

## SOME ASPECTS OF LOSS MITIGATION IN INTERNATIONAL SALE OF GOODS

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I would like to express my greatest gratitude to Professor Dr. Albert Kritzer who has contributed decisively to the publication of this article. While I have never met Professor Kritzer personally, I consider myself very fortunate to have been able to cooperate with someone that contributed so exceptionally to the field of international commercial law and to the inter-cultural dialogue between people from all over the world. I am deeply saddened by his passing and would like to express my deepest condolences to his loved ones in these hard times.

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### 1 INTRODUCTION

#### 1.1 DUTY TO MITIGATE

*“If you invite someone to dinner, and hours after he was due he still hasn't arrived, you had better infer that he isn't coming, and start eating. You can't let yourself and your other guests starve merely because there is a slight chance that he will show up days later.”<sup>1</sup>*

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<sup>1</sup> Brandt, A., citing Posner, R. in *What Is My Duty To "Mitigate" My Damages?* - R. R. Donnelley & Sons v Vanguard Transportation Systems, Part 1; available at: <<http://www.illinoisconstructionlawblog.com/2009/08/articles/what-is-my-duty-to-mitigate-my-damages-rr-donnelley-sons-v-vanguard-transportation-systems-part-1>>.

The aggrieved party cannot sit idly while the losses resulting from the breach of contract accumulate and then expect to be entitled to recover the losses that could have been avoided. Instead, one is generally required to undertake all measures that are reasonable in the circumstances to mitigate the loss resulting from the breach. According to Chenwei Liu, “even where the aggrieved party has not contributed either to the non-performance or to its effects, it cannot recover for loss it would have avoided if it had taken reasonable steps to do so”<sup>2</sup>. If the aggrieved party fails to satisfactorily mitigate the loss it is likely to be precluded from recovering those avoidable losses – i.e. that harm which, whilst caused by the breach, could have been reduced by undertaking suitable measures.

The obligation of the aggrieved party to prevent further loss from occurring by undertaking reasonable measures can be found in most legal systems<sup>3</sup> and projects for the harmonisation of law around the world,<sup>4</sup> it is however expressed in different ways. Honnold suggests that many codes do not explicitly characterise the duty to mitigate loss. Instead, the principle of the party’s responsibility “for the damage it causes, often suggests that some of the damage was caused by the aggrieved party rather than the party in breach. Similarly, some systems limit the aggrieved party’s recovery by principles akin to what other legal systems call contributory negligence – e.g., the French doctrine of *faute de la victime*”<sup>5</sup> The duty to mitigate is a fundamental principle of *lex mercatoria*<sup>6</sup> and is also one of the most applied principles in international arbitrations.<sup>7</sup> Courts and arbitration tribunals generally assume that the duty to mitigate is a part of general trade usage.<sup>8</sup>

<sup>2</sup> Chenwei, L., *Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL*; available at: <<http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>>, §14.5.

<sup>3</sup> Stoll, H. and Gruber, G., “Article 77” in Schlechtriem, P. and Schwenger, I., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2005, second edition, Oxford University Press, New York, at p.787; See also: § 254 German BGB § 1304, Austrian ABGB, Art. 44(1) Swiss OR in conjunction with Art. 99.3 OR, Art. 1227 Italian Codice Civile, Art. 6:96(2)(a) Dutch NBW, Art. 243(4) Slovenian OZ, Art. 13(6) UNIDROIT Convention on International Leasing, Art. 404(1) Russian Civil Code, Art. 1475 Civil Code Québec, Art. 119 Chinese CL, Art. 1802 Ethiopian Civil Code; § 34.9 Standard Contract for the UK Offshore & Gas Industry, General Conditions of Contract (including Guidance Notes) for Marine Construction, on the situation in English law; JENKS, E. et al., *A Digest of English Civil Law*, 1921, Winnipeg, Wellington, at p. 124.

<sup>4</sup> See for example Art. 7.4.8 of the UNIDROIT Principles and Art. 9:505 of PECL.

<sup>5</sup> Honnold, O. J., *Uniform Law for International Sales under the 1980 United Nations Convention*, 1999, 3<sup>rd</sup> ed., Kluwer Law International, at p. 417.

<sup>6</sup> Osman, F., *Les Principes Généraux de la Lex Mercatoria, contribution a l'étude d'un ordre juridique anational*, 1992, LGDJ, Paris, at p.186; Chenwei, *supra* fn 2. .

<sup>7</sup> Blessing, M., “Das neue internationale Schiedsgerichtsrecht der Schweiz - Ein Fortschritt oder ein Rückschritt?” in Böckstiegel (ed.), *Die internationale Schiedsgerichtsbarkeit in der Schweiz (II)*, 1989, Köln, at pp. 68ff, also available at: <<http://www.trans-lex.org/output.php?docid=110400>>; See also Herber, R. and Czerwenka, B., *Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den Internationalen Warenkauf*, 1991, München.

<sup>8</sup> See also Iran-United States Claims Tribunal, *Watkins-Johnson Co. & Watkins-Johnson Ltd. v The Islamic Republic of Iran & Bank Saderat Iran*, 28 July 1989, available at: <<http://www.unilex.info/case.cfm?pid=1&do=case&id=38&step=FullText>> (the Court stated that the

## 1.2 DUTY TO MITIGATE IN THE CISG

The promisee's duty to mitigate damages is an “expression of the general principle of good faith in international commerce”<sup>9</sup>. According to Lookofsky, the general duty of good faith includes a duty to take reasonable steps to protect the other party's interests.<sup>10</sup> Zeller suggests that “if a person takes steps which are in good faith [...] he has acted reasonably specifically if the measures adequately prevent losses”<sup>11</sup>. Namely, the party relying on the breach cannot passively await occurrence of the loss and then claim damages. It “is obliged to take adequate preventive measures to mitigate [its] loss”<sup>12</sup>. The principle of good faith suggests that there should be no compensation for avoidable loss.<sup>13</sup> The loss is not to be compensated to the extent that it could have been reduced by undertaking reasonable measures.<sup>14</sup> If the aggrieved party has undertaken certain mitigation measures, however is proven to have insufficiently avoided damages in cases where undertaking further mitigation measures would have been reasonable, the damages will be reduced to the extent to which the loss could have been mitigated. Any loss that could have been entirely prevented cannot be recovered at all.<sup>15</sup>

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[seller's] right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts.”)

