Unresolved damages issues of the CISG: a comparative analysis

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Abstract

There are a number of damages issues which are not explicitly dealt with in the CISG and have as yet not been resolved in the more than 350 reported cases dealing with damages. The article discusses the issues of future damages, liability for the loss of a chance or opportunity and the contributory conduct of the non-defaulting party. This is done against the backdrop of the gap-filling provision in article 7 and the comparative provisions of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law. It is argued that the issues can be satisfactorily resolved with reference to the other two instruments.

INTRODUCTION

In most legal systems damages constitute one of the most important remedies after a breach of contract has taken place, as it may be claimed to compensate the aggrieved party in addition to any other available remedies like specific performance, suspension of performance, and avoidance.[1] This general statement is also true of articles 74–78 of the Vienna Convention for the International Sale of Goods, 1980 (CISG). Although the CISG provisions deal with damages quite comprehensively, there are a few issues that have not been specifically addressed. At present there are about 350 reported cases on the CISG[2] dealing with damages, none of which deals comprehensively with any of the issues outlined below. These issues present a gap in the Convention that needs to be interpreted or filled in accordance with the provisions of article 7.

These unresolved issues include:

- *Future damages*. Often the full extent of damages is not immediately apparent at the time of the breach of contract or even for some time thereafter. Circumstances such as prescription, often compel a party to lodge its action before the full extent of damages has set in, even though it may be quite clear that future damages will occur. The CISG does not specifically

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[1] J Lookofsky & H Bernstein *Understanding the CISG in Europe* (1997) 96–98.

[2] See cases collected at Pace University CISG site at http://www.cisg.law.pace.edu/cisg/text/e-text-74.html#case.

deal with this.

- *Liability for the loss of a chance or opportunity*. This is a specific application of the issue of future losses. In this instance it is not even sure that a future loss will be incurred, but there is a likelihood that it may. The CISG is silent on this issue.
- *Contributory conduct of the aggrieved party*. The CISG deals only indirectly with the issue of contributory conduct by an innocent party which exacerbates the loss or harm suffered. Article 77 of the CISG deals with the innocent party's duty to mitigate damages which covers only one aspect of the issue at stake here, namely the conduct of the aggrieved party subsequent to the initial breach. However, it does not deal with contributory conduct at the time of or prior to the initial breach.

This article addresses each of these issues through a comparative legal exposition of how they are dealt with in the UNIDROIT Principles of International Commercial Contracts (UNIDROIT principles) and the Principles of European Contract Law (PECL). Whether these materials may be employed in the interpretation and application of the CISG, will emerge from an analysis of article 7 of the CISG.

In conclusion, the comparative material will show that a remarkable degree of uniformity can be achieved in the interpretation and in filling the gaps in the CISG.

INTERPRETATION AND GAP FILLING

Provisions of the CISG

Article 7(1) of the CISG stipulates that

> (1) In the interpretation of this Convention, regard is to be had to its *international character* and to the need to promote *uniformity in its application* and the observance of good faith in international trade.
>
> (2) Questions concerning *matters* governed by this Convention which are *not expressly settled* in it are to be settled in conformity with the *general principles* on which it is based or, in the absence of such principles, in conformity with the *law applicable by virtue of the rules of private international law*. (My emphasis.)

It is clear that article 7 deals with two distinct issues: interpretation of the Convention (article 7(1));[3] and gap filling (article 7(2)), although it may sometimes be difficult to separate the two. Whether there is a gap which needs filling, or whether one is dealing with a broad rule which through proper interpretation will yield a satisfactory answer, may in some instances be very difficult to determine. However, if the underlying principle in article 7(2), namely that gaps are to be filled in conformity with the general principles of the CISG, is applied in conjunction with the principles in article 7(1), namely that regard must be had to the Convention's international character and the

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[3]See in general on interpretation, P Schlechtriem *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2ed 1998) 59*ff*; B Zeller 'Four-corners — the methodology for interpretation and application of the United Nations Convention on Contracts for the International Sale of Goods' (thesis 2003). Chapter 3 available at http://www.cisg.law.pace.edu/cisg/biblio/4corners.html#chp3.

need to promote international uniformity, it becomes clear that resort to the applicable municipal law, should be the very last option.[4]

It is generally recognised by authors and courts alike that other international bodies of law and comparative law are valid and valuable instruments in the process of interpreting the CISG and filling any gaps.[5] The current process of providing comparative analyses between the CISG, the PECL and the UNIDROIT principles on the Pace website, bears testimony to this.

