

# MEASURING DAMAGES UNDER THE CISG

## ARTICLE 74 OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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General rules for measuring damages are recited in Article 74 of the United Nations Convention for the Sale of Goods.<sup>1</sup> Cross-reference to this provision include:

- Articles 45(1)(b) and 61(1)(b) which establish the right to claim damages;<sup>2</sup>
- Articles 75 and 76 which define methods of calculating damages in certain cases;<sup>3</sup>
- Article 77 containing the rule of mitigation of damages;<sup>4</sup>
- Article 79 setting forth the rules on exemption from liability for damages because of an impediment to performance;<sup>5</sup> and
- Article 78 which provides that a claim for interest shall be “without prejudice to any claim for damages recoverable under article 74.”<sup>6</sup>

Articles 4 and 5 can also affect claims for damages:

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<sup>1</sup> U.N. Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18, Annex I (1980) *reprinted in* 19 Int'l Legal Mats. 668 (1980) [hereinafter cited as *Convention or CISG*] *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, 10 March – 11 April, 1980 A/Conf. 97/19 at 178 [hereinafter *Official Records*]. The UN-certified English text is published in 52 Fed. Reg. 6262, 6264-6280 (March. 2, 1987).

<sup>2</sup> CISG, *supra* note 1, arts. 45(1)(b) and 61(1)(b).

<sup>3</sup> *See id.* arts. 75 and 76.

<sup>4</sup> *See id.* art. 77.

<sup>5</sup> *See id.* art. 79.

<sup>6</sup> *See id.* art. 78.

- Article 4 (sentence one) limits such claims to those of the buyer and the seller;<sup>7</sup>
- Article 4(a) by virtue of its validity proviso can, in certain cases, permit domestic law to determine the validity of exculpatory clauses such as contract clauses that exclude liability for damages;<sup>8</sup> and
- Article 5 indicates that the Convention does not apply to damage claims “for death or personal injury caused by the goods to any person.”<sup>9</sup>

Other general provisions of the Convention that can have a bearing on claims for damages include: Article 6 (primacy of the contract); Article 7 (interpretation of the Convention, applicability of its general principles); Article 8 (intent of the parties); and Article 9 (usages and practices).<sup>10</sup> See also, Article 66 (loss or damage after risk passed to buyer) and Article 80 (failure of performance caused by the other party).<sup>11</sup> The Convention also imposes requirements such as those regarding the preservation of the goods (Articles 85 through 88) under which claims for damages can arise.<sup>12</sup>

The provisions discussed in this analysis are, first and foremost, Article 74; to a lesser extent, Articles 75 through 79; and, to a limited extent, certain of the other articles cited above. Although the analysis concentrates on cross-references to other provisions of the CISG, it must be noted that:

- CISG Article 74 was taken from and is, for all practical purposes, substantively identical to Article 82 of the 1964 Hague Uniform International Sales Law.<sup>13</sup> This is important because it opens up to researchers case law and commentaries on ULIS Article 82 (of which there are many), as well as case law and commentaries on CISG Article 74.

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<sup>7</sup> CISG, *supra* note 1, art. 4.

<sup>8</sup> *See id.* art. 4(a).

<sup>9</sup> *See id.* art. 5.

<sup>10</sup> CISG, *supra* note 1.

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> Convention Relating to a Uniform Law on International Sales of Goods July 1, 1964, 834 U.N.T.S. 107 [hereinafter ULIS]. That article 82 ULIS is the source of and substantively similar to CISG article 74. *See* Article 74: Legislative History (March 10-April 11, 1980) <<http://www.cisg.law.pace.edu>>.

- A fairly extensive Secretariat Commentary on the language contained in CISG Article 74 is available. This is the closest counterpart to an Official Commentary on this language.<sup>14</sup>

In a contract governed by the CISG, a failure to perform any obligation<sup>15</sup> entitles the injured party to seek, under Articles 45 and 61, various remedies, all of which include consequential damages under Article 74.<sup>16</sup>

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<sup>14</sup> For text of this commentary, see Article 74: Legislative History, *supra* note 13.

