Preliminary remarks

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PRELIMINARY REMARKS

The so-called anticipatory breach of contract occurs frequently in international commerce. Art. 72 CISG entitles an aggrieved party to avoid the contract in the event of the other party's anticipatory breach. It regulates two types of such anticipatory breaches, *i.e.* anticipated non-performances of obligations which are not yet due and cannot yet, therefore, be breached *stricto sensu.* Firstly, the ability and capacity of an obligor to perform must have deteriorated to such an extent that performance becomes most unlikely -- "it is clear that" the obligor *cannot* perform at the date of performance, Art. 72(1) CISG. Secondly, the obligor may repudiate his obligation by declaring that he *will not perform* on the date of performance, Art. 72(3) CISG. If the breach of the obligation repudiated or "endangered" by a deterioration of the capacity to perform would amount to a fundamental breach on the date of performance, the obligee need not wait until the breach actually occurs at the contractual time for performance, but can already avoid the contract at the time that the fundamental breach is anticipated. Likewise, in the case of a contract to deliver goods in instalments, the breach of an instalment due may allow avoidance of the contract with respect to instalments to be delivered at a later date if the breach of the obligation currently due "gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments", Art. 73(2) CISG; again, such grounds may be established either on account of objective factors (deterioration of the obligor's ability to perform), or on account of his subjective repudiation.

Avoidance under Art. 72 or Art. 73(2) CISG will hardly ever be the end of the case, but will almost always trigger claims for damages. The provisions on anticipatory breach regulate avoidance only; they do not -- contrary to the CISG's predecessor, ULIS (The Hague "Uniform Law on the International Sale of Goods" of 1964), in its Art. 77 --, mention damages. The drafters regarded a reference to the general section on damages as superfluous.

Damages can be recovered under either Art. 74 CISG, Art. 75 CISG or Art. 76 CISG. Since the date of performance, *i.e.* the date when the obligee may actually suffer losses from non-performance by the obligor, and the date of avoidance differ -- and may differ considerably --, there can be doubts as to the correct method of calculating damages: actual losses at the time of (non-)performance may be lower or higher than calculated -- and calculable -- at the time of avoidance. These concerns have been raised by a number of legal writers, who have -- in general -- recommended resorting to Art. 77 CISG, which sets out the duty of the aggrieved party to mitigate damages, in order to control unwelcome "side effects" of the calculation of damages under Art. 75 CISG or Art. 76 CISG. This contribution to honour one of the great scholars of international commercial law attempts to shed some light on the issues surrounding these concerns.

I. DAMAGES UNDER ART. 74 CISG

An anticipatory breach can coincide with an actual breach: a seller who is in default with delivery or a buyer who is in default with payments due are both in breach. However, such default, in itself, does not necessarily amount to fundamental breach and, therefore, may not constitute cause for avoidance under either Art. 49(1)(a) or Art. 64(1)(a) CISG. Notwithstanding this, default may indicate "clearly", under Art. 72(1) CISG, or may give good grounds to conclude, under Art. 73(2) CISG, that the obligor will not perform in the future. If such future non-performance would then, at the time of ultimate performance, amount to a fundamental breach, the aggrieved party can, under these provisions, already avoid the contract at the time of default.

Losses, including lost profits, can be recovered by the aggrieved party on the basis of the provisions on damages, in particular Art. 74 CISG. However, it may be difficult to show and prove precisely what profits have been lost by the premature liquidation of the contract, and it may require the aggrieved party to "open its books", *i.e.* to disclose its internal calculations, its customers and other business connections, etc. If, however, the aggrieved party has avoided the contract under Art. 72 CISG or Art. 73(2) CISG (with respect to future instalments), it may claim and calculate its damages under Art. 75 or Art. 76 CISG. Damages calculated under Arts. 75 or 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction) encompass the "normal" benefit of the bargain, if it was profitable at all. Thus, claiming damages under Arts. 75 or 76 CISG does not require disclosing the claimant's internal calculations, business relations, etc. -- it suffices to show that the prerequisites for making a claim under these provisions, *i.e.* the existence of a "contract price" and "price of a cover transaction" or "current price" are satisfied. The normal procedure for liquidating a contract in such cases of anticipatory breach, therefore, will be avoidance and calculation of damages under either Art. 75 CISG or Art. 76 CISG. I shall focus on these two provisions in the following observations.

II. DAMAGES UNDER ART. 75 CISG

The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 CISG as the difference between the contract price and the price of a cover transaction. The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction). The party aggrieved by an anticipatory breach, after having avoided the contract, may calculate its damages under Art. 75 or Art. 76 CISG (or under Art. 74 CISG, if calculated as the difference between the contract price and the price of a cover transaction).
difference between the contract price and the price of a cover transaction; "further damages", such as (additional) costs of transport or storage, are recoverable under Art. 74 CISG. Nonetheless, the party aggrieved is bound to keep its losses under control, i.e. to mitigate damages.

1. Not merely any cover transaction -- the purchase of substitute goods by the buyer or the resale to a third party by the seller -- may be subject to the calculation method under Art. 75 CISG: the substitute transaction must be undertaken in a reasonable manner, and it must be concluded within a reasonable time after avoidance. Both restrictions are based on the principle, set out more generally in Art. 77 CISG, that the party aggrieved by a breach must react reasonably in order to mitigate damages. [4] The obligation to mitigate may entail more restrictions (infra at 2. and 3.b.c)).

