DOES BREACH OF CONTRACT PAY?

The Disgorgement of Profits under the UN Sales Convention

UNIVERSITY OF HELSINKI
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Master's thesis
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Tiivistelmä/Referat – Abstract

The theme of this study relates to the basic values of contract law: Is breach of contract a wrong? Is compensation the sole objective of contractual remedies? Does – and should – breach of contract pay?

The themes reflect in the subject of the study, which is the disgorgement of profits under the United Nations Convention on Contracts for the International Sale of Goods (the "CISG" or "Convention"). The disgorgement of profits is a legal remedy that may come to question if breaching a contract is profitable to the defaulting party even though the aggrieved party is compensated. Disgorging profits denotes awarding the profit that arises out of the breach to the aggrieved party.

The study discusses three research questions. The first question enquires whether a trend in domestic contract laws to expand the availability of disgorgement damages should be taken into account in the interpretation of the CISG. The issue revolves around the principle of uniform application. The principle entails that the interpreter should not read the Convention through the lenses of domestic law, but rather as an autonomous body of law.

As a response to the first research question, the study suggests that the pro-disgorgement trend should not influence the interpretation of the CISG. The main reason for the conclusion is that the trend favouring disgorgement does not concern the majority of the CISG states, and taking such a trend into account in the interpretation of the CISG involves a significant risk of fragmenting the interpretation.

The second research question asks if the CISG provides for disgorgement. The study reviews the wording and the legislative history of Article 74 CISG, as well as the principles underlying the Convention as regards contractual remedies, namely the economic benefits principle and performance principle. Following the examination, the study suggests that if the aggrieved party does not incur loss as a result of breach of contract, it is not in line with the CISG to grant disgorgement as a remedy. Such interpretation would be in glaring conflict with the wording of the Article. However, the study also suggests that the principle of protecting contractual performance may warrant an expansive reading of the term 'loss', thus leading to a comparable result as a true disgorgement remedy.

The third and final research question asks whether the profit arising out of a breach can function as a measurement stick for compensatory damages. While the previous research question relates to granting the disgorgement of profits irrespective of whether the aggrieved party incurred loss, this section concerns the calculation of the *loss* caused by breach of contract. The study concludes that using the breaching party's profit in the calculation of loss fits well in the framework of quantifying compensatory damages within the CISG, if the aggrieved party is able to show that the method is best suited to the circumstances of the individual case.

To conclude, the study reflects on the disgorgement of profits through three questions; whether national developments on the area should impact the interpretation of the Convention, whether the CISG provides for disgorgement and whether the breaching party's profits can be taken into account in quantifying the aggrieved party's loss. As regards the bigger question of whether breach of contract pays – yes, it sometimes does. However, it is the legislator, not the interpreter, who can change this conclusion.

Avainsanat – Nyckelord – Keywords
International sales, CISG, contract law, remedies, disgorgement, punitive damages

Säilytyspaikka – Förvaringställe – Where deposited

Muita tietoja – Övriga uppgifter – Additional information

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ABBREVIATIONS

CISG / Convention	United Nations Convention on Contracts for the International Sale of Goods 1980
ICC	International Chamber of Commerce
NYC	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention")
PECL	The Principles of European Contract Law (1998/2002)
PICC 2010	The UNIDROIT Principles on International Commercial Contracts (2010)
ULIS	Convention relating to a Uniform Law for the International Sale of Goods (the predecessor of the CISG)
UNCITRAL	United Nations Commission on International Trade Law

FIGURES AND TABLES

1. INTRODUCTION

1.1. Policy perspectives

Breach of contract sometimes pays. In many jurisdictions, the party that breaches a contract may retain the eventual benefits of the breach after contractual damages have been deducted.[1] If breach of contract were a crime, state would collect such profits with interest. The recovery of the proceeds of a crime holds a place in the heart of criminal law sanctions.[2]

The fact that the fruits of breach of contract often stay with the breaching party follows from the philosophy of private law. Oliver Wendell Holmes has famously described a contractual obligation as 'a prediction that you must pay damages if you do not keep it – and nothing else'.[3] In this ideology, private law is not meant to punish, but to enforce private relationships.[4] The fact that punishment has been restricted to the domain of criminal law has even been lauded as a cultural achievement of developed legal systems.[5]

Despite the foregoing, elements of punishment are in fact present in contract law.[6] By way of example, the Unidroit Principles of International Commercial Contracts 2010[7] provide for a judicial penalty. Under this concept, a court may order a breaching party to pay a fine to the aggrieved party if the breaching party fails to comply with a court order to perform. The breaching party pays the sum to the aggrieved party even though the institution has been dubbed a 'penalty'. [8]

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[1] Ewoud Hondius and André Janssen, 'Chapter 26. Disgorgement of Profits: Gain-Based Remedies throughout the World' in Hondius E and Janssen A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015) 476.

[2] Pekka Viljanen, *Konfiskaatio rikosoikeudellisena seuraamuksena* (Edita Publishing Oy 2007) 63.

[3] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 462.

[4] Brian Coote, 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56 Cambridge Law Journal 537, 541. The opposing school opines that breaching a contract is immoral *per se*, and that contract law should properly reflect this immorality. Ben Depoorter and Stephen Tontrup, 'How Law Frames Moral Intuitions: the Expressive Effect of Specific Performance' (2012) 54 Arizona Law Review 673, 706.

[5] Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (Oxford University Press 2012) 579, para 44.06.

[6] ibid, 580, para 44.12.

[7] Referred to as the 'PICC 2010' below.

[8] Art. 7.2.4. PICC 2010.

The disgorgement of profits is another private law remedy that has been considered to penalise the breaching party. Disgorgement strips the profits arising out of breach of contract from the defaulting party, thus determining the remedy on the basis of the profit generated by the breach.[9]

To put the issue into a more concrete context, consider the following: A from Finland and B from Germany enter into a contract for the sale of shoes. The seller A undertakes not to sell the same brand of shoes to the market where B operates. However, B's competitor C, operating on the same market, offers A a hefty bonus for obtaining a batch of shoes of the same brand. A then decides to breach the exclusivity clause in the contract with B, and sell shoes to C.

In this hypothetical,[10] A obtains profit for the breach of contract, while B does not necessarily incur recoverable damage. B is likely to suffer some loss in some sense of the word, e.g. a decrease in market share. However, such loss is likely to be unrecoverable, difficult to prove and quantify. Under the CISG, B is entitled to compensation for the damage that he incurred as a result of the breach of exclusivity clause, and only to the extent that B can prove with reasonable certainty.[11]

As A's profit may well exceed B's damages, breach of contract may prove to be a lucrative business move for A even after he pays compensation to B. Allowing for such a result is counterintuitive.[12] Permitting the breaching party to benefit from a breach of contract opposes the ages old maxim of *pacta sunt servanda* ('contracts must be honoured'). This is where disgorgement of profits comes in, reallocating the 'illicit profit' to the non-defaulting party.[13]

The debate surrounding disgorgement can be understood through the question of who is entitled to the profit flowing from breach of contract.[14] Awarding windfall profit to the

[9] Allan E. Farnsworth, 'Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract' (1985) 94(6) The Yale Law Journal 1339, 1341; Hondius and Janssen (n 1) 475.

[10] *Cf. BRI Production "Bonaventure" v. Pan African Export*, a case with similar facts.

[11] CISG-AC Opinion No. 6, para 2.6.

[12] Sarah Worthington, 'Reconsidering Disgorgement for Wrongs' (1999) 62(2) Modern Law Review 218, 218.

[13] Hondius and Janssen (n 1) 475.

[14] Ingeborg Schwenzer and Pascal Hachem, 'The Scope of the CISG Provisions on Damages' in Saidov D and Cunnington R (eds), *Contract Damages. Domestic and International Perspectives* (Hart Publishing 2008 pp. 91–106) 95.

promisee is problematic in that it may bring the promisee in a better position than if the contract had been performed. Should the contractual entitlement be the maximum amount of damages, or should policy issues that are independent of the contract affect the remedy?[15] In other words, do contractual remedies only exist to secure the financial end result of the contract, or do they serve additional purposes?[16]

Deterring breach of contract and other private law wrongs is one justification for the existence of penal elements in legal remedies in legislation beyond the realm of criminal law.[17] The deterring effect of contractual remedies discourages from breaching a contract. For example, as regards the judicial penalty set forth in PICC 2010, the remedy functions as deterrence against non-compliance of a court order.[18]

In some circumstances, the deterring effect is more justified than in others. Commentators have recommended that disgorgement damages be available for breaches of contract that are morally reprehensible, as the deterring effect is more warranted due to the nature of the breach.[19] Policy perspectives, such as whether contractual remedies should have a deterring effect, and who is entitled to the profit arising out of a breach, lurk behind this study. While neither theme is directly relevant to the question of whether the CISG provides for disgorgement or not, policy perspectives are nevertheless necessary for an analysis on disgorgement. Legislation does not exist in a vacuum. It is essential to be familiar with the values that lie behind the norms and their effects on the society.[20]

1.2. Sources of law

As the discussion above illustrates, the core values of legislation are deeply relevant for the discussion on disgorgement. In light of this, the CISG offers an interesting legal framework to for an examination of disgorgement. The CISG represents a compromise

[15] Ernst J. Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chicago-Kent Law Review 55, 57.

[16] Coote (n 4), 540.

[17] It is arguable whether breach of contract should even be characterised as a 'wrong'. See Richard Posner, 'Let Us Never Blame a Contract Breaker' (2009) 107 Michigan Law Review 1349, 1349; Farnsworth (n 9) 1341.

[18] See Alexander Pekelis, 'Legal Techniques and Political Ideologies: A Comparative Study' (1943) 41(4) Michigan Law Review 665, 671 (as regards the corresponding French concept of '*astreinte*').

[19] Daniel Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' (1980) 80(3) Columbia Law Review 504, 558.

[20] Marc A. Loth, 'Limits of Private Law: Enriching Legal Dogmatics' (2007) 35(4) Hofstra Law Review 1725, 1736, who also refers to differing opinions on the issue.

between legal traditions, and the values that underlie legislation differ from one jurisdiction to other.[21]

The CISG is an international treaty and a uniform sales law. When implemented, the CISG displaces the state's substantive law and private international law rules concerning the international sale of goods. The CISG defines its scope of application autonomously in Articles 1–6 CISG.[22] The contracting parties may choose another law to govern their contract, but if they choose not to, the CISG automatically applies when the requirements under the aforementioned Articles are met.[23]

The CISG is often described as one of the most successful instruments in the harmonisation of international trade law. Up to 85 states have implemented the Convention, including most important trade nations of the world (with the exception of the United Kingdom).[24] Adding to the influence of the CISG, it has also impacted certain domestic sales laws. For example, the Finland and Sweden modernised their sales laws in the 80s on the basis of the Convention.[25]

The aim of the CISG is to reduce transaction costs by providing international norms for the sale of goods. The CISG enables the contracting parties to choose a neutral law to govern their contract.[26] Moreover, the differences in national legal systems hamper the

[21] Nils Schmidt-Ahrendts, 'CISG and Arbitration' [2011] Annals of the Faculty of Law in Belgrade – International Edition 211, 212.

[22] Michael Bridge, *The International Sale of Goods. Law and Practice* (2nd edn, Oxford University Press 2007), 506, para 11.01.

[23] Party autonomy is set forth in Art. 6 CISG. To summarise the main rules under Arts. 1–6 CISG, the Convention is applicable to a sales contract involving movable goods if the contracting parties are from different contracting states, or if the law of a contracting state becomes applicable through private international law rules. As an exception to the main rule, the CISG does not govern the validity of the contract or compensation for personal injury or death.

[24] Sieg Eiselen, 'The CISG as Bridge between Common and Civil Law' in DiMatteo, Larry (ed.), *International Sales Law: A Global Challenge*. (Cambridge University Press 2014 pp. 612–629), 613; UNCITRAL Internet page citing the contracting states,

http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 21 May 2016).

[25] Joseph Lookofsky, 'Alive and Well in Scandinavia: CISG Part II' (1999) 8 Journal of Law and Commerce 289, 289.

[26] Ingeborg Schwenzer and Pascal Hachem, 'Preamble' in Schwenzer I (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, Oxford University Press 2010 pp. 13–17), 16, para 8.

development of international trade due to, *inter alia*, the difficulty in resolving conflicts of laws.[27]

However, an international sales law cannot attain the goals set out above if courts and tribunals interpret it differently around the world. The CISG is a set of norms that co-exists with the domestic sales law in approximately 85 different countries. If domestic characteristics were allowed to leak in the application of the Convention in each contracting states, the uniform law would be reduced to 85 different international sales laws.[28] The noble aim of reaching an absolute uniformity in the interpretation of the CISG in all respects is, of course, unattainable in practice.[29]

The large body of international case law and jurisprudence are a challenge to the uniform interpretation of the Convention. In principle, CISG cases from Anchorage, Damascus and Shanghai are equally relevant case law to a Finnish interpreter.[30] The seemingly impossible task of even finding case law, let alone understanding it, is alleviated by the Internet and the efforts of universities and UNCITRAL in producing translations and summaries of CISG cases.[31]

Domestic preconceptions may unintentionally colour legal research on the topic of the CISG, for instance, this study and its analysis on disgorgement. The most likely bias in this study is Finnish contract law. To briefly introduce the lenses of domestic law that I inevitably have on, a close relationship between regulatory norms and case law guidance is a characteristic of Finnish and Nordic contract law. By contrast, continental law is typically based on codifications of law, and common law systems are built on case law and precedents. Finnish contract law is partly based on codified law, just as continental law

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[27] Larry DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer and Marisa Pagnattaro, *International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence* (Cambridge University Press 2005), 11.

[28] Ingeborg Schwenzer and Pascal Hachem, 'Chapter 2. General Provisions. Art. 7' in Schwenzer I (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, Oxford University Press 2010 pp. 120–144), 123, para 8.

[29] Robert Hillman, 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' [1995] Cornell Review of the Convention on Contracts for the International Sale of Goods 21, 21.

[30] Franco Ferrari, 'CISG Case Law: A New Challenge for Interpreters?' (1998) 4/5 Journal of International Business & Law 495, 524.

[31] For example, UNCITRAL Digests on CISG case law is accessible at http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html; the Pace University Law School CISG case database is accessible at: http://www.cisg.law.pace.edu/cisg/text/caseschedule.html.

traditions, but it also emphasises the importance of specific cases so as to realise a reasonable and equitable end result in a particular case.[32]

Furthermore, the fact that the CISG is an autonomous sales law complicates the systematic analysis of disgorgement. In legal research, scholars typically observe a certain phenomenon within the system of law.[33] For example, in the case of this study, it would be beneficial to review disgorgement in the systematic of private law.[34] However, the entirety of private law looks different in various contracting states, as the contracting states of the Convention represent different legal families and traditions.[35] Choosing any individual national system leads to incomplete findings.

In certain parts, I will compare the CISG to other international instruments and uniform law projects, such as the Unidroit Principles of International Commercial Contracts (PICC 2010) and the Principles of European Contract Law (PECL 1998/2002). Both collections of norms represent principles that are common to many domestic laws, in which respect they bear a similarity to the CISG.[36] Hence, PICC 2010 and PECL are interesting points of reference. However, in contrast to the Convention, the PICC 2010 and the PECL are not binding sources of law, unless contracting parties choose to apply them to a certain contract.[37]

1.3. Scope of the study and methodology

The research questions of this study revolve around the same theme: the disgorgement of profits in the context of the CISG. I will approach the theme from three different angles, through separate research questions. Below, I will elaborate on the each of the research questions that this study examines.

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[32] Matti Rudanko, 'Pohjoismainen sopimusoikeusajattelu ja kansainvälistyvä sopimusoikeus' (2014) 7–8 Lakimies 1006, 1007. See also Schwenzer, Hachem and Kee (n 5) 89, para 6.15 and Ewoud Hondius, 'Pro-Active Comparative Law: The Case of Nordic Law' (2007) 46 Scandinavian Studies in Law, Stockholm Institute for Scandinavian Law 143, 145–147.

[33] Ari Hirvonen, *Mitkä metodit? Opas oikeustieteen metodologiaan* (Yleisen oikeustieteen julkaisuja 17 2011) 39.

[34] As regards the systematic analysis of CISG norms, see also Schwenzer and Hachem (n 28), 130, para 21.

[35] Schwenzer, Hachem and Kee (n 5) 34–35, para 3.07.

[36] E. Allan Farnsworth, 'American Provenance of the UNIDROIT Principles' (1998) 72(6) Tulane Law Review 1985, 1986.

[37] Preamble, UNIDROIT Principles 2010.

The first research question relates to the general rules of the interpretation of the CISG, and the role that national sales laws have in the process. Namely, prof. Schwenzer, a well-known CISG scholar, has suggested that the developments in domestic laws favouring disgorgement damages should impact the interpretation of the CISG.[38] In Chapter 4, I discuss whether this statement is well-grounded. The question relates to the core of interpretation of the CISG, the principle of uniform application. The conventional view following from the principle maintains that courts and tribunals should not have regard to national laws in applying the CISG. On the other hand, the legitimacy of the Convention may decrease if the international sales law develops into a different direction than domestic sales laws, thus hindering the success of the CISG.

To describe the methodology as regards the first research question, I mainly approach the question on an abstract level. This means that I balance principles of the interpretation of the CISG, without attempting to deliver an answer on how to resolve specific legal problem. Due to the abstract nature of the first research question, I focus on ideology and objectives instead of entertaining a practical analysis of case law and related sources.

With regard to the first research question, my conclusion is that the pro-disgorgement trend should not influence the interpretation of the CISG. The reasons for this conclusion are that the development of expanding the scope of the disgorgement remedy does not concern the majority of the world of the CISG, and therefore placing emphasis on the trend in the interpretation of the CISG involves a significant risk of fragmenting the interpretation. In addition, I argue that if the alteration in interpretation follows from changing values, and not a change in factual circumstances, concerns arise regarding the justification of the new interpretation. Such concerns are warranted especially if the new interpretation conflicts with the wording of the treaty, as is the case with respect to disgorgement and the CISG.

The second research question is more concrete, asking if the CISG allows for a claim for disgorgement. I lay the groundwork for answering this question in Chapter 3, where I introduce the options for a legal basis for disgorgement under the CISG, and describe the conventional measures of damages under the CISG. In Chapter 5, I peruse the provision that proves to be the most appropriate basis for a claim for disgorgement, Article 74 CISG.

