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Chapter 2. Mitigation of Damages

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It would not be a great exaggeration to say that the concept of mitigation of damages represents one of the basic notions of the law on contract damages well known to almost every lawyer practicing in the field of contract law, especially in international settings. That notwithstanding, it is one of the legal principles that are, in many instances, difficult to understand and to apply in particular cases.

In an authoritative comparative law treaty published about thirty years ago and devoted to the legal consequences of breach of contracts, the problem of mitigating damages was presented in a nutshell that revealed the universality of this concept in substance, although it exists in different forms. (1) In spite of the decades that have passed since that time, the approach to this classical problem of contract law in theory and practice has not changed in principle, and the same approach may be used at present when dealing with the topic.

1 Theoretical and Formal Sources of the Concept

In the context of the notion of mitigating damages, reference is often made to a "duty" to mitigate damages, but at the same time this mode of expression is often and justly criticized. The main reason, of course, is that this "duty" is not matched by any corresponding right of the defendant ensuring that mitigation takes place. As a consequence, there is no sanction for "breach" of this "duty"; the only possible result of the plaintiff's failure to mitigate is to reduce the amount of his recovery. Strictly speaking, he does not incur any legal liability in consequence of the breach of "duty".

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Reference to mitigation of damages may imply at least three related ideas. The first is that the plaintiff cannot recover damages in respect of a loss that he ought to have avoided. The second is that if the plaintiff actually gains some benefit in consequence of the defendant's breach, he may have to take that benefit into account. Thus, damages may be reduced because the plaintiff is, as a result of the defendant's breach, discharged from his obligations to perform and so saves the expense of performing; or because he is enabled in consequence of the breach to obtain some profit or advantage that he would not otherwise have obtained. Under this second notion, the question is whether in fact his loss was reduced or "mitigated". Sometimes it is called "mitigation in fact". In some legal systems such as in common law countries, the expression "mitigation" is used in relation to both of the above ideas. In the civil law tradition, the distinction between them is sharper. Namely, the first situation is considered under the heading of the fault of both parties, and the second takes into account the compensating advantages.

The third related idea is what in common law jurisdictions is called contributory negligence. In civil law jurisdictions, this is treated as the situation in which loss is caused partly by the fault of the defendant and partly by that of the injured party. For the purposes of legal certainty, especially in the field of contractual relationships, it seems more plausible that this notion should be separated from that of the "duty" to mitigate since, unlike contributory negligence in mitigation, the plaintiff can only be charged with failing to take positive steps to avoid the harmful effects of an event brought about solely by the defendant's default. Another point that deserves to be taken into account from this perspective is that the notion of contributory negligence is predominantly associated with tort liability. But it should not be disregarded, since in borderline cases it might become necessary to consider this approach as well.

Mitigation as a legal concept directed to the limitation of damages has been developed in common law more extensively than in the civil law tradition, although considerable legal materials relating to the subject are to be found in national jurisdictions belonging to the former legal circle as well.

It would not be incorrect to state that it is universally accepted that the "duty" to mitigate loss may be said to have two aspects. First, the plaintiff may be bound to take positive steps to minimize the loss which would otherwise flow from the defendant's default. Second, he may be bound to refrain from taking steps which but for the default would have been properly taken under the contract, but which in view of the default may unjustifiably augment the loss.

The principle that the victim of a breach of contract cannot recover damages in respect of a loss that he ought to have avoided by taking reasonable steps is clearly recognized in practically all legal systems. In countries of the continental legal tradition, it is either expressly stated in the positive law, as in German law, (2) or established in case law as, for example, in France where codified law does not recognize the concept of mitigation as such, but some similar results may be obtained by application of the general rule about fault. (3) With regard to the law in France, the matter is considered, if at all, as an aspect of the need for

a causal link. (4)

Following the continental legal tradition in its German version, the Russian Civil Code, similar to new civil codes in other CIS countries, includes a provision that reflects the idea of mitigation of damages, although under the heading “fault of the creditor”. Article 404 of the Russian Federation Civil Code stipulates that the court shall also have the right to reduce the amount of liability of the debtor if the creditor intentionally or by negligence facilitated an increase in the amount of damages caused by non-performance or improper performance, or did not take reasonable measures to reduce it. The last part of the provision clearly points to the concept of mitigation of damages as it has evolved in modern practice. It should be mentioned that in the practice of the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry, the court that at present occupies the dominant position in dealing with international commercial disputes in the post-Soviet area, reference to the rule relating to mitigation of damages is among the most frequently used rules when Russian law is applied to the merits of the dispute.

