Article 74

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

OVERVIEW

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

2. The Convention determines the grounds for recovery of damages, but domestic procedural law may apply to the assessment of evidence of loss.[2] Applicable domestic law also determines whether a party may assert a right to set off in a proceeding under the Convention (see paragraph 38 below). Domestic substantive law may also govern issues relevant to the determination of the amount of damages, such as the weighing of evidence.[3] Domestic law may also apply to issues such as punitive damages. In one case a court seemingly accepted the validity of a claim for punitive damages in the context of a CISG damages claim, although the determination of the amount of damages was left open.[4] Domestic law may also apply to effect an apportionment of damages between the parties according to their respective share of responsibility.[5]

3. A general principle of full compensation has been derived from the damage formula in article 74.[6] Pursuant to article 7 (2), a tribunal used this general principle to fill the gap in article 78, which provides for the recovery of interest in stated circumstances but does not indicate how the rate of interest is to be determined.[7]

4. In accordance with article 6 a seller and buyer may agree to derogate from or vary article 74. Several decisions enforce contract terms limiting[8] or liquidating[9] damages. The validity of these contract terms is, by virtue of article 4 *(a)*, governed by applicable domestic law rather than the Convention.[10] Whether a party can claim damages as well as a penalty will be determined by domestic law.[11]

RELATION TO OTHER ARTICLES

5. An aggrieved party may choose to claim under article 74 even if entitled to claim under articles 75 and 76.[12] The latter provisions explicitly provide that an aggrieved party may recover additional damages under article 74.

6. Under article 50, a buyer may claim a reduction in the purchase price due to non-conforming goods, but may also claim damages under article 74 for further losses it may have suffered.[13]

7. Damages recoverable under articles 74 are reduced if it is established that the aggrieved party failed to mitigate these damages as required by article 77.[14] The reduction is the amount by which the loss should have been mitigated. See the Digest for article 77.

8. Article 78 expressly provides for the recovery of interest in specified cases but states that its provisions are "without prejudice to any claim for damages recoverable under article 74". Several decisions have awarded interest under article 74.[15] Interest has been awarded as damages where the circumstances were not covered by article 78 because the interest claim did not relate to sums in arrears.[16]

9. An aggrieved seller may require the buyer to pay the price pursuant to article 62. An abstract of an arbitral opinion suggests that the tribunal awarded the seller the price as damages under article 74.[17]

RIGHT TO DAMAGES

10. Article 74 provides a general formula for the calculation of damages. The right to claim damages is set out in articles 45 (1) *(b)* and 61 (1) *(b)*. These paragraphs provide that the aggrieved buyer and the aggrieved seller, respectively, may claim damages as provided in articles 74 to 77 if the other party "fails to perform any of his obligations under the contract or this Convention". Thus, the article 74 formula may be used for calculating damages for breach of obligations under the Convention as well as breach of provisions of the sales contract.[18]

11. Article 74 states that damages may be awarded for "breach of contract" that causes loss, without any qualification as to the seriousness of the breach or the loss. An abstract of one arbitral award suggests nevertheless that damages may be recovered under article 74 for "fundamental non-performance".[19]

12. Under articles 45 and 61 an aggrieved party is entitled to recover damages without regard to the "fault" of the breaching party.[20] Several decisions consider whether claims based on a party's negligence are covered by the Convention. An arbitral award concluded that an aggrieved buyer failed to notify the seller of non-conformity in a timely manner as required by article 39 of the Convention, and the tribunal applied domestic civil law to divide the loss equally between the seller and the buyer on the ground that the Convention did not govern the issue of joint contribution to harm.[21] A court decision concluded that the Convention did not cover a claim that the alleged seller had made a negligent misrepresentation inducing the conclusion of the sales contract.[22]

13. When an aggrieved buyer fails, without excuse,[23] to give timely notice to a breaching seller in accordance with articles 39 or 43, the aggrieved buyer loses its right to rely on the seller's breach when making a claim for damages.[24] Under article 44 of the Convention, however, if the buyer has a "reasonable excuse" for failing to give the required notice, the aggrieved buyer may nevertheless recover damages other than lost profits.[25]

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

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

TYPES OF LOSSES

16. The first sentence of article 74 provides that an aggrieved party's damages consist of a monetary sum to compensate him for "loss, including loss of profit, suffered . . . as a consequence of the breach". Except for the explicit inclusion of lost profits, article 74 does not otherwise classify losses. Decisions sometimes refer to the classification of damages under domestic law.[26] It has been held that a buyer who has received non-conforming goods and has not avoided the contract is entitled to recover damages under article 74 measured by the difference between the value of the goods the buyer contracted for and the value of the non-conforming goods that were actually delivered.[27] One court decided that sums paid by the aggrieved party as an administrative penalty in connection with the breach of the contract should not be compensated as contract damages.[28]

Losses arising from death or personal injury

17. Article 5 provides that losses arising from death or personal injury are excluded from the Convention's coverage. However, when deciding on its jurisdiction, one court implicitly assumed that the Convention covers claims by a buyer against its seller for indemnification against claims by a sub-buyer for personal injury.[29]

Losses arising from damage to other property

18. Article 5 does not exclude losses for damage to property other than the goods purchased.[30]

Losses arising from damage to non-material interests

19. Article 74 does not exclude losses arising from damage to non-material interests, such as the loss of an aggrieved party's reputation because of the other party's breach. Some decisions have implicitly recognized the right to recover damages for loss of reputation or good will,[31] but at least one decision has denied such recovery under the Convention.[32] One court found claims for both loss of turnover and loss of reputation to be inconsistent.[33]