[38] Ingeborg Schwenzer 'Section II. Damages. Arts. 74–77' in Ingeborg Schwenzer I (ed), Commentary on the UN Convention on the International Sale of Goods (CISG) (3rd edn, Oxford University Press 2010 pp. 999–1049), 1017, para 43.

The methodology of this part represents a traditional method of legal dogmatics that focuses on the normative content of the CISG provisions.[39] While the starting point of interpretation is the wording of the text, determining the content of the CISG requires additional interpretative tools.[40]

My conclusion in Chapter 5 is it is not in line to grant a monetary remedy under the CISG if the aggrieved party does not incur loss as a result of the breach of contract.[41] A remedy granted under Article 74 CISG should not be in glaring conflict with the wording of the article. However, I also argue that the principle of protecting contractual performance may warrant an expansive reading of the term 'loss', which may lead to a comparable result as a true disgorgement remedy. I come to this conclusion based on the argument that traditional compensatory damages do not in all cases adequately fulfil the objective of protecting contractual performance.

The third and final research question asks whether the profit arising out of a breach can function as a measurement stick for compensatory damages. While the previous research question relates to granting the disgorgement of profits irrespective of whether the aggrieved party incurred loss (a true disgorgement remedy), this section relates to the calculation of the *loss* caused by breach of contract. The relevance of damage is the key difference between a true disgorgement remedy and calculating loss based on the breaching party's profit. For a true disgorgement remedy, it is irrelevant whether the aggrieved party incurs loss. By contrast, in calculating compensatory damages, the aggrieved party is not entitled to damages if no loss was incurred.[42]

In the final Chapter, I introduce the legal framework behind the quantification of damages under Article 74 CISG. Furthermore, I go on to analyse an arbitral award where the promisor's profit was used as a measurement of damages. In other words, the methodology of this part is similarly dogmatic as the previous Chapter. To respond to the final research question, I argue that using the breaching party's profit in the calculation of loss fits well in

[39] Hirvonen (n 33) 21–22.

[40] Pilar Perales Viscasillas, 'Article 7' in Kröll S, Mistelis L and Perales Viscasillas P (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (C.H.Beck – Hart – Nomos 2011 pp. 111–141), 125, para 33; Schwenzer and Hachem (n 28), 130, para 21.

[41] Despite the generality of this statement, I do not mean to take a stand on price reduction, which is available under the CISG.

[42] Schwenzer, Hachem and Kee (n 5) 581, para 44.15.

the framework of quantifying compensatory damages, if the aggrieved party is able to show that the method is best suited to the circumstances of the individual case.

2. NOTION OF DISGORGEMENT OF PROFITS

Before commencing the analysis of the research questions set out above, in this Chapter 2, I describe the notion of disgorgement in general terms. I will first introduce the terminology relating to the concept as well as the basic characteristic of the institution. Subsequently, I will offer further insights and context for the remedy from the perspective of corrective justice theories and the economic analysis of law.

2.1. Terminology

Disgorgement of profits refers to skimming off the gains that a wrongdoer has made by a wrong.[43] Disgorgement often entails awarding the disgorged profits to the afflicted party, but not in all cases. For instance, under the Chinese Anti-Unfair Competition Law, profits obtained by a violation of competition law are handed over to the national treasury.[44] In a contract law setting, however, disgorgement denotes a remedy whereby the profits are awarded to the aggrieved party.

As opposed to damages, disgorgement is not a remedy that is generally available for all kinds of private law wrongs in most jurisdictions. Rather, it is typically scattered around in special provisions in different areas of private law.[45] Sometimes remedies that entail the stripping of profits have been hidden under a misleading label.[46] It has also been suggested that the aim of legislation enabling class actions follows from the goal of disgorging illegal profits.[47]

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[43] Farnsworth (n 9) 1341–1342; Hondius and Janssen (n 1) 475–476.

[44] Hondius and Janssen (n 1) 495.

[45] ibid, 476–478.

[46] ibid; Kruithof M, 'Disgorgement of Profits in Belgian Private Law' in Hondius E and Janssen A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015 pp. 89–120) 90 (for example, Belgian law does provide for disgorgement in theory, but in practice, the profits can in certain rare cases be stripped under the banner of compensation.)

[47] Niamh Connolly, 'Disgorgement in Ireland' in Hondius E and Janssen A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015 pp. 71–88) 83; Martin A. Hogg, 'Disgorgement of Profits in Scots Law' in Hondius E and Janssen A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015 pp. 325–344) 341.

Terminology in this area causes confusion: disgorgement is also referred to as the 'account of profits', 'restitutionary damages' or a 'gain-based remedy'.[48] The term 'account of profits' bears a connotation to remedies under equity in the common law tradition[49], whereas the term 'restitutionary damages' has been criticised for its close resemblance to the law of restitution[50]. 'Gain-based remedy', on the other hand, can be viewed as an umbrella term describing different kinds of awards of sums that are measured by the defendant's gain.[51] 'Disgorgement of profits' seems to be the most appropriate word in an international setting due to the lack of misleading connotations.[52] As 'disgorgement' is also the word of choice in the context of the CISG, this study employs the term. [53].

The concepts of a restitutionary remedy and disgorgement are distinct. As a general characterisation, restitution is a remedy whereby the defendant is ordered to give something *back* to the plaintiff. By contrast, in disgorgement, the defendant is required to give something *up*.[54] In the framework of the CISG, the term 'restitution' refers to the returning of contractual performances following an avoidance of contract, as provided for by Article 81 CISG.[55]

To briefly give a general idea of the ideological difference between the notions of unjust enrichment and disgorging profits arising from breach of contract: Unjust enrichment is

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[48] Mathias Siems, 'Disgorgement of profits for breach of contract: a comparative analysis' (2003) 7(1) Edinburgh Law Review 27, 28.

[49] Hondius and Janssen (n 1) 477. Equitable wrongs (which are typical of common law traditions) include, *inter alia*, the breach of fiduciary duty. According to Black's Law Dictionary, 2nd edition, a fiduciary duty relates to a party that '*must act for another. They are entrusted with the care of property or funds*'. Commentators have considered that e.g. the public interest in the integrity of the fiduciary relationship justifies the nature of the exceptional remedies for a breach of fiduciary duty. See, Paul B. Miller, 'Justifying Fiduciary Remedies' (2013) 63 University of Toronto Law Review 570, 586–602.

[50] Farnsworth (n 9) 1342; *cf.* Stephen Waddams, 'Gains Derived from Breach of Contract: Historical and Conceptual Perspectives' in Saidov D and Cunnington R (eds), *Contract Damages. Domestic and International Perspectives* (Hart Publishing 2008 pp. 187–206) 193 (noting that the term 'law of restitution' has also been used as a synonym for the institution of unjust enrichment); *cf.* Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2116 (who understands 'the law of restitution' as containing two separate parts: 'disgorgement for wrongdoing' and 'subtractive unjust enrichment').

[51] Andrew Botterell, 'Contractual performance, corrective justice, and disgorgement for breach of contract' (2010) 16(3) Legal Theory 135, 136.

[52] Hondius and Janssen (n 1) 476.

[53] The term is used by Schwenzer (n 38) 1017, para 43; Schwenzer, Hachem and Kee (n 5) and Nils Schmidt-Ahrendts, 'Disgorgement of Profits under the CISG' in Schwenzer I and Spagnolo L (eds), *State of Play: The 3rd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2012 pp. 89–102).

[54] Botterell (n 51) 136–137.

[55] Christiana Fountoulakis, 'Section I. Effects of avoidance. Arts. 81–84' In Schwenzer, Ingeborg (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press 2010 pp. 1095–1145) 1106, para 17.

meant to return a sum that the defendant received unjustly at the expense of the plaintiff. Disgorgement of profits, on the other hand, rather aims at stripping off the profit that was generated by doing wrong to the plaintiff.[56] In disgorgement, the profit to be disgorged is not necessarily obtained *at the expense* of the aggrieved party.

Disgorgement focuses on the breaching party, rather than the aggrieved party. For disgorgement, it is irrelevant whether the aggrieved party has incurred damage. It is thus possible that the party is awarded a sum that exceeds the loss, yielding a windfall profit to the aggrieved party. Following from this characteristic, disgorgement can be characterised as a *supra-compensatory* remedy[57]

In contrast to disgorgement, compensatory damages are centred around the aggrieved party. Compensatory damages are meant to 'undo' the effects of the breach, and they are measured by the loss that the aggrieved party suffers. In other words, damages are designed to give the aggrieved party the 'benefit of the bargain'.[58] In this study, the umbrella term 'compensatory damages' does not include disgorgement, as the remedy does not seek to indemnify the non-defaulting party, even if compensation may be its side effect.[59]

On the other hand, damages that are quantified by the wrongdoer's profit should be viewed as compensatory damages just as damages quantified by any other measure. A true disgorgement remedy differs from using the profit that the wrongdoer obtains in the quantification of damages. When profits are used in the quantification of damages, the afflicted party is not entitled to the profit as such, but the profit is used as a measurement of the loss. In these cases, the promisee has to justify why the promisor's profit reflects its own loss. This is not the case with regard to a pure disgorgement remedy.[60]

The outlook on disgorgement damages in contract law has been subject to discussion and controversy in common law countries in the last decades.[61] Traditionally, disgorgement

[56] Worthington (n 12) 220.

[57] Hondius and Janssen (n 1) 475.

[58] CISG-AC Opinion No. 6, para 3.1.

[59] Waddams (n 50) 193.

[60] For an in-depth discussion on this issue, see Chapter 6.

[61] For academic discussion, see for example Farnsworth (n 9); Friedmann (n 19); Siems (n 48); Daniel Friedmann, 'Restitution of profits gained by party in breach of contract' (1988) 104(Jul) Law Quarterly Review 383; Melvin A. Eisenberg, 'The Disgorgement Interest in Contract Law' (2006) 105(3) Michigan Law Review 559; Kull A, 'Disgorgement for Breach, the Restitution Interest, and the Restatement of

damages have not been available for a breach of contract. However, this approach was altered by *Attorney General v. Blake*, where disgorgement was granted to remedy breach of contract. The facts of the case were atypically colourful.[62] George Blake was a member of the British security and intelligence services when he became an agent for the Soviet Union, providing information to the USSR. Blake later drafted an autobiography where he described his life as a double agent. Blake concluded a publishing contract entitling him to a signing bonus and further instalments of upon the delivery and publication of the work.[63]

The House of Lords found that Blake's divulging information regarding his career as a spy violated his employment contract with the Crown. However, the Crown was not able to establish that it had incurred compensable loss, and therefore Blake was not ordered to pay compensatory damages. However, the Attorney General was successful in the claim for the gains that Blake had received for the work.[64]

Blake's moral culpability and bad faith influenced the decision to exceptionally strip the profits made by a mere breach of contract.[65] In general, academics have suggested that the reprehensibility or opportunism of the breach of contract should trigger the aggrieved party's right to disgorge the ill-gotten profits. The reason behind this contention is the inadequacy of mere compensatory damages. The inadequacy can be seen as following firstly from the immoral nature of the breach, and secondly from the aggrieved party's interest in performance, which, for instance, was not a mere economic interest in the *Blake* case.[66]

Contracts' (2001) 79(7) Texas Law Review 2021. Relevant case law includes, in addition to *Attorney General v. Blake (House of Lords, England)* discussed below, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd (High Court of Justice, Chancery Division, England)* where the defendant built houses on the plaintiff's property without seeking approval in breach of a restrictive covenant. The breach did not reduce the value of the plaintiff's land, and hence no compensatory damages were available. However, building the houses allowed the defendant to generate a profit of £50,000 and to save, £2,500. Brightman J decided to award £2,500 to the plaintiff.

[62] John D. McCamus, 'Disgorgement for Breach of Contract: A Comparative Perspective' (2002) 36 Loyola of Los Angeles Law Review 943, 948.

[63] *Attorney General v. Blake* (House of Lords, England).

[64] McCamus (n 62) 948.

[65] Lord Nicholls of Birkenhead even termed Blake a *'notorious self-confessed traitor*'. See *Attorney-General v. Blake* (House of Lords, England) para 275.

[66] Friedmann (n 19) 558; Kull (n 61) 2046–2047; McCamus (n 62) 949–950. The criterion of reprehensibility or opportunism adds a moral element to an assessment of a contract law remedy, which seems unfamiliar to the evaluation of business-to-business contracts.

To conclude the brief introduction of the concept of disgorgement, the terminology in the area is varied. Furthermore, while a disgorgement remedy is not generally available for all kinds of actions, a claim for disgorgement often presupposes moral reprehensibility on part of the breaching party, or a wrong of a particular nature. The final point illustrates the fact that disgorgement is not necessarily compatible with the CISG, as the scope of application of the Convention merely extends to the sale of goods – facts such as in the Blake case are difficult to happen imagine in a CISG context.[67]

2.2. Context for disgorgement

In this Subchapter, I provide context as to how disgorgement appears in light of the theories of corrective justice and law and economics. The following analysis is not useful for determining the normative content of the CISG, but rather for understanding the philosophical and practical background of a legal institution – in this case, the disgorgement of profits. Theories of corrective justice and law and economics are analytical tools that help reviewing and developing law.[68] While the ideas of corrective justice and economic analysis of law tend to support certain legal conclusions, neither theory is a source of binding legal rules.[69]

2.2.1. Disgorgement and corrective justice theory

In this Subsection, I will first introduce the basic elements of the corrective justice theory. Corrective justice theory describes the philosophical fundaments of private law, and I am only able to gloss over the most relevant parts of it for the purposes of examining disgorgement.[70] Subsequently, I will move on to describe the attempts to fit disgorgement into the mould of the theory. Disgorgement does not appear to easily chime with the ideals of the corrective justice theory, and the reconciliation process reaches a high level of abstraction.

The basic tenet of the corrective justice theory is that legal remedies are meant to correct an injustice that the claimant has suffered, but nothing more. In other words, remedies and

[67] Schwenzer (n 38) 101.

[68] Ernst J. Weinrib, 'Restitutionary Remedies as Corrective Justice' (2000) 1 Theoretical Inquiries in Law 1, 5; Richard Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer Law & Business 2014) (2014) 31.

[69] See, e.g. Waddams (n 50) 197.

[70] Weinrib (n 68) 3.

rectification should entail undoing the injustice that the defendant has committed.[71] The theory views a wrong as the defendant's act, omission or possession of something that is inconsistent with the claimant's right. The claimant's right mirrors the defendant's duty, which means in a contract law setting that the promisor's duty is the promisee's right.[72]

It follows from the rectification ideal that the legal remedy should reflect the structure and content of the wrong, whereas other aspects are irrelevant. In the words of Aristotle, '*it does not matter if a decent person has taken from a base person, or a base person from a decent person.... Rather, the law ooks only at differences in the harm [inflicted], and treats the people involved as equals [---]*'.[73] According to the corrective justice theory, policy reasons or other societal objectives should not be used as grounds for developing legal remedies.[74]

According to corrective justice theory, the failure to comply with a contractual term constitutes a wrong, and the appropriate contractual remedy should reflect the structure and content of the breach.[75] Traditional contractual damages in the amount of the expectation interest have been seen to conflict with the corrective justice theory. This is because expectation damages include 'compensation' for something that the promisee concretely did not have before the breach of contract. [76]

As for the disgorgement of profits, main question in the review of whether a remedy follows the ideals of the theory of corrective justice is whether the remedy undoes an injustice that the promisee has suffered due to the promisor's actions or omissions. In a claim for disgorgement, the promisor's gain is not a mirror image of the loss suffered by the promisee. Thus, awarding the promisor's gain to the promisee does not seem undo the effects of the breach from the point of view of the aggrieved party.[77]

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[71] Botterell (n 51) 137–138; Weinrib (n 68) 4.

[72] Weinrib (n 68) 4.

[73] Botterell (n 51) 137–138, quoting Aristotle, *Nicomachean Ethics* (translation Terence Irwin, Hackett Publishing Co., 1985).

[74] Weinrib (n 68) 37.

[75] Botterell (n 51) 138; Weinrib (n 68) 4.

[76] Botterell (n 51) 138; Lon Fuller and William Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale Law Journal 52, 54. For a differing view, Ernst J. Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chicago-Kent Law Review 55, 68 (who justifies the proposition that expectation interest is in accordance with the corrective justice theory by relying on a Kantian view of rights and obligations.)

[77] Smith (n 50) 2116.

Despite the foregoing, prof. Weinrib has suggested a way to bend the corrective justice theory into being in line with disgorgement. He contends that corrective justice should be viewed as concerning normative gains and losses instead of factual ones. By normative gains and losses, Weinrib refers to what the parties should have gained or lost under a Kantian regime. Kant approaches an individual's duties as only following from the need to respect other individuals' right to freedom. [78]

By way of example, to describe a hypothetical where a party suffers normative loss but no factual loss, Weinrib mentions the case of trespassing in private property without damaging the area. In contrast, factual loss without normative loss is present in a hypothetical where an injury has been inflicted without fault. Similarly, a normative gain (but no factual gain) appears in case of negligent injury. The opposite of this hypothetical is factual gain and lack of normative gain, e.g. in case where an individual accidentally paves the wrong driveway with expensive tiles.[79]

From the perspective of normative gains and losses instead of factual ones, disgorgement fulfils the mirror image requirement. The normative gain obtained by the breaching party reflects the normative loss suffered by the aggrieved party, and thus follows the corrective justice theory.[80]

An alternative way to reconcile the concept of disgorgement with the corrective justice theory has been to characterise contractual entitlement as a piece of property. Following this reasoning, the breach of contract means that the promisor makes use of the piece of the property that belongs to the promisee. Following from this, the profit arising out of the breach can also be seen as profit that the piece of property generates. In this, the effects of the wrong include the fact that the profit generated by the piece of property is wrongly allocated to the breaching promisor. This way to characterise a breach of contract is not far-fetched in a hypothetical where the seller sells a unique object of sale to a third party instead of the promisee.[81]

While disgorgement fits into the mould of the corrective justice theory with difficulty, this has practical relevance if one adheres to the premises of the theory. Namely, this refers to

[78] ibid, 2120, citing E. Weinrib, *Idea of Private Law* (Harvard University Press 1995), pp. 115–125.
[79] ibid.
[80] ibid.
[81] Botterell (n 51) 138.

the idea that legal remedies are meant to correct an injustice that the claimant has suffered, and not more. If one considers that contractual remedies serve other purposes, the theory amounts to an intellectual exercise.

