



CISG Advisory Council: Opinion No. 8
Calculation of Damages under CISG Articles 75 and 76

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* The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Université des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad de La Rioja; Professor Ingeborg Schwenger, University of Basel; Prof. John Y. Gotanda, Villanova University; and Prof. Michael G. Bridge, London School of Economics; Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary.

Article 75 CISG

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76 CISG

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Opinion

- 1.1 Articles 75 and 76 set forth ways to calculate damages when a contract has been avoided.
- 1.2 Articles 75 and 76 do not replace Article 74. Rather, they provide aggrieved parties with alternative methods that may be used to measure damages when a contract has been avoided.
- 1.3 Damages recoverable under Articles 75 or 76 should not place the aggrieved party in a better position than it would have enjoyed if the contract had been performed properly.
- 2.1 Under Article 75, an aggrieved party is entitled to recover as damages the difference between the contract price and the price of the substitute transaction.
- 2.2 The contract price is the price fixed in the contract or the price as determined under Article 55.
- 2.3 The price in any substitute transaction may be used to calculate damages under the formula set forth in Article 75 only if the aggrieved party made a substitute transaction in a reasonable manner and in a reasonable time.
- 2.4 In the event that the aggrieved party's substitute transaction was unreasonable, damages may be calculated according to Article 76 or Article 74.
- 3 An aggrieved party entitled to damages under Article 75 may also recover any further damages under Article 74.
- 4.1 Under Article 76, an aggrieved party is entitled to recover as damages the difference between the price fixed by the contract and the current price.
- 4.2 In order for damages to be calculated pursuant to Article 76, the contract must fix, expressly or implicitly, a price for the goods.
- 4.3 The current price is the price generally charged for such goods sold under comparable circumstances in the trade concerned.
- 4.4 The time at which the current price is to be established is the time of avoidance, which is the moment when avoidance was declared; provided, however, that if the aggrieved party avoids the contract after taking over the goods, then the current price is to be determined at the time of such taking over.
- 4.5 (a) The location at which the current price is to be established is the place where the delivery of the goods should have been made.
(b) If there exists no current price at the place of delivery, the current price is to be established at a reasonable substitute place.
5. If the contract does not fix a price or there is no current price within the meaning of Article 76, damages may be calculated under Article 74.
6. An aggrieved party entitled to damages under Article 76 may also recover any further damages under Article 74.

Comments

1.1 Articles 75 and 76 set forth ways to calculate damages when a contract has been avoided

Under the Convention, if a party fails to perform its contractual obligations, the aggrieved party has various remedies, including the right to claim damages.¹ The principles concerning the calculation of damages are set forth in Articles 74 through 76.²

The purpose of these provisions is to place the aggrieved party in the position that it would have been in had the contract been performed.³ To effectuate that purpose, Article 74 provides for the recovery of both actual loss suffered and net gains prevented.⁴ Articles 75 and 76 set forth ways that an aggrieved party can measure damages when a contract has been avoided.⁵ Article 75 provides a method for calculating damages if the aggrieved party avoided the contract and entered into a substitute transaction. If the aggrieved party has avoided the contract but has not entered into a substitute transaction, then Article 76 permits the abstract calculation of damages under certain conditions.

1.2 Articles 75 and 76 do not replace Article 74. Rather, they provide aggrieved parties with alternative methods that may be used to measure damages when a contract has been avoided

In cases where a contract has been avoided, Articles 75 and 76 provide alternative methods for calculating damages. However, these provisions are not mandatory in nature; aggrieved parties

¹ See CISG arts. 45, 61. While Articles 74 through 77 set forth the rules concerning damages, numerous other articles can affect the right to or calculation of damages. See CISG arts. 6, 7, 8, 9, 66, 80, 85, 86, 87, 88.

² See CISG arts. 74-76. Article 77 provides rules for mitigating damages. See CISG art. 77. Articles 79 and 80 provide certain exemptions from liability. See CISG arts. 79, 80.

³ See H. Stoll & G. Gruber in P. Schlechtriem & I. Schwenzer, *Commentary on the U.N. Convention on the International Sale of Goods*, 2d edition, Oxford, New York, 2005, art. 74 2; J. Honnold, *Uniform Law for International Sales*, 3d edition, Kluwer, The Hague, 1999, § 403 (citing Treitel, *Remedies*, 1998, 82).

⁴ For a discussion of the calculation of damages under Article 74, see CISG-AC Opinion No. 6, *Calculation of Damages under CISG Article 74* (Spring 2006).

⁵ See CISG arts. 75, 76.

can choose whether to calculate damages pursuant to them.⁶ Thus, Articles 75 and 76 do not replace Article 74; they supplement and work in connection with it.⁷

An aggrieved party may find it more advantageous to have damages calculated pursuant to Article 75 or 76, as opposed to Article 74, because seeking damages under Article 74 requires an aggrieved party to prove with a requisite degree of certainty that it suffered a loss and may necessitate that the aggrieved party "open its books, i.e., ... disclose its internal calculations, its customers and other business connections, etc."⁸ By contrast, Articles 75 and 76 do not require such disclosures in order to recover damages pursuant to them.

1.3 Damages recoverable under Articles 75 or 76 should not place the aggrieved party in a better position than it would have enjoyed if the contract had been performed properly

Damages under Articles 75 and 76, like those under Article 74, are compensatory in nature and should not provide the aggrieved party with a windfall. Accordingly, recovery under these provisions should not place the aggrieved party in a better position than it would have been in had the contract been performed.⁹ For example, an aggrieved buyer that has avoided a contract and made a cover purchase above the contract price in order to fulfill a standing contract for resale to a third party generally may not claim damages of both the difference between the contract price and the price of the cover purchase as well as profits lost on the subsequent resale.¹⁰

⁶ See P. Huber & A. Mullis, *The CISG – A New Textbook for Students and Practitioners*, Sellier, München, 2007, § 13(VII)(1).

