

Mitigation of Damages for Breach of Contract for the International Sale of Goods*

Mitigación de daños por incumplimiento del contrato de compraventa internacional de mercaderías

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Abstract: This article addresses the duty to mitigate damages in activities relating to the international sale of goods that are governed by the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), which is performed by the creditor in the event that the debtor breaches the contract. It is based on a dogmatic understanding of Article 77 of the CISG. The paper examines legal theory in order to establish the concept and legal character of mitigation of damages, and, through this, the scope. Court decisions and arbitration awards have also been studied, which, when implemented, have established what type of mitigating behavior should be undertaken by the creditor if the debtor breaches the contract.

Keywords: Mitigation of damages, Breach of contract, International Sale of Goods.

Resumen: Este artículo se refiere al deber de mitigar los daños en operaciones de compraventa internacional de mercaderías regidas por la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías, asumido por el acreedor ante el incumplimiento del contrato por el deudor. Para su elaboración se han tenido en cuenta la interpretación dogmática del artículo 77 de la Convención, apoyada en una indagación de tipo doctrinal con el fin de establecer el concepto y la naturaleza jurídica y a partir de ello su alcance, para lo cual igualmente se han estudiado fallos y laudos arbitrales que en su aplicación han establecido qué tipo de conductas mitigadoras deben ser asumidas por el acreedor frente al incumplimiento del deudor.

Palabras clave: Mitigación de daños, incumplimiento contractual, compraventa internacional de mercaderías.

Introduction

This article addresses the duty to mitigate damages in activities relating to the international sale of goods that are governed by the 1980 United Nations Convention, hereinafter the Convention on the International Sale or CISG (United Nations Convention on Contracts for the International Sale of Goods), which is performed by the creditor in the event that the debtor breaches the contract. It is based on a dogmatic understanding of Article 77 of the United Nations Convention on Contracts for the International Sale of Goods, which, to date, has been implemented by 89 countries, including several in Latin America. The paper examines legal theory in order to establish the concept and legal character of mitigation of damages, and, through this, the scope. Court

decisions and arbitration awards have also been studied, which, when implemented, have established what type of mitigating behavior should be undertaken by the creditor if the debtor breaches the contract.

The aim of the article is to demonstrate that there is a duty to mitigate damage, and also to avoid it. This is included in some of the Convention's rules, especially in Article 72, which allows the creditor to terminate the contract in the event of a future fundamental breach. If such action is not undertaken, Article 77 will apply, and, as such, the other party can request that compensation is reduced. This article, thus, suggests that for activities relating to the international sale of goods there is a duty not only to mitigate but also to avoid damage.

This article is organized into the following sections: First, the concept and legal recognition of the mitigation of damages in legal traditions are addressed. Subsequently, reference is made to the regulation of mitigation of damages in international contract instruments that have seemingly drawn on the rule contained in Article 77 of the Convention on the International Sale. Thirdly, the legal nature and scope of the mitigation of damages are discussed, then several representative mitigating behaviors are identified, including termination for fundamental foreseeable breach of contract in accordance with the regulations stated in the CISG. The final section contains the conclusions and bibliography.

Concept and recognition in the legal traditions

The following section explains the concept of mitigation of damages that is included in the Convention on the International Sale, and reference is also given to how it is recognized in other international contract instruments and in several harmonization proposals. Additionally, the way in which it has been adopted by countries that follow the Anglo-Saxon tradition as well as some that use continental European law will be referred to in order to provide an insight into the context on its inclusion into foreign laws.

The duty to mitigate damages can be considered to be a set of reasonable measures that the party who suffers the breach of contract should adopt in order to avoid being damaged to any further extent. As such, it cannot be claimed that the other party compensates them for those damages that are not a consequence of the breach, but instead for their own lack of adopting such measures.¹

The duty to mitigate damages, at least with respect to contemporary law, has Anglo-Saxon origins.² In England, it has been recognized that this includes the duty for the creditor to adopt reasonable measures to protect his interests when the debtor breaches the contract. This should be undertaken in such a way that the loss resulting from the breach should be minimized and any increase in damages should be avoided. The debtor will only be eligible for compensation of losses after having taken these measures.³ Sections 50 and 51 of the Sales of Goods Act establishes that the buyer or seller has the duty to minimize damages if the other

party breaches contract by signing an alternate contract, and, if this duty is breached, the compensation for breach can be reduced.⁴

In the United States, the duty to mitigate damages can be found in §350 of the *Restatement (2nd) of Contracts*; damages cannot be recovered if they could have been avoided by the aggrieved party. This does not prevent the affected party claiming compensation if they made reasonable efforts to avoid the loss, which, of course, depends on the circumstances.⁵ Also, the Uniform Commercial Code contains applications regarding the duty to mitigate damages such as those written in § 2-712, which establishes the possibility for the buyer to purchase replacement goods in place of the goods that the seller should have delivered, thus being able to reclaim the costs incurred. Sections § 2-708, § 2-713, and § 2-715 include the right to deduct the costs from the respective compensation that the seller or buyer breaching contract could have avoided as well as the indirect damages stemming from the seller's breach. This includes the loss that comes from the overall or specific needs that the seller had reason to be aware of when contracting and could not have reasonably been avoided through a replacement purchase or other method.⁶

In some codes that are based on the continental European tradition, mitigation of damages has been expressly included, for example in Articles 1227-1 of the Italian Civil Code, 1479 of the Civil Code of Québec, 6:101 of the Dutch Civil Code, 44 of the Swiss Code of Obligations, and §254-2 of the German Civil Code.⁷

In Latin American law, there have been no further developments other than the inclusion of mitigation of damages in Article 1327 in the Peruvian Civil Code of 1984; in Article 348 in the Bolivian Civil Code; and also in Article 1074 of the Colombian Code of Commerce, despite being written into insurance contracts when establishing that the insured party is obliged to avoid any increase in loss and to recover what is insured.⁸ Recently, the Argentine Civil and Commercial Code, which was created in August 2015, has included the duty to avoid causing unjustified damage and to take reasonable measures to avoid damage or reduce its extent.⁹

Despite the dearth of normative regulation, some authors have posed the possibility of deriving the duty to mitigate damages from the obligation to behave in good faith when implementing contracts that are explicitly legally regulated. As such, JORGE CUBIDES-CAMACHO has commented in the Colombian legal theory that the mitigation of damages should be seen as a demonstration of the “responsibility of indemnity”, which is, in turn, derived from the duty to act in good faith when implementing a contract that is established in Article 1603 of the Colombian Civil Code.¹⁰

Similarly, ÁLVARO VIDAL-OLIVARES bases his comments in Article 1546 of the Chilean Civil Code when he affirms that good faith serves to limit the powers and rights of the contractors and as a source of duties of conduct, for example, in this case, for the creditor affected by the breach of contract.¹¹ In Spain, LUIS DÍEZ-PICAZO affirms that the

mitigation of damages is derived from good faith, which means avoiding increasing damages. In order to do so, preventative measures that require reasonable care should be adopted.¹²

It is worthwhile mentioning that in the modernization proposal of the Spanish Civil Code, in terms of obligations and contracts, the duty to mitigate damages was included in Article 1211. The suggested rule sets out that the debtor will not respond for damages that the creditor could have avoided or reduced by adopting the measures required by good faith but will compensate for the expenses reasonably incurred by the creditor, even if the measures have been unsuccessful.

