

**PONTIFÍCIA UNIVERSIDADE CATÓLICA DO PARANÁ
ESCOLA DE DIREITO
CURSO DE DIREITO**

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**NUDGES IN THE CISG: A BEHAVIOURAL LAW AND ECONOMICS
APPROACH**

Curitiba

2020

NUDGES IN THE CISG: A BEHAVIOURAL LAW AND ECONOMICS APPROACH¹

‘NUDGES’ NA CISG: UMA ABORDAGEM À LUZ DA ECONOMIA COMPORTAMENTAL E DIREITO

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ABSTRACT

Nudges are a tool of behavioural economics that aims to facilitate people's lives through pointing them in a certain direction that would make their lives better. The structure of the nudges consists in the *choice architect*, that is, the person/business/entity responsible for creating the nudge and putting it into practice, bearing in mind the *libertarian paternalism* approach. The referred approach works with the possibility of leading someone into choosing a certain thing, without coercing them to do so, respecting their freedom of choice. Since making good, smart choices, is of great relevance in international trade, the objective of this article is to trace a parallel between the nudges tool and the United Nations Convention on Contracts for International Sale of Goods (CISG). Thus, it will analyse the nudges in the Convention and the reason why the choice architect might have chosen a certain direction. Moreover, this study investigates further the nudges regarding the chapter of damages, from article 74 to 77. The study was made according to the deductive approach, through a qualitative research. The conclusion was that the CISG aims to make the contracts ruled by it to be the most economic benefiting to the parties as possible and for that reason it nudges the parties into making choices that will be more profitable to them and provide more security to the trade.

Keywords: Nudges; CISG; behavioural law and economics; efficiency; international trade.

¹ Projeto de pesquisa apresentado no Grupo de Pesquisa de Direito Civil e Processo Civil, vinculado ao Projeto de Pesquisa Arbitragem, CISG e Princípios UNIDROIT como fatores de desenvolvimento: análise jurídica e econômica e à linha de pesquisa Arbitragem, CISG e Princípios UNIDROIT, da Escola de Direito da Pontifícia Universidade Católica do Paraná, como requisito parcial para aprovação na disciplina de TCC II, sob a orientação do Prof. Guilherme Freire de Melo Barros.

RESUMO

Os *nudges* são uma ferramenta da economia comportamental que visa facilitar a vida das pessoas, guiando-as por um determinado caminho que deixará suas vidas melhores. A estrutura dos *nudges* consiste no *arquiteto de escolhas*, ou seja, a pessoa/companhia/entidade responsável por criar os *nudges* e colocá-los em prática, conforme o viés do *paternalismo libertário*. Esse viés funciona com a possibilidade de guiar alguém para uma determinada opção, mas sem coação, respeitando sua liberdade de escolha. Considerando que fazer boas e inteligentes escolhas é um aspecto de grande relevância no comércio internacional, o objetivo do presente artigo é traçar um paralelo entre a ferramenta dos *nudges* e a Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias (CISG). Desta forma, serão analisados os *nudges* presentes na Convenção e a razão pela qual o arquiteto de escolhas possa ter escolhido determinado direcionamento. Ademais, este estudo investiga de forma mais profunda os *nudges* com relação ao capítulo sobre perdas e danos, do artigo 74 ao 77. O estudo foi feito pelo método dedutivo, através de uma pesquisa qualitativa. A conclusão foi de que a CISG visa fazer com que os contratos regidos por esta sejam o mais economicamente benéfico possível e, por esta razão, provoca as partes para que façam escolhas mais rentáveis para elas e seguras para a sua relação econômica.

Palavras-chave: Nudges; CISG; Economia comportamental e direito; eficiência; comércio internacional.

TERMO DE APROVAÇÃO

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Artigo científico aprovado como requisito parcial para obtenção de aprovação na disciplina de TCC2, pela seguinte banca examinadora:

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Curitiba, 12 de novembro de 2020.

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INTRODUCTION

It is an interesting exercise to observe how people behave in certain situations. It is fascinating to notice how different backgrounds and previous knowledge can alter one's perception of reality and influence others in the decision-making process. A simple yes or no can change a person's life. International commerce itself is about making assertive decisions.

