DAMAGES: THE NEED FOR UNIFORMITY

Djakhongir Saidov[*]

1. INTRODUCTION

The remedy of damages under the Convention is an area which has given rise to a number of problems which are either unresolved or have been dealt with in a non-uniform manner by judges and arbitrators. The purpose of this paper is to highlight some of these problems, identify different types of treatment that they have received, and put forward relevant arguments and suggestions. The problems will be discussed in the context of the case that has been decided by the Commercial Court of Zurich (Switzerland) on 10 February 1999[1] on the basis of the Convention. The reason for selecting this case as the basis for the discussion is that it is one of the relatively few cases under the Convention which has dealt with *several* important aspects of the law of damages and has made pronouncements in relation to a number of controversial issues. The issues raised by the decision in this case include the problems of recoverability of loss of or damage to reputation, loss of a chance, and standards of proving loss. This work will start by stating the facts of the case. The next sections will deal with each of the mentioned problems in turn. Finally, the conclusion will provide a summary of the issues raised by the case and suggestions put forward by this work.

2. FACTS

The case involves a dispute between a Swiss buyer and an Italian seller. The buyer was a publishing house for art books, and the seller was active in a printing trade. The dispute arose from the contracts on the basis of which the seller had undertaken to print, bind, and supply the buyer with various art catalogues and books. The seller claimed the payment of outstanding invoices relating to the seller's performance of the contracts. The buyer, in turn, argued that it was entitled to set off the seller's claims with counterclaims for

---

* Lecturer, University of Birmingham (United Kingdom).

1. CLOUT Case No. 331 [Handelsgericht Zurich, Switzerland, 10 Feb. 1999], *available at* http://cisgw3.law.pace.edu/cases/990210s1.html.

damages and reduction of the price. The dispute involves claims arising from several contracts. Since the focus of this paper is on the remedy of damages, only the court's treatment of the buyer's claims for damages is relevant for the present purposes.

First, the buyer argued that the seller had delivered the art books which had been printed with the use of a different type of paper than that agreed to by the parties. As a result, the books delivered by the seller did not conform to the contract and were of inferior quality. The buyer argued that it had suffered damage to its "image."[2] The court rejected this argument on the ground that the buyer's claim for compensation for this loss was not sufficiently substantiated by stating that "[w]hile the good will-damage . . . can certainly be compensated under the CISG . . . it also needs to be substantiated and explained concretely."[3]

The remaining three claims arose from the alleged late delivery. The buyer argued that as a result of the seller's late delivery of art books and catalogues to two presentations, an art exhibition and a press conference, it had suffered loss of profit because it had never again been considered by sponsors of these events as a potential supplier[4] and because it had failed to sell its products at these events.[5] All these claims were rejected by the court either on the ground that the seller had complied with its obligation to deliver the goods on time and was, therefore, not liable for late delivery[6] and/or on the ground that the buyer had failed to prove its loss of profit.[7] The important

---

2. *See id.* ¶¶ 2.1, 3.1(a). The buyer's claim was not entirely clear since it mainly relied on "the book's lower value" which (and it is not clear why) has been calculated on the basis of the binding costs incurred by the buyer. This claim has been interpreted by the court as either referring to the remedy of the reduction of the price under Article 50 or to the remedy of damages. Even if the buyer's claim was one for damages it is also by no means clear whether the buyer claimed compensation for losses *flowing from* damage to its image or whether it also wanted compensation for damage to its image *itself*.

3. *Id.* ¶ 3.1(b). The other reason for this decision was that the buyer had failed to demonstrate the connection between "good will-damage" and binding costs.

4. *See id.* ¶¶ 2.2, 2.4.

5. *See id.* ¶ 2.3.

6. *See* CLOUT Case No. 331, *supra* note 1, ¶ 3.2(d)(cc).

> Art. 31 CISG . . . distinguishes between contracts that involve the carriage of goods and such contracts where carriage is not necessary. . . . The seller's delivery obligation . . . consists in initiating the transport of the goods: He must hand over the goods to the first carrier for transmission to the buyer. . . . By handing over the goods to the first carrier for transmission to the buyer, the seller fulfils his delivery obligation. For this reason, the buyer may no longer hold the seller liable for non-performance under Art. 45(1)(b) CISG, if . . . the handing over to the buyer is delayed.