Regulation in the CISG and other international contractual instruments

Despite there being no rule that defines it expressly, the Convention on the International Sale includes a broad concept of breach of contract in an objective manner, which, apart from subjective elements such as guilt, includes the non-implementation of services as well as late and defective performance. It establishes a system of remedies that work for the creditor, who is able to choose freely from remedies such as enforced implementation, price reduction, repair; resolution or substitution is reserved for fundamental breaches—in events of breach of contract—according to what is specified in Articles 25 and 46.2 of the Convention.¹³

Compensation from damages can be found (Chapter V, Section II, Articles 74-77) among the remedies for breach of contract that are written in the CISG. It includes the value of the loss suffered and the gain that was not obtained by the creditor as a result of the breach, but is limited to the loss that the debtor would or should have had foreseen in the moment that the contract was signed. Facts are considered that he had or should have had a knowledge of at this moment of time as a possible consequence of the breach in terms of what is written in Article 74. It is worthwhile remembering that damages in the Convention on the International Sale can be filed for either independently or in addition to other remedies that are available to the creditor.¹⁴

However, compensation is limited by the duty to mitigate damages, which is regulated in Article 77 of the Convention for the International Sale in the following terms:

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

The mitigation of damages is understood in both the legal theory and in case law as one of the principles upon which the CISG is based.¹⁵ It is also considered to be based on the principle of good faith in international law¹⁶, and there is also an economic element which attempts to disincentivize

passive behaviors that aggravate damages that would otherwise have been avoided.¹⁷

In addition, as VIDAL-OLIVARES explains, the Convention on the International Sale makes sure that the creditor reasonably manages the effects that result from the debtor's breach. There are a series of duties that must be carried out in order to exercise the rights that are set out in each situation, in such a way that a balance is achieved when protecting the interests of the creditor and the debtor by assuring that he will behave in a reasonable way according to his particular circumstances.¹⁸

This rule has been incorporated into the modern instruments of contract law, which, through the Convention on the International Sale, seek global or regional harmonization or unification, and they are also widely approved in international arbitration; it is even recognized as one of the principles of *lex mercatoria*.¹⁹ Article 7.4.8 of the Unidroit Principles 2016 establishes that:

“Mitigation of harm

1. The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.
2. The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.²⁰

Similarly, Article 9.505 of the Principles of European Contract Law states that:

1. The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps.
2. The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.²¹

Also, in the Draft of the Common Frame of Reference (DCFR), Article III, 3.705:

III.-3:705: Reduction of loss

1. The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.
2. The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.²²

Similarly to the above-mentioned instruments, it is worthwhile mentioning that the Proposal for the Principles of Latin American Contract Law, which included this duty in terms of compensation being reduced if the creditor omitted adopting measures that, in accordance with good faith, were reasonable to mitigate losses. The reduction corresponds to the amount by which it would have been possible to mitigate damages.²³

Legal character and scope

There are two theories regarding the legal character of the mitigation of damages: the first conceives it as an obligation and the second as a duty.²⁴ According to the first, it is a behavior that party adversely affected by the damage should assume and, as such, can legally be required by the debtor.²⁵ Conversely, when the mitigation of damages is conceived as a duty, the debtor of the non-executed obligation cannot demand that the adversely affected creditor assumes mitigating behavior. The latter must, instead, execute the duty in order to protect his own interest, which, in this case, is the right to be compensated for the debtor's breach under penalty of a negative consequence for his/ her omission. This is because his behavior is taken into consideration when the compensation is valued for which he has the right, which will reduce the loss that the affected party could have avoided.²⁶

The mitigation of damages in the international sale of goods is not a contractual obligation as the debtor cannot turn to the remedies that the Convention has established for the situations in which there has been non-execution of the parties' obligations. It is, instead, a duty. Non performance with this duty will bring about consequences for the creditor in terms of his inability to claim complete damages for the debtor's breach.²⁷

The mitigation of damages involves both a positive and negative aspect, the first is that the creditor should adopt the measures necessary to reduce or avoid the losses that the breach has generated or may generate, and second, to refrain from behaviors that could increase the debtor's losses.²⁸

It has also been argued that, as a consequence of the duty to mitigate damages, the creditor should be compensated for the cost of the measures adopted; compensation for losses that could have effectively been avoided are excluded.²⁹ Moreover, the failure to comply with the duty to mitigate damages only affects the compensation for damages that arise as a result of the debtor's breach, but not the use of other remedies that are available to the creditor.³⁰

It is worthwhile mentioning that the duty to mitigate damages is limited by reasonableness as in no case can the creditor be required to mitigate losses that arise from a breach. It can also not be assumed that by reducing losses the creditor should undertake expensive operations according to the particular circumstances.³¹ Additionally, it can be considered that the evidence regarding the violation of duty to mitigate damage corresponds to the debtor.³² As this is assumed by the creditor, alleging breach of contract corresponds to the party that it benefits (the debtor) to the extent that he can maintain this circumstance in order to avoid having to compensate for the damages as a result of his breach of contract.

Examples of the duty to mitigate and avoid damages in the CISG

Determining reasonable measures to mitigate damage is a factual matter that depends as much on the uses as it does the practices established between the parties and the behavior of what a similar person in the same position and same circumstances to whoever must take such measures would have done in a similar situation. This is all in accordance with what is established in Articles 9 and 8.2 of the Convention, respectively, without obviously involving disproportionate efforts or expenses, as has already been mentioned.³³ In the following subsections, references are made to some representative cases that mitigate behaviors in order to illustrate them; they come from some considerations in the legal theory and case law decisions.