⁷ Articles 75 and 76 also work in conjunction with Article 77. For example, although Article 75 does not require the aggrieved party to conduct a substitute transaction, failure to do so may breach Article 77's obligation to mitigate damages. See *Art. 77 CISG*; see also *Arbitral Award*, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 6 June 2000, CISG-Online No. 1249 (Pace) (Tribunal noting that an aggrieved buyer did not meet its obligation to mitigate damages due to its failure to avoid the contract and engage in a substitute transaction.). Recovery under Article 76 may also be impacted by Article 77, because the obligation to mitigate damages may require that the aggrieved party engage in a substitute transaction if doing so would concretely establish damages that would be less than those calculated abstractly under Article 76. See Huber & Mullis, *The CISG* § 13(VII)(3)(b).

⁸ P. Schlechtriem, *Calculation of damages in the event of anticipatory breach under the CISG, 2006, §§ I, III* (available at <<http://www.cisg-online.ch/cisg/FS%20Hellner.pdf>>) ("Schlechtriem, Calculation of damages"); see also CISG-AC Opinion No. 6, *Calculation of Damages under CISG Article 74* (Spring 2006).

⁹ See Schlechtriem, *Calculation of damages, op. cit.* (stating "the abstract calculation of damages under the market price rule may initially produce odd results if current prices for the goods are decisive" and that "windfall profits could be controlled and avoided to a certain extent under the duty to mitigate damages contained in Art. 77 CISG").

¹⁰ See Germany, LG München (*Furniture case*), 6 April 2000, CISG-Online.ch 665, English translation available at <<http://cisgw3.law.pace.edu/cases/000406g1.html>>.

2.1 Under Article 75, an aggrieved party is entitled to recover as damages the difference between the contract price and the price of the substitute transaction

Article 75 provides a method for calculating damages when the contract has been avoided and the "buyer has bought goods in replacement or the seller has resold the goods."¹¹ Under these circumstances, an aggrieved party "may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Article 74."¹²

The purpose of Article 75 is to ensure that the aggrieved party will receive the benefit of the bargain of the avoided contract if the aggrieved party mitigates its damages by engaging in a substitute transaction.¹³ The rationale for Article 75 has been explained as follows:

If the contract is declared avoided for breach by the buyer, the seller is free to resell the goods. As a rule, it will be in his interest to do so. Analogously, if the contract is avoided for breach by the seller, the buyer will be interested in purchasing the same goods from another seller if possible. If the non-breaching party succeeds in reselling or replacing the goods, his effective loss will thereby be diminished. Article 75 takes this into account and sets forth special rules for calculating damages in such cases.¹⁴

2.2 The contract price is the price fixed in the contract or the price as determined under Article 55.

In order to calculate damages under Article 75, there must exist a "contract price." The "contract price" is the price expressly or implicitly fixed in the avoided original contract or the price in the avoided original contract as determined under Article 55.¹⁵ Article 55 provides that when a contract has been "validly concluded" but does not expressly or implicitly fix the price, the price will be the "generally charged" price for those goods at the time the contract was concluded, unless the parties provide otherwise.¹⁶

¹¹ See CISG art. 75.

¹² See *id.*

¹³ See Stoll & Gruber, *op. cit.*, art. 75, 1.

¹⁴ See V. Knapp, in C. Bianca & M. Bonnell, *Commentary on the International Sales Law, The 1980 Vienna Sales Convention*, Giuffrè, Milano, 1987, art. 75 2.1. Both the UNIDROIT Principles and the PECL contain provisions similar to Article 75 of the Convention. See UNIDROIT Principles art. 7.4.5; PECL art. 9:506.

¹⁵ See CISG art. 55. See Stoll & Gruber, *op. cit.*, art. 76 5.

¹⁶ See CISG art. 55.

2.3 The price in any substitute transaction may be used to calculate damages under the formula set forth in Article 75 only if the aggrieved party made a substitute transaction in a reasonable manner and in a reasonable time.

Damages are only compensable under Article 75 if: (1) in the case of a breach by the buyer, the seller sold the goods or, in the case of a breach by the seller, the buyer has purchased replacement goods; and (2) the substitute transaction was reasonable under the circumstances.¹⁷ Thus, an aggrieved party must act as a "careful and prudent businessman" would act while observing the relevant trade practices.¹⁸ The aggrieved party need not exhaust all possible avenues of research prior to engaging in a resale or cover purchase. All the circumstances surrounding the substitute transaction will be evaluated; therefore, a transaction that was carried out above the market price may, nevertheless, meet the reasonableness standard.¹⁹ The Secretariat Commentary explains:

For the substitute transaction to have been made in a reasonable manner ... it must have been made in such a manner as is likely to cause a resale to have been made at the highest price reasonably possible in the circumstances or a cover purchase at the lowest price reasonably possible. Therefore, the substitute transaction need not be on identical terms of sale in respect of such matters as quantity, credit or time of delivery so long as the transaction was in fact in substitution for the transaction which was avoided.²⁰

The substitute transaction also must be made within a reasonable time after avoidance.²¹ The time period for a reasonable substitute transaction begins when the aggrieved party in fact declares the contract avoided.²² The duration of the reasonable time window will depend *inter alia* on the existence and variability of a market for the goods. For example, if the goods have a

¹⁷ See CISG art. 75.

