

## **Claim for damages and their Requirements under the United Nations Convention on Contracts for International Sale of Goods (CISG), 1980**

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### **Abstract**

*The United Nations Convention on contracts for International Sale of Goods, 1980 (UN CISG) provides that an aggrieved party (buyer or seller) have a right to claim damages under articles 74-77 of CISG, if the other party fails to perform any of his obligations under the contract or this Convention. However, the claim of damages are subject to certain conditions provided in Sections 74-77 of CISG. In order to claim damages, the aggrieved party has the burden to establish the extent of loss, the damage was foreseeable at the time of conclusion of contract and not caused by the plaintiff's failure to mitigate.*

**Key words:** UNCISG, UNCITRAL, CLOUT Case, buyer, seller, damages, attorney, foreseeable.

### **1. Introduction:**

Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach.<sup>1</sup> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.<sup>2</sup>

In common law countries, an award of damages is the usual remedy for breach of contract. By contrast, in many civil law countries, when a breach of contract occurs, the claimant's primary remedy is specific performance, although many of these countries are increasingly permitting the recovery of damages as the preferred remedy.<sup>3</sup> The United Nations Convention on contracts for International Sale of Goods (CISG) is a uniform international law of sales, this is an optional law of contract for the sale of goods and states are contracting parties to this convention.<sup>4</sup>

## **2. Damages under United Nations Convention on Contracts for the International Sale of Goods (CISG):**

A validly concluded sale of goods contract, creates obligations on the parties to the contract. The buyer expects prompt delivery of the goods in conformity with the contract. The seller expects the buyer to accept delivery of the goods and to make timely payment for them.<sup>5</sup> The UN CISG applies to the contracts of sale of goods between parties whose places of business are in different States and when the States are contracting States or if the rules of private international law lead to the application of the law of a state which has ratified the Convention.<sup>6</sup> This Convention recognized certain obligations and remedies for the parties to the contract, which are examined in following paragraphs.

### **2.1. Obligations and Remedies for the buyer and seller:**

#### **2.1.1. Obligations of seller:**

The obligations of the seller under CISG includes, delivery of goods, hand over the documents and transfer the property in goods according to the contract<sup>7</sup> or if the contract involves carriage of the goods, hand over the goods to the carrier by making proper arrangements;<sup>8</sup> deliver the goods on a fixed date or in any other case deliver the goods within a reasonable time.<sup>9</sup> The seller must deliver the goods in conformity with the contract and also free from any right or claim of a third party.<sup>10</sup>

#### **2.1.2. Obligations of Buyer:**

The obligations of the buyer includes, pay the price for the goods and take delivery of them as required by the contract and this Convention<sup>11</sup> and also follow the requirements laid down in articles 54 to 60 of the Convention.

#### **2.1.3. Remedies for the Buyer:**

If the seller fails to perform any of his obligations under the contract or convention, the buyer may exercise rights provided in Articles 46 to 52; claim damages as provided in articles 74 to 77.<sup>12</sup> An aggrieved buyer's right to damages is cumulative with its other remedies i.e., the buyer does not forfeit its right to claim damages by invoking any other remedy.<sup>13</sup>

#### **2.1.4. Remedies for Seller:**

If the buyer fails to perform any of his obligations under the contract or under the Convention, the seller may exercise the rights provided in articles 62 to 65; claim damages as provided in articles 74 to 77. The seller may exercise the right to claim damages along with other remedies.<sup>14</sup>

## **2. 2. Damages for breach of contract or obligations under the Convention:**

The object of CISG is to put the aggrieved party in the economic position he would have been in had the contract been properly performed.<sup>15</sup> The CISG determines the grounds for recovery of damages, but domestic law may apply to the assessment of evidence of loss.<sup>16</sup> The article 74 follows the rule of Rule of Hadley v. Baxendale.<sup>17</sup>

