DOCTORAL (PhD) DISSERTATION

The foreseeability rule in the United Nations Convention on contracts for the international sale of goods

by

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List of Abbreviations

Art. / Arts.	Article / Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
CIETAC	China International Economic and Trade Arbitration Commission
CLOUT	Case Law on UNICITRAL Text
e.g.	exemplum gratii [for example]
et al.	et alii [and others]
et seq.	et sequentes [and following]
FTCA	Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce
i.e.,	id est [that is]
ICC	Court of Arbitration of the International Chamber of Commerce
ICAC	International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry
id.	idem [the same]
MKAC	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
n (for footnote)	Footnote
No.	Number
para/ paras	Paragraph/ Paragraphs
PECL	Principles of European Contract Law
s (for footnote)	section
U.S./USA	United States of America
UCC	The Uniform Commercial Code (UCC or the Code) 2007 Edition
UNICITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
UNILEX	International Case Law, UNIDROIT
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
UPICC	UNIDROIT Principles of International Commercial Contracts
v.	versus [against]

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Chapter I: Introduction

I. Background of the research

The global economy has experienced significant economic, social, political, and religious transformations over time, leading to greater international trade engagement among nations. However, the diversity of legal, political, and economic systems across countries has created legal fragmentation, which poses challenges to the efficient movement of global trade.[1] This has necessitated the development of uniform legal frameworks governing international sales of goods contracts to facilitate the growth of international trade.[2] The United Nations Convention on Contracts for the International Sale of Goods ('CISG'),[3] which provides a comprehensive set of rules governing cross-border sales contracts, is recognized as 'the most significant piece of substantive contract legislation' in this regard.[4] Since it entered into force in 1988, the CISG has been widely adopted and now serves as a cornerstone of international sales law, promoting uniformity and reducing trade barriers.[5]

In international contract law, damages are one of the primary remedies for a breach of obligation.[6] When there is a breach of contract, the aggrieved party has the right to claim recovery of damages. Damages are generally recoverable for any breach of contract, whether fundamental or not, and may be claimed either independently or in combination with

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[1] United Nations Commission on International Trade Law, Hague Conference on Private International Law, & International Institute for the Unification of Private Law. (2021). *Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales*. UNIDROIT / UNCITRAL / HCCH, para 14.

[2] Enderlein, F., & Maskow, D. (1992). *International sales law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods*. Oceana Publications, 1.

[3] United Nations 'International Convention on the International Sale of Goods' (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 59. [hereinafter *CISG]*.

[4] Lookofsky, J. (1993). The 1980 United Nations Convention on Contracts for the International Sale of Goods. In R. Blanpain (Ed.), *International encyclopaedia of laws: Contracts*. Kluwer Law International, para 7.

[5] CISG, preamble; Fisher, G. E. (1997). Remedies for breach of contract under the International Sales Convention. *Macquarie Law Journal, 1*, 236.

[6] Felemegas, J. (2003). An interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals. *Pace International Law Review, 15*(1), 93.

performance-based remedies.[7] Therefore, the claim for recovery of damages represents the 'dominant remedial institution' in the CISG.[8] The purpose of awarding damages is to ensure the expectation interest, placing the aggrieved party in the same economic position they would have had if the contract had been performed.[9] However, the compensation should not always be equal to the whole damage that follows as a consequence of a party's breach.[10] To avoid inequitable results, certain methods, namely causation, reasonable mitigation of losses by the aggrieved party, and foreseeability, have been introduced to limit the damage award to the extent to which a party in breach would be liable for such damages. Among these methods of limiting damages, the principle of foreseeability, which limits recoverable damages to losses that are foreseeable to the party in breach at the time of the conclusion of the contract, has internationally achieved the widest acceptance.[11] It has been entrenched in various national legal systems and international instruments with numerous versions. Foreseeability appears in both civil law systems, particularly in French law, and the common law traditions. These legal traditions influenced the drafting of foreseeability under Art. 74 CISG. The foreseeability rule in Art. 74 also finds parallels in soft law instruments such as the UNIDROIT Principles of International Commercial Contracts ('UPICC')[12] and the Principles of European Contract Law ('PECL').[13] With wide acceptance in both national and international law systems, the foreseeability principle, till the present stage, is recorded as a successful method of limiting damages in contract law.[14] Although there are differences in formulation, foreseeability provided in national legal systems as well as in model instruments shares a similar role as a limitation device to

[7] Flechtner, H. M. (2008). Buyers' remedies in general and buyers' performance-oriented remedies. In F. Ferrari (Ed.), *The CISG and its impact on national legal systems*. Sellier European Law Publishers, 340-2.

[8] Fisher, n 5, 243.

[9] United Nations Commission on International Trade Law Secretariat. (1979). *Commentary on the draft Convention on Contracts for the International Sale of Goods* (U.N. Doc. A/CONF.97/5). United Nations, Art. 70, comment 3 [hereinafter *Secretariat Commentary*].

[10] Zimmermann, R. (2014). Limitation of liability for damages in European contract law. *Edinburgh Law Review, 18*(2), 199.

[11] Id., 202.

[12] UNIDROIT, UNIDROIT Principles of International Commercial Contracts 2016. [hereinafter *UPICC]*.

[13] Lando, O., & Beale, H. (Eds.). (2000). *Principles of European Contract Law: Parts I and II*. Kluwer Law International; Lando, O., Clive, E., Prüm, A., & Zimmermann, R. (Eds.). (2003). *Principles of European Contract Law: Part III*. Kluwer Law International. [hereinafter *PECL]*.

[14] Saidov, D. (2021). *The law of damages in international sales: The CISG and other international instruments* (2nd ed.). Hart Publishing, 112.

ensure that liability for damages is within the contract and in contemplation of the debtor at the time of making the contract. The underlying justification for the foreseeability rule is that a contracting party, when deciding whether to agree to terms, limit liability, or obtain insurance, is unable to account for unforeseeable consequences of nonperformance when the contract was concluded.[15] The foreseeability rule, on the one hand, appears to be broad and flexible to accommodate each commercial and contractual context; however, on the other hand, while this flexibility may enable judges to accommodate the circumstances of individual cases, it may also lead to divergent interpretations and inconsistent outcomes among adjudicators, who often refer to domestic legal traditions for interpretation.[16]

The increasing complexity of international commerce further complicates the application of the foreseeability limitation. Contemporary commercial transactions frequently involve sophisticated supply chains, international logistics, fluctuating markets, and substantial consequential economic losses. Moreover, recent global crises, including the COVID-19 pandemic and ongoing geopolitical conflicts, have fueled concerns that globalization exposes economies to undue risks.[17] These disruptions have affected the performance of contractual obligations and contributed to an increase in contractual disputes arising from breaches of contract.[18] In this context, foreseeability, as a limitation on the recovery of damages, is also relevant. Evaluation of foreseeability has therefore become more difficult than in traditional commercial settings. Courts and arbitral tribunals must balance the principle of full compensation with the need to prevent unlimited liability, making foreseeability an essential mechanism for allocating commercial risks in international sales contracts. Moreover, inconsistent judicial reasoning and the growing body of case law continue to raise questions concerning the proper interpretation of foreseeability and the extent to which uniform

[15] Zimmermann, n 10, 206.

[16] Alaskarova, N. (2026). *Remedies for breach of international sales contracts under the CISG: Evaluating coherence and predictability in cross-border disputes* (Stanford-Vienna TTLF Working Paper No. 149). Stanford-Vienna Transatlantic Technology Law Forum, 7-8.

[17] World Trade Organization. (2023). *World trade report 2023: Re-globalization for a secure, inclusive and sustainable future*. World Trade Organization, 8. Available at: https://www.wto.org/english/res_e/booksp_e/wtr23_e/wtr23_e.pdf (accessed 12 June 2026).

[18] United Nations Commission on International Trade Law Secretariat. (2020). *COVID-19 and international trade law instruments: A legal toolkit*. United Nations. Available at: https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/covid-19toolkit_en.pdf (accessed 12 June 2026).

application has been achieved. Consequently, while foreseeability is designed to enhance predictability in the assessment of contractual damages, its practical application in international disputes may reduce legal certainty, especially where the assessment of damages is complicated by complex losses or volatile market conditions.[19]

II. Problem statement

Despite this widespread acceptance, there have been numerous discussions and arguments regarding foreseeability under Art. 74, which has reached no consensus yet. The rule has been criticized for being unclear when it comes to its application, relying upon a substantial degree of judicial discretion and giving rise to uncertainty. The CISG does not define several of the core terms employed in Art. 74, including 'foreseeability', 'loss', 'knowledge', and 'possible consequence', and offers little detailed guidance on how foreseeability should be evaluated in practice.[20] While this deliberate textual openness facilitates flexible application across diverse commercial circumstances, it has also created considerable uncertainty and contributed to significant divergences in interpretation. These terms themselves do not carry global or objective meanings that adjudicators can easily apply. Therefore, the application of Art. 74 is hindered by its ambiguity, leaving unanswered the key questions that determine foreseeability's operation in practice: How should the subjective and objective tests be applied? How is knowledge to be evaluated? What exactly must be foreseen? Who bears the burden of proof? In particular, the 'ought to have known' standard lacks a clear benchmark, and there is no guidance on how to evaluate the 'knowledge' of the breaching party. Besides, there are conflicting positions on the issue of the allocation of the burden of proof of foreseeability under the CISG. There is also no clear answer as to what exactly must be foreseen, nor which test is appropriate to evaluate causation.

In the absence of express interpretive guidance within the Convention, both legal scholars and domestic courts have developed divergent approaches to interpreting and applying

[19] Alaskarova, n 16, 30.

[20] Ehlers, A. (2013). Establishing a uniform interpretation of the CISG: A case study of Article 74. *Nordic Journal of Commercial Law, (2),* 21-22; Magnus, U. (2014). Remedies: Damages, price reduction, avoidance, mitigation, and preservation. In L. A. DiMatteo (Ed.), *International sales law: A global challenge*. Cambridge University Press, 264.

foreseeability. Adjudicators frequently resort, implicitly or explicitly, to domestic law for solutions. While such analogies may offer interpretative guidance, they risk undermining the autonomous and international character of the CISG, as required by Art. 7(1).[21] The divergent application of foreseeability reflects a tension between flexibility and uniformity of the CISG. On the one hand, the open-textured nature of Art. 74 allows for flexibility to adapt to different commercial contexts. On the other hand, it creates uncertainty and inconsistency in the application of foreseeability, which challenges the purpose of uniformity and harmonization of the CISG.

Also, it is worth considering whether foreseeability, which is alleged to be aging and inappropriate to the present world, remains a useful and effective mechanism for limiting the recoverability of damages in the context of the complexity of modern international trade. The rule seems not to be useful in case of mass transactions because a businessperson cannot foresee the consequences of the breach and the subsequent adjustments made to the transaction.[22] Moreover, while fixing the relevant time for assessing foreseeability at 'the time of the conclusion of the contract' is clear and well-suited, it is argued that a later time after the conclusion of the contract would be fairer. It is stated that the pre-contractual stage of dealings underlying the foreseeability rule is 'far removed from the world of shipping and commodity sales, where transactions are often concluded between substitutes, brokers and ship's agents on an expedited and informal basis'.[23]

The source of the foreseeability rule has been the subject of considerable debate among legal scholars and has also generated differing views in judicial and arbitral decisions. Some believe that it is derived from the English common law, others argue that it comes from French law, and certain scholars state that foreseeability originated from Roman law.[24]

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[21] Mullis, A. (2007). Twenty-five years on - The United Kingdom, damages and the Vienna Sales Convention. *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ), 71*(1), 46-47.

[22] Danzig, R. (1975). Hadley v Baxendale: A study in the industrialization of the law. *Journal of Legal Studies*, *4*(2), 279-80.

[23] Bridge, M. (2008). The market rule of damages assessment. In D. Saidov & R. Cunnington (Eds.), *Contract damages: Domestic and international perspectives*. Hart Publishing, 438.

[24] Kröll, S., Mistelis, L., & Perales Viscasillas, P. (Eds.). (2018). *UN Convention on Contracts for the International Sale of Goods (CISG): A commentary* (2nd ed.). C.H. Beck; Hart; Nomos, 968.

Generally, although Art. 74 aims to provide commercial certainty by limiting damages to what the parties could foresee, in practice, it has produced the opposite effect due to its ambiguities. Its lack of clear guidance or annotation has led to inconsistent judicial decisions, fragmented interpretation across jurisdictions, and ultimately, uncertainty for the contracting parties themselves.

III. Objectives of the research

The principal objective of this dissertation is to conduct a comprehensive and systematic examination of the foreseeability rule provided in Art. 74 of the CISG, with particular emphasis on its interpretation and application in international sales transactions. The dissertation seeks to identify the principal doctrinal and practical challenges arising from the interpretation of foreseeability and to assess their implications for the uniform and predictable application of the Convention.

To achieve this objective, the dissertation examines the historical development and theoretical foundations of the foreseeability rule and analyses its formulation within the CISG. It further investigates the interpretation and application of foreseeability under Art. 74 in international judicial and arbitral practice, with particular attention to the factors that influence the assessment of foreseeability, including the relevant tests to evaluate foreseeability, the time at which foreseeability is assessed, the object and degree of foreseeability, causation, and the allocation of the burden of proof.

The dissertation also aims to determine whether the existing provisions and interpretative mechanisms of the CISG provide a sufficiently coherent framework for resolving disputes concerning foreseeable losses. In this regard, particular consideration is given to Art. 7 and the Convention's international character, general principles, drafting history, and relevant international jurisprudence. The research seeks to distinguish between deficiencies in the normative framework of Art. 74 and difficulties arising from its decentralized interpretation and application across different jurisdictions.

A further objective is to develop a coherent and practically applicable interpretative framework for foreseeability that can enhance legal certainty while preserving the flexibility required by international commercial transactions.

Ultimately, the dissertation aims to contribute to the uniform interpretation and application of Art. 74 by clarifying existing doctrinal ambiguities, identifying areas of convergence and divergence in international practice, and proposing interpretative solutions that promote greater consistency and predictability without requiring amendment of the CISG.

IV. Research questions

In light of the conceptual ambiguity and practical inconsistencies identified above, this dissertation is guided by a central inquiry into the proper interpretation and application of foreseeability under Art. 74 CISG in order to move beyond fragmented judicial approaches and develop a coherent analytical framework capable of enhancing uniformity and predictability. Accordingly, the central research questions are:

1. Does the CISG text on foreseeability under Art. 74 have challenges in interpretation and application?

2. Is foreseeability under Art. 74 effective and adequate?

3. How has the foreseeability rule under Art. 74 been interpreted in academic literature and by courts and arbitral tribunals? Does the current application of foreseeability under Art. 74 ensure consistent and predictable outcomes in the recovery of damages?

4. What constitutes a proper interpretation of foreseeability under Art. 74? What interpretative standards and criteria can be developed to ensure a coherent, predictable, and uniform application of the foreseeability limitation under Art. 74?

5. Whether the CISG provides a coherent and predictable framework to interpret foreseeability and recovery of damages for international sales contracts in cross-border disputes?

V. Methodology

The research methodology employed in the dissertation is doctrinal research, with the analysis of legal doctrine and the comparative analytical method applied to examine foreseeability and its application. It integrates textual analysis, comparative study, and case law analysis, supported by a normative evaluation.

1. Doctrinal legal analysis

The dissertation studies the bulk of the data generated from both primary and secondary sources. This involves a close and systematic analysis of legal rules, their drafting history (*travaux préparatoires*), the Secretariat Commentaries, and other official UNCITRAL materials relevant to the interpretation of the Convention. Besides, other sources such as monographs, textbooks, legal commentaries, journal articles, and other academic publications addressing the CISG, international contract law, damages, and the doctrine of foreseeability, are used for a comprehensive analysis.

2. Comparative legal method

The comparative analytical method is applied to examine the differences in legislative regimes, their formulation, application, and interpretation. This method is served by both a historical and a functional level. The evolution of foreseeability from Roman law, to its development in French law (especially through Pothier and the Civil Code), and its formulation in English common law are the starting points for the historical-comparative approach. This historical perspective contributes to the understanding of why foreseeability appears from the very beginning of the CISG's drafting and the impact of foreseeability's formulations established in these legal systems on interpretation in Art. 74. Besides, the functional-comparative approach is also applied for comparing Art. 74 with 'soft law' instruments, namely the UPICC and the PECL. This study of the two model instruments is to show their similarity and differences, as well as their attempt to support the interpretation of the CISG, particularly of foreseeability under Art. 74.

3. Qualitative analysis of jurisprudence (case law and arbitral awards)

Case law is incorporated to understand how foreseeability is interpreted by the courts and tribunals and to identify the general trend in application, as well as the other factors used to evaluate foreseeability. The case law study is also essential for demonstrating the consequences of ambiguities in texts on the application of foreseeability in practice and for ensuring that the proposed interpretative framework is grounded in adjudicative practice. The sources for case law analysis are accessed from major databases, including the CISG Digest, Pace Law School's CISG Database, CLOUT, and UNILEX.

The dissertation examines over 100 reported decisions from various Contracting States, providing a comprehensive examination of the case law interpreting Art. 74 from the Convention's entry into force to the present. Cases were selected on the basis of their relevance to the subject matter examined in this dissertation, as well as decisions that illustrate significant doctrinal convergence or divergence among Contracting States. Decisions by tribunals and courts are all treated as equally significant evidence during examination. The recurring patterns identified appeared across multiple jurisdictions and judicial levels rather than being confined to isolated cases.

Taken together, the combination of doctrinal, comparative, and case law analysis supports a comprehensive and nuanced examination of foreseeability under Art. 74, contributing to achieving the objective of the dissertation.

VI. Scope and Limitations of the research

The research will be limited to the issue of foreseeability in international contracts for the sale of movable goods under Art. 74 of the CISG. While Art. 74 is the center of the study, other provisions connected to the issue are also considered, including those addressing causation and mitigation. Other CISG remedies, such as specific performance (Art. 46), price reduction (Art. 50), or the avoidance of the contract (Arts. 49, 64), are beyond the dissertation’s concern, except where they directly intersect with the assessment of damages. It does not extend to other areas of law, such as tort liability, domestic contract law outside the CISG, or public law considerations. The dissertation does not engage in extensive empirical analysis of the commercial impact of different interpretive approaches. It does not attempt to quantify the economic consequences of uncertainty or to measure the transaction costs associated with litigation over foreseeability. Such empirical work, while valuable, is beyond the scope of this doctrinal study.

The analysis is doctrinal and interpretive in nature. It seeks to understand what the foreseeability limitation means, how it should be applied, and what its proper scope should be. It does not offer a comprehensive critique of the damages regime of the CISG as a whole, except insofar as such a critique is necessary to serve the foreseeability analysis.

Besides, other international instruments and national legal systems governing the foreseeability of damage in the contracts of sale, namely, the UPICC, PECL, Roman law, French law, and English Common law, are also scrutinized in order to trace the historical and comparative development of foreseeability that serves a more comprehensive view. The dissertation precludes consideration of the American legal principles, even though it did influence, in part, the drafting of the CISG, because its adoption of the foreseeability rule is primarily rooted in English common law and French civil law. The dissertation does not purport to provide a comprehensive comparative study of foreseeability across all legal systems that have influenced the CISG's drafting, or of all relevant model instruments. Instead, it focuses on the principal legal traditions and instruments that are most directly relevant to understanding the historical development of foreseeability and its contemporary application under Art. 74 of the CISG.

The dissertation is concerned with the practical application of the foreseeability rule by courts and tribunals. The case law analyzed in this dissertation is drawn from as many of these Contracting States as possible, subject to the practical limitations of language and accessibility, to identify patterns, divergences, and interpretative trends. This allows the study to assess the practical application of foreseeability and its impact on the uniformity of the CISG. The analysis is not limited to the jurisprudence of any particular country or region.

The dissertation is a doctrinal study of the foreseeability limitation in Art. 74 CISG, informed by historical and comparative analysis, legal texts, and grounded in examination of case law. It openly acknowledges limitations on linguistic, jurisdictional, methodological, and substantive grounds. By clearly defining what this research does and does not do, and by acknowledging the constraints within which it operates, this section establishes the limitations of the dissertation and provides a realistic basis for evaluating its contributions. Within these limitations, the dissertation aims to make a significant and original contribution to the understanding and application of one of the most important provisions in the law of international sales.

VII. Structure of the dissertation

This dissertation is divided into seven chapters. The introduction chapter highlights the background of the research, the objective of the research, problem statements, research

questions, methodology, scope, and limitations of the research, and the structure of the dissertation.

Chapter II provides a historical and comparative analysis of the development of foreseeability from Roman law to its evolution in French law and in English common law. The chapter also discusses foreseeability's version in two model instruments: the UPICC and the PECL. This chapter serves to illuminate the origins of foreseeability and its developments through major legal systems to identify the similarities and differences and their influences to foreseeability in Art. 74.

Chapter III focuses specifically on the CISG with a brief introduction to the CISG and its damages regime. It examines the structure and function of Art. 74, and its relationship with other relevant provisions. This chapter also provides a textual and legislative history examination of foreseeability to serve the detailed analysis of the foreseeability test in the next chapters.

Chapter IV carried out the examination of foreseeability with a detailed analysis of the key factors involved in the evaluation of foreseeability under Art. 74, including both subjective and objective tests, knowledge and other related elements. It also examines the burden of proof and its standard, the relationship between foreseeability and causation, the required degree of probability of loss, and the relevant time of foreseeability. Through this analysis, the chapter seeks to clarify the evaluation of foreseeability in determining recovery of damages.

Chapter V examines the issue of recovery of loss by discussing the question of what precisely must be foreseen for damages to be recoverable. It also analyzes the contribution of foreseeability in deciding the recovery of several specific categories of loss. This chapter conducts a detailed application of foreseeability in case law, highlighting inconsistencies in judicial interpretation and the practical challenges in applying the foreseeability test.

Chapter VI proposes the two criteria supporting the evaluation of foreseeability, namely reasonableness and acceptance of liability.

Chapter VII serves as the concluding chapter of the dissertation by summarizing the main findings of the research and proposing a coherent interpretive approach for the application of foreseeability. It introduces and advocates for structured guidelines and criteria for the purpose of consistent, efficient, and uniform application.

Chapter II: Development of Foreseeability in the National Legal Systems and International Instruments

It seems that the incorporation of foreseeability into Art. 74 encountered little resistance during the drafting of the Convention because it was already recognized in a number of prominent legal traditions.[25] The principle of foreseeability under Art. 74 of the CISG did not originate with the CISG but is the result of a long and complex historical evolution across different legal traditions. The ambiguities of Art. 74 cannot be resolved without understanding the traditions from which it emerged. Understanding this development is essential for interpreting Art. 74 CISG, as the provision reflects a synthesis of ideas derived from both civil law and common law systems, as well as modern transnational instruments. Although the foreseeability standard has been refined and integrated into various jurisdictions and international instruments, its origin, including the source of foreseeability in Art. 74 of the CISG, is still debated among scholars. Roman law, French law, and English common law are all argued to be the origin of foreseeability. Besides, the UPICC and PECL provide important comparative and interpretive guidance for understanding the principle of foreseeability under the CISG.

This chapter will provide a journey of foreseeability that serves as a limitation of damages in contract by tracing the historical evolution of foreseeability, its initial establishment, and its development through key legal precedents in different legal systems. It thereby identifies the similarities and differences of foreseeability formulations between legal systems. This is to understand the historical development of foreseeability and whether it influences the drafting and interpretation of foreseeability under Art. 74. After this introduction, part II will examine the foreseeability and limitation of damages in Roman law. Part III will focus on how foreseeability was formulated in French law by tracing the period before and after the French Civil Code. Part IV will discuss the foreseeability rule in the common law. Part V will study foreseeability in the international model instruments, i.e., the UPICC and PECL. Finally, it is ended by a conclusion.

[25] Vékás, L. (2002). The foreseeability doctrine in contractual damage cases. *Acta Juridica Hungarica*, *43*(1-2), 152.

I. Roman law[26]

The Romans did not develop the theory of the general law of contract, but only individual cases. The rules varied based on several factors, including the formulation and the subject matter of contracts.[27] Although the general rule dealing with the limitation on contractual damages is absent in classical Roman law, it was addressed in particular circumstances by a number of jurists. In case of breaching contract, parties have the right to claim compensation, which would be objectively measured by the value of the object of sale or by referring to the facts of each individual case. The failure of the buyer to make timely payment, or to receive the delivered object of sale, is considered in default (*mora*, literally 'delay'). Compensation, in this case, is calculated based on the value of the object of sale, which may be only the price or interest when *mora* arose, determined by the judge, or also any costs relating to the object incurred by the seller before delivery. If the object of sale has a market value that can be easily measured, such as wheat or wine, the prevailing price at the time the suit is brought is used to measure the damages. The seller is liable for returning the paid price, or also the extent of the buyer's 'interest' (*id quod interest*) because of his failure to timely deliver or sell the goods that have latent defects. It means the seller is liable not only for direct damages but also for some of the consequential losses incurred by the buyer due to the seller's default.[28]

In the contractual relationship, foreseeability in Roman law seems to be a vague attempt to limit liability for damages. This dissertation does not try to provide a timeline of damages and foreseeability development in Roman law, but rather examines whether there is any effort in ancient Roman law to limit damages in contractual relationships. The examined issues are based on the doctrinal research by numerous scholars to illustrate the attempts in Roman law to limit damages and form foreseeability.

[26] This part was published by Nguyen, T. Q. (2025). Foreseeability and limitation of contractual damages in Roman law. *Zbornik radova Pravnog fakulteta, Novi Sad*, *59*(2), 597–605.

[27] Du Plessis, P. (2020). *Borkowski's textbook on Roman law* (6th ed.). Oxford University Press, para 9.2.

[28] Frier, B. W. (2021). *A casebook on the Roman law of contracts*. Oxford University Press, 59, 67. Available at http://www.law.harvard.edu/faculty/cdonahue/courses/rlaw/mats/Frier_007%20Chapter%204%20Casebook%20on%20the%20Roman%20Law%20of%20Contracts.pdf (accessed 1 March 2024).

1. Liability and element of knowledge

One of the attempts to limit liability for damages, where the element of knowledge becomes a factor in evaluating liability, can be found in D.19.1.13pr - Ulpian wrote in the thirty-second book on the Edict:

> "Julian, in the fifteenth book of his [Digest,] distinguishes between the knowing and unknowing seller with regard to condemnation in an action on purchase. He says that if he acted unknowingly in selling a diseased herd or an unsound timber, then in an action on purchase he will be held responsible for the difference from the smaller amount I would have aid had I known of this. But if he knew but kept silent and so deceived the buyer, he will be held responsible to the buyer for all losses he sustained due to this sale. Therefore, if a building collapsed due to the timber's unsoundness, he must make good the building's calculated worth; if herds die through contagion from the diseased herd, he should be held responsible for the interest in this not having occurred."[29]

Selling a piece of cattle that the seller knew they contracted a contagious disease, he can be sued for all damages, including consequential losses suffered by the buyer because of the defect from the sale, including the other animals owned by the buyer, which have died as a result of contracting the infection. If he conducts the sale without knowledge of the diseased cow, he only has to compensate part of the purchase price. Depending on knowledge, liability of the seller is treated differently. The knowing seller is liable not only for the defects but also for all consequential losses incurred by the buyer, while the ignorant seller has liability only for the price reduction. The knowing seller has to bear full liability for his failure to reveal the defects to the buyer, and this action is treated as fraud (*dolus*), which becomes a factor triggering liability for all damages resulting from it.

In a similar case, the owner sold his slave, who actually is a thief or a runaway - the D.19.1.13.1 - he is liable for the purchaser's interest in what is not being deceived if he was aware that the slave was a thief. But if the seller is unknown of the runaway truth, his liability is limited to the lesser amount he would have paid for had he known the slave was a runaway. In contrast, the seller is not liable in case he had no knowledge that the slave was the thief. The rationale behind

[29] Watson, A. (1985). *The Digest of Justinian 2*. University of Pennsylvania Press, 90.

this distinction between a runaway and a thief is that the buyer does not acquire the right to hold the runaway slave (*habere licere*), thus, the seller is liable as if for eviction; but, with regard to a thief, we can retain possession.[30] Ulpian, however, continues in the D.19.1.13.3 that the seller is liable: he ought not lightly to have affirmed what he did not know, even if he is unknown to the truth, but assures that the slave is kind and truthful, and therefore charged for a high value. There is a distinction between a person who was aware but remained silent and one who affirms what he was unaware of. It is reasonable that the former should have revealed that the slave was a thief, while the latter should not make a hasty affirmation.

In contrast to D.19.1.13pr, where full damages are only on the knowing sellers, D.19.1.6.4 (sale of a leaky barrel) and D.19.2.19.1 (lease of a leaky barrel) hold the seller and lessor liable for all damages, no matter whether they were aware of the defect in the thing sold or not. In the two Digests' texts, there is no distinction between the seller who had knowledge of the defect and the one unaware; both are liable for the buyer's full interest.

D.19.1.6.4 also mentioned the factor of affirmation that makes the seller liable for what the buyer lost because of that affirmation. Another case discussing the issue of liability relating to warranties is D.18.6.16. Gaius wrote in the second book of *Everyday Matters*:

> "If wine in vats is sold and (then), before it is removed by the buyer, it is corrupted because of its nature, he (the seller) will be liable to the buyer if he in fact affirmed its quality. But if he made no affirmation, the buyer bears the risk (periculum), since if he did not taste, or he did taste and wrongly approved (the wine), he has himself to blaim. Obviously, if the seller knew that its quality would not last until the day it was to be removed and did not warn the buyer, he will be liable for the extent of his (the buyer's) interest in having been warned."[31]

In case the wine becomes bad between the time the sale transaction has been concluded and before delivery, the risk normally is on the buyer (see Ulpian, D.18.6.1pr.). However, Gaius suggests two exceptions in which the seller bears the risk: first, if the seller affirms the product's quality; second, if the seller knew but chose not to disclose that it would go bad. The seller is

[30] Frier, n 28, 98.

[31] Id., 91.

liable to the extent of the buyer's interest in having received a proper warning if he knew of latent defects and did not warn the buyer. The prevention criterion was added in the text and became a measure of liability.

These Digests dealt with the seller's liability for latent defects connected to the knowledge factor. Some texts hold the seller who was unaware of the defects liable for damages. However, the extent of liability of the ignorant seller was not treated equally. The unknowing seller normally was liable for the difference between the paid price and the amount the buyer would have paid if he had been aware of the defect, but some Digests (such as D.19.1.6.4 or D.19.2.19.1) hold liability for full damages. In addition to the Digests discussed above, there are also other texts that hold the ignorant seller liable for defects were D.18.1.45 (sale of used clothing as new), and C.4.49.9 (sale of a piece of land that had a higher capitatio than the seller had claimed). The other texts exclude the unknowing seller's liability for defects, such as D.19.1.21.1 (sale of a piece of land for which a public land tax is imposed).[32]

2. Loss and connection with the matter (*circa ipsam rem*)

The relationship between loss and matter to determine damages is also discussed in Roman Law. There are also issues where losses would not be recoverable in case of non-delivery causing a buyer to suffer a loss that exceeds the value of the thing itself. Paul claimed that loss would be recoverable if it is 'in close connection with this matter'. Paul wrote in the thirty-third book on the Edict - para.19.1.21.3:

> "When the seller is responsible for non-delivery of an object, every benefit to the buyer is taken into account provided that it stands in close connection with this matter [*circa ipsam rem*]. If he could have completed a deal and made profit from wine, this should not be reckoned in, no more than if he buys wheat and his household suffers from starvation because it was not delivered; he receives the price of the grain, not the price of the slaves killed by starvation. An obligation does not increase because it is carried out slowly, although it would grow greater if wine were worth more today, and rightly so, for if the wine had been

[32] Hallebeek, J. (2010). The ignorant seller's liability for latent defects: One regula or various sets of rules? In J. W. Cairns & J. du Plessis (Eds.), *The creation of the ius commune: From casus to regula*. Edinburgh University Press, 186.

delivered, I as buyer would have it, and if not, that which should have been delivered previously is due now."[33]

Under the text, Paul suggested that losses are recoverable only if it is in close connection with the matter itself. He took the two examples (where a buyer was unable to sell wine at a profit due to the non-delivery of wine, or failure to deliver grain resulting in the death of the buyer's household due to starvation) to suggest that loss would be recoverable if it is in close connection with the matter itself (*circa ipsam rem*). There is no increasing obligation due to its late performance. However, if after the obligation was due and the value of wine rose, the amount owed should reflect that increase. If it wasn't delivered when it should have been, the current value of the wine should now be provided to match what the buyer should have received earlier. The obligation should be adjusted to 'what ought to have been given' at the time it was due if the wine was not delivered on time. Profits that could have been made from the sale would not be recoverable. Potential profit from selling the wine, or losses suffered due to the slaves killed by starvation, are insufficiently closely connected with the matter (*res*). If delivery is conducted late and the value of the wine increases because of the market price since that non-delivery date, damages are considered in sufficiently close connection with the matter, or implying the close connection between loss and the object of obligation. However, there seems to be a conflict here because Paul clarifies that loss of profit is not recoverable, while it can be argued that the buyer would have been able to profit from the increase in value by selling the wine later. The rule and its function are not clear.[34] Besides, there is no clear explanation of which losses would be considered to be closely connected with the matter and what *res* means; whether the matter refers to 'thing' (i.e., the object of obligation) or 'matter, affair' (i.e., the sale or the breach thereof). However, they laid the foundation to categorize the type of loss into direct loss (*interesse circa rem*) and consequential loss (*interesse extra rem*).[35] Paul seemed to expect to limit the scope of 'proximate cause' as much as possible in order to prevent claims for consequential damages, at least for the common items like wine and grain.[36] These criteria to

[33] Watson, n 29, 94.

[34] Diamond, A. (2016). *Remoteness and the limitation of contractual damages* [Master's thesis, Stellenbosch University]. SUNScholar Research Repository, 12. Available at: https://core.ac.uk/download/pdf/188224834.pdf (accessed 28 April 2024).

[35] Zimmermann, R. (1990). *The law of obligations: Roman foundations of the civilian tradition*. Juta, 831-2.

[36] Frier, n 28, 69.

limit liability for damages did not clearly provide for the presence of foreseeability. In addition, it is also questionable to determine the implication of the foreseeability test in that particular category of contract.

3. Foreseeability and limitation of contractual damages

During the Justinian period, by the sixth century, confusion arose because there were different rules for different types of contracts.[37] Justinian issued the *lex Sancimus* rule - C.7.47.1 (531 CE) as a response to the desire for certainty and consistency in law. C.7.47.1 provided:

> "[W]henever the amount or the nature of the property is certain, as in the cases of sales, leases and all other contracts, the damages shall not exceed double the value of the property. In all other instances, however, where the value of the property seems to be uncertain, the judges… shall carefully ascertain the actual amount of the loss, and damages to that amount shall be granted…"[38]

The rule differentiated between situations of certainty and uncertainty in the amount or nature of the property. Damages could not be awarded greater than double the property's value if the quantity or nature of the property was certain, as in sales, leases, and all other transactions. In contrast, if the value of the property appears uncertain, the judges were permitted to determine carefully the actual amount of the loss and award damages corresponding to that precise loss. It is in accordance with nature to impose penalties with a proper degree of moderation, or as explicitly prescribed by the laws. However, there was no clear rationale provided for the rule, and therefore, challenging its interpretation.[39] This rule was later developed into limitations upon damages in terms of a principle: foreseeability.

In sum, although there are vague rules on limitation to foreseeable loss,[40] Roman law laid the foundation for the legal concept of fair limits on damages in case of breach of contract, that the

[37] Zimmerman, n 35, 828.

[38] Scott, S. P. (Trans. & Ed.). (2001). *The civil law* (5-6). The Lawbook Exchange, 67.

[39] Zimmermann, n 10, 202.

[40] Ferrari, F. (1993). Comparative ruminations on the foreseeability of damages in contract law. *Louisiana Law Review, 53*(4), 1264.

defendant is required to provide reparation for loss.[41] Liability of a defaulting party is limited in case of failure to timely deliver, causing harm, or selling or leasing defective products by referring to the close connection between the breach committed and the losses suffered, or to the knowledge of the possible consequence caused by his breach of obligation. However, even in a similar situation relating to the element of knowledge, liability for damages is treated differently without a clear explanation. The element of knowledge, or the relationship between loss and matter contributed to the establishment of the foreseeability principle as a limitation of liability method.

Although Roman law has no direct influence on the drafting or interpretation of foreseeability in the CISG, the Justinian C.7.47.1 rules of double value served as an inspiration for French jurists to develop the foreseeability principle, which then has a significant influence on various national legal systems and model instruments, including the CISG.

II. French law

1. Development of foreseeability in earlier French law

The *lex Sancimus* rule remained virtually uncontested for nearly a millennium. In 1546, a French jurist of the sixteenth century, Carolus Molinaeus (Charles Dumoulin), made the first explanation of the *lex Sancimus* rule in relation to the statutory limitation concerning foreseeability. He asserted the reasoning behind Justinian's ruling was based on the fact that, in ordinary situations, the party in breach could only foresee the extent of damage, i.e., the *duplum.* He thereby offered a general rule that recoverable damages resulting from breaching a contract must be restricted to foreseen loss.[42] His view on foreseeability was generalized by Jean Domat and Robert Joseph Pothier, the French jurists in the seventeenth and eighteenth centuries. Domat wrote:

> "The profit or loss, which is to be computed as part of the damages of the buyer, ought to be restrained to that which may be imputed to the delay and which is a natural and ordinary

[41] Barnett, K. (2024). Reflections on the Principles of Remoteness in Contract in Comparative Law. *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique, 37,* 1611.

[42] Ferrari, n 40, 1264.

> consequence of it, and which it was easy to foresee… But we ought not to extend the damages to consequences that are remote, and altogether unforeseen."[43]

According to Domat, the damages should be limited to those that can be directly attributed to the delay, which are a natural and ordinary consequence of that delay, and are foreseeable. Damages should not be extended to cover consequences that are remote or unforeseen.

Pothier asserted that Justinian's ruling was not based on natural law and, therefore, was unenforceable in France.[44] He developed the test as follows:

> "When the debtor cannot be charged with any fraud, and is merely in fault for not performing his obligation, either because he has incautiously engaged to perform something which it was not in his power to accomplish, or because he has afterwards imprudently disabled himself from performing his engagements; the debtor is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit."[45]

A debtor is only liable for damages resulting from his failure to perform obligations that could have been contemplated at the time of concluding the contract. Pothier also referred to Paul's rule in D.19.1.21.3 to determine what kind of losses are deemed to have been foreseen at the time of concluding the contract. The vague term 'in close connection with the matter' of Paul D.19.1.21.3 was further developed to the object of the obligation, which, like in the *lex Sancimus*, becomes an important factor in limiting damages. Nonetheless, Pothier clearly expressed that recoverable damages also include profit, while the D.19.1.21.3 did not allow profits from the sale to be recoverable.

> "In general parties are deemed to have contemplated only the damages and interest which the creditor might suffer from non-performance of the obligation, in respect of the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby

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[43] Domat, J. (1850). *The civil law in its natural order* (W. Strahan, Trans.; Vol. 1). Charles C. Little and James Brown, 205.

[44] Perillo, J. M. (2004). Robert J. Pothier's influence on the common law of contract. *Texas Wesleyan Law Review*, *11*(2), 9.

[45] Pothier, R. J. (1853). *A treatise on the law of obligations, or contracts* (W. D. Evans, Trans.; 3rd American ed., Vol. 1). Robert H. Small, para 160.

> in respect to his other affairs: the debtor is not answerable for these, but only for such as are suffered with respect to the thing which is the object of the obligation, damni et interesse ipsam rem non habitam…."[46]

A party is liable for damages and interest which are in his contemplation, and not for incidental costs arising from the breach, concerning the object of the contract. To illustrate his statement, Pothier took the example of the seller's failure to deliver a horse as agreed. The seller is obliged to pay the price of a like horse or any increased value of horses that the buyer had to pay for another horse of similar quality, provided that it was in his contemplation of the loss and the horse was the object of the contract. However, if the seller failed to deliver the horse in time and the buyer suffered losses as a result, such as missing the revenue from his benefice due to his failure to arrive on time, the seller would not be held liable for such loss, which he did not contemplate at the time of the contract and is foreign to the obligation.[47] Differentiating the type of damages is significant to evaluate the liability of the debtor. Damages linked to the subject matter of the contractual obligation, and because the specific damage could therefore have been foreseen, are recoverable. Whereas, damages that are foreign to the obligation and were not in the contemplation of the debtor would not be recoverable, although they resulted from breaching the contract. However, this kind of damage is recoverable if it was contemplated in the contract and there were express clauses in the contract. Taking the same example of the sale of the horse, Pothier pointed out that if the contract explicitly states that the buyer must arrive at a particular time, and the buyer was unable to secure a replacement horse and therefore couldn't reach his benefice on time and lost potential revenue, the seller would indeed be liable for such damages.[48] It seems that Pothier relied on deemed contemplation and actual contemplation to establish liability for intrinsic damages and extrinsic damages, respectively.[49]

Pothier also referred to Ulpian's rule in D.1.19.1.13pr for his statement that the debtor is also liable for damages that are unforeseeable in cases where there was a fraudulent act. To illustrate his view, Pothier took the example of the sale of a cow with a contagious distemper. The seller

[46] Id., para 161.

[47] Id.

[48] Id., para 162.

[49] Diamond, n 34, 17.

knows that the cow is infected with a contagious disease and deliberately conceals this fact from the buyer. This concealment constitutes fraud, rendering the seller's liability not only for the damage to the purchased cow, which is the object of the sale, but also for the consequential damages that arise when the distemper spreads to the buyer's other cattle, causing additional losses.[50] In case the debtor commits fraud, he is liable for all damages flowing from the breach that relates to the object of the sale and all subsequent damages that directly flow from the fraudulent act, including those affecting the buyer's other property, without taking into account whether he can be presumed to have intentionally submitted to them. Fraud became a significant criterion that extends the seller's liability to all foreseeable and connected damages resulting from the fraudulent behavior. Pothier tried to reconcile the implied foreseeability, which is ruled differently by Ulpian and Paulus in D.19.1.13pr and D.19.1.21.3, in allowing the buyer to enforce the seller's obligations and to claim damages for any breach of the contract, and created a clear and flexible foreseeability principle.[51]

Pothier also emphasized the element of directness in limiting damages, ensuring that only losses with a close causal connection to the breach are recoverable. Pothier's infected cow example illustrates the distinction between direct and indirect loss in contractual liability. He held that the death of the farmer's livestock resulted directly from the seller's intentional breach of contract and, therefore, was compensable. However, if the farmer, due to the loss of his cattle, becomes unable to cultivate his land, pay his debts, and ultimately loses his farm, such losses are not recoverable because they did not result directly from the vendor's act. Pothier explains that such consequences are too remote and indirect because multiple factors could have contributed to the financial collapse. Pothier effectively demonstrated the principle that liability should be limited to losses with a clear and direct causal link to the breach. His rule on the directness requirement was then incorporated into the French Civil Code.

Pothier's rule on foreseeability was significantly more developed than that of his predecessors. He significantly advanced the foreseeability rule in contract law by refining the limitations on recoverable damages. His approach built upon previous legal traditions but introduced a more structured and rational framework for assessing damages in breach of contract cases. Earlier

[50] Pothier, n 45, para 166.

[51] Zimmermann, n 35, 831–2.

legal traditions, such as Roman law, had concepts of limiting damages, but they lacked a clear and systematic approach. Unlike earlier jurists who dealt with damages in a more ad hoc manner, Pothier advanced this by introducing a structured and systematic approach, clearly defining the scope of recoverable damages and ensuring that liability remained fair and predictable.

This work of Pothier became a significant influence on modern French civil law, other civil law systems like the Italian Civil Code, the Belgian Civil Code and the Louisiana Civil Code, the common law systems like the United States and England, and the model instruments like the CISG, PECL and UPICC, in terms of foreseeability.

2. Development of foreseeability in modern French Civil Code

As most stated by scholars, the first appearance of foreseeability in modern times is in French Law, which closely reflects the principles formulated by Pothier.[52] French law accepts the full compensation principle (*réparation intégrale*) with two types of damages, namely the actual loss suffered by the creditor (*damnum emergens)* and the gain or profit of which he has been deprived (*lucrum cessans),* originally from Roman law.[53] Causation and foreseeability become the criteria to assess damages. The remoteness conception in contract damages, ruled by Pothier, was used in the drafting of the 1804 French Code Civil. Art. 1150 of the Code Civil provides the requirement of foreseeability to determine the damages:

> "A debtor is held only to damages which were foreseen or which could have been foreseen at the time of the contract, when it is not by his wilfulness that the obligations were not executed. Even in the case where the inexecution of the agreement results from the wilfulness of the debtor, damages are to include … only what is an immediate and direct consequence of the inexecution of the agreement."[54]

A defaulting party is liable only for losses that it foresaw or could have foreseen at the time of the contract, unless losses were caused by wilfulness. Depending on whether the *dol* of the

[52] Erasmus, H. J. (1968). 'n Regshistoriese beskouing van Codex 7.47. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg, 31*, 235.

[53] Beale, H., Fauvarque-Cosson, B., Rutgers, J., & Vogenauer, S. (Eds.). (2019). *Cases, materials and text on contract law* (3rd ed.). Hart Publishing, 1061.

[54] *Code Civil des Français* 1150-1151 as translated in Crabb, J. H. (1995). *The French civil code* (Rev. ed.). Wolters Kluwer Law & Business, 223.

defaulting party caused the non-performance, the limitation on damages required in Art. 1150 and Art. 1151 are applied.[55] For the most part, the *dol* was understood to include both willful non-performance (*inexécution dolosive*)[56] and substantial fault that demonstrates the debtor's incapacity to fulfill its obligation (*faute lourde assimilable au dol*).[57]

The Code Civil was revised by the 2016 Ordinance No. 2016-131 for the purpose of modernizing French contract law, making it more coherent, predictable and attractive (the '2016 Ordinance').[58] The new provisions on foreseeability can be found in Arts. 1231-3 and 1231-4 of the 2016 Ordinance.

Art. 1231-3

"A debtor is bound only to damages which were either foreseen or which could have been foreseen at the time of conclusion of the contract, except where non-performance was due to a gross or dishonest fault."

Art. 1231-4.

"In the situation where non-performance of a contract does indeed result from gross or dishonest fault, damages include only that which is the immediate and direct result of non-performance."

Even though the two articles are the newly modified provisions on foreseeability with slight differences in wording, there is no major difference in meaning from the previous version - Arts. 1150-1151. The repairable damages are those that were foreseeable at the time of entering into the contract, except in case of serious misconduct or gross negligence, but always within the limit of what immediately and directly ensues from the nonperformance. At the time of entering

[55] Swain, W. (2020). The common law and the Code civil: The curious case of the law of contract. In O. Moréteau, A. Masferrer, & K. A. Modéer (Eds.), *Comparative legal history*. Edward Elgar Publishing, 16.

[56] Cour de cassation, première chambre civile. (1969, February 4). *Bull. civ. I,* no 60. Dalloz 1969. 601.

[57] Cour de cassation, chambre commerciale. (1990, April 3). *Bull. civ. IV*, no 108.

[58] See Cartwright, J., Fauvarque-Cosson, B., & Whittaker, S. (2016). *The law of contract, the general regime of obligations and proof of obligations: The new provisions of the Code civil created by Ordinance No. 2016-131 of 10 February 2016 translated into English*. Legifrance. Available at: http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf (accessed 12 December 2023).

the contract, the parties should be able to calculate and be aware of the extent of their potential liability for breach of contract.

There is no foreseeability requirement in case the breach is due to gross or dishonest fault of the debtor. In contrast to the former Art. 1150, where foreseeability does not apply in case of gross fault of the obligor during the performance of the contract, the new Art. 1231-3 extends to dishonest fault by stating both gross and dishonest fault.[59] A debtor cannot escape liability for damages resulting from gross or dishonest fault, even if such damages are unforeseeable at the time of the contract. However, the liability of the obligor in this case is limited to damages from direct and immediate consequences of the breach, according to Art. 1231-4 of the French Civil Code. The element of directness is required to provide the direct causal link between the breach of the debtor and the loss suffered by the creditor.[60] Without such a link, no compensation is to be paid by the breaching party, even when he commits fraud while performing the contract. The requirement of directness is qualified by the foreseeability factor indicated in the previous Article. The application of foreseeability is restricted to circumstances that do not involve fraud by the debtor.[61] French law distinguishes the concepts of foreseeability in Art. 1231-3 and direct consequence of a breach in Art. 1231-4, which refers to causation rather than foreseeability, and they serve distinct functions in determining recoverable damages. Foreseeability, along with causation, is a criterion to determine damages that are established as an immediate and direct consequence of the breach that is foreseen or could have been foreseen at the time of the contract formation. Once the requirement of directness is satisfied, the creditor's claim is further restricted to losses that were also foreseeable at the time of contracting. If the non-performance occurred without intention or a gross or dishonest fault, the debtor's liability for damages is limited to the loss that was direct and foreseeable. This layered approach ensures that only losses with a clear causal link to the breach and within the reasonable expectations of the debtor are compensable, reinforcing predictability in contractual liability.

Under French law, not all types of loss are recoverable, and the French courts have established specific criteria for determining recoverable damages: i) Certainty of Loss - the loss, whether

[59] Beale et al., n 53, 1071.

[60] Nicholas, B. (1992). *The French law of contract* (2nd ed.). Clarendon Press, 228.

[61] Musgrave, T. D. (2009). Comparative contractual remedies. *University of Western Australia Law Review*, *34*(2), 169.

actual damage or lost profit, must be certain rather than hypothetical. This includes future losses that are certain and missed opportunities, provided there is concrete evidence of a real opportunity; ii) Foreseeability; and iii) Contractual Limitations - parties may agree to limit liability through contractual clauses, and courts will generally uphold these limitations unless they are deemed manifestly excessive or unreasonably low. Initially, French law was understood as limiting only the type of recoverable loss, without restricting its extent. However, the *Cour de Cassation* later clarified that foreseeability applies to both the nature and the extent of the damages suffered by the creditor.[62] This interpretation ensures that damages are moderated based on what the claimant could have reasonably anticipated, effectively setting a financial cap on the defendant's liability. By requiring both the type and extent of damages to be foreseeable, the *Cour de Cassation* reinforced the underlying policy of foreseeability in Art. 1231-3 that a party to a contract should have been aware of the extent of their obligations when entering the contract.[63] Both contractual parties, when making a contract, should be aware of the risks they are assuming. Based on this knowledge, a defaulting debtor should therefore be liable for losses suffered by the creditor due to his breach of contract. Foreseeability is determined on the objective basis of the reasonable man rather than on the subjective basis of losses that are actually foreseen as the result of the contractual breach by the debtor. Therefore, the debtor is liable for the damage that a reasonable person would have foreseen, regardless of whether the debtor actually foresaw the damage or not.

The foreseeability principle in French law, rooted in Pothier's work, has remained a cornerstone of contractual liability. The French Civil Code (1804) codified his ideas, and the 2016 reform modernized them while maintaining their core logic. Pothier's influence persists in shaping fair and predictable contract enforcement in France today. Foreseeability's formulation in French law has significant influence to the drafting of the CISG as well as its interpretation in practice.

[62] Beale et al., n 53, 1071.

[63] Musgrave, n 61, 170.