<sup>15</sup> Obligation does not include only the agreed-upon performance. Claims for damages may also arise in a variety of situations for failure to meet obligations imposed by the CISG, such as failure to provide insurance information under Article 32, paragraph 3, or failure to give notice regarding a carrier under Article 32, paragraph 1. See CISG *supra* note 1, arts. 32(1) and (3). Some of the acts described as obligations under the CISG are, however, mere conditions which, if not met, do not create the right to claim damages but result in a loss of rights (like the obligation to examine the goods and the buyer's obligation to give notice of non-conformity under Articles 38 and 39). See FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 297 (1992). Of course, "if the goods turn out to be non-conforming, the buyer should be able to recover his reasonable expenses as a loss caused by the breach under Article 74 notwithstanding Article 38's silence on this point." Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 *CORNELL INT'L L.J.* 487, 529 n.202 (1988).

<sup>16</sup> Paragraph (2) [of Articles 45 and 61] emphasizes that by resorting to any other remedy the [injured party] is not precluded from claiming damages . . . . [S]ome national laws such as the English, German and Hungarian ones, do not allow combining the remedy of avoidance of a contract with an action for damages. The Convention rule corresponds to various national provisions such as Article 1184 of the Napoleonic Code and its followers and the United States Uniform Commercial Code.

Michael R. Will, *Buyers Remedies in General in COMMENTARY ON THE INTERNATIONAL SALES LAW* 331 (C. M. Bianca & M. J. Bonell eds., 1987).

[Under the Convention] [t]he remedy of damages is entirely separated from that of avoiding the contract. . . . A breach of contract may entitle the aggrieved party to declare the contract avoided or give him a right to damages, but these remedies are independent of each other. This means *inter alia* that even if a contract is still in force insofar as the party aggrieved can claim damages, the only exception being when the party in breach is 'exempted' according to Article 79 of the Convention. On the other hand, the fact that a party is exempted from liability to pay damages does not deprive the other party of his right to declare the contract avoided, provided that the special prerequisites for this remedy are fulfilled.

Jan Hellner, *The UN Convention on International Sale of Goods — an Outsider's View*, in *IUS INTERNATIONALES: FESTSCHRIFT FÜR STEFAN A. RIESENFELD* 81 (Jayme, Kegel & Lutter eds., 1983).

In addition to money damages under Article 61(1)(b),<sup>17</sup> an aggrieved seller may require performance under Article 62,<sup>18</sup> fix an additional time for performance under Article 63,<sup>19</sup> avoid or cancel the contract under Article 64,<sup>20</sup> or have goods identified to the contract under Article 65.<sup>21</sup> In addition to any of these remedies, seller may seek consequential damages under Article 74.<sup>22</sup>

An aggrieved buyer, in addition to damages under Article 45(1)(b), may require performance or substitute performance under Article 46(2),<sup>23</sup> demand repair of defective goods under Article 46(3),<sup>24</sup> fix an additional period of time for performance under Article 47,<sup>25</sup> accept seller's cured performance under Articles 48 and 37,<sup>26</sup> avoid or cancel the contract under Article 49,<sup>27</sup> or reduce the sales price under Article 50.<sup>28</sup> In addition to these remedies, buyer may seek consequential damages under Article 74.<sup>29</sup>

The right to all remedies for lack of conformity of the goods, including claims for damages, is related to the inspection requirement recited in Article 38 and subject to compliance with the notice requirement recited in Article 39.<sup>30</sup>

Under CISG Article 74, only foreseeable consequential damages are recoverable. There is no mention of incidental damages.<sup>31</sup> Nothing in the legislative history of the CISG suggests an intention to abolish incidental damages.<sup>32</sup> Damages

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<sup>17</sup> See CISG, *supra* note 1, art. 61(1)(b).

<sup>18</sup> See *id.* art. 62.

<sup>19</sup> See *id.* art. 63.

<sup>20</sup> See *id.* art. 64.

<sup>21</sup> See *id.* art. 65.

<sup>22</sup> See CISG, *supra* note 1, art. 74.

<sup>23</sup> See *id.* art. 46(2).

<sup>24</sup> See *id.* art. 46(3).

<sup>25</sup> See *id.* art. 47.

<sup>26</sup> See *id.* arts. 48 and 37.

<sup>27</sup> See CISG, *supra* note 1, art. 49.

<sup>28</sup> See *id.* art. 50.

<sup>29</sup> See *id.* art. 74.

<sup>30</sup> See discussion *supra* note 15.

<sup>31</sup> See CISG, *supra* note 1, art. 74.

