Damages, avoidance of the contract and performance interest under the CISG.¹

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Avoidance of contract, claims for damages and performance interest under the CISG are intricately interwoven with each other. The following reflections on this topic comprise the main part of a contribution to a liber amicorum for Apostolos Georgiades, Athens, who celebrates his 70th birthday on March 5, 2005. Since the final publication of this book will take some time and my contribution, being in German, will not be easily accessible to those interested in the CISG, I have decided – with the permission of the editors of the Festschrift – to publish this – slightly amended – excerpt in English on the internet.

I. Recovery of performance interest without avoidance of the contract.

Damages can be claimed under Art 74, Art 75 or Art 76 CISG. Damages and their calculation under Art 75 or Art 76 CISG require that the contract is terminated by avoidance; the party affected by a breach of the other party can claim the performance interest - or, as it is phrased in the new German Law of Obligations: damages in lieu of performance,³ i.e. damages instead of performance itself, which can no longer be required under Art 81 (1) CISG. The losses (i.e. damages) can be calculated either as the difference between the contract price and the price of a cover transaction – Art 75 CISG – or the market price (“current price”) at the time of avoidance – Art 76 (1) sentence 1 CISG –; in addition, „any further damages recoverable under Art 74“ have to be compensated. In other words, performance interest can be claimed in lieu of performance, and the calculation of losses under Arts 75 and 76 CISG secures the obligee’s benefit of the bargain. It is questionable, therefore, whether and under what circumstances performance interest can be claimed on the basis of Art 74 CISG alone, i.e. without avoidance of the contract, and, therefore, theoretically, in addition to further performance of the contract, thus possibly doubling the benefit of the bargain. In its recent reform of the law of obligations, the German legislature has made provision for a party to require performance

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interest without formal avoidance of the contract, but has taken account of the economic consequence that asking for performance interest factually “liquidates” (terminates) the contract, in three ways: First, performance interest in lieu of performance can only be asked for if the basic prerequisites of avoidance are met (although avoidance has not been declared), i.e. either in case of the expiry of an additional period of time or in certain instances of fundamental breach, cf. §§ 281, 283 BGB and §§ 323, 326(5) BGB. Secondly, by claiming performance interest in lieu of performance, claims for specific performance of the contract are then barred, § 281(4) BGB. Thirdly, any performance already made must be restituted in the same manner as if the contract had been avoided, § 281(5) BGB.

In the application of the CISG, the problem seems to be, at first sight, a matter of interpretation of Art 74 CISG, i.e. whether performance interest can be claimed at all without or before avoidance of the contract, and how it can be calculated. However, the problem is not so much one concerning the relationship between Art 74, on the one hand, and Arts 75, 76 CISG, on the other hand, but one of two distinct issues: Firstly, if the obligee liquidates the contract by claiming performance interest under Art 74 CISG, the “fate” of the claims for specific performance – predominantly the buyer’s claim for delivery and transfer of ownership in the goods, and the seller’s claim for delivery to be taken – needs to be clarified. Secondly, it is doubtful whether the high threshold for avoidance – fundamental breach or, in case of non-delivery, non-payment or failing to take delivery after the lapse of an additional period of time set by the obligee – can be undermined by asking for performance interest under Art 74 CISG without avoiding the contract.

Legal writers⁴ and courts⁵ allow claims for performance interest – though

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calculated using different factors – based on Art 74 CISG. However, the questions raised under this interpretation, such as the fate of the claim for specific performance, are not dealt with in the literature and in the decisions of state and arbitration courts, with some cases being rather “foggy” in citing Art 74 CISG despite avoidance of the contract and calculating the damages as the difference between the contract price and the price of a cover transaction; some using Art 75 CISG as the basis for their reasoning without mentioning whether or not the contract was avoided; or basing the difference between the contract price and the price of a cover transaction simply on Art 74 CISG. In addition, no deliberations can be found on the question of whether a party aggrieved by a breach and founding its claim for damages on Art 74 CISG, i.e. without having avoided the contract and asserting its damages as the difference between the contract price and (the price of) a cover transaction, can later avoid the contract and revert to calculating its losses under Art 76 CISG. I shall firstly deal with the question of claims for specific performance and performance interest:

a) A claim for damages requires a breach of contract that is not excusable under Art 79 CISG. In case of non-delivery, the contract is already breached with the first delay, i.e. with not meeting dates or periods for delivery; in case of non-conformity, the breach occurs through the delivery of non-conforming goods. On the side of the buyer, usually non-payment, late payment, not taking delivery or delay in taking delivery constitute the respective breach. The aggrieved seller could then, i.e. on account of the breach, ask for damages. This should also include the performance interest, too, as demonstrated by the express inclusion of loss of profit in Art 74 sentence 1. However, this can be calculated in different ways. One way, in my opinion and according to the prevailing view of legal writers, could be the difference between the contract price and the price of a cover transaction even without prior avoidance of the contract: Art 75 CISG should not be regarded as an exclusive basis for this method of calculating damages. The buyer who has received non-conforming goods, where the non-conformity does not amount to a fundamental breach entitling him to avoid the contract, must be allowed to make a cover purchase in order to continue his production and/or perform his contracts with his clients. Despite the absence of avoidance and, therefore, the inapplicability of Art 75 CISG, the buyer must

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As to “anticipatory breach” under Art 72 CISG, see infra II.4.

