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## CISG: Pace University School of Law Internet World Wide Web Site

Albert Kritzer

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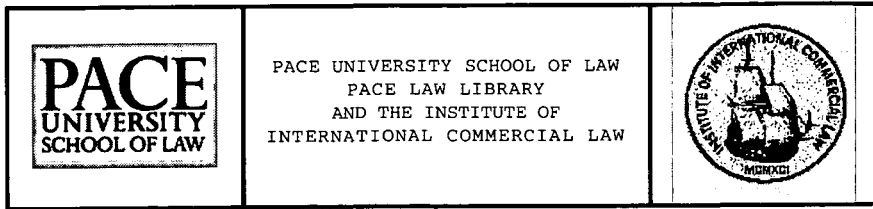
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## CASE LAW

United States 6 December 1995, U.S. Circuit Court of Appeals,  
2nd Circuit (*Delchi Carrier, S.p.A. v. Rotorex Corp.*) [accession  
number (database code of this case): 951206ul]

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<sup>2</sup> United Nations Convention on Contracts for the International Sale of Goods, opened for signature Apr. 11, 1980, 19 I.L.M. 668 [hereinafter CISG or Vienna Convention (referred to in cases under both names)].

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### Case identification

1. **DATE OF DECISION:** 6 December 1995
2. **JURISDICTION:** U.S.A. (federal court)
3. **TRIBUNAL:** U.S. Circuit Court of Appeals (2d. Cir.) [a federal appellate court]
4. **CASE NUMBER/DOCKET NUMBER:** Nos. 185, 717, Dockets 95-7182, 95-7186
- JUDGE(S):** Winter (author of opinion), Jacobs and Leval
5. **CASE NAME:** Delchi Carrier, S.p.A. v. Rotorex Corp.<sup>12</sup>
6. **CASE HISTORY:** 1st instance U.S. District Court (Northern District of New York) 9 September 1994 (*affirmed* in major part)
7. **SELLER'S COUNTRY:** U.S.A. (defendant)
8. **BUYER'S COUNTRY:** Italy (plaintiff)
9. **GOODS INVOLVED:** Compressors for air conditioners

### Case classification

10. **APPLICATION OF CISG:** Yes
11. **APPLICABLE CISG PROVISIONS AND ISSUES**

Section (a) identifies provisions at issue and issues addressed. Section (b) contains descriptors (to be drawn from a multi-lingual thesaurus). Sections (a) and (b) are tied to search engines (only partially in place). Section (c) contains comments on issues.

- (a) **Key CISG provisions at issue:** Articles 7(1); 7(2); 74; 78 [also relevant: Articles 1(1)(a); 6; 25; 35; 36; 46; 49; 75; 77; 86(1); 87]

**Classification of issues using UNCITRAL<sup>13</sup> classification code numbers:**

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<sup>11</sup> *Text(s) of case commentaries* <<http://www.cisgw3/law.pace.edu:80/cisg/wais/db/cases2/951206ul.html#tc>>.

<sup>12</sup> Delchi Carrier, S.p.A. v. Rotorex Corp., 71 F.3d 1024 (2nd Cir. 1995).

<sup>13</sup> United Nations Commission on International Trade Law.

**1B1** [Basic rules of applicability: parties in different Contracting States];

**6B** [Agreements to apply Convention (contract silent as to governing law)];

**7A; 7A1; 7A11; 7A2; 7C22; 7C23** [Interpretation of Convention: principles of interpretation; International character; Autonomous interpretation v. reliance on domestic law; Uniformity in application of Convention; Recourse to general principles on which Convention is based; Gap-filling by domestic law];

**25A** [Definition of fundamental breach: effect of a fundamental breach];

**35A; 35B3** [Conformity of goods to contract: quality, quantity and description required by contract; Quality of goods held out as sample or model];

**36A2** [Time for assessing conformity of goods (conformity determined as of time when risk passes to buyer): lack of conformity occurring after passage of risk];

**46B** [Buyer's right to compel performance: requiring delivery of substitute goods];

**49A1** [Buyer's right to avoid contract (grounds for avoidance): fundamental breach of contract];

**74A; 74A11; 74B1** [Damages, general rules for measuring: loss suffered as consequence of breach; Includes loss of profit (computation: loss of volume; overhead costs); Foreseeability of loss as possible consequence of breach];

**75A** [Avoidance (damages established by substitute transaction): substitute transaction after avoidance];

**77A** [Mitigation of damages: obligation to take reasonable measures to mitigate damages];

**78A; 78B** [Interest on delay in receiving price or any other sum in arrears (interest on liquidated vs. unliquidated amount); Rate of interest];

**86A11** [Duty of buyer who has received goods and intends to reject: reasonable care; deposit in warehouse (right to be reimbursed reasonable expenses)];

**87A** [Preservation of goods by deposit in warehouse]

**(b) Descriptors:** *Applicability; Choice of law (agreement silent); Conformity to contract; Fundamental breach; Avoidance; Substitute goods, buyer's right to require; Damages; Consequential damages; Loss of profit; Foreseeability; Storage; Interest; Exchange rates*

**(c) Editorial remarks**

EDITOR: Albert H. Kritzer<sup>14</sup>

The CISG issues present include:

- Applicability;
- Liability, in general;
- Remedies, in particular damages [The case applies Article 74 to a variety of damages issues that can arise when a transaction goes awry.];
- Interest, the manner in which it should be calculated and applied;
- Exchange rates, the formula to use to determine the date on which to apply them;
- Interpretation of the Convention (autonomous interpretation vs. reliance upon domestic law);
- The need to promote uniformity in the application of the Convention; and
- General principles of the Convention (the extent to which one should resort to them to fill gaps in the Convention).

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*Applicability/Choice of law (agreement silent).* The CISG was held applicable to a contract for the sale of goods concluded between a seller from the U.S. and a buyer from Italy at a time when this Convention was in effect in both countries. The Circuit Court of Appeals stated:

Generally, the CISG governs sales contracts between parties from different signatory countries. However, the Convention makes clear that the parties may by

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<sup>14</sup> Executive Secretary of the Pace Institute of International Commercial Law and Professor of law at Pace University Law School.

contract choose to be bound by a source of law other than the CISG, such as the Uniform Commercial Code. See CISG art. 6 ("The parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions."<sup>15</sup>) If, as here, the agreement is silent as to choice of law, the Convention applies if both parties are located in signatory nations. See CISG art. 1.<sup>16</sup>

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*Conformity to contract.* The Circuit Court of Appeals stated:

Under the CISG, '[t]he seller must deliver goods which are of the quantity, quality and description required by the contract,' and 'the goods do not conform with the contract unless they . . . [p]ossess the qualities of goods which the seller has held out to the buyer as a sample or model.' CISG art. 35.<sup>17</sup> The CISG further states that '[t]he seller is liable in accordance with the contract and this Convention for any lack of conformity.'<sup>18</sup> CISG art. 36.<sup>19</sup>

This case involved the supply of compressors for use by buyer in the manufacture of air conditioners.

The District Court held: "[T]here is no question that [seller's] compressors did not conform to the terms of the contract between the parties. . . . There are ample admissions [by the seller] to that effect."<sup>20</sup>

The Circuit Court of Appeals stated: "We agree . . . . There was . . . no genuine issue of material fact regarding liability . . . ."<sup>21</sup>

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*Fundamental breach/Avoidance/Substitute goods, buyer's right to require.* The Circuit Court of Appeals stated: "Under the CISG, if the breach is 'fundamental' the buyer may either require delivery of substitute goods, CISG art. 46, or declare

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<sup>15</sup> CISG, *supra* note 2, art. 6.

<sup>16</sup> 71 F.3d at 1028 n.1.