UNIDROIT principles

The International Institute for the Unification of Private Law is an independent intergovernmental organisation founded in 1926 and presently consisting of fifty-nine member states.[6] Its purpose is to study needs and methods for modernising, harmonising and coordinating private, and in particular commercial law as between states and groups of states. UNIDROIT's basic statutory objective is to prepare modern, and where appropriate, harmonised rules of private law understood in a broad sense.[7]

These instruments prepared by UNIDROIT are non-binding on member states but may lead to international conventions or, as in the case of the UNIDROIT principles, to the publication of a non-binding code of law which may be adopted voluntarily by parties or states.[8]

The UNIDROIT principles were published in 1994 as a comprehensive draft code for international commercial contracts. The principles go much further than the CISG in that they deal with all aspects of contract law, including validity and formation, whereas the CISG mainly deals with aspects of international sales law, largely excluding issues of validity and formation. The value of the principles are set out as follows in the presentation:[9]

> Even though the UNIDROIT principles will be applied in practice only because of their persuasive value, they may still have a significant role to play in at least five different contexts. To begin with, both international and national legislators may, because of the modern and functional solutions adopted therein, find a source of inspiration in the UNIDROIT principles for the preparation of new legislation in the field of general contract law or with respect to special types of transactions.
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> The UNIDROIT principles could also provide both State courts and private arbitrators with useful rules and criteria for interpreting and supplementing existing international instruments.

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[4]Schlechtriem n 3 above at art 7 Rn 31; U Magnus *J von Staudinger's Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetze* (13ed 1994) art 7 Rn 58.

[5]Schlechtriem n 3 above at art 7 Rn 10–14; Magnus n 4 above at art 7 Rn 37–39. *Cf* Zeller n 3 above at Chapter 5.

[6]Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute.

[7]See Bonell *UNIDROIT principles* 17–24; the UNIDROIT Website at: http://www.unidroit.org/english/presentation/main.htm#NR1.

[8]See UNIDROIT principles Preamble.

[9]See UNIDROIT Website at: http://www.unidroit.org/english/principles/pr-pres.htm.

There is some controversy about the use of the UNIDROIT principles in the interpretation of the CISG, but there seems to be strong support for their use in a persuasive sense as embodying rules which fill the need for a modern international sales law.[10] The approach suggested by Bonell, namely that the principles may be used not only to interpret and supplement even pre-existing international instruments, but also to fill gaps in individual provisions is an expression of and in conformity with the general principles underlying the CISG.[11]

PECL

The principles are the product of work done by the Commission on European Contract Law, consisting of lawyers from all member states of the European Union. They are the answer to a need within the European Community for a uniform set of legal rules governing the infrastructure of contract law and regulating specific types of contract in order to facilitate cross border trade and strengthen the single European market. [12]

The principles are intended to reflect a common core of solutions found to problems within quite diverse legal systems and legal traditions, and in this share a common characteristic with the UNIDROIT principles and the CISG.[13] Bridging the gap between the common law legal family and the civil law family in respect of legal structure, reasoning, terminology and fundamental concepts and classifications, provided a big challenge.[14]

Conclusion

The CISG, the UNIDROIT principles, and the European principles share many common characteristics and objects as a result of their aim to effect international harmonisation. Although the European principles are not aimed at achieving these objects on a global scale, their scope and complexity remain wide enough to provide valuable assistance in the process of interpreting and filling the gaps of the CISG.