Most of the time people tend to make the wrong choices or take the most difficult path to achieve a rather simple objective, and the result might not be the expected one.

In the economic field the situation is not different. However, it has stood out to economists that, perhaps, it was possible to guarantee a bigger percentage of right decisions by analysing people's behaviour and the probability that they would make a choice in a certain direction or choose an easier route if influenced to do so.

That was the origin of the Behavioural Economics and, in consequence of that, the "nudges" tool, which was created precisely to guide people's decisions into a more assertive direction.

Applying such theory into the field of Law, most specifically in regard to International Contract Law, through the United Nations Convention on Contracts for International Sale of Goods (CISG), it is possible to predict the contracting parties' behaviour, and nudge them into the most efficient direction, reducing barriers to international trade.

In fact, the CISG itself has adopted this approach in different sections of its text. This article will focus on the analysis of Part III, Chapter V, Section II in respect of damages.

In short lines, this study has three main objectives:

- (I) Provide a better understanding of what are nudges, how do they work and where they can be found;
- (II) Explain how the CISG benefits from this tool, leading its contracting parties into making decisions that will facilitate the legal relationship, seeking the contract's maximum efficiency;
- (III) Investigate how does the CISG nudges the parties when it comes to the matters of damages, according to its Part III, Chapter V, Section II.

The chosen method was the deductive approach, throughout a qualitative research.

1. NUDGES

The nudges originated from the recent Behavioural Economics theory, that considers external factors to economics, in which the intention is for economic models to have more adequate and consistent responses to individuals' behaviours.

Considering the need to better understanding human's economical behaviour, psychology and other social sciences were welcomed in order to achieve a clearer comprehension on what influences people in the decision-making process².

According to the Oxford Learner's Dictionary, the word nudge means "*to push someone gently, or gradually, in a particular direction*"³. Therefore, in a Behavioural Economics approach, nudges are made to push someone towards a certain orientation and are considered as "*liberty-preserving approaches that steer people in particular directions, but that also allow them to go their own way*"⁴.

Nudges are believed to advertise behaviourally informed regulation, that will self-benefit the population and thus promote socially desirable behaviours, discouraging self-injurious and socially undesirable conducts⁵.

The concepts of "*libertarian paternalism*" and "*choice architect*" are fundamental when understanding nudges. The structure of a nudge has its roots in what is called the "libertarian paternalism" which at first may seem contradictory, but in fact it is a very reasonable concept⁶.

The libertarian aspect of the concept derives from the idea that people are free to do what they want and to choose their own path. The goal is not to overwhelm those

² THALER, Richard. **Misbehaving**: The Making of Behavioral Economics. United States of America: W. W. Norton & Company, 2015.p. 27.

³ **OXFORD LEARNER'S DICTIONARIES**. Definition of nudge verb from the Oxford Advanced Learner's Dictionary. Available in: https://www.oxfordlearnersdictionaries.com/definition/english/nudge_1. Accessed 3 oct. 2020.

⁴ SUNSTEIN, Cass. Nudging: A very Short Guide. **J. Consumer Pol'y**, [s. l.], v. 37, 1 nov. 2020. Available in: <http://ssrn.com/abstract=2499658>. Accessed 3 out. 2020.

⁵ ZAMIR, Eyal; TEICHMAN, Doron. **Behavioral Law and Economics**. New York: Oxford University Press, 2018. p. 78.

⁶ SUNSTEIN, Cass; THALER, Richard. **Nudge**: Improving Decisions About Health, Wealth, and Happiness. United States of America: Caravan, 2008. p. 5.

who want to exercise their freedom, but to let them be free to easily decide on which road to follow. It simply means to preserve people's freedom.

Whereas the paternalism translates to the idea that legitimates the "architect" to try to influence people's choices into choosing the type of behaviour that will make their lives easier, simpler, safer and more practical. It is as if the choice architect actually cared about people's needs, acting in a paternal manner.

