

A Comparative Look at the Duty to Mitigate Loss: the Consequences of the Violation of This Duty

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Abstract

The duty to mitigate loss is a general principle of law that serves to limit the liability of the party that has caused injury to the extent that the injured party has not demonstrated the diligence expected from the latter. However, this duty also serves the purpose of ensuring economic efficiency. While the classic understanding requires that, according to the principle of pacta sunt servanda, the interests of the injured party should be prioritized, today, the contract also refers to the cooperation between the parties. Therefore, reduction in the amount of claimable compensation should not be the sole sanction vis-à-vis the injured party that has violated the duty to mitigate loss. Otherwise, the injured party may escape the consequences of having violated the duty to mitigate loss by resorting to other optional rights. However, in order to ensure economic efficiency, in case the injured party violates the duty to mitigate loss, sanctions should also be foreseeable in terms of other optional rights. This study will evaluate the effect of the violation of the duty to mitigate loss in particular, with regards to request for specific performance and rescission of contract.

Keywords: duty to mitigate loss, reduction of compensation, specific performance, rescission of contract.

JEL Classification: K12, K13

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1. Introduction

The duty to mitigate loss, in the simplest terms, refers to the best possible management of damage incurred. This duty is a form of conduct that imposes on the injured party the obligation to reduce or prevent the increase of economic consequences that derive from the act of the injuring party that engenders liability, by way of taking reasonable measures within the framework of the specific circumstances of the concrete case². In other words, this is the obligation of the injured party to take all measures that

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² Annick Achdari, *Le devoir du lésé de minimiser son dommage* (Zurich-Bâle- Genève: Schulthess, 2008),

can be expected from that party in order to keep damages incurred at the lowest possible level³. Thus, the adopted measures will lead to a reduction in the compensation debt of the injuring party.

The duty to mitigate loss finds its field of application both in contractual liability and liability arising from unlawful acts⁴. It is accepted that the duty to mitigate loss is a fundamental principle of the law of obligations regarding the scope of the compensation claim of the injured party⁵.

In order to reveal the consequences of conduct in violation of the duty to mitigate loss, it is first necessary to consider the manner in which this duty is regulated in various legal systems. In the first part of our study, we shall mention the regulations and accepted principles regarding this duty under international texts and the legislation of certain countries within the Continental European and Common Law legal systems; in the second part, we shall deal with doctrinal opinions concerning the consequences of violations of the duty to mitigate loss based on the said regulations and we shall provide a brief evaluation on the subject matter.

2. The regulation of the duty to mitigate loss under various legal systems

2.1. The duty to mitigate loss under international texts

2.1.1. The duty to mitigate loss under the Vienna Convention on the International Sale of Goods (CISG)

The “United Nations Convention on Contracts for the International Sale of Goods” was prepared by the United Nations Commission on International Trade Law (UNCITRAL) in 1980 and entered into force in 1988.

According to article 77 of the Vienna Convention regarding the duty to mitigate loss: “*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*

1; Roland Brehm, “Art 44”, in *Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR Berner Kommentar zum Schweizerischen Privatrecht, Band VI: Obligationenrecht, 1. Abteilung: Allgemeine Bestimmungen, 3. Teilband, 1. Unterteilband*, ed. Heinz Hausheer/ Hans Peter Walter (Bern: Stämpfli, 2006), Art. 44, n. 46; Ingeborg Schwenzer, *Schweizerisches Obligationenrecht Allgemeiner Teil*, (Bern: Stämpfli, 2016), 110.

³ Stephan Weber, “Die Schadenminderungspflicht – Eine Metamorphe Rechtsfigur” in *Haftpflicht- und Versicherungsrechtstagung*, ed. Alfred Koller (St. Gallen: Verlag Institut für Versicherungswirtschaft, 1999), 137; Vito Roberto, *Schweizerisches Haftpflichtrecht*, (Zurich: Schulthess, 2002), 230.

⁴ Pascal Pichonnaz, “Le devoir du lésé de diminuer son dommage,” in *La fixation de l’indemnité, Colloque du droit de la responsabilité civile 2003*, ed. Franz Werro (Bern: Stämpfli, 2004), 110 ff.; Weber, “Schadenminderungspflicht,” 138; Achtari, *Le devoir*, 14, 16; Başak Baysal, *Zarar Görenin Kusuru [Fault of the Injured Party]* (İstanbul : Oniki Levha, 2012), 215 and 313; Leyla Müjde Kurt, “Zarar Görenin Zararı Azaltma Külfeti [The Duty to Mitigate of the Injured Party]” *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 64, no.3 (September 2015): 777.

⁵ Achtari, *Le devoir*, 12; Judgement of the Swiss Federal Court dated 22.09.2006 No. 4C.177/2006, c. 2.2.1. In fact, according to Weber this principle is a fundamental principle of both private and public law: Weber, “Schadenminderungspflicht,” 137.

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 regulation in question compels the indemnitee to keep losses at a minimum. It has been regulated that in case of violation of this duty, the compensation will be reduced to the extent of the damage that could have been avoided. This regulation is an embodiment of the “obligation to observe good faith in international trade” stipulated under article 7/1 of CISG⁶.

This provision regulates that the party entitled to compensation should take the reasonable measures that are expected from that party within the framework of good faith. The point of reference at this point is the behavior that a reasonable person should display given the same circumstances⁷. Of course, in determining what measures are to be considered reasonable, the established practices between the parties and international commercial customs have to be taken into account⁸. In this context, it would be possible to mention that the party that is affected by breach of contract or is under such a threat, in order to prevent or reduce loss, could be required to conclude a substitute purchase or sale contract, depending on the specific circumstances of the concrete case⁹.

While the Vienna Convention regulates the possibility to apply reduction to the compensation amount in case of failure to prevent avoidable damages as a sanction of violating the duty to mitigate loss, it is debatable whether this provision can also be applied in terms of other claims. According to the prevailing view, in accordance with the wording of the provision and its systematic placement, the duty to mitigate loss applies only to compensation claims¹⁰. This view argues that the violation of this duty does not preclude requests for rescission of contract or specific performance¹¹. However, there are also views that defend that it would be inappropriate to put forward such requests if insistence would result in an increase of damage¹². This debate will be discussed in detail in the second part of our study.