See supra fn. 5.
be allowed to calculate his damages on the basis of the costs of the cover transaction. Of course, these damages, i.e. the costs of cover contracts, must have been “foreseen or foreseeable” by the party in breach – i.e. within the contemplation of the parties – as a consequence of the particular breach under Art 74 sentence 2 CISG. This should normally be the case if goods do not conform with the contract or if the seller is in default in delivering commodities or other goods in a volatile market. In case of other breaches, e.g. of ancillary obligations such as to provide information about the goods and their use, to submit a delivery schedule for instalments well before the period of delivery, to name a ship for the transport to be organized by the seller, etc. – if the respective clauses in the contract amount to obligations at all – this aspect of foreseeability could be doubtful and has to be decided on the basis of the circumstances of the case.

b) However, if, e.g., the aggrieved buyer asks for the performance interest – calculated as the difference between the contract price, which he has not yet paid, and the price of a cover purchase –, he must be barred from also claiming specific performance of the contract, be it delivery in case of non-delivery or cure under Art 46 CISG in case of non-conformity of the goods. § 281(4) of the German BGB, as reported supra, expressly denies claims for performance where the obligee has claimed damages in lieu of performance. The CISG does not have a comparable provision. However, a comparable rule could be derived by gap-filling under Art 7(2) CISG and resorting to a principle found in Arts 16(2)(b), 29 (2) sentence 2 CISG, disallowing (or estopping) the assertion of rights in contradiction to previous declarations or conduct (interdiction of venire contra factum proprium).¹¹ Arts 46(1), 62 CISG, which are based on the same principle, should also bar such an “inconsistent” request for performance. If, e.g., the obligee claims the performance interest calculated as the difference between the contract price and the price of a cover transaction – or as the difference between the (hypothetical) costs of manufacturing or purchasing the goods and the sales price –, in other words, as lost profit from the transaction, then he can no longer ask for specific performance to the extent that the obligor has relied on the obligee’s first claim for damages; in particular, where he has already paid.

c) On the other hand, if the obligee merely undertakes a cover transaction, i.e. before he has avoided the contract or has claimed and/or received damages, this should not deprive the obligor of his right to tender performance; the seller who is, e.g., in default, may nevertheless tender the goods, even if the buyer has already concluded a cover purchase. The buyer’s cover transaction does not prevent the seller from making late performance and the buyer

¹¹ This gap-filling rule should bar a claim for specific performance, however, only, if the obligor has relied on the obligee’s claiming damages in lieu of performance (Art 16(2)(b): “...has acted in reliance of the offer”, Art 29(2) 2nd sentence: “...has relied on that conduct”). For a corresponding restriction of § 281(4) German BGB see Gsell, Das Verhältnis von Rücktritt und Schadensersatz, Juristenzeitung 2004, 643, 648.
cannot refuse to take delivery merely on account of having undertaken a cover transaction. But since the seller was in breach, the costs of the cover transaction may be claimed as damages caused by the seller’s delay, i.e. damages in addition to performance instead of damages in lieu of performance. Damages to be claimed in such a case are those that the buyer suffers by having to dispose of the goods acquired in the cover purchase, e.g., the difference between the price paid for the cover goods and the proceeds from re-selling or otherwise utilizing them (“utilization” damages - see also infra sub e). In this case, the buyer is, of course, bound under Art 77 CISG – duty to mitigate damages – to undertake such a precautionary cover transaction only if it is reasonable to do so, e.g., because otherwise the damages would be likely to increase even further. In addition, the buyer must utilize the goods bought in the cover purchase in the best way possible. It may even come about that, if the utilization of these goods results in a profit, there is no loss at all to be recovered from the defaulting seller. Likewise, where the buyer is in default in taking delivery of the goods, the seller may sell the goods and claim performance interest under Art 74 CISG without having avoided the contract, calculating his damages as the difference between the contract price and the proceeds from resale. But this could be dangerous for the seller, since without avoidance he remains bound to deliver, and the buyer may still require performance, necessitating another delivery from the seller. Although the additional costs could be recovered as damages caused by the buyer’s first breach, i.e. his delay in taking delivery of the first tender, the premature resale by the seller must have been justified as a “reasonable” mitigating measure under Art 77 CISG. This may be the case, e.g., in unpredictably fluctuating markets. However, in most cases, it would be more reasonable to set an additional period of time for the buyer to take delivery, to avoid the contract when this period has lapsed without the buyer having taken delivery, and then to claim damages under Art 75 CISG.

d) The argument that a claim for performance interest based on Art 74 CISG does in fact liquidate the contract and that, therefore, the prerequisites of avoidance could be “undermined”, particularly in the case of delivery of non-conforming goods, is – in my opinion – unfounded. It may initially appear contradictory that the buyer, who cannot avoid the contract because the non-conformity does not amount to a fundamental breach, may claim (the full) performance interest on the basis of Art 74 CISG, calculated, perhaps, as the difference between the contract price and the price of a cover purchase, and thereby avoid the prerequisites of Art 75 CISG. But this only appears to be a contradiction: The high threshold for avoidance is not supposed to prevent liquidation of a contract, but only the unwinding of contracts and, in particular, the necessity to restitute goods already delivered and thus requiring transportation back to the seller, possibly storage, and other costly actions. The same reason can be cited for the high threshold of a claim for substitute goods under Art 46(2) CISG, because this, in the same way,
necessitates restitution of the non-conforming goods. However, performance interest on the basis of Art 74 CISG, i.e. without avoidance and restitution, does not require this costly unwinding of performance that has already been completed.