2.2.2. Disgorgement according to law and economics

Theories of corrective justice and economic analysis of law can be seen as each other's counter parts.[82] In contrast to corrective justice theories that reject the usefulness of taking into account policy perspectives, law and economics is one of the sciences of policy. The economic analysis of law explores the effects of regulation on behaviour, reviewing legal norms with an economic approach.[83]

Law and economics focuses on the effects of regulation and analyses whether law operates optimally.[84] The economic analysis of law strives for an efficient society. 'Efficiency' in this context commonly refers to the total wealth created by different ways of allocating resources.[85] According to the economic analysis of law, regulation should encourage an optimal use of resources.[86]

In view of the foregoing, law and economics does not classify actions or omissions as wrongs or injustice. By contrast, the movement observes the economic consequences of such actions or omissions. Furthermore, law and economics measures the effects and incentives created by law in monetary terms, and views sanctions and remedies as prices.[87] Law and economics reviews legal rules in light of whether they reach a certain end, which is typically the maximisation of wealth.[88]

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[82] Weinrib (n 68) 37. For the common characteristics of law and economics and corrective justice theories, see below in this section.

[83] Robert D. Cooter and Thomas Ulen, Law and Economics (Pearson Education M.U.A. 2013) 1–4. *Cf.*, Posner (n 68) 321–322 (aptly pointing out that two ideologies share characteristics despite their differences. For instance, both theories embrace idea that the nature of the person that committed a wrong should not have an effect on the legal consequence. The basic ideology of the concept of corrective justice is that the legal consequence should mirror the wrong and not have regard to the person. From the point of view of law and economics, if the reputation of the accused influenced the legal consequence, people would spend resources to becoming reputable and well-liked, which would not be efficient.)

[84] Cooter and Ulen (n 83) 1–4.

[85] Sidney DeLong, 'The Efficiency of a Disgorgement as a Remedy for Breach of Contract' (1989) 22(3) Indiana Law Review 737, fn. 17.

[86] Posner (n 68) 14.

[87] Cooter and Ulen (n 83) 3–4.

[88] Loth (n 20) 1735.

Law and economics defines a contract as a bargain consisting of promises.[89] Enabling contracting increases economic efficiency because contracts allow individuals to allocate resources to the use that generates the highest value.[90] The reason why contract law remedies are considered to have an effect on the optimal allocation of resources is that the remedies influence the risks and rewards of contracting. Therefore, rational parties are likely to have regard to the remedies during negotiations and when assessing the profitability of a contract.[91]

Disgorgement is an institution that can be subject to an economic analysis from different viewpoints. One of the more prominent ones is the efficient breach theory that questions the advantages of a disgorgement remedy in contract law.[92] An efficient breach[93] refers to a hypothetical where the breach yields a positive return to the breaching party even after the aggrieved party has been compensated fully and other possible costs of the breach have been paid.

Economists maintain that such a breach of contract should be encouraged because it leaves neither of the contracting parties economically worse off than if the contract had been fulfilled.[94] In other words, the breach is a Pareto improvement because one of the parties is better off, while neither party is left worse off.[95] Following this line of reasoning, disgorgement damages are inefficient because the institution prevents an efficient breach. Disgorgement damages encourage the promisor to allocate the resources that are needed to

[89] The American background of the law and economics movement is visible in the plural form of 'promise'. Under US contract law, a contract should always include consideration, and thus, a single promise cannot constitute a binding undertaking. See, Cooter and Ulen (n 83) 272–274. By contrast, in Finland, consideration is not required for the formation of a binding contract. See, Rudanko (n 32) 1017–1019.

[90] DeLong (n 85) 739.

[91] ibid, 740–741.

[92] Other possible angles include the cost analysis method that approaches the question of the efficiency of a remedy by reviewing the least cost avoider. The cost analysis method is also relevant to the justification of the efficient breach theory. See, DeLong (n 85) 740–742. This study only introduces the basic elements of the efficient breach discussion, for an in-depth analysis, see Posner (n 68) or DeLong (n 85).

[93] DeLong (n 85) 742 (arguing that the term 'efficient breach' is misleading. The term implies that the breach causes efficiency, while the efficiency is rather induced by the more efficient allocation of the resources that are needed for performing the contract.)

[94] Amy Kirby, 'Punitive Damages in Contract Actions: The Tension between the United Nations Convention on Contracts for the International Sale of Goods and U.S. Law' (1997) 16 Journal of Law and Commerce 215, 216; Ronald J. Scalise, 'Why No Efficient Breach in the Civil Law: A Comparative Assessment of the Doctrine of Efficient Breach of Contract' (2007) 55 American Journal of Comparative Law 721, 722; DeLong (n 85) 742.

[95] Scalise (n 94) 725.

perform the contract (‘*performance resources’*) to fulfilling the contractual obligation instead of using them to a more profitable use.[96]

From another an economical point of view, unenforceable contracts are not efficient. If the legal system does not enforce contracts, the parties themselves have to incur extra costs to ensure the fulfilment of the contract. In addition, if buyers cannot trust in the seller fulfilling their promise, the buyers may choose to engage in a less favourable trade, leading to a suboptimal result.[97] Having effective remedies to ensure enforceability and deter breach of contract promotes efficiency in this sense. Disgorgement is an effective remedy in the sense that it eliminates the incentive to breach a contract. Moreover, the promisor who is provided with an opportunity to use the performance resources more profitably can attempt to negotiate with the promisee to delay delivery or to be released from the contractual undertaking. Thus, a disgorgement remedy does not necessarily prevent the reallocation of performance resources in a more efficient way.[98]

It has also been argued that granting disgorgement damages requires ‘formidable transaction costs’. These costs are attributable to the calculation of the benefits that the breach has generated, and the determination of whether the breach caused the benefit. It supposedly follows from these procedural costs that disgorgement is an inefficient remedy.[99] While it is true that it is not always simple to calculate an exact amount or determine whether a causal link exists between a benefit and the breach, the same hurdle can be associated with several other contract law remedies, such as compensatory damages or price reduction. There does not seem to be a reason to attribute such procedural costs with disgorgement damages any more strongly than other remedies. Hence, the transaction costs should not be taken into account in the assessment of disgorgement damages in relation to other contractual remedies.

To conclude, the efficient breach theory is a controversial topic.[100] In essence, the theory views disgorgement damages as discouraging the promisor from allocating performance resources to a more efficient use. It follows that disgorgement cannot be described as an

[96] Posner (n 68) 131; DeLong (n 85) 742. *Cf.* Posner (n 68) 129 (distinguishing between opportunistic breaches of contract and other breaches, arguing that disgorgement should be available for the former ones.)
[97] Posner (n 68) 96–97.
[98] DeLong (n 85) 744. It may be, however, that the negotiation costs make this opportunity less efficient.
[99] ibid, 768–774.
[100] *Cf.* Posner (n 68); Friedmann (n 61).

optimal remedy from an economical perspective.[101] However, the fact that disgorgement effectively discourages breach of contract may increase trust in potential contracting parties and hence lead to a buyer choosing the optimal seller.[102] Lastly, awarding disgorgement damages may in some cases entail significant procedural costs, but these seem to be inherent in different kinds of contractual remedies, such as compensatory damages.[103]

3. SETTING THE FRAMEWORK: INTRODUCING CISG

Having previously introduced the notion of disgorgement, in this Chapter, I describe the characteristics and provisions of the Convention that are relevant for the interplay between the remedy and the CISG. I will first introduce the interpretative tools that allow to go beyond the wording of the Convention, namely interpretation according to the general principles of the CISG and gap-filling. Furthermore, I will discuss the possible legal bases for a claim for disgorgement in the CISG, Articles 74 and 84(2) CISG. Finally, I will review the measures of the compensatory damages that are available under the CISG.

3.1. Use of general principles in gap-filling and interpretation

In this Subchapter, I focus on the role of general principles in the interpretation and gap-filling under the CISG. Before introducing gap-filling or interpretation, I will first justify the attention that I give to the principles underlying the CISG in this Subsection. The role of the principles is essential to disgorgement, as the principles are the sole important factor speaking for granting disgorgement under the Convention.[104] Therefore, responding to the questions of how and why general principles affect the interpretation of the CISG is a focal point in the analysis of disgorgement under the Convention.

Interpretation and gap-filling are methods that enable resolving legal questions. In broad terms, gap-filling settles legal questions where the text of the CISG is silent, while

[101] DeLong (n 85) 742.
[102] Posner (n 68) 96–97.
[103] DeLong (n 85) 768.
[104] Schwenzer (n 38) 1017, para 43.

interpretation comes to question where the content of a provision is unclear.[105] The line between interpretation and gap-filling is not clear, and not all authors even distinguish between the concepts.[106] However, distinguishing between them is important due to the diverging rules concerning the methodological approaches. As will be discussed in the following Subchapter, it bears practical relevance if gap-filling principles are applicable to the question of whether the CISG provides for disgorgement or not.

General principles are relevant to both tools, even though the significance of the general principles is only mentioned explicitly in terms of gap-filling in the text of the Convention.[107] Applying the general principles is a type of systematic interpretation. In other words, reviewing a legal question together with the relevant general principles is a way to observe a provision in the entirety of the Convention.[108]

There are several aspects that support the conclusion that the general principles play a role in the interpretation in addition to gap-filling. Firstly, there does not appear to be a reason to apply the general principles in gap-filling but not in the 'mere' interpretation of an article.[109] It would be contradictory to allow the interpreter discretion in relation to gap-filling, but then restrict interpretation to a formalistic textual analysis.[110] This holds true especially where it is not easy to draw a line between gap-filling and interpretation.[111] Secondly, interpretation in accordance with general principles allows the CISG to adjust to changes in the society in accordance with its purpose to promote international trade. International treaties should not be disconnected of the surrounding society, and

[105] Pilar Perales Viscasillas, 'The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-filling of CISG' in Janssen A and Meyer O (eds), *CISG Methodology* (Sellier European Law Publishers 2009 pp. 287–318) 293–294.

[106] Bruno Zeller, *Damages under the Convention of Contracts for the International Sale of Goods* (2nd edn, Oxford University Press 2005), 70.

[107] Larry A DiMatteo, 'Case Law Precedent and Legal Writing' in Janssen A and Meyer O (eds) *CISG Methodology* (Sellier European Law Publishers 2009 pp. 113–132), 117; Urs Peter Gruber, 'Legislative Intention and the CISG' in Janssen A and Meyer O (eds), *CISG Methodology* (Sellier European Law Publishers 2009 pp. 91–112), 96.

[108] André Janssen and Sörren Clas Kiene, 'The CISG and Its General Principles' in Janssen A and Meyer O (eds), *CISG Methodology* (Sellier European Law Publishers 2009 pp. 261–286) 285.

[109] DiMatteo (n 107) 117.

[110] Gruber (n 107) 96.

[111] Sieg Eiselen, 'Unresolved Damages Issues of the CISG: A Comparative Analysis' (2005) 38 Comparative and International Law Journal of Southern Africa 32, 33.

interpretation according to the general principles provides necessary flexibility for the interpretation.[112]

Moving on from interpretation to gap-filling, Article 7(2) CISG provides that matters that are not expressly settled by the wording of the Convention should be resolved in conformity with the general principles underlying the CISG. If general principles that resolve the issue do not exist or cannot be discerned, the interpreter may turn to domestic law.[113] As regards this second step of the gap-filling mechanism, Bonell has asserted that '*courts should to the largest possible extent refrain from resorting to the different domestic laws and try to find a solution within the Convention itself*'.[114]

To concretise the gap-filling mechanism with an example, the question of who bears the burden of proof regarding damages is resolved as follows: Firstly, an interpreter should define whether the question is governed by the CISG, as a gap may only exist with regard to an issue that is. The question of who bears the burden of proof is in the scope of the CISG, as Article 79 CISG explicitly sets forth a norm on the allocation of the burden. Secondly, the interpreter should apply the general principles underlying the Convention that determine how the issue should be resolved. [115] For burden of proof, the relevant general principles are the reasonability standard and the policy that the breaching party should not escape liability if the breaching party's wrongful act causes the difficulty in proving damages with certainty. Based on a weighing of these principles, it follows that the aggrieved party bears the burden of showing that it incurred loss with reasonable certainty.[116]

With regard to gap-filling, certain soft laws, especially the PICC 2010 and the PECL, have been suggested as material to be used in gap-filling.[117] The use of such principles as gap-filling has been most frequent in arbitral awards. The rationale is that the mentioned rules

[112] Pilar Perales Viscasillas, 'Article 7' in Kröll S, Mistelis L and Perales Viscasillas P (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (C.H.Beck – Hart – Nomos 2011 pp. 111–141) 116, para 17.

[113] Sieg Eiselen, 'Literal Interpretation: The Meaning of the Words' in Janssen A and Meyer O (eds), CISG Methodology (Sellier European Law Publishers 2009 pp. 61–90), 62.

[114] Michael Joachim Bonell, 'Article 7' In Bianca MC and Bonell MJ (eds) *Commentary on the International Sales Law* (Dott. A Giuffrè Editore, S.p.A. 1987), 75.

[115] Franco Ferrari, 'Burden of Proof under the CISG' [2000–2001] Pace Review of the Convention on Contracts for the International Sale of Goods (CISG) 1.

[116] CISG-AC Opinion No. 6, paras 2.3–2.7.

[117] DiMatteo (n 107) 127.

in the soft law instruments are similar, but often more comprehensive than the corresponding norms under the CISG.[118] In addition, the PICC 2010, the PECL and the CISG share a common objective – the promotion of international trade. Both the PICC 2010 and the PECL are silent on disgorgement, only providing for traditional compensatory damages. Thus, neither collection of norms is useful for the purposes of this work.

This Subchapter has referred to the 'general principles under the CISG' in general terms time and time again without specifying what those principles are. The CISG does not list the general principles underlying it, but the interpreter is supposed to read between the lines.[119] To name some of the principles, the principle of good faith can function as a gap-filling principle in addition to its role under Article 7(1) CISG.[120] Secondly, the full compensation of the aggrieved party has been considered to constitute a principle. Finally, another principle that may be relevant in terms of disgorgement is the principle of preservation of contract (*favor contractus*).[121] The general principles that are relevant for disgorgement are examined in depth in Chapter 5.

3.2. Possible legal bases for disgorgement in the CISG

This Subchapter describes how disgorgement appears in the context of the CISG on a general level. Arguably the most natural legal basis for granting disgorgement under the CISG would be Article 74, which is the basic provision setting out the extent of damages that the aggrieved party is entitled to.[122] Based on Article 74 CISG, the breaching party is liable to pay compensatory damages to the aggrieved party.

In addition to Article 74 CISG, prof. Hillman has proposed Article 84(2) CISG as legal grounds for disgorgement. Article 84(2) CISG provides that if a contract is avoided after the buyer has received the object of sale, the goods are returned, and the seller is entitled to

[118] Larry A DiMatteo and André Janssen, 'Interpretive Methodologies in the Interpretation of the CISG' in DiMatteo LA (ed.), *International Sales Law: A Global Challenge* (Cambridge University Press 2014 pp. 79–101) 96; Perales Viscasillas (n 105) 288.

[119] Harvard Law Review Note, 'Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods' (June 1984) 97 Harvard Law Review 1984, 1991–1992; Bonell (n 114) 69.

[120] Francesco G. Mazzotta, 'Good Faith Principle: Vexata Quaestio' in DiMatteo LA (ed.), *International Sales Law: A Global Challenge* (Cambridge University Press 2014 pp. 120–134), 134 (noting that the good faith principle is no more important than other principles that Art. 7(2) CISG refers to, despite its double role.)

[121] Janssen and Kiene (n 108) 273 and 281.

[122] Schwenzer (n 38) 1017, para 43; Schmidt-Ahrendts (n 53).

any benefits that the buyer has derived from the goods. Basing his argument on an analogical application of this Article, Hillman has concluded that the aggrieved party should be entitled to the disgorgement of 'any benefit' that a breaching party has derived from breach of contract.[123] In other words, Hillman claims that an article setting out the legal effects of an avoidance could be used as legal grounds for an alternative remedy, disgorgement.

To introduce Hillman's entire line of reasoning, he suggests that allowing the breaching party to benefit from the breach of contract would be inconsistent with the principles under the Convention. Therefore, following from the principle that gaps should be filled in accordance with the principles underlying the Convention, the CISG should be viewed as providing for the disgorgement of profits. Among such 'principles underlying the Convention', Hillman mentions encouraging to the completion of contracts, the promotion of trust and cooperation, supporting planning, and reducing transaction costs.[124]

As the principles underlying the Convention are relevant for the interpretation of provisions as well as gap-filling, interpreting the Article 74 CISG as allowing for a claim for disgorgement could be justified with similar arguments as the ideas that Hillman has put forward. It is worth noting that there is only scarce legal literature analysing disgorgement in connection with Article 84(2) CISG.

Interpreting Article 84(2) CISG as providing for a disgorgement remedy appears to be far-fetched to say the least. The article concerns the effects of avoidance for the benefit of the seller. An interpretation that the provision allows for a claim for disgorgement requires stretching it to concern remedies for breach of contract, and benefit either party. It seems to be less of a stretch to consider Article 74 CISG in connection with disgorgement.[125]

A final technical point as regards Hillman's reasoning concerns the question of whether the availability of a disgorgement remedy constitutes a gap. As stated in the previous Subchapter, 'gaps' are issues that the CISG does not expressly resolve, but that the CISG

[123] Hillman (n 29) 33. As regards the role of analogy under the CISG, see e.g. Gert Brandner, 'Admissibility of Analogy in Gap-filling under the CISG' [1999] Pace Law School Institute of International Commercial Law.

[124] Hillman (n 29) 36.

[125] Similarly, Schmidt-Ahrendts (n 53) 90 (concluding that Art. 74 CISG is the only possible basis for a claim for disgorgement under the CISG.)

governs.[126] The system of remedies under the CISG is exhaustive, and hence it is problematic to propose that the lack of explicit mention of a remedy constitutes a gap.[127] If disgorgement were a gap, it would follow that any remedy that is not explicitly mentioned in the text could be viewed as gaps as well.