2.1.2. The duty to mitigate loss under the UNIDROIT principles

The UNIDROIT Principles, which determine the general principles of international commercial contract law, have been prepared as a non-binding “*restatement*” text and have achieved great reputation within the international trade

⁶ Ulrich Magnus, “Art. 77” in *J. von Staudingers Kommentar zum BGB mit Einföhrungsgesetz and Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, Wiener UN-Kaufrecht: CISG*, ed. Julius von Staudinger and Ulrich Magnus (Berlin: Sellier de Gruyter, 2018), n. 2.

⁷ Magnus, “Art 77,” n. 10.

⁸ Ingeborg Schwenzer, “Art. 77,” in *Schlechtriem&Schwenzer Viyana Satım Sözleşmesi Şerhi [Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG)]*, ed. Ingeborg Schwenzer and Pınar Çağlayan Aksoy (İstanbul: Oniki Levha, 2015), n. 7; Magnus, “Art 77,” n. 10.

⁹ Schwenzer, “Art. 77,” n. 10; Friederike Schäfer, “Art. 77,” in *UN-Kaufrecht - CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980*, ed. Christoph Brunner (Bern: Stämpfli, 2014), n. 8 ff; Magnus, “Art 77,” n. 11.

¹⁰ Magnus, “Art 77,” n. 6; Schwenzer, “Art 77,” n. 4.

¹¹ Schäfer, “Art. 77,” n. 2; Schwenzer, “Art 77,” n. 4.

¹² Michael Bridge, “Remedies and Damages,” in *International Sales Law*, eds. Larry DiMatteo, André Janssen, Ulrich Magnus and Reiner Schulze, 2nd edition, (Baden-Baden: Bloomsbury, 2021), 597.

community, both in practice and in academia.

One of the regulations that is important for our study is article 1.7 of the UNIDROIT Principles. According to this article, “(1) *Each party must act in accordance with good faith and fair dealing in international trade.* (2) *The parties may not exclude or limit this duty*”. It is stated that as a natural consequence of this provision, the duty to mitigate loss, which finds its basis on the good-faith rule and which is clearly regulated under article 7.4.8 of the UNIDROIT Principles, can neither be disregarded nor can its content be restricted by the parties¹³. Because, leaving an act in violation of the duty to mitigate loss without consequence would be a clear violation of article 1.7 which imposes an obligation to act in accordance with the rule of good-faith.

Article 7.4.8 of the UNIDROIT Principles regulates the duty to mitigate loss. According to the said article, “(1) *The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party’s taking reasonable steps.* (2) *The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm*”.

In the commentary regarding article 7.4.8 of the UNIDROIT Principles, the purpose of this regulation is stated as to prevent the indemnitee from demonstrating inaction while waiting for compensation where there is damage that they could eliminate or mitigate; it is stated that there could be no compensation for damages that the indemnitee could have prevented by taking reasonable precautions¹⁴.

Also, in the commentary regarding the said article, it is stated that the indemnitee who bears the consequences of the non-performance of the contract cannot be expected to take costly measures in terms of time and money; however, causing an increase in injury that could have been prevented by taking reasonable measures, yet which were not adopted, is not economically reasonable. It is stated that measures expected to be taken by the indemnitee are either measures to limit the extent of the injury or to prevent an increase in the initial amount of injury suffered¹⁵. The result is that the indemnitee, by way of taking necessary precautions, is required to reduce damages incurred and if not possible, to prevent increase in damages¹⁶. It is stated that the duty to mitigate loss as it is regulated under the UNIDROIT Principles differs in character from the duty to mitigate loss regulated under art. 77 of CISG, because CISG art. 77 imposes on the indemnitee the duty to positively limit damages arising from the breach of contract¹⁷. In our opinion, there is no difference between the two texts with regards to the regulation of the duty to mitigate loss. As a matter of fact, under both regulations, it is indicated that an indemnitee cannot seek compensation for damages that they could eliminate or prevent by adopting reasonable measures, hence, conduct conform to that which is expected from an honest indemnitee is required.

¹³ For this view with which we agree with, see Stéphan Reifegerste, *Pour une obligation de minimizer le dommage* (Marseille: Presses Universitaires d’Aix-Marseille, 2002), 74.

¹⁴ UNIDROIT Principles on International Commercial Contracts 2016, art. 7.4.8, commentary. See <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>, 282.

¹⁵ <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>, 282-83.

¹⁶ Stefan Eberhard, *Les sanctions de l’inexécution du contrat et les principes UNIDROIT* (Lausanne : CEDIDAC, 2005), 215.

¹⁷ Eberhard, *Les sanctions*, 217.

The only sanction foreseen for violating the duty to mitigate loss is the indemnitees inability to seek compensation from the indemnifier for damages that they could have prevented. The article does not stipulate depriving the indemnitee of other means¹⁸. In face of this regulation, the issue arises as to whether the person who does not comply with the duty to mitigate loss may resort to other means.

2.1.3. The duty to mitigate loss under the principles of European contract law

Principles of European Contract Law (PECL) were created by a commission set up under the presidency of Danish jurist Ole Lando in order to serve the harmonization of contract law within Europe¹⁹. Similar to the UNIDROIT Principles, these principles are not legally binding. However, compared to the UNIDROIT Principles, PECL are effective in a more limited geographical area. Since these principles foresee general principles to be applied to the law of contracts in the European Union, they only find application within the European Union²⁰.

The duty to mitigate loss is regulated under Article 9:505 of the Principles of European Contract Law. According to the first paragraph of the said provision, “*The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps*”. According to the second paragraph of the same article, “*The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss*”.

2.2. The duty to mitigate loss within the continental European legal systems

2.2.1. Under Swiss and Turkish law

Under both Swiss and Turkish law, the duty to mitigate loss is accepted as a general principle that finds application not only in private law but also public law²¹.