III. Common law

1. The Hadley v. Baxendale rule and the issue of foreseeability's origin and the inventiveness of the Hadley rule

1.1. The Hadley v. Baxendale rule

In English jurisprudence, foreseeability was said to be first established in *Hadley v. Baxendale*, which has become one of the most frequently cited case law examples when determining limitations on damage compensation. In this case, Hadley, a mill owner, signed a contract with Baxendale, a carrier, to transport a broken crankshaft to a manufacturer for repair by an agreed time. Baxendale delayed the delivery of the shaft to the manufacturer by the specified date, resulting in the delay of the reopening of the mill's operation. Hadley sued the carriers for the lost revenues he would have made had the mill been able to operate. The court denied the plaintiff's claim for loss of profit by holding that the defendant was not aware that failure to deliver the shaft caused the delayed operation of the mill.

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[64]

Losses can be claimed for recovery if they arise naturally and in the ordinary course of events from the breach of contract, or if they could reasonably have been contemplated by both parties. According to the court, it was unreasonable to expect the defendants to have contemplated a loss of profit as a consequence of their breach because the stoppage of the mill was not considered a natural consequence of the breach. Since the defendants were aware that they were providing a millshaft and that the plaintiffs owned a mill, it is unreasonable to assume that they should have foreseen that a delay in delivery would cause the plaintiffs to lose profits. It could have been possible that the plaintiffs owned another shaft for the mill, which would be available to replace

[64] *Hadley v. Baxendale* (1854) 9 Ex 341, 156 Eng. Rep. 145, 354.

during the interim, or there could have been other problems with the steam engine that caused the stoppage of the mill after the shaft's repair.[65]

The court further stated that loss of profits should not be taken into consideration when the loss did not naturally arise from breaking the contract or when the defendants were not informed of any special circumstances that were communicated to them. There are two rules, generally known as the two 'limbs' outlined in this case. The first rule was that compensation is awarded if damages were suffered as a natural consequence, i.e, in the usual course of things, due to a breach of obligation. This first rule addressed situations where the loss was of a type that any reasonable man would have foreseen as a likely consequence of the breach. The second rule applied to the losses arising from special circumstances, which needed to be communicated to the defendant at the time of concluding the contract. It states that a party can recover damages for losses beyond those that arise naturally (the first limb) only if the losses were in the reasonable contemplation of both parties when entering into the contract. This means that if the breaching party was made aware of specific circumstances that could lead to additional losses, they can be held liable for those losses. However, if the special circumstances were unknown to them, they are not responsible for the extra damages. Compensation should reflect the amount of loss that would typically result from breaching contract under the particular circumstances that were known and disclosed.[66] These rules are to restrict the amount of money that may be recovered for anticipated profits and consequential damages.[67] To determine foreseeability, it is required that the party in breach possessed special knowledge (actual knowledge) and any knowledge attributed to the parties (imputed knowledge). Therefore, the objective (reasonable person) and subjective (in light of the facts known) tests are applied to evaluate the contemplation, which is based on the ordinary course of events and special circumstances or knowledge it should have possessed. It is well acknowledged that general and special damages serve as the benchmark for determining foreseeability.

The *Hadley v. Baxendale* classification of general and special damages is sometimes similar to Pothier's distinction between intrinsic and extrinsic damages. Intrinsic damages, as described

[65] Id., 355.

[66] Id.,

[67] Gotanda, J. Y. (2007). *Damages in lieu of performance because of breach of contract* (Working Paper No. 53). Villanova University Charles Widger School of Law Digital Commons, 10.

by Pothier, refer to losses that naturally arise from a breach of contract, much like general damages in this case, which are foreseeable as a natural consequence of the breach. Extrinsic damages, on the other hand, depend on special circumstances outside the normal course of events, aligning with special damages ruled in this case, which are recoverable only if the breaching party was made aware of the specific circumstances at the time of contracting. While the concepts share similarities, *Hadley v. Baxendale* introduced a more structured and widely applied framework within the common law. The foreseeability principle in *Hadley v. Baxendale* was based on the idea of Pothier's work but developed with key distinctions. Pothier's concept of 'direct consequences', which also underpins modern French law, is broader than the *Hadley v. Baxendale* rule of 'foreseeable or contemplated' consequences. The defendant in this case is only liable for his intentional breach of obligations. English law began to view 'direct' results as those that are presumed to have been considered as the *Hadley v. Baxendale* test evolved.[68] Another key difference is that while *Hadley v. Baxendale* requires both parties to foresee damages, making foreseeability a mutual standard, Pothier's approach considers only what the defendant could have reasonably foreseen. This distinction reflects the differing contractual philosophies of civil and common law traditions.

The foreseeability limitation in this case not only constrained discretionary damage awards by the court but also enhanced the certainty and predictability of contractual liability, ensuring a more structured and consistent approach to compensation. The view of liability for damages in the *Hadley v. Baxendale* judgment is based more on reasonableness, as demonstrated by the foreseeability requirement.[69]

1.2. The issue of foreseeability's origin and the inventiveness of *Hadley v. Baxendale*

There is a debate on the issue of foreseeability's origin. Some scholars refer to Roman law as the first appearance of foreseeability. For example, Liu and Saidov believe that 'it was first established in Roman law',[70] or Ferrari indicates that there is 'a vague attempt to limit the

[68] Diamond, n 34, 44.

[69] Ibbetson, D. (1999). *A Historical Introduction to the Law of Obligations*. Oxford University Press, 231.

[70] Saidov, D. (2002). Methods of limiting damages under the Vienna Convention on Contracts for the International Sale of Goods. *Pace International Law Review*, *14*(2), 333; Liu, C. W. (2003). *Remedies for non-performance: Perspectives from CISG, UNIDROIT Principles and PECL*. Law School of Renmin University of China; Institute

compensation of damages in contract law to foreseeable damages was made in Roman law'.[71] Djordjevic is of the opinion that the roots of foreseeability is Roman law.[72] Lloyd and Chase stated that the foreseeability requirement in *Hadley v. Baxendale* originates in Roman law.[73] Some scholars hold the position that foreseeability is origin from the common law. The German scholars, including Herber & Czerwenka[74] and Reinhart,[75] state that 'the limitation to the foreseeable damages comes from Anglo-American law'. McDowell also agrees with the idea that the foreseeability rule was first introduced in *Hadley v. Baxendale*.[76] Van Houtte noted that Art. 74 foreseeability's origin is from the Anglo-American and that it 'has its origin in the English case *Hadley v. Baxendale*.[77] In contrast, Ferrari rejected the idea that the source of foreseeability was the common law and strongly affirmed that all the foreseeability versions treated in different legal systems, even the English common law of *Hadley v. Baxendale*, is derived from French law.[78] Lookofsky also is of the opinion that the Common law *Hadley v. Baxendale* principle of foreseeability 'seems to have originated in France'.[79] Honnold added that the English *Hadley v. Baxendale* opinion on foreseeability relied on the French approach.[80] Kramer considers that the foreseeability version in all jurisdictions has been taken, directly or indirectly, from Pothier, the eighteenth-century French jurist, who borrowed it from Molinaeus.[81] From these opinions, the central points, which are discussed below, are

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of International Commercial Law, s 14.2.1. Available at: https://iicl.law.pace.edu/sites/default/files/cisg_files/chengwei.html (accessed 5 February 2026).

[71] Ferrari, n 40, 1264.

[72] Kröll et al., n 24, 968.

[73] Lloyd, R. M., & Chase, N. J. (2016). Recovery of damages for lost profits: The historical development. *University of Pennsylvania Journal of Business Law*, *18*(2), 317-8.

[74] Herber, R., & Czerwenka, B. (1991). *Internationales Kaufrecht*. C.H. Beck, 333.

[75] Reinhart, G. (1991). *UN- Kaufrecht: Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den Internationalen Warenkauf*. C.F. Müller, 170.

[76] McDowell, B. (1985). Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness. *Case Western Reserve Law Review*, *36(2)*, 287.

[77] Houtte, H. van. (1995). *The law of international trade*. Sweet & Maxwell, 146.

[78] Ferrari, n 40, 1261.

[79] Lookofsky, n 4, para 290.

[80] Honnold, J. O. (1999). *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed.). Kluwer Law International, para 407.

[81] Kramer, A. (2005). An Agreement-Centred Approach to Remoteness and Contract Damages. In N. Cohen & E. McKendrick (Eds.), *Comparative Remedies for Breach of Contract*. Hart Publishing 2005, 249.

foreseeability as ruled in the *Hadley v. Baxendale* common law and the influence of Pothier's treatment of foreseeability.

Hadley v. Baxendale is widely acknowledged as the turning point in English contract history because it laid the fundamental principle of contract law on remoteness of damages, which became the inspiration for the foreseeability rule in other legal systems and international instruments. However, there have been different views on the contributory source of the foreseeability rule established in *Hadley v. Baxendale*. While it was argued by some scholars that it was invented as a product of industrialization, other scholars stated that the rule came from French law (Pothier's treatise). The two different views are examined by taking into account the economic and legal context and the influence of Pothier's writing on the Common law system at the time of *Hadley v. Baxendale*'s decision.

a. The economic and legal context of Hadley v. Baxendale:

Hadley v. Baxendale has been described as an innovative rule, 'a judicial invention in an age of industrial invention'[82] and 'a fixed star in the jurisprudential firmament'.[83] Did the Industrial Revolution play a role in forming the inventiveness of the *Hadley v. Baxendale* rule? This case emerged during the transformative period of the Industrial Revolution and capital accumulation. The 19th century was characterized by a complex economy, marked by significant technological advancements and a shift from agrarian economies to industrial powerhouses. It was a time of a 'half-matured and unevenly developing nature of the economy', where commercial interactions increasingly involved growing capital agglomerations and pyramiding interlocking of transactions.[84]

This era not only revolutionized production processes but also required the evolution of business practices, especially in contract management. Legal systems also underwent changes as a result of the Industrial Revolution to adapt to the increasing complexity of commercial transactions and social transformation. The law of contracts had to evolve in response to the enormous rise in commercial disputes as a result of the exponential growth in commercial activities. Before industrialization, the English law of contracts was remarkably underdeveloped and damages, in

[82] Danzig, n 22, 250.

[83] Gilmore, G. (1995). *The Death of Contract* (R. K. L. Collins, Ed.; 2nd ed.). The Ohio State University Press, 92.

[84] Danzig, n 22, 259.

particular, were still a matter for the jury.[85] Damages in contract were considered as a matter of fact rather than a matter of law. This created a veil of uncertainty over the functioning of the contract system as a whole, making it challenging to assess its overall functioning effectively.[86] Besides, the discretion of the jury in damages awards allowed the jury to determine the choice of damages. However, this was unacceptable by the middle of the 19th century. Therefore, the need for a limiting device to have the instruction to judges was driven by the eagerness to establish a coherent doctrine. There are attempts to establish damages for breach of contract[87] and the extent of the recoverable loss that resulted 'naturally', 'immediately', or 'necessarily' from 'the breach of the contract itself'.[88] However, these definitions were inadequate, leaving the issue of the extent of losses that could be recoverable uncertain. It was required to have a method to calculate damages so that the recoverable loss is certain and predictable. *Hadley v. Baxendale* formulated the rule of foreseeability to restrict liability in contract that met such requirements and became the leading case on limiting damages in contract.

b. Influence of Pothier and French civil law on the common law of contract:

The need to change the law of contract in the context of the Industrial Revolution urged consultations with various sources, including merchants, commercial practices elsewhere in Europe, and foreign sources. Pothier's *Traité des Obligations* became one of the most influential 'outside' sources and became the solution for the common law treatise writers and judges. Florian Faust also states that Anglo-American judges and authors were already familiar with Pothier's writings.[89] The English version of Pothier's *Traite des obligations* was published in 1806 and spread among Anglo-American judges, writers, and practitioners because it offered the structured framework of general principles of contract law that English lawyers were particularly seeking.[90] It then became the tendency to apply foreseeability as a limitation of liability in both England and the U.S. There are references to Pothier by some American courts

[85] Barnett, n 41, 1602.

[86] Landa, J. T. (1987). 'Hadley v. Baxendale' and the Expansion of the Middleman Economy. *The Journal of Legal Studies*, *16*(2), 455.

[87] See *Robinson v. Harman* (1848) 1 Exch 850, 154 Eng. Rep. 363.

[88] Musgrave, n 61, 358.

[89] Faust, F. (1994). Hadley v. Baxendale - an Understandable Miscarriage of Justice. *The Journal of Legal History*, *15*(1), 41-43.

[90] Id., 61; Atiyah, P. S. (1979). *The rise and fall of freedom of contract*. Clarendon Press, 399.

concerning the foreseeability limit. The decision in *Blanchard v. Ely* of 1839, fifteen years earlier than *Hadley v. Baxendale*, states that 'our courts are more and more falling into the track of the civil law, the rule of which is thus laid down by a learned writer',[91] Pothier. Some other cases also referred to Pothier as the inventor of limitation of liability principle to foreseeability and recognized his rule as the true origin of *Hadley v. Baxendale.*[92]

Pothier's formulation of damages appeared, with some variations, in the writings of Chapman, Kent and Sedgwick.[93] The 1847 *Treatise on the Measure of Damages* of the American legal scholar Theodore Sedgwick was also inspired by Pothier's writings, reusing similar examples used by Pothier. In his writing, he stated that determining the extent of damages is not about full compensation for all losses, but rather about equitably apportioning losses between parties depending on each situation.[94] His works on damages influenced the court's decision in *Hadley v. Baxendale*. The Hadley ruling appeared to support his opinion that liability for damages should be assessed on the basis of reasonableness, which is represented in the foreseeability test.[95] In the written report submitted to the appellate bench in the *Hadley v. Baxendale* case, the counsel of both sides cited the French authority and Sedgwick concerning the limitation of damages views.[96] James Shaw Willes, Baxendale's attorney, was aware of the damage clauses in the French Civil Code and Sedgwick's similar opinions. In his subsequent edition of *Smith's Leading Cases*, he emphasized Sedgwick's influence.[97] In addition, Baron Parke, one of the three judges, in the oral argument, referred specifically to Arts. 1149, 1150 and 1151 of the French civil code - provisions directly shaped by Pothier's treatise, that '[T]he sensible rule appears to be that which has been laid down in France, and which is declared in their code – Code Civil, liv. iii. tit. iii. ss. 1149, 1150, 1151, and which is thus translated in Sedgwick…'. He also brought

[91] *Blanchard v. Ely* 21 Wend 346 (N.Y. 1839).

[92] See *Masterton v. Mayor of Brooklyn* 7 Hill 61 (N.Y. 1845), *Griffin v. Colver* 16 N.Y. 489 (1858)*; Jones v. George* 61 Tex. 345 (1884), *Manss-Owens v. H. S. Owens & Son* 105 S.E. 543 (Va. 1921) and *Sinclair Refining Co. v. Hamilton & Dotson* 178 S.E. 777 (Va. 1935).

[93] Barnes, W. (2005). Hadley v. Baxendale and Other Common Law Borrowings from the Civil Law. *11 Tex. Wesleyan L. Rev.*, 633.

[94] Sedgwick, T. (1847). *A treatise on the measure of damages*. JS Voorhies, 112.

[95] Diamond, n 34, 43.

[96] *Hadley v. Baxendale* (1854) 9 Ex 341, 147-8; Danzig, n 22, 258.

[97] Danzig, n 22, 258.

up Sedgwick's work when discussing the French law on damage.[98] Baron Parke was stated by Professor Simpson to be 'the moving spirit behind *Hadley v. Baxendale.*[99]

c. Before Hadley v. Baxendale, the contemplation rule was well formulated in the other common law system.

As discussed above, there are American cases dealing with foreseeability even before *Hadley v. Baxendale*. There was also an Australian case, *Girard v Biddulph,*[100] twenty years prior to *Hadley v Baxendale,* establishing the foreseeability rule. Captain Biddulph, the owner of a steam-powered mill, requested damages for the loss of profits resulting from the failure to complete the steam engine on time of the defendant manufacturer, Mr. Girard. Chief Justice Forbes of the Supreme Court of New South Wales emphasized the need for 'reasonable and moderate damages' and required specific allegations and proof of special damages for losses beyond the ordinary course. He noted that without explicit evidence of special damage, the plaintiff could only claim for reasonable damages sustained from the time the defendant was supposed to complete the contract to the time the action was brought. Given that early Australian judges had limited access to legal texts, this case is intriguing.[101] It appears that the Australian courts independently adopted a practical approach without consulting any discussions regarding the remoteness of contract law damages. While *Girard v Biddulph* did not establish a precedent as influential as *Hadley v. Baxendale*, it reflects early judicial considerations regarding the foreseeability test as a measure to calculate damages in case of breach of contract in colonial Australia. The case illustrates the challenges that courts faced in balancing the need for fair compensation with the foreseeability principles, even before this principle was formally articulated in English law.[102]

From the texts analyzed above, industrialization in the 19th century indeed challenged business and legal practices in England. In terms of damages for breach of contract, it was necessary to

[98] *Hadley v. Baxendale* (1854) 9 Ex 341, 147-8.

[99] Simpson, A. W. B. (1975). Innovation in Nineteenth Century Contract Law. *Law Quarterly Review*, *91*, 248.

[100] *Girard v Biddulph* [1834] NSWSupC 127.

[101] Barnett, n 41, 1602.

[102] Kercher, B. (2001). Case comment: Colonial Contracts and Expectation Damages: Girard v Biddulph, New South Wales Supreme Court, 1834. *Macquarie Law Journal*. Available at: https://www7.austlii.edu.au/cgi-bin/viewdoc/au/journals/MqLawJl/2001/5.html (accessed 8 February 2025).

have measures to restrict damages and to limit jury discretion in measuring damages. During the search for or invented methods to limit contractual damages, common law judges and practitioners found the solution in Pothier's treatment of damages. In *Hadley v. Baxendale*, neither prior cases as authority is cited nor British legislation or commentaries are invoked in the primary opinion,[103] the case thus appears as an innovative formulation of a new principle in common law. However, the French Code Civil and especially Pothier's writings have a significant impact on reshaping English contract law in general, and on the formulation of the remoteness test in *Hadley v. Baxendale*.[104] Therefore, *Hadley v. Baxendale* represents the transplantation of a foreign rule, driven by the demands of the age of industrial invention rather than the inventiveness of the rule itself,[105] and the rule of remoteness in *Hadley v. Baxendale* is derived from Pothier's foreseeability formulation. Even before *Hadley v. Baxendale*, there were approaches to foreseeability independently made by the courts outside England. Therefore, *Hadley v. Baxendale* is not the first establishment of foreseeability; however, its formulation of foreseeability has become the model for the courts and contributes to the development of foreseeability in other legislations and international instruments.

Some scholars view *Hadley v. Baxendale* as a significant legal innovation, while others see it as an evolution of earlier principles. Although the case borrowed from predecessors like Pothier, it is widely regarded within the Common Law tradition as inventiveness for its time because it introduced a structured and logical framework for assessing damages. Before *Hadley v. Baxendale*, courts awarded damages inconsistently, often relying on vague notions of fairness or causation, leading to unpredictable rulings. There was no consistent rule for determining the scope of contractual liability, which created uncertainty for contracting parties. *Hadley v. Baxendale* changed this by establishing a clear two-limb test, ensuring that damages were limited to foreseeable losses, thereby promoting greater predictability and fairness in contract law.

[103] Danzig, n 22, 254.

[104] Swain, n 55, 10.

[105] Ferrari, n 40, 1267.

2. The continuing influence of Hadley v. Baxendale

2.1. Victoria Laundry (Windsor) v. Newman Industries [1949] 2 KB 528.

Foreseeability's formulation in *Hadley v. Baxendale* was later refined and restated by Lord Asquith in *Victoria Laundry (Windsor) Ltd vs Newman Industries Ltd* (1949) (*'Victoria Laundry')*.[106] The court ruled that if a loss is the natural and immediate consequence of a breach, it is considered to have been within the contemplation of the parties and is therefore compensable. However, if this is not the case, the loss could still be recoverable if it can be demonstrated that both parties could contemplate it with the actual knowledge of particular circumstances.[107]

> "In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.
>
> What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
>
> For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v. Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable."[108]

Under the first rule in *Hadley v. Baxendale,* losses could be recoverable by the plaintiff if any person, as a 'reasonable man', can foresee, based on the presumed knowledge of the nature and character of their contracting partner's business, that damages will naturally result from their

[106] *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 528.

[107] Peel, E. (2015). *Treitel on the law of contract* (14th ed.). Sweet & Maxwell, 965-7.

[108] *Victoria Laundry (Windsor) LD. v Newman Industries LD*. [1949] 2 KB 528.

breach. The second rule of *Hadley v. Baxendale* would allow the plaintiff to recover additional or 'consequential' damages if the plaintiff actually communicates special circumstances to the defendant during the negotiation of the contract, in which damages would result from a breach.[109] The two rules were treated as a single rule with the requirements of two types of knowledge: imputed knowledge (in cases where the loss was a natural and direct consequence of the breach) and actual knowledge (where there was knowledge of special circumstances rendering the loss foreseeable). The court merged the two *Hadley v. Baxendale* rules into a single underlying principle: a defendant is responsible for losses that a reasonable person, possessing the same knowledge and in the same situation, would have foreseen.[110] In contrast to *Hadley v. Baxendale*, which required the contemplation of both parties, *Victoria Laundry* limits contemplation only to the party 'who later commits the breach'. In addition, the court stated that in case of special damages, both the imputed and actual knowledge that the party in breach possessed should be subject to an objective test. It is sufficient that, if the contract-breaker had considered the matter, he would, as a reasonable person, have concluded that the loss in question was likely to result. The contract-breaker, in this case, would be held liable for such loss. The actual contemplation of the parties was not considered as a part of the remoteness test.[111]

2.2. Czarnikow Ltd v Koufos the Heron II ('The Heron II')

The use of the term 'reasonably foreseeable' in *Victoria Laundry* was not accepted as the criterion of remoteness in contract by the House of Lords in the case of *Czarnikow Ltd v Koufos The Heron II* ('*The Heron II*').[112] Lord Reid considered this term a confusing measure of damages between contract and tort and stated it to be more appropriate to liability in tort.[113] The House of Lords distinguished between the contemplation test and the test of foreseeability, treating them as separate and distinct despite their seeming synonymy.[114] Lord Reid proposed a

[109] Landa, n 86, 456.

[110] Winterton, D. (2015). *Money awards in contract law*. Hart Publishing, 231.

[111] Peel, n 107, 1055.

[112] *Czarnikow v Koufos, The Heron II* [1969] 1 AC 350, 389.

[113] Id., 383, 385–6.

[114] Id., 389.

remoteness rule based on ‘reasonable contemplation’ and defined the contemplation test as follows:

> “The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.”[115]

The House of Lords attempted to address the issue of uncertainty regarding the degree of probability of loss, which must have been foreseeable to measure damages. In this regard, Lord Reid proposed the test of whether the defendant contemplated the loss as being ‘not unlikely’ to occur if the contract were breached. He used the phrase ‘not unlikely’ to indicate a degree of probability that was significantly less than an even chance but not very unusual and easily foreseeable.[116] Some phrases, including that the loss was ‘not unlikely’,[117] ‘easily foreseeable’,[118] ‘serious possibility’,[119] ‘very substantial’[120] or a ‘real danger’[121] were used by the Lords to formulate the required degree of probability with which damage must be foreseeable. The decision of the House of Lords outlined the significant role of the relevant degree of likelihood in determining the contemplation of reasonable men.

Generally, the reasonable contemplation test, which arises from *Hadley v. Baxendale* and was refined in cases like *Victory Laundry* and *The Heron II*, has been a landmark in determining remoteness of damages in contract law. While it has become the standard rule and is widely used by the court as a guiding principle, it has also faced significant criticism. This approach is criticized that it is lack of precision. The phrases, like ‘reasonable contemplation’, ‘damage which occurred in the usual course of things’ or ‘not unlikely’, lack clear definitions and precise thresholds. What constitutes a ‘not unlikely’ loss can vary significantly based on judicial

[115] Id., 385.

[116] Id., 383, 385–6.

[117] Id., 383.

[118] Id., 383.

[119] Id., 414-5.

[120] Id., 388.

[121] Id., 425.

interpretation. In addition, there is no clear expression on the extent of the commercial context to be taken into account by the court to evaluate whether damage occurred in the usual course of things.[122] Moreover, it is argued that this test does not effectively address the strategic incentives of parties in a transaction to withhold valuable private information.[123]

3. Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)

Mercator, the owners of the Achilleas, was time-chartered to Transfield for a specified period. The owners had also contracted and fixed a follow-on time charter with a third party, which the charterers were unaware of. The vessel's late delivery caused a delay for the follow-on charter. During this period, market rates dropped significantly. Mercator claimed damages for the delay period and for the reduction in the price of the follow-on charter, which had been on particularly lucrative terms.

The central issue, in this case, was whether the damages to a shipowner for delayed redelivery of a vessel should be restricted to the difference between the charter and market rates of hire for the duration of the extended use, based on the principle of remoteness. The expectation of the market would also appear to be an important factor to take into account when deciding whether the defendant should be held responsible for the loss that has been suffered.[124] The arbitrator, the primary judge, and the court of appeal were all in favor of the shipowners and agreed that it was appropriate to award damages for the period of delay and for the loss of the following charter. The court of appeal's judgment reinforced the foreseeability rule of *Hadley v. Baxendale* while taking into account the commercial context of the shipping industry. The court found that the loss of the follow-on charter was a natural and foreseeable consequence of the late redelivery, and it was common in the shipping industry for delays to disrupt subsequent charters, and the charterers were aware of this commercial reality. The first rule of *Hadley v. Baxendale* was applied to emphasize that damages were recoverable if they arose naturally or were within the reasonable contemplation of the parties at the time of contracting.[125] However, the decision

[122] Harris, M. (2012). Fairness and remoteness of damage in contract law: A lexical ordering approach. *Journal of Contract Law*, *28*, 125.

[123] Johnston, J. S. (1990). Strategic bargaining and the economic theory of contract default rules. *The Yale Law Journal*, *100*(3), 630-4.

[124] McKendrick, E. (2012). *Contract law: Text, cases, and materials* (5th ed.). Oxford University Press, 888.

[125] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, 55-56.

of the court of appeal was ultimately overturned by the House of Lords because they considered that the volatile market conditions, which led to the reduced charter rate, were outside the parties' contemplation at the time of contracting.[126] The House of Lords suggested that something more than simple contemplation of a potential loss under the second limb of *Hadley v. Baxendale* was needed. The five Lords offered nuanced perspectives on the issue of liability for losses, which are very broadly summarized below:

Lord Rodger and Baroness Hale held that the loss in question had not been reasonably contemplated and was therefore regarded as too remote to be recoverable.[127] In their views, the fluctuations of the market rendered the extent of loss suffered, not its nature, not foreseeable. Lord Rodger emphasized what would ordinarily be in the parties' contemplation, restricting recovery to losses that 'generally happen in the ordinary course of things', as the parties would not have had an opportunity to address unforeseen events explicitly.[128] In this case, the loss could not be regarded as 'not unlikely' due to the extremely volatile market.[129] However, there seems problem with their approach to the application of the reasonable foreseeability test because the law requires foreseeability of type, not the extent of loss, while they only took the extent of loss into account.[130]

Both Lord Hoffmann and Lord Hope are concerned about whether the breaching party has assumed liability for the type of losses claimed.[131] Their Lordships took the assumption of responsibility approach as the fundamental basis of limitation of liability for damages and justification for the reasonable foreseeability test.[132] In their views, the liability of a contract-breaker for losses is limited to what he or she (objectively) assumed responsibility for.[133] The losses could not be recoverable if the charterer ought not fairly to be taken to have assumed

[126] Edelman, J., & Bourke, L. (2018). FW Guest Memorial Lecture 2017: *Hadley v Baxendale*. *Otago Law Review*, *15*(2), 219.

[127] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, 91.

[128] Id., 52.

[129] Id., 60.

[130] McKendrick, n 124, 891.

[131] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, 15, 32.

[132] Diamond, n 34, 118.

[133] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, 16, 31.

responsibility for those damages, even if the losses were foreseeable.[134] The state of the market was unpredictable and was beyond the control of the defendant during the second charter agreement period; therefore, a party cannot expect to assume responsibility for these losses.[135] Lord Walker agreed with Lords Hoffmann, Hope and Rodger.[136] He took into account the nature and purpose of the transaction and highlighted the importance of commercial certainty, framing the matter as one of what the contracting parties must be presumed to have in mind.[137]

The House of Lords awarded damages for the period of delay but did not include the loss of the follow-on charter because the charterers had not assumed liability for losses tied to the follow-on charter. From the case, the assumption of responsibility appears as a new approach to liability for damages. A loss may be recoverable if it was unlikely to occur in the usual course of events, provided the defendant cannot reasonably be considered to have assumed responsibility for losses of that specific type. This principle acknowledges that the reasonable foreseeability approach alone is not sufficient to evaluate damages; it must also be consistent with the implicit or explicit allocation of risk within the contractual framework. The assumption of responsibility is a supplement and separate element of the remoteness rule.[138] The defendant's acceptance of responsibility for the losses is the key to determining whether or not the loss is recoverable, and the expectation of the market is crucial to consider whether the defendant is liable for the loss.[139] This approach requires consideration not only of the contractual purpose but also of the business background in which the contract was concluded and the factual matrix.[140] *The Achilleas* decision is widely viewed as a landmark in the development of modern English contract law regarding damages in contract. It introduced a nuanced approach to determining remoteness by emphasizing the assumption of responsibility. This development marked a shift from the traditional reasonable foreseeability test, reflecting the growing need for clarity and fairness in complex commercial transactions.

[134] McKendrick, n 124, 890.

[135] Lord Hope. *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, 34, 36.

[136] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, 87.

[137] Id., 78.

[138] Beale et al., n 53, 1075.

[139] McKendrick, n 124, 891.

[140] Kramer, A. (2014). *The law of contract damages*. Hart Publishing, 291.

The assumption of responsibility approach is said to be a novel test to replace the uncertainty or indeterminacy of the traditional reasonable foreseeability approach. Its establishment is 'to revisit some important general issues [which are] all aspects of how the rule in *Hadley v Baxendale* has been developed'.[141] *The Achilleas* is one of the occasional cases that appeared as an exception where the assumption of responsibility is explicitly considered. The decision in *The Achilleas* is a combination of the reasonable foreseeability approach and the broader approach. It referred to the implicit risk allocation embedded in the parties' agreement to assess the foreseeability of damages. This approach provided much-needed certainty for the shipping industry, aligning with market expectations and practices. However, it did not disrupt the broader principles of law relating to remoteness.

Generally, foreseeability in Common Law has evolved from the rigid two-limb rule established in *Hadley v. Baxendale* to a nuanced approach, as seen in cases like *Victoria Laundry* and *The Achilleas*. While the principle continues to ensure predictability, modern cases have introduced considerations that balance fairness, including commercial context (*The Heron II*) and assumed risks (*The Achilleas*). This evolution demonstrates Common Law's adaptability, refining the application of foreseeability while preserving *Hadley v Baxendale*'s core objective, ensuring that liability aligns with what a reasonable party would have contemplated at the time of contracting. *Hadley v. Baxendale* remains a foundational case, establishing the framework for determining the remoteness of damages. Its principles continue to shape the law, although modern developments like the assumption of responsibility test in *The Achilleas* reflect efforts to adapt to contemporary commercial contexts. In the great majority of cases, the traditional reasonable contemplation as established in *Hadley v. Baxendale* remains the standard approach to foreseeability of damages. Foreseeability's formulation, established in the common law, especially *Hadley v. Baxendale,* contributes to the drafting of foreseeability in Art. 74 CISG and significantly impacts its interpretation.

[141] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, 61, 66.

IV. Model Instruments[142]

The PECL and the UPICC have a broader scope than the CISG,[143] not only covering contracts for the international sale of goods, but are also regarded as useful companions to the CISG.[144] They can therefore assist in interpreting various CISG provisions and are well-suited to fill certain gaps in the Convention.[145] Although neither instrument is legally binding, both are widely recognized as persuasive restatements of modern international contract law and are frequently relied upon by courts, arbitral tribunals, and scholars when interpreting the CISG. This is particularly evident in relation to damages, where the PECL and the UPICC offer practical assistance to a number of interpretative questions arising under the Convention.[146] They also provide important comparative and interpretive guidance for understanding the principle of foreseeability under the CISG. A comparative examination of these instruments helps clarify the meaning and scope of foreseeability, demonstrates the existence of a broader international consensus on the limitation of contractual damages, and contributes to the uniform interpretation of the CISG in accordance with Art. 7.

1. The UPICC

The UNIDROIT Principles of International Commercial Contracts ('UPICC') were written under the auspices of the International Institute for the Unification of Private Law ('UNIDROIT'),[147] and it comprises a set of general rules conceived for international commercial contracts. It was first published in 1994 and was revised in 2004, 2010 and, most recently, in 2016. The scope of UPICC's application is not only to the contract of sale but also to other types

[142] The comparison of foreseeability between the three instruments, the CISG, UPICC and PECL, was published by Nguyen, T. Q. (2024). Comparing foreseeability in contractual damages under the CISG, Unidroit Principles and Principles of European Contract Law. *Pázmány Law Review*, *11*(1), 147–158.

[143] Felemegas, J. (Ed.). (2007). *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*. Cambridge University Press, 31.

[144] Id., 30.

[145] Blase, F., & Höttler, P. (2004). Remarks on the damages provisions in the CISG, Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (UPICC). In *Trans-Lex Law Research*. Available at: https://www.trans-lex.org/100705 (accessed 28 April 2025).

[146] Id.,

[147] The Institute for the Unification of Private International Law, commonly known by its French name as "UNIDROIT," is an independent intergovernmental institution initially established as an adjunct to the League of Nations.

of commercial contracts. The main purpose of the UPICC is to establish a uniform framework for international commercial contracts and to promote uniformity in their interpretation and application across different countries. The UPICC is considered the soft law of international commercial contracts, a guide for harmonizing international commercial contract law by interpreting and supplementing national law and international uniform law instruments, such as the CISG.[148] It is considered a model for the domestic law of several countries.[149] Some reformed domestic contract laws were drafted by reference to the UPICC.[150] The Principles are also cited by both arbitrators and domestic courts in their rulings as the governing rules of law.[151] Many domestic courts and arbitral tribunals resort to the UPICC to assist in interpreting the CISG and other model instruments.[152] The parties can choose the UPICC as the rules of law governing their contract, either by incorporation into their contracts (in whole or in part), or by a straightforward choice of the UNIDROIT Principles.

The dissertation uses the latest version, 2016, for its examination of foreseeability in the UPICC. Chapter 7, Section 4 of the Principles addresses the remedy of damages, including the right to damages (Art. 7.4.1) and the principle of full compensation (Art. 7.4.2), certainty of harm (Art. 7.4.3), foreseeability of harm (Art. 7.4.4), mitigation (Art. 7.4.8), and contributory fault (Art. 7.4.7). Foreseeability is adopted in Art. 7.4.4 of the UPICC, which is inspired by Art. 74 CISG.[153] It is used as a limitation of damages to ensure that the non-performing party is not liable for harm which it could not foresee at the time of the conclusion of the contract and 'against the risk of which it could not have taken out insurance'.[154]

Art. 7.4.4 holds that:

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[148] See UPICC, Preamble.

[149] Bonell, M. J. (2004). UNIDROIT Principles 2004-The new edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law. *Uniform Law Review, 9*(1), 7-8, 13-17.

[150] Vogenauer, S. (Ed.). (2015). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd ed.). Oxford University Press, 91-106.

[151] Bonell, M. J. (2010). The UNIDROIT Principles of International Commercial Contracts: Achievements in practice and prospects for the future. *Australian International Law Journal, 17*, 178.

[152] See Case No. A21-6939/2009 Arbitrazh Court of Kaliningrad Region (Russia) 15 December 2011.

[153] Blase & Höttler, n 145.

[154] UNIDROIT "Official Comments on the PICC" (2016), Art. 7.4.4. [hereinafter *UPICC Commentary*]

> "The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance."

Accordingly, the non-performing party (and its servants or agents) is not liable for harm that the party could not have reasonably foreseen, at the time of concluding the contract, as the result of non-performance that arises in the usual course of events, having regard to the particular circumstances of the contract.[155] Because all harm suffered could be deemed unforeseeable, claims for damages could be limited or even denied altogether.[156] Even if a loss is causally connected to the breach and can be proven with certainty, it will not be recoverable unless it satisfies the foreseeability requirement. Foreseeability is required to be assessed together with the requirement of certainty of harm set out in Art. 7.4.3.[157] The aggrieved party must establish both that the harm was foreseeable (under Art. 7.4.4) with 'certainty (is likely) to flow from such a breach'.[158] In an Arbitral Award No. A-1795/51, the tribunal applied Art. 7.4.3 (certainty of harm) and 7.4.4 (foreseeability) to deny the claim by the aggrieved party for the cost to buy a house at the place of contractual performance.[159] Foreseeability also needs to be considered with causation requirements that, as in most legal systems, the claimant must establish a causal connection between the non-performance and the harm suffered.

The foreseeability test in the UPICC is both subjective and objective. The non-performing party is responsible not only for harm that it actually foresaw in a particular situation, but also for harm which it 'could reasonably have foreseen'. Foreseeability is determined by a 'normally diligent person' who could reasonably have foreseen as a consequence of the non-performance in the ordinary course of things and in each specific contract situation.[160] If the non-performing

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[155] Id.,

[156] McKendrick, E. (2015). Article 7.4.4. In S. Vogenauer (Ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd ed.). Oxford University Press, 995.

[157] UPICC Commentary, Art. 7.4.4.

[158] Eiselen, S. (2002). *Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 74 of the CISG*. Institute of International Commercial Law, Pace University School of Law, para h. Available at: https://iicl.law.pace.edu/cisg/page/use-unidroit-principles-help-interpret-cisg-article-74#editorial (accessed 23 April 2025).

[159] National and International Arbitral Tribunal of Milan No. A-1795/51, 1 December 1996.

[160] UPICC Commentary, Art. 7.4.4.

party had special knowledge of particular risks, liability may extend to those risks even if they would not normally be foreseeable. In case there is no explicit knowledge, the non-performing party is liable for harm if it could reasonably have foreseen. The word 'reasonably' used in this context does not imply a 'reasonable person', it is used to express the reasonable foreseeability of the non-performing party.[161]

The Official Comments on UPICC Art. 7.4.4 further clearly state that the non-performing party includes its servants or agents. Instead of differentiating types of breach as some legal systems do,[162] the UPICC uses the term 'non-performance', which includes every circumstance where a given party fails to perform its contractual obligations. All possible damages caused by non-performance can be measured by foreseeability.

The relevant time to assess foreseeability is the time at the conclusion of the contract. This approach aligns with other model instruments, like the CISG and the PECL, and other national laws. The burden of proof of foreseeability of harm is on the non-performing party. The injured party is required to show that 'it must have been foreseeable that harm with certainty (is likely) to flow from such a breach'.[163]

Under the UPICC, only the type of harm, not its extent, is required to be foreseen unless the extent is such that it effectively transforms the harm into a different type of loss.[164] The non-performing party need not foresee the exact amounts of damages arising from its non-performance. It is sufficient that the general nature of the loss was foreseeable. This approach ensures that the foreseeability limitation does not impose unrealistic expectations regarding the ability of parties to predict the exact consequences of a breach. Besides, Art. 7.4.4 requires that the harm be foreseen as 'likely to result' from non-performance. This phrase indicates that the required probability falls short of certainty but requires more than a mere possibility. In some commercial contexts, a relatively low probability of harm might be sufficient if the potential

[161] Saidov, n 14, 116.

[162] Schwenzer, I. (2002). Rechtsbehelfe und Rückabwicklungsmodelle im CISG, in den European und UNIDROIT Principles, im Gandolfi-Entwurf sowie im Schuldrechtsmodernisierungsgesetz. In P. Schlechtriem (Hrsg.), *Wandlungen des Schuldrechts*. Baden-Baden: Nomos, 49.

[163] Eiselen, n 158, para h.

[164] UPICC Commentary, Art. 7.4.4; Eiselen supports this position, arguing that a similar interpretive approach should be adopted under the CISG (see Eiselen, n 158, para h).

magnitude of loss is substantial and this risk was communicated to the other party. Some national legal systems award damages even for unforeseeable harm if the non-performance results from wilful misconduct or gross negligence; however, there is no such exception expressed in the UPICC.[165] Thus, foreseeability should be interpreted narrowly.[166]

In general, foreseeability established in the UPICC corresponds to the foreseeability solution formulated in Art. 74 CISG.[167] It is used by the courts and tribunals to interpret foreseeability and damages regulated in Art. 74 CISG[168] as a gap-filling tool or to understand the general tendencies.

2. The PECL

The Principles of European Contract Law (PECL) is a set of model rules drafted and promulgated by the Commission on European Contract Law. It was established as a 'response to a need for a Union-wide infrastructure of contract law to consolidate the rapidly expanding volume of Community law regulating specific types of contract'.[169] Part I of the PECL was published in 1995; Part II has been available since 1999, and Part III was completed in 2002. Unlike the UPICC and CISG, which are applicable worldwide, the PECL is specifically designed for the European context. However, they cover a wider scope than both the UPICC and CISG, covering general rules for contract law in Europe that include not only international commercial contracts, but also domestic and consumer contracts.[170]. The PECL aim to facilitate cross-border transactions in Europe, provide guidance to national courts and legislatures, and assist in filling gaps in national laws.[171] The PECL are also soft law and are not legally

[165] UPICC Commentary, Art. 7.4.4.

[166] Id.,

[167] Id.,

[168] See *Sanovo International A/S v. Ovoprot International S.A.*, Cámara Nacional de Apelaciones en lo Comercial (Argentina) 16 October 2013.

[169] PECL, Introduction.

[170] PECL, Art. 1:101; Saidov, n 14, 8.

[171] See PECL, Introduction, Art. 1:101; Lando, O. (1992). Principles of European Contract Law: An Alternative to or a Precursor of European Legislation? *The American Journal of Comparative Law, 40*(3), 577-8.

enforceable. However, they have gained a significant informal influence on law reform in many European countries.[172]

The PECL pursue similar aims[173] and were drafted in a similar style and structure to the UPICC. The similarities between the two instruments can be attributed to the mutual influence of the two drafting groups.[174] They are inspired by the CISG and share close conceptual affinities with the Convention. Therefore, the PECL are useful instrument in assisting the interpretation of the CISG texts.[175]

Chapter 9 of the PECL addresses the remedies available to an aggrieved party in case of non-performance. Section 1 deals with entitlement to remedies generally, Section 2 addresses cure by the non-performing party, Section 3 concerns the right to withhold performance, Section 4 regulates termination of the contract, and Section 5 governs the remedy of damages. Like the CISG and the UPICC, damages solutions regulated in the PECL aim to protect the aggrieved party's contractual interest. The principle of full compensation is subject to several limitations, including causation, certainty, mitigation of loss, and foreseeability. Art. 9:501 establishes the right to damages for loss caused by non-performance. Art. 9:502 articulates the measure of damages as 'such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed'. Foreseeability is set out in Art. 9:503, playing an essential role in balancing the principle of full compensation and avoiding excessive or unforeseeable liability.

Art. 9:503 of the PECL holds that:

> "The nonperforming party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a like result of its non-performance, unless the non-performance was intentional or grossly negligent."

[172] Zimmermann, n 10, 194.

[173] Lando, O. (2001). Comparative law and lawmaking. *Tulane Law Review, 75*(4), 1019.

[174] Bonell, M. J. (2005). *An international restatement of contract law: The UNIDROIT Principles of International Commercial Contracts* (3rd ed.). Transnational Publishers, 338.

[175] Blase & Höttler, n 145.

This Art. 9:503 of PECL, as stated by Reinhard Zimmermann**,** is inspired by French law.[176] Under the PECL, the non-performing party is only liable for loss that, at the time the contract was concluded, he actually foresaw or could reasonably have foreseen, unless the non-performance was committed intentionally or was caused by gross negligence. This provision bears a significant resemblance to its counterparts in the CISG (Art. 74) and the UNIDROIT Principles (Art. 7.4.4), except for its regulation of the exception for intentional or grossly negligent non-performance.[177] This exception, which appears in no other international instruments, reflects a considered policy judgment that a party whose breach is particularly culpable should not be entitled to rely on the foreseeability limitation. The non-performing party is not exempt from liability for loss in case its act of non-performance was intentional or grossly negligent, even if it was unforeseeable. In this case, full compensation is awarded.[178] This approach has deep roots in European legal traditions. Several civil law systems, most notably French law, provide that the foreseeability limitation does not apply in cases of fraud (*dol*) or gross fault (*faute lourde*). This different expression of the PECL may come from its wider application to national and consumer contracts.

The Principles, like other model instruments, apply the subjective and objective elements for the foreseeability test, which require the party not only to foresee but also to be in a position to reasonably foresee the loss. The UPICC's phrase 'could reasonably have foreseen' is also repeated in Art. 9:503, which imposes that the non-performing party was in a position to reasonably foresee that loss. Besides, like the UPICC, the PECL favors the 'non-performance' expression, which differs from English law, where what both parties should have foreseen is the focus rather than the non-performing party.[179] As to the issue of what needs to be foreseen, the PECL's text is not clear; however, the Comments to the PECL suggest that the foreseeability requirement encompasses not only the type or nature of the loss but also its extent.[180]

The foreseeability test in PECL also includes the causation requirement, as other international instruments do. The PECL, like the UPICC, seems to adopt a more restrictive standard with the

[176] Zimmermann, n 10, 193–224.

[177] Gotanda, n 67, 67.

[178] Liu, n 70, s 14.2.6.

[179] Saidov, n 14, 114.

[180] See PECL, Illustration 1, Comment A, Art 9:503.

requirement that the loss suffered is a 'likely result' of the non-performance.[181] This standard occupies a middle ground between mere possibility and certainty. The 'likely result' standard involves a contextual judgment that depends on the nature of the contract, the parties' circumstances, and any information communicated at the time of contracting.

Art. 9:503 fixes the critical time for assessing foreseeability at 'the time of conclusion of the contract'. This temporal reference point, which is similar to the CISG and UPICC, reflects the fundamental policy that liability should be limited to risks that the parties could have taken into account when they assumed their contractual obligations. However, by expressing 'unless the non-performance was intentional or grossly negligent', it may be inferred that the time of foreseeability may be extended to a later time after the contract was made.

In sum, the CISG, UPICC, and PECL all adopt the same basic limitation on damages: a party is liable only for losses that were foreseeable at the time of contracting. The UPICC and PECL discuss these issues in greater detail through comments and illustrations, making them useful for analyzing gaps in Art. 74. They are a useful source in explaining the development, meaning, and application of the foreseeability principle in international contract law.

V. Conclusion

An overview of the underlying history of the rules on foreseeability shows that Roman law did have attempts to limit liability to foreseeable loss, although it is vague. From Roman texts and Molinaeus' idea, Pothier developed the foreseeability limitation. Distilled from Pothier's works, foreseeability was incorporated into modern French law and effectively integrated into Anglo-American law, particularly in *Hadley v. Baxendale*. The dissertation agrees with the argument that foreseeability established in Hadley v Baxendale, one of the earliest and most well-known cases on this limitation, was not an invented rule in the Industrial Revolution period. *Hadley v. Baxendale* is not the origin of the foreseeability test; rather, it is influenced by Pothier's work. Therefore, the foreseeability principle appearing in various legal systems and international instruments comes from Pothier's treatise.

[181] Gotanda, n 67, 67.

There are significant similarities in foreseeability limitation on damages between French law and the common law, as demonstrated by the precedent set in *Hadley v. Baxendale*. Both systems aim to limit liability to losses that are closely connected to the breach (directness in French law, natural and probable consequences in *Hadley v. Baxendale*) and require that damages be foreseeable at the time of contracting to assess what a reasonable promisor could have foreseen. Besides, they apply an objective standard to evaluate foreseeability, and the external factor that the promisor was known at the time of making the contract is a useful tool to evaluate damages.

Despite the shared emphasis on foreseeability, French and English law take distinct approaches, especially in contractual relationships. The French approach to foreseeability focuses solely on the defendant's perspective, assessing what the debtor could have reasonably foreseen at the time of contracting. This unilateral assessment ensures that liability is limited to what the breaching party anticipated. In contrast, the common law approach considers foreseeability from the standpoint of both parties. This distinction highlights a fundamental difference between the two legal traditions in allocating contractual risk. In addition, while the *Hadley v. Baxendale* court rejected the idea that fraud should serve as an exception to the foreseeability rule, French law takes a different approach. Under Arts. 1231-3 and 1231-4, the applicability of damage limitations depends on whether the breach resulted from *dol*. In such exceptional cases involving *dol*, the foreseeability limitation is set aside, and a directness test determines recoverable damages. This distinction highlights a fundamental difference between the two legal systems in addressing intentional breaches of contract. Causation and foreseeability play a significant role in determining the scope of damages recoverable for breach of contract in French law, and they are set out in two separate Articles. The principle of directness requires that there must be a clear and unbroken causal link between the breach and the loss suffered by the injured party, ensuring that only damages directly resulting from the breach are recoverable. This principle serves as a fundamental prerequisite for compensation. The foreseeability test is explicitly incorporated as a requirement for recoverable damages, further limiting recoverable damages to those that were not only directly caused by the breach but also foreseeable at the time of contracting. This two-step approach refines the scope of liability, balancing fairness with contractual predictability. Unlike French Law, the common law does not rely on the principle of directness to establish causation in contract breaches. The basis for determining causation remains less clearly defined,

lacking a singular test equivalent to the directness requirement in French Law. In both legal systems, damages for breach of contract are recoverable only if a causal link exists between the breach and the loss. In French law, this link is explicitly defined by the principle of directness, ensuring that only damages directly resulting from the breach can be claimed. In contrast, the common law lacks a strict equivalent, making the determination of causation less precise. Instead, it relies on a combination of foreseeability and the 'natural and probable consequences' test, which, while resembling directness, does not function as a distinct requirement. In French law, the foreseeability requirement is treated in an autonomous manner as a limit to the principle of full compensation, whereas in English law it appears as an element relating to the directness or indirectness of the harm (remoteness of damage).

Regardless of their similarities and differences, both French Law and English common law have a significant influence on CISG drafting as well as the interpretation of foreseeability.

The principle of foreseeability constitutes an important limitation on contractual damages in both the UNIDROIT Principles and the PECL. The analysis of the two provisions demonstrates a high degree of conceptual and textual similarity, including the subjective and objective approach, the degree of probability, time of foreseeability. This convergence enhances legal certainty in international and European commercial practice and supports the broader objective of developing common principles of contract law across different legal traditions. International arbitral tribunals often refer to the UPICC when interpreting the CISG. Academic literature also regularly compares the CISG with the UPICC and PECL. Both instruments play a vital role in interpreting and filling the gap in the foreseeability rule formulated in Art. 74 CISG.

Chapter III: Damages and Foreseeability in CISG

This chapter provides a brief introduction to the CISG, outlining its history and scope. It then offers a short overview of the Convention's damages framework in general, with particular attention to Art. 74. Additionally, it presents the general understanding of foreseeability under the CISG and Art. 74, as well as its legislative drafting, before proceeding to a detailed analysis of the foreseeability test in the following chapters.

