

# METHODS OF LIMITING DAMAGES UNDER THE VIENNA CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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## I. INTRODUCTION

This work seeks to examine the mechanism of limiting damages under the Vienna Convention on Contracts for the International Sale of Goods (CISG).<sup>1</sup> The importance of the issue of limiting damages can be realized when viewed in the light of the role that damages play in a general framework of the CISG. It has been said, "[n]o aspect of a system of contract law is more revealing of its underlying assumptions than is the law that prescribes the relief available for breach."<sup>2</sup> The right to damages plays a central role in the CISG remedial scheme.<sup>3</sup> Because the CISG regulates international sales contracts, which serve as a basis for international economic relations, certainty and predictability in the field of damages are exceptionally important principles of the Convention's legal regime. Thus, clarity in the regulation of damages and the extent to which its theoretical foundation has been elaborated are essential elements in determining the Convention's "underlying assumptions" and in effecting the trends of legal regulation of international sales transactions.

The purpose of using a method of limiting damages is to restrict the liability in damages. This makes the issue of limiting damages an integral part of general legal regulation of damages. Therefore, it is difficult to achieve certainty and predictability in the rules on damages unless the theoretical ba-

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<sup>1</sup> United Nations Conventions on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 reprinted in [1980] XI UNICTRAL YEARBOOK 149, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterX/treaty17.asp> [hereinafter CISG].

<sup>2</sup> E. Allan Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 247 (1979).

<sup>3</sup> See HERBERT BERNSTEIN & JOSEPH M. LOOKOFKY, UNDERSTANDING THE CISG IN EUROPE: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 96 (1997).

sis for regulation of the mechanism of limiting damages is developed. At the present moment, it seems that there is room for further development. This article will examine the relevant provisions of the CISG and emphasize some of the issues that require further elaboration.<sup>4</sup>

Before discussing the methods of limiting damages, this article, for the sake of clarity and completeness, will examine such issues as the interests protected and the categories of loss covered by the Convention. The reason for examining the interests protected and the categories of loss here is because an examination of the methods of limiting damages is not complete without taking these issues into consideration.

Further, the relevant provisions regarding and problems related to them will be examined. Attention will be paid to the treatment of analogous issues in some legal systems where similar principles have been extensively developed, as well as in the International Institute for the Unification of Private Law (UNIDROIT Principles).<sup>5</sup> However, due to the international character of the Convention,<sup>6</sup> the examination of the CISG will not be based on the approaches of domestic legal systems. It is believed that comparison is, probably, one of the most efficient ways to underline some of the unique features inherent in some legal regimes (especially in such a document as the CISG because of its self-standing position) and to develop solutions to existing theoretical problems. As has been said in the context of comparative law, the "different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who has corralled in his own system."<sup>7</sup>

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<sup>4</sup> This article will not cover the issue of contractual limitation of damages.

<sup>5</sup> International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 1994), available at <http://www.undroit.org/english/principles/chapter-1.htm> [hereinafter UNIDROIT Principles].

<sup>6</sup> See CISG, *supra* note 1, art. 7(1).

<sup>7</sup> KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 15 (Tony Weir trans., 2d ed. 1987).

## II. INTERESTS PROTECTED AND CATEGORIES OF LOSS

1. *Expectation and Reliance Interests*

The central principle relating to the measurement of damages, which is common to many legal systems, is the interest that an aggrieved party has in the performance of the contract. It is generally stated that a party has the right to be placed *in the same economic position he would have been in had the contract been properly performed*.<sup>8</sup> This interest is usually referred to as "expectation interest." It is regarded as, "expectation measure is the natural measure of recovery, since it accords directly with the underlying morality of promise keeping."<sup>9</sup> A party's expectation interest generally will represent the actual worth of the contract to that party.<sup>10</sup> In principle, perfect expectation interest will leave an injured party indifferent between performance and breach.<sup>11</sup> In a global context, some believe that realization of the expectation interest will "stimulate economic activity, facilitate reliance on business agreements and protect the "credit system."<sup>12</sup>

The expectation interest is not the only interest that may be protected by an award of damages. Sometimes, the so-called "reliance interest" is protected as well.<sup>13</sup> The purpose of the reliance interest is to put the aggrieved party in as good a position as he would have been had the contract never been performed.<sup>14</sup> This usually is done by compensating a party for the losses incurred in reliance on the contract.<sup>15</sup> The idea behind this principle is that if the contract has not been duly performed, the aggrieved party may seek to recover those expenses incurred in

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<sup>8</sup> See G. H. TREITEL, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT* 76 (1988) (emphasis added).

<sup>9</sup> ANDREW S. BURROWS, *REMEDIES FOR TORTS AND BREACH OF CONTRACT* 20 (2d ed. 1994).

<sup>10</sup> See RESTATEMENT (SECOND) OF CONTRACTS cmt. b ¶ 344 (Pamphlet No. 3 1981).

<sup>11</sup> See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 204 (2d ed. 1997).

<sup>12</sup> A. I. OGUS, *THE LAW OF DAMAGES* 285 (1973).

<sup>13</sup> See TREITEL, *supra* note 8, at 76 (stating that the third protected interest is the restitution interest. However, it will not be addressed in this article.).

<sup>14</sup> See *id.* at 183.

<sup>15</sup> See *id.*

reliance on the contract, as these expenses would otherwise be wasted.<sup>16</sup>

How are these interests reflected in the CISG? As stated, “the basic philosophy of the action for damages is to put the injured party in the same economic position he would have been in if the contract had been performed.”<sup>17</sup> Following this philosophy, the damages provisions of the CISG are aimed at protecting the injured party’s expectation interest.<sup>18</sup> This is made clear by the wording of Article 74 — “loss, including loss of profit.”<sup>19</sup> Consequently, it is logical that the reliance interest is also covered by the CISG because recovery of the expectation loss should, as a rule, include reliance loss.<sup>20</sup>

With respect to the correlation between these two interests, the point has been raised as to whether there is an obligation to elect between the recovery of reliance and expectation damages.<sup>21</sup> This concern is not groundless. In some legal systems, only strictly defined situations will give rise to a right to claim

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<sup>16</sup> See OGUS, *supra* note 12, at 286.

<sup>17</sup> Secretariat Commentary to Article 70 of the 1978 Draft, Commentary on the Draft Convention Contracts for the International Sale of Goods Prepared by the Secretariat, ¶ 3, UN Doc. A/CONF.97/5 (1997), available at <http://www.cisg-online.ch/cisg/materials-commentary.html#Article70> [hereinafter Secretariat Commentary].

<sup>18</sup> See BERNSTEIN & LOOKOFKY, *supra* note 3, at 99. See also HANS STOLL, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 553 (Peter Schlechtriem ed., Geoffrey Thomas trans., 1998); Jeffrey S. Sutton, *Measuring Damages under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L. J. 737, 742 (1989), available at <http://www.cisg.law.pace.edu/cisg/biblio/sutton.html>; Eric C. Schneider, *Measuring Damages under the CISG: Article 74 of the U.N. Convention on Contracts for the International Sale of Goods*, 9 PACE INT’L L. REV. 223, 228 (1997), available at <http://www.cisg.law.pace.edu/cisg/text/cross/cross-74.html>.

<sup>19</sup> CISG, *supra* note 1, art. 74.

[T]he promisee is to be measured by his expectation, that is, by “the benefit of the bargain,” and is not limited to the extent of his reliance losses . . .

[I]t seems implicit in a reference to the promisee’s “loss, including loss of profit” . . . . The word “loss” alone might be read narrowly to refer to out-of-pocket reliance expenditures, but the mention of “loss of profit” makes it clear that this is not what is intended.

FARNSWORTH, *supra* note 2, at 249.

<sup>20</sup> See RESTATEMENT (SECOND), *supra* note 10, ¶ 344, illus. 2. See also Schneider, *supra* note 18, at 228; BERNSTEIN & LOOKOFKY, *supra* note 3, at 100; Sutton, *supra* note 18, at 742; Farnsworth, *supra* note 2, at 247.

<sup>21</sup> See JACOB ZIEGEL, INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 9-38, n.104 (Nina M. Galston & Hans Smit eds., 1984).

damages for both reliance and expectation losses.<sup>22</sup> However, in relation to the CISG, there is no obligation to elect between these interests. The idea, underlying Article 74, is to compensate the injured party fully for the loss suffered as a consequence of the breach.<sup>23</sup> In other words, all kinds of loss suffered by the party should, in principle, be recoverable without the necessity of election.<sup>24</sup> Moreover, the text of the CISG does not prescribe any concrete formula or contain any requirement analogous to those found in the legal systems referred to above. The types of loss that may be recovered will depend on the circumstances of a particular case. It is suggested that the CISG did not intend to establish such an obligation, nor is it expedient to promote such a scheme.

On the other hand, it is to be borne in mind that overcompensation should not be allowed. In other words, the recovery of damages should not result in a profit to the innocent party.<sup>25</sup> What if the breach of the contract brings certain advantages to the injured party? The UNIDROIT Principles, for example, address this situation. According to Article 7.4.2, in determining harm one should consider "any gain to the aggrieved party resulting from its avoidance of cost or *harm*."<sup>26</sup> It seems that the solution should be the same under the CISG. It has been said that this rule was implicit in Article 74:

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<sup>22</sup> See TREITEL, *supra* note 8, at 89-90.

<sup>23</sup> See STOLL, *supra* note 18, at 553. See also VICTOR KNAPP, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 543 (Cesare Massimo Bianca & Michael Joachim Bonnell eds., 1987).

<sup>24</sup> See section II(2) of this article relating to categories of loss. See also the discussion in section II(1) on interrelation between full compensation for harm and expectation interest.

<sup>25</sup> See STOLL, *supra* note 18, at 566.

<sup>26</sup> UNIDROIT Principles, *supra* note 5, art. 7.4.2.

A hires out excavating machinery to B for two years at a monthly rental of 50,000 French francs. The contract is terminated after six months for non-payment of the rentals. Six months later, A succeeds in renting out the same machinery at a monthly charge of 55,000 French francs. The gain of 60,000 French francs realized by A as a result of the reletting of the machinery for the remainder of the initial contract, that is to say one year, should be deducted from the damages due by B to A.

*Id.* at art.7.4.2 off. cmts.

[T]he party entitled to damages does not suffer a “loss” to the extent that the breach of contract also confers advantages on him which absorb the detriment suffered.<sup>27</sup>

A further issue, which needs to be addressed, is the relationship between the concepts of *expectation interest* and *full compensation for harm*. These two concepts are widely used together in the discussion of the principles underlying Article 74. For example, it has been said that Article 74 “expresses the principle of full compensation”; that is, “the promisee has a right to be fully compensated for all *disadvantages* he suffers as a result of the promisor’s breach of contract.”<sup>28</sup> It has been further stated that “[t]hose *disadvantages* are established by comparing the situation in which the promisee finds himself as a result of the breach of contract with the situation in which he would have found himself if the contract had been correctly performed”(this is his expectation interest).<sup>29</sup> The principle of full compensation, therefore, is the basis for recovery of damages for loss in many civil law systems. This formula comprises *actual loss (damnum emergens)* and *loss of profit (lucrum cessans)*.<sup>30</sup> It has been stated, “only owing to this principle will the *full protection of the interests* of those, who suffer losses . . . be provided.”<sup>31</sup>

Since both expectation interest and the full compensation of harm are used in relation to the same subject matter, it is necessary to clarify their use. Three different views can be taken with respect to the relationship of these two concepts. First, *prima facie*, it seems that these concepts mean the same thing, i.e., they are both used to describe the principle underlying Article 74. Second, the concept of “full compensation for harm,” which is reflected in the CISG in the same way as it is

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<sup>27</sup> STOLL, *supra* note 18, at 566.

<sup>28</sup> *Id.* at 553. See also Landgericht [District Court] 45 O237/79, 10 June 1980 (F.R.G.), <http://cisg.law.pace.edu/cisg/wais/db/cases/800610g1.html> (where the court stated that the principle of full compensation was applicable to Article 82 of the ULIS).

<sup>29</sup> STOLL, *supra* note 18, at 553. See also KNAPP, *supra* note 23, at 543; UNIDROIT Principles, *supra* note 5, art. 7.4.2 (this article directly employs the term “full compensation for harm”). *Id.* at art. 7.4.2 (1).

<sup>30</sup> See TREITEL, *supra* note 8, at 84. See also M.I. BRAGINSKIY & V.V. VITRYANSKIY, DOGOVORNOYE PRAVO [CONTRACT LAW] 516 (1998); O. S. JOFFE, OBYAZATOL STVENNOYE PRAVO [LAW OF OBLIGATIONS] 103 (1975) (trans. by D. Saidov).

<sup>31</sup> JOFFE, *supra* note 30, at 103.

established in some civil law systems, covers all possible kinds of loss. As to the expectation loss, one can argue that it does not cover all types of loss. This article will show that the CISG, in addition to other types of loss, also covers the losses, which in some common law systems are referred to as "consequential" and "incidental" losses. It has been stated that these two kinds of loss do not form a part of a party's expectation.<sup>32</sup> Third, it can be said that, in essence, these concepts convey the same idea but "play different roles": expectation interest represents the ultimate goal of the damages claim, and full compensation for harm is the means or mechanism of achieving that goal or satisfying that interest. It seems that the last view is the most acceptable one.

## 2. Categories of Loss

Article 74 provides for compensation for "loss, including loss of profit, suffered as a consequence of the breach."<sup>33</sup> Following the logic of this provision, it can be concluded that loss should be divided into two main categories: "actual"<sup>34</sup> and "effective"<sup>35</sup> loss and loss of profit.<sup>36</sup> Besides this broad division, Article 74 does not define what concrete types of loss can be compensated. It seems that the principle of full compensation for harm, in the light of the particular contract and circumstances, should be the basis for determining the loss.<sup>37</sup> This principle, in turn, leads us to conclude that all kinds of loss, suffered by the party and caused by the breach, are recoverable.<sup>38</sup>

However, some commentators have gone further. They have worked out the classification in order to identify concrete forms or types of loss besides the main categories of loss mentioned above. In particular, it has been suggested that in the

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<sup>32</sup> See TREITEL, *supra* note 8, at 86-88.

<sup>33</sup> CISG, *supra* note 1, art. 74.

<sup>34</sup> See STOLL, *supra* note 18, at 559.

<sup>35</sup> See KNAPP, *supra* note 23, at 543.

<sup>36</sup> Redressing both these elements of loss constitutes the principle of full compensation for harm. See *id.* See also UNIDROIT Principles, *supra* note 5, art. 7.4.2 off. cmts.

<sup>37</sup> See STOLL, *supra* note 18, at 558.

<sup>38</sup> This recovery is subject to the rules of limiting damages. See BERNSTEIN & LOOKOFKY, *supra* note 3, at 99.



context of actual loss “[l]osses caused by breach of contract may take the form of loss by the *non-performance* as such, *incidental* loss, or other losses consequent upon the breach [*consequential loss*].”<sup>39</sup> This commentator has defined each of these “forms of loss”<sup>40</sup> and examined the way these losses should be treated under the CISG.<sup>41</sup>

There have been attempts to identify the losses recoverable under the CISG, and to clarify the situation in that respect is appreciated. However, in this article, this classification will not be relied upon. It is suggested that there is no objective need to try to “embrace,” through such a classification, a wide diversity of different “forms” of loss that can arise in practice. Article 74 has been formulated in such a way as to cover *any situation, which causes any type or “form of loss,”* provided that its requirements are met. Therefore, it seems that, in terms of practical application of this provision, there is no need to “view” a situation through the suggested classification because the formula in Article 74 will suffice. Nor does the classification seem to be necessary for the development of the “theory” of the CISG. For the sake of illustration, let us refer to a legal system, where the issue of types of loss is treated in an analogous way.

Article 14 of the Civil Code of the Republic of Uzbekistan provides that damages consist of “expenses, which a person, whose right has been infringed, has incurred or will have to incur in order to redress the infringed right, loss or damage to its property (*real loss*) [as well as] *profits*, which have not been received and which would have been received . . . if his right had

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<sup>39</sup> See STOLL, *supra* note 18, at 559.

<sup>40</sup> See *id.*

Loss by the non-performance as such is the deficit in performance irrespective of further consequences of the breach. Here, one can speak of a promisee’s primary or direct loss. “Incidental losses” are expenses incurred by the aggrieved party, not to realize his expectation interest, but to avoid any additional disadvantages (here, the commentator refers directly to the UCC). “Consequential loss” caused by a breach includes additional losses going beyond non-performance loss as such, for example, the promisee’s liability to third persons consequent upon his failure to perform following the promisor’s breach, or harm caused to person or property by a defect in the goods.