The common law doctrine of mitigation usually starts by stating that the principle breaks down into three basic rules. First, a party injured upon the occurrence of a breach of contract may not hold the contract breaker responsible in respect of losses that he could reasonably have avoided. Second, expenses reasonably incurred in avoiding or minimizing a loss resulting from a breach of contract may be charged to the contract breaker. Third, regardless of whether an injured party in the circumstances had to mitigate, any action he takes after the breach of contract, which in fact avoids or minimizes the loss, will serve correspondingly to diminish the contract breaker's liability in damages. (5)

In common law jurisdictions, the source of the rule is relevant case law. (6) But at the same time, even with regard to English law, according to authoritative opinions, the expression “mitigation of damage” is an umbrella term applied in books and cases to a number of matters, some of which are related and some of which are completely unconnected. (7) To a surprising degree, the subject is liable to hardly any critical examination in the leading texts. (8)

In the early sixties, an authority in the field of international commercial law submitted in English legal literature (9) the view that the establishment of the modern doctrine of mitigation used by the contract breaker as a frequent defence to reduce the damages he was liable to pay had undergone two stages. The first was the recognition that the loss reduced by an aggrieved party should be taken into account when calculating his damages against the contract breaker. In the second stage, the aggrieved party did not actually reduce his loss, but a reasonable person would have done so, and the question was whether the plaintiff's negative attitude, his failure to act, should be taken into account in the calculation of damages. Describing the true basis of the doctrine of mitigation in the same analysis, the author pointed to the rule governing the measure of damages, as laid down in, and derived from *Hadley v. Baxendale*.

Nowdays there are many factors pointing to the tendency to recognize the mitigation rule, not only in national laws but also in international arbitration practice. (10) It has also been submitted that the obligation to mitigate damages belongs to usage, reflected in mercantile practice, which seems regularly to guide merchants in their transactions and arbitrators in their decisions. (11)

Now it is not very difficult to find international arbitration cases where the rule on mitigation of damages has been considered to be a part of general principles of law and applied in international cases. For example, in an ICSID case the tribunal stating that the duty to mitigate damages was not expressly mentioned in the BIT, ruled, however, that this duty could be considered to be part of the General Principles of Law which, in turn, were a part of the rules of international law applicable in the dispute, according to Article 42 of the ICSID Convention. (12)

In the practice of the Iran-US Tribunal, the mitigation rule was applied in a number of instances. In one case, the rule was applied notwithstanding the tribunal stating that it was unable to discern a conflict between Iranian and United States law on the issue of mitigation. (13)

According to one observation, (14) in frequent cases of major international arbitral disputes on large construction cases or long-term contracts – where an arbitral tribunal had to resort to some denationalized rules as a primary, supplementary or corrective source of law to come to a justified and justifiable decision – the award was essentially based on not more than a handful of key notions. These may be said to form part of the general principles of law common to civilized nations or *lex mercatoria*, or of a transnational law. One of the most important of these notions is the duty to mitigate damages.

Another evidence of a fundamental character concerning the idea of mitigating damages in international relations is the Governing Council of the UN Compensation Commission's inclusion, in guidelines for awarding compensation for business losses caused by Iraq's unlawful invasion and occupation of Kuwait, a provision to the effect that the total amount of compensable losses would be reduced to the extent these losses could reasonably had been avoided. (15)

2 Content of the Concept in Practice

The principle of mitigation can be applied in a great variety of situations. But all of these can be summarized in a simple formula: an aggrieved party must take steps to minimize his loss, on the one hand, and he must abstain from doing anything to increase his loss on the other.