A replacement transaction

ANA SOLER-PRESAS highlights that in the international sale of goods the initiation of a replacement transaction or “business of market coverage” is quintessential mitigating behavior.³⁴ The author defines the business of market coverage or replacement as that which is entered into by the creditor who terminates the original agreement in order to satisfy his interest in performance: that is, they obtain an alternative provision from the one that was originally agreed upon. This business is entered into in exclusive interest of the creditor of the compensation at the expense of the debtor who breaches contract.³⁵

This type of replacement transaction can be undertaken by either the seller (reselling the goods) or by the buyer (buying replacement goods), as is established in Article 75 of the Convention. According to this rule, if the contract is terminated but one of the two parties implements it within a reasonable timeframe after termination, the party claiming the compensation may obtain the difference between the price of the contract and the price stipulated in the replacement transaction, as well as any other damages that are can be requested according to Article 74.³⁶ The reasons that can lead to either one of two contractors to enter into a replacement transaction are varied. They include: preventing the goods from becoming damaged, for example if the buyer fails to comply with his obligation to receive the goods; events in which it is expensive for the seller to keep the goods based on an unjustified refusal of the buyer to receive them; or the buyer can enter into a replacement transaction if the seller has not delivered the goods, which are necessary to carry out a production process that cannot be interrupted in order not to breach contracts with third parties, etc. SCHWENZER assumes that Article 77 may mandate a replacement if this indeed functions to avoid the failure that comes from a breach and the creditor's intention is not to terminate the contract. It also indicates that the replacement transaction is mitigating behavior if, as a result of it, the loss is less than expected.³⁷

In several cases, it has been accepted that the replacement sale or purchase is mitigating behavior; for example, in a decision regarding a shoe sales contract in which the seller terminated the contract and sold the shoes to retailers due to the buyers' breach of contract in terms of payment and the concession of requested guarantees.³⁸

Contracting the delivery of goods that were not delivered on time by the buyer with a third party is also considered to be mitigating behavior. An example of this is a contract entered into between a Canadian company (seller) and a U.S. company (buyer) for the production and delivery of templates to manufacture car parts. The seller was delayed in production, which led the buyer having to request another producer to manufacture the templates in order to be able to deliver the end-buyers their parts in a timely manner. The buyer filed a claim and was awarded the extra costs that he incurred resulting from changing producer as well as the damages for breach of contract due to the fact that some of the templates were not in line with the contractual specifications.³⁹

Purchasing parts that replace the damaged pieces from another provider

The buyer purchasing parts to replace the damaged pieces or parts is a demonstration of the duty to mitigate damages. Indeed, in a case in which the buyer made allegations regarding a lack of conformity for some air compressors, the seller, who was the manufacturer, was ordered to pay compensation that covered the expenses incurred by the buyer when he attempted to rectify the defects. These included the payment made by the defendant when he bought compressors from a third party in order to mitigate the original losses as the claimant could not secure orders due to the defendant's breach of contract, there were handling and storage costs of the non-conforming goods, and there was also the buyer's loss of profit that resulted from the decrease in sales of the said goods to third parties.⁴⁰

Paying the transport and storage costs of goods that were not received by the buyer

If the buyer does not receive the object of the contract, a mitigating measure on the part of the seller would be to pay the transport and storage costs. This decision was arrived at in a case involving a lawsuit that was filed by the seller in which compensation was claimed for the buyer's breach of contract as well as interest for failure to pay the purchase price. The court accepted the seller's termination of contract for the payment not having been made in the additional time-frame established in accordance with Articles 63.1 and 64.1b of the Convention. It also ruled that the seller had the right to claim interest according to Article 78 and compensation for the maintenance of undelivered machinery, according to Article 74. It also accepted that the seller had mitigated the damage according to Article 77 when he transported and stored the goods that were not received by the buyer.⁴¹

Protecting or preserving the goods

It is worthwhile mentioning that the principle of mitigation of damages is also seen in other rules in the Convention, such as Articles 85-88, which relate to the preservation of goods for both the seller and the buyer.⁴² According to these rules, if the buyer delays receiving the goods, or when the payment of the agreed price and the delivery are supposed to take place at the same time but the agreed price is not paid, and, the seller is in possession of the goods, then they must take reasonable measures to preserve them according to the circumstances.

Similarly, when the buyer who has received the goods intends to reject them due to a breach of contract by the seller, such as when the goods are defective in terms of quality or quantity or when they are delivered to a place or at a time that is different to what was agreed upon either in the contract or the Convention, in accordance with Articles 45-52, reasonable measures should be adopted for their preservation, according to the circumstances. This includes depositing them in third party warehouses at the expense of the other party insofar as the costs are not excessive, which is contemplated in Article 87 of the Convention. Moreover, they could be sold by what is contemplated in Article 88 of the Convention when the other party has taken a very long time to claim the goods, accept their return, or pay the price of the cost of preserving them, or any other reasonable costs.⁴³

As VICENTE MONTES points out, the stated Articles are applications of the principle of mitigation of damages, which is established in Article 77, since the creditor who claims that the debtor has breached contract should adopt reasonable measures, according to the circumstances, to reduce the loss. This includes the loss of earnings that are a result of the breach.⁴⁴

Early termination for future fundamental breach of contract

As was indicated in the introduction of this article, it might arguably be the case that in the context of the CISG, the duty to mitigate damages is not only limited to the moment at which the fundamental breach of the obligations stipulated in the contract happens; it also includes the duty to avoid damage. As such, SOLER-PRESAS has stated that by including lost profits in the object of the mitigation the Convention has made it clear that the measures to be adopted are not only mitigating in the strict sense. They should also include those measures that help to avoid the imminent detrimental consequences that could arise from breach of contract.⁴⁵ Similarly, VIDAL-OLIVARES, notes that the creditor does not only have the duty to mitigate losses that have already taken place; he also has the duty to prevent or avoid other losses that may occur in the future.⁴⁶ For this reason, termination of contract for future fundamental breach falls within this type of mitigating conduct.