e) However, claiming performance interest on the basis of Art 74 CISG without avoidance has important consequences for the calculation of these damages: If the buyer liquidates the contract by claiming performance interest without avoiding the contract, he has to keep the non-conforming goods, the value of which has to be taken into account in the calculation of the buyer’s total damages. If he resells the goods – even at a high discount because of their non-conformity –, the proceeds have to be accounted for in the calculation of damages. Likewise, if the buyer claims performance interest because the seller was in default in delivering the goods, but then the seller makes a late tender, the buyer has to take delivery because he cannot avoid (since the delay might not amount to a fundamental breach or an additional period of time was not set). In such a case, the value of the goods bought as cover, if and insofar as they can be utilized, or the proceeds from re-selling them, respectively, have to be taken into account. Whether and to what extent the buyer’s losses are thereby mitigated is to be determined by reference to the circumstances of the case: In case of delay in delivering special goods, perhaps even specifically manufactured for the buyer, which the buyer intended to resell to a particular client, utilization of additional goods acquired in a cover purchase might be difficult and costly. In case of generic goods, on the other hand, resale might be easy and in a rising market even profitable, mitigating or altogether preventing losses from the seller’s breach. Of course, in such a case, i.e. asking for performance interest without having avoided the contract, the buyer remains bound to pay the price, and the calculation of his overall claim is similar to the situation under Art 75 CISG: In case of avoidance and claiming damages under Art 75 CISG, he could reclaim the purchase price under Art 81(2) CISG as part of the total sum (damages as the difference between the contract price and the price of a cover transaction + restitution of the price), while in case of a claim based on Art 74 CISG without avoidance, the full costs of the cover transaction can be claimed, while the seller keeps the price paid. If the buyer has not yet paid (or paid only a part of the price), the (part of the) purchase price still due can be set-off against a corresponding part of the damages claim. As analysed above, the value of the goods received and to be kept in case of non-avoidance must also be taken into account. The duty to mitigate damages under Art 77 CISG in such a case may require asking the seller to take back the goods if the seller is in a better position to utilize them and the costs of (re)transport etc. are negligible – in fact, this means that an “unwinding” of the contract then takes place in the same way as under Art 75 CISG.

f) The performance interest claimed under Art 74 CISG, calculated as the costs of a cover transaction (or as the difference between the contract price – not
yet paid – and the price of a cover purchase) should only be calculated on the basis of an actual cover transaction and not on the basis of the “current price” as under Art 76 CISG. The arguments put forward at the conference in Vienna (infra at II.2.) for using the date of avoidance as the reference date for the “abstract” calculation of damages are valid here, i.e. also in the case of performance interest based on Art 74 CISG.

II. Performance interest and avoidance of contract

1. Problems of damage claims for performance interest under Art 76 CISG and the priority of “concrete” calculation of damages on the basis of actual cover transactions.

As mentioned in part I, performance interest – damages in lieu of full performance – can be calculated in different ways. In the international commodity trade, in particular, these damages are frequently measured as the difference between the contract price and the price of a cover transaction, the latter being either an actual cover transaction – see Art 75 CISG – or a hypothetical cover transaction in the market at the “current price”, in other words: an “abstractly” calculated difference, under Art 76 CISG. This provision, however, raises some questions, which - to my knowledge - have not yet been satisfactorily settled.

Art 76(1) sentence 1 CISG provides for the “abstract” calculation of the damages as the difference between the contract price and a hypothetical cover “at the time of avoidance” and (only) if the aggrieved party “has not made a purchase or resale under article 75”. Sentence 2 allows, under certain circumstances, a different date for the relevant current price (“taking over of the goods”), and para 2 fixes the place for the hypothetical cover transaction. The basic requirements of this so-called “market price rule” are, however, that

aa) the contract was avoided, and

bb) that there was no actual cover transaction under Art 75 CISG, i.e. after avoidance of the contract.

Concrete calculation of damages, i.e. the difference between the contract price and the price of an actual cover transaction, has priority. However, it must have been “a purchase or resale under Art 75”, in other words, a cover transaction after avoidance. This can create difficulties for a party dealing in goods with strongly fluctuating prices if it has reason to expect a breach by the other party – perhaps on account of rumours or information in media specializing in the particular trade – and, therefore, has to consider measures to limit possible losses, e.g., to make a cover purchase as a precautionary measure before it has or could have avoided the contract.