*Id.*

<sup>41</sup> See *id.* at 559-63.

not been infringed.”<sup>42</sup> Even though this provision has been elaborated in a bit greater detail, it is analogous to the approach taken by Article 74 of the CISG. As in the case with the CISG, this provision is based on the principle of full compensation for harm and serves the purpose of restoring the position that the party would have been in had the obligation properly been performed.<sup>43</sup> With respect to Article 14, it could be equally stated that, in a legal sense, *real loss* should be constituted by a number of different “forms” of loss. However, the concept of *real loss*, which has been used since its establishment in Roman law,<sup>44</sup> has not been treated as being constituted, *in a legal sense*, of “forms” of loss. So far, this treatment of *real loss*, in the theory of civil law, has been rather acceptable. Since the formula used in the CISG is similar to that provided in the Civil Code of Uzbekistan and some other civil law systems, the experience of the treatment of this issue in civil law should not be disregarded. The classification serves as a useful example reflecting certain types or “forms” of loss that occur in practice. However, in the framework of the CISG, the suggested “forms” of loss should not be treated as *legal categories*.

Further, it is to be noted that terminology used to identify the “forms” of loss can lead to some confusion since that terminology is widely used in some legal systems.<sup>45</sup> Moreover, some of the terms used have several different meanings.<sup>46</sup> Taking into account the “international character” of the Convention,<sup>47</sup> this type of terminology should be avoided as much as possible. Thus, this article will adhere to the model, which follows directly from Article 74, i.e., *actual loss* and *loss of profit*.

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<sup>42</sup> CODE CIVIL [C. CIV.] art. 14 (Uzb.) (trans. by D. Saidov) (emphasis added). See also GK RF art. 15, reprinted in *The Civil Code of the Russian Federation*, pts. 1, 2, 7-8 (Peter B. Maggs ed. and trans., 1997).

<sup>43</sup> See BRAGINSKIY & VITRYANSKIY, *supra* note 30, at 518.

<sup>44</sup> See *id.* at 524.

<sup>45</sup> Terms such as “incidental” and “consequential” losses are used in some common law systems.

<sup>46</sup> For the different meanings in which the term “consequential loss” has been used, see TREITEL, *supra* note 8, at 87.

<sup>47</sup> See CISG, *supra* note 1, art. 7(1).

(a) *Actual Loss*

Actual loss can be defined as *any reduction in the assets of an injured party* as they existed when the contract was concluded,<sup>48</sup> or *an increase in his liabilities* that, for example, “occurs when an obligee, not having been paid by its obligor, must borrow money to meet its commitments.”<sup>49</sup> As mentioned above, there can be a great variety of forms in which actual loss can manifest. Therefore, it does not seem possible to list all forms that actual loss may take.<sup>50</sup> Nonetheless, so long as the necessary requirements have been met,<sup>51</sup> the compensation for actual loss should be awarded under Article 74.

(b) *Loss of Profit*

The second category of loss to which Article 74 specifically refers is the loss of profit.<sup>52</sup> Loss of profit is in a different category because it is substantially different from that of actual loss. In particular, whereas actual loss *generally* means the diminution in the assets of an injured party at the time of the conclusion of the contract, loss of profit means the *loss of any increase in the assets* caused by the breach.<sup>53</sup> In other words, loss of profit means that, if the contract had been performed properly and the breach had not been committed, the injured party would have enjoyed an increase in his assets. It has been said that both categories of loss (actual loss and profit loss) are regulated in the same way in the CISG.<sup>54</sup> However, one essential difference between the two, reflected in the Convention’s scheme, should be addressed. This difference relates to the effect of Article 44.<sup>55</sup> Namely, this Article allows for the disre-

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<sup>48</sup> See STOLL, *supra* note 18, at 561.

<sup>49</sup> UNIDROIT Principles, *supra* note 5, art. 7.4.2 ¶ 2 off. cmts. The usage of the comments to the UNIDROIT Principles in this context seems acceptable since it is stated that, in this respect, Article 7.4.2 of the Principles follows Article 74 of the CISG. *Id.*

<sup>50</sup> The classification discussed in section II(2) of this article is helpful in the illustration of a diversity of the forms of loss.

<sup>51</sup> See section III of this article on methods of limiting damages.

<sup>52</sup> A direct reference to this type of loss is explained by the fact that, in some legal systems, the “loss” by itself does not include the loss of profit. See Secretariat Commentary, *supra* note 17, ¶ 3. See also KNAPP, *supra* note 23, at 543.

<sup>53</sup> See STOLL, *supra* note 18, at 563.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

gard of the provisions of Articles 39 and 43<sup>56</sup> if the buyer has a reasonable excuse for the failure to give the required notice. If the buyer does not have a reasonable excuse, he may reduce the price or claim damages. However, in that type of claim for damages, the loss of profit cannot be demanded.<sup>57</sup>

(c) *"Lost Volume" Situation*

This section of the article will examine the problem identified as the "lost volume" situation.<sup>58</sup> This doctrine has received extensive development in American judicial practice and academic writings. The type of loss, implied by the term "lost volume," is likely to arise in international sales transactions. Therefore, an understanding of the essence of this concept and its place (if any) within the Convention's legal regime is extremely important.

The concept of "lost volume" has been the subject of an enormous debate. Nevertheless, it can be defined. Lost volume is a type of loss that can be sustained only by a party who acts as a seller. In a lost volume situation, a seller has fewer customers than he can supply.<sup>59</sup> After one of his buyers commits a breach of contract by repudiating the contract, not accepting or rejecting the goods, the seller successfully resells the contract goods to a different buyer. However, the second sale cannot be a replacement for the original contract. The reason is that the second buyer would have purchased these goods from the seller, even if the original contract had been performed. Therefore, the seller has "lost volume." His "total number of sales [has been] reduced by the quantity represented by the original contract."<sup>60</sup>

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<sup>56</sup> According to Article 39, the buyer loses the right to rely on the lack of conformity in the goods, and, accordingly, to claim damages, if he does not give notice within a reasonable time from the moment he discovered or ought to have discovered the non-conformity. See CISG, *supra* note 1, art. 39. Article 43 provides that if the buyer does not give the seller the notice of nature of claims of a third party, provided in this Article, he will lose the right to rely on Articles 41 and 42, and, consequently, to exercise the relevant remedies. See CISG, *supra* note 1, art. 43.

<sup>57</sup> See CISG, *supra* note 1, art. 44.

<sup>58</sup> The term was first coined by Professor Robert J. Harris, *cited in* Daniel W. Matthews, *Should the Doctrine of Lost Volume Seller Be Retained? A Response to Professor Breen*, 51 U. MIAMI L. REV. 1195, 1199 (1997).

<sup>59</sup> See Roy Ryden Anderson, *Damages for Sellers under the Code's Profit Formula*, 40 Sw. L. J. 1021, 1023 (1986).

<sup>60</sup> John M. Breen, *The Lost Volume Seller and Lost Profits Under U.C.C. § 2-708(2): A Conceptual and Linguistic Critique*, 50 U. MIAMI L. REV. 779, 793 (1996).

The second transaction cannot make the seller whole. This transaction would have been made in any event. Yet, the breach has prevented the seller from earning one more profit from the original contract.<sup>61</sup>

Let us illustrate this type of situation by an example. Suppose that S has several identical tables he wants to sell. B1 contracts to buy one table. Shortly after the conclusion of the contract, B1 repudiates. S resells the table to B2. S claims that this resale did not put him into the position he would have been in had the contract with B1 been performed. If B1 had not breached, S also would have sold a table to B2, and earned two units of profit, instead of one.

The lost volume concept has been strongly criticized on conceptual and economic grounds. Although this article will not engage in a detailed discussion of the problem with lost volume, it is necessary to point out the main grounds for the criticism of the doctrine.

First, it has been said that the lost volume concept is not in line with the seller's duty to mitigate.<sup>62</sup> This issue will be addressed later in this work.<sup>63</sup>

Second, it has been argued that the seller's expectation interest in the profit from the second sale is unprotected.<sup>64</sup> According to this view, the seller's expectation should be evaluated only at the time of entering into a valid contract.

A valid contract is the basis for legal protection of a party's expectation. Accordingly, at the time of the conclusion of the contract with the breaching buyer, the seller's expectation is legally protected only under this contract. Although the law protects the seller's expected benefit under a valid contract for the sale of goods, it does not protect the seller's expectation as to what his market will be like following the contract.<sup>65</sup> . . . The seller's ex-

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<sup>61</sup> See also a definition in RESTATEMENT (SECOND), *supra* note 10, ¶ 347, cmt. (f).

<sup>62</sup> This argument has been put forward by Professor Morris Shanker. See Morris G. Shanker, *The Case for a Literal Reading of UCC Section 2-708(2) (One Profit for the Reseller)*, 24 CASE. W. RES. L. REV. 697, 701-03 (1973). See also Breen, *supra* note 60, at 819-20; Matthews, *supra* note 58, at 1213-14; Sherwin J. Malkin, *Beware the Lost Volume Seller*, May 6 CBA Record 2025 (1992).

<sup>63</sup> See section III(4)(d) for a discussion of the "lost volume" situation.

<sup>64</sup> See Breen *supra* note 60, at 823-27.

<sup>65</sup> *Id.* at 827.

pectation that he will resell the goods does not arise until after the original buyer has repudiated the deal. The seller does not have this expectation until after he has entered into the contract with the second buyer. In awarding the profit remedy to volume sellers, courts retroactively apply this expectation to the formation of the original contract, the only time at which expectations are relevant with respect to the contract goods. In other words, the seller's expectation of an additional sale is actually a post hoc expectation, which is an oxymoron.<sup>66</sup>

It is argued that this point does not withstand close analysis:

The lost volume seller's expectation in the second sale is unprotected until the seller enters into the second contract. At that time, the seller has a protectable interest in the original contract, and a separate and distinct protectable expectation in the second sale . . . . [T]he lost volume seller is not claiming a protectable interest in two transactions at the time of the original sale. Conversely, the lost volume seller claims an expectation in two contracts entered into at different intervals. Thus, the argument over the lost volume seller is not whether the seller has a protectable expectation in the post-contractual market, but whether, after the second sale is consummated, the expectation on the second sale should be used to reduce the expectation interest on the original sale.<sup>67</sup>

The third critical argument is that the award of damages, flowing from the lost volume, overcompensates the seller. It puts the seller into a better position than the one he would have been in had the original contract been performed.<sup>68</sup> This view naturally flows from the second argument, that is, that the seller does not have a protectable expectation in being in such a position.<sup>69</sup> Since the second argument has not been supported, the "overcompensation" point cannot be accepted as well.

Although the CISG does not explicitly address this issue, it is suggested that, in the framework of the CISG, loss of volume should be recognized as a valid legal concept. As has been shown above, the Convention's damages remedy is based on the

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<sup>66</sup> *Id.* at 824.

<sup>67</sup> Matthews, *supra* note 58, at 1216.

<sup>68</sup> See Breen, *supra* note 60, at 827-30.

<sup>69</sup> See *id.* at 827.

concept of expectation interest. In lost volume situations, unless an injured party is compensated properly for this type of loss, he will not be put into the position he would have been in if the contract had been the contract performed. However, procedures for measuring damages under the CISG, as stipulated in Articles 75 (so-called “concrete” calculation)<sup>70</sup> and 76 (“abstract” calculation),<sup>71</sup> will not restore a party’s expectation interest. For instance, in the example above, if after avoidance of the contract S “within a reasonable time” and for the same price resells the table to B2, there will be no difference between the contract price and the price in the second transaction. The seller cannot recover damages under Article 75, even though he suffered the loss of an additional profit he would have received had there been no breach. If, however, S resells the table at a price lower than the contract price, then he only will be able to recover the difference between the contract price and the price in the second transaction. Again, this difference will not compensate him for the additional profit that he would have received had he sold one more table. Analogous results will follow if abstract calculation under Article 76 is applied. However, both Articles 75 and 76 provide that an injured party may recover “any further damages recoverable under Article 74.”<sup>72</sup> It seems that this allowance can adequately cover a lost volume claim.<sup>73</sup>

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<sup>70</sup> See CISG, *supra* note 1, art. 75.

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

CISG, *supra* note 1, art. 75.

<sup>71</sup> See CISG, *supra* note 1, art. 76

If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under [A]rticle 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under [A]rticle 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

CISG, *supra* note 1, art. 76.

<sup>72</sup> CISG, *supra* note 1, arts. 75, 76.

<sup>73</sup> See ZIEGEL, *supra* note 21, § 9-41. Articles 75 and 76 “adequately cover a lost volume claim.” *Id.* See also JOHN O. HONNOLD, UNIFORM SALES LAW FOR IN-

At least in one case, decided in Germany,<sup>74</sup> the court awarded damages for loss of volume. In that case, the seller agreed to manufacture and sell jewelry to the buyer.<sup>75</sup> The buyer did not pay and delivery was not made. The court stated that damage, suffered by the seller, would arise "regardless of a possible resale of the goods ordered to a subsequent buyer, as the later contract would have been formed independently of the [buyer's] order."<sup>76</sup>

In another case, decided in the United States, the seller delivered defective compressors, which the buyer intended to use in its manufacture of air conditioners.<sup>77</sup> In that case, the buyer was unable to obtain substitute compressors from other sources, and therefore suffered *loss in the volume* of air conditioners that it was able to manufacture for the selling season.<sup>78</sup> The United States District Court for the Northern District of New York found that the CISG permitted "recovery of lost profit resulting from a diminished volume of sales."<sup>79</sup> The United States Court of Appeals for the Second Circuit upheld this decision.<sup>80</sup> However, though the loss in this case was called "loss in volume," it does not represent the type of loss being discussed in this part of the article. First, the injured party acted as a buyer under the original contract with the breaching party. As has been mentioned above, loss of volume (in the sense it is meant here) can pertain only to a seller. Second, in a "classic" lost volume situation, the seller has *sufficient supply and insufficient demand*. In the present case, the breach diminished the party's *capacity* to supply, which led to loss of a certain number of customers. Thus, the party did *not have sufficient capacity* to sup-

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INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 512-13 (2d ed. 1991).

<sup>74</sup> See Oberster Gerichtshof [Supreme Court] 2 Ob 100/00w, 28 Apr. 2000 (Aus.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000428a3.html>.

<sup>75</sup> See *id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *Delchi Carrier, SpA v. Rotorex Corporation*, No. 88-CV-1078, 1994 U.S. Dist. LEXIS 12820, \*3 (N.D.N.Y. 1994), *aff'd and rev'd in part*, 71 F.3d 1024 (2d Cir. 1995), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940909u1.html>.

<sup>78</sup> See *Delchi Carrier, SpA*, 1994 U.S. Dist. LEXIS 12820, at \*9.

<sup>79</sup> *Id.* at \*14.

<sup>80</sup> The Court of Appeals for the Second Circuit stated that the district court's findings were "not clearly erroneous." See *Delchi Carrier SpA v. Rotorex Corporation*, 71 F.3d 1024, 1029 (2d Cir. 1995), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951206u1.html>.



ply its potential customers. As will be seen later in this article, the seller cannot be a lost volume seller unless he can prove that he had *actual capacity* to supply his customers. Moreover, in this case, an injured party seems to have had sufficient demand for its goods. It lost its potential customers as a result of an insufficient capacity. Thus, although the court used the term "loss in the volume," this case does not reflect the situation under consideration.

Although it is argued that loss of volume should be covered by the CISG, an elaboration of strict standards in relation to a lost volume seller is crucial. If there are no such standards, a seller may find himself overcompensated. Fortunately, American legal academics have developed general criteria that a seller must meet in order to qualify as a lost volume seller. Professor Harris has developed three main requirements that a lost volume seller must meet: "(1) the person who bought the resold entity would have been solicited by the plaintiff had there been no breach or resale; (2) the solicitation would have been successful; and (3) the plaintiff could have performed that additional contract."<sup>81</sup> Most American courts and commentators have adopted these requirements.<sup>82</sup> However, another formulation of this test will be relied upon in this article.

In order to identify a lost volume seller two questions must be answered in affirmative: (1) Could the seller have supplied both the original and the resale buyer? (2) Would the seller have sold the goods to the resale buyer even if there had been no repudiation by the original buyer?<sup>83</sup>

The first question focuses on a seller's *capacity* to supply both buyers. This element is crucial for establishing a lost vol-

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<sup>81</sup> Jerald B. Holisky, *Finding the 'Lost Volume Seller': Two Independent Sales Deserve Two Profits under Illinois Law*, 22 J. MARSHALL L. REV. 363, 375 (1998). In addition to the requirements defined by Holisky, some courts have adopted a fourth requirement. The fourth requirement is that the seller must show that it would have been profitable for him to make both sales. See generally R.E. Davis Chemical Corp. v. Disonics, Inc., 826 F.2d 678 (7th Cir. 1987), cited in Malkin, *supra* note 62. However, this requirement seems to be arguable and will not be relied upon in this article. Compare Breen, *supra* note 60, at 795-96.