In both legal systems, this duty manifests specifically by virtue of certain regulations within the Code of Obligations. In this context, we must first mention article 44 of the Swiss Code of Obligations [SCO] (Article 52 of the Turkish Code of Obligations [TCO])²² which regulates the mitigation of compensation within the

¹⁸ Eberhard, *Les sanctions*, 216 ff.

¹⁹ The aim of these principles is to establish a conceptual and systematic basis for harmonization of contract law within the European Union, to build a bridge between Continental European countries and the Common Law system, to be a source of inspiration for national legislators and thereby to make progress for the codification of European Contract Law. See, Arzu Oğuz, “Sözleşmeler Hukuku Alanında Hukukun Birleştirilmesi,” *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 49, no. 1 (May 2000): 53.

²⁰ According to article 1:101 of PECL, these principles contain general rules to be applied to the law of contracts in the European Union.

²¹ Weber, “Schadenminderungspflicht,” 137; Thierry Luterbacher, *Die Schadenminderungspflicht – Unter besonderer Berücksichtigung der aktienrechtlichen Verantwortlichkeit* (Zürich: Schulthess, 2005), 177; Achdari, *Le devoir*, 5-11; Niklaus Lüchinger, *Schadenersatz im Vertragsrecht* (Freiburg: Universitätsverlag, 1999), 349 ff.; Pichonnaz, “Le devoir,” 110 ff.; Kurt, “Zarar Görenin,” 777.

²² The Turkish Code of Obligations was prepared on the basis of the Swiss Code of Obligations and entered

framework of the general provisions of the SCO. According to the first paragraph of the said provision, *“Where the person suffering damage consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely”*. While article 44 of SCO (article 52 of TCO) is a regulation concerning tort liability, in light of article 99/III of SCO (article 114/II of TCO) which foresees that *“in other respects, the provisions governing liability in tort apply mutatis mutandis to a breach of contract”*, the duty to mitigate loss also finds field of application in terms of contractual liability²³. In conclusion, the duty to mitigate loss emerges as one of the reasons that plays a role in the reduction of compensation.

On the other hand, under the special provisions of SCO and TCO, there are concrete manifestations of the duty to mitigate loss within the framework of certain regulations concerning sale, lease, and service contracts.

2.2.2. Under German law

The general provision which regulates the duty to mitigate loss under German law is BGB § 254. BGB § 254 regulates common fault and the second paragraph of this provision deals with the duty to mitigate loss. According to BGB § 254, *“(1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party. (2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage. The provision of section 278 applies with the necessary modifications.”*

Apart from this general provision, there are also special regulations that embody the duty to mitigate loss. Especially § 62, 11, 122, 126 and 183 of the Insurance Contracts Law (Versicherungsvertragsgesetz) are considered within this framework²⁴. In addition, in the Commercial Code (Handelsgesetzbuch) § 376 regulates the substitution contract which is one of the manifestations of the duty to mitigate loss regarding commercial sale contracts. According to this provision, in case of a definitive forward sale, the indemnitee may request compensation of damages incurred due to non-performance by way of a substitute purchase or sale. In case of a concrete substitution contract, the loss is calculated concretely, whereas if damages are determined based on the stock market or market price of the good, an abstract valuation

into force in 1926. Later, a new Code of Obligations was prepared to cover most of the updates in the Swiss Code of Obligations, and the new Turkish Code of Obligations entered into force in 2012.

²³ In the same direction see, Luterbacher, *Die Schadenminderungspflicht*, 117; Achari, *Le devoir*, 12.

²⁴ Gottfried Schiemann, “§ 254,” in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, §§ 249-254 (Schadenersatz recht)*, (Berlin: Otto Schmidt – De Gruyter, 2005), n. 5.

is in question²⁵.

2.2.3. Under French law

The French Civil Code does not foresee any regulation concerning the duty to mitigate loss²⁶. The duty to mitigate loss is not considered a general principle under French Law. The only legal provision regarding the duty to mitigate loss is contained under article L. 172-23 of the Insurance Law and it only covers maritime insurance²⁷. According to the said provision, the insured must contribute to the salvage of insured goods and take all necessary precautions against those responsible.

However, it can be said that in certain court decisions regarding liability law and sale contracts, there is a tendency to punish the injured party for negligence in the management of injury. For example, in the event of a violation of bodily integrity where an increase in damage occurs due to not undergoing necessary treatment, as a rule, the integrity of the body is prioritized and based on the idea that injured persons cannot be forced to undergo treatment against their will, no reduction is applied to the compensation amount to be received by the person who refuses treatment²⁸. However, certain court decisions draw attention to the consequences of the injured party's refusal to undergo treatment²⁹. In addition, it has been stated by court decisions that with regards to breaches of sale contracts, damages that could have been prevented by the buyer who did not conclude a timely and suitable substitution contract would not be compensated; however, even so, the existence of the duty to mitigate loss is not accepted as a general principle³⁰.

While some writers in French doctrine point out that the duty to mitigate loss should be accepted as a general principle³¹; others approach this with reservation, arguing that the acceptance of such a duty is not in accordance with the French legal

²⁵ It should be noted that by subjecting concrete substitution contracts to strict conditions HGB § 376 seeks to prevent the indemnitee from speculating on the amount of compensation to be paid by the indemnifier.

²⁶ Anne Laude, "L'obligation de minimiser son propre dommage existe-t-elle en droit privé français?," *Les petites affiches* 232, (November 2002) : 55 ff.; Anne Mettetal, "L'obligation de modérer le préjudice en droit privé français," *Revue de la Recherche Juridique*, no. 4 (Autumn 2005) : 1890 ff.; Reifegerste, *Pour une obligation*, 91.

²⁷ Reifegerste, *Pour une obligation*, 94.

²⁸ See, e. g. Decision of the 2nd Civil Chamber of the French Court of Appeal, *Dibaoui c/ Flamand et al.* dated 19.06.2003, n. 931. For the criticism of this decision, Patrice Jourdain, "La Cour de cassation nie toute obligation de la victime de minimiser son propre dommage", *Revue Trimestrielle de Droit Civil*, no. 4 (2003): 716 ff.; Reifegerste, *Pour une obligation*, 98, especially see decisions at p. 99 footnote 303; decisions at Achari, *Le devoir*, 40, footnote 165.