A reasonable manner means that the cover transaction must be made at a reasonable price, if and to the extent that the aggrieved party has a choice. An aggrieved buyer may not simply cover at any price, and a seller aggrieved by a buyer's breach may not resell at just any price. A "reasonable manner" of covering presupposes that the cover contract corresponds more or less [5] to the contract breached. In particular, the delivery dates fixed in the contract breached should be, if possible, part of the cover contract. Reasonable is an open term, which defies any hard and fast definition; what is reasonable depends on the circumstances of the case: although a seller, aggrieved by a repudiation of a buyer (such as by refusing to take delivery), should resell at the highest price obtainable, circumstances can necessitate selling the goods at a price below the market price [6] in the case of seasonal goods which have to be resold at the end of the season, a resale price 50 % below the contract price may still be reasonable. [7] By way of example, a resale by an aggrieved seller at a price of $0.497 per unit below the average market price of $6.047 per unit (at the time of delivery, the market price hovered between $5.983 and $6.407 per unit) was still to be reasonable, since the seller had to resell ex warehouse, which -- according to the arbitral tribunal -- was "hard". [8] Likewise, the interpretation of reasonable time after avoidance will depend on the circumstances of the case: if the conclusion of a cover transaction proves to be difficult, even several months could still be "reasonable". [9]

In addition, the flexibility of the concept of reasonableness also applies to the delivery dates: the delivery dates under the cover transaction do not need to precisely coincide with those under the contract breached where this is simply not possible or would result in unreasonable additional costs.

2. While the duty to react by concluding a cover transaction in a reasonable manner and within a reasonable time after avoidance is a requirement to mitigate losses "built into" Art. 75 CISG, [10] the general duty to mitigate also influences the time for avoidance: under Arts. 49(2) and 64(2) CISG, the party aggrieved by late -- but nevertheless completed -- performance, or another breach (except entire non-performance) of the other party must declare avoidance within a reasonable time. Even in the case of complete non-performance, i.e. non-delivery by the seller or non-payment by the buyer, where Arts. 49(2) or 64(2) CISG are inapplicable, the general principle of Art. 77 CISG may also require a reaction by the aggrieved party, such as a declaration of avoidance within a reasonable period of time; it would be misleading to allege that the aggrieved party can "hold out" and "wait and see" at will. [11] However, the consequences of an unreasonable delay in declaring avoidance are different in cases of non-performance from those under Arts. 49(2) or 64(2) CISG: if the seller is in breach under Art. 49(2) CISG, or, likewise, the buyer under Art. 64(2) CISG, the aggrieved party that waits unreasonably long before declaring avoidance loses the right to avoid the contract. Therefore, recourse to Art. 75 CISG and the calculation of damages under this provision are barred. Conversely, in the case of non-delivery or non-payment -- and, respectively, in cases of anticipatory breaches by loss of performing capacity under para 1, or repudiation under para 3 of Art. 72 CISG (or similar anticipatory breaches of instalment contracts under Art. 73 CISG) -- late and, therefore, perhaps otherwise unreasonable avoidance is still possible and effective. The obligor can avoid and claim damages calculated under Art. 75 CISG; neither Art. 49(2) nor Art. 64(2) CISG apply. However, if an earlier avoidance was not only possible, but could have been taken as a measure ... reasonable in the circumstances to mitigate the loss ... resulting from the breach Art. 77 CISG, then the damages calculated under Art. 75 CISG, i.e. the difference between the contract price and the price of a cover transaction (or the further damages recoverable under Art. 74 CISG), may have to be reduced: if, for example, the goods that the seller had declined to deliver (perhaps -- and often -- under some pretext) could have been procured without unreasonable difficulties from another source at a lower price than was ultimately paid, i.e. due to the unreasonable delay in making a cover transaction, then the damages recoverable under Art. 75 CISG must be reduced under Art. 77 CISG in proportion to the losses that would have been mitigated had avoidance been declared and, accordingly, the cover transaction been made earlier. Again, however, the time to avoid should reasonably have been declared, and when a cover transaction was possible and could have been reasonably concluded, is a matter to be determined in consideration of (all) circumstances of the individual case.

3. In cases of anticipatory breach or, likewise, breach of an instalment sale and avoidance with respect to future instalments under Art. 73(2) CISG, there are particular difficulties in assessing the "reasonableness" of actions to be taken under Art. 77 CISG in order to mitigate damages, and this is even more challenging than in cases of "normal" breaches, which take place at the time the obligations (to deliver, to take delivery or to pay) fall due.

a) First of all, a factor to be taken into account is how certain and undisputed the right to avoid is, i.e. whether it is based on an anticipatory fundamental breach within the meaning of Art. 72 CISG or on "good grounds to conclude that a fundamental breach will occur with respect to future instalments", Art. 73(2) CISG. If there is a clear and unambiguous repudiation in writing, which provides solid evidence of an anticipatory breach by the obligor, the aggrieved obligee is better placed to make a decision than in the other cases of para 1 of Art. 72 CISG, i.e. where it is clear that one of the parties will commit a fundamental breach: what may seem clear at one time can well be seen in a different light at a subsequent point in time, particularly with the benefit of hindsight at the time of litigation or arbitration, with the consequence that what appeared to be a quick declaration of avoidance and the undertaking of an immediate cover transaction at the relevant time might later appear to have been premature.