<sup>82</sup> See Breen, *supra* note 60, at 794.

<sup>83</sup> See Holisky, *supra* note 81, at 380-82. The reason Holisky used such a formulation of the test is that in his opinion, the first two requirements in Harris' test address the concern, reflected by the second question, "but not in sufficient detail to be useful." *Id.* at 382, n. 113-14.

ume case. Imagine that a small seller produces the goods to the limit of his capacity. If buyer 1 breaches the contract, this seller resells the goods to buyer 2. Had buyer 1 not breached, the seller would not have been able to sell the goods to buyer 2 due to his limited capacity. The seller has not, in fact, suffered any loss of volume. The sale to buyer 2 should be considered merely as a mitigation measure.<sup>84</sup>

Deciding the issue of whether a seller in question was a lost volume seller, the courts will need to rely not on a theoretical ability to supply, but on a practical ability to supply both buyers, based upon the circumstances of a particular case.<sup>85</sup> It is necessary for a seller to prove that he had, for example, excessive capacity to manufacture the goods or ready access to additional inventory.<sup>86</sup> If he cannot do that, then if he wants to qualify as a lost volume seller, he will need to present evidence that "he would, in fact, have expanded his manufacturing operations, or sought and found replacement stock outside his regular supply channels."<sup>87</sup>

The second question is whether the seller would have made a second transaction even if there had been no breach by the first buyer. Put in a different way, the question is whether the first sale and resale after the breach are "wholly independent events."<sup>88</sup> If an answer to this question is "no," a seller cannot be regarded as having suffered loss of volume. Several guidelines have been put forward to help us determine whether the second sale would have been made, had there been no breach.

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<sup>84</sup> See John A. Sebert, Jr., *Remedies under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PENN. L. REV. 360, 386-87 (1981).

<sup>85</sup> See Holisky, *supra* note 81, at 380. Holisky also refers to an American case *Lake Erie Boat Sales, Inc. v. Johnson*, 463 N.E. 2d 70 (Ohio Ct. App. 1983). In this case, a retail boat dealer was denied a lost profit because the only proof of the seller's capacity that was offered was testimony by the dealer's salesman that "to his knowledge" the plaintiff-dealer had an unlimited supply of the same type of boat and equipment that the defendant had purchased. *Id.* at 73.

<sup>86</sup> See Holisky, *supra* note 81, at 380-81.

<sup>87</sup> *Id.* at 381.

<sup>88</sup> *Id.* at 382. See also *Snyder v. Herbert Greenbaum & Assoc., Inc.*, 380 A.2d 618 (Md. Ct. Spec. App. 1977) (where the court stated that "[t]he whole concept of lost volume is the sale of the goods to the resale purchaser could have been made with other goods had there been no breach. In essence, the original sale and the second sale are independent events, becoming related only after the breach, as the original sale goods are applied to the second sale.") *Id.* at 625.

First, the fact that the seller has made some *special* efforts to carry out the second sale is said to serve as an indication that, absent the breach, this sale would not have been made. "Such special efforts might include advertising . . . or highlighting the breached item on the showroom floor. Any of these actions indicate that the seller would not have solicited the ultimate resale purchaser except for the breach, therefore, any lost volume is illusory."<sup>89</sup>

Second, the needs of a particular resale buyer are to be taken into consideration.<sup>90</sup> Third, the characteristics of the goods under the original contract must be considered. The general idea is that the more specific the goods are, the more likely the resale is not a lost volume sale. The resale can be the result of either the seller's special efforts or of the particular needs of the second buyer.<sup>91</sup>

Both requirements, the "capacity" and "wholly independent events" tests, must be met. Meeting only one of these requirements is not sufficient to establish a lost volume case. This essential rule in analyzing a potential lost volume situation has been repeatedly ignored by American courts. Instead of having applied both requirements (or three requirements in Harris' test), they deemed it sufficient to establish only a "capacity" element.<sup>92</sup> Such a treatment of a potential lost volume case should not be allowed. It is most likely to result in overcompensation.

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<sup>89</sup> Holisky, *supra* note 81, at 384.

<sup>90</sup> See Sebert, *supra* note 84, at 388.

[I]f the resale buyer was in the market only for an orange convertible which he could buy "off the lot", and the seller only had such a car, because the original buyer breached his special order contract, there is no lost volume even though the dealer passed the capacity test and even though he took no special actions to resell the vehicle. On the other hand, if the resale buyer was in the market for a Chevrolet of the same general type and style of the car that the original buyer refused, then it seems likely that the dealer would have sold same type of car to the resale purchaser anyway.

Holisky, *supra* note 81, at 384-85.

<sup>91</sup> See *id.* at 385.

<sup>92</sup> See *Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846 (E.D.N.Y. 1979), *aff'd*, 614 F.2d 1289 (2d Cir. 1979). See also *Distribu-Dor, Inc. v. Karadanis*, 90 Cal. Rptr. 231 (Cal. Ct. App. 3d App. Dist. 1970); *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (1972), *cited in* Sebert, *supra* note 84, at n. 116. See generally *Great Western Sugar Co. v. Mrs. Alison's Cookie Co.*, 563 F. Supp. 430 (E.D. Mo. 1983), *aff'd on other grounds*, 749 F.2d 516 (8th Cir. 1984); *Autonumerics, Inc. v. Bayer Indus., Inc.*, 696 P.2d 1330 (Ariz. Ct. App.

The seller should qualify as a lost volume seller only when both requirements are met.

The guidelines above are based principally on writings of American legal scholars and practice of American courts. But, it is suggested that they can be applied to the CISG. As shown above, application of Articles 75 and 76 alone will not lead to fair results. Article 74 should be the basis for recovery of lost volume to obtain fair results. However, Article 74 does not explicitly provide for such a situation. Therefore, proper guidelines are necessary so that the courts and arbitrators can address such cases. The rules suggested by this article seem to lead to sensible and fair results. The fact, in itself, that these rules are based on the American legal practice and were developed by American lawyers should not impair the "international character" of the Convention. On the contrary, experience of American courts reflects different legal aspects and problems of modern commercial activity. For an "international lawyer" this experience should help address analogous problems in the "international context." An international lawyer should be careful in using this experience. The regulation of international transactions governed by the CISG should not be based on the legal concepts and principles of one particular legal system. Although lost volume is a concept used within the American legal system, it represents a problem that is not "alien" to international transactions. We should not "view" such situations through the prism of American legal principles and rely upon purely domestic sources of law. Rather, we should search for sensible solutions, offered by that legal system without impairing the international character of the Convention and contributing to achieving uniformity in its application. In a lost volume case, the American legal system seems to offer helpful guidelines.

(d) *The Problem of Non-Material Loss*

How should a situation where non-material loss was caused by the breach be addressed in a situation where the CISG is applicable? In order to answer this question, it is necessary to define the term "non-material loss," determine the forms it can

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1984); *Kaiserman v. Martin J. Ain, Ltd.*, 112 Misc.2d 768, 450 N.Y.S.2d 135 (N.Y. Sup. Ct. 1981) *cited in* Holisky, *supra* note 81, at n. 86, n. 89.

have and correlate this concept with the nature of legal relationships governed by the CISG.

Non-material loss is defined as loss flowing from an injury or damage to non-material values. Non-material values are values that do not have “*economic content*” and are inseparable from the personality of the bearer of these values.<sup>93</sup> Non-material values include: life; health; dignity; honor; reputation; etc. Accordingly, non-material loss is loss or harm flowing from injury to health, physical or moral suffering, damage to honor and reputation, etc.<sup>94</sup>

In general, the CISG does not cover non-material loss. First, the Convention is mostly applicable to relationships of commercial character. Generally, commercial relations are aimed at achieving material or pecuniary purposes. These purposes do not involve non-material categories. Accordingly, one can conclude that in a commercial setting, non-material loss is not likely to arise and should not be claimed.<sup>95</sup>

Additionally, most commercial players are legal entities (corporate bodies), and the question arises as to whether legal entities can sustain non-material loss. It seems that, generally, a legal entity should not be capable of suffering this type of loss. For example, the National and International Arbitral Tribunal of Milan, applying the UNIDROIT Principles, excluded compensation for emotional harm and distress because the injured party was a corporate entity.<sup>96</sup>

Finally, it should be noted that in one case, decided by the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, the plain-

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<sup>93</sup> See GRAZHDANSKOYE PRAVO [CIVIL LAW] PART 1 312 (A.P. Sergeev & Y.K. Tolstoy eds., 1998) (trans. D. Saidov).

<sup>94</sup> In this regard, see UNIDROIT Principles, *supra* note 5, art. 7.4.2 ¶ 5 off. cmts.

<sup>95</sup> See STOLL, *supra* note 18, at 558, where it has been stated, “[c]ross-border transactions normally serve commercial ends. Consequently, in principle, compensation for non-material loss cannot be claimed.” *Id.*

<sup>96</sup> See Camera Arbitrale Nazionale ed Internazionale di Milano [National and International Arbitral Tribunal] A-1795/51, 01 Dec. 1996 (Italy), <http://www.unilex.info/dynasite.cfm?dsid=136208&x=1>. However, this matter is not that straightforward. For instance, Plenum of the Supreme Court of Russian Federation in its resolution N 10, dated 20 December 1994 was inclined to suggest that moral harm can be inflicted upon a legal person, and the compensation for it should be allowed. See GRAZHDANSKOYE PRAVO, *supra* note 93, at 325.

tiff was denied compensation for "moral harm."<sup>97</sup> The Tribunal, in denying compensation, found that the CISG did not contain provisions regarding the compensation for "moral harm" in a situation analogous to the case under consideration.<sup>98</sup>

Nonetheless, it seems that there may be at least two situations in which non-material loss may be compensated. The first situation is when the purpose of the transaction is entirely non-material, and the parties are aware of such a purpose.<sup>99</sup> In this situation, the loss caused by the breach, which totally or substantially undermines the whole (non-material) purpose of the transaction, should be recoverable. However, in the context of international commerce, a situation of this kind seems to be atypical.

The second situation is where an injured party's business reputation is adversely affected as a result of the breach. In commerce, in general, and in international sales, in particular, business reputation plays an important role. It can affect and sometimes pre-determine the state of affairs of a subject of commercial activity.<sup>100</sup> Thus, this section of the article will examine why and how loss of, or injury to, reputation should be governed by the CISG.

The issue of injury to reputation needs to be approached carefully. In order to understand the legal implications of this form of loss, it is helpful to consider the treatment of this matter in English law.

English cases have established a distinction between an injury to reputation as being *non-material* (non-pecuniary) loss and *pecuniary* loss, flowing from such an injury. While loss of

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<sup>97</sup> For regulation of "moral harm" in some legal systems, see the CODE CIVIL [C. CIV.] arts. 1021, 1022 (Ubz). See also Gk Rf, *supra* note 43, art. 151. For a discussion of this issue, see GRAZHDANSKOYE PRAVO, *supra* note 93, at 323-25.

<sup>98</sup> See MIKHAIL GRIGORIEVICH ROZENBERG, KONTRAKT MEZHDUNARODNOY KUPLI-PRODAZHI [CONTRACT OF INTERNATIONAL SALES] 73 (1998) (trans. D. Saidov).

<sup>99</sup> "For example, if both parties understood the purpose of a contract for the sale of a motor vehicle to be to enable the buyer to undertake a holiday trip." STOLL, *supra* note 18, at 558.

<sup>100</sup> For instance, "impairment of business reputation can bring about loss of customers, making heavier the conditions of obtaining the credit. On the other hand, business reputation, which has been formed, can serve as a guarantee that a businessman will remain "afloat", even when his business went down." GRAZHDANSKOYE PRAVO, *supra* note 93, at 315.

reputation in itself cannot be recovered,<sup>101</sup> pecuniary loss caused by loss of reputation has been held recoverable in several cases.<sup>102</sup> Should loss of (injury to) reputation in itself be separated from pecuniary loss flowing from it? It is submitted that *business reputation* should be regarded as a separate legal category. Business reputation can be defined as an *opinion* of “business actors” on another subject of commercial activity, which has been formed on the basis of its professional qualities.<sup>103</sup> Although, as we can see from this definition, the nature of the business reputation is wholly non-material, it represents certain value in and of itself. One of course can argue that since the *ultimate* purpose of good reputation in business is to make a profit, the loss of (injury to) reputation should have legal significance only when it leads to a loss of profit.<sup>104</sup> However, it seems incorrect to consider the “legal status” of reputation exclusively in the context of the principal purpose of commercial activity as making a profit. Regardless of whether or not damage to reputation has led to loss of profit, reputation in itself should represent a separate non-material category, which has its own value. Consequently, damage inflicted upon reputation should entail the *non-material loss* of the value of the reputation itself.

Thus, it is suggested that, at least in theory, loss of reputation *in itself* should be recoverable under Article 74. It is the form of *loss*, and the principle of full compensation for harm that should be the basis for recoverability. Perhaps, here, it is

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<sup>101</sup> See *Addis v. Gramophone Co. Ltd.*, A.C. 488, 489 (H.L. 1909). See generally *O’Laoire v Jackel International Ltd.*, 2 I.C.R. 718 (C.A. 1991).

<sup>102</sup> See *Aerial Advertising Co. v. Batchelor’s Peas Ltd.*, 2 All E.R. 788 (K.B. 1938). See also *Groom v. Crocker*, 60 Lloyd’s List L. Rep. 393, 419 (C.A. 1938); *Anglo-Continental Holidays Ltd. v. Typaldos Lines (London) Ltd.*, 2 Lloyd’s Rep. 61, 64, 66 (C.A. 1967); *GKN Centrax Gears Ltd. v. Matbro Ltd.*, 2 Lloyd’s Rep. 555 (C.A. 1976).

<sup>103</sup> See GRAZHDANSKOYE PRAVO, *supra* note 93, at 317.

<sup>104</sup> The [buyer] cannot claim a loss of turnover, on the one hand — which could be reimbursed in the form of lost profits — and then, on the other hand, try to get additional compensation for a loss in reputation. A damaged reputation is completely insignificant as long as it does not lead to a loss of turnover and consequently lost profits. A businessperson runs his business from a commercial point of view. As long as he has the necessary turnover, he can be completely indifferent towards his image

Landgerischt [District Court] 10 O 72/00, 9 May 2000 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000509g1.html>.

relevant to cite the critical words of one commentator in relation to the position taken by English courts.

What about the continued denial of damages for loss of reputation in itself that is a non-pecuniary loss? While perhaps less crucial, there is again no justification for this restriction. Adherence to full compensation dictates recovery, and although proof of this loss may be difficult, as may assessing damages, these are not reasons for blanket refusal . . . .<sup>105</sup>

In practice, a party seldom will be able to recover the damages for loss of (injury to) reputation because of the difficulty of proving such a loss and of meeting the requirements of Article 74.<sup>106</sup> Even if a party proves that he has suffered a loss of reputation, it will be very difficult to calculate his loss. At best, "all the courts can aim for is a fair and reasonable sum."<sup>107</sup>

As mentioned above, loss or injury to reputation can lead to pecuniary loss in the form of loss of profit. This can be called *material manifestation* of non-material loss. Loss of profit, in a commercial context, is, probably, the main negative result caused by loss of reputation. Loss of profit is more likely to be claimed in cases where reputation has been damaged.<sup>108</sup> As in the case with the loss of reputation in itself, the requirements of Article 74 are of *particular importance* in establishing the liability of a party in question.

It seems that, in practice, proving this type of loss will not be easy.<sup>109</sup> However, once the requirements of Article 74 have been met, this loss should be compensated. For example, the Helsinki Court of Appeals upheld the decision of the Court of First Instance, which had allowed damages that resulted from

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<sup>105</sup> BURROWS, *supra* note 9, at 224.

<sup>106</sup> See section III of this article for a discussion on the methods of limiting damages. For example, with respect to the rule of foreseeability, it has been said that "[a stricter] test is to be applied as regards foreseeability of a buyer's loss of goodwill . . . . The seller is as a rule liable for such loss of goodwill only if, at the time of the conclusion of the contract, the buyer pointed out the risk of the particular type of loss." STOLL, *supra* note 18, at 571.

<sup>107</sup> BURROWS, *supra* note 9, at 226.

<sup>108</sup> For a typical example of loss of profit flowing from loss of reputation, see *GKN Centrax Gears Ltd. v. Matbro Ltd.*, 2 Lloyd's Rep. 555, 573 (C.A. 1976).

<sup>109</sup> "It is usually not possible to offer precise proof of those losses [meaning lost profits]." BURROWS, *supra* note 9, at 226.



loss of goodwill.<sup>110</sup> This decision, however, can be criticized for failing to discuss the requirements of Article 74 (foreseeability, for example), which, as has been said, are extremely important in such situations.<sup>111</sup>

Further, English law has identified another type of loss of profit. This loss of profit flows not from an injury to reputation but from loss of a *chance to enhance reputation*. Although cases addressing this type of loss related mainly to actors<sup>112</sup> and authors,<sup>113</sup> it is possible to conceive a hypothetical for international sales. However, such losses can hardly be proved, let alone the establishment of foreseeability, causal link, and certainty (if applicable).