<sup>17</sup> CISG, *supra* note 2, art. 35.

<sup>18</sup> CISG, *supra* note 2, art. 36.

<sup>19</sup> 71 F.3d at 1028.

<sup>20</sup> 71 F.3d at 1028 (citing Judge Cholakis' partial summary judgement ruling. "After three years of discovery and a bench trial on the issue of damages", the case was transferred to Judge Munson, who then wrote the District Court opinion. *Id.*).

<sup>21</sup> 71 F.3d at 1028.

the contract [avoided], CISG art. 49, and seek damages.”<sup>22</sup> Quoting Article 25, the Circuit Court stated: “[T]he District Court held that ‘[t]here appears to be no question that [buyer] did not substantially receive that which [it] was entitled to expect [and that] any reasonable person could foresee that shipping nonconforming goods to a buyer would result in the buyer not receiving that which he expected and was entitled to receive.’”<sup>23</sup> Because the cooling power and energy consumption of an air conditioner compressor are important determinants of the product’s value, the District Court’s conclusion that [seller] was liable for a fundamental breach of contract under the Convention was proper.”<sup>24</sup>

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*Damages (issues addressed and types of damages allowed/disallowed): findings of fact and rulings of law.*

SUMMARY OF FACTS (Circuit Court of Appeals).

“In January 1988, [seller] agreed to sell 10,800 compressors to [buyer] for use in [buyer’s] line of portable room air conditioners. The air conditioners were scheduled to go on sale in the spring and summer of 1988 . . . . The compressors were scheduled to be delivered in three shipments before May 15, 1988.

[Seller] sent the first shipment by sea on March 26 . . . . [Seller] sent a second shipment of compressors on or about May 9 . . . . While the second shipment was en route, [buyer] discovered that the first lot of compressors did not conform to the sample model and accompanying specifications. On May 13 . . . [buyer] informed [seller] that 93 percent of the compressors were rejected in quality control checks because they had lower cooling capacity and consumed more power than the same model and specifications. After several unsuccessful attempts to cure the defects in the compressors, [buyer] asked [seller] to supply new compressors conforming to the original sample and specifications. [Seller] refused . . . .

[On] May 23, 1988, [buyer] cancelled the contract [declared the contract avoided]. Although it was able to expedite a pre-

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<sup>22</sup> *Id.*

<sup>23</sup> Citing Judge Cholakakis, *supra* note 20 at 1029.

<sup>24</sup> 71 F.3d at 1029.

viously planned order of suitable compressors from Sanyo, another supplier, [buyer] was unable to obtain in a timely fashion substitute compressors from other sources and thus suffered a loss in volume of [air conditioner units] during the 1988 selling season.”<sup>25</sup>

**RULING.** The District Court held seller liable for breach of contract. The Circuit Court of Appeals affirmed this ruling.

**BUYER’S DAMAGE CLAIMS ALLOWED/DISALLOWED**  
(The opinion expresses costs and expenses in lire. These costs and expenses are expressed below [in dollars] (rounded off) and at the exchange rate the District Court assigned in accordance with New York law).

- |             |  |
|-------------|--|
| [\$ 23,550] | “[E]xpenses [buyer] incurred in attempting to remedy the nonconformity of the compressors.” <sup>26</sup><br>ALLOWED: District Court.<br>AFFIRMED: Circuit Court.  |
| [\$407,750] | “[T]he cost of expediting shipment of previously ordered Sanyo compressors after [buyer] rejected the [nonconforming] compressors.” <sup>27</sup><br>ALLOWED: District Court.<br>AFFIRMED: Circuit Court. (In an act the court approved as mitigation of damages, instead of paying [\$12,550] for the sea shipment of compressors previously ordered from another source, buyer spent [\$420,000] to have them shipped by air.) <sup>28</sup> |
| [\$ 15,250] | “[S]hipping, customs, and incidentals relating to the two shipments of [nonconforming] compressors.” <sup>29</sup><br>DISALLOWED: District Court.<br>REVERSED: Allowed, Circuit Court.   |

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<sup>25</sup> *Id.* at 1027.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> 71 F.3d at 1027.



- [\$ 10,650] "[C]osts of handling and storing the rejected compressors."<sup>30</sup>  
ALLOWED: District Court (with a portion of these damages based on a "reasonable estimate").  
AFFIRMED: Circuit Court.
- [\$ 31,500] "[T]he cost of obsolete tooling purchased only for production of units with . . . compressors"<sup>31</sup> purchased from seller.  
DISALLOWED: District Court.  
REVERSED: Allowed, Circuit Court.
- [\$ 21,900] "[T]he cost of obsolete insulation and tubing that [buyer] purchased only for use with . . . compressors"<sup>32</sup> purchased from seller.  
DISALLOWED: District Court.  
REVERSED: Allowed, Circuit Court.
- [\$ 17,850] "[L]abor costs for four days when [buyer's] production line was idle because it had no compressors to install in the air conditioning units."<sup>33</sup>  
DISALLOWED: District Court.  
REMANDED for additional facts: Circuit Court.
- [\$ 1,650] "[T]he cost of modification of electrical panel for use with substitute Sanyo compressors."<sup>34</sup>  
DISALLOWED: District Court (buyer "failed to prove that this cost was directly related to [seller's] breach"<sup>35</sup>).  
AFFIRMED: Circuit Court.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 71 F.3d at 1027.

<sup>35</sup> *Delchi Carrier, S.p.A. v. Rotorex Corp.*, 1994 WL 495787 \*5 (N.D.N.Y. 1994).

[\$806,750] “[L]ost profits resulting from a diminished sales level of [air conditioner] units.”<sup>36</sup>  
ALLOWED: District Court (lost profits on “unfilled orders” but not on “indicated orders” said to be speculative).  
AFFIRMED: Circuit Court.

These claims are discussed in two parts: the claim for [\$407,750] (for steps buyer took to mitigate the loss); and other damages claims.

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*Damages (cost of expediting shipment of previously ordered Sanyo compressors after buyer rejected the nonconforming compressors supplied by seller) / Mitigation of damages / Cover*  
FINDINGS OF FACT (District Court)

[\$407,750] “Seller was able to expedite shipment of previously ordered Sanyo compressors, thereby filling part of the void left by [seller’s] breach. [Buyer] paid [\$420,000] for accelerated air shipment of previously ordered Sanyo compressors. . . . Sea shipment of the Sanyo compressor would have cost [\$12,550].”<sup>37</sup>

#### CONCLUSIONS OF LAW

District Court: “Once [buyer’s] attempts to remedy the non-conformity failed, it was entitled to expedite shipment of previously ordered Sanyo compressors to mitigate its damages. Indeed, [the] CISG requires such mitigation. . . . CISG article 77 (‘A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss.’<sup>38</sup>). The shipment of previously ordered Sanyo compressors did not constitute cover under . . . CISG article 75, because the Sanyo units were previously ordered, and hence cannot be said to have replaced the nonconforming . . . compressors. Nonetheless, [buyer’s] action in expediting shipment of Sanyo compressors was both commercially reasonable and reasonably foreseeable, and therefore [buyer] is

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<sup>36</sup> 71 F.3d at 1027.

<sup>37</sup> 1994 WL 495787 at \*1.

<sup>38</sup> CISG, *supra* note 2, art. 77.

entitled to recover [\$407,750] as the net cost of early delivery of Sanyo compressors ([\$420,000] for air shipment less [\$12,550] expected cost for ocean shipment)."<sup>39</sup>

Circuit Court of Appeals: Affirmed.

Article 77 states: "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."<sup>40</sup> And the statutory source of a damages claim for mitigation expenses such as these is Articles 45 and 74.

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*Damages/Interpretation of the Convention/General principles of the Convention.* Provisions of the CISG that are relevant to the court's review of the remaining damages issues include:

*Article 7*

"(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application . . . .