Id. ¶ 3.2(d)(cc) (citation omitted).

7. The court's ruling that the seller was not liable for late deliveries was the primary basis for rejecting only the two of the buyer's claims. *Id.* ¶¶ 3.2(d)(cc), 3.3(b). Nonetheless, the court has also added

pronouncement of the court was that the "CISG does not determine which degree of certainty is necessary for a judge to form his or her profit hypothesis. . . However, the thwarting of a pure profit chance generally does not lead to a reimbursable damage."[8]

3. PROBLEMS RELATING THE REMEDY OF DAMAGES UNDER THE CISG

3.1 General

From the brief description of the facts of the case, it is evident that the decision has touched upon several aspects of the law of damages under the CISG. However, it is unfortunate that the court has neither dealt with the issues in sufficient detail nor presented the reasons for its statements. Nevertheless, I hope that focusing our attention on this decision will stimulate a debate on three questions. First, is damage to reputation recoverable under the Convention? Second, can the claimant claim compensation for loss of a chance? Finally, what are the proper standards of proving losses and determining the amount of damages under the Convention? In the following sections, I will present arguments and considerations which are, in my view, relevant for the purposes of addressing these questions.

3.2 Damage to Reputation

As noted above, the buyer in this case claimed that its "image" had been damaged as a result of the alleged breach by the seller. Although the seller was not found to be in breach, the court has made an important pronouncement by stating that the "good will damage" is recoverable under the Convention. These facts give rise to two questions. First, what exactly was meant by such terms as damage to "image" or "good will"? Second, did

---

that even if the seller had been responsible for the late delivery, the buyer would have failed to prove the alleged loss of profit. *Id.* ¶ 3.2(h). Failure to prove loss of profit was however the ground for dismissing the third claim of the buyer. *Id.* ¶ 3.4.

> [T]he [buyer] does not even come close to substantiating her supposed set-off claim. Neither does the [buyer] submit when, where and how much too late delivery was effected, nor does she provide any grounds to conclude that the [sponsor] gave her the prospect of further commissions and that this would have led to a profit (in what amount?). The [buyer] does not even state that the [sponsor] has ever since become active as an arts sponsor in any form. It is not the Court's task to calculate like a bookkeeper the [buyer]'s possible profit chances.

Id. ¶ 3.4.

8. *Id.* ¶ 3.2(h).

the buyer and the court refer to the compensation for damage to the buyer's "image"/"good will" *itself* or did they refer to the financial losses *flowing from* it?

So far as the first question is concerned, although such vague terms as "image" and "reputation" are sometimes said to have different meanings, it seems likely that what was meant in this case was, what we often call, damage to "reputation." However, even if we agree that this was probably the case, it is not particularly helpful because we will need to agree what we mean by the term "reputation." At this point, I would like to stress that, in my view, it is necessary to develop a uniform definition of "reputation" for the purposes of properly dealing with the question of recoverability, measuring damages, and contributing to achieving uniformity. If there is no uniform definition of "reputation," *what is it* that should or should not be recoverable and *what is it* that needs to be measured? In the absence of a uniform definition, it is difficult to expect judges and arbitrators to deal with these issues in a uniform manner because they may have different views on and understandings of the notion of reputation.

Some of the definitions I have come across in legal literature define "reputation" as an opinion of business persons and/or customers on a commercial actor, which has been formed on the basis of the latter's professional and business qualities.[9] In the context of business literature, I have seen "reputation" being defined as "[j]udgements made of the organization over time based on the organization's behaviour, performance, and the collective experiences of the organization"[10] or as "a collective term referring to all stakeholders' views of corporate reputation, including identity and image."[11] The difference between these definitions is not enormous. All these definitions point towards "reputation" primarily meaning the way *others* view and assess one's business activity, qualities and performance. The only difference is that the latter two definitions seem to refer to "reputation" as also

---

9. *See, e.g.*, CIVIL LAW (GRAZHDANSKOYE PRAVO) 317 (A.P. Sergeyev & Y.K. Tolstoy eds., 1998); Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 287 (1991) (defining "goodwill" as the "value which inheres in the fixed and favourable consideration of customers arising from an established and well-known and well-conducted business").

10. JOHN M. T. BALMER & STEPHEN A. GREYSER, REVEALING THE CORPORATION: PERSPECTIVES ON IDENTITY, IMAGE, REPUTATION, CORPORATE BRANDING, AND CORPORATE-LEVEL MARKETING 174 (2003).

