TRAN THUY LINH

Damages for Non–conforming Goods under Vienna Convention
A Comparison with Vietnamese Law

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In Vietnamese Law, according to Article 304 Commercial Law “The party claiming damages for loss shall bear the burden of proof of the loss and amount of loss attributable to the act of breach, and of the loss of direct profits
which the aggrieved party would have earned in the absence of such breach”. It is generally accepted that the burden of proving the extent of damages lies on the aggrieved party. It is reasonable because it is fair to both sides and the aggrieved has conditions to do that. So in order to recover damages for non-conforming goods, the buyer must prove that it has suffered a loss as a result of the lack of conformity of the goods, it means that a loss was sustained or will be sustained. Addition the buyer has to define the amount of the loss. We should understand “the amount of damages” means the extent of damages, the buyer need not prove the precise amount of loss because it is very difficult in case of loss of direct profit. The buyer must only provide a basic upon which a Court or an Arbitrary can reasonably estimate the extent of damages.

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## Abbreviations

<table>
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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>UCC</td>
<td>Uniform Commercial Code (of United States)</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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Executive Summary

The thesis gives a systematic analysis of damages as a buyer’s remedy for non-conforming goods under an international sale contract under the 1980 UN Convention on International Sale of Goods (CISG) and Vietnamese Law. The aim of the thesis is seeking to provide a comprehensive remark of the similarities and differences of the resolve of damages for non-conforming goods between Vietnamese law governing contract for sale of goods and CISG and base on the result of comparative studying to try to give some solutions for improving Vietnamese law in this field.

Delivery of defective goods is very typical in the reality of international sale of goods contract where most problem arise. How to define defective goods and how to apply the available remedies in this case? The reality of international sale of goods shows that damages is the area most important to parties in a dispute, specially, in case the difference in location of parties in international sale contract lead to the difficult in applying some other remedies such as repair or replacement. Moreover, damages is also one of the most complex and controversial remedy. There are a large number of damages issues for non-conforming goods but the study only limit in examining some issues:

- What is the contend of the concept non – conforming goods?
- In case of non – conforming goods, which remedies should be available to the buyer?
- The position or the relationship between damages and other remedies?
- What losses are compensated?
- How is the damage calculated?
- How is the buyer’s right to obtain damages limited in CISG and Vietnamese law?
- Whether and if so how the buyer should be obliged to notify the seller, and within which time limits he should be obliged to bring forward his claim?

Other controversial issues are to examine base on the result of precise analysis:

- What are the problem concerning the provisions about damages within CISG and Vietnamese law?
- How to resolve these problems to improve Vietnamese law?
Firstly, descriptive method will be used to bring a comprehensive view about the regulations on damages for non-conforming goods in CISG and Vietnamese law. The thesis, then, bases on a analysis some important cases and leading academic writing to clarify regulations. The comparative method will be used through to compare CISG with Vietnamese law.

The thesis is divided into three chapters. Chapter one examines general issues, basic notions which connect to determination of damages for non-conforming goods; Chapter two gives the answers of research questions within CISG and Vietnamese law; Chapter three gives some evaluations from comparative studying and suggest some solutions to improve Vietnamese law.
1. Introduction

1.1 Subject- Background

The last two decades have seen a huge change in international commerce with the emergence of the global economy. Sale of goods is the most popular form of international commerce. Sales of goods have been growing rapidly with the opening up of new markets in developing countries and, as a result, disputes between transnational contracting parties have increased in number, size and complexity. In a sales contract, whatever one party expects, is connected closely to the performance obligations of the other party. So if one party, does not perform its obligations, for whatever reason, in almost every case, the other party will be damaged.

Defective performance as a seller’s breach of contract is very common and is where most problems arise. According to Hondius “The sale of goods, it has been said, is the single most important contract, and delivery of defective goods is the single most important complication”\(^1\). To protect the interest of the buyer in the case of non-conforming goods, most legal systems give them the right to a remedy and the right to claim damages is a very important one. Damages constitutes one of the most complex remedies after a breach of contract has taken place, as it may always be claimed to compensate the aggrieved party in addition to any other available remedies such as specific performance, suspension of performance, and avoidance…

In fact the application of damages as a remedy in international transactions is rather controversial not only from its nature but also because the rules concerning it are not the same in different countries.

Nowadays international commercial practice require the harmonization of the rules which allow traders the world over to conduct business on the same terms. Or in other words, the key factor in the need to develop uniform international commercial law is globalization.

Vienna convention on contract for 1980(CISG) was drafted by UNCITRAL in an attempt to create a uniform and applicable law for international sale of goods contracts. Now, CISG with over 70 state members is the uniform sales law in countries that account for more than two thirds of all world trade.\(^2\) CISG applies to

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\(^1\) Cited in Sivesand (2005), p.7.

\(^2\) This is the claim on the welcome page of Pace Law School CISG database website, accessed on April 24, 2008 at [http://cisg.law.pace.edu/](http://cisg.law.pace.edu/)
Contracts of sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a contracting State\(^3\) but it is not mandatory,\(^4\) in many cases CISG is applied by regulating within standard terms which is one of components made up international commercial law. CISG becomes the treaty is applied most widely amongs multilateral treaties in international commerce about international sale of goods. Many big trading partners of Vietnam ratified CISG but Vietnam has not yet ratified it. Note that the regulation of damages has an important position in CISG.

Vietnamese law also provides for damages for breach of contract but only in general and does not cover international sale of goods contracts specifically. To write about damages for non-conforming goods under both CISG and Vietnamese law from a comparative perspective seems a very interesting legal project.

1.2 Research question and aim of thesis

The main purpose of this essay is to compare the rules in the CISG to the rules in Vietnamese law concerning damages as a buyer’s remedy when the goods do not conform to the contract. Beside this, the thesis will try to give some suggestions for improving Vietnamese law in the area.

To fulfil the purpose of the thesis the following questions will be dealt with:

- What is the content of the concept non-conforming goods under the CISG and Vietnamese law?

- In case of non-conforming goods, which remedies should be available to the buyer under CISG and Vietnamese law?

- The position or the relationship between damages and other remedies?

- How is the damage calculated?

- How is the buyer’s right to obtain damages limited in CISG and Vietnamese law?

- Are there exemptions to damages for non-conforming goods under CISG or Vietnamese Law?

\(^3\) See Article 1(1) CISG

\(^4\) See Article 6, Article 95 CISG
1.3 **Methodology**

The author will use a descriptive method to provide a comprehensive view of the regulations on damages for non-conforming goods in CISG and Vietnamese law. Each issue will be analysed based not only on the words in the texts but also on relevant cases. The author only analyzes case relating to the application of CISG because it is too difficult to find case law in Vietnam where courts do not publish cases. The aim to define how the regulations are to be understood and what problems arise from the way each issue is handled. The result of the analyses will be synthesized to give opinions and a brief conclusion. Because the thesis mentions regulations on damages in two legal systems, the comparative method will be used through to compare CISG with Vietnamese law.

1.4 **Delimitation**

I focus on sales law and do not go into how damages are dealt with in general contract law. Most legal systems have special rules which are exclusively applicable to sale law. And, furthermore, the sale of goods is still the main area in the field of international transactions. I am only dealing with commercial transactions, not transactions between businessmen and consumers or consumer and consumer. I will not look at all remedies for breach of contract because space and time are limited. Damages as a remedy was chosen because, in my opinion, it is the most complex remedy. I will also restrict myself to damages due to the non-conformity of the goods to the contract. I will not deal with late performance or complete lack of performance by the seller. The goods discussed are always movable and tangible goods. I will not deal with the sale of rights or intangible goods.

CISG is the most important multinational treaty concerning international sale law. Its regulations have become standards in many legal systems it makes sense to compare Vietnamese law with CISG.

1.5 **Sources of the thesis.**

1.5.1 The Vienna Convention on the International Sale of Goods (CISG)

The Vienna Convention on the International Sale of Goods (CISG) was finalised at a diplomatic conference in Vienna in 1980. It was the result of the combination and development of the subject matter of two prior conventions, notably the two Hague Convention 1964 which were criticised because they reflected the legal traditions and
Damages for non–conforming Goods

The CISG only applies to international sales. Limiting sales rules to international transactions was necessary because these rules are embodied in a Convention designed for universal adoption. The Convention is divided into four parts. Part One deals with the scope of application of the Convention and general provisions. Part Two contains the rules that govern the formation of contracts for the international sale of goods. Part Three deals with the substitute rights and obligations of the buyer and the seller that arise from a contract. Part Four contains the final clause of the Convention. The subject matter of this thesis concerns mainly Part Two of the Convention.

General rules for measuring damages are provided in Article 74 of the CISG but related to this provisions are:

- Articles 45(1)(b) and 61(1)(b) which establish the right to claim damages;
- Article 75 and 76 which define the methods of calculation of damages in certain cases;
- Article 77 provides the rule of mitigation of damages;
- Article 79 setting forth the rules on exemption from liability for damages because of an impediment to performance;
- Article 78 provides that a claim for interest shall be “without prejudice to any claim for damages recoverable under Article 74”
- And some other articles can also affect claims for damages, such as Article 5 which indicates that the Convention does not apply to damages claims “for death or personal injury caused by the goods to any person”

In this thesis, the analysis concentrates on Article 74 through Article 77 and Article 79.

1.5.2 Vietnamese Law on International Sale of Goods.

Contract Law on international sale of goods in Vietnam has a process of development through many stages with different characters of social, economic condition. In the first stage of “Đổi mới” (Innovation) international sale of goods

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7 See 2.1.1
8 Honnold (1999), p.15.
Damages for non–conforming Goods

The contract was governed by Temporary Regulations No. 4794/TN-XNK (enacted in 31 of July 1991) which provided instructions on the signing of the purchase of foreign commercial contract. Then, it was governed by Commercial Law 1997. Now international sale of goods contract is governed by Vietnamese Commercial Law 2005, Government’s Decree No.12/2006/ND-CP on January 23, 2006 detailing the implementation of the commercial law regarding international goods sale and purchase activities and goods sale and purchase agency, processing and transit with foreign parties. However, with the thinking Civil Code considered the "mother law" to cover all the areas of economy - trade, marriage and family, the labor, the international sale of goods contract is also governed by Vietnamese Civil Code 2005. Relates to the matter “Damages for non–conforming goods” the thesis will focus only on studying the related provision (mainly in chapter VII) of Vietnamese Commercial Law 2005 which is in validity. Besides it, the thesis will also study some related provisions of Civil Code which provides related issue that Commercial law does not provide. The relation between Vietnamese Civil Code and Vietnamese Commercial Law is the relationship between the general and the particular. The Vietnamese Civil Code and Vietnamese Commercial Law were approved on the same day, June 14, 2005 and also together became into force on January 1, 2006. Comparing with former documents, the regulations about international sale of goods contract now are provided closer to international law.

2. Some General Issues on Damages for Non-conforming goods.

2.1 Contract and breach of contract

2.1.1 Contract and contract for international sale of goods

Contract. Contracts are an integral part of everyday life, all over the world. The contract is the most popular form of civil transactions and also the main base upon which civil obligations arise. The concept of “contract” is defined quite similarly in different law systems, although the words used may not be the same.

According to US Law, “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty” (US Restatement) or “Contract means the total legal obligation which results from the parties’ agreement as affected by this Act and any other applicable rules of law.” (UCC of US)
In the French Civil Code (the Napoleonic Code), Article 1101 states “A contract is an agreement which binds one or more persons, towards another or several others, to give, to do, or not to do something”\(^9\)

In the Civil Code 2005 of Vietnam, a contract “is an agreement between the parties to establish, change or terminate civil rights and/or obligations”.

In the words of Sir Guenter Treitel “A contract may be defined as an agreement which is either enforced by law or recognised by law as affecting legal rights or duties of the parties”\(^{10}\)

So a contract may be defined as a legally binding agreement it means that agreement is either enforced by law or recognised by law as affecting the legal rights or duties of the parties. A contract is a mutual agreement or concensus between two or more people, the content of contract is the legal rights and duties or in other words the contract always gives legal rights and duties of contractual parties. In most legal system, a contract is accepted legally when it meets requirements as follow\(^{11}\):

Firstly, the parties must have the right of freedom of will when signing the contract.