<sup>32</sup> See ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 19 (1989). Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO. WASH. J. INT'L L. & ECON. 415, 459 (1989).

which would be characterized as incidental in other legal systems should be recoverable as consequential damages under the CISG. It seems, however, that only foreseeable incidental damages are recoverable under Article 74 as consequential damages.<sup>33</sup>

Article 75 states the measure of damages in situations where there has been an avoidance or cancellation of the contract by an aggrieved buyer or seller and damages are to be measured by the difference between the cost of the substitute transaction and the contract price.<sup>34</sup> Article 76 provides for situations where an aggrieved buyer or seller has avoided the contract but has not effected a substitute transaction.<sup>35</sup> The measure of damages under Article 76 is the difference between current price and market price.<sup>36</sup> Articles 75 and 76 also allow the aggrieved party consequential damages under Article 74.<sup>37</sup>

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<sup>33</sup> In the United States, under the Uniform Commercial Code, incidental damages must only be proved with reasonable certainty. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 266 (3d ed. 1988) (distinguishing between "incidental" and "consequential" damages). A recent New York decision applying CISG Article 74 required that incidental damages be foreseeable to be recovered. *Delchi Carrier, S.p.A. v. Rotorex Corp.*, No. 88-CV-1078, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994) *affirmed in part, reversed in part*, in *Delchi Carrier, S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. Dec. 6, 1995). In *Delchi Carrier*, the plaintiff, buyer-manufacturer, claimed damages for costs of shipping, customs and incidentals as well as labor costs for the period of time when their production line was idle due to lack of parts, as a foreseeable consequence of seller's having delivered defective parts. *Id.* The district court denied these damages on the ground that they were included in *Delchi Carrier's* recovery on its lost profit claim and to award them would constitute a double recovery. *Id.* The New York Court of Appeals reversed stating,

Delchi's lost profits are determined by calculating the hypothetical variable costs that would have been, but were not, incurred. This figure, however, does not compensate for costs actually incurred that led to no sales. Thus, to award damages for costs actually incurred in no way creates a double recovery and instead furthers the purpose of giving the injured party damages 'equal to the loss' CISG art. 74.

*Id.*

<sup>34</sup> See CISG, *supra* note 1, art. 75.

<sup>35</sup> See *id.* art. 76.

<sup>36</sup> See *id.*

<sup>37</sup> Article 74, in contrast to Article 75 of the CISG, (damages in case of avoidance and substitute transactions) and Article 76 of the CISG, (damages in case of avoidance and no substitute transactions) provides the more general rule and is applicable even when either of the later two provisions cannot be invoked. CISG, *supra* note 1, art. 74. Articles 75 and 76, which are available as the measure of damages to an aggrieved party after the contract has been avoided, permit an avoiding party to claim further damages recoverable under Article 74. Harry M.

Article 74 damages are based on the principle that damages should provide the injured party with the benefit of the bargain, including expectation and reliance damages.<sup>38</sup> Arguably, Article 74 authorizes the awarding of lost profits where, under Articles 75 and 76, a lost-volume seller has resold the goods in a market where demand exceeds supply.<sup>39</sup> This argument has not been tested in a court and it has been suggested that the parties to a contract include a "clause which specifies whether lost volume damages are recoverable and how they should be recovered."<sup>40</sup>

A major limitation to CISG damage recovery is the lack of a separate provision for breach of warranty.<sup>41</sup> Instead, Article 74 applies to all breaches of contract and is further limited by Article 5<sup>42</sup> which disallows "claims for damages in the case of death or bodily injury caused by the goods, irrespective of whether or not the buyer himself or a third person is involved."<sup>43</sup>

Article 74 contains its own limitation on consequential damages; that they are recoverable so long as they "do not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract."<sup>44</sup> Article

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Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 102 (1988).

<sup>38</sup> Jeffrey S. Sutton, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L.J. 737, 742 (1989). This is consistent with the philosophy of the drafters of the CISG. See UN. Conference, Official Records, CISG, *supra* note 1, at 59.

<sup>39</sup> Given the language and juxtaposition of Articles 74, 75 and 76, a tribunal could view Article 75 and 76 as specific applications of the sweeping language of the first sentence of Article 74 and not as limitations placed on it. Moreover, Article 74 could be read within the context of its previously stated purpose- to put the 'injured party in the same economic position he would have been in if the contract had been performed.' The 1978 Commentary to the predecessor of Article 74 may also suggest a lost volume and lost overhead damage award.

Sutton, *supra* note 38, at 747. See also Flechtner, *supra* note 37, at 102.

<sup>40</sup> Sutton, *supra* note 38, at 748.