<sup>9</sup> See Art. 7(1) of the CISG.

<sup>10</sup> Lookofsky, J., *Understanding the CISG, A Compact Guide to the 1980 United Nations Convention on contract for the International Sale of Goods, Third (Worldwide) Edition* Kluwer Law International, 2008 Kluwer Law International, p. 153; See also Stoll/Gruber p. 787; see also Magnus, U., “Art. 77 [Obliegenheit, den Schaden zu mindern]” in Honsell, H. et al., *Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenverkauf (CISG)*, Springer Verlag, Berlin, Heidelberg, 1997, p. 974 on the “Grundsatz von Treu und Glauben”.

<sup>11</sup> Zeller, B., “Comparison between the provisions of the CISG on mitigation of losses (Art. 77) and the counterpart provisions of PECL (Art. 9:505)”, available at: <<http://www.cisg.law.pace.edu/cisg/text/peclcomp77.html>>, § II; See also Amtsgericht München, Germany, 23 June 1995 (*Tetracycline case*), English abstract available at: <<http://www.unilex.info/case.cfm?pid=1&do=case&id=147&step=Abstract>> where the Court found that “In the light of the calculation of the loss suffered, the [seller] should have taken such measures which are reasonable with regard to a wise holder of a claim for damages. Reasonableness will thereby be determined in accordance with the principle of good faith”.

<sup>12</sup> Knapp, V., “Article 77” in Bianca, C. M. and Bonell, M. J., *Commentary on the International Sales Law – The 1980 Vienna Sales Convention*, Milan 1987, Also available at: <<http://www.cisg.law.pace.edu/cisg/biblio/knapp-bb77.html>>, p. 560.

<sup>13</sup> See also Stoll/Gruber, p. 787 This provision is based on the principle that there should be no compensation for avoidable loss.

<sup>14</sup> Honsell/Magnus, p. 974.“

<sup>15</sup> Stoll/Gruber, p. 787, See also Enderlein, F. and Maskow, D., *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*, Oceana Publications 1992, New York, London, Rome, also available at: <<http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>>, p. 309, (“If the loss could have been prevented, there would have been the chance to *reducing the damages down to zero*”).

## 2 LEGISLATIVE HISTORY AND SCOPE OF APPLICATION

The principle of mitigation of damages of Art. 77 is analogous to that of Art. 88 ULIS.<sup>16</sup> According to Knapp, Art. 77 CISG adds to the wording of Art. 88 ULIS to clarify that the loss which is to be mitigated includes not only loss of assets (*damnum emergens*) but also loss of profit (*lucrum cessans*).<sup>17</sup> Stoll and Gruber advise that, although the phrase 'loss resulting from the breach' appears in English versions of both texts equally, a change in the French version has been made that being: from '*la perte subie*' of ULIS Art. 88 to '*la perte . . . résultant de la contravention*' suggests that the promisee is required not only to undertake reasonable measures to mitigate loss that has already occurred but also to mitigate imminent loss.<sup>18</sup>

Furthermore, under Art. 61(2) ULIS the seller had an obligation to resell the goods if that was in conformity with usage and reasonably possible, otherwise it could not claim payment of the purchase price. According to CISG provisions, the seller may well be able to claim the price, for the duty to mitigate as provided by Art. 77 normally only applies to claims for damages.

At the Vienna Diplomatic Conference, the United States delegation proposed an amendment to be made to the text which would ensure the application of the mitigation principle to promisee's other remedies, including its right to claim performance. This proposal did not receive the necessary majority and was therefore rejected.<sup>19</sup> As a result, the promisee generally retains its right to claim performance even if it had failed to mitigate the loss resulting from the promisor's breach.<sup>20</sup>

## 3 REASONABLENESS OF THE MEASURES TO MITIGATE THE LOSS UNDERTAKEN BY THE AGGRIEVED PARTY

Article 77 requires the aggrieved party to perform "such measures as are reasonable in the circumstances" to mitigate the loss. Although the notion of 'reasonableness' is specifically mentioned in thirty-seven provisions of the CISG,<sup>21</sup> the Treaty contains no

<sup>16</sup> Article 88 ULIS reads: "The party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages".

<sup>17</sup> Knapp, p. 559 § 1.1; Stoll, H. in Caemmerer/Schlechtriem: *Kommentar zum Einheitlichen UN-Kaufrecht*, C. H. Beck'sche Verlagsbuchhandlung, München 1995, p. 659; See also PECL Art. 9:505 which is silent on the aspect of recovering damages for loss of profit.

<sup>18</sup> Stoll, p. 659; See also Chenwei, § 14.5.1.

<sup>19</sup> The United States proposal was rejected by 24 votes to 8; See also Schlechtriem, P., *Einheitliches UN-Kaufrecht (Das Übereinkommen der Vereinten Nationen über internationale Warenkaufverträge)*, Tübingen 1982, p. 92; Knapp, p. 566; Stoll/Gruber, p. 788.

<sup>20</sup> On the (non)application of the principle of mitigation to the right to require performance and the effect of right to require performance see Riznik, P., "Article 77 CISG: Reasonableness of the Measures Undertaken to Mitigate the Loss, Faculty of Law", University of Copenhagen/Maribor 2009 also available at: <<http://cisgw3.law.pace.edu/cisg/biblio/riznik.html>>, pp. 8-13.