Possible forms of damages as a result of breach of contract are non-performance damages, incidental damages, and consequential damages. Damages for non-performance consist in the non-or defective performance as such. Incidental damages are the expenses incurred by the promise, which are not, related the realization of his expectation interest, but rather are incurred in order to avoid any additional disadvantages. Consequential damages caused by a breach include additional losses going beyond non-

performance, for instance the promisee's liability to third parties as a result of the breach or harm caused to a person or property by a defect in quality.<sup>18</sup>

Paragraph (1) of Article 46 and Article 62 respectively grant the buyer and the seller the choice of either the right to specific performance or the right to other remedies such as damages, or a combination of the two, as long as they are not "inconsistent with" the request for specific performance.<sup>19</sup> The aggrieved party may request only damages or damages in conjunction with other remedies.<sup>20</sup>

The basic requirement for the buyer's claim for damage is that seller failed to perform any of his obligations arising under the contract or under CISG.<sup>21</sup> According to Article 45 1 (b) CISG the buyer may claim damages as provided in Articles 74 to 77, if the seller fails to perform any of his obligations under the contract. The issue of calculation and measure of damage are dealt with in Articles 74 to 77 CISG.

Article 74 allows claim of damages for breach of contract, comprise 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.<sup>22</sup> An aggrieved party may claim under article 74 even if entitled to claim under article 75 or 76.<sup>23</sup> However, damages recoverable under Articles 74, 75 & 76 are reduced if it is established that the aggrieved party failed to mitigate these damages as required by article 77.

The first sentence of article 74 provides for the recovery of all losses as a result of the other party's breach. The second sentence limits recovery to those losses 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.<sup>24</sup>

Article 74 allows the aggrieved party to claim actual loss suffered due to breach of contract and it includes the loss of profits. The actual loss generally means the diminution in the assets of an injured party at the time of the conclusion of the contract, the loss of profit means the loss of any increase in the assets caused by the breach.<sup>25</sup>

Article 74 represents the general Convention rule on damages, as it protect against all foreseeable loss caused by the breach, including direct loss suffered by a buyer who will not or cannot avoid. But Article 74 is most significant regarding indirect (consequential) loss, including lost profits and other purely economic loss, as well as physical loss.<sup>26</sup>

The standard established by Article 74 is brief but powerful. It means damages consist of "the loss, including loss of profit suffered....as a consequence of the breach" –a standard that is designed to place the aggrieved party in as good a position as if the other party had properly performed the contract.<sup>27</sup> The damages under CISG can be collected are restricted in three ways, which are as follows:<sup>28</sup>

**First:** The loss must be foreseeable at the time of the conclusion of the contract. It means only foreseeable consequential damages related to the breach may be recovered;<sup>29</sup>

**Second:** The losses must be proved with a reasonable certainty and are not merely speculative. Recovery of damages will be limited into those that are provable with some degree of certainty, therefore, purely speculative damages may not be collected;<sup>30</sup> and

**Third:** The losses were not caused by the plaintiff's failure to mitigate. It means, even if the loss was foreseeable and its amount is certain, the non-breaching party will be limited in the recovery in the event the party failed to mitigate the damages.<sup>31</sup> For example, the buyer has a source for substituted goods must make efforts to obtain those substituted goods. Otherwise, the buyer will be precluded from collecting full loss of profits.

### **2.2.1. The damages claimed must be foreseeable at the time of the conclusion of the contract:**

The CISG provides for damages for loss, including loss of profits, suffered as a consequence of a breach of contract, but does not define in detail which are the losses for which compensation be obtained. In order to identify the losses for which compensation may be demanded, regard must be had to the principle of full compensation for loss in the context of the particular contract concerned.<sup>32</sup>

#### **2.2.1.1. Foreseeability:**

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 as a possible consequence of its breach.<sup>33</sup> It refers to foreseeability at the time of conclusion of contract. The meaning is that it is only the party in breach who is required to foresee or to be in a position to foresee. The burden of proof with regard to the foreseeability lies with the aggrieved party.<sup>34</sup>

