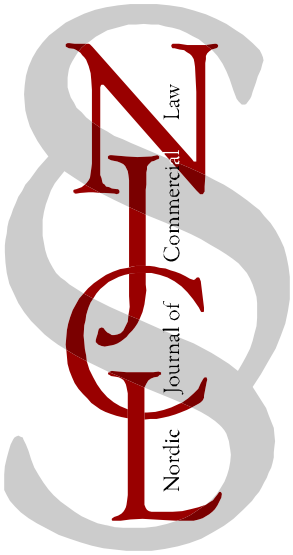

RECOVERABILITY OF THE BUYER'S LOST RESALE PROFIT UNDER CISG

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Introduction

It is a common conjuncture that the right to claim damages as a result of a breach of contract plays the most pivotal role among the remedies available to an aggrieved party.[1] Hence, the importance of taking a better look at damages that can be recovered for a particular type of loss. In this essay an attempt is made to identify some of the problems that arise before the courts when granting damages for buyer's lost resale profit under the UN Convention on the Contracts for the International Sale of Goods.[2] The practice in the area seems to be far from clear or consistent and academic literature is not always lending a helping hand.

The purpose of the first part of the essay is to sketch the notion of lost resale profit against a broader background of the law of damages. Further and more detailed analysis will oscillate around three issues which in practice appear to be central to the recoverability of the lost resale profit by the buyer, namely the foreseeability, calculation and mitigation of that loss. It is fascinating to see how the concrete and abstract considerations, general principles and their detailed applications are all masterfully interwoven in the colourful fabric of the lost resale profit issue. The author hopes to shed some light on the various patterns embellishing this fine material and, if possible single out the most prominent strands.

1. Loss of resale profit as a type of loss recoverable under Art. 74 CISG

Before embarking on the more concrete analysis, it is important to bear in mind some basic propositions relating to the issue of damages under CISG.

Pursuant to Art. 45(1)(b) CISG, if the seller fails to perform any of his obligations that he has under the contract or the Convention, the buyer may claim damages as provided under Arts. 74-77 CISG. It is irrelevant whether the obligations that the seller failed to perform are principal or ancillary.[3] Thus the seller's liability may be triggered not only by his failure to deliver goods (Arts. 30 and 31 CISG) but also by delivery of goods which do not conform to the contract (Art. 35 CISG).

[1] S. Eiselen, Measuring damages for the breach of contract: Remarks on the manner in which UNIDROIT Principles on International Commercial Contracts mat be used to interpret or supplement Article 74 of the CISG, in: An International Approach to the Interpretation of the United Nations Convention on the Contracts for the International Sale of Goods (1908) as Uniform Sales Law, ed. J. Felemegas, CUP 2007, at 211.

[2] Hereinafter referred to as the Convention or CISG.

[3] M. Müller-Chen, in P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford 2005, Art. 45, p. 520.

The seller's liability for performance of his obligations is objective, independent of fault or specific warranty of performance.[4] He assumes that liability the moment he undertakes an obligation to perform under a contract governed by CISG.

The recoverability of damages under the Convention is determined by the following principles.

First, the purpose of remedies of breach of contract is to provide relief to the aggrieved party rather than provide a mechanism to prevent the breach.[5] Therefore, for the buyer to recover damages there must be a failure on the part of the seller to perform any of his obligations under the contract or the Convention[6] and no exemption available under Art. 79 or Art. 80 CISG.[7] In other words, damages are compensatory, not punitive, in nature.[8]

Second, relief to the aggrieved party is to be measured by that party's loss of "expectation interests", also known as "the benefit of the bargain".[9] Damages aim to put the party who suffered loss in the position which he would have enjoyed had the contract been performed[10] although not in any better one.[11] This is often said to be the principle of full compensation.[12] It means that all types of losses are relevant under CISG.[13] As P. Huber pointed out, whilst various classifications of losses may turn out to be helpful in identifying types of loss that can be suffered, by no means should they serve as criteria of recoverability of loss under CISG. The basic philosophy of damages is, as stipulated in the Secretariat Commentary, to place the injured party "in the same economic position he would have been in if the contract had been performed".[14]

