CALCULATION OF DAMAGES ON THE BASIS OF THE BREACHING PARTY'S PROFITS UNDER THE CISG

Edgardo Muñoz[1]

David Obey Ament-Guemez[2]

I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) is an international treaty that governs the international sale of goods in over eighty-five nations.[3] As in all legal systems, liability for damages, including loss of profits, arises under the CISG when one of the parties breaches any of its obligations under the sales contract or the Convention.[4] The remedy of damages is not limited by other concurrent remedies that the injured party may resort to, such as the avoidance of the contract or specific performance.[5]

The CISG embodies the principle of full compensation found in all legal systems whereby damages shall be equal to the financial loss suffered as a result of the breach.[6] However, the precise contours of the principle of full compensation in the CISG are currently being determined by scholarship and case law. For example, a leading expert in this area has advanced that "the notion that the promisee must not be overcompensated cannot strictly be applied in the context of the Convention,"[7] suggesting that it may be possible to take into account the benefit that the breaching party obtains from its breach when assessing and calculating damages.[8]

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[1] Professor of Law, Universidad Panamericana, Facultad de Derecho, Prolongación Calzada Circunvalación Poniente No. 49 Ciudad Granja CP 45010 Zapopan, Jalisco, México. Email: emunoz@up.edu.mx. Ph.D. (Basel), LL.M. (UC Berkeley), LL.M. (Liverpool), LL.B. (U Iberoamericana).

[2] Law Associate at Von Wobeser & Sierra, Mexico City; Graduate in Law, Universidad Panamericana Facultad de Derecho, Mexico.

[3] *See* U.N. COMM'N ON INT'L TRADE LAW, *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Jan. 6, 2017).

[4] United Nations Convention on Contracts for the International Sale of Goods arts. 45(1)(b), 61(1)(b), 74, Aug. 31, 1981, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3 [hereinafter CISG].

[5] This applies unless the obligee does not perform because of a *force majeure* or hardship situation covered by CISG art. 79. *See id.* at art. 79.

[6] Ingeborg Schwenzer & Pascal Hachem, *The Scope of the CISG Provisions on Damages*, *in* CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 91, 92-93 (Djakhongir Saidov & Ralph Cunnington eds., 2008).

[7] Ingeborg Schwenzer, *Article 74*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 1002, 1002 (Ingeborg Schwenzer ed., 3d ed. 2010).

[8] *Id.*; *see also* Nils Schmidt-Ahrendts, *Disgorgement of Profits under the CISG*, *in* STATE OF PLAY: THE 3RD ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE 89, 97-98 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2012).

This article is written upon the above proposition. We endeavor to furnish arguments and support for the proposition that under some limited circumstances damages calculations may take into account the benefits that the breaching party obtained from its breach. The circumstances that warrant this approach under the CISG take place where, for example, the buyer who suffers a breach consisting of the non-delivery of the goods is unable to calculate its loss because, at the time of the breach, it had neither pre-orders from its own customers, nor had it ever in the past traded with the unique type of goods at stake in that transaction.

In section II, we revisit the principle of full compensation upon which the remedy of damages under the CISG is based. In section III, we explore whether the principle of "good faith" in Article 7(1) of the CISG provides support for an interpretation of the full compensation principle in Article 74 of the CISG, encompassing the profits made by the breaching party as a method to calculate damages. In section IV, we test the compatibility of the damages calculation method proposed here with the damages systems in Articles 74, 75 and 76 of the CISG. In section V, we provide arguments in favor of this methodology despite its opposition to the notion of efficient breach. In section VI, we reject the view that disgorgement of profits results from Article 84 of the CISG or that the same claim should be possible under domestic laws otherwise applicable to a CISG contract.

II. THE PRINCIPLE OF FULL COMPENSATION

The CISG remedies for breach are aimed at fully redressing any breach of contract or violation of the provisions in the convention. In this regard, Articles 45 and 61 of the CISG, which enumerate the remedies for breach of contract available to the seller and the buyer, respectively, entitle the aggrieved party to claim damages as provided in Articles 74 to 77, together with other compatible remedies.[9] In order to achieve full indemnity, Article 74 of the CISG stipulates that the aggrieved party is entitled to be placed in the same financial position it would have been in had the other party not breached its obligations under the contract or the CISG.[10] This approach is known as the "full compensation principle" and seeks to compensate the aggrieved party for all disadvantages suffered as a

[9] CISG, *supra* note 4, at arts. 45(a)(b), 61(1)(b). This is contrary to what was stipulated in Article 82 of the Uniform Law on the International Sale of Goods, in which a distinction was made between damage caused when the contract was avoided and when it was not avoided. *See* Victor Knapp, *Article 74*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 538, 538-39 (C.M. Bianca & Michael Joachim Bonnell eds., 1987).

[10] CONTRACTS FOR INT'L SALE OF GOODS ADVISORY COUNCIL, CISG ADVISORY COUNCIL OPINION NO. 6: CALCULATION OF DAMAGES UNDER CISG ARTICLE 74, comment 1.1 (2006), http://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_6.pdf [hereinafter CISG ADVISORY COUNCIL OPINION NO. 6].

result of the breach.[11] Indemnity under Articles 74 to 77 also seeks to satisfy all related costs that are the result of the non-performance.[12] In view of this, the CISG allows the aggrieved party to recover other losses, such as incidental loss, consequential loss, and loss of profits.[13]

The principle of full compensation is, nevertheless, subject to two requirements found in Article 74. The first self-evident requirement is that there must be a breach of contract caused by the seller or the buyer, and a loss to the other party ensuing from such breach.[14] The loss that follows the breach is a key element of the principle of full compensation because the breaching party is liable only for the loss suffered by the injured party as a consequence of that breach.[15] In view of that, a party who wishes to claim damages under Article 74, including loss of profits, has the burden of proving, with a reasonable degree of certainty, that it suffered a loss and the extent of that loss.[16] However, the amount of the loss does not need to be shown with mathematical precision.[17] In this regard, other CISG provisions stipulate two non-exclusive methods of proving and calculating a party's

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[11] CISG ADVISORY COUNCIL OPINION NO. 6, *supra* Note 10, comment 1.1.