#### **2.2.1.2. Knowledge is an essential**

According to English law, knowledge is an essential element in evaluating foreseeability. Determination of foreseeability depends on the knowledge that the parties had at the time of the conclusion of the contract or, “at all events”, the breaching party had at that time. The determination of foreseeability directly depends on the party’s knowledge.<sup>35</sup>

#### **2.2.1.3. Remote damages:**

According to article 74, damages equal to the loss suffered as a consequence of breach will be awarded, up to the limit of what was or ought to have been foreseen at the contract date by the contract breaker as a possible consequence of breach. The rule thus incorporates requirements of both factual and legal causation (or remoteness). It also includes direct as well as consequential losses.<sup>36</sup>

In *Vandermaesen Viswaren v. Euromar Seafood*,<sup>37</sup> the plaintiff ordered an amount of seafood from the defendant for delivery on a specific date and time. The defendant indicated to the plaintiff that delivery would take place later on that day, but then failed to make any delivery whatsoever. The court awarded damages on the basis of the extra costs incurred on a replacement purchase, extra delivery costs and an amount of 25,000 Belgian Francs for the extra effort and trouble of the plaintiff to acquire the replacement goods. The court of appeal agreed with lower court decision.

### **2.2. The losses must be proved with reasonable certainty and are not merely speculative:**

Article 74 allows a party to collect any foreseeable damages incurred because of a breach of contract. A plaintiff may collect lost profits caused by delivery of defective goods, but only those profits that can be proven with reasonable certainty.<sup>38</sup> In common law countries it requires proving lost profits with reasonable certainty.<sup>39</sup> The decision in *Delchi Carrier case* explains this principle.

In *Delchi Carrier, S.P.A. Vs. Rotorex Corp.*,<sup>40</sup> the court held that a plaintiff may collect lost profits caused by delivery of defective goods, involved a warranty dispute between a US seller of compressors (Rotorex) and an Italian purchaser (Delchi). The trial court determined that the compressors failed to conform to the specifications provided in the contract or the sample provided by Rotorex to Delchi. After Rotorex failed to cure the defects, Delchi sued for breach of contract and recovery of damages, including consequential damages for lost profits. The lost profits were allegedly due to lost volume caused by a closing of the assembly line for four days until the compressors were repaired. They also sued for incidental damages such as the cost to repair the compressors, the cost of storage, and the costs of expediting substitute goods.

In Delchi case lost profits claimed under two categories (1) lost profits on “actual orders” and (2) lost profits on “indicated orders” i.e. it would have been made had more stock been available.

In first category claims, Delchi proved with sufficient certainty a total lost profit of 546,377,612 lire. The court held that the governing law of this case is the CISG. Article 74 allows for Delchi to collect monetary damages that are equal to its loss, including lost profits. Delchi is entitled to compensatory damages for those expenses incurred in repairing of nonconforming goods, obtaining substituted goods, storage of rejected goods, and reasonably certain lost profits. The court allowed damages on the ground that these losses were a “foreseeable and direct result of Retorex’s breach”.

Under the second category Delchi claimed 4,000 lire as additional lost sales in Italy, this is supported only by speculative testimony of Italian sales agents who stated they would have ordered if more were available. The District court did not allow damages for lost profit on the “indicated orders”, because Delchi did not prove this with reasonable certainty. Lost profits do not include profits that arise from anticipated sales that cannot be determined by reasonable certainty.