I. CISG in a nutshell

1. History of the CISG

The need for a unified sales law emerged in the early 20th century when legal scholars and international trade organizations realized the challenges posed by different regulations from national laws in cross-border trade.[182] The UNIDROIT made early attempts to harmonize the law governing the international sale of goods.[183] In 1930, Ernst Rabel[184] laid the foundation for later attempts at unification by proposing a comparative study of sales laws.[185] In 1934, UNIDROIT began preparing a draft convention.[186] The first draft, known as the Rome Draft, was introduced in 1939.[187] However, the process was interrupted by World War II, preventing the draft from being completed as an international convention.[188] The 1964 Hague Conventions, which introduced the Uniform Law on the International Sale of Goods ('ULIS') and the Uniform

[182] Ferrari, F. (1994). International business, law merchant, and law school curricula. *Yale Journal of Law & the Humanities, 6*(1), 95–98.

[183] Cohen, K. S. (2005). Achieving a uniform law governing international sales: Conforming the damage provisions of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code. *University of Pennsylvania Journal of International Law*, *26*(3), 603.

[184] The Austrian scholar and academic Ernst Rabel (1874-1955).

[185] Huber, P., & Mullis, A. (2007). *The CISG: A new textbook for students and practitioners*. Sellier European Law Publishers, 2.

[186] Farnsworth, E. A. (1962). Formation of international sales contracts: Three attempts at unification. *University of Pennsylvania Law Review, 110*(3), 306.

[187] Huber & Mullis, n 185, 2.

[188] United Nations Commission on International Trade Law. (1988). *United Nations Convention on Contracts for the International Sale of Goods: Note by the Secretariat* (U.N. Doc. A/CN.9/307). In *Yearbook of the United Nations Commission on International Trade Law 1988* (Vol. XIX). United Nations, 109.

Law on the Formation of Contracts for the International Sale of Goods ('ULF'), were the result of these efforts. The ULIS regulated the international sale of goods, while the ULF exclusively governed the formation of international sales contracts. The ULIS came into force on August 18, 1972, and five days later the ULF entered into force. Nevertheless, these conventions were not very successful and failed to gain widespread acceptance, particularly among non-European countries.[189] They were criticized for being vague and carrying a continental (civil) legal style,[190] which failed to satisfy the expectations of the developing countries, Eastern Europe, and the United States.[191]

Recognizing the limitations of the Hague Conventions, the United Nations Commission on International Trade Law ('UNCITRAL'), which was founded in 1966 to modernize and harmonize cross-border trade laws, took on the task of developing a more universally acceptable legal framework.[192] UNCITRAL started drafting a new convention in the 1960s, with the goal of developing a comprehensive and well-balanced set of rules. In order to revise the existing conventions (ULIS and ULF) or draft a new document that would achieve wider international support, UNCITRAL established a working group in 1968 that was made up of nations from different regions in the world.[193] The drafting process involved extensive negotiations among representatives from a variety of legal and economic backgrounds. Key issues included contract formation, obligations of buyers and sellers, risk transfer, and remedies for breach. The revised draft integrated sales and contract formation rules into a single text, emphasizing clarity, flexibility, and neutrality. The first draft of the proposed convention was completed in January

[189] Bonell, M. J. (1987). Introduction to the Convention. In C. M. Bianca & M. J. Bonell (Eds.), *Commentary on the international sales law: The 1980 Vienna Sales Convention*. Giuffrè, para. 1.2; Schlechtriem, P. (2010). Introduction. In I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed.). Oxford University Press, para. 1.

[190] Kröll et al., n 24, 3.

[191] Winship, P. (1984). The scope of the Vienna Convention on International Sales Contracts. In N. M. Galston & H. Smit (Eds.), *International sales: The United Nations Convention on Contracts for the International Sale of Goods*. Matthew Bender, 11-12.

[192] Honnold, J. O. (1991). *Uniform law for international sales under the 1980 United Nations Convention* (2nd ed.). Kluwer Law International, 50.

[193] Bianca, C. M., & Bonell, M. J. (Eds.). (1987). *Commentary on the international sales law: The 1980 Vienna Sales Convention*. Giuffrè, 5-6.

1976, which was subsequently approved in June 1977.[194] In 1978, it was deliberated and incorporated into substantive sales law as the 1978 Draft Convention,[195] forming the substantive foundation of what would become the CISG. The final text of the CISG was adopted at the Vienna Diplomatic Conference on April 11, 1980, with 62 states participating and 8 international organizations.[196] The purpose of the Convention's establishment is to harmonise the law and ensure a common context and legislative framework in the field of international sale of goods. The CISG became effective on 1 January 1988, initially binding for its first eleven signatory states.[197] Over the years, it has been accepted and recognized worldwide with 97 member states, representing two-thirds of world trade.[198] With widespread acceptance, the CISG has become a modern legal instrument recorded as the most successful international document in unified international sales law[199] and 'the greatest influence on the law of worldwide trans-border commerce', including among non-members.[200] The adoption of the CISG has significantly facilitated international commerce by reducing transaction costs, promoting legal certainty, and improving the efficiency of cross-border supply chains.[201] It has influenced domestic contract laws and served as a reference point for legal reforms. Despite its widespread recognition, the United Kingdom has not ratified the CISG due to its lack of 'legislative priority'.[202]

The historical development of the CISG reflects the international community's efforts to create a fair and predictable legal framework for the international sale of goods. Its broad acceptance

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[194] Schlechtriem, P. (1986). *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*. Manz, 19.

[195] Id.

[196] Bianca & Bonell, n 193, 16.

[197] Schlechtriem, n 189, para. 1

[198] The status of signatories to the Convention is listed on the United Nations Commission on International Trade Law, UNCITRAL. Available at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status. (accessed 15 December 2025).

[199] Rogers, V., & Lai, K. (2014). History of the CISG and its present status. In L. A. DiMatteo (Ed.), *International sales law: A global challenge*. Cambridge University Press, 8.

[200] Schlechtriem, P. (2005). Requirements of application and sphere of applicability of the CISG. *Victoria University of Wellington Law Review*, *36*(4), 781.

[201] Fountoulakis, C. (2005). The parties' choice of "neutral law" in international sales contracts. *European Journal of Law Reform, 7*(3–4), 315.

[202] Moss, S. (2006). Why the United Kingdom has not ratified the CISG. *Journal of Law and Commerce, 25*, 483.

demonstrates its success in bridging legal differences and promoting international trade. As global trade evolves, the CISG continues to serve as a vital instrument in unifying contract law and reducing barriers to cross-border transactions.

2. Content of the CISG

The CISG provides a uniform framework for international sales of goods that applies to contracts for the sale of goods between parties whose places of business are located in different countries.[203] It includes 101 Articles with four parts that regulate the formation of contracts, rights and obligations of buyers and sellers, remedies for breach, and other key aspects of international sales.

Part I ranges from Art. 1 to Art. 13, which establishes both the Convention's scope of application (Chapter I, Arts. 1-6) and general provisions (Chapter II, Arts. 7-13) governing the implementation of its substantive rules (Parts II-III).

Part II (Arts. 14–24) deals with contract formation and conditions for a valid contract, including offer, revocation, acceptance, and withdrawal, as well as timing, manner, and modifications of acceptance.

As the Convention's most extensive section, Part III (Arts. 25–88) covers the provisions for contractual performance obligations of buyers and sellers, remedies in case of breach, and risk allocation mechanisms. It is divided into five chapters: Chapter I (Arts. 25-29) sets out general provisions, including fundamental breach (Art. 25), notices and communications (Arts. 26–27), specific performance (Art. 28), and contract modification (Art. 29). Chapter II (Arts. 30-52) outlines the seller's obligations (delivery of the goods, documentation, conformity of goods, and third-party claims) and the buyer's remedies for seller's breach of contract. Chapter III (Arts. 53-65) details the buyer's obligations (payment, taking delivery) and seller's remedies for buyer's breach of contract. Chapter IV (Arts. 66-70) contains provisions on the passing of risk, which is directly related to the buyer's payment obligation and will consequently be examined in the chapter on payment obligations. Chapter V (Arts. 71-88) covers provisions common to both parties' obligation, such as instalment contracts and anticipatory breach (Arts. 71-73),

[203] CISG, Art.1.

damages (Arts. 74-77), interest (Art. 78), exemptions from the strict liability for damages (Arts. 79-80), contract avoidance consequences (Arts. 81-84), and goods preservation (Arts. 85-88).

Lastly, Part IV (Arts. 89–101) sets out the final provisions, including rules on ratification procedures, entry into force mechanisms, permissible reservations, and territorial application rules.

II. Damages for breach of contract in the CISG

1. Overview of damages for breach of contract in CISG

In the CISG, according to Art. 45(1) (for buyer's remedies) and Art. 61(1) (for seller's remedies), any failure to perform a contractual obligation constitutes a breach of contract, thereby entitling the aggrieved party to claim damages under Arts. 74-77.[204] In the remedial system of the CISG, along with other remedies including right to claim specific performance (Arts. 46 and 62), price reduction (Art. 50) and contract avoidance (Arts. 49 and 64) which are only applicable in certain cases of breach, damages are the most frequently invoked remedy for breach of contract either as the sole remedy or in conjunction with other remedies available under the Convention.[205]

The recovery and measurement of damages are governed by the four interrelated provisions (Arts. 74-77), which establish a comprehensive framework for the recovery of damages arising from the breach of contract.[206] Art. 74 of the CISG establishes the general principle for the recovery of damages, allowing a party to claim compensation for loss resulting from a breach, including loss of profit, provided that such loss satisfies the foreseeability requirement. Art. 75 applies in a specific case where the contract is avoided, and a substitute purchase or resale was made by the aggrieved party. Art. 76 introduces the market price test as an alternative measure of damages when there is a current price for the goods and no actual substitute transaction under Art. 75 has occurred. Finally, Art. 77 places a duty on the aggrieved party to mitigate losses, limiting damages if the injured party failed to take reasonable steps to reduce the loss**.** While

[204] Lookofsky, n 4, para 288.

[205] Kröll et al., n 24, 960; Butler, P. (2018). Damages principles under the Convention on Contracts for the International Sale of Goods (CISG). In J. A. Trenor (Ed.), *The guide to damages in international arbitration* (3rd ed.). Global Arbitration Review, 45. Available at: https://globalarbitrationreview.com/guide/the-guide-damages-in-international-arbitration-archived/3rd-edition. (accessed 06 September 2025).

[206] Butler, n 205, 45.

Arts. 75 and 76 apply exclusively in cases where the contract has been avoided, Art. 74 remains applicable regardless of whether avoidance has occurred. In cases where the contract has been avoided, Art. 74 allows the recovery of additional damages beyond those available under Arts. 75 and 76.[207] Any damages awarded under Arts. 74, 75, or 76 are subject to reduction if it is demonstrated that the aggrieved party failed to mitigate losses in accordance with the obligations set out in Art. 77. Since the Convention adopts the no-fault liability approach, the provisions of Chapter V (Arts. 74-77) serve to measure the extent of the liability established by the no-fault liability standard in Arts. 45 and 61.[208]

In addition to the core damages provisions, the determination of claims for damages may also be influenced by other provisions, including Arts. 6, 7, 8, and 9 (on party autonomy, interpretation, intent, and usages), as well as Arts. 66, 79 and 80. Preservation obligations under Arts. 85–88 may also lead to damage claims.[209]

2. General principles of damages under the CISG

Art. 74 of the CISG establishes the primary rule for damages. It states:

> "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. 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."

Accordingly, an injured party is entitled to compensation for losses, including loss of profit, resulting from a breach of contract. Art. 74 is composed of two key requirements for the recovery of damages. First, the loss must be suffered as a consequence of the breach. Second, the loss must have been foreseeable at the time the contract was concluded.[210]

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[207] Knapp, V. (1987). Article 74. In C. M. Bianca & M. J. Bonell (Eds.), *Commentary on the international sales law: The 1980 Vienna Sales Convention*. Giuffrè, 539.

[208] Lookofsky, n 4, para 288.

[209] Schneider, E. C. (1997). Measuring damages under the CISG: Article 74 of the United Nations Convention on Contracts for the International Sale of Goods. *Pace International Law Review*, *9*(1), 224.

[210] Schlechtriem, P., & Schwenzer, I. (Eds.). (2016). *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed.). Oxford University Press, Art. 74, para 1.

The first sentence sets out the general rule for compensation, providing that the aggrieved party is entitled to a 'sum equal to the loss', which encompasses all damages resulting from the breach, including loss of profit. This formulation embodies two fundamental aspects. First, damages under Art. 74 are strictly monetary in nature, as indicated by the phrase 'sum equal to'.[211] Second, the provision adopts a broad approach to recoverable loss by encompassing any loss resulting from the breach.[212] This excludes non-monetary remedies from the scope of Art. 74, reflecting the Convention's focus on economic restitution. The purpose of Art. 74 is to place the aggrieved party in the same economic position as if the contract had been properly performed,[213] thereby securing the benefit of the bargain.[214] This standard embodies the principle of full compensation,[215] a concept recognized in many national legal systems,[216] model instruments like UPICC and PECL, and international judicial decisions, which aim to eliminate the adverse economic consequences of breach without overcompensating the claimant. Instead of punishing the breaching party, Art. 74 is designed to protect the contractual expectations of the parties and to ensure compensation in the case of breach of contract.[217]

The principle of full compensation is limited by the foreseeability rule provided in the second sentence. This rule functions as a counterbalance to the no-fault liability established under Arts. 45 and 61 by limiting the recoverable damages to those which the breaching party foresaw or ought to have foreseen at the time the contract was concluded.[218] While the first sentence establishes a baseline of full compensation, the second sentence introduces a limitation of

[211] Huber & Mullis, n 185, 269-70.

[212] Knapp, n 207, 540, 543.

[213] Secretariat Commentary, n 9, Art. 70, comment 3.

[214] Farnsworth, E. A. (1979). Damages and specific relief. *The American Journal of Comparative Law, 27*(2–3), 249.

[215] CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA, para 1. [hereinafter *CISG-AC Opinion No. 6*]; Kröll et al., n 24, 957-58.

[216] For example, in Serbian, German, Austrian, French, Italian, Portuguese, and Dutch law.

[217] Hillman, R. A. (1995). Applying the United Nations Convention on Contracts for the International Sale of Goods: The elusive goal of uniformity. *Cornell Review of the Convention on Contracts for the International Sale of Goods*. Available at: https://iicl.law.pace.edu/sites/default/files/cisg_files/hillman1.html (accessed 25 October 2025).

[218] Witz, W., Salger, H., & Lorenz, M. (2000). *International einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*. Verlag Recht und Wirtschaft, Art. 74, para 2; Schlechtriem & Schwenzer, n 210, Art. 74, para 4.

liability grounded in the parties' ex ante expectations. It means the claimed loss, which passes the full compensation principle and causation requirement in the first sentence, must satisfy the foreseeability requirement established in the second sentence to be entitled to recovery. Therefore, foreseeability plays a decisive role as the next filter in determining the recoverability of damages claimed under Art. 74.

The text of Art. 74 of the CISG is substantively similar to Art. 82 of the ULIS and Art. 70 of the 1978 Draft Convention. The jurisprudence and scholarly analysis relating to Art. 82 ULIS remain relevant to the interpretation of Art. 74 CISG.[219] The case law from ULIS has been used as guidance when interpreting Art. 74 CISG, and the Commentary to the 1978 Draft Convention has been used to explain Art. 74 CISG. A key distinction between Art. 74 of the CISG and its ULIS counterparts (Arts. 82 and 83) lies in its broader applicability. Unlike ULIS, which drew a strict distinction between damages claims when the contract remained in force (Art. 82) and when it had been avoided (Art. 83), Art. 74 applies regardless of avoidance.[220]

Art. 74 has been described as a 'brief but powerful' provision.[221] However, this 'brief' also creates significant interpretation challenges. As Blase and Hottler argued, it appears to generate more questions than it resolves.[222] The vagueness of Art. 74 leaves several important questions unresolved, creating room for differing interpretations. Art. 74 does not provide a definition of 'loss' nor does it clearly identify what constitutes full compensation.[223] Notably, the provision does not prescribe specific methods for calculating the loss suffered.[224] Consequently, when faced with complex assessments, courts and arbitral tribunals must determine damages based on the contractual context of each case. While this flexible approach allows the rule to adapt to different factual situations, it also makes the assessment of damages inherently difficult, especially in cases involving complex or uncertain calculations. Moreover, one of the most significant threats to the CISG's goal of international uniformity is the tendency of courts to revert to their own domestic laws (*lex fori*) when interpreting Art. 74, producing divergent

[219] Schneider, n 209, 224.

[220] Schlechtriem & Schwenzer, n 210, Art. 74, para 1.

[221] Honnold, n 80, para. 403.

[222] Blase & Höttler, n 145.

[223] Schlechtriem & Schwenzer, n 210, para 5, 18; Kröll et al., n 24, 962.

[224] Knapp, n 207, 545.

results. Consequently, it risks damages being assessed in an inconsistent and unpredictable manner across jurisdictions, which weakens the uniform application of the Convention and imposes significant challenges in its practical implementation.

III. Foreseeability in CISG

1. Overview of foreseeability in CISG

Foreseeability is expressed not only in Art. 74, but also appears in several provisions of the CISG. Art. 25, in defining fundamental breach, adopts the same consideration.[225] Foreseeability also operates in Art. 79 in determining exemption from liability for impediments.[226] Each provision uses foreseeability in a different context, but always as a mechanism for allocating risk.

Under Art. 25, a breach is considered fundamental only if its consequences were foreseeable to the breaching party or to a reasonable person of the same kind in the same circumstances. This means that the aggrieved party cannot invoke fundamental breach remedies if the party in breach could not have foreseen the particular consequences rendering the breach fundamental.[227] This requirement ensures that a party is not exposed to the more severe consequences of a fundamental breach on the basis of exceptional or unforeseeable circumstances. The presence of foreseeability in Art. 25 is to prevent contract cancellation on grounds that would not warrant so serious a remedy.[228] Its function is to confine the remedy of avoidance to breaches that undermine the contractual relationship and deprive the aggrieved party of the contractual benefit it was entitled to expect. In this way, the foreseeability requirement distinguishes breaches that 'truly disrupt' the parties' contractual relationship from those that, although constituting non-performance, do not justify the exceptional remedy of contract avoidance.[229] Foreseeability

[225] Enderlein & Maskow, n 2, 116.

[226] Albert H. Kritzer. Editorial remarks on CISG Article 74. Available at: https://iicl.law.pace.edu/cisg/page/annotated-text-cisg-article-74 (accessed 6 November 2025).

[227] Enderlein & Maskow, n 2, 116.

[228] Flechtner, H. M. (2008). Remedies under the new International Sales Convention: The perspective from Article 2 of the U.C.C. *Journal of Law and Commerce, 25*(1), 77.

[229] Honnold, J. O., & Flechtner, H. M. (2009). *Uniform law for international sales under the 1980 United Nations Convention* (4th ed.). Kluwer Law International, 278.

operates as both the subjective test – what the breaching party actually foresaw the substantial detriment, and the objective test - what a 'reasonable person of the same kind in the same circumstances' has foreseen such a result. The objective test prevents the breaching party from escaping liability by merely asserting the lack of actual foreseeability. The defense fails unless a reasonable person in the same circumstances would also have been unable to foresee the consequences.[230] Unlike Art. 74, Art. 25 does not expressly identify the relevant time at which foreseeability must be assessed, leaving open the question of whether foreseeability should be determined at the time of contracting, at the time of the breach, or at some other relevant point. This ambiguity has generated divergent views in both the literature and case law concerning the proper relevant time to evaluate foreseeability under Art. 25.[231]

In contrast to certain other CISG articles, Art. 79 does not expressly refer to the foreseeability rule.[232] However, its center on what could and should have been 'taken into account' effectively allows the foreseeability standard to operate with considerable flexibility.[233] Foreseeability is thus clearly relevant to this provision.[234] Although many events capable of constituting an impediment under Art. 79 are, in a general sense, foreseeable, their mere foreseeability does not preclude reliance on the exemption.[235] What matters is whether it was reasonable for the breaching party to have foreseen or taken the impediment into consideration.[236] The relevant standard is whether a reasonable person in the party in breach's standpoint, considering the actual circumstances at contract formation and applicable trade practices, ought to have foreseen the impediment, either initially or as it subsequently emerged.[237] The parties need not consider those that, despite being generally foreseeable, are not reasonably expected to occur before

[230] Kröll et al., n 24, 344.

[231] Enderlein & Maskow, n 2, 116.

[232] Davies, M. (2014). Excuse of impediment and its usefulness. In L. A. DiMatteo (Ed.), *International sales law: A global challenge*. Cambridge University Press, 302.

[233] Enderlein & Maskow, n 2, 323.

[234] Davies, n 232, 305-6.

[235] Enderlein & Maskow, n 2, 323.

[236] Kritzer. Editorial remarks on CISG Article 74, n 226.

[237] Schlechtriem & Schwenzer, n 210, Art. 79, para 14.

contractual performance, or would have no effect on the contract even if they did occur.[238] Where the impediment was reasonably foreseeable, the exemption under Art. 79 is unavailable.

2. Foreseeability in Art. 74

2.1. General

Like other legal systems and model instruments,[239] foreseeability is used in Art. 74 as a method of limiting damages. The breaching party is only liable for foreseeable losses; any damage that is beyond the foreseeability of the party in breach will preclude him from liability. It means Art. 74 strongly confirms the idea that 'having regard to all circumstances of the given case, the party in breach is not liable for a loss he could not foresee'.[240] The establishment of foreseeability is to ensure the link between damages claimed and the contract itself, preventing recovery for losses that fall outside its scope and therefore could not reasonably be expected by the other party.[241] Furthermore, the underlying idea is that the parties, at the time of contracting, should be able to assess the risks they are assuming and the potential extent of their liability arising from their contract.[242] Contracting parties are therefore allowed to evaluate potential risks inherent in the transaction and take appropriate precautions, for example, by deciding whether to assume the risk, obtain insurance, or decline to enter into the contract.[243] This aligns with the expectations of the business community that a party to a contract should not act as insurer of their counterpart's entire contractual venture.[244] Moreover, it encourages parties in a contract to disclose any special or unusual circumstances at the time of contracting, as only those losses which the breaching party knew or ought to have known about may be claimed as damages

[238] Enderlein & Maskow, n 2, 323-4.

[239] See French law, English common law, UPICC, PECL sections in chapter II.

[240] Knapp, n 207, 541.

[241] Principle VII.2 - Principle of foreseeability of loss. Available at: https://www.trans-lex.org/947000 (accessed 12 December 2025).

[242] Bernstein, H., & Lookofsky, J. M. (1997). *Understanding the CISG in Europe: A compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*. Kluwer Law International, 140; Farnsworth, E. A. (1970). Legal remedies for breach of contract. *Columbia Law Review, 70*(7), 1207; Saidov, n 14, 113.

[243] Schlechtriem & Schwenzer, n 210, Art. 74, para 4.

[244] Bridge, M. G. (1997). *The sale of goods*. Oxford University Press, 541.

under Art. 74.[245] Therefore, as a limitation on recoverable damages, the foreseeability rule promotes fairness between the parties to a contract.[246] It protects the aggrieved party's right to compensation while preventing the party in breach from being exposed to excessive or unexpected liability. This balancing function is central to the operation of Art. 74 CISG and supports the need for a coherent and objective framework for assessing foreseeability.

2.2. Historical background

Along with the history of the CISG outlined above, the foreseeability requirement in Art. 74 is also influenced by the work of Ernst Rabel, *Das Recht des Warenkaufs.*[247] Rabel extensively examined the concept of remoteness of damages in contract law, drawing insights from its evolution in French, English, and later, American legal systems (as seen in the Uniform Sales Act).[248] He considered the English and American approach of foreseeability to be 'truer to the ancient approach to contract law' because they refer to parties' intentions, and therefore, advocated for determining foreseeability based on the imputed or actual intentions of the parties in a contract relationship.[249] However, he acknowledged this approach could be 'defective and often fictitious'.[250] Thus, Rabel suggested it is sounder to determine foreseeability from the perspective of a reasonable person with similar knowledge of the relevant parties in the contract than the adequate causation test, which he blamed on its objective nature.[251] He also stated that the best theory for determining damages should depend on 'the sense and scope of the contract', identifying which interests of the creditor the promise should have warranted, and that only these specific interests should be protected by 'concrete' (special) damages in case of breach.[252] Rabel's advocacy for foreseeability found institutional expression in the 1956 draft of the ULIS, where Arts. 82 and 86 adopted foreseeability as a criterion for limiting damages. He hailed this development as a 'striking practical gain' for international sales law, reflecting his belief that

[245] Schlechtriem & Schwenzer, n 210, Art. 74, para 4; Zeller, B. (2018). *Damages under the convention on contracts for the International Sale of Goods*. (3rd ed.) Oxford University Press, 95.

[246] Hart, H. L. A., & Honoré, T. (1985). *Causation in the law* (2nd ed.). Clarendon Press, 230.

[247] Rabel, E. (1936). *Das Recht des Warenkaufs: Eine rechtsvergleichende Darstellung* (Vol. 1). de Gruyter.

[248] Rabel, E. (1938). A draft of an international law of sales. *The University of Chicago Law Review*, *5*(4), 554.

[249] Id., 554.

[250] Id.,

[251] Id.,554-5.

[252] Id.,

foreseeability enhanced both legal certainty and fairness in transnational commercial transactions.[253] Rabel's foreseeability doctrine featured prominently in the 1935, 1939, and 1963 drafts. Given its longstanding acceptance, foreseeability naturally carried over into Arts. 82 and 86 of the Hague Sales Convention, and from there directly into Art. 74 CISG.[254]

Thus, the inclusion of foreseeability in Art. 74 represents not only a convergence of civil and common law traditions but also a direct continuation of Rabel's view that foreseeability is not a test that is merely subjective nor too objective.[255]

2.3. The legislative history of foreseeability in Art. 74 of the CISG

The foreseeability rule in Art. 74 was finalized during the 1980 Vienna Diplomatic Conference, where delegates debated its scope, wording, and underlying principles. As noted above, the discussions were built on earlier drafts from ULIS (1964) and the 1978 UNCITRAL Draft Convention. The legislative history of foreseeability in Art. 74 of the CISG during the 1980 Vienna Diplomatic Conference reveals a strong commitment to the principle as it was initially drafted by UNCITRAL, despite proposals for modification.

- Early UNCITRAL Drafts and the Working Group (Pre-Vienna Conference)

The foreseeability concept entered the drafting process through the Working Group on the International Sale of Goods and was included in the 1977 draft as Art. 55 (later renumbered as Art. 56, and ultimately adopted as Art. 74). This draft version stated:

> "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. Such damages cannot 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 which he then knew or ought to have known, as a possible consequence of the breach of contract."

[253] Rabel, E. (1952). The Hague conference on the uniform sales law. *The American Journal of Comparative Law*, *1*(1/2), 63.

[254] Vékás, n 25, 158.

[255] Rabel, n 248, 554-5.

During the Committee of the Whole I discussions,[256] a significant proposal emerged to replace the foreseeability limitation with the following:

> "Such damages shall not include compensation for loss of a nature which the party in breach could not reasonably have foreseen at the time of the conclusion of the contract or of an extent which would be excessive in relation to the price, the ability of the party in breach to foresee or prevent the loss as well as other circumstances of the case."

This alternative suggested replacing the second sentence of Art. 55 with a more restrictive version, introducing a dual test that limited damages based on both the nature of the loss and its extent in relation to the contract price and the breaching party's ability to foresee or prevent the loss, as well as other circumstances of the case. Proponents argued that the original text was hypothetical and offered little effective guidance, suggesting it was easier to foresee the nature of a loss than its extent. However, this proposal obtained little support and was widely criticized for introducing vague and overly complex standards. The Committee found it would introduce 'many difficulties', particularly in determining 'excessive' damages in relation to price or evaluating 'other circumstances of the case'. Concerns were also raised that it duplicated exemption criteria already addressed in other Articles (like the predecessor to Art. 79 CISG). Consequently, the Committee did not retain this proposal, emphasizing the clarity and utility of the existing foreseeability limitation.[257] Furthermore, a suggestion to entirely delete the second sentence of Art. 55, thereby leaving the limitation of damages to national law, was also rejected.[258] Ultimately, the Committee concluded that 'no change of substance is called for' regarding this Article and recommended its adoption as Art. 56 (later renumbered to Art. 74), preserving the original foreseeability wording.[259]

- 1980 Diplomatic Conference - First Committee Meetings

[256] United Nations Commission on International Trade Law. (1977). *Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods* (Doc. B(1), Annex I; U.N. Doc. A/32/17). In *UNCITRAL Yearbook, Volume VIII (1977)*. United Nations, para 473-479. Available at: https://iicl.law.pace.edu/cisg/page/doc-b1-annex-i-report-committee-whole-i-relating-draft-convention-international-sale-goods (accessed 31 May 2025).

[257] Id., paras 475-7.

[258] Id., para 478.

[259] Id., para 479.

Further discussions took place during the 30th meeting of the First Committee on 31 March 1980, where Pakistan proposed an amendment (A/CONF.97/C.1/L.235) to modify the foreseeability clause (then Art. 70):

> "Such damages may not exceed the reasonable expectation of 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 which he then knew or ought to have known, as a possible consequence of the breach of contract." [260]

Pakistan suggested adding 'reasonable expectation of loss' to clarify foreseeability. This amendment sought to inject an explicit reasonableness standard, aiming to ensure that damages, particularly loss of profit, were not awarded for harms that the breaching party could not reasonably foresee. Ghana's delegate understood Pakistan's intention as an attempt to introduce more objective wording to ensure that claims for loss of profit were not automatic when the breaching party could not reasonably have foreseen the risks. However, Greece's delegate opposed the amendment, calling it a confusing mix of objective and subjective criteria. He maintained that the existing text's criterion was 'objective enough' because it already limited damages to what the party 'had foreseen or ought to have foreseen', making the proposed amendment both unnecessary and potentially confusing. Also, the term 'reasonable' was already used frequently enough in the Convention. The Chairman noted the lack of support for Pakistan's amendment, and it was ultimately rejected by the Committee.[261]

Norway also submitted a structural proposal (A/CONF.97/C.1/L.230) suggesting that provisions on damages (Art. 70–73) be grouped with exemption clauses. While this was referred to the Drafting Committee, it did not affect the substance of the foreseeability standard in Art. 74.

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[260] United Nations Commission on International Trade Law. (1980). *Report of the First Committee: Summary records of meetings-Article 70 became CISG Article 74 (Outline of committee proceedings)* (U.N. Doc. A/CONF.97/11). In *United Nations Conference on Contracts for the International Sale of Goods: Official records*. United Nations. Available at: https://iicl.law.pace.edu/cisg/page/legislative-history-1980-vienna-diplomatic-conference-first-committee-article-74 (accessed 31 May 2025).

[261] United Nations Commission on International Trade Law. (1980). *Summary records of meetings of the First Committee: 30th meeting, 31 March 1980* (U.N. Doc. A/CONF.97/C.1/SR.30). In *United Nations Conference on Contracts for the International Sale of Goods: Official records—Documents of the Conference and summary records of the plenary meetings and of the meetings of the main committees*. Available at: United Nations. https://iicl.law.pace.edu/sites/default/files/cisg_files/Meeting30.html (accessed 31 May 2025).

Ahead of the Conference, several opinions provided input on the draft foreseeability clause. The International Chamber of Commerce (ICC) suggested deleting the second sentence entirely, preferring the limitation of damages of a more general nature. Israel proposed allowing parties to agree on a binding damages formula, subject to judicial moderation if excessive. These ideas, though noted, did not lead to changes in the final text.[262]

The foreseeability clause was ultimately retained with only minor drafting changes. It became the second sentence of Art. 74 CISG, which provides:

> "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 light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract."

The legislative history clearly demonstrates a consistent preference for the foreseeability standard as originally formulated by UNCITRAL. Despite attempts to introduce more complex or alternative limitations, the drafters at the Vienna Diplomatic Conference deliberately chose to maintain the established foreseeability test, deeming it sufficiently objective and practical for determining the scope of recoverable damages under Art. 74 CISG. The rejection of proposals for 'excessive' damages or the inclusion of 'reasonable expectation' underscores the intent to retain a concise and flexible foreseeability standard based on what the breaching party knew or ought to have known at the time of contract conclusion.

[262] United Nations Commission on International Trade Law. (1980). *Analysis of comments and proposals by Governments and international organizations on the draft Convention on Contracts for the International Sale of Goods, and on draft provisions concerning implementation, reservations and other final clauses* (U.N. Doc. A/CONF.97/9). United Nations. Available at: https://iicl.law.pace.edu/sites/default/files/cisg_files/Fdraft.html (accessed 31 May 2025).

Chapter IV: Evaluation of Foreseeability

This chapter studies the evaluation of foreseeability in detail by scrutinizing the key factors involved in determining foreseeability, namely the subjective and objective standards, the knowledge test, the burden of proof, the time of foreseeability, and causation. It seeks to identify the challenges of these factors and propose solutions for a clear and consistent interpretation of foreseeability in determining recovery of damages.

I. Tests for foreseeability

This part examines the question of how to evaluate foreseeability by studying the party who is required to foresee, the two objective and subjective tests, and other relevant factors to assess foreseeability, including the knowledge test.

1. Who is required to foresee?

By limiting damages to losses that 'the party in breach foresaw or ought to have foreseen', Art. 74 places the foreseeability requirement on the party in breach. This is because 'the plaintiff nearly always knows his own business and circumstances better than the defendant'.[263] Assessing foreseeability from the perspective of the party in breach is consistent with the risk-allocation rationale of Art. 74, under which the scope of liability is determined by the risks assumed by the party in breach.[264] As Murphey observes, establishing foreseeability on the part of the breaching party 'surely does not envision delivering a windfall to the plaintiff' by recovering losses that were not foreseen. Instead, the wording directs attention to the party who 'will have to answer for the amount of the loss'.[265] This approach is similar to other instruments of international contract law, notably the PECL and the UPICC, and the French Code Civil, which require only the party in breach to foresee the loss.[266] This position, however, presents a

[263] Corbin, A. L. (2002). *Corbin on contracts: A comprehensive treatise on the working rules of contract law* (Vol. 5). West Publishing, 29.

[264] Saidov, n 14, 114.

[265] Murphey, A. G., Jr. (1989). Consequential damages in contracts for the international sale of goods and the legacy of Hadley. *The George Washington Journal of International Law and Economics, 23*(2), 435.

[266] UPICC, Art. 7.4.4; PECL, Art. 9:503; French Ordinance No. 2016-131, Art. 1231-3.

notable theoretical divergence from the traditional formulation of common law foreseeability originating in *Hadley v. Baxendale*, where both parties are required to foresee damages.[267] However, in practice, English courts, from *Hadley v Baxendale* to later cases such as *The Heron II*, have mostly taken into account the foreseeability of the party in breach.[268] Thus, despite requiring both parties to foresee the loss, the foreseeability of the party in breach is still the main concern to evaluate damages in common law.[269] As Saidov stated, although there is a difference in the formulations of foreseeability, the practical application is often similar, and the CISG's explicit focus on the party in breach is preferable.[270]

While the requirement of the party in breach is reasonable and widely accepted in all legal systems and model instruments, this dissertation suggests the injured party should be required to foresee in certain special circumstances. If the injured party could not reasonably anticipate the relevant events troubling its business relating to the contract with the party in breach to assess the relevant risks and take action, for example, to communicate them to the other party, it is questionable whether the breaching party should bear liability for such loss merely because foreseeability can be imputed to it objectively. The injured party did not treat the risk as significant enough to disclose, requiring the breaching party to have guarded against it is unreasonable. This consideration should apply to contracts where there is a significant asymmetry of information, expertise, or commercial sophistication, or in case the aggrieved party is a large, multinational corporation with specialized knowledge of its own business operations, dealing with a smaller or less professionally equipped counterparty. In such a situation, taking into account the injured party's foreseeability of the loss may contribute significantly to an evidentiary and fair evaluation. As stated by Treitel:

> "The [injured party's] contemplation in such a situation may be necessary to establish the purpose for which he intended to use the subject matter and hence to show that his failure to obtain it actually led him to suffer the alleged loss."[271]

[267] Saidov, n 14, 114; Liu, n 70, s 14.2.3.

[268] Vékás, n 25, 160.

[269] Treitel, G. H. (1988). *Remedies for breach of contract: A comparative account*. Clarendon Press, 159.

[270] Saidov, n 14, 114.

[271] Treitel, n 269, 159.

Therefore, when the injured party, especially an experienced one, did not foresee the loss, it is unreasonable to argue that the breaching party is able to foresee it. The burden then falls on the injured party to prove that, despite its own lack of foreseeability, the defendant had sufficient information, for example, through industry practice or prior dealings, to have foreseen the loss. However, requiring the injured party's foreseeability does not replace the requirements of the party in breach's foreseeability. Rather, it serves as a preliminary, or filtering, inquiry to clarify the nature and purpose of the transaction and to explain how the loss arose, which is crucial in assessing foreseeability. This approach encourages communication between parties in a contractual relationship. To recover exceptional losses under Art. 74, a party is required to notify the other party when concluding the contract, which establishes a subjective standard to evaluate whether the loss is foreseeable.[272]

In conclusion, Art. 74 expresses foreseeability of the party in breach as the crucial factor for assessing damages. This approach is coherent, efficient, and consistent with other legal systems and model instruments. However, consideration of foreseeability on the side of the aggrieved party may be reasonable in exceptional circumstances, not as an independent requirement of foreseeability, but as a supplementary consideration in order to prevent excessive extension of liability where undisclosed or unforeseeable risks were never actually assumed by the breaching party.

2. The test of foreseeability

To evaluate foreseeability, Art. 74 adopts both subjective and objective tests by requiring the party in breach to have 'foresaw or ought to have foreseen' the loss.[273] The subjective test focuses on the actual knowledge of the party in breach, while the objective test considers whether he 'ought to have foreseen' the loss. The breaching party is liable if it is evidenced that it actually foresaw the loss, or was objectively in a position to foresee it.[274] This approach is a 'normative test',[275] which closely resembles the foreseeability formulation in other model

[272] Sutton, J. S. (1989). Measuring damages under the United Nations Convention on Contracts for the International Sale of Goods. *Ohio State Law Journal*, *50*(3), 744.

[273] Id., 743-4; Schlechtriem, n 189, 1019-20.

[274] Liu, n 70, s 14.2.2.

[275] Ehlers, n 20, 18.

instruments, like the UPICC and PECL, and other national laws, like French law or English common law.

By incorporating both objective and subjective tests of foreseeability, Art. 74 effectively places the parties, not the courts, in control of their assumed risks. If the parties wish to limit their liability for damages, they will have an incentive to negotiate clear terms on this matter, for example, limiting the amount of compensation for delays, excluding indirect damages, or including clauses limiting the maximum compensation based on the contract value. Conversely, if they intend to broaden the scope of recoverable damages, they can ensure that the relevant concerns are communicated at the time of contracting, thereby reflecting the breaching party's knowledge of those specific risks.[276]

Although the wording of Art. 74 clearly incorporates both subjective and objective tests, their relationship and practical application are interpreted in various ways.[277] This section will discuss the interpretation of both subjective and objective tests and how the tests work in assessing foreseeability.

2.1. Subjective Foreseeability

The primary and most stringent assessment of foreseeability under Art. 74 of the CISG is whether the party in breach actually foresaw the loss, which serves as the first layer of the foreseeability assessment. The subjective test focuses on the actual knowledge of the promisor. It plays a significant role in case the contracting party is aware of unusual losses that may arise in case of breach,[278] or where the loss suffered is exceptional, or substantially greater than what would normally result from a breach of a contract of the same kind.[279] This makes a little difference between the objective and the subjective test.[280] If a party, during contract formation, anticipates that a breach of contract by the other party would result in 'exceptionally heavy

[276] Kamine, B. S. (2018). *Foreseeability of breach of construction contract damages*. Construction Lawyers Society of America. Available at: https://www.constructionsociety.org/foreseeability-breach-construction-contract-damages/ (accessed 28 June 2025).

[277] Ehlers, n 20, 33.

[278] Cohen, n 183, 611.

[279] Liu, n 70, s 14.2.2.

[280] Schneider, n 209, 229.

losses or losses of an unusual nature', it may inform the other party accordingly.[281] Once notified, the counterparty assumes liability for these damages, rendering the losses foreseeable. Any resulting loss falling within that communicated risk may be recoverable as damages. In this way, subjective foreseeability functions as a mechanism for expanding the scope of liability beyond ordinary or typical losses, provided that actual knowledge can be established. The core establishment of the subjective test, therefore, is to allow the parties to allocate known, specific risks at the formation of the contract. It is argued that the subjective test produces outcomes more favorable to the aggrieved party,[282] particularly when the breaching party was made aware, at the time of contracting, of special circumstances that would not have been expected to foresee the loss.[283] Similar results may arise where the parties have a well-established commercial relationship[284] that establishes a deeper mutual understanding of each other's commercial needs and expectations, or when a party qualifies as a trade specialist,[285] implying a higher level of actual awareness regarding industry-specific consequences.

While this subjective standard theoretically serves to establish liability for actual foreseeable losses, its practical application in limiting recovery of damages remains questionable due to challenges in evidence.[286] The aggrieved party has to prove the foreseeable loss; however, it cannot access the breaching party's private thoughts or intentions at the time of contract formation to prove the breaching party foresaw the loss, who, in litigation, will try to deny such allegation of foreseeability when questioned. The subjective test thus rarely governs outcomes in practice, except where the aggrieved party can demonstrate prior explicit warnings about the specific risk of loss during the process of contract formation.[287] It offers no incentive for admission and often yields to the objective standard instead. In short, the subjective test is doctrinally relevant but appears significantly limited in practical application.[288] It mostly

[281] Cohen, n 183, 611-2.

[282] Kröll et al., n 24, 968.

[283] Schlechtriem & Schwenzer, n 210, Art. 74, para. 51.

[284] Kröll et al., n 24, 969.

[285] Id.,

[286] Huber & Mullis, n 185, 272.

[287] Id., 272-3.

[288] Ishida, Y. (2022). What does 'foreseeable' mean? The scope of damages under CISG Articles 74-77: Reasonability principle of foreseeability - We don't need a crystal ball. *Journal of Law and Commerce*, *40*(2), 247.

serves a complementary role to the objective test, acting as a safety net where clear, communicated foreseeability can be shown.

An important question arises as to what level of subjective expectation is sufficient to justify an award of damages. Art. 74 does not provide further guidance for this issue. In assessing whether subjective foreseeability exists, adjudicators take into account a range of subjective factors relating to the promisor's knowledge at the time the contract was concluded, which will be discussed in section 3 below.

In sum, the subjective test in Art. 74 is a crucial evaluation of foreseeability. It allows parties to manage and allocate specific contractual risks through the disclosure of information, transforming unknown risks into known liabilities. However, its application is challenged by the difficulty of proving it and a lack of textual guidance, leading to judicial and arbitral ambiguity.

2.2. Objective Foreseeability

The party in breach is liable not only for what it actually foresaw but also for what it was in a position to foresee.[289] Liability may arise not only where the loss was actually foreseeable in principle, but where a contracting party failed to take into account risks that a party in its position was expected to anticipate at the time of contracting. While the wording of Art. 74 centers on the breaching party, it still implies an objective evaluation of that party's knowledge, rather than relying solely on a subjective assessment. This means a party cannot escape liability by arguing their actual foreseeability was less than what he should have been in a position to foresee the loss.[290] Objective foreseeability also appears in other instruments of international contract law, notably the PECL and the UPICC. However, by using the phrase 'ought to have been foreseen', the CISG's objective requirement is arguably stricter than the 'could reasonably have foreseen' standard applied in Art. 7.4.4 of the UPICC and Art. 9:503 of the PECL.[291] While the latter formulation focuses on the mere possibility of foreseeability, the CISG's wording seems to impose a duty for the party in breach to foresee the loss. This linguistic distinction introduces a subtle but potentially significant shift from capability to obligation.[292] Nevertheless, it is

[289] Liu, n 70, s 14.2.2

[290] Id.,

[291] Saidov, n 14, 115.

[292] Zimmermann, n 10, 205.

unlikely that this difference in wording produces different results. This statement is supported by the official Comments to both Principles.[293] The Comments on the UPICC explicitly state that Art. 7.4.4 corresponds to Art. 74 of the CISG, while the Comments on the PECL adopt the same language as the CISG when explaining the foreseeability requirement.[294] These explanations suggest that the instruments share a common conceptual approach and that the variations in wording should not be over-emphasized.

A critical issue arising from the objective test concerns the identity of the person who 'ought to have foreseen' the loss. Does this test refer to the breaching party itself, or to a reasonable person in the same circumstances?[295] As discussed above,[296] the CISG requires the breaching party itself, not a putative reasonable person, who should be aware of the potential loss with its specific attributes and knowledge.[297] Foreseeability is assessed from the perspective of the breaching party, taking into account the facts and information that were known or could have been objectively known to that party at the time of contract formation. While adopting the same foreseeability test, Art. 25 CISG explicitly applies a reasonable person standard, stating that a breach is not fundamental if 'a reasonable person of the same kind in the same circumstances would not have foreseen' the loss. In contrast, Art. 74 uses the phrase 'ought to have foreseen' but notably omits any direct reference to the reasonable person. If the drafters had intended Art. 74 to apply the same foreseeability standard as that of Art. 25, they could have used similar language that references the reasonable person. The absence of such expression in Art. 74 suggests that foreseeability under Art. 74 is assessed through what the party in breach itself, not a reasonable person,[298] is objectively in a position to foresee the loss based on the facts and matters it knew or should have known were available at the time when the contract concluded.[299]

Even if the CISG indicates that the party in breach is expected to have foreseen the loss, it remains unclear how to determine whether the loss was indeed one that the party in breach

[293] See UPICC Commentary, Art. 7.4.4; PECL Comment A, Art. 9:503.

[294] Saidov, n 14, 115.

[295] Id.,

[296] See chapter IV: I. 1.

[297] Saidov, n 14, 116.

[298] Id., 115-6.

[299] Liu, n 70, s 14.2.2.

'ought to have foreseen'. This leads to complexity and uncertainty in the interpretation of the objective test. How exactly should liability be evaluated from the perspective of the party in breach? Should it be based on a *bonus pater familias, vir optimus,* or some other benchmarks to determine the limits of liability?[300] Since there is no explicit guidance or elaborate annotation for this objective evaluation under Art. 74, courts and arbitral tribunals have adopted various interpretations to establish a standard for objective foreseeability.

In one case, the tribunal assessed objective foreseeability by considering whether 'any reasonable person of the same kind and under the same circumstances as the defendant' could have foreseen the damage.[301] Similarly, there is a case where the tribunal clarified the objective nature of foreseeability, linking it to the expectations of a 'professional businessman'. The tribunal invoked the UPICC (Arts. 7.4.1 and 7.4.4) and the PECL (Arts. 9.501 and 9.502) to further emphasize the objective foreseeability approach. It ruled that as a professional businessman, the seller ought to have reasonably foreseen that a breach of contract could cause the buyer to incur customs penalties and local legal consequences. The court considered the professional context, asserting that commercial parties must bear a higher standard of foreseeability due to their expertise.[302] In another decision, the court emphasized that foreseeability is not assessed solely from the standpoint of the party in breach, but also from that of a reasonable person of the same kind, placed in the same circumstances. The court also stressed that this assessment requires a comprehensive consideration of the background and process leading up to the formation of the contract and the content of the contract.[303]

In a case, to assess whether the respondent was liable for the claimant's alleged incidental and consequential losses, the tribunal focused on the foreseeability of those damages under Art. 74 of the CISG. The tribunal took the view that 'any reasonable person … would assume that the claimant acts as an agent of the Ministry of Defense in Ukraine'. Because the contract identified the Ministry as the end-user, the tribunal found no reason for the respondent to expect a secondary, independent sale between the claimant and the Ministry. On that basis, the tribunal

[300] Ehlers, n 20, 33.

[301] ICC No. 9187, June 1999 (Coke).

[302] FTCA No. T-9/07, 23 January 2008.

[303] Case No. 2021Da255655 Supreme Court (Korea) 27 September 2023 (Texsus S.p.A. v. Hansung Fiber Co., Ltd).

found that any damages resulting from the claimant's separate contractual dealings with the Ministry of Defense of Ukraine were not foreseeable to the respondent within the meaning of Art. 74 of the CISG and therefore could not be recovered. Accordingly, such claims were dismissed.[304]

Also, in the *Cooling system* case, the Austrian supreme court interpreted objective foreseeability by making reference to the 'reasonable person' standard established in Art. 8 of the CISG. The assessment must take into account whether a reasonable person in the position of the obligor, and having regard to the circumstances of the case, would have foreseen the consequences.[305] The reference to Art. 8(2) is particularly insightful. By cross-referencing this article, the court emphasizes that the 'reasonable person' in the context of foreseeability is not an average individual, but rather a reasonable person in the obligor's specific situation or trade. Instead of applying a general reasonable person standard, it should consider the specific context of the contract.

In *Castel v Toshiba*, the court clarified that when Art. 74 refers to consequences that 'ought to have been foreseen', it speaks of consequences that were objectively foreseeable to the breaching party. The court expressly agreed to treat what 'ought to have been foreseen' as equivalent to what was 'foreseeable'.[306]

In *bullet-proof vest*, the court introduced, by relying on two domestic cases,[307] the concept of an 'ideal promisor', i.e., the prudent and 'reasonable' representative of the circle of transactions in which the breaching promisor belongs, also in light of the purpose of the specific sales contract.[308]

Different interpretations from various courts and tribunals have highlighted the ambiguity in the application of the objective foreseeability test and the lack of a widely accepted standard.

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[304] Vienna International Arbitral Centre (VIAC) No. ARB-5740, 30 October 2024 (Progress v. OTL Firearms and Imports Corporation).

[305] Case No. 7 Ob 301/01t Supreme Court (Austria) 14 January 2002 (Cooling system).

[306] *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] FCAFC 55.

[307] Two domestic cases also concerned Art. 74: Case No. 22513/2003, the Multi-Member Court of First Instance Thessalonika (Greece) and Case No. 63/2006, the Court of Appeals of Lamia (Greece).

[308] Case No. 4505/2009 Multi-Member Court of First Instance of Athens (Greece) 1 January 2009 (bullet-proof vest).

Analysis from these cases demonstrates that judges and arbitrators, when applying Art. 74, interpret the objective foreseeability test as a practical and contextual standard. The objective foreseeability test under Art. 74 is not a rigid rule but a contextual balance. It is agreed that adjudicators must decide on a case-by-case basis[309] to assess whether the loss was foreseeable to the party in breach at the time the contract was concluded. However, general guidance on foreseeability assessment is essential.

Given the ambiguities inherent in the phrase 'ought to have foreseen' and the need for guidance for evaluating foreseeability, this dissertation advocates the application of a reasonable businessperson standard as an appropriate benchmark for determining the objective foreseeability of the party in breach under Art. 74. Although Art. 74 does not expressly reference the reasonable person, the use of 'reasonable person' is consistent with the broader interpretative framework of the Convention, reflecting its underlying emphasis on reasonableness and fairness in a transaction. The term 'reasonable person' first appeared in the ULIS[310] and was subsequently retained in the CISG framework. It is strongly supported by other provisions of the Convention, particularly Art. 8, which establishes interpretative criteria for evaluating a party's conduct and statement.[311] Art. 8(2) adopts an objective standard of reasonableness by requiring that a party's statements or conduct shall be in the manner in which a reasonable person of the same kind as it would have had in the same circumstances, provided that the actual intent of a party cannot be determined. The central element of this provision is the construction of the 'reasonable person' standard. Its application depends on identifying the characteristics that define a person of 'the same kind' and determining which surrounding factors constitute 'the same circumstances'. These considerations are crucial because they establish the benchmark against which the parties' statements, conduct, and expectations are assessed. The core challenge of this provision lies in defining the 'reasonable person', which requires a strict

[309] Huber & Mullis, n 185, 273.