Article 7(1) requires the acknowledgment of its international character and uniformity in its application. This requisite is best served by taking persuasive

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[10]MJ Bonell (ed) *A new approach to international contracts: the UNIDROIT principles of international commercial contracts* (1999) 12–13. See also AH Kritzer *General observations on use of the UNIDROIT principles to help interpret the CISG* on the Pace University Website at: http://www.cisg.law.pace.edu/cisg/text/matchup/general-observations.html.

[11]Bonell n 10 above at 12; and MJ Bonell *An international restatement of contract — The UNIDROIT principles of international commercial contracts* (1994) Introduction.

[12]O Lando & H Beale *Principles of European contract law parts I and II* (2000) xxi. See also K Riedl *The work of the Lando-Commission from an alternative viewpoint* on the Pace University Website at: http://www.cisg.law.pace.edu/cisg/text/peclintro.html; and AH Kritzer *Observations on the use of the principles of European contract law as an aid to CISG research*: http://www.cisg.law.pace.edu/cisg/text/peclcomp.html.

[13]Lando & Beale n 12 above at xxiii–xv.

[14]*Id* at xxii-xxiii.

notice of other international instruments like the UNIDROIT principles and the European principles.

MOMENT IN TIME FOR DETERMINING DAMAGES

CISG

Neither the CISG, nor the UNIDROIT principles, nor the European Principles contains a specific provision on the time at which damages should be calculated. Article 74 CISG is the primary provision determining the liability of the party in breach. It stipulates that:

> 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. ...

The underlying principle in respect of damages in the CISG is that of full compensation for damages. The innocent party should as far as possible be restored to the position in which it would have been had the contract been properly been carried out by the other party.[15] The innocent party is therefore, in principle, entitled to have all damages caused by a breach restored, limited only by the requirement that such damages must have been foreseeable as a possible consequence of the breach at the time of contracting.[16] In order to effect full compensation, the moment for establishing liability should be extended as far into the future as possible so that all consequences may become known. Practically, however, this will be the point at which the action is lodged, or the point at which the court or arbitral tribunal gives judgment.[17]

The suggestion that the procedural law of the *lex fori* should determine this issue[18] should be rejected. This approach may lead to differing results and defeat the object of international harmonisation and uniformity.

In one instance the specific time for the calculation is prescribed, namely in article 76 where the market price is used as a presumptive measure of calculation. In terms of this article, if a contract is avoided, the difference between the contract price and the current price of the goods *at the time of the avoidance* may be claimed as damages.

UNIDROIT principles

Article 7.4.2 of the principles is the equivalent of article 74 CISG. It provides: for full compensation in the following terms:

> (1) The aggrieved party is entitled to *full compensation* for harm sustained as a result of the non-performance. Such harm includes both *any loss* which it *suffered and any gain of which it was deprived*, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

As with the CISG, no specific indication is given as to when the determination

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[15]Magnus n 4 above at §74 Rn 16, 19-23; Schlechtriem n 3 above at art 74 Rn 2.

[16]Magnus n 4 above at §74 Rn 31-35; Schlechtriem n 3 above at art 74 Rn 4.

[17]Magnus n 4 above at §74 Rn 55; Schlechtriem n 3 above at art 74 Rn 33.

[18]See Schlechtriem n 3 above at art 74 Rn 33 fn 110.

should be made. However, the Unidroit principles makes express provision for the payment of future losses[19] providing a strong indication that determination should be pushed as far forward as possible, *ie* when the claim is lodged, adjudicated or at the time of judgment. This conclusion is further strengthened by the provisions of article 7.4.3(3) which allows the court a general discretion to determine the extent of the damages where they cannot be proven with a sufficient degree of certainty. This approach would lead to the same result as the conclusion reached above in respect of the CISG.

PECL

The liability for damages under PECL is contained in article 9:502:

> The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived.

The position here is similar to that in the CISG and the Unidroit principles, namely that the general measure of damages are described, but that no guidance is given in respect of determining the extent of the damages. No specific guidance can therefore be gleaned from PECL in respect of the time for determining damages.