¹⁸ See Stoll & Gruber, *op. cit.*, art. 75 6; see also Arbitral Award, ICC 8128/1995 (*Chemical fertilizer case*), CISG-Online.ch 526, English translation available at <<http://cisgw3.law.pace.edu/cases/958128i1.html>>.

¹⁹ See Arbitral Award, ICC 8128/1995 (*Chemical fertilizer case*), CISG-Online.ch 526, English translation available at <<http://cisgw3.law.pace.edu/cases/958128i1.html>> (factors such as time constraints on the aggrieved party will be considered in determining whether the price of a substitute transaction was reasonable); see also Stoll & Gruber, *op. cit.*, art. 75 6.

²⁰ See Secretariat Commentary, art. 71 [draft counterpart to CISG art. 75], 4 (available at <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-75.html>>). The Secretariat Commentary is on the 1978 Draft of the Convention; there exists no official commentary on the CISG. Nevertheless, the Commentary reflects that Secretariat's impressions of the purposes and effects of the Commission's work and provides a helpful analysis of official text of the CISG. See A. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, Kluwer, 1990 ("[The Secretariat] Commentaries are the closest available counterpart to an Official Commentary on the Convention and, when they are relevant, constitute the most authoritative citations to the meaning of the Convention that one can find.").

²¹ See Stoll & Gruber, *op. cit.*, art. 75 7.

²² See Secretariat Commentary, *op. cit.*, art. 71 5.

fluctuating market price, what constitutes a reasonable period may be relatively short.²³ By contrast, goods that are seasonal or unique may result in a longer period being considered reasonable.²⁴

Some courts and commentators maintain that Article 75 may be used to calculate damages in cases where the substitute transaction occurs prior to the avoidance of the contract, if the obligor has unambiguously declared that it will not perform under the terms of the contract.²⁵ This position, however, is inconsistent with the explicit language of Article 75, which states that the substitute transaction take place "after avoidance" of the contract. Avoidance of the contract is required to conduct a substitute transaction because it is the declaration of avoidance that terminates the rights of the parties under the contract and gives the aggrieved party the freedom to seek its performance interest elsewhere.²⁶

In addition, the substitute transaction must be in fact a replacement for the avoided transaction. Identifying a single transaction as a substitute may be difficult for an aggrieved party that often deals in contracts similar to the avoided one. Such a party has several options, including identifying a substitute transaction prior to engaging in it, choosing the first transaction after avoidance as the substitute, or proceeding abstractly under Article 76.²⁷ There is no requirement that the terms of the substitute transaction be identical to those of the avoided one, but it may be necessary to adjust damages based on differences in the contract terms and to account for either expenses saved or additional expenditures.²⁸

²³ See, e.g., Germany, OLG Hamburg (*Iron molybdenum case*), 28 February 1997, CISG-Online.ch 261, English translation available at <<http://cisgw3.law.pace.edu/cases/970228g1.html>>.

²⁴ See, e.g., Germany, OLG Düsseldorf (*Shoe case*), 14 January 1994, CISG-Online.ch 119, English translation available at <<http://cisgw3.law.pace.edu/cases/940114g1.html>> (ruling three months reasonable period for sale of seasonal goods).

²⁵ See Germany, OLG Hamburg (*Iron molybdenum case*), 28 February 1997, CISG-Online.ch 261, English translation available at <<http://cisgw3.law.pace.edu/cases/970228g1.html>> (allowing calculation under Article 75 despite no formal avoidance of the contract, when necessary to uphold general fairness under the principle of good faith). See Stoll & Gruber, *op. cit.*, art. 75 5.

²⁶ See Germany, OLG Bamberg (*Fabric case*), 13 January 1999, CISG-Online.ch 516, English translation available at <<http://cisgw3.law.pace.edu/cases/990113g1.html>> (calculation under Article 75 inappropriate when aggrieved buyer made cover purchase prior to avoiding the contract). In such case, damages may be calculated under Article 74.

²⁷ See Knapp, *op. cit.*, art. 76 § 2.4; see Honnold, *op. cit.*, § 410.1.

²⁸ See Secretariat Commentary, *op. cit.*, art. 71 3.4.

2.4 In the event that the aggrieved party's substitute transaction was unreasonable, damages may be calculated according to Article 76 or Article 74.

A prerequisite to recovery under Article 75 is a finding by the tribunal that the substitute transaction was "reasonable."²⁹ Controversy exists over the appropriate method for calculating damages when an aggrieved party has made substitute transaction that is found to be unreasonable.

Under one approach, if an aggrieved party entered into a substitute transaction that was not made in a reasonable manner, the situation is viewed as being the same as if no substitute transaction had taken place.³⁰ Thus, damages may be calculated abstractly under Article 76 without regard to the second transaction, assuming that the requirements are satisfied for calculating damages pursuant to Article 76 (for example, there exists a "price fixed in the contract" and a "current price for the goods").³¹ If, however, damages cannot be calculated under Article 76, then damages are to be calculated under Article 74. The decision of OLG Hamm, 16 January 1992, illustrates this approach.³² In that case, after the buyer breached a contract for the sale of 200 tons of bacon, the seller avoided the contract and resold the goods for approximately 25% of the contract price. The court determined that the contract had been properly avoided, but the resale of the goods had not been done in "in a reasonable manner" and, therefore, did not fall within Article 75. Accordingly, the court calculated damages abstractly under Article 76, rather than concretely under Article 75.³³

Another approach for determining damages when the substitute transaction is found to be unreasonable calls for a concrete calculation under Article 75, but with an adjustment to the price of the substitute transaction to account for the factor(s) that made it unreasonable.³⁴ Under this approach, the aggrieved party cannot claim damages that exceed what it would have obtained if the substitute transaction had been reasonable.³⁵ However, this approach is not consistent with Article 75's expressed prerequisite that the substitute transaction be made "in a reasonable manner and within a reasonable time after avoidance."³⁶ Additionally, determining

²⁹ See *id.* at 4.