[310] See Art. 9 addressing the usages and their application where the contracting parties have not expressly referred to them.

[311] Zeller, B. (2006). The challenge of a uniform application of the CISG: Common problems and their solutions. *Macquarie Journal of Business Law,* 317.

evaluation of what qualifies as 'the same kind' and 'the same circumstances'.[312] The reasonable person test serves a specific and limited function, eliminating the possibility of a party escaping liability by relying on their unreasonableness.[313] A similar approach is evident in Art. 25, which expressly incorporates an objective foreseeability test by reference to what 'a reasonable person of the same kind in the same circumstances' would have foreseen. This objective standard should be applied when assessing foreseeability under Art. 74 because foreseeability constitutes an underlying general principle of the CISG pursuant to Art. 7(2) and operates analogously across both Art. 25 and Art. 74.[314]

Reasonableness plays a significant role in assessing what a party should have foreseen.[315] By applying the objective intent under Art. 8, it becomes possible to assess whether the party in breach should reasonably have foreseen the consequences resulting from the breach.[316] This provision establishes an objective but contextual standard, directly related to the assessment of foreseeability under Art. 74.[317] Therefore, to assess objective foreseeability, it is appropriate to refer to a reasonable person in the same circumstances who would have foreseen the loss.[318] Accordingly, in the context of international sales law, the assessment should focus on a reasonable businessperson who possesses comparable attributes and relevant knowledge at the time of making the contract, operating under the same contractual and commercial circumstances as the breaching party. This approach aligns with most scholars' positions and judicial decisions. Scholars normally read objective foreseeability as 'a reasonable party in the

[312] Lautenschlager, F. (2007). Current problems regarding the interpretation of statements and party conduct under the CISG-The reasonable third person, language problems and standard terms and conditions. *Vindobona Journal of International Commercial Law and Arbitration, 11*(2), 262.

[313] Graffi, L. (2003). Case law on the concept of "fundamental breach" in the Vienna Sales Convention. *International Business Law Journal (Revue de droit des affaires internationales), 2003*(3), 340.

[314] Huber & Mullis, n 185, 216; Zeller, B. (2007). The remedy of fundamental breach and the United Nations Convention on the International Sale of Goods (CISG): A principle lacking certainty? *Vindobona Journal of International Commercial Law and Arbitration, 11*(2), 226; Koch, R. (1999). The concept of fundamental breach of contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG). In Pace International Law Review (Ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*. Kluwer Law International, 264, 322. Available at: https://iicl.law.pace.edu/sites/default/files/cisg_files/koch.html (accessed 27 June 2024).

[315] Zimmermann, n 10, 205-6.

[316] Zeller, B. (2011). Penalty clauses: Are they governed by the CISG? *Pace International Law Review, 23*(1), 10.

[317] Id.,

[318] Enderlein & Maskow, n 2, 301.

same situation could expect the loss from its non-performance,'[319] or 'a reasonable person in the shoes of the promisor and aware of the circumstances at the time of the conclusion of the contract would have foreseen'.[320] It is generally accepted that the test asks whether a reasonable person in the same situation, with the same knowledge at the time of contracting, would have foreseen the loss. This approach would allow the court to assess the logical allocation of damages and the associated contractual risks between the parties.[321]

The question then arises as to how a reasonable businessperson would be applied to assess objective foreseeability under Art. 74. The term 'reasonable person' has frequently drawn criticism for its conceptual uncertainty.[322] Legal scholarship offers diverse and inconsistent definitions of this standard, with no uniform standard prevailing.[323] While the reasonable person standard must be applied on a case-by-case basis,[324] further specification is essential to address the circumstances of each case. The 'reasonable person' should not be understood as a general or abstract person but must be given a concrete manner. In the context of the CISG, resorting to domestic standards of care or professional skill that prevail among businesspersons within their own country should be avoided.[325] Instead, the assessment must be conducted autonomously and take into account the CISG's international character, considering the commercial context of the transaction, the relevant trade practices, and the expectations of reasonable merchants engaged in international trade. To apply this standard effectively in practice, this dissertation suggests several elements for identifying the reasonable businessperson to assess the objective foreseeability under Art. 74. These proposed elements are drawn from CISG commentaries and opinions, scholarly writings, judicial decisions, and commercial practice relating to all relevant provisions on damages in the CISG.

[319] Kröll et al., n 24, 968 citing Schlechtriem, P., & Butler, P. (2009). *UN law on international sales: The UN Convention on the International Sale of Goods*. Springer, para 302. See also Cohen, n 183, 612; Vékás, n 25, 162.

[320] Schlechtriem & Schwenzer, n 210, Art. 74, para 51.

[321] Vékás, n 25, 162.

[322] Kröll et al., n 24, 223.

[323] Lautenschlager, n 312, 262.

[324] DiMatteo, L. A. (1997). The counterpoise of contracts: The reasonable person standard and the subjectivity of judgment. *South Carolina Law Review, 48*(2), 301.

[325] Felemegas, n 143, 28.

First, the reasonable businessperson must be in the same position as the party in breach. This requires the adjudicator to consider the specific attributes of the breaching party, including consideration of the party's role in the transaction, its business background, and experience.[326] A reasonable businessperson with decades of experience in a particular trade would be expected to foresee different risks than a newly established startup in the same field. Besides, the business size and level of sophistication are also important to consider. A multinational corporation, for example, a corporation with dedicated legal and compliance departments, is held to a different standard of objective foreseeability than a small, local business. The 'reasonable businessperson' for the former is a sophisticated global entity; for the latter, it is a competent local merchant. When evaluating the parties' sophistication, consideration should be given to their individual or organizational understanding of the implications arising from a specific contractual event. [327] In addition, it is necessary to assess professional identification and commercial function in the relevant sector.[328] The reasonable businessperson standard must be trade-specific because the standard of reasonableness can vary substantially across different trade sectors.[329] Thus, a reasonable businessperson is the one engaged in the same specific trade or industry as the breaching party.[330] It assesses foreseeability by asking if a reasonable person, operating within the same industry and circumstances as the breaching party, would have known about the potential consequences of the breach. If a reasonable businessperson in the defendant's trade would have foreseen the loss, then the breaching party 'ought to have foreseen' it. Unlike a general 'reasonable person, the standard is specifically tied to the conduct of a party in the specific industry and commercial realities of the transaction. This standard makes the foreseeability criterion more impartial by linking it to a person engaged in the same branch of business, rather than to an abstract, universal standard of reasonableness.

Second, the reasonable businessperson should have, or is supposed to have, the same knowledge as the party in breach would have in the particular contractual circumstances.[331] This

[326] See case FTCA No. T-9/07, 23 January 2008.

[327] DiMatteo, n 324, 318.

[328] Schlechtriem & Schwenzer, n 210, Art. 8, para 21.

[329] Graffi, n 313, 340.

[330] Schlechtriem & Schwenzer, n 210, Art. 8, para 25.

[331] See section 3.1 'Knowledge' below.

includes knowledge gained from pre-contractual negotiations, contractual terms, established course of dealing, and relevant trade practices. Information provided by the aggrieved party regarding specific risks or sensitive issues must also be taken into account, as such information shapes what a reasonable businessperson in the breaching party's position ought to have foreseen.

Thirdly, the reasonable businessperson should be one who typically enters into the particular type of contract under the circumstances involved. This criterion emphasizes that the standard is tied to the specific transaction type, not just the general profession, to ensure that foreseeability is assessed against the expectations and risk awareness normally associated with the relevant trade or industry. For instance, a reasonable businessperson entering into a contract for the sale of seasonal goods would foresee that a delay in delivery could render the goods worthless. A reasonable businessperson contracting for the sale of raw materials to a manufacturer would foresee that a breach could cause production stoppages. Consideration should be given to the specific circumstances of the parties and context in which the contract was formed,[332] including the background and process leading to its conclusion, as well as the actual terms of the agreement.[333] Particular attention should be given to the circumstances surrounding the formation of the contract, the factual and commercial background leading to its conclusion, the course of negotiations between the parties, and the substance of the contractual terms ultimately agreed upon. This includes their technical background, language, cultural differences, and general knowledge of the market conditions, supply chain realities, and relevant events affecting performance.[334]

Thus, the objective foreseeability asks what a reasonable businessperson of the same kind, in the same position, with the same knowledge, and engaged in the same type of contract would have foreseen the loss. Applying these criteria to identify the 'reasonable businessperson' standard provides a clearer method for assessing the objective foreseeability test in Art. 74. It avoids the vagueness of a general 'reasonable person' standard by adhering to the specific

[332] DiMatteo, n 324, 318.

[333] Case No. 2021Da255655 Supreme Court (Korea) 27 September 2023 (Texsus S.p.A. v. Hansung Fiber Co., Ltd).

[334] Farnsworth, E. A. (1987). Article 8. In C. M. Bianca & M. J. Bonell (Eds.), *Commentary on the international sales law: The 1980 Vienna Sales Convention*. Giuffrè, 99.

context of the party in breach and the nature of the contract. This approach provides adjudicators with a more precise tool for determining whether the actual breaching party should be held liable for the loss. It also provides clearer guidance on the general phrase 'ought to have foreseen'.

As noted, although Art. 74 expressly requires both subjective and objective tests, foreseeability is normally interpreted as an objective requirement.[335] In practice, courts and tribunals also rely on what the party in breach 'ought to have foreseen' to determine recovery of loss.[336] This is because of the difficulty in proving evidence of subjective foreseeability.[337] Therefore, the subjective consideration is often ignored or limited, and the objective 'ought to have foreseen' standard is treated as the only measure. However, this dissertation submits that foreseeability should be evaluated by both subjective and objective tests, and the subjective test should be considered first and foremost.[338] This is effectively applied by the court in the *bullet-proof vest* case, where it carried out a thorough application of Art. 74 of the CISG. The court begins with an individualized (subjective) assessment of the promisor's foreseeability, and if it is not concluded that the promisor had foreseen the damage, then it is examined whether he ought to have foreseen the damage.[339] The subjective and objective tests operate in a complementary relationship. The objective test applies where actual knowledge cannot be proven and provides an alternative basis for liability based on what a reasonable person would have foreseen. It, however, does not operate to reduce liability below what the party actually foresaw. If the party possessed special knowledge that made a particular loss foreseeable, even if that loss would not be foreseeable to a reasonable person without such knowledge, the party is liable. While subjective foreseeability introduces evidentiary challenges and potential uncertainty, it plays an indispensable role in ensuring that liability reflects the actual informational position of the

[335] Radetzki, M. (1999). Cause and Damage: Interpretation of Liability-activating Causation Terms in Property Insurance. *Scandinavian studies in law*, *38*, 334; Herre, J. (1996). *Ersättningar i köprätten: Särskilt om skadeståndsberäkning*. Stockholm, 408; Ramberg, J., & Herre, J. (1995). *Köplagen*. Stockholm, 399.

[336] United Nations Commission on International Trade Law. (2016). *UNCITRAL digest of case law on the United Nations Convention on Contracts for the International Sale of Goods*. United Nations, 337. [hereinafter *UNCITRAL Digest 2016*].

[337] Ishida, n 288, 247.

[338] Flambouras, D. P. (2009). Case law of Greek courts for the Vienna Convention (1980) for International Sale of Goods. *Nordic Journal of Commercial Law, 2009*(2), 31.

[339] Case No. 4505/2009 Multi-Member Court of First Instance of Athens (Greece) 1 January 2009 (bullet-proof vest).

breaching party. A balanced approach of subjective and objective tests preserves both doctrinal integrity and practical workability within the framework of Art. 74 CISG.

3. Criteria to evaluate foreseeability

Foreseeability under Art. 74 is not an isolated concept but is shaped by other contextual elements influencing what a party foresaw or ought to have foreseen the loss. Contract terms, actual and constructive or imputed knowledge, and trade usage all serve as key tools for assessing foreseeability. Considering these elements when evaluating foreseeability is essential to identify the specific expectations and risk allocation of the contracting parties. The following sections will examine the criteria employed to assess subjective and objective foreseeability.

3.1. Knowledge

In defining the scope of foreseeability, the knowledge test plays a crucial role.[340] The contracting parties are required to take into account 'the facts and matters of which he then knew or ought to have known'. Along with the subjective and objective tests of foreseeability, Art. 74 also establishes two distinct bases for determining knowledge, namely actual and imputed or constructive knowledge.[341] With actual (*de facto*) knowledge, foreseeability is assessed by what the party in breach foresaw the loss, based on facts and matters of which he then knew. Conversely, imputed knowledge treats the party in breach as having been able to foresee the consequences of the breach if it was objectively in a position to know the underlying facts and circumstances.[342] It means that the liability of the party in breach may be derived from the knowledge disclosed by the other party to the contract, or from the knowledge of the relevant traders, provided that such knowledge can be expected of these relevant traders.[343]

Although the CISG expressly requires the knowledge element, it provides no definition of the knowledge test.[344] Notably, it did not employ a revised version of Art. 13 ULIS, which had

[340] Saidov, n 14, 116.

[341] Id.,

[342] Knapp, n 207, 542.

[343] Murphey, n 265, 451.

[344] Fogt, M. M. (2015). The knowledge test under the CISG: A global threefold distinction of negligence, gross negligence and de facto knowledge. *Journal of Law & Commerce, 34*(1), 28.

directly addressed this issue.[345] In addition, there is no interpretative guidance regarding what constitutes 'knowledge' for these purposes, nor how courts should evaluate it.[346] This silence has produced doctrinal uncertainty that cannot be resolved through a simple reading of the Convention and inconsistent judicial reasoning.

Elsewhere within the Convention, there are several references to degrees of knowledge.[347] The term 'knew' is not a single use at Art. 74, but also appears in other provisions of the CISG. Thus, interpretation of actual knowledge is also supported by other similar terms, for example 'made known'[348] or 'become aware'[349] or 'to make known'[350] or 'is aware'.[351] Also, the phrase 'ought to have known' is located at other places in the CISG, including Art. 9(2), Art. 49(2)(b)(i), Art. 79(4), Art. 68, Art. 2(a), Art. 38(3). Besides, other similar terms, namely 'ought to have discovered',[352] 'ought to have become aware of',[353] 'would have had'[354] or 'would not have',[355] are also useful to determine the imputed knowledge.[356] Therefore, interpretations of these terms may provide valuable guidance in other areas of the Convention, including evaluation of foreseeability provided under Art. 74.[357]

This section examines the application of the knowledge test in Art 74. It analyzes how actual knowledge ('knew') is identified and proven, how imputed knowledge ('ought to have known') is interpreted, and what degree of knowledge suffices to render particular losses foreseeable.

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[345] Id., 92.

[346] Id., 27-28.

[347] Amissah, R. (1997). *Cross-references and editorial analysis: Article 65*. Institute of International Commercial Law, Pace University School of Law. Available at: https://iicl.law.pace.edu/sites/default/files/bibliography/missing_specifications_in_international_sales.pdf. (accessed 18 August 2025).

[348] CISG, Art. 35(2)(b).

[349] CISG, Arts. 43(1), 49(2)(a), 64(2)(a).

[350] CISG, Art. 48(2)–(3).

[351] CISG, Art. 69(2).

[352] CISG, Art. 39(1).

[353] CISG, Art. 43(1).

[354] CISG, Art. 8(2).

[355] CISG, Art. 25.

[356] Fogt, n 344, 38.

[357] Article 74 Words and Phrases. Available at: https://iicl.law.pace.edu/cisg/page/article-74-words-and-phrases (accessed 12 January 2026).

The analysis draws upon the general principles and provisions of the Convention, relevant case law, scholarly commentary, and practices prevailing in international trade.

3.1.1. Actual knowledge

Actual knowledge refers to the facts and circumstances that the party in breach was demonstrably aware of at the time of the contract's conclusion, or where it had been duly notified of the risk of such consequences by the other party at the time of contracting.[358] Questions arise on what constitutes 'actual knowledge' under Art. 74 and how to evaluate actual knowledge? The CISG gives no specific interpretation of the identification of actual knowledge,[359] requiring examination of case law, scholarly commentary, and the Convention's underlying principles. The interpretation of the subjective intent of the contracting parties, according to Art. 8(1), as well as other reference provisions to actual knowledge in CISG, are useful sources to identify actual knowledge provided in Art. 74.

The knowledge must relate to 'facts and matters' that make particular loss consequences foreseeable, not merely general awareness that a breach might cause some damage.[360] To evaluate actual knowledge, various elements are required to be proved. Explicit contractual clauses and other written communications provide the most reliable evidence of actual knowledge. Besides, pre-contractual negotiations and correspondence, and the course of dealing between the parties may demonstrate that specific information was conveyed to the breaching party. In addition, trade usages and practices are a valuable source to evaluate actual knowledge.[361] In one case, the court stated that damages caused by the surrounding circumstances of one party could only be covered if those circumstances were known by the other party at the time of the conclusion of the contract. Because the buyer failed to prove such knowledge or foreseeability at the time of the conclusion of the contract, it was not entitled to such damages.[362] There is a case where the court dismissed the claim for damages because the seller did not know that the buyer intended to export the goods outside the European Union.

[358] Liu, n 70, s 14.2.4; Knapp, n 207, 542.

[359] Rauda, C., & Etier, G. (2000). Warranty for intellectual property rights in the international sale of goods. *Vindobona Journal of International Commercial Law and Arbitration, 4*(1), 44.

[360] Knapp, n 207, 542.

[361] See section 3.2.2 below.

[362] Case No. 3 U 83/98 Appellate Court Bamberg (Germany) 13 January 1999 (Fabric).

Furthermore, in the parties' earlier exchanges regarding the goods, no information was ever given by the buyer as to the final destination of the goods. Thus, the seller did not know about the supplementary restrictions as to the quality and that the goods' contamination with fluorocarbons would be an obstacle to their export. Therefore, the seller could not have foreseen that additional costs might be incurred by the buyer.[363]

Regarding the question of how specific actual knowledge should be, this dissertation submits that it depends on whether the loss is ordinary or extraordinary to decide the degree of knowledge. The degree of required knowledge correlates with the atypicality of the loss. As noted, recovery of the unusual or extraordinary loss is limited to what the party in breach foresaw such loss.[364] Therefore, the more unusual the loss, the more precise the knowledge must be. For instance, ordinary losses (e.g., market price differentials, standard lost profits in resale contracts) generally require only knowledge of the commercial nature of the transaction, while extraordinary or atypical losses (e.g., unusually high penalties owed to third parties, speculative downstream profits) require specific disclosure.

Therefore, actual knowledge of relevant facts and matters plays a vital role in determining foreseeability under Art. 74, particularly in cases involving exceptional or unusual losses.[365] It encourages parties to the contract to disclose crucial information about their specific needs or potential extraordinary losses at the time of entering into the contract.[366] Where a party knows at the time of contract formation that the other party's failure to perform the contract could result in exceptional or unusual losses, it may disclose that information to its counterparty. Such disclosure provides crucial evidence for determining whether damages can be recovered.[367] By doing so, it puts the other party on notice, allowing them to adjust their performance, pricing, or risk mitigation strategies accordingly.[368] For instance, if the buyer informed the seller that these specific raw materials were needed for a one-time, extremely lucrative government contract with

[363] Case No. VIII GC 262/16 District Court of Szczecin (Poland) 4 October 2017.

[364] See section 2.1 above.

[365] Saidov, n 14, 116.

[366] Alhajaj, A. M. A. H. (2015). *The concept of fundamental breach and avoidance under CISG* (Doctoral dissertation, Brunel University London). Brunel University Research Archiv, 102. Available at: https://bura.brunel.ac.uk/handle/2438/12043 (accessed 10 September 2025).

[367] Saidov, n 14, 116.

[368] Liu, n 70, 205.

severe penalty clauses for delay, the specific penalties from that government contract (which would not be ordinarily foreseeable) become foreseeable if the seller breaches the contract. Without such information provided by the buyer, there was no actual knowledge established in the party in breach, and therefore, liability for the penalty clause may be excluded, provided that they are governed under the CISG. This enables the injured party to recover for damages that would otherwise be considered too remote or unforeseeable under the objective foreseeability. In such cases, actual knowledge can significantly expand liability beyond what would otherwise be expected under the objective test.

However, actual knowledge assessment is challenged by the evidentiary burden that is nearly impossible to discharge.[369] Under subjective foreseeability, it is challenging to prove that the breaching party actually knew the relevant facts at the time when the contract was made.[370] In practice, this requirement poses significant evidentiary and methodological challenges, often leading courts and arbitral tribunals to frequently rely on imputed knowledge instead. In the *Cooling system* case, the court found that the lower courts had inadequately considered the role of foreseeability under Art. 74 as a limitation on the recovery of damages. The trial court failed to assess the seller's subjective foreseeability of the risk when concluding the contract. Given that the seller knew both the installation location and the operating conditions of the table cooler, it should have foreseen that defective performance could result in losses.[371] To establish actual knowledge, the claimant must demonstrate that the relevant information was communicated to the breaching party, who was aware of the factual circumstances, and understood that these circumstances created a risk of loss in the event of breach.

There is an argument put forward in favor of a partly subjective test, that the expertise of a party needs to be taken into account.[372] However, this dissertation does not support this idea and states that actual knowledge should be referred to what the fact and matter the party in breach is actually aware of. 'Actual knowledge' under Art. 74 refers to the specific, factual information

[369] CISG-AC Opinion No. 22, The seller's liability for goods infringing intellectual property rights under Article 42 CISG, Rapporteur: Dr. David Tebel, rothorn legal, Frankfurt am Main, Germany, para 8.2.

[370] Fogt, n 344, 40; Farnsworth, n 334, 99.

[371] Case No. 7 Ob 301/01t Supreme Court (Austria) 14 January 2002 (Cooling system).

[372] Schwenzer, I. (Ed.). (2013). *Schlechtriem & Schwenzer: Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* (6th ed.). C.H. Beck, 595.

that the breaching party actually possessed or was explicitly made aware of at the time of contract conclusion. It requires more than a vague suspicion or general understanding. The knowledge must be concrete enough to allow the breaching party to appreciate the loss that could result from a breach, even if not the exact monetary amount. It acknowledges that parties enter into contracts based on a certain understanding of the potential consequences of their actions.

3.1.2. Imputed knowledge 'ought to have known'

The imputed knowledge transforms Art. 74 from a purely subjective test into one with objective elements. A party is liable for loss if he ought to have known the relevant facts and circumstances at the time of contracting, even if actual knowledge cannot be established under the subjective test.[373] Imputed knowledge is measured based on 'those facts that would be disclosed by an investigation or inquiry that the party should make'.[374] By applying this imputed knowledge, minimum standards of commercial awareness applicable to all participants in international trade are established. It thus reflects professional responsibility in international commerce. Imputed knowledge applies where a loss is not of a special type or extent, meaning that relevant knowledge and foreseeability are objectively presumed.

As discussed above, the Convention requires the breaching party, not a general putative reasonable person, to foresee the loss. The assessment of the objective test attributes to the appraiser not only a general understanding of the relevant business sector, but also the specific knowledge available to the party in breach.[375] As stated in Trans-Lex, the objective test is assessed by asking what a reasonable person placed in the same position as the party in breach would have foreseen.[376] Therefore, the objective knowledge examines what a reasonable businessperson in the same circumstances and with comparable professional skills and expertise to the party in breach was aware of the facts and matters resulting from the breach of contract.[377]

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[373] Liu, n 70, s 14.2.4.

[374] Honnold, n 80, para 229.

[375] Lando, O. (1991). *Udenrigshandelens kontrakter: Udenrigshandelsret 1* (4th ed.). Juristforbundets Forlag, 290 f.

[376] VII.2 - Principle of foreseeability of loss. Available at: https://www.trans-lex.org/947000 (accessed 12 December 2025).

[377] Fogt, n 344, 98.

The reasonable person is placed in the situation of the breaching party, meaning that the party's particular circumstances, trade, industry, and commercial context inform what knowledge should be imputed.

A further issue concerns whether knowledge possessed by employees or agents can be attributed to the contracting party. Although Art. 74 does not expressly address this attribution, other provisions concerning general principles of agency and representation, as well as Art. 7 and Art. 8, support the view that knowledge held by individuals acting within the scope of their authority is attributable to the party. Attribution depends on whether the individual acquired the knowledge have involved in the contractual transaction.[378] For corporations and commercial entities, knowledge is necessarily mediated through representatives like directors, managers, or employees involved in contract negotiation or performance, who will typically be imputed to the corporation, provided it was acquired within the scope of their professional responsibilities. If a sales manager is informed of special delivery requirements during negotiations, that knowledge is attributable to the company. In contrast, where a person has no connection to the contract, mere awareness of a relevant fact does not guarantee an understanding of its contractual implications, and therefore might not bring it to the parties' attention.[379] The key criterion is its connection to the contractual relationship.

As noted, the Convention provides no definition or guidance as to what knowledge ought to be imputed to a contracting party to evaluate foreseeability under Art. 74. Questions arise on what sort of knowledge is considered to be imputed. How is imputed knowledge determined and evaluated? Because objective interpretation relies on a diverse range of criteria, identifying the factors and patterns that may be useful for adjudicators in determining what knowledge is considered 'ought to have known' to the party in breach. Such factors help to promote consistency in the application of the foreseeability rule and enable contracting parties to form reasonable expectations regarding how foreseeability will be applied in particular situations.[380] This dissertation, based on an analysis of the CISG general principles and other provisions concerning the knowledge-based test, advisory opinions, comparative research, scholarly

[378] Principles of European Contract Law [Knowledge and behaviour of person for whom a party is responsible]. Available at: https://iicl.law.pace.edu/node/29166 (accessed 18 January 2026).

[379] Id.,

[380] Saidov, n 14, 118.

doctrine, and case law, outlines several factors in identifying constructive knowledge to evaluate foreseeability under Art. 74.

a. The breaching party's business experience and professional expertise

In assessing imputed knowledge, the professional experience and commercial sophistication of the breaching party should be taken into account.[381] Common commercial scenarios, such as the possibility of resale or general changes in market circumstances, are typically considered imputed knowledge. Similarly, standard commercial liabilities to clients and routine extra costs like those for delivery, storage, and insurance are generally deemed foreseeable.[382] Such losses are part of the normal commercial activities and can reasonably be anticipated by any party possessing similar industry experience. Where traders or merchants are involved in international commerce, they must have knowledge of a baseline level of the market. For example, in volatile commodity markets (e.g., steel, oil, agricultural products), price fluctuations are normally known to contracting parties operating in the market.[383] A professional seller of commodities ought to know that its failure to deliver goods may expose the buyer to losses due to price differentials or cover purchases. Conversely, losses resulting from unusual, excessive, or highly specific liabilities to third parties, such as a buyer losing an unannounced government contract due to late delivery, are not automatically foreseeable unless additional context is provided to the seller. In one case, the tribunal found that a company in the business of supplying and trading the specific commodity in question clearly foresaw that its buyer would enter into onward sale contracts. Under normal circumstances, it expects to do so at prices higher than its own purchase price. The tribunal further noted that, according to prevailing scholarly opinion, adverse market developments that negatively affect the breaching party, as occurred in this case, are, in principle, foreseeable.[384] In another case, the court clarified that for a buyer acting as an intermediary, the expected profit from reselling the goods constitutes such a typical contractual interest. Consequently, the risk of lost transactions and lost profits represents a normal and

[381] Knapp, n 207, 542.

[382] Schlechtriem & Schwenzer, n 210, Art. 74, para. 25.

[383] Saidov, n 14, 118.

[384] ICC No. 16369, 2011.

foreseeable commercial risk in such operations, and should therefore be known to the contractual counterparty.[385]

b. Knowledge of the other party's business and commercial purpose

A second important factor concerns the breaching party's awareness of the general commercial function of the transaction, even absent knowledge of specific downstream contracts. A seller engaging in high-volume sales to wholesalers in a sensitive or highly competitive market is expected to foresee the loss to its customers or profits to the buyer.[386] To be charged with knowledge that non-performance could disrupt resale or production, the seller does not need to know the specific terms of the buyer's subcontract. This knowledge, imputed as a matter of commercial common sense, makes certain categories of loss foreseeable. In one case, the tribunal considers that because the claimant informed the defendant that it would resell the pipes to end-users, it was foreseeable that the claimant may incur liability for losses third parties incurred for defective pipes.[387] In another case, the court ruled that, considering that the plaintiff is a corporation that wholesales fiber products, the possibility of the plaintiff subsequently selling products to a third party is considered to have been sufficiently foreseeable to the defendant at the time of contracting.[388] In *Delchi Carrier SpA v. Rotorex Corp. (Delchi*), the U.S. court of appeals applied this principle in holding that lost profits from disrupted production were foreseeable. The seller (Rotorex) knew that the buyer (Delchi) manufactured air conditioning units; indeed, the compressors were specially ordered for that purpose. The court found that 'it was objectively foreseeable that Delchi would take orders for Ariele sales based on the number of compressors it had ordered and expected to have ready for the season'. The seller's imputed knowledge of the buyer's manufacturing business made production interruptions and consequent lost sales a foreseeable result of delivering non-conforming compressors.[389]

[385] Case No. VSL Sodba in sklep I Cpg 285/2019 &VSL Sodba I Cpg 677/2020, High Court of Ljubljana (Slovenia) 29 October 2019 & 5 January 2021.

[386] Saidov, n 14, 119.

[387] American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR) No. 01-20-0015-5404, 31 May 2023 (Tex-Isle Supply, Inc. v. Tecnotubi S.p.A. et al.).

[388] Case No. 2021Da255655 Supreme Court (Korea) 27 September 2023 (Texsus S.p.A. v. Hansung Fiber Co., Ltd).

[389] *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

c. The interrelationship between business nature, goods, contract, and loss

Constructive knowledge is often inferred from the alignment between the nature of the buyer's business, the nature of the goods supplied, the structure and purpose of the contract, and the type of loss suffered. Losses that have no connection to the nature of the buyer's business are unlikely to be foreseeable, unless the seller was otherwise knew about the particular circumstances causing such losses.[390] The goods themselves also imply information about foreseeable losses. Different products carry different inherent risk profiles that reasonable merchants are expected to recognize. For instance, seasonal goods (e.g., winter clothing) supplied to a retailer imply time-sensitive resale opportunities, or perishable goods imply urgency and limited market windows. A seller who breaches a contract to deliver steel, grain, or oil at a fixed price ought to foresee that the buyer's cover damages will be calculated based on the market price at the time of breach, which may be substantially higher than the contract price. If the loss suffered corresponds naturally to these characteristics, such as lost seasonal profits or production downtime, it will typically fall within imputed knowledge. Conversely, if the loss is disconnected from the transaction's commercial function, constructive attribution becomes weaker. When goods are clearly intended for incorporation into other products, for example, component parts and specialized goods, the supplier ought to know that defects or delays may disrupt the buyer's production. In *Delchi*, the compressors were not finished goods but components for air conditioners, a fact apparent from the nature of the product and the quantity ordered.[391] For the goods produced according to the buyer's specifications, the seller has to know that the goods serve a particular purpose and that non-conformity will cause disruption to that purpose. The very fact of customization puts the seller on notice of the buyer's specific requirements.

d. The commercial structure of the transaction

The volume, price, and terms of the transaction provide a useful source for evaluating imputed knowledge. A massive order for a specific product normally reveals that the buyer is not purchasing for personal use but for a larger commercial purpose, either manufacturing or resale. In *Downs Investments Pty Ltd v. Perjawa Steel SDN BHD*, in assessing the circumstances of the

[390] Saidov, n 14, 120.

[391] *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

transaction, the Australian supreme court noted that the contract concerned approximately 30,000 metric tonnes of scrap steel, a volume that indicated its intended use for commercial resale or industrial purposes.[392] The buyer's failure to establish a required letter of credit constituted a fundamental breach, the seller was entitled to damages, including losses from having to sub-charter vessels and reselling the steel to alternative purchasers. The commercial scale of the transaction made such consequential losses foreseeable. Similarly, delivery schedules provide information about the urgency and timing of the buyer's needs. A tight delivery schedule implies knowledge that delay will cause production stoppages or missed market opportunities. Extended payment terms may indicate the buyer's need to generate revenue from resale before paying the supplier.

e. Business identity, characteristics, standing, and size

The relative sophistication, size, and market position of the parties shape the constructive knowledge standard. A multinational corporation with extensive international operations is held to a different standard than a small local trader. A party's size and standing may indicate access to market information, familiarity with trade practices, and capacity to understand complex transactions.[393] A reasonable person in the situation of a small, first-time importer may not be expected to know the same industry practices as a seasoned international merchant. However, this evaluation must avoid transforming the standard into a subjective inquiry. The focus remains on reasonable expectations within the relevant commercial community.

f. The aggrieved party's involvement in design and production

When the aggrieved party has participated in designing the goods or advising the seller about manufacturing processes, such involvement imputes knowledge of the goods' intended use and the importance of particular specifications.[394] Conversely, when the aggrieved party has unique or unusual requirements that are not communicated, the seller cannot be expected to know them. A buyer with extraordinarily profitable downstream uses for standard goods must disclose those

[392] *Downs Investments Pty Ltd v. Perjawa Steel SDN BHD*, [2000] QSC 421 (Australia) 17 November 2000.

[393] CISG-AC Opinion No. 19, Standards and Conformity of the Goods under Article 35 CISG, Rapporteur: Professor Djakhongir Saidov, King's College London, United Kingdom, 4(g).

[394] CISG-AC Opinion No. 19, 4(e).

uses to make the consequent losses foreseeable. Thus, imputed knowledge interacts with responsibility allocation in the broader contractual relationship.

From the above factors, constructive knowledge is typically attributed where the loss corresponds to the ordinary commercial function of the contract, the risk is inherent in the goods or industry, the breaching party possesses relevant professional experience, or the loss arises from predictable third-party reactions. In contrast, where the loss stems from extraordinary or undisclosed contractual arrangements, the loss is speculative or disproportionate, the aggrieved party's independent conduct produces atypical risk, or the chain of causation becomes excessively remote, constructive knowledge is generally denied. Foreseeability under Art. 74 is thus a dynamic concept, subject to evolving commercial practices and expectations.

3.2. Other criteria to evaluate foreseeability

3.2.1. Contract terms

Contract terms serve as an indispensable evaluation of foreseeability[395] because they reveal the contracting parties' allocation of risks, the rights and obligations, and expectations at the time of contracting, which provide important evidence of the breaching party's foreseeability of loss. In *Progress v. OTL Firearms*, in order to determine whether the respondent was liable for the claimant's incidental and consequential losses, the tribunal examined the scope of the contract and the capacity in which the claimant had acted at the time the contract was concluded. On that basis, it found that damages arising from the separate contractual relationship between the claimant and the Ministry of Defense of Ukraine were not foreseeable to the respondent within the meaning of Art. 74 CISG and were therefore not recoverable.[396]

Under the party autonomy principle provided in Art. 6, any conflict regarding the priority of interpretative elements should be resolved in favor of the parties' express or implied intentions as reflected in the terms of their contract.[397] To determine the intention that can reasonably be attributed to the contracting parties, whether explicitly or implicitly, Art. 8 plays an essential

[395] Liu, n 70, s 14.2.4.

[396] Vienna International Arbitral Centre (VIAC) No. ARB-5740, 30 October 2024 (Progress v. OTL Firearms and Imports Corporation).

[397] Saidov, n 70, 336; Stoll, H. (1998). Article 74. In P. Schlechtriem (Ed.) (G. Thomas, Trans.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*. Clarendon Press, 555.

role,[398] as it also establishes the framework for interpretation of contracts.[399] When the contractual language is unambiguous, the terms should generally be given their ordinary meaning.[400] Because foreseeability reflects the terms of the contract,[401] certain contractual clauses, for example, delivery conditions or quality of product, may demonstrate the parties' foreseeability of specific contingencies or losses. When a contract explicitly allocates risks for delay, price volatility, or third-party claims, such provisions help to define the scope of foreseeable loss. For instance, if a contract specifies the use of a particular component for a high-value end product, it implicitly indicates a higher potential loss if that component is defective than if it were for a generic, low-value item. However, it should be noted that not all foreseeable losses are codified in contract terms, particularly in standard form or less meticulously negotiated agreements.

In case the contractual provisions are ambiguous or not clearly expressed, the appropriate interpretation is that which a reasonable person of the same kind, placed in the same situation, would have understood from the relevant terms.[402] This approach is relevant where both parties have participated in negotiating, drafting, or otherwise executed within a formal written memorial.[403] Nevertheless, the reasonable person concept has been criticized for its vagueness.[404] Relying merely on Art. 8(2) for contractual interpretation may introduce ambiguity, as the understanding attributed to a reasonable person may vary even where the relevant circumstances are substantially similar. Such interpretative ambiguity may lead courts and tribunals to rely on the domestic legal traditions to interpret the meaning of the contractual terms, thereby undermining the uniformity and international character of the Convention.[405] Therefore, when interpreting contract terms, particularly to determine foreseeability under Art.

[398] Saidov, n 70, 337.

[399] Schlechtriem & Schwenzer, n 210, Art. 8, para 3.

[400] UNCITRAL Digest 2016, n 336, 54.

[401] Stoll, n 397, 555.

[402] Kröll et al., n 24, 153, 155.

[403] Smythe, D. J. (2016). Reasonable standards for contract interpretation under the CISG. *Cardozo Journal of International and Comparative Law, 25*(1), 12.

[404] Kaczorowska, A. (1991). Règles uniformes d'interprétation d'un contrat international. *Revue de Droit International et de Droit Comparé, 68*(4), 306.

[405] See Smythe, n 403, 16-19.

74, adjudicators should also consider the general principles underlying the CISG, such as Arts. 7 and 9, in order to ensure a consistent and autonomous interpretation of the Convention.[406]

Commercial parties often do not foresee every consequence or have the foresight (or bargaining power) to embed all foreseeable risks into the written contract.[407] It is often impractical, if not impossible, for parties to foresee all conceivable future breaches and their multifaceted consequences, thus making it challenging to insert a precise term addressing every potential damage into the contract. Therefore, the terms of the contract are not the only indication of foreseeability, other contextual elements, such as knowledge and trade usage, are indispensable to evaluate foreseeability.[408]

3.2.2. The role of trade usage in assessing foreseeability under Art. 74

There are situations where trade usage plays an important role in assessing foreseeability.[409] In one case, the tribunal assessed foreseeability by relying on Art. 9(2) CISG, considering relevant trade usages applicable to the transaction, including Incoterms 2000, which were recognized as established trade usage in the relevant market and expressly referenced in the parties' contract. Taking these usages into account, the tribunal concluded that a loss of profit resulting from non-delivery was a foreseeable consequence of the breach under Art. 74.[410]

Trade usages are essential elements in commercial contracts[411] as they provide commonly accepted standards and expectations that facilitate the conduct of business transactions. Under Art. 9, trade usages and practices bind parties if they are established practices by the parties, agreed usages, or international usages or customs. Art. 9(1) covers agreed usages and established practices, while Art. 9(2) applies to usages that are implicitly made applicable to the contract. The purpose of Art. 9 is not to recognize legal norms, customary law, or a *lex mercatoria*, but to help determine the content of the parties' agreement.[412] Consequently, applicable practice or

[406] Id., 20-25.

[407] Bridge, M. G. (2017). *The international sale of goods* (4th ed.). Oxford University Press, 481–3.

[408] Saidov, n 70, 337.

[409] Liu, n 70, s 14.2.4.

[410] MKAC No. 105/2005, 13 April 2006.

[411] Bridge, M. (2023). *The international sale of goods* (5th ed.). Oxford University Press, para 10.61.

[412] Schlechtriem & Schwenzer, n 210, Art. 9, para 2.

usage possesses a normative value and functions as a direct source of contractual obligations,[413] and carries the same binding effect as a contractual term.[414] In CISG, usage serves two primary functions. First, it acts as a supplementary factor for interpreting a contract's content during both its formation and performance.[415] Second, it also fulfils an important interpretative function within the Convention, serving as a criterion for contract interpretation under Art. 8(3).[416]

Trade usage operates as a general principle affecting the application of many CISG provisions.[417] Thus, considering trade usage may be useful when interpreting the scope of foreseeability under Art. 74. This is also affirmed by a ULIS case, where the court ruled that the subjective and objective test in Art. 82 ULIS[418] could be satisfied by demonstrating a relevant trade custom as to foreseeability.[419] Article 9 incorporates both subjective and objective bases for binding parties to a usage in their legal relationship.[420] As such, trade usage functions both as a subjective and objective criterion for determining foreseeability.[421]

Trade usage may assist in establishing subjective foreseeability where the contracting parties have agreed, either expressly or implicitly, to apply a particular usage to a specific transaction as provided in Art. 9. In determining the scope and content of the parties' agreement, Art. 8 provides guidance for interpreting the parties' express or implied intent.[422] Where the parties explicitly agree to incorporate a particular trade usage into the contractual agreement, it satisfies the subjective standard of foreseeability under Art. 74, as the breaching party demonstrably knew of and accepted the consequences attached to that usage. In cases where there is no such

[413] Kröll et al., n 24, 231.

[414] UNCITRAL Digest 2016, n 336, 63.

[415] Kröll et al., n 24, 163.

[416] Id.

[417] DiMatteo, L. A., Dhooge, L., Greene, S., & Maurer, V. (2004). The interpretive turn in international sales law: An analysis of fifteen years of CISG jurisprudence. *Northwestern Journal of International Law & Business, 24*(2), 433.

[418] As has been noted, Art. 74 CISG has its substantive origins in Art. 82 ULIS.

[419] Case No. VIII ZR 210/78 Supreme Court (Germany) 24 October 1979 (Cheese). See Saidov, n 14, 123.

[420] Saidov, n 70, 338; Junge, W. (1998). Article 9. In P. Schlechtriem (Ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (G. Thomas, Trans.,). Clarendon Press, 76-77.

[421] Saidov, n 70, 338.

[422] Schmidt-Kessel, M. (2010). Article 9. In I. Schwenzer (Ed.), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed.). Oxford University Press, paras 6–7.

explicit agreement, an implied agreement is sufficient under Art. 9(1), and even in the total absence of an agreement, Art. 8(3) allows courts to consider relevant usages when interpreting the parties' statements and conduct.[423] Therefore, a trade usage may contribute to establishing subjective foreseeability even where it has not been expressly incorporated into the contract, provided that the parties' intention to be bound by it can be inferred from the circumstances. Not only written usages, but also domestic or local usages and contractual clauses from other trades are relevant.[424]

Subjective foreseeability may also be established through practices that the parties have developed between themselves and that are binding under Art. 9(1). In this context, only practices actually observed between the parties are relevant; broader industry observance carries no weight. However, practices cannot be established without prior business dealings.[425] The parties must have concluded a number of sales agreements with such regularity and consistency to form a shared basis for understanding future conduct in similar situations.[426] These practices can include the application of standard terms, purely domestic or local usages, or clauses originally borrowed from other industries.[427] When these subjective grounds apply, the established usage or practice serves as the benchmark to determine the breaching party's actual knowledge. Accordingly, such usages and practices may serve as evidence of the breaching party's foreseeability of the consequences arising from its breach, thereby supporting a finding of subjective foreseeability under Art. 74.

Usage binds parties not only through express or implied agreement but also when the contracting parties 'knew or ought to have known' of it, and if the usage is widely recognized and regularly observed within that particular industry. Trade usages falling within the scope of Art. 9(2) are objective in nature and thus function as a normative standard applicable to international sales contracts.[428] This objective character makes trade usage particularly relevant to the assessment of foreseeability under Art. 74.

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[423] Schlechtriem & Schwenzer, n 210, Art. 9, para 7.

[424] Id., para 6.

[425] Id., para 8.

[426] Honnold, n 80, para 116; Schmidt-Kessel, n 422, para 8.

[427] Schlechtriem & Schwenzer, n 210, Art. 9 para 6; Bonell, n 189, Art. 9, 107.

[428] Kröll et al., n 24, 171.

To identify the objective character, the usage should be sufficiently established within the relevant trade so that traders who engage in the relevant trade may reasonably be presumed to know of it, not depend on the parties' subjective intentions, their place of business, or their prior involvement in the particular market where the usage operates.[429] Consequently, a party may be charged with knowledge of a usage even where no evidence exists that it actually knew of it.

Although the CISG contains no explicit definition of the term 'trade usage',[430] it should be interpreted autonomously[431] and independently from domestic legal traditions.[432] While knowledge of a usage should generally be universal within a particular trade or business sector, a usage operating solely in a country or region may still qualify, provided that it is widely known within that particular trade and regularly observed in the particular trade sector.[433] The concept is broad, encompassing any conduct that is regularly observed and widely accepted in business transactions within a particular trading sector,[434] even if it operates as a local legal norm.[435] Thus the decisive factor is not the geographical origin of the usage, but the extent of its acceptance and observance among merchants engaged in the particular field of commerce. The degree of acceptance must be such that merchants operating in that sector can have knowledge of and take account of the usage in their commercial dealings. In this way, trade usages provide an objective benchmark to evaluate foreseeability, supporting the conclusion that a reasonable trader in the same trade sector would be expected to know it.

If the evaluation of trade usage is relevant, it becomes a great help in determining both actual and constructive knowledge to assess the foreseeability of a party.[436] This dual relevance of trade usage is particularly important in transnational commercial disputes, where the parties may

[429] Id., 173.

[430] Ferrari, F. (2005). What sources of law for contracts for the international sale of goods?: Why one has to look beyond the CISG. *International Review of Law and Economics*, *25*(3), 333.

[431] Bonell, n 189, Art. 9, 111.

[432] Schmidt-Kessel, n 422, para 113; Mankowski, P. (Ed.). (2019). *Commercial law: Article-by-article commentary*. Nomos; C. H. Beck; Hart Publishing, 47.

[433] Schmidt-Kessel, n 422, paras 16, 18.

[434] Kröll et al., n 24, 170.

[435] Schlechtriem & Schwenzer, n 210, Art. 9, para 12.

[436] Saidov, n 70, 338.

not share the same legal background but operate within a similar commercial sector. In this way, usage acts as an interpretive tool that narrows or clarifies the scope of expected risks.

To sum up, contractual terms, knowledge, and trade usage function as interconnected elements in evaluating foreseeability and recovery of damages under Art. 74. Each element crucially contributes to a nuanced and context-sensitive evaluation of what risks were reasonably foreseen by the parties. A proper interpretation of the foreseeability requirement under Art. 74 requires consideration of the Convention as a whole, including its other relevant provisions and general principles. Such an integrated approach prevents fragmented or homeward-trend interpretations and promotes the autonomous and uniform application of the CISG.

II. The burden of proving foreseeability and its standard

1. Burden of proof

Art. 74 does not expressly regulate either the burden of proof or the standard of the burden of proof in claims for damages.[437] This silence has given rise to divergent views as to whether these matters are left to the applicable domestic procedural law, or should be resolved autonomously under the Convention's underlying principles and objectives.[438] Several decisions have addressed the burden of proof by reference to domestic procedural law. For instance, in *Skin Cleaning and Skin Care Products*,[439] the court found that rules on the burden of proof were to be governed by the national law of the forum state. However, this issue should not be understood as leaving these matters to domestic procedural law. Today, the prevailing view is that the burden of proof should be determined within the CISG's own framework,[440] derived from its general principles and objectives, not from national law, to serve the Convention's uniformity goal.[441] In *Furniture Case III*, the court clarified that despite lacking an express provision on the

[437] Kröll et al., n 24, 962.

[438] Id., 962-3.

[439] Case No. 2 U 352/09 Koblenz Higher Regional Court (Germany) 22 April 2010 (Skin cleaning and skin care products).

[440] Schlechtriem & Schwenzer, n 210, Art. 74, para 66.

[441] Ferrari, F. (2002). Burden of proof under the CISG. *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000–2001*, 1–8. Available at: https://iicl.law.pace.edu/sites/default/files/cisg_files/ferrari5.html (accessed 23 March 2025).

burden of proof, the issue remains within the Convention's scope and must be governed autonomously by its principles.[442] This dissertation also supports this view.

The next question is who should bear the burden of proof in case of damages? The burden of proof follows a well-established principle: a party asserting a claim bears the burden of establishing the facts necessary to support that claim. Conversely, a party invoking an exception bears the burden of proving the facts supporting that exception.[443] Accordingly, applying this principle to Art. 74, the aggrieved party claiming damages must establish the contractual breach, the existence of the resulting loss, the extent of that loss, the causation, and the foreseeability of that loss.[444] Some decisions also place the burden of proof for establishing a breach, causation, and quantifiable loss on the party seeking damages. For instance, in *THI Medical, S.A.C. v. Filmore Management Trading*, the court held that the plaintiff must provide sufficient evidence of both the breach and resulting damages under the CISG's provisions.[445] Similarly, in *Hewlett-Packard France c. Matrox Graphics Inc.*, the court clarified that the party seeking damages has to prove both the right to damages and the amount.[446] In a U.S. case, the court indicated that the plaintiff bears the burden of demonstrating the amount of damages by establishing necessary facts.[447] In a case, the Serbian FTCA denied recovery of lost profits and amortization due to the claimant's failure to produce adequate evidence of loss.[448] This approach is essential to preserve the Convention's goal of uniformity and to prevent divergent domestic solutions from undermining its effectiveness.

The issue of the burden of proof as to foreseeability also remains a contested issue under the CISG, with divergent views as to which party bears the responsibility for establishing that the

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[442] Case No. HG 930 138.U/HG 93 Commercial Court Canton Zurich (Switzerland) 09 September 1993 (*Furniture case III)*

[443] Kröll et al., n 24, 962-3; Saidov, n 70, 375; Huber & Mullis, n 185, 281-2; Schlechtriem & Schwenzer, n 210, Art. 74, para 66.

[444] Saidov, n 70, 375-6.

[445] Case No. 21-21632-Civ-GAYLES/TORRES U.S. District Court for the Southern District of Florida (USA) 23 August 2023 (THI Medical, S.A.C. v. Filmore Management Trading, LLC et al).

[446] Case No. 2020 QCCS 78 / 500-05-070786-023 Superior Court of Quebec (Canada) 10 January 2020 (Hewlett-Packard France v. Matrox Graphics Inc.).

[447] Case No. 4:23-cv-4437, 2024 WL 5146062 U.S. District Court for the Southern District of Texas (USA) 17 December 2024 (Fundiciones Balaguer, S.A. v. Ferrell-Ross Roll Manufacturing, Inc).

[448] FTCA No. T-4/05, 15 July 2008; FTCA No. T-8/09, 15 June 2010.

loss was, or was not, foreseeable to the breaching party.[449] There are opinions that it is the party in breach who has to prove the loss was not foreseeable[450] because foreseeability operates as a specific qualification to the general principle of full compensation established in the first sentence of Art. 74.[451] This approach takes foreseeability as an affirmative defense.[452] The idea is that once a breach, causation, and resulting loss are established by the aggrieved party, the breaching party must prove that the loss was unforeseeable and should therefore fall outside the scope of its liability.[453] Nonetheless, most scholars take the view that placing the burden of proving foreseeability on the party seeking to recover damages is more consistent with Art. 74 and the CISG framework.[454] The aggrieved party is required to prove that the loss that results from such a breach must have been foreseeable.[455] This approach treats foreseeability not as an exception to the principle of full compensation, but as an integral condition of liability, alongside the requirements of breach, loss and causation between the breach and that loss.[456] In practice, courts and tribunals have generally required the claimant to prove both the existence and extent of the loss claimed under Art. 74. In one case, the tribunal required the claimant to prove the foreseeability of the damage as a consequence of its non-compliance with the contract performance.[457] In another case, the court stated the burden of proof was placed on the buyer, who was seeking additional costs arising out of processing the goods in Germany. The buyer has to demonstrate that the damages claimed were foreseeable to the seller at the time of making the contract.[458] This approach aligns with other international instruments like the UPICC and the PECL, the party who asserts a claim must prove all elements of that claim, including foreseeability. It is also consistent with CISG case law, which often requires the party claiming

[449] Schlechtriem & Schwenzer, n 210, para 66.

