

# Sharing International Commercial Law across National Boundaries

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Festschrift for Albert H Kritzer  
on the Occasion of his  
Eightieth Birthday

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**The Pot Calling the Kettle Black:  
The Impact of the Non-Breaching Party's  
(Non-) Behavior on its CISG-Remedies**

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Words can hardly be found to describe how much Al Kritzer has done for the international CISG community. His name stands for years of generous support of students and young academics, and in particular, for the unification of sales law. His endeavors, starting with the annual Willem C. Vis International Commercial Arbitration Moot, the CISG Database of Pace Law School, the Queen Mary Case Translation Programme, as well as the CISG-Advisory Council that he initiated, have all contributed to a broader understanding of the CISG and to a furthering of its uniform application and interpretation. Thus, it is a pleasure and honor for us to make a small contribution to the uniform interpretation of the CISG on the occasion of Al's birthday.

INTRODUCTION

In Articles 77 and 80, the CISG contains two provisions that address the issues of mitigation of damages and contributory or comparative negligence, respectively.

According to Article 77 CISG, any aggrieved party must take reasonable measures to mitigate the loss resulting from a breach of contract. If it fails to do so, the damages are reduced in the amount by which the loss should have been mitigated. This 'duty' to mitigate<sup>1</sup> is an expression of the

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<sup>1</sup> On the use of the term 'duty', see Treitel, GH (1995) *An outline of The Law of Contract* (6th ed) Oxford University Press at 393; cf Goetz, CJ and Scott, RE (1983)

*lex mercatoria*,<sup>2</sup> as well as of the principle of good faith in international commerce.<sup>3</sup> Furthermore, the mitigation rule is well recognized in international arbitration practice,<sup>4</sup> and can also be found in most legal systems,<sup>5</sup> as well as in the ongoing projects for the harmonization of contract law (UNIDROIT Principles of International Commercial Contracts 2004, the 'UNIDROIT

<sup>1</sup> 'The Mitigation Principle: Towards a General Theory of Contractual Obligation' 69 *Virginia Law Review* 967 at n 1.

<sup>2</sup> Berger, M (2004) 'Préjudice indemnisable et droit international des contrats' (4) *Revue de droit des affaires internationales / International Business Law Journal* 427 at 441; Komarov, AS (2006) 'Mitigation of Damages' in Derains, Y and Kreindler, RH (eds) (2006) *Evaluation of Damages in International Arbitration* ICC Publication (668) 37 at 41; cf Mustill, LJ 'The New Lex Mercatoria: The First Twenty-five Years' in Bos, M and Brownlie, I (eds) (1987) *Liber Amicorum for the Rt. Hon. Lord Wilberforce* Clarendon Press 149 et seq, who has enumerated the duty to mitigate as one of twenty general principles of international commerce.

<sup>3</sup> Stoll, H and Gruber, G in Schlechtriem, P and Schwenzer, I (eds) (2005) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed) Oxford University Press, Art 77 para 1.

<sup>4</sup> Komarov 'Mitigation of Damages' supra fn 2 at 40.

<sup>5</sup> U.S.: U.C.C. § 2-715(2)(a): recovery only for losses 'which could not reasonably be prevented by cover or otherwise'; cf Restatement of the Law 2nd (Contracts) § 350(1): 'damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation'. On the mitigation principle in Common Law systems, see in general Bridge, MG (1989) 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (105) *Law Quarterly Review* 398 et seq; Treitel, GH (1988) *Remedies for Breach of Contract* Clarendon Press at 179. Germanic legal systems discuss the mitigation principle under the heading of 'Mitverschulden' (fault of both parties), see Germany: Bürgerliches Gesetzbuch (BGB) § 254; Switzerland: Obligationenrecht (OR), Articles 44(1) and 99(3); Austria: Allgemeines Bürgerliches Gesetzbuch (ABGB), § 1304; cf The Netherlands: Burgerlijk Wetboek (BW), Articles 6:96(2) and 6:101(1); and Russian Federation: Russian Civil Code Article 404. In France, the duty to mitigate does not apply to contract cases, see Le Pautremat, S (2006) 'Mitigation of Damages: A French Perspective' (55) *International and Comparative Law Quarterly* 205 et seq.

Principles',<sup>6</sup> Principles of European Contract Law, the 'PECL'<sup>7</sup>).

Whereas by the wording, systematic placement and history of Article 77 CISG, the duty to mitigate only applies to damages,<sup>8</sup> Article 80 CISG has a broader sphere of application. According to this provision, a party may not rely on any failure of the other party to perform if such failure was caused by the obligee. This provision has no predecessor in the Uniform Law on the International Sale of Goods of 1964 ('ULIS'), but was a last-minute inclusion in the Convention at the 1980 Vienna Conference based on a proposal by the (former) German Democratic Republic.<sup>9</sup> The UNIDROIT Principles and the PECL widely correspond to the CISG, and distinguish between situations where the aggrieved party contributed to the non-performance,<sup>10</sup> and those

<sup>6</sup> Article 7.4.8 UNIDROIT Principles; while Article 7.4.7 is concerned with the conduct of the aggrieved party in regard to the cause of the initial harm, Article 7.4.8 relates to that party's conduct subsequent thereto, see UNIDROIT Principles of International Commercial Contracts 2004, Article 7.4.7, Comment 4. On the use of the UNIDROIT Principles to help interpret Article 77, see Opie, E (2005) 'Commentary on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 77 of the CISG', available at: <http://cisgw3.law.pace.edu/cisg/biblio/opie.html>.

<sup>7</sup> Article 9:505 PECL, cf Lando, O and Beale, H (eds) (2000) *Principles of European Contract Law Parts I and II* Kluwer Law International at 444; see also Zeller, B (2005) *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/biblio/zeller77.html>.