It is based on social sciences' researches which conclude that in most occasions, individuals make very poor choices, that could have been avoided if they had payed full attention, had all the information necessary, unlimited cognitive capacities or complete self-control.

Essentially, it implies that the "choice architect", the one responsible for organizing the context in which the nudge will be used (e.g. the State or a private institution), will gently push people towards a path and give them the option of pursuing it or not, even if what the architect is offering will make people's life easier in several ways.

It is important to highlight that the "libertarian paternalism" is a very broad way of paternalism, not very intrusive. The nudge will be valid as long as there are no impositions in regard to what one should be doing. It will give the subject a choice and it will influence it to choose in a determinate manner, always preserving one's freedom.

A good example to illustrate the "libertarian paternalism" is the GPS. It will provide the best, fastest route to get one where it needs to go, but still the person can choose their own route if it desires⁷.

When the choice architects implement nudges, they seek to make an incentive for the decision-maker to consider a path that offers a solution that not only will be useful for that moment, but also very important in the future⁸.

Another important characteristic of such tool is that the nudge should be clear, easily identifiable and avoidable. On that note, Sunstein⁹ explains that there are ten important manners of making nudges¹⁰:

⁷ SUNSTEIN, Cass. Nudging: Um Guia Muito Breve. *In*: AVILA, Flavia; BIANCHI, Ana Maria. **Guia de Economia Comportamental e Experimental**. 1. ed. São Paulo: [s. n.], 2015. cap. II. Available in: <http://www.economicomportamental.org>. Accessed 1 out. 2020. p. 111

⁸ SAMSON, Alain. INTRODUÇÃO À ECONOMIA COMPORTAMENTAL E EXPERIMENTAL. *In*: AVILA, Flavia; BIANCHI, Ana Maria. **Guia de Economia Comportamental e Experimental**. 1. ed. São Paulo: [s. n.], 2015. cap. I. Available in: <http://www.economicomportamental.org>. Acesso em: 1 out. 2020. p. 45

⁹ Cass R. Sunstein is currently the Robert Walmsley University Professor at Harvard. He is the founder and director of the Program on Behavioral Economics and Public Policy at Harvard Law School.

¹⁰ SUNSTEIN, op. cit. p. 111

1. Default nudge – the most effective type of nudge. For example, when one automatically enrolls in a retirement or health plan programmes, through an “opt-out” type of program, in order to increase savings or improve their health;
2. Simplification – it is a manner of optimizing programs. If a something is simpler, there are greater chances of people engaging in it;
3. Uses of social norms – the objective is to inform people that the majority of others display a certain behaviour, so they will follow. For example, using the expressions “most people”, “nine out of ten”, etc;
4. Increases in ease and convenience – offer people the easiest and most convenient choice. Usually, resistance to change is a product of difficulty, therefore people tend to choose the easiest path;
5. Disclosure – a simple disclosure, if the information is comprehensible and accessible, can be highly effective. For example, economic and environmental costs associated with energy use, or the full cost of certain credit cards;
6. Warnings, graphic or otherwise – the classic example of the cigarettes. There is a risk in consuming such product, make it clear with bold large letters and people will pay attention to it;
7. Precommitment strategies – if the commitment precedes the action, people are more likely to maintain such behaviour, preventing procrastination;
8. Reminders – the reminder could come by email or a text message, so as for one not to forget the conduct it should follow to achieve a certain result;
9. Eliciting implementations intentions – people have a tendency to perform a certain activity if someone provokes their intention of implementing it, for example, asking questions about such intention;
10. Informing people of the nature and consequences of their own past actions – giving access to how much one has spent on energy bills may make them rethink their behaviour.

When it comes to implementing nudges such as the abovementioned, it is possible to rely on existing institutions or create a new one, that will be exclusively responsible for studying the best nudge applicable to a certain situation, acting as the choice architect.

The default rule nudge is considered to be the best one, because often people do

not go out of their way to opt-out of something that, in theory, is beneficial to them. Once being enrolled in a programme; it is most likely that one will remain in that position.

A daily example is of when people are a part of an email chain, almost no one will take the time of day to unsubscribe from that list. Normally, people would just keep receiving and ignoring those emails instead of opting out.