<sup>41</sup> Although the term "warranty" is not encountered in the "warranty obligations" that are somewhat analogous to those contained in, for example, the U.S. Uniform Commercial Code, the term is recited in CISG Article 35 (the provision of the Convention dealing with conformity of the goods).

<sup>42</sup> CISG, *supra* note 1, art. 5.

<sup>43</sup> FRITZ ENDERLEIN & DIETRICH MASKOW, *supra* note 15, at 298.

<sup>44</sup> See CISG, *supra* note 1, art. 74. "The principle of excluding damages for unforeseeable losses is found in the majority of legal systems." See U.N. Confer-

74 contains both an objective and subjective test, limiting damages to the "loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known."<sup>45</sup> In situations where the breaching party was informed of unusual losses which might occur in case of a later breach there is little difference between the objective and the subjective standard.<sup>46</sup>

Although lost re-sale profits should be recoverable by a buyer who was known or should have been known to the seller to be a purchaser for resale, it is not certain that courts will award damages for less direct lost profits, such as profits lost by a manufacturer-buyer when goods necessary for production are defective, late or not delivered, or when profits are lost due to customer dissatisfaction which resulted from a seller's breach of contract (loss of good-will). In these situations it is most likely that the law of the forum will determine the extent to which Article 74 damages for lost profits will be allowed.<sup>47</sup>

The CISG does not contain the limitation found in some jurisdictions (for example, the United States) that damages must be proved with reasonable certainty. This limitation may, however, be applied as part of the domestic law of the forum. The one decision by a court in the United States which deals directly with Article 74 held that damages under the CISG must be

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ence, Official Records, *supra* note 1, at 59: Although numerous scholars have claimed that the rule of foreseeability in CISG Article 74 is derived from the English common law, it has been forcefully argued that it is derived from French law. Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257, 1263-69 (1993); Detlef König, *Voraussehbarkeit des Schadens als Grenze vertraglicher Haftung*, in DAS HAAGER EINHEITLICHE KAUFGESETZ UND DAS DEUTSCHE SCHULDRECHT, KOLLOQUIUM ZUM 65. GEBURTSTAG VON ERNST VON CAEMMERER 74, 86-130 (Hans G. Leser & Wolfgang Marschall von Bieberstein eds., 1973).

<sup>45</sup> Sutton, *supra* note 38, at 743-44.

<sup>46</sup> See WHITE & SUMMERS, *supra* note 33, at 514-18, and ENDERLEIN & MAS-KOW, *supra* note 15, at 744.

<sup>47</sup> See Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. PENN. J. I. B. L. 615 (1995) (for a U.S. decision on CISG Article 74 and for a discussion of German court opinions on ULIS Article 82). Article 74 is substantively identical to ULIS Article 82 and decisions under Article 82 ULIS are informative as to how national courts will allow consequential damages under CISG. Kritzer, *supra* note 32, at 477; see also Sutton, *supra* note 38, at 299.

proved with reasonable certainty.<sup>48</sup> Since the reasonable certainty limitation is not mentioned by the CISG, it is arguably proper for a court to apply the law of the forum. One commentator has stated that, "problems of proof and certainty of loss are procedural matters which remain within the province of national law, and procedural conceptions may still serve as covert limitations on CISG consequential awards."<sup>49</sup>

The CISG contains two explicit references to interest, Articles 78 and 84(1).<sup>50</sup> Under Article 84(1), "[i]f the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid."<sup>51</sup> Under Article 78, "[i]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74."<sup>52</sup> CISG Article 84(1) refers solely to interest that can be collected by the buyer on the price (a liquidated amount).<sup>53</sup> CISG Article 78 refers to interest that can be collected by the seller or the buyer and to interest on the price or any other sum that is in arrears.<sup>54</sup> Article 78 is silent on whether it applies to unliquidated as well as liquidated damages,<sup>55</sup> provides no guidance for calculating such interest and gives no indication of the circum-

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<sup>48</sup> Delchi Carrier, 1994 WL 495787; for a decision of the Delchi Carrier case, see Schneider, *supra* note 47, at 615.

<sup>49</sup> JOSEPH M. LOOKOFSKY, CONSEQUENTIAL DAMAGES IN COMPARATIVE CONTEXT, 181-187 (1989).

<sup>50</sup> The ULIS also contains two explicit references to interest. See ULIS, *supra* note 13, arts. 88(1) and 83.