Along with this general idea, the following observation should be also taken into account: the party who ought to mitigate will not be held to an extraordinary standard of behaviour. The extent to which there should have been mitigation is a question of fact, and the plaintiff must take steps consistent with demands for reasonable and prudent action. The plaintiff will not have to embark on a difficult and hazardous course of action, nor to act in such a way as to impair his commercial reputation. Also it is worth noting that, as suggested, one should not make a fetish of the doctrine of mitigation. (16)

With regard to that part of the concept directed to minimizing loss, the most common approach to avoiding the loss is that an aggrieved party makes a substitute contract. For example, when a seller of goods fails to deliver, the buyer must go into the market at a relevant time to buy substitute goods. If he fails to do so, he cannot recover any further loss he may suffer because the market continues to rise or because he is deprived of the opportunity of making a profit out of the use or resale of the goods. (17) This means that the amount of loss he could have avoided by making a substitute contract is subtracted in calculating his damages. In the case of sale of goods, it has been suggested that this principle inspired the standard formulas under which the buyer's or seller's damages are based on the difference between the contract price and the market price in that market where the injured party could have arranged a substitute transaction for the purchase or sale of similar goods. (18)

Nevertheless, speaking of substitute transaction as a means of avoiding loss, it should be remembered that mitigation of damages will be adequate only if a new deal is a true substitute for the old one.

On the other hand, a tribunal could find that an adequate substitution deal would not be feasible as a means of avoiding the loss. So, while considering whether during a relevant period the claimant could have procured replacement supplies of similar goods and thereby mitigated the loss, one tribunal found, on the basis of witnesses' statements, that such possibilities did not exist. Due to production costs, environmental constraints, competitive factors and other reasons, no existing factory was prepared to supply necessary items to the claimant at prices making profitable a resale to the claimant's purchasers, who all manufactured or marketed the end product. The only alternative, therefore, was to wait for a new factory to be established similar to the factory figuring in the agreement between the parties. (19)

Sometimes, in order to meet the requirement to avoid unnecessary loss related to the breach of the contract, instead of entering into a cover deal the aggrieved party has to inform the other party of his intention to undertake other measures to mitigate damages in order to give the other party the opportunity to cooperate in order to reach optimal results. An illustration of this approach in a particular case can be found in the following situation based on an international arbitral award. (20) In this case, the buyer received a shipment of coffee from the seller that did not correspond with the quality description in the contract. According to Hamburg coffee trade usage, the buyer should then have determined the price of the agreed goods at the time of the incorrect performance by making a "coverage deal", that is, by buying a certain quantity of coffee of the contractually agreed quality. However, due to a temporary lack of suitable coffee on the market, the buyer bought coffee of a higher quality. The buyer also sold the coffee supplied by the seller to a third party and claimed damages in arbitration for the lower price he obtained for it. The arbitrators found that, while it was acceptable for the buyer to buy higher quality coffee for a coverage deal if there was a shortage of suitable coffee on the market, the buyer breached his obligations under the Hamburg usage by failing to mitigate damages and to inform the seller of his intention to re-sell the coffee to a third party, as the seller was thus incapable of "influencing the sale and the sale's timing".

The idea of necessary cooperation between the parties in cases where the problem of mitigating damages might arise finds its application in modern arbitration practice. In one case, an arbitral tribunal considering the claimant's request for a refund of the purchase price observed that although the defendant was obligated to perform according to the contract, the claimant had been forewarned by the defendant concerning its problems in providing for an essential part of the goods to be delivered, and could have limited the damages it suffered by terminating the contract at an earlier stage. (21)

In another award, the tribunal ruled that it appeared, at a minimum, that the claimant's offer to renew the contract for a certain period of time presented the defendant with an appropriate opportunity to mitigate its damages. The tribunal believed that it would be unfair for one of the parties to deny the other the opportunity to correct a situation created by its improper conduct. (22)

There is an example of the case where the tribunal found it would not be appropriate to reduce the compensation for damages suffered by reason of a failure of the claimant to observe its obligation to mitigate damages, taking into account the conduct of defaulting party. The circumstances, which led the tribunal to this decision, are as follows: the seller (respondent) argued that the buyer claiming damages for the delay and improper delivery of

the goods could have, in sufficient time, offered its clients merchandise equivalent to the subject matter of the contract between the parties, in conformity with its obligation to take all appropriate steps to limit its damage and reduce its losses.

In this case, the boots, which were the subject matter of the contract, had a seasonal character and could not have been sold and delivered to the buyer's clients except at the beginning of the season at the latest. The seller, on the basis of promises made by its own supplier, had, up to a certain time and for a major part of the order, led the buyer to believe that it would be in a position to deliver the goods, admittedly late, but prior to the last moment. Its failure to fulfill these promises only became apparent after it was too late to obtain the merchandise elsewhere. In effect, having regard to the changing demand to which this kind of product was subject, suppliers kept very little in stock. The seller failed to identify the sources the buyer could have turned to in order to obtain merchandise equivalent to that described in the contract.