³⁰ See *id.* at 6.

³¹ See Knapp, *op. cit.*, art. 75 § 2.6.

³² See Germany, OLG Hamm (*Frozen bacon case*), 22 September 1992, CISG-Online.ch 75, English translation available at <http://cisgw3.law.pace.edu/cases/920922g1.html> (declaring that Article 76 should be used in this circumstance).

³³ See *id.*

³⁴ See Stoll & Gruber, *op. cit.*, art. 75 9.

³⁵ See *id.*

³⁶ See CISG art. 75. One commentator notes that "this solution would create unnecessary uncertainty and is too far from the wording of the provisions which clearly points to either Art. 76 or Art. 74 CISG in those cases." Huber, *op. cit.*, § 13(VII)(2)(a)(bb) Fn.1051.

the adjustment necessary to achieve a result equivalent to a reasonable substitute transaction requires an inquiry into the market price of the goods. Therefore, if the goods have a market price, calculating the damages in an unreasonable substitute transaction under the adjustment approach to Article 75 will almost always produce the same result as an abstract calculation under Article 76.³⁷

Where the aggrieved party has entered into a substitute transaction in an unreasonable manner, it is consistent with the design and purposes of the damages sections of the Convention to bar application of Article 75 and instead allow an aggrieved party to calculate damages abstractly under Article 76 or concretely under Article 74. This approach finds support in the Secretariat Commentary:

If the resale or cover purchase is not made in a reasonable manner or within a reasonable time after the contract was avoided, damages would be calculated as though no substitute transaction had taken place. Therefore, resort would be made to article 72 [the draft counterpart of CISG article 76] and, if applicable, to article 70 [the draft counterpart of CISG article 74].³⁸

3. An aggrieved party entitled to damages under Article 75 may also recover any further damages under Article 74.

Under Article 75, an aggrieved party may recover any "further damages" under Article 74. The purpose of this provision is to ensure that an aggrieved party can be made whole when its expectation interests are not satisfied by the substitute transaction formula in Article 75.³⁹ The "further damages" clause allows the aggrieved party to recover incidental and consequential damages in addition to the damages recovered under Article 75.⁴⁰ "Further damages" may include, *inter alia*: (1) costs associated with the substitute transaction under Article 75;⁴¹ (2) loss

³⁷ See Stoll & Gruber, *op. cit.*, art. 75 9.

³⁸ See Secretariat Commentary, *op. cit.*, art. 71 6. While neither the UNIDROIT Principles nor the PECL expressly address the issue of how to calculate damages when the substitute transaction is unreasonable, their structures for calculating damages are analogous to the Convention and lead to the conclusion that the same result would be reached under these instruments. See UNIDROIT Principles arts. 7.4.1-7.4.6; see PECL arts. 9:506-9:507

³⁹ See Honnold, *op. cit.*, § 415.

The UNIDROIT Principles and the PECL both provide that where the market price damage formula does not give the aggrieved party the "benefit of the bargain," that party may seek additional damages. See UNIDROIT Principles art. 7.4.6; see PECL art. 9:507. The American Uniform Commercial Code (U.C.C.) allows for recovery of incidental damages and consequential damages (including lost profits) when the market price damage formula does not make the promisee whole. See U.C.C. § 2-708(2); see also U.C.C. §§ 2-706, 2-712.

⁴⁰ See Stoll & Gruber, *op. cit.*, art. 75 10; see Flechtner, Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C., 8 J.L. & COM. pp. 53, 97-107 (1988) at 53, 95.

⁴¹ See Stoll & Gruber, *op. cit.*, art. 75 10; see Flechtner, Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C., 8 J.L. & COM. pp. 53, 97-107 (1988) at 53, 95.

caused by the delay in locating a substitute transaction;⁴² (3) loss due to a change in the interest rates or in the currency exchange rate between the date that the transaction was supposed to have occurred under the contract and the substitute transaction;⁴³ (4) costs to a seller of an unsuccessful tender of goods or their necessary storage;⁴⁴ and (5) costs associated with the failed transaction.⁴⁵

In certain transactions, it may not be appropriate to award lost profits as "further damages." This may occur when, for example, the substitute transaction provides the aggrieved party with the same opportunity to profit that the avoided transaction provided.⁴⁶ In such a circumstance, where the substitute transaction itself replaced the profits lost on the original transaction, allowing an aggrieved party to recover additional lost profits would place that party in a better economic position than if the contract had been performed.

The decision of LG München, 6 April 2000, illustrates this point.⁴⁷ There, the seller breached the contract by failing to deliver furniture the buyer intended to resell to a third party. The buyer was forced to purchase substitute furniture at a higher price. The buyer then fulfilled its agreement with the third party. The District Court denied the buyer's claim for lost profits, reasoning that awarding damages to the buyer based on the substitute transaction formula under Article 75 made the buyer whole.⁴⁸ The combination of the profit made on the sale to the third party and the damages under Article 75 satisfied the buyer's expectation interest.

⁴² See Stoll & Gruber, *op. cit.*, art. 75 10; see also United States, *Delchi Carrier S.p.A. v. Rotorex Corp.*, U. S. Court of Appeals (2d Circuit), 6 December 1995, CISG-Online.ch 140 (noting that labor expenses associated with plant shutdown due to breach might be available if they were variable costs).

⁴³ See Germany, LG Krefeld (*Shoe case*), 28 April 1993, CISG-Online.ch 101 ("Further damages awarded to the seller included the attorney's fees the seller incurred to declare the contract avoided, the interest the seller paid for loans, and the loss it suffered from the devaluation of the Italian Lira since the date on which the buyer should have paid originally.").