ULIS Article 81(1) provides that "[w]here the seller is under an obligation to refund the price he shall also be liable for the interest thereon at the rate fixed by Article 83, as from the date of payment." *Id.* art. 81(1)

ULIS Article 83 provides that:

[w]here the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to such a sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%.

*Id.* art. 83.

<sup>51</sup> See CISG, *supra* note 1, art. 84(1).

<sup>52</sup> See *id.* art. 78.

<sup>53</sup> ULIS, *supra* note 13, art. 81(1) has the same effect.

<sup>54</sup> See CISG, *supra* note 1, art. 78.

<sup>55</sup> ULIS Article 83 refers solely to interest that can be collected by the seller on the price (a liquidated amount). ULIS, *supra* note 13, art. 83.



stances under which pre-judgment interest should be awarded.<sup>56</sup>

CISG, Article 7(2) directs that all matters not expressly settled in the CISG, “be settled in conformity with the general principles on which it [the CISG] is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”<sup>57</sup> It has been argued that pre-judgment interest on unliquidated damages be allowed under the CISG’s general principle of full compensation

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<sup>56</sup> Because the members of the UNCITRAL Working Group charged with developing the language that eventually became CISG Articles 84(1) and 78, at some stage of their proceedings considered versions of ULIS Articles 81(1) and 83, it has been argued that its drafters intended that pre-judgment interest not be allowed on unliquidated damages. Article 78 CISG, more than any other provision of the Convention, was subject to disagreement based on cultural differences of the various signatory nations. Interest is prohibited under religious rules in some countries and was treated differently in capitalist and communist societies. The 1976 draft of the CISG would not have allowed a buyer pre-judgment interest on unliquidated damages. Article 58 of the 1976 UNCITRAL Working Group’s Draft Convention, which authorized interest only for sellers, was not included in the 1977 and 1978 drafts. Sutton, *supra* note 38, at 749.

In some quarters . . . the Convention’s legislative “history” . . . ranks high on the list of sources of law: perhaps the next best thing to an official commentary, the travaux are seen as evidence of the founding fathers’ collective intent. And indeed, a fair number of the CISG decisions already rendered by certain national courts justify their rulings, *inter alia*, by reference to this “process” by which the Convention text came to be . . .

JOSEPH LOOKOFSKY, UNDER THE CISG IN THE USA (1995). It has also been noted,

Our experience with legislative history at the national . . . and . . . international . . . levels gives grounds for a certain measure of skepticism. We might not expect the proposals, counter-proposals and comments made by various national delegates during years of drafting (and re-drafting) of the CISG text to provide simple solutions to complex questions of Convention interpretation.

*Id.* at 17.

Another basis to surmise that it is not the intent of the CISG to award interest on unliquidated amounts is that, wherever practical, the CISG seeks to balance buyer’s and seller’s remedies. See, *e.g.*, the format of Articles 45 and 61. To balance Article 84(1), which limits interest to a liquidated amount, perhaps Article 78 should also be limited to a liquidated amount. Enderlein and Maskow argue against awarding interest on unliquidated damages, but Honnold and Sutton argue that the issue may depend whether the court looks to its own legal traditions in awarding damages. See FRITZ ENDERLEIN & DIETRICH MASKOW, *supra* note 4, at 313-14; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 527 (1991); and Sutton, *supra* note 38, at 750.

<sup>57</sup> See CISG, *supra* note 1, art. 7(2).

stated in Article 74.<sup>58</sup> Whether to give pre-judgment interest on unliquidated damages is also arguably an issue the drafters believed should be resolved by resort to the conflict of law rules of the forum.<sup>59</sup> This approach will, of course, confirm the criticism of the CISG that “[a]bsent a specific provision dealing with interest, differences in application could occur by each country reading Article 74 as allowing its own position on interest.”<sup>60</sup>

In the case of *Delchi Carrier, S.p. A. v. Rotorex*, a US District Court in 1994 held that a buyer was entitled to pre-judgment interest under CISG Article 78.<sup>61</sup> The District Court decision, which was affirmed on this issue on appeal,<sup>62</sup> awarded plaintiff pre-judgment interest on its unliquidated damages (reliance damages and consequential damages for lost profit) under the law of the forum, the United States Code.<sup>63</sup>

The federal court in *Delchi Carrier* had diversity jurisdiction over a case involving a contract between US and Italian corporations. “In diversity cases federal courts must follow the conflict of laws rules prevailing in the states in which they