[12] Article 74 establishes the general principle pursuant to which the party who suffers a breach of contract shall be indemnified for all loss arising out of that breach, Schwenzer, *supra* note 7, at 1000, while Articles 75 and 76 establish two methods to calculate the non-performance loss incurred by the suffering party. *Id.* at 1002. On the other hand, Article 77 establishes a duty for the suffering Party to mitigate its own loss. *Id.*

[13] *Id.* at 1006; *see* CISG ADVISORY COUNCIL OPINION NO. 6, *supra* note 10, at comment 1.1-1.2. The principle of full compensation is found in most legal systems. *Id.* at 1.2. Common law jurisdictions regard damages as the primary remedy designed to place the injured party in the same economical position it would have been had the contract been performed in accordance with its terms, while civil law jurisdictions follow the same approach under the theories of *dannum emergens* and *lucrum cesans* that focus on both the losses incurred, and the gains that the promisee was prevented from obtaining due to the breach of contract. *See* Ulrich Magnus, *The Vienna Sales Convention (CISG) Between Civil and Common Law – Best of All Worlds?*, 3 J. CIV. L. STUD. 76-77 (2010); E. ALLAN FARNSWORTH, UNITED STATES CONTRACT LAW 167-68, 173 (1999 ed. 1991); INGEBORG SCHWENZER, PASCAL HACHEM, & CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW 603 (2012); ROBERT CLARK, CONTRACT LAW IN IRELAND 543 (5th ed. 2004); MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 159 (4th ed. 2001); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 503 (3d ed. 1998); CLAUDE D. ROHWER & ANTHONY M. SKROCKI, CONTRACTS IN A NUTSHELL 441-50 (8th ed. 2000).

[14] For more on causation and causality, *see generally* DJAKHONGIR SAIDOV, THE LAW OF DAMAGES IN INTERNATIONAL SALES: THE CISG AND OTHER INTERNATIONAL INSTRUMENTS 79 (2008) [hereinafter THE LAW OF DAMAGES IN INTERNATIONAL SALES]; Djakhongir Saidov, *Methods of Limiting Damages Under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE INT'L L. REV. 307, 344 (2002) [hereinafter *Methods of Limiting Damages*].

[15] *Methods of Limiting Damages*, *supra* note 14; *see* THE LAW OF DAMAGES IN INTERNATIONAL SALES, *supra* note 14, at 80.

[16] *Methods of Limiting Damages*, *supra* note 14, at 371.

[17] CISG ADVISORY COUNCIL OPINION NO. 6, *supra* note 10, at comment 2; *see also* Arbitration Tribunal of Russian Federation Chamber of Commerce and Industry, June 6, 2000, 406/1998, (Russ.), http://cisgw3.law.pace.edu/cases/000606r1.html; Beer Case, Oberlandesgericht Brandenburg [OLG] [Provincial Court of Appeals] Nov. 18, 2008, 6 U 53/07, (Ger.), http://cisgw3.law.pace.edu/cases/081118g1.html.

damages for breach of contract.[18] Article 75 allows a party to prove and calculate its non-performance loss by taking into account the difference between the price for a substitute transaction and the price agreed in the breached contract.[19] Article 75 requires that there be both a breach that causes the avoidance of the contract and a substitute transaction.[20] Both must take place within reasonable time[21] and in a reasonable manner,[22] otherwise, there is a risk of violating the duty to mitigate damages as required by Article 77 of the CISG.[23] On the other hand, Article 76 provides the aggrieved party with an alternative method to prove and calculate its non-performance loss.[24] Article 76 considers the difference between the price in the breached contract and the market price of the goods at the time of avoidance as an indicator of non-performance loss.[25] Accordingly, Article 76 requires that there is a breach that causes the avoidance of the contract and a market price for the goods in question.[26]

Under the second requirement, damages arising out of the breach are, or ought to be, foreseeable by the breaching party at the time of the conclusion of the contract.[27] This principle, rooted in the common law of

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[18] Articles 75 and 76 apply to calculate non-performance loss when an avoidance of the contract takes place. *See* CISG, *supra* note 4, at arts. 75-76. Article 74, on the other hand, can be applied in order to calculate all types of losses, such as non-performance loss, incidental loss, consequential loss and loss of profit. *See id.* at art. 74.

[19] *Id.* at art. 75.

[20] *See id.*; Canned Oranges Case, China International Economic & Trade Arbitration Commission, Nov. 30, 1997, CISG/1997/33, (China), http://cisgw3.law.pace.edu/cases/971130c1.html.

[21] CISG, *supra* note 4, at art. 75; *see* Zweirad Technik v. Reinhardt, Supreme Court of Denmark, Oct. 17, 2007, 071017DK, (Den.), http://www.cisgnordic.net/071017DK.shtml; *see also* NV Secremo v. Helmut Papst, Hof van Beroep Antwerp [Court of Appeals Antwerp], Jan. 22, 2007, 2004/AR/1382, (Belg.), http://cisgw3.law.pace.edu/cases/070122b1.html.

[22] CISG, *supra* note 4, at art. 75. This applies regardless of small differences in the kind or quality of the product. *See* Case No. 8128 of 1995, (ICC Int'l Ct. Arb.), http://www.unilex.info/case.cfm?pid=1&do=case&id=207&step=FullText.

[23] CISG, *supra* note 4, at art. 77; *see* Oberster Gerichtshof [OGH] [Supreme Court] Apr. 28, 2000, 1 Ob 292/99v, http://www.cisg.at/1_29299v.htm (Austria) [hereinafter Jewelry Case]; *see also* Bielloni Castello S.p.A. v. EGO S.A., Corte di Appello di Milano [Appellate Court Milan], Dec. 11, 1998, (Italy), http://cisgw3.law.pace.edu/cases/981211i3.html.

[24] *See* CISG, *supra* note 4, at art. 76.

[25] *Id.*

[26] *Id.* The concept of market is to be understood as a "community of suppliers and acquirers of goods and services, where the level of demand at a given time drives prices up or down." Michael Bridge, *The Market Rule of Damages Assessment*, *in* CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 431, 438 (Djakhongir Saidov & Ralph Cunnington eds., 2008). Therefore, the market price is the amount of money that suppliers or acquirers of certain goods are willing to pay or charge for them. *See id.* For an alternate definition, see Schwenzer, *supra* note 7, at 1038, which defines market price as "the price generally charged for goods of the same kind, traded in the same businesses under comparable circumstances at a particular location."