²⁹ *Revue Trimestrielle de Droit Civil* 1975, 713 ff. In its decision, the Criminal Division of the French Court of Appeal stated that the accident victim's refusal to receive blood transfusion was his fault and stated that the judges of the first-instance court should investigate whether the victim would have had a chance to live if they had not committed this faulty conduct.

³⁰ Reifegerste, *Pour une obligation*, 103.

³¹ Reifegerste, *Pour une obligation*, 181; Mettetal, "L'obligation de modérer," 1914 ff.; Denis Mazeaud, "La passivité de la victime, l'intérêt de l'auteur du dommage", *Recueil Dalloz* (2004) : 1346 ff; Laude, "L'obligation de minimiser," 55 ff.

system³².

2.2.4. Interim evaluation of different approaches under French, German and Swiss law vs. Turkish law

The reason why the duty to mitigate loss is accepted under German, Swiss and Turkish law, but not under French law can be assessed as follows: In French law, the general approach in regulations concerning tortious acts is to prioritize trust in the law. As a matter of fact, in French law, the subjective theory of illegality is accepted, and as such, it is accepted that the perpetrator is held responsible for all kinds of damage caused to someone else that does not rely on a right. In other words, under French law, illegal conduct is considered as conduct that is not based on a right³³.

However, under German, Swiss and Turkish law, the objective illegality theory is accepted. Within this framework, a violation of compulsory legal rules aimed at the protection of the property or the person of individuals is sought³⁴. Accordingly, only the violation of an absolute right or the violation of an interest protected by a special norm of the law can be considered as unlawful. This demonstrates that under German, Swiss and Turkish law, the freedom of economic enterprise is prioritized. Because the narrower the limits of tort liability, the easier it will be for entrepreneurship. However, in legal systems where all kinds of harmful conduct are accepted as unlawful, as it is under French law, the public trust in the law is protected instead of the freedom of enterprise.

It is possible for us to generalize this difference of approach between German, Swiss and Turkish law and French liability law. Since under French law any conduct that does not rely on a right is considered illegal, this legal system demonstrates a more rigid approach to the principle of full compensation and states that under all circumstances the injuring party is under the obligation to compensate all damages. Whereas, according to German, Swiss and Turkish law, not all damages are to be compensated, only those damages that derive from the violation of an absolute right or an interest protected by a special norm are subject to compensation and even if all the conditions of compensation are met, the principle of full compensation may be softened

³² Horatia Muir-Watt, "La modération des dommages en droit anglo-américain," *Faut-il moraliser le droit français de la réparation du dommage*, Colloque du CEDAG de l'Université Paris V, *Petites affiches*, no. spécial, (Novembre 2002): 45. The author argues that this duty is incompatible with the principle of full compensation and contractual liability found in French law; in the same direction see, Geneviève Viney, *Rapport de synthèse*, Colloque du CEDAG, *Petites affiches*, no. spécial, (November 2002): 66. On the other hand, Jourdain tries to bring a mid-way solution, stating that whereas it is not correct to accept the duty to mitigate loss as a general principle in French law, it is also an excessively rigid attitude to reject this duty outright; the judge should evaluate under the concrete circumstances of each case whether the increase of damages due to the inaction of the injured party may be imputed to that party as a fault. See, Jourdain, "La cour de cassation," 716.

³³ Fikret Eren, *Borçlar Hukuku Genel Hükümler [Law of Obligations General Provisions]* (Ankara: Yetkin, 2017), 606, 607.

³⁴ Hermann Becker, "Art. 41", in *Berner Kommentar Bd. VI Obligationenrecht, 1. Abt. Allgemeine Bestimmungen*, (Bern: Stämpfli, 1941), n. 38; Karl Oftinger and Emil W. Stark, *Schweizerisches Haftpflichtrecht Allgemeiner Teil, Band I*, (Zürich: Schulthess, 1995), 171.

in case of fault of the injured party.

2.3. The duty to mitigate loss under common law systems

The duty to mitigate loss has a very important place within Common Law and it is accepted as a general principle of compensation law. Under Common Law, this duty arises in relation to both tortious and contractual liability³⁵. Accordingly, the person injured by a breach of contract must take all reasonable steps to reduce the extent of the damage arising from the breach; the injured party will not be able to claim compensation for incurred damages, not for those that arise as a result of the actual breach of contract, but for those that arise as a result of the failure to act reasonably after the breach³⁶. The scope of the tort perpetrator's liability should be narrowed to the extent that the damage is attributed to the unreasonable inaction of the injured party³⁷.

In English law, the duty to mitigate loss is encountered in certain legal texts as well as jurisprudence³⁸. In American law, there are regulations regarding the duty to mitigate loss under *Restatement (Second) of Contracts*, *Restatement (Second) of Torts* and *Restatement (Third) of Torts*³⁹.

On the other hand, it should be noted that under Common Law, the foundation of the duty to mitigate loss is not based on the rule of good faith, but on the principle of responsibility. In English Law, there are no rules of conduct based on general principles such as the rule of good faith⁴⁰. Whereas in US law, in terms of the duty to mitigate loss, there are differences between states⁴¹. The fact that the rule of good faith has not been accepted as a general principle does not mean that parties who act against it are treated more compassionately compared to how they would be treated under Continental European law. English law has refused to accept as a general principle the rule of good faith which for many years has been accepted as a general principle in Continental European legal systems. Instead, it has preferred to adopt specific solutions to a wide range of issues that be considered as relating to *unfairness*⁴².

³⁵ Anne Michaud, "Mitigation of damage in the context of remedies for breach of contract," *Revue Générale de Droit* 15, n. 1, (1984): 296.

³⁶ Sir Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (Oxford, Oxford University Press: 2010), 555.

³⁷ David K. Allen, John T. Hartshorne and Robyn M. Martin, *Damages in tort* (London, Sweet & Maxwell: 2010), n. 4-001.