Secondly, the contract must be the collection of commitments which are recognized, supported and protected by law.

Thirdly, the contract must be agreements, commitments reflects the uniformity of the will of the parties.

A contract may relate to any one or more of a large number of transactions, such as sale, employment, carriage, hire, lease, mortgage…The law has a general or unified theory of contract which applies to all contracts irrespective of their contend or subject matter. Beside it, each particular transaction may also be governed by special rules peculiar to them. In this thesis my concern will be with special rules applied to contracts for international sale of goods.

*Contract for international sale of goods.* “Contracts for the sale of goods are amongst the most common types of contract encountered”\(^{12}\). The contract for international sale of goods is also the most common type of contract in international transactions.

In contrast to the concept “contract”, there is no single universally accepted definition of the concept “contract for international sale of goods”.\(^{13}\) The Vienna

\(^{9}\) http://www.napoleon-series.org/research/government/code/book3/c_title03.html#chapter1


\(^{11}\) Le Thi Bich Tho (2004), p.10


\(^{13}\) Fawcett, Harris, Bridge (2005), p.2
Damages for non-conforming Goods

Convention does not provide a positive definition of “international sale of goods” but we can find guidance on the meaning of this concept in its provisions. According to Article 1(1) of the Vienna Convention, a sale of goods contract has the “international” element if it is agreed “between parties whose places of business are in different States…” There is no longer any need for the existence of a further foreign element. The concept of place of business is clarified in Article 10. The Convention does not define “sale”. However it does specifically exclude certain types of sale such as judicial sales and sales by auction. Those types of sales do not have a trade purpose or they are special sales which need to be governed by separate regulations. Article 3(2) also exclude contracts where the “preponderant part of the supplier’s obligation is the provision of labour or services”. In contrast, article 3(1) makes it clear that contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party orders the goods undertake to supply a substantial part of the materials necessary for such manufacture or production. The Vienna Convention also provides no definition of “goods”. However, it does set out some specific exclusions in article 2 and other provisions of the Convention provide guides for construing this basic concept. It is clear that the “goods” governed by the Convention must be tangible, corporeal things, and not intangible rights like those excluded by Article 2(d) such as stocks, shares, investment securities, instruments evidencing debt, obligations or the right to payment. It also means that sales of patent rights, copy rights, trademarks and “know–how” are not governed by the Convention. On the other hand, “goods” governed by the Convention refers to moveable – tangible assets. A sale of land is also excluded. This is shown clearly by numerous provisions e.g. quality and packaging (Art 35), placement or repair of defective part (Art 46), shipment and damage during transit (Art 67-69)...  

Contract for international sale of goods. “Contracts for the sale of goods are amongst the most common types of contract encountered”\(^\text{14}\). The contract for international sale of goods is also the most common type of contract in international transactions.

In contrast to the concept “contract”, there is no single universally accepted definition of the concept “contract for international sale of goods”.\(^\text{15}\) The Vienna Convention does not provide a positive definition of “international sale of goods” but we can find guidance on the meaning of this concept in its provisions. According to Article 1(1) of the Vienna Convention, a sale of goods contract has the “international” element if it is agreed “between parties whose places of business are

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\(^{15}\) Fawcett, Harris, Bridge (2005), p.2
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So the concept of “international sale of goods contract” is not the same in the Convention and Vietnamese Law. While the Convention looks at the subject of the contract (with the place of business being in different State), Vietnamese Law focuses on the transfer of goods as the object of the contract providing the international element; the definition of goods in Vietnamese law is larger than in the Convention, and includes tangible rights which are excluded by Article 2 of the Convention. In this thesis, “international sale of goods contract” is understood as covering both meanings depending on whether the matter discussed belongs to the Convention or Vietnamese law.

Contracts for the international sale of goods are considered as fundamental to the global economy. This kind of contract is an important element in support of international trade, and it cuts across political, economic and cultural differences.

2.1.2 Breach of contract

Every contract imposes obligations on at least one of the party. If the contract is unilateral, it imposes obligation on only one of the parties. In the more common case
of a biliteral contract, obligations are imposed on both parties.\textsuperscript{16} A contract on international sale of goods is a biliteral contract, so obligations are imposed on both buyer and seller. The seller is obligated to deliver the goods and he maybe obligated to ensure that they are of a certain quality or fit for particular purpose. The buyer, on the other hand, is obligated to accept the goods and to pay for them. Contracts are generally entered into with a view to perform the bargain and to mutually increase the asset base of each contracting party. However, not all contracts run the intended course because of the breaching of one or both parties. A party who either fails or refuses to perform his obligations imposed under the contract will generally be in breach or in other words a breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, perform defectively or incapacitates himself from performing.\textsuperscript{17}

The notion of breach of contract is provided in Article 45 and 61 CISG “…fails to perform any of his obligations under the contract or this Convention…” So under the Convention, the notion “breach of contract” covers all failures of a party to perform any of his obligations. There is no distinction between main obligations and auxiliary obligations. Obligation does not include only the agree –upon performance. There is a variety of situations for failure to meet obligations imposed by the CISG, such as failure to provided insurance information under Article 32, paragraph 3, or failure to give notice regarding a carrier under Article 32, paragraph 1. Under certain conditions a breach of contract is considered to be fundamental (Article 25).

The concept of breach of contract is defined in article 3(12) Vietnamese commercial law: “breach of contract means one party fails to perform, fails to perform fully or perform incorrectly an obligation in accordance with an agreement of the parties or in accordance with this law”. This provision shows the nature of breach of contract is treatments of contractual parties does not conform with the obligations under the contract and the obligations arising from the provisions of law relating to contract. It can be said that the concept of breach of contract is also understood quite similar in the Convention and Vietnamese Law. A breach of contract by seller in sale contract, according to Article 45 of the Convention is fails to perform any obligations of seller according to the contract or the provisions of the Convention. “Fails to perform any obligations" as stipulated by the Convention can be understood corresponding to " fails to perform, fails to perform fully or perform incorrectly an obligation " as provided in Article 3 (12) Commercial Law 2005. Both the Convention and Commercial Law 2005 are recognized the basic obligations of

\textsuperscript{16} Treitel (2004), p.312.

\textsuperscript{17} Poole (2006), p. 319
the seller are deliver the goods and the documents relating to goods. The breach of contract by sellers can be no delivery, late delivery or deliver the goods do not conform to the contract.

The legal bases for define an act in breach of contract are commitments in the valid contract and regulations of contract law. The duty to perform the obligations of contractual parties depends primarily on the terms of the contract. Performance must be exactly accordance with these terms. So the contract must expressly provide the obligations of parties, specially the duty to deliver the right goods of the seller that is very complicated in almost case.

A breach of contract is a civil wrong and in most cases, a breach of contract will involve only civil liability. Contractual liability is in many cases strict: that is, it arises quite independently of fault.\(^\text{18}\) In the case of a buyer who cannot pay the agreed price for goods simply because his bank has failed: there is no doubt that he is in breach of contract. In other example, a seller of goods may be unable to deliver because he is let down by his suppliers or because he is unable to find shipping space to get the goods to agreed destination: he is in breach of contract even though his inability to deliver was not due to any failure on his part to take reasonable steps to secure performance. Contractual liability has basic characters as follow\(^\text{19}\):

- It is applied on the basis of a breach of effective contract;
- Its content associated with the implementation of obligations under contracts or liability on property;
- The application is applied by authorized agencies or organizations (courts, arbitrators) or by the aggrieved party on the basis of legal regulations

However, not every failure to perform a contractual promise is a breach. There is no breach of contract when non – performance of a contract is justified by some lawful excuses provided by law or by contract itself.

A breach of contract may entitle the injured party to claim damages, specific performance or an injunction. In appropriate circumstances he may be entitled to more than one of these remedies. Every contract has its own particular reason and that each party has particular expectation which will flow from successful transaction. Therefore each party has a particular interest in the contract which it wants protected. A breach of contract will violate the contractual interest but not every interest is redressed. It has always recognized that in actual life many losses must go without compensation, and much harm be suffered without redress. Not


\(^{19}\) Pháp luật về Hợp đồng trong Thương mại và Đầu tư–Những vấn đề pháp lý cơ bản (2008), p.57
every loss in fact is loss in law. The sphere of the latter is being smaller than, and included in, that of the former.\textsuperscript{20}

\section*{2.2 Non-conforming goods}

\subsection*{2.2.1 The seller’s obligation to ensure conformity}

International sale law is a part of the law of obligations which deals also with liabilities.\textsuperscript{21} The duties of the seller in the context of liabilities under sales law consist, briefly, of delivering the \textit{right goods}, to the \textit{right place}, at the \textit{right time} and at the \textit{agreed priced}. This thesis focuses on the first of these fundamental elements, in other words, the question of the conformity of goods to the contracts.

Most disputes in international contracts relate to disagreements on the seller’s obligation with respect to quantity, quality or other characteristic of his performance, concerning which Honnold concluded that “most sales controversies grow out of dispute over whether the good conform to the contract”\textsuperscript{22} In international sale transaction, because of the distance element, the buyer often enters into an agreement without having had previous sight of the goods. The buyer must rely to a higher degree on the information in the contract and on the seller’s information about the goods. The seller becomes the “eyes” of the buyer, so that the nature of the goods is overwhelmingly a matter within the sphere of influence of the seller. The seller must answer for the information he gives and what is agreed.\textsuperscript{23}

Article 35 (1) of CISG declares what seem to be obvious, namely that the seller must deliver goods of quantity, quality, description and packaged as required by the contract. Article 35 (2) also provides that the goods do not conform unless they satisfy the following four cumulative requirements: fitness for the purpose for which goods of the same descriptions would commonly be used; fitness for any particular purpose expressly or impliedly made known to the seller at the time of conclusion of the contract except where the buyer either does not rely or unreasonably relies upon the seller’s skill and judgment; possession of the qualities of goods held out as a sample or model; and packaging or containment in a manner adequate to preserve

\begin{itemize}
\item \textsuperscript{20} Hale, William, B. (1896) p.7.
\item \textsuperscript{21} Henschel (2005), p. 23
\item \textsuperscript{22} Honnold (1999), p.252
\item \textsuperscript{23} Hanschel (2005), p.66
\end{itemize}
and protect the goods.\textsuperscript{24} These requirements are implied by law. Basically, CISG lays down when goods are deemed to conform with the contract and sets out the principle that the goods must conform with the requirements of the contract. However, there is no clarification as to whether all cases of non-conformity constitute a defect in the goods. CISG does not make any distinction between defects in quality, defects in quantity. In so doing, the CISG differs from most domestic laws, including Vietnamese Law, which makes a clear distinction between those two concepts.

Vietnamese Commercial law use the term quite close to the term of the CISG, “goods which do not conform with the contract”. Article 39 of Vietnamese Commercial law defines, “where the contract does not contain any specific clause, goods shall be deemed not to conform with the contract if the goods belong to one of the following cases: (a) the goods are unfit for the ordinary use purpose of goods in the same category; (b)...unfit for any specific purpose about which the purchaser informed the seller or about which the seller should have known at the time of entering into the contract; (c) ...not of the same quality as sample goods previously provided by the seller to the purchaser; (d)...not preserved or packaged in the usual manner applicable to other goods in the same category, are not in appropriate way for goods preservation if there is no usual manner for preserving such goods.” So the concept of conformity in Article 39 Vietnamese Commercial Law does not include the quality of the goods as in CISG. However, Vietnamese law operates negative, contrary to CISG. Convention gives concepts and describes the cases of goods is deemed conform to the contract, the remains of cases goods will be deemed not conform to the contract. Vietnamese Commercial gives the case the goods is deemed not conform to the contract, the remains goods would be conform to the contract.