Moreover, in economic analysis, the default rule is perceived as a mean of maximizing efficiency, reducing transaction costs and inducing information sharing. When the default rules mirror the preferences of the people to which they apply, they may save those people the costs of actively making those arrangements¹¹.

To sum up, nudges are regulatory tools that benefit from psychological insights – that had been empirically tested and approved – so that the choice architect can design the decision-making environment to promote certain choices, without limiting it to a single option.

2. THE CISG

The CISG rules international contracts for the sales of goods and has been ratified by 94 contracting states¹².

Since its creation in 1980, it has gained a lot of space and recognition in international trade. By 2009, the CISG Contracting States were responsible for approximately seventy-eight percent of all international sales contracts, meaning that potentially, up to that percentage of all trades could be governed by the Convention¹³.

As efficient contract laws should be, it strives to maximize the economic benefits from the contract after costs¹⁴. The goal when drafting the rules was providing an alternative for the parties to choose a familiar, easily understandable and fair alternative to other legislations.

¹¹ ZAMIR E TEICHMAN. *op. cit.* p. 179

¹² UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. **Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)**. Available in: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status. Accessed 3 out. 2020.

¹³ SCHWENZER, Ingeborg; HACHEM, Pascal. The CISG: Success and Pitfalls. **American Journal of Comparative Law**, [s. l.], v. 57, 1 abr. 2009. Available in: <https://www.cisg.law.pace.edu/cisg/biblio/schwenzer-hachem.html>. Accessed 3 out. 2020. p. 457

¹⁴ SPAGNOLO, Lisa. **CISG Exclusion and Legal Efficiency**. The Netherlands: Wolters Kluwer, 2014. p.27

The drafters of the Convention aimed to make a set of rules that would be compatible with both common law and civil law systems, so as no conflicts would arise in case the parties needed to resort to their domestic law systems.

According to DiMatteo and Ostas, the CISG has rules that could be characterized in five groups:

- (I) Rules fit for both common and civil law;
- (II) Rules that understand the superiority of either common or civil law;
- (III) System-neutral rules;
- (IV) Rules that refrain from certain topics, leaving it to the parties' domestic law; and
- (V) Rules that can belong to any of the first three groups but have been subject of modification by the CISG Drafters, that opted for an original or autonomous interpretation of its rules.¹⁵

The structure of the rules itself, however, is made up of four parts, divided in specific chapters and sections.

In its Preamble, the CISG stresses that it seeks to develop international trade on the basis of mutual benefit, with uniform rules, as it reads¹⁶:

(...) the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order, (...) the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, (...) that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

¹⁵ DIMATTEO, Larry; OSTAS, Daniel. Comparative Efficiency in International Sales Law. **American University International Law Review**, Washington, v. 26, ed. 2, 2011. pp. 376-377

¹⁶ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. **United Nations Convention on Contracts for the International Sale of Goods**. Available in: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>. Accessed 27 out. 2016.

It sets the tone on what to expect and to what is expected from the Convention's Contracting States, and from the parties that may adopt this as the rule for their contract.

CISG's First Part determines the scope of application of the rules, such as the application of domestic laws as default rules, the kind of goods that can be subject to the application of the Convention and the possibility of derogating from any of its provisions.

Regarding this possibility of derogation from the CISG or any of its provisions, it is important to highlight that the provision itself can be interpreted as a default rule nudge, seeing it adopts an opt-out system.

It also promotes the uniform interpretation of the CISG, enlightened by the principle of good faith. This Part was designed to end the legal uncertainty regarding the applicable law and to promote manners of reducing barriers to international trade that may arise from the interaction of diverse foreign laws.

The Second Part deals with the formation of the contract. It defines what constitutes a proposal, the acceptance, offer, counter-offer – all aspects to the negotiation of the contract – and, of course, its conclusion.

The sale of goods is the subject to the Third Part, it is CISG's core. It rules regarding the breach of contract and its remedies, all the obligations of the buyer and the seller regarding the delivery of goods and the handing over of documents, the conformity of the goods and third-party claims and the payment of the price.