Whether an actual cover transaction before avoidance or at some considerable time after the declaration of avoidance allows or bars recovery of damages
under Art 76 CISG is doubtful and will be considered here first. In addition, the case must be dealt with in which a cover transaction is concluded “within a reasonable time after avoidance” (as Art 75 CISG requires), but the price is left open to be determined at a much later date of delivery, e.g. in a year and in accordance with the then current price in some commodity exchange. In this case, it is also questionable whether such a cover transaction takes priority if the future price at the delivery date varies from the current price at the time of avoidance. It is obvious that the answer to these questions may be different from the each party’s different point of view; the view being dependant on the development of prices: If the buyer, anticipating non-delivery by the seller, makes a cover purchase before actually having avoided or being able to avoid, e.g. after having set an additional period of time under Art 47 CISG, or being unsure as to whether the information about the seller’s situation is correct and amounts to “clear” knowledge under Art 72(1) CISG that a fundamental breach will be committed, or whether some responses of the seller express a repudiation (cf. Art 72(3) CISG), the seller in breach will demand that the calculation of the buyer’s damages should be based on the cover transaction, provided that the prices were lower then. However, if the prices were higher at the time of the cover transaction, the seller will probably refer to the current price at the time of avoidance and might argue that the cover purchase was not concluded after avoidance as required in Arts 76, 75 CISG. On the other hand, if the market price has risen since his actual cover purchase, the buyer will prefer to ignore the cover purchase concluded at the price before avoidance, and instead will refer to the current price at the time of avoidance, thus hoping for an additional profit. The case is similar where the cover transaction was concluded some time – no longer reasonable as required under Art 75 CISG – after avoidance of the contract, or delivery under and determination of the price of the cover contract take place a considerable time after avoidance: In a rising market, the seller will prefer to refer to the current price at the time of avoidance, but to the actual price if prices have decreased since avoidance; the buyer, in contrast, will take the opposite view. The question is, therefore, the extent to which an actual cover takes priority over the market price rule under Art 76 CISG.

The priority of a calculation based on an actual cover transaction, as stated in Art 76 CISG, is not an automatic solution: Art 84 (1) ULIS, predecessor of Art 76(1) CISG, allowed the party aggrieved by a breach of the other party to choose freely between the “concrete” or “abstract” calculation of damages. In particular, a party claiming damages was not bound by the duty to mitigate damages (Art 88 ULIS), to use the better price of an actual cover transaction as the basis of his calculation, or – even less so – to conclude such a cover contract in order to mitigate damages. This rule was upheld in Art 57 of the Geneva

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12 See also infra at II.3.
13 (Hague) “Uniform Law on the International Sale of Goods” of 1964, predecessor of the CISG; as to this history, see Schlechtriem, Introduction to Schlechtriem/Schwenzer, supra fn.5.
draft of 1976; the report of the working group stated that Art 57 ULIS (market price rule) allows calculation of damages on the basis of the current price “at the option of the injured party any time the contract had been avoided and there is a current price for the goods”. 

Opinions changed, though: In the 10th session of UNCTRAL in Vienna (1977), the provision – then Art 58 – was altered: the market price rule was to apply only if the aggrieved party had not concluded an actual cover transaction. It was assumed that an actual cover contract was always more favourable, and that the aggrieved party should be prevented from claiming a higher amount of damages, on the basis of the market price, than he had actually suffered. This solution was maintained in the New York draft of 1978 and in the present version of Art 76(1) CISG. However, the Vienna draft of 1977 and the New York draft of 1978, in its Art 72(2), stated the relevant point in time as being the time at which the obligee could have avoided the contract. This draft rule was challenged, however, at the UN conference in Vienna. It can be ascertained from discussions at the conference that the defenders of the draft rule feared that another date, such as the date of the actual declaration of avoidance – which to a certain extent could be chosen by the aggrieved party –, would allow manipulation of the relevant date to the detriment of the obligor. In the end, the contrary opinion(s) prevailed, but the arguments of one of the advocates of the proposal that was ultimately successful (the Norwegian delegate Rognlien) made it clear that a delay caused by the aggrieved party – e.g. the buyer, who was informed by the seller that he will not or cannot perform –, in avoiding the contract and, thereby, in fixing the decisive date for the calculation of damages, would have to be regarded as a violation of the duty to mitigate damages. Thus, despite the changes agreed upon in Vienna, by way of a “detour” – applying Art 77 CISG –, the date at which the obligee could have avoided may still be influential in a given case.

This drafting history reveals two points:

aa) First, it was assumed that an actual cover transaction would – always or, at least, in most cases – be more favourable and would reduce the amount of damages due by the seller in breach, and that, therefore, a cover transaction not only had priority under Arts 75, 76 CISG, but that the duty to mitigate damages could require a cover contract to be taken into account, even if it was concluded

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19 Cf. O.R. p. 394, paras 28 et seq (16 Committee), p 222 paras 39, 40; cf. for these developments and discussions also Schlechtriem, Uniform Sales Law; Manz Vienna 1986, p. 98.
20 The Norwegian delegate’s argument was in answer to this author’s defense of the draft rule; I had pointed out that actual avoidance as the decisive date would allow speculation of the obligee to the disadvantage of the obligor in breach, cf. O.R. p 396 para 48.
before avoidance. However, the party in breach bears the burden of proving that an actual transaction was indeed a mitigating measure, and that – and why – it had to be undertaken as “reasonable” under Art 77 CISG.

bb) Secondly, in order to avoid some unwanted consequences of the rule that was ultimately accepted, it was implied in the arguments of the Norwegian delegate that, in some instances, the date at which the aggrieved party could have avoided the contract must be taken into account: The danger of speculation by the obligee in choosing the date for the declaration of avoidance should be neutralized by the duty to mitigate damages, which might require taking the date at which the obligee could have concluded such a transaction as the decisive reference date.

Consequently, in the case of anticipatory breach and a rising market, the decisive date could well be the date at which, under Art 72(1) CISG, the aggrieved party could have first avoided the contract.