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[4] M. Müller-Chen, in P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford 2005, Art. 45, p. 528.
[5] E. A. Farnsworth, Remedies and Specific, 27 American Journal of Comparative Law 1979, at 247.
[6] See Art. 45(1)(b) CISG.
[7] P. Huber, in: Huber/Mullis, The CISG. A new textbook for students and practitioners, Sellier 2007, at 257.
[8] G. H. Treitel, Remedies for Breach of Contract, p. 76; P. Huber, in: Huber/Mullis, The CISG. A new textbook for students and practitioners, Sellier 2007, p. 268; CISG Advisory Council Opinion No 6, Calculation of Damages under CISG, Article 74, para. 9.5.
[9] E. A. Farnsworth, Remedies and Specific Relief, 27 American Journal of Comparative Law 1979, at 247; G. H. Treitel, Remedies for Breach of Contract, at 82. German law refers to this interest as Erfüllungsinteresse or positive interest, as opposed to Vertrauensinteresse, i.e., negative interest, which is protected by compensating expenses and other losses incurred in reliance on the contract. The latter aims to put the aggrieved party in the position in which he would have been had the contract never been made. (Treitel, ibidem, p. 83).
[10] Stoll, Gruber, in: Schlechtriem/Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 74 (...); see also commentary to an earlier version of the Convention, A/CN.9/116, Annex II, available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/vol7-p96-142-e.pdf> and the Sectretariat Commentary on the 1978 Draft, at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-74.html>.
[11] CISG Advisory Council Opinion No 6, Calculation of Damages under CISG, Article 74, para. 9. Cf. P. Huber, in: P. Huber, A. Mullis, The CISG. A new textbook for students and practitioners, Sellier 2007, at 256 (although the statement has been made with regard to availability of various remedies, it remains valid for the present purposes): "... damages are not available where their award would lead to the buyer being overcompensated."
[12] CISG Advisory Council Opinion No 6, Calculation of Damages under CISG, Article 74, para. 1.1.
[13] P. Huber, in: P. Huber, A. Mullis, The CISG. A new textbook for students and practitioners, Sellier 2007, p. 268.
[14] Commentary on the Draft Convention on Contracts for International Sale of Goods prepared by the Secretariat, Doc A/CONF.97/5, Art. 29, No. 5 – United Nations Conference on Contracts for the International Sale of Goods, Official Records, New York, 1981 (A/CONF.97/19), 53. J. Honnold, Uniform Law For International Sales under the 1980 United Nations Convention, 3rd ed., Kluwer Law International 1999,

Third, only loss suffered as a consequence of the breach of contract will be compensable. It appears that the test applicable to determine causation is the *conditio sine qua non* or the "but for" test.[15] In order to avoid the so-called "Adam and Eve" causation trap, where everything would ultimately have the cause in the beginnings of the Universe, a mechanism of limitation of damages needs to be in place. One of the mechanisms instated in the Convention is the foreseeability test,[16] which constitutes the next proposition.

Fourth, losses recoverable under Art. 74 CISG have been confined only to those that "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 known, as a possible consequence of the breach of contract".[17]

Fifth, damages should not include compensation for loss that might reasonably have been avoided.[18] The requirement of avoidability has been expressed in Art. 77 CISG, according to which a party relying 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.

As follows from the principle of full compensation and Art. 74 CISG, the aggrieved party can claim damages for any loss that the party suffered, including loss of profit.[19]

Whilst the actual loss has been defined as the reduction in the assets which existed when the contract was concluded, loss of profit is taken to mean any increase in the assets which the breach prevented.[20] A cursory definition of profits referenced to in Art. 74 CISG was laid down in the *Compound fertilizer case* of 30 January 1996.[21] Anticipated profits were taken to mean net profits, i.e., anticipated gross profits less payable fees.