<sup>8</sup> *Official Records of the United Nations Conference on Contracts for the International Sale of Goods* ('O.R.') at 61, available at: <http://www.cisg-online.ch>, Art 73 para 3; Stoll, H and Gruber G in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 77 para 4; Magnus, U (2005) *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG)* Sellier – de Gruyter, Art 77 paras 4, 6.

<sup>9</sup> See O.R. at 134-6.

<sup>10</sup> Article 7.1.2 UNIDROIT Principles, which encompasses any other 'event as to which the first party bears the risk'; on the interplay between the UNIDROIT Principles and Article 80 CISG see Schäfer, F (2004) 'Editorial remarks on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 80 of the CISG', available at: <http://www.cisg.law.pace.edu/cisg/biblio/schafer.html>; cf Article 9:504 PECL, which embraces the situation where the aggrieved party's conduct was a partial cause of the non-performance, and the situation where the aggrieved party exacerbated its loss-producing effects by its behavior; see Lando and Beale *Principles of European Contract Law* supra fn 7 at 444; see also Butler, AE (2004) *Limitation of Remedies Due to Failure of Performance Caused by Other*

where it failed to reduce the loss by taking reasonable steps.<sup>11</sup>

Article 80 CISG has counter-parts in domestic laws, especially in the Germanic legal systems, that do not distinguish between situations where the creditor's acts or omissions cause the breach of contract, and those where they relate to the extent and development of any loss resulting from such breach.<sup>12</sup> In contrast, the Anglo-American legal systems, up to this very day, do not recognize such an express principle in contract law as that laid down in Article 80 CISG. The mitigation principle is not designed to apply to cases where the creditor's behavior has caused the breach itself, since, in general, it only comes into play where the breach has already occurred.<sup>13</sup> Furthermore, the principle of contributory or comparative negligence, under Anglo-American law, is generally confined to tort law, and may only be applied to contract cases in which the liability for breach of contract is the same as a liability in tort independently of the existence of a contract.<sup>14</sup> Yet there are many other legal devices to address this problem, since the creditor's contributory be-

*Party: Comparison Between Provisions of the CISG and Counterpart Provisions of the Principles of European Contract Law*, available at: <http://www.cisg.law.pace.edu/cisg/biblio/butler1.html>.

<sup>11</sup> See supra fn 6-7.

<sup>12</sup> See Germany: BGB § 254; Switzerland: OR, Articles 44(1) and 99(3); Austria: ABGB, § 1304.

<sup>13</sup> Bridge 'Mitigation' supra fn 5, 398 at 404; McGregor, H (2003) *McGregor on Damages* (17th ed) Sweet & Maxwell at 223 para 7-020; Beale, H (2004) *Chitty on Contracts* (29th ed, Volume I) Sweet & Maxwell at 1482 para 26-097.

<sup>14</sup> See eg the decision by the Court of Appeal (England) in *Forsikringaktieselskapet Vesta v. Butcher* [1989] A.C. 852, where it was accepted that the plaintiffs were entitled to formulate the claim, which was based on s 4 of the Law Reform (Contributory Negligence) Act 1945, in either contract (breach of a contractual duty of care) or tort (tort of negligence); *Barclays Bank plc v. Fairclough Building Ltd* [1995] QB 214; cf McKendrick, E (2005) *Contract Law – Text, Cases and Materials* (2nd ed) Oxford University Press at 1102; Burrows, A (2005) *Remedies for Torts and Breach of Contract* (3rd ed) Oxford University Press at 136 et seq; Treitel *The Law of Contract* supra fn 1 at 396 et seq. But see the decision by the High Court (Australia) in *Astley v. Austrust Limited* (1999) 197 CLR 1, 31 et seq, where it was held that those decisions which have applied apportionment legislation, based on the Law Reform (Contributory Negligence) Act, to breaches of contract 'are wrong and should not be followed in this country'; cf Law Commission (1993) *Contributory Negligence as a Defence in Contract Law* Com. No. 219 at 4. In the U.S., many states have enacted comparative fault statutes, which are similar to the ideas underlying the Uniform Comparative Fault Act 1977, and which deny the application of the comparative negligence rule

havior can also be discussed under headings such as *causation* or *remoteness of damage (foreseeability)*, *impossibility*, *frustration* or the like.<sup>15</sup>

Against this background of diverse domestic approaches, it does not come as a big surprise that there are many uncertainties concerning the application and limitations of Articles 77 and 80 CISG.

## SELECTED PROBLEMS

### Questions Surrounding Article 80 CISG

#### *The Interplay between Articles 80 and 79 CISG*

As set out above, according to Article 80 CISG, the obligee may not rely on any failure by the obligor, to the extent that this failure was caused by its own act or omission.<sup>16</sup> As far as the creditor's right to claim damages is concerned, the same result already follows from Article 79(1) CISG, which provides for an exemption from liability if the failure to perform was due to an impediment beyond the obligor's control that could not reasonably be taken into account, avoided or overcome.<sup>17</sup> However, Article 80 CISG is not a mere extension of Article 79(1) CISG, but has a distinctive sphere of application.<sup>18</sup>

to pure breach of contract cases; cf Treitel *Remedies for Breach of Contract* supra fn 5 at 180.

<sup>15</sup> See Treitel *The Law of Contract* supra 1 at 398 et seq; Klauss-Hartung, S (1991) *Mitverschulden bei Vertragsbruch im US-amerikanischen, englischen und deutschen Recht* Centaurus at 50 et seq. In France, the issue is discussed under the heading of fault of the victim ('faute de la victime'), see Treitel *Remedies for Breach of Contract* supra fn 5 at 190 et seq.