Finally, a case, decided by the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, has raised an interesting aspect of the "reputation" problem. That is reputation, not of the businessperson, but of its goods. Case No 054/1999<sup>114</sup> concerned a contract by installments. The plaintiff claimed loss of profit suffered as a result of a delay in selling and reduction of prices of the goods of the second installment. This loss, according to the plaintiff, was caused by the fact that the goods of the first installment had been defective, which, in turn, led to the loss of reputation of the goods on the market. The Tribunal rejected this claim on several grounds. First, there was no causal link between the breach and the loss claimed. Second, the plaintiff did not prove that the amount of the claim was commensurate to the breach. If damage to reputation had been caused by the breach, the plaintiff could have been entitled to claim damages only in the proportion to that which had been caused by the

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<sup>110</sup> See *Helsingin hovioikeus* [Court of Appeals] S 00/82, 26 Oct. 2000 (Fin.), <http://cisgw3.law.pace.edu/cases/001026f5.html>.

<sup>111</sup> The case contained a dissenting opinion in which foreseeability has been touched upon. Moreover, the decision can be criticized for having measured damages according to Finnish law, although the CISG was applicable. This issue is, however, beyond the scope of this article.

<sup>112</sup> See generally *Marbe v. George Edwards (Daley's Theatre) Ltd.*, 1 K.B. 269 (Eng. C.A. 1928); *Herbert Clayton v. Oliver*, A.C. 209 (H.L. 1930).

<sup>113</sup> See generally *Tolnay v. Criterion Film Productions Ltd.*, 2 All E.R. 1625 (K.B. 1936); *Joseph v. National Magazine Co. Ltd.*, 3 All E.R. 52 (Ch. 1959).

<sup>114</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 054/1999, 24 Jan. 2000 (Russ.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000124r1.html>.

breach. Third, the standard of foreseeability was not established.

However, it seems that had these conditions been met, the Tribunal would have allowed damages for loss of profit flowing from loss of reputation of the goods. Thus, loss of profit flowing from loss of reputation of the goods is, in principle, recoverable. The question arises as to the relationship between reputation of a business manufacturer and reputation of goods, which requires further elaboration. Here, it will be just stated that, in some cases, reputation of goods may be considered as a separate category of damages, (separate from reputation of a businessperson) in order to establish the liability in damages.

### III. METHODS OF LIMITING DAMAGES

#### 1. *General*

A principle common to many legal systems is that of limiting the contractual liability of the party in breach.<sup>115</sup> The purpose of this principle is as follows:

[T]he full compensation of the expectation and reliance interests would operate either as too strong a disincentive to the assumption of contractual obligations, or to an undue raising of charges to cover such unlimited liability.<sup>116</sup>

The CISG uses a similar approach. It is based on the idea that the recovery of damages cannot be unlimited. This section of the article will examine the methods that the CISG provides in order to achieve this objective, and emphasize the problems associated with this issue. Additionally, the respective techniques for limitation of damages vary depending on the principles established in a particular legal system.<sup>117</sup> Further, the UNIDROIT Principles, in this respect, represent an interesting example as well: the Principles contain a number of well-known methods of limitation of damages.

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<sup>115</sup> See TREITEL, *supra* note 8, at 76.

<sup>116</sup> *Id.* at 143.

<sup>117</sup> See generally TREITEL, *supra* note 8, 143-208.

## 2. *Foreseeability*

One method of limiting damages, which has received extensive application in various legal systems and international acts, is the principle of foreseeability.<sup>118</sup> This principle has a long history. It was first established in Roman law.<sup>119</sup> Much later, it was established in the Code Napoleon and, consequently, adopted by a number of legal systems.<sup>120</sup>

This rule has been adopted by the common law as well.<sup>121</sup> It was established in the famous case of *Hadley v. Baxendale*<sup>122</sup> and further restated in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*<sup>123</sup> The UNIDROIT Principles contain an analogous provision in Article 7.4.4.<sup>124</sup> This rule of foreseeability constitutes the main manner of limiting damages in the CISG as well. Namely, the relevant provision provides as follows:

Damages may not exceed the loss that 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.<sup>125</sup>

The purpose of this section of the article is to examine the CISG's approach to foreseeability in comparison to those of other legal systems.<sup>126</sup>

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<sup>118</sup> See generally Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257 (1993). See also TREITEL, *supra* note 8, at 150; UNIDROIT Principles, *supra* note 5, art. 7.4.4 off. cmts.

<sup>119</sup> See Ferrari, *supra* note 118, at 1264.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 1265. See also TREITEL, *supra* note 8, at 150. This adoption is said to represent "one of the comparatively rare instances in which a major doctrine of the civil law appears to have been taken over in the nineteenth century by the [c]ommon law." *Id.*

<sup>122</sup> 156 Eng. Rep. 145 (1854).

<sup>123</sup> 2 K.B. 528 (C.A. 1949).

<sup>124</sup> "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." UNIDROIT Principles, *supra* note 5, art. 7.4.4.

<sup>125</sup> CISG, *supra* note 1, art. 74.

<sup>126</sup> The main emphasis will be made regarding the English rule on foreseeability.

(a) *Essential Factors in Evaluation of Foreseeability*(i) *Knowledge*

According to English law, knowledge is an essential element in evaluating foreseeability. Determination of foreseeability depends on the knowledge that the parties had at the time of the conclusion of the contract or, "at all events," the breaching party had at that time.<sup>127</sup> Although under the CISG it is only the party in breach whose knowledge matters, the position is analogous. Article 74 states that foreseeability should be established "in the light of the facts and matters of which he then knew or ought to have known."<sup>128</sup> This clearly shows that foreseeability should be examined on the basis of the party's knowledge. Thus, determination of foreseeability directly depends on the party's knowledge.<sup>129</sup>

Under English law, knowledge can be of two kinds: *imputed* knowledge (which in "the ordinary course of things" is possessed by any reasonable person regardless of whether the party in breach actually possesses it or not) and *actual* knowledge (which means knowledge the party in breach actually has of some special circumstances, which lie beyond "the ordinary course of things").<sup>130</sup> Such a division of knowledge into two types flows from the two parts of the rule established in *Hadley v Baxendale*.<sup>131</sup> The CISG, in turn, does not directly establish

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<sup>127</sup> See *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Inc.*, 2 K.B. 528, 537 (1948).

<sup>128</sup> CISG, *supra* note 1, art. 74.

<sup>129</sup> This statement is supported by some commentators: "[F]oreseeability, as understood in Article 74, depends on the knowledge of facts and matters which enable the party concerned to foresee the results of the breach." KNAPP, *supra* note 23, at 542. See also BERNSTEIN & LOOKOFKY, *supra* note 3, at 99.

<sup>130</sup> See *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Inc.*, 2 K.B. 528, 537 (1948).

<sup>131</sup> Namely, the rule is that damages "should be, either such as may, fairly and reasonably be considered arising naturally, i.e.,] according to the usual course of things, from the [b]reach of [c]ontract 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 [b]reach of it. [I]f the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

the two parts of the *Hadley* rule, which subsequently gave way to the doctrine of two types of knowledge. However, analogous subjective and objective standards have been established with respect to the party's knowledge: "the facts and matters of which he . . . *knew or ought to have known*."<sup>132</sup> The text of Article 74 of the CISG is likely to address "the ordinary course of things" as well as "the special circumstances cases."

Generally, knowledge, in the light of an objective standard, should be imputed to the party in breach if it objectively can be considered that such knowledge is based on the experience of the party as a "merchant."<sup>133</sup> Moreover, the circumstances of the concrete case should be taken into account.<sup>134</sup>

With respect to actual knowledge, based on a subjective standard, it has been said that "[t]he party in breach will be . . . considered as having known the facts and matters enabling him to foresee the possible consequences of the breach, and therefore, as having foreseen them, whenever the other party to the contract has drawn his attention to such possible consequence in due time."<sup>135</sup> The question then arises: Should the other party to the contract be the only source that one considers in evaluating the actual knowledge of the breaching party? It is not argued that the other party to the contract is, in the context of a subjective standard, the main source of information. However, it is not the *only* available source. It has been correctly stated that

[m]odern business practices (and equipment), accounting methods and the extensive communication of information make more knowledge available to both parties . . . [and] [a] potential breacher today will have available a great deal more information about what can happen concerning the contract and hence ought

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*Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

<sup>132</sup> CISG, *supra* note 1, art. 74 (emphasis added).

<sup>133</sup> See KNAPP, *supra* note 23, at 542.

<sup>134</sup> See HARVEY MCGREGOR, MCGREGOR ON DAMAGES 157 (15th ed., 1988).

<sup>135</sup> KNAPP, *supra* note 23, at 542. In this regard, see Oberlandesgericht [Provincial Court of Appeal] 2U 30/77, 23 Mar. 1978 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/780323g1.html>. This case was decided on the basis of Article 82 of the ULIS and the court decided as follows: "The damage resulting as a consequence of the breach was foreseeable to the buyer at the time of the conclusion of the contract, considering the circumstances, which were familiar to the buyer . . . . The [seller] had specifically pointed out the possibility of imminent damage in case of non-performance." *Id.*

to know a great many more facts than a potential breacher in the nineteenth century.<sup>136</sup>

Therefore, in deciding whether the party in breach can be considered as having known “the facts and matters,” a right *balance* has to be found in relying on available sources. This means that we will need to assess the *proportion* in which each of the sources of information can be said to have contributed to the formation of the party’s knowledge. However, ultimately, the specific circumstances of a particular case should be decisive.

Another way to determine the actual knowledge of a party is provided in Article 8. In particular, Article 8(2) refers to the “statements and other conduct” of the party and together with Article 8(3) provides for the rule of interpretation regarding statements and conduct of the party.<sup>137</sup> These statements and conduct of the party in breach can sometimes serve as important indicators of the knowledge he had at the time of the conclusion of the contract.

(ii) *Terms of the Contract*

It has been said that the foreseeability rule “reflects the terms of the contract,” and therefore “precedence is always given to the express or implied intentions of the parties which define those terms.”<sup>138</sup> The terms of the contract, together with knowledge of the party in breach, are important factors in evaluation of foreseeability. Additionally, in case there are hesitations as to the sequence or priority of application of these elements, precedence should be given to the “express or implied” intentions of the parties with respect to the terms of the contract. The basis for this statement is Article 6 of the CISG.<sup>139</sup> It is also to be mentioned that in this context, Article

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<sup>136</sup> Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO WASH. J. INT'L L. & ECON. 415, 452 (1989), available at <http://www.cisg.law.pace.edu/cisg/biblio/murphey.html>.

<sup>137</sup> See CISG, *supra* note 1, arts. 8(2), 8(3).

<sup>138</sup> STOLL, *supra* note 18, at 555.

<sup>139</sup> See CISG, *supra* note 1, art. 6.

8 will be the mechanism of determining the intentions and interpreting the respective terms of the contract.<sup>140</sup>

However, it is submitted that the above-mentioned statement can bring about the following considerations as well. The statement that the foreseeability rule “*reflects the terms of the contract*” may seem to confine the entire concept of foreseeability to the content of the contract. However, it would be better to say that foreseeability is partly reflected by the terms of the contract. Besides the contract terms, there are other elements that are essential in evaluating foreseeability such as knowledge and trade usage.<sup>141</sup> These two elements *may or may not* be explicitly reflected in the contract. Accordingly, the party’s actual foresight and the ability to foresee *may not always* be explicitly reflected in the contract.

### (iii) Trade Usage

It seems that, in some cases, a trade usage can serve as an additional factor for evaluating foreseeability. For example, in one case, the German Supreme Court held that subjective and objective tests in relation to foreseeability<sup>142</sup> “can be conclusively met by a showing of trade custom as to foreseeability.”<sup>143</sup> It also follows from this decision that trade usage can be relevant for determining both subjective and objective standards with respect to foreseeability. This statement, in turn, brings about some theoretical considerations, which do not seem to have any practical significance.

Article 9 of the CISG contains both subjective and objective grounds for applicability of a usage to the parties’ legal relation-

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<sup>140</sup> See CISG, *supra* note 1, art. 8. See also the discussion in section III(2)(a) (iii) of this article with respect to the importance of Article 8 in determining the actual knowledge of the party in breach.

<sup>141</sup> See the discussion in section III(2)(2)(d) of this article with respect to trade usage.

<sup>142</sup> For a discussion of the two standards in relation to foreseeability, see section III(2)(d) on Objective and Subjective Standards with Respect to Foreseeability.

<sup>143</sup> See Bundesgerichtshof [Federal Supreme Court] VIII ZR 210/78, 24 Oct. 1979 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/cases2/791024g1.html>. This case was decided on the basis of Article 82 of the ULIS.

ships.<sup>144</sup> It seems that where trade usage is relevant in evaluating foreseeability, the applicability of an objective or a subjective standard of foreseeability can be linked to the grounds provided for in Article 9.

If a subjective ground is applicable, i.e., if the parties have specifically agreed to a particular trade usage, established a practice between themselves,<sup>145</sup> or knew of a usage,<sup>146</sup> then such a usage or practice will be likely to determine *the actual knowledge* of a party in breach. It follows that actual knowledge can establish the *actual foresight*. But, the fact that a party *actually knew* of something does not necessarily mean that he *actually foresaw* its consequences. Actual knowledge can lead to the establishment of an objective standard, i.e., that a party, having known of certain conditions, was in a *position to foresee* the consequences of the breach, but *did not in fact foresee them*.

If an objective ground for applicability of a usage comes into play, then this ground is likely to *impute* the knowledge of the party in breach.<sup>147</sup> Provided that a party *did not actually* possess the knowledge, the imputed knowledge will be more likely to lead to determination of an *objective foreseeability* ("ought to have foreseen"), rather than of an *actual foresight*. The reason for this conclusion is that it is highly unlikely that a party will *actually foresee* the consequences if he does not possess the requisite knowledge.

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<sup>144</sup> See CISG, *supra* note 1, art. 9. See also WERNER JUNGE, COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 76-77 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998).

<sup>145</sup> See CISG, *supra* note 1, art. 9(1).

<sup>146</sup> "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties *knew*." CISG, *supra* note 1, art. 9(2).

<sup>147</sup> "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties . . . *ought to have known* and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." CISG, *supra* note 1, art. 9(2).



(b) *Whose Foreseeability?*

Article 74 makes it clear that it is *only* the party in breach who is required to foresee or to be in a position to foresee.<sup>148</sup> The position is somewhat different in English law. In particular, in *Hadley v. Baxendale*, the requirement was that the loss be *in the contemplation of both parties*.<sup>149</sup> It seems, however, that this divergence will not produce any substantial differences between the applications of the two rules.<sup>150</sup> The reason is that it is the breaching party whose foreseeability matters because it is almost always that “the plaintiff knows his business and circumstances better than the defendant.”<sup>151</sup>

(c) *Relevant Time for Evaluation of Foreseeability*

In English law, the relevant time for evaluating foreseeability is generally the time of making the contract.<sup>152</sup> This rule “is well settled and has proved remarkably resistant to change.”<sup>153</sup>

The position is the same in the CISG. Article 74 directly refers to “the time of the conclusion of the contract.”<sup>154</sup> In gen-

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<sup>148</sup> See CISG, *supra* note 1, art. 74. For the misapplication of this provision, see *Delchi Carrier, SpA*, 1994 U.S. Dist. LEXIS 12820 \*12 (where it was stated that the loss should not exceed the amount “reasonably envisioned by the parties”). See generally Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 J. INT’L BUS. LAW 615 (1996), available at <http://www.cisg.law.pace.edu/cisg/wais/db/articles/schnedr2.html>. For the correct application of this provision, see Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 155/1994, 16 Mar. 1995 (Russ.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950316r1.html>, cited in ROZENBERG, *supra* note 98. The tribunal of the Moscow Commercial Arbitration provided, *inter alia*, that the *defendant* ought to have foreseen the possibility of loss as possible unfavourable consequences of the breach of his obligations. *Id.*

<sup>149</sup> See generally *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854). The idea underlying this rule is “to emphasize that the contemplation by the plaintiff was not enough to satisfy the test of remoteness.” TREITEL, *supra* note 8, at 159.

<sup>150</sup> See Murphey, *supra* note 136, at 447.

<sup>151</sup> ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW (1964), cited in Murphey, *supra* note 136, at 147.

<sup>152</sup> See generally *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854); *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Inc.*, 2 K.B. 528 (1948). For the discussion of this rule in English and American law, see TREITEL, *supra* note 8, at 160-61. See also Murphey, *supra* note 136.

<sup>153</sup> TREITEL, *supra* note 8, at 160.