Conclusion

Although none of the instruments under discussion contains a specific indication on the time at which damages should be assessed, there are strong indications that in order realistically to put the aggrieved party in the position it would have been had there been no breach — *ie* to provide it with full compensation — the moment for determination should either be the date the claim is lodged, or preferably when judgment is given. The further forward the moment for determination is extended, the more accurately the exact extent of the foreseeable damages may be determined. In all three instruments, there are strong indications that this is the correct approach.

FUTURE DAMAGES

Practical example

> *A imports goods bought from B on a consignment basis. In terms of the agreement B will deliver the goods in 6 bi-monthly consignments. In the first two consignment 50% of the goods are defective. A wants to lodge a claim against B for delivery of conforming goods as well as damages. The damages consist of the cost of warehousing the defective goods, the prospective cost of returning them to B and prospective profits he would probably have made on the sale of the goods over the next four months. The question arises whether a court/tribunal can make and award for these prospective damages in terms of the CISG.*

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[19]See **FUTURE DAMAGES** and **DAMAGES FOR LOSS OF A CHANCE OR OPPORTUNITY** below.

CISG

On a literal interpretation, it would seem that article 74 may restrict damages to losses already suffered. The wording refers to 'a sum equal to the loss, ... , suffered by the other party'. However, this interpretation is too narrow and is contradicted by the reference to 'including loss of profit'. Very often a loss of profit will be only prospective profit at the time when an action is lodged.[20]

Often the full extent of damages is not immediately apparent at the time of the breach of contract or even for some time thereafter. Circumstances such as prescription sometimes compel a party to lodge its action before the full extent of damages has set in, even though it may be quite clear that future damages will still arise. The CISG does not specifically deal with this. The issue, however, is directly addressed in article 7.4.3 of the UNIDROIT principles and article 9:501 of the PECL. The provisions in both these instruments may be useful in filling this apparent gap in the CISG.

Under UNIDROIT principles

The issue of future damages is dealt with in article 7.4.3 of the UNIDROIT principles:

> (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. ..(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

In the comments to article 7.4.3, emphasis is laid on the fact that it reaffirms the well-known requirement of certainty of harm. In terms of this principle it is unfair to require the non-performing party to compensate the innocent party for harm which is not certain. However, where there is a reasonable certainty that further harm will occur, even though it is not absolutely definite, the innocent party is entitled to compensation.[21]

This is a practical and reasonable approach to ensure that the innocent party is adequately compensated and that the non-performing party is not unfairly burdened. It takes cognisance of the fact that the innocent party is entitled, and in certain circumstances is compelled due to reasons of prescription, to lodge its action as soon as the breach has occurred. A party wishing to claim specific performance, for instance, will lodge such an action, including the action for damages, sooner rather than later when the performance may be of no value to it.

From article 7.4.3 two guiding principles can be deduced:

- The fact that further harm will occur must be established or proven with a reasonable degree of certainty.
- This requirement of certainty does not necessarily have to extend to the *quantum* of the claim. A measure of judicial discretion will allow for an

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[20]See Schlechtriem n 3 above at art 74 Rn 24.

[21]See Comment 1 to 7.4.3 at: http://www.unidroit.org/english/principles/chapter-7-4.htm.

equitable result where the harm is certain, but the extent of the harm cannot be established with certainty.

Under the PECL

PECL contains provisions similar to article 7.4.3 of the UNIDROIT principles:

> (1) The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108. (2) The loss for which damages are recoverable includes: (a) non-pecuniary loss; and (b) future loss which is reasonably likely to occur.