Another problematic feature of declaring that disgorgement is a gap is the second step of the gap-filling mechanism. If the availability of disgorgement was be left to be resolved by the applicable domestic law, disgorgement would be available in some jurisdictions, but not available in others, even if CISG were the law governing the contract. Playing with the thought, it could theoretically follow that any remedy that is available under a domestic law could be granted for a breach of a CISG contract. If disgorgement represents a gap, would nominal damages or a judicial penalty be a gap as well, as the CISG does not deny them either? If so, the availability of any contractual remedy would then be resolved by the general principles of the CISG or, failing that, domestic law. The divergence of available remedies under a *uniform* sales law would be unacceptable, especially so as the remedies for breach of contract bear special importance in the context of a sales law.[128]

An appropriate interpretation would be to conclude that disgorgement is not a gap, as Article 74 CISG settles the extent of the monetary remedies that the aggrieved party is entitled to.[129] Therefore, the issue should be considered as settled by the CISG, with the evident note that Article 74 CISG must be interpreted in this respect.

Although the availability of disgorgement should not be viewed as a gap in the Convention, disgorgement could at least theoretically be provided for by Article 74 CISG pursuant to interpretation. In any event, the general principles are relevant in the issue because principles can be used in the interpretation of the text of the CISG, and not only gap-filling.[130]

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[126] Art. 4(a) CISG; Bonell (n 114) 74.

[127] UNCITRAL Digest on Art. 45 CISG; Peter Huber and Alistair Mullis, *The CISG. A new textbook for students and practitioners* (Sellier European law publishers 2007) 322. As the remedies for buyers and sellers are mirror images, it follows that the seller's remedies set forth in Art. 61 CISG are exhaustive as well.

[128] Djakhongir Saidov, 'Damages: The Need for Uniformity' (2005–2006) 25 Journal of Law and Commerce 393, 393.

[129] Due to the generality of the term 'monetary remedy', it is appropriate to note that contractual damages are in fact not the sole monetary remedy under the Convention, as Art. 50 CISG provides for price reduction.

[130] DiMatteo (n 107) 117; Gruber (n 107) 96.

3.3. Different measures of damages generally and under the CISG

In view of the discussion in the two previous Subchapters, the availability of disgorgement under the CISG should be determined on the basis of the interpretation of Article 74 CISG. This Subchapter introduces the basic elements regarding the liability for damages under the CISG under the Article. The relevance of this Subsection is to explain the conventional approach to damages under the CISG. In the end of the Subsection, I discuss the objectives of CISG damages on one hand and disgorgement on the other, addressing the question of how Article 74 CISG relates to the penal elements involved in disgorgement.

The basics of the damages provisions under the CISG are simple. The buyer and the seller's liability are mirror images: the breach of any obligation under the contract or the CISG triggers the aggrieved party's right to damages.[131] Hence, a party is entitled to damages for a breach of the obligation to pay the contractual price just as well as the confidentiality clause.

Article 74 CISG provides that the aggrieved party is entitled to a '*sum equal to the loss, including loss of profit, suffered [---] as a consequence of the breach*'. The norm reflects the principle of full compensation, entailing that the promisee is entitled to compensation for any disadvantage caused by the breach.[132] The recoverability of type of loss does not depend on whether the loss is classified as direct, indirect, consequential, incidental, etc.[133]

Even if classifications are irrelevant for the recoverability of loss, theoretical descriptions may aid in understanding damages. According to a traditional classification of contract law, the notions of expectation interest and reliance interest describe the measures of contractual damages.[134] Reliance interest denotes the value of the actions that the promisee has taken because of reliance in the contract. The purpose of reliance damages is to undo the harm that the reliance on the contract has caused to the promisee.[135] Expectation

[131] Art. 45 CISG provides for damages for breach of contract by the seller; Art. 61 CISG provides for damages for breach of contract by the buyer. Huber and Mullis (n 127) 322.

[132] CISG-AC Opinion No. 6, para 1.1. This rule is of course subject to exceptions. For example, the CISG does not govern the issue of compensation for death or personal injury under Art. 5 CISG.

[133] Zeller (n 105) 122. Differing opinions as to this point have been suggested, however, they generally seem not to be based on an interpretation of the CISG. See, e.g. Eric C. Schneider, 'Measuring Damages under the CISG - Article 74 of the United Nations Convention on Contracts for the International Sale of Goods' (1997) 9 Pace International Law Review 223, 227.

[134] Fuller and Perdue's classic article from 1936 also describes the 'restitution interest', which refers to the contractual parties' right to the restitution of the contractual performance in case the contract is rescinded.

[135] Fuller and Perdue (n 76) 54.

interest refers to the value to the promisee of the performance that he was due to receive under the contract but did not.[136] Thus, damages can be described as being, so far as possible, a pecuniary equivalent to the contractual entitlement.[137]

The aggrieved party is entitled to damages irrespective of the fault (or lack thereof) on behalf of the breaching party. In other words, the negligence or wilfulness of the breaching party is irrelevant as regards the damages under the CISG.[138] The CISG reflects control liability. If the breach is due to an impediment beyond control, liability for damages does not arise.[139]

The right to full compensation is limited by the aggrieved party's duty to mitigate loss and the doctrine of foreseeability. The duty to mitigate refers to the responsibility to take any reasonable measures to mitigate loss that a breach of contract causes.[140] Failure to mitigate precludes the aggrieved party from claiming compensation for damage that could reasonably have been avoided.[141]

The requirement of foreseeability means that the breaching party is not liable to compensate damage that it could not foresee, or ought not to have foreseen, as a possible result of a breach.[142] The exact amount of the loss need not be foreseeable, but the foreseeability requirement refers to the *type* and the *extent* of the loss.[143] Foreseeability is assessed at the time of the conclusion of the contract.[144]

In contrast to full compensation of loss, punitive damages are sums awarded in excess of the loss suffered by the aggrieved party (also referred to as 'overcompensation').[145] As the

[136] ibid; Weinrib (n 76), 56; Botterell (n 51) 142–143.

[137] Botterell (n 51) 143, citing Peter Jaffey, 'Restitutionary Claims Arising on Contractual Termination' in E.J.H Schrage (ed), *Unjust Enrichment and the Law of Contract* (2011).

[138] John Y. Gotanda, 'Articles 74–78' in Kröll S, Mistelis L and Perales Viscasillas P (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (C.H.Beck – Hart – Nomos 2011 pp. 990–1042) 992, para 7.

[139] Art. 79 CISG; Björn Sandvik, 'Voidaanko kontrollivastuuta pitää sopimusoikeuden yleisenä periaatteena? Kontrollivastuun kehitys ja asema sopimusoikeuden järjestelmässä' (2014) 5 Lakimies 651, 653.

[140] Art. 77 CISG.

[141] Gotanda (n 138) 1033, para 1.

[142] Art. 74 CISG.

[143] Djakhongir Saidov, *The Law of Damages in International Sales: The CISG and other International Instruments* (Hart Publishing 2008), 113.

[144] Art. 74 CISG.

[145] Schwenzer and Hachem (n 14) 102; John Y. Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42 Columbia Journal of Transnational Law 391, 395.

term describes, the aims of the excess award include punishing the breaching party and deterring breach of contract.[146] A slightly different definition is that punitive damages are a granted in an amount that is independent of the extent of loss.[147] The latter definition does not require that the amount of damages exceeds the amount of loss, but rather that the awarded amount is determined by other means than by reference to the loss.

Disgorgement of profits bears a punitive element in the sense that the remedy may yield a windfall profit to the promisee.[148] This is probably the element that troubles most lawyers that are reluctant to approve disgorgement. Despite the punitive colour that disgorgement bears, I do not use the term 'punitive damages' as encompassing disgorgement damages for the sake of the clarity of the terminology of this work.

A black and white view of the objectives of punishment and compensation is not necessarily accurate. For instance, Fuller and Perdue challenge the notion that damages in the amount of expectation interest have a merely compensatory nature, arguing that the expectation interest includes 'compensation' for something that the promisee never had.[149] Fuller and Perdue maintain that expectation damages may also be considered as penalising the promisor for the breach of contract.[150]

Fuller and Perdue's reasoning, however arguable their conclusion may be, shows why demarcations for certain types of remedies, such as 'punitive', are mere descriptions that should not in themselves carry legal significance. In other words, the fact that a remedy is punitive should not *per se* mean that it does not conform with a law, e.g. the CISG. The availability of disgorgement under the Convention should rather be determined on the basis of an interpretation of Article 74 CISG.[151]

In this Chapter, I first discussed the role of the principles underlying the CISG. The principles are essential in the discussion concerning disgorgement, as the principles are the

[146] Schwenzer and Hachem (n 14) 102.

[147] Schwenzer, Hachem and Kee (n 5) 580, para. 44.13.

[148] Hondius and Janssen (n 1) 475.

[149] Fuller and Perdue (n 76); *cf.* Weinrib (n 76) 68 (answering Fuller and Perdue's proposition of the non-compensatory nature of the expectation measure by asserting that while the promisee never received the profit arising out of the contractual performance, the promisee was entitled to the performance itself. The expectation interest compensates for the infringement of the contractual entitlement.)

[150] Fuller and Perdue (n 76) 54; Botterell (n 51) 142–143; Weinrib (n 76) 56.

[151] Similarly, Schwenzer (n 38) 1002, para 8 (stating that '*penal elements can also play a role despite the fact that the Convention does not allow awarding punitive damages*'.)

sole important factor speaking for granting disgorgement under the Convention. Subsequently, I introduced the basic methodological differences of gap-filling and interpretation, concluding that gap-filling does not come to question with respect to disgorgement. This is because disgorgement is not a gap, as Article 74 CISG settles the extent of the monetary remedies that the aggrieved party is entitled to. Furthermore, I argued that while Article 74 CISG provides for the compensation of the aggrieved party's expectation and reliance interests, which can be described as compensatory remedies, the term 'compensatory' is a mere description without legal relevance. The penal element that disgorgement bears is not *per se* a hindrance to Article 74 CISG being interpreted as providing for disgorgement.

4. DOMESTIC TRENDS IN INTERPETATION OF CISG

In the previous Chapter, I focused on introducing the characteristics of the CISG that are the most important for an analysis of disgorgement. I will now turn to examine the interpretation of the CISG in more depth. In this Chapter, I turn to the first research question of whether a domestic contract law development to expand the availability of disgorgement damages should be taken into account in the interpretation of the Convention.

'Interpretation is an art, not a science'.[152] This famous statement underlines the flexible nature of interpretation. However, there are frames to the artwork, i.e. the rules that guide interpretation.[153] In this Chapter, I will first describe the norms guiding the interpretation of the CISG. Subsequently, I will turn to discuss whether a pro-disgorgement trend truly exists. Finally, I will observe the relation between the principle of uniform application and possible the pro-disgorgement trend.

4.1. Interpretation of the CISG in general

In this Subchapter, I will first introduce the legal sources applicable to the interpretation of the Convention. Then, I will move on to examine the general objectives and principles that

[152] Originally in French: *'L'interprétation est un art, non un science'*. Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2005), 340 citing Serge Sur, *L'inteprétation en Droit International Public* (Librairie Générale de Droit et de Jurisprudence 1974).
[153] Art. 7 CISG.

guide the interpretation of the Convention. Finally, I will describe the concrete tools that can be used in interpreting the CISG. The description of the basic structure of the interpretation of the CISG will aid in understanding the effect that the domestic legal influences can, or cannot, have on the Convention.

To clarify the source of the legal norms that govern the interpretation of the Convention, the interpretative methods and principles expressed in the Vienna Convention on the Law of Treaties (VCLT) are not applicable to the CISG.[154] The underlying reason is that the VCLT regime is designed to apply to the obligations of contracting states, while the CISG is more often interpreted in the realm of a commercial relationship between private parties.[155] The CISG autonomously sets forth the applicable rules of interpretation in Article 7 CISG.

Article 7(1) CISG sets forth the objectives and principles of the interpretation, although the CISG does not otherwise concretely specify the methods of interpretation that are available.[156] The provision provides for three main directives to be followed in interpretation: the need to take into account the international character of the norms, the aim of promoting uniformity in the application of the Convention, and the goal to promote good faith in international trade.[157] These should rather be described as objectives rather than methods of interpretation, as they do not offer tools for the interpreter.

The references to the international character and the principle of uniform application are intertwined. 'International character' refers to the idea of an autonomous interpretation of terms, i.e. that the terms used in the Convention should be understood in CISG terms, independently of any domestic preconception. Courts and tribunals should not assume that '*good faith*' under the CISG is the same as '*bonne foi*' in the French legal system.[158] On

[154] With the exception of Art. 7 CISG, which does not apply to its own application. Thus, public international law principles on interpretation apply to Art. 7 CISG. Bruno Zeller, 'The Observance of Good Faith in International Trade' in Janssen A and Meyer O (eds), *CISG Methodology* (Sellier European Law Publishers 2009 pp. 133–150), 137.

[155] Honnold (n 41) 158–159; Schwenzer and Hachem (n 28), 131, para 23; Michael P. Van Alstine, 'Dynamic Treaty Interpretation (1998) 146 University of Pennsylvania Law Review 687, 706–707.

[156] Schwenzer and Hachem (n 28), 130, para 2 Art. 7(2) CISG.

[157] Uniformity in application and promotion of good faith have been added to several other UNCITRAL conventions since, such as the Convention on Independent Guarantees and Stand-by Letters of Credit (1995) and Convention on the Use of Electronic Communications in International Trade (2005).

[158] Schwenzer and Hachem (n 28), 123, para 8; Bernardo M. Cremades, 'Good Faith in International Arbitration' (2012) 4 American University International Law Review 761, 770–771. *Cf.* Camilla Baasch Andersen, 'Good Faith? Good Grief!' (2014) 17 International Trade and Business Law Review 310, 315, (considering German law to be the 'most recognisable culprit' of non-uniform applications because '*German*

the other hand, the principle of uniform application is a broader idea, entailing that the CISG should be interpreted uniformly in different jurisdictions.[159] The interpreter should not read the Convention through the lenses of domestic law, but taking into account how courts and tribunals elsewhere have interpreted the same provision.[160]

Uniformity and consistency of application is more likely to be achieved if lawyers in different jurisdictions use the same interpretative tools and give them equal weight. Different interpretative methodologies are emphasised in different legal families.[161] For example, the importance of legislative history varies in different CISG contracting states. In civil law countries, preparative works are typically relied on in interpretation. By contrast, common law countries place more importance on the literal meaning of a legal text.[162] The interpretation of the CISG should represent a certain balance between different legal cultures, just as the substantive norms under the Convention.[163]

Under Article 7(1) CISG, 'the observance of good faith' is the third guiding philosophy in the interpretation of the CISG. In terms of good faith, it is important to distinguish between the principle of good faith as a method of interpretation and the good faith obligation of the contracting parties. This study only addresses good faith as a principle that guides the interpretation of the CISG. It is controversial whether the CISG imposes a duty of good faith on the parties,[164] and examining the question is not relevant for the scope of this study.

The meaning of what the principle of good faith under Article 7(1) CISG requires is unclear.[165] 'Good faith' has diverging meanings in domestic laws. Under the Convention, 'the observance of good faith in international trade' has been put into practice by interpreting the CISG provisions as forbidding the deliberate pursuit of self-interest,

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law is comfortable with its own flexible doctrine of good faith, as developed over centuries and embodied in the BGB since 1900. When looking at art 7 of the CISG it is therefore tempting for a German judge, familiar and comfortable with his own domestic doctrine, to assume that the same is embodied [in the CISG]'.)

[159] Art. 7(1) CISG.

[160] Ferrari (n 30) 495.

[161] DiMatteo and Janssen (n 118) 79.

[162] Eiselen (n 113) 62.

[163] DiMatteo and Janssen (n 118) 80–81.

[164] Mazzotta (n 123) 133; Peter Schlechtriem, 'Good faith in German Law and in International Uniform Laws' speech given at Saggi, Conference e Seminari in February 1997.

[165] Bridge (n 22) 534, para 11.33.

deliberate exploitation of dominance over others and dishonest behaviour.[166] In addition, certain articles of the Convention have been described as manifestations of the good faith principle by the Secretariat Commentary on Article 7 CISG.[167]

Moving on to the concrete methods of interpretation, the natural starting point is the wording of the text.[168] Certain authors assert that where the formulation of the Convention is unequivocal, further interpretative tools are not needed.[169] The United States federal Appellate Court for the 11th Circuit has also put forward that the goal of the uniform application of the CISG can only be achieved by interpreting and applying the plain language of the text.[170] However, according to the more compelling contrary view, a strict literal approach may easily mislead the interpreter and thereby lead to a non-uniform result, even if the text is seemingly unequivocal.[171] As noted above, CISG terms should be understood in the CISG context instead of the domestic definition of a notion.[172] Domestic preconceptions as to legal terms may misguide the judge or the arbitrator, and thereby increase the homeward trend.[173] In addition, different language versions of the Convention may prove problematic to uniformity.[174]

International case law[175], doctrine[176] and legislative history[177] should be taken into account in interpretation of the Convention. Using these methods in the interpretation of the Convention is necessary in light of the principle of uniform application enshrined in

[166] Perales Viscasillas (n 112) 120.

[167] Secretariat Commentary 1978 on Art. 6, para 3 CISG.

[168] Perales Viscasillas (n 112) 125, para 33; Schwenzer and Hachem (n 28), 130, para 21.

[169] Eiselen (n 113) 61.

[170] *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino (Federal Appellate Court for the 11th Circuit, United States)*. The statement concerned contract interpretation and the applicability of the parol evidence rule in CISG cases.

[171] Larry DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer and Marisa Pagnattaro, 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) 24 Northwestern Journal of International Law & Business 299, 313; Eiselen (n 113) 76; see also Gruber (n 107) 96.

[172] Franco Ferrari, 'Gap-Filling and Interpretation of the CISG: Overview of International Case Law' (2003) 7 Vindobona Journal of International Commercial Law & Arbitration 63, 66; UNCITRAL Digest on Art. 7 CISG, p. 42, para 4.

[173] Eiselen (n 113) 76.

[174] Perales Viscasillas (n 112) 125, para 34.

[175] Honnold (n 41) 142, para 92.

[176] E.g. the *Machines case 2000 (Supreme Court, Austria)*. In the case, the court again evaluated the non-conformity standard set out in Art. 35(2) CISG and referred to scholarly opinion on the issue.

[177] E.g. the *Condensate crude oil mix case (Netherlands Arbitration Institute).* The case concerned the non-conformity of the goods. The tribunal assessed the standard that Art. 35(2) (a) CISG sets to the object of sale. The tribunal took the drafting history into in its assessment of the proper standard.

Article 7(1) CISG. A judge's or an arbitrator's familiarisation with CISG preparatory works, doctrine and case law reduces the risk of diverging applications in different jurisdictions.[178] Below, I will elaborate on each of these sources and their significance to the interpretation of the Convention.