Losses arising from change in value of money

20. Article 74 provides for recovery of "a sum equal to the loss" but does not expressly state whether this formula covers losses that result from changes in the value of money. Several courts have recognized that an aggrieved party may suffer losses as a result of non-payment or delay in the payment of money. These losses may arise from fluctuations in currency exchange rates or devaluation of the currency of payment. Tribunals differ as to the appropriate solution. Several decisions have awarded damages to reflect currency devaluation[34] or changes in the cost of living.[35] On the other hand, several other decisions refused to award damages for such losses. One decision concluded that a claimant that is to receive payment in its own currency is generally not entitled to recover losses from currency devaluation, but went on to suggest that a claimant might recover damages for currency devaluations if it was to be paid in foreign currency and it had a practice of converting such currency immediately after payment.[36] Another court stated that while devaluation of the currency in which the price was to be paid could give rise to damages recoverable under the Convention, no damages could be awarded in the case before it because future losses could be awarded only when the loss can be estimated.[37]

EXPENDITURES BY AGGRIEVED PARTY

21. Many decisions have recognized the right of an aggrieved party to recover reasonable expenditures incurred in preparation for or as a consequence of a contract that has been breached. The second sentence of article 74 limits recovery to the total amount of losses the breaching party could foresee at the time the contract was concluded (see paragraphs 33-35 below). Although the Convention does not expressly require that expenditures be reasonable several decisions have refused to award damages when the expenditures were unreasonable.[38]

22. Decisions have awarded incidental damages to an aggrieved buyer who had made reasonable expenditures for the following purposes: inspection of non-conforming goods;[39] handling and storing non-conforming goods;[40] preserving goods;[41] shipping and customs costs incurred when returning the goods;[42] expediting shipment of substitute goods under an existing contract with a third party;[43]

installing substitute goods;[44] sales and marketing costs;[45] commissions;[46] banking fees for retransfer of payments;[47] wasted payment of value added tax;[48] hiring a third party to process goods;[49] obtaining credit;[50] delivering and taking back the non-conforming goods to and from a sub-buyer;[51] reimbursing sub-buyers on account of non-conforming goods;[52] moving replacement coal from stockpiles;[53] loss incurred in sub-chartering a ship that had been chartered to transport goods under a contract that the seller properly avoided;[54] additional shipping charges incurred by the buyer due to the seller delivering in instalments instead of one shipment;[55] installation and de-installation costs of defective goods;[56] 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.[57] Several decisions have awarded buyers who took delivery of non-conforming goods the reasonable costs of repair as damages.[58] At least one decision implicitly recognizes that an aggrieved buyer may recover incidental damages, although in the particular case the buyer failed to establish such damages.[59] Another decision assumed that the Convention governed a buyer's claim for indemnification for expenses incurred in reimbursing a sub-buyer for personal injury caused to an employee.[60] One court refused damages for the cost of retransferring a car and other incidental expenses relating to avoidance where the buyer was not entitled to avoid the contract.[61] One arbitral tribunal awarded the cost of acquiring equipment that subsequently became superfluous due to the avoidance of the contract, but ordered that ownership of those goods be transferred to the seller upon payment of the damages.[62]

23. Decisions may recognize that an aggrieved buyer may recover for particular types of expenditure but deny recovery in a particular case. Some decisions explicitly recognize that recovery is possible for the type of expenditure but deny recovery for failure of proof, lack of causation, or their unforeseeability by the breaching party. Thus one decision recognized the potential recovery of a buyer's advertising costs but declined to award damages because the buyer failed to carry its burden of proof.[63] Other decisions may implicitly assume the right to recover particular expenditures. When deciding on its jurisdiction, one court implicitly assumed that the Convention covers claims by a buyer against its seller for indemnification of a sub-buyer's claim for personal injury.[64]

24. Aggrieved sellers have recovered damages for the following incidental expenses: storage of goods at the port of shipment following the buyer's anticipatory breach;[65] storage and preservation of undelivered machinery;[66] the cost of modifying a machine in order to resell it;[67] costs related to the dishonour of the buyer's cheques.[68] A seller who has delivered non-conforming goods and subsequently cures the non-conformity is not entitled to recover the cost of cure.[69] A counter-claim by the seller for the value of the buyer's use of a defective machine was refused, because the buyer had used the machine in order to mitigate its damages.[70]

Expenditures for debt collection; attorney's fees

25. Decisions are split on whether the cost of using a debt collection agency other than a lawyer may be recovered as damages. Several decisions have awarded the seller the cost,[71] but several other decisions state that an aggrieved party may not recover compensation for the cost of hiring a debt collection agency because the Convention does not cover such expenses.[72] One case required such costs be incurred reasonably.[73]

26. A number of courts and arbitral tribunals have considered whether an aggrieved party may recover the costs of a lawyer hired to collect a debt arising from a sales contract. Several decisions award damages to compensate for legal fees for extra-judicial acts such as the sending of collection letters.[74] One decision distinguished between the extra-judicial fees of a lawyer in the forum and similar fees of a lawyer in another jurisdiction it included the fees of the former in the allocation of litigation costs under the forum's rules and awarded the fees of the latter as damages under article 74 of the Convention.[75]

27. Decisions are split as to whether attorney's fees for litigation may be awarded as damages under article 74.[76] Citing article 74, several arbitral tribunals have awarded recovery of attorney's fees for the arbitration proceedings.[77] In a carefully reasoned award, another arbitral tribunal concluded that a supplemental interpretation of the arbitration clause by reference to both article 74 and local procedural law authorized the award of attorney's fees before a tribunal consisting of lawyers.[78] It was further held that lawyer's fees reasonably incurred outside court proceedings were recoverable under article 74.[79] Another court stated that, in principle, legal costs could be recovered, although the court denied them in the particular case.[80] Many cases award attorney's fees without indicating whether the award is for damages calculated under article 74 or is made pursuant to the tribunal's rules on the allocation of legal fees.[81] Several decisions have limited or denied recovery of the amount of the claimant's attorney's fees on the grounds that the fees incurred were unforeseeable[82] or that the aggrieved party had failed to mitigate these expenses as required by article 77.[83] An appellate court in the United States reversed a decision awarding attorney's fees as damages under article 74 on the ground, inter alia, that the Convention did not implicitly overturn the "American rule" that the parties to litigation normally bear their own legal expenses, including attorneys' fees.[84]