2. Duty to undertake a cover transaction?

While, as described supra, the duty to mitigate damages may require that the price of an actual precautionary cover transaction undertaken before avoidance – but after a breach – has to be taken as the reference price for the calculation of the aggrieved party’s performance interest, and, in addition, the same duty might require taking the date at which the aggrieved party could have avoided the contract as the decisive reference date for calculating damages under the market price rule – Art 76 CISG –, whether this duty may also require actual avoidance of the contract and/or the conclusion of a cover contract as soon as possible thereafter still remains to be seen. In other words: Is the aggrieved party not only allowed to make a cover purchase before avoidance, and then bound to use the price of such precautionary cover transaction as a reference price for calculating its damages under Art 75 CISG (in case of later avoidance) or Art 74 CISG (in case that no avoidance is declared), but also obliged to undertake a cover transaction under Art 77 CISG? Could the obligor in breach, being sued for damages calculated under Art 76 CISG, rely on the defence that the aggrieved party could have concluded a cover contract earlier, i.e. before declaring avoidance, at a lower price, and, this having been a “measure reasonable in the circumstances” – Art 77 CISG –, could have thereby mitigated the losses from

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21 Consequently, some authors dealing with the burden of proof, claim that the debtor of the obligation to pay damages has the burden of proving that the claimant, who had invoked Art 76 CISG to calculate his damages on the basis of the market price rule, had indeed concluded a cover transaction, cf. Schönle, supra fn. 5, Art 76 para 22; Dettmaier, supra fn. 5, Art 76 para 7.

Actual cover transactions, being measures to mitigate damages under Art 77 CISG, can be either concluded on the spot market or otherwise, if other opportunities are available and “reasonable” – commercial settings being unforeseeably rich in variety, there can be no hard and fast rule drafted at a scholar’s desk as to what kind of cover might be reasonable under the concrete circumstances of the case

22 See Austrian OGH February 6, 1996, www.CISG-online.ch 224, where avoidance and undertaking of a cover transaction were regarded as mitigation measures, but were only denied prima facie; similar Tallina Ringknnakohus (Estonia) February 19, 2004, www.CISG-online.ch 826.
the breach? In the analysis of ULIS, legal writers have rejected this point of view. But in light of the discussions in Vienna about the relevant date for calculating damages (supra II.1. b and c), there are good reasons to assume that, in regard to the CISG, the duty to mitigate damages can require that a cover transaction be undertaken at the earliest possible point in time, if, e.g. the market is rising and, therefore, it is reasonable under the circumstances to make a cover purchase. However, as measures to mitigate damages under Art 77 CISG, cover transactions can either be concluded on the spot market, covering each amount as it becomes necessary, or otherwise, e.g. with a particular partner, covering the whole contract breached. Which option is more “reasonable” depends on the circumstances, i.e. the kind of goods, the relevant markets, available supplies and partners, etc. As commercial settings can be unforeseeably rich in variety, there can be no hard and fast rule drafted at a scholar’s desk as to what kind of cover might be “reasonable” under the concrete circumstances of a given case.

Courts seem to be inclined, too, to treat the failure to cover – if possible and reasonable under the circumstances - as a violation of the duty to mitigate. In any event, the question of whether a failure to undertake a possible cover transaction at a more favourable price constitutes a breach of the duty to mitigate will predominantly arise in cases, already discussed in Vienna, in which a cover contract could have been concluded before avoidance (see infra 3.). That a buyer could, e.g., on account of non-delivery, make a cover purchase after avoidance at a better price than the current price is – having regard to what a reasonable measure under the circumstances under Art 77 CISG would be –, in my opinion, a rather theoretical and exceptional case.

In any event, the burden of proof that a certain transaction was a “reasonable” measure to mitigate damages and, therefore, to be undertaken by the obligee, rests, as stated supra, on the obligor in breach.

3. In particular: Cover transaction before a later avoidance.

Art 75 CISG presupposes – as restated supra II. 1. – that the aggrieved party has avoided the contract on account of the obligor’s breach and then has concluded a cover contract. But, in practice, a party, e.g. a buyer, will frequently, in the case of delay by the other party, conclude a cover contract as a