⁴⁴ See Switzerland, HG Aargau (*Cutlery case*), 26 September 1997, CISG-Online.ch 329, English translation available at <<http://cisgw3.law.pace.edu/cases/970926s1.html>> (awarding, in case where buyer breached by refusing to accept goods when tendered, further damages that included purchase price of goods which seller could not resell and transportation costs for unsuccessful tender); see also United States, *Delchi Carrier S.p.A. v. Rotorex Corp.*, U. S. Court of Appeals (2d Circuit), 6 December 1995, CISG-Online.ch 140 (awarding damages for shipping, customs, and incidentals related to rejection and return of defective goods).

⁴⁵ See Arbitral Award, ICC 8128/1995 (*Chemical fertilizer case*), CISG-Online.ch 526, English translation available at <<http://cisgw3.law.pace.edu/cases/958128i1.html>> (awarding, in case where buyer supplied the breaching seller with custom sacks to be used in the delivery of the goods, costs of new sacks used in substitute transaction); see also United States, *Delchi Carrier S.p.A. v. Rotorex Corp.*, U. S. Court of Appeals (2d Circuit), 6 December 1995, CISG-Online.ch 140 (awarding damages relating to machinery only purchased for use with undelivered goods).

⁴⁶ See Stoll & Gruber, *op. cit.*, art. 75 11.

⁴⁷ See Germany, LG München (*Furniture case*), 6 April 2000, CISG-Online.ch 665, English translation available at <<http://cisgw3.law.pace.edu/cases/000406g1.html>>.

⁴⁸ See *id.*

It would also be inappropriate for an aggrieved party to recover damages under Article 75's substitute transaction formula and, in addition, lost profits caused by lost volume sales under Article 74 as "further damages." The aggrieved party would receive a double recovery if it were to receive damages based on the substitute transaction and lost volume damages which presume that a substitute transaction never took place.⁴⁹ An aggrieved party must choose either to proceed under Article 75 or to pursue lost volume damages under Article 74, but it cannot do both.⁵⁰ However, in the case of a true lost volume seller, the subsequent transaction may be treated as being one additional to, rather than a replacement for, the avoided transaction.⁵¹ In such a situation where the subsequent transaction would have occurred regardless of the avoidance of the original transaction, the lost volume seller may calculate its damages under Articles 76 or 74 and, in addition, retain the profit made on the subsequent transaction.

4.1 Under Article 76, an aggrieved party is entitled to recover as damages the difference between the price fixed by the contract and the current price.

Article 76 provides that when an aggrieved party has avoided the contract but has not made a substitute transaction under Article 75, it is entitled to damages measured by "the difference between the price fixed by the contract and the current price ... as well as any further damages recoverable under Article 74."⁵² This approach has been described as an abstract method for calculating damages, which is in contrast to the concrete method for measuring damages set forth in Article 75.⁵³

Article 76 provides an alternative means to Article 75 for determining damages when the contract has been avoided but, (1) in the case of an aggrieved buyer, that party has not bought goods in replacement pursuant to Article 75 or, (2) in the case of an aggrieved seller, that party has not resold the goods pursuant to that provision.⁵⁴ It is important to point out, however,

⁴⁹ See Germany, OLG Hamburg (*Jeans case*), 26 November 1999, CISG-Online.ch 515, English translation available at <<http://cisgw3.law.pace.edu/cases/991126g1.html>> (citing danger of double recovery).

⁵⁰ See Stoll & Gruber, *op. cit.*, art. 75 11.

⁵¹ See generally Official Comment to UNIDRIOT Principles, art. 7.4.5 1.

⁵² See CISG art. 76(1); cf. U.C.C. §§ 2-708(1) (seller's market price damages), 2-713 (buyer's market price damages); see also Flechtner, *op. cit.*, at 99 (discussing the differences between the U.C.C.'s manner for measuring market price damages and method set forth in the CISG).

⁵³ As noted, an aggrieved party may alternatively seek recovery under Article 74. However, as Peter Schlechtriem pointed out, in some cases it may be more advantageous for an aggrieved party to seek damages under Article 76. See Schlechtriem, *Calculation of damages*, *op. cit.*, § III ("The market price rule has great advantages for the aggrieved parties in transborder cases especially, for it dispenses with proving concrete damages and, thereby, avoids the hazards of diverging domestic procedural rules on taking and evaluating of evidence, e.g., as to who acts as fact-finder (jury or judge) or what degree of probability constitutes full proof, i.e. reasonable or 99% certainty, or whether the judge has discretion to estimate the aggrieved party's damages, such as under § 287 German Code of Civil Procedure.").

⁵⁴ See CISG art 76.

that a concrete determination of damages under Article 75 is generally preferred to abstract determination under Article 76, and ordinarily takes precedence if the requirements of Article 75 are met.⁵⁵

The purpose of Article 76 has been explained as follows:

[Under Article 76,] a concrete demonstration of the non-performance loss is not necessary. The rule is based on the premise that the promisee has the right to make a substitute transaction at the current price. The promisor must bear the costs of a substitute transaction. However, he should not gain an advantage if the promisee has not carried out such a transaction but has instead taken another course of action.⁵⁶

Article 76 may be used to calculate damages even if an aggrieved party has made a substitute transaction, if the purchase or resale was not made in a reasonable manner or within a reasonable time after the contract was avoided.⁵⁷ Since the requirements for calculating damages pursuant to Article 75 have not been met, and damages may be calculated under Article 76 as though no substitute transaction has taken place.