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<sup>58</sup> JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN SCANDINAVIA, 101, n.162 (1996) (citing [Klaus Bacher and Hans Eberstein], KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (Ernst von Caemmerer & Peter Schlechtriem, eds., 1995), Art. 78 RD. Nos. 12, 15. Lookofsky states: “[t]he ‘matter’ of whether interest is payable on sums in arrears is clearly ‘governed by’ the Convention; if the matter of whether such ‘sums’ includes only liquidated sums is ‘governed but not settled’ by the CISG, we can look to the ‘general [Article 74] principle’ of full compensation.” *Id.* Lookofsky also cites Article 7.4.10 of the UNIDROIT Principles for the proposition that a party be compensated as of the date of the harm. *Id.*

<sup>59</sup> Sutton, *supra* note 38, at 750. “If courts interpret Article 78 in the context of their own legal traditions, then interest could conceivably be awarded under the Convention for liquidated as well as unliquidated damages, or for damages based on current price and substitute transactions.” *Id.*

<sup>60</sup> Eva Diederichsen, Comment, *Commentary to Journal of Law & Commerce Case I: Oberlandesgericht, Frankfurt Am Main*, 14 J.L. & COM. 177, 180-81 (1995).

<sup>61</sup> *Delchi Carrier*, 1994 WL 495787.

<sup>62</sup> *Id.*

<sup>63</sup> 28 U.S.C. § 1961(a). This section provides that

[i]nterest shall be allowed on any money judgment in a civil case recovered in a District Court. . . . Such interest shall be calculated from the date of the entry of judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States treasury bills settled immediately prior to the date of the judgment.

*Id.*

sit.”<sup>64</sup> Since this case did not involve the foreign relations of the United States, federal common law should arguably not have been applied.<sup>65</sup> The Federal District Court in *Delchi Carrier*, if it found the CISG silent on the issue of awarding pre-judgment interest on unliquidated damages, could have looked to the conflict of laws rules of New York to determine whether New York or Italian law controlled on this issue. The Court might have determined that under New York conflicts rules, New York had a greater interest<sup>66</sup> in this matter than Italy and might also have concluded that the matter of pre-judgment interest is procedural rather than substantive<sup>67</sup> and thus might have based its recovery on the New York Code which allows pre-judgment interest on unliquidated damages for breach of contract.<sup>68</sup> The court engaged in no discussion about these issues.

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<sup>64</sup> See *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 494 (1940).

<sup>65</sup> In *Erie R. Co. v. Tompkins*, the Supreme court stated that there is no federal general common law. Since then federal courts have developed a federal common law in certain limited fields, including the area of foreign relations. 304 U.S. 64, 58 S. Ct. 817 (1938). In *Banco Nacional de Cuba v. Sabbatino*, the issue was whether the Act of State doctrine was governed by state or solely by federal law which would be binding on state courts. 376 U.S. 398, 84 S. Ct. 923 (1964). The Court, in holding that federal decisional law controlled, stated that it “seems fair to assume that the Court did not have rules like the Act of State doctrine in mind when it decided *Erie R. v. Tompkins*.” *Id.* at 376 U.S. at 425, 84 S. Ct. at 939; see also, Harold G. Maier, *The Basis and Range of Federal Common Law in Private International Law Matters*, 5 VAND. J. TRANSNAT. L. 133 (1971); SWAN AND MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS*, 1139 (1992).

<sup>66</sup> Joseph A. Zirkman, *New York's Choice of Law Quagmire Revisited*, 51 BROOKLYN L.R. 579, 586 (1985); In *Associated Metals & Minerals v. Sharon Steel Corporation*, a federal district court in New York held that Pennsylvania law had a reasonable relationship to the contract and enforced a choice of law clause so that Pennsylvania law governed the awarding of pre-judgment interest. 590 F. Supp. 18 (S.D.N.Y. 1983).

<sup>67</sup> In *O'Rourke v. Eastern Air Lines, Inc.*, the court held that *calculation* of prejudgment interest in a wrongful death action under the New York statute is considered a substantive issue, but the issue of *whether to award* such interest depended on whether prejudgment interest was consistent with the goals of the Warsaw Convention and the Montreal Agreement. 730 F.2d 842 (2d Cir. 1984). The Second Circuit found it was not, but the Fifth Circuit, in *Domangue v. Eastern Air Lines, Inc.*, found that prejudgment interest was consistent with the Convention and was a valid exercise of the court's discretion. 722 F.2d 256 (5th Cir. 1984).