This possibility can be found in Article 72 of the Convention, according to which, if before the date of performance of the contract it was clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoid. As far as is possible, this entails the duty to communicate what is written in point 2 of the Article with reasonable notice to the debtor. This remedy is not only useful for the seller who will not be obliged to manufacture or deliver a product for which they will not be paid, but it is also useful for the buyer who will not have to wait for the delivery that will not be made. Adopting this possibility will contribute to minimizing the damage that the parties will be forced to repair as a result of the breach.⁴⁷

Conclusions

The following are the main conclusions from the previous sections:

The duty to mitigate damages, which are contained in Article 77 of the United Nations Convention Contracts for the International Sale of Goods, is not understood as an obligation but as a duty that is assumed by the creditor who seeks compensation for damages resulting from breach of contract. It consists of adopting reasonable measures to reduce the loss that comes from the other party's breach. These can either be in the preparatory stage of the contracting process or avoiding that the loss ever occurs.

The creditor should undertake this duty while seeking to protect his/her own interests that entail the right to obtain compensation for the debtor's breach of contract. The consequences of breach of contract are that his/her behavior will be taken into consideration when deciding on the amount of compensation for breach of contract and the loss that disadvantaged party could have avoided.

Determining reasonable measures to mitigate damage is a factual matter that depends on both the uses and the practices established between the parties and the behavior that will be or would have been carried out in a similar situation by a similar person in the same position or in similar circumstances to the person who needs to take the measures. This is in accordance with what is established in Articles 9 and 8.2 in the Convention, respectively, and, obviously, there should be no unreasonable costs.

Based on some decisions and considerations from the legal theory, the following could be examples of mitigating behavior: A replacement transaction, which seeks to obtain a replacement of what was originally agreed upon and which can be effected by both the seller and the buyer. The second could be obtaining parts from another provider that replace those damaged. The costs of transporting and storing the good that was not received by the buyer may also be assumed by the seller, and the contract can be terminated for a fundamental foreseeable breach.

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Notes

- 1 LUIS DÍEZ-PICAZO, *Fundamentos del Derecho Civil patrimonial, II. Las relaciones obligatorias*, 783 (6^a ed., Thomson Civitas, Cizur Menor, Pamplona, 2008).
- 2 However, without doubt, as LILIAN C. SAN MARTÍN-NEIRA indicates, the duty to avoid damages was recognized by Roman law. The author has suggested appealing to Roman law as a method of establishing the rules that govern the damage avoidable in the Latin American legal subsystem. LILIAN C. SAN MARTÍN-NEIRA, *La carga del perjudicado de evitar o mitigar el daño. Estudio histórico-comparado, passim* (Universidad Externado de Colombia, Bogotá, 2012). The following author also acknowledges its Roman origins: CARLOS IGNACIO JARAMILLO-JARAMILLO, *Los deberes de evitar y mitigar el daño. Funciones de la responsabilidad civil en el siglo XXI y trascendencia de la prevención*, 145-159 (Pontificia Universidad Javeriana, Temis, Bogotá, 2013).
- 3 PATRICK S. ATIYAH, *An Introduction to the Law of Contract*, 458 (5th ed., Clarendon Press, Oxford, 1995). GUENTER HEINZ TREITEL, *The Law of Contract*, 976-982 (11th ed., Thomson Sweet & Maxwell, London, 2003). In these texts, reference is made to the verdicts that have implemented the mitigation of damages. In relation to these rules that include the duty to mitigate damages as developed by the English, see: MARÍA LUISA PALAZÓN-GARRIDO, *Los remedios frente al incumplimiento en el Derecho comparado*, 219-220 (Thomson Reuters Aranzadi, Cizur Menor, Pamplona, 2014). As the author explains, this duty includes three rules: a) The adversely affected party cannot claim compensation for damages that could have been avoided by adopting reasonable measures that were appropriate for the circumstances. b) The damage mitigated is not compensable, and c) If the affected party incurs a reasonable amount of costs or losses due to their mitigating actions, they can be recovered. *Ibid.*

- 4 PATRICK S. ATIYAH, JOHN N. ADAMS & HECTOR MACQUEEN, *The Sale of Goods*, 487 (11th ed., Pearson, London, 2005).
- 5 American Law Institute, ALI, *Restatement of the Law (2nd)*, 3, 126 (American Law Institute Publishers, Saint Paul, Minnesota, 1981). E. ALLAN FARNSWORTH, *Contracts*, 808 (3rd ed., Aspen Law & Business, New York, 1999).
- 6 JOHN D. CALAMARI & JOSEPH M. PERILLO, *The Law of Contracts*, 562-564 (4th ed., West Group, Saint Paul, 1998). E. ALLAN FARNSWORTH, *op. cit.*, 806-817 (1999).
- 7 The concept is not greatly recognized in the codes that are based on continental European tradition. However, despite not explicitly referring to it, ROBERT JOSEPH POTHIER also mentions it when explaining a case based on the sale of livestock that suffered a contagious disease that caused the buyer a heavy economic loss due to other cattle he owned being affected. He was then left with land that was not possible to cultivate, and the author questioned if the debtor's responsibility extended to all damages caused despite knowing about the existence of the disease affecting the livestock. That is to say, should the seller be treated as malicious. Faced with this situation, POTHIER affirms that the seller should not respond for all the damages as these were not so inevitable that the buyer could not have overcome them by looking for other animals to plow the land, or by giving them to a settler. As such, this conduct must be estimated when calculating damages. ROBERT JOSEPH POTHIER, *Tratado de las obligaciones*, Nos. 166-168, 101-102 (traducido al español con notas de Derecho patrio por una sociedad de amigos colaboradores, parte primera, Barcelona, Imprenta y litografía de J. Roger, Barcelona, 1839).
- 8 EDGARDO MUÑOZ, *Sección comparativa iberoamericana a los artículos 74 al 77 de la CISG, in Schlechtriem & Schwenzler: Comentario sobre la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*, t. II, 1749-1755, 1754 (INGEBORG SCHWENZLER & EDGARDO MUÑOZ, dirs., Aranzadi, Thomson Reuters, Pamplona, 2011). Regarding regulations in civil law, PALAZÓN-GARRIDO explains how for some that belong to this tradition, "the duty to mitigate damage is connected with the coincidence of the creditor's fault when causing damage, and it is regulated jointly with the latter as limits to the compensation of the contractual damages." MARÍA LUISA PALAZÓN-GARRIDO, *op. cit.*, 220 (2014). In relation to other countries that have adopted Napoleonic style codes, the author indicates that, often, the duty to mitigate damages has been considered in these systems as an assumption of breach of causal link to avoid the creditor being able to claim for damages caused in part by their passivity. On some occasions, the theory of predictability has been applied, and, on others, the general principles of blame and the coincidence of contributory negligence have been applied; however, the author adds that in countries such as France, Belgium, and Spain the principle of good faith allows the mitigation of damages to be substantiated. MARÍA LUISA PALAZÓN-GARRIDO, *op. cit.*, 222 (2014).
- 9 As provided in the rule (article 1710 of the Civil and Commercial Code), every person has the duty, insofar as it depends on them, to: a) avoid causing unjustified harm; (b) take, in good faith and in accordance with the circumstances, reasonable measures to prevent damage, or to reduce its extent. If such measures prevent or reduce the extent of damages for which a third party would be liable, the person has the right to be reimbursed for the value of the expenses incurred in accordance with the rules of unjust enrichment; c) not worsen the damage, if it has already occurred.
- 10 According to this article, contracts must be implemented in good faith, and, therefore, enforce not only what is expressed in them, but everything that clearly arises from the nature of the obligation, or from the law that it falls

