assumption that could sell at the market price). See also Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (aggrieved buyer's loss of profits on its sale to first sub-buyer, who rejected, and on resale to second sub-buyer at price below original contract price); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (majority of court awarded seller, who had resold goods, global amount of 10 per cent of price stating that breaching buyer could expect such an amount of loss; dissenting opinion questioning whether sufficient proof of damages); Xiamen Intermediate People's Court, China, 31 December 1992, Unilex (aggrieved seller's lost profits calculated as difference between contract price and price in contract with its supplier).

93 *Bielloni Castello v. EGO*, Tribunale di Milano, Italy, 26 January 1995, Unilex (noting that claim of lost sale conflicted with claim for damages under art. 75).

94 CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] (distinguishing between lost sales for which there was sufficiently certain evidence of damage and other "indicated orders" for which evidence was too uncertain) (see full text of the decision), *affirmed* by CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

95 CIETAC award No. 1740, China, 20 June 1991, published in *Zhongguo Guoji Jingji Maoyi Zhongcai Caijueshu Xuanbian (1989–1995)* (Beijing 1997), No. 75 [429–438] (rental of machinery by buyer's sub-buyer not foreseeable by breaching seller).

96 CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (breaching party could not foresee that late delivery would require processing in Germany rather than Turkey).

97 Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (aggrieved buyer's payments to freight forwarder exceptionally large and therefore reduced by 50 per cent).

98 Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (aggrieved buyer's attorney's fees for dispute with freight forwarder).

99 CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (expense of resurfacing grinding machine not foreseeable because not reasonable in relation to price of wire to be ground).

buyer[100]; inspection of the goods would take place in importing country rather than exporting country[101]

34. On the other hand, several decisions have explicitly found that claimed damages were foreseeable. One decision states that the seller of a good to a retail buyer should foresee that the buyer would resell the good[102], while an arbitration tribunal found that the breaching seller could have foreseen the buyer's losses because they had corresponded extensively on supply problems[103]. Another decision concluded that a breaching buyer could foresee that an aggrieved seller of fungible goods would lose its typical profit margin[104]. A majority of another court awarded ten per cent of the price as damages to a seller who had manufactured the cutlery to the special order of the buyer and the majority noted that a breaching buyer could expect that sum[105].

Burden and standard of proof

35. Although none of the damage formulae in articles 74, 75 and 76 expressly allocates the burden of proof, those decisions that address the issue more or less expressly agree that the party making the claim bears the burden of establishing its

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[100] CLOUT case No. 476 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 406/1998 of 6 June 2000] (buyer's damages for lost profit reduced to 10% of price because breaching seller did not know terms of sub-sale).

[101] CLOUT case No. 474 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 54/1999 of 24 January 2000] (seller could not foresee inspection abroad which was alleged to lead to loss of reputation of goods sold).

[102] CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (the seller of a good to a retail buyer should foresee that the buyer will resell the good). See also CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (buyer who failed to take over electronic ear devices could foresee the seller's delivery losses) (see full text of the decision).

[103] CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (tribunal assumed, in its discretion as provided by domestic law, that amount of loss caused could be foreseen) (see full text of the decision).

[104] CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (breaching buyer can foresee that aggrieved seller of fungible goods would lose its typical profit margin).

[105] CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (dissent argues that seller had not sufficiently proved the amount of its damages).

claim[106]. One court gave effect to a national law rule that where a breaching seller acknowledged defects in the delivered goods the burden of establishing that the goods conformed to the contract shifted to the seller[107]. Another decision expressly placed the burden of establishing damages on the claimant[108].

36. Several decisions state that domestic procedural and evidentiary law rather than the Convention governs the standard of proof and weight to be given evidence when determining damages[109].

Set off

37. Although the Convention does not address the issue of whether a counterclaim may be set off against a claim under the Convention[110], the Convention does determine whether a counterclaim arising from the sales contract exists[111] and, if it

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[106] See CLOUT case No. 476 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 406/1998 of 6 June 2000] (aggrieved buyer had burden); CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved party failed to carry burden); CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999] (aggrieved party carried burden of proof) (see full text of the decision); CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (aggrieved party failed to carry burden); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (aggrieved party failed to produce evidence of actual loss under art. 74 or current market price under art. 76); CLOUT case No. 467 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 407/1996 of 11 September 1998] (aggrieved buyer established amount of breach) (see full text of the decision); City of Moscow Arbitration Court case No. 18–40, Russia, 3 April 1995, available on the Internet in English translation at http://cisgw3.law.pace.edu/cases/950403r1.html (aggrieved buyer "substantiated" relevant current price and currency conversion rate).

[107] Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at http://www.rws-verlag.de/bgh-free/volltex5/vo82717.htm (breaching seller failed to show conformity at time risk shifted to buyer).

[108] CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved buyer had burden of establishing damages).

[109] Helsingin hoviokeus [Helsinki Court of Appeals], Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (grounds of recovery under CISG but calculation of damages under art. 17 of the Finnish Law of Civil Procedure); CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (applicable domestic law determines how to calculate damages when amount cannot be determined); CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] ("sufficient evidence [under common law and law of New York] to estimate the amount of damages with reasonable certainty") *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

[110] CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998] (applicable law, not Convention, determines whether set off permitted); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (domestic law applicable by virtue of private international law rules determines whether set off allowed).

[111] CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (set-off permitted under applicable national law; counterclaim determined by reference to Convention). But see CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (counterclaim arose under Convention; set off permitted under Convention).

does, then the counterclaim may be set off against a claim arising under the Convention[112].

Jurisdiction; place of payment of damages

38. Several decisions have concluded that, for the purpose of determining jurisdiction, damages for breach of contract are payable at the claimant's place of business[113].

[112] CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (buyer's counterclaim set off against seller's claim for price); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (buyer damages set off against price); Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (damages for non-conformity set off against claim for price); CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (buyer's counterclaim would have been allowable as set off but seller had not breached). See also CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (implicitly recognizing the possibility that buyer's tort claim could be raised to set off against seller's claim for the price, court applies CISG notice provisions to bar tort claim).

[113] CLOUT case No. 205 [Cour d'appel, Grenoble, France, 23 October 1996] (deriving general principle from art. 57 (1) that place of payment is domicile of creditor); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (deriving general principle on place of payment from art. 57 (1)).