[27] CISG, supra note 4, at art. 76. For a better comprehension of its application and use in courts, see Clothing Case, Case No. 8786 of 1997, (ICC Int'l Ct. Arb.), http://www.unilex.info/case.cfm?id=463 and Legfelsöbb Bíróság [Supreme Court of Hungary] 2000. Legf. Bir. Gf1.30.299/2000, http://cisgw3.law.pace.edu/cases/000000h2.html#cx.

contracts,[28] limits damages to what both parties must have been able to foresee as the consequence of a breach.[29] However, the foreseeability principle in Article 74 regards "the possible consequences of a breach, not whether a breach would occur or the type of breach."[30] Therefore, if special circumstances are known by the parties, the latter are naturally held to have assumed that those circumstances may lead to damages in case of breach.[31]

III. INTERPRETATION OF THE FULL COMPENSATION PRINCIPLE IN ARTICLE 74 OF THE CISG PURSUANT THE PRINCIPLE OF GOOD FAITH IN ARTICLE 7(1) OF THE CISG

We submit that the possibility of calculating one party's damages on the basis of the benefits obtained by the other party from the breach by the other party exist in Article 74 of the CISG if Article 74 is interpreted in good faith. The proposed approach to calculate a party's loss will sound to many as a claim for disgorgement of profits.[32] The basic example regards a seller that, after entering into the sales contract with the buyer but before delivery of the goods, decides to sell the same goods to a second buyer who is willing to pay more than the first buyer. The price given to the second buyer is high enough to make a larger profit, even if the producer has to indemnify the first buyer for the seller's non-performance losses. A claim for disgorgement of profits by the first buyer would seek to skim off the profits made by the seller (the breaching party) in the second sale.[33] Our submission rests on the premise that it is possible to calculate the aggrieved party's damages on the basis of the gains made by the breaching party. However, we do not argue that the breaching party should be sanctioned in this way whenever it breaches a contract. Rather, we submit that, under

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[28] The relevant precedent is the House of Lords of England in Hadley v. Baxendale (1854) 156 Eng. Rep. 145, 9 Ex. 341. It has been said that this ruling was a transplantation of a foreign rule. *See* Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257, 1266-67 (1993). Apparently, the House of Lords of England were not the ones who came up with this innovative limit on the damages claimable by a plaintiff, but it instead arose from American case law, which was based at the same time on the French Code Civil, specifically in Articles 1149, 1150 and 1151. *Id*. at 1267.

[29] Schwenzer, *supra* note 7, at 1018-19. In Latin America, there is an exception to the foreseeability rule: if a debtor causes a breach of contract with gross negligence (*dolo*), he is to be held liable not only for the foreseeable damages caused, but also for the unforeseeable damage caused by his breach. Edgardo Muñoz, *Understanding the CISG System of Remedies from the Latin American Domestic Laws*, *in* CISG AND LATIN AMERICA 93, 107 (Ingeborg Schwenzer ed., 2016). *See id.* for more discussion on the CISG system of remedies in Latin America.

[30] U.N. COMM. ON INT'L TRADE LAW [UNCITRAL], *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 349 (2012), https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf.

[31] *See* Schwenzer, *supra* note 7, at 1019.

[32] Disgorgement of profits refers to a claim of damages calculated based on the profits made by the party in breach. *See generally* E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985).

[33] *See* Schmidt-Ahrendts, *supra* note 8, at 99.

some circumstances, the approach offers the most reasonable and fair way to achieve full compensation in light of the principle of good faith in Article 7 of the CISG.

The general view regarding this issue under the CISG is that claims for disgorgement of the breaching party's profits must be rejected. The CISG Advisory Council has stated that Articles 74 to 76 preclude placing the aggrieved party in a better position than what it would have enjoyed if the contract had been properly performed.[34] Pursuant to this view, what is relevant for damages calculations is the actual loss incurred by the aggrieved party, not the benefits received or gains made by the breaching party.[35] Accordingly, an award of disgorgement of profits could easily lead to overcompensation.[36]

That being said, Article 7 provides that in the interpretation of the Convention regard is to be had to the observance of good faith in international trade. The principle of good faith in Article 7 is not defined. Instead, this concept has been understood to mean "fairness, fair conduct, reasonable standards of fair dealing . . . a common ethical sense . . . and honesty in fact."[37] The good faith principle is also embodied in several other provisions of the Convention relating to the parties' statements, rights, and obligations.[38] For instance, Article 16(2)(b) of the CISG prevents a party from revoking an offer where it was reasonable for the other party to rely upon the offer being irrevocable.[39] Article 29 of the CISG allows a party to deviate from an agreed-upon, non-oral modification clause to the extent that it relied on the other party's conduct, and that the latter would not assert its rights under that clause.[40] Moreover, Article 40 of the CISG bars the seller from relying on the buyer's failure to examine the goods and give notice of non-conformity under Articles 38 and 39, if the seller knew or should have known of that lack of conformity.[41] It must be noted, however, that the principle of good faith in Article 7(1) applies only to the interpretation of the CISG. It is not intended to integrate new obligations to the parties'

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[34] CISG ADVISORY COUNCIL OPINION NO. 6, *supra* note 10, at ¶ 9*; see also* CONTRACTS FOR INT'L SALE OF GOODS ADVISORY COUNCIL, CISG ADVISORY COUNCIL OPINION NO. 8: CALCULATION OF DAMAGES UNDER CISG ARTICLES 75 AND 76, ¶ 1.3 (2008), http://www.cisgac.com/file/repository/CISG_AC_Opinion_8_English.pdf.

[35] THE LAW OF DAMAGES IN INTERNATIONAL SALES, *supra* note 14, at 33.

[36] *See* Schmidt-Ahrendts, *supra* note 8, at 93-94; *see also* Schwenzer, *supra* note 7, at 1017.

[37] Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 4 VINDOBONA J. INT'L COM. L. & ARB. 15, 17-18 (1999); *see generally* Paul J. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods*, 18 J.L. & COM. 333 (1999).

[38] *See generally* Bruno Zeller, *Good Faith - The Scarlet Pimpernel of the CISG*, 6 INT'L TRADE & BUS. L. ANN. 227 (2001).