<sup>21</sup> According to Lookofsky, the adjective reasonable (or unreasonable) appears 47 times throughout the text of the CISG. See Lookofsky, J., *Understanding the CISG, A Compact Guide to the 1980 United Nations Convention on contract for the International Sale of Goods, Third (Worldwide) Edition*, Kluwer

definition of the term.<sup>22</sup> Zeller suggests that “this is not a question of law but rather a question of fact” as every case will have different circumstances; therefore it is “within court's discretion to evaluate measures of mitigation”.<sup>23</sup> In Opie's opinion these circumstances include “[the amount of] time within which [the] action was undertaken to diminish an avoidable loss and whether a substitute transaction was conducted on an arm's length basis”<sup>24</sup>. The reasonableness of the measures is to be interpreted “taking into account the competing interests of the parties, as well as commercial customs and the principle of good faith”<sup>25</sup>.

When ascertaining whether the undertaken measures were reasonable in the circumstances, due consideration is to be given to the general provisions of the CISG, in particular those of Arts. 7 and 9.<sup>26</sup> The obligation to mitigate avoidable loss is to be interpreted taking into account the competing interests of the parties, as well as commercial customs and the principle of good faith.<sup>27</sup> The promisee is therefore only required to undertake those measures which could be expected in the same circumstances from a reasonable person acting in good faith.<sup>28</sup> The measures will be

Law International, 2008, p.38.

<sup>22</sup> The notion of reasonableness is however defined in the PECL, see Kritzer, A., “Reasonableness – Overview comments” available at: <<http://www.cisg.law.pace.edu/cisg/text/reason.html>>, par. 1; See also PECL Art. 1:302. “Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account”.

<sup>23</sup> Zeller, § II. Comparing the mitigation principle in PECL and CISG.

<sup>24</sup> Opie, E., “Commentary on the manner in which the UNIDROIT Principles may be used to interpret or supplement Art. 77 of the CISG”, January 2005, available at: <<http://www.cisg.law.pace.edu/cisg/principles/uni77.html>>, § III, par. 1; See also Honsell/Mahnus, p. 975 who suggest that the reasonableness is to be assessed according to the ‘objective criterion’ of a reasonable person in similar circumstances – “Hierfür ist der objektive Maßstab einer verständigen Person in gleicher Lage [Art. 8(2) CISG] zugrunde zu legen”.

<sup>25</sup> Ibid.

<sup>26</sup> Oberster Gerichtshof, Austria, 6 February 1996 (*Propane case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/960206a3.html>>, CLOUT case no. 176 (The Court stated that a possible measure to reduce damages is reasonable, “if it could have been expected as bona fides [good faith] conduct from a reasonable person in the position of the claimant under the same circumstances”).

<sup>27</sup> Stoll/Gruber, p. 790, Mayer, P. “Le Principe de Bonne Foi devant les Arbitres du Commerce International” in: *Festschrift Pierre Lalive*, Basel, Frankfurt am Main 1993, p. 551.

<sup>28</sup> Oberlandesgericht Graz, Austria 24 January 2002 (*Excavator case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/020124a3.html>> (The decision found, citing Karollus, *UN-Kaufrecht*, at p. 225, that “the obligation stated in Art. 77 CISG is to be interpreted taking into account the competing interests of the parties, as well as commercial customs and the principle of good faith”); See also Oberstergerichtshof, Austria, 14 January 2002 (*Cooling system case*); available at: <<http://cisgw3.law.pace.edu/cases/020114a3.html>>, CLOUT case no. 541 (The Court noted “that loss caused by a breach of contract is not recoverable if it could have been reduced by taking reasonable measures. A potential measure to mitigate damages is reasonable, if in good faith it could be expected under the circumstances. This is to be determined according to the actions of a reasonable person in the same circumstances”); Oberster Gerichtshof, Austria, 6 February 1996 (*Propane case*); available at: <<http://cisgw3.law.pace.edu/cases/960206a3.html>>, CLOUT <case no. 176 “A possible measure to reduce damages is reasonable, if it could have been expected as bona fides [good faith] conduct from a reasonable person in the position of the claimant under the same circumstances”.

found reasonable if a reasonable person of the same kind and in the same circumstances would have undertaken them “with any relevant trade usages being taken into account”<sup>29</sup>. Hence, the promisee is not required to undertake measures which might well mitigate the loss but would require excessive and unreasonable efforts and costs.<sup>30</sup> If the aggrieved party refrains from undertaking excessive measures, it should not be found to have breached its duty to mitigate.<sup>31</sup> Moreover, it may generally also be unable to recover costs that were, albeit they have mitigated damages, unreasonably high.<sup>32</sup>

Furthermore, different types of factors are to be considered (such as perishability of the goods, fluctuation in market price, availability of a specific market, third party obligations etc.).<sup>33</sup> The list of appropriate measures can therefore hardly be considered exhaustive. Consequently, a decision on the reasonableness of the mitigation measures is to be assessed on the basis of examination of all the circumstances of the case, criterion of reasonableness and the type of loss in question.<sup>34</sup> Lookofsky notes that the extent to which a given loss is avoidable “may depend in part on the buyer's ingenuity, experience, and financial resources (ability to obtain credit quickly, etc.), so the question of what constitutes 'reasonable' mitigation will depend on the court's evaluation of the situation in the concrete case”<sup>35</sup>.

If the promisee undertakes some measures, it would have been reasonable to undertake additional measures to mitigate the loss, as the damages are to be reduced by the difference between the amount of loss that should have been mitigated and the amount of loss that has actually been mitigated.<sup>36</sup>

### 3.1 APPROPRIATE MEASURES TO MITIGATE THE LOSS – A COVER TRANSACTION

Article 77 may require the aggrieved party to conclude a substitute transaction,<sup>37</sup> especially in a situation where a substitute transaction would avoid consequential

<sup>29</sup> Stoll/Gruber, p. 790; See also Honsell/Magnus, p. 975; See Art. 9 CISG.