It is worth keeping in mind that it would be not very wise to claim that a substitute transaction should be always treated as a universal means to avoid the loss. In some cases, a substitute deal might not be adequate to serve as a measure. The authoritative restatement of the contract law in the US stressed that the mere fact that an injured party can make arrangements for the disposition of the goods or services he was to supply under the contract does not necessarily mean that by doing so he will avoid loss. If he entered into both transactions but for the breach, he would have "lost volume" as a result of the breach. (23)

The rule that an aggrieved party must act reasonably to avoid loss is widely recognized and understood to be an integral part of the concept of mitigating damages. That is why it would be useful to refer to its implication in the context of mitigation. In a case frequently cited in this connection, the English decision *Banco de Portugal v. Waterlow and Sons, Limited*, (1932) A.C. 452, 506, stated the rule as follows:

"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

In practice, there are various examples of the application of the rule of reasonable behaviour in mitigating damages. In particular, a party is not bound to take steps to mitigate loss if such steps would be very expensive in relation to the loss to be avoided; he is not bound to engage in complicated litigation with third parties, even though its outcome might have been to reduce the loss; and he is not bound to take steps that are contrary to business ethics and that would tend to lower or ruin his commercial reputation. (24) Thus, in general he should not, for example, spend more on curing a defect in performance than the subject matter without the defect would be worth; nor should he continue to incur expenses for the purpose of tendering performance after the other party clearly indicates that he will refuse to accept it. (25)

Whether an available alternative transaction is a suitable substitute depends on all of the circumstances, including the similarity of the performance and the times and places that they would be rendered. If the aggrieved party acts reasonably in an effort to minimize the loss, but in fact thereby increases it, he may be entitled to recover the increased loss.

The current practice of applying the rule on mitigation provides evidence that this concept could and should be used flexibly. This seems to be crucial to its correct application in the great variety of practical situations where damages are awarded for breach of contract.

Commercial practice provides a number of examples of particular actions or inactions that have been taken as reasonable to avoid loss when the breach of contract has taken place. Undertaking active behaviour seems to be more the rule than the opposite. But constructive arrangements need not only mean making a substitute deal or something similar.

Also, it seems logical that once a party has reason to know that performance by the other party will not be forthcoming, he is ordinarily expected to stop his own performance to avoid further expenditure and to take such affirmative steps as are appropriate to avoid loss by making substitute arrangements or otherwise. (26)

It is necessary to note that that difficult questions concerning application of the rules on mitigation of damages may arise in cases of anticipatory breach of the contract.

As to what could be accepted as an adequate response to comply with the "duty" to mitigate damages, the following example may be useful. In this case, the tribunal found that the conduct of a party amounted to acting under the general principle *exceptio non adimpleti contractus* when the other party turned out to be in default, and this was entirely consistent with the generally accepted principle of mitigation of harm. (27) In the decisions of the Iran-US Tribunal, quite often the claimant's timely disposition of goods or cancelling subcontracts or orders relating to agreements in the wake of the events that took place in Iran was accepted as

a reasonable way to mitigate damages.

The following case gives an example of reasonable action of an aggrieved party to mitigate damages in not quite a standard fashion. (28) A Hungarian export company granted an English importer the sole and exclusive rights for the import and sale of certain Hungarian wines in the territory of the United Kingdom, including in particular a wine called X, for a quite substantial time period. After the exporter terminated the agreement to supply wine X, the importer resorted to arbitration against the exporter, claiming damages for wrongful repudiation of the agreement, consisting, in essence, of a loss of profits together with interest and costs. Among other things, the tribunal considered the problem of whether the claimants had breached their duty to mitigate loss, namely, whether the claimants had taken measures that would have been reasonable to avoid the loss they sustained as the result of the breach of the contract committed by the exporter.

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The tribunal came to the conclusion that the claimants were not acting unreasonably in declining to attempt to expand their sales of Hungarian generic wines. If they had thought it was reasonably possible to sell larger volumes profitably, they could easily have obtained supplies from the defendants and would no doubt have done so. The tribunal accepted the evidence that they could not substantially increase sales of generic wines, and that to have any chance of increasing such sales would have required the launching of a new brand. This, in turn, would have involved a very substantial capital investment represented by promotion costs, with great uncertainty as to the likely degree of success. The tribunal considered that the prospects of increased sales of generic wines were so uncertain and the capital expenditure in launching them was so great that the claimants were quite justified in refusing to take the risk of losing their capital. There was therefore no breach of the duty to mitigate.