[450] Enderlein & Maskow, n 2, Art. 74 para. 10; Zeller, B. (2005). *Damages under the Convention on Contracts for the International Sale of Goods*. Oceana Publications, 82;

[451] Vékás, n 25, 169.

[452] Kröll et al., n 24, 970.

[453] Enderlein & Maskow, n 2, Art. 74 para. 10.

[454] Schlechtriem & Schwenzer, n 210, Art. 74, para 66; Saidov, n 70, 376; Knapp, n 207, 541; Huber & Mullis, n 185, 281.

[455] Eiselen, n 158, para s.

[456] Stoll, H. (2000). Article 74. In P. Schlechtriem (Ed.), *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)*. C. H. Beck, 721.

[457] ICC No 9187, June 1999 (Coke).

[458] Case No. 3 U 83/98 Appellate Court Bamberg (Germany) 13 January 1999 (Fabric).

damages to prove foreseeability. This allocation does not, however, preclude a mitigation of the evidentiary burden in certain categories of cases, particularly where losses result from actual non-performance and foreseeability may be inferred from the nature of the breach itself.[459]

This dissertation, therefore, agrees with the prevailing view that the party seeking damages under Art. 74 bears the burden of proving the existence of a breach, the occurrence of loss, foreseeability, and causation. It also proposes further clarification of proving foreseeability under Art. 74. In light of the challenges in proving foreseeability as discussed above, particular attention should be given to the information reasonably available to the parties at the time of contract formation and to the function of foreseeability in enabling the parties to assess, price, and allocate contractual risks. The injured party is required to prove the information available to the breaching party, the relevant facts and conditions, particularly those concerning the nature, extent, and potential consequences of the loss claimed. This approach reflects the principle that a party seeking compensation for an unusual or exceptional loss should provide the information necessary to demonstrate that the circumstances giving rise to that loss were sufficiently communicated or otherwise known to the other party at the time of contracting. It ensures that foreseeability is assessed based on information that was actually available, or reasonably attributable, to the party in breach when the contractual risk was assumed.[460] As stated by the tribunal, the foreseeability of loss must be evaluated solely based on the information available to the respondent when the contract was concluded.[461]

In essence, this dissertation submits that the structure of a damages claim under Art. 74 should be viewed as a sequential allocation of burdens. The burden of proof as to the breach of contract, the resulting loss, and the causal nexus between the breach and that loss is placed on the claimant. The claimant has to prove the breaching party's knowledge of relevant facts and matters resulting in the incurred loss. The defendant then has to prove that the loss was unforeseeable at the time of contracting. This allocation, grounded in principles of fairness and

[459] Schlechtriem & Schwenzer, n 210, para 66.

[460] Magnus, U. (1999). Wiener UN-Kaufrecht (CISG). In *Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*. Sellier de Gruyter, Art. 74, 62.

[461] Vienna International Arbitral Centre (VIAC) No. ARB-5740, 30 October 2024 (Progress v. OTL Firearms and Imports Corporation).

litigation efficiency, preserves the compensatory purpose of Art. 74 while allowing foreseeability to operate as a principled limitation on liability.

2. Standard of Proof

While the burden of proof determines which party must prove a fact, the standard of proof sets the required threshold - the measure of evidentiary sufficiency required to establish loss and thereby recover damages.[462] It dictates how convincing the evidence must be for a party to succeed in its claim for recovery of damages under Art. 74.

The Convention, like the burden of proof issue, does not explicitly articulate the requisite standard. The silence raises the question of whether the applicable standard of proof should be the issue of procedure decided by the domestic law of the forum state (*lex fori*) or, in case of arbitration, the *lex arbitrii*, or a matter covered by the Convention itself.[463] Some courts and scholars have characterized the applicable standard of proof as a matter of procedural law and therefore fall outside the scope of the CISG.[464] Besides, there are cases where the court left this question open.[465]

There is an opinion that the standard of proof applicable to a claim for damages is governed by the CISG[466] because the Convention requires the injured party to establish the loss suffered, and quantifying damages is an essential part of asserting a claim for damages.[467] This dissertation submits that treating the standard of proof as a matter governed by national procedural law is inconsistent with the CISG's mandate of uniform interpretation under Art. 7(1). The amount of proof required to recover damages directly affects the substantive scope of liability under Art.

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[462] Kröll et al., n 24, 964.

[463] CISG-AC Opinion No. 6, para 2; Kröll et al., n 24, 964.

[464] Magnus, U. (2013). Article 74. In *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*. Sellier/de Gruyter, para. 61; Schlechtriem, P. (2007). Non-material damages-Recovery under the CISG? *Pace International Law Review, 19*(1), 97, 102. Case No. A2 2001 105 Court of First Instance Canton Zug (Switzerland) 14 December 2009; Case No. HG070223/U/dz Commercial Court of the Canton of Zurich (Switzerland) 22 November 2010 (Ski wear and sportswear); Case No. 2 U 352/09 Koblenz Higher Regional Court (Germany) 22 April 2010 (Skin cleaning and skin care products); *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

[465] Case No. 4A_440/2009 Supreme Court (Switzerland) 17 December 2009; Case No. VIII ZR 384/12 German Supreme Court (Germany) 16 July 2013 (Ring binders).

[466] See CISG-AC Opinion No. 6, para 2; Schlechtriem & Schwenzer, n 210, Art. 74, para 67; Saidov, n 14, 184.

[467] Saidov, n 14, 184; Gotanda, J. Y. (2008). Using the UNIDROIT Principles to fill gaps in the CISG. In D. Saidov & R. Cunnington (Eds.), *Contract damages: Domestic and international perspectives*. Hart Publishing, 119.

74. Allowing domestic standards of proof to govern this issue would lead to different outcomes depending on the forum,[468] challenging the CISG's efforts to achieve uniformity in international sales law.[469] Therefore, the standard of proof must be regarded as a substantive issue governed by the Convention itself, domestic evidence rules are neither needed nor admissible.

Courts and tribunals have taken different approaches to the standard of proof in determining damages claims under the Convention.[470] Some decisions have required damages to be specifically ascertained,[471] others have adopted a more flexible approach, requiring only that damages be 'reasonably proved'[472] or supported by 'sufficient proof'.[473] In certain cases, courts have assessed damages *ex aequo et bono*.[474] Notwithstanding these divergent views, the CISG-Advisory Council adopts reasonable certainty as the applicable standard.[475] It is the claimant's burden to establish both the loss and its extent to a reasonable degree of certainty. This standard is of particular importance when it comes to inherently speculative heads of damage, such as loss of profit, loss of reputation, or loss of chance, where precise quantification is often impossible.[476] Applying the reasonable certainty approach is justified on the foremost ground that it promotes uniformity by ensuring consistent treatment of CISG damages claims regardless of the divergent standards of proof across jurisdictions. Besides, the breaching party should not be released from liability just because its wrongful conduct has prevented the claimant from proving loss with absolute certainty. Furthermore, the reasonable certainty standard finds strong support within the Convention's own framework.[477] The reasonableness standard is frequently invoked in the Convention, serving as a general principle for assessing party conduct whenever

[468] Kröll et al., n 24, 964.

[469] Schlechtriem & Schwenzer, n 210, Art. 74, para 67.

[470] Kröll et al., n 24, 964.

[471] See Case No. 3 U 246/97, Court of Appeal Celle (Germany) 2 September 1998 (Vacuum cleaners); Case No. 22 U 4/96, Court of Appeal Cologne (Germany) 21 May 1996 (*Used car case I).*

[472] Case No. 95/3214 District Court of Kuopio (Finland) 5 November 1996 (Butter); CIETAC No. CISG/1990/01 (Cloth wind coats).

[473] *Delchi Carrier SpA v Rotorex Corp* 1994 WL 495787; CIETAC No. CISG/1995/01 23 February 1995 (jasmine aldehyde).

[474] Case No. 04/3568 Commercial Court Hasselt (Belgium) 20 September 2005 (Bread).

[475] CISG-AC Opinion No. 6, para 2.

[476] Schlechtriem & Schwenzer, n 210, Art. 74, para. 67.

[477] CISG-AC Opinion No. 6, paras 2.3-2.6.

no specific rule applies.[478] Under the reasonableness principle, where the precise amount of damages cannot be quantified, the court must reasonably assess the available evidence and the overall context of the case to determine the amount,[479] rather than being denied altogether due to evidentiary difficulties. By adopting this standard, courts can ensure both uniformity and fairness in the assessment of damages under Art. 74. Further support for this standard can be found in the UPICC and PECL. Under Art. 7.4.3 of the UPICC, compensation is recoverable only for harm proved with a reasonable degree of certainty. This language confirms the familiar certainty requirement while making clear that absolute precision is not required. Similarly, Art. 9:501(2) of the PECL allows recovery for future loss that is reasonably likely to occur.[480] These provisions confirm that reasonable certainty represents a widely accepted transnational standard for the proof of damages.

This standard is also supported by a number of decisions. For example, in *Hewlett-Packard France c. Matrox Graphics Inc.*, the court stated that the proof is only to a level of reasonable certainty rather than with mathematical precision.[481] In *Krape S.A. v. Lik Supply, Corp*., the claimant successfully demonstrated that the loss was provable with reasonable certainty and resulted from the breach.[482] In *Tex-Isle Supply, Inc. v. Tecnotubi S.p.A. et al.*, the court also required the claimant to prove its damages with reasonable certainty. [483]

While the CISG Advisory Council has endorsed the reasonable certainty standard as the appropriate standard of proof for the existence and extent of loss under Art. 74, it does not expressly clarify whether this standard also governs the foreseeability requirement ruled in the second sentence. It is noted that the reasonable certainty standard is applied to serve for proving the but-for causation test established in the first sentence.[484] Questions arise as to what level of

[478] Bonell, n 189, Art. 7, 80-81.

[479] Schlechtriem & Schwenzer, n 210, Art. 74, para 67.

[480] CISG-AC Opinion No. 6, para 2.7.

[481] Case No. 2020 QCCS 78 / 500-05-070786-023 Superior Court of Quebec (Canada) 10 January 2020 (Hewlett-Packard France v. Matrox Graphics Inc.).

[482] Case No. 21-CV-03742-AMD-JRC U.S. District Court for the Eastern District of New York (USA) 15 September 2022 (KRAPE S.A. v. LIK Supply, Corp).

[483] American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR) No. 01-20-0015-5404, 31 May 2023 (Tex-Isle Supply, Inc. v. Tecnotubi S.p.A. et al.).

[484] Ishida, n 288, 243.

proof is required to establish foreseeability of loss under Art. 74 CISG? Does the reasonable certainty standard also apply to proving foreseeability?

This dissertation submits that foreseeability should be proved reasonably because reasonableness operates as a general criterion to assess the parties' behavior.[485] Reasonableness is suggested to assess objective standards[486] and the reasonable loss and its extent when evaluating foreseeability.[487] Therefore, it is justified for a party to prove foreseeability reasonably. Its level should be applied flexibly. For example, for subjective foreseeability, or for the loss of reputation, it should be proved with a reasonable certainty because this requires strict evidence of actual knowledge. For objective foreseeability, reasonable proof is sufficient.

In sum, the burden of proof and its standard for determining recovery of damages under Art. 74 is governed by the CISG. The burden of proof is on the party claiming damages to prove that the party in breach knew or ought to have known the facts and circumstances relevant to the occurrence and extent of the loss. The claimant must establish that the loss was reasonably foreseeable to the party in breach at the time of contract formation. This interpretation ensures internal consistency within Art. 74, aligns with the Convention's broader reliance on reasonableness, and reinforces the role of foreseeability as a principled limitation rather than an absolute barrier to recovery.

III. Causality requirement and probability of loss

1. Causation and foreseeability

By requiring the loss to be suffered 'as a consequence of the breach', the first sentence of Art. 74 establishes a causation requirement as a primary limitation on recoverable damages.[488] The party in breach is liable only for losses that are causally attributable to the contractual breach.[489] Analogous requirements are found in other model instruments like Art. 7.4.2(1) UPICC and Art. 9:501(1) PECL, showing that the requirement of a causal link between breach and loss

[485] Bonell, n 189, Art. 7, 81.

[486] See Chapter IV: I. 2.2.

[487] See Chapter V.

[488] Saidov, n 70, 344.

[489] Schlechtriem & Schwenzer, n 210, Art. 74, para 42.

constitutes a common structural element of modern model instruments on contract law.[490] However, like the CISG, these instruments refrain from prescribing a detailed theory of causation, leaving the matter to general principles and judicial interpretation.

The causation requirement serves two functions. Primarily, it acts as a prerequisite for the imposition of liability.[491] Accordingly, only losses that are caused by the breach are recoverable as damages. This establishes causation as a condition for the existence of liability for damages and for a valid claim of the aggrieved party. In addition, the causation requirement, which is employed by certain legal systems, operates as a limitation measure of damages.[492] The liability of the breaching party extends only to losses that were caused by its breach.[493] Thus, causation ensures doctrinal coherence between the principle of full compensation and the limitation of liability.

The concept of causation has been approached differently across legal traditions, giving rise to a variety of theories designed to determine causation.[494] As a result, causation is neither a uniform nor a self-evident concept and requires careful examination.[495] At its core, causation can be described as either a sequence of interconnected events or conditions,[496] or an objective factual nexus between a particular event or omission.[497]

Academic opinion is divided on the relationship between foreseeability and causation. One view holds that the foreseeability rule leaves no room for theoretical development in causation.[498] According to this view, once foreseeability serves as the principal limitation on recoverable damages, a separate theoretical analysis of causation becomes unnecessary. The foreseeability

[490] Saidov, n 14, 87.

[491] McCormick, C. T. (1935). *Handbook on the law of damages*. West Publishing Co, 260.

[492] Treitel, n 269, 162.

[493] Id.,

[494] Honoré, A. M. (1971). Causation and remoteness of damage. In K. Zweigert & K. Drobnig (Eds.), *International encyclopedia of comparative law* (Vol. XI, Chapter 7). Martinus Nijhoff Publishers; Saidov, n 70, 344; Hart, H. L. A., & Honoré, T. (1985). *Causation in the law* (2nd ed.). Clarendon Press, 432-3.

[495] Saidov, n 70, 345.

[496] Hart & Honoré, n 246, 44.

[497] Saidov, n 70, 345 citing Sergeyev, A. P., & Tolstoy, Y. K. (Eds.). (1998). *Grazhdanskoye pravo [Civil law]*, 570.

[498] Stoll, n 397, 558.

requirement, therefore, effectively subsumes issues of causation. Others do not expressly address the question of causation, instead treating foreseeability as the sole criterion for determining the scope of recoverable damages.[499]

There is a view that the causal link 'strongly overlaps' with the foreseeability principle. The interconnection between foreseeability and causation makes it difficult to treat the two concepts as wholly distinct.[500] A causation factor is also comprised by the foreseeability test.[501] A party cannot foresee any result if it cannot be aware of the possible consequences to others and of the degree of uniformity of the sequence of events. Nevertheless, this conceptual intersection does not render them interchangeable or mutually exclusive.[502]

This dissertation submits that foreseeability and causation perform distinct functions and should not be conflated. Once a causal link is established under the first sentence of Art. 74, liability for damages is then limited to the extent of foreseeable loss established in the second sentence. Causation determines whether, and to what extent, a loss is attributable to the breach by establishing the causal link between the events.[503] Foreseeability restricts liability to less than the total loss attributable to the breach,[504] determining whether that loss falls within the scope of the breaching party's liability. Accordingly, although foreseeability may limit the extent of recoverable damages, it cannot, either conceptually or practically, replace the requirement of causation. A party cannot foresee the consequences of a breach without an awareness of how such consequences may affect the other party. Therefore, it is generally accepted that foreseeability and causation are not interchangeable concepts but rather serve complementary roles and balance each other. Art. 74 is sufficiently flexible to accommodate the application of general principles of causation alongside the foreseeability rule.[505] The principles of full compensation and foreseeability in the CISG itself provide the framework for assessing

[499] Knapp, n 207, 540.

[500] Saidov, n 70, 345.

[501] Treitel, n 269, 153.

[502] Saidov, n 70, 345; Liu, n 70, s 14.2.5.

[503] Hart & Honoré, n 246, 84-85.

[504] Id., 255-6.

[505] Liu, n 70, s 14.2.5.

causation and determining the scope of recoverable damages.[506] It allows recoverable damages for both direct and indirect losses that are causally connected to the breach, and foreseeability limits damages to those foreseeable by the debtor. In other words, only the foreseeability rule in Art. 74(2) can justify excluding liability for remote losses outside the promisor's sphere of responsibility.[507]

While Art. 74 establishes the requirement of causation, it does not explicitly define the test[508] nor provide a criterion to assess it.[509] To give practical effect to the principle of full compensation, a reliable and objective criterion is necessary. The most widely accepted test in CISG scholarship and case law is the 'but-for' test (*conditio sine qua non*) as an appropriate standard.[510] According to this standard, a loss is caused by a breach if it would not have occurred but for that breach.[511] This test asks a straightforward, objective question: but for the defendant's breach, would the plaintiff's loss have occurred? If the answer is 'no' (the loss would not have occurred without the breach), then causation is established. If the answer is 'yes' (the loss would have happened anyway), then the breach is not the cause of that specific loss.

In practice, adjudicators also apply the but-for test to determine causation. In one case, the court used the but-for test and ruled that but for [the defendant's] breach, [the plaintiff] would have earned approximately $6,806 from reselling the hay to [the third party], and a total expected profit of $1,640. This loss is foreseeable to the defendant at the time of contracting.[512] In another case, the primary judge stated that, but for the defendant's breaches, the plaintiff would have

[506] Kröll et al., n 24, 961.

[507] Schlechtriem & Schwenzer, n 210, Art. 74, para 42.

[508] Magnus, n 20, 264.

[509] Ishida, n 288, 240.

[510] Kröll et al., n 24, 961; Schönle, H., & Koller, T. (2010). Article 74. In H. Honsell (Ed.), *Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)* (2nd ed.). Springer, paras 22, 23; Williams, G. (1961). Causation in the Law. *The Cambridge Law Journal*, *19*(1), 63.

[511] Schlechtriem & Schwenzer, n 210, Art. 74, para 42.

[512] Case No. 10-80851-CV U.S. District Court for the Southern District of Florida (USA) 7 November 2011 (Al Hewar Environmental & Public Health Establishment v Southeast Ranch, LLC and Joel Gutierre).

earned a 20% gross margin on non-epidemic manufacturer goods for the 2005–2007 fiscal years.[513]

The but-for test functions as a filter, designed to eliminate claims of loss that are unrelated to the breach, while preserving those that are.[514] By filtering out events irrelevant to the sequence of causation, it provides a simple and workable standard for determining liability.[515] In cases of breach by omission, the test requires a showing of high probability that but for such omission, had it been performed, the loss would not have occurred.[516] This dissertation also finds that the but-for test is a suitable test to interpret causation of damages.

Despite its widespread use, critics argue that the but-for test may risk expanding damages unduly,[517] potentially generating an infinite chain of loss claims.[518] At the same time, the but-for test may also produce unfair results for the aggrieved party.[519] In certain situations, particularly those involving multiple sufficient causes, causal over-determination, a strict application of the test may deny recovery even where the breach has contributed to the loss.[520] In such situations, two or more independent events are each capable of producing the same loss. Because the loss would have occurred even in the absence of one of those events, the test fails to establish liability. For example, where other factors independent of the seller's late delivery were sufficient to cause the delay and resulting loss, the but-for test would show the loss would have occurred even if the seller had performed delivery on time. On this reasoning, a breach of contract cannot constitute the factual cause of the loss, and foreseeability cannot resolve this difficulty, because causation is a separate condition for liability.[521] It is suggested that the solutions for these issues are the 'NESS' test - an act is a cause of a loss if it is a necessary

[513] *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2011] FCAFC 55.

[514] Ishida, n 288, 248.

[515] Zeller, n 245, 112.

[516] Magnus, n 20, 264.

[517] Ishida, n 288, 246.

[518] Id., 247.

[519] Saidov, n 14, 92.

[520] Id., 90.

[521] Id.,

component of a sufficient set of conditions that produced the loss,[522] and the 'substantial factor'- a breach may be regarded as a substantial factor in causing the loss, notwithstanding the presence of other contributing factors.[523]

The operation of foreseeability together with causation is to reconcile full compensation with fair risk allocation. However, foreseeability is ill-equipped to address situations where multiple factors contribute to a loss, and the breach is merely one element among several. Thus, in certain complex commercial situations, the strict 'but-for' test and the 'foreseeability' limitation are inadequate for deciding recovery of damages. They can produce results that are either too broad, for example, holding a breaching party liable for a long chain of events simply because it was a 'but-for' cause, or too vague, such as where the loss is foreseeable but seems remote from the breach.

This dissertation considers that while the but-for test is an appropriate test for causation, the word 'consequence' in the first sentence of Art. 74 should be interpreted to encompass the loss that should be connected to the breach. Causation operates on two distinct levels: factual 'but-for' causation and probabilistic 'causal link' causation.[524] An act constitutes a but-for cause where the loss would not have occurred in the absence of the breach. By contrast, an act may be regarded as a causal connection between the breach and the resulting loss where it contributes to or increases the occurrence of the loss.[525] Interpreting the word 'consequence' in the first sentence of Art. 74 should not be read merely as a but-for test, but also refers to its causal connection to the breach of contract. Assume a seller delivers non-conforming goods that technically violate safety regulations. Before the buyer can remedy the defect, authorities initiate an industry-wide investigation for unrelated political reasons, suspending the buyer's operations. The buyer claims extensive losses resulting from the shutdown. While the non-conformity is a factual condition of the regulatory action, the decisive cause of the extensive losses lies in extraordinary governmental intervention. The breach is linked but not the dominant

[522] Hamer, D. (1999). "Chance would be a fine thing": Proof of causation and quantum in an unpredictable world. *Melbourne University Law Review, 23*(3), 571-2; See Saidov, n 14, 91-92.

[523] Id.; Honoré, n 494, 68- 69.

[524] Calabresi, G. (1975). Concerning cause and the law of torts: An essay for Harry Kalven, Jr. *University of Chicago Law Review, 43*(1), 71-72.

[525] Ben-Shahar, O. (2000). Causation and foreseeability. In B. Bouckaert & G. De Geest (Eds.), *Encyclopedia of law and economics* (Vol. 2, *Civil law and economics*). Edward Elgar Publishing, 646-7.

or legally relevant cause of the shutdown. Incorporating this criterion into the causation requirement does not contradict the foreseeability test in the second sentence; rather, it addresses a different question that foreseeability may not resolve. Foreseeability is about knowledge (what the party knew), while causal connection is about connection (how the loss happened and whether it connected to the breach). Thus, foreseeability does not replace the need to determine whether the loss qualifies as causal connection. Rather, it is applied after the damages claimed satisfy the but-for test and whether the loss is connected to the breach.

As observed by a court, it was always necessary to examine whether the damage would have occurred absent the relevant action of the party in breach.[526] Without the act of the party in breach, the loss would not have occurred. In a case, the court stated that the buyer was entitled to recover expenses incurred for transportation, storage, and testing under Art. 74. However, the buyer failed to demonstrate that some of those expenses were directly connected to the breached contract.[527] Similarly, in one case, the tribunal rejected the buyer's claim for reputational loss on the ground that the buyer had failed to establish a causal connection between the alleged loss and the seller's breach of contract.[528]

For operation, the but-for test should be applied first to determine whether the loss would have occurred but for the breach. If the but-for test is established, the loss must be sufficiently closely connected to the breach to warrant attribution. Only losses that pass the causation requirement, both the but-for test and causal connection, are subject to the foreseeability limitation. Foreseeability thus limits the scope of risk assumed by the breaching party, while the concept of legal consequence limits the structural reach of causal attribution. Each element performs a distinct function.

In sum, foreseeability and causation 'could be applied in a rather consistent manner'.[529] The 'consequence' term expressed in the first sentence of Art. 74 should be read as both the but-for test and causal connection between the breach and the loss. Such an interpretation reinforces

[526] Case No. 32 Cdo 2978/2016, ECLI:CZ:NS:2018:32.CDO.2978.2016.1 Supreme Court (Czech Republic) 18 April 2018 (Solarpower GmbH v. Servis FVE a. s. and M. B).

[527] Case No. BS-47340/2021-SHR Maritime and Commercial Court (Denmark) 14 December 2022 (Schroll Medical ApS v. Vertanical GmbH).

[528] MKAC No. 54/1999, 24 January 2000.

[529] Ramberg, J. (2000). *International commercial transactions* (2nd ed.). Kluwer Law International, 126.

predictability, proportionality, and fairness in the allocation of risk in international sales law. This approach would preserve the Convention's commitment to full compensation while ensuring balanced risk allocation.

2. The degree of probability required for foreseeability

On the question of how probable the loss must be, Art. 74 limits recovery of damages to those that were foreseeable as 'a possible consequence' of the breach.[530] This formulation indicates that the Convention does not demand that the loss be probable, likely, or even not unlikely, as suggested by several scholars,[531] but a possible consequence.[532] The party in breach need not foresee the exact size of the loss, it is sufficient that the possibility of such loss was foreseeable.[533] In one case, the court expressly held that the loss was foreseeable within the meaning of Art. 74. It reasoned that, at the time of concluding the sales contract, the defendant could foresee the possibility that if it failed to pay the freight charges to the carrier, the carrier would seek payment from the plaintiff as consignor and potentially initiate legal proceedings, and in such a situation, the plaintiff would have to instruct legal counsel and incur legal fees.[534] In another decision, the court found no breach of Arts. 74, 75, or 77, holding that the seller failed to establish that the possibility of a replacement purchase was possible, and the damages claimed exceeded the loss that was foreseeable to the breaching party.[535]

In comparative perspective, the term 'possible consequences' of the CISG diverges from other degrees employed in several national legal systems and international model instruments. Both the UPICC[536] and the PECL[537] require that the harm be foreseeable as being 'likely to result' from non-performance. The English law refers to losses arising as the 'probable result' of the

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[530] Kritzer, A. H. (1994). *Guide to practical applications of the United Nations Convention on Contracts for the International Sale of Goods*. Kluwer Law and Taxation Publishers, 477.

[531] See Witz & Salger, n 218, Art. 74, para 15; Lüderitz, A., & Dettmeier, B. (2000). Article 74. In H.-T. Soergel (Ed.), *Soergel: Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*. Kohlhammer, para 28; Schlechtriem & Schwenzer, n 210, Art 74, para 50.

[532] Kröll et al., n 24, 969.

[533] Butler, n 205, 53; Schlechtriem & Schwenzer, n 210, Art 74, para 50.

[534] *Rolser S.A. v. Global Living*, Tokyo District Court (Japan) 3 June 2019.

[535] Case No. 439/10 Court of Appeal (Spain) 15 July 2010.

[536] UPICC, Art. 7.4.4.

[537] PECL, Art. 9:503.

breach.[538] The distinction between 'possible consequence', 'likely to result', and 'probable result' is not merely linguistic and is the subject of extensive debate. 'Possible' is a broad term[539] which may expand the liability of the breaching party. In *The Heron II*, the House of Lords distinguishes 'possible consequence' and 'probable result' as:

> "[S]uppose one takes a well-shuffled pack of cards, it is quite likely or not unlikely that the top card will prove to be a diamond: the odds are only 3 to 1 against. But most people would not say that it is quite likely to be the nine of diamonds for the odds are then 51 to 1 against."[540]

The expression 'not unlikely', or similar words, reflects a relatively low degree of probability.[541] Ziegel and Samson also resort to *The Heron II* to state that the foreseeability rule under Art. 74 CISG is broader than the rule in *Hadley v Baxendale*. [542] Thus, the CISG appears to widen the scope of liability placed on the party in breach.[543] In contrast, the UPICC and the PECL's approach to the degree of probability is more restrictive by expressly requiring that the loss be likely to result from non-performance.[544] In practice, however, this variation in language does not produce divergent outcomes.[545]

This dissertation takes the view that the term 'possible' is not important in evaluating foreseeable loss or in deciding recoverable damages under Art. 74 if it is not interpreted properly and well structured. The central argument is that relying on the word 'possible' renders the foreseeability requirement conceptually vacuous as a limiting principle, because almost anything may be described as possible in the sense that it could occur.[546] The term 'possible'

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[538] See *Hadley v Baxendale* (1854) 9 Ex 341.

[539] *Czarnikow v Koufos, The Heron II* [1969] 1 AC 350, 390.

[540] Id.,

[541] Id.,

[542] Ziegel, J. S., & Samson, C. (1981). *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*. Uniform Law Conference of Canada. Available at: *https://iicl.law.pace.edu/sites/default/files/bibliography/english2_0.pdf*. (accessed 23 March 2024).

[543] Murphey, n 265, 440.

[544] Saidov, n 14, 133.

[545] Id.,

[546] Ishida, n 288, 262.

sets the lowest conceivable threshold of probability. The concept of possibility refers to a theory of uncertainty designed to accommodate incomplete information.[547] It has been criticized for its lack of a clear definition and the absence of established evaluative criteria.[548] In logical and philosophical terms, an event is possible if it is not impossible. For example, based on recent scientific announcements of UFOs, it is possible that aliens will land on Earth tomorrow and launch an attack. Although such an event is extraordinarily unlikely, it is not logically impossible. Therefore, if a contract for the sale of goods were breached, a buyer could theoretically argue that it was 'possible' that the breach would cause them to be on Earth at the exact moment of an alien invasion, resulting in loss of life or property. Such a claim is absurd, yet it satisfies a literal reading of 'possible'. Similarly, where two States share a long history of political or territorial disputes but have recently issued declarations of peace, it remains possible that armed conflict could resume within a short period of time, although this event is currently unlikely. If a seller breached a contract by delaying the shipment of goods to a buyer located in one of these countries, the buyer might claim that it was 'possible' the delay caused them to be caught in a sudden outbreak of war, leading to the destruction of their business. Again, while possible, this outcome is remote and speculative.

Therefore, possibility carries its own broad criterion,[549] encompassing events that are conceivable but so remote that no reasonable party would take them into account when allocating contractual risks. A person with sufficient imagination could, in theory, regard virtually anything as possible.[550] If the foreseeability test under Art. 74 is reduced to a binary assessment of whether a loss was 'possible' or 'impossible', then almost any loss, no matter how remote or bizarre, could theoretically satisfy the test, provided it is not physically or legally impossible. There is an opinion that the 'possible' term should be interpreted at a low degree of

[547] Dubois, D., & Prade, H. (2015). Possibility theory and its applications: Where do we stand? In J. Kacprzyk & W. Pedrycz (Eds.), *Springer handbook of computational intelligence*. Springer, 31.

[548] Hacking, I. (1967). Possibility. *The Philosophical Review*, *76*(2), 143.

[549] Case No. 7 Ob 301/01t Supreme Court (Austria) 14 January 2002 (Cooling system). (The court explained that the loss claimed should be determined based on 'a large degree on what possible losses' a reasonable person would have foreseen').

[550] Radetzki, n 335, 335.

probability of foreseeable loss. This suffices to impose liability on the breaching party.[551] A carrier could argue that it is possible that a delay in shipping could cause the buyer to miss a once-in-a-lifetime market bubble; a seller could argue that it is possible that supplying non-conforming goods could cause the buyer to lose a fantastically lucrative sub-contract. The 'possible' element of the foreseeability test, if interpreted literally and in isolation, may have little or no effect in restricting the recoverable damages.[552]

The foreseeability rule in contract law operates as a mechanism for limiting damages and as a risk-allocation tool that prevents the breaching party from being held liable for losses that were too remote at the time of contracting.[553] The test is meant to draw a line between losses for which the contract implicitly allocated risk and those that were entirely outside the parties' contemplation. If the line is drawn at 'possible', it is drawn in the wrong place. As the examples of alien invasion and geopolitical conflict illustrate, almost any loss can be characterized as a possible outcome of a breach. This does not help to provide guidance to the court in distinguishing between losses that are a normal incident of the type of contract (and thus implicitly insured against) and losses that are extraordinary. It eliminates the normative limitation that the drafters likely intended to include by referring to the 'particular circumstances of the individual case',[554] because even the most extraordinary loss can be framed as a 'possible' outcome.

Legal scholarship demonstrates a clear tendency to interpret the foreseeability doctrine broadly so as to encompass possibly all types of damages arising from contractual breaches.[555] If foreseeability were satisfied merely by demonstrating that a loss was possible in an abstract or theoretical sense, Art. 74 would fail to impose any effective limitation on liability. The fact that the resulting loss is merely 'possible' does not constitute a strict prerequisite for the recovery of damages.[556] The operative and limiting function of Art. 74 is not found in the word 'possible',

[551] Herre, J. (1996). *Ersättningar i köprätten: Särskilt om skadeståndsberäkning*. Stockholm, 408; Ramberg, J., & Herre, J. (1995). *Köplagen*. Stockholm, 646 f.

[552] Ishida, n 288, 262.

[553] Saidov, n 14, 112-3.

[554] Schlechtriem & Schwenzer, n 210, Art.74, para 50.

[555] Vékás, n 25, 162.

[556] Id., 160.

but rather in the preceding phrase ‘in the light of the facts and matters of which he then knew or ought to have known’. It is this inquiry into the ‘facts and matters’ known to the parties that allocates risk and determines the scope of recoverable damages, rendering the specific word chosen to describe the degree of probability a matter of linguistic preference rather than substantive legal consequence. As stated by Saidov, the broad scope of liability is limited by the preceding phrase of Art. 74 ‘in the light of the facts and matters of which [the breaching party] knew or ought to have known’.[557] This expression confines foreseeability to the breaching party’s actual or constructive knowledge at the time of contract formation, not whether a loss was a possible outcome in an abstract manner. A loss is not just ‘possible’, it is a normal and foreseeable incident of dealing with a retailer. Conversely, if the buyer has a highly unusual and lucrative resale contract, that specific loss is not within the seller's contemplation unless the buyer communicated it. The loss remains ‘possible’ in the abstract, it is not impossible for a delay to cause a loss of profit, but it is not foreseeable because the seller lacked the requisite knowledge. Likewise, a seller cannot be expected to foresee an alien invasion or a sudden geopolitical conflict simply because such events are ‘possible’.

Generally, comparative legal scholarship has devoted significant attention to the distinction between ‘possible consequence’ and ‘probable result’ to prove that ‘possible consequence’ carries a broad scope of liability. This dissertation argues for the inefficacy of the term ‘possible’, which is so broad as to be incapable of performing any meaningful limiting function on its own. It is undeniable that the ‘possible consequence’ should be assessed on a case-by-case basis and cannot be established through a fixed degree of probability or expressed by reference to a fixed percentage.[558] However, this term should be constructed properly to facilitate foreseeability assessment. In short, the ‘possible’ consequence should not be interpreted broader than the scope of (reasonable) foreseeability.

IV. Time of foreseeability

Under Art. 74, the evaluation of foreseeability is explicitly anchored to the time of the conclusion of the contract. The drafters' choice to fix foreseeability at this time reflects its

[557] Farnsworth, n 214, 247–53.

[558] Vékás, n 25, 160.

purpose to promote commercial certainty and predictability to ensure that, at the time of making the contract, parties have the chance to assess potential risks and implement protective measures, be it through the negotiation of specific clauses, strategic pricing, or securing insurance. However, the increasing prevalence of complex, long-term, and dynamic contractual relationships affected by external disruptions such as global pandemics, armed conflicts, and market volatility challenges the efficacy of fixing time at the time of the conclusion of the contract. As agreements evolve through subsequent modifications or adapt to shifting market conditions in response to changing circumstances, the nature and magnitude of risks can shift significantly after the initial contract formation. In such contexts, a rigid adherence to the time of formation of the contract can result in an inequitable distribution of loss that ignores the parties' ongoing renegotiations and reassumptions of risk. Besides, in the case of wilful or intentional breach, it seems to be unfair to determine foreseeability only at the time of concluding the contract. This part examines the issue of the relevant time to evaluate foreseeability under Art. 74 of the CISG and argues that the time for assessing foreseeability should be treated flexibly in certain circumstances, such as contractual modification and intentional breach, where the current formulation produces unjust or commercially unreasonable outcomes.

1. The default rule under Art. 74 of the CISG

The relevant time at which foreseeability must be assessed is one of the decisive factors in determining the foreseeability of damages. The prevailing view, endorsed by most legal systems, scholars, and model instruments, is that the relevant time to determine foreseeability is the time when the contract is concluded, not the time of the breach. French law stipulates that ‘a debtor is bound only to damages which were either foreseen or which could have been foreseen at the time of conclusion of the contract.[559] A similar time point also appeared in the common law, such as the *Hadley v. Baxendale*[560] or the *Victoria Laundry (Windsor) v. Newman Industries* case.[561] At the international level, Art. 7.4.4 of the UPICC and Art. 9:503 of the PECL identify that the evaluation of foreseeability is at the time of the conclusion of the contract.

[559] Ordinance No. 2016-131, Art. 1231-3.

[560] *Hadley v. Baxendale* (1854) 9 Ex 341.

[561] *Victoria Laundry (Windsor) LD. v Newman Industries LD*. [1949] 2 KB 528.

Similarly, foreseeability in Art. 74 of the CISG is also fixed at the time of conclusion of the contract to determine whether a loss is foreseeable. Accordingly, the party in breach is excluded from liability for losses they could not foresee at the time the contract was concluded, even if they became aware of the losses while performing the contract.[562] This approach serves as a legal safeguard ensuring that parties are only liable for risks that were within their contemplation at the time of entering into the contract. Events arising after contract formation, including at the time of the breach, have no bearing on the assessment of foreseeability.[563] Requiring a precise time in assessing foreseeability is vital,[564] and specifying time at the conclusion of the contract will help to promote legal certainty, risk management and prevent *ex post facto* reallocation of contractual risk.

Most scholars agree that the time at which the contract is concluded in Art. 74 of the CISG is unambiguous, requiring no textual amendment.[565] For a wide range of transactions, this approach remains both logical and effective. The foreseeability of loss must be evaluated at the time the contract is concluded, because this is the only point at which parties are in a position to negotiate terms, weigh risks, and make informed decisions about risk allocation to protect themselves.[566] It enables parties to have the opportunity to take into account any extraordinary circumstances beyond the ordinary course of business. Fixing the time of foreseeability at contract conclusion provides clarity and facilitates efficient risk management. Legal consequences cannot be anchored to events or awareness arising after the contract enters into force, as post-contractual knowledge does not affect the original assumption of risk. Accordingly, the time of breach is not relevant to the foreseeability analysis under Art. 74. As a matter of principle, a loss or risk that becomes known only after the contract is formed does not retroactively alter the scope of foreseeable damages. As such, the time of contract conclusion serves as a temporal boundary that limits exposure to unforeseeable losses, ensuring that liability remains within the range of risks that were reasonably calculable.

[562] Knapp, n 207, 542.

[563] Kröll et al., n 24, 969.

[564] Liu, n 70, s 14.2.3.

[565] Treitel, n 269, 160.

[566] Saidov, n 14, 132.

Jurisprudence across a wide range of CISG jurisdictions applies the relevant time for assessing foreseeability under Art. 74 is the time at the conclusion of the contract. In an Austrian case, the supreme court noted that all losses, including loss of profit, are recoverable to the extent they were foreseeable at the time of the conclusion of the contract.[567] In another case, the tribunal rejected damages claims for incidental and consequential losses sought by the claimant, ruling that the claims were not foreseeable for the respondent at the date the contract was concluded.[568] Similarly, there is a case where the court held that because the buyer failed to prove such knowledge or foreseeability at the time of the conclusion of the contract, it was not entitled to damages.[569]

The German cheese case clearly affirms the application of the time-of-conclusion standard. While lower courts denied recovery for consequential losses (such as lost customers, reputational damage, and increased delivery costs), the German supreme court reversed, grounding its decision in the foreseeability standard at the time of contract formation. In this case, a German importer bought cheese from a Dutch exporter, and 3% of the cheese was defective, leading to significant consequential losses for the buyer, including loss of customers, damages paid to a customer, and increased transport costs due to lost delivery arrangements. Lower courts denied recovery for lost profits, holding that the seller could not foresee that 3% defective cheese would cause such extensive losses. The supreme court reversed, ruling that foreseeability is assessed at the time of contract formation, and since the seller knew the buyer was a reseller, such losses were foreseeable.[570]

Although this rigid time 'at the conclusion of the contract' is widely used and supported by various legal systems and international instruments, scholars and judges, there are other views on the time to determine foreseeability. Several scholars have questioned whether limiting foreseeability to the time of contract formation always yields equitable results. Notably, Murphey argues that 'a sounder decision can be made nearer the time of performance or breach', particularly in light of developments that may emerge during the course of contractual

[567] Case No. 7 Ob 301/01t Supreme Court (Austria) 14 January 2002 (Cooling system).

[568] Vienna International Arbitral Centre (VIAC) No. ARB-5740, 30 October 2024 (Progress v. OTL Firearms and Imports Corporation).

[569] Case No. 3 U 83/98 Appellate Court Bamberg (Germany) 13 January 1999 (Fabric).

[570] Case No. VIII ZR 210/78 Supreme Court (Germany) 24 October 1979 (Cheese).

performance.[571] Similarly, Samek advocates for an exception in cases of wilful breach, on the ground that parties who act deliberately against contractual duties are less deserving of protection under a strict foreseeability threshold fixed at the outset.[572] From a different angle, Robin Cooke offers a more nuanced approach by proposing that courts consider both the moment of contracting and the moment immediately before breach to determine whether a loss was reasonably foreseeable.[573] Eisenberg suggested that foreseeability should be assessed at the time of breach, ensuring that the breaching party accounts for all reasonably foreseeable losses before deciding whether to breach.[574] Several American cases tend to treat damages as foreseeable when they stem from post-contracting disclosures highlighting an imminent risk of loss.[575]

There are cases where courts have expressed a preference for using a different point in time, other than the conclusion of the contract, when assessing foreseeability. In the *Chilean Sea Bass* case, the seller and the buyer entered into an agreement for the supply of Antarctic toothfish in January 2020. As the COVID-19 pandemic destabilized global fishing markets, both parties faced significant commercial losses. The seller subsequently filed suit, alleging that the buyer had violated the terms of the original agreement. In response, the buyer argued that the original contract had been modified in March 2020 through an affiliate of the seller by reducing the price. This adjustment was undertaken to mitigate the pandemic's adverse impact on the market and to maintain the ongoing business relationship between the contracting parties. The Court affirmed a valid modification and ruled that the buyer failed to pay the amounts due even under the modified agreement and was therefore in breach of the modified contract. In assessing damages under Art. 74, the court emphasized that foreseeability must be evaluated based on what the party in breach knew, or ought to have known, at the time of the modification (March 2020), rather than at the time of the original contract (January 2020). At the time the buyer agreed to reduce the price, it was already aware of the ongoing disruptions caused by the COVID-19

[571] Murphey, n 265, 449.

[572] Samek, R. (1964). The relevant time of foreseeability of damages in contract. *Australian Law Journal*, *38*, 126-7.

[573] Cooke, R. (1978). Remoteness of damages and judicial discretion. *Cambridge Law Journal*, *37*(2), 298.

[574] Eisenberg, M. A. (1992). The Principle of Hadley v. Baxendale. *California Law Review, 80*(3), 599.

[575] See Vékás, n 25, 163.

pandemic and the resulting volatility in the seafood market. In these circumstances, it was reasonably foreseeable that a failure to pay under the modified terms would result in substantial and readily quantifiable losses to the seller.[576] The court's reasoning recognized that the contractual modification constituted a renewed allocation of risk between the parties. By anchoring foreseeability to the time of modification, the court aligned the assessment of damages with the parties' updated knowledge, reallocation of risk, and expectations in light of rapidly evolving market conditions. This approach ensures that damages are proportionate to what the breaching party understood to be the risks at the moment they reaffirmed their commitment.

Another case shedding light on the 'time of foreseeability' under Art. 74, albeit from a slightly different angle, is *Busrel Inc. v. Dotton et al.* In *Busrel*,[577] the plaintiff (Busrel) entered into a contract with defendants Ms. Dotton and KRP for the supply of personal protective equipment (PPE). Busrel paid the full purchase price of $8,200,000 into an escrow account before delivery. The defendants failed to supply the PPE and refused to refund the payment in full, returning only $250,000. The plaintiff claimed breach of contract under the CISG, seeking compensation for the unrefunded amount of $7,950,000. The court ruled in favor of Busrel, awarding $7,950,000 in compensatory damages (the full payment minus the partial refund). The decision was based on the reasoning that the defendants were aware that Busrel had already transferred the full $8,200,000 into escrow before their breach. Thus, they knew or should have foreseen that failing to deliver the PPE or refund the payment would result in a loss equivalent to the full purchase price. Since the defendants were aware of the payment before breaching, the foreseeability requirement under Art. 74 was satisfied regardless of whether the loss was foreseeable at the initial contract stage. The court considered what defendants actually knew about the full payment at the time they breached, not just at the time the contract was concluded. Thus, the total loss was foreseeable in light of the circumstances that had developed after contract conclusion, but before or at the time of breach.

[576] Case No. 21-cv-337-JJM-LDA U.S. District Court for the District of Rhode Island (USA) 22 May 2024 (Chilean Sea Bass Inc. v. Kendell Seafood Imports, Inc).

[577] Case No. 1:20-cv-01767 U.S. District Court for the Western District of New York (USA) 01 November 2022 (Busrel Inc. v. Dotton et al).

In a case of ICAC, the tribunal reportedly applied the foreseeability test with reference to a later time when the invoice was presented.[578] This decision might be seen as contravening the plain language of Art. 74. It seems the tribunal intended to assess actual knowledge and practical risk awareness at a point in time that more accurately captured the commercial context of the dispute.

While Art. 74 clearly mandates that foreseeability be assessed at the time of contract conclusion, some courts and tribunals have developed practical refinements in applying this rule: modifications create a new benchmark for foreseeability, or known post-contract facts may reinforce or help determine what was objectively foreseeable. The cases of *Chilean Sea Bass Inc.* and *Busrel Inc.* collectively offer valuable insights into the judicial interpretation of the time of foreseeability under Art. 74, moving beyond a rigidly literal application of 'at the time of the conclusion of the contract'.

2. Reassessing the temporal scope of foreseeability under Art. 74

Giving the parties the opportunity to calculate potential risks and protect themselves based on the information available at the initial stage, the relevant time to assess foreseeability at the time of conclusion of the contract appears to be appropriate. While this rule promotes certainty by fixing foreseeability at contract formation, modern commercial realities - where contracts often involve ongoing communication, cooperation, modifications, and renegotiation between the parties - challenge this rigid time standard. Treating these as static relationships where rights and expectations are fixed from the outset ignores the continuous association between parties and the evolving context in which contracts operate. Sales agreements often include open-terms or contingency provisions for future conditions, such as price adjustments, installment deliveries, or extensions, that implicitly acknowledge the volatility of risk and the obligation to perform over time. This dissertation argues that there are circumstances where assessing foreseeability at a later time becomes more justifiable, aligning with the intentions of the parties, the practical requirements of cross-border transactions, and especially the 'assumption of risk' rationale.

[578] ICAC No. 7 Ukrainian Chamber of Commerce, 7 February 2007. Cited in Saidov, D. (2021). *The law of damages in international sales: The CISG and other international instruments* (2nd ed.). Hart Publishing, 132.

2.1. Long-term contracts with open-ended terms

Many long-term contracts deliberately leave essential terms, such as price, quantity, or delivery dates, to be determined or agreed upon at subsequent stages of the contractual relationship.[579] In relationships where performance is continuous or where critical terms are to be negotiated at later intervals, each such negotiation may be viewed as forming a new contractual commitment, or at least a renewed assumption of known risks. Thus, each bargaining phase may constitute a new foreseeability benchmark.[580] If a party becomes aware of heightened risks during this ongoing process, it should act, either by giving notice, renegotiating, or exiting the contract, to protect itself rather than subsequently relying on unforeseeability to avoid liability. For example, with a five-year supply contract that includes an annual price review clause, if market volatility occurs in the third year, the seller's awareness of potential losses should govern foreseeability at that stage, not the first year. This prevents parties from being bound by outdated risk assessments, promoting adaptive fairness. Furthermore, in cases where the contract can be terminated at will, it can be argued that a new contract is essentially formed at each stage of negotiation, justifying a later assessment of foreseeability. If, at the time of negotiating these open terms, one party becomes aware of risks that were not foreseeable initially, it is appropriate to assess foreseeability with reference to that negotiation stage. This allows the party to protect itself, even if it means terminating the contract.

Long-term contracts, particularly those with open-ended clauses, imply a 'living' commercial relationship. Unlike discrete, one-off sales, these agreements require reassessment and reallocation of risk over time as circumstances evolve. To insist on foreseeability only at the initial conclusion for such contracts would ignore their very nature and the commercial expectations of the parties to adapt to a changing environment.

2.2. Contract adjustment as a renewed assumption of risk

Modification refers to any updated, adjusted, or new information owned by a party after the conclusion of the contract and agreed by the parties for contract performance. When parties agree to change the terms of a contract after its initial conclusion, a renewed assumption of risk

[579] Saidov, n 14, 133.

[580] Id.,

occurs.[581] If the parties renegotiate essential elements, such as price, volume, or delivery schedule, this renegotiation reflects a new acceptance of risk. During this renegotiation process, the potential party in breach with updated knowledge becomes newly aware of risks that were not foreseeable at the time of the original contract, and now has the opportunity to protect themselves.[582] This chance to protect themselves, based on new knowledge, allows the timing of risk prediction to shift to the time of contract modification or adjustment.

This approach becomes even more crucial when considering recent global upheavals such as the COVID-19 pandemic and ongoing armed conflicts. These events fundamentally alter the commercial landscape, introducing risks that were genuinely unforeseeable at the time when many international sales contracts were concluded. Assuming a case where a German manufacturer (buyer) signed a contract in late 2019 with a Chinese supplier (seller) to purchase a large quantity of specialized electronic components, with delivery scheduled for Q2 2020. At the time of signing the contract, neither party could foresee that the Chinese government would impose strict lockdown measures, leading to factory closures and a complete halt to production and shipping from that region. When the seller is unable to deliver components due to mandatory government lockdowns, the buyer suffers significant delays and losses in production. No reasonable businessperson could have foreseen the specific nature and scale of the COVID-19 lockdowns in late 2019 (at the time of making the contract). When the pandemic developed, both parties became aware of the extraordinary risks. If the seller informs the buyer of a temporary halt in production due to government measures, and the buyer then has to decide whether to wait, seek an alternative supplier, or renegotiate terms, a new opportunity to protect oneself has arisen. The resulting damage should then be assessed based on what was foreseeable after this information is provided and any subsequent negotiations or inaction.

The focus shifts to whether the other party acted reasonably after the event became known. In such situations, parties often modify existing agreements to mitigate damage or maintain the supply relationship. Courts recognizing modifications aimed at mitigating damage or maintaining the supply relationship, such as in the case of *Chilean Sea Bass* discussed above,

[581] Saidov, n 14, 132.