<sup>30</sup> Knapp, p. 560; Stoll/Gruber, p. 790, § 7, Zeller, § II; Weber, R., “Vertragsverletzungsfolgen: Schadenersatz, Rückabwicklung, vertragliche Gestaltungsmöglichkeiten in Wiener Kaufrecht“ in Bucher E (ed.), *Wiener Kaufrecht, Berner Tage für die Juristische Praxis*, Stämpfli, Bern 1990., p. 205.

<sup>31</sup> Knapp, p. 560.

<sup>32</sup> Oberster Gerichtshof, Austria, 14 January 2002 (*Cooling system case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/020114a3.html>>, CLOUT case no. 541 (The Court denied the aggrieved buyer the right to claim the damages that arose from mitigation, claiming that “The buyer can also remedy the defect itself [...] if a cure is not expected by the seller [...] However, in doing so, the buyer may not undertake any unreasonable expenditures (Art. 77 CISG): if the costs to effect a cure stand in no reasonable proportion to the benefit of the cure for the buyer, then they are not recoverable”.)

<sup>33</sup> Opie, § 3.

<sup>34</sup> Saidov, D., “Methods of Limiting Damages under the Vienna, Convention on Contracts for the International Sale of Goods”; available at: <<http://cisgw3.law.pace.edu/cisg/biblio/saidov.html>>, § 4.(b).

<sup>35</sup> Lookofsky, p. 136.

<sup>36</sup> Knapp, p. 560.

<sup>37</sup> See also Art. 9.506 PECL.

losses following the non-performance or defective performance of the contract, e.g. exposure to damages claims by sub-customers or a loss of profit.<sup>38</sup>

If the goods obtained by a substitute purchase are merely meant to complement the seller's performance, the aggrieved party might well be found to have complied with its duty to mitigate. Huber provides the following example: "seller has not delivered, buyer needs the goods for its production process and orders a certain quantity to bridge the gap until the seller will make delivery"<sup>39</sup>.

However, if the nature of a suggested substitute transaction is such that its effects are meant to entirely replace those of the original transaction (e.g. if the goods obtained by the substitute purchase are meant to replace the goods originally stipulated by the seller), the aggrieved party nevertheless remains entitled to demand specific performance and need not avoid the contract (thereby losing its claim for performance) in order to enter into a timely substitute transaction.<sup>40</sup> According to Stoll and Gruber, the aggrieved party may "basically continue to require performance without infringing on the requirement to mitigate losses under Article 77"<sup>41</sup>. In Magnus' opinion, performance should be given priority and therefore a declaration of avoidance and a substitute transaction will only be required from the aggrieved party in special circumstances, e.g. when the market price of the goods is fluctuating rapidly.<sup>42</sup>

### 3.1.1 COVER PURCHASE BY THE BUYER

Case-law provides numerous decisions regarding the reasonableness of the measures the aggrieved party has or should have undertaken to mitigate loss. A purchase of substitute goods may often be considered a measure, reasonable in the circumstances.

According to a decision of the Oberlandesgericht Celle, the buyer might be expected to look for replacement goods in markets other than the local region. The court found that the buyer had failed to comply with its duty to mitigate by only seeking substitute goods in the local area, especially since it made the original purchase from a foreign seller.

#### 3.1.1.1 CASE 1

Case 1<sup>43</sup> is where a Dutch seller and a German buyer concluded a contract for sale of vacuum cleaners. After delivery, the vacuum cleaners proved to be defective due to

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<sup>38</sup> Stoll/Gruber, p. 790.

<sup>39</sup> Huber, P., "Some introductory remarks on the CISG", available at: <<http://www.cisg.law.pace.edu/cisg/biblio/huber.html>>, p. 291.

<sup>40</sup> On the other hand, Schlechtriem suggests that if the aggrieved party merely undertakes a cover transaction before it has avoided the contract, "this should not deprive the obligor of his right to tender performance". See Schlechtriem, P.: "Damages, avoidance of the contract and performance interest under the CISG", available at: <<http://www.cisg.law.pace.edu/cisg/biblio/slechtriem21.html>> § I.c.

<sup>41</sup> Stoll/Gruber, p. 792.

<sup>42</sup> Honsell/Magnus, p. 976.

<sup>43</sup> Oberlandesgericht Celle, Germany, 2 September 1998 (*Vacuum cleaners case*), English translation

the lack of vacuuming power. The buyer did not buy the goods elsewhere asserting that a cover purchase of that same brand of vacuum cleaners was not possible at the time in Göttingen, Lower Saxony and North Hessen. The Court found this assertion to be insufficient and maintained that “the [buyer] purchased from a Dutch seller in the present case therefore offers from foreign countries, at least from all of Germany, should have been considered. It is decisive that the [buyer] does not offer any explanation regarding its efforts to instigate a substitute purchase”.

### 3.1.1.2 CASE 2

Case 2<sup>44</sup> is where the seller, a Hong Kong company and a German buyer concluded a general agreement regarding the supply of goods. After facing financial difficulties, the sellers' supplier failed to deliver the goods and the seller failed to perform. Upon the seller's request for payment of previously delivered goods, the buyer set off a counter-claim regarding compensation for lost profits resulting from sellers' failure to deliver goods. The Court found that by not acquiring the goods elsewhere, the buyer did not breach its duty to mitigate, stating that “taking into consideration the short delivery time in the contract and the alleged difficulty in finding another supplier for another supply, there [was] no manifest violation by the buyer of its duty to mitigate the loss according to Article 77 CISG”.