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."<sup>41</sup>

*Article 74*

"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or

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<sup>39</sup> 1994 WL 495787 at \*4.

<sup>40</sup> CISG, *supra* note 2, art. 77.

<sup>41</sup> CISG, *supra* note 2, art. 7.

ought to have known, as a possible consequence of the breach of contract.”<sup>42</sup>

THE CIRCUIT COURT’S APPROACH. The court’s syllogism was:

- (1) Citing the importance of looking to the “language [of the] Convention”, “the ‘general principles’ upon which it is based” and the Convention’s direction “that its interpretation be informed by its ‘international character’ and the need to promote uniformity in its application;”<sup>43</sup>
- (2) Reasoning that “[c]ase law interpreting analogous provisions of Article 2 of the Uniform Commercial Code (‘UCC’) may also inform where the language of the relevant CISG provisions tracks that of the UCC;”<sup>44</sup>
- (3) The court looked to U.S. domestic law to interpret the CISG’s rules on damages “[b]ecause there is virtually no U.S. case law on the Convention.”<sup>45</sup>

Although the quotations are from the Circuit Court’s opinion, the District Court reasoned in a similar manner. This led to: references to “incidental damages,” “probable consequence” and “reasonable certainty;” a reading into Article 74 of requirements that the damages be “directly attributable to the other party’s breach” and “reasonably envisioned by [both] parties;” and, when confronted with a gap in the CISG (no explicit direction as to the manner in which to handle direct and variable costs in computations of lost profits), reliance upon American authority.<sup>46</sup>

The language of the District Court and the Circuit Court of Appeals on these subjects is:

- “[T]o recover a claim for lost profit under [the] CISG, a party must provide . . . sufficient evidence to estimate the amount of damages with **reasonable certainty**”<sup>47</sup> (District Court). “Sufficient certainty” is the phrase used by the Circuit Court.

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<sup>42</sup> CISG, *supra* note 2, art. 74.

<sup>43</sup> 71 F.3d at 1028 (citing CISG art. 7).

<sup>44</sup> 71 F.3d at 1028.

<sup>45</sup> *Id.*

<sup>46</sup> 1994 WL 495787 at \*4.

<sup>47</sup> *Id.* at \*5.

- To recover a cost incurred, buyer must “prove that this cost was **directly attributable** to [seller’s] breach”; to recover damages for lost orders, buyer must prove that his “inability to fill these orders was **directly attributable** to [seller’s] breach”<sup>48</sup> (District Court).
- “In the absence of a specific provision in the CISG for calculating lost profits, the District Court was correct to use **the standard formula employed by most American courts**”<sup>49</sup> (Circuit Court).
- “[I]nquiries . . . are whether the expenses were reasonably foreseeable and legitimate **incidental** or consequential damages”<sup>50</sup> (Circuit Court).
- The right to collect damages is “subject . . . to the familiar limitation that the breaching party must have foreseen the loss as a **probable** consequence”<sup>51</sup> (Circuit Court).
- Damages may not be “in excess of the amount **reasonably envisioned by the parties**”<sup>52</sup> (District Court). The Circuit Court simply refers to “reasonably foreseeable” damages.

To illustrate the court’s drawings on domestic interpretations of damages issues: Citing McCormick, Farnsworth refers to “certainty” (later modified to “reasonable certainty”) as a “distinctive contribution of the *American* courts.”<sup>53</sup> E. Allan Farnsworth, “Farnsworth on Contracts” (1990), vol. III at 252. “*Incidental damages*” is a *UCC* phrase.<sup>54</sup> *UCC* Section 2-715(1). “*Probable* consequence” is also not a CISG term. The CISG’s term is “possible consequence.” Etc.

AN ALTERNATIVE LINE OF REASONING. An alternative approach is to center on Articles 7 and 74. This would lead to a different type of reasoning. Examples of such reasoning are:

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<sup>48</sup> *Id.* at \*7.

<sup>49</sup> 71 F.3d at 1029.

<sup>50</sup> *Id.* at 1030.

<sup>51</sup> *Id.*

<sup>52</sup> 1994 WL 495787 at \*4.

<sup>53</sup> 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 252 (1990).

<sup>54</sup> *UCC* §2-715(1) (1996).

*Domestic Law*

- “Interpretation of the Convention should be autonomous, in the sense that it should not depend on principles and concepts derived from any national legal system.”<sup>55</sup> Jan Hellner, “Gap-filling by Analogy,” *Hjerner Festschrift* (Stockholm 1990) 220.
- Even “[w]here a Convention rule is directly inspired by domestic law . . . the court should not fall back on its domestic law, but interpret the rule by reference to the Convention.”<sup>56</sup> Bernard Audit, “The Vienna Sales Convention and the Lex Mercatoria” in “Lex Mercatoria and Arbitration,” Carbonneau ed. (Transnational 1990) 154.

*Article 7*

- “A generous response to the invitation of Article 7(2) to develop the Convention through the ‘general principles on which it is based’ is necessary to achieve the mandate of Article 7(1) to interpret the Convention with regard to ‘the need to promote uniformity in its application’ . . . .”<sup>57</sup>
- “Article 7(2) states that when questions arise concerning matters ‘governed by this Convention’ that are ‘not expressly settled’ in the Convention, the question is to be settled ‘in conformity with the general principles’ on which the Convention is based. Only when such a general principle cannot be found may the tribunal turn to [other sources].”<sup>58</sup> John O. Honnold, “Uniform Law for International Sales Under the 1980 United Nations Convention”, 2d ed. (Kluwer 1991) 157, 156.

ADDITIONAL GUIDANCE. For further data on reasoning that centers on Article 7 and for citations to international case law and other aids to interpreting Article 74, researchers are invited to [hypertext link to:](#)

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<sup>55</sup> JAN HELLNER, GAP-FILLING BY ANALOGY 220 (*Hjerner Festschrift*, Stockholm 1990).

<sup>56</sup> Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria in LEX MERCATORIA AND ARBITRATION* 154 (Carbonneau ed., 1990).

<sup>57</sup> JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 156, 157 (Kluwer, 2d ed., 1991).

<sup>58</sup> *Id.*

- <Related Article 7 guidance>,<sup>59</sup> containing further views on “general principles” and comments on the legislative history (travaux préparatoires) of Article 7(2).
- <Added data on Article 74>,<sup>60</sup> containing material on the legislative history of this provision and scholarly writings (doctrine), linked to citations and presentations on case law (jurisprudence).

Fifty CISG cases that cite Article 74 are identified. Also provided are citations to thirty-six court rulings on Article 82 of the 1964 Hague Uniform International Sales Law (ULIS):<sup>61</sup> relevant to the interpretation of the language contained in CISG Article 74 because CISG Article 74 was taken from (and is substantively identical to) ULIS Article 82.

CAVEAT. Notwithstanding Article 7’s impetus to uniformity, there is a side to all proceedings — procedural conceptions — that can lead to rulings on certain matters in accordance with the law of the forum instead of the Convention.

Domestic regimes have different procedural conceptions. And, if under domestic law a matter is regarded as procedural, it has been customary to rule on it in accordance with the law of the forum.

- Similarly, domestic regimes generally have different rules for torts and contracts and they too can vary by regime. In that setting, it has been said: “[T]he label that the state law bears should be irrelevant.”<sup>62</sup> John O. Honnold, “Uniform Law for International Sales — The 1980 United Nations Convention”, 18 *Asian Pacific Regional Trade Law Seminar* (1984) 195. “The substance rather than the label or characterization of [the] rule of domestic law determines whether it is displaced by the Convention. In determining [this], the tribunal . . . should be guided by the

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<sup>59</sup> *Related Article 7 guidance* <<http://www.cisgw3.law.pace.edu:80/wais/db/cases2/951206ul.html#addendum>>.