³⁸ For example, under articles 50 and 51 of the 1979 *Sale of Goods Act*, it is foreseen that loss in case of non-performance is to be calculated according to the difference between the market value of the non-executed performance and the price in the contract, hence, the expectation that the buyer could procure the good by concluding a substitute contract at market price is established.

³⁹ Allan Farnsworth, "Good Faith in Contract Performance," in *Good Faith and Fault in Contract Law*, ed. Jack Beatson and Daniel Friedmann (Oxford, Clarendon Press: 1995), 155.

⁴⁰ Farnsworth, "Good Faith," 154; Horst K. Lücke, "Good Faith and Contractual Performance," in *Essays on Contract*, ed. P. D. Finn (Sydney, Law Book Co: 1987), 156 ff.

⁴¹ For example, the duty to mitigate loss is clearly regulated under the Louisiana Civil Code art. 2002. There are authors who state that under Louisiana law this duty is based on the rule of good faith established under art. 1759 of the Civil Code. See, Saul Litvinoff, "Damages, Mitigation, and Good Faith," *Tulane Law Review* 73, no. 4 (1999): 1163.

⁴² Jack Beatson and Daniel Friedmann, "From classical to modern contract law," in *Good Faith and Fault*

While good faith is not accepted as a general principle in English law, the duty to mitigate loss is accepted as a code of conduct. Accordingly, the injured party cannot claim compensation for the amount of damage that they could have prevented by taking reasonable measures⁴³. The content and extent of the duty to mitigate loss are determined on the basis of the course of action required of a reasonable person given the same circumstances⁴⁴.

It can be said that the content of the duty to mitigate loss as it is accepted under Common Law largely coincides with the duty to mitigate loss accepted in Continental European legal systems. As a matter of fact, in both Continental European legal systems and Common Law systems, the judge is to determine the content of this duty by using discretion within the framework of the specific circumstances of the concrete case.

3. The consequences of violating the duty to mitigate loss

3.1. In terms of determining the amount of compensation

When the regulations in various legal systems are examined, it is seen that the violation of the duty to mitigate loss first emerges as a reason for reduction in the amount of compensation. Where there is damage that could have been prevented by the injured party by way of adopting reasonable measures, the failure to take such measures will lead to a reduction in the compensation amount.

CISG art. 77 openly mentions loss of profit, whereas PECL remains silent in terms of loss of profit. However, by virtue of the official commentary to Article 9:501 of PECL, it can be said that in case of violation of the duty to mitigate loss, under the PECL, full compensation for loss of profits cannot be claimed⁴⁵.

If we are to provide an example of tortious acts, the sanction to be faced by the victim who causes an increase in injury by refusing reasonable treatment will be a reduction in the amount of compensation. Since bodily integrity constitutes a part of personal rights, it is not possible for the person who has suffered bodily harm to be directly coerced into any treatment. Therefore, the duty to mitigate loss does not result in forcing the person who has suffered bodily harm to undergo treatment. However, in case of refusal of a reasonable treatment, it is accepted that the victim will bear the economic consequences, namely the increased damage⁴⁶. It should be noted,

in *Contract Law*, ed. Jack Beatson and Daniel Friedmann (Oxford, Clarendon Press: 1995) 14 ff.; Jeannie Marie Paterson, "Good Faith Duties in Contract Performance," *Oxford University Commonwealth Law Journal* 14, no. 2 (2014): 282 ff.

⁴³ Beatson, Burrows and Cartwright, *Anson's*, 555.

⁴⁴ Beatson, Burrows and Cartwright, *Anson's*, 555.

⁴⁵ Bruno Zeller, "Mitigation of damages: Comparison between the provisions of the CISG (Art.77) and the counterpart provisions of the Principles of European Contract Law (Art. 9:505)" in *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, ed. John Felemegas, (Cambridge: Cambridge University Press, 2007), 486-489.

⁴⁶ Ahtari, *Le devoir*, 225; Kurt, "Zarar Görenin," 786; Pichonnaz, "Le devoir," 123; Haluk Tandoğan, *Türk Mes'uliyet Hukuku [Turkish Tort Law]* (İstanbul: Vedat, 2010) 288 ff.; Brehm, "Art. 44," n. 50; Decision of the Swiss Federal Court dated 27.4.2011, 4A_37/2011, c. 2.3.

nevertheless, that under the French legal system, which denies the duty to mitigate loss, the injured person may refuse reasonable treatment for personal reasons, and this does not constitute a breach of the duty to mitigate loss⁴⁷.

3.2. In terms of loss or limitation of other rights

In case of breach of contract, in addition to compensation, it is possible to raise other claims against the individual who violated the debt. As seen from the regulations discussed under Section I, it has not been expressly ruled whether the breach of the duty to mitigate loss has any effect on other claims such as specific performance or rescission of contract. In the following, we shall examine whether the right to demand specific performance or the right to rescind a contract can be limited due to the violation of the duty to mitigate loss.

3.2.1. Request for specific performance

The request for specific performance is a manifestation of the principle *pacta sunt servanda* accepted under Continental European contract law⁴⁸. Within the framework of the principle of *pacta sunt servanda*, which means that agreements must be kept, the parties are bound by contracts which they have concluded and are responsible for the performance of this contract⁴⁹. However, due to today's complex economic relations, the evaluation of law from an economic point of view has changed and developed the meaning and scope of the principle of *pacta sunt servanda*⁵⁰. Although contractual justice is shown as one of the main purposes of this principle, legal systems approach the issue of how to ensure contractual justice in varying ways.