[582] Kramer, A. (2008). Remoteness: New problems with the old test. In D. Saidov & R. Cunnington (Eds.), *Contract damages: Domestic and international perspectives*. Hart Publishing, 294, 297-8.

reasonably assessed foreseeability at the time of modification, when the parties had up-to-date knowledge of market changes related to the pandemic and could reassess their obligations. The *Chilean Sea Bass* case demonstrates that a rigid application of the time of contract conclusion to evaluate foreseeability may not be appropriate to commercial practice, especially in situations involving valid contract modifications. The Convention, while it is silent on the treatment of modified contracts in Art. 74, does not prohibit adjusting the foreseeability test when there is a justifiable reason. Applying the foreseeability at the time of modification promotes fairness, particularly in the case of unforeseeable events (e.g., pandemics). If foreseeability is tightly bound to the original contract, the parties may be unfairly held liable for losses arising from subsequent unforeseeable interruptions. The Court's approach ensures that liability corresponds to the breaching party's awareness at the time of the modified terms. This approach is also consistent with the CISG's underlying principles of good faith and promoting uniformity (Art. 7(1) and 7(2)).

Ongoing armed conflicts, such as the 2022 full-scale invasion of Ukraine, also strongly underscore the need for flexible foreseeability assessments. While regional conflicts may be predictable in certain politically unstable areas, sudden escalations, widespread sanctions, and disruptions to critical trade routes and energy markets are often beyond the reasonable foreseeability of many global businesses. Taking the Russia-Ukraine war, which has disrupted supply chains in grain, energy, and raw materials, leading to the failure to perform numerous international contracts, as an example. Sellers and buyers operating in affected sectors (e.g., steel, sunflower oil, natural gas) faced sudden export/import bans or sanctions, the destruction of production facilities, and disruptions to banking and the SWIFT system, hindering payments. For contracts concluded before February 2022 (invasion date), contracting parties may not have foreseen such severe risks. However, the continuation or extension of contract performance after the outbreak of war reflects the parties' updated understanding of those risks. Assuming a case where a Spanish food importer (buyer) entered a long-term contract in 2021 with a Ukrainian grain exporter (seller) for regular shipments of wheat. The contract had fixed prices and delivery routes via the Black Sea. With the outbreak of the full-scale war in February 2022, the Black Sea ports were blockaded, and global energy prices (and therefore shipping costs) skyrocketed. The seller was unable to ship the wheat via the agreed route, and alternative routes were significantly more expensive, making the original contract terms extremely unfavorable

financially. In this scenario, the risks were unforeseeable at the time the contract was signed. While geopolitical tensions in the region may have been known, the full-scale invasion and its immediate devastating impact on Black Sea shipping and global energy markets were unforeseeable for a typical grain sales contract in 2021. Furthermore, as the war escalated, both the buyer and seller became acutely aware of the new, extremely serious risks. Agreeing to renegotiate and continue the contract implied that the parties reassumed the risk and had the opportunity to protect themselves. Holding the seller to adhere to what was foreseeable at the time of the original contract, as if the impact of the war were already known in 2021, would be commercially unsound and would lead to the collapse of the contract rather than adaptation. This implies that the parties' continued performance of the contract amidst the risk of war means they reassumed that risk, making subsequent losses foreseeable.

Another hypothetical example refers to the Red Sea shipping crisis (2023–2024), which was caused by Houthi attacks and regional instability, leading to severe delays in container shipping passing through the Suez Canal. This impacted delivery timelines and costs, particularly for goods transported between Asia, Europe, and Africa. Companies that initially entered sales contracts before these events were often forced to change routes or renegotiate delivery terms months later. Those who accepted such renegotiations may have updated their risk allocation. For instance, an electronics company agreed in early 2023 to ship through Suez by November. In October 2023, due to increasing attacks on commercial vessels, the parties renegotiated for delivery via a different, more expensive route. If the buyer later breaches the contract, the seller can claim damages that were foreseeable at the time of renegotiation, rather than at the time of the original agreement.

These hypothetical examples highlight that for such unusual events, the concept of a party having an opportunity to protect itself often arises after the initial contract formation, specifically when the unforeseen risk occurs or becomes known. This reinforces the idea that the contracting party should notify the other party of the increased risk not necessarily at the time of entering into the contract, but when he becomes aware of the risk. This proactive notification allows the other party to assess their options, renegotiate, or implement risk mitigation strategies. Agreeing to continue the contract means the parties reassume risks and obligations. Therefore, foreseeability at the time of adjustment is more appropriate.

2.3. Time of foreseeability under Art. 74 in cases of wilful breach

The nature of the breach, including whether it was intentional or negligent, may also affect the determination of foreseeability.[583] Some national legal systems compensate for damages even for unforeseeable losses when the breach was caused by a party's intentional actions or gross negligence. Under French law, a debtor cannot escape liability for damages resulting from gross or dishonest fault, even if such damages are unforeseeable at the time of the contract.[584] The Serbian Law on Contracts and Torts does not require foreseeability in case of wilful misconduct or gross negligence.[585] The PECL addresses such an issue by providing that the non-performing party is not exempt from liability for losses resulting from intentional or grossly negligent non-performance if such losses were unforeseeable.[586] In this case, the successful aggrieved party is entitled to full compensation.[587] However, there is no such exception expressed in the CISG reflecting its implication in refusing full compensation for loss, even if it is impossible to foresee, in case of a wilful breach. Although neither the CISG nor the UPICC expressly adopts such a requirement, jurisprudence in comparable legal regimes demonstrates that the intentional nature of a party's breach can influence the evaluation of foreseeability.[588]

The reason foreseeability is tied to the conclusion of the contract is to allow parties to price their risks. As noted, the purpose of foreseeability is to protect parties from disproportionate liability for unforeseeable risks that they did not implicitly assume at the time of the conclusion of the contract. That purpose is not served when a party, after the contract is concluded, acquires knowledge of the increased risks and nonetheless intentionally breaches the contract. A party that intentionally breaches is no longer managing a commercial risk; they are making a conscious choice to cause harm. Therefore, the rationale underlying the traditional rule becomes significantly less persuasive when the breach is wilful. In this analysis, intentional breach refers to situations where the obligor deliberately decides not to perform its contractual obligations, and is aware, or substantially certain, that its non-performance will cause specific loss to the

[583] Saidov, n 14, 123.

[584] Ordinance No. 2016-131, Art. 1231-3.

[585] The Serbian Law on Contracts and Torts (1978/2020), Art. 266, para. 2.

[586] PECL, Art. 9:503.

[587] Liu, n 70, s 14.2.6.

[588] Enderlein & Maskow, n 2, 301.

other party. In such circumstances, the party in breach typically possesses superior and more up-to-date knowledge at the time of breach. This knowledge may include the counterparty's specific reliance interests, the existence of downstream contracts, or the extent of potential economic loss. The rationale for limiting damages to what was foreseeable at the time the contract was concluded creates inconsistency. This allows a party to intentionally cause damage that is entirely foreseeable at the time of breach, while escaping liability on the grounds that such damage was not foreseeable at an earlier stage. The rigid application of foreseeability at the time of the conclusion of the contract in cases of wilful breach risks such an outcome. It allows the party in breach to rely on prior information limitations despite possessing actual knowledge of the damage at the time of the breach. Therefore, the relevant time for assessing foreseeability should be the time of the breach, not the time of entering into the contract.

To see how this works in practice, consider this hypothetical scenario: in January, a technology manufacturer (buyer) enters a contract with a chip supplier (seller) to purchase 100,000 units at $10 each, with delivery in December. At the time the contract was signed (January), a global shortage was not foreseeable. By October, a sudden global crisis caused chip prices to skyrocket to $100 each. The seller, seeing an opportunity to make a huge profit, deliberately breached the contract with the buyer to sell those chips to a third party for $100 each. Under Art. 74**,** the seller's liability is limited to what was foreseeable in January. Because the $90/unit price surge was unforeseeable at the time of the conclusion of the contract, the buyer might only recover nominal damages, leaving the seller with a huge and unjustified profit. Conversely, if assessing foreseeability at the time of the breach, because the breach was wilful and the price increase at this time is a known fact, the seller is liable for the full $90/unit difference, which eliminates their incentive to breach the contract and effectively compensates the buyer for their losses in the current market.

Although the CISG does not explicitly establish a separate regime for wilful breach, it does not treat all forms of breach as normatively equivalent. The role of contract law is not merely to protect the aggrieved party in the event of breach of contract, but also to provide an efficient, predictable, and secure framework for regulating economic relationships between parties. This objective requires not only compensation for breach but also the proper performance of

contractual obligations.[589] Accordingly, the party in breach should bear responsibility for its improper performance, particularly where the breach is wilful. By moving the foreseeability evaluation to the time of breach, the law ensures that a wilful breacher cannot benefit from their own bad faith. This is consistent with the principle of good faith outlined in Art. 7(1) of the CISG, which states that the Convention should not be used to facilitate or reward intentional misconduct. While good faith does not operate as a direct source of obligations, it acts as an interpretative principle aimed at limiting the possible outcomes that would allow for abusive or opportunistic conduct. In cases of wilful breach, foreseeability should be assessed at the time of breach, or at least include losses that were in fact foreseen at that time. Such a model preserves the advantages of the traditional rule while preventing its misuse in cases of intentional violations. This proposed time brings a more equitable result. It prevents the seller from using the protective foreseeability as a shield for intentional misconduct, upholds the principle of good faith, and ensures that damages serve their proper compensatory and deterrent functions. The buyer is fully compensated for losses intentionally caused by the seller, rather than being limited to the traditional evaluation of foreseeability at the time the contract was concluded.

In conclusion, applying the time at the conclusion of the contract to determine foreseeability is a general standard, which was widely used in both national legal systems and international instruments, to ensure the allocation of risk between contracting parties. This approach is also adopted by the courts and tribunals in most cases, demonstrating its consistency and effectiveness in fixing the scope of responsibility. However, the rigid application of this 'fixing time' for foreseeability can prove detrimental to fairness and trade practice in certain contractual relationships involving renegotiations, modifications, extensions, or long-term contracts. In such dynamic scenarios, the nature and extent of risk can change significantly after the original contract is concluded, and parties often renegotiate their obligations to adapt to these new circumstances. The parties' actions imply a change in risk allocation. Therefore, it is justifiable and fair to shift the time of foreseeability from the contract's conclusion to a time of such modifications when the parties renew their assumption of risks and have the opportunity to protect themselves. Furthermore, when the breach is wilful or intentional, the appropriate time to assess foreseeability should be shifted to the time of the breach. This more flexible approach

[589] Samek, n 572, 129.

is not a deviation from the core principle of foreseeability but rather an alignment with its underlying assumption of risk rationale. Besides, it is supported by other general principles under the CISG, particularly Art. 8, which governs the interpretation of the parties' intentions. The intentions of contracting parties shape the obligations they assumed and the expectations arising from their contractual relationship. Since Art. 8(3) permits the parties' subsequent conduct to be considered in ascertaining their intentions, it is reasonable, in appropriate circumstances, to evaluate foreseeability under Art. 74 at a later point in time following contract formation. The principle of good faith embodied in Art. 7(1) CISG provides further support for this approach. Good faith informs the conduct of the parties and, in turn, may be relevant to the interpretation and application of the Convention's provisions,[590] and, in appropriate circumstances, to the temporal assessment of foreseeability under Art. 74. Both Arts. 7 and 8 serve as important interpretative tools through which the CISG gives effect to the principles of certainty, flexibility, and justice embedded in the Convention.[591]

By allowing this approach for assessment of foreseeability to shift with the evolution of the contract and the emergence of new, previously unforeseeable risks, parties are empowered to adapt and effectively protect their interests in an increasingly complex and unpredictable global trading environment. This enhances fairness by aligning damages with actual commercial awareness, preserves CISG's adaptability to evolving trade practices, and mitigates harsh outcomes where rigid application would unfairly punish parties for unforeseeable risks after the contract has been formed. This approach does not undermine the CISG's foreseeability but rather adapts it to the contextual trade. In an era of cascading global crises from pandemics to wars to climate-induced supply chain collapses, the CISG must demonstrate its sufficient interpretive flexibility to remain the governing law of choice for international sales. Therefore, future interpretations of Art. 74 need to balance textual integrity with commercial practicality.

[590] Koch, R. (1999), 336; Powers, P. J. (1999). Defining the undefinable: Good faith and the United Nations Convention on Contracts for the International Sale of Goods. *Journal of Law and Commerce, 18*, 334.

[591] Zeller, B. (2004). Fundamental breach and the CISG: A unique treatment or failed experiment? *Vindobona Journal of International Commercial Law and Arbitration, 8*(1), 88-89.

Chapter V: Object of Foreseeability

This chapter discusses foreseeability and its object by discussing the question of what precisely must be foreseen. It then highlights several kinds of foreseeable and unforeseeable loss extracted from case law. It also examines the foreseeability's operation in deciding the recovery of several specific categories of loss. This chapter conducts a detailed application of foreseeability in case law, highlighting inconsistencies in judicial interpretation and the practical challenges in applying the foreseeability test.

I. What precisely needs to be foreseen?

Art. 74 establishes that damages are limited to the 'loss which the party in breach foresaw or ought to have foreseen'. This formulation makes clear that what must be foreseen is not the breach itself, nor the specific manner in which the breach will occur, but the loss itself incurred as a possible consequence of breach.[592] It is well-settled that the foreseeability requirement pertains to the loss as a possible consequence of breach, the breaching party need not have foreseen that it would breach or the specific type of breach that would occur. While both the CISG and PECL require foreseeability of 'loss', the UPICC refers to foreseeability of 'harm'. Although there is only a slight difference in meaning, the use of 'harm' in the UPICC seems to expand the liability of the non-performing party.

Art. 74 allows recovery for foreseeable losses caused by breach but offers no definition of such losses.[593] This silence gives rise to a critical interpretive question: what exactly is the object of foreseeability?[594] In particular, the mere reference to 'loss' does not clarify whether foreseeability relates solely to the type of the loss, to its extent, or to both elements combined. Does the foreseeability requirement apply solely to the general type of the loss, or does it also extend to its quantitative extent? A further issue is whether foreseeability of the extent of loss

[592] Schlechtriem & Schwenzer, n 210, Art. 74, para 52; Piltz, B. (2008). *Internationales Kaufrecht*. C.H. Beck, para. 5–544; Karollus, M. (1991). *UN-Kaufrecht: Eine systematische Darstellung für Studium und Praxis*. Springer, 217.

[593] Felemegas, n 6, 97.

[594] Ehlers, n 20, 34.

requires only a general limitation of liability or the precise amount of loss. The CISG itself provides no explicit guidance on these issues, and divergent approaches in comparative law further complicate their interpretation under Art. 74.[595] This ambiguity is also reflected in other international instruments employing similar foreseeability language,[596] which likewise fail to offer definitive guidance on the distinction between the type and extent of loss. Consequently, the ambiguity has become a contentious subject in scholarly commentaries on these instruments. There are different interpretations of the international instruments regarding this issue without particular reasons, demonstrating the persistent ambiguity across international instruments.[597] The Comments to the PECL imply that both the type of loss and its extent must be foreseeable.[598] One of the Comments to the UPICC states that foreseeability pertains to the nature of harm rather than its extent unless the extent is so exceptional that it effectively transforms the harm into a different type.[599] These divergent interpretative approaches, without clear textual or conceptual justification, demonstrate the persistent ambiguity across international instruments.[600] These divergent approaches are further reflected across legal systems, with English common law traditionally requiring only the type of loss to be foreseeable, whereas certain civil law systems impose a stricter standard mandating foreseeability of both the type of loss and its extent.[601]

The ambiguity over what precisely needs to be foreseen risks undermining the uniform application of the CISG and may lead to inconsistent judicial outcomes across different jurisdictions. It also creates uncertainty regarding the aggrieved party's right to compensation

[595] See Marsh, P. D. V. (1994). *Comparative contract law: England, France, Germany*. Gower, 313; Beale, H., Hartkamp, A., Kötz, H., & Tallon, D. (Eds.). (2002). *Cases, materials and text on contract law*. Hart Publishing, 818; Nicholas, n 60, 230; Terré, F., Simler, P., & Lequette, Y. (1996). *Droit civil: Les obligations* (6th ed.). Dalloz, 439; Perović Vujačić, J. S. (2022). Contracts for the international sale of goods: A comparative review of the solutions of the UN Convention on the International Sale of Goods and the Serbian Law of Obligations. *Revija Kopaoničke škole prirodnog prava, 4*(1), 285.

[596] UPICC, Art. 7.4.4; PECL, Art. 9:503.

[597] Saidov, n 14, 126.

[598] PECL, Illustration 1, Comment A.

[599] UPICC Commentary, Art 7.4.4.

[600] Saidov, n 14, 126.

[601] Id., 125.

and its amount.[602] This part, therefore, analyzes these questions to determine the proper object of foreseeability under Art. 74.

1. Only the type of loss is required to be foreseeable

There is an opinion that Art. 74 limits the foreseeability requirement to the nature of the loss, and not to its extent.[603] Under this view, only the type of loss is enough to make the party in breach liable. Once a certain category of loss, for example, loss of profits or liability to a sub-buyer, is foreseeable to the breaching party when entering into the contract, its liability is established without considering the foreseeability of the extent of loss. This interpretation aligns with the traditional common law approach, which requires foreseeability only of the kind of loss, not the degree of loss.[604] This position finds support in scholarly opinion and a number of case laws. A leading commentary on the UPICC explicitly states that foreseeability 'relates to the nature or type of the harm but not to its extent unless the extent is such as to transform the harm into one of a different kind'. [605] Proponents have suggested that this reasoning should likewise be applied to the CISG, given the parallel structure and function of the damages provisions in both instruments.[606]

Several decisions also reflect support for limiting the breaching party's foreseeability to the type of loss. In a decision of the ICAC, the tribunal held that Art. 74 CISG does not specify whether the extent of the loss must be foreseeable. The case concerned a buyer who sought to recover from the seller the amount of penalty that the buyer had paid to its own customer. The seller argued that although a penalty might have been foreseeable, the amount was extraordinarily high that it could not reasonably have been foreseen when the contract was made. The tribunal rejected this argument, reasoning that the foreseeability of the penalty as a type of loss was sufficient. The specific amount of the penalty was deemed irrelevant for the purposes of Art. 74 because the Convention does not require that the debtor foresee the precise quantitative extent

[602] Id., 126.

[603] Liu, n 70, s 14.2.5.

[604] Peel, E. (2011). *The law of contract* (13th ed.). Sweet & Maxwell, 1056.

[605] UPICC Commentary, Art 7.4.4.

[606] Eiselen, n 158, para h.

of potential damages.[607] In *Zhejiang Xinlong Construction Co Ltd v Shaoxing Zhengxin Metal Trading Co Ltd*,[608] the appellate court ruled that the failure to supply steel by the seller, which resulted in the buyer's loss that ensued a 40% increase of the market price of steel, was foreseeable. Judge Yuan referred to foreseeability as a universal consensus found in international treaties such as Art. 7.4.4 of the UPICC and Art. 74 of the CISG as the mirror because it is supported by Chinese law.[609] Notably, in dealing with the issue of whether the type or extent of a loss must be foreseen, which was not solved by Chinese law, Judge Yuan considered that only the type (not the extent) of a loss is subject to the foreseeability test.[610] His view is similar to the approach advocated for Art. 7.4.4 of the UPICC. In this case, the 40% rise of the market price was insufficient to translate the harm into one of a different kind as described in the Comments to Art. 7.4.4 of the UPICC.

Requiring foreseeability of the type or nature of the loss is indispensable since the nature of the loss is an essential and defining element of the notion of loss.[611] It shields the injured party from having to prove the breaching party's foreseeability of the precise amount or extent of loss, focusing instead on the general category of risk. The approach promotes certainty in recovery for foreseeable kinds of loss but can be criticized for imposing liability for losses of an unforeseeably massive scale, potentially conflicting with the foundational principle of limiting damages to the foreseeable consequences of the breach.

2. Requiring foreseeability of the extent of the loss

There exists a view that foreseeability should not be tied to the nature of loss; otherwise, a party could escape liability for losses that were entirely foreseeable in amount but unexpected in

[607] MKAC No. 97/2004, 23 December 2004 (Indian-Russian sales contract case I).

[608] *Zhejiang Xinlong Construction Co Ltd v Shaoxing Zhengxin Metal Trading Co Ltd*, Shaoxing Intermediate People's Court (China) 2018. extracted from Liu, Q. (2022). The PICC in Chinese courts. *Uniform Law Review*, *27*(3).

[609] Yuan XiaoLiang, The People's Judicature No. 35/2019, 85; Contract Law of the People's Republic of China (1999), Art. 113; Civil Code of the People's Republic of China (2021), Art. 584;

[610] Liu, n 608, 24-25.

[611] Saidov, n 14, 126-7.

character.[612] Proponents of this view argue that the type of loss should only be relevant insofar as it refers to the extent of loss.[613]

Contrary to the 'type-only' opinion, a number of commentators and jurisprudence, often drawing from civil law traditions, argue that the foreseeability rule under Art. 74 requires foreseeability of both the type or nature of the loss and its extent.[614] Proponents supporting this view contend that the convention's wording and purpose demand it. The expression 'may not exceed' is interpreted as indicating that the foreseeability requirement encompasses the extent of the loss, not merely its general category.[615] The extent of a loss cannot be foreseen separately from its type and nature because any attempt to express the loss in monetary terms requires prior understanding of the nature of loss involved.[616]

The view to include the extent of loss finds strong support in a large number of decisions. One case where the foreseeability of the extent of the loss is implied. In this case, the appellate court refused the expert's calculations that foreseeable damage should be 120% of the base market price as the correct determination of the foreseeable damage. Instead, the court set the limit of foreseeable damage at 20% of the agreed price, based on the calculations presented by the expert. It is further explained by the supreme court that because the market price increased significantly beyond the reasonably acceptable limit of contractual risk after the contract was concluded, the seller was released from the obligation for 80% of the harm claimed by the buyer.[617] In the *Cooling System* Case, the buyer incurred extra costs due to being unable to repay a loan on time, leading to the accrual of high interest in Lithuania. The court ruled that the obligor must have been capable of recognizing that a breach would give rise to a loss 'essentially of the type and extent that actually occurred'. It stated that while damages were recoverable, the interest rate applicable had to be one that the seller could have reasonably foreseen.[618] The same

[612] Diamond, T. A., & Foss, H. (1994). Consequential damages for commercial loss: An alternative to *Hadley v. Baxendale*. *Fordham Law Review, 63*(3), 709.

[613] Id.,

[614] Nicholas, n 60, 231; Gotanda, J. Y. (2011). Article 74. In S. Kröll, L. Mistelis, & P. Perales Viscasillas (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)*. Hart Publishing; C.H. Beck, 766.

[615] Saidov, n 14, 129.

[616] Id., 127.

[617] Case No. V CSK 254/14 Supreme court (Poland) 20 January 2015.

[618] Case No. 7 Ob 301/01t Supreme Court (Austria) 14 January 2002 (Cooling system).

approach appears in a decision of the court of first instance, involving the sale of bullet-proof vests from a Dutch seller to a Greek buyer. The Greek court stated that 'the object of foreseeability is the nature and extent of the damage as a possible consequence of the contractual breach, but not the breach itself'.[619]

It is suggested that where the extent of the loss substantially exceeds what could reasonably have been foreseen, the loss may, in certain circumstances, be treated as a different kind of loss.[620] This is because an extraordinary or disproportionate increase in the magnitude of the damage may place it beyond the type of losses that the breaching party could reasonably have foreseen at the time of contracting. In such exceptional situations, the excessive extent of the loss renders the loss 'unusual', thereby crossing the boundary into a new category of harm that the party in breach could not reasonably have foreseen.

While the prevailing interpretation across most legal systems requires foreseeability of both the type and extent of loss, this approach presents practical challenges. Although the CISG offers a basic distinction between 'loss suffered' and 'loss of profit',[621] this classification proves insufficient in practice. It is often difficult to classify losses between different categories of loss and determine whether the actual loss falls within the same 'foreseeable' category.[622] In commercial transactions, lost profits (the nature of loss) are in contemplation of contracting parties. Yet the extent of such losses may sometimes be more than what the party in breach could reasonably have foreseen. Whether this transforms the character of the loss, and to what extent, raises questions without clear answers.

Categorizing and grouping losses is not an easy task because of the overlaps between categories,[623] such as between loss of profit, cost of cover, loss of goodwill, or lost business opportunities. Ambiguities between groupings are inevitable, and it is impossible to clarify the distinctions. To navigate these complexities, a functional, risk-based approach is often advocated. Overly rigid categorizations risk undermining this principle by diverting attention

[619] Case No. 4505/2009 Multi-Member Court of First Instance of Athens (Greece) 1 January 2009 (bullet-proof vest).

[620] UPICC Commentary, Art 7.4.4; Huber & Mullis, n 185, 273.

[621] Saidov, n 14, 127.

[622] Id.,

[623] Id.,

from the rule's functional rationale. Therefore, the focus should remain on the underlying purpose of the foreseeability rule: the fair allocation of risk between contracting parties.[624] This suggests that the real question should be whether the actual loss suffered falls within the kind of risks the breaching party could reasonably be expected to consider at the time of contract formation. This perspective stays true to the commercial rationale of foreseeability: enabling parties to manage risk, price it appropriately, and insure against it.[625] Besides, evaluating the nature and extent of loss also depends on how the consequences of damage are identified in each individual case. The consequence of damage may be defined in a broad and general term, like loss of profits, or in a more detailed expression, like loss of profits from loss of goodwill.

This dissertation also submits that it is required to foresee both the type of loss and its extent, and argues that this better serves the CISG's objectives of promoting international trade and uniform application. The purpose of foreseeability is to allocate risk in a fair and predictable way at the time of contracting.[626] In the real world of contract negotiation and risk assessment, commercial parties do not limit their planning to categories of loss, they care about financial exposure. Commercial parties calculate potential liability exposure to price risk, obtain insurance, and make rational business decisions based on both the type and approximate financial liability. A rule that exposes a party to liability for a loss of unforeseeable magnitude undermines this calculability. To say that a party assumed the risk of a 'type' of loss without considering how large that loss could reasonably be is inconsistent with how commercial parties operate. If only the type of loss must be foreseeable, parties may find it challenging to establish reasonable expectations about the potential financial liabilities. Besides, the party in breach could become liable for massive, unexpected damages so long as the type of loss is nominally foreseeable, undermining the predictability that risk allocation requires. If foreseeability were restricted solely to the type of loss, a critical element of commercial risk assessment, the quantitative boundaries of liability would be disregarded.[627] Such an approach would inevitably expose parties to unforeseeable financial exposure, thereby distorting the very risk calculus that the foreseeability rule seeks to preserve. Therefore, it is analytically sound to argue

[624] Id.,

[625] Huber & Mullis, n 185, 272.

[626] Saidov, n 14, 112-3.

[627] Saidov, n 14, 129.

that the foreseeability requirement under Art. 74 must encompass the extent of loss. This interpretation aligns not only with the pragmatic realities of commercial decision-making but also with the foundational risk allocation objective of the rule. By requiring parties to anticipate the approximate scale of potential damages, the foreseeability doctrine ensures that liability remains within the bounds of assumed and insurable risk, fostering predictability in contractual relations. Taking a hypothetical case, in early 2022, a Ukrainian seller (seller) contracted with an Egyptian buyer (buyer) for the sale of 10,000 tons of wheat, CIF Alexandria. The contract was governed by the CISG. One day before shipment, the seller's storage silo near Odesa was destroyed by a missile strike, leading to the seller's failure to deliver. The buyer, facing a critical shortage, was forced to buy replacement wheat on the spot market at prices 250% higher than the contract price due to the global supply shock triggered by the war. The buyer sued for the full price differential, amounting to tens of millions in damages. While the seller, as a professional in the grain trade, foresaw the type of loss (buyer's cover cost increase) from non-delivery, the extent of the 250% price surge was not foreseeable. At the time of contracting, while regional tensions were known, the full-scale invasion and the subsequent blockade of Black Sea ports, which caused the catastrophic global price spike, were not part of the ordinary course of things nor communicated as a special circumstance. To hold the seller liable for the full, war-driven hyperinflation would make commercial risk assessment impossible for any party operating in a geopolitically sensitive region. This ruling allows parties to calculate risk based on known market volatilities, not unknown geopolitical cataclysms. In addition, this approach helps to prevent disproportionate liability. It prevents a breaching party from becoming an involuntary insurer for catastrophic losses triggered by special circumstances unknown to them. Besides, requiring foreseeability of both the type and extent of loss will avoid forum shopping and ensure uniformity. The different interpretation by the courts and tribunals on this issue incentivizes forum shopping and directly undermine the CISG's mandate of uniform interpretation. Requiring foreseeability of both type and extent, by contrast, is seen as providing clearer boundaries for commercial risk allocation and enhancing predictability in cross-border transactions, as well as providing a more concrete, globally applicable tool for judges to limit damages in extraordinary cases, thereby fostering more predictable outcomes across jurisdictions. The legislative history of the CISG also implied its support for the ‘type-and-extent’ requirement by rejecting the proposed text ‘[s]uch damages shall not include

compensation for loss of a nature which the party in breach could not reasonably have foreseen at the time of the conclusion of the contract ...'.[628]

In conclusion, this section posits that the 'type-and-extent' requirement is not only textually implied and judicially recognized but is also a necessary approach for achieving the commercial fairness and legal predictability that are essential for the successful operation of the CISG in international trade.

3. Foreseeability of the precise amount

Even though the parties are required to foresee both the nature and extent of loss, the question arises as to what extent the parties must foresee and whether the parties are required to foresee the precise amount of the loss. The CISG itself does not expressly address this issue. As a result, judicial and arbitral interpretations have diverged, creating a degree of jurisprudential uncertainty. There is a case where the tribunal requires foreseeability to the exact amount of loss. In this case, the tribunal dismissed the claim for loss of profit of the buyer, holding that the margin between the contract price and the resale price was unforeseeable to the seller at the time the contract was concluded.[629] This reasoning suggests that the tribunal required foreseeability not only of the type of loss (e.g., lost profits) but also of the specific profit margin. Such an approach requires that the precise amount of loss be foreseeable, thereby setting a particularly high threshold of foreseeability.

However, the prevailing scholarly opinion and a majority of judicial decisions reject this stringent interpretation, stating that Art. 74 does not necessitate foreseeability of the specific details or the precise pecuniary amount of the loss.[630] This view was affirmed in the German *Cooling System* Case, where the court ruled that the provision does not require losses to be foreseeable in precise or detailed terms, and certainly not in the form of a specific numerical sum.[631] A more nuanced perspective is reflected in a case decided by the district court of Kuopio. There, the buyer claimed damages for additional interest incurred on a loan

[628] *Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods* (Doc. B(1), Annex I; U.N. Doc. A/32/17), n 256, paras 473-9.

[629] CIETAC, *Silicon and manganese alloy* 1 February 2000.

[630] Schlechtriem & Schwenzer, n 210, Art. 74, para 52; UNCITRAL Digest 2016, n 336, 337.

[631] Case No. 7 Ob 301/01t Supreme Court (Austria) 14 January 2002 (Cooling system).

obtained to finance the purchase as a result of the seller's breach. The court accepted that the type of loss, additional financing costs, was foreseeable. However, it concluded that the seller could not reasonably have foreseen the specific interest rate applicable in Lithuania, which differed significantly from Western European rates. Consequently, the court awarded damages based on an interest rate that it considered foreseeable to the seller.[632] This decision implicitly acknowledges that while the type of loss (additional financing costs) was foreseeable, the specific amount of that loss, as determined by an atypical rate, was not. The focus remained on whether the extent of the loss fell within the foreseeability of the party in breach. Further supporting this view is the case of *Hewlett-Packard France c. Matrox Graphics Inc.*, where the court explicitly stated that 'mathematical precision is certainly not required under the CISG'.[633]

From the perspective of international trade practice, the precise amount of loss is rarely foreseeable at the time of entering into the contract. Requiring foreseeability of the precise amount would, in practice, deprive the aggrieved party of any recoverable damage, thereby undermining the remedial function of damages under the CISG.[634] As discussed above, in practice, what parties can generally foresee at the time of contract conclusion is the type of loss and its general extent. While the debtor need not have foreseen the specific amount of loss, the general extent of the potential loss must fall within the risks contemplated at the time of contracting.[635]

This approach is also consistent with the CISG AC Opinion 6. Although the Opinion does not further elaborate on foreseeability, it provides that the aggrieved party bears the burden of proving the extent of the loss suffered, but it is not required to establish it with absolute mathematical precision.[636] This reflects an understanding that neither the exact quantum of loss nor its precise foreseeability requires absolute precision, provided that the nature and general extent of the loss were reasonably foreseeable.

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[632] Case No. 95/3214 District Court of Kuopio (Finland) 5 November 1996.

[633] Case No. 2020 QCCS 78 / 500-05-070786-023 Superior Court of Quebec (Canada) 10 January 2020 (Hewlett-Packard France v. Matrox Graphics Inc.).

[634] Saidov, n 14, 126.

[635] Mankowski, P. (2013). Article 74. In K. Schmidt (Ed.), *Münchener Kommentar zum Handelsgesetzbuch* (3rd ed.). C. H. Beck, para 23.

[636] CISG-AC Opinion No. 6, 2.

For these reasons, this dissertation supports the view that Art. 74 CISG does not require the party in breach to foresee the specific amount of loss, but only the type of loss and its general extent. This interpretation is not only supported by the weight of judicial authority and scholarly commentary but is also essential to preserve the practical utility and efficacy of the damages remedy in international sales transactions.

II. Type of loss and foreseeability

As noted, the first sentence of Art. 74 establishes that damages consist of a sum equal to the loss, 'including loss of profit', suffered as a result of the breach. Aside from this explicit inclusion of loss of profit, the provision offers no further identification of which categories of loss are recoverable.[637] This open-ended approach reflects the flexible character of the Convention, empowering the adjudicator's discretion in evaluating the distribution of loss resulting from the breach of contract.[638] However, it has also generated interpretative challenges that judges often resort to the familiar categorizations of their domestic legal systems to interpret the type of recoverable loss under the CISG framework, particularly because domestic legal systems employ divergent terminologies and conceptual frameworks to classify contractual losses.[639] Common law lawyers, for instance, frequently employ the distinctions between expectation and reliance loss, or between incidental and consequential damages.[640] Conversely, jurists from fault-based legal systems often distinguish between direct and indirect losses.[641] Besides, some others differentiate between *damnum emergens* (actual loss suffered) and *lucrum cessans* (loss of profit), which is influenced by classical Roman law.[642] As a result, judicial decisions and academic writings frequently adopt domestic classification. While domestic law categories may provide useful guidance in identifying the different kinds of loss that may result

[637] Schlechtriem & Schwenzer, n 210, Art. 74, para 18.

[638] Vékás, n 25, 172.

[639] Kröll et al., n 24, 973.

[640] Schwenzer, I., Hachem, P., & Kee, C. (2012). *Global sales and contract law*. Oxford University Press, paras 44.151 et seq.

[641] Id., para 44.138.

[642] Djordjević, M., & Pavić, V. (2014). The CISG in Southeastern Europe. In L. A. DiMatteo (Ed.), *International sales law: A global challenge*. Cambridge University Press, 444.

from a breach of contract,[643] it risks undermining the Convention's goal for uniformity and autonomous interpretation under Art. 7(1) CISG.[644] In this respect, it must be acknowledged that courts and commentators have not always succeeded in detaching their analyses from domestic conceptual categories.[645]

Various scholarly efforts have sought to clarify which losses are recoverable under the CISG.[646] While these attempts are valuable, the recoverability of loss under Art. 74 cannot be resolved through rigid categorization. Whether damages are recoverable is to be assessed based on the principle of full compensation, taking into account the particular purpose and commercial context of the contract.[647] Art. 74 is framed in broad terms so as to encompass any type of loss, provided that its requirements of causation, foreseeability, and proof are satisfied.[648]

Against this background, the present chapter does not seek to further classify losses. The purpose here is not to propose a new or definitive taxonomy of recoverable losses under Art. 74. Rather, it focuses on an examination of case law in order to identify which losses have been considered foreseeable and unforeseeable in practice. The outline of foreseeable and unforeseeable losses does not serve as clear-cut answers on which losses are foreseeable or not, but as indications for detailed analysis in the specific circumstances of each case. Besides, this part also examines how the foreseeability requirement, by analyzing judicial and arbitral decisions, operates as a limiting principle in the recovery of damages under Art. 74, particularly in relation to categories of loss that have proven controversial.

1. Losses that are foreseeable

The relevant case law has recognized a diverse range of losses as foreseeable and therefore recoverable under Art. 74. Judicial and arbitral decisions have found foreseeability to be satisfied in a variety of factual scenarios. For example, a court held that a seller who supplies

[643] Huber & Mullis, n 185, 269.

[644] Kröll et al., n 24, 973.

[645] Id.,

[646] Saidov, n 70, 315.

[647] Schlechtriem & Schwenzer, n 210, para 18.

[648] Bernstein, H., & Lookofsky, J. M. (1997). *Understanding the CISG in Europe: A compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*. Kluwer Law International, 99; Saidov, n 70, 314.

goods to a retailer or distributor is expected to foresee that the buyer intends to resell them and may therefore suffer resale-related losses in the event of a breach.[649] In one case, the tribunal concluded that a seller could foresee the buyer's losses where the parties had exchanged extensive correspondence concerning supply difficulties, thereby making the risk of consequential loss apparent.[650] Also, in transactions involving fungible goods, a breaching buyer who failed to make an advance payment as required under the contract was found to have foreseen that the seller would lose its standard commercial profit margin as a result of the breach.[651] In a case, the arbitrator also held that a buyer's decision to engage external legal counsel to pursue the recovery of advance payments from a seller is ordinarily foreseeable. In cross-border transactions, it is also common and commercially reasonable for the buyer to instruct legal counsel located in the seller's jurisdiction, and such costs are foreseeable. The arbitrator also observed that pre-arbitral legal expenses are foreseeable.[652] In cases involving goods manufactured to the buyer's special order, courts have held that a buyer could reasonably expect the seller to earn a certain profit margin and have awarded damages accordingly.[653] Foreseeability has also been recognized where a buyer failed to open a letter of credit as stipulated in the contract, leaving the seller unable to use a chartered vessel arranged for the transportation of the goods; the resulting loss incurred through sub-chartering the vessel was deemed foreseeable.[654] Likewise, the arbitral tribunal ruled that it is foreseeable that a buyer will finance its purchases and incur interest obligations, and that such financing costs may therefore constitute recoverable losses.[655] Courts have also awarded damages for travel and accommodation expenses incurred by the buyer in connection with contractual performance,

[649] Case No. 43 O 136/92 District Court Aachen (Germany) 14 May 1993; Case No. 22 U 4/96 Court of Appeal Cologne (Germany) 21 May 1996 (*Used car case I).*

[650] Court of Arbitration of the Hamburg Chamber of Commerce, 21 June 1996 (Chinese goods case).

[651] Case No. 1 Ob 292/99v Supreme Court (Austria) 28 April 2000 (Jewellery).

[652] ICC No. 26406/HBH, 27 May 2022.

[653] Case No. OR.96.00013 Commercial Court Canton Aargau (Switzerland) 26 September 1997.

[654] Case No. [2000] QSC 421 / SC No 10680 of 1996 Supreme Court of Queensland (Australia) 17 November 2000.

[655] FTCA No. T-8/06, 01 October 2007.

such as attending tests or inspections required under the sales contract.[656] According to one court, the risk of lost transactions and lost profits is foreseeable.[657]

More generally, case law has recognized a wide range of losses as foreseeable and recoverable under Art. 74 CISG. These include expectation loss;[658] damages for storage, care and maintenance;[659] bank fees;[660] expenses related to transportation, storage, and testing incurred as a direct result as well as storage costs incurred following the avoidance of the contract;[661] costs of repairing defective goods and resulting loss of profits;[662] loss of the resale profits;[663] costs associated with sorting and repackaging non-conforming goods;[664] travel expenses of the buyer's employees incurred in connection with the conclusion or performance of the contract;[665] the loss of the performance bond of the buyer's responsibility to its sub-buyer;[666] interest payable on bank loans obtained to finance advance payments of the price;[667] customs duties, value-added tax, and other expenses incurred as a consequence of the party in breach.[668]

As noted, these outlined certain foreseeable losses do not serve as a rigid formulation of which losses are foreseeable. Evaluation of foreseeability depends on the specific circumstances of each case.[669] It may nevertheless be helpful to offer some guiding considerations that can serve as a foundation for a more in-depth assessment in each individual case.[670] A loss that is

[656] Case No. 18-10969 French Supreme Court (France) 09 July 2019.

[657] Case No. VSL Sodba in sklep I Cpg 285/2019 &VSL Sodba I Cpg 677/2020 High Court of Ljubljana (Slovenia) 29 October 2019 & 5 January 2021.

[658] Bulgarian Chamber of Commerce and Industry No. 26/00, 28 February 2002.

[659] ICC No. 7585, 01 January 1992.

[660] FTCA No. T-22/05, 30 October 2006.

[661] Case No. BS-47340/2021-SHR Maritime and Commercial Court (Denmark) 14 December 2022 (Schroll Medical ApS v. Vertanical GmbH).

[662] Case No. 22513/2003 Multi-Member Court of First Instance Thessalonika (Greece).

[663] Case No. HG.1999.82-HGK Commercial Court Canton St. Gallen (Switzerland) 03 December 2002.

[664] FTCA No. T-13/05, 5 January 2007.

[665] FTCA No. T-8/06, 01 October 2007.

[666] Case No. 10-80851-CV U.S. District Court for the Southern District of Florida (USA) 7 November 2011 (Al Hewar Environmental & Public Health Establishment v Southeast Ranch, LLC and Joel Gutierre).

[667] FTCA No. T-8/06, 01 October 2007.

[668] FTCA No. T-9/07, 23 January 2008.

[669] Schlechtriem & Schwenzer, n 210, Art. 74, para 53.

[670] Huber & Mullis, n 185, 274.

foreseeable in one commercial context may fall outside the reasonable foreseeability of the parties in another. These decisions illustrate that foreseeability under Art. 74 does not operate by excluding entire categories of loss as a matter of principle. Rather, it functions as a contextual limitation that depends on what the party in breach knew or ought reasonably to have known at the time of making the contract, assessed against the background of the particular commercial transaction.

2. Losses that are not foreseeable

Judicial and arbitral practice also demonstrates that a range of losses have been denied recovery on the ground that they were not foreseeable to the party in breach. The judicial delineation of unforeseeable losses may assist contracting parties in identifying potential risks, assessing their implications, and taking them into account when negotiating and allocating those risks accordingly. In one case, a court held that storage costs were not foreseeable to the buyer because storage was neither set out in the contract nor otherwise apparent from the contractual relationship.[671] In another dispute, a lower court rejected the plaintiff's claim for damages corresponding to transportation and storage costs incurred in relation to defective goods, reasoning that such loss was not foreseeable under the circumstances of the case.[672] In a decision, a court refused to award damages for the cost of processing goods as scrap, concluding that such costs were not reasonably foreseeable and therefore were not recoverable under Art. 74.[673] One court has further held that losses relating to reputation and loss of clientele are not, as a general rule, foreseeable under Art. 74, absent special circumstances that were known or ought to have been known to the breaching party at the time of contract conclusion.[674] In one case, the tribunal ruled that damages incurred under the claimant's contract with the third party were not foreseeable to the respondent and therefore could not be recovered.[675] Courts have also denied

[671] Case No. C- 37 0645 09 58/10 District Court Tukums (Latvia) 05 May 2010.

[672] Case No. 2021Da255655 Supreme Court (Korea) 27 September 2023 (Texsus S.p.A. v. Hansung Fiber Co., Ltd).

[673] Case No. 4:20-CV-00425 U.S. District Court for the Southern District of Texas (USA) 20 September 2021 (Hefei Ziking Steel Pipe Co., Ltd. v. Meever & Meever et al).

[674] Case No. 4505/2009 Multi-Member Court of First Instance of Athens (Greece) 1 January 2009 (bullet-proof vest).

[675] Vienna International Arbitral Centre (VIAC) No. ARB-5740, 30 October 2024 (Progress v. OTL Firearms and Imports Corporation).

claims where the alleged loss is deemed too remote or hinges on circumstances unknown to the breaching party. In a case, a court of appeal dismissed a buyer's claim for compensation for loss of opportunity, holding that the seller could not have foreseen such loss at the time of contract formation.[676]

Case law further reveals a variety of specific losses that have been deemed unforeseeable. These include the rental costs of machinery incurred by the buyer's sub-buyer;[677] additional costs incurred in processing the goods in another country as a result of the seller's late delivery;[678] unreasonably high costs of repair;[679] exceptionally high payments made to freight forwarders;[680] unusually high interest rates;[681] loss of the resale profit in case it is exceptionally and extraordinarily high;[682] courts have also rejected claims for lost profits where the breaching seller was unaware of the specific terms of contract between the buyer and its sub-buyer,[683] as well as claims for inspection costs incurred in the country of importation instead of the country of exportation.[684]

It seems adjudicators excluded losses arising from expenditures that deviate from what is normal or expected in the relevant trade or context. These decisions illustrate the limiting function of the foreseeability requirement in Art. 74, particularly where the claimed losses arise from unusual, excessive, or party-specific arrangements that fall outside the normal risk profile of an international sales transaction. Losses will be considered unforeseeable depending on special circumstances, internal business arrangements, or extraordinary cost levels that were not communicated to, and could not reasonably have been foreseen by, the breaching party.

[676] Case No. 18-10969 French Supreme Court (France) 09 July 2019.

[677] CIETAC No. 75, 20 June 1991.

[678] Case No. 3 U 83/98 Appellate Court Bamberg (Germany) 13 January 1999 (Fabric).

[679] Case No. 7 Ob 301/01t Supreme Court (Austria) 14 January 2002 (Cooling system).

[680] Arbitration Institute of the Stockholm Chamber of Commerce No. 107/1997, 1998.

[681] Case No. S 96/605 Court of Appeal Helsinki (Finland) 27 March 1997.

[682] CIETAC No. CISG/2003/01, 3 June 2003.

[683] MKAC No. 406/1998, 06 June 2000.

[684] MKAC No. 54/1999, 24 January 2000.

3. Examination of several types of loss and application of foreseeability

This section explores typical loss scenarios that frequently arise in international sales disputes and examines how adjudicators assess their foreseeability. Examining case law allows for a more concrete understanding of foreseeability application in practice. By doing so, this section seeks to identify implicit factors that courts may rely upon as supportive tools when determining the recoverability of damages, including the nature of the contract, the information exchanged between the contracting parties when entering into the contract, and the commercial context of the transaction. This section also discusses several controversial types of loss to be recoverable under the CISG to figure out the role of foreseeability in determining recovery of damages, and how foreseeability of the type of loss is evaluated in each contractual context.

3.1. Non-performance loss, Direct losses, Replacement cost, Cost of repair

Damages arising from non-performance encompass the aggrieved party's primary or direct loss.[685] Direct loss, or loss of non-performance, constitutes the primary and immediate financial detriment suffered by the promisee as a direct result of the breach. It represents the natural and ordinary consequence of non-performance and is therefore generally deemed both foreseeable and causally attributable to the breaching party.[686] In a sales contract, recoverable loss encompasses both the decrease in value caused by the seller's breach, particularly non-conforming goods, and the mitigation expenses incurred by the aggrieved party to achieve its benefit of proper contract performance.[687] These may include costs of repair, rental expenses for substitute goods during the period of non-performance,[688] or financing costs such as interest or loan expenses incurred in connection with a down payment, and costs associated with replacing damaged or unusable objects.[689] The foreseeability of direct damages also extends to financial consequences that typically accompany non-performance. For example, exchange rate or

[685] Schlechtriem & Schwenzer, n 210, Art. 74, para 22.

[686] Brunner, C., & Gottlieb, B. (Eds.). (2019). *Commentary on the UN Sales Law (CISG)*. Wolters Kluwer, 520.

[687] Secretariat Commentary, n 9, para. 6; Kröll et al., n 24, 974, Schlechtriem & Schwenzer, n 210, Art. 74, para 54.

[688] Kröll et al., n 24, 974; Huber & Mullis, n 185, 274-5. Case No. 271 C 18968/94 Lower Court München (Germany) 23 June 1995 (Tetracycline); Case No. 27 U 58/96 Appellate Court Köln (Germany) 8 January 1997 (Tannery machines); *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

[689] Case No. 11 U 191/94 Court of Appeal Hamm (Germany) 09 June 1995; FTCA No. T-8/06, 01 October 2007.

currency losses suffered by the seller in case of late payment, or by the buyer in comparable situations, are generally considered foreseeable where they arise in the normal course of international commercial transactions.[690] Such losses are inherent in cross-border trade and therefore lie within the risk sphere assumed by the contracting parties. Such losses fall within the recovery of damages under Art. 74 CISG and will normally satisfy the requirement of foreseeability.

a. Cost of repair

The Austrian supreme court stated that the cost of repair constitutes recoverable damages under Art. 45(1)(b) CISG when the seller has failed to remedy the non-conformity within a reasonable time. In such circumstances, the buyer is entitled to undertake the repair themselves and claim compensation for the resulting expenses. The court ruled that repair costs are recoverable only insofar as they are reasonable in relation to the intended use of the sold goods. It imposed a reasonableness limitation on recoverable repair costs. The buyer may require repair only where such repair would not be unreasonable for the seller. In particular, repair may be considered unreasonable where the costs of cure would be disproportionately high. Having regard to all the circumstances of the case, including the urgency of the situation, the time required to replace the defective device, and the claims made by the main contractor, the court held that the buyer could set off the damages against the entire contractual price.[691]

The German federal court denied a claim for 78,000 DM in repair costs where the goods were only 63,000 DM. It held that disproportionate repair costs are per se unforeseeable because a seller cannot be expected to foresee repair expenses that exceed the entire contract value of the goods.[692] This reasoning reflects a concern for preserving the balance of contractual risk allocation. Allowing recovery of repair costs that exceed the contract value would, in the court's view, expose the seller to liabilities qualitatively different from those assumed at the time of contracting. Foreseeability, in this case, is applied effectively in ensuring recoverable damages do not exceed the value of the goods.

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[690] Schlechtriem & Schwenzer, n 210, para 54; 102. Case No. C1 08 45 Court of Appeal Canton Valais (Switzerland) 28 January 2009.

[691] Case No. 7 Ob 301/01t Supreme Court (Austria) 14 January 2002 (Cooling system).

[692] Case No. VIII ZR 300/96 Supreme Court (Germany) 25 June 1997.

As a general rule, costs of repair are recoverable under Art. 74. To recover repair costs, the buyer must respect the seller's right to cure under Art. 48.[693] Accordingly, the buyer may recover repair costs only where the seller had no right to cure, most notably where cure was impossible, expressly refused, unreasonably delayed, or would have caused unreasonable inconvenience or uncertainty for the buyer. Subject to these limitations, costs of repair are generally considered foreseeable, but only to the extent they are reasonable in light of the intended use of the goods and the context of the case. Conversely, repair costs that are unreasonably high, in particular where they are grossly disproportionate to the value of the goods or the contractual price, will normally fail to satisfy the foreseeability requirement. A seller cannot be expected to foresee repair expenses that are higher than the contract value. The recovery of repair costs is determined by, among other remedies and limitation methods, reasonableness and foreseeability.

b. Replacement cost

In the *Tex-Isle v. Tecnotubi* case,[694] a U.S. distributor of line pipe for oil and gas applications contracted with Tecnotubi to supply API 5L pipe manufactured by Alessio. Tex-Isle informed Tecnotubi during negotiations that the pipe would be coated and resold to upstream and midstream oil and gas operators for use in gathering and transportation pipelines. After installation by EOG, the pipe in the Fearless Pipeline failed hydrostatic testing. Subsequent inspections revealed widespread weld seam defects in pipes from the same production source. EOG abandoned both the tested Fearless Pipeline and the untested Quijote Pipeline and constructed replacement lines using non-Alessio pipe. Tex-Isle settled EOG's claims and sought to recover those losses from Tecnotubi. Tex-Isle claims damages for the replacement of EOG's Fearless and Quijote pipelines with non-Alessio pipes. The tribunal applied foreseeability to address whether Tex-Isle may recover damages under Art. 74 for losses arising from EOG's abandonment and replacement of pipelines allegedly constructed with defective Alessio-manufactured pipe, and whether those losses were reasonably foreseeable at the time of contracting. The tribunal found it was foreseeable that widespread defects in pipes sold for oil and gas transportation could lead to the complete replacement of defective pipelines. This was

[693] Huber & Mullis, n 185, 274.