Clearly the issue in defining as goods conform to the contract, resolution of Vietnamese Commercial similar to Vienna Convention. Except the concept of the Convention also includes elements of the amount of goods and approach the problem is the differences between the two systems as above, the remaining elements of the concept of conforming goods under the Convention and Vietnamese Commercial Law basically are the same. The conformity of the goods according to both CISG and Vietnamese Law is understood the conformity of goods to contracts (specific clause on this issue) and to the requirements implied by law. Both Article 35 (2) the Convention and Article 39 (1) Commercial Law 2005 are identified 3 factors (i) purpose of goods pursuant to the common use of similar goods or based on specific purpose of goods that the seller can see at the time of signing the contract, (ii) quality of goods is based on the quality of sample goods, (iii) the method of packaging and

\textsuperscript{24} International Sale of Goods, p.80
Damages for non-conforming Goods

 preservation based on the normal method of packaging and preservation of that goods or pursuant to the relevant principles. Although according to the Article 39 Vietnamese Commercial Law, the quantity of goods is not considered a component constitutes the concept of goods in conformity to the contract but Article 41 provides common principles in remedy for and for delivery of goods which do not conform with the contract. Article 34 (1) provides “A seller shall be obliged to deliver goods and vouchers [relating to the goods] in accordance with the contractual agreements on quantity, quality, method of packaging and preservation and in accordance with other clauses in the contract” Clearly the regulation has found that although under the understanding of the Article 39 the concept goods do not conform to the contract does not include the lack of goods in quantity but in terms of overall the non-conforming in quantity of goods can be considered as a factor structure the concept of goods do not conform to the contract.

In short, goods are deemed to be conform to the contract if they do not meet one of the following factors:

- the requirements on quantity of the goods by the contract;
- the requirements on quality of the goods as agreed or base on the quality of the sample goods;
- the requirements on purpose of the goods as information is exchanged between the parties or base on the ordinary use purpose of goods in the same category;
- the requirements on preserving or packaging as agreed or base on the usual manner applicable to other goods in the same category, or the appropriate way for goods preservation if there is no usual manner for preserving such goods.

2.2.2 Buyer’s remedies for non–conforming goods.

Every law exists for the purpose of establishing and protecting legal rights. A legal right is a right with which the law invests one person, and in respect to which, for his benefit, a duty is imposed on another or others to do or refrain from doing certain acts. Wherever the law recognizes a right, it also gives a remedy for its violation. Remedies are either preventive of threatened wrongs, or redressive of wrong committed.

Remedies available to a party are a key consideration for that party, particularly if the contract is breached. However, the issue of remedies is one of the areas in which the diversity of legal systems is obvious.25

The remedies available to a buyer or seller under the CISG are drawn from both common – law and civil law systems. They are intended to give the parties benefit of their bargain and to put the parties into the economic position they would have been in if the breach not occurred.

As regards the remedies for non – conformity, most countries provide a specific regime. The CISG also takes a uniform approach towards the remedies for breach of contract. In general, the buyer can exercised his right upon breach of contract by requiring performance or substitute performance under Article 46(2), demand repair of defective goods under Article 46(3), fix an additional period of time for performance under Article 47, avoid the contract under Article 49, reduce the sales price under Article 50. Nevertheless, it is indicated that some remedies only apply if the goods do not conform to the contract namely in the case of repair, replacement and price reduction (Art 46(2) and (3) and Art 50). Addition to these remedies, buyer can claim damages under Article 74 -77.

Under Vietnamese Law, According to Commercial Law 2005 (Article 292), excluding those forms of responsibility by the parties agreed not against the basic principles of Vietnamese law, international treaties that the Republic of socialist Viet Nam a member and practices of international trade, there are six forms following responsibilities apply to violations of trade in general and relationships in the purchase and sale of goods in particular: Specific performance, Penalty for breach, Damages for loss, Suspension of contractual performance, Rescission of contract.

Thus, compared with the CISG, Vietnamese Commercial Law does not have the remedy of price reduction. It is easy to understand because the remedies in Vietnamese Commercial Law are not applied only for sale of goods contract but also contract in commerce in general. However, Vietnamese Commercial Law have the regulations on the remedies of penalty for breach, suspension of the contractual performance, Temporary cessation of contractual performance. According to Vietnamese Law, the right to claim damages also is applied independently or in addition to other remedies. Vietnamese Law does not provides remedies only applying in the case of non-conforming goods.

In summary, both the legal system give the aggrieved party the right to apply certain remedies to protect the interests of himself, although exist some differences, but both system are recorded damages are not applied only in the case of non-conforming goods but also any form of breach of contract. Damages is considered as the most complex forms of all remedies. In the field of non – conforming goods, the applying of damages is typical and more controversial such as in many cases the indirect losses due to non –conforming goods can be highly unpredictable and
burdensome to the seller. In this thesis, the authors will focus on the analysis the remedy of damages in case the goods do not conform to the contract.

2.3 Damages for breach of contract

2.3.1 Damages in general and damages for breach of contract.

_Damages in general are the pecuniary compensation which the law compels a wrongder to make to the person injured by his wrong._ 26

The ability to award damages is an important economic function and it is not surprising to find laws regulating the awarding of damages in a variety of legal documents. Damages is divided into damages for torts and damages for breach of contract.

Compensation is the fundamental and all pervasive principle governing the award of damages. _Compensation means the award of a sum of money which, so far as money can be so, is equivalent to the claimant’s loss._ 27 Generally, damages have to be paid in money and are not to be recovered as restitution or restoration. Compensation, not restitution, value, not cost, is the measure of relief. _The usual function of damages is compensation; that is, damages are usualy compensatory._ In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, not a punishment to the wrongdoer, whether the action be in contract or tort. However, where a tort is accompanied by circumstances of fraud, gross negligence, malice, or oppressive, damages are sometimes awarded as a punishment to the offender. In such cases, the damages are not limited to an amount sufficient to compensate plaintiff for the wrong suffered, but that a further sum, called “exemplary”, or “punitive” damages. Exemplary or punitive damages can not be recovered for breach of contract.

In most legal systems, there is an important distinction between damages in cases of tort and cases of contract. Damages for tort have grounds for liability to compensate is infringement upon the life, health, honour, dignity, prestige, property, rights, or other legitimate interest outside contract of individuals, legal persons or other subjects while damages for breach of contract have grounds for liability upon the breach of contract. The function of tort law is primarily to compensate a party for wrongful harm by putting him back into the position he would have been if the tort had not occurred. So on a claim for damages for tort the measure of damages is not the value of the lost bargain but the amount neccessary to restore the claimant to the

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26 Cite as Hale

27 Andrew Burrows, p.29
position in which he was before the wrongful action occurs. The primary function of contract law is to secure for each contracting party the benefit of the bargain he has made. So on a breach of contract the innocent party is entitled to the protection of his expectation interest, that is, to be placed in the position he would have had if the contract had been performed. Typically, the contractual duties are positive while tort duties are negative. It leads to different results between compensatory damages for breach of positive contractual duties and for breach of negative tort duties.  

For example, the claimant buys a car. The seller falsely misrepresents to him, and gives a contractual warranty, that the car was only one year old. In fact it is four years old. The claimant pays £5,000 while the market value of one year old car is £5,500 and the value of the car he actually receives (given its real age) is £4,000. If the claimant keeps the car and brings a claim for damages for the tortious misrepresentation, the aim is to put him into as good a position as if he had never entered into a contract. His damages will be £5,000 - £4,000 = £1,000. But if he brings an action for breach of contract, that is for breach of contractual warranty as to the age of the car, the aim is to put him into as good a position as if the statement had been true. His damages will be £5,500 - £4,000 = Damages are discussed in this thesis are damages for breach of contract.

**Damages for breach of contract.** Contract law, whether national or international has very few mandatory provisions and hence is at the disposition of the parties to model their individual contractual situations. One of the main problems in contract law is determining what remedial system is available to an aggrieved party in case of breach of contract. Solutions to this problem vary between legal systems.

In common law countries, an award of damages is the usual remedy for breach of contract. By contrast, in many civil law countries, when a breach of contract occurs, the claimant's primary remedy is specific performance, although many of these countries are increasingly permitting the recovery of damages as the preferred remedy. Damages in civil law countries are thus viewed as a secondary remedy. However, in a number of civil law countries, claimants or courts may choose the remedy. In both common law and civil law systems, the rules concerning damages for breach of contract are complex and vary greatly from country to country.

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28 Burrow, p.34


In common law countries, such as in English law\(^{31}\) the purpose of damages is not to punish the respondent, but rather to place the party who has sustained a loss, in so far as money can do it, in the same situation as if the contract had been performed. Therefore, damages are commonly awarded to protect a claimant's expectation interest.

Common law systems classify damages for breach of contract into three categories: nominal, general, and special. Nominal damages may be awarded when the respondent is liable for a breach of contract but the claimant is unable to prove actual damages. General damages are those "presumed to result from the infringement of a legal right or duty." They are characterized as the "natural and probable consequences" of the particular breach and include both pecuniary and non-pecuniary losses. Special damages arise from "special or extraordinary circumstances beyond the reasonable prevision of the parties" and cannot be claimed unless "special facts were communicated by and between the parties."

English courts have drawn a number of other distinctions between general and special damages. Special damages must be specifically pleaded and proved in order to be awarded. By contrast, general damages are recoverable without proof of loss, and the claimant need only aver "that such damage has been suffered."

As noted, in common law jurisdictions, a claimant typically is entitled to its expectation interest. The claimant is entitled to be placed, in terms of money, in the same position it would have enjoyed had the contract been performed. The method of determining the sum of money varies depending on the circumstances of the case, including whether the claimant has terminated the contract and whether there has been a total or partial breach.

Civil law systems base awards of damages on two Roman law concepts of compensation. The first is damnum emergens, that is, compensation for actual losses suffered. For example, when a contract to build a ship is breached, the claimant may seek to recover damages for the value of the materials that the claimant purchased to construct the ship. The second is lucrum cessans, or net gains prevented. This concept relates to the expectation of putting the bargained-for performance to good use. For instance, in the above example, the claimant may also claim damages for the profit it would have made. As in common law countries, the goal of damnum emergent and lucrum cessans is to place the non-breaching party in the position it would have been in had the contract been performed.

Some civil law jurisdictions classify damages for breach of contract into two categories called positive interest and negative interest. Positive interest places the claimant in the financial position it would have been in had the contract been performed. This amount may include any profits it would have received if the breach had not occurred. By contrast, the purpose of negative interest is to restore the claimant to the position it would have been in had the transaction never taken place. In other words, the remedy furthers the claimant's reliance interest.

Some principles are discovered in this system not in others. As an example, the fault principle is commonly discussed in civil law under the heading of legal effect of failure in performance, whereas in common law whether fault is a prerequisite for liability is viewed as a substantive rather than a remedial question.

Despite the existence of difference, contractual damages issues relies on a common core, we can see common principles in many legal systems. Most legal systems accept that (i) the contracting party cannot avoid the performance of the contractual obligations without incurring any negative consequence; (ii) the injured party cannot take advantage of the breach by generating a damage to the breaching party; (iii) the remedies to the breach of contract can be provided either by contract (e.g., penalty clause, etc.) or by the Courts; (iv) the moral damages, in principle, are not recoverable...

All countries impose requirements and limitations on damages for breach of contract. These requirements may include causation, foreseeability, avoidability, certainty, fault, and, in a few instances, notice of an intention to seek damages. These requirements and limitations may also apply to the recovery of lost profits, but their application to lost profits may differ from their application to damages for actual losses suffered.