Article 76 may also be used, instead of Article 75, to calculate damages where the aggrieved party is "continuously in the market" for the particular good of the type in question.⁵⁸ In the case of a true lost volume seller, where the aggrieved party engaged in multiple transactions similar to the avoided one, it may not be possible to identify a specific substitute, and, therefore, impossible to calculate damages concretely under Article 75.⁵⁹ The aggrieved party may then pursue damages under the abstract calculation of Article 76 and seek further damages under Article 74.⁶⁰

⁵⁵ See Germany, OLG Hamm (*Frozen bacon case*), 22 September 1992, CISG-Online.ch 75, English translation available at <<http://cisgw3.law.pace.edu/cases/920922g1.html>> (noting that in the presence of a substitute transaction, concrete calculation of damages under Article 75 prevails over abstract calculation under Article 76).

⁵⁶ See Stoll & Gruber, *op. cit.*, art. 76 1.

⁵⁷ See Secretariat Commentary, *op. cit.*, art. 72 [draft counterpart of art. 76 CISG] 2.

⁵⁸ See E.A. Farnsworth, *Farnsworth on Contracts*, 3d edition, Aspen, New York, 2004, p. 252; see also P. Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Manz, Vienna, 1986, p. 97.

⁵⁹ See Knapp, *op. cit.*, art. 76 § 2.4. See also J. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in N. Galston & H. Smit, eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, M. Bender, New York, 1984, § 9.05.

⁶⁰ The UNIDROIT Principles Article 7.4.6 contains a provision analogous to Article 76. See UNIDROIT Principles art. 7.4.6; Official Comment to UNIDROIT Principles, art. 7.4.6 1. See also *Arbitral Award, ICC 8502 (Rice case)*, 1 November 1996, CISG-Online.ch 1295 (discussing CISG art. 76 and UNIDROIT Principles 7.4.6). Similarly, the PECL also contains a provision for calculating damages abstractly. See PECL art. 9:507.

4.2 In order for damages to be calculated pursuant to Article 76, the contract must fix, expressly or implicitly, a price for the goods.

Article 76 states that the contract price is the "price fixed by the contract."⁶¹ Unlike Article 75, which allows the contract price to be determined pursuant to Article 55, Article 76 requires the contract itself to either expressly or implicitly fix a price for the goods as a prerequisite to calculating damages under Article 76.⁶²

It has been suggested that Article 76 may be used to calculate damages for contracts with open price terms.⁶³ This approach derives from the view that the principle of full compensation should allow a price to be fixed pursuant to Article 55.⁶⁴ However, this interpretation is contrary to the text of Article 76 and should be avoided.⁶⁵ As such, if there is no price fixed in the contract, Article 76 is inapplicable and an aggrieved party that has avoided the contract without making a substitute transaction may pursue damages under Article 74.

4.3 The current price is the price generally charged for such goods sold under comparable circumstances in the trade concerned.

Abstract calculation of loss under Article 76 is only possible if the contract goods have a current price.⁶⁶ The requirement that a current price exists does not mandate that there be an official or unofficial market quotation for the goods in question.⁶⁷ A current price is established by the

⁶¹ See CISG art. 76(1).

⁶² See Stoll & Gruber, *op. cit.*, art. 76 3.

⁶³ See Schlechtriem, Calculation of damages, *op. cit.*, §§ IV. 1, 3(b).

⁶⁴ See *id.*

⁶⁵ See Stoll & Gruber, *op. cit.*, art. 76 5; see also Summary of Records of Meetings of the First Committee, 37th Meeting, Consideration of the Report of the Drafting Committee to the Committee, Article 71 and 72 [became CISG article 75 and CISG article 76], 7 April 1980, available at <<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting37.html>>.

⁶⁶ See Estonia, Tallinna Ringkonnakohus (*Novia Handelsgesellschaft mbH v. AS Maseko*), 19 February 2004, CISG-Online.ch 826, English translation available at <<http://cisgw3.law.pace.edu/cases/040219e3.html>> (holding seller was required to provide adequate proof as to existence of current price for tomato paste in order to recover damages under Article 76).

⁶⁷ See Knapp, *op. cit.*, art. 76 § 3.3; see also Official Comment to UNIDROIT Principles, art. 7.4.6 2 ("This will often, but not necessarily, be the price on an organised market.").

However, "goods which are made under special order by the buyer" may necessitate that damages be calculated under Article 74 instead of Article 76. See F. Enderlein & D. Maskow, *International Sales Law*, Oceana, New York, 1992, art. 76 § 2.

price generally charged for the sale of goods of the same kind and on comparable terms.⁶⁸ Thus, establishing a current price within the meaning of Article 76 requires an objective basis for determining the value of the goods and is not possible when the goods are valued based on subjective needs.⁶⁹ Furthermore, an adjustment may be necessary to account for any differences in terms between the avoided transaction and the market price.⁷⁰

4.4 The time at which the current price is to be established is the time of avoidance, which is the moment when avoidance was declared; provided, however, that if the aggrieved party avoids the contract after taking over the goods, then the current price is to be determined at the time of such taking over.

Under Article 76, the current price is to be determined "at the time of avoidance." The time of avoidance is "the moment in time when the avoidance was declared."⁷¹

However, if the aggrieved party avoids the contract "after taking over the goods," then the current price is to be determined instead at the "time of such taking over."⁷² This applies

⁶⁸ See Germany, OLG Celle (*Vacuum cleaners case*), 2 September 1998, CISG-Online.ch 506, English translation available at <<http://cisgw3.law.pace.edu/cases/980902g1.html>> (stating "[t]he current price is the price that is generally charged for goods of the same kind in the respective industry under comparable circumstances"); see also B. Nicholas, *The Vienna Convention on International Sales*, 105 L.Q. Rev. 230, 1989, Fn. 30. To determine if the goods are comparable, a tribunal may look to CISG Article 35, which sets forth the requisite factors for conforming goods. Cf. *Arbitral Award, ICC 8740 (Russian coal case)*, 1 October 1996, CISG-Online.ch 1294.