## 3.1.2 COVER SALE BY THE SELLER

As it can be noted in past decisions, the most typical mitigation measure expected from an aggrieved seller is a resale of the goods. In a decision before the Appellate Court of Düsseldorf, it was found that the seller had complied with the duty to mitigate the loss by performing a cover transaction.<sup>45</sup>

### 3.1.2.1 CASE 3

In case 3<sup>46</sup>, an Austrian seller and a German buyer concluded several contracts for the sale of rolled metal sheets which provided for delivery and payment in instalments. After a few shipments had been delivered the buyer failed to pay the price and refused to take over the subsequent shipments. After having unsuccessfully demanded that the buyer take delivery of the remaining goods, the seller conducted a cover sale and claimed payment of the difference between the contractually agreed price and the proceeds of the cover sale. The tribunal found that not only was this claim justified but also that it might even be considered as a necessary measure.

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available at: <<http://cisgw3.law.pace.edu/cases/980902g1.html>>, CLOUT case no. 318 (The Court however found the buyers submissions incomplete and was therefore unable to determine the extent of the damages. The issue of mitigation was therefore of no importance for the outcome of the case.)

<sup>44</sup> Schiedsgericht der Handelskammer Hamburg, Germany, 21 March 1996 (*Chinese goods case*); available at: <<http://cisgw3.law.pace.edu/cases/960321g1.html>>, CLOUT case no. 166.

<sup>45</sup> Oberlandesgericht Düsseldorf, Germany, 14 January 1994, available at: <<http://www.cisg-online.ch/cisg/urteile/119.html>>, CLOUT case no. 130.

<sup>46</sup> Vienna Arbitration proceeding SCH-4366, 15 June 1994 (*Rolled metal sheets case*), available at: <<http://cisgw3.law.pace.edu/cases/940615a3.html>>, CLOUT case no. 93.



### 3.1.2.2 CASE 4

In case 4<sup>47</sup>, the Islamic Republic of Iran and a company from the United States of America concluded a contract regarding the sale of electronic equipment used for a military program. After the Islamic Republic of Iran had failed to pay a substantial amount of the price as well as to provide satisfactory assurances the payment would be forthcoming, the seller conducted a substitute sale. The Tribunal found that the seller's "right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts. [...] Based on the evidence before it, the Tribunal is further convinced that [the seller] made a reasonable effort in selling the equipment. The invoices presented by [the seller] demonstrate sufficiently the effort to find buyers for the equipment all over the world. A substantial part of the equipment was sold, even though for less than the Contract price agreed with Iran. [The seller] explained to the Tribunal's satisfaction that much of the equipment was modified or designed according to the specifications of the Iranian Air Force and, therefore, difficult to sell to other customers".

However, in certain circumstances an aggrieved seller conducting a cover sale was found to have failed to mitigate damages properly. If the breaching buyer offers to take over the goods or a part of the goods at a lower price which is still higher than the current market price, the seller might according to Art. 77 well be obliged to accept this offer. According to Stoll and Gruber, the seller can "only claim the difference between the price offered by the buyer and the price obtained by the substitute transaction" if it does not accept this offer.<sup>48</sup> In a case before the Spanish Supreme Court, the aggrieved seller was found to have failed to mitigate damages properly by reselling the goods at a price that was lower than the price offered by the breaching buyer, after the latter had tried to amend the contract.

### 3.1.2.3 CASE 5

In case 5<sup>49</sup> a Spanish buyer and a Dutch seller concluded a contract of sale of 800,000 sacks of jute at a price of \$0.559 per bag. Subsequently, the buyer proposed to reduce the contractually agreed price of a vast part of the goods. The seller did not accept this proposal and attempted to condition buyer's payment on the issuance of a letter of credit to cover the purchase price agreed in the contract. Thereupon the seller resold the goods to a substitute buyer after only a few days for a very inferior price to the one subsequently offered by the buyer. The court found that by selling goods at an inferior price than the one it was offered by the original buyer, the seller had failed to mitigate damages properly. The sum of damages awarded to the seller was therefore reduced

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<sup>47</sup> Iran-United States Claims Tribunal, *Watkins-Johnson Co. & Watkins-Johnson Ltd. v The Islamic Republic of Iran & Bank Saderat Iran*, 28 July 1989, available at: <<http://www.unilex.info/case.cfm?pid=1&do=case&id=38&step=FullText>>.

<sup>48</sup> Stoll/Gruber, p. 791.

<sup>49</sup> Tribunal Supremo, Spain, 28 January 2000 (*Internationale Jute Maatschappij v Marin Palomares*), available at: <<http://cisgw3.law.pace.edu/cases/000128s4.html>>, CLOUT case no. 395.

by the difference in the price offered by the buyer and the price at which the goods were sold to the substitute buyer.

An aggrieved seller has also been found not to have been expected to perform a cover sale. In a CIETAC decision the seller was found not to have breached its duty to mitigate by not reselling the wind coats that were made exclusively to the specifications of the buyer.

#### 3.1.2.4 CASE 6

Case 6<sup>50</sup> is where a Chinese seller and a foreign buyer entered into a contract regarding the sale of cloth wind coats. After delivery, the buyer claimed that the colour was not in conformity with the contract, notified the seller of the lack of conformity and refused to accept the goods. The tribunal found that the goods were in fact in conformity with the contract and that the buyer had breached the contract by refusing to take delivery. As the contract provided that the goods are to be delivered FOB Fuzhou (Incoterms 1980), the buyer's responsibility was to provide for the shipping, however it failed to do so. As a result, the seller incurred expenses by storing the goods in a warehouse. As for mitigation of the damages, the Tribunal found that "because the goods under the contract were manufactured in accordance with the specification provided by the buyer, it [was] not easy for seller to sell the goods to mitigate the losses. Therefore, the Arbitration Tribunal [was] of the opinion that the amount of damages and the interest claimed by seller [were] reasonable"<sup>51</sup>.