LOST PROFITS

28. The first sentence of article 74 expressly states that damages for losses include lost profits. Many decisions have awarded the aggrieved party lost profits.[85] When calculating lost profits, fixed costs (as distinguished from variable costs incurred in connection with fulfilling the specific contract) are not to be deducted from the sales price.[86] One decision awarded a seller who had been unable to resell the goods the difference between the contract price and the current value of those goods.[87] The common profit margins of the buyer provide a basis for determining the buyer's claim for damages according to one case.[88] Another court awarded the buyer the difference between its unit costs for producing products using the defective production machine delivered by the seller, and the buyer's unit costs if the production machine had not been defective.[89] An arbitral tribunal awarded the commission the buyer would have earned as damages for

lost profit where the seller was aware of the commission.[90] One court calculated the damages for lost profits on the basis of the value of the goods in the intended market. Loss of profit will not be awarded where the loss could easily have been avoided by cover purchases of raw materials in accordance with article 77.[91]

29. The second sentence of article 74 limits the damages that can be awarded for losses caused by the breach to losses that the breaching party foresaw or should have foreseen at the time the contract was concluded.[92] One decision reduced the recovery of profits because the breaching seller was not aware of the terms of the buyer's contract with its sub-buyer.[93] An arbitral tribunal held that a profit margin of 10 per cent was foreseeable in the specific trade based on the use of an Incoterm.[94] One court held that it was foreseeable in the steel trade that goods were purchased for resale at a profit.[95] Another court held that it was not foreseeable that a breach would cause the buyer to acquire a new warehousing facility.[96]

30. Damages for lost profits will often require predictions of future prices for the goods or otherwise involve some uncertainty as to actual future losses.[97] Article 74 does not address the certainty with which these losses must be proved. One decision required the claimant to establish the amount of the loss according to the forum's "procedural" standards as to the certainty of the amount of damages.[98]

31. Evidence of loss of profits, according to one decision, might include evidence of orders from customers that the buyer could not fill, evidence that customers had ceased to deal with the buyer, and evidence of loss of reputation as well as evidence that the breaching seller knew or should have known of these losses.[99]

Damages for "lost volume" sales

32. In principle, an aggrieved seller who resells the goods suffers the loss of a sale when he has the capacity and market to sell similar goods to other persons because, without the buyer's breach, he would have been able to make two sales. Under these circumstances a court has concluded that the seller was entitled to recover the lost profit from the first sale.[100] Another court, however, rejected a claim for a "lost sale" because it did not appear that that the seller had been planning to make a second sale at the time the breached contract was negotiated.[101] An aggrieved buyer may have a similar claim to damages. A court concluded that a buyer could recover for damages caused by its inability to meet the market demand for its product as a result of the seller's delivery of non-conforming components.[102]

FORESEEABILITY

33. 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.[103] It has been noted that it is the possible consequences of a breach, not whether a breach would occur or the type of breach, that is subject to the foreseeability requirement of article 74; and it has been suggested that article 74 does not demand that the specific details of the loss or the precise amount of the loss be foreseeable.[104] In addition, such foreseeability must be assessed "objectively" and its proof is not confined to resorting to evidence from the breaching party.[105]

34. Decisions have found that the breaching party could not have foreseen the following losses: rental of machinery by buyer's sub-buyer;[106] processing goods in a different country following late delivery;[107] an exceptionally large payment to freight forwarder;[108] attorney's fees in dispute with freight forwarder;[109] the cost of resurfacing a grinding machine where that cost exceeded price of wire to be ground;[110] lost profits where breaching seller did not know terms of contract with sub-buyer;[111] the cost of inspecting the goods in the importing country rather than exporting country;[112] necessary preparation costs incurred by the buyer.[113] One court held that loss of reputation and loss of clientele is not generally foreseeable.

35. On the other hand, several decisions have explicitly found that claimed damages were foreseeable. One decision states that the seller of goods to a retail buyer should foresee that the buyer would resell the good,[114] while an arbitration tribunal found that a breaching seller could have foreseen the buyer's losses because the parties had corresponded extensively on supply problems.[115] Another decision concluded that a breaching buyer who failed to pay the price in advance, as required by the contract, could foresee that an aggrieved seller of fungible goods would lose its typical profit margin.[116] A majority of another court awarded 10 per cent of the price as damages to a seller who had manufactured the goods to the special order of the buyer; the majority noted that a breaching buyer could expect such a seller's profit margin.[117] It has also been held that a buyer could foresee that its failure to establish a letter of credit as required by the sales contract would leave the seller with a chartered vessel, intended to transport the goods, that it could not use; the loss the seller incurred in sub-chartering that vessel was thus recoverable under article 74.[118] An arbitral tribunal held that it was foreseeable that a buyer would finance its purchases and would have to pay interest on such financing.[119]

BURDEN AND STANDARD OF PROOF

36. Although none of the damage formulae in articles 74, 75 and 76 expressly allocates the burden of proof, those decisions that address the issue agree, more or less expressly, that the party making the claim bears the burden of establishing its claim.[120] One court gave effect to a national law rule that, if a breaching seller acknowledges defects in the delivered goods, the burden of establishing that the goods conformed to the contract shifts to the seller.[121] Another decision expressly placed the burden of establishing damages on the claimant.[122]

37. Several decisions state that domestic procedural and evidentiary law rather than the Convention governs the standard of proof and the weight to be given evidence when determining damages.[123] In one case a court awarded damages on a basis of fairness (*ex aequo et bono*) where the seller could not establish its damages with certainty.[124]

A Supreme Court left open whether the standard of proof is an autonomous "standard of reasonableness" or is governed by the court's domestic law of procedure. The decision however expresses sympathy with the latter approach.[125]

SET OFF

38. Although the Convention does not address the issue of whether a counterclaim may be set off against a claim under the Convention,[126] the Convention does determine whether a counterclaim arising from a sales contract exists[127] and, if it does, the counterclaim may then be subject to set off against a claim arising under the Convention.[128]