<sup>60</sup> *Added data on Article 74* <<http://www.cisgw3.law.pace.edu:80/cisg/wais/db/cases2/951206ul.html#addendum>>.

<sup>61</sup> Uniform International Sales Law (ULIS), 1964 Hague Convention, Article 82.

<sup>62</sup> John O. Honnold, *Uniform Law for International Sales — The 1980 United Nations Convention*, 18 *ASIAN PACIFIC REGIONAL TRADE LAW SEMINAR* 195 (1984).

provisions of Article 7, and give to the Convention the widest possible application consistent with its aim as a unifier of legal rules governing the relationship between parties to an international sale.”<sup>63</sup> Wellington Khoo, “Commentary on the International Sales Law,” Cesare Massimo Bianca & Michael Joachim Bonell eds. (Milan 1987) 48.

- For a term recited in the CISG — for example, possible consequences — such commentators would likely derive its meaning and application from the Convention, even though in some jurisdictions this is a term that can have domestic procedural overtones.<sup>64</sup> Cf. Lookofsky. In the context of damages, he states: “Problems of proof and certainty of loss are procedural matters which remain within the province of national law, and procedural conceptions may . . . serve as covert limitations on CISG consequential awards.”<sup>65</sup> Joseph M. Lookofsky, “Consequential Damages in Comparative Context” (Copenhagen 1989) 283, n. 158.

“POSSIBLE” CONSEQUENCES. In damages proceedings, one encounters a spectrum of words and phrases that can apply to losses that may be the consequence of a breach of contract. They include: “certain”, “reasonably certain”, “probable” or “likely”, “speculative” [a word the District Court used to procedurally preclude evidence on one of buyer’s damages claims (testimony on “indicated orders” that failed to materialize as opposed to “unfilled orders” for which loss of profit was allowed)] or “unlikely” or “remote.” To this spectrum, the CISG adds its own word, “possible.” There is controversy among commentators as to its meaning.

- Murphey states:  
“The phrase ‘as a possible consequence’ appears in Article 74, while *Hadley v. Baxendale*<sup>66</sup> [the 1854 English case referred to as the source of the foreseeability doctrine under

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<sup>63</sup> WELLINGTON KHOO, COMMENTARY ON THE INTERNATIONAL SALES LAW 48 (Cesare Massimo Bianca & Michael Joachim Bonell eds., Milan 1987).

<sup>64</sup> Cf. JOSEPH M. LOOKOFSKY, CONSEQUENTIAL DAMAGES IN COMPARATIVE CONTEXT 283 (COPENHAGEN 1989).

<sup>65</sup> *Id.* at n.158.

<sup>66</sup> *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854) (This 1854 English case is referred to as the source of the foreseeability doctrine under common law.).



common law] chose 'as a probable result'. Neither 'possible' nor 'probable' appears in UCC Section 2-715 . . . but the Restatement Section 351<sup>67</sup> uses 'probable'. . . . Thus the language of the CISG ostensibly widens the area of liability imposed upon a breaching party . . . ."<sup>68</sup> Arthur G. Murphey, "Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley," 23 Geo. Wash. J. Int'l L. & Econ. (1989) 439-440. Under the CISG, "the actual loss suffered by the party injured by a breach is more likely to be recovered, since it only need be foreseeable as a possible result."<sup>69</sup>

- Similarly, Ziegel states:  
 "The Convention's test is whether the breaching party foresaw or ought to have foreseen the . . . loss suffered by the injured party as a 'possible' consequence of the breach of contract. 'Possible' is a very broad word. To borrow from Lord Reid's example in *The Heron II* [*Koufos v. Czarnikow Ltd.* ("*The Heron II*")],<sup>70</sup> 1989, 1 A.C. 350 (H.L.), a case which interprets the rule in *Hadley v. Baxendale*, if one takes a well-shuffled pack of cards it is quite possible, though not likely, that the top card will prove to be the nine of diamonds even though the odds are 51 to 1 against."<sup>71</sup> Jacob S. Ziegel, "International Sales: The United Nations convention on Contracts for the International Sale of Goods", Nina M. Galston & Hans Smit eds. (New York 1984), Ch. 9 at 38. "By way of contrast, the judgments in *The Heron II* make it clear that the damages will not be recoverable at common law unless there is a 'serious possibility' or a 'real danger' of the occurrence or

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<sup>67</sup> RESTATEMENT (SECOND) OF CONTRACTS § 351.

<sup>68</sup> Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO. WASH. J. INT'L L. & ECON. 415, 439-40 (1989).

<sup>69</sup> *Id.* at 474.

<sup>70</sup> *The Heron II* [*Koufos v. Czarnikow Ltd.* ("*The Heron II*")], 1989, 1 A.C. 350 (H.L.)

<sup>71</sup> Jacob S. Ziegel, "International Sales: The United Nations convention on Contracts for the International Sale of Goods," Nina M. Galston & Hans Smit eds. (New York 1984), Ch. 9 at 38.

that they are not 'unlikely to occur'.<sup>72</sup> Jacob S. Ziegel, "The Vienna International Sales Convention," *New Dimensions in International Trade Law: Canadian Perspectives*, Ziegel & Graham eds. (Butterworth 1982) 48. "It may be safely assumed that this test is substantially more demanding than the Convention prescription that the breaching party must have foreseen the damages 'as a possible consequence of the breach of contract'. Many consequences are possible though not probable or likely . . . ."<sup>73</sup>

- Nicholas also calls attention to the potential for expanded damages that may be derived from the phrase "possible consequence."<sup>74</sup>

Farnsworth, however, attaches less significance to this phrase. He states:

"Although the use in [Article 74] of 'possible consequence' may seem at first to cast a wider net than the Restatement's 'probable result', the preceding clause ('in the light of the facts . . .') cuts this back at least to the scope of the . . . language [of the Uniform Commercial Code]."<sup>75</sup>

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### *Interest.*

The District Court stated:

"[Buyer] is entitled to pre-judgment interest pursuant to . . . CISG Article 78. Because Article 78 does not specify the rate of interest to be applied, the court in its discretion awards [buyer] pre-judgment interest at the United States Treasury Bill rate as set forth in 28 U.S.C. §1961(a)."<sup>76</sup> The Circuit Court of Appeals affirmed this ruling without comment. Relevant issues include: rate of interest, and accrual of interest.

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<sup>72</sup> Jacob S. Ziegel, "The Vienna International Sales Convention," *New Dimensions in International Trade Law: Canadian Perspectives*, Ziegel & Graham eds. (Butterworth 1982) 48.

<sup>73</sup> Jacob S. Ziegel, "Canada Prepares to Adopt the International Sales Convention," 18 *Canada Bus. L.J.* (1991) 14.

<sup>74</sup> Barry Nicholas, "The Vienna Convention on International Sales Law," 105 *L. Quarterly Rev.* (1989) 230.

<sup>75</sup> E. Allan Farnsworth, "Damages and Specific Relief," 27 *Am. J. Comp. L.* (1979) 253.

<sup>76</sup> 1994 WL 495787 at \*7.

Article 78 states:

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."<sup>77</sup>

The United States Code (law of the forum) states: "Interest shall be allowed on any money judgment in a civil case recovered in a District Court . . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment."<sup>78</sup> 28 U.S.C. §1961(a) (1988).

**ACCRUAL OF INTEREST.** Article 78 refers to interest on a "sum that is in arrears." Does this authorize pre-judgment interest? Commentators have reasoned as follows.