Parties may also agree upon the remedies available for breach of contract. For example, the parties may limit the scope of liability in the event that a party terminates the contract because of certain events. In addition, the terms may include a liquidated damages provision, which provides for a specified amount of damages to be paid by a party who repudiates the agreement. Some jurisdictions, however, may refuse to enforce such a clause when the amount to be paid in damages is so grossly disproportionate to the actual loss or the loss that could reasonably arise under the circumstances as to constitute a penalty clause.
2.3.2 Contractual Interest protected and categories of loss

The central principle relating to the measurement of damages which is common to many legal systems, is that of the interest which an aggrieved party has in the performance of the contract or in other words the categories of loss. Normally, loss includes any harm to person or property of the aggrieved party, and any other injury to his economic position.\(^{32}\) **CISG does not provide what is loss**, only in Article 74 and Article 77 of CISG the word “loss” is mentioned. Loss, under CISG, is described as all those amounts of money which the aggrieved party had to spend only as a consequence of the breach, and the breaching party ought to have foreseen those losses. Beside it, Article 5 states that “This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person”. The CISG only knows of compensation in money.\(^{33}\) It means that CISG does not cover pecuniary – loss, such as pain and suffering, inconvenient and mental distress resulting from the failure to perform. In reality of international trade, there are various types of losses which the aggrieved party always claims.

*Loss of bargain (or expectation interest)* which has been termed as the cornerstone of damages in contract law. A party's expectation interest will generally represent the actual worth of the contract to that party. And perfect expectation interest will leave an injured party indifferent between performance and nonperformance.\(^{34}\) It endeavors to put the aggrieved party into the same economic position he would have been in had the contract been properly performed.\(^{35}\) In other words the aggrieved party is entitled to be compensated for the loss of his bargain or his expectation arising out of or created by the contract.

*Reliance loss (interest).* The object of reliance interest is to put the aggrieved party into the situation in which he would have been had the contract never been performed by compensating him for expenses incurred in reliance on the contract. The idea behind this principle is that if the contract has not been duly performed, the aggrieved party may seek to recover those expenses which he incurred having acted in reliance on the contract, as these expenses would otherwise be wasted. This occurs when the plaintiff incurs expense in performing the contract, or perhaps even in preparing for its performance, in reliance on the defendant also performing his part.

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\(^{32}\) Treitel (1995), p. 842

\(^{33}\) Chengwei (2003)

\(^{34}\) Chengwei (2003)

\(^{35}\) Saidov, D., (2001)
of the bargain.\textsuperscript{36} Sometimes the expenses of a kind which the aggrieved party must incur if he is to perform his part of the contract but sometimes wasted expenses may be recoverable as reliance loss even though the aggrieved party was not, under the contract, actually obligated to incur them.

\textit{Restitution loss (interest).} A claim for restitution may not, strictly speaking, be one for damages; its purpose is not to compensate the aggrieved party for a loss but to deprive the defaulting party of a benefit or in other words it prevents the defaulting party gaining from the breach. For simplest example of restitution, a seller has been paid in advance and then fails to deliver. He is bound to restore the price and the effect of this is to put both parties into the position in which they have been if the contract had not been made. Or other example is a party who has deliver goods under a supposed contract which turn out to be void may have a claim for restitution of the goods or for the value of the goods he delivered. In practice, there is considerable overlap between reliance and restitution. Performance by the aggrieved party is a form of reliance which often benefits the defaulting party. Reliance interest and restitution interest are easily explained as they cover actual losses. These two interest are also sometimes referred to as “negative contract interest”.

Three types of interest expectation, reliance and restitution are not mutually exclusive, frequently they overlap. A person who incurs expenditure in negotiations leading up to commercial contract will normally assume that if he secures the contract and it is duly performed, he will recoup the expenditure and make a profit. His expectation interest thus encompasses his reliance interest, and in certain conditions (eg, where the lost profit is hard to assess) the court may allow recovery of pre–contract expenditures as the measure of damages for breach of the contract.\textsuperscript{37}

\textsuperscript{36} Cited in Chengwei (2003)

\textsuperscript{37} Goode (2004), p.67
3. Damages for non–conforming goods under comparative perspective between CISG and Vietnamese law.

3.1 The Right to require damages.

3.1.1 Right to damages in general.

In case of non–conforming goods, there are many problems as a result of such breach. For examples, machinery may fail to function properly; defective raw materials may cause production problems in the buyer’s factory; goods purchased for release may lead to complains and claims by sub-purchaser. In such cases, the buyer may bring an action for damages follows from the general rule that an action for damages lies in every case of a breach of contract. The aggrieved party is generally entitled to recover damages “whenever it suffers loss from other party’s unjustified failure to perform”38.

Under CISG, Art .45 provides that if the seller fails to perform any of his obligations under the contract or the Convention, the other party may “claim damages as provied in articles 74 to 77” (Art. 45(1)(b)). Furthermore, the entitled party “is not deprived of any right he may have to claim damages by exercising his right to other remedies” (Art. 45(2)). The words of Art. 45 show that a breach can occur even if it is not laid down explicitly by the Convention.

The right to damages, like other remedies, arises from the sole fact of breach. It is enough for the aggrieved party simply to prove the breach. It is not necessary to prove that the breach was due to the fault of the breaching party. Damages can be claimed no matter whether the breach of contract has been committed intentionally or negligently or in any other way. To submit such claims, the aggrieved party may request damages as an exclusive remedy or in conjunction with other remedies. Thus, in the case of defective performance, the buyer can apply the right to damages for non–conforming goods he accepts exclusively or he can apply the right to damages in conjunction with other remedies such as the right to require substitute goods or repair

Under Vietnamese Law, there is not any article provides only the right to claim damages of the buyer in general or incase of non –conformity directly. The right to

38 Comment and Notes to the PECL, Art 9:501, Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp74.html>
require damages is stipulated in common not regard the right of buyer or seller, the breach is delay, non performance or defective performance. Art 302 Commercial Law defines “Damages for loss means the defaulting party pays compensation for the loss or damage caused to the aggrieved party by a breach of the contract”, Art 303 – Grounds for liability to pay damages for loss. So, in case the seller deliver the goods does not conform with the contract and this action of the seller causes losses or damages for the buyer, the buyer has the right to claim damages for the loss or damage caused by non–conformity breach of the seller. The fault of the breaching party is not mentioned, so Damages for breach of contract under Vietnamese law, like Vienna convention, can be claimed no matter whether the breach of contract has been committed intentionally or negligence or any other way. The aggrieved party must not prove the breach was due to the fault of the breaching party.

3.1.2 The conditions of liability

The requirement about the conditions of liability is particularly important in international sales contracts. There is always a need to blame people but only for the consequences of their actions. This is merely an extension of the principles of justice and fairness as, economically speaking, losses should be covered by those who are responsible for their occurrence.

Most importantly, the requirement of the conditions is not only a method limiting liability for damages in many legal systems, but also the very foundation on which the right to claim damages is based.

Both CISG and Vietnamese law provide three conditions of liability to pay damages for loss. The first sentence of Article 74 CISG provides “Damages for breach of contract by one party…, the loss, including loss of profit, suffered by the other party as a consequence of the breach”. Article 303 Commercial Law provides grounds for liability to pay damages for loss.

“Except for cases of immunity from liability prescribed in article 294 of this Law, liability to pay damages for loss shall arise when the following factors exist:

1. There is an act in breach of the contract;
2. There occurs an actual loss;
3. The act in breach of the contract is the direct cause of the loss.”

So damages for breach of contract under CISG or Vietnamese Law is applied only if three conditions are satisfied. They are (a) There is an breach of contract (by the seller or the buyer), (b) there occurs a loss suffered by the other party; and (c)
causality between (a) and (b). In Vietnamese Law these conditions applied not only for damages for breach of sale contract but also commercial contract in general.

So the party in breach is liable only for the loss suffered by the injured party as a consequence of that breach. There is a causal link between the breach and a loss. Causation will determine the range of events. Article 74 is clear in that the first sentence states that if a party breaches the contract, damages “consisting of a sum equal to the loss” must be paid. This is very clear, causation in a logical sense can be applied to work out exactly what damages have occurred through the breach of the contract.

Loss under Article 74 must be actual loss, the words “a sum equal to the loss” make it clear. Because only actual losses can be recovered as a certain sum of money. However, CISG does not state clearly whether the party in breach is liable only for the loss caused to the injured party by a direct causality or whether his liability extends to losses by indirect causality. The implied answer may be found by applying the criterion of foreseeability (discuss later): the party in breach will be liable even for loss indirectly caused to the other party provided that this loss was foreseeable by the party in breach at the time of the conclusion of the contract. So the party in breach is liable for losses caused by both direct and indirect causality.

Articles 303 Vietnamese Commercial Law states more clearly about the extent of the loss recovered. It must be actual loss. The act in breach of the contract is the direct cause of the breach of the contract. However, the relation between the breaching party (or the subject of the act in breach of contract) and the injured party (the party suffered the loss) is not shown clearly like CISG (The words “loss suffered by other party” make it clear). Commercial Law 2005, has removed the fault of the breaching party as a factor when defining the basis for damages liability (this factor was provided in Vietnamese Commercial Law 1997), while the Article 308(1) Civil Code 2005 provides “A person who does not perform or performs improperly a civil obligation must bear civil liability if he/she is at fault”. As in the Civil Code 2005, issues of civil liability as provided for all civil liability in contract and civil liability outside the contract, so it can be understood that fault is one of bases which the liability to pay damages for loss shall arise. Clearly the civil law and commercial law have not unified on the grounds for liability to pay damages for loss.

However, Both CISG and Vietnamese Commercial Law 2005 provide the exemptions (the cases beyond the control of the parties) in such cases the breaching party is exempted from liability because the breaching party does not have the fault in breach of contract. So the lack of the fault factor does not mean that fault of breaching party is not considered in defining the liability to pay damages under CISG and Vietnamese Law.
3.1.3 The relation to other remedies.

Under CISG Art 45(2) establishes that by exercising his right to other remedies the buyer is not deprived of any rights which he may have to claim damages. It can thus be said that the right to require damages run parallel to other remedies. The right to claim damages therefore exists either as an exclusive right or as a supplemental one beside the remedies contained in Art. 45. The subject matter of the damages claim differs according to which remedy is chosen.

Under Vietnamese Law, the relationship between different remedies (includes the relation between damages with other remedies) is stipulated very clearly. Article 299(1) provides the relationship between specific performance and other remedies, specially emphasize the relation to damages “unless otherwise agree, during the period of application of the remedy of specific performance aggrieved party shall have the right to claim damages for loss and penalty for breach but it shall not be permitted to apply other types of remedies.” It means that damages may be applied as a supporting remedy beside the remedy of performance. It also states clearly in such case, the remedy of penalty for breach can be applied parallel with damages as secondary remedy without any other remedies. However, contractual parties still have the right to have “otherwise agree” which are not inconsistent with fundamental principles of Vietnamese Law, International commercial Practice and International Treaty which Vietnam is a member (Article 5 and Section 2). Article 307 defines the remedy of damages are always available while the remedy of penalty for breach only if the parties do have a specific agreement on penalty for breach. According to article 309(2), 311(2) the aggrieved party shall have the right to claim damages even in case of temporary cessation of contractual performance or contract is suspended. The relation of damages to avoidance (or rescission) is mentioned in article 314(3) - Legal consequences of rescission of contract “the aggrieved party shall have the right to claim damages for loss in accordance with this Law”. Article 316 gives the common rule “The right of a party to claim damages for loss for a breach of contract by the other party shall be preserved after other remedies have been applied.”

Although the way to provide in CISG and Vietnamese Law is different, the solution for the relationship between Damages and other remedies is similar. The right to claim damages is always available when a contract has been broken, this right is not deprived by the application of any other remedies.
3.2 Calculation of damages

3.2.1 Damages as full compensation

It is said that the right to damages is simply a direct deduction from the principle *pacta sunt servanda*. The mainly effect of the right to damages is to substitute a pecuniary obligation for the obligation which was promised but not performed. The pecuniary obligation is the full compensation that the injured party is received from the breaching party. The principle of full compensation for breach of contract is expressed in many different legal systems.