11. GARY DAVIES ET AL., CORPORATE REPUTATION AND COMPETITIVENESS 63 (2002). "*Image*" has been here defined as "the view of the company held by external stakeholders especially that held by customers" and "*identity*"—as "the internal, that is employee's, view of the company." *Id.* at 61.

meaning the way an organization views itself. Although I must admit that I am not certain whether my earlier understanding of the word "reputation" included this latter meaning, I am now inclined to believe that one's view of him/herself is not completely irrelevant to the notion of "reputation." These differences in definitions of the term "reputation" demonstrate that it is important that we realize that to be able to answer the question whether loss of reputation is recoverable under the Convention, we need to agree *what* we mean by this term. It seems that this question requires further research into the nature of the notion of reputation. Nonetheless, I believe that most people will probably agree that what we often mean by "reputation" is, at least, what others think of one's business activity, qualities, and performance. My further discussion will be based on this definition.

The second question is whether the buyer and the court in this case have only referred to financial losses *flowing from* damage to reputation or whether they were also concerned with compensation for damage to reputation itself. The question is important because if the court were concerned with a possibility of awarding damages for loss of reputation itself, it would mean that the court recognised that, so far as the Convention is concerned, a commercial "reputation" is an "asset" or a value in itself. The statement made by the court (i.e. that the "'good will-damage' can certainly be compensated under the CISG") seems to support this interpretation of the decision.

The next question is whether this is the approach that we need to take in interpreting and applying the Convention. It should be noted that there are several cases where the courts have taken a different view by ruling that loss of reputation is not recoverable under the Convention.[12] This is not surprising taking into account the fact that, by contrast with other international instruments,[13] the Convention does not expressly state what could be

---

12. CLOUT Case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000], *available at* http://cisgw3.law.pace.edu/cases/000509g1.html.

> The [buyer] cannot claim a loss of turnover, on the one hand—which could be reimbursed in the form of lost profits—and then, on the other hand, try to get additional compensation for a loss in reputation. A damaged reputation is completely insignificant as long as it does not lead to a loss of turnover and consequently lost profits. A businessperson runs his business from a commercial point of view. As long as he has the necessary turnover, he can be completely indifferent towards his image. [Buyer] does not prove that her allegedly damaged reputation harmed her sales quotas.

Id. See also CLOUT Case No. 313 [Cour d'appel Grenoble, France, 21 Oct. 1999], *available at* http://cisgw3.law.pace.edu/cases/991021f1.html ("deterioration of commercial image [reputation] is not compensable damages in itself, if it did not entail proved pecuniary damages").

13. *See* UNIDROIT Principles of International Commercial Contracts art. 7.4.2(2) (2004) [hereinafter UNIDROIT PRINCIPLES]; Principles of European Contract Law Parts I & II Combined and Revised art. 9:501(2)(a) (1998) (expressly providing for recoverability of non-pecuniary losses).

recognized as a "loss." The question whether loss of reputation is recoverable seems to be largely the question of policy and it is suggested that there are sufficiently important considerations which justify the recoverability of this loss under the CISG.

By contrast with other non-material values, commercial reputation is an integral part of, and often an important prerequisite for, a successful business activity. Conversely, loss of or injury to reputation is likely to adversely affect the injured party's business.[14] It could, of course, be argued that the ultimate purpose of good commercial reputation is to gain profit. Therefore, reputation should be of legal significance only when it leads to loss of profit. Otherwise, it should be of no importance at all. It is submitted that this view should not be adopted. A businessman may have spent a long period of time and even foregone some quick economic opportunities in order to build up solid foundation for good reputation. For such a businessman, damage to reputation may represent a considerable loss, even if he cannot prove immediate economic and financial losses. In many cases, loss of reputation will have, sooner or later, repercussions on the business as well. Finally, it has been suggested that "goodwill . . . can exist even where the business does not make a profit."[15] If this is true, viewing the issue of loss of reputation exclusively through its connection with profitability of business would mean underestimating the value of the phenomenon of reputation. On this basis, I suggest that reputation should be regarded as an independent "asset" of a commercial actor which is a value in itself.[16] Since damage to reputation