JURISDICTION; PLACE OF PAYMENT OF DAMAGES

39. Several decisions have concluded that, for the purpose of determining jurisdiction, damages for breach of contract are payable at the claimant's place of business.[129]

Notes

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

[2] Helsingin hoviokeus, Finland, 26 October 2000, English translation available on the Internet at www.cisg.law.pace.edu (grounds for recovery determined under CISG but calculation of damages made under article 17 of the Finnish Law of Civil Procedure); CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (applicable domestic law determines how to calculate damages when amount cannot be determined); CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994] (referring to "sufficient evidence [under the common law and the law of New York] to estimate the amount of damages with reasonable certainty"), affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1993, 3 March 1995]; U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010 (ECEM European Chemical Marketing B.V. v. The Purolite Company), available on the Internet at www.cisg.law.pace.edu.

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

[4] U.S. District Court, Southern District of New York, United States, 30 March 2010 (Guangxi Nanning Baiyang Food Co. Ltd v. Long River International, Inc.), available on the Internet at www.cisg.law.pace.edu.

[5] Supreme People's Court, People's Republic of China, 30 June 2014, (ThyssenKrupp Metallurgical Products GmbH v. Sinochem International (Overseas) Pte Ltd), (2013) *Min Si Zhong Zi* No. 35 Civil Judgment, available on the Internet at www.court.gov.cn.

[6] CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (deriving general principle from article 74 for purposes of filling gap in article 78, in accordance with article 7 (2)). See also CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (article 74 is "designed to place the aggrieved party in as good a position as if the other party had properly performed the contract") (see full text of the decision). For further discussion of a general principle of full compensation, see the Digest for article 7.

[7] CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994].

[8] Hovioikeus Turku, Finland, 12 April 2002, English translation available on the Internet at www.cisg.law.pace.edu (contract term limiting recovery of damages is enforceable).

[9] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (Arbitral award No. 302/1996), Rozenberg, *Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy Moscow* (1999–2000) No. 27 [141–147], English translation available on the Internet at www.cisg.law.pace.edu (liquidated damage clause displaces remedy of specific performance; amount of liquidated damages was reasonable and foreseeable under article 74 as measure of expected profit); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia Federation, 23 November 1994 (Arbitral award No. 251/93), Unilex (damages for delay granted only to extent of contract penalty for delay clause); Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at www.cisg.law.pace.edu (penalties for delay awarded); Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 18 November 2004 (Manufactured articles), English translation available on the Internet at www.cisg.law.pace.edu (penalties for late performance sustained); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 March 2004 (Arbitral award No. 135/2003), English translation available on the Internet at www.cisg.law.pace.edu.

[10] See Hangzhou Intermediate People's Court, People's Republic of China, 30 October 2014, (Globtrans-bat Ltd v. Hangzhou Fuxing Group Co. Ltd), (2013) *Zhe Hang Shang Wai Chu Zi* No. 182 Civil Judgment, available on the Internet at www.court.gov.cn; CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (term in seller's general conditions limiting damages not validly incorporated into contract) (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (validity of standard term excluding liability determined by domestic law, but reference in domestic law to non-mandatory rule replaced by reference to equivalent Convention provision).

[11] Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at www.cisg.law.pace.edu (where penalty exceeds the actual damages, the buyer was entitled to claim penalty amount reduced according to domestic law).

[12] U.S. District Court, Eastern District of Missouri, United States, 10 January 2011 (Semi-Materials Co., Ltd v. MEMC Electronic Materials, Inc.), available on the Internet at www.cisg.law.pace.edu. CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved

party may claim under article 74 even if it could also claim under articles 75 or 76). See also CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994) (citing article 74, the tribunal awarded buyer the difference between contract price and price in substitute purchase); CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (awarding seller, without citation of specific Convention article, difference between contract price and price in substitute transaction); China International Economic and Trade Arbitration Commission, People's Republic of China, 26 December 2005 (Heating system device case), English translation available on the Internet at www.cisg.law.pace.edu; Efetio Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case), English translation available on the Internet at www.cisg.law.pace.edu.

[13] Amtsgericht Luzern-Land, Switzerland, 21 September 2004 (watches case), English translation available on the Internet at www.cisg.law.pace.edu (buyer failed to provide sufficient evidence to sustain such claims however); Hof van Beroep Gent, Belgium, 10 May 2004 (N.V. Maes Roger v. N.V. Kapa Reynolds), English translation available on the Internet at www.cisg.law.pace.edu.

[14] CLOUT case No. 1029 [Cour d'appel Rennes, France, 27 May 2008 (Brassiere cups case)] (buyer failed to notify seller of defects in the goods in a timely manner where the goods were being specifically manufactured).

[15] See, for example, Van Gerechtshof 's-Hertogenbosch, the Netherlands, 20 October 1997 (Dongen Waalwijk Leder BV v. Conceria Adige S.p.A.), Unilex (interest awarded under both articles 74 and 78); Pretura di Torino, Italy, 30 January 1997, Unilex (aggrieved party entitled to statutory rate of interest plus additional interest it had established as damages under article 74), English available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (seller awarded interest under article 74 in amount charged on bank loan to seller that was needed because of buyer's non-payment); Amtsgericht Koblenz, Germany, 12 November 1996, English translation available on the Internet at www.cisg.law.pace.edu (bank certificate established that aggrieved seller was paying higher interest rate than official rate under applicable law); Käräjäoikeus of Kuopio, Finland, 5 November 1996, available on the Internet at www.utu.fi (breaching party could foresee aggrieved party would incur interest charges, but not the actual rate of interest in Lithuania); CLOUT case No. 195 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1995] (seller entitled to higher interest under article 74 if he established damages caused by non-payment); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (damages includes interest paid by aggrieved seller on bank loans); CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (interest awarded at commercial bank rate in Austria); Landgericht Berlin, Germany, 6 October 1992, English translation available on the Internet at www.cisg.law.pace.edu (assignee of aggrieved party's claim entitled to recover 23 per cent interest rate charged by assignee); CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (seller recovered price and interest at the statutory rate in Italy plus additional interest as damages under article 74). See also CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999] (aggrieved party had right to recover damages under the Convention for losses resulting from delay in payment but applicable domestic law determines when delay becomes culpable); CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996] (failure to establish additional damages under article 74); CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (claimant awarded statutory interest rate under article 78 but claimant failed to establish payment of higher interest rate for purposes of recovering damages under article 74); Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 1 October 2007 (Timber case). English translation available on the Internet at www.cisg.law.pace.edu.