⁶⁹ See *Arbitral Award, ICC 8740 (Russian coal case)*, 1 October 1996, CISG-Online.ch 1294. The Comment to the UNIDROIT Principles Article 7.4.6 explains that "current price" is the price is determined in comparison with the price that is generally charged for the same or similar goods or services. Evidence of the current price may be obtained from professional organizations and chambers of commerce, among other sources. See Official Comment to UNIDROIT Principles art. 7.4.6 2. Although the PECL provides for the recovery of damages equal to the difference between contract price and the current price, it does not define that term in the text or in the comment and notes. See PECL art. 9:507.

⁷⁰ See *Arbitral Award, CIETAC (Silicon and manganese alloy case)*, 1 February 2000, CISG/2000/01, English translation available at <<http://cisgw3.law.pace.edu/cases/000201c1.html>> (appropriate to apply a percentage reduction when current price is based on goods of superior quality to those of avoided contract). See *Arbitral Award, CIETAC (Silicate-iron case)*, 18 April 1991, CISG/1991/01, English translation available at <<http://cisgw3.law.pace.edu/cases/910418c1.html>> (inappropriate to use published price of goods that did not incorporate the same delivery terms as the avoided contract).

⁷¹ See Stoll & Gruber, *op. cit.*, art. 76 11. The 1978 Draft Convention (Article 72(1)) referred to the moment the injured party first could have declared avoidance as the reference point for the time of avoidance. This was designed to prevent the aggrieved party from speculating at the other's expense. This language, however, was found objectionable because it was too uncertain and gave too much discretion to courts that would interpret this provision, particularly in cases of anticipatory breach. See Knapp, *op. cit.*, art. 76 §§ 2.9.1-2.9.3.

⁷² Neither the UNIDROIT Principles nor the PECL contain language as detailed as Article 76 on determining the time at which the current price is to be established. Both provide that the current price is to be determined at the time the contract is terminated. See UNIDROIT Principles art. 7.4.6; see PECL art. 9:507.

regardless of whether the buyer knew at the time of "taking over the goods" that there existed grounds to avoid the contract.⁷³ This provision is designed to "prevent[] an avoiding buyer who has received delivery from manipulating the time of avoidance in order to increase the seller's liability."⁷⁴

Cases of anticipatory breach, when the aggrieved party avoids the contract prior to the date that performance was due, may lead to inaccurate assessments of damages under Article 76.⁷⁵ This is because, in a fluctuating market, there is no guarantee that the market price at the time of performance will be the same as the price at the time that the contract was avoided. Therefore, it may be appropriate to calculate damages based upon the current price at the time of avoidance for the goods in the futures market at the time of performance. However, in some cases there may not be such price available. If there is no futures market for the goods, the current price at the time of avoidance should be used to calculate damages even in the case of anticipatory breach.⁷⁶ This follows the text of Article 76 as well as the rationale that the market price need not reflect all the terms of the avoided contract.⁷⁷

Article 2 of the U.C.C. normally measures the seller's market price damages at the time for tender and the buyer's damages at the time the buyer learned of the breach. However, if the breach is an anticipatory repudiation and the action comes to trial before the repudiator's performance is due, the U.C.C. market price damages are measured at the time the aggrieved party learned of the repudiation. See Flechtner, *op. cit.*, at 99-100.

⁷³ See Stoll & Gruber, *op. cit.*, art. 76 11.

⁷⁴ Flechtner, *op. cit.*, at 99. This double test was apparently adopted because some delegates felt that the test in the draft article (the time when the aggrieved party first had the right to avoid the contract) was too vague, and because others were concerned that the substitution of the time of actual avoidance might enable the aggrieved party to postpone avoidance to take advantage of a fluctuating market. On the other hand, the time of delivery was not generally suitable either because there might not have been any delivery as in the case of an anticipatory repudiation. Thus, the final text of Article 76 was regarded as an appropriate compromise. See J. Ziegel in Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, 1981 (available at <<http://cisgw3.law.pace.edu/cisg/text/ziegel76.html>>).

⁷⁵ See Schlechtriem, Calculation of damages, *op. cit.*, Preliminary Remarks.

⁷⁶ See *id.*, §§ III(2)(c), (d).

⁷⁷ See Secretariat Commentary, *op. cit.*, art. 71 4.

4.5 (a) The location at which the current price is to be established is the place where the delivery of the goods should have been made.

(b) If there exists no current price at the place of delivery, the current price is to be established at a reasonable substitute place.

Article 76 specifies determining the current price first by looking to "the price prevailing at the place where delivery of the goods should have been made."⁷⁸ The "place where delivery should have been made" is determined pursuant to Article 31.⁷⁹

If no current price exists at the place of delivery, the current price is then determined to be "the price at such other place as serves as a reasonable substitute. ..." ⁸⁰ There are no universal criteria for determining whether another place serves as a reasonable substitute.⁸¹ In general, a substitute place is reasonable if, taking into account transportation costs to the substitute location, an average merchant under the circumstances (from the point of view of both the buyer and seller) would find such a place suitable.⁸² Typically, this place is the location that is the most physically proximate.⁸³ At first glance, the lack of a current price at the place of

⁷⁸ CISG art. 76.

⁷⁹ Article 31 states:

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;
- (c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

CISG art. 31.