under. JORGE CUBIDES-CAMACHO, *Obligaciones*, 237 (8ª ed., Ibáñez, Pontificia Universidad Javeriana, Bogotá, 2017). Also, JORGE SUESCÚN-MELO, *Derecho privado. Estudios de derecho civil y comercial contemporáneo*, t. 1, 203 (2ª ed., Legis, Bogotá, 2003). Regarding the admission of mitigation of damages in Colombian case law, it is necessary to consult the Court of Civil Cassation's judgment of December 16th, 2010, Reporting Judge Arturo Solarte-Rodríguez. It should be noted that the remarks made as part of this ruling referred to Article 77 of the Convention on the International Sale of Goods. On this subject: JORGE OVIEDO-ALBÁN, *Mitigación de daños en la compraventa internacional. A propósito de la sentencia de Casación de la Corte Suprema de Justicia de Colombia de 16 de diciembre de 2010*, 36 *Revista Iusta*, 49-60 (2012).

- 11 ÁLVARO VIDAL-OLIVARES, *La protección del comprador. Régimen de la Convención de Viena y su contraste con el Código Civil*, 163 (Ediciones Universitarias de Valparaíso, Pontificia Universidad Católica de Valparaíso, Valparaíso, 2006). And ÁLVARO VIDAL-OLIVARES, *La carga de mitigar las pérdidas del acreedor y su incidencia en el sistema de remedios por incumplimiento*, in *Estudios de Derecho Civil III. Jornadas Nacionales de Derecho Civil, Valparaíso 2007*, 429-457, 437 (ALEJANDRO GUZMÁN-BRITO, scientific editor, Legal Publishing, Santiago de Chile, 2008). In this text, the author also raises the possibility of laying the groundwork for the admission of the duty to mitigate damages without the need for an express rule that recognizes it in the application of the causality criteria in terms of breach of contract, according to Article 1558 of the Chilean Civil Code. ÁLVARO VIDAL-OLIVARES, *La carga de mitigar las pérdidas...*, 429-457, 449 (2008). Along similar lines, CRISTIÁN GANDARILLAS-SERANI, *Algunas consideraciones acerca del deber de mitigación o minimización del daño frente al incumplimiento contractual*, in *Estudios de Derecho Civil IV, Jornadas Nacionales de Derecho Civil, Olmué, 2008*, 431-449, 447 (CARLOS PIZARRO-WILSON, coord., Legal Publishing, Santiago de Chile, 2009). See also, RAMÓN DOMÍNGUEZ-ÁGUILA, *Notas sobre el deber de minimizar el daño*, 5 *Revista Chilena de Derecho Privado*, 73-95, 74 (2005). JUAN IGNACIO CONTARDO-GONZÁLEZ, *Indemnización y resolución por incumplimiento*, 434-435 (Thomson Reuters, Santiago de Chile, 2015). Presenting the opposite opinion, JORGE LÓPEZ-SANTA MARÍA, *Informe en Derecho sobre la obligación del acreedor de una indemnización, de mitigar o atenuar los daños. Contrato de transporte marítimo*, 8 *Revista Chilena de Derecho Privado*, 203-233, 214 (2007). The author states that there is no general rule in Chilean law from which such an obligation can be derived although there are particular rules that recognize it, as is the case of Article 77 of the Vienna Convention which is the subject of this work. JORGE LÓPEZ-SANTA MARÍA, *op. cit.*, 203-233, 218-222 (2007).
- 12 LUIS DÍEZ-PICAZO, *op. cit.*, 783 (2008). The author adds that it is clear that an element is introduced that breaks the causal relationship as the increase in damages does not constitute a direct or immediate consequence of breach of contract. This, instead, comes from the creditor's inaction. LUIS DÍEZ-PICAZO, *op. cit.*, 784 (2008).
- 13 ÁLVARO VIDAL-OLIVARES, *El incumplimiento contractual y los remedios de que dispone el acreedor en la compraventa internacional*, 33 *Revista Chilena de Derecho*, 3, 439-477 (2006).
- 14 On this point, see, among others: ÁLVARO VIDAL-OLIVARES, *La protección del comprador...*, 109 (2006).
- 15 Cf. BERNARD AUDIT, *La compraventa internacional de mercaderías*, 64 (Ricardo de Zavalía, transl., Zavalía Editor, Buenos Aires, 1994). ALEJANDRO M. GARRO & ALBERTO L. ZUPPI, *Compraventa internacional de mercaderías. La Convención de Viena de 1980*, 79 (2ª ed., Abeledo Perrot, Buenos Aires, 2012). FRANCO FERRARI, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 *Georgia Journal of*