The application of the general rule that if the claimant acts unreasonably and does not attempt to mitigate his losses, he cannot recover the extra loss he suffers as a result, can be demonstrated by a case where the problem of mitigation of damages was considered in a situation relating to the performance of monetary obligations paid in a foreign currency. In this case, the tribunal dealt with the claim for damages allegedly incurred due to a change in currency value. The point of departure in his decision was the statement that the currency in which the debt was to be paid fluctuated because the rate of exchange was freely determined on the money market and the creditor was not entitled to expect that the exchange rate would remain stable and that consequently he would not sustain a loss of exchange.

The tribunal held in this case that obtaining a guaranty against exchange rate fluctuations (*Kurssicherungsgeschäft*) could have minimized the foreseeable risk of depreciation of the currency of payment. Such a guaranty could have been obtained for periods ranging from one day to five years. A domestic creditor is expected to hedge against the risk of the exchange rate, which entails relatively minor expenses. This also applied to the claimant in the present case, involving imports from East Africa. It was judged possible to foresee, not only that the currency would continue to decline, but also that a delay in the delivery of the goods might occur. To that extent, the claimant had a duty to mitigate damages. The claimant did not comply with this duty and had to bear the loss, which, incidentally, had become noticeably less as a result of the recovery of the exchange rate of the currency at a later stage. (29)

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Another example of what was considered to be reasonable inactivity not contrary to the mitigation approach was found in an investment dispute involving a private investor and a host state. In this case, the argument of the state respondent that the claimant could have resumed its activities after the lifting of the ban which prohibited its activities in the host country was considered not to be persuasive by the tribunal. The tribunal was of the opinion that the investor, who had been subjected to a revocation of the essential licence for its investment activity three years earlier, had good reason to decide that, after that experience, it should not continue with the investment activity, after which the activity could be resumed. (30)

In another investment dispute where a foreign investor lost its licence to engage in business ventures in the host country, the state respondent contended before the tribunal that the investor could still have sold its interests in investment contracts to a third party and should indeed have done so to mitigate any loss sustained due to the decision to terminate its licence. It was said that both Indonesian and international law pointed to such a duty to mitigate. The investor did not contest that applicable national law and international law both acknowledged the principle of mitigation, but claimed that there was no realistic prospect of its being able to mitigate its loss. Finding that the assignment of corresponding interests was subject to limitations and certain relevant events that took place, the tribunal came to the conclusion that it would have been virtually impossible for the investor/ claimant to find interested purchasers and held there was no failure on the part of the investor to mitigate damages. (31)

On the other hand, in another case (32) the tribunal found that the sudden, unexpected interruption of deliveries to the claimant caused harm to it, which took the form of difficulties in adapting to a new situation requiring changes in manufacturing arrangements during a period of time. But in the absence of indications as to the efforts and attempts made by the claimant during the alleged year of inactivity, the tribunal, considering whether the claimant

took necessary steps to mitigate harm, held that the commercial inactivity of the claimant was caused in part by its inertia.

The circumstances surrounding the performance of the transaction can indicate that inactivity of an aggrieved party does not result in violation of the duty to mitigate damages. Subjective circumstances are taken into account to the extent of relieving an impecunious plaintiff from incurring expenditure, provided that such a situation does not betoken a reprehensible abdication of commercial responsibility on entering into the contractual adventure. (33)

The question of exactly when it is necessary for the aggrieved party to make the substitute contract is answered in some legal systems more or less directly. English law takes the position that it follows from the principle on which the “duty” of mitigation is based, namely that the duty will normally arise only when the claimant has become aware of the breach. (34) In the United States, the approach in dealing with this question, supported by relevant rules of the UCC and case law, is that the injured party is expected to act promptly after learning that the other party’s performance will not be forthcoming. (35)

Arbitration practice unequivocally shows that, from a procedural point of view, reference to mitigation is ordinarily made by the respondent on whom rests the burden of proving that the claimant failed to mitigate avoidable damages by reasonable measures.

3 Evolution of the Rule in International Instruments

The rules about mitigation of damages have recently appeared in a number of international documents produced for the purpose of unifying the legal regulation of international commerce. Among them are legal texts which have a different legal character, namely the instruments with binding effect, as well as those that are sources of so called “soft law”.