### **2.3. The losses were not caused by the plaintiff’s failure to mitigate:**

Article 77 obligates the aggrieved party to mitigate damages. 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>41</sup>

Article 77 imposes a duty on an aggrieved party to take reasonable steps to reduce his or her losses. This presumably includes the purchase of substitute goods by an aggrieved buyer.<sup>42</sup> Article 77 does not state at what point in a legal proceeding the issue of mitigation must be considered by a court or tribunal. However, there are several decisions state that an aggrieved party is not obliged to mitigate in the period before the contract is avoided.<sup>43</sup> The provision is not clear in Article 77 in respect of which party bears the burden of pleading the failure to mitigate. It was held that the tribunal should review *ex officio* whether the aggrieved party had complied with the mitigation principle, but that the breaching party had the burden of establishing failure to comply.<sup>44</sup>

Article 77 applies to all cases of liability to pay damages for breach of contract. The obligation to mitigate damages exists not only when a loss has already occurred, but also even before the loss arises.<sup>45</sup> Article 77 only requires the party entitled to compensation to take those reasonable measures to mitigate loss that could be expected under the circumstances from a party acting in good faith. The reference point must therefore be the conduct of a prudent person entitled to damages who is in the same position as the aggrieved party, with any relevant trade usages being taken into account.<sup>46</sup>

### **2.4. Recovery of damages where the contract has been avoided:**

Article 74 assumes a right to damages on the part of the buyer pursuant to Article 45 (1) (b) and Article 74 is supplemented by Article 75 and 76. Article 75 governs the concrete calculation for losses due to non-performance in the case of avoidance of contract, and Article 76 permits an abstract calculation of damages under certain conditions in case of avoidance. If the conditions for application of article 75 are satisfied, the aggrieved party may recover the difference between the contract price and the price in the substitute transaction.

Article 75 applies if the contract is avoided and if the aggrieved party concludes a substitute transaction in a reasonable manner and within a reasonable time after avoidance.<sup>47</sup> An aggrieved party seeking damages calculated under article 75 must conclude a substitute transaction if the seller is the

aggrieved party, this substitute transaction involves the sale to some other buyer, if an aggrieved party is buyer, when he buys goods to replace those promised in the avoided contract.<sup>48</sup>

Article 75 allows calculating damages concretely by referring to the price in an actual substitute transaction, whereas article 76 allows calculating damages abstractly by referring to the current market price. An aggrieved party may choose to recover damages under article 74 even when it might recover under article 76.<sup>49</sup>

Recovery of damages under article 75 is available only if the contract has been effectively avoided by the aggrieved party. Substitute transactions concluded before avoidance do not fall within the coverage of article 75.<sup>50</sup> However, the damages recoverable under article 75 are reduced if it is established that the aggrieved party failed to mitigate those damages as provided in article 77.

If, however, an aggrieved party concludes a substitute transaction for less than the contract quantity, both articles 75 and 76 may apply.<sup>51</sup> Where the aggrieved party failed to prove that certain similar sales conducted at the same time constituted cover sales, it was allowed to calculate its damages under article 76.<sup>52</sup> In a case a buyer bought replacement goods at almost double the new price proposed by the seller, the court held that it did not constitute a transaction in a reasonable manner.<sup>53</sup>

In *CLOUT Case No. 217*<sup>54</sup> German plaintiff (seller) had produced sets of cutlery ordered by a Swiss defendant (buyer). Some part of the cutlery were specifically embossed for the buyer. The buyer refused to accept the delivery and claimed that no contract had been validly concluded or that it was entitled to declare the contract avoided because of a violation of exclusive rights granted by the seller.

The seller declared the contract avoided and sued the buyer for damages. The seller argued that apart from the covering sale under Article 75, the exact determination of the damages under the circumstances required an unreasonable or disproportionate expense. The majority of the court held that the non-defaulting party is entitled to the damages as proved under article 75, i.e. the difference between the actual contract price and the covering sale and all other damages incurred.