Where the seller markets the goods to multiple clients and regularly concludes similar transactions, it has been found that it has not failed to comply with the duty to mitigate by not reselling the goods, for a substitute transaction would mean loss of profit. Namely, the other sale would have taken place regardless of the cover transaction. The seller should generally be able to recover not only the difference between the price of the original sale and the resale but also consequential damages for the loss of profit (resulting from the fact that it had lost an opportunity to sell other goods that it has at its disposal).<sup>52</sup>

#### 3.1.2.5 CASE 7

In case 7<sup>53</sup> a German seller and an Austrian buyer entered into several contracts of sale of jewellery. The general conditions which were expressly made part of the contract,

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<sup>50</sup> China post-1989 CIETAC Arbitration proceedings (*Cloth wind coats case*), available at: <<http://cisgw3.law.pace.edu/cases/900000c1.html>>.

<sup>51</sup> However, as the seller failed to provide any specific amount or present evidence of the costs for storing the goods, the Tribunal did not consider its claim regarding damages incurred because of storing of the goods.

<sup>52</sup> According to Hellner, it is in such cases easier for the seller to recover damages for consequential loss than for a buyer to recover consequential loss in a corresponding case; Hellner, J., "The UN Convention on International Sales of Goods - an Outsider's View" in Jayme, E., *Ius Inter Nationes - Festschrift für Stefan Riesefeld, aus Anlass seines 75. Geburtstag*, C.F. Müller Juristischer Verlag, Heidelberg 1983, p. 100.

<sup>53</sup> Oberster Gerichtshof, Austria, 28 April 2000 (*Jewellery case*), available at:

required the purchase price to be paid in advance. The buyer sent the seller two cheques for the amount of two invoices however, the seller's bank refused to cash the cheques due to insufficient funds in the account. After reminding the buyers unsuccessfully, the seller fixed an additional period of time (the so called '*Nachfrist*'). The buyer refused to pay in advance, claiming that the parties had agreed on payment after delivery. Thereupon the seller claimed damages resulting from the breach of contract, specifically the loss of profit amounting to DM 21,314.75 – the difference between the purchase price and costs of manufacturing. Regarding buyer's claim that the seller had failed to mitigate the loss properly by reselling the goods “far under value” the Court found that “this damage arises regardless of a possible resale of the goods ordered to a subsequent buyer, as the later contract would have been formed independently of [the buyer's] order. [...] There have been no ascertained substitute transactions by [the seller]. [The buyer's] objection that [the seller] failed in its duty to mitigate the damages is completely unsubstantiated. The fact alone that - possibly long after the dispute arose between the parties - some goods have been sold, cannot be considered to prove a substitute transaction. In the case of marketable goods, it is more likely that the alternative sale would also have taken place had the [buyer] accepted the goods”. The Court concluded that the buyer's claim regarding mitigation of damages is “ineffective as far as the promisee, in performing the substitute transaction, would have lost another similar transaction bringing the same profit as the first transaction”.

### **3.2 APPROPRIATE MEASURES TO MITIGATE THE LOSS – A COVER TRANSACTION**

A party relying on the breach may be required to undertake further measures to mitigate the loss, e.g. legal measures against acts of state that are hindering the breaching party in fulfilling its contractual obligations.<sup>54</sup> Stoll and Gruber suggest that the injured party is not required to undertake measures that “lie in the other party's sphere of responsibility and that the other party can take without difficulty”<sup>55</sup>.

#### **3.1.3 OTHER MEASURES REQUIRED OF THE BUYER**

Numerous other mitigation measures have been expected from aggrieved buyers. In case of delivery of non conforming goods the buyer may be obliged to repair the goods itself in order to prevent them from worsening or to avoid consequential losses.<sup>56</sup> In a situation where the seller is unable to hand the goods over to the carrier in due time, the buyer might be expected to arrange for the carriage of the goods or take delivery at the place where they are located itself.<sup>57</sup>

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<<http://cisgw3.law.pace.edu/cases/000428a3.html>>, CLOUT case no. 427.

<sup>54</sup> Stoll/Gruber, p. 790, Weber, p. 205.

<sup>55</sup> Stoll/Gruber, p. 791.

<sup>56</sup> See Stoll/Gruber, p. 790; Knapp, p. 560; Honsell/Magnus, p. 976.

<sup>57</sup> Knapp, p. 560.

The Oberlandesgericht Köln found that a buyer had conformed to its duty to mitigate by contracting another party to treat leather hides after seller's refusal to return the tanning machines that were being readjusted by the seller and awarded the buyer damages in the sum of costs incurred by commissioning a third party with the tanning of the hides.<sup>58</sup> In another case the buyer was found not to have breached its duty to mitigate loss by continuing to print on the non-conforming fabric, even after having discovered the nonconformity, however at the express urging to do so by the seller.<sup>59</sup> A further measure that was considered appropriate was offering the sub-buyer a reduction of ten percent in the purchase price of the goods because of the late delivery.

### 3.1.3.1 CASE 8

In case 8<sup>60</sup> instead of delivering the goods in the agreed time, the seller delivered after the season for the sale had already ended. When reselling the goods to its sub-buyers the buyer reduced the price by 10 percent because of late delivery. The Tribunal ruled that by doing so, the buyer mitigated the loss sufficiently and granted it buyer damages in the difference between the price paid and the price obtained at the sale.

### 3.1.3.2 CASE 9

Case 9<sup>61</sup> was before the Oberlandesgericht Köln whereby, a buyer of aluminium hydroxide was found not to have performed adequate mitigation measures by failing to examine separate shipments of goods before mixing them together. As the buyer kept all its aluminium hydroxide supplies in the same silo, all of its supplies were contaminated by adding the non-conforming goods. The Court stated that an immediate inspection was necessary even when all the goods in the silo originated from the same seller, if the goods were going to be mixed together with the goods from other shipments. It would have been reasonable to inspect the goods before adding them to the silo because the inspection consisted of simple tests.