It also has provisions on the passing of risk, anticipatory breach and instalment contracts, damages, interests, exemptions of liability, effects of avoidance and the preservation of the goods. This is the longest and most important Part of the CISG.

The Fourth Part embraces the final provisions, that regard aspects of the signature of the Convention, as well as directions for the Contracting States.

Nonetheless, in order for the CISG to be efficient, facilitating free trade around the globe, it must consider some economic functions such as (I) prevention of opportunistic behaviour by the parties; (II) efficient gap-filling default rules in case of incomplete contracts; (III) shifting of risk; and (IV) reduction of dispute resolution costs in contractual disputes¹⁷.

¹⁷ SPAGNOLO. op. cit. p. 27

As it has been presented, the CISG approaches some of those functions openly, but some, not so much. Even so, those are manners of nudging parties into the directions that the choice architect, also known as the CISG Drafters, deems to be best.

2.1. Nudges in the CISG

Throughout the whole text of the CISG it is possible to observe several nudges that aim to make the rules as efficient as possible, pushing parties towards a particular path. As previously mentioned, a good contract law should have provisions that correspond to economic functions to maximize the parties' gain and to restrain unpleasant situations.

With the Behavioural Law and Economics approach, it is possible to analyse three main aspects of a contract law, in order to make sure it intends to be economically benefiting to the parties, such as deferring to individual autonomy; reducing transaction costs; and providing stability in transaction. All of those have been introduced into the Convention and have the objective of nudging the parties.

One of the CISG's fundamental premises is that the will of the parties is the most important tool for contract interpretation, according to its article 8. This approach is a manner of ensuring that the parties' knowledge and experience is taken into consideration in case any matters arise from the contract, it is known as "individual autonomy".

When contract laws adopt this approach, there is an increment in economic growth. In this sense, the contract terms that reflect the subjective agreement of the parties should be enforced, without restrictions¹⁸.

Therefore, considering that the Convention encourages the parties to express their will in the contract and, in case there is a problem, it provides tools to help interpreting what the parties' real intent was, this can be considered one of the CISG's biggest nudges. It aims to guide the parties into the direction of precisely stating what their will was when drafting and discussing the terms of the contract.

Another aspect of the CISG is the goal to reduce transaction costs, through the provisions regarding remedies in case of breach of contract – articles 25 and 45 to 52

¹⁸ DIMATTEO, OSTAS. *op. cit.* pp. 387 - 389

– or even by discouraging fraud and inappropriate negotiations, as foreseen by articles 7 to 24. It aims to encourage the parties into guaranteeing that the terms agreed in the contract will be performed and to avoid fraudulent behaviour within the contract.

As a nudge, it serves to demonstrate to the parties that it is economically better off negotiating ethically, complying with the contract and delivering their part of the agreement, rather than defectively performing it or even not performing it at all.

Regarding the mentioned stability, a particularly relevant aspect in the international context of the CISG, it is important for the law to work as an incentive structure. Apart from the articles that determine the uniform application of the convention by the Courts, the good faith negotiations, the previous relationship between the parties and the default rules, another mean to achieve the same end is by mixing the type of rules, as previously specified, in between common law and civil law friendly or even system-neutral provisions.

This is a different type of nudge, however, because it intends to demonstrate to the parties that the CISG is a stable, reliable law and should be adopted by them to rule their contract in international trade. It has the objective of making people opt for the Convention.

It is clear that the CISG drafters worked as Choice Architects when putting together this set of rules. International trade is very dynamic, and some nudges can lead the parties into safer and more economic advantageous directions. That is one of the reasons why the Convention has been so successful over the years.

2.2. Nudges Regarding Damages Pursuant to the CISG

The concept of “damages” in international law is a monetary compensation for the loss incurred by the injured party in cases of breach of contract¹⁹.

In order for a party to have the right to claim damages for breach of contract, it has to prove the said breach, the losses that derive from it and the causal link between the breach and the losses it incurred²⁰.