- Enderlein & Maskow state:

"From the formulation that interest is to be paid on sums in arrears we draw the conclusion that interest is to be paid from the time when the respective sum is due . . . . [W]e believe that in regard to claims for damages . . . from the aspect of interest, one should proceed on the assumption that they become due when they have been liquidated vis-a-vis the other party and in the amount in which later they turn out to be justified . . . ."<sup>79</sup>
- Sutton states:

"The interpretation of Article 78 will be affected by whether a court focuses on the language 'sum in arrears,' an approach which would probably limit interest to delays in paying liquidated damages, . . . or considers its own legal traditions in awarding interest. If courts interpret Article 78 in the context of their own legal traditions, then

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<sup>77</sup> CISG, *supra* note 2, Article 78.

<sup>78</sup> 28 U.S.C. §1961(a) (1988).

<sup>79</sup> FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 313-14 (Oceana 1992).

interest could conceivably be awarded under the Convention for liquidated as well as unliquidated damages . . . .”<sup>80</sup>

- Honnold states:  
“Article 78 refers to any ‘sum’ in ‘arrears’. In some jurisdictions interest does not accrue until the amount in arrears has been ‘liquidated’ — i.e. made certain; other jurisdictions grant interest even though the sum owed is in dispute.”<sup>81</sup> To illustrate, he cites Restatement Second of Contracts (U.S.A.) §354: “See Comment on Paragraph (1): interest is recoverable even though the amount of performance is in dispute and must be proved by evidence extrinsic to the contract. Paragraph (2) provides for allowance of interest in other cases ‘as justice provides . . .’ Under comment d, this recovery may extend to interest on consequential loss . . . .”<sup>82</sup>

Also relevant is whether accrual of interest (rate of interest also) is regarded as a procedural or a substantive matter.

- Lookofsky believes that accrual of interest ought to turn on the Convention. Like the *Delchi* court, he would allow pre-judgment interest in this case, but he would support this conclusion by drawing on general principles of the Convention, not domestic law. Citing comments in accord by Stoll (Hans Stoll, “Kommentar zum Einheitlichen UN-Kaufrecht”, Ernst von Caemmerer & Peter Schlechtriem eds. (Munich 1995), Art. 78 Rd. Nos. 12, 15), Lookofsky states:  
“The ‘matter’ of whether interest is payable on sums in arrears is clearly ‘governed by’ the Convention; if the matter of whether such ‘sums’ includes only liquidated sums is ‘governed but not settled’ by the CISG, we can look to the ‘general [Article 74] principle’ of full compensation”.<sup>83</sup>

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<sup>80</sup> Jeffrey S. Sutton, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 OHIO STATE L. J. 750 (1989).

<sup>81</sup> JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 527 (Kluwer, 2d ed. 1991).

<sup>82</sup> *Id.* at 527.

<sup>83</sup> JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG IN SCANDINAVIA* 101 n.162 (Copenhagen 1996), *citing comments in accord* by Stoll (HANS STOLL, *KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT* Art. 78 Rd. Nos. 12, 15 (Ernst von Caemmerer & Peter Schlechtriem eds. Munich 1995)).

Joseph Lookofsky, "Understanding the CISG in Scandinavia" (Copenhagen 1996) 101 n.162. Lookofsky also calls attention to Article 7.4.10 of the UNIDROIT Principles (declaring it 'only natural' that the aggrieved party be compensated as of the date of the harm).<sup>84</sup>

**RATE OF INTEREST.** The court allowed interest at a rate specified in a domestic statute that was apparently applied as the law of the forum. Alternative approaches are general principles of the Convention (Article 7(2), first part), or "in conformity with the law applicable by virtue of the rules of private international law"<sup>85</sup> (Article 7(2), second part). The following is an excerpt from an arbitral award describing these alternatives and ruling in favor of the latter approach:

Article 78 of the CISG, while granting the right to interest, is silent on the question of the applicable rate. In international writings and case law to date it is disputed:

whether the question is outside the scope of the Convention — with the result that the interest rate is to be determined according to the domestic law applicable on the basis of the relevant conflict-of-laws rules or

whether there is a true gap in the Convention within the meaning of Article 7(2) so that the applicable interest rate should possibly be determined autonomously in conformity with the general principles underlying the Convention (see in this sense, for example, J. O. Honnold, "Uniform Sales Law, 2d edition, Denver-Boston 1991, 525-526; ICC Arbitral Award No. 6653 (1993), Denver-Clunet 1993, 1040).<sup>86</sup>

That tribunal stated:

This second view is to be preferred, not least because the immediate recourse to a particular domestic law may lead to results which are incompatible with the principle embodied in Art. 78 of the CISG, at least in the cases where the law in question expressly prohibits the payment of interest. One of the general principles underlying the CISG is that of

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<sup>84</sup> *Id.*

<sup>85</sup> CISG, *supra* note 2, Article 7(2).

<sup>86</sup> Arbitral Proceeding SCH-4318 of 15 June 1994 at the Internationales Schiedsgericht der Bundeskammer der gewerb of Austria, Unilex database 1995/II, D.1994-13 (English translation of German text).

‘full compensation’ of the loss caused.<sup>87</sup> It follows that, in the event of failure by the debtor to pay a monetary debt, the creditor, who as a business person must be expected to resort to bank credit as a result of the delay in payment, should therefore be entitled to interest at the rate commonly practiced in its country with respect to the currency of payment, i.e., the currency of the creditor’s country [Germany in this case] or any other foreign currency agreed upon by the parties [U.S. dollars in this case] . . . The information received from the Deutsche Bundesbank is that the average ‘prime borrowing rate’ for U.S. dollars in Germany in the period in question was 6.25%. The interest due from the respondent should be calculated at that rate.<sup>88</sup>

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*Exchange rates (date of conversion to dollars)/Foreseeability.*

A finding of fact was:

Seller’s “first shipment of compressors reached [buyer’s] facility . . . on April 20, 1988”.<sup>89</sup> The District Court stated:

“The parties do not dispute that the exchange rate in effect on April 20, 1988 is appropriate for converting damages from lire to dollars. This is in conformity with the New York ‘breach-day rule,’ under which damages sustained in foreign currencies are converted as the rate of exchange prevailing on the date of breach. *Middle East Banking v. State Street Bank Int’l*, 821 F.2d 897, 902-903 (2d Cir. 1987). Thus damages shall be converted at the rate of 1,238 lire per one dollar. [Buyer’s] total compensable damages equal 1,545,434,848 lire, or 1,248,331.87 dollars in principal, plus interest.”<sup>90</sup>

The Circuit Court of Appeals affirmed this ruling without comment.

The “breach-day rule” selected by the court appears to be one of several approaches. In commenting on the time at which the loss to the injured party should be measured under Article 74, the closest counterpart to an Official Commentary on

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<sup>87</sup> cf. CISG, *supra* note 2, Article 74.

<sup>88</sup> Arbitral Proceeding SCH-4318 of 15 June 1994 at the Internationales Schiedsgericht der Bundeskammer der gewerb of Austria, Unilex database 1995/II, D.1994-13 (English translation of German text).

<sup>89</sup> 1994 WL 495787 at \*1.