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

[17] Arbitration Court of the International Chamber of Commerce, February 1997 (Arbitral award No. 8716), (Fall 2000) *ICC International Court of Arbitration Bulletin*, vol. 11, No. 2, pp. 61-63 (damages awarded in amount of price).

[18] See, for example, CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (seller's failure to notify the buyer that the seller was suspending performance in accordance with article 71 (3) was itself a breach of the Convention entitling buyer to damages).

[19] Arbitration Court of the International Chamber of Commerce, February 1997 (Arbitral award No. 8716), (Fall 2000) *ICC International Court of Arbitration Bulletin,* vol. 11, No. 2, pp. 61-63.

[20] Oberlandesgericht Linz, Austria, 8 February 2012, *Internationales Handelsrecht* 2015, 104 = CISG-online No. 2444; CLOUT case No. 1233 [Oberlandesgericht Munich, Germany, 5 March 2008] (Stolen car case), English translation available on the Internet at www.cisg.law.pace.edu

[21] Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996 (No. 56/1995), Unilex (setting a 50/50 division of the 10 per cent of price held back by buyer because of non-conformity of goods).

[22] U.S. District Court, Southern District of New York, United States, 10 May 2002 (Geneva Pharmaceuticals Tech. Corp. v. Barr Laboratories, Inc.), available on the Internet at www.cisg.law.pace.edu (domestic law "tort" claim of negligent misrepresentation not preempted by Convention). See also CLOUT case No. 420 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 August 2000] (Convention does not govern non-contractual claims); Kantonsgericht St. Gallen, Switzerland, 13 May 2008 (skid chains and adaptors case), English translation available on the Internet at www.cisg.law.pace.edu (pre-contractual misrepresentations by the seller caused reliance damage to the buyer when reselling the goods).

[23] See CISG articles 40 (buyer's failure is excused when seller could not have been unaware of non-conformity and failed to disclose non-conformity to buyer) and 44 (preserving specified remedies for the buyer if he has "reasonable excuse" for failure to notify). See also CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (buyer need not give notice declaring avoidance of contract when seller stated it would not perform); CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (seller estopped from asserting buyer's failure to give timely notice).

[24] See, for example, CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999] (failure to give sufficiently specific notice); CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (failure to give sufficiently specific notice); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (failure to satisfy article 39 bars both CISG and tort claims for damages); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (failure to give sufficiently specific notice); CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (failure to give timely notice); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (failure to give timely notice); CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (failure to notify); CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (failure to notify); CLOUT case No. 50

[Landgericht Baden-Baden, Germany, 14 August 1991] (failure to give timely notice of non-conformity); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (failure to examine and notify of non-conformity of goods).

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

[26] See, for example, CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (loss of profit in case was "positive damage") (see full text of the decision); CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit) United States 6 December 1995] ("incidental and consequential" damages) (see full text of the decision) affirming in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994].

[27] CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

[28] Federal Arbitrazh Court of Moscow District No. KG-A40/5498-00, 6 December 2000.

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

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

[31] Helsingin hoviokeus, Finland, 26 October 2000, English translation available on the Internet at www.cisg.law.pace.edu (recovery of good will calculated in accordance with national rules of civil procedure); CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (stating that article 74 includes recovery for loss of goodwill but aggrieved party did not substantiate claim) (see full text of the decision); CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (no recovery under CISG for loss of good will unless loss of business proved); CLOUT case No. 210 [Audiencia Provincial Barcelona, Spain, 20 June 1997] (aggrieved party did not provide evidence showing loss of clients or loss of reputation) (see full text of the decision).

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

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

[34] Arrondissementsrechtbank Roermond, the Netherlands, 6 May 1993 (Gruppo IMAR S.p.A. v. Protech Horst BV), Unilex (damages in amount of devaluation because payment not made when due); Tribunal cantonal Valais, Switzerland, 28 January 2009 (Fiberglass composite materials case), English translation available on the Internet at www.cisg.law.pace.edu.

[35] See, for example, Tribunal commercial de Bruxelles, Belgium, 13 November 1992 (Maglificio Dalmine s.l.r. v. S.C. Covires), Unilex (failure to pay price; court allowed revaluation of receivable under Italian law to reflect change in cost of living in seller's country).

[36] CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (seller did not establish its loss from devaluation of currency in which price was to be paid). See also Tribunal cantonal Valais, Switzerland, 28 January 2009 (Fiberglass composite materials case), English translation available on the Internet at www.cisg.law.pace.edu.

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

[38] CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision); CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (expense of resurfacing grinding machine not reasonable in relation to price of wire to be ground); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 9 September 1994 (Arbitral award No. 375/93) (recovery of storage expenses shown to be in amounts normally charged).

[39] Stockholm Chamber of Commerce, Sweden, 1998, Unilex (examination).

[40] Stockholm Chamber of Commerce, Sweden, 1998, Unilex (storage); CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (reversing in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], which had denied recovery of storage costs).

[41] CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531).

[42] CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (reversing in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], which had denied recovery of shipping costs and customs duties); Pretore del Distretto di Lugano, Switzerland, 19 April 2007 (children's play structure case), English translation available on the Internet at www.cisg.law.pace.edu (cost of storage not proven); China International Economic and Trade Arbitration Commission, People's Republic of China, December 2006 (Automobile case), English translation available on the Internet at www.cisg.law.pace.edu.