In the case of an instalment contract, the aggrieved buyer is slightly better off, as the evidentiary threshold of Art. 73(2) CISG is somewhat lower: good grounds to conclude that a fundamental breach will occur with respect to future instalments is less severe than it is clear; and, consequently, it will probably be easier for the buyer to justify a more "premature" avoidance and cover purchase as a
III. DAMAGES UNDER ART 76 CISG

b) As stated supra at II. 1., a "reasonable" cover transaction has to correspond roughly to the terms of the contract breached, and in cases of anticipatory breach, the aggrieved party should attempt to conclude a cover contract for delivery on the same delivery dates as those set out in the contract breached. [12] This -- making a cover transaction by buying or selling for delivery at a date in the future -- may also be required under Art. 77 CISG if an immediate cover transaction will entail additional costs, such as storage costs, and if the buyer does not need the goods until the time of delivery as set out in the contract breached. However, contracting for delivery in the future will not always be possible, in particular with respect to ongoing instalment contracts, and not in regard to all goods. [13] Furthermore, a cover transaction with a future performance date might turn out to be more expensive than a cover transaction to be performed within a reasonable time after avoidance, with the consequence that the duty to mitigate may require a cover transaction to be performed after avoidance. [14] In any case, this is the scenario addressed by most legal writers when discussing cover contracts after avoidance. [15]

c) If cover by purchasing or selling for delivery at a future date is not possible, it remains to be considered whether the aggrieved party may cover by purchasing or selling for performance at (a reasonable time after) avoidance, taking prices at that point in time into account for the calculation under Art. 75 CISG. Legal writers advocate this solution. [16] and I agree. The aggrieved party cannot be expected to wait until the time of contractually-agreed performance before undertaking a cover transaction. Solely the duty to mitigate losses may require the aggrieved party to wait before undertaking a cover transaction, provided that losses are thereby reduced. The following factors must be considered when evaluating whether it may be a "reasonable measure" to wait:

First of all, where performance is due in the future, the uncertainty of price developments in cases of anticipatory breach must be considered: the more certain price increases are, with the consequence that cover transactions should be undertaken promptly, the sooner a buyer aggrieved by the seller's anticipatory breach will be expected to avoid and cover. Only if prices were certain to fall could waiting before making cover be a reasonable measure to mitigate the buyer's losses. Conversely, in the case of anticipatory breach by the buyer: the more certain a fall in the market prices is, the sooner a reasonable seller aggrieved by a buyer's repudiation can be expected to cover by reselling the goods. Waiting in such circumstances would not be a reasonable measure to mitigate losses. Only where prices are certain to rise could the seller be expected to wait. Price developments that can be expected with certainty comprise a serious factor in deciding whether to cover now or later, but such certainty is rare, even more so if the time for performance is in the distant future. If the performance is not due until the distant future, with the consequence that the party aggrieved might not "need" the performance until later, perhaps considerably later, e.g. a year after the anticipatory breach, any prognosis of price developments becomes increasingly uncertain, and could not be regarded as a reliable basis for determining "measures reasonable in the circumstances to mitigate losses". If a buyer, in 2006, has bought goods in a long-term contract that are not to be delivered -- on request, perhaps -- until 2010, it will, in most cases, be difficult, if not hazardous, to predict what the prices in 2010 will be, i.e. at the time when the buyer actually has to pay. The same token, a seller aggrieved by a buyer's refusal to take delivery of the goods in 2010 will always run a risk of cover-selling too early, as there is a chance that prices will increase by the date of delivery. Therefore, a cover transaction should be allowed right (i.e. within a "reasonable" period) after avoidance, even if it subsequently turns out that waiting would have paid. Of course, in wildly fluctuating markets, the aggrieved party should not cover in the spot market at peak prices -- but this advice is only to be followed if there is some likelihood of prices going down again.

There is another factor in the equation: in cases of breach of obligations that are not due until a future point in time (and the resulting avoidance), a cover transaction at the time of the anticipatory breach may cause additional losses, which are "recoverable under Art. 74 CISG", in addition to the difference between the contract price and the price of the cover contract, as "further damages", Art. 75 CISG. Cover by an aggrieved purchaser for goods to be delivered shortly after the anticipatory breach, for example, in the spring of 2007, may not only prove to be premature in regard to the anticipated development of prices, but may also cause (as considered supra at II.3.b)) additional costs for storage of the goods, which are not needed -- for resale to customers, or for the buyer's own production -- until, say, 2008. Furthermore, the premature payment of the purchase price may cause (a loss of) interest. On the other hand, a seller aggrieved by an anticipatory repudiation may save storage or transport costs if he sells promptly, and may also earn interest on the price earlier; the duty to mitigate losses may require, therefore, such a timely cover sale, if the savings "outweigh" the risks in price developments. In exceptional cases, therefore, such additional costs may influence the opinion as to whether to cover speedily, or to wait as a "measure reasonable in the circumstances" to mitigate losses.

In summary, Art. 77 CISG only prohibits prompt avoidance and conclusion of a cover contract for immediate performance in cases of anticipatory breach under Art. 72 CISG and Art. 73(2) CISG in rare and exceptional situations. The outcome of litigated cases will often depend on the burden of proof. If the party aggrieved has covered by a contract providing for instant performance, the obligor in breach may allege that this was not a "reasonable manner" because it was not in accordance with the terms of the contract breached, which did not require performance until a future date. The party aggrieved then has to show and, if contested, to prove that it would not have been "reasonably" possible and less costly to make a cover transaction for future performance. If, however, the obligor in breach alleges that avoidance and the conclusion of a cover contract were premature, and that the duty to mitigate would have required waiting before taking such steps, the burden of proof is on the obligor: the obligor in breach must not only prove the factors, i.e. the circumstances, which could give rise to a duty to mitigate, but he must also show why a later cover transaction would have been "a measure reasonable in the circumstances" under Art. 77 sent. 1 CISG, and to what extent the losses could have been mitigated. [18]

In summary, in order to calculate losses in cases of anticipatory breach, a cover contract should principally provide for delivery at the time fixed in the contract breached. However, if such cover contracts are not available or only at prices higher than those for delivery at the time of (after) avoidance, the aggrieved party should cover for delivery at that time. The duty to mitigate damages may, in exceptional circumstances, require waiting before making a cover transaction at some later date.