Article 77 of the UN Convention on International Sale of Goods (CISG) provides that a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. It stipulates further that if he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

The case law on the application of this article collected in UNCITRAL CLOUT gives examples which facilitate a better understanding of the range of relationships covered by the article. As an example, in a court decision it was stated that if an aggrieved party does not request damages, whether by way of an affirmative claim or by way of set-off, Article 77 does not apply. (36)

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In another case, the court with reference to the authority of the parties (Article 6 of CISG) to derogate from or vary the formula set out in Article 77, concluded that if an aggrieved party seeks to enforce a penalty clause in the contract, Article 77 does not require the aggrieved party to reduce the penalty in order to mitigate the loss. (37)

Addressing the question concerning the point in a legal proceeding at which the issue of mitigation must be considered by a court, the answer to which question is not provided in Article 77, the court, in one decision, concluded that the issue of whether mitigation should be considered in a proceeding on the merits or in a separate proceeding to determine damages was a procedural issue governed by domestic law rather than by the Convention. (38)

Article 77 does not expressly state when the aggrieved party must take measures to mitigate. Several decisions referred to in the UNCITRAL Digest of Case Law on CISG state that an aggrieved party is not obligated to mitigate in the period before the contract is avoided (i.e. at a time when each party may require the other to perform). (39) If an aggrieved party does take measures, however, he must do so within a reasonable time under the circumstances. In one of these decisions, the court found that the seller’s resale of goods to a third party two months after they had been rejected, was reasonable within the context of the fashion industry. (40) In another case, it was found that the buyer’s purchase of substitute goods approximately two weeks after the seller declared that it would not perform was not a failure to mitigate, even though the price in a volatile market had risen sharply. (41) It should be mentioned also that in this case the transaction was characterized as highly speculative.

Article 77 provides that the breaching party may claim a reduction in the damages to be awarded to the aggrieved party in the amount by which reasonable mitigation measures would have reduced the loss to the aggrieved party. The practice of applying this provision indicates that sometimes the reduction was calculated without specific reference to the loss that could have been avoided. In one case, in an award the tribunal found that the aggrieved buyer who failed to mitigate should be entitled only to 50 percent of the difference between the contract price and the price the buyer received when it resold the non-conforming goods to its customers. (42) In another arbitral award, the tribunal divided the loss between the aggrieved buyer and the breaching seller who was claiming payment for partial delivery because of the buyer’s failure to mitigate damages. (43)

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Since Article 77 does not explicitly require an aggrieved party to notify the other party of proposed steps to mitigate losses, it is worth mentioning one decision where lack of such notice led to the conclusion that the claimant lost the right to be awarded damages, which

could have been avoided if the notice to the other party had been given. In this case, the buyer was denied compensation for the cost of translating a manual where the buyer had failed to notify the seller on the ground that if the buyer had done so, the seller could have supplied existing translations. (44)

Article 77 does not directly address the problem concerning which party bears the burden of pleading the failure to mitigate. This is probably one of the reasons why different approaches have emerged in dealing with this question in practice. In an arbitration case, it has been stated that the tribunal should review *ex officio* whether the aggrieved party complied with its duty to mitigate, but that the breaching party had the burden of establishing failure to comply. (45) On the other hand, the court addressing this question stated that no adjustment to damages would be made if the breaching party fails to indicate what steps the other party should have taken to mitigate. (46) The results of analysis of the current practice of applying Article 77 prompt the conclusion that decisions on who has the ultimate burden of establishing failure to mitigate consistently place the burden of establishing the failure of the amount of consequent loss on the breaching party. (47)

It is interesting to note that the idea of the contributory negligence of the aggrieved party, which reflects the traditional approach of continental civil law to the problem of mitigating damages, is also included in the CISG. Namely, Article 80 provides that a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

The UNIDROIT Principles contain a separate Article 7.4.8 dealing with mitigation of harm, which reads as follows:

- "1. The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.
- "2. The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm."