Article 76 allows damages if there is no purchase (buyer) or resale (seller) under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If the party claiming damages avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.<sup>55</sup>

A non-breaching party who has avoided the contract need not measure its damages by the formula in article 75. It has the option of measuring damages by Article 76's market price formula.<sup>56</sup> The analysis of provisions applicable for claiming damages are summarized in following points:

1. In order to claim damages, the damages must have been foreseeable at the time that the contract was signed.<sup>57</sup>
2. The damages were not caused by the plaintiff's failure to mitigate;<sup>58</sup> and
3. The damages must be proved with reasonable certainty and are not merely speculative.<sup>59</sup>
4. Where the contract has been avoided, the damages can be claimed concretely by reference to the price in a substitute transaction i.e. cost of cover transaction (where buyer has bought goods in replacement or seller has resold the goods).<sup>60</sup>
5. The cover transaction must be within a reasonable time after avoidance of contract;
6. Where the contract has been avoided and no cover transaction, damages may be claimed abstractly by reference to the current market price.<sup>61</sup>
7. In Article 75 an aggrieved party is entitled to recover damages the difference between the contract price and the price of the substituted transaction. Where as in 76 aggrieved party is entitled to recover damages the difference between the contract price and the market price.



8. Articles 75 & 76 are in addition to Article 74 for recovery of damages. These articles apply when the contract has been avoided;
9. An aggrieved party entitled to damages under Article 76 may also recover any further damages under article 74.
10. In the event that the aggrieved party's substitute transition was unreasonable, damages may be calculated according to Article 76 or Article 74.<sup>62</sup>
11. The damages recoverable under Sections 74, 75 & 76 are reduced, if it is established that the aggrieved party failed to mitigate losses.<sup>63</sup>
12. If a party fails to pay the price or arrears, the other party is entitled to interest on it.<sup>64</sup>
13. If the contract is avoided, an aggrieved party who claims damages under article 75 or 76 is also subject to articles 81 to 84 on the effects of avoidance.
14. The buyer or seller required to preserve the goods in possession against losses, as provided in Articles 85 to 88.
15. A party who fails to perform contract is exempted from damages if a party proves that the requirements of articles 79 or 80 are satisfied (due to impediments beyond control);<sup>65</sup> 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.<sup>66</sup>
16. A party who fails to give notice of non-conformity as required under 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.<sup>67</sup>
17. If a buyer retains non-conforming goods, he may reduce the price of goods under Article 50.
18. Losses arising from death or personal injury are excluded from the coverage of CISG.<sup>68</sup>
19. Parties to the contract may derogate from any of the provisions of CISG.<sup>69</sup>

### 3. Burden of proof in claiming damages:

The aggrieved party has burden of establishing loss.<sup>70</sup> Under the general principles of law the party claiming damages has the burden of establishing the existence and the amount of damages caused by the other party's breach.<sup>71</sup>

Although none of the damage formulas in article 74, 75 and 76 expressly allocates the burden of proof. In *BVundesgericht*,<sup>72</sup> 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.<sup>73</sup>

Evidence of loss of profits, 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 of loss of reputation as well as evidence that the breaching seller knew or should have known of these losses.<sup>74</sup>

### 4. Calculation of damages:

In some legal systems, a party need not prove the actual extent of its damages in all cases to be successful. It must prove that it has suffered damages and that there is some difficulty in establishing the exact quantum. In these cases courts may award a sum of damages, estimated to the best of its abilities.<sup>75</sup>

Article 74 only requires that concrete damages must be proven, but it does not deal with the way in which the extent of the damages must be proven. It is clear that the manner of proving whether damages have been suffered and the manner of proving the extent or a quantum of those damages, should *prima facie* be determined by the *lexi fori* as these are clearly issues of procedural law.<sup>76</sup> The Convention determines

the grounds for recovery of damages, but domestic procedural law may apply to the assessment of evidence of loss. The applicable domestic law determines how to calculate damages, when the amount cannot be determined.<sup>77</sup>

In CLOUT case no. 318,<sup>78</sup> the buyer alleged that the vacuum cleaners received by him from the seller did not perform up to standard and failed to return the defective goods. The court held that under Article 74 the plaintiff must exactly calculate damages. Therefore, the counter claim of damages was dismissed because it had failed to properly prove its damages.