In the comment to this article it is stated that the recovery of future loss requires a court or tribunal to evaluate two uncertainties: the likelihood that the future loss will occur; and the amount of this loss. This covers both prospective expenditure which would not have been necessary had the breach not occurred, and gains which the aggrieved party could reasonably have expected to make.[22] In the notes to the article mention is made of the fact that all the European systems will allow damages for future losses provided such prospective losses are not too remote.[23]

Conclusion

From the principle of full compensation and the fact that of necessity claims will often be lodged before all damages resulting from a breach have set in, it is necessary to fill the gap in section II CISG in respect of future damages. From the provisions of the UNIDROIT principles and PECL where express provision is made for future losses, it is clear that in international trade it is acceptable for a court or tribunal to make an award for future damages. The specific principles found in these provisions provide a firm footing for filling this gap.

DAMAGES FOR LOSS OF A CHANCE OR OPPORTUNITY

Practical example

> *X is an importer of high quality furniture. For the past three years he has participated in the annual Madrid Trade Fair. Part of the fair includes a competition for the best exhibition. The competition carries a prize of 10.000. X has ordered furniture from Y which is essential for his exhibition. Y has failed to deliver the goods in time for the fair with the result that X's exhibition is not up to standard. X has won the competition in two of the past three years. X wants to claim damages for the loss of the opportunity to win the prize.*

A claim for damages for a loss of opportunity is a specific application of the issue of future losses, or is akin to it. In this instance it is not even sure that the loss would have accrued as there is no certainty that X would have won the prize, but there is a likelihood that he may have.

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[22]See Comment F in Lando & Beale n 12 above at 436.

[23]See note 5 in Lando & Beale n 12 above at 438.

Under CISG

The CISG is silent on this issue as it is on the issue of future damages. Whereas PECL is also silent on this issue, article 7.4.3 of the UNIDROIT principles makes express provision for liability in such a case. This is also in accordance with English law which contains instructive examples of damages awarded for a loss of opportunity.[24]

Under the UNIDROIT principles

The general provision in the UNIDROIT principles dealing with the certainty of harm and future damages also specifically deals with this issue:

> ARTICLE 7.4.3 (Certainty of harm) (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of an opportunity in proportion to the probability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

Article 7.4.3 firstly establishes expressly that a claim for such a loss is valid and enforceable. Secondly, it gives instructions on how such a claim is to be quantified, *ie* a court arbitrator must establish what the probability was that the opportunity that was lost would have matured into the winning event. In the case of horse racing such an eventuality can be established with some sense of certainty in referring to the odds on a particular horse. In other cases, such as tenders, the specific tender would have to be weighed against the other competing, and especially the winning tender, to establish the prospect of success.

In the event that the court should find, for instance, that there was a sixty per cent chance of success, it should award sixty per cent of the probable profits or prize money as damages; *te* it should award compensation in proportion to the probability of its occurrence. Where the probability is only twenty per cent, then twenty per cent should be awarded, even though the prospects may have been remote.

This provision is an exception to the general provision contained in article 7.4.3(1), namely that harm must be established with a reasonable degree of certainty. This is also true of future harm. In the case of loss of an opportunity, there can never be certainty. The underlying principle here is that compensation is to be paid for that loss of opportunity. The *quantum* of the damages here is more akin to that paid for non pecuniary damages than true damages.

Whether such a claim should be allowed is therefore in the end a question of policy similar to the question of whether non-pecuniary damages such as distress or anguish caused by a breach of contract, should be compensated. In the case of the UNIDROIT principles, it was judged fair and equitable that such damages be compensated. This is also in accordance with the position

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[24]See for instance *Chaplin v Hicks* [1911] 2 KB 786 CA.

in English and French law.[25]

Under the PECL

It would seem that two sections of PECL are considered relevant for determining the issue of loss of opportunity, namely article 9:503 which deals with foreseeability, and article 9:501 which deals with the general right to damages.

In terms of article 9:501, a loss for which damages are recoverable includes a future loss which is reasonably likely to occur.[26] In Note F to article 9:501 it is simply stated that future loss may often include the loss of opportunity.

Article 9:503 limits the extent of the liability through the criterion of foreseeability as follows:

> The non-performing party is liable only for los which it foresaw or could reasonably foreseen at the time of the conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent.