<sup>154</sup> CISG, *supra* note 1, art. 74.

eral, this issue in the CISG seems to be “problem-free.” The only point that this work will emphasize is that the time of the conclusion of the contract is an important factor in assessing foreseeability because other important elements of foreseeability, such as knowledge of the party in breach or certain circumstances of the case, will be examined only within the limits of this particular period of time. Therefore, *precision* in relation to the time becomes very important. In this regard, it has been correctly stated that the “negotiating leading to the conclusion of the contract may . . . last a certain period of time.”<sup>155</sup> The correct view seems to be that foreseeability status be evaluated at the time when “the contract came into being”<sup>156</sup> or *entered into legal force*. This approach is in line with that taken in some legal systems where the conclusion of the contract is the basis of its entry into legal force.<sup>157</sup>

It also is to be noted that, since the moment of entry into legal force is decisive in evaluating foreseeability, careful attention should be paid to the requirements of some legal systems predetermining the entry of the contracts into legal force. This statement is primarily relevant to those countries that have certain requirements as to the form of the contracts, rules on state registration of the contracts, and made a reservation under Article 96 of the CISG.<sup>158</sup> The Russian Federation, for example, has made a reservation under this Article<sup>159</sup> and provides for certain requirements with respect to the form of external economic transactions.<sup>160</sup>

Thus, the moment of the conclusion of the contract, the moment of its entry into legal force is the decisive time in deter-

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<sup>155</sup> See KNAPP, *supra* note 2, at 542.

<sup>156</sup> *Id.*

<sup>157</sup> For example, in accordance with Article 357 of the Civil Code of the Republic of Uzbekistan, the contract enters into force and becomes binding on the parties from the moment of its conclusion. See CODE CIVIL [C. CIV.] art. 357 (Uzb.) (trans. by D. Saidov).

<sup>158</sup> See CISG, *supra* note 1, art. 96, Commentary on Article Declarations.

<sup>159</sup> Since the Russian Federation is a successor of the USSR's obligations under the CISG they have adopted the reservation.

<sup>160</sup> See generally ROZENBERG, *supra* note 98. See also BRAGINSKIY & VITRYANSKIY, *supra* note 30, at 274. Article 1181 of the Civil Code of the Republic of Uzbekistan provides for the external economic transaction with a participation of a national of the Republic of Uzbekistan to be made in writing. See CODE CIVIL [C. CIV.] art. 1181 (Uzb.).

mining a party's foreseeability. Foreseeability that takes place after this moment should have no legal consequences.<sup>161</sup>

(d) *Objective and Subjective Standards with Respect to Foreseeability*

In English law, we have seen the manifestation of objective and subjective standards with respect to the knowledge, which has been established as an essential element for evaluation of foreseeability.<sup>162</sup> What are the standards with respect to the foreseeability test itself?

The first part of the rule in *Hadley v Baxendale* has been interpreted to mean the objective standard, i.e., "the defendant is liable for loss which any reasonable person in his position could have foreseen."<sup>163</sup> The second part of the rule was construed as a "mixture" of two elements: "the defendant is liable for loss which *could have been foreseen* by a reasonable person with the *same knowledge* of special circumstances as the defendant had."<sup>164</sup> The same commentator, stating the fact that the objective element enters into the second part of the rule, gives an example of two views with respect to this fact.<sup>165</sup> The first view is that "the rule applies not only where the defendant knew of the special circumstances, but also where he had reason to know."<sup>166</sup> At that, reference is, *inter alia*, made to Article 74 of the CISG.<sup>167</sup> It is correct that the CISG provides for both standards with respect to foreseeability<sup>168</sup>: "foresaw or ought to have foreseen."<sup>169</sup> But the difference between the provision in the CISG and English law, in this respect, is that Article 74 strictly divides these two standards. Within the rule, the two standards do not "enter into each other." Whereas, in English

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<sup>161</sup> See KNAPP, *supra* note 23 at 542.

<sup>162</sup> But see generally *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Inc.*, 2 K.B. 528 (1948) (where there was no direct reference to such standards, the division onto the actual and imputed knowledge, in essence, seems to be the manifestation of these standards) *Id.*

<sup>163</sup> TREITEL, *supra* note 8, at 155.

<sup>164</sup> *Id.*

<sup>165</sup> See *id.*

<sup>166</sup> *Id.* at 155-56.

<sup>167</sup> See *id.* at 156, n. 74.

<sup>168</sup> The CISG also provides for both standards in terms of knowledge.

<sup>169</sup> CISG, *supra* note 1, art. 74.

law, it has been shown that both elements are present in the second part of the rule.

However, even though there is a strict division of standards in Article 74, both of them are equally applicable. In order to determine foreseeability, it will be sufficient to prove either that a party actually foresaw the loss or was objectively in a position to foresee it.<sup>170</sup> Therefore, it is not necessary to prove that the party in breach actually foresaw the loss.<sup>171</sup> The proof of an objective element will be sufficient to make the party liable for loss.<sup>172</sup> However, such liability may “be restricted on the basis of a reasonable allocation of risks under the contract.”<sup>173</sup> In particular, it may follow explicitly or implicitly from the terms of the contract that certain losses should not be covered by the party’s liability, even though they were foreseen or objectively foreseeable.<sup>174</sup>

(e) *What Must Be Foreseen?*

The foreseeability, in Article 74, directly refers to “the loss . . . as a possible consequence of the breach of contract.”<sup>175</sup> Therefore, it is the (amount of) loss that must be foreseen.<sup>176</sup> At that, most leading commentators agree that Article 74 does not require the foreseeability of the precise amount of loss.<sup>177</sup> The loss is said to be foreseeable “if the risk that has actually materialized is essentially the same as the risk which was foresee-

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<sup>170</sup> See KNAPP, *supra* note 23, at 541.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* See also STOLL, *supra* note 18, at 568. A good example of the method the court used to establish the applicability of an objective standard is found in Bundesgerichtshof [Federal Supreme Court] VIII ZR 210/78, 24 Oct. 1979 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/791024g1.html>. In order to come to a conclusion, the court of a lower instance relied

on a written inquiry to the Industrial and Trade Association of Dusseldorf and the German-Dutch Trade Association regarding the state of mind of merchants in [the field in question] . . . as to whether a Dutch exporter in December 1976, who is to deliver cheese to a German importer would break off business if three percent of the goods delivered by the Dutch importer were defective.

*Id.*

<sup>173</sup> STOLL, *supra* note 18, at 568.

<sup>174</sup> See *id.*

<sup>175</sup> CISG, *supra* note 1, art. 74. See also KNAPP, *supra* note 23, at 541.

<sup>176</sup> See KNAPP, *supra* note 23, at 541.

<sup>177</sup> See STOLL, *supra* note 18, at 569 (with further reference to Rabel). See also KNAPP, *supra* note 23, at 541.

able at the time of the conclusion of the contract.”<sup>178</sup> The crucial question, however, is what concrete factors must the party in breach foresee or ought to have foreseen to be liable for the loss?

The first such factor is the *possibility of the loss*.<sup>179</sup> This conclusion flows directly from Article 74, which provides that the loss must be foreseen as “a possible consequence of the breach.”<sup>180</sup> There is no doubt that the risk of loss is directly related to the potential loss. Therefore, the second factor, which the party had to foresee or ought to have foreseen, is the *type of the loss*.<sup>181</sup> It is further submitted that foreseeability should relate also to the *possible extent of the loss* (the third factor).<sup>182</sup> The breaching party should not be held liable for the full extent of the loss if he could not have reasonably foreseen or was not in the position to foresee the extent that would follow from the type of the loss that he foresaw or ought to have foreseen. The party should be liable only for the losses that he reasonably foresaw or ought to have foreseen as the possible extent of the loss. It also is to be noted that in evaluating the possible extent of the loss, the manner in which the loss was caused, or the events that led to the loss having acquired the extent in question, often can be decisive. Therefore, arguably, these aspects can be regarded as necessary factors that a party had to foresee or ought to have foreseen to be liable for the extent of the loss in question.

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<sup>178</sup> STOLL, *supra* note 18, at 569.

<sup>179</sup> See STOLL, *supra* note 18, at 567.

<sup>180</sup> For the sake of comparison, English law requires damages to be contemplated as “a probable result.” A similar approach is reflected in the RESTATEMENT (SECOND), *supra* note 10, ¶ 351. It is clear that these rules require a certain degree of probability. The CISG, in turn, “widens the area of liability imposed upon a breaching party.” In other words, the CISG is more “severe” toward the party in breach, in this respect. It is sufficient that the party in breach foresaw or ought to have foreseen the loss only as a “possible consequence of the breach.” Murphey, *supra* note 136, at 420.

<sup>181</sup> See STOLL, *supra* note 18, at 569.

<sup>182</sup> “[A]n attempt to restrict the notion of foreseeability solely to the type of loss and to exclude the extent of the loss from consideration is unconvincing: if the extent of the loss considerably exceeds what was foreseeable, then a risk has materialized which is different from the risk which was foreseeable.” *Id.*

### 3. Causation

Another method of limiting damages, which is used by some legal systems, is that of *causation*.<sup>183</sup> The discussion, in this section, will concentrate on this issue in the framework of the CISG.

Article 74 provides that only damages for such loss as has been "suffered . . . as a consequence of the breach," are recoverable.<sup>184</sup> Therefore, it is apparent that there is a requirement as to the presence of a causal link between the breach and the loss.<sup>185</sup> The concept of causation in different legal systems gave rise to the development of various "theories"<sup>186</sup> of causation.<sup>187</sup> Does the causal link, established in Article 74, leave us any room for developing the "theoretical background," which would underpin it? Will there be a need to do so?

Some commentators believe that since the foreseeability rule is used, there can be no room for further theoretical development of the issue of causation.<sup>188</sup> Others merely avoid the question, laying everything on the foreseeability rule.<sup>189</sup> The major implication of these views seems to be that the foresee-

<sup>183</sup> See TREITEL, *supra* note 8, at 162. See also BRAGINSKIY & VITRYANSKIY, *supra* note 30, at 575-76 (discussing causation in the Civil Law of Russian Federation); G.H. TREITEL, *THE LAW OF CONTRACT*, 879-81 (9th ed., 1995); MCGREGOR, *supra* note 134, at 138-43 (on causation in English law).

<sup>184</sup> CISG, *supra* note 1, art. 74.

<sup>185</sup> See KNAPP, *supra* note 23, at 540. See also STOLL, *supra* note 8, at 558; BERNSTEIN & LOOKOFKY, *supra* note 3, at 98; UNIDROIT Principles, *supra* note 5, art. 7.4.2 cmts.

<sup>186</sup> H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 432-33 (2d ed. 1985). The term "theories of causation" has been criticized on the ground that it implies an attempt to develop a scientific theory, while these authors believe that the "theories" represent "conceptual, not empirical investigation." *Id.*

<sup>187</sup> See generally HART & HONORÉ, *supra* note 186, 79-123, 277-92, 381-442. See also BRAGINSKIY & VITRYANSKIY, *supra* note 30, at 576-80; TREITEL, *supra* note 8, at 162-73; JOFFE, *supra* note 30, at 113-28.

<sup>188</sup> See STOLL, *supra* note 18, at 558.

The Convention has no room for legal theories of causation which limit liability for damage to probable or not entirely remote causal sequence of events, since it employs the foreseeability rule (Article 74) in order to exclude liability for damage which is so remote as to lie outside the scope of a party's responsibility.

*Id.* (emphasis added).

<sup>189</sup> See KNAPP, *supra* note 23, at 540.

As to causality, it may be questioned whether the party in breach is liable only for the loss caused to the injured party by a direct causality or whether his liability extends to losses by indirect causality. *There is no*

ability rule excludes the possibility of theoretical development of causal problems. This article does not support this position. In order to express my view of this problem, the article shall examine the relationship between the two concepts. Is foreseeability capable of fully replacing the potential scope of the concept of causation?

There can be no doubt that these two concepts strongly overlap. Their close inter-connection has given rise to confusion in different legal systems. The confusion primarily manifests itself in the fact that foreseeability has been used to establish the causal connection.<sup>190</sup> For example, in American legal literature, it has been stated that the only test of causation was foreseeability.<sup>191</sup> A Swiss author, in defining the theory of adequate causation, essentially, used a foreseeability rule.<sup>192</sup> Such confusion is said to take place even in France, where the two requirements are provided for in separate articles of the Civil Code.<sup>193</sup>

Thus, it is recognized that foreseeability and causation are closely related and it hardly seems possible to separate them. However, such a connection cannot serve as a basis for considering the two concepts as mutually exclusive. Nor is it correct to regard foreseeability as, *at least on a theoretical level*, fully replacing the potential "effect" of causation.

The concept of causation requires some examination. It can be defined as a "sequence of classes of complex events or conditions"<sup>194</sup> or an objective connection between the events.<sup>195</sup> In legal science and practice, causation is used either for establishing both the *existence of liability* and the *extent of liability* or for determining just one of these elements.<sup>196</sup> First, this method

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*explicit answer to this question in the Convention.* A working solution may be found by applying the criterion of foreseeability.

*Id.* (emphasis added).

<sup>190</sup> See TREITEL, *supra* note 8, at 153.

<sup>191</sup> See CORBIN, *supra* note 151, at 70.

<sup>192</sup> "A loss is considered to be caused by an event if the event is appropriate to bring it about and if a third person in the light of general experience and with knowledge of all the facts could have foreseen the possibility of loss." TREITEL, *supra* note 8, at 153.

<sup>193</sup> See *id.* See also CODE CIVIL [C. CIV.] arts. 1150, 1151 (Fr.).

<sup>194</sup> HART & HONORÉ, *supra* note 186, at 44 (with further reference to Mill).

<sup>195</sup> See GRAZHDANSKOYE PRAVO, *supra* note 93, at 570.

<sup>196</sup> See HART & HONORÉ, *supra* note 186, at 84-85.

artificially limits the "range of events" (otherwise, the events, which we identify as *cause* and *effect*, will go away to infinity into two opposite directions).<sup>197</sup> Then, one of the following questions will need to be answered: (a) What caused the event in question? or (b) Is the causal link between the two events in question sufficient to establish either liability or the required extent of liability? In order to answer either of these questions one of the "theories" of causation is used. In answering the first question, we identify one event (breach, for example) out of all preceding events, which contributed to the arising of the event in question (loss, for example) as the *cause*. In answering the second question, we determine whether there is a required causal connection between one preceding event (breach) and a subsequent event in question (loss). If a causal connection, required by a particular theory of causation, is found, then the event in question (loss) can be considered as having been caused by one of the preceding events (breach).

On the basis of this view of the concept of causation, this article will emphasize three main reasons why, *in theory*, foreseeability cannot fully serve as a substitution for causation.

The first reason is that these two methods generally should be used at different stages. As mentioned above, causation artificially establishes the range of events and determines the causal connection between the events. Once this has been done, foreseeability is applied to determine the limits to the consequences to which liability would have extended had causation alone been applied. In other words, foreseeability limits liability to something less than the loss, which the breach is said to have *caused*.<sup>198</sup> Therefore, the foreseeability rule generally should serve as a final "cut-off" of liability.

However, this may not always be the case. In rare cases, it is causation that should be the "cut-off" of liability (second reason). Contrary to the view that development of the theory of causation is irrelevant within the framework of the CISG,<sup>199</sup>

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<sup>197</sup> See BRAGINSKIY & VITRYANSKIY, *supra* note 30, at 580 (with further reference to Shershenevich).

<sup>198</sup> See HART & HONORÉ, *supra* note 186, at 255-56.

<sup>199</sup> See STOLL, *supra* note 18, at 558. "It suffices that breach was a condition of the occurrence of the harmful event . . . [and] [accordingly] [i]t is irrelevant whether the damage was caused directly or indirectly by the breach." *Id.*



there may be situations where foreseeability alone will not be capable of dealing with the problem of limiting liability. This may occur in situations where, in addition to the breach, there is another event (or events) that equally could have led to the occurrence of the loss that the breach is said to have caused. Imagine that it is extremely difficult to establish the *real cause of the loss*:<sup>200</sup> was it the breach or was it that other event(s)? At that, the party in breach foresaw or was in the position to foresee the possibility, the type, and the possible extent of the loss because this loss ought to have been foreseen as a possible consequence of the breach. It seems that, in this type of situation, a certain approach to treatment of causal problems may be necessary.