¹⁹ SAIDOV, Djakhongir. **The Law of Damages in International Sales**: The CISG and other International Instruments. Portland: Hart, 2008. p. 17

²⁰ SAIDOV. op. cit. p. 20

In the CISG, this situation is ruled by Part III, Chapter V, Section II, and consists in the provisions of four articles: 74 to 77. On the first part of its article 74, the Convention states that:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. (...)

Honnold has stated that *“the standard established by Article 74 is brief but powerful”*²¹, that is because it provides both the concept and a quantitative standard for damages. Besides, the nudge is crystal clear: perform the contract as it was agreed. If one party breaches the contract, it must leave the aggrieved party in the same position it would be as if the contract was performed²², therefore, it is more advantageous for the parties to just perform the contract.

The economic function for this article is to prevent opportunistic behaviour from the parties, through the principle of full compensation²³, which could prevent parties from breaching the contract in case it seemed more financially interesting to them.

The second part of the article states:

(...) Such damages may not exceed the loss which the party in breach 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.

The same reasoning, that is, the prevention of opportunistic behaviour, can be observed in the second part of the article.

The writing of the article makes it clear that damages can only be claimed to the extent in which the party who breached the contract could have foreseen it – or ought

²¹ HONNOLD, John. **Uniform Law for International Sales under the 1980 United Nations Convention**. The Hague: Kluwer Law International, 1999. 541 p. Available in: <https://cisgw3.law.pace.edu/cisg/biblio/honnold.html>. Accessed 1 out. 2020.

²² SCHWENZER, Ingeborg; HACHEM, Pascal. **The Scope of the CISG Provisions on Damages**. In: *CONTRACT Damages: Domestic and International Perspectives*. Oxford: [s. n.], 2008. cap. 3. Available in: <http://edoc.unibas.ch/dok/A5264748>. Accessed 2 out. 2020. P. 92

²³ CISG ADVISORY COUNCIL OPINION NO. 6. **Calculation of Damages under CISG Article 74**. Available in: <http://www.cisgac.com/cisgac-opinion-no6/>. Accessed 3 out. 2020.

to – at the time of conclusion of the contract. Meaning that, if the parties, in the future, may want to claim full compensation under damages, they must cooperate and inform each other of the use, importance and even possibility of a substitute transaction in case of breach of contract.

The CISG uses the provision of the second part of article 74 as a manner of avoiding market failure of asymmetrical information²⁴, by nudging the parties into sharing information and cooperating.

In this part of the article it is also possible to notice the principle of the protection of the expectation/performance interest, which aim to make the parties understand that the contract is, of course, binding and there is a legal right to the other party's performance of the obligation. There is also the morality of a promise that must be kept and the psychological expectation of the innocent party.

Moreover, by protecting the expectation/performance interest, it increases stability in commercial trade through the reduction of the risks associated with breach of contract, encouraging contracting and exchange²⁵.

Examining the issue even deeper in the law and economics perspective, the economic goal of wealth maximization requires the goods to be put where they are most valuable at, which not only is the aim of the expectation damages, but also is what the choice architect deems to be the best outcome.

Articles 75 and 76 CISG set forth ways of measuring damages when a contract has been avoided and should not be considered as a replacement for article 74, being solely alternative measures to it²⁶.

The first article considers the scenario in which the aggrieved party avoided the contract and started a substitute transaction:

If the contract is avoided and if, in a 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

²⁴ AKERLOF, George. The Market for "Lemons": Quality Uncertainty and the Market Mechanism. **The Quarterly Journal of Economics**, Oxford, v. 84, ed. 3, 1970. p. 490

²⁵ SAIDOV. *op. cit.* p. 28

²⁶ CISG ADVISORY COUNCIL: OPINION NO. 8. **Calculation of Damages under CISG Articles 75 and 76**. Available in: <https://www.cisgac.com/cisga-opinion-no8/>. Accessed 3 out. 2020.

the price in the substitute transaction as well as any further damages recoverable under article 74.

According to the text, the party is entitled to damages that correspond to the difference between the contract price and the price in the substitute transaction. This means that the choice architect, in the same sense of article 74, wanted to ensure that the goods would be put to their most valuable use, either with their replacement or reselling.