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23 See supra at II.1. fn. 15.
24 Affirming Stoll/Gruber ibidem (fn.5 ) Art 75 para 2; Mankowski ibidem (fn. 5) Art 75 para 8.
25 Clearly so Court of Appeals Hamm (Germany) September 22, 1992, www.CISG-online.ch 57: The buyer had refused to take delivery. The court stated that the seller was not only allowed, but also bound under Art 77 CISG to resell (in the case at hand, however, a reasonable resale was not possible, so that in the end the calculation of damages under Art 76 CISG prevailed); Court of Appeals Celle September 2, 1998, www.CISG-online.ch 506: Failure to attempt to make a cover purchase outside the buyer’s region regarded as violation of the duty to mitigate; Austrian OGH (Supreme Court) April 28, 2000, www.CISG-online.ch 581: Omission to resell as cover purchase in this case no violation of the duty to mitigate damages, since the obligee/seller could have concluded additional contracts with other clients anyway, so that a resale would not have mitigated the losses caused by the buyer’s breach.
precautionary measure before ultimately declaring avoidance at some later date. This will often be the case when the obligee (e.g. the buyer) has set an additional period of time for performance (e.g. delivery) under Art 47(1) CISG and, therefore, cannot declare avoidance during this period – Art 47 (2) CISG –, but is reasonably expecting that the period will lapse without the obligor performing. If the expectation of the obligee (buyer) turns out to be correct and he avoids the contract immediately after the expiration of the additional period of time, it could be questioned whether he can or must calculate his damages on the basis of the precautionary cover transaction, or whether he may claim damages “abstractly” under Art 76 CISG.\(^{26}\) Since the aggrieved party, as was reasoned supra at I., can calculate his performance interest on the basis of Art 74 CISG even without avoiding the contract,\(^{27}\) this should not pose a problem and would be in conformity with the interests of the obligor (seller) in the event that the prices have gone up since the cover transaction was undertaken. In such circumstances, a cover transaction after avoidance would have been more costly: the obligee (buyer) would be bound by his duty to mitigate damages to calculate his performance interest on the basis of the less costly cover contract. As the discussions in Vienna – reported supra at II. 1. b and c – show, this case was regarded as regulated by the regime of Arts 74-77 CISG: Not only the potentially more favourable cover contract, but also – even more so – the cover transaction actually concluded under more favourable conditions must be decisive. This does not apply, however, if the respective transaction was not concluded before declaring avoidance and/or waiting out the expiration of an additional period of time set in order to justify a buyer’s avoidance, but rather as part of the general buying or selling in order to satisfy old and new customers – in other words, if a purchase or sale would have been concluded in any case and in addition to the contract breached, thereby generating additional turnover and income – an additional business volume now lost by the necessity to use the goods to cover the contract breached.

Matters are more problematic if the prices have fallen since the precautionary cover transaction and are lower at the time of avoidance: Can a defaulting seller now require the buyer to conclude another cover purchase after avoidance at a lower price and to base his calculation of damages under Art 75 CISG on this less expensive contract? In my opinion – as reasoned supra I. in the context of a calculation of damages under Art 74 CISG – the answer must be “No”: The higher costs of the earlier cover transaction are a consequence of the obligor’s (seller’s) breach – delay in performance – and they are recoverable unless falling prices were foreseeable with some certainty and, therefore, an early cover transaction could not be regarded as a reasonable mitigating measure under Art 77 CISG. In any case, the buyer – in my opinion – could conclude another cover transaction.

\(^{26}\) Cf. Stoll/Gruber *ibidem* (fn. 5) Art 75 para 3: “the buyer who did not get the goods, may, in order to fulfill his obligations to his customers, use other goods, which he had already acquired before, and charge the seller in default for the costs of these goods”; see also as to an anticipatory breach of contract *infra* at 4.

\(^{27}\) See Stoll/Gruber *ibidem* (fn. 5) Art 74 para 16 for a cover purchase in case of delay in delivery.
purchase after avoidance and resell the goods bought under the first – precautionary – cover contract; losses from this “utilization” would then be “further damages recoverable under article 74” in addition to the difference between the contract price and the price of the second cover contract concluded after avoidance, Art 75 CISG.


In case of a situation governed by Art 72(1) CISG – when “it is clear ... prior to the date for performance that one of the parties will commit a fundamental breach of contract ...” –, i.e. in case of an anticipatory breach, in particular by a refusal to perform (repudiation) – most legal writers agree that the aggrieved obligee can thereby claim damages calculated as the difference between the contract price and the price of a cover transaction regardless of whether or when the contract was finally avoided. This result should follow from an analogous application of Art 75 CISG. As soon as the aggrieved party can definitely avoid the contract, the same method of calculation of damages must be allowed as if it had already avoided the contract. This can be founded, too, on the argument used in the discussions in Vienna (supra II. 1. b) that, at least as a measure to mitigate damages, an earlier date than that of actual avoidance could be taken as the decisive reference date if a cover transaction would then have been possible and “reasonable” under Art 77 CISG due to the lower costs thereby incurred. The result is – in my opinion – correct and warrants support, although it need not be based on an analogy to Art 75 CISG or “good faith” arguments, but follows from the considerations contained in supra I. a) that the buyer aggrieved by a breach, in particular by a delay in delivery by the seller, may make a cover purchase and claim his losses, i.e. his performance interest, from the seller under Art 74 CISG regardless of whether and when avoidance is declared. In case of an anticipatory breach by repudiation – Art 72 paras 1, 3 –, which is to be treated like an actual breach, an immediate cover transaction must be allowed, the costs of which represent a consequence of this breach. In the case of the alternative where “it is clear” that a fundamental breach will be committed, a cover transaction without avoidance should only be undertaken if the “reasonable notice” under Art 72(2) CISG proved to be in vain, i.e. when assurance of performance was not forthcoming within a reasonable time. The same applies in the case of an instalment contract if the buyer, on account of non-performance of one instalment, intends to avoid, under Art 73(2) CISG, in respect of future instalments as well, and covers before declaring avoidance. The costs of cover transactions in these cases are damages caused by the other

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28 Stoll in Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht – CISG –. 3rd ed., C.H. Beck München 2000, Art 75 para 5; Stoll/Gruber ibidem (fn. 5) Art 75 para 4: Under principles of good faith and fair dealing, the obligor has to be taken on his word – refusing to perform - and he cannot then claim that avoidance was not yet declared; similar Staudinger/Magnus ibidem (fn. 5) Art 75 para 4; contra Mankowski ibidem (fn. 5) Art 75 para 4.