[39] CISG, *supra* note 4, at art. 16(2)(b).

[40] *See* Zeller, *supra* note 38, at 241-42.

[41] *Id.* at 239.

contract or to interpret the parties' statements and conduct.[42] The criteria in Articles 8 and 9 are meant to fulfill that purpose.[43]

In spite of the above, it has been recognized that when interpreting the provisions of the CISG under the principle of good faith, that principle may affect the parties' rights and obligations.[44] In light of this, some courts and scholars have made use of the principle of good faith to uphold that, for example, the declaration of avoidance required by Articles 75 and 76 of the CISG is unnecessary when "the debtor has finally and definitely refused to perform."[45] In the same line of argument, an Austrian Arbitral Tribunal decided that a seller that had repeatedly made statements to the buyer, from which the buyer could reasonably infer that the seller would not raise the defense of late notice in Article 39, was barred from invoking such provision pursuant to Articles 7(1) and the provisions invoking the concept of reliance expressed in Articles 16(2)(b) and 29(2).[46] The Tribunal referred to this as the "prohibition *of venire contra factum proprium*, which represents a special application of the general principle of good faith . . . one of the general principles on which the Convention is based."[47] In another case, an Appellate Court in Germany found that after two and a half years since the breach of contract, a buyer had lost its right to declare its avoidance.[48] As a consequence, the Court dismissed the buyer's claim for damages against the seller under Articles 45(1)(b) (remedy of damages),

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[42] *See* Zeller, *supra* note 38, at 244. In this regard, the Secretariat Commentary states that "the principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention." Conference on Contracts for the International Sale of Goods, *Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*, 18, U.N. Doc. A/CONF.97/19 (1991).

[43] *See* CISG, *supra* note 4, at arts. 8-9. The limited scope of the principle of goods faith in Article 7(1) CISG dates back to the opposition raised by some countries during the drafting of the Convention (specially from the common law tradition), *see* Powers, *supra* note 37, at 344, and their resilience of imposing to the parties an abstract principle which could mean "different things to different people in different moods at different times and in different places." *C.f.* Michael G. Bridge, *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?*, 9 CANADIAN BUS. L.J. 385, 407 (1984).

[44] Francesco G. Mazzotta, *Good Faith Principle: Vexata Quaestio*, *in* INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 120, 132 (Larry A. DiMatteo ed., 2014) (noting that "despite the limiting wording of Article 7(1), the good faith concept has been applied, *de facto*, to the conduct of the contracting parties.").

[45] Ingeborg Schwenzer & Pascal Hachem, *Article 7*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, *supra* note 7, at 120, 129; *see* D.B. GmbH v. C.N.H., Supreme Court of Poland, Jan. 27, 2006, III CSK 103/05, (Pol.), http://www.unilex.info/case.cfm?pid=1&do=case&id=1129&step=FullText; *see also* Iron Molybdenum Case, Oberlandesgericht Hamburg [Appellate Court Hamburg], Feb. 28, 1997, 1 U 167/95, (Ger.), http://cisgw3.law.pace.edu/cases/970228g1.html.

[46] *See* Rolled Metal Sheets Case, Arbitral Tribunal Vienna, June 15, 1994, SCH-4318, (Austria), http://cisgw3.law.pace.edu/cases/940615a4.html.

[47] *Id.*

[48] Automobiles Case, OLG München [Appellate Court Munich], Feb. 8, 1995, 7 U 1720/94, (Ger.), http://cisgw3.law.pace.edu/cases/950208g1.html.

45(2) (remedy of damages in conjunction with other remedies), and 49(1)(a) (remedy of avoidance of the contract).[49] The Court found that allowing the buyer to declare the contract avoided after such a long time would violate the principle of good faith contained in Article 7(1) of the Convention.[50]

The above scholarship and cases reflect the increasing understanding that parties to a CISG contract shall conduct themselves in accordance with the principle of good faith during the conclusion of the sales contract and its performance. As stated by a scholar,

> if good faith in international trade were to be promoted by a liberal application of the provisions of the Convention, how else can a judge promote 'good faith' in trade other than by requiring the parties to behave in good faith? Stated differently, good faith cannot exist in a vacuum and does not remain in practice as a rule.[51]

Despite this growing perception, the principle of good faith in the CISG shall not be used as a tool to integrate additional obligations. What it is clear, however, is that the drafters of the Convention intended to determine the extent of the rights and obligations under the CISG in light of the principle of good faith.[52] In this regard, we submit that the principle of good faith in Article 7(1) of the CISG provides support for an interpretation of the full compensation principle that encompasses the possibility to calculate one party's losses by taking into account the benefits that the breaching party obtained from the breach in the following scenario: where the buyer who suffers a breach consisting of the non-delivery of the goods is unable to calculate its loss of profits because at the time of the breach it neither had pre-orders from its own customers, nor had it ever traded with the unique type of goods at stake, making it impossible for the aggrieved buyer to prove an assumed loss from its own books.

As stated above,[53] the principle of full compensation seeks to compensate the aggrieved party for its own losses. That means that there is no apparent direct relationship between a party's losses and the profits made by the party in breach.[54] Nevertheless, the benefits received by the breaching party cannot be simply overlooked. The "reflecting gains made by the breaching party may be an appropriate way of implementing the

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[49] Automobiles Case, *supra* note 48.

[50] *See id.*

[51] Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 140 (1997).

[52] *Id.*

[53] *See* discussion *supra* Section II.