In note 6 to this article, mention is made of the fact that although most systems require a degree of 'certainty' in respect of any loss, this requirement must not be taken too literally as courts have awarded damages for loss of profit and an opportunity which is not always certain.[27] Specific reference is made to the English case of ***Chaplin v Hicks***[28] where damages were awarded for the loss of participation in a beauty contest. This notion is well accepted in English law where awards have been made in the following instances loss of the opportunity of earning tips or commission; loss of the opportunity of appealing against an arbitration award; and the loss of the opportunity to make profits on contracts not yet concluded.[29]

Conclusion

It would seem that an award for damages for the loss of opportunity is not entirely speculative or unusual as it is specifically recognised in both the UNIDROIT principles and English law. Whether this issue is actually one dealing with future losses and foreseeability strictly speaking, is doubtful. The party is compensated for the loss of a present opportunity and not the loss of the actual prize, commission or profit. In a true case of future losses, it is reasonably certain that those losses will occur, but their extent is somewhat uncertain. The court is therefore tasked with calculating the extent of the damages as best as it can with the knowledge available at the time of the hearing. No allowance is made for the fact that there is a possibility that the

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[25]See Lando & Beale n 12 above at note 5 on 438 and note 6 on 443.

[26]See 4 above for the text. See also Lando & Beale n 12 above at 436.

[27]For the position in Germany see H Fleischer 'Schadenersatz für verlorene Chancen im Vertrags und Deliktsrecht' 1999 *Juristenzeitung* 766*ff* where an 'all-or-nothing' approach seems to be the norm.

[28][1911] 2 KB 786 CA. See generally GH Treitel *The law of contract* (10ed 1999) 890–891; and Fleischer n 28 above at 767.

[29]See Treitel n 29 above at 890.

damages may not in fact occur. The full present value of the expected future damages are awarded.

In the case of the loss of the opportunity the value of the opportunity that has already been lost must be determined. This is done by taking into account the likelihood that the prize may have been won and the size of the prize. If, for instance, the prize is $100 000 and there was a twenty per cent chance of winning the prize, the court would ordinarily award $20 000 in damages.

Although there is no indication in the CISG that an award of damages should be possible for a loss of opportunity, there is sufficient indication in the UNIDROIT principles, and even in PECL, that such an award should be possible. This would also be in accordance with the principle of full compensation for damages underlying the CISG, and more particularly, article 74.

CURRENCY OF DAMAGES

Practical example

> *A, an Australian company is the exporter of certain fruit and vegetables. A has a contract with B, a Dutch importer, for the sale of certain quantities of fresh fruit and vegetables on a weekly basis at certain set prices. Payment for the goods is effected in American dollars in the American bank account of A. During November 2002 A failed to deliver any of the goods as required by the contract for a period of three weeks. In this time B had to source products from other producers to meet its obligations causing it to pay 50 000 Euro more than it would have done taking the exchange rates then applying into account. The dispute between A and B is heard in a London court which has jurisdiction. The question is in which currency the damages should be awarded and what the role of the exchange rate between the various currencies should be.*

Under the CISG

Exchange rates between individual currencies are subject to daily fluctuations which can sometimes vary quite dramatically. As a result, the question of which currency the damages are to be awarded, is highly relevant. In a particular instance, various countries or tribunals may have jurisdiction in a matter and the court or tribunal should not summarily be awarded in the local currency of the court or tribunal, which may have no further contact with the whole transaction.

The CISG contains no provision on this issue. The point of departure should, however, be that in terms of the principle of freedom of contract underlying the CISG, any contractual arrangement that the parties have agreed upon, should take precedence. Therefore, if the agreement specifically states that damages on breach of contract is payable in US dollars, the court awarding damages should do so in dollars.

However, in this case the court is faced with the difficulty that the damages suffered were actually suffered in Euros and not dollars. It will therefore have

to determine the dollar amount with reference to the Euro amount. The question then becomes one of deciding which date to use as the date of conversion from Euros to dollars. Is it at the time of the breach, or the actual time the damages were suffered, or the date of judgment, or the date of payment?