[43] CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (affirming in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], which had awarded costs of expediting shipment of goods under existing contract); China International Economic and Trade Arbitration Commission, People's Republic of China, 25 July 2006 (Bleached softwood Kraft pulp case), English translation available on the Internet at www.cisg.law.pace.edu.

[44] CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; CLOUT case No. 732 [Audiencia Provincial de Palencia, Spain, 26 September 2005 (Printing machine case)].

[45] Helsingin hoviokeus, Finland, 26 October 2000, English translation available on the Internet at www.cisg.law.pace.edu (damages recovered for sales and marketing expenses of aggrieved buyer).

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

[47] Zivilgericht Basel-Stadt, Switzerland, 8 November 2006 (packaging machine case), English translation available on the Internet at www.cisg.law.pace.edu.

[48] Landgericht Berlin, Germany, 13 September 2006 (Aston Martin automobile case), English translation available on the Internet at www.cisg.law.pace.edu.

[49] CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997]; CLOUT case No. 732 [Audiencia Provincial de Palencia, Spain, 26 September 2005 (Printing machine case)].

[50] CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

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

[52] CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (buyer entitled to damages in amount of compensation paid to sub-buyer for non-conforming goods); Landgericht Paderborn, Germany, 25 June 1996, Unilex (damages for reimbursement of sub-buyer's travel expenses to examine product, costs of examination, cost of hauling defective products, costs of loss on a substitute purchase). See also CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)] (no indemnity awarded because third party's pending claim against buyer was not yet resolved); China International Economic and Trade Arbitration Commission, People's Republic of China, December 2006 (rabbit skin case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1182 [Hovioikeus hovrätt Turku Finland, 24 May 2005] (irradiated spice case), English translation available on the Internet at www.cisg.law.pace.edu.

[53] Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), Unilex (cost of moving replacement coal from stockpiles recoverable).

[54] CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000].

[55] CLOUT case No. 1119 [China International Economic and Trade Arbitration Commission, People's Republic of China, 9 November 2005] (DVD machines case), English translation available on the Internet at www.cisg.law.pace.edu.

[56] CLOUT case No. 1515 [Oberster Gerichtshof, Austria, 15 January 2013], *Internationales Handelsrecht* 2013, 117 = CISG-online No. 2398 (delivery of mosaic tiles which were in part defective: costs of cover purchase and of de-installation (?) of already installed tiles which were not defective but did not fit with the new tiles = recoverable); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 November (Arbitral award No. 2006 98/2005) (Feedstock equipment case), English translation available on the Internet at www.cisg.law.pace.edu; Zivilgericht Basel-Stadt, Switzerland, 8 November 2006 (Packaging machine case), English translation available on the Internet at www.cisg.law.pace.edu.

[57] Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 1 October 2007 (Timber case), English translation available on the Internet at www.cisg.law.pace.edu. See, however, CLOUT case No. 1235 [Oberlandesgericht Dresden, Germany, 21 March 2007] (Stolen automobile case), English translation available on the Internet at www.cisg.law.pace.edu, where recovery of such costs was refused because the buyer could not establish the necessity of incurring them.

[58] Bundesgerichtshof, Germany, 24 September 2014, *Neue Juristische Wochenschrift* 2015, 867 = CISG-online No. 2545 (buyer's reasonable and necessary cost to put defective goods into usable state is recoverable); CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002]; CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (expenses incurred when attempting to remedy the non-conformity) (see full text of the decision), affirming in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994]; Ontario Court-General Division, Canada, 16 December 1998 (Nova Tool and Mold Inc. v. London Industries Inc.), Unilex (reimbursing expenses of having third party perform regraining that had been overlooked by seller, and of repairing non-conforming goods); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (cost of repair); Landgericht Stuttgart, Germany, 29 October 2009 District Court (artificial turf case), English translation available on the Internet at www.cisg.law.pace.edu (cutting out white lines in turf delivered for a golf course); CLOUT case No. 1117 [China International Economic and Trade Arbitration Commission, People's Republic of China, 31 May 2006] (Diesel generator case), English translation available on the Internet at www.cisg.law.pace.edu.

[59] CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (advertising costs not sufficiently particularized) (see full text of the decision). See also Pretore del Distretto di Lugano, Switzerland, 19 April 2007 (Children's play structure case), English translation available on the Internet at www.cisg.law.pace.edu (cost of storage not proven).

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

[61] CLOUT case No. 1232 [Oberlandesgericht Stuttgart, Germany, 31 March 2008] (Automobile case), English translation available on the Internet at www.cisg.law.pace.edu.

[62] China International Economic and Trade Arbitration Commission, People's Republic of China, 3 August 2006 (Water pump case), English translation available on the Internet at www.cisg.law.pace.edu.

[63] CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (advertising costs not sufficiently particularized) (see full text of the decision). See also CLOUT case No. 935 [Handelsgericht Zürich, Switzerland, 25 June 2007] (Printed materials case), English translation available on the Internet at www.cisg.law.pace.edu.

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

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

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

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

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

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

[70] Zivilgericht Basel-Stadt, Switzerland, 8 November 2006 (Packaging machine case), English translation available on the Internet at www.cisg.law.pace.edu.

[71] Landgericht München 15 March 2012, *Internationales Handelsrecht* 2013, 72 = CISG-online No. 2583 (cost for debt collection abroad by domestic debt collector is not recoverable whereas involvement of foreign debt collector can be helpful and cost thus recoverable); CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999] (recovery of debt collection costs allowed); CLOUT case No. 1203 [Rechtbank Breda, the Netherlands, 16 January 2009] (Watermelon case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 930 [Tribunal cantonal Valais, Switzerland, 23 May 2006] (Suits case), English translation available on the Internet at www.cisg.law.pace.edu.

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

[73] Rechtbank Rotterdam, Netherlands, 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.), English translation available on the Internet at www.cisg.law.pace.edu.