<sup>16</sup> Cf Schmidt-Kessel, M (2007) *Gläubigerfehlverhalten* J.C.B. Mohr (Paul Siebeck) at § 11 IX 3 a, according to whom Article 80 CISG is an expression of the principle of 'venire contra factum proprium'; see also Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 80 para 1: 'Art. 80 is an expression of the general principle of good faith but does not specify the consequences of contributory negligence on the part of the promisee'.

<sup>17</sup> Schlechtriem, P (2007) *Internationales Kaufrecht* (4th ed) J.C.B. Mohr (Paul Siebeck) at 209, para 297.

<sup>18</sup> Schlechtriem, P (1986) *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods* Manz at 104, available at: <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem-80.html>; Trachsel, H (2003) 'Die vollständige

Firstly, in cases of the creditor's own contributory behavior, the prerequisites of Article 79(1) CISG concerning the foreseeability and the duty to avoid or overcome the impediment do not apply.<sup>19</sup> For example, a seller is exempted from liability under Article 80 CISG if its failure to construct and deliver machinery according to the contract is due to the fact that the buyer did not provide the construction instructions or obtain the necessary import license.<sup>20</sup> Secondly, as already mentioned, Article 80 CISG precludes the creditor from asserting any remedy, while Article 79 CISG applies to damages only.<sup>21</sup>

#### *Conditions for Exemption*

Article 80 CISG requires that the failure has been caused by the obligee's own act or omission. Whether the obligee was at fault is irrelevant,<sup>22</sup> nor is it permitted to invoke an exemption under Article 79(1) CISG. Thus, in the above example, it is immaterial whether the buyer negligently failed to provide the instructions or whether the plans were destroyed by a fire which would otherwise qualify as an exemption under Article 79(1) CISG.

und teilweise Haftungsbeziehung sowie die Haftungsreduktion nach UN-Kaufrecht (Art. 79, 80 und 77 CISG)' in Baudenbacher, C (ed) *Aktuelle Probleme des Europäischen und Internationalen Wirtschaftsrechts* Helbing & Lichtenhahn 345 at 383; Salger, H-C in Witz, W, Salger, H-C and Lorenz, M (eds) (2000) *Internationales Einheitsrecht Kaufrecht* Recht und Wirtschaft at Art 80 para 4.

<sup>19</sup> Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 80 para 5; Trachsel 'Die vollständige und teilweise Haftungsbeziehung' supra fn 18 at 383.

<sup>20</sup> Schlechtriem *Internationales Kaufrecht* supra fn 17 at 209, para 297.

<sup>21</sup> Magnus, U in Honsell, H (ed) (1997) *Kommentar zum UN-Kaufrecht* Springer at Art 80 para 4; Huber, P in (2004) *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 3, Schuldrecht, Besonderer Teil I* (4th ed) C.H. Beck at Art 79 paras 28-29.

<sup>22</sup> Fountoulakis, C in Schwenger, I and Fountoulakis, C (eds) (2007) *International Sales Law* Routledge Cavendish at 577; Schmidt-Kessel *Gläubigerfehlverhalten* supra fn 16 at § 11 IX 3 a; Magnus *Kommentar* supra fn 8 at Art 80 para 11; Oberlandesgericht Koblenz (Germany), 31 January 1997, available at: <http://www.cisgw3.law.pace.edu/cases/970131g1.html> = CISG-online 256; cf the 30th meeting of the First Committee on Article 65 *bis* (became Article 80 CISG), available at <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting30.html>.

There is ample case law on which acts or omissions by the obligee constitute a cause for the obligor's failure to perform. Courts and arbitral tribunals have found that the requirements of Article 80 CISG were satisfied under the following circumstances:<sup>23</sup> a buyer's failure to pay the price for delivered goods causing the seller to fail to deliver other goods;<sup>24</sup> a buyer's failure to take delivery of the goods causing the seller's failure to make delivery;<sup>25</sup> a seller's failure to perform its obligation to designate the port of shipment causing the buyer's failure to open a letter of credit;<sup>26</sup> a buyer's unjustified refusal to accept the seller's offer to cure a non-conformity causing the seller's failure to cure;<sup>27</sup> a buyer's failure to adhere to operating instructions causing a breakdown of the delivered equipment;<sup>28</sup> and a seller's repudiation of future delivery obligations causing the buyer's failure to pay for some prior deliveries.<sup>29</sup>

If the failure to perform is caused by the act or omission of a third party, the question arises whether such conduct can be attributed to the promisee. This question has to be answered in accordance with Article 79 CISG.<sup>30</sup>

<sup>23</sup> Cf UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, available at: <http://cisgw3.law.pace.edu/cisg/text/digest-art-80.html>.

<sup>24</sup> Belarusian Chamber of Commerce and Industry International Court of Arbitration, 5 October 1995, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/951005b5.html>; Oberlandesgericht München (Germany), 9 July 1997, available at: <http://cisgw3.law.pace.edu/cases/970709g1.html> = CISG-online 282; cf Oberlandesgericht München (Germany), 1 July 2002, available at: <http://cisgw3.law.pace.edu/cases/020701g1.html> = CISG-online 656.

<sup>25</sup> Oberlandesgericht München (Germany), 8 February 1995, available at: <http://cisgw3.law.pace.edu/cases/950208g1.html> = CISG-online 143.

<sup>26</sup> Oberster Gerichtshof (Austria), 6 February 1996, available at: <http://cisgw3.law.pace.edu/cases/960206a3.html> = CISG-online 224.

<sup>27</sup> Oberlandesgericht Koblenz (Germany), 31 January 1997, available at: <http://cisgw3.law.pace.edu/cases/970131g1.html> = CISG-online 256.

<sup>28</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 29 December 2004, available at: <http://cisgw3.law.pace.edu/cases/041229r1.html> = CISG-online 1212.