[54] THE LAW OF DAMAGES IN INTERNATIONAL SALES, *supra* note 14, at 29.

compensatory purpose of damages."[55] Leading authors would agree that this is the case when the seller breaches the contract by opting to sell the goods promised to the buyer to a third party.[56] In our view, this is only justified under the circumstances just described. The principle of good faith may only enlarge the methods of damages calculations in accordance with the principle of full compensation where an assumed loss exists that cannot be quantified, but on the basis of any profits made by the breaching party. In this regard, the principle of full compensation must not be limited to the pecuniary loss suffered as shown on the balance sheet of the non-breaching buyer,[57] *i.e.*, a concrete loss shown by a substitute purchase or lost profits reflected by failed pre-orders from the buyer's customers. In circumstances where there is no way of calculating exactly how much the buyer would have made with the goods he did not receive,[58] the principle of good faith, which means reasonable standards of fair dealing and a common ethical sense, offers the justification for applying a more easily identified baseline to calculate such profits, *i.e.*, the breaching party's profits.[59]

Going back to the circumstances described above, let us imagine that the seller opted to breach the contract in order to sell directly to one of the buyer's potential clients. Let us also assume that the goods in question are one of a kind. The aggrieved buyer is prevented from a resale opportunity. It may be impossible for the buyer to obtain equal goods that may allow it to make similar profits with different customers. In that case, the award of damages calculated solely on the basis of the price of the promised goods in the breached contract—either by applying Articles 75 or 76 of the CISG, or by calculating loss of profits on the basis of past sales of different goods—could not be considered as an appropriate method to indemnify the losses that one could assume the buyer actually suffered. Despite the fact that the buyer may not be able to furnish its own evidence of a concrete loss, one may assume that such loss exists, and that what is missing are the elements to calculate it.

At the conclusion of the contract, a seller covers its risk against falling prices, but assumes the risk that prices will increase. The buyer, on the other hand, covers against the risk of raising prices, but assumes the risk

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[55] THE LAW OF DAMAGES IN INTERNATIONAL SALES, *supra* note 14, at 33.

[56] Schwenzer, *supra* note 7 at 1017; *see also* Schmidt-Ahrendts, *supra* note 8, at 98 (stating that the profits made by the seller in the second sale actually indicate what the first buyer himself could have made by reselling to a third party).

[57] Schwenzer & Hachem, *supra* note 6, at 94. Generally, all other losses of the aggrieved party that do not directly appear on the balance sheet are simply deemed to be non-pecuniary and thus not compensable.

[58] Where, for example, the buyer had pre-orders from his customers, but not in relation to all of the good it was to acquire from the breaching seller.

[59] *See* Schmidt-Ahrendts, *supra* note 8, at 98-99.

that market prices may decline after the conclusion of the contract.[60] The CISG entitles the aggrieved party to an indemnity for the value of its unrealized contractual expectation in order to receive the benefit of the bargain.[61] Therefore, if the seller decided to breach the contract and resell the same goods to a second buyer, the seller deprives the first buyer from the opportunity to resell the goods at the higher market price. That lost opportunity is the expectation interest existing at the conclusion of the contract, and it is just, fair, and reasonable (good faith as required by Article 7 of the CISG) that the profits made by the breaching party are taken as the baseline to calculate the indemnity for the damages, where there are no other elements to prove them.

In 1995, the Court of Appeals of Grenoble, France, applied the principle of good faith to expand the calculation method to achieve full compensation in different circumstances.[62] In said case, the seller, a French jeans manufacturer, agreed to make various deliveries to the buyer in the United States of America. The contract stipulated that the goods were to be sent to and sold only in South America and Africa. The reason was that the seller already had "contracts with many foreign distributors and that, more specifically in the case of Spain where the brand name 'Jeans Bonaventure' is sought after, [the seller had] an interest in not allowing a parallel network of sale [parallel imports]".[63] During the negotiations preceding the contract and its performance, the seller repeatedly demanded proof of the destination of the goods sold. Amidst the second delivery, it arose that the buyer had actually been shipping the jeans to Spain. The Court ordered the buyer to pay seller 10,000 French francs concluding that the buyer's conduct "made worse by the judicial position taken by the [buyer] at trial constitute[d] an abuse of procedure…[and] the inconvenience caused by this trial to [the seller] justifies the sum requested."[64] As Professor Saidov states in regard to this case, "[i]t can be argued that profits made by the buyer by reselling the goods in Spain would constitute an appropriate measure of recovery of compensatory damages particularly considering that they would most likely be reflective of profits the seller lost as a result of the breach."[65]

In a more recent CISG case, an arbitral tribunal constituted under Stockholm Chamber of Commerce arbitration rules reached a similar

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[60] John Y. Gotanda, *Dodging Windfalls: Damages Based on Market Price, Actual Loss, and Appropriate Awards* (Villanova Univ. Sch. Law Pub. Law & Legal Theory, Working Paper No. 2015-1016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683525.

[61] CISG ADVISORY COUNCIL OPINION NO. 6, *supra* note 10, at comment 3.1.

[62] Cour d'appel [CA] [regional court of appeal] Grenoble, Feb. 22, 1995, D. 1995, JR 100, 93/3275 (Fr.), http://cisgw3.law.pace.edu/cases/950222f1.html [hereinafter Grenoble case].

[63] *Id.*

[64] *Id.*

[65] THE LAW OF DAMAGES IN INTERNATIONAL SALES, *supra* note 14, at 35.

conclusion.[66] A Brazilian seller agreed to sell a number of high accuracy and quality pressure sensors to a Chinese buyer that were to be integrated and used in the buyer's new series of pressure transmitters.[67] The parties also agreed that the seller would license the buyer on a non-exclusive basis so the buyer could use and integrate the pressure sensors into the buyer's new products to be sold in Asia.[68] The parties included a confidentiality clause in the contract, since the performance of the agreement meant that the seller would supply confidential information to the buyer.[69] In the arbitration proceedings, the buyer brought a claim of damages for breach of the seller's obligation to deliver pressure sensors in accordance to the contract.[70] The seller raised a counter-claim for the breach of the confidentiality clause.[71] The seller argued that the buyer never had the genuine intention to perform its obligations under the agreement, and that it actually only entered into it as a tactical step to obtain access to the seller's confidential and proprietary technology in order to develop, manufacture, and sell the pressure sensors, which would directly compete with those manufactured and sold by seller.[72] The seller claimed that, based on the information given to the buyer, the buyer had begun to manufacture and sell devices that incorporated proprietary technology.[73]

The proof offered on this matter consisted of tests conducted by the seller on the buyer's sensors. These tests concluded that "the signal responses exhibited by [the buyer's] Sensors are identical or substantially similar to those exhibited by [the seller's] Sensors . . . such identity or substantial similarity is unlikely unless [the buyer's] Sensors incorporate[d] [the seller's] proprietary technology including its software."[74] Furthermore, the seller claimed that the buyer provided a third-party Chinese manufacturer access to the technology.[75] The tribunal agreed that "it would stretch incredulity too far to conclude that all the similarities were the result of chance."[76] Therefore, the tribunal concluded that the buyer copied the seller's confidential information, and that this was a breach of the agreement entitling the seller to relief.[77] The tribunal made an award for damages that equaled the amount of profits the buyer made within the twenty-four month period within which the buyer used the seller's