Under the Common Law legal system, the sanctions foreseen for breach of contract aim to meet the material expectations that the creditor would have achieved had the contract been fulfilled. Accordingly, in case of breach of contract, the essential element is the satisfaction of the unrealized performance benefit of the creditor. Within the framework of the method of economic analysis of the law, since the breach of contract is recognized as a right to the parties if it is economically efficient (efficient breach), the claim for compensation emerges as the primary sanction within this

⁴⁷ For example, in a judgement delivered on 19.06.2003, the French Court of Cassation reversed the decision of the Court of Appeal which ordered a reduction in the amount of compensation to be afforded to the injured victim of a traffic accident, who did not accept the treatment offered by the physician and caused the damage to increase; the Court ruled that an injured person was not obliged to accept the treatment prescribed by the physician. In this judgement, the Court of Cassation indicated that according to Article 1382 of the French Civil Code, the perpetrator of the accident was obliged to eliminate all harmful consequences, and that the injured person was not obliged to mitigate loss in favor of the person responsible. Cass. civ. 2e, 19.06.2003, n°01-13289, Bulletin no. 203.

⁴⁸ Ece Baş, "Satım Hukukunda Aynen İfa Talebinin Birincil Yaptırım Olması Sorunu [Execution Request in Sales Law as a Primary Sanction]" *Yaşar Üniversitesi Hukuk Fakültesi Dergisi Özel Sayısı 1*, (2013): 623.

⁴⁹ Baş, "Satım Hukukunda," 625; Eren, *Borçlar Hukuku*, 1281.

⁵⁰ Başak Baysal, *Sözleşmenin Uyarlanması [Adaptation of the contract]* (İstanbul, On İki Levha: 2009), 10; Baş, "Satım Hukukunda," 627.

system⁵¹. However, a request for specific performance comes to the fore as a secondary claim, only in cases where the claimant would become a victim due to the fact that compensation would not constitute a full and appropriate sanction⁵².

On the other hand, in Swiss and Turkish legal systems, in case of breach of contract, specific performance arises as a primary claim, provided that the debt is due, and performance is possible⁵³. Compensation and the right to rescind the contract, which are other optional rights envisaged for default in contracts that impose obligations on both parties, are regulated as secondary claims⁵⁴. Here, the main aim is to protect the debtor.

In the CISG, three separate sanctions are foreseen in case of breach of contract, regardless of the type of violation. These are specific performance, compensation and rescission of contract (CISG art. 46/1, art. 74, art. 49/1). As in the CISG, the possibility of claiming specific performance in case of breach of contract is foreseen in other international harmonization studies as well (PECL art. 9:102, UNIDROIT Principles art. 7.2.2). In both PECL and UNIDROIT Principles, the claim for specific performance is subject to various limitations.

The fact that the creditors capacity to reasonably obtain performance in another way constitutes an obstacle to a request for specific performance (PECL art. 9:10, paragraph 2, subparagraph d; UNIDROIT Principles art. 7.2.2, subparagraph c) points to inspiration from the Common Law system. According to this, in cases where it is possible for the creditor to obtain the performance from another source, it will not be possible to insist on specific performance. If the benefit to be obtained from the contract can be achieved by the creditor by virtue of obtaining the goods from another party and demanding the difference as compensation, this method should be preferred⁵⁵.

Under the Continental European legal system, where the right of the creditor to demand specific performance in case of breach of contract is the primary claim, it is highly controversial whether this right can be limited within the framework of the duty to mitigate loss.

The issue has been especially discussed within the framework of the right to mitigate loss under CISG art. 77. In consideration of the wording and systematic placement of art. 77, some authors have expressed that the provision finds application only in terms of compensation claims⁵⁶. According to this view, violation of the duty to mitigate loss can only have an indirect effect on claims of specific performance or

⁵¹ Baş, "Satım Hukukunda," 626 ff.; Başak Başoğlu, *Türk Hukukunda ve Mukayeseli Hukukta Aynen İfa Talebi [Specific Performance in Turkish and Comparative Law]* (İstanbul: On İki Levha, 2012), 19.

⁵² Vanessa Mak, "Specific Performance in English Consumer Sales Law," in *Specific Performance in Contract Law: National and Other Perspectives*, ed. Jan Smiths, Daniel Haas and Geerte Heslen (Intersentia: 2008), 121; Baysal, *Sözleşmenin*, 331; Baş, "Satım Hukukunda," 633; Başoğlu, *Türk Hukukunda*, 17.

⁵³ Baysal, *Sözleşmenin*, 330; Başoğlu, *Türk Hukukunda*, 69; Baş, "Satım Hukukunda," 631.

⁵⁴ Başoğlu, *Türk Hukukunda*, 71.

⁵⁵ Yeşim Atamer, "İfa Engelleri Hukukunu Yeniden Sistematize Etmeyi Düşünmek [Considering Resystematizing Non-Performance of Contracts]," in *Prof. Dr. Rona Serozan'a Armağan Cilt I*, (İstanbul: On İki Levha: 2010), 242.

⁵⁶ Schwenzer, "Art. 77," n. 4; Magnus, "Art. 77," n. 6.; Schäfer, "Art. 77," n. 2. Also see Secretariat Commentary, art.73, §3.

rescission of contract⁵⁷. As such, requests for specific performance or rescission of contract cannot be restricted under CISG art. 77, however they are indirectly affected due to compensation claims that accompany them. In this context, for example, if the indemnitee delays the exercise of the right to rescind the contract speculatively, in order to increase the compensation claim, then a part of the damage is not compensated, however the right to rescind is available⁵⁸.

According to another view, CISG art. 77 is applicable to a claim of specific performance, thus, if insisting on specific performance violates the duty to mitigate loss this right should not be exercised. For example, if the buyer refuses to receive the goods before the seller starts production, can the seller force specific performance? The answer to this question is controversial, especially when it comes to contracts for goods that are to be produced⁵⁹. To illustrate this question through an example, according to the contract between A and B, B will produce and deliver some goods to A in accordance with A's special requests. Since these goods are prepared for a very specific use of A, there is no possibility of finding buyers in another market. Before B starts production, A informs B that they no longer need those goods and to not start production. Despite this, can B start production and use a claim of specific performance to force A to pay the price of the goods? This question must be answered negatively. Since B has no legitimate interest in producing and delivering goods that will not be used. The correct solution is for B to terminate the contract and demand compensation for the losses incurred⁶⁰. Therefore, CISG art. 77 must be applied to claims of specific performance, and it must be accepted that insistence on specific performance constitutes a violation of the duty to mitigate loss⁶¹. Some authors who accept that the duty to mitigate loss regulated under CISG art. 77 applies only to compensation claims, arrive at this solution by virtue of the rule of good faith stipulated under CISG art. 7. According to these authors, in cases where it would constitute a breach of the rule of good faith, claims of specific performance should be disregarded. It is indicated that, at this point, the application of CISG art. 7/1 instead of CISG art. 77 is more appropriate in terms of considering the interests of both parties⁶².