<sup>29</sup> Zurich Chamber of Commerce (Switzerland), 31 May 1996, available at: <http://www.cisgw3.law.pace.edu/cases/960531s1.html> = CISG-online 1291: 'One could call this an anticipation of an anticipatory breach'.

<sup>30</sup> Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 80 para 3; Lüderitz, A and Dettmeier, M in Soergel, HT (2000) *Bürgerliches Gesetzbuch: Band 13, Schuldrechtliche Nebengesetze 2, Übereinkommen der Vereinten Nationen*

Thus, what is decisive in such a case is whether this person can be attributed to the promisee's sphere of risk in accordance with Article 79(1) CISG, or whether the promisee is otherwise responsible for this third person under Article 79(2) CISG.

#### *Failure to Perform Caused by Both Parties*

It is still open to discussion whether Article 80 CISG applies only to cases where the promisee alone is responsible for the failure to perform, or whether it also applies where both parties contributed to the non-performance.<sup>31</sup> This controversy is rooted in the old idea of the Roman concept of *culpa compensation* as well as the common law rule of *contributory negligence*. Both concepts favored an all-or-nothing-approach by excluding any claim by the promisee, who was at fault,<sup>32</sup> and thus, any fault of the promisee led to the total disregard of the promisor's behavior.<sup>33</sup>

It may be argued that the sheer wording of Article 80 CISG, pursuant to which 'a party may not rely on a failure of the other party to perform', brings back memories of these archaic concepts.<sup>34</sup> However, in our opinion and also according to the prevailing view of legal writers, in such cases, a pro

*über Verträge über den internationalen Warenkauf (CISG)* W. Kohlhammer at Art 80 para 2; Neumayer, KH and Ming, C (1993) *Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire CEDIDAC* at Art 80 n 2.

<sup>31</sup> On this discussion, see Trachsel 'Die vollständige und teilweise Haftungsbe-freiung' supra fn 18 at 394 et seq; Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 80 para 7.

<sup>32</sup> See Zimmermann, R (1990) *The Law of Obligations: Roman Foundations of the Civilian Tradition* Juta & Co at 1010 et seq.

<sup>33</sup> It has to be noted that the harshness of the common law rule that the plaintiff's contributory negligence provided a complete defence to an action in tort was remedied, however slight, in most common law jurisdictions, see eg the Law Reform (Contributory Negligence) Act 1945 in the UK; the New Zealand Contributory Negligence Act 1947; contributory negligence statutes adopted within the jurisdictions of Australia and Canada (cited in Law Commission *Contributory Negligence* supra fn 14 at 5, fn 18-19); as well as the comparative fault statutes in the U.S.

<sup>34</sup> Cf. Koziol, H (2005/2006) 'Reduction in Damages According to Article 77 CISG' (25) *Journal of Law and Commerce* 385; Lüderitz and Dettmeier in Soergel *Bürgerliches Gesetzbuch* supra 30 at Art 80 para 3.

rata apportionment of the loss must be possible.<sup>35</sup> The wording of Article 80 CISG does not prevent such a result either, since the second part of this provision provides that relying on the failure to perform is only excluded 'to the extent' that such failure was caused by the obligee's behavior. Moreover, the fact that *Peter Schlechtriem* proposed, at the 1980 Vienna Conference, to replace the phrase 'in so far as' by 'to the extent that'<sup>36</sup> shows that, albeit the last-minute inclusion of Article 80 CISG, much importance was attached to its wording.

### *Legal Consequences*

According to Article 80 CISG, the obligee loses the right to rely on the other party's failure to perform. This means that not only the right to claim damages, but also all other remedies for a failure to perform, such as a claim for specific performance, the right to avoid the contract, or the right to reduce the purchase price, are excluded.<sup>37</sup> Furthermore, the promisee against whom a claim is brought may not raise the defense of the claimant's failure to perform.<sup>38</sup>

In cases where both parties contributed to the non-performance, apportionment according to each respective contribution may be difficult. Whereas any monetary claims, especially damages, claims for interest or an action for

<sup>35</sup> Magnus *Kommentar* supra fn 8 at Art 80 para 14; Schlechtriem *Internationales UN-Kaufrecht* supra fn 17 at 210 para 298; Neumayer and Ming *Convention* supra fn 30 at Art 80 n 3; Trachsel 'Die vollständige und teilweise Haftungsbefreiung' supra fn 18 at 399. Cf Huber *Münchener Kommentar* supra fn 21 at Art 80 para 6, according to whom Article 80 CISG contains a general principle in terms of Article 7(2) CISG.

<sup>36</sup> O.R. at 393 n 3. This oral amendment to the proposed Article 65 *bis* or Article 23 *bis* (became Article 80 CISG), made by the Federal Republic of Germany, was adopted by 34 to none votes and referred to the Drafting Committee, see the Report of the First Committee, available at: <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries79,80.html>.

<sup>37</sup> Schmidt-Kessel *Gläubigerfehlverhalten* supra fn 16 at § 11 IX 3 b; Magnus *Kommentar* supra fn 8 at Art 80 para 17; Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 80 para 9; Schäfer 'Editorial remarks' supra fn 10 at 5.

<sup>38</sup> Schlechtriem *Internationales UN-Kaufrecht* supra fn 17 at 209 para 297; Oberster Gerichtshof (Austria), 6 February 1996, available at: <http://cisgw3.law.pace.edu/cases/960206a3.html> = CISG-online 224.

the price can easily be apportioned,<sup>39</sup> problems arise when it comes to claims for specific performance or the right to avoid the contract. These claims cannot simply be mathematically apportioned.<sup>40</sup> In light of this, some authors suggest that these rights can only be exercised if the contribution to the failure to perform by the other party preponderated, i.e. amounted to more than 50 percent.<sup>41</sup> When unwinding the contract or upon granting specific performance, the relative contributions should be taken into account when assessing any counterclaim of the other party.<sup>42</sup>

However, this solution seems to be rather arbitrary, especially since the determination of the relative contributions is always more or less discretionary and cannot be calculated with mathematical precision. Thus, another approach is called for. It should be left to the promisee to choose whether or not to rely on its right to specific performance, or to avoid the contract if it is willing to pay the monetary amount reflecting its share in causing the failure to perform.