*Under CISG.* Article 74 is a basic rule defining the general extent of the obligation to pay damages for all cases in which the Convention provides for such an obligation. “Damages for breach of contract…consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach…” The rule that in general both the loss suffered by the injured party and his loss of profit are to be compensated expresses the principle of compensation: the injured party has a right to be fully compensated for all disadvantages he suffers as a result of the breach of contract of the other party. Those disadvantages are established by comparing the situation in which he would have found himself if the contract had been correctly performed. The specific reference to “loss of profit” is necessary because in some legal systems the concept of “loss” standing alone does not include loss of profit. The Convention does not give a specific categories of loss the injured party may claim, it means that these claims might arise out of a wide range of situations, including claims for damages ancillary to a request that the party in breach perform the contract or to a declaration of avoidance of the contract. No specific rules have been set forth in Article 74 describing the appropriate method of determining “the loss…suffered…as a consequence of the breach”. The court or arbitral tribunal must calculate this loss in the manner best suited to the circumstances. However, according to Article 6 the parties may agree upon the remedies available for breach of contract. For example, they may limit the scope of liability in the event that a party terminates the contract because of certain events. In addition, they may include a liquidated damages provision, which provides for a specified amount of damages agreed upon by the parties. This clause is sometimes refused to enforce in some jurisdictions for public policy reasons.

*Under Vietnamese Law,* the principle of full compensation is also mentioned in Article 302 Commercial law 2005. “The defaulting party pays compensation for the

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40 Secretariat Commentary on Art. 70 of the 1978 Draf (counterpart of CISG Art. 74)
loss caused...by breach of the contract” and “damages shall comprise the value of the actual and direct loss which the aggrieved party has had to bear due to the defaulting party plus the [loss of] direct profits which the aggrieved party would have earned in the absence of such breach”. The injured party has a right to be compensated for both losses he has had to bear as a result of the breach of the defaulting party and loss of profit. These losses must be actual and direct.

The principle of full compensation under different legal systems makes it clear 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”. However, damages may be excused as in the case of force majeure or of an exemption clause (we discuss later). In this case, the aggrieved party may not recover damages for loss not caused by the fail to perform.

Two legal system acknowledge the general measure of damages is the principle of full compensation, namely that the aggrieved party is entitled to be put into the same position as he would have been had the defaulting party complied with the terms of his contract. However, It is submitted that the second consequence of the principle that damages are compensatory is that an award of damages should not enrich the plaintiff: he cannot recover more than his loss. 41

3.2.2 Loss recoverable.

According to Art. 74 CISG, the buyer (the promisee) is entitled to damages, consisting “of a sum equal to the loss including loss of profit”. It is a very broad definition and theoretically should include all losses suffered by the promisee except those specifically excluded by the contract, or by law.

Article 74 states that the injured party may, as a rule, recover as damages “a sum equal to the loss, including loss of profit, suffered... as a consequence of the breach”. This wording makes it clear that Article 74 permits compensation of damages only by recovering a certain sum of money. It means that the injured party can claim only definable losses. On the other hand, Article 74 clearly stipulates that the aggrieved party can only claim losses including loss of profit which have been suffered as a consequence of the breach. Therefore, there is really only one category of losses which is mentioned by the CISG. Besides it, Article 74 does not define what concrete types of loss can be compensated. It seems that the principle of full compensation for harm, in the light of the particular contract and circumstances, should be the basis for determining the loss. 42 This principle will lead us to the

41 Chengwei (2003)
42 Chengwei (2003)
conclusion that all kinds of loss, suffered by the party and caused by the breach, are recoverable. http://www.cisg.law.pace.edu/cisg/biblio/saidov.html - 36 But the fact remains however that not all losses can be calculated

According to CISG Advisory Council Opinion No.6 the aggrieved party can claim compensation for:

- the value of its unrealized contractual expectation in order to receive the benefit of the bargain, it is direct loss (sometimes termed non–performance loss or loss of value) which is often measured by "the difference between the value to the aggrieved party of the performance that should have been received and the value to that party of what, if anything, actually was received", for example, the contract provided for the sale of 100 tons of grain for a total price of $50,000 FOB. When the delivered grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. If the grain had been as contracted, its value would have been $55,000, but because of the deterioration caused by the moisture after it was dried the grain was worth only $51,000. The buyer is entitled to cover $55,000 - $51,000 = $4,000 for the value of unrealized contractual expectation.

- the costs of reasonable measures to bring about the situation that would have existed had the contract been properly performed. In the example above, the buyer had to dry the grain with extra cost is $1,500 so he is entitled to cover this cost.

- losses resulting from declining exchange rates if the aggrieved party can prove that it would have received a higher monetary value if the breaching party had paid the money owed pursuant to the contract. For example, a contract calls for a buyer to pay U.S. $10,000 upon delivery of goods to a seller in country X where the currency is the Euro and the rate of exchange (at the time of delivery) for U.S. $10,000 is Euro 10,000. The buyer then wrongfully refuses to pay the seller and the seller files a suit in an American court to collect. However, by the time that the court enters judgment in favor of the seller, US $1 is worth only Euro 0.7692. Thus, awarding the seller U.S. $10,000 would, in effect, give the seller only Euro 7692. The seller is thus entitled to its payment under the contract (U.S. $10,000), plus an additional U.S. $3,000, which would give the seller the equivalent of Euro 10,000.

- any net gains prevented as a result of the breach, that is, net profits lost as a result of the breach of contract. In general, net profits are calculated by subtracting from gross profits the expenses saved as a result of the aggrieved party being excused from performance. Precise calculation of lost profits may not be possible but

43 Saidov, D., (2001)

44 Examples was provided by Secretariat Commentary.
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the breaching party should not be able to escape liability on the ground that lost profits are uncertain. Damages for the loss of a chance or opportunity to profit ordinarily are not recoverable under Article 74, however, this prohibition does not apply when the aggrieved party purposely enters into a contract in order to obtain a chance of earning a profit. The aggrieved party is entitled to recovery of not only profits lost prior to the judgment, but also for future lost profits, to the extent that such lost profits can be proved with reasonable certainty and subject to the principles of foreseeability and mitigation. Lost profits include those arising from lost volume sales.

- additional costs reasonably incurred as a result of the breach and of measures taken to mitigate the loss. These expenses, which are sometimes referred to as incidental damages, are for loss in addition to the aggrieved party's loss in value from being deprived of performance under the contract. For example, the additional costs incurred by one party as a result of the other party’s unjustified refusal to perform, the cost to the seller of tendering the goods in vain, or of preserving and storing them if the buyer rejects them without justification or refuses to make payment upon delivery of the goods as agreed in the contract. The buyer can claim the expense of storing goods which have been delivered late and which he returns after avoiding the contract, or reimbursement of the addition expense of loading and unloading goods caused by the seller failure to pack the goods in the manner required by the contract

- pecuniary loss resulting from claims by third parties as a result of the breach of contract. These losses are sometimes called consequential damages. For example, in the case of a breach by the buyer, a seller may suffer consequential damages resulting from the termination of contracts with suppliers, or fees resulting from a dishonored check. A buyer may be able to recover consequential damages when the seller delivers defective goods, the buyer resells them to third parties, and the buyer incurs liability to the third parties for defective or non-performance.

- loss of goodwill as a consequence of the breach. However, recovery of damages for such loss is available only if the aggrieved party can establish with reasonable certainty that it suffered a financial loss because of a breach of contract. Goodwill, however, is notoriously difficult to define. Thus, its loss is difficult to measure. In the decision of Art books case45, the Commercial Court stated that damages resulting from a loss of goodwill must be "substantiated and explained

45 Switzerland 10 February 1999 Commercial Court Zürich, Case No.HG 970238.1 available at http://cisgw3.law.pace.edu/cases/990210s1.html
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concretely”. In Video recorders case\textsuperscript{46} the Court denied damages for loss of goodwill because the buyer was unable to "calculate the exact losses resulting from the damaged reputation."

It has already been mentioned that "the basic philosophy of the action for damages is to put the injured party in the same economic position he would have been in if the contract had been performed. Following this philosophy, the damages provisions of the CISG are aimed at protecting the injured party's expectation interest. The wording of Article 74 - "loss, including loss of profit" - makes that clear. The general rule requires that in case of non-conforming goods, the seller shall compensate the buyer for any loss caused by the breach. However in many cases the indirect loss due to non–conformity of the goods can be highly unpredictable and burdensome to the seller.\textsuperscript{47}

Where the seller delivers and the buyer retains defective goods, the loss suffered by the buyer might be measured in a number of different ways. If the buyer is able to cure the defect, his loss would often equal the cost of the repairs. If the goods delivered were machine tools, the buyer's loss might also include the loss resulting from lowered production during the period the tools could not be used. If the delivery of the defective goods constituted a fundamental breach of contract, the buyer could avoid the contract. In such a case he would measure his damages under article 75 or 76.

According to Article 302(1) Vietnamese Commercial Law “the defaulting party pays compensation for the loss or damage caused to the aggrieved party by a breach of the contract” so in principle, the breaching party must damages for all losses caused to the aggrieved party by a breach of contract but according to Article 302(2) "The value of damages for loss shall comprise the value of the actual and direct loss which the aggrieved party has had to bear due to the defaulting party plus the [loss of] direct profits which the aggrieved party would have earned in the absence of such breach."\textsuperscript{48} Therefore, not all loss accounts are legal recognition that the recoverable losses must be the actual losses. Article 307 (2) Civil Code provides the actual losses include the loss of property, reasonable expenses incurred in preventing, mitigating and/or redressing the damage and the loss or reduction of actual income. They are losses can be calculated in money by a relatively reasonable way. Actual losses can be direct losses and indirect losses. Direct losses are the losses can be calculated.

\textsuperscript{46} Germany 9 May 2000 District Court Darmstadt, Case No. 10 O 72/00, available at http://cisgw3.law.pace.edu/cases/000509g1.html

\textsuperscript{47} Sivesand, p.83

\textsuperscript{48} Article 302 (2) Vietnamese Commercial Law
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easily and accurately as lost property, reduction of value of goods, cost of storing the goods…Indirect losses are the losses which the calculation of them must be based on the reasonable, logical and scientific presumption as income reduction and lost profits.\(^{49}\) Thus, Contract law of Vietnam provides the aggrieved party is entitled to claim damages for both direct and indirect loss. In Article 302 (2) the phrase “the actual and direct loss” is to indicate the direct loss, the phrase “the [loss of] direct profits” is to indicate the indirect loss. However, by the way to provide that, the recoverable losses include \textit{direct profit}, it makes a confusion in applying, because the law does not provide the guidance to definite direct profit. The words “direct profits” in article 302 (2) Commercial law and Article 307 (2) Civil Code provides about actual losses also makes us understand that it seems that loss of goodwill, future profits and loss of a chance or opportunity are not recoverable under Vietnamese law. It is clear that the scope of the losses recoverable under Vietnamese Law is smaller than under CISG. Such Vietnamese regulations on loss recoverable sometimes will not achieve the goals of the damages for breach of contract is put the aggrieved party into the same economic position that he may have been if the contract is implemented properly, nor ensure the principles full compensation.