<sup>68</sup> N.Y.C.P.L.R. § 5001 (McKinney 1994). Article 50, Judgments Generally states:

Interest to verdict, report or decision:

The Convention does not contain explicit directions on rate of interest. A considerable amount of CISG case law has emerged on this subject and it is inconsistent. Tribunals have staked out at least three different theories as to the law that governs rate of interest in a contract that is subject to the CISG:

- (1) the CISG itself determines rate of interest by recourse to its general principles;<sup>69</sup>
- (2) rate of interest is determined in conformity with the law applicable by virtue of the rules of conflicts of law of the forum;<sup>70</sup> and

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(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

*Id.*

Pennsylvania has developed a similar rule in its courts. *See* U.S. v. Bethlehem Steel Corp., 113 F.2d 301 (3d Cir. 1940) (likewise it is well settled in Pennsylvania that in an action to recover unascertained damages for a breach of contract the allowance of interest prior to judgment is discretionary).

<sup>69</sup> *See, e.g.*, the following ruling in Arbitral Proceeding SCH-4318 of 15 June 1994 at the Internationales schiedsgericht der bundeskammer der gewerb of Austria:

One of the general principles underlying the CISG is that of 'full compensation' of the loss (*cf.* Art. 74 of the CISG). It follows that, in the event of failure by the debtor to pay a monetary debt, the creditor, who as a business person must be expected to resort to bank credit as a result of the delay in payment, should therefore be entitled to interest at the rate commonly practiced in its country . . . .

*Id.* For the full text of this decision, *see* Unilex database 1995/II, d.1994-13 (English translation of German text). For related data on this case, *see* Pace Internet Database on the CISG, *supra* note 47, at Case Presentation 940615s1 (SCH-4318).

<sup>70</sup> Most CISG tribunals that have ruled on rate of interest have taken this position. *See* VAN HOUTTE, *THE LAW OF INTERNATIONAL TRADE*, 147 n.25 (1995). Legal scholars and courts in Germany have concluded that the conflict of law rules of the forum should determine which law will govern the awarding of interest under the CISG. *See* Schlechtriem, *Anmerkung in Schiedssprüche zu Streitigkeiten aus international Kaufverträgen: Anwendbarkeit des CISG*, *RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW]* 95, 590, 592-594 (1995); *See also* James J. Callaghan, *U.N. Convention for the International Sale of Goods: Examining the Gap-filling Role of CISG In Two French Decisions*, 2 *J. OF L. AND COMM.* 183, 198-99 (1995) (published also in Pace Internet Database on the CISG *supra* note 47, at Case Presentation 930616f1) (arbitrators have used conflicts rules to determine rate of interest rather than the rule of the forum.) The article suggests that arbitrators should use a rate which indemnifies against the harm caused by the delay rather than the law of any particular state. *Id.*

- (3) rate of interest is determined by the law of the forum without reference to its rules of conflicts of law.<sup>71</sup>

These approaches have led to rate of interest determined by the law of the place of payment, the law of the place of actual loss, the law of the creditor, the law of the debtor or creditor, or simply the law of the forum (in accordance with approach (3)) without regard to any of the above.<sup>72</sup>

The CISG takes the position of those countries in which interest is not necessarily a component of damages.<sup>73</sup> Article 78 states that interest is recoverable “without prejudice to any claim for damages—under Article 74.” This separation of interest from damages will allow a party to recover interest when there is no other evidence of damage suffered<sup>74</sup> or when impedi-

<sup>71</sup> A basis for approach (3) may be a determination that rate of interest should be regarded as a procedural issue; hence, subject to the law of the forum (without reference to its rules of conflicts of law). Some tribunals appear to have regarded interest as determined by the law of the forum without going into the basis for their position. See, e.g., *Delchi Carrier*, 1994 WL 495787 (where, because article 78 does not specify the rate of interest, the court in its “discretion,” awarded interest be paid at the US Treasury Bill rate as set forth in 28 U.S.C. 1961(a)).

<sup>72</sup> See VAN HOUTTE, *supra* note 70, who has found that courts considered the following laws applicable for the determination of the interest rate:

—*law of place of payment*: ICC award no. 7153 (1992), (1992)J.D.I. 1005

—*law of creditor*: LG Stuttgart September 5, 1989, (1990) IPRax (1991) 317; LG Frankfurt September 16, 1991, (1991) RIW 952; KG Berlin January 24, 1994, (1994) RIW 683; OLG München March 2, 1994, (1994) RIW 545; ICC award no. 7197 (1992), (1993) J.D.I. 1028.