This situation is best illustrated by the following example: the buyer provides some of the material that the seller is to use in manufacturing the goods. This material is defective but the seller could have been aware of this defect. Let us suppose that the contribution of the buyer amounts to approxi-

<sup>39</sup> Trachsel 'Die vollständige und teilweise Haftungsbefreiung' supra fn 18 at 399; Magnus in Honsell *Kommentar* supra fn 21 at Art 80 para 12; Tallon, D in Bianca, CM and Bonell, MJ (eds) (1987) *Commentary on the International Sales Law* Giuffrè at Art 80 n 2.5.

<sup>40</sup> Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 80 para 10; Magnus *Kommentar* supra fn 8 at Art 80 para 14; Tallon in Bianca & Bonell *Commentary* supra fn 39 at Art 80 n 2.5; Trachsel 'Die vollständige und teilweise Haftungsbefreiung' supra fn 18 at 399.

<sup>41</sup> Trachsel 'Die vollständige und teilweise Haftungsbefreiung' supra fn 18 at 409; Schäfer 'Editorial Remarks' supra fn 10 at 4 a. Some authors even argue that the all-or-nothing-approach with respect to non-monetary claims requires a considerable preponderance of the contribution to the failure to perform by the other, see Magnus *Kommentar* supra fn 8 at Art 80 para 14; Brunner, C (2004) *UN-Kaufrecht – CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980* Stämpfli at Art 80 para 6; Huber *Münchener Kommentar* supra fn 21 at Art 80 para 6.

<sup>42</sup> Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 80 para 10. Yet the legal basis for this counterclaim is open to discussion; see in detail Trachsel 'Die vollständige und teilweise Haftungsbefreiung' supra fn 18 at 399 et seq.



mately two thirds, and that of seller to one third. In this case, according to our opinion, the buyer should still be able to claim specific performance subject to Article 28 CISG, provided that it indemnifies the seller for two thirds of the additional costs that it must incur in manufacturing the goods anew. Likewise, avoidance must be possible in this case if the buyer is willing to pay two thirds of the seller's loss.

This result is also in accordance with the mitigation principle set out in Article 77 CISG. However, where the contribution of the 'breaching' party seems to be virtually negligible, notions of good faith in international commerce call for an exclusion of such non-monetary remedies.

### Questions Surrounding Article 77 CISG

#### *Scope of Article 77 CISG*

Article 77 CISG requires the aggrieved party to mitigate the loss.<sup>43</sup> If it fails to take reasonable measures, the other party may claim a reduction in the damages.<sup>44</sup> The provision is based on the principle that there should be no compensation for avoidable loss.<sup>45</sup>

<sup>43</sup> Cf Article 88 ULIS: '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>44</sup> But see Schlechtriem, P 'Gemeinsame Bestimmungen über Verpflichtungen des Verkäufers und des Käufers' in (1985) *Wiener Übereinkommen von 1980 über den internationalen Warenkauf, Lausanner Kolloquium vom 19. und 20. November 1984* Schulthess 149 at 170; Hellner, J 'The UN Convention on International Sales of Goods – an Outsider's View' in Jayme, E, Kegel, G and Lutter, M (eds) (1983) *Ius inter nationes: Festschrift für Stefan Riesenfeld aus Anlass seines 75. Geburtstages* Müller 71 at 99.

<sup>45</sup> Stoll, H (1987) 'Inhalt und Grenzen der Schadensersatzpflicht sowie Befreiung von der Haftung im UN-Kaufrecht, im Vergleich zu EKG und BGB' in Schlechtriem, P (ed) *Einheitliches Kaufrecht und nationales Obligationenrecht* Nomos 257 at 268. But see Koziol, H (1998) 'Rechtsfolgen der Verletzung einer Schadensminderungspflicht – Rückkehr der archaischen Kulpakompensation?' *Zeitschrift für Europäisches Privatrecht* 593; Koziol 'Reduction' supra fn 34 at 389, who surprisingly examines whether Article 77 CISG is based on the Roman concept of culpa-compensation.

Mitigation problems arise in a wide variety of circumstances.<sup>46</sup> The usual setting is that a breach of contract has already occurred. Thus, a buyer of non-conforming goods may be under a duty to have them repaired.<sup>47</sup> Furthermore, the aggrieved party may be under a duty to make a cover transaction to prevent, or at least minimize the loss.<sup>48</sup> In order to fully comply with the mitigation principle, the aggrieved party may even be expected to co-operate and interact with the breaching party when making the cover transaction.<sup>49</sup>

However, the duty to mitigate arises not only when the loss or even the breach has occurred, but already exists when a breach is threatening.<sup>50</sup> Difficult problems arise in connection with an anticipatory breach of contract.<sup>51</sup> According to Article 72(1) CISG, the aggrieved party may avoid the contract

<sup>46</sup> Honnold, JO (1999) *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed) Kluwer at para 417. Cf van Houtte, H (2000) 'The Vienna Sales Convention in ICC Arbitral Practice' (11) *ICC International Court of Arbitration Bulletin* 22 at 32; Komarov 'Mitigation of Damages' supra fn 2 at 41.

<sup>47</sup> Witz in Witz, Salger & Lorenz *International Einheitliches Kaufrecht* supra fn 18 at Art 77 para 9; Stoll and Gruber in Schlechtriem & Schwenzer *Commentary* supra fn 3 at Art 77 para 7.