## **5. Types of damages:**

### **5.1. Consequential Loss:**

The compensability of incidental losses is not explicitly mentioned in Article 74. There are some examples of incidental losses, that includes, the additional costs incurred by a party as a result of the other party's unjustified refusal to perform. The consequential loss includes any kind of non-performance that may result in additional losses for the promisee that flow from his particular situation and the arrangements he had already made. Consequential losses in this sense are, for example, loss caused by the promisee's liability to a third party incurred as a result of the contract.<sup>79</sup>

The aggrieved party may collect incidental damages, such as costs incurred in repairing, storing, inspection of non-performing goods, protecting the defective goods and shipping and customs costs incurred when returning goods. The damages for incidental costs include, hiring a third party to process goods,<sup>80</sup> travel and subsistence expenses incurred by the buyer in travelling to the seller's place of business in order to try and salvage the contract.<sup>81</sup>

In CLOUT case No. 85<sup>82</sup> the court held that a buyer could recover for damages caused by its inability to meet the market demand for its products as a result of the seller's delivery of non-conforming components.

### **5.2. Damages for Lost Volume:**

According to Professor Harris, there are three main requirements that a seller must meet to claim damages for lost volume:<sup>83</sup>

1. The person who bought the resold entity would have been solicited by the plaintiff had there been no breach or resale;
2. The solicitation would have been successful; and
3. The plaintiff could have performed that additional contract.

In *R.E. Davis Chemical Corp. V. Diasonic Inc.*,<sup>84</sup> the court held that a lost volume seller may recover for lost profits if it can prove two conditions: First, the seller must prove that he profitably could have made the second sale. Second, the seller must establish that it probably would have made the second sale had the buyer not breached.

In a *Jewelry Sales case*<sup>85</sup> the buyer did not pay and delivery was not made. The Austrian Supreme Court held that damages, suffered by the seller, would arise "regardless of a possible resale of the goods ordered to a subsequent buyer. As the later contract would have been formed independently of the (buyer's) order.

### **5.3. Damages for actual loss:**

Actual loss can be defined as any reduction in the assets of an injured party as they existed when the contract was concluded. As long as the necessary requirements have been met, the compensation for actual loss should be awarded under Article 74.<sup>86</sup>



#### **5.4. Damages for the loss of goodwill and reputation:**

As a rule, the compensation under article 74 should include every aspect which has an economic value so that the for instance the buyer's loss of "good will" as a result of having distributed the defective products supplied to him by the seller may be recoverable provided that his loss can be measured in money (and that it was foreseeable).<sup>87</sup> The loss of customers may be recoverable under certain circumstances.<sup>88</sup>

In Arbitration case<sup>89</sup> the seller (Respondent) from Russia and the buyer (Claimant) for US, the action was brought by an American firm ( buyer), against a Russian company (seller), in connection with a contract concluded by the parties in January 1998. The plaintiff (buyer) claimed loss of profit suffered as a result of a delay in selling and reduction of prices of the goods of the second installment. This loss, according to the plaintiff, was caused by the fact that the goods of the first installment had been defective, which, in turn, led to the loss of reputation of the goods on the market. The tribunal rejected this claim on the grounds including;

1. That there was no casual link between the breach and the loss claimed;
2. The plaintiff did not prove that the amount of the claim was commensurate to the breach.
3. The standard of foreseeability was not established.

#### **5.5. Attorney fee as damages:**

Article 74 states 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.

There is a divergence in scholarly opinion on the question of whether Attorney's fee allowed as damages under CISG. On the one hand, there is strong support for the position that the recovery of attorney's fee does not fall within the scope of the CISG; rather, it is a matter for domestic procedural law. On the other hand, the opposing view that attorney's fee are properly recoverable as damages under Article 74 of the CISG by a successful plaintiff, as long as the other requirements of that provision are met, has also been expounded.<sup>90</sup>

Several decisions awarded damages to compensate for legal fees for extra-judicial acts such as the sending of collection letters.<sup>91</sup> In CLOUT case No. 254,<sup>92</sup> the court allowed reasonable pre-litigation costs of lawyer in seller's country compensable and pre-litigation costs of lawyer in buyer's country to be awarded as part of costs.