[74] CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003] (reminder letter) (see full text of the decision); CLOUT case No. 254 [Handelsgericht des Kantons Aargau, Switzerland, 19 December 1997] (extra-judicial costs); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996] (reminder letter); Landgericht Aachen, Germany, 20 July 1995, Unilex (pre-trial costs recoverable under article 74); Kantonsgericht Zug, Switzerland, 1 September 1994, Unilex (expenses for non-judicial requests for payment reimbursable if payment was overdue at time of request). See also CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (seller failed to mitigate loss in accordance with article 77 when it hired a lawyer in buyer's location rather than a lawyer in seller's location to send a collection letter); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (although in principle legal costs incurred before avoidance of the contract are recoverable under article 74, they were not recoverable in this case because the fees were recovered in special proceedings); Gerechtshof 's-Hertogenbosch, the Netherlands, 27 November 1991 (De Vos en Zonen v. Reto Recycling), Unilex (construing ULIS article 82, predecessor of article 74, court allowed extrajudicial costs). See also U.S. Court of Appeals (7th Circuit), United States, 19 November 2002 (Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.), available on the Internet at www.cisg.law.pace.edu (leaving open whether certain prelitigation expenditures might be recovered as damages when, e.g., expenditures were designed to mitigate the aggrieved party's losses); CLOUT case No. 796, [Juzgado de Primera Instancia, No. 3 de Badelona, Spain, 22 May 2006 (Bermuda shorts case)].

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

[76] Many decisions award attorneys' fees but support the award by citation to domestic law on the allocation of litigation costs. See, for example, Landgericht Potsdam, Germany, 7 April 2009 (Pharmaceutical implements), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1117 [China International Economic and Trade Arbitration Commission, People's Republic of China, 31 May 2006] (Diesel generator case), English translation available on the Internet at www.cisg.law.pace.edu.

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

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

[79] Landgericht München, 15 March 2012, *Internationales Handelsrecht* 2013, 72 = CISG-online No. 2583.

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

[81] See, for example, Hovioikeus Turku [Court of Appeals], Finland, 12 April 2002, English translation available on the Internet at www.cisg.law.pace.edu (without citing article 74, court provides for recovery of attorneys' fees); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 November 2006 (Arbitral award No. 2006 98/2005) (Feedstock equipment case), English translation available on the Internet at www.cisg.law.pace.edu.

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

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

[84] U.S. Court of Appeals (7th Circuit), United States, 19 November 2002 (Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.), available on the Internet at www.cisg.law.pace.edu (leaving open whether certain prelitigation expenditures might be recovered as damages). (The United States Supreme Court denied certiorari for this case on 1 December 2003.) See also U.S. District Court, New Jersey, United States 15 April 2009 (San Lucio, S.r.l. et al. v. Import & Storage Services, LLC), available on the Internet at www.cisg.law.pace.edu.

[85] Helsingin hoviokeus, Finland, 26 October 2000, English translation available on the Internet at www.cisg.law.pace.edu (lost profit calculated in accordance with national law of civil procedure); CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000 (Arbitral award No. 406/1998)] (aggrieved

buyer entitled in principle to recover for lost profit from sale to its customer); CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (aggrieved buyer entitled to recover difference between value that contract would have had if seller had performed and the costs saved by buyer); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (buyer entitled to lost profits); CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (breaching seller liable in amount of buyer's lost profits when buyer had to reimburse sub-buyer); CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (buyer's lost profits), affirming in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994]; CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)] (seller's lost profits measured by article 75). See also CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999] (buyer did not produce evidence of lost profits) (see full text of the decision); Bundesgericht, Switzerland, 17 December 2009 (Watches case), English translation available on the Internet at www.cisg.law.pace.edu; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at www.cisg.law.pace.edu (penalties for delay awarded); Rechtbank Arnhem, the Netherlands, 1 March 2006 (Skoda Kovarny v. B. van Dijk Jr. Staalhandelmaatschappij B.V.), English translation available on the Internet at www.cisg.law.pace.edu.

[86] CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (in calculating lost profits, holding that fixed costs are not costs the aggrieved buyer saved); CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1993, 3 March 1995] (in absence of specific direction in Convention for calculating lost profits, standard formula employed by most US courts appropriate) (see full text of the decision). See also U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Tunes, Inc. et al. v. Gerhard Schubert GmbH), available on the Internet at www.cisg.law.pace.edu.

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

[88] Bundesgericht, Switzerland, 17 December 2009 (Watches case), English translation available on the Internet at www.cisg.law.pace.edu.

[89] Zivilgericht Basel-Stadt, Switzerland, 8 November 2006 (Packaging machine case), English translation available on the Internet at www.cisg.law.pace.edu.

[90] Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at www.cisg.law.pace.edu (penalties for delay awarded).

[91] Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 2005 (Arbitral award No. 48), English translation available on the Internet at www.cisg.law.pace.edu.

[92] China International Economic and Trade Arbitration Commission, People's Republic of China, December 2006 (Rabbit skin case), English translation available on the Internet at www.cisg.law.pace.edu (seller was aware of the resale contract and ought to have foreseen the profit margin).

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

[94] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006 (Arbitral award No. 105/2005), English translation available on the Internet at www.cisg.law.pace.edu. In another case a tribunal awarded 30 per cent as the margin of lost profit: China International Economic and Trade Arbitration Commission, People's Republic of China, 22 August 2005 (Valve case), English translation available on the Internet at www.cisg.law.pace.edu.

[95] Rechtbank Arnhem, the Netherlands, 1 March 2006 (Skoda Kovarny v. B. van Dijk Jr. Staalhandelmaatschappij B.V.), English translation available on the Internet at www.cisg.law.pace.edu.

[96] U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Tunes, Inc. et al. v. Gerhard Schubert GmbH,), available on the Internet at www.cisg.law.pace.edu.

[97] Oberlandesgericht Brandenburg, Germany, 18 November 2008 (Beer case), English translation available on the Internet at www.cisg.law.pace.edu (cancellation of a beer contract where buyer had to buy certain amounts of beer over the contractual period).