Schlechtriem[30] is of the opinion that in terms of the principle of the concrete calculation of damages, the damages should be awarded in the currency in which the party entitled to damages suffered the damages. Practically speaking there may sometimes however be difficulties in determining which is the appropriate currency. Where, for example, a party has to buy foreign currency to purchase substitute goods or mitigate damages, does the *quantum* of the damages consist of the foreign currency value or the domestic currency amount used to purchase that foreign currency?

Under the UNIDROIT principles

Article 7.4.12 of the UNIDROIT principles gives the court a discretion by stipulating:

> Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.

The flexibility inherent in this approach confirms the approach advocated by Schlechtriem, namely that there is no hard and fast rule to determine which currency is the most appropriate where the parties have not specifically agreed thereto. The alternative takes account of the fact that the aggrieved party may have incurred expenses in a particular currency to repair damage it has sustained. In such a case it should be entitled to claim damages in that currency even if it is not the currency of the contract. Another currency which may be considered the most appropriate is that in which the profit would have been made.

Under the PECL

PECL contains a provision very similar to the that of the UNIDROIT principles, namely article 9:510:

> Damages are to be measured by the currency which most appropriately reflects the aggrieved party's loss.

This approach leaves it to the court or tribunal to choose the currency which will best serve to compensate the aggrieved party in full. In Note C it is specifically mentioned that damages may arise in several different currencies. In such a case the award should be made accordingly. In Europe, the approach is not necessarily uniform. In the notes to article 9:510, mention is made that certain Italian writers are critical of awards in foreign currency, whereas there is a more general acceptance of this practice by English, Belgian

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[30]*CISG* art 74 Rn 29.

and German authors.[31]

Conclusion

It would seem that the flexible and open approach adopted in both the UNIDROIT principles and PECL, represents a solution to filling this gap which is also in accordance with the viewpoints of authors on the CISG. Due to the differing circumstances, the court should have a discretion to determine which currency will most appropriately put the aggrieved party in the position it should have been in had it not been for the breach of contract.

CONTRIBUTORY CONDUCT OF AGGRIEVED PARTY

Practical example

> *A is a manufacturer of clothing. For this purpose it needs certain custom-built machinery which it orders from B. The machines fail to operate correctly after installation because (i) certain sections were built and assembled incorrectly by B; and (ii) the design specifications provided by A were incorrect in some instances. As a result A has suffered a loss of $100 000 in lost sales.*

Under the CISG

Except indirectly, the CISG does not deal with the issue of contributory conduct of the innocent party which adds to the loss or harm suffered. Some authors argue that articles 77 and 80 apply to this type of situation.

Article 77 of the CISG deals with the duty to mitigate damages by the innocent party which covers only one aspect of the issue at stake here, namely a failure to avoid further damages after the breach by not taking reasonable steps. This dichotomy between contributory conduct and failure to mitigate, reflects the English position. In many European systems, failure to mitigate and contributory conduct are seen as species of the same phenomenon.[32]

Article 80 provides that:

> A party may not rely on a failure of the other to perform, to the extent that such failure was caused by the first party's act or omission.

There is a difference of opinion between authors on the CISG whether this article indeed makes provision for contributory negligence or not. Bianca and Bonell, after remarking that the provision lacks clarity, express the opinion that where an amount of money is claimed (*ie* damages), a judge will be able to award a lesser amount.[33] Schlechtriem concludes that article 80 'can in no way be apportioned'. He bases his view on the fact that this article was

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[31]See Lando & Beale n 12 above at 458 Note 2. See also Bassenge *et al Palandt Bürgerrliches Gesetzbuch* (60ed 2001) § 245 Rn 5-8; Alberts 1989 *NJW* 609*ff*; HE Henke 'Mitverursachen und Mitverschulden — Wer den Schaden herausfordert, muss den Schädiger schonen' 1988 *Juristische Schulung* 753-761 for the German position generally.