On the other hand, the second article, 76, the injured party is entitled to the price between the price fixed by the contract and the current price²⁷:

(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 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 purposes 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.

If a party has avoided the contract but did not make a substitute transaction pursuant to article 75, the party is entitled to damages according to article 76. This is considered as an abstract determination of damages, in contrast to a concrete determination of damages under article 75, which is preferred, having met its standards.

²⁷ CISG ADVISORY COUNCIL: OPINION NO. 8. **Calculation of Damages under CISG Articles 75 and 76**. Available in: <https://www.cisgac.com/cisga-opinion-no8/>. Accessed 3 out. 2020.

Again, this article is another attempt of offering security to the parties when it comes to the dealing of damages. The choice architect sought to avoid the possibility for the aggrieved party to be granted damages that exceed the amount of its loss.

Last but not least, article 77 tackles the issue of mitigation of losses:

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 mitigation rule consists in the aggrieved party making all reasonable efforts to avoid the breach from happening. A good example can be observed in article 75, through a substitute transaction.

It is clear, once more, that the choice architect strived to protect the expectation/performance interest of the injured party with a lower amount of damages and also provides the breaching party with the possibility of investing the remaining amount elsewhere²⁸.

Saidov explains that one might think that the duty to mitigate the loss is very altruistic. However, it is also a practice in the interest of the aggrieved party, seen as businesspeople would normally try to reduce or avoid losses in situations where it is possible to do so.

The injured party does not mitigate losses because it is of the interest of the breaching party, but because it wants to be able to recover at least some of the damage it incurred.

For example, an international market player timing is very important, so it might be better for the injured seller to recover some of the amount lost and quickly invest it in a new deal, rather than wait longer to the full compensation of damages and miss a business opportunity.

In case the injured party is the buyer, it may do its best efforts to find substitute goods to avoid a break in commercial relations, liability and damage to its reputation.

²⁸ SAIDOV. *op. cit.* pp. 126-127

Nonetheless, parties often mitigate losses for the simple reason that they may not be awarded damages after all. By mitigating the loss, the party may not lose everything at once. The rule mirrors a usage of international trade²⁹.

For all that has been exposed, there are no doubts regarding the use and effectiveness of the nudges in the damages section of the Convention. The main goal of the choice architect in these four articles is to provide the parties with stability when dealing with damages, by preventing opportunistic behaviour by the parties, by protecting the expectation/performance interest and even through the principle of full compensation.

CONCLUSION

It is indeed an interesting experience to observe others and analyse their behaviours in different situations, especially if they are market players, in which each decision can determine the success – or failure – of their businesses.

The nudges are important tools to influence people in their decision-making process and lead them to which the choice architect considers to be the best path. This tool can be used in different ways, for the most diverse reasons. It can lead one into purchasing a certain product, quitting a bad habit, paying a bill, or even changing their lifestyle altogether.

Nudges are so versatile they can even be used in the making of rules, to lead parties into choosing a certain law, adding a different clause to their contract, adapting their trade usages and so on.

The drafters of the CISG have certainly built the rules with nudges in mind, working as the choice architect, as it is clear from the study at hand. Throughout all the provisions of the Convention, there is always an expectation set by the architect, mostly to economically maximize the gains of the contract and to provide stability for the parties.

In regard to the section of damages, the Convention sets forth, in its four articles that deal with this issue, the concern of making the parties properly comply to what was agreed by the contract. In case they do not comply and there is a breach of

²⁹ SAIDOV. op. cit. p. 129

contract, the breaching party must pay damages.

The discussion is about the measuring of such damages and the duty of both the breaching and the aggrieved parties. In consideration of those aspects, the choice architect seeks mainly to lead the parties, through the writing of its provisions, into the way of contractual stability, prevention of opportunistic behaviour of the parties and the promotion of the expectation/performance interest.

Needless to state, the result of the CISG embracing the nudges as a tool to maximize the rule's efficiency and making good use of them is very successful as the number of Contracting States has grown over the years as well as the number of trades ruled by it.

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