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- 16 INGEBORG SCHWENZER, *op. cit.*, 1104-1110, 1104 (2016). JAVIER SAN JUAN-CRUCELAEGUI, *op. cit.*, 228 (2005). INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, *Global Sales and Contract Law*, 630-631 (Oxford University Press, Oxford, 2012).
- 17 ANA SOLER-PRESAS, *La valoración del daño en el contrato de compraventa*, 64-65 (Universidad Pontificia Comillas, Aranzadi Editorial, Pamplona, 1998). Also see different theories on its foundation: DJAKHONGIR SAIDOV, *The Law of Damages in International Sales. The CISG and other International Instruments*, 125-127 (Hart Publishing, Portland, 2008).
- 18 In fact, and as the author explains, the Convention sets forth a series of duties in terms of communication and material conduct for the creditor affected by the breach, which are demonstrated in the duty to report the lack of conformity of the goods within a reasonable timeframe, starting from when it was discovered. According to what is established in Articles 35 and 30 of the Convention, there is a limit of two years that commence when the goods are delivered after which the possibility of invoking the lack of conformity will be lost. Similarly, the duty to communicate the decision to terminate the contract (Article 26) as a material conduct duty, is precisely to mitigate the losses that derive from the breach, and is established in Article 77. Cfr. ÁLVARO VIDAL-OLIVARES, *La gestión razonable de los efectos del incumplimiento en la compraventa internacional*, 18 *Revista de Derecho (Valdivia)*, 2, 55-81 (2005). ÁLVARO VIDAL-OLIVARES, *La carga de mitigar las pérdidas...*, 429-457, 435-436 (2008). In the author's words "... in Vienna the creditor —the party who is damaged by the breach— must, just like the debtor, behave reasonably, according to the requirements of objective good faith. This is the behavior that the debtor, and every reasonable person in his position, hopes from the creditor, even though they have been affected by the breach. By establishing the idea of reasonable management of the effects of the creditor's breach, the Convention manages to establish a system of balanced remedies that are strict not only with the debtor who has breached contract but also with the creditor who has been affected by the non-performance. If they fail to observe reasonable behavior, then they may

- be deprived of their right to compensation, to one of the remedies, or even the reduction in compensation to which they are entitled". ÁLVARO VIDAL-OLIVARES, *La carga de mitigar las pérdidas...*, 429-457, 436 (2008).
- 19 FILALI OSMAN, *Les principes généraux de la lex mercatoria*, 183-186 (Bibliothèque de Droit Privé, volume 224, Librairie générale de droit et de jurisprudence, LGDJ, Paris, 1992). BRUNO ZELLER, *Mitigation of Damages: Comparison between the Provisions of the CISG (Art. 77) and the Counterpart Provisions of the Principles of European Contract Law (Art. 9:505)*, in *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, 486-490, 486 (JOHN FELEMEGAS, ed., Cambridge University Press, New York, 2007). INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, *op. cit.*, 631 (2012). PETER RIZNIK, *Some Aspects of Loss Mitigation in International Sales of Goods*, 4 *Vindobona Journal of International Commercial Law and Arbitration*, 267-282, 268 (2010).
- 20 EWAN MCKENDRICK, *Article 7.4.8*, in *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, 901-904 (STEFAN VOGENAUER & JAN KLEINHEISTERKAMP, eds., Oxford University Press, Oxford, 2009). ELISABETH OPIE, *Mitigation of Losses: Remarks on the Manner in which the UNIDROIT Principles May be Used to Interpret or Supplement Article 77 of the CISG*, in *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, 226-231 (JOHN FELEMEGAS, ed., Cambridge University Press, New York, 2007). Also see the article's official comments: International Institute for the Unification of Private Law, Unidroit, *Unidroit Principles of International Commercial Contracts*, 282-283 (Rome, 2016).
- 21 Regarding this subject, LUIS DÍEZ-PICAZO, ENCARNACIÓN ROCA-TRÍAS & ANTONIO MANUEL MORALES-MORENO, *Los principios del Derecho europeo de contratos*, 382-383 (Civitas, Madrid, 2002). As Vidal Olivares points out, despite the fact that both the UNIDROIT Principles and the PECL, unlike the Convention, do not explicitly impose the duty to mitigate damages on the creditor, they take it for granted as this explains the reduction in compensation. ÁLVARO VIDAL-OLIVARES, *La carga de mitigar las pérdidas...*, 429-457, 441 (2008).
- 22 CHRISTIAN VON BAR, ERIC CLIVE & HANS SCHULTE-NÖLKE, eds., *Principles, Definitions and Model Rules Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, 251 (Outline Edition Prepared by the Study Group on a European Civil Code, and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the Principles of European Contract Law, Sellier, Munich, 2009). On the reception of the duty to mitigate damage in the PECL/DCFR see: ANA SOLER-PRESAS, *La indemnización por resolución del contrato en los PECL/DCFR*, 2 *InDret, Revista para el Análisis del Derecho*, 1-32, 9-19 (2009). JAVIER NANCLARES-VALLE, *Capítulo 5. Libro III. Obligaciones y derechos*, in *Unificación del derecho patrimonial europeo, marco común de referencia y derecho español*, 163-217, 189-191 (EDUARDO VALPUESTA-GASTAMINZA, coord., Bosch, Barcelona, 2011).
- 23 The Principles of Latin American Contract Law Proposal relates to a project that was prepared by a group of teachers from several Latin American countries and sponsored by the Foundation for Continental Law. The article on the suggested mitigation of damages was taken from a draft version written in 2013, which can be found in ANTONIO MANUEL MORALES-MORENO, *Los principios latinoamericanos de derecho de los contratos. Un debate abierto sobre las grandes cuestiones jurídicas de la contratación*, LXVII *Anuario de Derecho Civil*, 1, 227-254, 253 (2014).