---

14. *See* Sergeyev & Tolstoy, *supra* note 9, at 325, stating that "impairment of business reputation can bring about loss of customers, making heavier the conditions of obtaining the credit. On the other hand, business reputation, which has been formed, can serve as a guarantee that a businessman will remain 'afloat,' even when his business went down" (translation of the author); Thomas W. Waelde, *Contract and Enforceability in International Business: What Works?*, *at* http://www.dundee.ac.uk/cepmlp/journal/html/vol5/article5-8.html, stating, with respect to multinational enterprises, that the impact of the loss of reputation can be dramatic: "A large multinational company will in most cases rather pay out damages than suffer the much greater damage to its reputation with repercussions on its activities around the world."

15. *See* Oswald, *supra* note 9, at 287, with reference to an American case *Engstrom v. Larson*, 77 N.D. 541, 560 n.18, 44 N.W.2d 97, 108 (1950), where the court stated that:

> [N]either the fact that the business is very profitable or successful, nor that it is not a very profitable and even a losing business, is the only test of goodwill . . . in view of the fact that goodwill may be said to be a desire of old clients to resort or return and continue business relations where the clients have been accustomed to do business (quoting McFadden v. Jenkins, 169 N.W. 151, 156 (N.D. 1918)).

16. *See* DAVIES ET AL., *supra* note 11, at 65 ("[C]orporate reputation is a significant, albeit intangible, asset. . . [R]eputation has value, and [it] is substantial for most organizations"); JOHN SMYTHE, COLETTE DORWARD & JEROME REBACK, CORPORATE REPUTATION: MANAGING THE NEW STRATEGIC

would mean an injury to this value, it should be regarded as a "loss" within the meaning of Article 74 CISG.

3.3 Standards of Proving Loss and Determining the Amount of Damages[17]

By stating that "CISG does not determine which degree of certainty is necessary for a judge to form his or her profit hypothesis," the court has highlighted the issue of the standards of proving losses and determining the amount of damages which has been a source of non-uniformity in the application of the Convention. The examination of cases reveals a variety of ways in which this issue has been dealt with. First, in several cases this issue has been regarded as a procedural issue which is outside the scope of the CISG.[18] In this category, I would also include cases where the judges have exercised their discretion in determining the amount of damages which have derived from national procedural rules.[19] It should also be noted that even if it is true that all procedural issues are outside the scope of the Convention, one author has argued that "there exists no systematic abstract criterion that would enable a given case to be classified unequivocally and rationally as being either of a procedural or a substantive nature" and that "the rules of evidence are classified, [in most legal systems,] as substantive, not as procedural. . . ."[20] If this is true, then it seems possible to argue that standards of proving losses are a matter of substantive law and, therefore, cannot be excluded from the scope of the CISG simply on the basis of its allegedly procedural nature. Second, some cases seem to regard the Convention as containing a standard of proof by stating that damages will have to be determined by an "exact,"[21]

ASSET 7(1992) ("Every organization must treat its reputation as an asset.").

17. I have dealt with these issues in greater detail in Djakhongir Saidov, *Standards of Proving Loss and Determining the Amount of Damages*, 21 J. CONT. L. (forthcoming 2005).

18. Bezirksgericht Sissach, Switzerland, 5 Nov. 1998, *available at* http://cisgw3.law.pace.edu/cases/981105s1.html; Handelsgericht St. Gallen, Switzerland, 3 Dec. 2002, *available at* http://cisgw3.law.pace.edu/cases/021203s1.html.

19. CLOUT Case No. 5 [Landgericht Hamburg, Germany, 26 Sept. 1990], *available at* http://cisgw3.law.pace.edu/cases/900926g1.html; CLOUT Case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 Mar. 1996], *available at* http://cisgw3.law.pace.edu/cases/960321g1.html; Court of Arbitration of the International Chamber of Commerce, Case No. 8611/HV/JK, 23 Jan. 1997, *available at* http://cisgw3.law.pace.edu/cases/978611i1.html; CLOUT Case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, 15 June 1994], *available at* http://cisgw3.law.pace.edu/cases/940615a4.html.

20. Chiara Giovannucci Orlandi, *Procedural Law Issues and Law Conventions*, 5 UNIFORM L. REV. 23, 27, 29 n.29 (2000), *available at* http://www.cisg.law.pace.edu/cisg/biblio/orlandi.html.