3.3 Limits to claims for damages.

3.3.1 The foreseeability.

The application of the principle of foreseeability is very common to many legal systems. The foreseeability principle has its roots in the Roman law and through the Code Napoleon, it has found its way into a number of legal systems, include the common law.\(^{50}\)

\textit{The CISG}, in Art 74 states the limitations which exist in claiming damages:

\begin{quote}
...the loss which the party in breach \textit{foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.}
\end{quote}

Art 74 imposes the limiting factor of foreseeability. \textit{The underlying idea is that the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement.}\(^{51}\) The most important element contained in Art 74 is knowledge measured at the time of the contract was included

\(^{49}\) Nguyen Thi Khe, p.78

\(^{50}\) Saidov, D., (2001)

\(^{51}\) Chengwei (2003)
and not at the time of the breach. The relevant time from the point of view of foreseeability is of course the time when the contract came into being. It follows that no subsequent foreseeability will have legal effect under Article 74. The party in breach will thus not be liable for losses he objectively could not foresee at the time of the conclusion of the contract even if he later (e.g., at the moment of the breach of contact) becomes able to foresee them. The wording “foresaw or ought to have foreseen” makes it clear that the party claiming damages need not to prove that the party in breach really foresaw the loss. It will be enough if he prove that the party in breach was objectively in a position to foresee it. That means that the breaching party is not liable for all losses which are the consequence of the breach, but only for a foreseeable loss. The foreseeability rule in Article 74 CISG alludes to the fact that the risk factor must be taken into consideration. At the time of conclusion, contractual parties must contemplate what risks can occur in process of contractual implementation. These contemplated risks are important meaning in define the extent of loss recoverable. In case Macromex Srl. v. Globex International, Inc the arbitrator read Article 74 to determine loss of profit as the amount foreseeable at the signing of the contract and finding that "Buyer is entitled to lost profits caused by Seller that were foreseeable at the time of entry into the Contracts." The term "foreseeability" here is not the same as that used in the second element of force majeure, where it serves to protect the breaching party from unexpected impediments. The loss of profit foreseeable at the signing of the contract refers to circumstances similar to those raised here-preventing each side from using unforeseeable circumstances to modify the contract. Just as a Seller cannot require the buyer to pay an unexpected jump in market price for the contracted good, the seller is not required to accept less than the contract price even if the market crashes or a government regulation causes the price to drop.

In Vietnamese Law, the rule of foreseeability is not mentioned. According to Article 302, “The value of damages for loss shall comprise the value of the actual and direct loss which the aggrieved party has had to bear due to the defaulting party plus the [loss of] direct profits which the aggrieved party would have earned in the absence of such breach” It means that the breaching party is liable for all losses which the aggrieved party has had to bear as the consequence of the breach of contract, not to mention whether it is foreseeable loss. In fact the foreseeability rule

52 Cite as Knapp, in Commentary on the International Sales Law (1987), p.542
53 Zeller(2005), p.96
54 United States 16 April 2008 Federal District Court [New York], Case No. 08 Civ. 114 (SAS), available at http://cisgw3.law.pace.edu/cases/080416u1.html
is also not mentioned or discussed in interpretation or analysing law by Vietnamese courts or Vietnamese writers. This is seemed unique because many legal systems apply the foreseeability rule to limit the extent of damages. It can be explained by the application of fault rule in Vietnamese Law on civil liability with the purpose is limit the extend liability to pay damages for loss.

3.3.2 Time banner, notice.

The obligation to notify the seller any lack of conformity is, in particular, intend to place the seller in a position in which he may, if possible, remedy the lack of conformity by delivering the missing goods or substitute or by repair, or reduce the buyer’s loss in some other way. The buyer’s objection is also intend to give the seller an opportunity to prepare for any negotiation or dispute with the buyer concerning the lack of conformity and to take the necessary steps, in that regards, for example by securing evidence. Furthermore, the seller may need to prepare a claim against his own supplier. Finally, it is intend to establish certainty for the seller in regard to those accounts which he can consider to be closed at any particular time.55

According to the Art 39(1) CISG, the buyer loses the right to rely on a lack of conformity of the goods if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after the buyer has discovered it or ought to have discovered it. It can be said that in this way both notification duty and time limit restrict or limit the buyer’s right to obtain remedies. Even if a lack of conformity has obviously accured, the buyer’s right to claim damages may already have expired due to the fact that he failed to comply with a duty to notify or because a time limit has expired.56

The basic for notification obligation of the buyer is the obligation to examine the goods under Article 38. The obligation to examine the goods in article 38 is designed to set a time when, if no examination was conducted, the buyer "ought to have discovered" a lack of conformity of the goods as provided in article 39. There is no other consequence arising out of a failure to examine the goods.57

The time by which the buyer must examine the goods under Article 38 corresponds to the time in Article 39 by which he has discovered or ought to have discovered any lack of conformity and from which “a reasonable time” begins to run for giving notice of the lack of conformity.58

56 Sivesand (2005), p.157
reasonable time and it may lead to confusion in applying. In reality of international commerce, there are may case law on how to interpret the question of what period is reasonable in the sense of Article 39 CISG. In *AG Augsburg Case No. 11 C 4004/95*, the Court stated that the maximum period of time considered reasonable for the purpose of Article 39(1) was one month after discovery, and that certain factors -- such as the seasonal nature of the goods, which in the present case concerned fashion wear for a particular season -- would necessitate that the buyer give notice even sooner. The Court also noted that among the factors to be considered is the nature of the goods (chiefly, whether perishable or non-perishable) 60. Perishable goods generally give rise to an obligation to notify the seller within a shorter period of time.61 In *Bronneberg v. Belvédère*,62 the Dutch buyer claimed the Italian seller had breach the contract on the ground that the goods (the tiles) were not of the quality required by the contract. The court determined that since the buyer was informed by its customer that they did not conform to the contract in July 1991, but did not inform the seller of their lack of conformity until November of that year, it had failed to give notice to the seller of the lack of conformity of the tiles within a reasonable time of discovery, as required by article 39(1) CISG. In a similar case, the Court held that three months was too late.63 The expression “reasonable time” was chosen in order to have a flexible standard that could apply to all different kinds of transactions and different types of goods.64 Article 39(2) gives an absolute cut-off for notice of lack of conformity. Buyer loses his right to remedies if he does not provide such notice no later than within a specified two years-period, unless this time-limit is inconsistent with a contractual period of guarantee. The time limit for the buyer’s duty to give

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59 Schwenzer (2006)
60 Germany 29 January 1996 Lower Court Augsburg (*Shoe case*)

translation available at  http://cisgw3.law.pace.edu/cases/960129g1.html

61 CME Cooperative Maritime Etaploise S.A.C.V. v. Bos Fishproducts Urk BV, Case No. HA ZA 95-640, Netherlands 5 March 1997 District Court Zwolle

available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970305n1.html

62 W.M.J.M. Bronneberg v. Ceramica Belvédère S.p.A, Case No. 16.442, Netherlands 20 February 1998 Supreme Court,

available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980220n1.html

63 Gruppo IMAR S.p.A. v. Protech Horst, Case No. 920159, Netherlands 6 May 1993 District Court Roermond

Available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930506n1.html

64 Sivesand (2005), p.163
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notice of lack of conformity is not to be understood as a statute of limitations as shown in ICC Arbitration Case No. 7565 of 1994. The seller contended that "the thirty day time limitation in [the arbitration clause] reflects the parties intention to depart from the provisions of ... Article 39(2) of the Vienna Convention relating to the statute of limitation of an action based on the seller's guarantee of defects, by shortening the period of ... two years which otherwise would prevail." The tribunal disagreed, stating:

"Art. 39(2) ... has nothing to [do] with claims or other means of action in justice. It just deals with notice of a lack of conformity ... It leaves entirely open the matter of the time during which, after that notice, a Claimant may or may not file its claim within a Court or an Arbitral Tribunal. This matter depends on the proper law of limitation ... '[the time period recited in Article 39(2)] is not to be understood as a Statute of limitation' [citations provided]."

Under CISG, indications that there is a duty to notify speedily include whether the goods are of a perishable nature, the need for impartial sampling or testing and the possibility of cure by the seller. Vietnamese Law does not have any provision clearly expresses duty on the buyer to give notice of lack of conformity. However, Article 318 Vietnamese Commercial Law provides the limitation period for a complaint. This period shall be as agreed upon by the parties, but in the absence of such agreement, the that limitation period is three months from the date of deliver the goods if the complaint relating to the quantity of goods, and is six months from the date of delivery or three months from the expiry date of warranty period if the complaint relating to the quality of goods. According to Article 40 Commercial Law, if the complaint of buyer is not given within the time limit under Article 318, the seller shall not be liable for any defect in the goods. It means that within period of limitation, the buyer can claim seller breach the contract on ground that the goods do not conform to the contract even if the buyer did not inform the seller about that in reasonable time. As shown above the regulation about obligations of buyer to notify the lack of conformity of the goods is necessary, so Vietnamese Law leave open this issue will sometime lead to disadvantages for the seller, the seller will fall into passive situation. Especially, in case of particular goods such as perishable goods, seasonal goods, the lack of duty to


66 Honnold (1999), p.280

67 See Article 318 Vietnamese Commercial Law 2005
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give notice in the limited time will exclude the right to cure or remedy goods of the seller and even cause more loss for the buyer.

3.3.3 Burden of proof
The importance of the issue of burden of proof should not be underestimated. Although burden of proof is a procedural matter in nature, the way it is allocated between the parties can often pre-determine the outcome of a case. Certainty, this issue is of particular importance when it comes to proving the standards of limiting damages.

*The CISG* does not contain a direct rule as to the burden of proof. However, the analysis should focus on whether the matter is governed by the Convention by examining “the purposes and policies of individual provisions as well as the Convention as a whole”. Given the need to promote the Convention’s international character and the need to promote uniformity in the Convention’s application, and in light of the purposes and policies of Article 74, the aggrieved party bears the burden of proving with reasonable certainty such party has suffered a loss as a result of the breach. The imposition of a “reasonable” standard should not be viewed as radical. Rather, it is consistent with the Convention as a whole.68 Several reasons support the conclusion that burden of proof falls within the scope of the Convention. First of all, the CISG actually contains the word ‘proved’ in Art. 11 and the word 'proves' in Art. 79. The latter provision is the strongest indication of a direct regulation of burden of proof. The CISG expressly deals with burden of proof in Art. 79. In Art. 79, it is stipulated that: “A party is not liable for any failure to perform ... if he proves that ...”. The wording expressly indicates who bears the burden of proof and it would therefore seem far-fetched to claim that the CISG is not at all concerned with the burden of proof. Even though a few courts have excluded the burden of proof from the CISG, the majority of court decisions acknowledge that burden of proof is within the scope of the CISG. The general principle concerning burden of proof that is identified in case law is as follows: The party deriving legal benefit from a legal provision or an exemption has to prove the existence of the factual prerequisites of the provision. In the *Tribunale de Vigevano case*,69 the Court confirmed that a party who raises a claim also bears the burden of proof by stating that “The burden of proof rests upon the one who affirms, not the one who denies.” Or in *Delchi Carrier*

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69 Rheinland Versicherung v. Atlarex and Allianz Subalpina, Case No. 405, Italy, 12 July 2000 District Court Vigevano

Cite as http://cisgw3.law.pace.edu/cases/000712i3.html
v. Rotorex case, the Court held that damages under the CISG must be proved with reasonable certainty. In case non–conforming goods, claiming non-conformity will be a legal benefit to the Buyer and therefore he has to prove the existence of facts supporting his claim.

In Vietnamese Law, according to Article 304 Commercial Law “The party claiming damages for loss shall bear the burden of proof of the loss and amount of loss attributable to the act of breach, and of the loss of direct profits which the aggrieved party would have earned in the absence of such breach”. It is generally accepted that the burden of proving the extent of damages lies on the aggrieved party. It is reasonable because it is fair to both sides and the aggrieved has conditions to does that. So in order to recover damages for non-conforming goods, the buyer must prove that it has suffered a loss as a result of the lack of conformity of the goods, it means that a loss was sustained or will be sustained. Addition the buyer has to define the amount of the loss. We should understand “the amount of damages” means the extent of damages, the buyer need not prove the precise amount of loss because it is very difficult in case of loss of direct profit. The buyer must only provide a basic upon which a Court or an Arbitrary can reasonably estimate the extent of damages.

3.4 Damages in case avoidance of contract.

Damages is one of the most important remedies any legal system can award in order to restore financial equilibrium. The parties are then put into a position as if the contract would have been performed. However, that is not always the case, as in certain circumstances damages are not the remedy which is envisaged or is practical. In case non–conforming goods establishes a fundamental breach of contract the buyer may refuse the goods and declare the contract avoided. According to the Article 45 (2), the buyer never loses his right to claim damages by exercising his right to other remedies. The buyer can claim damages in case avoidance of contract relying on Article 75 or Article 76. Article 75 and 76 state alternative methods for measuring damages on avoidance need to be considered together. Article 75 bases damages on a repurchase by the buyer or resale by the seller while

70 Delchi Carrier, S.p.A. v. Rotorex Corp, Case No. 88-CV-1078, United States 9 September 1994 Federal District Court

Cite as http://ciscgw3.law.pace.edu/cases/940909u1.html

71 Thomas Neumann

72 Zeller (2005), p. 192
Article 76 looks to the “current” (or market) price for the goods in question. Both articles represent a specific application of Article 74 and should be read in conjunction with it.