- 24 On the difference between obligation and duty as elements of the imperative relationship, see: ANTONIO CABANILLAS-SÁNCHEZ, *Las cargas del acreedor en el Derecho Civil y en el Mercantil*, passim (Montecorvo, Madrid, 1988). After explaining its origin in procedural law, the author points out that although the behavior of which the duty is part must be observed by the creditor as it is in his own interest as a requirement to carry it out, the author also considers DÍEZ-PICAZO's position who points out that, regardless, the debtor is also interested in the creditor exercising the duty as it affects him. ANTONIO CABANILLAS-SÁNCHEZ, *op. cit.*, 45 (1988). Also, LUIS DÍEZ-PICAZO, *op. cit.*, 152 (2008). Colombian legal theory: MARIANA BERNAL-FANDIÑO, *El deber de coherencia en el Derecho colombiano de los contratos*, 181-185 (Pontificia Universidad Javeriana, Bogotá, 2013).
- 25 This thesis is upheld by TOMÁS VÁZQUEZ-LÉPINETTE, *La conservación de las mercaderías en la compraventa internacional*, 188 (Tirant lo Blanch, Valencia, 1995), as he believes that it is the right to demand the reduction in compensation that is due to the counterpart.
- 26 ÁLVARO VIDAL-OLIVARES, *La protección del comprador...*, 33-34 (2006). RODRIGO FUENTES-GUÍNEZ, *El deber de evitar o mitigar el daño*, 217-218 *Revista de Derecho, Universidad de Concepción*, 223-248, 226 (2005). RAFAEL ILLESCAS-ORTIZ & PILAR PERALES-VISCASILLAS, *Derecho mercantil internacional. El derecho uniforme*, 233 (Editorial Centro de Estudios Ramón Areces, Madrid, 2003). LILIAN C. SAN MARTÍN-NEIRA, *op. cit.*, 311-316 (2012). ANA SOLER-PRESAS, *La indemnización por resolución...*, 1-32 (2009). GUENTER HEINZ TREITEL, *Remedies for Breach of Contract. A Comparative Account*, 179 (Oxford University Press, Oxford, 1988). ANTONI VAQUER-ALOY, *La armonización del derecho de obligaciones y contratos*, 211 (Astrea, Universidad Sergio Arboleda, Bogotá, 2017). Also on the discussion about the legal character of the mitigation of damages: CARLOS IGNACIO JARAMILLO-JARAMILLO, *op. cit.*, 178-180 (2013). PALAZÓN-GARRIDO points out that despite being known as “the duty to mitigate” it is not properly a duty as it does not involve an obligation of a subject with respect to another who can be considered to be the owner of a right. It is, rather, a rule that prevents the party affected by the breach from claiming for those losses that could have been avoided, reduced, or offset simply by adopting reasonable measures that were appropriate for the particular circumstances. MARÍA LUISA PALAZÓN-GARRIDO, *op. cit.*, 218 (2014).
- 27 In this regard, MARÍA LUISA PALAZÓN-GARRIDO, *op. cit.*, 199 (2014). ANA SOLER-PRESAS, Artículo 77, in *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 621-628, 622 (LUIS DÍEZ-PICAZO Y PONCE DE LEÓN, dir., coord., Civitas, Madrid, 1998). Also, in ANA SOLER-PRESAS, *La indemnización...*, 9-19, 10 (2009). INGEBORG SCHWENZER, *op. cit.*, 1104-1110, 1105 (2016). ÁLVARO VIDAL-OLIVARES, *La protección del comprador...*, 35, 156 (2006). TREITEL remarks that the breach of “duty” to mitigate does not involve legal responsibility as it only reduces the amount of the compensation that the plaintiff can seek. GUENTER HEINZ TREITEL, *The Law of...*, 976-977 (2003). In the same vein, in relation to Article 7.4.8 of the UNIDROIT Principles: EWAN MCKENDRICK, *op. cit.*, 901-904, 901 (2009).
- 28 VICTOR KNAPP, *Article 77, in Commentary on the International Sales Law*, 559-567, 560 (C. MASSIMO BIANCA & MICHAEL JOACHIM BONELL, coords., Giuffrè, Milan, 1987). TOMÁS VÁZQUEZ-LÉPINETTE, *op. cit.*, 181-183 (1995). ÁLVARO VIDAL-OLIVARES, *La protección del comprador...*, 157, 160 (2006). Accordingly, with reference to Article 1227 of the Italian Civil Code: GIOVANNA VISINTINI, *Tratado de la responsabilidad civil*, 2, 269 (AÍDA KEMELMAJER DE CARLUCCI, transl., Astrea, Buenos Aires, 1999). GIANROBERTO VILLA, *Danno e*

- risarcimento contrattuale*, in *Trattato del Contratto a cura di Vincenzo Roppo, V, Rimedi*, 2, 751-976, 922 (Giuffrè, Milano, 2006).
- 29 FRITZ ENDERLEIN & DIETRICH MASKOW, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods*, 308-309 (Oceana, New York, 1992). ANA SOLER-PRESAS, *Artículo 77*, 621-628, 627, 628 (1998). ÁLVARO VIDAL-OLIVARES, *La protección del comprador...*, 162 (2006). RODRIGO FUENTES-GUÍÑEZ, *op. cit.*, 223-248, 228 (2005). ÁNGEL CARRASCO-PERERA, *Derecho de contratos*, 1222 (2ª ed., Aranzadi-Thomson Reuters, Cizur Menor, Pamplona, 2017). Also in point two of Article 7.4.8 of the Unidroit Principles: “The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm”.
- 30 ÁLVARO VIDAL-OLIVARES, *La protección del comprador...*, 157 (2006).
- 31 Cfr. VICTOR KNAPP, *op. cit.*, 559-567, 560 (1987). INGEBORG SCHWENZER, *op. cit.*, 1104-1110, 1107 (2016). INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, *op. cit.*, 632 (2012). ÁNGEL CARRASCO-PERERA, *op. cit.*, 1222 (2017). ESPERANZA CASTELLANOS-RUIZ, *La compraventa internacional de mercaderías*, in *Contratos*, t. XVI, *Los contratos internacionales* (I), 381-632, 612 (MARIANO YZQUIERDO-TOLSADA, dir., Thomson Reuters Aranzadi, Cizur Menor, Pamplona, 2014).
- 32 INGEBORG SCHWENZER, *op. cit.*, 1104-1110, 1110 (2016). ANA SOLER-PRESAS, *Artículo 77*, 621-628, 627 (1998). Although in any case, the UNCITRAL digest of case law highlights that the verdicts are divided by who should invoke the failure to adopt measures to reduce the loss as, while in some it has been decided that the burden of evidence corresponds to the debtor who made the breach, others have opted to demand that the creditor take reasonable measures to reduce the loss. Cfr. United Nations Commission on International Trade Law, Uncitral, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 358 (2016 edition, United Nations, New York, 2016).
- 33 FRITZ ENDERLEIN & DIETRICH MASKOW, *op. cit.*, 308 (1992). VICTOR KNAPP, *op. cit.*, 559-567, 560 (1987). EWAN MCKENDRICK, *op. cit.*, 901-904, 902 (2009). ELISABETH OPIE, *op. cit.*, 226-231, 229 (2007). CARLOS IGNACIO JARAMILLO-JARAMILLO, *op. cit.*, 180-188 (2013). INGEBORG SCHWENZER, *op. cit.*, 1104-1110, 1107 (2016). ÁLVARO VIDAL-OLIVARES, *La protección del comprador...*, 158 (2006). BRUNO ZELLER, *op. cit.*, 486-490, 487 (2007). I will also be a factual matter to evaluate the elements that damage derived from the breach of contract to be distinguished from the escalation of damages that is effectively ascribable to the creditor's negligent omission. UMBERTO BRECCIA, *Le obbligazioni*, 651 (Giuffrè, Milano, 1991).
- 34 ANA SOLER-PRESAS, *Artículo 77*, 621-628, 625 (1998). Also see: BERNARD AUDIT, *op. cit.*, 199. ÁNGEL CARRASCO-PERERA, *op. cit.*, 1224 (2017). INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, *op. cit.*, 632 (2012). ÁLVARO VIDAL-OLIVARES, *El cálculo de la indemnización del daño y la operación de reemplazo en la compraventa internacional*, in *Colección de estudios de Derecho Civil en homenaje a la profesora Inés Pardo de Carvallo*, 387-397, 390 (ALEJANDRO GUZMÁN-BRITO, scientific editor, Ediciones Universitarias de Valparaíso, Pontificia Universidad Católica de Valparaíso, Valparaíso, 2008). ÁLVARO VIDAL-OLIVARES, *La carga de mitigar las pérdidas...*, 429-457, 444 (2008). The author affirms that, in this case, the amount of compensation is fixed by the difference between the price of the contract and the price of the replacement operation, notwithstanding the other damages that can be awarded compensation in accordance with Article 74 of the Convention. Additionally, in terms of assuming that the replacement operation is