Third, it can be argued that causation should be established “through” foreseeability. For example, one author has stated:

The living conviction of . . . [a] . . . man . . . that there is uniformity in the sequence of events, that we can in good measure predict the future from the past, and that we can in some degree ourselves control the future, is all that we are expressing when we assert the relation of cause and effect.<sup>201</sup>

Indeed, foreseeability largely consists of an element of causation. Without an understanding of how events can affect each other and of “a degree of uniformity of sequence of events,” it would be impossible to foresee anything whatsoever. However, causation as a phenomenon exists on its own regardless of our knowledge of the world. It is an objective phenomenon.<sup>202</sup> Therefore, it seems incorrect to bring an objective process, which exists independently of our perception of the world, *entirely* down to the way a person could foresee the potential causal processes. The foreseeability rule under the CISG includes both subjective and objective standards. The way a person actually had foreseen or been in the position to foresee the

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<sup>200</sup> See generally *Mash & Murrell, Ltd. v. Joseph I. Emanuel, Ltd.*, 2 Lloyd’s Rep. 326 (C.A. 1961) (where it could not have been established with certainty what had caused the deterioration of potatoes).

<sup>201</sup> CORBIN, *supra* note 151, at 69.

<sup>202</sup> Although some authors assert that, in certain circumstances, a state of mind may be relevant in deciding the causation issues. See HART & HONORÉ, *supra* note 186, at 436.

potential development of events, at the time of the conclusion of the contract, does not necessarily coincide with the way such a development has, in fact, taken place. In determining liability or the extent of liability, we need to rely on an objective sequence of events, and not on the way a person foresaw or ought to have foreseen that sequence. As mentioned above, foreseeability generally should be used after an objective sequence of events has been established.

Thus, *in theory*, foreseeability cannot serve as a substitute for causation. In support of this view, it also should be noted that some legal systems employ both these methods and in spite of the confusion, which sometimes takes place, do not regard the use of foreseeability as excluding the possibility of theoretical development of causal problems.<sup>203</sup> Rather, these concepts should supplement and balance each other. As has been correctly stated by one author, “[the] doctrines on foreseeability and . . . causation could be applied in a rather consistent manner and Art. 74 is certainly flexible enough to accommodate an application of [these] general principles.”<sup>204</sup>

The next question is whether there will be a need for the theories of causation? With respect to contractual liability, the issues of causation are more theoretical, rather than of practical importance.<sup>205</sup> International sales transactions, as a rule, will be based on contractual relationships, and, in essence, the statement above will be applicable to them. Therefore, the

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<sup>203</sup> For example, the French legal system employs both these principles. See TREITEL, *supra* note 8, at 153, 167-68.

<sup>204</sup> JAN RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS 126 (2d ed. 2000).

<sup>205</sup> In the first place, the harm for which compensation is to be paid in the law of contract is usually economic rather than physical, and establishing ‘causal connection’ between breach of contract and economic loss . . . also involves a different relation, viz. that of failing to provide a person with the opportunities for gain. Secondly, the causal or near-causal problems which arise in actions for breach of contract are often relatively simple in comparison with the difficulty of determining the scope of the duty to pay damages, so that attention has been concentrated on the latter . . . . Finally, liability in contract is more often based on the notion of risk than in tort: a defendant is then obliged to pay compensation for having, by a breach of contract, provided the occasion for harm, though he would not ordinarily be said to have caused it.

HART & HONORÉ, *supra* note 186, at 576. See also BRAGINSKIY & VITRYANSKIY, *supra* note 30, at 576.

problems connected with the issues of causation hardly will represent any practical significance. In many cases it will be possible to dispense with an examination of causal issues by using the foreseeability standard only. However, we cannot exclude such a possibility. Therefore, it is important to emphasize the types of cases in which causal problems may be relevant.<sup>206</sup> First, the cases related to damage to property caused by defective goods could be of relevance.<sup>207</sup> These cases seem to be governed by the Convention.<sup>208</sup> Second, causal issues may be relevant in the situations where an injured party had to incur expenses as a result of the breach.<sup>209</sup> The third case, where causation may be of importance, is where the party has been deprived of the loss of profit.<sup>210</sup>

Thus, it is suggested that at least, on a level of theoretical considerations, and for the sake of those rare cases where causation may be relevant, the development of methods of treating causal problems under the CISG should be carried out.

#### 4. *Mitigation of Loss*

The next method of limiting damages, which is used in the CISG, is the principle of mitigating loss.<sup>211</sup> Some legal sys-

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<sup>206</sup> For the cases where the presence of a causal link has been considered, see Schiedsgericht der Handelskammer [Arbitral Tribunal] 21 Mar. 1996 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960321g1.html>. See also Landgericht [District Court] 7b O 142/75, 25 May 1977 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/770524g1.html>; Bundesgerichtshof [Federal Supreme Court] VIII ZR 121/98, 24 Mar. 1999 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html>; (Sacovini/M Marazza v. Les fils de Henris Ramel) Cour de Cassation [Supreme Court] 173 P/B 93-16.542, 23 Jan. 1996, (Fr.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960123f1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 155/1994, 16 Mar. 1995 (Russ.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950316r1.html>.

<sup>207</sup> See HART & HONORÉ, *supra* note 186, at 310, 314.

<sup>208</sup> "Since the Convention does not exclude claims for damage to property, it would follow that such claims, if they otherwise fall within the Convention, would be governed by the Convention." WARREN L. KHOO, INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 50 (Nina M. Galston and Hans Smit, eds. 1984). See ROLF HERBER, COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 50 (Peter Schlechtriem ed., Geoffrey Thomas, trans. 2d ed. 1998).

<sup>209</sup> In common law, these expenses are usually referred to as "incidental expenses." See HART & HONORÉ, *supra* note 186, at 310-11, 314-16.

<sup>210</sup> See *id.* at 311-12, 316-21.

<sup>211</sup> See CISG, *supra* note 1, art. 77.

tems<sup>212</sup> and international documents<sup>213</sup> provide for this method as well.

(a) *Meaning, Purpose and Status of the "Mitigation" Provision*

The central idea underlying the principle of mitigating loss is that the aggrieved party cannot recover damages, with respect to loss, that he reasonably could have avoided.<sup>214</sup> The purpose of this principle is to prevent the injured party from passively waiting for the loss to take place and then suing the party in breach for this loss when the injured party could have avoided such loss.<sup>215</sup> From the economic point of view, it has been said that it is "unreasonable . . . to permit an increase in harm, which could have been reduced by the taking of reasonable steps."<sup>216</sup> In the CISG, this principle is reflected in Article 77 and has been formulated as follows:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.<sup>217</sup>

The requirement of mitigating loss pertains only to the injured party's right to damages.<sup>218</sup> It follows from Article 77 that if the aggrieved party fails to mitigate, the party in breach will have the right to claim reduction in damages by the amount

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<sup>212</sup> See TREITEL, *supra* note 8, at 179.

<sup>213</sup> See UNIDROIT Principles, *supra* note 5, art. 7.4.8(1). Article 7.4.8(1) states: "The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps." *Id.*

<sup>214</sup> See TREITEL, *supra* note 8, at 179. See also STOLL, *supra* note 18, at 586; KNAPP, *supra* note 23, at 559-60; Sutton, *supra* note 18, at 748; RESTATEMENT (SECOND), *supra* note 10, ¶ 127; OGUS, *supra* note 12, at 322; A.G. GUEST ET AL., BENJAMIN'S SALE OF GOODS 864 (5th ed. 1997); MCGREGOR, *supra* note 134, at 168; UNIDROIT Principles, *supra* note 5, art. 7.4.8 cmts.

<sup>215</sup> See KNAPP, *supra* note 23, at 559-60. See also UNIDROIT Principles, *supra* note 5, art. 7.4.8 off. cmts.

<sup>216</sup> UNIDROIT Principles, *supra* note 5, art. 7.4.8 off. cmts.

<sup>217</sup> CISG, *supra* note 1, art. 77.

<sup>218</sup> See STOLL, *supra* note 18, at 587.

that could have been avoided.<sup>219</sup> The failure to mitigate will not affect the injured party's claim for other remedies.<sup>220</sup> The only exception is said to be the case where it was reasonable to expect the injured party to carry out certain actions, for example, in the form of avoidance of the contract or of the conclusion of a cover transaction<sup>221</sup> in order to mitigate the loss.<sup>222</sup>

Regarding the amount, by which the damages should be reduced, the following formula is to be followed:

1. The full amount of damages should be calculated. This should be done according to the rules provided for in Articles 74-76;
2. The amount of loss, which should have been avoided, should be established;
3. The second amount should be deducted from the first.<sup>223</sup>

Another issue, which needs to be considered, is the "status" of Article 77. It has been an obligation on the injured party: "[a] party . . . *must* take such measures."<sup>224</sup> But does it really represent an obligation as such?

Some sources state that the provision in Article 77 is one of several provisions of the Convention (together with Articles 85-88) that provide for a "duty owed by the *injured party to the party in breach*."<sup>225</sup> On the other hand, it has been stated that under this provision the injured party "is under an 'obligation to herself' to mitigate her loss."<sup>226</sup> It seems that both of these opinions cannot be fully accepted as correct.

First, an obligation can be defined as a legal relationship, by virtue of which one party is entitled to demand from the other party the performance of certain actions.<sup>227</sup> Based on Ar-

<sup>219</sup> See CISG, *supra* note 1, art. 77.

<sup>220</sup> See KNAPP, *supra* note 23, at 561. See also STOLL, *supra* note 18, at 587; CISG, *supra* note 1, art. 73; Secretariat Commentary on Article 73 of the 1978 Draft, Commentary on the Draft Convention Contracts for the International Sale of Goods Prepared by the Secretariat, U.N. Doc. A/CONF.97/5, available at <http://www.cisg.law.pace.edu/cisg/text/seccomm/seccomm-77.html> [hereinafter Secretariat Commentary on Article 73].

<sup>221</sup> See STOLL, *supra* note 18, at 586-87.

<sup>222</sup> See *id.*

<sup>223</sup> KNAPP, *supra* note 23, at 562.

<sup>224</sup> CISG, *supra* note 1, art. 77.

<sup>225</sup> CISG, *supra* note 1, art. 73. See also Secretariat Commentary on Article 73, *supra* note 220 (emphasis added).

<sup>226</sup> BERNSTEIN & LOOKOFSKY, *supra* note 3, at 103.

<sup>227</sup> See JOFFE, *supra* note 30, at 6.

ticle 77, the breaching party cannot demand from the injured party performance of his "duty." Therefore, the injured party does not owe such a "duty" to the party in breach.

Second, we cannot, properly speaking, refer to mitigation as "an obligation to herself." It would contradict the essence of an obligation as a legal concept<sup>228</sup> and, consequently, the party "cannot owe a duty to himself."<sup>229</sup>

Thus, we can see that even if it is possible to refer to mitigation using such terms as a "duty" or an "obligation,"<sup>230</sup> the nature of this "duty" is substantially different from other obligations under the CISG.<sup>231</sup> In fact, it does not represent a contractual obligation.<sup>232</sup> There are two principal reasons for such a conclusion.

The first reason has already been touched upon, but will be reiterated again: the "duty" under Article 77 does not represent a legal relationship between the parties, which gives one party the right to demand a certain action from the other.

Second, the breach of an *obligation* is the basis for liability under the Convention.<sup>233</sup> However, the breach of the "duty" to mitigate will not give rise to any form of liability under the CISG.<sup>234</sup> Non-compliance with Article 77 will entail the loss by the injured party of the right to claim those damages, which could have been avoided.<sup>235</sup> Therefore, the view that Article 77 can lead to the development of a general principle that would establish a duty of "loyalty to the other party to the contract,"

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<sup>228</sup> See definition of legal concept in section III(4)(a) of the article.

<sup>229</sup> MCGREGOR, *supra* note 134, at 172.

<sup>230</sup> The terminology duty and obligation has been criticized. See TREITEL, *supra* note 8, at 179. See also MCGREGOR, *supra* note 134, at 172.

<sup>231</sup> See KNAPP, *supra* note 23, at 562.

<sup>232</sup> See STOLL, *supra* note 18, at 556. See also BERNSTEIN & LOOKOFKY, *supra* note 3, at 102.

<sup>233</sup> See STOLL, *supra* note 18, at 556.

<sup>234</sup> See *id.* See also KNAPP, *supra* note 23, at 562; TREITEL, *supra* note 8 at 179; Delchi Carrier SpA, 1994 U.S. Dist. LEXIS 12820 at \*13 (for the misconstruction of this provision where article 77 was interpreted as requiring mitigation); Schneider, *supra* note 148.

<sup>235</sup> See CISG, *supra* note 1, art. 77. See also STOLL, *supra* note 18, at 586. See, e.g., (Internationale Jute Maatschappij BV v. Marin Palomares S.L.) Tribunal Supremo [Supreme Court] 454/2000, 28 Jan. 2000 (Spain), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000128s4.html> (where the seller's damages claim was reduced by the amount, which could have been avoided).

the breach of which results in damages,<sup>236</sup> is not supported in this article.<sup>237</sup>

In one respect, however, it seems that the “duty” to mitigate may represent the basis for refusal to enforce the party’s right to specific performance.<sup>238</sup> Nevertheless, even in that context, this provision should not be construed as an obligation in a legal sense. Instead, its function will be the prevention of the party exercising his right to remedy with specific performance.<sup>239</sup>

The opinion that the “duty” to mitigate is not an obligation in a legal sense is in line with the approach taken in English law. The relevant position has been formulated as follows: “A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase ‘duty to mitigate.’ He is completely free to act as he judges to be in his best interests.”<sup>240</sup>

#### (b) *Reasonable Measures*

According to Article 77, *measures* to mitigate loss must be *reasonable* in the circumstances concerned.<sup>241</sup> The type of measures that need to be undertaken depends on the criterion of *reasonableness*.<sup>242</sup> The latter, in turn, depends on and will be construed in the light of the circumstances in question.<sup>243</sup> In general, it has been said that a measure is reasonable “if under the particular circumstances, it could be expected to be taken by

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<sup>236</sup> See Schneider, *supra* note 18, at 237; ULRICH MAGNUS, GENERAL PRINCIPLES OF UN-SALES LAW 59 (3-4) RABELS ZEITSCHRIFT (Lisa Haberfellner trans. 1995), available at <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html>.

<sup>237</sup> This opinion can be supported by BERNSTEIN & LOOKOFSKY, *supra* note 3, at 103 n.147.

<sup>238</sup> See section III(4)(c) for a discussion on mitigation in case of an anticipatory breach.

<sup>239</sup> See HONNOLD, *supra* note 73, at 518.

<sup>240</sup> Sotiros Shipping Inc. v. Sameiet Solholt (The “Solholt”), 1 Lloyd’s Rep. 605 (C.A. 1983), cited in MCGREGOR, *supra* note 134, at 172; ACCORD RESTATEMENT (SECOND), *supra* note 10, ¶ 127.

<sup>241</sup> See CISG, *supra* note 1, art. 77.

<sup>242</sup> The criterion of reasonableness with respect to measures of mitigating is also used by some legal systems as well as by the UNIDROIT Principles. See GUEST, *supra* note 214, at 864-65. See also MCGREGOR, *supra* note 134, at 171; RESTATEMENT (SECOND), *supra* note 10, ¶ 350(2); UNIDROIT Principles, *supra* note 5, art. 7.4.8(1).

<sup>243</sup> See KNAPP, *supra* note 23, at 560. See also STOLL, *supra* note 18, at 588.

a person acting in good faith,"<sup>244</sup> or if it is "adequate" and preventive with respect to the loss.<sup>245</sup> In evaluating the situation, one also should consider the party's skills and position as a businessman, for example, "ingenuity, experience, and financial resources," etc.<sup>246</sup> Relevant trade usage, if any, should be taken into account as well.<sup>247</sup> The aggrieved party is not obligated to take measures that, in the circumstances concerned, are "excessive"<sup>248</sup> and entail unreasonably high expenses and risks.<sup>249</sup> An aggrieved party can refrain from such measures and still comply with Article 77.<sup>250</sup>

What types of measures are addressed in Article 77? Article 77 provides that the measures should be aimed at mitigation of "the loss, including loss of profit, resulting from the breach."<sup>251</sup> Following Article 74, this provision refers to all kinds of loss. It is understandable that, in practice, different types of loss can give rise to a great variety of situations. Consequently, the decision on *how* and *in what way* an injured party should have mitigated his loss can be made only on the basis of carefully examining all circumstances of a concrete situ-

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<sup>244</sup> STOLL, *supra* note 18, at 588. It seems that this approach to construction of reasonableness of a measure was taken by Supreme Court of Austria Oberster Gerichtshof [Supreme Court] 10 Ob 518/95, 6 Feb. 1996 (Aus.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960206a3.html>. Namely, the court stated, "[a] possible measure to reduce damages is reasonable, if it could have been expected as *bona fides* conduct from a reasonable person in the position of the claimant under the same circumstances." *Id.*

<sup>245</sup> See KNAPP, *supra* note 23, at 560.

<sup>246</sup> BERNSTEIN & LOOKOFKY, *supra* note 3, at 103.

<sup>247</sup> See STOLL, *supra* note 18, at 588. See also CISG, *supra* note 1, art. 9.

<sup>248</sup> KNAPP, *supra* note 23, at 560.