<sup>90</sup> 1994 WL 495787 at \*7.

the language contained in Article 74 lists three alternatives. The Secretariat Commentary states: This language "gives no indication of the time . . . at which 'the loss' to the injured party should be measured. Presumably it should be . . . at an appropriate point of time, such as the moment the goods were delivered [a "breach-day rule"], the moment the buyer learned of the non-conformity of goods, or the moment that it became clear that the non-conformity would not be remedied by the seller under [Article 37, 46, 47 or 48]."<sup>91</sup> Official Records, p. 59, n. 2. For exchange-rate calculations, there may also be another alternative: the time of the conclusion of the contract. Referring to delay-in-payment exchange-rate case law under ULIS Article 82,<sup>92</sup> Enderlein & Maskow state that "the loss suffered from a decline in the currency which occurred as a consequence of the delay in payment was predominantly rejected as not foreseeable."<sup>93</sup>

### Case citations

## 12. CITATIONS TO ABSTRACTS OF DECISION

(a) **UNCITRAL abstracts** (Circuit Court opinion): Case Law on UNCITRAL Texts, *CLOUT abstract no. 138*; (District Court opinion): Case Law on UNCITRAL Texts, *CLOUT abstract no. 85*

### (b) Other abstracts

*English*<sup>94</sup> (District Court opinion): Unilex database, 1995

*French*<sup>95</sup> (District Court opinion): Revue de Droit des Affaires Internationales/ International Business Law Journal (1995) 753

## 13. CITATIONS TO TEXT OF DECISION

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<sup>91</sup> Official Records, p. 59, n. 2.

<sup>92</sup> Uniform Law of International Sales (ULIS), 1964 Hague Convention, Article 82.

<sup>93</sup> FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 302 (Oceana 1992).

<sup>94</sup> Unilex database, 1995.

<sup>95</sup> Revue de Droit des Affaires Internationales/ International Business Law Journal (1995) 753.

(a) **Original language**<sup>96</sup> (English): Circuit Court of Appeals. 71 F.3d 1024 (1995) [alternative citations: Pace CISG website; Lexis and Westlaw]. District Court: Pace CISG website; 1994 Westlaw 495787; 1994 U.S. Dist. Lexis 12820; Unilex database, 1995

(b) **Translation:** n/a

#### 14. CITATIONS TO COMMENTS ON DECISION

*English (commentaries on District Court opinion): Schneider, Consequential Damages in the International Sale of Goods: Analysis of Two Decisions [Delchi Carrier, S.p.A. v. Rotorex Corp. (CISG decision: U.S. Dist. Ct. 1994) and Bundesgerichtshof 24 Nov. 1980 (ULIS decision: Supreme Ct., Germany)], 16 University of Pennsylvania Journal of International Business Law (1996) 615-668; Darkey, A U.S. Court's Interpretation of Damage Provisions Under the UN Convention on Contracts for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity?, 15 Journal of Law & Commerce (1995) 139-152; Richman, International Law and Organization Newsletter, New Jersey Bar Association (March 1995) 17.*

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<sup>96</sup> 71 F.3d 1024 (1995) [alternative citations: Pace CISG website, Lexis and Westlaw]. District Court: 1994 Westlaw 495787 (N.D.N.Y. 1994); Lexis 12820; Unilex database, 1995.



**Addendum**

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**DELCHI V. ROTOREX, ADDITIONAL DATA  
TWO KEY ARTICLES OF THE CISG AT  
ISSUE: 7(2) AND 74**

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- 

**CISG Article 7(2)***ULIS antecedents*

Article 17 (and Article 2) of the 1964 Hague Sales Convention (ULIS) contain the general rules for interpretation of the Convention considered by the UNCITRAL Working Groups that met to formulate the CISG.

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*ULIS Article 17*

“Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based.”

*See also* ULIS Art. 2: “Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law.”

[“*ULIS was intended to be a self-contained law of sales, divorced from the surrounding law of the countries of the buyer and the seller, and especially divorced from the law of the forum in case of litigation. If there was a problem which fell within its general scope but which was not to turn to the law that would otherwise have governed the transactions.*” *Eric E.*

Bergsten, "Basic Concepts of the UN Convention on the International Sale of Goods", *Das UNCITRAL-Kaufrecht im Verleich zum Österreichischen Recht*, Doralt ed. (Vienna 1985) 16.]

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*CISG Article 7(2)*

"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

See also CISG Art. 7(1): "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

[CISG Article 7 "can be said to combine three different rules: . . . Interpretation of the Convention should be autonomous, in the sense that it should not depend on principles and concepts derived from any national legal system. In a similar spirit, the article provides for gap-filling through analogy, which shall be given priority over the application of national rules. At the same time, through reference to rules of private international law which point to national legal systems, it is admitted that all questions cannot be settled by the method of analogy." Jan Hellner, "Gap-filling by Analogy", *Hjerner Festschrift* (Stockholm 1990) 220.]

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See also Rosenberg who refers to CISG Art. 7(2) as "a compromise more favourable to the supporters of Art. 17 of ULIS than its opponents". Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-filling — An Analysis and Application*, 20 Australian Bus. L. Rev., 450 (1992); and André Tunc, one of the chief architects of ULIS (retained to help UNCITRAL Working Groups make their transition from ULIS to the CISG). He stated: "[T]he application of domestic law or of the law indicated by the conflict rules of law or of the law indicated by the conflict rules of the *lex fori* would amount to precluding the application of the Uniform Law in many cases which the legislator and the par-

ties themselves had wanted the law to cover. The application of the national law of the court hearing the case . . . would also render unachievable the desire that the rights and obligations of the parties be defined without recourse to a court. . . Recourse to the law designated by the rules of private international law would have the same effect and would introduce an additional element of uncertainty." André Tunc, Annex XIV to A/CN.9/WG.2/WP.6/Add.1, *reported in* Peter Winship, *Private International Law and the UN Sales Convention*, 21 Cornell Int'l L.J., 827-828 (1988).

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*Guides to CISG Article 7(2)*

Views of commentators are presented.

*Winship states:*

"Reference to private international law rules is the least problematic aspect of [Article 7(2)]. The true danger lies in courts unnecessarily resorting to these rules. The provision itself requires that before the rules are consulted, the reader must first find that there is a gap in the text, and then find that the Convention does not provide a clear answer. . . . If the reader is generous in his approach to the Convention text there should be little need to consult conflicts rules and then prove the applicable law. . . ." Winship, *supra*, at 843.

*Rosenberg states:*

"Recourse may only be had to domestic law solutions when it is not possible to fill a gap by applying the general principles on which the Convention is based, or where no such principles exist. . . . In addressing these questions, tribunals must be conscious of the mandate in Art. 7(1) that regard is to be had to the international character of the Convention and the need to promote uniformity in its application. The temptation to adopt a domestic law analysis of the problem should be resisted. Tribunals must recognise the uniquely international nature of the Convention and its function as uniform law." Rosenberg, *supra*, at 101.

*Enderlein & Maskow similarly state:*

"Gaps should be closed in the first place from within the Convention. This is in line with the aspiration to unify the law which, in a way, is established in the Convention itself (para-

graph 3 of the preambular part, Article 7, paragraph 1) as one of its underlying principles. Such gap-filling can be done . . . by applying such interpretation methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed. When one interpretation reaching this far beyond the wording of the law is expressly approved by the Convention's text, then this must all the more apply to an extensive interpretation. But it seems as though the Convention goes one step further permitting decisions which themselves go beyond analogy and reach into the area of a creative continuation of the development of the law. It also appears to be admissible under the Convention that decisions can be the result of principles which the Convention itself formulates and which do not necessarily have to be reflected in individual rules. . . ." Fritz Enderlein & Dietrich Maskow, *International Sales Law* 58-59 (Oceana 1992).

*And Honnold states:*

"[One should follow an approach] designed to reconcile the two competing values embodied in Article 7(2): (1) That the Convention should be developed in the light of its 'general principles' and (2) that this development would be subject to limits. This approach responds to the reference in Article 7(2) to the principles on which the Convention 'is based' by requiring that general principles to deal with new situations be moored to premises that underlie specific provisions of the Convention. Thus, like the inductive approach employed in case law development, the first step is the examination of instances regulated by specific provisions of the Convention. The second step is to choose between these two conclusions: (a) The Convention deliberately rejected the extension of these specific provisions; (b) The lack of a specific provision to govern the case at hand results from a failure to anticipate and resolve this issue. If the latter alternative applies, the third step is to consider whether the cases governed by the specific provisions of the Convention and the case at hand are so analogous that a lawmaker would not have deliberately

chosen discordant results for the group of similar situations. In this event, it seems appropriate to conclude that the general principle embracing these situations is authorized by Article 7(2)." John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 155-156 (Kluwer 2d ed. 1992).