[694] American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR) No. 01-20-0015-5404, 31 May 2023 (Tex-Isle Supply, Inc. v. Tecnotubi S.p.A. et al.).

based on i) Tecnotubi's knowledge that the pipes were for coated (FBE) use in oil/gas gathering and transportation lines; ii) the severe potential liability (property damage, injury, death) and reputational damage from a pipeline rupture; iii) the discovery of systemic weld seam problems; iv) contract terms contemplating the rejection of all pipe even if not all is defective. The tribunal held that abandonment and replacement of the Fearless Pipeline were reasonably foreseeable. EOG's decision was commercially reasonable and unchallenged in cross-examination. Therefore, damages associated with the replacement of the Fearless Pipeline were recoverable, subject to avoiding double recovery.

To assess the damages for the Quijote Pipeline, the Tribunal put the question of whether it was reasonably foreseeable to Tecnotubi at the time of contracting that it would be liable for the full replacement cost of a pipeline that was never hydrostatically tested, simply because some joints from the same heat used in that pipeline had been found to be defective in another pipeline. The tribunal held that it was not reasonably foreseeable that Tecnotubi would be liable for the full replacement cost of an untested pipeline (the Quijote Pipeline) solely because defects were discovered in another pipeline using pipes from the same production source. Accordingly, Tecnotubi was not liable for the costs of constructing a parallel Quijote Pipeline.

For similar claims on replacement cost, the tribunal awarded differently based on the application of foreseeability. Damages associated with replacing the Fearless Pipeline were recoverable as foreseeable losses, whereas damages associated with replacing the untested Quijote Pipeline were not foreseeable, and therefore unrecoverable, except for the cost of the defective pipes themselves. It is emphasized that the relevant question was not whether the end user's conduct was commercially reasonable ex post, but whether the specific loss fell within the scope of risks assumed ex ante. Where a pipeline had been tested and had failed, and where subsequent inspections revealed systemic defects posing serious safety and liability risks, it was reasonably foreseeable that the pipeline would be rejected and replaced in its entirety. Liability for replacement of the tested Fearless Pipeline, therefore, fell within the scope of foreseeable damages under Art. 74. The tribunal accepted that systemic defects and safety-critical use expand the range of foreseeable losses, but it refused to collapse foreseeability into mere reasonableness of downstream business decisions. By denying recovery for replacement of an untested pipeline while allowing recovery for tested failures and the cost of the defective pipe

itself, the tribunal calibrated foreseeability to preserve proportionality and prevent indeterminate liability.

Similarly, the expenses for the substitute performance are also foreseeable, as indicated in the case of *Tetracycline*. The court held that the seller could have foreseen that expenses to remedy the non-conformity would result from the breach and the extent incurred by the substitute performance. The buyer was entitled to recover damages corresponding to the costs of substitute performance, provided that such expenses were necessary, foreseeable, and reasonable at the relevant point in time.[695]

The replacement cost due to defective goods is generally foreseeable; however, specific requirements should be applied. For the full replacement claim, regardless of whether a defect is detectable, it requires that the specific sequence of events leading to the loss be reasonably foreseeable at the time of contract formation.

In sum, direct damages or non-performance loss is generally foreseeable because the party in breach would be able to foresee that such loss would have been a possible consequence of a breach at the time of the conclusion of the contract. A professional seller, at the time of contract conclusion, knows or ought to know that the buyer is entering the contract to receive goods of a certain value and utility. The seller is therefore presumed to foresee that delivering non-conforming goods will necessarily deprive the buyer of that expected value. This is grounded in the seller's fundamental obligation under Art. 35(2)(a) to deliver goods fit for their ordinary purpose. Expenses directly undertaken to cure the breach, such as repair costs, rental for substitute goods, or the cost of a replacement purchase, are reasonable and necessary measures a buyer would take. It also highlights that foreseeability under Art. 74 is closely linked to necessity and reasonableness. Losses, particularly those stemming from measures taken to restore the aggrieved party to the position it would have enjoyed absent the breach, must be both necessary and reasonable in light of the circumstances. The measure taken must be a necessary response to the breach in the specific commercial context. Was repair the only viable option given time constraints (urgency, claims from sub-buyers) or the nature of the defect? Could the buyer have reasonably awaited the seller's cure? Besides, reasonableness refers to the cost

[695] Case No. 271 C 18968/94 Lower Court München (Germany) 23 June 1995 (Tetracycline).

incurred, which must be proportionate. Expenses that exceed what is required to remedy the breach or that are disproportionate to the contractual interest at stake may fall outside the scope of recoverable damages, even if they are causally connected to the non-performance. Therefore, foreseeability associated with necessity and reasonableness are the requirements in order to qualify for recovery under Art. 74 CISG.

3.2. Incidental and consequential losses

Art. 74 CISG does not expressly mention the recovery of incidental losses.[696] However, it does not mean recovery for such losses is excluded from the CISG framework, especially with the CISG's principle of full compensation.[697] Moreover, the *travaux préparatoires* offer no evidence that the drafters intended to preclude their recovery.[698] In the absence of explicit regulation, courts have occasionally looked for guidance in domestic laws or model laws. For example, in the *Hefei Ziking* case, the court looked to Texas UCC §2.710 for guidance on what constitutes 'incidental' damages since the CISG does not define incidental damages. Accordingly, the court allowed the recovery of the transportation and re-routing costs, including costs to forward the goods to another port, costs of shipping the goods back to China, and domestic transportation costs.[699]

The key question is not if they are recoverable, but under what conditions. Incidental losses consist of costs incurred by the aggrieved party that do not directly contribute to its expectation interest, but are instead incurred to prevent or reduce further loss or to protect its contractual rights following the breach.[700] These typically include expenses arising from the aggrieved party's efforts to mitigate damages or pursue rights.[701] For example, expenses for storing or preserving goods, incurred to prevent a further loss, costs for expedited delivery of substitute goods, extra expenses for sorting defective items, and losses arising from delays fall into this

[696] Schneider, n 209, 226.

[697] Schlechtriem & Schwenzer, n 210, Art. 74, para 28.

[698] Murphey, n 265, 459.

[699] Case No. 4:20-CV-00425 U.S. District Court for the Southern District of Texas (USA) 20 September 2021 (Hefei Ziking Steel Pipe Co., Ltd. v. Meever & Meever et al).

[700] Schlechtriem & Schwenzer, n 210, Art. 74, para 28.

[701] Brunner, n 686, 522.

category.[702] Thus, in assessing the recoverability of incidental losses, Art. 77 must be taken into account. Incidental damages are considered generally foreseeable to the extent that they arise from reasonable measures taken by the aggrieved party in the particular circumstances.[703] Because such expenses are a consequence of protecting parties' contractual interests or mitigating additional loss, they satisfy the foreseeability requirement of Art. 74, provided that they are reasonable in nature and amount. Accordingly, courts have recognized the recoverability of various forms of incidental expenses, including additional costs arising from the removal of non-conforming tiles,[704] additional costs for storing perishable goods,[705] expenses for preservation and modification in order to resell them to another buyer,[706] cost of a necessary inspection, cost of transport and the cost reasonably incurred in preserving the goods may generally be regarded as foreseeable and therefore recoverable under Art. 74.

The following cases illustrate how courts and tribunals have applied the foreseeability requirement to incidental losses under Art. 74 in the specific context, with particular emphasis on the interaction between foreseeability and reasonableness.

In one case, the plaintiff claimed damages equivalent to the costs incurred for inspecting components of defective fibre and the amounts of damages it had paid to its own customer after supplying the defective goods. The central issue was whether these incidental losses were foreseeable under Art. 74. The supreme court clarified that foreseeability must be assessed not only from the aspect of the actual party in breach, but also from that of a reasonable person of the same kind placed in the same circumstances. In making this assessment, the court held that all relevant factors must be considered, including the background and process leading to the conclusion of the contract and the content of the contractual obligations themselves. Applying this standard, the court found that additional expenditures for the inspection of components following a belated discovery of defects were easily foreseeable in light of transaction practices. Such inspection costs are a typical and reasonable response to suspected non-conformity, especially in commercial supply chains involving industrial components. Furthermore, the court

[702] Schlechtriem & Schwenzer, n 210, Art. 74, para 28.

[703] Id., para 55.

[704] Case No. 7 4 Ob 208/12k Supreme Court (Austria) 15 January 2013.

[705] Case No. 2 U 27/99 Court of Appeal Braunschweig (Germany) 28 October 1999.

[706] ICC No. 7585, 01 January 1992.

held that the buyer's liability for damages towards its own customer due to defects in the goods also fell within the scope of generally foreseeable damages. Given that the plaintiff was a corporation engaged in the wholesale of fibre products, the possibility that the goods would be resold to third parties was sufficiently foreseeable. Importantly, the court emphasized that foreseeability does not require anticipation of the precise scope or amount of the damage, but the general type of loss that might result from non-conforming performance. On this basis, the supreme court reversed the part of the lower judgment that had denied compensation for the inspection costs and the damages paid to the third party, thereby adopting a broad and commercially practical understanding of incidental damages and foreseeability under Art. 74.[707] In this case, the court adopted an objective, contextual standard: foreseeability is determined from the perspective of the same kind of reasonable person placed under the same circumstances, considering the contract's background, process, and content.

Similarly, in a dispute of *Minh Dung v. Aluminum Alloys,* the U.S. district court held that the storage costs incurred for holding the hazardous waste were recoverable under Art. 74 of the CISG, as it was both caused by the seller's breach of contract and was foreseeable at the time of contracting. The seller could foresee that non-delivery of aluminum ingots would deprive the buyer of resale or production profits, and shipping hazardous material might incur storage or handling costs.[708]

In one case, where the buyer sought compensation for transport costs incurred in returning non-conforming goods to the seller, both the court of first instance and the appellate court denied the buyer's claim. The courts reasoned that the decision to transport the goods back to Spain after discovering the lack of conformity was taken unilaterally by the buyer and was expressly disputed by the seller. The buyer failed to establish the necessity or usefulness of this measure, and the expense was therefore regarded as having been incurred at the buyer's sole discretion. As such, it could not reasonably be imposed on the seller. The courts further held that the restitution of the unsuitable goods could not be characterized as reasonable behavior within the scope of the CISG, particularly Arts. 8 and 9, nor could it be justified under the duty to mitigate

[707] Case No. 2021Da255655 Supreme Court (Korea) 27 September 2023 (Texsus S.p.A. v. Hansung Fiber Co., Ltd).

[708] Case No. 1:20-cv-01764 U.S. District Court for the Middle District of Pennsylvania (USA) 02 August 2021 (Minh Dung Aluminum Company, Ltd v. Aluminum Alloys MFG LLC).

in Art. 77. In the case of non-tradable goods, the courts found it difficult to envisage circumstances that would require or justify the transportation of the goods back to the seller's facilities, especially where destruction or disposal at the place where the goods were located would have been possible and potentially less costly.[709] This decision illustrates that foreseeability alone is insufficient to establish recoverability. Even if transport costs might abstractly be foreseeable, they will not be compensable unless they are reasonable, necessary, and consistent with the buyer's duty to mitigate. Incidental expenses incurred without consultation, justification, or commercial necessity fall outside the scope of recoverable damages under Art. 74 CISG.

In *Schroll Medical ApS v. Vertanical GmbH*,[710] the court held that a buyer is entitled to reclaim expenses related to transportation, storage, and testing incurred as a direct result of the seller's breach. However, the court refused to compensate certain claimed expenses on the ground that the buyer failed to establish a sufficiently direct connection to the breach. This outcome illustrates that foreseeability must be complemented by a clear demonstration of causation: even a foreseeable category of loss will not be compensable if the specific expense cannot be linked to the breach. Besides, the court found that a cost incurred for obtaining a market permit in anticipation of marketing the goods in Germany was not a loss attributable to the breach, because the permit remained valid for five years and could be applied to future transactions unaffected by this contract. The mere fact that the permit was obtained in anticipation of the contract at issue did not make it a recoverable loss, since no causal disruption of economic position had actually occurred due to the breach. This emphasizes that foreseeability, together with a direct consequence of non-performance, determines recovery of loss under Art. 74.

In sum, scholarly commentary and case law generally regard incidental costs incurred as a consequence of a breach as foreseeable and may therefore be recoverable under the CISG, taking into account the commercial background, transaction practice, and knowledge available at the time of contracting. While the full compensation principle and the nature of commercial

[709] Case No. 759/2008 Appellate Court Madrid (Spain) 10 March 2009.

[710] Case No. BS-47340/2021-SHR Maritime and Commercial Court (Denmark) 14 December 2022 (Schroll Medical ApS v. Vertanical GmbH).

dealings make many incidental costs generally foreseeable, such expenses are recoverable only if reasonable and causally connected to the breach, consistent with mitigation obligations under Art. 77.

3.3. Consequential damages

Consequential damages encompass a broad range of losses that do not directly or immediately result from the breach of contract. It is derived beyond those direct losses caused by the breach.[711] Liability of the aggrieved party to third parties arising from the breach, property damage from defective goods, loss of reputation, loss of goodwill, and other economic losses that are a consequential result of the breach of contract.[712] Such losses are recoverable as direct or incidental damages only where they satisfy the requirement of foreseeability and causation.[713] While such losses are not excluded from recovery, they are subject to stricter scrutiny because they often depend on the aggrieved party's particular circumstances, contractual arrangements with third parties, or the surrounding economic environment. Therefore, foreseeability plays a significant role in determining recovery of consequential losses.[714]

Economic losses stemming from dealings with third parties, including lost resale profits, are in principle foreseeable and recoverable under the Convention.[715] Where a seller's breach causes the buyer to lose its benefit from a resale, the resulting loss of resale profit will generally be considered foreseeable if resale was the purpose of the contract and this purpose was foreseeable at the time of contract conclusion.[716] In commercial sales, especially where the buyer is a professional trader, resale is generally foreseeable. This is reflected in the *Steel products* case, where the court held that the seller 'knew or ought to have known' that the buyer, as a steel trader, would resell the goods to third parties.[717] Similarly, in *Propane gas*, the supreme court

[711] Schlechtriem & Schwenzer, n 210, Art. 74, para 33.

[712] Id., paras 33-37.

[713] Zeller, B. (2009). *Damages under the Convention on Contracts for the International Sale of Goods* (2nd ed.). Oxford University Press, 118; Brunner, n 686, 524.

[714] Schlechtriem & Schwenzer, n 210, Art. 74, para 56.

[715] Kröll et al., n 24, 975.

[716] Schlechtriem & Schwenzer, n 210, Art. 74, para 57.

[717] Case No. 125903 / HA ZA 05-682, District Court Arnhem (Netherlands) 1 March 2006.

stated that when commercial goods are sold to a merchant, resale was presumed foreseeable with no need for further indications.[718]

In *KRAPE S.A. v. LIK Supply Corp.*, the plaintiff sought recovery of lost profits arising from its inability to fulfill business obligations for a third-party customer due to the defendant's breach of contract. The court stated that under the CISG, damages are recoverable only to the extent that they were foreseeable to the defendant at the time of entering into the contract, reflecting the principle articulated in *Hadley v. Baxendale*. The court emphasized that foreseeability depends on what the party in breach knew or ought to have known at the time the contract was concluded. Given that the plaintiff was engaged in the business of purchasing and reselling medical products, it was foreseeable that the gloves were intended for resale and that a failure to deliver conforming goods would prevent the plaintiff from fulfilling downstream obligations. Accordingly, the court found that the loss of profits resulting from the inability to resell the gloves was foreseeable as a consequence of the breach and therefore recoverable under the CISG.[719]

Other similar cases support the *KRAPE* case's argument. In *Profi-Parkiet sp. z o.o. v. Seneca Hardwoods LLC*, plaintiff, a supplier of wood products, bought raw products from the defendant with the intent to resell them. Given the plaintiff's background, it is foreseeable that a failure to supply the hardwood would result in lost downstream sales. The defendant, as a supplier of hardwood, would reasonably foresee that its buyer, a wood product supplier, would be reselling the materials in a specific market (the European market). The very nature of the plaintiff's business makes the reselling intention an obvious and contemplated aspect of the contract. The court applies the standard accounting principle for calculating lost profits, ensuring that only the true economic loss (sales revenue minus variable costs) is considered, rather than simply gross

[718] Case No. 10 Ob 518/95 Supreme Court (Austria) 6 February 1996 (Propane gas).

[719] Case No. 21-CV-03742-AMD-JRC U.S. District Court for the Eastern District of New York (USA) 15 September 2022 (KRAPE S.A. v. LIK Supply, Corp).

revenue.[720] In *St. Paul Commodities v. Island Biofuel*, the court explicitly stated that 'lost profits are generally available to resellers or brokers.[721]

In the 2009 case[722] involving the delivery of defective wine, the buyer, an established trader in the wine market, claimed lost profits due to its inability to resell wine that contained an impermissible additive delivered by the seller. While the seller acknowledged the presence of ascorbic (or benzoic) acid, the dispute centered on whether the buyer's claimed loss of profit was foreseeable under Arts. 74 and 76 of the CISG. The appellate court held that the economic loss suffered in this regard was foreseeable at the time of contract conclusion. The seller, as a wholesaler in the wine sector, was aware both of the addition of the prohibited substance and of industry standards rendering such wine unsuitable for resale. Furthermore, the seller knew that the buyer was not an end consumer but a merchant whose business model depended on reselling the goods at a profit. Thus, it was foreseeable that the delivery of defective wine would make resale impossible and would directly cause the buyer to suffer a loss of profit. The court therefore concluded that the lost profits claimed by the buyer were a foreseeable consequence of the breach and compensable under the CISG.

While ordinary resale profits may be foreseeable, profits that are unusually high or exceptional in nature are not considered and must be expressly communicated to the other party at the time the contract is concluded.[723] Without such notice, losses of this nature are unlikely to satisfy the foreseeability requirement. This limitation was illustrated in an arbitral award, where the tribunal found that the buyer's claimed loss of profit was excessively high and therefore violated Art. 74. The tribunal ordered the seller to refund the price of the goods and shipping costs and to compensate the buyer only for a reasonable amount of lost profit. The tribunal further held that the return of the goods lacked practical significance and that, should the seller insist on their return, it would have to bear the associated costs.[724]

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[720] Case No. 13 CV 4358 (PKC)(LB) U.S. District Court for the Eastern District of New York (USA) 23 May 2014 (Profi-Parkiet sp. z o.o. v. Seneca Hardwoods LLC).

[721] Case No. 12-CV-3108 (DRH)(AKT), 2013 WL 3874447 U.S. District Court for the Eastern District of New York (USA) 25 July 2013 (St. Paul Commodities, LLC v. Island Biofuel, LLC).

[722] Case No. 759/2008 Appellate Court Madrid (Spain) 10 March 2009.

[723] Kröll et al., n 24, 975.

[724] CIETAC No. CISG/2003/01, 3 June 2003.

Overall, judicial practice also demonstrates consequential loss is recoverable, but its recovery is subject to the foreseeability rule. For a common type of consequential loss, lost resale profits, foreseeability is context-dependent and often presumed in commercial dealings. On the other hand, foreseeability also protects the breaching party from liability for extraordinary or unknown risks unless those risks were transparently allocated to them at the outset of the contract.

3.4. Other controversial losses

There are several types of loss is controversial as to whether they are recoverable under the CISG's ambit. This section examines the application of foreseeability in case law to evaluate how courts and tribunals apply the test and assesses the extent to which foreseeability functions as a basis for determining the recovery of the losses under Art. 74. Given the breadth of potentially controversial types of loss, this dissertation does not attempt to examine every controversial category of loss. Rather, it focuses on several losses that are particularly relevant to examining the role of foreseeability in the recovery of loss.

3.4.1. Penalty clause

The recovery of penalty clauses under the CISG remains a controversial issue in both scholarship and case law because the CISG does not explicitly address penalty clauses. The core issue is whether such clauses fall within the scope of the CISG or are excluded by Art. 4(a) as matters of contract validity.[725] Most courts and arbitral tribunals hold that the validity of penalty clauses is outside the scope of the CISG, and must therefore be assessed under domestic law.[726] Some other cases found the penalty clause to be valid, but its amount was reduced under domestic law,[727] or under Art. 7.4.13 of the UPICC, referred to as international usages under

[725] Zeller, n 316, 2.

[726] FTCA No. T-4/05, 15 July 2008; Case No 12 U 39/00 Court of Appeal Hamburg (Germany) 25 January 2008; FTCA No. T-10/09, 31 May 2010.

[727] CIETAC No. CISG/2005/04, 9 November 2005 (DVD machines); Case No. 1993/AR2935 Court of Appeal Antwerp (Belgium) 18 June 1996; MKAC No. 105/2005, 13 April 20.

Art. 9(2) CISG.[728] A number of scholars also argue that penalty clauses are governed by the CISG.[729]

Within the scope of this dissertation, it only discusses the issue of penalty in terms of its function of compensation (damage function). This dissertation submits that penalty clauses are covered by the CISG, and foreseeability supports this interpretation. Because penalty clauses apply only when a party breaches the contract, they function as part of the CISG's remedial framework. Such clauses are intended to provide a predetermined monetary remedy for losses arising from a breach and therefore serve a compensatory function.[730] Art. 74 allows recovery for any loss suffered as a consequence of the breach. This full compensation principle implies that a penalty clause is recoverable under the CISG, subject to the limitation of foreseeability.[731] This foreseeability requirement is crucial in determining whether an agreed sum stipulated in a penalty clause can be recovered under the CISG. As noted, Art. 8 plays a significant role in interpreting foreseeability under Art. 74. By allowing both parties' subjective and objective intent to be considered, Art. 8 assists in determining what the parties actually foresaw or ought reasonably to have foreseen at the time of contracting. When parties expressly include a fixed sum in the contract to be payable in the event of breach, this constitutes evidence that the consequences of breach, at least up to that amount, were within the foreseeability of both parties. In this sense, an agreed penalty clause represents a shared risk allocation and a pre-estimation of loss, thereby satisfying the foreseeability requirement under Art. 74. This alleviates the aggrieved party's burden of proving unusually high, complex losses.[732] It reflects the parties' subjective risk evaluation and mutual acceptance of potential liability. Consequently, when applied together, Arts. 8 and 74 support the conclusion that compensatory penalty clauses fall within the general principles of the CISG rather than being excluded from its scope.[733] The

[728] MKAC No. 229/1996, 05 June 1997.

[729] Bridge, M. (2007). *The international sale of goods: Law and practice*. Oxford University Press, para. 11.38; Zeller, n 316, 2; Perales Viscasillas, P., & Solana Álvarez, J. (2014). Spain. In L. A. DiMatteo (Ed.), *International sales law: A global challenge*. Cambridge University Press, 463; Schlechtriem & Schwenzer, n 210, Art. 74, para 58.

[730] Zeller, n 316, 7.

[731] Perales Viscasillas & Solana Álvarez, n 729, 464.

[732] Zeller, n 316, 11.

[733] Id.,

contracting parties, by agreeing to such a clause, clearly assume the risk of incurring the stipulated damages upon breach.

However, while foreseeability and assumption of risk justify the inclusion of penalty clauses within the CISG framework, they are not sufficient on their own to determine the extent of recoverable compensation. Although parties may agree to limit liability by expressing a specific amount in the contract, this does not automatically entitle the aggrieved party to recover sums exceeding the actual or reasonable loss suffered. This dissertation, therefore, argues that the extent of compensation under a penalty clause must also be assessed in light of the general principle of reasonableness under the CISG. Insofar as contractual penalties align with the established practices of the parties or prevailing trade usages under Art. 9, the penalty clauses may be considered foreseeable under Art. 74, provided that its amount is reasonable.[734] Support for this approach can be found in the Arbitral Award where the tribunal upheld the validity of the penalty clause under the CISG but reduced its amount on the basis of the CISG's general principle of reasonableness. It limited the penalty to a percentage of the delayed sums, not the total cost of the delivered goods, and applied the contractual maximum of 10% accordingly.[735]

Where penalty clauses are expressly incorporated into the contract, contractual penalties are generally regarded as foreseeable. Nevertheless, case law demonstrates that the foreseeability of such penalties is not automatic and may be rejected in particular circumstances. In one case, the tribunal held that the penalty clauses weren't foreseeable because they arose from contracts entered into by a trading company that had entrusted the buyer with concluding the relevant sales contracts, and those contracts were concluded only after the contract between the seller and the buyer had been concluded.[736] In one case, a contractual penalty, although it may generally be foreseeable, was held to be unforeseeable because the specific penalty clause in the buyer's contract was exceptionally onerous or disproportionately disadvantageous to the buyer.[737]

[734] Schlechtriem & Schwenzer, n 210, Art. 74, para 58.

[735] MKAC No. 137/2004, 13 January 2006.

[736] CIETAC No. CISG/2004/05, 29 September 2004.

[737] Case No. 419 O 48/01 District Court Hamburg (Germany) 21 December 2001.

In conclusion, the recoverability of penalty clauses under the CISG remains a contested issue, as evidenced by the conflicting positions taken by both legal scholars and international tribunals. Case law studies also illustrate the role of foreseeability in determining the recoverability of contractual penalties. This dissertation submits that penalty clauses that serve a compensatory function should be regarded as falling within the scope of the CISG. The full compensation principle and foreseeability requirement under Art. 74, interpreted through Art. 8, allow for the recognition of compensatory penalty clauses as part of the CISG's general principles. At the same time, the principle of reasonableness ensures that recovery remains proportionate to the loss and consistent with the Convention's underlying objectives. This approach promotes uniformity, respects party autonomy, and avoids unnecessary reliance on domestic validity rules, thereby better fulfilling the CISG's purpose as a harmonizing instrument of international sales law.

3.4.2. Non-pecuniary loss and loss of goodwill

Non-material loss is generally understood as loss resulting from damage to non-material values, such as personal injury, physical or psychological suffering, and damage to personal reputation.[738] Since the text of the CISG does not expressly address non-material loss, the recoverability of such damages under Art. 74 has long been the subject of doctrinal controversy. The prevailing view in legal doctrine is that non-pecuniary damages are not recoverable under Art. 74.[739] Most commentators argue that the Convention is primarily concerned with economic interests arising from international sales transactions and that damages for pain and suffering, mental distress, or loss of enjoyment fall outside its scope.[740] Consequently, claims for non-material loss, such as psychological injury or emotional distress, cannot be considered recoverable under Art. 74. However, it is also argued that non-material damages may be recoverable in exceptional circumstances. This exception typically applies where the contract itself expressly serves a non-material purpose, and the breach fundamentally frustrates that

[738] Saidov, n 70, 327.

[739] Schlechtriem, P. (2007). Non-material damages - Recovery under the CISG? *Pace International Law Review*, *19*(1), 90.

[740] Stoll, n 397, 558; Schwenzer, I., & Hachem, P. (2008). The scope of the CISG provisions on damages. In D. Saidov & R. Cunnington (Eds.), *Contract damages: Domestic and international perspectives*. Hart Publishing, 100; Schlechtriem & Schwenzer, n 210, Art. 74, para 41.

purpose.[741] While this exception may be relevant in limited circumstances, it has little practical significance in the context of international sales.[742]

In business relationships, non-material loss most commonly arises in the form of loss of goodwill or damage to reputation. 'Goodwill' is a multifaceted concept that may refer to a business's favorable reputation among customers, the perceived quality of its goods, or its ability to earn profits above the market norm.[743] Here, views diverge on whether its recovery should be limited to pecuniary loss. The majority position holds that because Art. 74 does not permit recovery of non-pecuniary loss, damages for loss of reputation are compensable only insofar as the loss of goodwill has caused a demonstrable financial loss.[744] However, proponents of this position also consider loss of goodwill to be a material loss that is simply difficult to evaluate.[745] In contrast, there is a view that the scope of recoverable damages should not be limited to pecuniary loss.[746] In commercial practice, businesses may invest intangibly in developing and maintaining their goodwill; therefore they should be entitled to compensation for damage to their reputation, even in the absence of an immediate, measurable financial loss.[747]

Case law also reveals that claims for non-pecuniary loss almost arise in the form of damages for loss of goodwill or damage to business reputation or the reputation of goods. While there is a decision that explicitly denies recoverability under the CISG,[748] a significant number of courts and arbitral tribunals have treated, at least in principle, such loss as compensable, even if damages are ultimately denied for other reasons.[749]

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[741] CISG-AC Opinion No. 6, 7.1; Saidov, n 70, 328.

[742] Saidov, n 70, 328.

[743] Kröll et al., n 24, 985.

[744] Schlechtriem & Schwenzer, n 210, Art. 74, para 36; Kröll et al., n 24, 986.

[745] Witz & Salger, n 218, Art. 74 para 14; Schönle, H. (1997). Article 74. In H. Honsell (Ed.), *Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)*. Springer, para 7.

[746] Schwenzer & Hachem, n 740, 98.

[747] Saidov, D. (2008). Damage to business reputation and goodwill under the Vienna Sales Convention. In D. Saidov & R. Cunnington (Ed.), *Contract damages: Domestic and international perspectives*. Hart Publishing, 389.

[748] MKAC No. 309/1993, 03 March 1995.

[749] Case No. 4C.179/1998 Swiss Federal Supreme Court (Switzerland) 28 October 1998; Case No. 97/03974 Court of Appeal Grenoble (France) 21 October 1999; Case No. 755/95-C Court of Appeal Barcelona (Spain) 20 June 1997.

In theory, damages for loss of goodwill or pecuniary loss to a party's reputation are recoverable under Art. 74 in accordance with the principle of full compensation.[750] This approach aligns with the principle of full compensation and finds support in comparative instruments such as Art. 7.4.2 of the UPICC and Art. 9:501(2)(a) of the PECL.[751] The CISG Advisory Council has similarly opined that loss of goodwill may be recoverable, provided the aggrieved party can establish with reasonable certainty that its commercial reputation was damaged as a result of the breach.[752] This dissertation also submits that this kind of loss is recoverable under the full compensation principle, provided the general requirements for damages are satisfied, including foreseeability. Loss of goodwill may be foreseeable where the contractual purpose indicates that the transaction is intended, at least in part, to support or preserve the party's reputation.[753]

Loss of goodwill may in some cases overlap with loss of profit. Damage to reputation can impair sales and thus be reflected in lost profits. Where this is the case, awarding separate compensation for loss of goodwill risks double recovery.[754] As illustrated in one case, in which the buyer claimed damages both for loss of reputation and for loss of turnover as lost profits resulting from defective video recorders. The court rejected the claim for loss of goodwill, holding that the buyer could not recover lost turnover as lost profits on the one hand and then seek additional compensation for loss of reputation on the other.[755] This necessitates a clear distinction between pure reputational damages and their financial manifestations. Loss of reputation constitutes a distinct category of damage and therefore should not be conflated with loss of profit. Nevertheless, a reduction in profits resulting from lost business transactions may provide evidence of the underlying reputational loss. The assessment of such loss should consider factors such as the size of the company, the relevant market, the value of the trademark, and the costs reasonably necessary to restore its reputation.[756]

[750] Kröll et al., n 24, 985.

[751] Blase & Höttler, n 145.

[752] See CISG-AC Opinion No. 6, para 7.

[753] Schlechtriem & Schwenzer, n 210, Art. 74, para 58.

[754] Kröll et al., n 24, 986.

[755] Case No. 10 O 72/00 District Court Darmstadt (Germany) 09 May 2000.

[756] Schlechtriem & Schwenzer, n 210, Art. 74, para 36.

One of the few decisions to explicitly grant damages for loss of goodwill is a judgment of the Helsinki court of appeal.[757] In that case, the court awarded damages for various types of harm, including loss of goodwill, without requiring concrete proof of actual financial loss. The court of first instance had stated that

> "[i]n estimating the loss resulting from loss of goodwill, the Court of First Instance has taken into consideration the fact that the [buyer] has not done business in this trade sector before the coming about of the business relationship now in question. … The Court of First Instance has estimated the damage caused to [the buyer] on the basis of a rule laid down [in] the Civil Procedure Act (section 17)."

In estimating the damage, the court took into account that the buyer had not previously conducted business in the relevant trade sector before entering into the contractual relationship at issue. Relying on a provision of the Finnish Civil Procedure Act, the court estimated the damage caused by the loss of goodwill without requiring a detailed demonstration of actual pecuniary losses.

This judgment is noteworthy in that it treats loss of goodwill as a compensable pecuniary value, even in the absence of precise proof of loss. It thus implicitly supports the view that damage to reputation as having pecuniary value falls within the scope of Art. 74. However, the decision fails to engage with the foreseeability requirement of Art. 74, which plays a critical role in this circumstance.[758] The court did not examine whether the seller foresaw or ought to have foreseen, at the time of contract conclusion, that its breach would cause damage to the buyer's goodwill.

By contrast, a Greek case law demonstrates a more restrictive approach grounded explicitly in the foreseeability requirement to deny damages for non-material harm, including damage to reputation and loss of clientele. In a dispute concerning defective bulletproof vest materials, both parties claimed compensation for non-material harm, including damage to reputation and loss of clientele. The seller claimed damages for loss of professional reputation and clientele due to the alleged wrongful avoidance of the contract by the buyer. The buyer, in turn, claimed compensation for moral damage resulting from harm to its reputation, disturbance of its

[757] Case No. S 00/82 Court of Appeal Helsinki (Finland) 26 October 2000 (Plastic grass carpets).

[758] Saidov, n 70, 331.

commercial relationships with key customers, and loss of reputation and credibility of its goods. The court rejected all such claims, holding that damage resulting from loss of reputation and clientele could not, as a general rule, be considered foreseeable within the meaning of Art. 74. The court emphasized that such losses were neither subjectively nor objectively foreseeable at the time of contract conclusion.[759] This decision underscores the importance of foreseeability as a limiting principle in deciding the recovery of non-material loss.

Similarly, the arbitral award involving a U.S. buyer and a Russian seller illustrates the role of foreseeability in claims for the loss of reputation.[760] In this case, the buyer claimed reimbursement for unpaid amounts from final customers and compensation for lost profits and reputational harm incurred due to the seller delivering defective goods (first installment), which the buyer had already resold. The buyer's customers refused to pay for the non-conforming goods. The buyer alleged that the non-conformity of the first installment tarnished its reputation with downstream customers, causing damage to its reputation, which impaired its ability to resell the second installment. However, the tribunal found that the buyer failed to prove that the seller's breach of contract could have caused a serious loss of the buyer's reputation, making it difficult to resell the second installment. The tribunal rejected the claim, citing the absence of a causal link, the failure to prove the quantum of the loss, and, critically, the failure to establish foreseeability. The tribunal found that the seller neither foresaw nor ought to have foreseen at the time of contract formation, based on the circumstances of which he then knew or ought to have known, that the buyer would inspect the goods abroad using non-standard methods (deviating from the contract's Technical Conditions [TC]). Nor could the seller foresee that such an inspection would lead to reputational damage, causing the buyer's alleged losses. The contract did not specify that the buyer would resell the goods to downstream customers or that defects would tarnish the buyer's reputation, and the buyer conduct inspections abroad using non-TC methods, which allegedly worsened the reputational harm. The seller, therefore, could not have foreseen that this would result in reputational damage to the buyer or the product. The buyer's decision to inspect goods abroad using non-TC methods was an independent intervening act. The tribunal suggested that proper inspection under contract terms might have

[759] Case No. 4505/2009 Multi-Member Court of First Instance of Athens (Greece) 1 January 2009 (bullet-proof vest).

[760] MKAC No. 54/1999, 24 January 2000.

mitigated reputational harm. In this arbitral case, simply knowing the goods would be resold wasn't enough to make a serious loss of reputation foreseeable to the seller. This decision underscores that foreseeability is not assessed abstractly but concretely, based on the specific circumstances known or knowable to the parties at the time of contracting. The tribunal did not exclude goodwill damages in principle but required concrete evidence that the breaching party knew or should have known that its breach would affect the aggrieved party's market reputation. The case law reveals three recurring and cumulative requirements for the recovery of goodwill-related damages under Art. 74: (1) a causal link between the breach and the alleged reputational harm; (2) proof of loss with reasonable certainty; and (3) foreseeability of the loss at the time of contract conclusion.

These decisions illustrate that, in practice, damages for loss of reputation are rarely compensated because of the difficulty of proving such a loss and of meeting the requirements of Art. 74,[761] including foreseeability, causal link, and certainty (if applicable). Even if a party proves that it has suffered a loss of reputation, it will be very difficult to calculate its loss.

Allowing recovery for non-material loss without considering the foreseeability limitation would introduce unacceptable uncertainty and unfairness. Goodwill and reputation are often 'second-line' losses; they do not flow directly from the breach but are a consequence of it.[762] It is generally foreseeable that a businessperson would use the goods to generate profit, either directly or indirectly. In a case involving the buyer who lost clientele after receiving inferior meat, the Swiss supreme court ruled the loss of clientele was foreseeable to a seller who knew the buyer operated as a wholesaler in a sensitive market.[763]

Nevertheless, this dissertation takes the position that general knowledge is not sufficient to establish foreseeability of such loss. Rather, specific knowledge should be considered. Of course, to judge specific knowledge, it depends on a case-by-case basis. To decide whether a loss is foreseeable, one should question how the loss matters. This dissertation suggests that the foreseeability of loss of goodwill should encompass not only the type and extent of the loss, but also the foreseeability of the causal mechanism through which such loss is suffered. This is

[761] Saidov, n 70, 330.

[762] Zeller, n 450, 123.

[763] See Case No. 10 O 72/00 District Court Darmstadt (Germany) 09 May 2000.

particularly relevant for loss of goodwill, which typically arises through complex interactions with third parties, such as inspection procedures, market exposure, attribution of responsibility, or regulatory intervention. It clarifies why certain claims for reputational loss are denied despite the abstract foreseeability of such harm, and strengthens foreseeability as an effective limiting principle. Besides, foreseeability should also be evaluated through the lens of reasonableness. Not only must the occurrence of reputational loss be foreseeable, but its extent must also be reasonably foreseeable. Furthermore, a more context-sensitive assessment of foreseeability is necessary to prevent uncertainty and potential unfairness to the breaching party. This dissertation suggests that loss of goodwill or damage to reputation should be considered foreseeable under Art. 74 only where, at the time of contract conclusion, the breaching party foresaw or could have foreseen a real risk of such harm in light of specific, case-sensitive factors. These include: (1) the nature and sensitivity of the buyer's market; (2) the function of the goods within the buyer's business; (3) the visibility of the defect to third parties; (4) the likelihood that the defect would be attributed to the buyer rather than the seller; (5) the scale and seriousness of the breach; and (6) the information actually communicated or reasonably available to the seller. No single factor is decisive. Rather, foreseeability must be assessed holistically, with heightened scrutiny due to the indirect and non-material character of reputational loss. This approach reconciles the principle of full compensation with the CISG's commitment to predictability and reasonable limitation of liability.

In conclusion, judicial practice reveals divergent approaches regarding whether non-pecuniary damages are recoverable under the CISG. Even among decisions that recognize the possibility of recovering such loss under the Convention, the weight given to foreseeability varies considerably. In some cases, foreseeability is not expressly considered, whereas in others it plays a decisive role in determining whether such loss is recoverable. Judicial decisions also demonstrate that claims for loss of reputation are rarely successful in practice, as adjudicators strictly enforce the evidentiary burdens surrounding foreseeability, the causal link, and the calculation of loss with reasonable certainty. The dissertation submits that damages for loss of goodwill or harm to commercial reputation are not categorically excluded under Art. 74. To recover reputational damages under Art. 74, an aggrieved party must demonstrate that such harm was foreseeable at contract conclusion, prove a causal link between the breach and the loss, and present clear evidence of the loss suffered. Rather than relying solely on a 'general knowledge'

standard, the assessment of foreseeability should be contextual and grounded in the specific circumstances of the contract, its purpose, and the goods involved. This approach balances the principle of full compensation with the need for legal certainty and fairness, ensuring that claims for non-material loss are only successful where the reputational risk was a genuine and discernible consequence of the breach at the time the contract was made.

3.4.3. Attorneys' fees

The question of whether attorneys' fees are recoverable under CISG remains a controversial issue in both legal doctrine and jurisprudence. The debate turns primarily on whether such costs can be qualified as a 'loss' expressed in Art. 74. The recoverability of legal costs incurred in enforcing or defending contractual rights highlights a tension between the Convention's principle of uniform application and the role of domestic procedural law.

A significant number of scholarly opinions argue that legal fees arising from litigation are not recoverable as damages under Art. 74, with different rationales.[764] A central argument is based on the principle of equality between buyer and seller.[765] Proponents contend that while a successful plaintiff may plausibly frame legal fees as a direct consequence of the defendant's breach, a successful defendant cannot establish a causal link between the breach and the costs of defending against an unfounded claim. Allowing recovery only for the prevailing claimant would therefore introduce an asymmetry that conflicts with the CISG's principle of equality between buyer and seller. Therefore, these authors conclude that the reimbursement of legal costs incurred in judicial proceedings lies outside the scope of the CISG and should instead be governed by domestic law, specifically the *lex fori*. On this view, costs incurred in preparation for litigation, as well as expenses not compensated under domestic procedural rules, are likewise excluded from the Convention's damages regime.[766]

This recourse to domestic law is justified by several, often overlapping, doctrinal foundations. Some authors characterize attorneys' fees as a matter of procedural law, which Art. 7(2) CISG

[764] Kröll et al., n 24, 987.

[765] Schlechtriem & Schwenzer, n 210, Art. 74, para 30, Preamble, para 8 and Art. 7, para 34.

[766] See Gotanda, J. Y. (2005). Awarding damages under the United Nations Convention on Contracts for the International Sale of Goods: A matter of interpretation. *Georgetown Journal of International Law*, *37*(1), 130.

excludes from the Convention's scope.[767] Others invoke the drafters' intent, suggesting the absence of an explicit provision indicates a deliberate choice not to regulate the issue.[768] A further rationale posits that the CISG's principles are ill-suited to adjudicating the reasonableness and calculation of attorneys' fees, a task for which domestic cost regimes are better equipped.[769] Consequently, under this prevailing view, costs incurred both during proceedings and in preparation for litigation, including those not indemnified by domestic cost-shifting rules, fall to be determined by applicable domestic law. In practice, many commentators combine two or more of these rationales to support recourse to domestic law.[770]

In contrast, a minority of scholars advocate for the recoverability of legal costs under the meaning of Art. 74.[771] These authors emphasize the plain wording of Art. 74, which provides for full compensation for all losses suffered as a consequence of a breach. Proponents of this position emphasize the broad wording of Art. 74, which encompasses 'loss suffered as a consequence of the breach', and argue that the principles of full compensation, foreseeability, mitigation, and reasonableness embedded in the CISG provide a sufficient normative framework to assess whether legal costs should be recoverable in a given case.[772]

The persistence of these opposing views underscores the structural tension between the CISG's aspiration to uniformity and the traditionally domestic character of rules governing litigation costs. As a result, the recoverability and foreseeability of attorneys' fees under Art. 74 remain unsettled, continuing to invite divergent interpretations across jurisdictions. This section examines the role of foreseeability in determining whether legal costs are recoverable as damages under Art. 74, and how foreseeability should operate within the Convention's system

[767] Flechtner, H. M. (2002). Recovering attorneys' fees as damages under the U.N. Sales Convention (CISG): The role of case law in the new international commercial practice, with comments on *Zapata Hermanos v. Hearthside Baking*. *Northwestern Journal of International Law & Business, 22*(2), 152; Huber & Mullis, n 185, 278.

[768] Lookofsky, J., & Flechtner, H. (2003). Viva Zapata! American procedure and CISG substance in a U.S. Circuit Court of Appeal. *Vindobona Journal of International Commercial Law and Arbitration*, *7*(1), 98.

[769] Gotanda, n 766, 131; Mullis, n 21, 44.

[770] Kröll et al., n 24, 987.

[771] Zeller, n 450, 143 et seq; Felemegas, J. (2002). The award of counsel's fees under Article 74 CISG, in *Zapata Hermanos Sucesores v. Hearthside Baking Co.* (2001). *Vindobona Journal of International Commercial Law and Arbitration, 6*(1), 29-39; Schlechtriem, P. (2002). Attorneys' fees as part of damages. *Pace International Law Review, 14*(1), 205-10.

[772] Kröll et al., n 24, 987.

of limitations on damages. It will look at different views from both legal doctrine and judicial practice by examining case law on this issue. This examination of foreseeability in the recovery of legal costs is conducted with an awareness of the controversy between the CISG and procedural law, as well as other remedies in the Convention.

Judicial practice reflects the doctrinal divide regarding attorneys' fees outlined above. This jurisdictional divergence generates considerable uncertainty for parties in dispute and undermines the objective of uniform implementation under the CISG. Courts and tribunals have rendered inconsistent and contradictory opinions on whether attorneys' fees may be awarded as damages under Art. 74. The controversy arises from divergent interpretations of the notion of 'loss' within the meaning of Art. 74 and from differing views on the relationship between substantive damages and procedural cost allocation. The following section reviews the relevant case law, distinguishing between litigation costs incurred during judicial proceedings and extra-judicial legal expenses.

a. Not recoverable under CISG Art. 74

A clear line of authority, particularly pronounced in United States courts, denies the recoverability of attorneys' fees incurred in court proceedings under Art. 74. The leading decision in this regard is *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, decided by the U.S. Court of Appeals for the Seventh Circuit in 2002. The court held that attorneys' fees do not constitute damages under Art. 74. The court found the CISG is a substantive body of contract law, whereas rules regarding attorneys' fees are generally considered matters of procedural law. The Seventh Circuit stated: 'The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law'. The court viewed the allocation of attorneys' fees as a procedural issue, which should be determined by the law of the forum (in this case, U.S. federal court procedures), rather than by the CISG itself. The court found that the CISG does not explicitly provide for the recovery of attorneys' fees, and there is no evidence in the drafting history of the Convention that such fees should be an element of damages. Art. 74 permits recovery for foreseeable losses caused by breach, but the court concluded that this was not meant to override national procedural rules regarding fee-shifting. Accordingly, the court firmly places

the issue of fee-shifting outside the scope of the CISG's substantive provisions and within the domain of domestic procedural law.[773] This approach has been consistently followed by several U.S. federal courts and international courts. In *Norfolk Southern Railway Co. v. Power Source Supply, Inc.*, the court expressly denied recovery of attorneys' fees under Art. 74 or any other CISG provision. The case *Victory Foodservice Distributors Corp. v. N. Chr. Liatsos & Co. Ltd.* further reinforces the consistent judicial interpretation in U.S. courts that attorneys' fees are not recoverable under the CISG. The court looked to New York law as the procedural law of the forum.[774]

The district court in *Minh Dung Aluminum Company, Ltd v. Aluminum Alloys MFG LLC* rejected the claim not only for attorneys' fees in a strict sense, but also for court filing fees, legal research, and service of process. The court viewed that foreseeable loss within the meaning of Art. 74 does not encompass attorneys' fees. These expenses are not a direct or foreseeable 'loss' stemming from the seller's breach of contract itself, but rather costs associated with the litigation process necessary to enforce rights. Referring explicitly to the *Zapata* rule, the court affirmed that court filing fees and other litigation-related expenses likewise fall outside the scope of recoverable damages under the CISG. If attorneys' fees themselves are excluded, there is, in the court's view, no principled basis for treating subordinate litigation costs differently.[775]

In these cases, the court specifically excluded costs associated with filing the claim, legal research, and service of process, characterizing them as non-recoverable under Art. 74.

In *Brands International Corporation v. Reach Companies, LLC*, the court followed *Zapata* very thoroughly explains why the *Zapata* court (and subsequent courts that follow it) concluded that Art. 74 does not include attorney's fees. It stated that if 'loss' under Art. 74 includes attorney's fees, then only a prevailing plaintiff could recover them. A prevailing defendant would have no basis under Art. 74 to recover their legal costs, as there's no 'breach' by them. The court emphasized that 'the CISG Article laying out the rights of buyers and sellers in the event of

[773] Case No. 01-3402, 02-1867, 02-1915 U.S. Court of Appeals (7th Circuit) (USA) 19 November 2002 (Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Comp).

[774] Case No. 17cv2227 U.S. District Court for the Southern District of New York (USA) 13 November 2017 (Victory Foodservice Distributors Corp. v. N. Chr. Liatsos & Co. Ltd).

[775] Case No. 1:20-cv-01764 U.S. District Court for the Middle District of Pennsylvania (USA) 02 August 2021 (Minh Dung Aluminum Company, Ltd v. Aluminum Alloys MFG LLC).

breach are almost entirely mirror images of each other'. The CISG provisions (e.g., Arts. 45–52 for buyers and Arts. 61–65 for sellers) are structured to reflect a balanced reciprocity of rights and remedies. Interpreting Art. 74 to include attorney's fees for plaintiffs but not allowing defendants to recover them would disrupt this carefully constructed balance, creating an imbalance in the rights of the contractual counterparty. The court further noted that 'such an interpretation runs up against Art. 7(2)'s charge to interpret issues not expressly settled by the CISG in conformity with the general principles on which it is based'. Allowing attorneys' fees under Art. 74, without textual support and in a way that disrupts structural parity, would violate this interpretive mandate.[776] This case reaffirms the central message of *Zapata*, that the CISG is about substantive contract law, not procedural cost allocation, and its balanced structure must not be undermined by unilateral judicial interpretation.

Several non-U.S. adjudicators also excluded legal costs from being governed by the CISG. In one case, the court of appeal explicitly states that attorneys' fees and litigation costs are not recoverable under the CISG because they are procedural matters governed by the law of the forum, not by the substantive contract law provisions of the CISG.[777] Similarly, the decision of the district court of the Netherlands in *Frese Biogas GmbH & Co KG v. Circular Values BV et al.*[778] ruled that legal costs were subject to Dutch law because it is not governed by the CISG. The Swiss courts, in several cases, treat attorneys' fees and procedural litigation costs as outside the scope of the CISG because these are procedural matters, not contractual damages under Art. 74. The courts awarded legal costs under local (Swiss) law and made no reference to Art. 74 of the CISG.[779] In *MaRa Medical-Technical-Aid GmbH v. Ningbo Laida Automotive Technology Co. Ltd.*, the court explicitly stated that Art. 74 of the CISG does not regulate the issue of attorneys' fees and notary costs. To reinforce its conclusion, the court cited the CISG Opinion

[776] Case No. 23-2164 Court of Appeals for the Eighth Circuit (USA) 30 May 2024 (Brands International Corporation v. Reach Companies, LLC).

[777] Case No. 2017/AR/68 Court of Appeal Antwerp (Belgium) 04 March 2020.

[778] *Frese Biogas GmbH & Co KG v. Circular Values BV et al.*, No. C/02/367340 / HA ZA 20-1, Zeeland-West-Brabant District Court (Netherlands) 29 May 2024.