## 3.1.4 OTHER MEASURES REQUIRED OF THE SELLER

Stoll and Gruber suggest that if the buyer offers to take over only a part of the goods at a price, inferior to the one that has been contractually agreed, the seller must accept the offer if the price is above that which could be obtained by a cover transaction. If it nevertheless makes the substitute transaction at a lower price, it can only claim the difference between the price originally agreed and the price offered by the buyer.<sup>62</sup>

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<sup>58</sup> Oberlandesgericht Köln, Germany, 8 January 1997 (*Tannery machines case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/970108g1.html>>.

<sup>59</sup> Federal Appellate Court [4th Circuit], United States, 21 June 2002 (*Schmitz-Werke v. Rockland*); available at: <<http://cisgw3.law.pace.edu/cases/020621u1.html>>, CLOUT case no. 580.

<sup>60</sup> ICC award no. 8786 of January 1997 (*Clothing case*); available at: <<http://cisgw3.law.pace.edu/cases/978786i1.html>>.

<sup>61</sup> Oberlandesgericht Köln, Germany, 21 August 1997 (*Aluminium hydroxide case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/970821g1.html>>, CLOUT case no. 284.

<sup>62</sup> Stoll/Gruber, p. 791, see Case 5 *supra*.

In a case before the ICC International Court of Arbitration the tribunal found that the seller had acted reasonably by storing, maintaining and caring for the non-delivered machinery.<sup>63</sup> On the other hand, an aggrieved seller has been found to have failed to mitigate damages properly by not avoiding the contract and by demanding payment of the bank guarantee after buyer's breach of contract.

### 3.1.4.1 CASE 10

In case 10<sup>64</sup> an Italian buyer and a German seller concluded a contract of sale of eleven cars. As agreed in the contract the buyer furnished a bank guarantee for the price in favour of the seller. The time of delivery was never expressly agreed. After a couple of months the buyer informed the seller that due to the strong fluctuations between the Italian and the German currency, it would be unable to accept delivery of the cars and urged the seller to try to defer delivery from its supplier. The seller therefore cancelled the orders from the supplier and drew on the bank guarantee. Thereupon the buyer claimed repayment of the guarantee sum and damages. The Court found that the buyer had breached the contract by not taking delivery of the cars and the seller was therefore entitled to claim damages. "But, as the [seller] never avoided the contract, it had disregarded its duty to mitigate its loss and could not claim damages. Therefore, the [seller] was not entitled to the [guarantee] sum".

## 4 COSTS OF MITIGATION

When a party undertakes measures to mitigate the loss it will likely suffer additional costs. This sum is to be "considered as a loss suffered as a consequence of the breach of contract"<sup>65</sup> and can be claimed on the basis of Art. 74. The costs of mitigation measures, including those that failed to successfully mitigate the loss, are to be borne by the party in breach. However, this only applies to reasonable measures.<sup>66</sup> The costs are therefore refundable even if they have been undertaken in vain, as long as they can be considered reasonable in the circumstances.<sup>67</sup>

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<sup>63</sup> ICC Arbitration case no. 7585 of 1992 (*Foamed board machinery case*), Case abstract and editorial remarks available at: <<http://cisgw3.law.pace.edu/cases/927585i1.html>>, CLOUT case no. 301 (The Italian seller refused to deliver the machinery after the Finnish buyer had failed to perform its obligations in due time).

<sup>64</sup> Oberlandesgericht München, Germany, 8 February 1995 (*Automobiles case*), available at: <<http://cisgw3.law.pace.edu/cases/950208g1.html>>, CLOUT case no. 133.

<sup>65</sup> Knapp, p. 561.

<sup>66</sup> Honsell/Magnus, p. 976; KNAPP, p. 561 ("The expended sum of money is considered as a loss suffered as a consequence of the breach of contract."); Stoll/Gruber, p. 792, (According to the authors, it is irrelevant whether the "limitation of the reimbursement to reasonable expenses is derived from Art. 77, or directly from Art. 74..."; See also Oberster Gerichtshof, Austria, 14 January 2002 (*Cooling system case*); available at: <<http://cisgw3.law.pace.edu/cases/020114a3.html>>, CLOUT case no. 541 (In the Court's opinion "the buyer may not undertake any unreasonable expenditures [Art. 77 CISG: if the costs to effect a cure stand in no reasonable proportion to the benefit of the cure for the buyer, then they are not recoverable".)

<sup>67</sup> Knapp, p. 561; Honsell/Magnus, p. 976.

In a case involving a Swiss seller and a German buyer regarding a sale of stainless steel wire, the German Supreme Court found that the buyer could not demand payment of the costs of double sanding the delivered defective wire as well as the costs of converting the sanding machine to process the defective wire, because they were disproportionate to the cost of the wire.<sup>68</sup> In another case, the Court found that the buyer had failed to mitigate the loss by ordering a missing translation of VCR manuals elsewhere as it did not notify the seller who would have had the VCR manuals in the required languages.

#### 4.1.1.1 CASE 11

Case 11<sup>69</sup> is where a Swiss buyer and a German seller entered into a contract for sale of 4,000 video recorders. Among other alleged defects, the buyer stipulated that by only delivering manuals in German the seller had breached the contract as it should have also delivered the manuals in other official Swiss languages. The buyer therefore had the manuals translated. Although the Court found that the seller was not obliged to deliver the manuals in other languages spoken in Switzerland as this should have been stipulated, it nonetheless ruled on the matter of mitigation, stating that the buyer “by ordering the production of the manuals elsewhere instead of requesting delivery from the [seller] -- violated its obligation to mitigate damages under Article 77 CISG. At least the [seller]’s parent company, a global player in the market, would have been able to provide a delivery of manuals in French and Italian without necessitating translation costs”.