Case law is one of the principal sources of interpretation of the CISG. As one of the most powerful tools in achieving consistency in application, case law is a highly authoritative, *albeit* not a binding source.[179] Furthermore, legal literature has an assisting task by systematising and researching the CISG and its case law. Scholarly writing also introduces case law from different jurisdictions, thereby advancing uniformity.[180] Finally, legal literature has an important role in formulating the general principles of the Convention.[181]

Furthermore, preparatory works can be taken into consideration in the application of the Convention.[182] However, too much emphasis on legislative history may impede the natural development of a treaty. International treaties should not be disconnected of the surrounding society.[183] In such situations, courts and tribunals slavishly following the original legislative intention may render the uniform law outdated.[184]

The final question concerns the interplay of the methods of interpretation set forth above. No generally recognised ranking has been established in jurisprudence, which suggests that they may be used in a flexible order and manner. This is why interpretation is rather an art than an exact science. As an exception, however, the textual analysis is typically the starting point of interpretation, whereas other methods complement and clarify the text of the Convention.[185]

To summarise the observations that I have made in this Subsection, many sources of guidance can be used in the interpretation of the Convention. The rules regarding interpretation are flexible. However, the goal of a uniform interpretation is unyielding in

[178] E.g. Hillman (n 29) 37–38.

[179] Perales Viscasillas (n 112) 128, paras 40–41; Hillman (n 29) 37–38.

[180] Bridge (n 22) 532, para 11.31.

[181] ibid.

[182] Perales Viscasillas (n 112) 126, para 36.

[183] ibid, 116, para 17.

[184] Gruber (n 107) 91 (noting, in addition, that legislative intention and diverging case law should not necessarily be seen as conflicting sources of law, as changing economic, political or cultural circumstances have not been considered by the legislator.)

[185] DiMatteo and Janssen (n 118) 88.

the sense that it should always be taken into account in resolving any legal question under the Convention.

4.2. The relevance of national developments to the interpretation of the Convention

The research question that I discuss in this Chapter, i.e. whether domestic trends have an effect on the interpretation of the Convention, comprises two subquestions: Firstly, is there truly a tendency in national laws to expand the scope of disgorgement? Secondly, assuming that such tendency exists, should such a trend impact the approach taken by the CISG?

In this Subchapter, I will first shed light on whether and where the national trend towards expanding the scope of disgorgement damages is discernible. After this, I examine whether the principle of uniform application allows to take into account the observed extent of the trend. In order to answer this question, I will analyse the principle of uniform application, determining whether it constitutes an absolute prohibition of all national influences, or rather a guideline for attaining a functioning international sales law. Finally, I will explore if and what kind of reasons justify a dynamic interpretation that collides with the wording of the treaty, arguing that a change in the approach of a treaty is more warranted due to changes in circumstances rather than values.

4.2.1. Pro-disgorgement trend

As mentioned before, prof. Schwenzer argues that domestic developments should play a role in the interpretation of the Convention. In connection with this statement, she mentions the developments in Dutch law, English law, Canadian law and German law.[186] Taking into account that there are currently 85 contracting states of the CISG, the observed trend does not represent the larger part of the CISG nations.[187]

Due to the unavoidable vagueness of the review in this Subchapter, it is not imperative to define which countries are considered relevant as regards the pro-disgorgement trend.

[186] Schwenzer (n 38) 1017, fn 123.

[187] UNCITRAL Internet page citing the contracting states. While England is not a CISG state, this is not necessarily relevant for Schwenzer's argument. English courts may come to apply the CISG, e.g. if the parties have chosen the Convention as the applicable law, or through the international private law rules on the conflict of laws (Art. 1.1(b) CISG).

Answering this question would not be straightforward, as countries that have not implemented the CISG may nonetheless come to apply the Convention, for instance through an application of private international law rules. Thus, the developments in potentially all countries of the world (with the possible exception of North Korea and other such countries that do not participate in international trade) may arguably be considered relevant for the CISG. This point illustrates the difficulties that are embodied in the statement that domestic law developments should affect the interpretation of the CISG.

Before turning to the analysis, it is relevant to note the challenge involved in the task of defining whether a certain trend is visible in the national laws around the world. It is practically impossible to give a conclusive answer of where a development to expand the scope of disgorgement exists in all domestic contract laws that are relevant for the CISG. In this Subchapter, I am forced to rely on individual articles drafted by individual scholars, without being able to critically evaluate the conclusions of these sources due to the lack of knowledge on the different legal systems. Hence, this Subchapter represents a mere scratch on the topic.

Fortunately the recent developments of the disgorgement institutions have been subject to legal comparative research, as disgorgement in private law was the theme of the XIXth congress of the International Academy of Comparative Law in 2014. In connection with the congress, Hondius and Janssen collected 24 national reports on disgorgement, each drafted by a local scholar. While the extent of this considerable comparative project does not cover even half of the contracting states of the CISG, it comprises a variety of legal traditions. The participating countries included Australia, Brazil, Chile, China, France, Germany, Israel, Japan, Norway, Slovenia and South Africa. The national reports observed the disgorgement institution under several branches of private law, and not only contract law.[188]

In summarising the reports' analysis of the future of the remedy, Hondius and Janssen conclude that majority of the reporters had a positive attitude towards creating or expanding disgorgement damages as a self-standing remedy. In addition, several reporters wished for a stricter approach to skimming off illicit profits.[189] Hondius and Janssen

[188] Hondius and Janssen (n 1).

[189] ibid, 500–501 (referring to e.g. the reports from Greece, Italy and China; Eleni Zervogianni, 'Disgorgement of Profits in Greece'; Paolo Pardolesi, 'An Italian Way to Disgorgement of Profits?'; Xiang Gao and Chengwei Liu, 'The Disgorgement Damage System in Chinese Law' each in Hondius E and Janssen

observe that the scope of application and requirements of granting disgorgement damages vary greatly between different national systems. However, no such development was observed in several other jurisdictions. Disgorgement was even seen as being against the contract law culture in some countries.[190]

Furthermore, what may have impacted the responses of the national reporters, the original questionnaire was formulated in a way that strongly favours disgorgement. For example, the questionnaire began with a reflection of whether '*tort pays*'. Furthermore, the questionnaire requested an analysis of whether each national system was efficient in skimming off '*illegal profits'*.[191] As described in the beginning of this study, it is not evident that profit obtained due to breach of contract should be considered illegal in a normative sense, instead of perceiving it neutrally as the price of breaching a contract.[192]

Based on the collection of reports drafted by Hondius and Janssen, it appears that there is a tendency towards developing disgorgement damages in some domestic laws, or at least a scholarly wish for such a development.[193] However, the development was not observed in all reports, or even half of them. The fact that the development of disgorgement damages does not encompass all CISG countries is relevant for the second question relating to Schwenzer's argument, as will be observed below. The second question was whether such possible national developments *should* affect the interpretation of the CISG.

4.2.2. Uniformity and modernisation of treaties

In the context of the principle of uniform application, the traits of national law amount to a curse word. The importance of uniformity in the application of an international convention is famously described by Viscount Simonds as follows: '*It would be deplorable if the*

A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015 pp. 407–428).)

[190] See, for example the reports from Slovenia, Croatia and Turkey (Damjan Možina, 'Disgorgement of Profits in Slovenian Law'; Ana Keglević, 'Disgorgement of Profits in Croatian Law'; Başak Başoğlu, 'Non-genuine Benevolent Intervention in Another's Affairs and Disgorgement of Profits under Turkish Law' each in Hondius E and Janssen A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015)).

[191] Hondius and Janssen (n 1) 3–10.

[192] See, e.g. Posner (n 17), p. 1349.

[193] Development favouring disgorgement has been noted in, for example, the Chinese and the French report (Gao and Liu (n 196) 427; Michel Séjean, 'The Disgorgement of Illicit Profits in French Law' in Hondius E and Janssen A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015 pp. 121–138), 130.

nations should, after protracted negotiations, reach agreement [...] and that their several courts should then disagree as to the meaning of what they appeared to agree upon'.[194]

While the status of the principle of uniform application is undisputed under the CISG, its exact content is less clear. The approaches to the principle can be distinguished as 'strict uniformity' and 'functional uniformity'.[195] Strict uniformity involves the idea that all provisions under the CISG should be interpreted exactly the same way as they are in other nations applying the CISG. Following the strict approach, no domestic influence can be brought to the Convention, rejecting the idea of interpreting the CISG in light of national developments.[196] By contrast, the ideal of functional uniformity accepts that an absolute unification of rules is an impossible task. Functionalists aim at achieving a manageable level of uniformity that decreases impediments to international sales, however eliminating uncertainty as to the normative content of CISG provisions.[197]

The wording of Article 7 CISG leans towards the notion of functional uniformity. Firstly, the provision states that '*regard has to be had to the international character*', instead of e.g. '*provisions must be interpreted in accordance with the international character thereof*'. The formulation can be interpreted to imply that the drafters did not intend to impose an absolute standard. Secondly, the article refers to the '*need to* ***promote*** *uniformity in its application'* (emphasis here), instead of using a stronger expression.[198]

In any sense of the concept of uniformity, reaching a unified interpretation is difficult if all national developments are given weight in the interpretation of the Convention. Courts in various jurisdictions may have a greatly diverging view of a trend in law. In addition, it may be overtly demanding to require that a court or a tribunal is aware of international developments. This holds true especially if a certain development happens to not affect the part of the world where the court or tribunal is seated.[199]

On the other hand, prof. Schwenzer has argued that giving way to national developments in fact *increases* uniformity, instead of undermining it. According to her line of reasoning, the

[194] *Scruttons Ltd. v. Midland Silicones Ltd. (House of Lords, England).*

[195] DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 171), 310 (who note, in addition, that uniformity can also be perceived in terms of absolute or relative uniformity, or formal and substantive uniformity)

[196] ibid, 308; Schwenzer and Hachem (n 28) 123, para 8.

[197] DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 171), 310.

[198] ibid.

[199] On the subject of the challenges of uniformity, see Ferrari (n 30) 254

national trends that favour disgorgement damages lead to courts and tribunals resorting to domestic laws in addition to the CISG, if they find the remedies under the Convention unsatisfactory.[200] Schwenzer's position can be described as realistic, even pessimistic. In essence, she argues that courts and tribunals will not apply norms that significantly differ from their national laws, and hence the CISG should develop to better reflect domestic laws.

However, in 85 national laws, there is no such thing as a single trend. As noted above, development to expand the scope of disgorgement damages cannot be discerned all over the world.[201] As was the case during the drafting of the contracting states of the CISG, many states still frown upon granting overcompensation to remedy breach of contract, and scorn the thought of deterrence as a goal of contractual remedies.[202] While the adoption of disgorgement into the Convention by way of interpretation may increase a positive attitude towards the CISG in some countries, but the same move is likely to have the opposite effect in others.

From the perspective of retaining the importance of an aging treaty, how does a convention '*stay connected with the surrounding society*' if national law influences are considered as nothing more than a menace?[203] Treaties become outdated rapidly if no dynamic interpretation is allowed.[204] The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (below referred to as 'NYC') is an example of a treaty that has preserved its utility partly due to the liberal interpretation as regards the written form requirement.[205] Similarly, the CISG remains the leading convention on the area of international trade, despite having been adopted as early as in 1980, a year when Jimmy Carter was the president of the US and the first version of video game Pac-Man was lanced.[206] Dynamic treaty interpretation allows adjusting international conventions to changing circumstances over time.[207]

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[200] Schwenzer (n 38) 1001, para 7.

[201] See Subchapter 4.2.1.

[202] See, e.g. Možina (n 190) 403–404; Keglević (n 190) 387–389; Başoğlu (n 190) 253.

[203] Perales Viscasillas (n 112) 116, para 17 (noting that the interpretation should not be disconnected from the society.)

[204] DiMatteo and Janssen (n 118) 87

[205] Perales Viscasillas (n 112) 116, fn 26.

[206] Wikipedia article on Pac-Man, https://fi.wikipedia.org/wiki/Pac-Man (accessed 24 May 2016).

[207] Van Alstine (n 155) 175.

The most successful international conventions have a high number of contracting states, and thus updating the text of such a convention is extremely difficult, even impossible.[208] The development of the modern economy and technologies yields legislation obsolete in a matter of years, if interpretation does not lend a hand in keeping it modern.[209] In this respect, allowing national trends to influence international treaties contributes to functional uniformity.

Domestic influences typically disturb the uniformity of application, and thus an effect on the interpretation of the CISG would have to be an exception. Hence, it would seem logical to require that a certain tendency could be observed in the greater part of the contracting states for it to bear weight in the interpretation of the CISG. This would be a way to manage the risk that the domestic tendency leads to the fragmentation of the interpretation of the Convention.

In addition to taking into account the risk of fragmented application, one should also review the justification of changing interpretations. Dynamic interpretation seems most justifiable in cases where the need for interpretation is due to developed technologies or other change of circumstances.[210] A classic example of a question where a dynamic interpretation has been needed is electronic correspondence and electronic signatures. For instance, it has been considered that an arbitration agreement concluded via e-mail suffices as an agreement in writing that is contained in an exchange of 'letters or telegrams', as required by the New York Convention.[211]

However, a tendency to favour disgorgement damages in domestic laws is a different kind of development. The fact that disgorgement has arisen to complement compensatory damages has more to do with changing values and attitudes than developed technologies or change of circumstances. In comparison to compensatory damages, disgorgement damages are a step towards a punitive remedy.

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[208] For example, the New York Convention has up to 156 contracting states, ranging from Canada to China.

[209] Van Alstine (n 155) 783.

[210] *Cf.* Gruber (n 40) 91 (who discusses the relation between case law that develops tendencies that the legislator did not intend. Gruber notes that legislative intention and diverging case law should not necessarily be seen as being conflicting, as changing economic, political or cultural circumstances have not been considered by the legislator. According to *e contrario* reasoning, it can be deduced that if a certain development is not due to changing economic, political or cultural circumstances, it conflicts with the legislative intention.)

[211] Art. II(2) NYC.

The reason why changing the interpretation of the CISG due to changing values is problematic because the CISG can be seen as a compromise of values that the contracting states have found.[212] The drafters of the CISG decided not to include punitive or other *supra-compensatory* damages, even though they did exist in certain jurisdictions when the CISG was drafted.[213] To commence interpreting Article 74 CISG, which provides for compensatory damages, as granting the right to an amount exceeding loss would seem to be contrary to the compromise that the contracting states have found.[214]

To conclude the discussion on the issue, Schwenzer's idea that the CISG should be interpreted in light of recent development in different domestic laws seems problematic. Following from the principle of autonomous interpretation of the CISG, courts and tribunals are not typically allowed to take domestic traits into account when applying the Convention.

Moreover, achieving uniformity in application is difficult if national developments can be given weight in the interpretation. Only a development that is common to most of the contracting states could possibly be introduced in the Convention without fragmenting the interpretation. In addition, a dynamic interpretation seems most justifiable in cases where the need for interpretation is due to developed technologies or other changing circumstances. By contrast, nationally changing values should not lead to a changing interpretation, as the CISG represents a compromise of values that the contracting states have agreed on.

5. CISG AS GRANTING DISGORGEMENT?

In the previous Chapters of this study, I have introduced the concept of disgorgement as well as the principles of the interpretation of the CISG. In this Chapter, I employ the notion

[212] Harvard Law Review Note (n 119) 1986–1987; Van Alstine (n 155) 751.

[213] Watterson S, 'Gain-Based Remedies for Civil Wrongs in England and Wales' in Hondius E and Janssen A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015 pp. 29–70) 33; Gotanda (n 150) 395; CISG-AC Opinion No. 6, para 9.5.

[214] Van Alstine has taken a different approach, maintaining that Art. 7 CISG, by setting forth such vague regulation as regards interpretation and gap-filling, in fact empowers the judicial authority to develop substantive law. Van Alstine argues that '*the "interpretation" [of the CISG] should also include consideration of changes in societal values and in a statute's legal context subsequent to its adoption'*. See Van Alstine (n 155) 776.

and the interpretative tools for the purposes of examining whether Article 74 CISG yields to providing for disgorgement.

Before turning to the analysis, I will describe briefly the attitude that previous legal research has taken towards disgorgement in the framework of the CISG. The prevailing opinion is rather against the interpretation that the CISG grants an aggrieved party the right to disgorgement. However, as will be observed below, Schwenzer supports cautiously the interpretation that disgorgement of profits may be awarded under the CISG in specific circumstances, while Schmidt-Ahrendts is against this view. In addition, both authors refer to German literature on the CISG where the 'almost unanimous opinion' is that the aggrieved party is not entitled to disgorgement.[215]

Article 74 CISG sets out the framework for the extent of damages that the aggrieved party is entitled to due to breach of contract.[216] In the first Subchapter, I will observe the wording, the limitations to damages, and the legislative history of Article 74 CISG and attempt to fit disgorgement into the frame. In the second Subchapter, I will discuss the general principles of the CISG from the perspective of disgorgement. In the final Subchapter, I will introduce a case where disgorgement of profits was granted under an international sales law, the predecessor of the CISG (ULIS).

5.1. Wording, limitations to damages, and the legislative history of Article 74 CISG

Article 74 CISG provides that the aggrieved party is entitled to a "*sum equal to the loss, including loss of profit, suffered [---] as a consequence of the breach*". Even after the first glance, it is fair to conclude that the idea of disgorgement is not in line with the wording of Article 74 CISG.[217] The focus of the Article is strongly on the loss that the aggrieved party suffers, instead of the profit that the breaching party incurs.

However, what is less clear, the term 'loss' is not explicitly defined in the Article. The first factor to take into account in the interpretation of CISG terms is that interpreters should rely on the CISG-specific content of the word, instead of its domestic definition.[218] The

[215] Schwenzer (n 38) 1017, para 43; Schmidt-Ahrendts (n 53).
[216] Arts. 45 and 61 CISG.
[217] Schmidt-Ahrendts (n 53) 93.
[218] Ferrari (n 172) 66; UNCITRAL Digest on Art. 7 CISG, p. 42, para 4.