<sup>48</sup> Ontario Court of Appeal (Canada), 26 January 2000 (*Nova Tool v. London Industries*), available at: <http://cisgw3.law.pace.edu/cases/000126c4.html>; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich, 15 June 1994, available at: <http://cisgw3.law.pace.edu/cases/940615a3.html> = CISG-online 691; Oberlandesgericht Hamburg (Germany), 28 February 1997, available at: <http://cisgw3.law.pace.edu/cases/970228g1.html> = CISG-online 261; Oberlandesgericht Düsseldorf (Germany), 13 September 1996, available at: <http://cisgw3.law.pace.edu/cases/960913g1.html> = CISG-online 407; Oberlandesgericht Celle (Germany), 2 September 1998, available at: <http://cisgw3.law.pace.edu/cases/980902g1.html> = CISG-online 506.

<sup>49</sup> German Coffee Association, Final award of 13 July 1998, (2000) *Yearbook Commercial Arbitration* XXV at 216 (applying 'Hamburg usages') holding that the buyer failed to mitigate damages by not informing the seller of its intention to re-sell the coffee to a third party, as the seller was thus unable of 'influencing the sale and the sale's timing'.

<sup>50</sup> Schlechtriem 'Gemeinsame Bestimmungen' supra fn 44 at 169; Weber, RH (1991) 'Vertragsverletzungsfolgen: Schadensersatz, Rückabwicklung, vertragliche Gestaltungsmöglichkeiten' in Bucher, E (ed) *Berner Tage für die juristische Praxis 1990, Wiener Kaufrecht* Stämpfli 165 at 205.

<sup>51</sup> Cf Honnold, JO (1989) *Documentary History of the Uniform Law for International Sales* Kluwer at 451; Saidov, D (2001) 'Methods of Limiting Damages under Vienna Convention on Contracts for the International Sale of Goods', available at: <http://cisgw3.law.pace.edu/cisg/biblio/saidov.html> at II 4 c; see eg Oberlandesgericht

if, prior to the date of performance, it is clear that the other party will commit a fundamental breach of contract. It may then calculate its damages according to Article 75 CISG as the difference between the contract price and the price of a cover transaction, or alternatively, under Article 76 CISG as the difference between the contract price and the current market price at the time of avoidance.<sup>52</sup>

Let us assume a scenario concerning particularly volatile markets, where the breach in the future becomes clear at a point in time at which market prices are extremely unfavorable to the breaching party, and where it can be assumed that the development will be more favorable in the future. It is submitted that the aggrieved party, under these circumstances, must mitigate the loss by not avoiding the contract and making a cover transaction immediately, but by waiting until the market conditions have improved.<sup>53</sup> Although the legal situation seems unquestionable, many factual problems arise in these cases surrounding the question of what should be a reasonable measure under the circumstances. The outcome of the individual case will thereby often depend on the burden of proof.<sup>54</sup>

The crucial question, however, is whether the aggrieved party can wait until the future contractual date of performance, or whether it may be obliged to avoid the contract before that date when anticipating a market development that becomes more and more unfavorable for the party in breach. Suppose that on 1 June, seller and buyer conclude a contract to sell and deliver 1,000 bales of cotton at US\$ 50 per bale on 1 August. On 1 July, seller repudiates the contract, when the market price is at US\$ 60 per bale.<sup>55</sup> Is buyer under an obligation to avoid the contract on 1 July if prices are expected to rise further? Or can it wait until the delivery date of 1 August, even if prices at that time are expected to be and indeed are at US\$ 70 per bale?

Braunschweig (Germany), 28 October 1999, available at: <http://cisgw3.law.pace.edu/cases/991028g1.html> = CISG-online 510.

<sup>52</sup> See in detail Schlechtriem, P (2007) 'Calculation of damages in case of anticipatory breach under the CISG', available at: <http://www.cisg-online.ch/cisg/FS%20Hellner.pdf>; Schlechtriem, P (2006) 'Damages, avoidance of the contract and performance interest under the CISG', available at: [http://www.cisg-online.ch/cisg/Schlechtriem\\_Damages\\_Avoidance.pdf](http://www.cisg-online.ch/cisg/Schlechtriem_Damages_Avoidance.pdf).

<sup>53</sup> Cf Schlechtriem 'Calculation of damages' supra fn 52 at 7.

<sup>54</sup> Schlechtriem 'Calculation of damages' supra fn 52 at 8.

<sup>55</sup> Cf the reversed example of Honnold *Uniform Law* supra fn 46 at para 419.1.

Although the mitigation principle would generally apply in this case of the buyer claiming damages, most scholars opine that the aggrieved party may indeed wait until the contractually agreed date of performance and calculate its damages, be it according to Article 74, 75 or 76 CISG, according to that date.<sup>56</sup> Although it is conceded that it might be extremely difficult to know when a 'rising' market has reached its peak, or a 'falling' market has reached its minimum, thus making it almost impossible to determine whether avoidance of contract at a certain time is a required reasonable measure in terms of Article 77 CISG, the principle of mitigation should prevail in this case. This is all the more true, if the market development can be *ex ante* determined with reasonable certainty. Then, the aggrieved party has no legitimate interest in waiting until the agreed date of performance for the sole purpose of inflicting further harm upon the party in breach.<sup>57</sup>

#### *Application to Other Remedies*

It is highly questionable, however, whether the duty to mitigate can be applied to remedies other than damages, especially the right to specific performance, including the action for the price, as well as the right to price reduction. The background to this controversy can be found in the drafting history of Article 77 CISG. At the 1980 Vienna Conference, *John Honnold* proposed an amendment to what is now Article 77 CISG, according to which it should have read: 'if he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have mitigated, or a corresponding modification or adjustment of any other remedy'.<sup>58</sup> Thus, it would have been clear that the mitigation principle would not have been restricted to damages, but could have been applied to all other remedies. This proposal, however, was rejected on grounds of the wording being 'too gener-

<sup>56</sup> See Honnold *Uniform Law* supra fn 46 at para 419.1: 'No one knows when a "falling" market has reached bottom'; Stoll and Gruber in Schlechtriem & Schwenzer *Commentary* supra fn 3 at Art 77 para 9; Magnus *Kommentar* supra fn 21 at Art 77 para 8.