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In this connection, it is useful to consider the Official Comments to the UNIDROIT Principles, since they play an important role in identifying the reasons and the logic of including in this informal codification a particular rule reflecting an internationally accepted general approach. The Comment to the above-mentioned article describes the duty of an aggrieved party to mitigate harm. The purpose of this article is to avoid the aggrieved party's passively sitting back and waiting to be compensated for harm which it could have avoided or reduced. Any harm that the aggrieved party could have avoided by taking reasonable steps will not be compensated. Evidently, a party who has already suffered the consequences of non-performance of the contract cannot in addition be required to take time-consuming and costly measures. On the other hand, it would be unreasonable from an economic standpoint to permit compensation for an increase in harm, which could have been reduced by taking reasonable steps. The steps to be taken by the aggrieved party may be directed either to limiting the extent of the harm – above all when there is a risk of it lasting for a long time if such steps are not taken (often they will consist in a replacement transaction: see Art. 7.4.5) – or to avoiding any increase in the initial harm.

The reduction in damages to the extent that the aggrieved party has failed to take the necessary steps to mitigate the harm must not, however, cause loss to that party. The aggrieved party may therefore recover from the non-performing party the expenses incurred by it in mitigating the harm, provided that these expenses were reasonable in the circumstances (S2).

The UNIDROIT Principles also contain the rule originating from civil law jurisdictions commonly used to deal with a situation implying the "duty" to mitigate damages. Article 7.4.7 (Harm due in part to aggrieved party) stipulates that where the harm is due in part to an act or omission of the aggrieved party, or to another event for which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

Rules on mitigation of damages similar to those contained in the UNIDROIT Principles are also to be found in another informal codification of rules applying to the contracts in general: by the European Union. Article 9:505 (Reduction of Loss) of the Principles of European Contract Law includes two norms reflecting the commonly adopted approach. Making the distinction ▲
P 51 ▼ of the rule on mitigation from what may be called contributory negligence on the part of the aggrieved party, the commentary to the above-mentioned rules indicates that even where the aggrieved party has not contributed either to the non-performance or to its effects, it cannot recover for a loss it would have avoided if it had taken reasonable steps to do so. The Principles explain further that the failure to mitigate loss may arise either because the aggrieved party incurs unnecessary or unreasonable expenditures, or because it fails to take reasonable steps that would result in the reduction of loss or in offsetting gains. (48) It is also indicated that the aggrieved party will not necessarily be expected to take steps to mitigate its loss immediately when it learns of the breach; this will depend on whether its actions are reasonable in the circumstances.