CISG Advisory Council[219] has noted that Article 74 CISG '*is to be liberally construed to compensate an aggrieved party for all disadvantages suffered as a result of the breach'*, the relevant definition for loss being 'all disadvantages'.[220] Moreover, it is generally accepted that damages should be measured so as to give the aggrieved party the benefit of the bargain. In other words, compensation should bring the party into the position in which it would have been if the contract had been duly performed.[221]

The compensation of all disadvantages is limited by the requirements of foreseeability and causation. Fitting disgorgement together with these requirements poses a challenge. To first discuss the foreseeability doctrine, the requirement of foreseeability means that the breaching party is not liable to compensate damage that it could not foresee, or ought not to have foreseen, as a possible result of a breach.[222] The idea behind the rule is to enable contracting parties to calculate the risks of a contract before concluding it. This arguably encourages commercial activity through protecting the contracting parties from having to pay for unexpected loss following a breach.[223]

There seems to be no reason why the requirement of foreseeability should not apply indiscriminately to disgorgement damages, assuming that such a remedy is available under Article 74 CISG. However, it is unclear how the requirement applies to the breaching party's profit. In any event, granting disgorgement damages should not hinder contracting parties' possibility to evaluate the risks of a contract at conclusion. In other words, liability in an extent that exceeds what the parties could reasonably foresee at the time of the conclusion of the contract goes against Article 74 CISG.

Turning to the causation, the breaching party is only liable for a loss that has a sufficient causal link with the breach. The central question is, when is a profit attributable to the breach of contract, and not, for example, the skill of the breaching party?[224] To illustrate

[219] The CISG Advisory Council is a private initiative that publishes opinions on the application of the Convention. Even though the Council opinions are not binding, they are considered authoritative especially in light of the principle of uniform interpretation. See, e.g. Ingeborg Schwenzer, 'The CISG Advisory Council' (2012) 2 Nederlands Tijdschrift 46 and case *Teevee Toons, Inc. & Steve Gottlieb, Inc. v. Gerhard Schubert, GmbH (Federal District Court for New York, United States),* where the court relied on Opinion no. 3 in its interpretation of the Convention.

[220] CISG-AC Opinion No. 6, para 1.1.

[221] Secretariat Commentary 1978 on Art. 70, para 3 CISG; Gotanda (n 138) 991, para 1.

[222] Art. 74 CISG.

[223] Saidov (n 143) 102–103.

[224] Graham Virgo, 'Restitutionary Remedies for Wrongs: Causation and Remoteness' in Rickett C (ed), *Justifying Private Law Remedies* (Hart Publishing 2008) (concerning disgorgement in English law.)

this point: The breaching party A obtains a profit of EUR 100 as a result of breach of contract. A, who would otherwise not have additional money to spend, invests the profit in a tech start-up that happens to publish a successful mobile game where players chase pocket monsters. One month after the investment, the original EUR 100 has turned into EUR 1,000,000. Even if A would not have been able to invest in the start-up if not for the breach of contract,[225] is the entire amount of EUR 1,000,000 really attributable to the breach of contract?

The corresponding questions arising in the context of determining the causal link between the breach and loss are resolved by the doctrine of foreseeability. In other words, if the breach causes a loss that increases in an unexpected way, the breaching party is not liable for the part that exceeds the reasonably foreseeable amount.[226] However, it is not clear whether foreseeability would function as a corresponding limitation to the unexpectedly large profit that arguably becomes subject to disgorgement.

Causation in disgorgement damages has been discussed in national laws that provide for disgorgement. Arguably the doctrine developed in national legal systems would apply to the CISG as well if disgorgement was granted under the Convention. However, I will not be able to examine the question of causation in disgorgement in the CISG framework in depth, as the theme could be the subject of a study of its own.

Finally, as regards the legislative history of Article 74 CISG, the history of the provision begins with the predecessor of the CISG, ULIS. The wording of Article 74 CISG is very close to that of Article 82 ULIS, with the exception that the ULIS Article did not apply if the contract had been avoided.[227] There were few discussions on damages provisions during the preparation of the CISG.[228] The Secretariat Commentary states, however, that '*the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed'*.[229] The

[225] This is referred to as the *but-for rule*, see e.g. Schwenzer (n 38) 1015, para 40.
[226] Art. 74 CISG.
[227] Schwenzer (n 38) 999–1000, para 1.
[228] Schwenzer and Hachem (n 14) 91.
[229] Secretariat Commentary on Art. 70 CISG, para 3.

disgorgement of profits does not seem to fit inside this philosophy, unless the amount of profit that the breaching party gains equals to the aggrieved party's loss.[230]

To summarise the main findings of this Subsection, neither the wording nor the legislative history supports the conclusion that disgorgement could be claimed to remedy a breach of contract under the CISG. However, this alone does not lead to a conclusion as regards the availability of disgorgement, as other tools should be employed in the interpretation of the Convention in addition to the literal interpretation of the text and historical analysis.[231] However, there should be a relatively high threshold for adopting an interpretation that does not follow the wording of a provision, or even contradicts it.[232] Furthermore, if one accepts that the disgorgement of profits is available under the CISG, the limitations of damages under Article 74 CISG will have to be accommodated to the novel interpretation.

5.2. Disgorgement in light of the general principles of the Convention

As noted above, the general principles are relevant since the text of the Convention does not provide for disgorgement explicitly. The CISG does not list the general principles underlying it, but the interpreter is supposed to read between the lines.[233] The remedial system and especially damages are such a central part of the Convention that there are numerous principles that are relevant for the disgorgement of profits.

There is an obvious risk that interpreters from different cultures derive diverging principles from the Convention.[234] During the drafting of the CISG, some delegates of contracting states doubted whether it was possible for the uniform law to provide or develop general principles. The delegates suspected that the recourse to general principles would be an empty phrase that domestic courts would ignore, proceeding directly to the second step of the gap-filling mechanism, the recourse to domestic law.[235]

[230] Measuring the aggrieved party's loss with the breaching party's profit is discussed in Chapter 6.
[231] Zeller (n 105) 70.
[232] Schmidt-Ahrendts (n 53) 93.
[233] Harvard Law Review Note (n 119) 1991–1992; Bonell (n 114) 69.
[234] Perales Viscasillas (n 112) 136–137, paras 56–57.
[235] Harvard Law Review Note (n 119) 1991–1992; Bonell (n 114) 69.

5.2.1. Full compensation

The central issue in this Subchapter is, whether the principle of full compensation implies that compensation exceeding the amount of loss is not available under the Convention.[236] The status of the principle under the Convention is uncontested, and Article 74 CISG explicitly provides for full compensation.[237]

In broad terms, the principle refers to the aggrieved party's right to be compensated for all disadvantages suffered as a result of the breach of contract.[238] However, the specifics of the principle are not as clear cut as its general content. 'All disadvantages' can be understood in broad terms or in a more restricted sense. For example, in German contract law, loss is determined by the differential theory ('*Differenzhypothese*'): the losses that appear on the balance sheet are compensable, and any other type of loss is non-compensable. However, arguably the application of such a strict approach lacks legal basis under the CISG, especially due to the strong position of the principle of full compensation. It follows that some disadvantages that are not visible on the balance sheet should be deemed recoverable.[239] Under the PICC 2010 and PECL, non-pecuniary damage is explicitly mentioned as compensable.[240]

Without entertaining an analysis of what the expectation measure truly entails, the CISG Advisory Council has merely recommended that overcompensation not be awarded under the CISG, following the wording of Article 74 CISG. More specifically, the Council's Opinion states that Article 74 CISG does not allow for awards that bring the promisee to a better position than it would have been had the contract been performed.[241]

Furthermore, several factors may lead to the factual undercompensation of the non-defaulting party. Firstly, the reality of quantifying the amount of all the disadvantages suffered by the promisee is rarely as straightforward as the theory. Difficulties in calculating damage may lead to determining the amount of damages as lower than the loss

[236] As regards full compensation, the issue of whether non-pecuniary damage is compensable under the CISG is an often recurring theme (see, for example, Schwenzer (n 38) 1015, para 39 and Schwenzer and Hachem (n 14) 94–95). However, this study does not take part in the discussion as it is not sufficiently relevant for disgorgement.

[237] Schwenzer (n 38) 1001, para 5; CISG-AC Opinion No. 6, para 1.

[238] ibid.

[239] Schwenzer and Hachem (n 14) 94-95.

[240] Art. 7.4.2(2) PICC; Art. 9:501(2)(a) PECL.

[241] CISG-AC Opinion No. 6, para 9.5.

actually amounts to. Secondly, the damage that is unforeseeable to the breaching party is not compensable pursuant to Article 74 CISG.[242] Thus, it is the aggrieved party that bears the risk of unforeseeable loss. Thirdly, the promisee's burden to prove that it incurred damage with reasonable certainty may mean that the party is not able to furnish proof of the whole loss, which further increases the difference between damages and actual full compensation.[243]

Finnish jurisprudence in the areas of contract and tort law conventionally views the principle of full compensation as comprising two elements: the right to compensation for all damage ('*täysi korvaus'*) on one hand, and the prohibition of overcompensation ('*rikastumiskielto'*) on the other.[244] In other words, the prohibition of overcompensation is seen as an integral part of the principle of full compensation. The traditional Finnish interpretation that the unavailability of overcompensation follows from the principle of full compensation could be justified on the basis of the wording of Article 74 CISG. It is possible to interpret the formulation '*damages [---] consist of a sum equal to the loss'* as meaning, *e contrario*, that damages do not consist of anything more than the sum equal to the loss. While this argument is well-grounded, it is not the sole possible interpretation of the full compensation under the CISG.

The content of the principle of full compensation intrinsically linked to the following discussion on the balancing act of the economic benefits principle and performance principle. There is thus no need to rush into conclusions regarding the principle of full compensation before the following analysis.

5.2.2. Protection of the economic benefits in contrast to contractual performance

This Subchapter aims to compare and balance the economic benefits principle versus the performance principle. Furthermore, the part discusses a proposition of hypotheticals where it has been considered that the performance principle to requires granting disgorgement.[245] In the very first Chapter of this study, I enquired whether contractual

[242] Quantification and recoverability are introduced in detail below in Section 3.1.

[243] Schwenzer and Hachem (n 14) 103.

[244] Mika Hemmo, *Vahingonkorvausoikeus* (Talentum Media Oy 2005), 2004; Pauli Ståhlberg and Juha Karhu, *Suomen vahingonkorvausoikeus* (Talentum Media Oy 2013) (also mentions the differential theory in connection with the discussion on the principle of full compensation.)

[245] Schwenzer (n 38) 1017, para 43.

remedies exist to secure the mere financial results of a contract, or the very performance of the obligations. This question is central for the following discussion.

To first introduce the principles that this Subchapter compares, the 'economic benefits principle' denotes the idea that contractual damages compensate for lost economic benefits. A strict application of the principle supports the application of the differential theory that is only willing to take into account economic losses that appear on a balance sheet. The principle follows from the general theory that the law of damages protects the contracting parties' economic positions.[246]

The economic benefits principle follows from the view that compensation is the sole purpose of damages.[247] However, other commentators take a stance that compensation is only one of several objectives. Prevention of breach of contract has also been advocated as a goal of contractual damages.[248]

The 'performance principle' refers to the idea that the law of damages protects the contracting parties' interest in performance. The principle encompasses the thought that contracting parties do not conclude contracts to obtain monetary compensation, but to receive the adequate performance.[249] The performance principle includes the notion that damages are not a sufficiently effective remedy if the breaching party manages to profit from the breach of contract.[250]

The reason why balancing these principles is relevant to disgorgement relates to the analysis regarding the principle of full compensation in the preceding Subchapter. The economic benefits principle speaks for the application of the above mentioned differential theory in determining what constitutes a loss. However, if one were to emphasize the performance principle, a larger understanding of a loss would come to question.

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[246] Schwenzer, Hachem and Kee (n 5) 583, para 44.22.

[247] ibid, 579–580, para 44.10, citing e.g. Ulrich Magnus, 'Art. 74' in J. Von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier - De Gruyter 1993).

[248] Schwenzer, Hachem and Kee (n 5) 579, para 44.08.

[249] ibid, 583, para 44.23; Schwenzer and Hachem (n 14) 94.

[250] This idea was well put by the Master of the Rolls, Lord Woolf in *Attorney General v. Blake (House of Lords, England)*: '[---] *If the court is unable to award restitutionary damages for breach of contract, then the law of contract is seriously defective. It means that in many situations the plaintiff is deprived of any effective remedy for breach of contract, because of a failure to attach a value to the plaintiff's legitimate interest in having the contract duly performed* [---]*'*, paras 456–457; CISG-AC Opinion No. 10, para 4.3.5.

The economic benefits principle mainly derives from the wording of Article 74 CISG and the *e contrario* reasoning that contractual damages only consist of a sum equal to the loss, but do not comprise more.[251] The economic benefits principle is not categorical under the Convention. An absolute adherence to the principle would oppose abstract calculations of damages, such as provided for by Article 76 CISG.[252]

The commentators that have discussed the performance principle under the CISG have relied on the availability of a claim for specific performance as a legal basis for the principle.[253] Further, the principle can also be derived from a closely related ideal of upholding contracts ('*favor contractus*'). The principle of upholding contracts entails that a solution that leads to the continued validity of a contract should be favoured over the contract's premature termination. The ideal is exhibited by several articles in the CISG, such as Article 25 CISG, which sets out a high threshold for a fundamental breach entitling the aggrieved party to avoid the contract.[254]

The CISG Advisory Council has noted the increasing emphasis on the performance principle in its opinion no. 10, concerning liquidated damages in a CISG contract. While the Advisory Council does not explicitly assert that damages under the CISG should be interpreted in light of the performance principle, it does make predictions on the future interpretations of the CISG that it based on a shift from the economic benefits principle to the performance principle.[255] Taking into account the, at least theoretical, importance of the CISG Advisory Council, its proposition speaks for the increasing importance of the performance principle.[256]

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[251] See also Schwenzer and Hachem (n 14) 93–96.

[252] Schwenzer and Hachem (n 14) 94. In an abstract calculation of costs, damages are calculated on the basis of hypothetical costs. By contrast, the concrete measure of damages means calculating costs that have actually been incurred by the non-defaulting party. Art. 76 CISG concerns the calculation of loss based on the market price of the goods where the contract has been avoided. See, Schwenzer (n 38) 1016, para 41.

[253] The right to specific performance is set forth in Arts. 46 and 62 CISG, with the restriction provided for by Art. 28 CISG; Schmidt-Ahrendts (n 53) 89. The availability of a claim for specific performance is not a given, as specific performance is typically an exceptional remedy in common law jurisdictions. See, for example, Shael Herman, 'Specific Performance: A Comparative Analysis (1)' (2003) 7(1) Edinburgh Law Review 1, 7.

[254] Schwenzer and Hachem (n 28) 138, para 35; Franco Ferrari, 'General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 Unidroit Conventions' (1997) 2(3) Uniform Law Review 451, 465.

[255] CISG-AC Opinion No. 10, paras 4.3.5–4.3.7.

[256] Even though the Council opinions are not binding, they are considered authoritative especially in light of the principle of uniform interpretation. See, e.g. Schwenzer (n 219).

Prof. Schwenzer has formulated case examples where she maintains that the performance principle in itself requires that a breaching party should not be entitled to benefit from a breach of contract. Therefore, she argues, the aggrieved party should be entitled to the breaching party's profit.[257] These examples do not so much shed light on the question of whether the performance principle should prevail over the economic benefits principle, but they are helpful in concretising the balancing act, and illustrating what a different emphasis as regards the principles means in practice.

The first case example concerns a second sale where the seller sells the goods to another buyer at a higher price, thereby realising a higher profit than agreed under the first contract. In the second case, the seller undertakes to manufacture goods under humane conditions, but breaches the contract by resorting to non-conforming mechanisms that reduce production costs. In the third constellation, the buyer sells goods to a market despite having undertaken to not supply the goods to that location.[258]

The three hypotheticals are different in terms of whether the promisee incurs loss in the sense of the economic benefits principle. The aggrieved party of the first case example, the second sale, is in the best position in this respect. The promisee of that case is the likeliest to incur economic loss even in terms of the economic benefits principle. The promisee may incur damage in the form of loss of profit, for example. Such loss is not difficult to calculate if the promisee had already concluded contracts for the sale of the non-delivered goods.[259]

In the two other case examples, the non-defaulting party does not necessarily sustain economic loss. In addition, the most probable form of damage that the aggrieved party could claim in these constellations, loss of goodwill, is notoriously difficult to define, let alone prove and quantify.[260] As it is possible that no compensatory damages become payable in relation to these two hypothetical breaches, conventional compensatory damages do not seem to fulfil the need to protect the contractual performance.

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[257] Schwenzer (n 38) 1017, para 43 (in connection with outlining these case examples, Schwenzer also notes that disgorgement can also be seen as a way to quantify the aggrieved party's loss where it is 'difficult or impossible' to prove. Measuring loss by the breaching party's profit is discussed at length in Chapter 6 of this work.) For a dissenting opinion regarding Schwenzer's case examples, Schmidt-Ahrendts (n 53), 90–92 examines each of the hypotheticals and concludes that disgorgement is unwarranted in each case.

[258] Schwenzer (n 38) 1017, para 43.

[259] Schmidt-Ahrendts (n 53) 90.

[260] Schmidt-Ahrendts (n 53), 91–92.

A possible counterargument for the proposition that the performance principle requires disgorgement could be to suggest that a claim for specific performance is sufficient to protect the promisee's right to performance.[261] However, as regards the foregoing constellations, specific performance would only be appropriate in the first case example, i.e. second sale. However, a claim for specific performance is not compatible with the two other hypotheticals. The damage is already done when the goods have already been manufactured in inhumane conditions, or when the market boasts with the goods that were not supposed to end up into it.

Moreover, Schwenzer's second hypothetical is of particular interest from a policy perspective. The obligation to manufacture the goods humanely has much more value than the promisee's sheer economic interest in the manufacturing process. The promisor's obligation is relevant for, *inter alia*, the health of the manufacturing employees. The economic benefits principle fails to take into account and protect non-economic interests that underlie some contractual obligations.[262]

Prof. Schwenzer's examples of cases where she suggests that disgorgement be granted, illustrate the differences of the two principles. The goal of protecting contractual performance can be considered to call for an additional remedy in part of the case examples, as it is possible that no compensatory damages become payable in relation to a clear breach of contract, even though non-economic damage occurs. On the other hand, a claim for specific performance could be seen as adequately protecting the promisee of one of the examples.

To briefly summarise the discussion above, the two principles derive from different parts of the CISG. While the economic benefits principle follows from the wording of the Article 74 CISG, a strict adherence to the former principle is unwarranted under the Convention, as Article 76 CISG illustrates.[263] The legal grounds for the performance principle relate to the availability of specific performance and the ideal of upholding contracts, which is exhibited by the high threshold of avoiding a contract under Article 25

[261] See also, Steven Walt, 'For Specific Performance under the United Nations Sales Convention' (1991) 26 Texas International Law Journal 211, 245–246.