<sup>57</sup> Cf Stoll and Gruber in Schlechtriem & Schwenzer *Commentary* supra fn 3 at Art 77 para 9, and Magnus *Kommentar* supra fn 8 at Art 77 paras 6 and 12.

<sup>58</sup> O.R. at 133.

al and hence dangerous'.<sup>59</sup> Although the legislative history, wording and the systematic placement of Article 77 CISG is indeed a strong argument against the applicability of the mitigation principle outside the sphere of damages, the consequences of this interpretation are questionable and, in some cases, not reconcilable with notions of good faith in international commerce.

The most illuminating example in this regard is the action for the purchase price. Imagine the case where the sales contract requires the seller to manufacture and deliver custom-made goods to the buyer. Before the seller starts production, the buyer repudiates the contract. Can the seller knowingly go on with production and force the execution of the contract upon the buyer by claiming the purchase price at the agreed date of performance?<sup>60</sup>

A look at national laws shows that this question can only be answered in the negative, although the CISG does not specifically grant the buyer a right to terminate the contract.<sup>61</sup> Under § 2-709(1) U.C.C., the seller only has an action for the price if either the buyer accepted the delivered goods, or if the risk of loss has already passed to the buyer, or if it is unable after reasonable effort to resell the goods at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.<sup>62</sup> If the seller has not even started production, an action for the price *a fortiori* does not exist. Equally,

<sup>59</sup> Schlechtriem, P for the Federal Republic of Germany at the 30th Meeting of the First Committee, available at [cisg.law.pace.edu/cisg/text/link77.html](http://cisg.law.pace.edu/cisg/text/link77.html) para 73, who was, however, in favor of Honnold's proposal with respect to a price reduction; cf on the discussion at the 1980 Vienna Conference and Article 61(2) ULIS Hellner 'The UN Convention' supra fn 44 at 87 fn 51; cf Hager, G (1975) *Die Rechtsbehelfe des Käufers wegen Nichtabnahme der Ware nach amerikanischem, deutschem und Einheitlichem Haager Kaufrecht* Metzner at 192 et seq; Kranz, N (1989) *Die Schadensersatzpflicht nach den Haager Einheitlichen Kaufgesetzen und dem Wiener UN-Kaufrecht* Peter Lang at 226-228.

<sup>60</sup> See on this question Hellner 'The UN Convention' supra fn 44 at 87; Schlechtriem 'Gemeinsame Bestimmungen' supra fn 44 at 170 (assuming that there is an actual obligation to mitigate loss which can be a basis for a damages claim); Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 77 para 5; Neumayer and Ming *Convention* supra fn 30 at Art 77 n 5.

<sup>61</sup> Disapproving Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 77 para 5.

<sup>62</sup> In English law, section 49(1) and (2) of the Sale of Goods Act 1979 provides that an action for the price may be brought only if the property in the goods has passed to the buyer or if the purchase price is to be paid on a certain day irrespective of delivery, cf Hager in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 62 para 8.

under civil law systems, in the above-mentioned situation, the seller could not compel the buyer to fulfill the contract by way of specific performance. According to most continental legal systems,<sup>63</sup> the buyer has the opportunity to cancel the contract before manufacture is completed. In that case, the seller keeps the right to be compensated for the work done. However, its compensation is reduced by what it saves due to the cancellation of the contract and by what it gains or deliberately omits to gain by investing its working power in another project.

This is nothing else than a duty to mitigate.<sup>64</sup> The PECL, in Article 9:101(2), reach the same result by denying a right to specific performance of a monetary obligation if the aggrieved party could have made a reasonable substitute transaction or if performance would be unreasonable in the circumstances.<sup>65</sup> In summary, the result elaborated here cannot be questioned. Although one might argue that, from a dogmatic point of view, this result cannot be achieved by applying the duty to mitigate under Article 77 CISG, recourse is then to be had to other provisions of the Convention, such as interpretation via Article 7(1) CISG<sup>66</sup> or gap-filling via Article 7(2) CISG.<sup>67</sup>

<sup>63</sup> See Germany: BGB, § 651 sentence 3, § 649; Switzerland: OR, Article 377; Austria: ABGB, § 1168(1); France: Code civil, Article 1794; Italy: Codice civile, Article 1671.

<sup>64</sup> Cf Bridge, M (1999) *The International Sale of Goods: Law and Practice* Oxford University Press at 105: 'In one respect, the rule in Article 77 CISG goes beyond English law. It is a rule of mitigation of loss and not of damages. It could therefore be invoked against a party who unreasonably keeps open and does not avoid a contract in the face of an anticipatory repudiation.'

<sup>65</sup> By contrast, Article 7.2.1 UNIDROIT Principles grants a right to specific performance for any monetary obligation, thereby disregarding the problem discussed above, cf Schwenger, I (1998/99) 'Specific Performance and Damages according to the 1994 UNIDROIT Principles for International Commercial Contracts' (3) *European Journal of Law Reform* 289 at 293 et seq.

<sup>66</sup> Hager in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 62 para 14; Herber, R and Czerwenka, B (1991) *Internationales Kaufrecht* C.H. Beck at Art 77 para 7.