<sup>249</sup> See STOLL, *supra* note 18, at 588. This conclusion can be supported by the view taken by an Australian court. In particular, the court has stated that the obligation to mitigate did not require seller to put at risk its commercial reputation by taking technical points to avoid its obligation under its agreement to charter a vessel when the owner accepted its intimation that it would charter the vessel and become liable under terms eventually to be formalised in the unlikely event that they had not been formalised prior to seller's termination of the contract.

(Downs Investments Pty Ltd v Perwaja Steel) Supreme Court of Queensland, Civ. J. No. 10680, 17 Nov. 2000 (Austl.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/001117a2.html>.

<sup>250</sup> See KNAPP, *supra* note 23, at 560.

<sup>251</sup> CISG, *supra* note 1, art. 77. The position, in this respect, is different in English law, which refers to mitigation of *damages*, not of *loss*. See MICHAEL BRIDGE, *INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE* 105 (1999).



ation, criterion of reasonableness, and the type of loss in question. Therefore, it does not seem possible to list every single measure that is implied in this provision.

However, in order to illustrate the wide range of possible mitigating measures, some examples will be given. Mitigation can, for instance, have the form of making a substitute transaction (resale or repurchase);<sup>252</sup> avoiding a contract;<sup>253</sup> finding a sub-contractor;<sup>254</sup> *expediting* shipment of goods that have not been purchased in a cover transaction;<sup>255</sup> sub-chartering a vessel;<sup>256</sup> or contacting a party in breach and submitting the documents, proving the claim, in order to receive necessary information, which could help in mitigating the loss.<sup>257</sup>

Further, it is also worth noting that an oddity can be discovered in some cases of mitigation. The problem is that, some-

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<sup>252</sup> See, e.g., Oberlandesgericht [Provincial Court of Appeal] 17 U 146/93, 14 Jan. 1994 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940114g1.htm>. See also (Metal Concentrate) Court of Arbitration of the International Chamber of Commerce 8574 (ICC 1996), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/968574i1.html>; (Steel Bars) Court of Arbitration of the International Chamber of Commerce 6281 (ICC 1989), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980902g1.html>; Oberlandesgericht [Provincial Court of Appeal] 3 U 246/97, 2 Sept. 1998 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980902g1.html>. In international sales, this measure seems to be the "usual" form of mitigation. See STOLL, *supra* note 18, at 588. Additionally, the importance of this measure has been emphasised in the context of the loss of profit. In particular, it has been stated, "[the] requirement [to make a substitute transaction] must be considered, especially where a substitute transaction would avoid consequential losses following the non- or defective performance of the contract (e.g., claim by a buyer for loss of profit)." *Id.*

<sup>253</sup> See Oberlandesgericht [Provincial Court of Appeal] 7 U 1720/94, 8 Feb. 1995 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g1.htm> (where the court has stated, "as the [seller] never avoided the contract, it had disregarded its duty to mitigate its loss"). See also RAMBERG, *supra* note 204, at 159.

<sup>254</sup> See (Nova Tool & Mold Inc. v. London Industries Inc.) Ontario Court of Appeal, C31315, 26 Jan. 2000 (Can.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000126c1.html>.

<sup>255</sup> See Delchi Carrier SpA, 1994 U.S. Dist. LEXIS 12820 at \*13 (N.D.N.Y. 1994).

<sup>256</sup> See (Downs Investments Pty Ltd v Perwaja Steel) Supreme Court of Queensland, Civ. J. No. 10680, 17 Nov. 2000 (Austl.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/001117a2.html>.

<sup>257</sup> See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 054/1999, 24 Jan. 2000 (Russ.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000124r1.html>. See also RAMBERG, *supra* note 204, at 131. In some cases, this measure can be rather important, because "[s]ometimes it may also be possible for [one party] to inform the [other party] what he could himself do to mitigate his loss." *Id.*

times, mitigation itself can bring about certain forms of loss.<sup>258</sup> In other words, mitigation can be the source of loss. In taking certain mitigating measures, an injured party may have to incur a number of different expenses such as the costs of storage, repair costs, or brokerage costs. Is it required and is it possible to mitigate this type of loss, or, in other words, to mitigate a measure aimed at mitigation? It is argued that the wording of Article 77 is broad enough to cover this situation, and therefore requires mitigating this type of loss as well. It also is submitted that it is *not impossible* to mitigate this kind of loss. For example, suppose that the buyer informs the seller that he will not be able to accept delivery and pay for the goods. The contract has been avoided, and the seller mitigates his loss by reselling the goods. At that, in such a cover sale, the seller had to incur a certain amount of brokerage costs. If it can be proved that it was reasonable to avoid these brokerage costs, then these costs should not be included in the claim. Likewise, if it were reasonable to incur a lesser amount of brokerage costs, then the claim should be reduced. Finally, it should be said that since these damages can be caused by a diverse number of situations, the measures preventing this loss would vary accordingly.

(c) *Mitigation of Loss in Case of an Anticipatory Breach*

It has been said that “one challenging area for the prospective operation of the duty to mitigate” is its applicability with respect to an anticipatory breach.<sup>259</sup> Is there a duty to mitigate in connection with an anticipatory breach and, if so, can measures to mitigate be applied in such a case? This question requires some examination.

It has been stated that the “duty” to mitigate should apply in the case of an anticipatory breach of contract.<sup>260</sup> Generally, such a conclusion is based on the following reasoning: “The aim of Article 77 is to encourage mitigation of loss. To this end, measures directed at mitigating the loss are to be taken as soon

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<sup>258</sup> See STOLL, *supra* note 18, at 560-63. This form of loss is sometimes referred to as “incidental loss.” *Id.*

<sup>259</sup> See generally ZIEGEL, *supra* note 21, at 9-41.

<sup>260</sup> See CISG, *supra* note 1, art. 73. See also Secretariat Commentary on Article 73, *supra* note 220; KNAPP, *supra* note 23, at 566-67.

as the party to the contract could foresee the danger of breach of the contract by the other party and of his potential loss.”<sup>261</sup>

With respect to a fundamental breach, it has been said that if it is *clear* that such a breach will take place,<sup>262</sup> the party concerned “cannot await the contract date of performance before he declares the contract avoided and takes measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise.”<sup>263</sup> Further, it should be remembered that Articles 71 and 72 of the CISG govern the conduct of parties in “anticipatory breach” situations. It is important, for the purpose of this discussion, to bear in mind that the procedure in these provisions is of a *non-mandatory* character: Article 71 does not *oblige* the aggrieved party to suspend his obligations where it is apparent that the other party will not perform a “substantial” part of his obligations;<sup>264</sup> in a similar vein, under Article 72 it is not required that the aggrieved party avoid that contract when it is clear that a fundamental breach will take place.<sup>265</sup>

Some commentaries recommend that in the case of an anticipatory breach and, in particular, in the case of a fundamental breach, the procedures prescribed in Articles 71 and 72 be used.<sup>266</sup> It is further stated that if the party does not follow this procedure, i.e., does not suspend his performance and avoid the contract, and insists on the performance by the other party, there will be a risk for the party to be found not in compliance with Article 77.<sup>267</sup> Therefore, if the aggrieved party, in a situation of an anticipatory breach, wants to comply with Article 77, he should follow either the procedure in Articles 71 and 72 and, if a positive result does not follow, subsequently mitigate; or he should mitigate as soon as he could foresee the breach.<sup>268</sup>

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<sup>261</sup> KNAPP, *supra* note 23, at 566-67.

<sup>262</sup> See CISG, *supra* note 1, art. 72(1).

<sup>263</sup> Secretariat Commentary on Article 73, *supra* note 220, ¶ 4. See also KNAPP, *supra* note 23, at 567.

<sup>264</sup> See CISG, *supra* note 1, art. 71(1).

<sup>265</sup> See CISG, *supra* note 1, art. 72(1).

<sup>266</sup> See KNAPP, *supra* note 23, at 567. See also CISG, *supra* note 1, art. 73; Secretariat Commentary on Article 73, *supra* note 229, ¶ 4.

<sup>267</sup> See KNAPP, *supra* note 23, at 567.

<sup>268</sup> See *id.*

However, as mentioned above, while the duty to mitigate *may*, in certain cases, be applied to an anticipatory breach situation, there *is no* such general requirement.<sup>269</sup> If, for example, prior to the contract date, one party refuses to perform his obligations and wants to repudiate the contract, nothing in the Convention *obliges* the other party to follow Article 72, i.e., to avoid the contract or accept the repudiation. He is fully entitled to continue his performance and to demand the performance from the other party. Accordingly, there will be no need for him to mitigate if he continues to perform and expects the same from the other party.<sup>270</sup> Therefore, generally, if the performance from the party in breach does not take place at the contract date, the injured party can subsequently sue for damages, without apprehending that his claim can be reduced.

However, it is further suggested that this solution *should not always* be the case. There are categories of cases where the duty to mitigate, in a situation of an anticipatory breach, should be regarded as *necessary* in order not to suffer a sanction of reduction in damages under Article 77.

Why should there be such a necessity? In order to find an answer to this question let us first consider whether analogous situations arose in some legal systems. It seems that English law can be particularly helpful in this respect.

A general rule is that when one party repudiates the contract prior to the performance date, the other party has an option. He can refuse to accept the repudiation and treat the contract as subsisting. In this case, the contract continues to exist and no need to mitigate arises. Alternatively, he can accept the repudiation and treat the contract as at an end. In this case, he has the right to sue the breaching party at once. This right will then be subject to the mitigation rule.<sup>271</sup>

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<sup>269</sup> The term "requirement" should not be considered in the light of the status of the duty to mitigate, discussed in section III(4)(a) of this article. It refers to the sanction, which will follow in case of non-performance of the duty to mitigate. In other words, we are not concerned whether the party is obliged to mitigate in case of an anticipatory breach - this issue has been already examined. Our concern is only whether the amount claimed should be reduced if mitigation has not taken place.

<sup>270</sup> Compare examples and solutions in HONNOLD, *supra* note 73, at 516-17. See also Secretariat Commentary on Article 73, *supra* note 220; KNAPP, *supra* note 23, at 562-63.

<sup>271</sup> See MCGREGOR, *supra* note 134, at 174.

However, despite this rule being a well-established one, it is subject to two exceptions: (1) where it simply could not work; and (2) where it would lead to “wholly unreasonable” results.

The first category includes cases where performance of the obligations is based on the cooperation between the parties. Where performance of the obligations by the innocent party depends on that of the party in breach, it may turn out that the former will not be able to carry out his part of the obligations without the latter’s cooperation.<sup>272</sup> “In most cases by refusing co-operation the party in breach can compel the innocent party to restrict his claim to damages.”<sup>273</sup> Therefore, where it is established that performance was not possible without the cooperation of the parties, the innocent party can be found as having been bound to accept repudiation.<sup>274</sup> In this case, his right to damages will be subject to the “duty” to mitigate.

The second category includes situations in which the absence of the “legitimate interest” of the innocent party has been proved.

[I]f it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it.<sup>275</sup>

An example, given in *White and Carter (Councils) Ltd. v. McGregor*, will help illustrate the concept. A company had concluded the contract with an expert. Under the contract, the expert undertook to go abroad in order to compile a report. Shortly after the conclusion of the contract and before anything was done, the company repudiated the contract. The expert still intended to carry out his part of the obligations. It has

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<sup>272</sup> The concept of cooperation is not restricted only to active cooperation. It implies “passive” co-operation as well. This rule was developed in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.*, 1 Ch. 233, 253-54 (1971).

<sup>273</sup> *White and Carter (Councils) Ltd. v. McGregor*, 2 A.C. 428 (H.L. 1961).

<sup>274</sup> See *Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei G.M.B.H.*, 1 Lloyd’s Rep. 205, 256 (C.A. 1975).

<sup>275</sup> *White and Carter (Councils) Ltd. v. McGregor*, 2 A.C. 428, 431 (H.L. 1961).

been said that “[t]o allow such an expert then to waste thousands of pounds in preparing the report cannot be right if a much smaller sum of damages would give him full compensation for his loss.”<sup>276</sup>

What are the criteria of determining the legitimate interest? At present, no distinct criteria have been developed in English law. Nevertheless, certain rules, in this respect, have been established.

First, from the above-mentioned example, it may seem that reasonableness is the criterion. Certainly, reasonableness is a very important factor. However, proof that the innocent party has acted *unreasonably* will not suffice to prove the absence of a legitimate interest.<sup>277</sup> In order to determine the presence or absence of a legitimate interest, it will be necessary to distinguish between “merely unreasonable” and “wholly unreasonable” actions.<sup>278</sup>

Second, a legitimate interest will not be established by reference only to the interests of the innocent party. The innocent party must take into consideration the interests of the breaching party as well.<sup>279</sup> Presumably, this rule represents a further development of the primary statement of the basic rule in *White and Carter (Councils) Ltd. v. McGregor*, which provided that the breaching party should not be “saddled . . . with an additional burden.”<sup>280</sup>

Third, the legitimate interest should be established on the condition that damages are an adequate remedy.<sup>281</sup>

Since the concept of a legitimate interest is rather abstract, the rules governing its determination may seem to be “vague.” It has been correctly pointed out that an absolute certainty can never be attained.<sup>282</sup> Nonetheless, these rules will represent

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<sup>276</sup> *Id* at 428-29.

<sup>277</sup> See *Clea Shipping Corporation v. Bulk Oil International Ltd.*, 1 All E.R. 129 (Q.B. 1983).

<sup>278</sup> See *id* at 651.

<sup>279</sup> See *Stocznia Gdanska S.A. v. Latvian Shipping Co., Latreefers Inc. and Others*, 2 Lloyd’s Rep. 132, 138-39 (C.A. 1996).

<sup>280</sup> *White and Carter (Councils) Ltd. v. McGregor* 2 A.C. 428, 431 (H.L. 1961).

<sup>281</sup> See *Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei G.M.B.H.*, 1 Lloyd’s Rep. 250, 255 (C.A. 1975).

<sup>282</sup> See *generally* *Clea Shipping Corporation v. Bulk Oil International Ltd.*, 1 All E.R. 129 (1983).

the basis for determining the presence or absence of a legitimate interest in the context of the circumstances of a concrete case.

Are the situations involving the elements of cooperation and legitimate interest likely to arise in international sales? Should such situations be treated as “exceptions” to the general position under Article 72? The answer to these questions should be “yes.”

Let us start with the cooperation element. Suppose, it is “clear” that a fundamental breach will occur.<sup>283</sup> The innocent party, however, thinks that he is perfectly entitled to the performance and does not avoid the contract. The contract, of course, remains in existence. The innocent party needs to continue to perform because he does not want to be in breach himself. The problem, however, is that he cannot perform unless the breaching party cooperates. In other words, the performance of the innocent party’s obligations is pre-determined by that of the breaching party. For example, in an Ex-works contract, the buyer has an obligation to take delivery of the goods when they are placed at his disposal.<sup>284</sup> However, the buyer will not be able to take delivery if the seller does not carry out his delivery obligation, the goods available to the buyer. In an FOB contract, the seller will not be able to make a delivery if the buyer fails to nominate a ship. The seller will not be able to manufacture the goods for the buyer if the latter does not perform his obligation to supply the seller with the necessary materials. In these types of situations, the innocent party may be compelled to treat the contract as avoided. If the innocent party is compelled to avoid the contract, he will be subject to a “duty” to mitigate, as provide by Article 77.

The question arises: Can the innocent party require specific performance in such cases?<sup>285</sup> Here, it is necessary to draw a line between those obligations that are already due and those that are not. For example, in the FOB contract, the refusal to pay and accept a delivery before the due date can be regarded as an indication of an anticipatory breach. But in the context of

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<sup>283</sup> See CISG, *supra* note 1, art. 72.

<sup>284</sup> See JAN RAMBERG, ICC GUIDE TO INCOTERMS 2000: UNDERSTANDING AND PRACTICAL USE Section EXW, B4 (1999).

<sup>285</sup> See CISG, *supra* note 1, arts. 46, 62.

cooperation, the innocent party will need the enforcement only of those obligations that are necessary to perform his part of the contract. Therefore, in order for the FOB seller to make a delivery, he will need the enforcement of the buyer's obligation to nominate a ship. If the seller wants to go on with the contract, the buyer's refusal to perform future obligations (to pay and to take a delivery) *will not affect* the seller's ability to deliver the goods. Accordingly, at this stage the seller does not need to be concerned about the enforcement of the future obligations. The seller will need to be concerned with it when he succeeds in enforcing his obligation, completes his part of the contract, expects the buyer's final performance of payment, and accepts delivery. When the seller seeks to enforce the buyer's obligation to nominate a ship, he will be dealing with an *actual* but not an *anticipatory* breach. This is so because this obligation precedes the seller's delivery date. Accordingly, the innocent party will be entitled to specific performance with respect to this obligation.