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## **CISG Article 74**

### *ULIS and other antecedents*

Article 82 of the 1964 Hague Sales Convention (ULIS) contains the general rules for damages considered by the UNCITRAL Working Groups that met to formulate the CISG. This article passed through their sieve and that of the UNCITRAL Committee of the Whole that overviewed their work. Accompanied by an interpretive commentary commissioned by the United Nations General Assembly (the Secretariat Commentary), the general rule for damages contained in ULIS Article 82 was also approved by the delegates to the 1980 Diplomatic Conference at which the CISG was promulgated.

Following ten years of deliberations, ULIS Article 82 was adopted as CISG Article 74 with no substantive differences between these texts. For the citations to the Official Records of these proceedings, see the section of the Pace Internet database on the CISG reporting on the legislative history of its Article 74.

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### *Comparison with CISG Article 74*

ULIS Article 82 and CISG Article 74 compare as follows:

#### **ULIS Article 82**

. . . damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party.

#### **CISG Article 74**

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.

Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him as a possible consequence of the breach of contract.

Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have been known, as a possible consequence of the breach of contract.

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*Antecedents to CISG Article 74/ULIS Article 82*

Many commentators ascribe a common law parentage to ULIS Article 82/CISG Article 74. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854), is frequently referred to as its source. Tunc, however, points out that the doctrine of foreseeability of damages is encountered in many legal systems. André Tunc, *Commentary on the Hague Convention* (The Hague 1966), Official Records at 92. And, quoting from the opinion in *Hadley v. Baxendale* ("the sensible rule appears to be that which has been laid down in France, and which is declared in their code — Code Civil 1149, 1150 1151"), Ferrari traces the ancestry of the doctrine of foreseeability to long established rules (Code Napoleon, etc.) in effect in French-based legal systems. Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 La. L. Rev. 1257 at 1267, 1268 (1993).

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*Guides to the language contained in CISG Article 74*

Guides to the language contained in CISG Article 74 are to be found in scholarly writings on this subject and in case law on ULIS Article 82 and CISG Article 74.

*Scholarly writings*

Among the several thousand scholarly writings on the CISG are many that provide guidance on the proper interpretation of the language contained in CISG Article 74. Several are listed below, in chronological order.

TEXTS PUBLISHED IN ENGLISH

- 1966 André Tunc, Commentary on the Hague Conventions on the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale, (Commentaire sur les Conventions de La Haye du les juillet 1964 sur la Vente Internationale des objets mobiliers corporels et la Formation due contrat de vente) in Ministry of Justice of the Netherlands ed. Diplomatic Conference on the Unification of Law Governing the International Sale of Goods (the Hague, 2-25 April 1964) - Records and Documents of the Conference, Vol. 1 - Records, The Hague (Government) 1966, 355-391.
- 1979 *Secretariat Commentary*, U. N. Conference on Contracts for the International Sale of Goods, at 14-66, U.N. Doc. A/CONF. 97/19 (Vienna, March 10 - April 11, 1980).
- [These two commentaries merit special attention as they are part of the Official Records of the conventions they interpret. The Secretariat Commentary that interprets the language of CISG Article 74 may be accessed on the Pace Internet database on the CISG.]*
- 1979 E. Allan Farnsworth, *Damages and Specific Relief*, 27 Am. J. Comp. L. 247-253 (1979).
- 1981 Jacob S. Ziegel, Analysis from a Provincial Common Law Perspective, in *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* 143-144, available in PACE CISG Website (on file at Faculty of Law Library University of Toronto).
- 1984 *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, ch. 9, commentary by Jacob S. Ziegel at 36-42 (Nina M. Galston & Hans Smit eds., New York: Matthew Bender 1984).
- 1986 *International Sale of Goods: Dubrovnik Lectures*, commentaries by Leif Sevón and Jelena Vilus at

- 235, 246-250 (Petar Sarcevic & Paul Volken eds., New York: Oceana 1986).
- 1986 Peter Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* 97 (Vienna: Manz 1986).
- 1987 Massimo C. Bianca & M. Joachim Bonell, *Commentary on the International Sales Law*, commentary by Victor Knapp at 538-548 (1987).
- 1989 Joseph Lookofsky, *Consequential Damages in Comparative Context: From Breach of Promise to Monetary Damages in the American, Scandinavian and International Law of Contracts and Sales* 23-27, 101, 197-199, 255-288 (Jurist-og Økonomforbundet, København).
- 1989 Arthur G. Murphey, *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 Geo. Wash. J. Int'l L. & Econ., 415-474 (1989).
- 1989 Jeffrey S. Sutton, *Measuring Damages under the United Nations Convention on the International Sale of Goods*, 50 Ohio St. L.J., 737-752 (1989).
- 1991 John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 503-506 (2nd ed., Deventer: Kluwer Law International 1991) (Honnold is the most frequently cited authority on the CISG).
- 1992 Fritz Enderlein & Dietrich Maskow, *International Sales Law, United Nations Convention on Contracts for the International Sale of Goods - Convention on the Limitation Period in the International Sale of Goods*, 207-302 (New York: Oceana 1992).
- 1993-94 Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, 581-592 (Deventer: Kluwer Law International 1994) (looseleaf text containing excerpts from the above and other commentaries).



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### LITERATURE IN OTHER LANGUAGES

There is also an abundance of scholarly writings on CISG Articles in other languages. They include books (doctoral theses) on Article 74, e.g., Norbert Kranz, diss. Hamburg (Lang: European University Studies 1989) 286 p.; and Gritli Ryffel, diss. Zürich (Lang 1992), 155 p., and much other material. In Germany, a commentary that is frequently cited is:

- 1994           Kommentar zum Einheitlichen UN-Kaufrecht, [commentary by Hans Stoll], at 624-645, (Ernst von Caemmerer & Peter Schlechtriem, eds., 2d ed., München: Beck, 1994) (an English translation is scheduled for publication by Oxford University Press).

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### *Guides to the language contained in CISG Article 74: case law*

Case law on both ULIS Article 82 and CISG Article 74 can assist in the interpretation of the language of CISG Article 74.

#### ULIS ARTICLE 82 CASE LAW

A good source of information on ULIS case law interpreting the language of CISG Article 74 is Peter Schlechtriem/Ulrich Magnus, *Internationale Rechtsprechung zu EKG und EAG. Eine Sammlung belgischer, deutscher, italienischer, israelischer und niederländischer Entscheidungen zu den Haager Einheitlichen Kaufgesetzen* (Baden-Baden 1987), 410-438. See also Peter Schlechtriem, "Einheitliches Kaufrecht, Erfahrungen mit den Haager Kaufgesetzen-Folgerungen für das Wien UN-Kaufrecht", *Österreichisches Recht der Wirtschaft* (1989/2a, 51 *et seq.*).

The following ULIS Article 82 cases are reported in *Internationale Rechtsprechung*:

Supreme Court [Germany] 24 October 1979, VIII ZR 210/78 at 410-415.

Supreme Court (Israel) 10 October 1982 (Harlo & John's Ltd. v. Adams) at 415 and 449-453.

LG Konstanz [District Court Germany] 1976, 3 HO 376 at 415 and 465-466.

LG Konstanz [District Court Germany] 15 July 1976, 3 HO 18/76 at 416 and 339-340.

LG Siegen [District Court Germany] 15 October 1976, 1 O 173/75 at 416 and 388-389.