Article 31 differentiates between ordinary sales and sales involving the carriage of goods. When the contract of sale involves the carriage of goods, the place of delivery will be the place where the seller hands over the goods to the first carrier for transmission to the buyer. In a case between an Italian buyer and a Swiss seller, for example, an Italian court held the place of performance was England, since the goods had been delivered to a carrier in Sheffield. See Italy, Tribunale di Reggio Emilia (*Industrial machinery case*), 3 July 2000, CISG-Online.ch 771, English translation available at <http://cisgw3.law.pace.edu/cases/000703i3.html>; see also Netherlands Hoge Raad, 26 September 1997, CISG-Online.ch 286.

⁸⁰ CISG art. 76(2). Under U.C.C. §§ 2-708(1) and 2-713(2), market price damages are measured at the place of tender for the seller and, in many cases, also for the buyer. See U.C.C. §§ 2-708(1), 2-713(2) (1978). However, U.C.C. § 2-713(2) measures the market price at the place of arrival where the buyer has rejected or revoked acceptance after the goods arrived. See U.C.C. § 2-713(2).

⁸¹ See Enderlein & Maskow, *op. cit.*, art. 76 § 11.

⁸² See Knapp, *op. cit.*, art. 76 § 3.4.

⁸³ See Stoll & Gruber, *op. cit.*, art. 76 10.

delivery may suggest that no current price exists at all.⁸⁴ However, if delivery was in the seller's country and the buyer avoided the contract after arrival and inspection in the buyer's country, the buyer may be unable to establish a market price in the seller's country.⁸⁵ In such a case, the buyer may resort to a reasonable substitute location.

5. If the contract does not fix a price and there is no current price within the meaning of Article 76, damages may be calculated under Article 74.

Article 76 does not explicitly state how damages are to be calculated if there exists no price fixed by the contract or a current price cannot be determined. In such event, damages may be calculated under Article 74.⁸⁶

6. An aggrieved party entitled to damages under Article 76 may also recover any further damages under Article 74.

Like Article 75, Article 76 states that the aggrieved party is entitled not only to the difference between the price fixed by the contract and the current price, but also to any further damages recoverable under Article 74. These damages may include additional losses, including lost profit, for which the formula set forth in Article 76 alone would not provide compensation.

The Secretariat Commentary provides the following illustrations of the calculation of damages under Article 76:

Example [A]. The contract price was \$50,000 CIF. Seller avoided the contract because of Buyer's fundamental breach. The current price [at the time of avoidance] for goods of the contract description at the place where the goods were to be handed over to the first carrier was \$45,000. Seller's damages ... were \$5,000.

Example [B]. The contract price was \$50,000 CIF. Buyer avoided the contract because of Seller's non-delivery of the goods. The current price [at the time of avoidance] for goods of the contract description at the place the goods were to be handed over to the first carrier was \$53,000. Buyer's extra expenses caused by the Seller's breach were \$2,500. Buyer's damages under articles [76 and 74] were \$5,500.⁸⁷

When an aggrieved party seeks both damages under Article 76 and further damages under Article 74, the total amount of damages awarded should not place the aggrieved party in a

⁸⁴ See Enderlein & Maskow, *op. cit.*, art. 76 § 11.

⁸⁵ See Honnold, *op. cit.*, § 413.

⁸⁶ See Knapp, *op. cit.*, art. 76 § 3.7.

⁸⁷ See Secretariat Commentary, *op. cit.*, art. 72 8.

better position than it would have been in had the contract been properly performed.⁸⁸ For example, assume that a seller rightfully avoided a contract because of the buyer's fundamental breach and did not resell the goods. The price fixed in the contract for the goods was \$50,000 and the relevant market price of comparable goods at the time of avoidance of the contract was \$45,000. Under Article 76, the seller's damages are \$5,000. In this case, the seller still has the goods and, presumably, can resell them for the current price; therefore, if the seller also claims that Article 74 entitles it to recover the profit it would have made on the sale under the contract, the claim for lost profit should be denied.⁸⁹ Awarding the seller lost profits would provide it with a windfall because the seller still has the goods and, presumably, can resell them for the current price. If, however, the price at which the seller can now sell the goods has fallen since the time of avoidance, the seller might argue that it is entitled to further damages. Nevertheless, Article 77 requires that a party take reasonable measures to mitigate its loss, including loss of profit, resulting from the breach. Therefore, if it fails to do so, the other party may claim a reduction in the damages of the amount by which the loss should have been mitigated.

In most cases, "further damages" under Article 76 would be similar to the damages available under Article 75. However, there are some notable differences.⁹⁰ If an aggrieved party proceeds under Article 76, it can claim its loss which exceeds the difference between contract price and the market price.⁹¹ For example, if the seller breached the contract in a rising market and thereby caused the buyer to miss an opportunity to resell the contract goods for 50% above the market price, the buyer should theoretically be able to recover this 50% difference as "further damages."⁹² These damages would be available if the buyer proceeds under Article 76, but not if it proceeds under Article 75 because conducting a cover purchase would have preserved the opportunity to profit from the third party transaction.⁹³ Additionally, lost profits may be appropriate as further damages under Article 76 when the aggrieved party claims lost volume damages.

⁸⁸ See Knapp, *op. cit.*, art. 76 § 2.7.

⁸⁹ It is assumed that this case does not involve lost volume sales.

⁹⁰ See Stoll & Gruber, *op. cit.*, art. 76, n. 39.

⁹¹ See *id.* The promisee must have attempted to mitigate this loss under Article 77 in order to recover.

⁹² This assumes that the damages were foreseeable and the aggrieved party undertook appropriate mitigation efforts.

⁹³ See *id.*, art. 75 11.