[779] See Case No. PT12.025612-190402 Court of Appeal Canton Vaud (Switzerland) 24 May 2019 and Case No. HG070223/U/dz Commercial Court Canton Zurich (Switzerland) 22 November 2010.

No. 6, which confirms that the costs associated with litigation are not automatically recoverable under Art. 74.[780]

There is a case where courts have rejected the recoverability of extra-judicial costs under Art. 74. In the *Ski wear and sportswear*[781] case decided by the Commercial Court of the Canton of Zurich in 2010, the court held that extra-judicial legal expenses incurred before litigation were so closely connected to subsequent litigation costs that they should be treated as part of the latter. As litigation costs, they were therefore governed by procedural law and excluded from the scope of Art. 74. This decision confirms that extra-judicial legal costs closely tied to litigation are not recoverable as damages under Art. 74. Instead, they fall under the scope of procedural law and are governed by the domestic law of the court hearing the case.

b. Recoverable under the CISG

A further strand of jurisprudence, predominantly found in international arbitral practice, supports the recovery of legal costs under Art. 74. Several arbitral tribunals have expressly treated attorneys' fees as a substantive loss within the meaning of Art. 74.[782] These decisions generally proceed from the premise that Art. 74 does not exclude legal costs from its scope and therefore they are recoverable.

The tribunal of *Hiperbaric, S.A. v. OCVA Holdings* affirmed the recoverability of legal fees under Art. 74 by invoking the principle of full compensation. The tribunal stated that Art. 74 is silent on the recoverability of legal fees but does embody the principle of full compensation. On this basis, the tribunal adopted a broad and inclusive interpretation of Art. 74.[783] At the same time, however, the dissertation found the tribunal did not explicitly examine whether the legal costs awarded were foreseeable at the time of contract conclusion or whether a sufficient causal nexus existed between the breach and the expenses incurred. The reasoning thus appears to rely

[780] *MaRa Medical-Technical-Aid GmbH v. Ningbo Laida Automotive Technology Co. Ltd*., Intermediate People's Court, Ningbo, Zhejiang Province (China) 25 August 2022.

[781] Case No. HG070223/U/dz Commercial Court of the Canton of Zurich (Switzerland) 22 November 2010 (Ski wear and sportswear).

[782] See Court of Arbitration of the Hamburg Chamber of Commerce, 21 June 1996 (Chinese goods case); MKAC No. 186/2003, 17 June 2004 (Barter transaction); CIETAC No. CISG/1996/23, 14 May 1996 (Down coat case).

[783] ICC No. 25926/PDP, 23 February 2022 (Hiperbaric, S.A. v. OCVA Holdings, LLC).

almost exclusively on full compensation, without adequately integrating foreseeability and causation as limitations on liability.

In a case decided by CIETAC, the tribunal accepted evidence of attorneys' fees and held that such fees constituted foreseeable losses under Art. 74. The tribunal expressly stated that such costs 'can be expected and should be expected' by the breaching party at the time of contract formation.[784]

Several courts treated extra-judicial costs, such as expenses incurred for legal advice, expert opinions, or the preparation of claims and defenses prior to or outside formal court proceedings, as recoverable under Art. 74. This is illustrated by some German courts. In one case, the court held that pre-trial attorneys' fees are recoverable under Art. 74 CISG as foreseeable damage. It reinforces that fees for out-of-court legal enforcement, such as demand letters or legal consultations prior to filing suit, qualify as economic loss caused by the breach, not mere procedural costs.[785] In the *Notice regarding non-conforming shoes* case decided by the district court of Munich, the court stated that pre-trial and incidental litigation costs are recoverable under Art. 74.[786] This reinforces the view that costs 'incidental' to the breach and incurred before or during early stages of dispute resolution, if aimed at enforcing or mitigating the consequences of a breach, can fall within the scope of 'loss' under Art. 74.

Several Dutch courts also consider incidental or pre-trial costs, are recoverable under Art. 74 of the CISG. In one case, the court confirmed that extrajudicial legal costs are governed by Art. 74 CISG, but allocation and calculation are to be handled in accordance with local (Dutch) law since Art. 74 does not specify how to calculate or limit extrajudicial costs.[787] Similarly, in *Difrusol S.L. v. Euromeridian B.V.*, the court held that attorneys' fees and legal costs (extrajudicial costs) are recoverable under Art. 74.[788]

[784] CIETAC No. CISG/1999/09, 12 February 1999.

[785] Case No. 5 U 65/23 Court of Appeal Stuttgart (Germany) 12 January 2024.

[786] Case No. 3 HK O 7733/15 District Court Munich I (Germany) 06 May 2016.

[787] Case No. C/08/309410 / HA ZA 24-44 Overijssel District Court (Netherlands) 6 November 2024.

[788] Case No. C/10/683122 / HA ZA 24-643, District Court Rotterdam (Netherlands) 29 January 2025 (*Difrusol S.L. v. Euromeridian B.V.*).

In *Raiffeisenbank Emsland-Mitte EG et al. v. De Eendracht*, the court explicitly states that the attorneys' fees were recoverable as damages under Art. 74. The court, however, made a distinction between extrajudicial and judicial costs. Extrajudicial costs refer to legal fees incurred before a lawsuit is formally filed (e.g., for initial advice, negotiations, demand letters), which are generally recoverable under Art. 74. Litigation costs refer to fees incurred during the actual court proceedings, which are typically covered by the court's cost allocation rules (e.g., procedural rules of the forum). The court acknowledged that additional legal costs are inherent in international disputes, such as the costs of legal assistance in several countries, the costs involved in obtaining advice, opinions, and the like, which qualify as reasonable costs for compensation.[789]

Likewise, the Japanese district court in *Rolser S.A. v. Global Living Inc* case distinguished between attorneys' fees incurred due to litigation and those incidental to contract performance. Attorneys' fees related to the litigation (i.e., those related to pursuing the claim in court) are not recoverable under Art. 74. The Japanese court, in this respect, treats litigation costs as a matter of the procedural law of the forum, not as damages flowing directly from the breach of contract under Art. 74. Whereas, attorneys' fees 'incidental' to the contract (e.g., legal fees incurred in connection with the negotiation or termination of the contract, or for out-of-court collection efforts) are recoverable under Art. 74. The court recognized that certain legal fees, not directly related to the lawsuit itself, but rather incurred as a consequence of the breach in an attempt to manage or mitigate the effects of the breach outside of the court proceedings, could be considered a foreseeable loss under Art. 74.[790]

There are some cases that support the recovery of legal costs under Art. 74 tend to emphasize the limiting role of causation. In a dispute between a Chinese seller and a German agency (defendant), the appellate court acknowledged, in line with the prevailing opinion in Germany, that out-of-court legal costs may in principle be recoverable under Art. 74 CISG, provided that they constitute objectively necessary expenses for legal proceedings. Nonetheless, the court denied recovery in the specific case due to the absence of a causal nexus between the breach and

[789] Case No. C/08/202458 / HA ZA 17-254, Overijssel District Court (Netherlands) 15 April 2020 (*Raiffeisenbank Emsland-Mitte eG and R+V Allgemeine Versicherung AG v. Aan- en Verkoopcoöperatie "De Eendracht" U.A.*).

[790] *Rolser S.A. v. Global Living*, Tokyo District Court (Japan) 3 June 2019.

the legal costs claimed. Because the power of attorney granted to the law firm predated the contractual dispute, the court could not establish that the costs were incurred as a consequence of the breach in question.[791] This decision illustrates that, even where attorneys' fees are conceptually regarded as recoverable loss, there must be a clear causal link between the breach of contract and the incurrence of those specific legal costs.

The importance of causation is further underscored by the recent decision of the Vietnam International Arbitration Center in *Rythern Vietnam International Company Limited v. Meg Home Plus, LLC* case. Although the tribunal acknowledged that the respondent had breached its payment obligations, it rejected the claimant's request for reimbursement of dispute- related legal costs incurred in U.S. court proceedings. The tribunal found no causal link between the breach and the legal expenses arising from the claimant's U.S. lawsuit. Given that the parties had agreed to resolve disputes through arbitration (VIAC), the claimant's decision to initiate court proceedings in the United States was inconsistent with the arbitration agreement. Consequently, the tribunal held that the costs incurred in the U.S. litigation were caused by the Claimant's own actions and did not constitute recoverable damages under Arts. 74–77 of the Convention. Accordingly, the respondent was not ordered to bear those legal costs.[792]

In addition to decisions either clearly accepting or rejecting the recoverability of legal costs under Art. 74 CISG, some cases deliberately refrain from deciding the foundational question of whether such costs fall under Art. 74 or are governed by national law. An illustrative example is *Merwestaal Moerdijk B.V. v. StaRo Stahlrohrhandelsgesellschaft mbH*, where the claimant sought reimbursement of extra-judicial legal costs allegedly incurred in connection with the disputed sales contract. The court found that the claimed costs were not sufficiently substantiated and that their connection to the contract at issue remained unclear.[793] Against this background, the court expressly refrained from deciding whether extra-judicial legal costs qualify as a 'loss' under Art. 74 or whether their recoverability is instead governed by national law.

[791] Case No. 8 U 46/23 Court of Appeal Köln (Germany) 9 January 2025.

[792] Vietnam International Arbitration Centre (VIAC) No. 1123/VN/ARB, 15 November 2023 (Rythern Vietnam International Company Limited v. Meg Home Plus, LLC).

[793] Case No. 200.239.305/01 Court of Appeal 's-Hertogenbosch (Netherlands) 11 June 2019 (Merwestaal Moerdijk B.V. v. StaRo Stahlrohrhandelsgesellschaft mbH).

In conclusion, the CISG does not explicitly address whether attorneys' fees qualify as recoverable damages. This has forced courts to determine whether such costs fall within the scope of 'loss' under Art. 74 or whether they are governed by domestic procedural rules. Case law demonstrates that there is no uniform consensus on this issue, and therefore, on whether and to what extent attorneys' fees constitute foreseeable damages under Art. 74 of the CISG. The recovery of legal costs is marked by significant fragmentation and is strongly influenced by domestic legal prejudices. Rather than reflecting a uniform and autonomous interpretation of the Convention, judicial and arbitral decisions frequently mirror entrenched national approaches to the allocation of legal costs, particularly the procedural–substantive divide prevalent in common law and civil law systems. For instance, U.S. courts often classify attorneys' fees as procedural matters governed by domestic law; in contrast, civil law jurisdictions, such as Germany and the Netherlands, exhibit varying approaches. While some courts allow partial recovery of extrajudicial costs under Art. 74, others deny recovery for attorneys' fees incurred during litigation or remain undecided as to whether such fees fall within the scope of recoverable losses or are subject to national procedural rules. This fragmentation has led to undermining the CISG's goal of uniformity in international sales law.

The examined cases demonstrate that the issue of legal costs is frequently resolved through the lens of domestic procedural prejudices. Several decisions acknowledge the recoverability of legal costs under Art. 74 CISG based on the principle of full compensation; however, the application of foreseeability is questionable. In some cases, foreseeability is used as a rationale for exclusion, holding that legal costs are categorically unforeseeable with no specific reason. In other cases where foreseeability is employed to allow recovery of legal costs, courts and tribunals frequently assert that legal costs are, in general, foreseeable in international commercial disputes, without considering specific circumstances and factors to evaluate foreseeability. In several cases, the amounts of recoverable legal costs are then determined by reference to national law, further challenging the autonomous operation of Art. 74 and obscuring the role of foreseeability as a substantive limitation under the CISG. This inconsistent treatment reveals that the foreseeability principle, despite its significant role in Art. 74, has often been ignored or applied in a perfunctory manner in the context of legal costs. This jurisprudential inconsistency not only perpetuates uncertainty regarding the recoverability of legal costs under

the CISG but also undermines the Convention's objective of uniformity in the interpretation and application of its damage provisions.

This dissertation agrees with the opinion that legal costs, including litigation costs, are recoverable under the CISG because the principle of full compensation established in Art. 74, which encompasses all kinds of monetary loss, does not preclude legal costs. Full compensation seeks to place the aggrieved party in the same economic position it would have been in if the contract had been properly performed.[794] From this perspective, excluding attorneys' fees would undermine the very rationale of Art. 74, as legal costs often represent a real and substantial economic burden borne by the aggrieved party as a result of the breach. At the same time, the principle of full compensation does not operate in isolation. It is explicitly limited by the requirements of causation, foreseeability in Art. 74, and mitigation in Art. 77. With respect to causation, even under a strict 'but-for' test, attorneys' fees are a consequence of the breach.[795] But for the failure by the defendant to perform contractual obligations, the aggrieved party would not have had a claim against the defendant, and would not have incurred the attorney's fee. Accordingly, the causation requirement, properly understood, does not exclude attorneys' fees from the scope of recoverable loss under Art. 74. Besides, foreseeability constitutes a further limitation on liability under Art. 74. Generally, foreseeability will rarely preclude recovery of attorneys' fees.[796] It is generally foreseeable when entering into the contract that a breach of contract may lead to a dispute and, consequently, to the incurrence of legal costs. Parties engaged in international sales transactions are aware that non-performance may necessitate legal advice, negotiation, or dispute resolution. In this sense, legal costs are almost always foreseeable at the time of contract conclusion. Therefore, the text of Art 74 does not exclude attorneys' fees, and thus, foreseeability is relevant to the recovery of legal costs.

By applying both foreseeability and causation limitation, recovery of legal costs in most cases is undeniable. This, however, challenges the risk allocation rationale, the application of foreseeability, and fairness. This dissertation, therefore, argues that purely applying the objective or subjective foreseeability test without considering the purpose of the foreseeability

[794] Secretariat Commentary, n 9, comment 3.

[795] Zeller, n 450, 124, 143-67.

[796] Id., 105, 143-67.

principle is not enough to evaluate whether a loss is recoverable under the CISG and to decide the extent of foreseeable loss. The purpose of foreseeability is to 'limit the risk of liability to the extent that the party in breach ought to have taken into account at the conclusion of the contract, thus enabling that party to consider taking the risk, taking out insurance or abstaining from concluding the contract'.[797] Foreseeability is established to limit liability to the risks that the party in breach (ought to) have taken into account when concluding the contract. The rule thus serves to enable the parties to contract to allocate risk, assess its exposure, adjust the contract price, obtain insurance, or refrain from entering into the contract altogether. In practice, although parties are generally aware that legal costs may arise in the event of a dispute, they do not ordinarily assume liability for the other party's legal costs. In other words, a party did not foresee that attorneys' fees would be recoverable as damages. Parties typically do not take into account the legal costs when considering whether to take this risk and adjust the price or insurance. It means that while the occurrence of legal costs is foreseeable, their recoverability as damages is not assumed.

Therefore, this dissertation proposes an additional interpretative factor: the assumption or acceptance of liability. Under this approach, a loss should be regarded as foreseeable under Art. 74 only to the extent that the breaching party can be said to have accepted liability for that loss at the time of contract conclusion. Applying this criterion enhances fairness and aligns foreseeability with its underlying purpose. It prevents the automatic inclusion of legal costs as recoverable damages solely on the basis that they are generally foreseeable, while still allowing recovery where the assumption of liability can reasonably be inferred, for example, where the contract provides for fee-shifting, where the dispute resolution mechanism clearly allocates legal costs, or where established trade usages indicate that such costs are borne by the breaching party. Besides, the principle of reasonableness should play a decisive role in determining the recoverability and extent of legal costs, particularly with respect to extra-judicial expenses. Even where legal costs are regarded as recoverable in principle, only those expenses that are reasonable in extent and reasonably incurred in connection with the breach should be compensated.

[797] Huber & Mullis, n 185, 272.

Chapter VI: Recommendation

As discussed throughout this dissertation, the foreseeability rule established in Art. 74 remains ambiguous. This ambiguity has led to fragmented judicial reasoning, inconsistent outcomes, and commercial uncertainty. The textual test alone is insufficient to guide courts and arbitrators in resolving the complex questions that arise in practice. To address these limitations, supplementary criteria are necessary. This chapter proposes two supplementary criteria, namely reasonableness and acceptance of liability, for the evaluation of foreseeability under Art 74 CISG.

I. Reasonableness as the criterion for foreseeability under Art. 74 CISG

The assessment of foreseeability under Art. 74 of the CISG has long presented interpretive challenges for courts, arbitral tribunals, and practitioners. From previous analysis chapters, this dissertation proposes the reasonableness standard as an appropriate and necessary criterion to interpret foreseeability under Art. 74. It argues that reasonableness functions not only as the standard for determining who 'ought to have foreseen' the loss, the evidence and probability of loss, but also as an evaluative tool for determining the object of foreseeability, namely the type of loss and the extent of loss. By grounding the foreseeability test in reasonableness, this dissertation seeks to enhance doctrinal coherence, reflect existing judicial practice, and align Art. 74 with the general principles of the CISG.

1. Justification of reasonableness

Reasonableness is not unfamiliar to the CISG. It is expressed many times throughout its provisions in the form of 'reasonableness' or 'unreasonableness'.[798] These numerous references, without limitation to any single doctrinal area, but cover interpretation, performance, breach, and remedies, reflect the deliberate legislative choice to establish reasonableness as a general standard of evaluation. Thus, reasonableness is a general principle of the CISG, which is used

[798] See Arts. 8(2), 16(2)(b), 18(2), 25, 33(c), 34, 35(2)(b), 37, 38(3), 39(1), 43(1), 46(2), 46(3), 47(1), 48(1), 48(2), 60(a), 63(1), 65(1), 65(2), 75, 76(1), 77, 79(1), 79(4), 85, 86(1), 86(2), 87, 88(1), 88(2), 88(3).

to evaluate the conduct of parties, especially when there is no specific rule.[799] It has the same role as in common law jurisdictions, that is, a standard of evaluation that closely resembles the civil law notion of good faith.[800] Under Art. 7(2), if the issue is governed by the Convention but is not explicitly addressed, it must be resolved in accordance with the general principles on which the Convention is based. Reasonableness, as a general principle of the CISG, significantly influences the proper interpretation and application of its provisions.[801] Therefore, this principle should not only be recognized, but also be used to interpret and fill gaps in specific provisions, such as Art. 74.[802] Although Art. 74 establishes foreseeability as a limitation of damages, it does not specify the method to assess foreseeability. This constitutes a normative gap that may legitimately be filled by referring to the reasonableness principle. Therefore, the use of reasonableness as the criterion for foreseeability does not introduce an external concept, but rather gives effect to an internal and general principle of the CISG.

Even though reasonableness appears in numerous provisions, there is no clear definition in the CISG.[803] However, it can resort to the PECL, where reasonableness is defined in Art.1:302:

> "Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account."

This definition is especially well-suited for incorporation within the CISG framework because it is consistent with the CISG's application of reasonableness. Accordingly, reasonableness should be evaluated objectively by reference to what parties acting in good faith and under the same circumstances as the parties would reasonably have considered.[804] This definition offers

[799] Bonell, n 189, Art. 7, 81; Felemegas, n 143, 29.

[800] Kröll et al., n 24, 7.

[801] Felemegas, n 143, 36.

[802] DiMatteo, L. A., & Janssen, A. (2014). Interpretive methodologies in the interpretation of the CISG. In L. A. DiMatteo (Ed.), *International sales law: A global challenge*. Cambridge University Press, 90.

[803] Liu, n 70, s 14.5.2.

[804] *See* Kritzer, A. H. *Overview comments on reasonableness*. Institute of International Commercial Law, Pace University School of Law. Available at: https://iicl.law.pace.edu/cisg/page/reasonableness#overv (accessed 14 June 2026).

three critical elements that can guide foreseeability assessment under Art. 74. First is the objective standard in which reasonableness is determined by reference to 'persons acting in good faith and in the same situation as the parties'. Secondly, contextual factors, including the contract's nature and purpose, the specific context of the case, and trade usages and practices, are required to be taken into account. This contextual approach mirrors the CISG's own interpretive mandate under Art. 8, which requires interpretation in light of the circumstances and the parties' intentions. Thirdly, the integration of good faith is a necessary condition. The definition connects reasonableness to good faith, which has been acknowledged as a general principle under Art. 7 and as a synonym for reasonableness itself,[805] despite being controversial as an independent duty under the CISG.

In the context of evaluating foreseeability under Art. 74, this dissertation sets specific standards to measure reasonableness and offers an interpretive framework that courts and arbitral tribunals might use to determine foreseeability. Weighing all relevant factors is necessary to determine reasonableness. The nature and purpose of the contract, which set the standard for reasonable foreseeability, are key elements. In addition, the parties' status, the particulars of the case, and any relevant trade usages or practices within the relevant profession should also be considered.[806] Foreseeability is strongly related to the reasonableness of the aggrieved party's reliance. The more reasonable and obvious the reliance, the more foreseeable the resulting loss. For example, obvious reliance is deemed foreseeable when reliance is objectively apparent from the facts, while revealed reliance is obviously foreseeable when particular reliance interests are communicated. When reliance is in line with trade practices, it is foreseeable if there is industry-standard reliance. For undisclosed reliance, when reliance remains only internal and uncommunicated, it is typically not foreseeable. This standard upholds foreseeability's role as a shared expectation-based risk allocation mechanism.

2. Reasonableness as an interpretative criterion of foreseeability

Analysis from Chapter IV highlights that reasonableness should be used as a criterion to assess objective foreseeability from the perspective of a businessperson in the same position, to prove

[805] DiMatteo, L. A. (2014). Future challenges of international sales law. In L. A. DiMatteo (Ed.), *International sales law: A global challenge*. Cambridge University Press, 732; Kröll et al., n 24, 7.

[806] Kritzer, n 804.

foreseeability reasonably, and to consider 'possible consequence' and the relevant time of foreseeability properly.

This dissertation, observing from its examination in Chapter V, suggests that reasonableness is proposed to apply not only to who foresees but to what is foreseeable. It means both the type of loss and its extent are required to be foreseen reasonably. This proposal is supported, first, by the recognition of reasonableness as a general principle of the CISG. Secondly, it is applied by judges in practice, as illustrated in Chapter V. Especially, it is reinforced by the structure of the damages provisions in Art. 74 to Art. 77, where they are all permeated by the reasonableness principle. The structural relationship between Art. 74 and its subsequent provisions (Arts. 75-77) is particularly instructive. While Art. 74 is the general rule, Arts. 75-77 provide specific provisions on damages that operationalize the limitation of damages through the reasonableness principle. Art. 75 applies where, following the breach, the aggrieved party purchases or sells substitute goods 'in a reasonable manner and within a reasonable time'. Art. 76 provides for damages based on a current price, which is defined by what is 'reasonable' in terms of time and place of the substitute transaction. Art. 77 imposes a duty on the aggrieved party to take reasonable measures to mitigate the loss arising from the breach. A loss reasonably foreseeable should be one that a reasonable person could reasonably mitigate. Whether mitigation measures are reasonable must be determined by considering all the relevant contexts of the specific case, the applicable standard of reasonableness, and the type of loss involved.[807] These three provisions together form a coherent subsystem that governs the calculation and limitation of damages, which are consistently guided by reasonableness. It is a logical and systematic inference that the general limitation in Art.74 is applied by the same principle. Arts. 75-77 ensure the quantification of loss is reasonable; Art. 74, interpreted through reasonableness, ensures the qualification of loss is reasonable. It would be inconsistent to apply reasonableness rigorously in Arts. 75 to 77, while excluding it from the foreseeability assessment under Art. 74. Rather, the foreseeability test should be understood as encompassing the reasonableness principle alongside the temporal and knowledge-based criteria explicitly stated in Art. 74. Therefore, the foreseeability test of Art. 74 encompasses the reasonableness principle together with the type of loss and its extent.

[807] Saidov, n 70, 353-4.

a. The type of loss

Not all losses causally that linked to a breach and are generally foreseeable should be compensable. Reasonableness filters which categories of loss are within the foreseeability of the contracting parties. For example, the cost of transportation of the goods back to the origin country after discovering its defect is not automatically recoverable if it is decided solely by the buyer without discussing it with the seller.[808] Where the cost of repairing goods is disproportionately higher than the price of obtaining a substitute, or where the expense involving repair bears no reasonable relation to the benefit the buyer would gain from remedying the defect, such costs are deemed unreasonable.[809]

In a case, the buyer was entitled to recovery for lost profits, indirect loss of profits, travel costs, and design expenses because, according to the arbitrator, they were 'reasonable'.[810] In one case, the court stated that for a successful claim under Art. 74, it suffices that the breach forces the aggrieved party to incur expenses, provided that such expenses are reasonable costs.[811] In another case, the arbitrator held that both a customs fine resulting from the buyer's breach of the contractual payment obligations and travel costs incurred for arbitration attendance are recoverable, because they were found to be 'reasonable'.[812] To identify whether a loss is reasonably foreseeable, several factors should be considered, including the necessity of the costs, reasonable measures, as well as good faith and fairness.[813]

b. The extent of loss

As discussed in the previous chapter, it should be required to foresee both the type and its extent. If a type of loss (e.g., lost profit) is required to foresee reasonably, its claimed extent must also have been reasonably foreseeable. A loss may be foreseeable in kind but unreasonable in extent. For example, lost profits are foreseeable, but extraordinary profit margins are not. Was the extent proportionate to the contract value and risk allocation? Reasonableness supports evaluating the

[808] See Case No. 759/2008 Appellate Court Madrid (Spain) 10 March 2009.

[809] Schlechtriem & Schwenzer, n 210, Art. 46, para 40.

[810] See ICC No 8786, January 1997 (Clothing).

[811] Case No. 27 U 58/96 Appellate Court Köln (Germany) 8 January 1997 (Tannery machines).

[812] See MKAC No. 38/1996, 28 March 1997.

[813] See Chapter V: II. 3.

extent of loss. Relevant elements should be taken into account, including the proportionality of the loss to the contract price, normal profit margins in the relevant sector, the duration of the loss, the availability of substitute transactions, and the information available to the parties at the time of conclusion of the contract. Courts and tribunals can avoid imposing liability for losses of an excessive or disproportionate magnitude that would not have been reasonably foreseen by the party in breach if considering these elements while measuring foreseeability. Assume a case where the buyer demands damages equal to 25% of the contract price, although only 10% of the supplied goods are defective. It is obvious that the amount of the loss claimed is clearly unjustified, even though the loss resulting from defective goods is theoretically foreseeable. A seller would not have foreseen such a disproportionate loss. Applying reasonableness in evaluating the foreseeability of the extent of loss allows the adjudicator to exclude excessive damages without distorting the doctrines of causation or mitigation.

To sum up, this dissertation argues that the reasonableness principle provides a coherent, autonomous criterion and should be recognized as a proper criterion to assess foreseeability under Art. 74 CISG. It does not replace the foreseeability test but gives content to it. Reasonableness operates, first, as the standard for determining who ought to have foreseen the loss, through the reasonable person test. Secondly, it supports determining the evidentiary process and the probability of foreseeability. Finally, it serves as an evaluative tool for determining the object of foreseeability, both the type of loss and its extent. Importantly, reasonableness should be applied contextually by considering the nature and purpose of the contract, the specific circumstances of the case, and the relevant trade usages and practices.

Applying reasonableness as a supporting criterion to evaluate foreseeability aligns Art. 74 with the general principles of the CISG, ensuring coherence with Arts. 75 to 77, reflects judicial practice, and promotes fairness in international sales law. By confining recoverable damages to losses that are reasonable in nature and extent, the CISG’s damages regime can better balance full compensation with the legitimate need to limit contractual liability. This approach honors the Convention's objective for uniformity while providing the practical guidance that commercial parties require.

II. Acceptance of liability as a supplementary criterion for foreseeability

The discussions of foreseeability in Chapters IV and V highlight that foreseeability alone may not always provide a sufficiently balanced or predictable framework for allocating risk between contracting parties. This statement does not intend to put foreseeability as the sole or highest remedy method, but rather as a limitation device after the establishment of the full compensation principle in the first sentence of Art. 74, and together with other limitation methods like causation and mitigation. Foreseeability is interpreted by whether the breaching party foresaw or ought to have foreseen the loss as a possible consequence of breach. However, foreseeability in its pure application may be insufficient to effectively restrict recoverable damages in cases where the loss is disproportionate to what was reasonably foreseeable.[814] Therefore, applying purely foreseeability may risk either over- or under-compensation depending on how expansively 'possible consequence' is construed. In response to the problem of disproportionate damages, certain legal traditions have developed a stricter approach to foreseeability, limiting the breaching party's liability for disproportionate losses to cases in which it assumed the risk of such losses as part of the contract.[815] This dissertation also recommends that, in certain cases, acceptance or assumption of liability should be considered as a supplementary criterion when evaluating foreseeability and recovery of damages.

1. Justification of acceptance of foreseeability

The concept of assumption of liability appeared in the English case: *The Achilleas*, where the House of Lords reformulated the remoteness test around assumption of responsibility.[816] However, this dissertation does not advocate for the horizontal transplantation of the English common law 'Achilleas' doctrine into the CISG. Rather, it is reflected within the CISG's own framework. The proposed supplementary criterion of acceptance of liability is consistent with the autonomous interpretative methodology required by Art. 7(1) and 7(2) CISG. Uniform

[814] Farnsworth, n 242, 1208; Waddams, S. M. (2004). *The law of damages* (4th ed.). Canada Law Book, 558; Saidov, n 14, 124.

[815] Burrows, A. S. (2019). *Remedies for torts, breach of contract, and equitable wrongs* (4th ed.). Oxford University Press, 98-100.

[816] See Chapter II: IV. 3

interpretation as required by Art. 7 is ‘neither a rigid nor a simple mandate’.[817] Achieving uniformity requires a properly interpretative approach that recognizes and respects the purposes and policies underlying the Convention's provisions.[818] Rather than importing domestic doctrines of assumption of responsibility, it is identified, through objective evidence of negotiations, contractual undertakings, commercial practices, and disclosed purposes, the scope of risk that the breaching party accepted at the time of contracting. Such an approach reinforces the Convention's general principles of party autonomy, objective interpretation, contractual risk allocation, and good faith in international trade while promoting greater uniformity in the application of Art. 74 across Contracting States.

The foreseeability rule in Art. 74 is convincingly justified by its risk allocation function in a fair and reasonable manner.[819] The breaching party should be liable only for losses whose risk it could reasonably have taken into account at the time of concluding the contract. This rationale enables parties to calculate risks, exclude or reduce potential liability, procure insurance, adjust contract price, or refuse to contract.[820] It would direct attention to the specific contractual bargain and the risks the parties can be understood to have assumed. This risk allocation rationale is inherently linked to the acceptance of responsibility concept. In other words, foreseeability may also be rationalized by reference to the risks that the parties would have assumed under their contractual agreement.[821] In practice, parties may sometimes be aware of potential losses yet choose not to take any steps to account for those risks, indicating that they did not intend to assume liability for such consequences.

Acceptance of liability is also justified by the good faith rationale. It is contrary to good faith if a buyer paying a nominal price for a standard commodity and giving a vague notice of a potentially massive downstream risk expects the seller to underwrite that million-dollars risk without a corresponding premium. Good faith serves as the foundation for the expectation that

[817] Flechtner, H. M. (1998). The several texts of the CISG in a decentralized system: Observations on translations, reservations and other challenges to the uniformity principle in Article 7(1). *Journal of Law and Commerce, 17*, 188.

[818] Id.,

[819] Saidov, n 14, 113.

[820] Huber & Mullis, n 185, 272.

[821] Ishida, n 288, 250.

contractual obligations will be performed faithfully and in accordance with the agreement. It requires a standard of conduct that reflects what the parties would have considered socially acceptable at the time of contracting.[822] Invoking the general principle of good faith via Art. 7 validates the assumption of liability test by preventing the buyer from shifting uncompensated, asymmetric risks onto the seller. Good faith demands that the scope of liability under Art. 74 must remain proportionate to the commercial equilibrium of the contract. By applying good faith (Art. 7) to interpret Art. 74, foreseeability should be limited to those risks that the contract's commercial context indicates the contract breaker actually accepted liability for.

Furthermore, acceptance of liability may be justified by Arts. 8 and 9. The two provisions regulate contractual interpretation by reference to the parties' intentions, established commercial practices, and applicable trade usages.[823] Art. 8 seeks to ascertain the parties' 'real expression of will' as expressed in the contract,[824] and allows adjudicators to examine parties' conduct before, during, and after the contract to determine their intent.[825] These provisions are helpful to determine the scope of risks that the parties allocated at the time of contracting and the contractual liability that the parties assumed. The application of Art. 74 necessarily depends on identifying the obligations undertaken by the parties and the commercial context in which the contract was concluded. Since Arts. 8 and 9 govern that issue, they legitimately contribute to the assessment of what consequences should be regarded as falling within the scope of the breaching party's assumed contractual risk. The price, terms, conduct, and industry practice determine what the parties agreed. Thus, the acceptance criterion is not external, it is the logical extension of Art. 8's interpretive regime to the specific question of damage foreseeability.

2. Applying acceptance of liability

This dissertation suggests acceptance of liability as the solution for cases involving an amount exceeding the contract value, or in situations where, in practical business, parties normally have no intention to bear liability, for example, legal litigation costs. This dissertation follows an autonomous approach to the interpretation of the CISG, in accordance with Art. 7, and does not

[822] Kröll et al., n 24, 123.

[823] Schlechtriem & Schwenzer, n 210, Art. 8, para 1, 2; Art. 9, para 1; Kröll et al., n 24, 163.

[824] Kröll et al., n 24,147.

[825] Zeller, n 316, 10.

advocate recourse to domestic legal principles as a basis for interpreting the Convention. It, however, finds comparative support in the underlying rationales of the English jurisprudence and academic commentary, which are relevant to the issues examined and draw an analogy to support the position of this recommendation.

Acceptance of liability is particularly relevant in cases where the general foreseeability test would result in liability that is unquantifiable, unpredictable, uncontrollable, or disproportionate,[826] or where imposing such liability would conflict with market understanding and expectations.[827] The assumption of responsibility is a supplementary tool to the application of the reasonable foreseeability test that can limit or expand the liability of the defendant. It also serves as a check where imposing liability based on knowledge alone would be contrary to established market understandings and expectations,[828] or to parties' rights to assume and allocate risks when making the contract. In such circumstances, liability of the defendant should be limited to damages resulting from special circumstances when those circumstances have been communicated in a manner demonstrating that the defendant accepted, or can reasonably be taken to have accepted, the associated risk of such loss. Contracting parties should not only foresee the possibility that a particular loss may occur, but should also contemplate that the counterparty would assume liability for that loss.

To determine whether a party can reasonably be regarded as having accepted the risk, several contextual factors should be taken into account. In certain circumstances, the payment of the purchase price or the issuance, opening or payment of a letter of credit may be treated as evidence of contractual acceptance at the time of contract formation.[829] This supports the conclusion that particular contractual obligations or risks have been accepted, which may, in turn, be relevant when assessing the assumption of liability for Art. 74. Price may reflect the risk taken. If a party charges a premium in exchange for taking on an extraordinary risk, it is a clear indicator of assumption. Conversely, if a seller charges a standard market price despite being aware of a massive potential loss for the buyer, it suggests that the seller did not implicitly

[826] Hamblen J in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd,* [2010] EWHC 542 (Comm) 18 March 2010.

[827] McKendrick, n 124, 892.

[828] Hamblen J in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd,* [2010] EWHC 542 (Comm) 18 March 2010.

[829] Schlechtriem & Schwenzer, n 210, Art.8, para 2.

agree to cover that loss. Besides, it should be considered a disproportionate loss. If the claimed damages are wholly disproportionate to the contract price, notice of the extraordinary loss may not be enough. Even with knowledge, the extraordinary nature of the loss suggests that a reasonable person would not have understood the defendant to be guaranteeing against such an outcome without explicit discussion and, typically, a price adjustment to reflect the added risk. In addition, the extent to which the parties are insured against, or could reasonably be expected to insure against, the relevant loss is also necessary to determine the intention of accepting risks. Also, the obligee's silence after receiving late payment, or the seller's reluctant acceptance of the other party's contract rejection, may raise the question of an implied waiver of rights.[830] Accordingly, these circumstances may also be relevant in determining whether a party has accepted or assumed particular contractual risks or liabilities. This consideration becomes particularly important where the type of loss is exceptional in relation to the normal purpose of the contractual obligation. Even where the defendant possesses knowledge of the specific risk, recovery may reasonably be limited when the potential loss is wholly disproportionate to the contract price or where no price adjustment has been made to reflect the additional exposure. In cases of such disproportionate liability, notice to the defendant of a potential extraordinary loss may not, by itself, justify imposing responsibility. Instead, some indication, such as a contractual price adjustment, may be necessary to demonstrate that the additional risk was actually incorporated into the parties' allocation of risk.

By clarifying to all parties where the risk was and allowing them to control how it was distributed, the requirement for the assumption of responsibility would increase certainty. It would be advantageous for the contracting parties to express their concerns so that they would be able to discuss how to limit their exposure. By promoting transparent discussions and deliberate allocation of liability, this standard helps shield parties from disproportionate risk exposure, fostering fairness and predictability in contractual arrangements. Besides, it respects party autonomy, giving effect to the parties' own allocation of risk, whether express or implied. At the same time, it is important to maintain doctrinal clarity by making a clear distinction between knowledge and intention: while knowledge may inform an inference of intention, it cannot replace the intention of the parties. This provides useful assistance in evaluating

[830] Id.,

foreseeability and recovery of loss. In this way, supplementing the foreseeability test with an inquiry into assumption of responsibility would leave parties clearer on where the risk lay from the outset. It encourages parties to explicitly set out their concerns and negotiate their exposure, rather than leaving risk allocation to the 'unquantifiable and unpredictable' outcomes of a broad foreseeability test. A buyer fearing exceptional losses would be encouraged to explicitly disclose them and seek the seller's express acknowledgment, perhaps in exchange for a price premium. When a seller is informed of a risk, they have three options: either expressly disclaim liability, adjust the price to reflect the risk, or remain silent and perhaps be deemed to have accepted it based on objective criteria like those mentioned above. This approach does not shield the defendant possessing knowledge; it just needs more than mere knowledge to establish liability for truly extraordinary losses. It ensures that liability is a product of agreement and conscious risk allocation, which is the core function of contract law, rather than an unforeseen and unfair consequence of a breach.

III. Conclusion

The interpretive problems of foreseeability in Art. 74 that occur in practice cannot be solved by the text alone. In seeking its refinement, this chapter proposes two criteria, acceptance of liability and the reasonableness standard, and integrates them into a structured analytical framework. This refinement is based on the general principles of good faith and fairness and risk allocation rationale, which are the core purpose of foreseeability, ensuring that outcomes are not only legally correct but also just and commercially reasonable. These criteria are not intended to replace the existing structure of Art. 74 and foreseeability in particular, but rather to clarify and operationalize its application through a logically ordered and conceptually grounded sequence of analysis. This makes foreseeability doctrinally coherent, practical, and consistent with the Convention's objective of uniformity.

Chapter VII: Conclusion and Recommendation

> "The CISG is sufficient to determine if a loss was or not foreseeable in the sense of the CISG without the Tribunal being required to make recourse to any national law."[831]

I. Conclusion

This dissertation has examined the foreseeability rule under Art. 74 CISG through an analysis of its historical development, theoretical foundations, interpretation, and application in case law. It also identified the ambiguities and inconsistencies that have undermined the effectiveness of foreseeability. The research has yielded the following results:

1. Through a historical-comparative framework, this dissertation reconstructs the genealogical lineage of the foreseeability rule, tracing its doctrinal evolution from Roman foundations through Pothier's contributions to the French Civil Code, its common law, and its eventual incorporation into Art. 74. It has answered the controversial question of the origin of foreseeability by stating that foreseeability is derived from French law (Pothier's work on foreseeability). The dissertation also contributes to comparative contract law by identifying both common and distinctive characteristics of the foreseeability rule under English common law, French law, the UPICC, PECL, and CISG. Moreover, it illuminates why foreseeability emerged as a central principle from the early drafting stages of the Convention. English common law and French law have significant influence on foreseeability's formulation under Art. 74. Model instruments like the UPICC and PECL play a vital role in assisting the general tendencies and legitimate gap filling of foreseeability in Art. 74.
2. An analysis of the dissertation showed that foreseeability remains an effective method of limiting damages and should be retained as a device to limit liability for damages in international sales law. It serves essential functions of fairness, risk allocation, commercial predictability, and incentives for information exchange that no other principle can fully

[831] Vienna International Arbitral Centre (VIAC) No. ARB-5740, 30 October 2024 (Progress v. OTL Firearms and Imports Corporation).

replace. Foreseeability, therefore, on the one hand, protects the aggrieved party's expectation when contracting, while, on the other hand, it prevents excessive, unreasonable, and unforeseeable liability for the party in breach.

3. The dissertation also highlighted the ambiguity of the CISG's text on foreseeability under Art. 74, where there is no definition of its core terms nor clear guidance or annotation for the interpretation and application of foreseeability. First, the application of the subjective and objective tests is inconsistent due to the lack of a clear benchmark. It is not clear how exactly liability should be evaluated through the lens of the party in breach. Besides, Art. 74 provides no definition of its 'knowledge' test nor interpretative guidance regarding what constitutes 'knowledge' for these purposes, and to which circumstances actual knowledge and imputed knowledge should be applied. Also, there is no regulation on the issue of the burden of proof and its standard for proving damages and foreseeability, and no clear test to evaluate causation. Furthermore, Art. 74 does not specify what exactly needs to be foreseen. Whether foreseeability applies only to the general type of loss or also to its extent. Besides, it remains unclear whether a party is required to foresee a precise amount or not. There is also no further specification of which categories of loss are recoverable in Art. 74.

   The vagueness has led to fragmented judicial reasoning, inconsistent results across jurisdictions, and uncertainty for the contracting parties. The interpretation of foreseeability normally carries local interpretative preferences, producing different results. This challenges one of the CISG's primary objectives of uniformity in international sales law.

4. The dissertation has identified several aspects of the foreseeability rule in Art. 74 CISG that may hinder its effective application in practice and its capacity to adequately protect the parties' legitimate expectations within their contractual relationships. Firstly, the party in breach is required to foresee the loss; however, if focusing only on the foreseeability of the party in breach, it is insufficient to capture the complexities of commercial relationships. Second, in certain complex business contexts, a mechanical application of causation and foreseeability alone proves inadequate for determining damages. Third, the use of the term 'possible consequence' in Art. 74, if interpreted literally, is linguistically broad to undermine the limiting function of foreseeability, thereby hindering its effective application. Finally, fixing the relevant time of foreseeability at the 'time of the conclusion of the contract' does

not always ensure an effective assessment of foreseeability. While this relevant time is appropriate in general business transactions, it is not always appropriate in the context of long-term contracts, adjustments during contractual performance, or in the case of wilful breach.

5. In examining the application of foreseeability by the courts and tribunals in determining recovery of damages, the dissertation has studied several specific categories of loss. It highlights that loss of profit is generally considered foreseeable; however, it is required that specific disclosure be made where the profit claimed is extraordinary or speculative. Contractual penalties are generally foreseeable, depending on the particular circumstances of the case. Loss of goodwill and reputation should be assessed cautiously. The claim for this loss requires clear evidence that the defendant knew of the aggrieved party's particular reliance on reputation or that the contract reflects specific goodwill considerations. Liability to third parties is generally foreseeable if, in a contract and commercial context, the party in breach knew or ought to have known of the aggrieved party's obligations to its own customers or suppliers or is aware of the nature of the goods involved. Pre-contractual disclosure should also be considered in these cases. Legal costs and expenses are recoverable under Art. 74 and considered foreseeable in some cases where such costs are incurred as incidental loss or where the parties could reasonably anticipate litigation costs.
6. The analysis undertaken in this dissertation demonstrates that the CISG, on a structural level, provides a coherent and balanced legal framework for the interpretation and application of the foreseeability limitation under Art. 74. Although the Convention has no definition or annotation of foreseeability, its text, general principles, drafting history, and interpretative provisions collectively offer sufficient guidance to enable an autonomous interpretation. The Convention therefore contains the necessary normative structure to protect the legitimate interests of both buyers and sellers while maintaining an appropriate balance between the principle of full compensation and the need to limit contractual liability. However, the practical application of foreseeability reveals a tension between theoretical coherence and uniform predictability. The dissertation establishes that flexibility in the CISG's foreseeability rule does not, in itself, undermine the coherence of the Convention. Flexible standards can accommodate the diverse circumstances of international commercial transactions and allow adjudicators to consider the particular context of each dispute.

However, flexibility may reduce predictability when courts apply those standards through domestic interpretative approaches. The research therefore distinguishes between normative coherence and cross-forum uniformity: the former can be achieved through the Convention's existing interpretative framework, while the latter depends substantially upon the convergence of judicial and arbitral practice. It highlights that foreseeability is not a self-executing rule. The effective application of the foreseeability rule depends not only on the Convention's normative framework but also on the international interpretative tendencies of the jurisdictions.

II. Recommendation

This dissertation responds to the ambiguities and divergent interpretations, inefficiency, and inadequacy of foreseeability by clarifying each element of the foreseeability test and proposing a proper framework for its assessment. These recommendations do not seek to reform the text of the Convention. Rather, they offer interpretative and practical approaches that can improve predictability, consistency, and uniform application of the CISG within its existing framework. Their implications extend both to contracting parties and to the broader interpretative and judicial practice concerning the application of foreseeability under the Convention.

1. The dissertation suggests that while the focus is on the foreseeability of the breaching party, considering the aggrieved party's foreseeability is necessary in certain circumstances where the injured party is a major multinational corporation possessing specialized insight into its own business dealings, while the counterparty is smaller or less sophisticated. The dissertation also proposes the ‘reasonable businessperson’ of the same trade and in the same circumstances as the appropriate benchmark for assessing the objective foreseeability test and identifies several criteria for determining who qualifies as a reasonable businessperson, thereby avoiding an overly abstract application of the test. Because the subjective test is sometimes ignored by judges when evaluating foreseeability, the dissertation clarifies that the subjective test should be the first filter to evaluate foreseeability and the objective test should be used where no subjective test is established. In addition, the dissertation also clarifies what constitutes actual knowledge and imputed knowledge, how each is identified, and how they should be applied in assessing foreseeability. Also, it lists various elements that constitute actual and imputed knowledge and clarifies that the degree of specificity required,

it depends on knowledge of the circumstances that would lead to the loss, whether the loss is ordinary or extraordinary, to decide the degree of knowledge. In evaluating foreseeability, a contextual, reasonable foreseeability assessment should be carefully examined based on the specific contract context with its purpose, the characteristics of the contracting parties, the nature of the special goods involved, and the applicable trade practices and usages.

2. As to the issue of burden of proof, the dissertation submits that the party seeking damages bears the initial burden of proving the existence of a breach, the occurrence of loss, foreseeability, and causation. To determine foreseeability and the recoverability of damages, the evidentiary structure should operate as a sequential allocation of burdens. The claimant should establish the relevant facts and circumstances, including the information available to the party in breach and those factors concerning the nature, extent, and potential consequences of the loss claimed. Once this evidentiary threshold has been satisfied, the burden should shift to the party in breach to demonstrate that the loss was not foreseeable at the time of contract formation. Regarding the applicable standard of proof, the claimant should establish that the loss was reasonably foreseeable at the time of contract formation.
3. The dissertation suggests that the term ‘consequence’ in the first sentence of Art. 74 should be understood as encompassing both the but-for test and the causal connection between the breach and the loss. Applying both approaches to causation can assist in assessing foreseeability, particularly in complex commercial situations involving multiple contributing or intervening events. Additionally, this study demonstrates the doctrinal inefficacy of the phrase 'possible consequences' in the second sentence of Art. 74 when read literally. To perform a meaningful limiting function, this term must be properly construed in a manner that facilitates a coherent assessment of foreseeability and should not be construed more broadly than the scope of reasonable foreseeability.
4. Regarding the relevant time of foreseeability, the dissertation submits that the standard temporal benchmark for assessing foreseeability under Art. 74 CISG is the time of contract conclusion. However, it also argues that there are situations where assessing foreseeability at a later time brings more justifiable results. When the parties' relationship involves renegotiations, adjustments, or a long-term contract, it is appropriate and equitable to consider foreseeability at the time of those modifications, when the parties renew their risk assumptions and ensure to protect themselves, rather than at the time of the original contract

conclusion. Besides, when the breach is the intention of a party, the relevant time for evaluating foreseeability should be the time of the breach. This approach is better suited to the complexities of international trade in recent times, where conditions may change rapidly and unpredictably in modern international commercial practice.

5. The dissertation supports the view that both types of loss and their extent are required to be foreseen. The party in breach is not required to foresee the precise amount of the loss. It also lists several kinds of losses, foreseeable and unforeseeable, to serve as indicators for evaluating foreseeability in a specific case.
6. This dissertation, by examining the interpretation of foreseeability as well as taking into account its legal and commercial contexts, identifies implicit factors that influence decision-making and proposes supplementary criteria, namely reasonableness and acceptance of liability, to evaluate foreseeability and recovery of damages. The two proposed criteria, reasonableness and acceptance of liability, are considered supplementary criteria, not a replacement for foreseeability under Art. 74, to serve its interpretation in practice that aligns with the autonomous interpretation of the Convention. First, reasonableness supports the evaluation of the objective test, the process of evidence, probability, and the relevant time of foreseeability. Besides, it serves as an evaluative tool for determining the object of foreseeability, encompassing both the type and the extent of loss. Second, the acceptance of liability focuses on whether the defendant is understood as having accepted expressly or implicitly the risk of certain types of loss at the time of contracting. There are cases where the parties are aware of the possible loss, but did not intend to assume liability for such loss. It reflects the aim of foreseeability, which is to ensure the assumption of risk by parties at the time of the conclusion of the contract. This should apply to cases where the loss is unusual, and the general foreseeability test may lead to an unquantifiable, unpredictable, uncontrollable, or disproportionate liability, or cases where, in commercial practice, parties do not intend to bear liability. In these cases, mere knowledge is not sufficient to impose liability, which would be contrary to established market understandings and expectations, or to parties' will when joining in a sales transaction.

Improving the effectiveness of foreseeability under Art. 74 does not necessarily require legislative amendment of the CISG. Instead, greater legal certainty can be achieved through

more consistent use of the Convention's existing interpretative mechanisms and greater engagement with international jurisprudence. The findings and recommendations therefore support an interpretative rather than legislative response to the identified problems. When applied through a coherent framework, the foreseeability limitation strikes an appropriate balance between compensation and protection. The proposed solutions of this dissertation preserve this flexibility of foreseeability to each individual context while providing the structure needed for consistent application. This approach ensures the efficiency of foreseeability as a limitation tool while supporting the underlying objectives of the CISG's uniformity and fairness in international sales law.

The results of the dissertation contribute to both the theoretical understanding and practical application of the foreseeability rule and recovery of damages in international sales law. In practical terms, the proposed framework may assist courts and arbitral tribunals in structuring their assessment of foreseeable losses and may provide legal practitioners and commercial parties with greater guidance when assessing contractual risks, negotiating agreements, and drafting contractual provisions concerning liability and damages. In theoretical terms, the research contributes to the development of an autonomous methodology for interpreting the CISG and demonstrates how flexible international legal standards can coexist with the requirements of predictability and uniformity.

Overall, the dissertation demonstrates that the effectiveness of foreseeability under Art. 74 CISG depends not only on its literal wording but also on its systematic interpretation in light of the general principles and autonomous framework of the Convention. The dissertation therefore contributes a structured and autonomous approach capable of promoting greater consistency while preserving the flexibility required by international commerce. It provides a basis for further academic research into foreseeability, contractual risk allocation, damages, and the relationship between flexibility and uniformity in international commercial law.

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