In CLOUT case No. 130 the court held that legal costs incurred in actions to enforce claims under two different contracts were allowed. In CLOUT Abstract No. 930, the Swiss court held that reasonable costs for the recovery of the debt by the creditor are considered to be accessory costs, which can be claimed according to Article 74 of CISG. In *Wolfram R. Seidel GmbH v. Crotton S.A.*,<sup>93</sup> the court in Spain awarded to the buyer, under the heading of consequential damages, the costs of lawyer's fees in relation to extra-judicial claims addressed to the plaintiff outside Spain.

However, in *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*,<sup>94</sup> the court held that damages recoverable under Article 74 do not include attorney's fees incurred in the litigation by the successful plaintiff. The recovery of the costs of attorneys employed in litigating a claim under the Convention is a matter beyond the scope of the CISG, governed instead by the domestic law of the forum as a procedural question.<sup>95</sup>

#### **6. Conclusion:**

The study on claiming damages under CISG reveals that an aggrieved party 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 the Convention. 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. Article 74 of CISG requires only that the loss in question be foreseeable by the defendant as a possible consequence of breach. Articles 75 and 76 apply for damages, when a contract is avoided.

The essential requirements for claiming damages are that the loss must be foreseeable at the time of conclusion of contract, loss must be proved with reasonable certainty and the losses were not caused by the aggrieved party's failure to mitigate. The damages recoverable under Articles 74 to 76 are reduced if it is established that aggrieved party failed to mitigate losses.<sup>96</sup> There is no reduction if there is no failure to mitigate.<sup>97</sup> Article 78 deals with recovery of interest. A non-material loss, which includes emotional injury mental suffering and moral damages, is not recoverable under the Convention.<sup>98</sup>

The Convention determines the grounds for recovery of damages, however, the procedure for assessment of loss is not explained. The problem associated with the calculation of lost profits also could be reduced if parties set forth in their agreement the method that the tribunal is to use to calculate lost profits in the event of a breach of contract. Tribunals also may consider a greater use of experts in evaluating claims for lost profits.<sup>99</sup> Article 7 (2) of CISG provides that any gaps in the CISG 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.<sup>100</sup>

The aggrieved party has the burden of establishing the extent of damage. With regard to procedure, the applicable domestic law determines how to calculate damages. The types of damages aggrieved party may recover due to breach of contract includes non-performance damages, damages for lost volume, incidental damages, and consequential losses.

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<sup>2</sup> Hadley v. Baxendale, (1854) 9 Exch. 341 at 354.

<sup>3</sup> John Y. Gotanda, Recovering Lost Profits in International Disputes, Fall, 2004, 36 Geo. J. Int'l L. 61.

<sup>4</sup> UN CISG has been ratified by 83 parties as on 11<sup>th</sup> December 2015, source: [www.uncitral/status](http://www.uncitral/status).

<sup>5</sup> Jianming Shen, S.J.D., Fall, 1996, 13 Ariz. J. Int'l & Comp. Law 253.

<sup>6</sup> Article 1.

<sup>7</sup> Article 30.

<sup>8</sup> Articles 31 & 32.

<sup>9</sup> Article 33.

<sup>10</sup> Articles 35 & 42.

<sup>11</sup> Article 53.

<sup>12</sup> Article 45 (1).

<sup>13</sup> Article 45 (2).

<sup>14</sup> Article 61.

<sup>15</sup> Case Law on UNCITRAL (CLOUT) case no. 541 (Oberster Gerichtshof, Austria, 14 January 2002).

<sup>16</sup> Finland, Helsingin hovioikeus 26 October 2000.

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