21. CLOUT Case No. 317 [Oberlandesgericht Celle, Germany, 2 Sept. 1998], *available at* http://cisgw3.law.pace.edu/cases/980902g1.html.

"precise"[22] calculation, "specific ascertainment"[23] or by proving "the existence and exact amount of . . . damage."[24] Unfortunately, these decisions explain neither how judges and arbitrators have arrived at these standards nor the meaning of these standards. Third, in a few cases the amount of damages awarded was determined *ex aequo et bono*.[25] Finally, it appears that, in several cases, judges and arbitrators have exercised their discretion which was not based on any legal rule to determine the amount of damages. For example, determination of the amount of damages has been discussed in terms of being or not being "reasonable,"[26] "sufficiently proved"[27] or supported by "sufficient evidence."[28]

In light of this non-uniform treatment, the immediate question is how the issue of proving losses and determining the amount of damages should be dealt with under the CISG. I would like to see the CISG being applied in the same way as the UNIDROIT Principles would be applied. The UNIDROIT Principles explicitly provide that losses need to be proved with a "reasonable degree of certainty."[29] This approach recognizes that the issue of standards of proving losses is *directly connected with the exercise* of the injured party's right to damages. The remedy of damages itself is governed by the Convention. The fact that the exercise of the right to damages can be treated in a variety of different ways is likely to have a negative impact on the exercise of this right as well as on the policies and considerations underlying the law of damages under the Convention. Accepting the unified standard is

---

22. CLOUT Case No. 168 [Oberlandesgericht Köln, Germany, 21 May 1996], *available at* http://cisgw3.law.pace.edu/cases/960521g1.html.

23. Landgericht München, Germany, 20 Feb. 2002, *available at* http://cisgw3.law.pace.edu/cases/020220g1.html.

24. Court of Arbitration of the International Chamber of Commerce, Case No. 9187, June 1999, *available at* http://www.cisg-online.ch/cisg/urteile/705.htm (CISG—online No. 705).

25. Rechtbank van Koophandel Hasselt, Belgium, 18 Oct. 1995, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=266&step=Abstract; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, *available at* http://cisgw3.law.pace.edu/cases/950502b1.html; Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004, *available at* http://cisgw3.law.pace.edu/cases/040604b1.html.

26. Käräjäoikeus Kuopio, Finland, 5 Nov. 1996, *available at* http://cisgw3.law.pace.edu/cases/961105f5.html; China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 1990, Contract #QFD890011, *available at* http://cisgw3.law.pace.edu/cases/900000c1.html.

27. China International Economic and Trade Arbitration Commission, People's Republic of China, 23 Feb. 1995, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=210&step=Abstract; Tribunal de commerce Namur, Belgium, 15 Jan. 2002, *available at* http://cisgw3.law.pace.edu/cases/020115b1.html.

28. Landgericht Göttingen, Germany, 20 Sept. 2002, *available at* http://cisgw3.law.pace.edu/cases/020920g1.html.

29. UNIDROIT PRINCIPLES, *supra* note 13, at art. 7.4.3(2).

likely to lead to greater uniformity in the injured parties' exercising their right to damages under the Convention.

A standard similar to that contained in the UNIDROIT Principles can be developed under the CISG. It is well known that the standard of "reasonable certainty" is based on the acknowledgement of the fact that in many cases it may be impossible for the injured parties to prove their losses with absolute certainty. What is required is that they provide evidence which can only be *reasonably* expected from them taking into account the particular circumstances of their case. On numerous occasions, it has been argued that many of the provisions of the CISG are based on the idea of reasonableness and that reasonableness is a general principle underlying the Convention. Bearing in mind the existing divergence of views as to what are the Convention's general principles, I would refrain from categorically asserting that reasonableness is a general principle of the CISG. Nevertheless, if it is at all possible for lawyers to agree on the list of these general principles, it seems to me that "reasonableness" will be the "first candidate" for this list. Thus, if there is a general principle of reasonableness, it is possible to argue that since Article 74 provides that proving loss is a necessary precondition for the right to claim damages, the claimant should be required to prove loss with such a degree of precision or certainty which can be reasonably expected of the claimant taking into consideration the particular circumstances of the case. This essentially means that losses will have to be proved with a "reasonable degree of certainty."