According to the view with which we agree with, if insistence on a claim of specific performance can be considered as an abuse of right, this right should also be limited⁶³. In arriving at this determination, the fact that insistence on a claim of specific performance would increase the damage should be taken into account; therefore, in our

⁵⁷ Magnus, "Art 77," n. 6; Schäfer, "Art. 77," n. 2.

⁵⁸ Magnus, "Art 77," n. 6; Schäfer, "Art. 77," n. 2.

⁵⁹ Schwenger, "Art. 77," n. 5.

⁶⁰ Djakhongir Saidov, "Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods," *Pace International Law Review* 14, no.2 (Fall 2002): 364 ff. It can also be argued that the benefit that B would gain would be much less than the loss that the other party would suffer. And this is one of the criteria that demonstrates existence of an abuse of right.

⁶¹ Saidov, "Methods," 364 ff. On the other hand, some authors argue that the seller should be given the right to demand specific performance, but a reduction should be made to the extent of unnecessary production costs: see, Schwenger, "Art. 77," n. 5.

⁶² Magnus, "Art 77," n. 7.

⁶³ In this direction see, Baysal, *Sözleşmenin*, 335 ff.; Schäfer, "Art. 77," n. 3 ff.; Saidov, "Methods," 361-65.

view, there is no harm in accepting the limitation of a claim of specific performance within the scope of CISG art. 77. As a matter of fact, since the duty to mitigate loss is a special manifestation of conduct in violation of the rule of good faith, accepting that a claim of specific performance can only be limited within the framework of the breach of the rule of good faith (CISG art. 7/1) is an inconsistent approach.

Since, apart from the violation of the duty to mitigate loss, an act contrary to the rule of good faith can occur in many different ways, it would be possible to rely on CISG art. 7/1 in other possibilities where the claim of specific performance violates the rule of good faith. The doctrinal criteria that point to an abuse of right, that is *the non-existence of a legitimate interest in the use of the right, the excessive disproportion between the benefit to be obtained from the use of the right and the harm that will be given to others, the acquisition of a right based on one's own immoral conduct and acting contrary to trust produced*⁶⁴, would be indicative of when insistence on a claim of specific performance would constitute an abuse of right.

If it is accepted that a claim of specific performance cannot be restricted even if it increases the damage, whereas in case of a compensation claim the violation of the duty to mitigate loss would bear consequences, if specific performance is claimed then the creditors conduct in violation of this obligation would remain without sanction. This in return would eliminate the meaning of the duty to mitigate loss. Under Continental European legal systems where the duty to mitigate loss is accepted as a general principle, the view that claims of specific performance may be limited in case of violation of this principle should be adopted.

3.2.2. Right to rescind the contract

The right to rescind a contract is regulated as one of the sanctions for breach of contract, both in Continental European legal systems and in international texts. In international harmonization studies, as in Continental European legal systems, the right to rescind is not an unlimited right granted to the creditor. The idea that a contract that the parties concluded with mutual consent should similarly be terminated by virtue of mutual agreement is one of the main reasons for the limitation of the right to rescind and this is a projection of the principle of *pacta sunt servanda*⁶⁵. Limitations on the right to rescind in international texts can be grouped under three headings⁶⁶. The first of these is the requirement that the breach of contract must be in the nature of a fundamental breach; the second is the use of the right to rescind by the creditor upon providing the debtor an additional grace, that is, by giving a last chance of performance, and the last one is to provide the debtor with the opportunity to remedy the breach of contract so as to override the creditor's right to rescind⁶⁷.

⁶⁴ For detailed information about the criteria indicating abuse of right, see, Kemal Oğuzman and Nami Barlas, *Medeni Hukuk [Civil Law]* (İstanbul: Vedat, 2014) 260 ff.; Rona Serozan, *Medeni Hukuk Genel Bölüm – Kişiler Hukuku [Civil Law General Part – Law of Persons]*, (İstanbul: Vedat, 2014) 279 ff.

⁶⁵ Atamer, "İfa Engelleri," 246.

⁶⁶ Atamer, "İfa Engelleri," 247 ff.

⁶⁷ Concerning the fact that the right to rescind may only be exercised if the breach of the contract is

The right to rescind, like all other rights, must be exercised in accordance with the rule of good faith⁶⁸. It can be easily determined that some of the limits imposed on the exercise of the right of rescind in both CISG and Swiss-Turkish law are indirectly related to the duty to mitigate loss. In particular, it is possible to say that the conditions of "considering the breach of contract as fundamental in nature" and "using the right to rescind within a reasonable time" which are required for the exercise of the right to rescind are both related to the duty to mitigate loss.

First, let's consider the condition that requires that the breach of contract is fundamental in nature. According to CISG art. 49/I, the buyer can only rescind a contract if the breach of contract can be considered as a fundamental breach⁶⁹. Similar regulations exist under SCO art. 205/2 and TCO art. 227/IV with regards to sale contracts. According to SCO art. 205/2, *"If the situation does not justify the buyer to rescind from the contract, the judge may decide to reduce the sales price"*. The purpose of this regulation is the exercise of the right to rescind only if the creditor cannot be expected to continue the contract as a result of the breach. In terms of contract violations that are not so severe, the buyer is directed to use other optional rights.

There is no interest that necessitates protection, especially in case of insistence on rescinding the contract where the breach of contract is easily remediable or where the subject matter of the contract can be otherwise used by the creditor⁷⁰. According to the view which we agree with, if the exercise of the right to rescind is to cause the debtor serious harm, while the creditor does not have a significant interest in exercising this right, this right should be restricted for being in violation of the duty to mitigate loss⁷¹.