A loss of resale profit is one possible type of lost profit situation and as such is fully compensable under Art. 74 CISG, though clearly it may not lead to the overcompensation of the buyer. If the seller has not delivered at all or the delivered goods (or part of them) are non-conforming, the buyer is left unable to gain profit from the resale of the goods. If, however, he manages to mitigate the loss and resell the goods albeit for a lower price, he should only be able to recover the price difference between the two contracts as his lost resale profit.

As F. Enderlein and D. Maskow state: "As to the loss of profit, there are several possibilities. It may be questioned whether the injured party is entitled to recover the loss of profit he actually

[15] Stoll/Gruber, in: P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 74, para. 23; P. Huber, in: P. Huber, A. Mullis, The CISG. A new textbook for students and practitioners, Sellier 2007, p. 270.
[16] D. Saidov, Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods, <http://cisg3.law.pace.edu/cisg/biblio/saidov.html>.
[17] For a more detailed analysis see below ("Foreseeability").
[18] E. A. Farnsworth, Remedies and Specific Relief, 27 American Journal of Comparative Law 1979, at 247.
[19] Art. 74 CISG: "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."
[20] Stoll/Gruber, in P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford 2005, Art. 74, para. 22, p. 758.
[21] China International Economic and Trade Arbitration Commission (CIETAC) proceeding of 30 January (Compound fertilizer case), 1996 <http://cisgw3.law.pace.edu/cases/960130c1.html>.

suffered, the exact profit he could have expected, or an average profit to be expected at a certain time in a certain place. It is unclear also for which period of time the loss of profit can be measured."[22]

In deciding whether the profit would have been made if the contract had been properly performed, the Convention does not stipulate what degree of probability is necessary. It is generally submitted that the aggrieved buyer should prove the loss with reasonable certainty.[23]

2. Foreseeability

As mentioned above, losses are only recoverable if they have been foreseeable by the party in breach of the contract. Foreseeability is a troublesome concept to define. It also appears to be the key principle applied by the courts when determining whether lost resale profit should be recoverable.

The main issue considered by courts in determining sellers' liability was whether the seller could foresee or ought to have foreseen the loss of buyer's profit. This, however, begs further question: what is the standard of foreseeability applied in the case of lost resale profit?

The wording of Art. 74 CISG[24] clearly suggests that the loss resulting from the breach of contract does not need to be actually foreseen.[25] The breaching party may be held liable if the loss is foreseeable. It seems that the foreseeability of buyer's lost resale profit has been ascertained in the jurisprudence by adopting one of the two different, if not contradictory, approaches. The courts have either required that the seller have the knowledge of the buyer's resale contract, typically already upon the conclusion of the contract of sale, or it has been assumed that the seller should know that the buyer was to resell the goods.

The first approach is illustrated in the *India rapeseed case*.[26] It was held that the seller should not be liable for the loss of resale profit since the resale contracts (entered into on 27 August 2002) were signed after the conclusion of the contract between the buyer and the seller (dated 30 July 2002). Therefore, the seller was unaware of the conclusion and the terms of the resale contract. The Arbitration Tribunal did not find sufficient evidence showing that the seller foresaw or ought to have foreseen the difference between the contract price and the resale price alleged by the buyer in the light of the facts which the seller then knew or ought to have

[22] Fritz Enderlein & Dietrich Maskow. "International Sales Law", Oceana (1992), p. 299.
[23] CISG Advisory Council Opinion No 6, Calculation of Damages under CISG, Article 74, para. 2; P. Huber, in: Huber/Mullis, The CISG. A new textbook for students and practitioners, Sellier 2007, p. 276; cf "the competent judge should be convinced that the profit would actually have been made ... before relief for this type of loss is granted", Neumayer/Ming, Art. 74, note 1; Weber, Vertragsverletzungsfolgen, p. 196, cited from Stoll/Gruber, in P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford 2005, Art. 74, p. 759.
[24] "...the loss which the party in breach ... ought to have foreseen".
[25] J. Lookofsky, The 1980 United Nations Convention on Contracts for the International Sale of Goods, Article 74, Damages for Breach, in: J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000), at 290, footnote 3, also available at <http://cisgw3.law.pace.edu/cisg/biblio/loo74.html>.
[26] CIETAC China Arbitration proceeding of 29 September 2004 (India rapeseed case), <cisgw3.law.pace.edu/cases/040929c1.html>.