[32]See Lando & Beale n 12 above at art 9: 505 note 1.

[33]See *CISG* 598. See also F Enderlein & D Maskow *International sales law* (1992) art 80 note 6(c).

introduced to soften the effect that the non-performer is liable in terms of the CISG for breach whether it was at fault or not.[34] Article 80 accordingly has a very narrow scope to exclude ***in toto*** the aggrieved party's remedies where it has caused the failure to perform of the other party.[35]

There is therefore a measure of uncertainty whether contributory conduct, besides the duty to mitigate, is covered by the CISG or not, and whether there exists a gap or not.

Under the UNIDROIT principles

In the UNIDROIT principles the questions of contributory conduct and mitigation are dealt with separately. Contributory conduct is dealt with in article 7.4.7, whereas the mitigation duty is dealt with in article 7.4.8:

> Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

Article 7.1.2, like article 80 of the CISG, establishes the general principle which restricts the exercise of remedies where non-performance is in part due to the conduct of the aggrieved party. This article, however, limits the right to damages to the extent that the aggrieved party has in part contributed to the harm. Very often the determination of each party's contribution to the harm will be difficult to determine and will therefore rely on the exercise of judicial discretion. In order to give some guidance to the court this article provides that the court shall have regard to the respective behaviour of the parties. The more serious a party's failing, the greater should be its contribution to the harm.[36] The issue of contributory conduct is therefore clearly dealt with in the UNIDROIT principles.

Under the PECL

The European principles follow the same pattern as the UNIDROIT principles in dealing with contributory conduct and the duty to mitigate in articles 9:504 and 9:505.[37]

> Article 9:504: Loss Attributable to Aggrieved Party (new; previously part of 4.504)
>
> The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects.

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[34]Schlechtriem n 3 above at art 80 Rn 5.

[35]This view of Schlechtriem is supported by the fact that the UNIDROIT principles art 7.1.2 contains a similar provision, whereas the issue of contributory conduct is separately dealt with in art 7.4.7.

[36]See the notes to art 7.4.7.

[37]For the position in English law see J Beatson *Ansons's law of contract* (27ed 1998) 583–584; Treitel n 29 above at 915–919. For the position in German law see Bassenge n 32 above at Vorbem v § 254 Rn 5; H Heinrichs (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (3ed 1994) at § 254 Rn 5, 59*ff*; Henke n 32 above at 753*ff*.

> Article 9:505: Reduction of loss
>
> (1) The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps.
>
> (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

In the commentary to article 9:505 mention is made of the fact that the article makes provision for two distinct types of situation, namely where the aggrieved party's conduct was partially responsible for the non-performance; and where the aggrieved party through its conduct aggravated the loss-producing effects of the breach.[38]

Conclusion

From this comparison it appears that a gap may exist in the CISG in respect of contributory conduct. Although article 77 and 80 deal with certain aspects of the problem, neither deals with it directly or comprehensively. Both suggest that contributory conduct should probably be taken into account, but do not go so far as making provision for it. It is clearly unfair that a party who through its own conduct has contributed to or exacerbated the damages suffered by its own actions, should receive full compensation. The approaches followed in the UNIDROIT principles and PECL provide a solid basis for filling this gap. As in most legal systems, the solution must make provision for a judicial discretion in solving this problem.

CONCLUSION

A number of issues in respect of damages have been raised in the context of the CISG, showing that there is some uncertainty or gaps in the Convention, in this regard. Article 7 CISG encourages courts and tribunals to adopt solutions which take note of the international character of the Convention and would lead to uniformity in practice, when interpreting the Convention and filling any gaps that may exist.

The comparison with the UNIDROIT principles and PECL above has shown that these instruments which are also international in character, can be valuable in augmenting the CISG. The specific solutions offered by these instruments to the issues raised are eminently reasonable and, more importantly, consonant with the principles underlying the CISG.

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[38]Lando & Beale n 12 above at 444.