III. DAMAGES UNDER ART 76 CISG
Art. 76 CISG allows calculation of damages by the aggrieved party as the difference between the contract price and the "current" price, i.e. the market price, without undertaking an actual cover transaction. In German legal systems this is usually referred to as an "abstract" calculation of damages, in contrast to a "concrete" calculation on the basis of a "concrete" cover transaction, which is regulated by Art. 75 CISG. The aggrieved party is regarded, for the purpose of calculating damages, as having undertaken a cover transaction at the current price, i.e. damages are calculated on the basis of a hypothetical cover transaction.

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. It is obvious that the uniformity of rules of substantive law on damages may turn out to be of little value if domestic rules on evidence produce diverging results in this regard (and may, therefore, invite forum shopping). In a normal Art. 76 CISG case, on the other hand, the aggrieved party only has to show the contract price and the price of the goods as listed on an exchange, so that even a summary judgment, provided that this mechanism is available in the jurisdiction concerned, may be applied for. Diverging rules on evidence then can do no harm to the uniform application of the Uniform Law.

Art. 76 (1) CISG also fixes the decisive date for the "current" price, which is required for this "abstract" calculation of damages in order to calculate the difference between the current and the contract price. In principle, this is the date of avoidance, Art. 76 (1) sent. 1 CISG; if the party claiming damages has taken over the goods, it is the date of taking over, Art. 76 (1) sent. 2 CISG. However, the anticipatory breach of contracts for delivery in the future was not, as far as I could see, specifically considered, and the drafters only had current prices for goods to be delivered at the time of (i.e. upon) avoidance in mind, as the alternative in Art. 76 (1) sent. 2 CISG reflects.

1. The basic rule of using the date of avoidance as the decisive date for determining the "current" price was a compromise resulting from long and engaged discussions in the working teams and at the conference in Vienna: the proponents of this solution had hoped for more certainty than could be expected from the alternative proposals and the solutions contained in earlier drafts, i.e. to choose the date at which the party aggrieved could first have avoided the contract as the decisive date. In the discussions in Vienna, it was made clear, however, that in exceptional situations, not the date of actual avoidance, but, under Art. 77 CISG, an earlier date, namely the date upon which avoidance could have first been declared would be decisive. Thus, due to the duty to mitigate damages under Art. 77 CISG, damages calculated at the "current" price on the first date at which the aggrieved party could have avoided the contract could lead to the same result as the -- discarded -- proposals to take this date as the general reference date. However, if my memory serves me correctly, all present in Vienna assumed that "current" prices in Art. 76 CISG meant the prices for delivery at the time of breach and avoidance.

2. In cases of anticipatory breach under Art. 72 CISG -- or, likewise, breach of an instalment obligation and avoidance with respect to future instalments, Art. 73(2) CISG -- the question as to which was the earliest date at which the aggrieved party could and should have avoided as a reasonable measure to mitigate damages, is as difficult to answer as in cases of calculation of damages under Art. 75 CISG, dealt with supra at II. However, the calculation of damages under Art. 76 CISG in cases of anticipatory breach may cause additional problems.

a) Since an anticipatory breach can occur long before the date at which performance is due, the "abstract" calculation of damages under the market price rule may initially produce odd results if current prices for the goods at the time of avoidance are decisive -- as the basic rule of Art. 76 CISG seems to say --, in particular in fluctuating markets. For example, the seller sells a commodity at the end of 2005 for delivery in early 2008, and repudiates the contract in early 2006. If the buyer consequently avoids in early 2006 and calculates his damages on the basis of the then-current price, he may take a gamble: if prices go up by the delivery date -- presumably the date at which the buyer actually needs the goods for his production or his customers -- the calculation based on market prices in early 2006 might not yield enough to adequately cover the buyer in early 2008. On the other hand, if prices fall by early 2008, damages calculated on the basis of market ("current") prices in early 2006 may result in a windfall profit for the buyer. Likewise, if the buyer of goods that are to be delivered in 5 annual instalments refuses to take delivery of the second instalment, thus giving the seller good grounds to conclude that the purchaser will not perform in the years to come, either, the difference between the market and the contract price of the future instalments at the time of (declaration of) avoidance may provide an -- apparent -- windfall profit for the seller claiming damages on the basis of Art. 76 CISG if prices are lower in the years to come, i.e. at the time at which deliveries were actually due. Did the drafters of Art. 76 CISG make a mistake, or is this interpretation of Art. 76 CISG wrong?

b) A formula similar to "the current price at the time of avoidance" can be found in other projects for the unification of law. However, domestic legal systems, such as the Swiss Code of Obligations in Art. 191(3) OR, the German Commercial Law in § 376(2) HGB, § 376(2) Austrian Commercial Code, the Italian Civil Code, Art. 1518, Art. 51(3) SGA, and the UCC § 2-708, use the term of performance (Erfüllungszeitpunkt) of the contract breached as a reference date, with the consequence that the difference between the contract price and the current price at this date determines the losses of the aggrieved party to be recovered under the market price rule. If there is a difference in current prices between those at the date of avoidance and those at the time of performance, the latter is decisive, with the consequence that -- at first sight -- the discrepancies between abstract and actual losses, which could result in windfall profits, cannot occur. Is this solution a better one? And is it really different to the one under Art. 76 CISG?