known, as a possible consequence of the breach of contract. Similarly, in the *Tinplate case*, it has been required that the buyer should inform the seller of a resale contract.[27]

The prerequisite of the seller's knowledge raises some doubts when it comes to lost resale profit cases. In commercial practice the buyer and the seller are usually identifiable entities entering into transactions with known purposes. Incidentally, if the buyer, being a shoe wholesaler, orders hundreds of pairs of shoes it is not unforeseeable that the goods would be resold. If then the seller does not deliver or delivers non-conforming goods, it seems evident that the buyer will suffer loss of profit that he could earn by resale. In addition, resale is one of the usual ways of dealing with goods and as such will usually be foreseeable.[28]

The relevance of commercial practice seems to have been taken into account by the Austrian Supreme Court in a case involving a sale (and resale) of propane gas.[29] In this case the German buyer and the Austrian seller entered into an agreement for the delivery of 3000 mt of propane gas. On the same day the buyer resold the ordered quantity of gas to the Dutch company onto the Belgium market. The seller however did not obtain from his supplier a permission required for reselling the gas in Benelux countries, as a result of which he did not deliver the gas to the buyer. The buyer let the sellers know that his customer already had made substitute purchases and that he was trying to sell the quantity already purchased in Germany. On the same day, the sellers also told the buyer that the natural gas could not be sold to customers in the so-called Benelux countries at all. The Austrian buyer instituted proceedings against the seller claiming lost profit from the envisaged resale of the natural gas in Belgium. The buyer claimed he suffered a loss of profit of $5 per ton, resulting in the total of $15,000. Although the seller was generally considered to be liable for loss of profit only if he had to reckon with the buyer's resale, it was held that "in case of the sale of commercial goods to a merchant, this can always be assumed without any further indications."

The approach taken by the Austrian Supreme Court in this case appears to be in line with a previous decision delivered by the Chinese Arbitration Tribunal in the *Art paper case* of 12 February 1996.[30] The Tribunal held that since the buyer is a trading company, the seller "should have known that the buyer was not buying goods for his own use" but in order to resell them.

In the judgment of 23 December 2004,[31] a Russian tribunal held that "the [Seller], as a professional participant of the market (...), could not have been unaware of the fact that the [Buyer] is not the consumer of the delivered goods and that it distributes them on the internal market of Russia, that naturally includes transshipment (resale) of the purchased goods by the [Buyer] to further customers." The tribunal took into account not only the status of the seller but also the long-lasting business relations the parties were in, which additionally were reflected in a number of contracts concluded between them.

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[27] CIETAC China Arbitration proceeding of 17 October 1996 (Tinplate case), <http://cisgw3.law.pace.edu/cases/961017c1.html>.
[28] P. Huber, in P. Huber/A. Mullis, The CISG. A new textbook for students and practitioners, Sellier, 2007, p. 273.
[29] Austria 6 February 1996 Supreme Court (Propane case), <http://cisgw3.law.pace.edu/cases/960206a3.html>.
[30] CIETAC China Arbitration proceeding of 12 February 1996 (Art paper case), <http://cisgw3.law.pace.edu/cases/960212c1.html>.
[31] Russia 23 December 2004 Arbitration proceeding 97/2004, http://cisgw3.law.pace.edu/cases/041223r1.html.

Considering the above-cited case law, it seems that the test applied to ascertain foreseeability of lost resale profit is often an objective one, i.e., it does not refer to what the seller actually foresaw. On the other hand, however, there is no reference to the reasonable person standard either. Foreseeability of lost resale profit seems to have been based on factors such as the nature of the goods involved ("commercial goods") and the status of the buyer ("a trading company", "not the consumer of the delivered goods"). It also means that the requirement of the loss being foreseeable at the time of the conclusion of the contract will normally be fulfilled.