LG Münster [District Court Germany] 24 May 1977, 76 O 142/75 at 416-418.

LG Münster [District Court Germany] 25 August 1977, 76 O 157/75 at 418 and 202-204.

OLG Hamm [Appellate Court Germany] 23 March 1978, 2 U 30/77 at 418-421.

OLG Hamm [Appellate Court Germany] 6 April 17 1978, 2 U 256/77 at 421 and 59-64.

LG München [District Court Germany] 12 May 1978, 6 HKO 17 595/77 at 421 and 440-441.

OLG München [Appellate Court Germany] 18 October 1978, 7 U 2762178 at 422-423.

OLG Hamm [Appellate Court Germany] 7 December 1978, 2 U 35/78 at 423-424.

OLG Hamm [Appellate Court Germany] 29 January 1978, 2 U 12/77 at 424 and 333-337.

LG Konstanz [District Court Germany] 18 October 1979, 3 HO 45/79 at 424 and 46-48.

LG Konstanz [District Court Germany] 6 December 1979, 3 HO 104/79 at 424 and 252-254.

LG Essen [District Court Germany] 10 June 1980, 45 O 237/79 at 425-426.

OLG Hamm [Appellate Court Germany] 26 June 1980, 2 U 28/80 at 426-429.

LG Konstanz [District Court Germany] 14 July 1980, 3 HO 38/80 at 429.

LG Heidelberg [District Court Germany] 27 January 1981, O 116/81 at 429-432.

LG Heidelberg [District Court Germany] 21 April 1981, O 216/80 KfH I at 432 and 257-260.

OLG Düsseldorf [Appellate Court Germany] 25 June 1981, 6 U 5781 at 433-434.

LG Dortmund [District Court Germany] 23 September 1981, 10 O 68/80 at 434 and 307-308.

LG Bonn [District Court Germany] 21 April 1982, 12 O 154/81 at 434 and 147-149.

LG Heidelberg [District Court Germany] 23 September 1982, O 39/82 KfH II at 434 and 369.

OLG Düsseldorf [Appellate Court Germany] 20 January 1983, 6 U 206/77 at 435 and 400-406.

LG Konstanz [District Court Germany] 3 March 1983, 3 HO 55/83 at 435 and 446-447.

OLG Hamm [Appellate Court Germany] 14 November 1983, 2 U 26/83 at 435 and 159-160.

OLG Koblenz [Appellate Court Germany] 23 December 1983, 2 U 1186/82 at 435 and 71-72.

Rb Arnhem [District Court Netherlands] 16 February 1984, 1983/1200 at 435-436.

OLG Celle [Appellate Court Germany] 2 March 1984, 15 U 78/83 at 436 and 337-339.

OLG Koblenz [Appellate Court Germany] 16 March 1984, 2 U 1719/82 at 436 and 46.

LG Konstanz [District Court Germany] 10 May 1984, 3 HO 2/84 at 436 and 234-236.

OLG Frankfurt [Appellate Court Germany] 17 April 1984, 5 U 116/83 at 436 and 170-171.

LG Konstanz [District Court Germany] 6 December 1984, 3 HO 19/83 at 436 and 279-281.

LG Braunschweig [District Court Germany] 15 January 1985, 6 S 218/84 at 437 and 344-346.

OLG Frankfurt [Appellate Court Germany] 15 May 1985, 21 U 183/84 at 432-438.

Rb Alkmaar [District Court Netherlands] 5 September 1985, 1377/1985 at 438.

*[Internationale Rechtsprechung, the source of these citations, was published in 1987. Other sources must be consulted for subsequent ULIS Article 82 case law.]*

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#### CISG CASE LAW: CISG CASES THAT CITE CISG ARTICLE 74

A good source of information on court and arbitration cases that cite CISG Article 74 is Michael R. Will, "International Sales Law Under the CISG: The First 284 or So Decisions" (4th ed. August 1996) 13-101 [published by Michael R. Will, Faculté de Droit, Université de Genève, Switzerland].

In addition to *Delchi v. Rotorex*, Professor Will reports the following cases in which CISG Article 74 is cited:

Watkins-Johnson v. Iran [Iran-US Claims Tribunal] 28 July 1989\*  
ICC Arbitration No. 6281 of 26 August 1989\*†  
LG Stuttgart [District Court Germany] 31 August 1989.\*†  
LG Aachen [District Court Germany] 3 April 1990.\*†  
Supreme Court [Netherlands] 13 September 1991.  
LG Frankfurt [District Court Germany] 16 September 1991.\*†  
ICC Arbitration No. 7179 of 1992.\*†  
ICC Arbitration No. 7585 of 1992.  
LG Heidelberg [District Court Germany].  
LG Berlin [District Court Germany] 6 October 1992.  
LG Göttingen [District Court Germany] 19 November 1992.\*  
Xiamen Intermediate People's Court [PRC] 31 December 1992.  
N.N. People's Court [PRC] 1993.  
Arbitral Tribunal IETAC [PRC] 27 February 1993.  
LG Krefeld [District Court Germany] 28 April 1993.\*  
LG Aachen [District Court Germany] 14 May 1993.\*†  
LG München [District Court Germany] 24 May 1993.  
Supreme Court [Israel] 22 August 1993.  
HG Zürich [District Court Switzerland] 1 September 1993.  
LG Hannover [District Court Germany] 1 December 1993.  
Tribunal Vaud [Switzerland] 6 December 1993.  
ICC Arbitration No. 7531 of 1994.  
ICC Arbitration No. 7565 of 1994.\*  
OLG Düsseldorf [Appellate Court Germany] 14 January 1994.\*  
KG Berlin [Appellate Court Germany] 24 January 1994.\*†  
OLG München [Appellate Court Germany] 2 March 1994.\*†  
Rb Zwolle [District Court Netherlands] 16 March 1994.  
Rb Amsterdam [District Court Netherlands] 15 June 1994.\*  
Arbitral Tribunal Vienna [Austria] SCH-4318, 15 June 1994.\*†  
Arbitral Tribunal Vienna [Austria] SCH=4366, 15 June 1994.\*†  
LG Kassel [District Court Germany] 14 July 1994.  
ICC Arbitration No. 7660/JK of 23 August 1994.\*  
LG Salzburg [District Court Austria] 13 January 1995.  
AG Wangen [District Court Germany] 8 March 1995.\*

LG Landshut [District Court Germany] 5 April 1995.\*  
HG Zürich [Commercial Court Switzerland] 26 April 1995.  
Roder v. Rosedown [Fed. Court South Australian District] 28 April 1995.  
Ag Alsfeld [Municipal Court Germany] 12 May 1995.  
LG München [District Court Germany] 29 May 1995.  
AG München [Municipal Court Germany] 23 June 1995.\*  
HG Zurich [Commercial Court Switzerland] 21 September 1995.  
LG Trier [District Court Germany] 12 October 1995.  
Arbitral Tribunal Budapest [Hungary] 5 December 1995.  
AG Augsburg [Municipal Court Germany] 29 January 1996.  
Supreme Court [Austria] 6 February 1996.  
Arbitral Tribunal Hamburg [Germany] 21 March 1996.  
Arbitral Tribunal Hamburg [Germany] 21 June 1996.  
LG Paderborn [District Court Germany] 25 June 1996.

\* = Abstract of case (English language) and in many instances full text (original language) published in *Unilex: International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods* (Transnational 1996), Michael Joachim Bonell, ed.

† = Abstract of case (English and other languages) published by the United Nations Commission on International Trade Law as a Case Law on UNCITRAL Texts (CLOUT) service.

In addition, there are case presentations prepared for the Pace database on the CISG ("<http://www.cisg.law.pace.edu>") which will also have full-text English translations of many of these and other CISG cases.

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