c) In cases of anticipatory breach, the apparent difference between the date of avoidance and the future date of performance, as reference dates, may be based on an excessively narrow understanding of the formula "current price at the time of avoidance": the rationale for allowing an abstract calculation under the market (current) price rule in Art. 76 CISG is to alleviate the aggrieved party's situation by treating it as if that party had indeed made a cover transaction. In other words and as discussed above, the calculation of damages is based on a hypothetical cover transaction. This hypothetical cover transaction must be based on terms and conditions comparable with those of the contract breached, as is the case if the aggrieved party does actually cover, and then calculates its damages under Art. 75 CISG (supra at II.1.): if performance is due at a future date, under Art. 75 CISG, the aggrieved party must (try to)
cover by concluding a contract for future performance. The same principle applies to the hypothetical cover under Art. 76 CISG: the aggrieved party has to calculate its damages as the difference between the contract price and the current price for the goods at the future date of performance. In other words, the current price at the time of avoidance under Art. 76 CISG is the current price for the goods at a particular future date.[25] i.e. the price in the futures markets at the date set out in the contract breached. This is confirmed by regarding the contract as an asset of the parties. If the value of this asset has to be determined, for example, because the contract is to be sold to another party, one would have to look at "what it is worth" now, considering the prices for such goods at the time of delivery.[26] The same reasoning applies if this "asset" is destroyed by an anticipatory breach.

d) As was mentioned in the discussion on Art. 75 CISG, the difficult cases are those where there is either no futures market for the goods at all and, therefore, no "present current prices for goods available at some future date(s)", or where determination of the price at the exact -- future -- delivery date is not possible at the time of avoidance. Is Art. 76 CISG inapplicable to these cases, with the consequence that the aggrieved party has to revert to Art. 75 CISG or Art. 74 CISG in calculating its damages? The answer must clearly be "no". Art. 76(1) sent. 2 CISG can only be interpreted as the current price for delivery now, i.e. at the time of taking over the goods, and not at a future date. This must also be of significance for the interpretation of sent. 1. However, it is not only the wording and its interpretation, but the ratio underlying Art. 76(1) sent. 1 CISG that necessitates the interpretation that, absent a futures market that allows for the determination of future prices for goods, current prices for delivery now must suffice. If one accepts that the calculation under Art. 76 CISG is based on a hypothetical cover transaction, the answer must be the same as in cases of actual cover under Art. 75 CISG; the hypothetical cover transaction under Art. 76 CISG must not be treated differently from an actual cover transaction under Art. 75 CISG. Furthermore, in most cases, there will not be a difference anyway, as the actual cover under Art. 75 CISG must be undertaken "reasonably" at current market prices. To use the current prices at the time of avoidance as a substitute for the calculation under Art. 76 CISG, if future prices for goods at the intended date of delivery cannot be ascertained, is also in line with the policy underlying Art. 76(2) CISG, which enables another market to be chosen as a reasonable substitute if there is no current price at the place of delivery. Finally, a (hypothetical) cover at current prices for goods at the time of avoidance may also be required if the forecasted future prices for the goods are considerably higher, which is often the case.

e) Thus, calculation of damages on the basis of current prices at the time of avoidance, although delivery was not due until a future date, again raises the possibility, mentioned above, of windfall profits for the aggrieved party (supra at III. 2.a)) if prices fall, and of actual losses if prices rise and are high at the time of actual performance. However, the latter problem should not raise any concerns, as rising prices are a risk taken by the aggrieved party in calculating its damages "abstractly" under Art. 76 CISG on the basis of current prices for delivery at the time of avoidance. The possibility of windfall profits should not simply be disregarded in an off-hand manner as an argument against the application of Art. 76 CISG in cases where there are no future prices available for the goods at the time of delivery. But windfall profits could be controlled and avoided, to a certain extent, under the duty to mitigate damages contained in Art. 77 CISG.[27] As in the case of calculation of damages under Art. 75 CISG, the duty to mitigate may require waiting (supra at II. 2. and 3.). Since there is, in my opinion, no reasonable way of pinpointing the precise moment at which the difference between the contract price and current prices under Art. 76 CISG should be determined, such as by choosing a hypothetical date for the (hypothetical) cover transaction, mitigation of damages may then require the aggrieved party to undertake an actual cover transaction and to calculate its damages under Art. 75 CISG. In other words, in situations where the calculation of damages under Art. 76 CISG would almost certainly result in windfall profits, for example, because current spot market prices are at a peak, the aggrieved party may then be under a duty to wait and then resort to Art. 75 CISG. In such a case, calculation of damages cannot be based on Art. 76 CISG, but only on Art. 75 CISG. The "circumstances" to be considered in deciding whether it is a reasonable measure to wait and to revert to an actual cover transaction are similar to those in cases where an actual cover transaction was intended anyway, including the (un)certainty of price developments, on the one hand, and the possible further costs of taking early (premature) cover or, rather, avoiding such costs, on the other (see supra at II.3.). A duty to mitigate by undertaking an actual cover transaction is rare: only if prices are very certain to fall could the aggrieved purchaser be required to forego its right to calculate its damages under Art. 76 CISG, and to make an actual cover purchase at a later point in time. It is also conceivable that an actual cover purchase of large quantities of a scarce commodity may drive prices up, so that actual cover becomes more costly than hypothetical cover at the time of avoidance, thereby negating its advantage as a loss-mitigating measure.