The standard of foreseeability under CISG remains however both subjective and objective. As early as in s 1979 ULIS case,[32] the Federal Supreme Court of Germany (*Bundesgerichtshof*) concluded that "... ULIS Article 82 [a match-up article with Article 74 CISG] [33] requires (...) that the test can conclusively be met by a showing of trade custom as to foreseeability, and that a survey of persons in the trade is a proper means of determining those facts".[34] In that case, a German cheese importer was reselling cheese to other customers concluded a contract with a Dutch exporter. It turned out that 3% of the total delivery of the cheese was defective. The buyer sought damages for loss of profits alleging that four of his wholesale customers ceased doing business with him, which resulted in lost profits over four years. Having taken into account the information from chambers of commerce and industry concerning the question of foreseeability, the court held that it was foreseeable that minor deficiencies in performance could lead to a loss of customers.

The decision has been criticized for treating foreseeability in the factual context rather than as an element in the assessment of the degree of the seller's risk assumption at the time of the conclusion of the contract.[35] Commenting on the decision, P. Schlechtriem noted that "Liability with regard to customers (indemnification), however, should at least have been 'foreseeable' within the normative meaning of this criterion since it is to be expected in the usual course of delivery of defective goods to a middleman. These types of damages are ('quite simply') considered 'foreseeable' not only for goods delivered to a middleman for resale but also for products for further processing, whose defects create replacement obligations for the buyer/manufacturer with respect to its customers."

[32] BGH of 24 October 1979, RIW 1980, 143 et seq., <http://cisgw3.law.pace.edu/cases/791024g1.html>.

[33] It has been established on various occasions that ULIS jurisprudence can be useful in interpreting the Convention, see F.A. Mann, Uniform Statutes in English Law, 99 Law Quarterly Review, 1983, p. 382; B. Audit, the Vienna Sales Convention and the Lex Mercatoria, in: Thomas E. Carbonneau ed., Lex Mercatoria and Arbitration, Juris Publishing 1998, p. 188.

[34] Cf. Eric C. Schneider, Measuring Damages under CISG, <http://cisgw3.law.pace.edu/cisg/text/cross/cross-74.html>, citing Jeffrey S. Sutton, Measuring Damages Under the United Nations Convention on the International Sale of Goods, 50 Ohio St. L.J. 743-744: "Article 74 contains both an objective and subjective test, limiting damages to the "loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known."

35 See Weitnauer, Nichtvoraussehbarkeit eines Schadens nach Art. 82 S. 1 des Einheitlichen Gesetzes über den internationalen Kauf beweglicher Sachen. Comment to BGH of 24 October 1979, IPRax 1981, 83, 84 sub IV. 1, cited after P. Schlechtriem.

This view seems to be supported in the *Art paper case*[36] where it was held that since the buyer was a trading company, the seller should have known that the buyer was not buying goods for its own use.

3. Calculation of lost resale profit

There are two possible ways of calculating damages in a situation when a buyer lost his resale profit:[37]

a) Calculating loss of profit as a price difference between the contract price and the price for reselling to the buyer's customer

b) Calculating loss of profit based on the difference between market price and the contract price.

The first method seems to have been applied in a majority of cases. One of the first cases where lost resale profit was successfully claimed by the buyer was the *Art paper case* of 12 February 1996.[38] The tribunal awarded damages for the buyer's loss of profit calculated as the difference between the contract price and the price the buyer would be paid pursuant to the resale contract. It is not clear, however, whether the buyer had already concluded the resale contracts with its customers.