29 Or an anticipatory breach under Art 72 (2) CISG.
party’s breach (non-delivery of an instalment due), which gives good grounds to conclude that a fundamental breach will also occur in regard to later instalments. Therefore, these costs are recoverable under Art 74 CISG.

For reasons mentioned above, the costs of a cover transaction undertaken before avoidance can be recovered even if they are higher than they would have been at the time of avoidance due to prices subsequently falling: In cases of Art 72(1) CISG, in particular in case of repudiation, and under Art 73(2) CISG, there is already a breach by the obligor, which makes him liable to pay damages thereby caused unless the obligee has violated his duty to mitigate, e.g., if prices were certain to fall and it could have been expected of the aggrieved party to wait until avoidance before undertaking a cover transaction. In the – rather unlikely – case that, despite an anticipatory breach under Art 72 (1)(3) CISG, performance occurs, the obligee can recover the losses from utilization of the goods acquired as cover as “damages in addition to performance”, as it isphrased in the new German Law of Obligations.\(^{30}\)

In cases like these, the courts have also discussed allowing the calculation of damages on the basis of a cover transaction before avoidance. Refusal to perform and delay in performance may occur simultaneously: In a case decided by the Hamburg Court of Appeal,\(^{31}\) the buyer/plaintiff had bought Chinese iron-molybdenum, which could not be delivered on time (allegedly on account of default of suppliers). In the course of the ensuing negotiations, the seller/defendant had asked for an adjustment of the price, but had also offered an indemnity to get out of the contract; both proposals had been rejected by the buyer (who apparently had also set an additional period of time for delivery). The court held that the buyer had the right to avoid the contract; firstly, since the delay, in itself, constituted a fundamental breach, time being of the essence (the court derived this from the use of the Incoterm CIF). Secondly, since an additional period of time had been set and had lapsed in vain, and thirdly, since the conduct of the seller amounted to a refusal of performance. Consequently, the seller no longer needed the protection granted by the requirement of avoidance as a prerequisite to the calculation of damages under Art 75 CISG, and the buyer could conclude a cover transaction even before avoidance, allowing assessment of damages on the basis of this cover contract.\(^{32}\)

5. Cover transactions as a precautionary measure before an actual or an anticipatory breach.

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\(^{30}\) See *supra* at I. fn. 1.

\(^{31}\) February 28, 1997, [www.CISG-online.ch](http://www.CISG-online.ch) 261

\(^{32}\) See also Downs Investments Pty Ltd v. Perwaja Steel SDN BHD, Supreme Court of Queensland, Australia, November 17, 2000, [www.CISG-online](http://www.CISG-online) 859: Repudiation of buyer “accepted” by obligee/seller regarded as allowing “termination” and damages under Art 75; actually, however, the contract had been avoided a little later and the cover resale was only concluded after avoidance. “Acceptance” of a repudiation, a Common Law concept, is not required under Art 72 (1)(3) CISG.
The situations dealt with in the preceding paragraphs were characterized by the fact that an obligor had already breached the contract or had committed an anticipatory breach, which – in the case of repudiation under Art 72(3) CISG or failure to provide adequate assurance of performance under Art 72(2) CISG – had to be treated as if a breach had already occurred. These breaches triggered claims for damages under Art 74 CISG, also allowing performance interest, calculated as the difference between the contract price and the price of a cover transaction.33 If, however, there has not (yet) been a breach or, at least, an anticipatory breach, i.e. where the buyer merely makes a cover purchase as a precautionary measure, then he is acting at his own risk. Should the obligor perform in time and in conformity with all contractual terms, i.e. no breach actually ends up occurring and the precaution proves to be superfluous, the obligee has to bear the costs of his precautionary measure himself. On the other hand, should a breach later occur and the obligee declares the contract avoided (and calculates his damages on the basis of Arts 75 or 76 CISG), the obligor cannot rely on the precautionary cover purchase as a measure (possibly) mitigating the damages claimed: the obligor in breach cannot benefit from the risk taken by the obligee in covering as a mere measure of precaution.

III. Does a cover transaction before avoidance exclude calculation of damages on the basis of Art 76 CISG in case of later avoidance?

The wording of Art 76 CISG only excludes the “abstract” calculation of damages, i.e. on the basis of the market price rule – if an actual cover transaction has been concluded “under article 75”. Since Art 75 CISG presupposes, as was repeatedly pointed out here, that the actual cover transaction was undertaken after avoidance, Art 76 CISG could be interpreted as being excluded only if a cover transaction occurs after avoidance. If, however, the obligee, e.g. a buyer, had made a cover purchase before avoidance as a mere precautionary measure, such as in the case of an anticipatory breach or a simple delay of the seller in meeting delivery dates, and if he then could have claimed damages on the basis of Arts 75 or 76 CISG, the obligor cannot rely on the precautionary cover purchase as a measure (possibly) mitigating the damages claimed: the obligor in breach cannot benefit from the risk taken by the obligee in covering as a mere measure of precaution.