In summary, the party aggrieved may calculate its damages under Art. 76 CISG by using the prices for the goods at the future date(s) as fixed in the contract breached. If such future prices are not available, these are to be substituted with prices current for the goods at the time of avoidance, unless the duty to mitigate requires waiting and undertaking an actual cover transaction at a later point in time. However, as with the calculation of damages under Art. 75 CISG, only under rare circumstances will the aggrieved party be required to wait and cover at a later time when prices are more beneficial for the party in breach. Furthermore, the party in breach has to demonstrate the circumstances, for example, a predictable price development at the time of avoidance, which made it reasonable to wait and undertake an actual cover transaction at lower (in the case of an aggrieved purchaser) or higher (in the case of an avoiding seller) prices than the current prices at the time of avoidance.

IV. OPEN PRICE TERMS

The application of Arts. 75 or 76 CISG in cases of anticipatory breach may cause problems if the future price for the goods to be delivered under the contract is not yet determinable at the time of avoidance. I have tried to develop solutions for these situations supra at II., and III. However, not only the "prices of the goods at the date of delivery", but also the contract price itself, which is the second factor of the calculation under Art. 75 or Art. 76 CISG, may be uncertain at the time of avoidance. Open price contracts, according to which the price is to be determined later -- but is still determinable --, are valid contracts under the CISG, despite the misconceived Art. 14(1) sent. 2 CISG.[28] Therefore, if, for example, the contract price in a contract, concluded in 2006 and to be performed in 2008, should be determined at the time of performance by adding a certain percentage to the then-current prices for the goods in question, this would be a valid contract. However, in the case of a premature breach, it would be difficult to determine the contract price, as the prices
calculation of damages

argue that it may well have breached the contract, but can, by failing to cooperate

such calculations are, at first sight,

underlying my

contract price. Of course, many more situations are conceivable and I do

ask the buyer to specify such features; if the

follow the route laid out in

harvest of a farm's produce, or the seller

either a ceiling is

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3.

issue a split award and leave the

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awards, the exact calculation could be left until later, when the necessary

be quantified at

a court or tribunal should, if its procedural rules

would be 538 $+ 37.66 $(7% of

declaration of

is the application of Arts. 75 and 76 CISG excluded in these cases, and the party aggrieved directed back to Art. 74 CISG, with its

inherent difficulties of showing and proving its lost benefit of the bargain? The issue has to be tackled on two levels, of which only one is the Uniform Sales Law; the other is the procedural rules of the court or arbitration tribunal and their flexibility in "shaping" decisions and awards, and, of course, the pleadings and motions of the parties. However, the variety of open price term contracts does not allow for a

hard and fast formula. Consequently, I shall only deal with a few examples.

1. If the parties do not determine the price and do not provide for its determination, but nevertheless intend to be bound, Art. 55 CISG applies.[30] Some legal writers regard Art. 76 CISG as inapplicable in such cases, as both factors needed to calculate "abstract"

damages -- contract price and current price -- are apparently the same.[31] However, since Art. 55 CISG refers to current prices at the
time of the conclusion of the contract, while Art. 76(1) sent. 1 CISG refers to the time of avoidance, which could result in, as set out above, the prices for goods at some future date,[32] there could very well be a difference between the contract price and the current price.[33]

2. The price could be based on a current price for the same goods plus a surcharge, or on the prices of some other commodity -- wheat, silver, etc. -- listed on an exchange. If future prices are also available on dates that coincide with the contractual delivery dates, there is no problem in calculating the future contract price. For example, a contract to deliver gas oil in April 2006, cif Rotterdam, is repudiated by the seller and avoided; the price was set at 7% above London listed prices and was listed on February 13, 2006 (the date of the
declaration of avoidance) for April 2006 at 538 $/t.[34] The damages of the buyer calculated under Art. 76 CISG as of February 13, 2006 would be 538 $ + 37.66 $(7% of 538) x quantity (tons) of the goods. If, however, no future prices are available (in one form or the other), a court or tribunal should, if its procedural rules permit and the aggrieved party so requests, issue a decision or award requiring the party in breach to pay, as damages, the difference between the contract price and the current price for the goods at the time of delivery -- to be quantified at the time of delivery. In other words, the exact amount of damages (i.e. the sum of money to compensate for the damages) must be calculated at a later point in time. Depending on the applicable law governing the enforcement of decisions and/or awards, the exact calculation could be left until later, when the necessary factors for the calculation, namely the current price at the time of delivery, become known. Alternatively, this amount could be determined by a neutral third party expert, or the court or tribunal could issue a split award and leave the fixing of the exact amount of damages to the second part of its award.

3. Where there are additional contingencies, such as price decreases or increases depending on the quantity of goods ordered, or the quantity depended on the purchaser's delivery orders in the future (see supra), or certain features -- and, thereby, the price of the goods -- depended on a specification by the buyer which the buyer fails to make, it would appear to result in a dead end for the aggrieved party's damages claims. However, one must first consider how speculative the contingencies really are, and what solutions the CISG proposes in other cases for dealing with comparable contingencies. One must also take the policy, expressed in Art. 76(2) CISG, of finding substitute solutions into account.