In the German *paperboard containers case*,[39] the buyer running a business for office organization systems concluded an annual framework contract for delivery of seller's "archive-solid-boards". In December 2002, the buyer refused to sign a follow-up contract proposed by the seller. Seller declared immediate termination of the 1999 contract because of the alleged "systematic breaches of payment terms" by the buyer. The Appellate Court in Köln found that the seller's termination of the contract was unjustified. Since throughout 2003 the buyer did not receive any deliveries from the seller, the buyer was unable to realize profits through resale of goods. The calculation of lost profits was based on the turnover expectation (of EUR 115,000) which was actually stated by the seller itself in his letter in December 2002. The court found that the buyer properly assumed the profit margin of 30% and took into account cost savings of 10%. The margin of profit was proved by having submitted a comparison of purchase and resale prices.

The seller was barred from successfully pleading ignorance as a means of challenging the buyer's margin of profit by stating that the seller had relied on a lower margin during contractual negotiations. The seller did not manage to specify which margin of profit had been proposed back and, in any case, his negotiation on the basis of too low figures appears to have been simply a tactic move.

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[36] CIETAC China Arbitration proceeding of 12 February 1996 (Art paper case), <http://cisgw3.law.pace.edu.cases/960212c1.html>.
[37] CIETAC China Arbitration proceeding of 29 September 2004 (India rapeseed meal case), <http://cisgw3.law.pace.edu/cases/040929c1.html>.
[38] CIETAC China Arbitration proceeding of 12 February 1996 (Art paper case), <http://cisgw3.law.pace.edu/cases/960212c1.html>.
[39] Germany 12 January 2007 Appellate Court Köln (Paperboard containers case), <http://cisgw3.law.pace.edu/cases/070112g1.html>.

In the already cited *Compound fertilizer case*,[40] the seller argued that the buyer's resale price was too high and the profit was exorbitant. Although in this case the seller failed to provide sufficient evidence, it would, arguably, be against the principle of full compensation if the buyer could recover excessive profits under the Convention.[41]

The second method of calculating lost resale profit was employed in a case of 27 May 2005 between a Turkish buyer and a Russian seller.[42] The seller failed to deliver a prepaid installment of goods to the buyer, who sued the former for loss of profits. In granting the buyer this claim, the Russian tribunal took into account the rate of profit existent on the Turkish market, which could be gained from the resale of the goods. The market rate was evidenced by the buyer in a document. It was held that the seller "could not have failed to foresee the occurrence of this loss of the [Buyer] in base of non-performance by the [Seller] of its contractual obligations".

Similarly, a Ukrainian tribunal[43] refused to accept buyer's calculation of the lost profit on the basis of subtracting the contract price of the goods from the sum the buyer claimed it could have received as payment for the processed product. Instead, the buyer was awarded a much smaller sum (US $897,000 instead of the initially claimed US $1,700,000) calculated on the basis of the difference between the market and contractual price.

Although it may not always be clear from the jurisprudence, it seems that calculation of lost resale profit can only be based on the difference between the resale contract price and the contract price when the buyer had concluded resale contracts. If there are no such resale contracts, even if the buyer regularly resells the goods to its customers, the loss should be calculated on the basis of market price.

4. Mitigation of loss of resale profit by the buyer

Article 77 CISG imposes an obligation upon the buyer to mitigate his loss of profit. If he fails to do so, the party in breach may claim a reduction of the amount of the damages.[44] The principle underpinning the mitigation of loss is that the aggrieved party should not recover damages for loss that could reasonably have been avoided.[45] It has been said to be the expression of good faith in international commerce.[46]

Pursuant to Art. 77 CISG, the aggrieved party is required to take measures that are reasonable in the circumstances, i.e., measures that under the circumstances of the individual case could

[40] CIETAC China Arbitration proceeding of 30 January 1996 (Compound fertilizer case), <http://cisgw3.law.pace.edu/cases/960130c1.html>.
[41] See also P. Huber, in Huber/Mullis, The CISG..., p. 276.
[42] Russia 27 May 2005 Arbitration proceeding, <http://cisgw3.law.pace.edu/cases/050527r1.html>.
[43] Ukraine 2005 Arbitration proceeding, Case no. 48, <http://cisgw3.law.pace.edu/cases/050000u5.html>.
[44] P. Huber, in P. Huber/A. Mullis, The CISG. A new textbook for students and practitioners, p. 289.
[45] G. Treitel, Remedies for Breach of Contract: A Comparative Account, 1988, p. 179; Knapp/Bianca, Bonell, pp. 559-560; Stoll/Gruber, in: Schlechtriem, Commentary on the UN Convention on the International Sale of Goods, p. 787.
[46] Stoll/Gruber, in: Schlechtriem, Commentary on the UN Convention on the International Sale of Goods, p. 787 and literature cited there.