If the contract is avoided for non-conformity of, the buyer will be interested in purchasing the same goods from another seller if possible and his effective loss will be diminished goods, the calculating damages in such cases is provided in Article 75:

If the contract is avoided and if, in reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Article 74.

The buyer may recover only the difference between the contract price and the price paid for the replacement goods (except for further damages recoverable under Article 74) provided that the latter higher than the price under the contract. Beside it the buyer may claim damages for any increase in costs as a consequence of the breach (recoverable under Article 74) such as increased transportation. However, Article 74 provides that the buyer can rely on the difference between the contract price and the price in the substitute transaction only if the cover purchase was made in a reasonable manner. Within context of Article 74, such manner would be likely to bring a cover purchase at the lowest price reasonably possible. Making (and identifying) a substitute transaction will be especially important when the goods have been specially manufactured or for some other reason are so unique that it will be difficult to establish a “current” price under Article 76. An advantage of the measurement of damages provided by Article 75 is that the repurchase by an aggrieved buyer, if reasonable, will itself set the measure of damages without the aggrieved party having the further burden to prove the current or market price for the goods.

Article 76 states an abstract calculation of loss under current price rule:

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under Article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages

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75 Cite as Knapp in Commentary on the International Sales Law (1987), p. 550
76 Honnold, p.450
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recoverable under Article 74. If, however, the party claiming damages has
avoided the contract after taking over the goods, the current price at the time of
such taking over shall be applied instead of the current price at the time of
avoidance.

(2) For the purpose of the preceding paragraph, the current price is the price
prevailing at the place where delivery of the goods should have been made or, if
there is no current price at that place, the price at such other place as serves as a
reasonable substitute, making due allowance for differences in the cost of
transporting the goods.

Under Article 76 the buyer who has avoided the contract may calculate his non-
performance loss in the narrow sense (i.e. loss caused by the mere breakdown of the
contract) abstractly according to the difference between the contract price and the
current price of the goods, provided that the goods have a current price. When the
buyer avoids the contract at the time the goods are handed over on rejecting a tender
of seriously defective goods, damages are based on “the current price at the time of
avoidance”.78 In case the buyer avoids the contract “after taking over the goods”,
damages are based on the “current price at the time of such taking over” – a date
prior to avoidance. The paragraph (2) of Article 76 points to the “price prevailing at
the place where delivery of the goods should have been made”. That refers to the
place of delivery as defined in Article 31.79 If there is no current price at the place of
delivery, the current price at a reasonable substitute place is to be taken and any
increase or decrease in transport costs is to be taken into account. Article 76 is
subsidiary for Article 75. As the wordings of Article 76 clearly show, it is permitted
only where a substitute transaction has not been made or when the substitute
transaction was not made in a reasonable manner or within a reasonable time after
avoidance. Where a substitute transaction has been made, concrete calculation of
damages under Article 75 takes precedence.80

In Vietnamese Law, there is no provisions applying only for damages incase of
avoidance.

3.5 The obligation to mitigate the loss.

Mitigation is a principle which is an obligation in the common law but not clearly
defined in civil law. In arbitration practice mitigation has become a general principle

78 Honnold, p.452.
79 Cite as Knapp in Commentary on the International Sales Law (1987), p. 557
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of international trade. The requirement to mitigate the loss is also an expression of good faith in international trade.\(^8\) The CISG has incorporated the doctrine of mitigation specifically into Art 77, but the rule is also reflected in Art 85 and 86, which are connected with the preservation of the goods after a breach. Article 77 is based on the principle that there should be no compensation for avoidable loss. Loss resulting from a breach of contract, including loss of profit, is not to be compensated to the extent that it could have been reduced by the taking of reasonable measures.\(^8\) Art 77 CISG states

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

The plaintiff must take all measures which are reasonable to reduce damages. It may include “the conclusion of cover transactions or even avoidance must be contemplated – if it will reduce damages”\(^8\). By the use of the word “must” take measures to mitigate the loss, Art 77 imposes a legal requirement, not a contractual obligation and hence allows the original breaching party to claim a set–off but does not result in a liability to pay damages. “It is a duty owed by the injured party to the party in breach” whereas another view is that the injured party “is under an obligation to herself to mitigate the loss”\(^8\). Article 77 does not define what measures are reasonable in the circumstances to mitigate the loss. The type of measures that need to be undertaken depends on the criterion of reasonableness, in the light of the circumstances in question.\(^8\)

Vietnamese Law also provides the obligation to mitigate the loss of the aggrieved party.

The party claiming damages for loss must take reasonable measures to mitigate the loss caused by a breach of the contract including the loss of direct profits which would have been earned in the absence of such breach. If the party claiming

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\(^8\) Zeller (2005), p.110.


\(^8\) Commentary on the UN Convention on the International Sale of Goods (CISG, p.586

\(^8\) Cited in Zeller (2005), p.111

\(^8\) Lookofsky (2003), p.103.

\(^8\) Chengwei (2003)
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damages fails to take such action, the defaulting party shall have the right to require a reduction in damages equal to the amount of loss that could have been mitigated.87

Compared to the CISG, the obligation to mitigate the loss under Vietnamese Law is quite similar. Under Article 305 Vietnamese Commercial Law, the party claiming damages must take reasonable measures to reduce damages. It is a legal requirement to the party claiming damages, so if he fails to take such action, the original breaching party has the right reduce damages. Like CISG, Vietnamese Law does not define what measure are reasonable. However, unlike CISG, Article 305 makes distinguish between the loss of direct profit and indirect profit. Connecting to other provision as a whole, Vietnamese Law only accepts direct loss of profits, so the obligation to mitigate the loss also relates to direct loss of profits, while CISG mentions all losses as the result of breach of contract.

3.6 Exemptions for damages

It is universally recognized that one of the important principles in contract law is “pacta sunt servanda.” It means that contractual undertakings must be respected. Each party is responsible for the execution of an agreement and hence also for its non–execution. The purpose of a contract is also to “forecast, define and clarify the intended and anticipated performance”. As such, each party would have allocated manageable risks to the contract and should be aware of the existence of possible unforeseen circumstances. The problem is how to manage these unforeseen circumstances. In an economic sense it is irrelevant whether the cause of the non–execution is outside the control of the breaching party or whether such impediments to an execution of a contract were foreseeable. This principle arguably reflects natural justice, as it protects the interests of the other party by biding a person to his promise. The reason is that the aggrieved party will suffer damages or losses which need to be accounted for.

However, it is recognized that not all breaches of a contract can be treated in the same way, as in certain circumstances a party may be confronted by events which are beyond his control. Such events can make performance either impossible or it can become too heavy a burden. In that sense, the principle of pacta sun servanda will lead to the opposite of its aim, namely to protect the parties to a contract. Such events do not foster the principle of natural justice either. Most countries therefore have recognized this fact and hence rules dealing with such situations are embodies in law.

87 Article 305 Vietnamese Commercial Law 2005
The principle which embodies the rule of changed circumstances is the doctrine of *rebus sic stantibus*.

The approach to changed circumstances varies from country to country and there is simply no uniformity in approach. Some legal systems only accept a narrow range of excuses; others are more generous. The rules dealing with situations of changed or supervening contractual circumstances are oriented on the two basic concepts of hardship and force majeure.

Force majeure has its origins in the Code Napoleon and was adopted in different forms in municipal law. General speaking, force majeure occurs when “the performance of a contract is impossible due to unforeseen events beyond the control of the parties”\(^{88}\). The aim of force majeure is to settle the problems resulting from non-performance either by suspension or termination of contractual obligations.

Hardship, on the other hand, is frequently incorporated into contracts as an express clause. It normally incorporates matters which are thought to be detrimental in the execution of a contract but not impossible. These circumstances must be of a fundamental nature and beyond the control of either party. Most importantly, these circumstances must be un-comtemplated and unforeseen.

The concepts of hardship and force majeure seem to be related to each other, particularly since they share some features: they both intend to regulate the effect of changed circumstances. The difference between the two concepts is most aptly described in such a way: hardship is at stake where the performance of the disadvantaged party has become much more burdensome, but not impossible, while force majeure means that the performance . . . the party concerned has become impossible, at least temporarily. Moreover, there seems to be a functional difference between the two concepts. Hardship constitutes a reason for a change in the contractual program of the parties. The aim of the parties remains to implement the contract. Force majeure, however, is situated in the context of non-performance, and deals with the suspension or termination of the contract.

**The CISG** deals with the issue of changed circumstances on an international level by avoiding any reference to existing domestic concepts. The drafters of the CISG chose the word “impediment” instead of “circumstance” or hardship or force majeure for that matter. Article 79 of CISG provides:

1. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
2. . . .

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Article 79 exempts a party from liability for damages when that party has failed to perform any of its obligations, including the seller's obligation to deliver conforming goods. “Failure to perform” within the meaning of article 79, has the same meaning as breach of contract in the provisions concerning damages. Article 79 describes conditions that must be satisfied before an exemption can be claimed. First, the failure to perform due to an impediment or the impediment should have caused the failure to perform. Second, the impediment must be beyond his control. Third, it was not reasonable to expect that the party took the impediment into account at the time of the conclusion of the contract or in other word, the impediment is unforeseeable. Forth, as a important requirement, the impediment could not have been avoided or overcome in substance or consequence. The breaching party must satisfy both of fours conditions above if it is exempted. It can be interpreted is that the performance of the contract has been prevented by something outside the breaching party’s sphere of control.

The breaching party is only protected from claiming damages but not the right of the aggrieved party to other remedy such as avoid the contract, require to reduce price. The exemption provided by article 79 has effect for the period during which the impediment exists.

The delivery of non–conforming goods is also a failure to perform within the meaning of Article 79. Admittedly, it is difficult to define and identify an impediment which has caused the failure to perform if the non – performance id based on the non –conformity of the goods delivered. The term “impediment” as used in article 79 mainly fits an event which restricts the scope of the breaching party’s activities in particular his ability to acquire the contract goods.

Vietnamese Law: The solutions relate to immunity from liability for breach of contract can be found in Article 302 (2), (3) Vietnamese Civil Code within general principle applying for breach of civil duties. Vietnamese Civil Code only provides two bases of the immunity are force majeure and the fault of the injured party; The opportunities to agree of the parties is opened. However, Articles 294, 295, 296 of Vietnamese commercial Law provide the parties in contract have the right to agree about any event which the occurrence of it will free breaching party from liability. Besides it, the breaching party will be immune from liability when: (i) Upon the occurrence of an event of force majeure; (ii) Upon a breach by one party which was totally due to the fault of the other party; (iii) Upon a breach by one party which was due to implementation of a decision of a competent State administrative agency about which the parties could not have known at the time of entering into the

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89 CISG Advisory Council Opinion No. 7
Damages for non–conforming Goods

Article 161(1) of Vietnamese Civil Code 2005 provides force majeure “means an event which occurs objectively and unpredictably and can not be overcome though all necessary measures have been applied and all the permitted capabilities have been used”. So, an event is considered as a force majeure in this sense when it satisfies: Occurring after the parties have concluded the contract; It is unusual so the parties can not predict and overcome; It causes the breach of contract.

In the case of force majeure, the parties may agree to extend the time –limit for performance of contractual obligations, if the parties does not agree or does not reach agreement, the time limit for performance of the obligations will be extended equal to the time which force majeure have happened plus the reasonable time to remedy the effect of it but not exceed the time is provided in Article 296 Commercial Law. In case the time for performance extended over the time is provided in article 296, the parties have the right to refuse to perform and no parties have the right to damages.