a) In the case of requirement contracts, where prices may depend on quantities and these, in turn, may depend on delivery orders to be made in the future, there will usually be a stated limit of what the purchaser may order and the seller has to deliver. In most cases, a bracket or a ceiling for the quantities the buyer can order will be set. If he repudiates the contract before ordering, it is proposed that a presumption should arise that the buyer would have ordered the maximum amounts, unless the seller -- who would suffer a disadvantage if prices decrease with increasing quantities -- shows that, for whatever reason, the buyer would or could have ordered less. Only if no ceiling was set for the quantities the purchaser could order, and could not be determined on the basis of usages or practices established between the parties -- Art. 9(1) and (2) CISG -- are Arts. 75 and 76 CISG rendered inapplicable. This is to be regarded as a consequence of the rather speculative deal entered into by the seller: he who agrees to deliver any quantity ordered by the other party takes the risk that he cannot give any certain evidence of damages if the other party orders nothing. The same applies to an output contract under which the buyer agrees to take all, or a certain percentage, of the seller's output (for example, during a year): either a ceiling is expressly or implicitly fixed, for example, on the basis of the maximum catch of a fishing vessel, or the most fruitful harvest of a farm's produce, or the seller takes the risk that Art. 76 CISG will be inapplicable.

b) In the case of a buyer's right to specify certain features of the goods and his subsequent failure or refusal to do so, one should follow the route laid out in Art. 65(1) CISG: the seller, aggrieved by the buyer's anticipatory breach, may, despite the anticipatory breach, ask the buyer to specify such features; if the buyer does not comply, then the seller may specify them himself and, thereby, set the contract price. Of course, many more situations are conceivable and I do not claim to have a solution for all of them. However, the policy underlying my proposals is to allow calculation of damages under Arts. 75 or 76 CISG even in cases where the factors necessary for such calculations are, at first sight, uncertain. This policy is based on the conviction that it should not be the party aggrieved that should suffer from these uncertainties -- it would violate my sense of justice (and hopefully not only mine) if the party in breach could successfully argue that it may well have breached the contract, but can, by failing to cooperate in determining the contract price, prevent the calculation of damages and, thereby, avoid liability altogether.
The following analysis is a slightly abridged version of a contribution to *aliber amicorum* for the eminent Swedish scholar Professor Jan Hellner. This book is forthcoming in 2007. Since this author is referring to some of the theses of this contribution in the upcoming 4th ed. of his "Internationalen UN-Kaufrecht", it seems justified to make them available on CISG-online.

1. Cf., e.g., *Mankowski* in Münchener Kommentar Handelsgesetzbuch, C.H.Beck München, vol. 6, 2004, Art. 76 para 5; Soergel/Lüderitz/Dettmeier, Bürgerliches Gesetzbuch, Schuldrechtliche Nebengesetze 2, CISG, Kohlhammer, Stuttgart 2000, Art. 76 CISG, para 5; Witz/Salger/Lorenz/Witz, International Einheitliches Kaufrecht, Verlag Recht und Wirtschaft, Heidelberg 2000, Art. 76 para 10; *Hornung* in Schlechtriem/Schwenzer, Commentary on the Convention on the International Sale of Goods -- CISG --, Oxford University Press, 2nd ed. 2005, Art. 72 para 35; *Gruber ibidem* Art. 76 para 12; cf. also *Stoll*, Zur Haftung bei Erfüllungsweigerung im Einheitlichen Kaufrecht, RabelsZ 52, 1988, pp. 617-643, who distinguishes between the two types of anticipatory breach and reasons that, in case of a deterioration of the obligor's ability to perform, the decisive date for calculating damages should be the time when performance should have been made; see also -- more generally referring to this date -- *Hornung ibidem* and the following analysis in the text sub II. and III.

2. As to the possibility of calculating damages under Art. 74 CISG as the difference between the contract price and the price of a cover transaction even without, or before avoiding the contract, see Schlechtriem, Schadenersatz und Erfüllungsinteresse, in: Festschrift für Apostolos Georgiades, C.H. Beck, München, Ant. N. Sakkoulas, Athen, Stämpfli, Bern, 2006, 383-402, 397 f.; English version see <http://www.cisg-online.ch/cisg/publications.html>.

3. Normal benefit of the bargain means the normal profit margin of the contract breached, which the aggrieved party “salvages” by a real or hypothetical cover transaction. This presupposes, of course, a profitable bargain to begin with, i.e. for the buyer, a contract price lower than the price he had to pay to cover, and for the seller, a contract price higher than he could have sold for elsewhere.


5. Cf. *Mankowski ibidem* (fn. 1), Art. 75 para 10, who points out that this requirement must have its limits: cover transactions have to be undertaken in a market situation not different from that of the contract breached.


8. CIETAC (China International Economic and Trade Arbitration Commission) of June 4, 1999, <http://cisgw3.law.pace.edu/cases/990604c1.html>; since it was hard to resell ex warehouse, the tribunal held that “accordingly, a resale price which was lower than the market price at that time, is reasonable”.

9. Court of Appeal Düsseldorf 14 January 1994, <www.CISG-online.ch> no. 119 (3 months in case seasonal good, which were difficult to dispose off, still reasonable); *Downs Investment PTY Ltd v. Perwaja Steel SDN BHD* Supreme Court of Queensland 17 November 2000, <www.CISG-online.ch> no. 587 (2 months still reasonable for resale of scrap metal).

10. Cf. *Witz*, ibidem (supra fn. 1), Art. 75 para 7: corresponding to Art. 77 CISG.


12. Exchanges list prices of certain goods available at a future date, but periods vary according to goods; e.g., the London Metal Exchanges -- LME -- lists prices for three months ahead only. Crude oil WTI (West Texas intermediate) contracts are traded now (February 17, 2006) for 2008 at 63 $/bar (source: Frankfurter Allgemeine Zeitung 17.2.2006, p.22). Besides commodities traded on exchanges, specialized traders may offer certain goods for delivery on dates even further in the future; according to my information, they may buy and store now, adding a "contango" (con tangens) for storage costs, interest, currency risks, etc., to the price, or by concluding hedging contracts.