[262] Schwenzer and Hachem (n 14) 94–95. Observing such a policy perspective is of course contrary to the Holmesian view that a contract is a mere obligation to pay damages if the promisor does not keep it, as expressed in Wendell Holmes (n 3) 462.

[263] Schwenzer and Hachem (n 14) 94.

CISG.[264] Furthermore, the CISG Advisory Council has noted the increasing importance of the performance principle over the economic benefits principle.

In conclusion to the examination of the economic benefits principle and performance principle, neither of the principles clearly prevails over the other. However, the formulation Article 74 CISG limits the possible inferences that can be drawn from the balancing act of the principles. Even if an interpreter chooses to emphasize the performance principle over the economic benefits principle, they should not grant a remedy that is in glaring conflict with the wording of the article. In light of the formulation of Article 74 CISG, awarding a disgorgement remedy that does not have any regard for the amount of loss appears problematic.[265]

Despite the foregoing, an interpreter can and should put into practice the principle requiring the protection of the contractual performance. A more justified approach could be to interpret the term 'loss' in an expansive manner.[266] For example, an interpreter could attempt to value the non-economic interest in performance in monetary terms.

5.2.3. Good faith in international trade

To top off the discussion on the principles underlying the Convention, the final issue of interest concerns the principle of good faith. Arguably the significance of the principle of good faith for disgorgement relates to the question of how demonstrations of bad faith on behalf of the breaching party affect the interpretation of Article 74 CISG.[267] In other words, the question in this Subchapter is whether considerations of good faith should play a role in determining if the case warrants an expansive understanding of the formulation of Article 74 CISG. To clarify the premises of this Subchapter, it examines good faith as a principle that guides the interpretation of Article 74 CISG, and not as a substantive obligation imposed on the contracting parties.[268]

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[264] Schwenzer and Hachem (n 28) 138, para 35; Ferrari (n 254) 465.

[265] See also Schmidt-Ahrendts (n 53) 92.

[266] Similarly, Schmidt-Ahrendts (n 53), who notes that an interpreter can protect the interest in performance by applying different methods of quantifying loss. Schmidt-Ahrendts concludes that an interpretation that is compatible with the object of a provision, but incompatible with its wording, may be only acceptable in exceptional circumstances which are not present in case of disgorgement.

[267] See also Schmidt-Ahrendts (n 53) 90.

[268] For an in-depth analysis on the nature of the good faith principle under the CISG, see John Felemegas, 'Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL' (2001) 13 Pace International Law Review 399 and Walt (n 261).

As noted above, the term 'good faith' has diverging meanings and statuses in domestic laws,[269] which may be the reason why the concept appears to have been particularly difficult to interpret in the context of the CISG[270]. For example, a German court concluded that it would violate the principle of good faith to insist on an explicit declaration of avoidance in case the seller has refused to perform its obligations, although the Convention expressly requires a declaration of avoidance.[271] Furthermore, case law is divided on the question of whether the CISG imposes on the parties an obligation to act in good faith.[272]

The concept of good faith has been put into practice under the CISG as forbidding the deliberate pursuit of self-interest, the exploitation of dominance over others and dishonest behaviour.[273] To form an image of what good faith denotes in an international setting, also the PICC 2010 employs the concept.[274] It is relevant to note that in contrast to the starting point of this Subchapter, which examines good faith as a principle of interpretation, the PICC 2010 imposes an obligation on the parties to act in good faith.[275] In construing the principle, the commented version of the PICC 2010 takes into account the standards of business practice in a certain trade, and the socio-economic environment in question, as well as the size and skills of the contracting parties.[276]

The viewpoint offered by PICC regarding the context of international trade point seems appropriate for the CISG, as the Convention is similarly concerned with cross-border business. Therefore, the determination of whether certain behaviour goes against the principle of good faith would consider whether such practice contradicts a certain standard

[269] Bruno Zeller, 'Good Faith – The Scarlet Pimpernel of the CISG' (2000) 6 International Trade and Business Law Annual 227. To exemplify the differences in understanding good faith, the French civil law views good faith as a general requirement imposed on all individuals, which implicates that contracts should be interpreted in view of this obligation. By contrast, the premise in English law is that contract negotiations feature parties that negotiate in self-interest, and an obligation of good faith would be inconsistent with this premise. See Cremades (n 164) 770–771 and 774.

[270] Baasch Andersen (n 164) 315.

[271] *Trade usage case (Court of Appeals, Cologne)*; UNCITRAL Case Digest, p. 43, para 13; a declaration is required by Arts. 26, 49 and 64 CISG.

[272] E.g. the German Supreme Court considered the good faith obligation to exist in the *Machinery case*, whereas an arbitral tribunal in an arbitration administered by the ICC has merely applied the concept as a tool to interpret the communications of the parties in the *Cowhides case (ICC arbitration)*; see also Baasch Andersen (n 164) 315.

[273] Perales Viscasillas (n 112) 120, para 3; Zeller (n 269).

[274] Art. 1.7 PICC.

[275] It is controversial whether the CISG sets forth an obligation for the contracting parties to act in good faith. Mazzotta (n 120) 133; Peter Schlechtriem , 'Good faith in German Law and in International Uniform Laws' speech given at Saggi, Conference e Seminari in February 1997. Available at: http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem16.html (accessed 22 April 2016) 179.

[276] PICC 2010, p. 21.

of behaviour, which is determined on the basis of the elements set out in PICC 2010 and mentioned above.

Even with the aforementioned guidance to good faith in international trade, it is difficult to piece together a general definition of what the concept entails. Perhaps the notion should be seen as a 'catch-all provision' for conduct that is reprehensible taking into account the context and the facts, rather than attempting to strictly define it.[277] In other words, the promotion of good faith in the application of the CISG entails discouraging reprehensible conduct, taking into account the standards of business practice in a certain trade, and the socio-economic environment in question, as well as the size and skills of the contracting parties. In the context of Article 74 CISG, this would imply that the ideal of good faith in international trade could play a role in the assessment of what is categorised as loss.[278] However, such an interpretation should not contradict the formulation of Article 74 CISG.

5.3. *Adras Chmorey Binyan v. Harlow & Jones Gmbh*

As the final issue of the Chapter that examines the availability of a true disgorgement remedy under the CISG, this Subchapter introduces a case where a court granted disgorgement in the context of international sales.[279] Even though the previous Chapters have allowed to draw conclusions on the issue even before visiting this aspect, reviewing this case illustrates what kind of arguments can, and cannot, be used to support granting disgorgement damages.

The applicable law in the *Adras*[280] case was ULIS (Convention relating to a Uniform Law for the International Sale of Goods, 1964), the less successful predecessor of the CISG.[281] The decision is relevant for the modern Convention as the damages provision under ULIS was nearly identical to that of the CISG.[282]

In 1973, a German seller contracted to sell iron to an Israeli buyer. The Yom Kippur war caused a delay in delivery, but the seller managed to deliver a part of the iron in early

[277] Christopher Kee and Edgardo Munoz, 'In Defence of the CISG' (2009) 14 Deakin Law Review 99, 105.
[278] See also Schwenzer (n 38) 1002, para 8.
[279] Friedmann (n 61) 384.
[280] *Adras Chmorey Binyan v. Harlow & Jones Gmbh (Supreme Court, Israel).*
[281] Peter Schlechtriem and Ingeborg Schwenzer, 'Introduction' in Schwenzer I (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, Oxford University Press 2010 pp. 1–12), 1.
[282] Schwenzer and Hachem (n 14) 91; Schneider (n 133) 224.

1974. In April 1974, the seller notified the buyer that due to high storage costs, it will have to sell the remaining part of the iron to third parties. The buyer replied by demanding the delivery of the rest of the iron that it was entitled to under the contract. Notwithstanding the reply, the seller sold the iron to third parties at a higher price than what it would have received under the contract. The buyer filed a claim for damages, and alternatively for the 'restitution' of the seller's profit, i.e. disgorgement.[283]

The Supreme Court first dismissed the buyer's claims in 1983. Firstly, court found that the buyer had not proven that it had incurred loss as a consequence of the breach of contract. Secondly, the court ruled that the buyer could not rely on Article 84 ULIS. The article provided that if a contract is avoided, the party claiming damages may recover the difference between the contract price and the market price at the time of avoidance. According to the court, the buyer had not avoided contract, as the claim that the buyer had filed did not constitute an avoidance of contract.[284] In addition, the market price of the iron had returned to its former level, and therefore there was nothing to recover as the difference between the contract price and the market price.[285]

Thirdly, the court dismissed the buyer's claim based on the law of unjust enrichment. The buyer had claimed that the profit that the seller made should be regarded as unjust enrichment. The court rejected the claim on the grounds that the law of unjust enrichment does not apply if there is no contract between the parties. However, the third claim was later re-assessed in a further hearing with an extended panel. The court decided to reverse its first decision and decided to award the profits to the buyer.[286]

The Supreme Court's decision to grant the seller's profit to the buyer was not grounded on ULIS, but rather the Israeli law of restitution.[287] However, the court's reasoning is interesting from the point of view of ULIS and thereby the CISG. The mere fact that the court applied the unjust enrichment norms to a contractual dispute deserves attention. The court found that the general principle against unjust enrichment enables the restitution of gains made at the expense of another. In the decision, Levin J. stated that if a contractual

[283] Friedmann (n 61) 384.

[284] This point concerns a difference between the ULIS and the CISG: While the Art. 74 CISG concerns damages for breach of contract in any case, Art. 84 ULIS only concerned damages for a contract that has been avoided.

[285] Friedmann (n 61) 384.

[286] ibid.

[287] ibid.

cause of action overlaps with a cause of action under the law of restitution, the claims are alternative.[288]

Barak J. compared the Israeli unjust enrichment law to a 'great eagle which spreads its winds over all other laws'. He suggested that contract law remedies do not only protect reliance interest and expectation interest, but also a third interest prohibiting unjust enrichment. Hence, the claimant may be simultaneously entitled to several remedies available under the law of obligations so long as the *claimant* does not obtain unjust enrichment through the availability of multiple remedies.[289]

On a terminological side note, it is misleading to call the restitution of unjust enrichment a 'remedy' in the sense of a remedy for breach of contract.[290] Unjust enrichment is rather a separate regime than an alternative remedy for breach of contract.[291] However, in practice, the regime of unjust enrichment constitutes an alternative tool to claim additional compensation for breach of contract, if one accepts that unjust enrichment norms can be applied even where the parties have concluded a contract.

The question of the scope of the Israeli unjust enrichment law is relevant, as domestic remedies may overlap with the remedies under the CISG just as they did in the *Adras* case. The tension between the domestic legal system and the international sales law has been referred to as the *cleavage of statutes*.[292] The cleavage of statutes is typically due to the dissonance of general principles in the national contract law on one hand and the international sales law on the other.[293] In this case, the overdriving effect of the Israeli unjust enrichment law causes the dissonance.

If the parties to a CISG contract are allowed to invoke domestic remedies alternatively or in addition to CISG remedies, parties in different contracting states of the Convention may

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[288] ibid.

[289] Talia Einhorn, 'Disgorgement of Profits in Israeli Law' in Hondius E and Janssen A (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer International Publishing Switzerland 2015 pp. 299–324) 302; Friedmann (n 61) 384. It is of course arguable whether the claimant of the Adras case ended up receiving unjust enrichment, as the breaching party's profit exceeded the loss that arose out of the breach of contract.

[290] Term used in Friedmann (n 61) 385–386.

[291] Waddams (n 50) 192–193.

[292] Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods: Commentary* (Oceana Publications 1992) 11.

[293] DiMatteo, Dhooge, Greene, Maurer and Pagnattaro (n 171), 308.

end up in different positions, as a domestic remedy in one country may not be applicable in another. This contradicts with the starting point of the CISG that aggrieved parties in the same situation in different jurisdictions should receive the same remedial treatment, for example the same amount of compensation.[294]

On one hand, the CISG only represents the sales law of the applicable legal system. The CISG has to be supplemented by other rules, such as the law regulating the validity of the contract or the transfer of ownership.[295] It is normal for the norms 'surrounding' the CISG to vary from one jurisdiction to another. The law of unjust enrichment could be viewed as one example of a set of norms that may result in diverging end results in different CISG countries.

However, the foregoing analysis ignores the fact that remedies for breach of contract fall into the scope of the CISG. While the surrounding areas of law do vary from one country to another, the norms that concern the scope of the CISG should not vary.[296] The purpose of the CISG is to offer a neutral international sales law, and legal certainty for the contracting parties. The general idea is that neither party to an international sales contract will not have to become acquainted with a foreign legal framework where the CISG applies, as the CISG leads to the same results everywhere. [297] Accepting the application of overlapping national remedies means that the parties have to be prepared for additional remedies arising from the applicable domestic law. This undermines legal certainty in choosing the CISG.

The Israeli Supreme Court justified stripping the profits from the seller with contract law arguments. The court emphasised the fact that a breach of contract should not be treated lightly. Levin and Barak JJ. criticised the idea of efficient breach and maintained that the disgorgement of profits functions as deterrence against breach of contract.[298] In addition, the court referred to the fact that under the Israeli contract law, specific performance is the primary remedy for breach of contract. It appears that the court's values as regards the acceptability of an efficient breach, the Israeli good faith obligation and the obligation to

[294] John Y. Gotanda, 'Awarding Damages under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation' (2005) 37 Georgetown Journal of International Law 95.
[295] Under Art. 4 CISG, the Convention does not govern the validity of the contract or the effect which the contract may have on the property in the goods sold.
[296] Art. 7 CISG; Ferrari (n 30) 245–246.
[297] Schwenzer and Hachem (n 26), 16, para 8.
[298] Friedmann (n 61) 385.

behave in a trustworthy manner strongly impacted the court's reasoning as regards the reconciliation of overlapping remedies.[299] The Israeli values and legal concepts concerning contract law should be irrelevant for the case, as the applicable contract law was ULIS instead of the Israeli contract law.

To conclude, the reasoning and conclusion of the *Adras* case are problematic in a number of respects. Firstly, the application of unjust enrichment norms as supplementary remedies to ULIS poses concerns as to the uniformity of remedies available under contracts that provide for a uniform law as the applicable set of norms. Secondly, the court seems to have applied an international sales law according to Israeli principles, which should not play a comparable role in applying an international piece of legislation. Therefore, the *Adras* case rather represents an example of the problems surrounding uniformity in application than a significant case to take example of.

6. MEASURING LOSS BY THE BREACHING PARTY'S PROFIT

Compensatory damages may lead to the same end result as disgorgement: stripping the breaching party of the profit made by a breach. However, as noted earlier in the introductory part, a true disgorgement remedy is not the same as quantifying damages in accordance with the breaching party's profit, even if the end result of the two remedies can be the same.[300]

The previous Chapter assesses granting disgorgement for breach of contract irrespective of the aggrieved party's loss (or lack thereof). This section analyses the use of the breaching party's profit as a measurement in the calculation of compensatory damages under the CISG. In the terminology of this work, the key difference between the quantification of damages according to profit on one hand, and disgorgement on the other, is loss caused by the breach. Granting disgorgement in its pure form does not require that the aggrieved party has suffered damage. By contrast, if the aggrieved party has not suffered loss, they

[299] Einhorn (n 289) 303.

[300] Schwenzer, Hachem and Kee (n 5) 581, para 44.15. A similar mechanism is in use in intellectual property law, where the loss of the proprietor can sometimes be calculated in accordance with the profits of the infringer, see Schwenzer, Hachem and Kee (n 5) 630, para 44.250.

are not entitled to damages. In addition, questions of proof should be dealt with differently in case of disgorgement on one hand and quantification on the other.[301]

This section commences by discussing the legal framework of the quantification of loss under Article 74 CISG and how the breaching party's profit may be relevant in the process. Subsequently, the Chapter goes on to introduce a case where profit made by breach of contract was used in the calculation of loss.

6.1. Quantification of damages under Article 74 CISG

To begin from the start, quantification of damages is an issue of both fact and law. Law determines the standard of compensation and the object of quantification. The standard of compensation can be, for example, adequate compensation, fair market value or full compensation.[302] Under the CISG, the relevant standard of compensation is full compensation.[303]

In determining the object of quantification, the court or tribunal assesses which costs the breaching party is liable to compensate. This consists of several elements, such as the recoverability of the type of loss, causal link, foreseeability and whether the aggrieved party could have avoided the loss.[304] It is only after the determination of the object that the quantification may take place, and it is important that these two phases not be confused. Determining the object of quantification is mainly a legal issue, while the quantification itself is more concerned with whether a fact has been shown. Confusing these different stages may lead to the erroneous conclusion that difficulty in quantifying a category of loss means that a type of loss is not recoverable at all.[305]

The breaching party's profits are relevant for the process of quantification, and not as pertinent in determining the object of quantification. The reason why study discusses the object of quantification is to prepare the ground for the following analysis of the

[301] The remark regarding proof is discussed below.

[302] Mark Kantor, *Valuation for Arbitration* (Kluwer Law International 2008) 1.

[303] Art. 74 CISG.

[304] Kenneth M. Kolaski and Mark Kuga, 'Measuring Commercial Damages via Lost Profits or Loss of Business Value: Are these Measures Redundant or Distinguishable?' (1998) 18 Journal of Law and Commerce 1, 3.

[305] Schwenzer, Hachem and Kee (n 5) 624, para 44.220.

quantification itself. Furthermore, the aforementioned expansive reading of the term 'loss' affects the assessment of whether a loss is recoverable.[306]

6.1.1. Determining the object of quantification

In determining the object of quantification, the broadest question to be answered is whether a type of loss is recoverable. To clarify, the 'type of damage' refers to categories of loss that the promisor is liable for. These may include reduced value, loss of profit or storage expenses. Despite the starting point of full compensation, not all types of damage are recoverable under the CISG. Some types fall out of the scope of the Convention.[307] In assessing the recoverability of a type of loss, the conclusions of the previous Chapter may come to play. The performance principle can be taken into account in the determination of whether a type of loss is recoverable.[308]

The breaching party's profit is more likely to be relevant for the quantification of certain types of loss than other ones. The most evident example of where the profit may be of use is determining the aggrieved party's loss of profit. This means compensation for profit that the promisee did not obtain due to the breach of contract.