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[66] Pressure Sensors Case (China v. Braz.) (Arb. Inst. of the Stockholm Chamber of Com. 2007), http://cisgw3.law.pace.edu/cases/070405s5.html.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

technology.[78] While the arbitrator did not refer to any specific CISG provision for awarding damages, he did state that he considered all the facts of the case.[79]

The CISG does not expressly prohibit the calculation of damages under the method proposed here. As mentioned before, scholars have concluded that disgorgement is not allowed under the CISG because of the risk of overcompensating the aggrieved party, and that in that regard, the principle of full compensation would be infringed.[80] However, as seen in scenarios such as those described above, the method for damages calculation proposed here may be the fairest and most effective way to achieve full compensation.

Even assuming that calculation of damages on the basis of the breaching party's profits would give rise to a windfall in favor of the aggrieved party and consequently violating the principle of full compensation, the following should be considered. In a breach of contract scenario, a windfall takes place in favor of the breaching party. This poses the question of who should really keep the windfall derived from the breach when there is no evidence to prove the assumed loss by the suffering party. Looking at this question from a reasonable non-legal point of view, many may bend towards the aggrieved party. In particular, the opposite would allow the breaching party to escape full liability simply because it is impossible for the aggrieved party to prove its damages with enough certainty.[81] The answer to this question therefore lies in the need of providing an alternative method for damages calculation where the usual methods are insufficient for such purposes.

A further argument that has been brought up against the method advocated here is that it discourages the aggrieved party from complying with its obligation of mitigating damages.[82] It is argued that if the buyer is entitled to relief on the basis of the profits made by the breaching party, it may no longer have an incentive to make a substitute transaction in the hope of obtaining a higher profit with this alternative methodology.[83] In this regard, we submit that the obligation to mitigate a party's loss persists. A buyer shall attempt to make a cover purchase when it is reasonable and possible to mitigate its loss. That being said, when no substitute transaction

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[78] Pressure Sensors Case, *supra* note 66.

[79] *Id.*

[80] *Id.*; *see also* Schmidt-Ahrendts, *supra* note 8, at 93.

[81] CISG ADVISORY COUNCIL OPINION NO. 6, *supra* note 10, at comment 2.4.

[82] CISG, *supra* note 4, at art. 77. Pursuant to Article 77, a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If the aggrieved party fails to take such measures, the party in breach may claim a reduction of damages in the amount the aggrieved should have mitigated.

[83] John D. McCamus, *Disgorgement for Breach of Contract: A Comparative Perspective*, 36 LOY. L.A. L. REV. 943, 950 (2003).

is possible or no clear market price exist for the goods at stake, a party should be entitled to calculate its loss under Article 74 as proposed here.

IV. COMPATIBILITY OF THE PROPOSED DAMAGES CALCULATION METHOD WITH THE DAMAGES SYSTEMS IN ARTICLES 74, 75 AND 76 OF THE CISG

Article 74 of the CISG does not expressly state a methodology pursuant to which a court or tribunal may calculate damages for breach of contract, as long as the aggrieved party is fully compensated. Neither Articles 75 nor 76 bar the possibility of taking the breaching party's profits into account in the calculation of damages under the CISG. The aggrieved party can rely solely on Article 74, despite the two options for damages' calculation offered by Articles 75 and 76.

In fact, the concrete method of damages calculation stipulated in Article 75 of the CISG is also intrinsic in Article 74, but absent the requirements to which Article 75 is subject to.[84] This follows the ruling of the Supreme Court of Austria, which held that damages recovered under Article 74 might be calculated in much the same way they would be calculated under Article 75.[85] In this line of thought, an alternative concrete method of calculation can also be achieved under Article 74 by, for example, comparing the price of the infringed contract with the price of the second sale carried out by a breaching seller. This alternative interpretation of the concrete method of calculation should be applied in the scenarios mentioned below.[86] As a matter of reasonableness and good faith, it appears proper to replace the breaching party with the suffering party in the second transaction, so that the suffering party's losses are calculated on the basis of breaching party's profits.[87] The aggrieved party is also released from the burden of entering into a timely and proper substitute transaction that may be impossible under the circumstances. This approach may also enhance efficiency because the reference for damages' calculation, *i.e.*, the second sale by the breaching seller, is obtained immediately at the time of breach and comprises both a non-performance loss and a loss of profits.

Likewise, the abstract method of damages calculation stipulated in Article 76 of the CISG is inherent in Article 74 but absent the requirements

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[84] Schwenzer, *supra* note 7, at 1006. *See infra* Section II.

[85] Jewelry Case, *supra* note 23. To calculate the damages, the seller could choose between Article 75 (substitute transaction) and Article 76 (current price), but neither Article 75 nor Article 76 prevents the seller from claiming damages under Article 74 even if the contract is avoided.

[86] The circumstances that warrant this approach under the CISG take place where, for example, the buyer who suffers a breach consisting in the non-delivery of the goods is unable to calculate its loss of profits because, at the time of the breach, he neither had pre-orders from his own customers nor had he ever in the past traded with the unique type of goods.

[87] *See* discussion *infra* Section III.

to which Article 76 is subject to.[88] As submitted by a leading scholar, in cases where Article 76 may be applied, a party may still rely on Article 74 in order to calculate its non-performance loss or loss of profits abstractly.[89] The possibility has been endorsed by the Supreme Court of Austria that allowed the calculation of damages under Article 74, following the method found in Article 76 CISG.[90] The profits made by the breaching party may, in some circumstances, reflect the amount of money that suppliers or acquirers of certain goods are willing to pay or charge for the goods in question, *i.e.*, market price. This may be the case where the goods at stake are not part of official listings or widely known published databases. In such situations, the price paid by the second buyer, for example, could work as a general assumption that what it paid is actually the current market price for the goods in question, and therefore, the profits made by the seller are also what the buyer itself could have obtained by reselling the goods to any third party at the time of the breach of contract. This calculation of damages on the basis of the profits made by the breaching party may also be more efficient because it releases the aggrieved party from the burden of demonstrating a market price for goods that are not widely commercialized and thus are not part of official or widely accepted price indicators. In addition, it allows one to consider, as reference for damages calculation, a price effectively paid by a participant in the market, the second buyer, at the time of breach.