<sup>67</sup> On the impact of Article 28 CISG on the action for the price, see Hellner 'The UN Convention' supra fn 44 at 88; see also Hager in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 62 para 14: 'If, on the basis of Article 28 [CISG], the seller is unable to bring an action requiring performance and is therefore restricted to a damages claim, he is under a duty to mitigate his loss.'

*Deal with the Breaching Party*

A final problem arising under Article 77 CISG should be discussed here: can the duty to mitigate require the aggrieved party to strike a deal with the breaching party, especially in cases when the parties are contracting in market conditions?<sup>68</sup> Suppose that the buyer repudiates the contract but, at the same time, is willing to buy the same goods from the seller at a lower price still well above the current market price. In this case, a strong argument can be made that the mitigation principle, in general,<sup>69</sup> 'requires' the seller to conclude the necessary cover sale, not with any third party at current market conditions, but rather with the buyer itself.<sup>70</sup> In an ICC case,<sup>71</sup> the arbitrators found that the claimant's offer to renew the distributorship agreement 'presented defendant with an appropriate opportunity to mitigate its damages' arising out of claimant's unlawful termination of the contract. In particular, the arbitral tribunal believed 'that it would be unfair for one of the parties to deny the other the opportunity to correct a situation created by its improper conduct'.

The doctrine of mitigation would thus function in a manner similar to the seller's right to cure under Article 37 CISG and its right to remedy defects under Article 48 CISG, since notions of mitigation and cure alike would minimize the economic dislocation following a breach of contract.<sup>72</sup> If the seller does not accept the offer of the breaching party, its damages are to be reduced in the amount of costs, which it would not have incurred through a deal with the breaching party.<sup>73</sup>

<sup>68</sup> See also Bridge 'Mitigation' supra fn 5 at 398 et seq; Goetz and Scott 'The Mitigation Principle' supra fn 1 at II B 3 and II B 1.

<sup>69</sup> Of course, the prior behavior of the contract breacher may well be such that the aggrieved party cannot reasonably trust the breaching party's assurances of performance under a 'new' contract, see *Payzu Ltd. v. Saunders* [1919] 2 K.B. 581 (C.A.), cited in Bridge 'Mitigation' supra fn 5 at 412.

<sup>70</sup> Cf Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 77 para 7.

<sup>71</sup> ICC, Final award in the case 5073 (1986), (XIII) *Yearbook Commercial Arbitration* (1988) 53 et seq (applying the rule of California law on mitigation of damages).

<sup>72</sup> Cf Bridge 'Mitigation' supra fn 5 at 411-412.

<sup>73</sup> Cf Tribunal Supremo (Spain), 28 January 2000, available at: <http://cisgw3.law.pace.edu/cases/000128s4.html> = CISG-online 203.

If the mitigation principle may even demand dealings with the breaching party, the same *a fortiori* holds water in cases where strict adherence to the contract would lead to unilateral burdensome results,<sup>74</sup> and in particular, where unforeseen contingencies may make performance excessively onerous for one party.<sup>75</sup> Irrespective of the question of whether the party burdened with the relevant change of circumstances may be relieved from its obligation to pay damages according to Article 79 CISG,<sup>76</sup> the duty to mitigate may require the other party to renegotiate the contract and its terms. Thus, it is submitted that similar results to those under Article 6.2.3(1) UNIDROIT Principles and Article 6:111(2) PECL, which entitle the disadvantaged party to request renegotiations, may also be achieved under Article 77 CISG.

## CONCLUDING REMARKS AND PERSPECTIVES

At the time of the 1980 Vienna Conference, Articles 77 and 80 CISG already constituted an application of the principle of good faith in international sales contracts. Compared to the all-or-nothing-approach that could be, and to this very day, is found in some legal systems, the possibility to apportion detriments and costs according to the relative contributions of the parties represents a conceptually refined solution. However, as has been shown, parties to a contract were still regarded as adversaries. This explains the then-prevailing reluctance to broaden the scope of the mitigation principle beyond the narrow wording of the respective provisions. During the last 25 years,

<sup>74</sup> Cf Hager, G (1983) 'Der Gedanke der Solidarität in der Lehre vom Synallagma' in Schlechtriem, P and Leser, HG (eds) *Zum Deutschen und Internationalen Schuldrecht, Kolloquium aus Anlaß des 75. Geburtstages von Ernst von Caemmerer* J.C.B. Mohr (Paul Siebeck) 26 at 43, referring inter alia to a case decided by the Bundesgerichtshof (Germany), 16 January 1953, *Monatsschrift für Deutsches Recht* (1952), at 282, available at: [http://www.ucl.ac.uk/laws/global\\_law/german-cases/cases\\_bundes.shtml?16jan1953](http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bundes.shtml?16jan1953) (applying the BGB), where the so-called 'Berlin-Blockade' from 1948 to 1949 impeded the buyer's export of drill hammers into the Eastern Zone of Germany.

<sup>75</sup> Cf Lando, O (2005) 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (53) *The American Journal of Comparative Law* 379 et seq at X 2, referring to time of depression or unrest.

<sup>76</sup> On the question whether Article 79 CISG applies to hardship cases, see Stoll and Gruber in Schlechtriem & Schwenger *Commentary* supra fn 3 at Art 79 para 30 et seq.

significant changes in the law of contracts have taken place. Parties are increasingly no longer regarded as opponents; instead, duties of co-operation and respect for the other party's legitimate interests are gaining ground. The UNIDROIT Principles contain an express provision in this regard.<sup>77</sup> This development receives further momentum from the fact that the litigation of disputes concerning international contracts before national state courts is ever-decreasing, whilst the use of alternative dispute resolution mechanisms, especially in the form of arbitration, is becoming more popular. The principles of good faith and mitigation form a core part of the basis of the thus evolving *lex mercatoria*.

<sup>77</sup> See Article 5.1.3 UNIDROIT Principles (Co-operation between the parties): 'Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligation.'