13. But comparison of costs may be difficult: while buying from a trader for future delivery may result in (his) surcharges for storage, interest etc. (previous fn.), being incurred, buying for delivery now may cause similar costs to be incurred by the purchaser, which can be recovered under Art. 74 CISG as "further damages": the buyer has to store the goods, and he loses interest on the purchase price, which he has to pay prematurely.

15. Cf. references in the following fns.

16. Most authors report this as the regular solution and ignore the possibility of purchasing for delivery in the future, cf. Lüderitz/Dettmeier ibidem (supra fn. 1), Art. 75 para 17; Mankowski ibidem (fn. 1), Art. 75 para 9; Stoll/Gruber ibidem (fn. 1) Art. 75 paras...
17. Differently, however, Stoll ibidem (fn. 1), p. 627, in case of anticipatory breach by loss or deterioration of performance capacity: a claim for damages arises only at the time of performance.


19. Current prices are primarily, but not only, those listed on exchanges. Current prices can also be researched and published by specialized papers and bulletins. Goods traded in markets where current prices are listed are mostly commodities in the widest sense, including, e.g., semi-conductors, scrap metal, copper-wire and other semifinished materials, but some specific goods may be traded at current prices, too, e.g. stamps, antique cars, etc. Mankowski advocates using Art. 55 CISG as a support, with the consequence that "current prices" refers to prices "charged at the time [of the conclusion of the contract] for such goods sold under comparable circumstances in the trade concerned"; other authors use the same formula without reference to Art. 55 CISG, cf., e.g., Magnus in Staudinger ibidem (previous fn.), Art. 76 para 13 with numerous references.


22. HGB = (German) Commercial Code.

23. Repudiation by the buyer: "market price at the time and place for tender", but see also UCC § 2-723 in case of repudiation by the seller.

24. The preparatory drafts for ULIS had also used the time of delivery as the reference date in cases of anticipatory breach, cf. Stoll ibidem (fn. 1) p. 636, but this special provision was dropped in the final version of 1964.

For a more extensive, but still interesting comparative law overview, see Ernst Rabel, Das Recht des Warenkaufs, vol. 1 reprint 1957 of the ed. 1936, de Gruyter Berlin, pp. 454-468, 463: the correct point in time is the date of delivery.

25. Cf. Hornung ibidem (fn. 1), Art. 72 para 25 (current price on the basis of a contract in the futures market); but see Stoll ibidem (fn. 1) at pp. 636, 637, who advocates the use of current prices at the time of avoidance "as the wording of Art. 76 says"; proposals to use the prices at a future delivery date would necessitate difficult calculations ("scher erträgliche Rechenoperationen"). Courts and the majority of authors prefer calculation based on current prices at the time of avoidance, cf. ICC-Paris award no. 8502 of 01.11.1996; UNILEX, Court of Appeals Hamburg of 04.07.1997, UNILEX; Tallinn Circuit Court of 19.2.2004, www.CISG-online.ch> no.826 (instalment contract concerning tomato paste to be delivered pursuant to delivery orders of the buyer, who repudiated by failing to send delivery orders for most of the outstanding quantity. Prices were dropping, and the court calculated the seller's damages under Art. 76 CISG by using the current price at the place of delivery -- cf Turkish port -- at the time of avoidance; Witz ibidem (fn. 1) Art. 76 para 19; Lüdenitz/Dettmeier ibidem (fn. 1), Art. 76 para 5 (but advocating control by Art. 77 CISG; the passage is not very clear in regard to avoidance); Magnus ibidem (fn. 18) Art. 76 para 15; Mankowski ibidem (fn. 1), Art. 76 para 5; Peter Huber in Münchener Kommentar Bürgerliches Gesetzbuch, C.H. Beck München, vol. 3, 4th ed. 2004, Art. 76 CISG para 5; Schönle in Honsell (ed.), Kommentar zum UN-Kaufrecht, Springer-Verlag Berlin Heidelberg 1997, Art. 76 para 13.


27. Mankowski (fn.1), Art. 76 para 5; Lüderitz/Dettmeier ibidem (fn.1), Art. 76 para 5; Stoll ibidem (fn. 1) p. 635.

28. Cf. for an overview of the meaning and controversial interpretations of this provision Schlechtriem/Schwenzer/Schlechtriem ibidem (fn. 1), Art. 14 paras 8-11.

29. e.g. a right of the purchaser to specify form, measurement or other features of the goods -- cf. Art. 65 (1) CISG -- may entail price variations as a consequence of this specification. An anticipatory breach and avoidance before specification leaves the contract price undetermined.

30. I shall not deal with the controversial relationship between Art. 14(1) sent. 2 and Art. 55 CISG, but refer to my analysis in Schlechtriem/Schwenzer ibidem (fn. 1) Art. 14 paras 8-11. Stoll/Gruber ibidem (fn. 1) Art. 76 para 5, argue that Art. 55 is inapplicable because Art. 76(1)sent. 1 requires a "price fixed by the contract" and not -- as in Art. 55 CISG -- merely a contract price. I do not agree, as Art. 55 refers to (the absence of) a price expressly or impliedly fixed.

31. Cf. Magnus ibidem (fn.18) Art. 76 para 25; Lüderitz/Dettmeier ibidem (fn. 1) Art. 76 para 2 (if no contract price is fixed with sufficient certainty).
32. See text at III.3.