In this regard, using the profits made by the breaching party as the basis for damages calculation shifts the risk of uncertainty to the breaching party whose breach gave rise to the uncertainty.[91] This, of course, does not deprive the seller from its right to prove that the buyer could not have sold the goods as profitably as it did.

As for the requirement of foreseeability in Article 74,[92] it is also complied with when damages are calculated on the basis of the profits made by the breaching party. At the time of the conclusion of the contract both parties are aware of the risk of breach of contract and its financial consequences.[93] Compensatory damages for such a likely breach also

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[88] *See* Schwenzer, *supra* note 7, at 1006.

[89] Schwenzer & Hachem, *supra* note 6, at 96; *see also id*. at 1016.

[90] *See* Jewelry Case, *supra* note 23.

[91] Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1367 (7th Cir. 1996) (holding "it is particularly in the area of quantifying the amount of lost profits that courts impose the risk of uncertainty on the breaching party whose breach gave rise to the uncertainty.").

[92] While it is true that the foreseeability requirement does not apply to Articles 75 and 76 of the CISG, the proposed methodology of damages calculation is based in Article 74, which does require it. *See* CISG, *supra* note 4, at art. 74.

[93] *See* Gotanda, *supra* note 60, at 6 (finding that a seller covers its risk against falling prices, but assumes the risk that prices of the goods sold will increase, but the buyer agrees on the contract price ensuring against the risk of raising prices, but assuming the risk that the price of the good may decline after the conclusion of the contract).

becomes part of the expectation interest. If things go as expected, both parties will obtain a windfall. However, if one of the parties breaches the contract it is also foreseeable that such a party will be liable to compensate the other party in an amount that may be equal or superior to the gains it made from its breach.

V. THE METHOD PROPOSED HERE AND THE THEORY OF EFFICIENT BREACH OF CONTRACTS

The calculation of damages on the basis of the profits made by the breaching party goes against the law and economics theory of efficient breach. This theory encourages contract breaches as long as it results in an efficient behavior.[94] For example, if a seller finds a second buyer who is willing to pay more value than the first buyer, then the seller should sell its goods to the second buyer. Given that the second buyer places a higher value on the goods, and provided that the first buyer's expectation loss is compensated at a lesser amount, the breach of contract generates at net wealth for everyone.[95]

In normal circumstances this theory holds true. The breaching party is able to pay the first buyer off. The aggrieved buyer would receive, in theory, what it expected under the contract if it is capable of furnishing evidence of lost re-sales and profits.[96] However, the theory of efficient breach is perfect only where there is evidence of a concrete loss suffered.[97] In cases where the buyer cannot demonstrate with reasonable certainty that it was prevented from making profits through concrete contracts with other customers, no indemnity may be received by the aggrieved buyer.[98]

In addition, an efficient breach of contract has costs that are often ignored and that bring inefficient results. These include costs resulting from the reallocation of goods, time and costs spent on looking for a new seller, negotiations with the customers of the buyer that ended up without product, or who may end up accepting a different product, and many more.[99] There are also the legal and business costs that will arise from the dispute between the first buyer and the seller, and it is not certain who will end up bearing them (especially if there is no clear rule in the proceedings about their

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[94] In law and economics, in and contract law, efficiency is achieved when it is impossible to make one party better off without making someone worse off. *See* Tejvan Pettinger, *Pareto efficiency*, ECONOMICSHELP (Nov. 28, 2012), https://www.economicshelp.org/blog/glossary/pareto-efficiency/.

[95] McCamus, *supra* note 83, at 950.

[96] Gotanda, *supra* note 60, at 7.

[97] Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1450 (1995).

[98] *See id.*

[99] Gotanda, *supra* note 60, at 9.

allocation, or if each party has to bear its own costs).[100]

Damages are usually difficult to prove, especially when dealing with goods that are unique, when no pre-orders have been made for the reselling of the goods, or when dealing with a new business that has no record of sales to compare prices with. On the contrary, the method proposed here only requires knowing the price at which the seller sold the goods to the second buyer.[101]

Finally, considering the breaching party's profits in damages calculations should be regarded as an alternative method that achieves full indemnity on the basis of what the parties negotiated as the risk for breach of contract.[102] This method takes as evidence what the buyer could have gained from the goods by looking into the breaching seller's profits in cases where more accurate evidence is not available. This method may encourage contract performance as a matter of public policy in future CISG contracts. It is a convenient tool for protecting the parties' interests in the performance of the contract, and providing an incentive to respect their contractual obligations by respecting the principle of *pacta sunt servanda.*[103]

VI. DISGORGEMENT OF PROFITS BY MEANS OF A CLAIM FOR UNJUST ENRICHMENT

Some scholars have suggested that a claim for disgorgement of profits is possible under Article 84 of the CISG.[104] This CISG provision calls for the restitution by the parties of any performance received or benefit obtained during the existence of the contract where the contract is eventually avoided with retroactive effect.[105] In fact, Article 84 embodies the general principle of unjust enrichment whereby a party shall not keep what it received from the other party and benefits derived thereof, if at some point there is no legal basis to hold them.[106] One scholar has for example submitted that "by applying the general principle of 'unjust enrichment' in Art. 84 […], the aggrieved party would be made whole and the party in bad faith disgorged of all unduly received benefits".[107] Referring to *BRI*

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[100] Gotanda, *supra* note 60, at 9.

[101] *See supra* Section IV.

[102] *See supra* Section II.

[103] Schmidt-Ahrendts, *supra* note 8, at 93.

[104] *See, e.g.*, Koneru, *supra* note 51, at 127 n.101, 128; Schmidt-Ahrendts, *supra* note 8, at 99-100; Liu Chengwei, *Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL*, ch. 18.6, CISG DATABASE, INST. OF INT'L COMMERCIAL LAW, PACE L. SCH. (2003), http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html.

[105] Article 84 states that, "(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid. (2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them . . . ."

[106] Schwenzer & Hachem, *supra* note 45 at 139.

[107] Chengwei, *supra* note 104.