Zeller refers to a Swiss decision where the Commercial Court St. Gallen pointed to the fact that “mitigation not only obliges the aggrieved party to take positive steps but these positive steps cannot be undertaken when they result in unnecessary costs”<sup>70</sup>. When comparing the duty to mitigate in the CISG to the PECL counterpart provisions, Zeller suggests that they lead to the same result, “however, Art. 9:505(2) turned the obligation around by allowing the aggrieved party only to recover costs which are reasonably incurred. The interpretation of the CISG as pointed out above suggests that the non-breaching party can incur expenses until the costs to mitigate become unreasonable. In sum, though, the practical effect is the same”<sup>71</sup>.

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<sup>68</sup> Bundesgerichtshof Germany, 25 June 1997 (*Stainless steel wire case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/970625g2.html>>, CLOUT case no. 235.

<sup>69</sup> Landgericht Darmstadt, Germany, 9 May 2000 (*Video recorders case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/000509g1.html>>, CLOUT case no. 343.

<sup>70</sup> Zeller, § II, See also Handelsgericht St. Gallen, Switzerland, 3 December 2002 (*Sizing machine case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/021203s1.html>> (The Court found, referring to Honsell/Magnus that “[Seller]’s counterclaim may be reduced to the extent it took measures to mitigate the losses or ought to have taken such measures. Such measures entail namely the re-sale or respectively the re-utilization of the sold machine, if there was not any market place for such a kind of production machine, because it was unique. Furthermore, these measures also entail the avoidance of any unnecessary expenditures and costs”.

<sup>71</sup> Zeller, § II, par. 5.

A party enforcing the claim through a debt collection company or an enforcing agent has in some cases been found to have failed to mitigate damages properly.<sup>72</sup> In a case before the Amtsgericht Berlin-Tiergarten, the seller (plaintiff) was denied its claim for compensation for costs of hiring a debt collection company. The Court stated that it was not the most economical way to collect its debt as it could have filed an action at a Dutch court and then, under the rules of Private International Law, have the decision enforced in Germany without further expenses.<sup>73</sup> A similar decision was made in a ruling of the Amtsgericht Alsfeld.

#### 4.1.1.1 CASE 22

In case 22<sup>74</sup> a German buyer ordered flagstones at the price of 1,575.00 DM from an Italian seller. After the buyer had failed to pay the price of the goods in time, the seller authorised an Italian attorney to send the buyer a reminder. After failing to resolve the dispute amicably, the seller sued the buyer at the competent German Court. One of the claims that the seller was asserting concerned the costs of the reminder. The Court found that by failing to authorise an attorney from the jurisdiction of the buyer, the seller had failed to mitigate the loss and was therefore not entitled to claim the attorney's fee besides "the procedural fees of its counsel if it mandated a lawyer seated in Germany". As the seller's counsel actually also operated an office in Stuttgart, it was particularly evident that the party cannot claim the fees for an Italian counsel as the counsel could have easily written the reminder at its German office.

In a case before the District Court Düsseldorf,<sup>75</sup> the Court found that the plaintiff had failed to undertake reasonable measures to mitigate the loss by entrusting an agent to recover the outstanding debt. Such action would have only been reasonable if the agent had more effective means of recovery than the plaintiff, a circumstance which the plaintiff failed to prove. In another case before a German court,<sup>76</sup> the plaintiff was also found to have acted in contradiction with the duty to mitigate the loss by employing a collection agency to recover the debt. The Court ruled that the plaintiff was unable to claim for compensation for the said fees saying that it was not evident from the circumstances of the case that the party in breach would have paid its debt after being requested by a collection agency, therefore a party would have had to entrust an attorney with the recovery of the outstanding debt. The expenses incurred from requests for payment by the attorney would have been included in the legal expenses of the trial.

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<sup>72</sup> Honsell/Magnus, p. 976.

<sup>73</sup> Amtsgericht Berlin-Tiergarten, Germany, 13 March 1997, English translation available at: <<http://cisgw3.law.pace.edu/cases/970313g1.html>>, CLOUT case no. 296.

<sup>74</sup> Amtsgericht Alsfeld, Germany, 12 May 1995 (*Flagstone tiles case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/950512g1.html>>, CLOUT case no. 410.

<sup>75</sup> Landgericht Düsseldorf, Germany, 25 August 1994 (*Fashion goods case*), English translation available at: <<http://cisgw3.law.pace.edu/cases/940825g1.html>>.

<sup>76</sup> Landgericht Berlin, Germany, 6 October 1992 (*Wine case*); available at: <<http://www.cisg-online.ch/cisg/urteile/173.htm>>; English translation available at: <<http://cisgw3.law.pace.edu/cases/921006g1.html>>.

## 5 CONCLUSION

The promisee is required to mitigate damages in all cases regarding claims of damages, resulting from a breach of CISG governed contracts. As Article 77 CISG now stands, the duty to mitigate normally applies solely to the claims for damages, hence the right to claim other remedies in full normally remains unaffected. This has been much discussed in legal theory as it gives rise to a conflict between the promisee's right to demand performance and its obligation to mitigate. It has been established that, although the duty to mitigate normally only applies to claims for damages, situations might occur, where a possibility of application to claims for performance would have been more reasonable. Perhaps a further development in case law will provide a clearer solution to this conflict.

Article 77 requires the party relying on the breach to undertake all mitigation measures that are reasonable in the circumstances. The primary purpose of this work was to canvass the reasonableness of the measures by focusing on the interpretation of reasonableness of the measures in case law and in scholarly materials. A number of important factors were considered and it has been confirmed that, as the circumstances differ from case to case, there can be no hard rule providing for situations, where certain mitigation measures are expected. The reasonableness of measures that were or should have been undertaken is rather to be assessed on a case by case basis. This assessment falls to the discretion of the tribunal and is to be made interpreting the general principles of international trade, especially the principle of good faith in international trade.