I suppose that the question is only a hypothetical one. If one assumes that – in accordance with the wording of Arts 75, 76 CISG – the obligee is not prevented from claiming damages calculated on the basis of the market price rule by a cover transaction before avoidance (Art 76 CISG), the cover transaction would nevertheless influence the amount of recoverable damages:

a) If the current price at the relevant dates under Art 76 (1) sentence 1 or 2 CISG is higher than the price of the cover transaction, the obligee can rely on this transaction as a measure mitigating damages under Art 77 CISG unless

33 Unless, of course, performance did still occur later and the goods purchased as cover had to be “utilized” with a loss, this loss to be claimed as damages “in addition to performance”, see text at I.c) and II.4.
he could and would have concluded additional contracts anyway (argument of *lost volume, supra* II.3.). This is further confirmed by the assumptions of the drafters of the Convention\(^{34}\) that an actual cover transaction would be less expensive in most cases and, therefore, should bar recourse to the market price rule.

b) If the current price is lower than the price of the cover transaction, a claim of the aggrieved party based on Art 76 CISG does not violate the interests of the obligor in breach. However, in my opinion, the obligee should be allowed to claim losses from the cover transaction as “further damages recoverable under article 74” – Art 76 (1), end of 1\(^{st}\) sentence –, since – and insofar as – these losses are a consequence of and caused by the obligor’s breach, in particular in the case of delay or anticipatory breach by repudiation or failure to provide adequate assurance of performance.

IV. Actual cover contract after avoidance at a price higher than the current market price.

a) If the obligee concludes a cover contract after avoidance at a price higher than the current market price for the same goods, this cannot be regarded – under normal circumstances as a cover – as having been made “in a reasonable manner” as required under Art 75 CISG and, therefore, could also not be used as a basis for the calculation of damages nor as a bar to a claim under Art 76 CISG. In addition, the policy underlying the priority of an actual cover contract, namely, that it will be concluded at a better price than the current market price (*supra* II. 1.b) excludes an interpretation under which the aggrieved party can claim damages in lieu of performance on the basis of an actual transaction undertaken at a price higher than the current price. The duty to mitigate damages would have required making a cover purchase at the current price, anyway, so that a price in excess of the current price would also be a violation of this duty under Art 77 CISG and, therefore, the excess amount would not be recoverable.

b) The case could be different if an actual cover contract was concluded after avoidance, but its price is left open to be determined at a later date, e.g. at delivery and dependent on the – then – current price. Example: Buyer had purchased from seller a certain amount of a commodity at a certain price in June 2004 for delivery in two instalments in 2005. In December 2004, seller refuses to make timely delivery; buyer, therefore, avoids under Art 72 CISG on December 30, 2004, and concludes a cover purchase for delivery in June and November 2005, prices to be determined at 3 % above the current market price at delivery. Opinions of the parties of the first – breached – contract will certainly be divided in such a case over the applicable method of calculation of the damages depending on the development of prices: If the

\(^{34}\) *Supra* at II.1. b) and c)
prices for the commodities bought under the cover purchase are rising the obligor will refer the aggrieved obligee to Art 76 CISG and the current price at the time of avoidance, while the obligee will try to claim under Art 75 CISG, i.e. on the basis of the actual price under the cover contract. If the prices had fallen since avoidance, the parties would probably reverse their arguments, the obligee claiming under Art 76 CISG, while the obligor will invoke Art 75 CISG and refer to the costs of the actual cover purchase. In my opinion, the policy for the priority of the calculation of damages on the basis of an actual cover transaction has to be kept in mind, namely the assumption that the aggrieved party can normally cover at a price lower than the current market price (see as to this assumption supra II.1. b). For this to be proved as correct, however, the price must be certain at the time of avoidance. If the price is to be determined at a later date in the future – e.g., at the later date of delivery –, this policy ceases to prevail: The aspect of speculation inherent in such an open price clause, i.e., the price to be determined later according to circumstances that are unforeseeable and not under the control of the obligee, is a risk to be borne by the obligee even if the speculative transaction was entered into as a consequence of the breach and avoidance of the first contract. Consequently, the obligee, although entitled to damages, has to bear the risk that (if) the price of the cover contract rises after avoidance, the cover contract might turn out to be more expensive than a cover purchase at a fixed, although high price at the time of avoidance. Under the basic rule of Art 76 CISG, therefore, he can only recover the current price at the time of avoidance. On the other hand, if the prices are falling, he may benefit from taking the risk of such an open price clause in the cover contract: Even if the buyer pays a better price later than the current price at the time of avoidance, he can still claim under Art 76 CISG; i.e. on the basis of the difference between the contract price and current price at the time of avoidance, this difference representing his “windfall” for the risk inherent in concluding an open price cover contract. The duty to mitigate under Art 77 CISG does not command a different result as it does not require that an obligee assume the risks inherent in an open price term, i.e. of speculating, in order to relieve the consequences of the obligor’s breach of contract. Another solution could be argued (only) if the future development of prices in a particular direction was certain at the time of avoidance, this being a factual matter to be proved by the obligor in breach if he claims that the (lower) price of the actual cover transaction should be decisive instead of the current price at the time of avoidance.

35 And at all, for often this assumption of (some of) the drafters of the Convention will be grossly false, e.g., where the aggrieved buyer has to cover in the spot market for the breach of long-term contract, another long-term contract as cover not being available or not at a certain price as in my example.
Final remark.
The subject matter of this piece may appear very specific since it deals with very special situations. However, the opinions expressed here were induced by my involvement in actual cases and they are relevant, even important, in order to show that the rules of the CISG are workable in the legal environment of international trade in commodities, i.e. markets with often fluctuating prices, which is sometimes doubted.  