When the circumstances which is immuned according to Article 294 occurs, the breaching party has the duty to notice immediately to the aggrieved party and must prove the circumstances are immuned.

Article 294 Vietnamese Commercial law provides “A party in breach of contract shall be immune from liability in the following cases:...” The Law does not indicate clearly what remedy the breaching party is immune So It can be said that one important difference between the provisions of the Convention and the provisions of Vietnamese law on exemptions is, according to Vietnamese law, the breaching party will be exempted from not only the liability to pay damages but also other remedy, under the provisions of the Convention, breaching party will be exempted only from liability to pay damages. It clear that the way Vietnamese Law provide in this issue is not reasonable. It clearly unfair and strongly violate the right and benefits of the aggrieved party. Infact, the aggrieved party entirely can avoid, temporary cessation of contractual performance or Suspension of contractual performance. Addition, Commercial Law does not provide the period during which the exemption provided by article 294 has effect. This make contractual parties feel vague about the “fate of contract”.

90 Article 294 of Vietnamese Commercial Law 2005
4. Some evaluative conclusions drawn from this comparative study and some suggestions on improving Vietnamese Law

4.1 Some evaluative conclusions drawn from this comparative studying.

The starting point of this thesis was studying an effective and popular solution applying in international transaction, the remedy of damages. Because of the complexity of the damages, the studying is limited on observation the applying the remedy of damages in case non–conforming goods which is the breach by the seller. The problem is that solutions are stipulated vary between legal systems. The drafters of CISG has attempted to harmonize substantive contract law. CISG has been one of the more successful international intruments produced. Few other commercial law conventions have attracted as many states like CISG. CISG has had considerable impact internationally on the reform of sales and contract laws. CISG has became a model for improving domestic law. The Scandinavian States have drawn on the Convention in revising their sales law.91 Comparative studying Vietnamese law with CISG, of course bring many advantages. However this unification or harmonization attempt has not been without its critics.92

The concept of “Non–conforming goods” under Vietnamese Law is narrower than the CISG, it only relates to the requirement of the quality of the goods while under CISG, this concept relates to both quality and quantity of the goods.

A limitation relates to the measure of damages and define which loss is recoverable which both CISG and Vietnamese Law have is the lack of definition of loss and the extend of loss under two systems. Beside it, the way Vietnamese Commercial Law provides about loss can make confusion, specially make the understanding direct and indirect loss becomes vague. Normally in international commercial law, indirect loss means loss of profit but in Article 302(2) Vietnamese Commercial Law “The value of damages for loss shall comprise the value of the **actual and direct loss** which the aggrieved party has had to bear due to the defaulting party plus the [loss of] direct profits...” and according to Article 303 “liability to pay damages for loss shall arise when... the act in breach of the contract is the **direct cause of the loss**”

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Generally, it can be said that many of the principles used in the calculation of damages are similar under CISG and Vietnamese Law. Both CISG and Vietnamese Law provide the rules of full compensation, causation, mitigation. However, Vietnamese Law is lack of the rule of foreseeability which is the powerful rule of CISG while CISG is lack of the rule of proof which is mentioned quite detail under Vietnamese Law. Both Vietnamese law and CISG does not accept fault principle.

Under CISG, the rules relating the recovery of the remedy of damages can be found in Article 74 to 78. By virtue of these rules, the buyer can recover damages to compensate for all foreseeable losses (rule of foreseeability) caused by the breach of delivering non – conforming goods of seller (rule of causation), provided that he has properly mitigated his damage (rule of mitigation). In principle, the Vienna Convention provides a uniform concept of remedy for the different kinds of breaches of contract rather than providing different remedies for different kinds of breaches, rather than different remedy for different kinds of breaches. Differentiation in accordance with the type of breach only follows indirectly from the specific provisions. The remedy of damages is designed to applied for any breach of contract by both seller and buyer, include the breach of deliver non –conforming goods. The CISG does not contain the limitation found in some jurisdictions (for example, the United States) that damages must be proved with reasonable certainty (rule of proof)

A major limitation which both CISG and Vietnamese Law have, relates to damage recovery is the lack of a separate provision for breach of conformity of goods. Instead, Article 74 CISG applies to all breaches of sale contract and is further limited by Article 5 which disallows "claims for damages in the case of death or bodily injury caused by the goods, irrespective of whether or not the buyer himself or a third person is involved." The remedy of damages under Vietnamese Commercial Law applies to all breach of all contract provided in Commercial Law.

It is clear that CISG imposes the higher requirement to the good faith and the level of whole heartedness of the contractual parties when enter into agreement. Such as, at the time to conclude the contract, the parties are required to consider and evaluate carefully not only the interest they will be received but the losses can occur if the contract will not be performed properly (Article 74 requires parties, at the time to conclude the contract must predict (foresee) possible consequence of the breach of contract, only the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract must be compensated); when the contract was concluded, the parties must follow the process of performing the contract, make the advantages conditions to each other perform the obligations (Article 38 provides the buyer must examine the goods; Article 39 provides the buyer loses the right to rely on a lack of conformity of the goods if he does not perform the notification; ...)
the contractual parties also are required to catch the changing or happening of the circumstances which has affect to the performing of the contract and notice to each other (Article 74 states clearly the party who fails to perform due to an impediment beyond his control must give notice to the other party of the impediment and its effect on his ability to perform;...) The all provisions of CISG show the purpose of the CISG is to keep the contract afoot as long as possible.93

4.2 Solutions to improve Vietnamese Law on damages for non-conforming goods in International sale of goods contract

4.2.1 Vietnam should ratify the Vienna Convention as soon as possible

Through the study of this subject, we can see that the issues on damages due to breach of contract on International sale of goods Contract is much more complex than on Domestic sale of goods contract. From the comparative studying and find some limits on regulations of Vietnamese Law on damages for non-conforming goods as above, we suggest Viet Nam should ratify the Vienna Convention 1980 because:

+ The Vienna Convention is a treaty which is applied most widely in international sales of goods. It provides very clear provisions about most of the issues relating to the performance of the international sale of goods contract. Although Vietnamese Commercial 2005 has certain improvement in the access closer to the international practices and commercial law, but the regulations on the international sale of goods contract is provided generally, especially the liabilities of the parties in the contract is not provided particularly but applied generally like domestic contract and need not to consider whether it is a sale of goods contract or not, it clearly is not reasonable.

+ The detailed provisions of the Convention strike a fair balance between the buyer and the seller coming from different states

+ Joining the Convention will help Vietnamese enterprises by saving their time in negotiate, studying and approach the legal systems of new countries. Further, although Vietnam does have a commercial law with good general principles, those for international sales of Goods lack some suitable provisions.

+ In the current conditions of international economic integration, joining CISG is almost necessary and will assist the trading activities of Vietnam in general and the sale of goods (import and export) in particular. It will show the effort of Vietnam is

93 Zeller (2005), p. 40
making to integrate into international trade. It also reflects the views of the Vietnamese State to meet increasingly high requirements of international businessmen both in and outside the country, create conditions for Vietnamese and overseas enterprises has common "voice", common opinion and ultimately, international commercial cooperative relationships will become increasingly more secure, long-lasting and open up.

Integration in international economy positively is a major policy of Vietnam. The narrowing the non-compatibility between commercial law of Vietnam and international commercial law is a priority. The implementation of this is also a commitment of Vietnam when joining WTO.

4.2.2 Amending some regulations of Vietnamese Law on this issue

As indicated above the relation between Vietnamese Commercial Law and Vietnamese Civil Code is the relationship between the general and the particular, so before giving suggestions to improve Vietnamese regulations govern international sale contract directly in Commercial Law, the author will have some suggestions to improve Civil Code.

a) Amending Vietnamese Civil Code

Provisions of Vietnamese Law on the fault of the party in breach of contract is not unified and has many unreasonable points. As indicated above, the Civil Code regulates “A person who does not perform or performs improperly a civil obligation must bear civil liability if he/she is at fault” while Commercial Law does not consider fault as one of bases which the liability to pay damages for loss shall arise. The Civil Code provisions on civil liability apply to both civil liabilities in the contract and outside of the contract is not reasonable. Because fault in contractual liability is not entirely the same in civil liability outside the contract. Therefore the author suggests, it should modify the Civil Code by separating provisions on contractual liability and civil liability outside the contract. Specifically, it need to build up the independent regulations on civil liabilities in the contract in the Section 7, Chapter XVII, third part "Civil Contracts."

The issue on exemptions of civil liability when a breach of contract, the law is not uniform. As analyzed above, the Civil Code 2005 has only two cases which base on them the breaching party will be exempted are force majeur and the fault of the aggrieved party. Vietnamese Commercial Law 2005 stipulates the four bases, compared to the Civil Code it has further the base of the agreement of contractual parties on this issue, and the breach is due to the implementation of decisions of the administrative state authority that the parties can not know at the time of signing the
Damages for non–conforming Goods

To limit this conflict, the author propose to rebuild the regulations on exemptions in the Civil Code. It should separate the regulations on exemptions of contractual liability with other issues on the contractual liabilities as mentioned above.

b) Amanding Vietnamese Commercial Law

Vietnamese Commercial Law 2005 has only 7 Articles (from Article 27 to Article 33) for regulating the international sale of goods contract and only stop at the level of clarifying the concept of international sale of goods contract. Other issues such as rights and obligations of the parties, the issue of risk transfer, the time of transfer of ownership, liabilities due to breach of international sale of goods contract are applied as to the domestic contract, it is clearly unreasonable. Firstly, the author suggests it should build a independent system of regulations to adjust the overall problems of the international sale of goods contract.

Especially for the regulations relating to the non-conforming goods and the issue of damages, the author have some suggestions as follows:

- Modifying the concept of conforming goods including the requirement on quantity of goods, this will be suitable for regulation on the obligations of the seller as "deliver goods and vouchers [relating to the goods] in accordance with the contractual agreements on quantity, quality, method of packaging and preservation and in accordance with other clauses in the contract". Therefore, the addition of the quantity of goods as a factor in the concept of conforming goods not only make advantages for the application, but also make the provisions of Vietnamese law compatible with the International law.

- Regarding loss recoverable, the authors proposes in Article 302(2) should redefine as the "The value of damages for loss shall comprise the value of the actual and direct loss which the aggrieved party has had to bear due to the defaulting party plus the [loss of] profits which the aggrieved party would have earned in the absence of such breach", i.e remove the word" directly " before the word" profits ". Loss of profits is the indirect loss. The word "direct" before “profits” will cause the confusing in applying, moreover such regulation will not ensure the benefits of the parties in commercial relationship and in accordance with the principle of full compensation as analyzed above in 3.2.2.

- Regarding to regulations on exemptions, base on the analyzing in 3.6, author propose it should provides clearly that exemptions are applies only to protect the breaching parties excluded in exercising monetary remedies such as damages and penalty for breach. Authors also proposes in Article 294 should clarify the period during which the exemption provided by this article has effect.
Conclusion

Contracts for international sale of goods is the most common type of contract that subjects of international business use in international transactions. In the current conditions of international economic integration, the actions of purchasing goods between the subjects of international business take place very rapidly, thereby promoting the development of different economies, closing the gap between the countries. However, the growing rapidly of international sale of goods has led to the disputes between transnational contracting parties have increased in number, size and complexity. The international character causes resolving disputes arising from the contract increased in level of complexity, and requires the resolution to be fast and flexible, efficient. Thus, studying the remedies for breach of contract of parties in international sale of goods contract is necessary.

Vietnamese Law on international sale of goods contract has not been provided systematically, sufficiently and comprehensively, it is not appropriate to the nature of the complexity of this activity. Although Vietnamese Commercial Law 2005 has certain improvement in the access closer to the international practices and
commercial law but not meet the practical development of international commercial activities.

From the research provisions of the Vienna Convention 1980, compared with provisions of Vietnamese law, the author tried to discover and set out some recommendations to improve Vietnamese law on the remedy of damages for non-conforming goods. Author also hope, the thesis will contribute scientific knowledge in improving Vietnamese law on international sale of goods contract in general.
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