[98] CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994] ("sufficient evidence [under common law and law of New York] to estimate the amount of damages with reasonable certainty"), affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1993, 3 March 1995]. See also, U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Tunes, Inc. et al. v. Gerhard Schubert GmbH), available on the Internet at www.cisg.law.pace.edu (damages must be determined with sufficient certainty).

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

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

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

[102] CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994] (distinguishing between lost sales for which there was sufficiently certain evidence of damage and other "indicated orders" for which evidence was too uncertain) (see full text of the decision), affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1993, 3 March 1995].

[103] Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009) (Bullet-proof vest case), English translation available on the Internet at www.cisg.law.pace.edu.

[104] CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision). See also Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009 (Bullet-proof vest case), English translation available on the Internet at www.cisg.law.pace.edu.

[105] CLOUT case No. 1132 [Federal Court of Australia (Full Court), Victoria District Registry, Australia, 20 April 2011] (Castel Electronics Pty Ltd v. Toshiba Singapore Pte Ltd), [2011] FCAFC 55 at [318].

[106] China International Economic and Trade Arbitration Commission, People's Republic of China, 20 June 1991, *Zhongguo Guoji Jingji Maoyi Zhongcai Caijueshu Xuanbian* (1989-1995) (Beijing 1997), No. 75 [429-438] (rental of machinery by buyer's sub-buyer not foreseeable by breaching seller).

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

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

[109] Stockholm Chamber of Commerce, Sweden, 1998, Unilex (aggrieved buyer's attorney's fees for dispute with freight forwarder).

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

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

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

[113] Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at www.cisg.law.pace.edu (penalties for delay awarded).

[114] High People's Court of Tianjin Municipality, People's Republic of China, 23 March 2007, (Canada Teda Enterprises Inc. v. Shanxi Weite Food Co. Ltd), (2006) *Jin Gao Min Si Zhong Zi* No. 148 Civil Judgment, available on the Internet at www.ccmt.org.cn; CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (the seller of goods to a retail buyer should foresee that the buyer will resell the good). See also CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (buyer who failed to take delivery of electronic ear devices could foresee the seller's delivery losses) (see full text of the decision).

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

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

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

[118] CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision).

[119] Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 1 October 2007 (Timber case), English translation available on the Internet at www.cisg.law.pace.edu.

[120] CLOUT case No. 1511 [Cour d'appel de Rennes, 9 May 2012]; See CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000 (Arbitral award No. 406/1998)] (aggrieved buyer had burden); CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved party failed to carry burden); CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999] (aggrieved party carried burden of proof) (see full text of the decision); CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (aggrieved party failed to carry burden); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (aggrieved party failed to produce evidence of actual loss under article 74 or current market price under article 76); CLOUT case No. 467 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 11 September 1998 (Arbitral award No. 407/1996)] (aggrieved buyer established amount of loss) (see full text of the decision); City of Moscow Arbitration Court, Russian Federation, 3 April 1995 (case No. 18-40), English translation available on the Internet at www.cisg.law.pace.edu (aggrieved buyer "substantiated" relevant current price and currency conversion rate); Oberlandesgericht Brandenburg, Germany, 18 November 2008 (Beer case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1021 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 15 July 2008] (Milk packaging equipment case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 935 [Handelsgericht Zürich, Switzerland, 25 June 2007] (printed materials case), English translation available on the Internet at www.cisg.law.pace.edu; Hovioikeus hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English translation available on the Internet at www.cisg.law.pace.edu. For further discussion of the burden of proof with respect to damage claims, see the Digest for Part III, Section II, Chapter V.

[121] Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at www.rws-verlag.de, English translation available on the Internet at www.cisg.law.pace.edu (breaching seller failed to show conformity at time risk shifted to buyer).

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

[123] CLOUT case No. 1506 [Cour d'appel de Nancy, France, 6 November 2013] (implicit solution); Helsingin hoviokeus [Helsinki Court of Appeals], Finland, 26 October 2000, English translation available on the Internet at www.cisg.law.pace.edu (grounds for recovery were governed by CISG, but the calculation of damages was governed by article 17 of the Finnish Law of Civil Procedure); CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (applicable domestic law determines how to calculate damages when amount cannot be determined); CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994] ("sufficient

evidence [under common law and law of New York] to estimate the amount of damages with reasonable certainty"), affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1993, 3 March 1995]; Hovioikeus hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English translation available on the Internet at www.cisg.law.pace.edu.

[124] Rechtbank van Koophandel Hasselt, Belgium, 20 September 2005 (M. Smithuis Pre Pain v. Bakkershuis), English translation available on the Internet at www.cisg.law.pace.edu.

[125] Bundesgerichtshof, Germany, 16 July 2013, *Internationales Handelsrecht* 2014, 58 = CISG-online No. 2466.

[126] CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998] (applicable law, not Convention, determines whether set off permitted); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (domestic law applicable by virtue of private international law rules determines whether set off allowed); CLOUT case No. 908 [Handelsgericht Zürich, Switzerland, 22 December 2005] (Retail fashion clothes case), English translation available on the Internet at www.cisg.law.pace.edu. For further discussion of set off, see the Digest for Part III, Section II, Chapter V.

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

[128] CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (buyer's counterclaim set off against seller's claim for price); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (buyer damages set off against price); Stockholm Chamber of Commerce, Sweden, 1998, Unilex (damages for non-conformity set off against claim for price); CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (buyer's counterclaim would have been allowable as set off had seller breached). See also CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (implicitly recognizing the possibility that buyer's tort claim could be raised in order to be set off against seller's claim for the price, but applying CISG notice provisions to bar tort claim); Landgericht Stuttgart, Germany, 29 October 2009 (Artificial turf case), English translation available on the Internet at www.cisg.law.pace.edu ("A set-off is at least admissible in the field of application of the CISG without an express provision as long as the counterclaim is based on the same legal relationship").

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