The requirement to exercise the right to rescind within a reasonable time is also associated with the duty to mitigate loss. Within this framework, the creditor's delay in the exercise of the right to rescind speculatively, in order to increase the compensation

fundamental in nature see, PECL art. 8:103 and art. 9:301, UNIDROIT Principles art. 7.3.1, CISG art. 49/I/a, TCO art. 227/IV. Concerning the fact that the right to rescind can be exercised upon providing the debtor with additional time see, PECL art. 9:301 and art. 8:106, subparagraph 3, UNIDROIT Principles art. 7.3.1 subparagraph 3 and art. 7.1.5, CISG art. 49/I/b, TCO art. 125. Concerning the fact that the debtor can override the creditors right to rescind by providing remedy to the breach of contract see, PECL art. 8:104, PICC art. 7.1.4, CISG art. 48, TCO art. 227/III.

⁶⁸ Baysal, *Sözleşmenin*, 345.

⁶⁹ The circumstance in which the breach of contract is to be considered fundamental is regulated under CISG art. 25. According to this provision: *"A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result"*. *an outcome was foreseen by the violating party and a reasonable person in the same position and circumstances could not have foreseen it"*. For detailed information on a fundamental breach of contract, see, Yeşim Atamer, *Uluslararası Satım Sözleşmelerine İlişkin Birleşmiş Milletler Antlaşması (CISG) Uyarınca Satıcının Yükümlülükleri ve Sözleşmeye Aykırılığın Sonuçları [Seller's Obligations and Consequences of Non-Performance Under CISG]* (İstanbul, Beta: 2005) 297 ff.; Ulrich G. Schroeter, "Art. 25," in *Schlechtriem & Schwenzer Viyana Satım Sözleşmesi Şerhi [Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG)]*, ed. Ingeborg Schwenzer and Pınar Çağlayan Aksoy (İstanbul: Oniki Levha, 2015), n. 12 ff.

⁷⁰ Atamer, "İfa Engelleri," 247; Baysal, *Sözleşmenin*, 346.

⁷¹ Baysal, *Sözleşmenin*, 346.

claim, is not accepted⁷². In order to determine whether the creditor delays the exercise of the right to rescind in order to increase the compensation claim, we must first determine the time frame in which the right is to be exercised.

If the right to rescind is not exercised within the required time-frame according to the specific circumstances of the case and if the delay in the exercise of this right creates a justified confidence in the debtor that the right to rescind will no longer be exercised, and if the exercise of the right after the required time would impose a much heavier burden on the addressee, it is accepted that the right to rescind becomes ineffective within the framework of the prohibition of abuse of rights⁷³. According to the CISG, if the seller has performed, albeit belatedly, the buyer must declare that the contract is avoided within a reasonable time from the moment he becomes aware that delivery has been made. In case of breach of contract other than late delivery, similarly, the buyer must exercise his right to rescind within a reasonable time after becoming aware of the breach⁷⁴. If the buyer does not comply with the reasonable time period, he will lose his right to rescind⁷⁵.

4. Conclusion

The duty to mitigate loss emerges as a legal principle which aims to ensure economic efficiency and avert waste by preventing increase of damage by way of reasonable measures that can be adopted by the injured party.

Today, the acceptance of the duty to mitigate loss as a general principle in numerous legal systems serves to realize compensatory justice. Compensation provided by the person who causes harm by way of unlawful conduct is based on the principle of compensatory justice. It is a requirement of compensatory justice that the person who breaches a contract in a contractual relationship, or in the event of a tortious act, the person who injures by way of unlawful conduct, must compensate incurred damages. However, while damage is being repaired, it is required to determine which damages are to be eliminated and to what extent.

While the principle of “*full compensation*” is valid under compensation law, there is a very important reason for imposing an obligation to mitigate loss on the injured party. As it is known, in accordance with the principle of full compensation, the party which causes damage, due to the responsibility that can be imputed to that party, has to compensate for all related damages⁷⁶. Of course, the upper threshold of the

⁷² Magnus, “Art 77,” n. 6.

⁷³ Rona Serozan, “CISG’a ve TBK’na Göre Alıcının Dönme Hakkının Sınırları [The Limits of the Right to Rescind the Contract under CISG and Turkish Code of Obligations],” *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, no. 2 (2012): 215.

⁷⁴ Markus Müller-Chen, “Art. 49,” in Schlechtriem&Schwenzer Viyana Satım Sözleşmesi Şerhi [Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG)], ed. Ingeborg Schwenzer and Pınar Çağlayan Aksoy (İstanbul: Oniki Levha, 2015), n. 28-33; Serozan, “CISG’a,” 214; Atamer, “Uluslararası,” 403 ff.

⁷⁵ Müller-Chen, “Art. 49,” n. 29, n. 33.

⁷⁶ Schwenzer, *Schweizerisches Obligationenrecht*, 99; Baysal, *Sözleşmenin*, 160, Kurt, “Zarar Görenin,” 777; Achtari, *Le devoir*, 1.

compensation is the amount of damage. However, the damage incurred may not always be the same with the damage to be compensated by the perpetrator. It may be possible to divide the damage between the responsible person and the injured person. Therefore, the principle of full compensation does not mean that, in any case, all the damage will be compensated by the responsible person. The duty to mitigate loss serves to determine how much of the damage was caused by the failure of the injured party to take reasonable precautions. As a result of this determination, the damage that the injured person could have prevented by adopting reasonable measures should not be imposed on the injuring person. In conclusion, it is clear that this duty serves efficiency in the economic sense.

Although the regulations that were examined within this study, with regards to the consequences of violating the duty to mitigate loss, foresee a reduction in the compensation amount that is to be afforded to the injured person, in our opinion, a claim of specific performance and the right to rescind a contract should also be limited if contrary to the duty to mitigate loss. How this evaluation is to be effectuated has been provided in detail within our study. Accepting the opposite view would cause the duty to mitigate loss, which is based on the rule of good faith, to become meaningless.

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