—*law of place of actual loss*: LG Aachen April 3, 1990, (1990) RIW 491.

—*proper law of contract*: AG Oldenburg April 24, 1990 (1991) IPRax 336; LG Hamburg September 26, 1990, (1991) IPRax 400; Belgian Cass., November 29, 1990, (1990) RW 1270.

—*law of debtor or creditor*: OLG Frankfurt June 13, 1991, (1991) RIW 591; OLG Frankfurt April 20, 1994, (1994) RIW 593.

For related data on each of these cases, see Pace Internet Database on the CISG, *supra* note 47. See also, Comment, *Interpretive Decisions Applying CISG*, 14 J.L. & Com. 201, 205-07 (1995).

<sup>73</sup> See LOOKOFSKY, *supra* note 58, at 99. In Scandinavia, where a distinction between damages and interest is made, interest is awardable without proof of economic loss. *Id.* at n.149. Where interest is part of damages, damages for lost interest is meant to compensate a party for the lost use of capital. Restatement of Contracts, Second, Section 354, Comment a. (1981).

<sup>74</sup> Lookofsky cites the decision of the Landgericht Frankfurt am Main, No 3/11 O 2/91, decided 16 September 1991, reported in UNILEX (1992-94). Lookofsky, *supra* note 58 at 100 n.153. For related data on this case, see Pace Internet Database on the CISG, *supra* note 47, at Case Presentation 910916g1.

ments under Article 79 have excused the other party from being liable for damages.<sup>75</sup>

The conclusion is: absent a specific [contract] provision dealing with interest, differences in application could occur by each country reading [the CISG] as allowing its own position on interest.<sup>76</sup>

Article 77 limits Article 74 damages by placing an obligation to mitigate damages on the aggrieved party.<sup>77</sup> CISG Article 77 provides:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.<sup>78</sup>

Because the first sentence of Article 77 is worded in terms of a duty to mitigate, courts may require such mitigation, and allow a set-off in favor of the breaching party for failure of the non-breaching party to mitigate. The second sentence seems to take the approach that CISG Article 77 was not intended to place liability on the injured party for failing to avoid damages<sup>79</sup> but is meant to simply precluded an injured party from recovering damages which could have reasonably been avoided.<sup>80</sup> A third

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<sup>75</sup> Kritzer, *supra* note 32, at 19.

A party can be obligated to pay interest even where damages are excused pursuant to the Convention's counterpart to force majeure (Art. 79). [In this case, the fact that the existence of an Article 79(1) impediment does not relieve a party from the obligation to pay interest on sums in arrears appears to be generally favorable to sellers]. Also, a literal reading of Article 78 has led one commentator to conclude that it may entitle an aggrieved party to interest plus lost use of capital as well as other damages under Article 74.

*See id.*

<sup>76</sup> Eva Diederichsen, Comment, *Recent Development: CISG*, 14 J.L. & COM. 177, 180-81 (1995).

<sup>77</sup> Article 77 of the CISG, "[m]itigation of damages," places the obligation of mitigation on an aggrieved party." FRITZ ENDERLEIN & DIETRICH MASKOW, *supra* note 15, at 298-99.

<sup>78</sup> *See* CISG, *supra* note 1, art. 77.

<sup>79</sup> E. Allan Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 251 (1979)

<sup>80</sup> The court in *Delchi Carrier* treated Article 77 as creating a duty to mitigate, the failure of which could result in damages. *See Delchi Carrier*, 1994 WL 495787. Under U.S. law, the burden of proof for showing that the injured party

interpretation of Article 77 takes the position that mitigation of loss can become a sword as well as a damages shield — by drawing on the “general principles” provision of the CISG, Article 7(2) to create a duty of “loyalty to the other party to the contract.”<sup>81</sup> Failure to mitigate damages may be a breach of this duty and result in recoverable damages.

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has not taken steps he could have taken to avoid damages is on the party in breach. E. ALLAN FARNSWORTH, *CONTRACTS* 897 (2d ed., 1990).

<sup>81</sup> See Peter Schlechtriem, *Recent Developments in International Sales Law*, 18 ISRAEL L.R. 320-21 (1983); and Lief Sevón reported in Honnold, *Uniform Words and Uniform Application: The 1980 Sales Convention and International Judicial Practice in EINHEITLICHES KAUFRECHT UND OBLIGATIONESRECHT* 139 (Peter Schlechtriem ed., 1987).