Loss of profit can be seen as consisting of different components: loss of profit, and loss of future profit. The former means profit that the aggrieved party would have made for a resale of goods pursuant to an agreement that was already in place before the breach of contract. The latter, on the other hand, denotes profit that the buyer could have received if it managed to resell goods that it was due to receive under a sales contract, but that it had

[306] This is a reference to the conclusion of Subchapter 5.2.2 in the previous Chapter: While granting monetary compensation in a case where the aggrieved party has not sustained loss is not in line with the Convention, the performance principle may under certain circumstances call for an expansive interpretation of what constitutes loss.

[307] Schwenzer (n 38) 1005, para 18, has argued that 'recoverability [of a type of damage] has to be determined in accordance with the overall objective of the CISG to achieve full compensation in view of the particular purpose of the contract'. As an undisputed exception to the main rule, compensation for personal injury or death is not within the scope of the CISG (Art. 5 CISG).
Furthermore, there is wide academic discussion regarding the compensability of legal costs under the CISG, see, e.g. Peter Schlechtriem, 'Legal Costs as Damages in the Application of UN Sales Law' (2006) 26 Journal of Law and Commerce 71 and Harry Flechtner, 'Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG)' (2002) 22(2) Northwestern Journal of International Law & Business 121.

[308] The conclusion of Subchapter 4.2.2 was that the performance principle may under certain circumstances call for an expansive interpretation of what constitutes loss.

not bound itself to sell.[309] The recoverability of loss of future profit is somewhat controversial.[310]

If a court or a tribunal finds loss of future profit not to be compensable under the CISG, the usefulness of a reference to the breaching party's profit diminishes. This is because the breaching party's profit is not relevant for calculating loss of profit under an existing contract for resale. It is possible to calculate such loss of profit in accordance with the contract.

Further questions that may arise at the stage of determining the object of quantification relate to causality and the foreseeability of loss, which are prerequisites for compensation under Article 74 CISG. In addition, it may be necessary to determine whether a certain loss could have been avoided, or whether a measure that caused costs was reasonable for the aggrieved party to take.[311] The latter issue is relevant as the aggrieved party is entitled to compensation for the costs of measures that were taken in order to place it in the same position where it would have been in had the contract been properly performed.[312]

6.1.2. Quantifying damage

The norms concerning the quantification of damages under the CISG are fairly flexible. The established main rule is that the full compensation of the relevant types of loss should be calculated in the manner that is best suited to the circumstances in each individual case ('*the most appropriate method rule*').[313] The flexibility of the most appropriate method rule is due to the great variety of situations that Article 74 CISG regulates. The scope of the provision particularly broad as it encompasses the breach of any obligation by either the buyer or the seller. Thus, the rule relates to a great variety of cases.[314]

It is unclear what kind of criteria are relevant in establishing the most appropriate method. The accuracy of the calculation is an evident factor. In addition, it appears justifiable to

[309] Schwenzer and Hachem (n 14) 97.

[310] Schwenzer and Hachem (n 14) 97. To clarify – recoverability of loss of profit in general is explicitly mentioned in Art. 74 CISG, and thus there is no question of the compensability if the profit would have been gained by contracts that had been entered into when the breach of contract occurred.

[311] If a cost was reasonably avoidable, it is not recoverable due to the aggrieved party's obligation to mitigate its loss under Art. 77 CISG.

[312] CISG-AC Opinion No. 6, para 3.2.

[313] Secretariat Commentary 1978 on Art. 70 CISG, para 4; CISG-AC Opinion No. 6, para 3.3.

[314] Secretariat Commentary 1978 on Art. 70 CISG, para 4.

balance the accuracy criterion with the procedural burden of the method. In other words, if a method is extremely accurate, but requires a great amount of research, it seems appropriate to opt for a less accurate method that involves a less burdensome process. The choice of course depends on the circumstances of the case.

The Secretariat Commentary on the draft counterpart of Article 74 CISG contains examples of appropriate ways to calculate loss. In one example, the breach of contract concerns the non-conformity of goods, more specifically, grain that had more moisture than it was allowed under the contract. In this case, the buyer incurred two types of loss: decreased value of the grain and drying expenses. According to the Secretariat Commentary, the loss is calculated as follows:

Table 1: Calculation of damages in case of non-conforming grain

The value that the grain would have had if it was conforming		$55,000
The value of the grain as delivered	-	$51,000
The damage that arises out of the decreased value		$ 4,000
Expenses of drying the grain	+	$ 1,500
Loss arising out of the breach in total		*$ 5,500*[315]

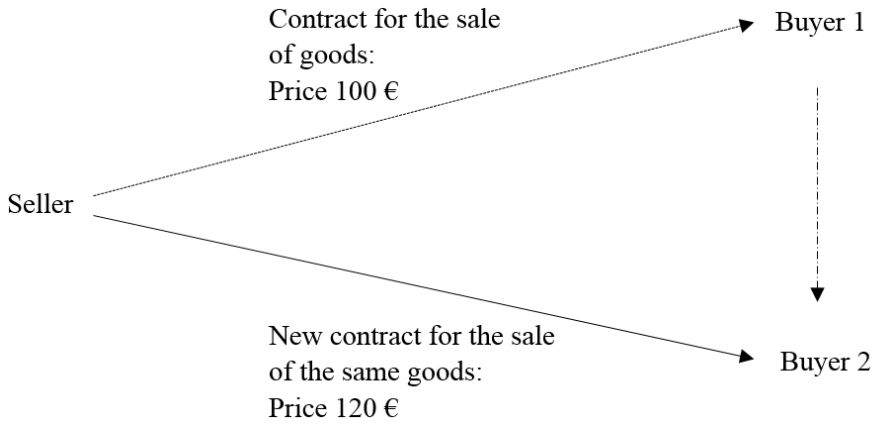
In cases where damages compensate the decrease in value and drying expenses, it is difficult to see how the profit that the promisor may make by the breach of contract could play a role in the quantification. Furthermore, in the Secretariat Commentary example of non-conforming grain, the most appropriate method of calculation is obvious enough to be unlikely to cause disaccord between the parties. The parties may of course have differing views as to the valuation of the costs, e.g. what the value of the grain would have been if it had been conforming.

In other cases, defining the most appropriate calculation method may be a more complex task. Difficulties arise when the promisee has incurred loss of further profit, or loss of goodwill.[316] It is possible to construe a situation where the profit that the promisor obtains is somehow linked to the value of the loss of profit that the promisee suffers. For example, in case a seller breaches a contract by selling the goods to a second buyer, one can argue

[315] Secretariat Commentary 1978 on Art. 70 CISG, para 5, example 70A; CISG-AC Opinion No. 6, para 3.3.
[316] Schwenzer and Hachem (n 14) 97–98.

that the first buyer could have resold the goods at the same profit. [317] The following figure illustrates this point:

Figure 1: connection of lost profits and the profit that arises out of the breach in a second sale situation



In Figure 1, the profit that the Seller obtains by selling the goods to the Buyer 2 instead of the Buyer 1 amounts to EUR 20, i.e. EUR 120 (the price that Buyer 2 is willing to pay) – EUR 100 (the price under the original contract) = EUR 20. On the other hand, if the Buyer 1 had received the goods and been able to sell the goods to the Buyer 2 at the same price as the Seller did, the profit would have also amounted to EUR 20, i.e. EUR 120 (the price that the Buyer 2 would have paid) – EUR 100 (the price that Buyer 1 would have paid to the Seller).

In addition to the most appropriate method rule, the calculation method should primarily be a concrete method. The alternative is an abstract calculation.[318] The concrete measure of damages means calculating costs that have actually been incurred by the non-defaulting party. In the context of non-delivery, this means that if the buyer manages to acquire substitute products, the damage is defined as the difference between the price of the substitute and the non-delivered product.[319]

[317] DeLong (n 85) 748.

[318] Schwenzer (n 38) 1016, para 41. The same starting point has been expressed in the *Jeans case 1999 (Court of Appeal Hamburg)* where the breach of contract was the non-conformity of the goods. In the case, the court calculated damages on the basis of the profit that the aggrieved buyer had obtained for the resale of corresponding undamaged goods.

[319] Schwenzer, Hachem and Kee (n 5) 624, para. 44.222.

In an abstract calculation, damages are calculated on the basis of hypothetical costs. To use the previous example of non-delivery, the damage would be determined as the difference between the market price of a substitute product and the non-delivered product.[320] Article 76 CISG, which is applicable when the contract has been avoided, warrants an abstract calculation of damages if no substitute transaction has been entered into.

The profit that the breaching party makes can be relevant to an abstract calculation, as in certain markets, the profit may function as proof of the market price. This could conceivably be the case if the goods are scarce, and it is difficult to determine the market price due to the low number of transactions in the market. Any suggestion as to the value of the goods can be useful for the determination if the goods are unique.[321]

The relevant rules that follow from the CISG have now been introduced. Evidently, applying the norms in accordance with facts is the necessary next step. In a legal proceeding, questions of proof sneak in with the facts. Before the application of rules, a court or a tribunal has to determine which facts have been established with a sufficient degree.[322]

The burden of furnishing the proof of loss and its quantity rests on the aggrieved party.[323] In addition, the scope of this burden extends to showing the approximate quantum of damages. The aggrieved party is required to prove the extent of damages and provide a basis for the court or tribunal to estimate the quantum of damages.[324]

In providing a damages calculation that proves the extent of damages, the aggrieved party justifies why the court or the tribunal should calculate damages in a certain way – for example, by reference to the breaching party's profit. If the breaching party prefers another method of calculation, they will have to show that an alternative method would be better suited to the circumstances of the case.[325] In view of this aspect, true disgorgement is

[320] ibid, 624–625, para. 44.223.

[321] Farnsworth (n 9) 1370–1378.

[322] Sieg Eiselen, 'Proving the Quantum of Damages' (2005) 25(1) Journal of Law and Commerce 375, 375.

[323] Ferrari (n 115) 8. The norm concerning the burden of proof is not specifically stated in the CISG, however, the issue is considered to be governed by the Convention. In order to recover damages, the aggrieved party must show with reasonable certainty that it has incurred loss as a result of the breach. See CISG-AC Opinion No. 6, para 2.6; Schwenzer and Hachem (n 14) 98. For a differing view, see Eiselen (n 322) 381–382.

[324] CISG-AC Opinion No. 6, para 2.9.

[325] Schmidt-Ahrendts (n 53) 93.

different from quantifying loss by reference to the profit arising out of the breach. If the CISG provided for the pure form of disgorgement, the aggrieved party would not have the burden to prove that the profit correlates with the loss.

As the final point relating to the quantification of loss, a commentator has noted that taking the breaching party's profit into account is appropriate where calculating is otherwise difficult.[326] Requiring difficulty implies that the breaching party's profits should only be a secondary means of calculating loss. However, at first sight it would appear unnecessary to require difficulty of calculating damages if the aggrieved party manages to prove that the breaching party's profit is the method of calculation that yields the most accurate result.

One justification for raising the threshold of using the breaching party's profit relates to the procedure of acquiring proof. Primarily, it is the aggrieved party that provides the damages calculation, together with figures and proof of valuations.[327] However, the non-defaulting party is typically not able to provide documentation on the breaching party's profit. In order for a court or a tribunal to calculate damages on the basis of the defaulting party's profit, the latter has to furnish proof to enable a calculation of the profit. This effectively means shifting a part of the burden to prove and calculate damages to the breaching party, and possibly disturbing the balance between the contracting parties and the system of burden of proof under the CISG. This viewpoint could justify setting an additional threshold for the use of the profit in calculation.

To conclude this discussion, using the profit as a measurement stick for the damage that the aggrieved party incurs fits into the framework of quantifying damages under the CISG. However, this requires that the aggrieved party shows that using the profit is the most appropriate method of calculation for the loss. Furthermore, a court or a tribunal considering the option of using the profits in calculation should take into account what this method entails with respect to the procedure.

6.2. *Pressure sensors case*

The profit made by the breaching party was used as a basis of the calculation of contractual damages under the CISG in an arbitration case administered by the Stockholm Chamber of

[326] Schwenzer (n 38) 1017, para 43.
[327] CISG-AC Opinion No. 6, para 2.6; Ferrari (n 115) 8.

Commerce in 2007.[328] I introduce the case as illustration of a constellation where it is questionable whether the breaching parry's profit constitutes the most appropriate method to calculate the aggrieved party's loss.

The case concerned a sales contract between a Chinese buyer and a Brazilian seller. Under the agreement that was concluded in 2002, the seller undertook to supply pressure sensors to the buyer, and license the devices to be integrated with the buyer's products. The sales contract also included a confidentiality clause, prohibiting the parties from using the information to purposes other than the performance of the sales contract.[329]

The buyer claimed that delivered sensors did not perform in compliance with the contract in certain temperatures. As the parties could not resolve the disagreement as to the alleged non-conformity of the sensors, the buyer commenced arbitration claiming damages. The tribunal rejected the buyer's claim for damages, finding that the buyer had failed to prove that the goods were defective.[330]

However, the seller filed a counterclaim alleging that the buyer had copied the buyer's source code, thereby breaching the confidentiality clause of the sales contract. Pursuant to the sales contract, the buyer's engineers had visited the seller's facilities in Brazil to implement the plan to integrate the seller's sensors to the buyer's products. The tribunal noted that the source codes of the seller and buyer bore significant similarities, which the buyer argued to be coincidental. The tribunal found seller's argument of illicit copying more convincing. The tribunal considered the copying to constitute misuse of confidential information under the sales contract.[331]

In assessing the seller's loss arising from the breach, the Tribunal focused on the benefit that the buyer had received. The Tribunal maintained that the advantage that the seller had obtained by the unauthorised use of information was receiving a head start for developing the technical solution in the code. The Tribunal concluded that the buyer could have produced the same code in 24 months' time without breaching the contract.[332]

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[328] *Pressure sensors case (SCC arbitration)*.
[329] ibid, paras 60–63 and 97.
[330] ibid, paras 75–83 and 146.
[331] ibid, paras 147–168.
[332] ibid, paras 170–174.

The Tribunal decided award the seller damages in the amount of the buyer's sales during a 24-month period.[333] The Tribunal did not justify this mode of calculation of the loss, but merely stated that '*there is no scientific way to assess damages in cases of this nature*'.[334] A reasonable explanation for the tribunal's calculation method would be to argue that if the buyer had not sold similar pressure sensors during the 24-month period, the seller would have been able to generate the same amount of sales as the buyer now did.

However, an argument that the seller would have generated less or more profit is conceivable. In the case, the parties even sold different products: the buyer's goods were pressure transmitters where the seller's sensors were integrated.[335] It does not seem far-fetched to claim that the buyer's revenue for the sales of the transmitters does not accurately correspond to what the seller would have obtained for selling pressure sensors.

In addition to the contribution that the *Pressure sensors case* offers to the substantive damages calculation, the case also illustrates the evidentiary hurdles that are associated with calculating loss by reference to the profit arising out of the loss. Unfortunately it is not possible to analyse the issues relating to evidence in this study. This is mainly because the scope of the CISG merely extends to burden of proof, and no other aspects of evidence or procedure. Thus, the norms regarding evidence from one CISG contracting state to another.[336] However, adding a brief note on the evidentiary matters that the *Pressure sensors case* illustrates is irresistible. The case is particularly suitable for the international theme of this study, as it features an international arbitration between parties that originate from countries with different customs for evidentiary disclosure.[337]

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[333] ibid, paras 174 and 183.

[334] ibid, para 180.

[335] *Pressure sensors case (SCC arbitration)*, para 86.

[336] Art. 4 CISG. In the words of judge Posner in *Zapata Hermanos v. Hearthside Baking (Federal Appellate Court for the 7th Circuit, United States)* (regarding the recoverability of legal costs as damages), the '*Convention is about contracts, not about procedure*'.

[337] *Pressure sensors case (SCC arbitration)*, para 177. The tribunal in the case also used the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which is considered to be a compromise between different legal traditions. See, e.g. Gabrielle Kaufmann-Kohler and Philippe Bärtsch, 'Discovery in international arbitration: How much is too much?' (2004) 1 Zeitschrift für Schiedsverfahren (German Arbitration Journal) 13 and Bernard Hanotiau, 'Document Production in International Arbitration: A Tentative Definition of 'Best Practices'' ICC Bulletin Special Supplement 2006: Document Production in International Arbitration 113.

The case involved the disclosure of documents, which the tribunal described as having been a '*difficult and sensitive*' issue throughout the proceedings.[338] Confidential information contained in the material was one of the problems of the case. The documents that the breaching buyer was ordered to provide contained confidential information, and thus the tribunal allowed to redact parts of the documents as trade secrets. [339]

It is conceivable that even the amount of the breaching party's profit constitutes such a valuable trade secret that divulging it is disproportionate in view of the usefulness of the information to the procedure. Courts and tribunals should resolve the conflict between the need to keep trade secrets confidential, and the information's relevance for the process, in accordance with the applicable procedural norms. The rules on confidentiality and privilege vary greatly in different jurisdictions,[340] and therefore the deliberation may yield diverging results in different *fori*.

To conclude, this study has reflected on the disgorgement of profits under the CISG through three different research questions. To summarise each of the conclusions I drew, I first argued that the pro-disgorgement trend should not influence the interpretation of the CISG. This view was based on the brief review concerning the development to expand the scope of disgorgement damages, which does not concern the majority of the CISG states. Taking such a trend into account in the interpretation of the CISG involves a significant risk of fragmenting the interpretation.

Secondly, I argued that the CISG does not provide for a true disgorgement remedy. While the argument that the interpretation of the CISG should protect contractual performance is convincing, an interpretation based on principles should not override the wording of the provision. However, I suggested that an interpreter can put the performance principle into practice by interpreting the term 'loss' expansively.

Thirdly, I maintained that calculating the aggrieved party's loss by reference to the breaching party's profit is in line with Article 74 CISG. This requires, however, that the aggrieved party can prove that using the profit is the most appropriate method of calculation for the loss. Furthermore, a court or a tribunal faced with a proposition to use

[338] *Pressure sensors case (SCC arbitration)*, para 176.
[339] ibid, para 176.
[340] Kaufmann-Kohler and Bärtsch (n 337) 19.

this method should take into account what this method entails with respect to the procedure.

Finally, as regards the bigger question of whether breach of contract pays – yes, it sometimes does, as the CISG does not warrant stripping the profits of the breaching party. If one considers that this conclusion is unbearable, an interpreter cannot change the approach of the CISG, not by observing domestic influences or applying the principles under the Convention. It is the legislator, not the interpreter, who can choose whether breach of an international sales contract pays.