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References

- *⁾ *President International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry; Council Member of the ICC Institute of World Business Law*
- 1) G.H. Treitel, *Remedies for breach of Contract (Courses of Action Open to a Party Aggrieved)*, International Encyclopedia of Comparative Law, Chapter 16, Vol. VII, Contracts in General, Arthur von Mehren / Chief Editor, 1976, pp.16-100.
- 2) *Bürgerliches Gesetzbuch*, § 254 par. 2.
- 3) See, for instance, the reference to Cass.civ 1, 29 April 1981, JCP 1982, 19730, where damages were reduced, as it was a “fault” of the creditor not to avoid loss due to the negligent performance of the debtor in *Principles of European Contract Law*, Parts I and II, prepared by the Commission on European Contract Law, edited by Ole Lando and Hugh Beale, 2000, p. 447.
- 4) Barry Nicholas, *French Law of Contract*, London, Butterworth, 1982, p. 226.
- 5) H. McGregor, *McGregor on Damages*, 17th ed., 2003, p. 217.
- 6) See G.H. Treitel, *The Law of Contract*. 11th ed., p. 976; E. Allan Farnsworth, *Contracts*, 3rd ed., pp. 806-807, *Restatement 2nd Contracts*, § 350, Comment, p. 127.
- 7) *McGregor on Damages*, p. 216.
- 8) Michael G. Bridge, *Mitigation of damages in contract and the meaning of avoidable loss*, *Law Quarterly Review*, 1989, pp. 398-399.
- 9) Clive M. Schmitthoff, *The Duty to Mitigate*, *Journal of Business Law*, 1961, pp. 362-364.
- 10) *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard and J. Savage eds., 1999, p. 817
- 11) Jean Thieffry, *Arbitration and the New Rules Applicable to International Sales Contracts under the United Nations Convention*, *Arbitration International*, Vol. 4 No. 1, 1988, p. 56.
- 12) *Middle East Cement Shipping and Handling Co. v. Republic of Egypt*. Award of 12 April 2002 in ICSID case No. ARB/99/6.
- 13) Award in case *Watkins-Johnson v. Iran* (No. 370 (429-370-1) 28 July 1989), *Yearbook Commercial Arbitration*, Vol. XV, 1990, p. 224.
- 14) Marc Blessing, *The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism*, *Journal of International Arbitration*, Vol. 5 No. 2, 1988, p. 61. See also Vanessa L.D. Wilkinson, *The New Lex Mercatoria Reality or Academic Fantasy?* *Journal of International Arbitration*, Vol. 12 No. 2, 1995, p. 110.
- 15) UN Compensation Commission, Governing Council, Eighth Session, Geneva, 14-18 December 1992, (S/AC.26/1992/15, 4 January 1993).
- 16) Schmitthoff, *The Duty to Mitigate*, p. 364.
- 17) G.H. Treitel, *The Law of Contract*, p. 977, Farnsworth, p. 809.
- 18) *Restatement 2nd Contracts*, § 350, Comment, p.128.
- 19) Arbitration Institute of the Stockholm Chamber of Commerce, Interim award of 17 July 1992 and final award of 13 July 1993, *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.), Vol. XXII, 1997, pp. 197-210.
- 20) Final Award of 13 July 1998, *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.), Vol. XXV, 2000, p. 216.
- 21) Partial Award in case No. 8782 of 1997, International Chamber of Commerce (ICC) Amsterdam, The Netherlands, *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.), Vol. XXVIII, 2003, p. 39.
- 22) ICC Partial Award in case No. 5073 of 1986, *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.), Vol. XIII, 1988, pp. 53-68.
- 23) *Restatement 2nd. Contracts*, § 350, Comment, p. 129.
- 24) G.H. Treitel, *Remedies for Breach of Contract*, pp. 16-103.
- 25) G.H. Treitel, *The Law of Contract*, p. 978.
- 26) *Restatement 2nd, Contracts*, § 350, Comment, *ibid.*
- 27) ICC Award (Second Partial Award) in case No. 7110 (1998), www.unilex.info.
- 28) ICC Final Award in case No. 5418 of 1987, *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.), Vol. XIII, 1988, pp. 91-103.
- 29) Arbitral Tribunal of Hamburg Friendly Arbitration. Award of May 2 1977, *Yearbook Commercial Arbitration*, P. Sanders (ed.), Vol. IV, 1979, pp. 202-202.
- 30) *Middle East Cement Shipping and Handling Co. v. Republic of Egypt*.
- 31) ICSID Final Award of 5 June 1990 in case No. ARB/81/8 and Decision on Supplemental Decision and Rectification of 17 October 1990, *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.), Vol. XVII, 1992, pp. 73-105.
- 32) Final Award in case 8817, ICC International Court of Arbitration Bulletin, Vol. 10 No. 2 , Fall 1999, pp. 77-78.
- 33) Michael G. Bridge, *Mitigation of damages in contract and the meaning of avoidable loss*, pp. 399-400.
- 34) G.H. Treitel, *The Law of Contract*, *ibidem.*
- 35) Farnsworth, p. 810.
- 36) CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000].
- 37) Reference in the *UNCITRAL Digest of Case Law on the United Nations Convention on International Sale of Goods (A/CN.9SER.C/Digest/CISG/77)* to Hof Arnhem, the Netherlands, 22 August 1995, Unilex (validity of penalty clause determined under national law).
- 38) CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (applying German law).
- 39) CLOUT case No. 361 (Oberlandesgericht Braunschweig, Germany, 28 October 1999), CLOUT case No. 130 (Oberlandesgericht Düsseldorf, Germany, 14 January 1994).

- 40) CLOUT case No. 130.
- 41) CLOUT case No. 277 (Oberlandesgericht Hamburg, Germany, 28 February 1997).
- 42) CLOUT case No. 474 (Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 54/1999 of 24 January 2000).
- 43) CLOUT case No. 265 (Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999).
- 44) CLOUT case No. 343 (Landgericht Darmstadt, Germany, 9 May 2000).
- 45) ICC Award No. 9187, June 1999, Unilex.
- 46) Reference in *UNCITRAL Digest on CISG case law (A/CN.9SER.C/Digest/CISG/77)* to *FCF S.A. v. Adriaafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherittemplate/jurisdiction-recht/jurisdictionio....>
- 47) *UNCITRAL Digest on CISG case law (A/CN.9SER.C/Digest/CISG/77)*, § 19).
- 48) *Principles of European Contract Law*, p. 445.

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