have been expected in good faith.[47] In one court's view, the answer to the question of which measures would be reasonable and ought to be taken depends on how a reasonable creditor would have acted in the same situation.[48]

Since the claim of the breach of the duty to mitigate damages is an exception leading to the loss of the claim for damages, it is the seller who needs to prove it. In the situation of lost resale profit, the seller will typically try to raise the argument that the buyer failed to conclude substitute contracts at an appropriate time and in an appropriate time framework according to Art. 75 CISG.[49] On the other hand, the buyer will counterclaim that he has taken reasonable measures to mitigate loss. Repeated requests addressed to the seller to deliver the goods were found to be insufficient means to mitigate loss.[50]

Analyzing the jurisprudence, it seems that the courts do not take the duty of the buyer to mitigate his loss seriously enough. It is often held that the buyer has a duty to take reasonable measures to mitigate his loss but rarely did the courts find the buyer falling short of this requirement. In the case of loss of resale profit it seems that the buyer will often be able to conclude substitute transactions to obtain the goods from elsewhere. Whether in practice substitution will actually be feasible is an entirely different matter and depends on the circumstances of the individual case. It seems, however, that the courts did not give it sufficient thought and failed to consider whether mitigation of the buyer's lost resale profit could have been mitigated in that way.

In the *India rapeseed meal case*, for instance, the seller argued that the buyer could purchase domestic goods to substitute the goods in resale contract. The Arbitration Tribunal found, however, that "the seller's allegations of purchasing substitute goods is not in accordance with the Contract and lacks of sufficient reasons." The decision in this respect is controversial. The duty of the buyer to mitigate his loss of resale profit by entering into substitute transactions should not be dependent on whether such an obligation has been stipulated in the contract itself. It is contained expressly in Art. 77 CISG.

5. Conclusion

The analysis of the jurisprudence in the area of loss of resale profit by the buyer seems to contain a number of inconsistencies and controversies. In awarding damages for lost resale profit the courts have mainly focused on the issue of foreseeability, leaving the duty of the buyer to mitigate his loss almost on the side.

Whilst circumstances surrounding the conclusion of the contract, notably the knowledge of seller of buyer's resale contracts, are of decisive relevance,[51] it appears to be impossible to

[47] Austria 6 February 1996 Supreme Court (Propane case), <http://cisgw3.law.pace.edu/cases/960206a3.html>; cf. von Caemmerer/Schlechtriem, Art. 77 n. 9).
[48] Austria 6 February 1996 Supreme Court (Propane case), <http://cisgw3.law.pace.edu/cases/960206a3.html>.
[49] Austria 6 February 1996 Supreme Court (Propane case), <http://cisgw3.law.pace.edu/cases/960206a3.html>; cf. Ukrainian Arbitration tribunal, which held that what would be regarded as a sufficient means of mitigation would be the purchase of analogous goods with price information presented by buyer (Case no. 48).
[50] Ukraine 2005 Arbitration proceeding, Case no. 48, <http://cisgw3.law.pace.edu/cases/050000u5.html>.
[51] Piltz, Internationales Kaufrecht, 1993, Munich, p. 291.

establish a general rule that certain damages are only foreseeable if they have been expressly dealt with in the contractual negotiations[52] or made known to the breaching party.

In awarding damages for the loss of resale profit the courts should take account of the specific nature of that loss, in particular the commercial practice in which the buyer and the seller operate.

[52] Switzerland 28 October 1998 Supreme Court (Meat case), <http://cisgw3.law.pace.edu/cases.981028s1.html>.