3.4 Loss of a Chance

The most interesting aspect of this decision is that it is the only decision I have come across which has expressly dealt with the issue of loss of a chance. It will be recalled that the court stated that, under the CISG, "the thwarting of a pure profit chance generally does not lead to a reimbursable damage." It is, again, unfortunate that the court has not given the reasons for this ruling. However, this statement raises the question whether the CISG should be interpreted as not allowing a claim for loss of a chance.

Loss of a chance is a peculiar concept. It can either be considered from the standpoint of the problem of recoverability of losses or be regarded as another standard of proving losses. It is suggested that both standpoints need to be borne in mind in dealing with the question of whether loss of a chance can be claimed under the CISG. In addition, I will try to demonstrate that these two sides of the loss of a chance concept are interdependent and cannot be separated.

If we look at loss of a chance from the standpoint of the problem of recoverability of losses, the question is whether "a chance" should be regarded as a value or "an asset" recognized by the Convention as a recoverable loss. One argument that could be made here is that in business taking a chance is indeed important. Commercial activity often involves risk and speculation. Taking risks and being involved in speculative ventures are often the principal ways of gaining profit which, in turn, is the ultimate purpose of a commercial activity. On this basis, I am inclined to take the view that the Convention should not ignore the importance of taking chances in business and should recognize a chance as being "an asset" having a value. This may be one reason why the CISG should be interpreted as allowing claims for loss of a chance.

As noted, it is also possible to regard loss of a chance as a standard of proving losses. It is well known that it is often difficult to prove loss of profit with absolute certainty because this would involve inquiry into a hypothetical future or past. Some cases provide examples where the claimant has failed to prove the amount of the alleged loss of profit with the required degree of certainty, but where the tribunal was satisfied that the loss had in fact occurred. For example, in one case where the UNIDROIT Principles have been relied upon, the tribunal stated that "[i]n many of the Claims the Claimants' documentary or other evidence established that an alleged loss had, in fact, occurred. But the evidence was insufficient in those Claims to demonstrate with a reasonable degree of certainty the amount of the loss."[30] The question in these type of cases is whether the claimant should be left with no, rather than some, compensation. It could be argued that while it would be unfair to the breaching party to be ordered to pay full compensation for loss of profit which cannot be proved with the required degree of certainty, it is, in this type of case, equally unfair to the injured party to be left with no compensation.[31] If we agree than such an outcome would indeed be unfair to the injured party, loss of a chance can be used as a tool of implementing our notion of fairness by allowing the injured party to go away with something rather than nothing. On this view, the concept of loss of a chance can be said to be based on the idea of disfavoring the "all-or-nothing" result in the award

30. United Nations Compensation Commission, Recommendation S/AC.26, 23 Sept. 1997 (Parties: Governments and International Organizations with Claims Arising out of Iraqi Invasion of Kuwait), *available at* http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1.

31. *See* Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1051 (1998).

of damages and, arguably, balancing the interests of both parties with a view to achieve a fair result.

Finally, it should be stressed that the two sides of the loss of a chance concept are interlinked. It could be argued that loss of a chance should be a recoverable type of loss precisely for the reason that the law should disfavor the "all-or-nothing" result in the award of damages and balance the interests of both parties. In other words, the second aspect can be used as a reason why loss of a chance should be a recoverable type of loss under the Convention.

Thus, I will venture to disagree with the opinion of the court. I believe that the reasons I have set out are sufficiently strong to justify the recoverability of loss of a chance under the CISG. Arguably, the formula provided for in the UNIDROIT Principles[32] could be used to help form an analogous approach under the Convention and contribute to the uniformity in the application of the Convention in this respect.

4. CONCLUSION

I hope that through this brief discussion I have managed to demonstrate the existing non-uniformity with respect to the treatment of several aspects of the law of damages touched upon by this case and identify some of the areas which are in need of further examination. I have put forward several suggestions relating to the question of how, in my view, the problems raised by this case should be dealt with. My final, and more general, point is that to answer the questions of *whether* and *how* a particular issue relating to the law of damages should be dealt with under the Convention, it is necessary to examine the nature of the issue in question and to agree on policies and principles which can be said to underlie the Convention. Otherwise, it does not seem realistic to expect uniformity in the application of the Convention.

32. UNIDROIT PRINCIPLES, *supra* note 13, at art. 7.4.3(2).