- mitigating behavior, see: ANTONIO MANUEL MORALES-MORENO, *Incumplimiento del contrato y lucro cesante*, 182 (Civitas, Thomson Reuters, Cizur Menor, Pamplona, 2010). ANTONIO MANUEL MORALES-MORENO, *Claves de la modernización del derecho de contratos*, 103-104 (Ibáñez, Centro de Estudios de Derecho Comparado, Bogotá, 2016). JUAN IGNACIO CONTARDO-GONZÁLEZ, *op. cit.*, 437 (2015). In terms of not recognizing the replacement operation as an indication of the risk management of the breach, see: JAIME ALCALDE-SILVA, *Incumplimiento y reemplazo: bases para una teoría general de la operación de reemplazo en derecho español*, 453-468 (Doctoral thesis, Universidad de Valencia, Valencia, 2013).
- 35 ANA SOLER-PRESAS, *Artículo 75, Artículo 76*, in *La Compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 609-621, 613 (LUIS DÍEZ-PICAZO Y PONCE DE LEÓN, dir., coord., Civitas, Madrid, 1998).
- 36 According to AUDIT, if the buyer obtains replacement goods or the seller finds another buyer in a sufficiently short period of time, an objective mechanism can be used to evaluate the prospective damages suffered. Article 75 sets the amount of damages as the price difference between the contract and the replacement; therefore, there will only be damages and losses on the part of the debtor in relation to the value of the goods if there is an unfavorable difference. BERNARD AUDIT, *op. cit.*, 203 (1994).
- 37 INGEBOURG SCHWENZER, *op. cit.*, 1104-1110, 1108 (2016).
- 38 Germany, Oberlandesgericht OLG [Provincial Court of Appeal] Düsseldorf, 17 U 146/93, 14th January, 1994, Clout Case 130. <http://cisgw3.law.pace.edu/cases/940114g1.html>
- 39 Canada, Ontario Court, General Division, *Nova Tool & Mold Inc. v. London Industries Inc.*, 16th December, 1998. <http://cisgw3.law.pace.edu/cases/981216c4.html>. Canada, Ontario Court of Appeal, *Nova Tool & Mold Inc. v. London Industries Inc.*, 26th January, 2000. <http://cisgw3.law.pace.edu/cases/000126c4.html>. In other case the tribunal said: “Under Art. 77 CISG, the aggrieved party must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit; if he fails to do so, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated”. Switzerland, Bundesgericht [Supreme Court], *Watches Case*, 17th December 2009. <http://cisgw3.law.pace.edu/cases/091217s1.html>
- 40 United States, Federal District Court, Northern District of New York, *Delchi Carrier SpA, v. Rotorex Corp.*, 9th September, 1994, Clout Case 85. <http://cisgw3.law.pace.edu/cases/940909u1.html>. When the case was appealed, the decision was upheld, and some additional compensation was included that had been denied in the first instance: this included transport and customs costs relating to the delivery of the compressors that were not in line with the original contract. United States, Federal Court of Appeals for the Second Circuit, *Delchi Carrier SpA, v. Rotorex Corp.*, 6th December, 1995, Clout Case 138. <http://cisgw3.law.pace.edu/cases/951206u1.html>
- 41 International Chamber of Commerce, ICC, *Arbitration Award ICC 7585, 1992*, Clout Case 301, 6 *ICC International Court of Arbitration Bulletin*, 2, 60 (November 1995). <http://cisgw3.law.pace.edu/cases/927585i1.html>, <http://library.iccwbo.org/dr-bulletins.htm>
- 42 BRUNO ZELLER, *op. cit.*, 486-490, 486 (2007).
- 43 JOHN HONNOLD, *op. cit.*, 101 (2009). VICENTE MONTES, *Artículo 86*, in *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 688-692, 689 (LUIS DÍEZ-PICAZO Y PONCE DE LEÓN, dir. coord., Civitas, Madrid, 1998). VICENTE MONTES, *Artículo 88*, in *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 693-696 (LUIS DÍEZ-PICAZO Y PONCE DE LEÓN, dir. coord., Civitas, Madrid, 1998). VICENTE MONTES,

- Artículo 87*, in *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 692-693, 693 (LUIS DÍEZ-PICAZO Y PONCE DE LEÓN, dir. coord., Civitas, Madrid, 1998).
- 44 VICENTE MONTES, *Artículo 85*, in *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 684-688, 686 (LUIS DÍEZ-PICAZO Y PONCE DE LEÓN, dir. coord., Civitas, Madrid, 1998).
- 45 ANA SOLER-PRESAS, *Artículo 77*, 621-628, 625 (1998). VICTOR KNAPP, *op. cit.*, 559-567, 566-567 (1987). Also, SCHWENZER, points out that the affected party should take the appropriate and possible measures to prevent losses or reduce their scope. INGEBORG SCHWENZER, *op. cit.*, 1104-1110, 1104 (2016).
- 46 ÁLVARO VIDAL-OLIVARES, *La carga de mitigar las pérdidas...*, 429-457, 444 (2008).
- 47 Accordingly: ALFONSO LUIS CALVO-CARAVACA, *Artículo 72*, in *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 569-573, 569 (LUIS DÍEZ-PICAZO Y PONCE DE LEÓN, dir., coord., Civitas, Madrid, 1998). CHRISTIANA FOUNTOULAKIS, *Article 72*, in *Schlechtriem & Schwenzler: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 1024-1040, 1040 (4th ed., INGEBORG SCHWENZER, ed., Oxford University Press, Oxford, 2016).
- * Research paper

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Additional information

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