Production "Bonaventure" v. Pan African Export,[108] a different author considers that the buyer was indeed obliged to account to the seller for the profits, not under Article 74, but under Article 84(2), which he suggests should be applied by analogy to cases where the seller (and not the buyer) declared the contract avoided.[109] A third scholar is also very explicit in this regard:

> The broader and primary goal of the Convention is to compensate the aggrieved party fully. Once this goal is accomplished, if there is still unjust enrichment on the part of the breacher, such unjust enrichment should be disgorged depending on the facts. […] This analysis not only satisfies the general principles of full compensation and unjust enrichment, but also promotes good faith and reasonable behavior between the parties in international trade, thereby fulfilling the mandates of Article 7.[110]

Such an approach is respectfully rejected here. We submit that Article 84 shall not be applied in the compensation of damages. Despite the fact that Article 84 embodies the principle of unjust enrichment, this should only be applied to the unwinding of the contract. Compensation of damages is a matter expressly dealt with by the CISG's provisions on damages in Articles 74 to 77. As we submitted above, the calculation of damages on the basis of the breaching party's profits is possible by an interpreting the concept of full compensation in Article 74 in good faith.[111] In this line of thought, there is no internal gap that needs to be filled with a general principle on which the CISG may be based.[112]

In addition, the notion of unjust enrichment is quite different to the calculation of damages on the basis of the breaching party's profits. Unjust enrichment refers to profits made without the right to do so (without legitimacy). For example, the interest accrued from the price paid in a subsequently-avoided contract are to be given back to the buyer, since there is no legal relationship that entitles the seller to keep the interest in the first place. On the contrary, the seller is entitled under a valid second contract to the profits made with a second buyer, regardless of breaching the first contract with the first buyer. Furthermore, damages and their calculation are part of contract law remedies. Unjust enrichment, on the other hand, is an independent remedy that gives rise to a non-contractual claim under most

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[108] Grenoble Case, *supra* note 62. *See also infra* Section III.
[109] Schmidt-Ahrendts, *supra* note 8, at 99-100.
[110] Koneru, *supra* note 51, at 128.
[111] *See supra* Section III.
[112] As it is mandated in case of internal gaps by Article 7(2).

jurisdictions.[113] From this perspective, claims for unjust enrichment would not be available under the CISG.[114]

The profits of the breaching party have also been targeted through claims of unjust enrichment on the basis of domestic laws. In *Adras Construction Co. Ltd. v. Harlow & Jones GmbH*, decided by the Supreme Court of Israel on November 2, 1998, an Israeli importer of steel had brought suit against a German seller for having resold part of the promised steel to a third party in Germany.[115] However, the buyer's claim was dismissed because it had lost a right to the remedies under the predecessor of the CISG, the Uniform Law on the International Sale of Goods (ULIS),[116] due to its failure to give notice of non-conformity within the established period. The buyer then filed new proceedings claiming this time that the seller, by not performing the contract and not being liable under ULIS, was unjustly enriched. In this new litigation, the Court found that the buyer was entitled to restitution of the profits made by the seller under the domestic laws of unjust enrichment, with no reference to the ULIS.[117]

The above approach is also rejected here. Already at the time of the *Adras* decision, scholars agreed that the unjust enrichment "remedy under domestic law [was] inconsistent with the [ULIS]".[118] The award of damages and its calculation is an issue expressly settled by Articles 74 to 77 of the CISG. Claims for unjust enrichment as damages are therefore a matter preempted by the CISG.[119] Since the unjust enrichment remedy is not contemplated within the provisions of damages for breach of contract, it is therefore safe to say that the so-called "restitution interest," which focuses not on the injured party's loss but on the breaching party's gain in order to prevent that party from being unjustly enriched, is not protected by the CISG.[120]

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[113] *See generally* R. B. Grantham & C. E. F. Rickett, *Disgorgement for Unjust Enrichment*, 62 CAMBRIDGE L.J. 159 (2003).

[114] Schmidt-Ahrendts, *supra* note 8, at 93.

[115] D.R.F. O'Dair & Doran Lipshitz, *Adras Building Material Ltd v Harlow & Jones Gmbh*, 3 Restitution L. Rev. 235, 237 (1995).

[116] The ULIS or Uniform Law on the International Sales of Goods of July 1, 1964 was, together with the ULF Uniform Law of the Formation of Contracts, the basis for the "new" Uniform Sales Law drawn up by the United Nations Commission on International Trade Law (UNCITRAL), which influenced not only the basic structures and key concepts in the CISG, but also many of its detailed solutions.

[117] O'Dair, *supra* note 115, at 239, 262, 273.

[118] Daniel Friedmann & Yehuda Adar, *Israel*, *in* INTERNATIONAL SALES LAW, *supra* note 44, at 523; *accord* Hans Stoll & Georg Gruber, *Article 76*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 780, 782 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

[119] In *Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd.*, the court held that an unjust enrichment claim is a matter preempted by the provisions on remedies for breach of contract under the CISG. No. 4:009CV00318 SWW, 2009 WL 5181854, at *7 (E.D. Ark. Dec. 23, 2009),

[120] THE LAW OF DAMAGES IN INTERNATIONAL SALES, *supra* note 14, at 33.

VII. CONCLUSION

The CISG provisions on damages neither expressly stipulate the possibility to calculate a party's loss on the basis of the breaching party's damages, nor expressly prohibit it. Nevertheless, this method to calculate a party's loss may be drawn from a good faith interpretation of Article 74 of the CISG. Courts and tribunals are requested to interpret the Convention's provisions in good faith pursuant to Article 7(1). Breaches of contract that make it too difficult for the aggrieved party to demonstrate its real loss other than by relying on the breaching party's profits warrant the use of the good faith principle to expand the notion of full compensation. The principle of full compensation must not be limited to the pecuniary loss suffered as shown in the balance sheet. The assumption that what the breaching party obtained in profits is what the aggrieved party could have gained from the correct performance of the contract reflects a loss that should be fully compensated under some circumstances. In particular, as advocated and demonstrated here, the calculation of damages on the basis of the breaching party's profits applies where a buyer, who suffers a breach consisting of the non-delivery of the goods, is unable to calculate its loss because at the time of the breach it neither had pre-orders from its own customers nor did it ever trade with the unique type of goods at stake in that transaction.