However, this remedy may not always be available. Article 28 provides that "a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention."<sup>286</sup> If the innocent party is not successful in enforcing this remedy, then he will have no choice but to treat the contract as avoided and certainly will be under a duty to mitigate his loss.<sup>287</sup>

Will the innocent party's right to specific performance be affected because of the breaching party's inability to perform? Generally, the answer should be "no." In a legal sense, this right will remain unaffected.<sup>288</sup> He will lose that right only if the inability is based on the conditions set out in Article 79.<sup>289</sup> How-

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<sup>286</sup> CISG, *supra* note 1, art. 28. The problem regarding entering judgments for specific performance is more likely to arise in common law courts, which are more reluctant to grant this remedy than the civil law courts.

<sup>287</sup> See GUNTER HAGER, COMMENTARY ON THE U.N. CONVENTION IN THE INTERNATIONAL SALE OF GOODS (CISG) 485 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998).

<sup>288</sup> See ULRICH HUBER, COMMENTARY ON THE U.N. CONVENTION IN THE INTERNATIONAL SALE OF GOODS (CISG) 380-81 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998).

<sup>289</sup> See *id.*



ever, it seems that in practice it will be difficult to force a party to perform when he objectively cannot do so.

Thus, in international sales, the cooperation element sometimes may compel the innocent party to avoid the contract and to be subject to the “duty” to mitigate. However, the innocent party normally will be entitled to specific performance. This remedy presumably will be targeted at the *actual* breach. But, we should still regard the cooperation element in the light of an anticipatory breach because the actual breach is the result of a general anticipatory breach. The performance of the obligation that was actually breached occurs earlier than the performance of the obligations that form the basis of the anticipatory breach. Further, Article 28 may limit the innocent party’s right to specific performance. And even in some situations, where the party still has a right to specific performance, it may be impossible to enforce it due to the breaching party’s objective inability to perform.

The second exception to the right, provided in Article 72, should be proof of the absence of a legitimate interest. It has already been shown that it is virtually impossible to give a clear definition to this concept. The best way to illustrate this concept is to consider it in the light of a hypothetical.

*Hypothetical A:*<sup>290</sup> On June 1, Buyer A and Seller B made a contract for B to produce and deliver to A 10,000 sheets of steel on August 1 at \$50 per sheet. A needed the steel for use in manufacturing. On July 1, B notified A that production difficulties in B’s steel mill would prevent delivery of the steel by August 1. B also stated that the production difficulties might persist for an unknown period after August 1 and urged A to obtain the steel elsewhere. Comparable steel was available in A’s area. The price at all times remained at \$50. For unexplained reasons, A did not seek or obtain the steel elsewhere. As a consequence, A’s production facilities were shut down for the month of August. A sued B for damages based on shutdown losses of \$10,000 per day, or \$300,000. Seller B argued that, under Article 77, A failed to “take such measures as are reasonable in the circumstances to mitigate the loss” so that there should be a corresponding reduction in the damages.

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<sup>290</sup> This example was taken from HONNOLD, *supra* note 73, at 517.

It seems that, in this example, A's damages claim should be reduced by the amount that could have been avoided. This conclusion is based on the absolute absence of any interest A could have in this particular transaction. What did A's treatment of the existing contract lead to? Can we trace realization or manifestation of any form of interest, and economic interest, in the first place? If A had bought the steel, and he had every opportunity to do so, he most likely would have prevented part of his loss (loss of profit, for example). B, in turn, would have given him an *adequate* compensation for the loss,<sup>291</sup> which had been caused by the breach and could not have been avoided. The closest that we can get in formulating a general criterion for determining the legitimate interest is to say that A's conduct, in these circumstances, was "wholly unreasonable."

It has been said that, in this situation, A's right to specific performance is irrelevant.<sup>292</sup> The reason is that a court would not be able "to overcome its production facilities."<sup>293</sup> In this case, we, once again, see the party's inability to perform as well as the court's inability to enforce specific performance in spite of the existence of the right to this remedy. However, it is argued that the proof of the absence of the legitimate interest should prevent the innocent party from exercising his right to specific performance.

*Hypothetical B:*<sup>294</sup> B undertook to manufacture certain goods for A. The goods are to be produced according to A's particular specifications. It is not possible to find any market for these goods, since the goods are suitable only for a very specific use. Before B starts production, A makes it clear that he no longer has an interest in the goods and urges B not to produce them. Should B, nevertheless, start the production, exercise his right to specific performance, and force A to accept the goods and pay for them?<sup>295</sup>

It seems that B should not be allowed to do so. Knowing that damages can provide adequate compensation, B does not

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<sup>291</sup> This rule was established in *Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei G.M.B.H.*, 1 Lloyd's Rep. 250 (C.A. 1975).

<sup>292</sup> See HONNOLD, *supra* note 73, at 518.

<sup>293</sup> *Id.*

<sup>294</sup> RAMBERG, *supra* note 204 at 120.

<sup>295</sup> See CISG, *supra* note 1, art. 62.

have any legitimate interest in manufacturing the goods, which will be of no use whatsoever. In this case, it is particularly important that *the innocent party bears in mind the interests of the breaching party*.<sup>296</sup> The court, in turn, should not grant specific performance. The exercise of this remedy will impose a *substantial burden on A without any benefit to B*.<sup>297</sup> The correct solution should be B's avoidance of the contract and receiving an adequate compensation in the form of damages.

How can we reconcile this approach with the legal right to specific performance established by the CISG? It seems that the only "counterbalance" to this right is a "duty" to mitigate. It has been correctly pointed out that "the different theoretical approaches may fade away when transformed into practical realities."<sup>298</sup>

Thus, we have seen that in some situations, keeping the contract alive may be "wholly unreasonable and untenable."<sup>299</sup> In such situations, the innocent party will not, as a rule, have any legitimate interest in further performance of the contract. Although the concept was developed in English law, it potentially embodies the practical situations; this can arise in international sales. Moreover, the rules established in English law for determining the presence or absence of legitimate interest can serve as extremely useful guidelines in practice. Finally, the right to specific performance, which the innocent party can try to exercise, should be restricted.

(d) *Mitigation in a "Lost Volume" Situation*

This article has suggested that a "lost volume" situation should be governed by the CISG. A "lost volume" seller should be allowed to recover damages flowing from this type of loss, provided that a number of requirements, suggested by this work,<sup>300</sup> and standards for limiting damages have been met. However, the peculiar nature of a "lost volume" situation makes

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<sup>296</sup> This rule was established in *Stocznia Gdanska S.A. v. Latvian Shipping Co.*, 2 Lloyd's Rep. 132 (C.A. 1996).

<sup>297</sup> See generally *White and Carter (Councils) Ltd. v. McGregor*, 2 AC 428 (H.L. 1961).

<sup>298</sup> RAMBERG, *supra* note 204, at 120.

<sup>299</sup> *Gator Shipping Corporation v. Trans-Asiatic Oil Ltd. S.A. and Occidental Shipping Establishment*, 2 Lloyd's Rep. 357, 375 (1978) (opinion of Justice Kerr).

<sup>300</sup> See section III(4)(d) of this article for a discussion on this topic.

it impossible for one such standard to be carried out. Specifically, the mitigation rule is not possible in such circumstances.

It has been stated that, depending on the circumstances, mitigation measures can have different forms.<sup>301</sup> However, when a seller suffers loss of volume, his mitigation measure (if it were possible to mitigate) generally should have the form of finding a substitute buyer and reselling the goods under the original contract. Where a seller makes such a resale, thinking that he thereby performs his "duty" to mitigate, he does not, in fact, avoid his loss. He will not minimize the lost profits that are the result of the breach of the first transaction by making a second transaction because the second transaction would have been made even if there had been no breach. Let us illustrate this point.

A agreed to buy a bicycle from B for \$100. This deal would give B a profit of \$10. A breaches the contract by refusing to take delivery of the bicycle and pay for it. B resells the bicycle to C, to whom he would have sold an identical bicycle in any event, even if A had not breached. Therefore, the sale to C will not affect B's actual damages. B should be entitled to claim \$10 as his lost profit.

An analogous situation has arisen in a case decided by Oberster Gerichtshof 28 April 2000.<sup>302</sup> The court found that, after the buyer breached the contract by having refused to pay for the jewelry, the seller did not perform a substitute transaction. The buyer contended that the seller failed to mitigate his loss, as required under Article 77 of the CISG. The court held that this argument was ineffective

as far as the promisee, in performing the substitute transaction, would have lost another similar transaction bringing the same profit as the first transaction . . . [Buyer's] (completely unsubstantiated) objection that [seller] failed to mitigate damages is therefore irrelevant, because the Court of First Instance found that a miscellaneous resale of the goods intended for the [buyer] would have materialized independently of the [buyer's] order.<sup>303</sup>

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<sup>301</sup> See section III(4)(b) of this article for a discussion on this topic.

<sup>302</sup> The facts of the case have been briefly stated in section II(2)(c) of this article.

<sup>303</sup> Oberster Gerichtshof [Supreme Court] 2 Ob 100/00w, 28 Apr. 2000 (Aus.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000428a3.html>.

Thus, it can generally be concluded that a “lost-volume” seller cannot mitigate his damages. Can this conclusion be reconciled with the provision, stipulated in Article 77? It seems that Article 77 does not preclude us from making such a conclusion. It provides that mitigation measures should be such “as are reasonable in circumstances.” Measures that are known to lead to no mitigation whatsoever can hardly be considered to be “reasonable.”<sup>304</sup>

However, it can be argued that circumstances of a particular case reveal methods of mitigation. Imagine, in the above-mentioned case,<sup>305</sup> although there was no possibility to mitigate by reselling that piece of jewelry itself because there was no demand *whatsoever* for that particular design, it is possible to avoid whole or part of the loss in a different way. For example, the seller has divided the jewelry into pieces and sold the precious stones from the jewelry. For our purposes, let’s assume that these measures were “reasonable” in the meaning of Article 77 (although it is likely that in many cases such measures would be considered to be “unreasonable” or “excessive”). It seems possible to prove that these measures were mitigation. How does this situation correlate with our conclusion that it is impossible to mitigate in a lost volume case? The answer is that at the moment the seller manages to find a “reasonable” way to mitigate, he cannot be regarded as a lost volume seller, even though, at the first glance, the situation seemed to be a lost volume situation. First, the central point of the lost volume doctrine is that the seller *cannot realize the expected volume*. In our example, it may be said that, strictly speaking, the seller lost volume of sales of the jewelry itself. However, in essence, he did not lose volume because, in one form or another, he managed to resell “the unit.” Second, one of the requirements that a seller must meet in order to qualify as a lost volume seller is that the first and second transactions must be “wholly independent events,”<sup>306</sup> i.e., there should not be any causal connection between these two transactions.<sup>307</sup> In the example above, the

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<sup>304</sup> For the discussion of the standard of “reasonableness,” see section II(4)(b) of this article.

<sup>305</sup> Oberster Gerichtshof [Supreme Court] 2 Ob 100/00w, 28 Apr. 2000 (Aus.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000428a3.html>.

<sup>306</sup> See the discussion in section II(2)(c) of this article.

<sup>307</sup> See Holisky, *supra* note 81, at n.110.

seller would not have broken up the jewelry and sold it in pieces had there been no breach. Therefore, this cannot be a lost volume situation.

### 5. *Certainty*

Most legal systems have a requirement as to certainty of damages claimed.<sup>308</sup> An analogous requirement can be found in the UNIDROIT Principles.<sup>309</sup> This part of the article will examine the position of the CISG in relation to this issue.

The CISG does not contain any express reference to certainty.<sup>310</sup> However, this article suggests that this limitation still can be applied to the cases regulated by the CISG.<sup>311</sup> Several ways of how this rule can be applied will be discussed. First, it can be applied through the procedural law of the forum.<sup>312</sup> It has been said that the “[p]roblems of proof and certainty of loss are procedural matters which remain within the province of national law, and procedural conceptions may still serve as covert limitations on CISG consequential awards.”<sup>313</sup> It follows from this statement that the procedural issues are beyond the scope of the CISG.<sup>314</sup> Therefore, if, for example, procedural law of country A contains a requirement as to the proof of certainty, the court may consider it mandatory to apply this requirement to a dispute governed by the CISG. In this case, such a decision will reflect the court’s opinion that procedural rules are not regulated by the Convention. For example, in case No 304/1993 (decision dated 3 March 1995) considered by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, the plaintiff was denied compensation of “moral harm” because, among

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<sup>308</sup> See TREITEL, *supra* note 8, at 192. See also MCGREGOR, *supra* note 134, at 214-30 (discussing the position in English law).

<sup>309</sup> UNIDROIT Principles, *supra* note 5, art. 7.4.3(1). In particular, Article 7.4.3(1) provides that “[c]ompensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.” *Id.*

<sup>310</sup> See UNIDROIT Principles, *supra* note 5, art. 7.4.3(1). See also Schneider, *supra* note 18, at 229-30; Schneider, *supra* note 148.

<sup>311</sup> See generally Schneider, *supra* note 148.

<sup>312</sup> See generally *id.*

<sup>313</sup> *Id.* See BERNSTEIN & LOOKOFSKY, *supra* note 3, at 101.

<sup>314</sup> See generally Schneider, *supra* note 148. “Certainly, matters that are clearly procedural will not be subject to the CISG or any other rules besides those of the forum.” *Id.*

other things, the amount of the claim was not substantiated.<sup>315</sup> Presumably, the certainty standard within the framework of this arbitration institution is based on the requirement that every party must prove the circumstances to which it refers as the basis of its claims and defenses.<sup>316</sup> Therefore, the requirement of proving the amount of "loss" has been, to some extent, imposed. The basis for the requirement was the procedural requirement in the respective rules. It seems that the decision implied that the procedural rule was beyond the scope of the CISG.

Second, the view can be taken that certainty is a matter governed but not expressly settled in the Convention. Certainty can be treated either as a procedural issue, "indirectly" governed by the CISG,<sup>317</sup> or merely as a substantive rule, governed but not expressly settled in the Convention. In this case, recourse must be first had to one of the general principles on which the Convention is based. The issue of whether the Convention contains a general principle in relation to certainty of damages is arguable and may require further elaboration. If no relevant general principle is found, the matter must be settled in accordance with the applicable rules of Private International Law (PIL). However, it is important to note that, if certainty of damages is treated as a procedural matter, recourse to rules of PIL may turn out to be irrelevant because rules of PIL point at the *substantive*, rather than the procedural part of the legal system in question.<sup>318</sup> In such a situation, the only reasonable way to proceed is to apply the procedural rules of the forum containing the provisions on certainty.<sup>319</sup>

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<sup>315</sup> See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 304/1993, 3 Mar. 1995 (Russ.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/9590303r1.html>. See also ROZENBERG, *supra* note 98, at 73.

<sup>316</sup> See ROZENBERG, *supra* note 98, at 70 (referring to the Rules of the Arbitration that are in question).

<sup>317</sup> See ROLF HERBERT, COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 46-7 (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998) (where the commentator states that "the CISG occasionally governs procedural rules indirectly"). *Id.*

<sup>318</sup> See VIKTOR P. ZVEKOV, MEZHUDNARODNOYE CHASTNOYE PRAVO [INTERNATIONAL PRIVATE LAW] 22, 116 (1999).

<sup>319</sup> See *id.* The concept of applicability of certainty, where it is considered a procedural rule, is beyond the scope of the CISG.

Third, the issue of certainty of damages is directly related to the problem of proof.<sup>320</sup> In practice, the proof of the precise amount of damages may not always be possible. Therefore, the extent of compensation can be determined on the basis of a mere discretion of a judge or an arbitrator. Such a solution to the problem of certainty can be found in a relevant provision of an applicable law.<sup>321</sup> This result may follow from either of the two approaches discussed above, i.e., where the issue of certainty is regarded as being either outside the scope of the CISG or “governed but not expressly settled,” in it, as well as from an application of the UNIDROIT Principles.<sup>322</sup> However, an analogous result also may follow where there were no grounds for such discretion. It seems that this approach has been taken in the ICC Arbitration Award 8611/HV/JK of 1997.<sup>323</sup> Namely, it has been stated that because of “the arbitrator’s lack of reliable documents concerning the number of the machines for which [buyer’s] customers did not pay because of non-delivery of replacement parts, *the arbitrator must judge the damages according to his own conviction having taken into consideration the circumstances.*”<sup>324</sup>

Fourth, one author argues that regulating the issue of certainty can be carried out on the basis of the UNIDROIT Principles.<sup>325</sup> Since one of the purposes of the Principles is to interpret or supplement international uniform law instruments,<sup>326</sup> such as the CISG, they can be used to supplement those provisions, which are within the Convention’s scope but not expressly settled in it.<sup>327</sup> That author suggests that the

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<sup>320</sup> See BRAGINSKIY & VITRYANSKIY, *supra* note 30, at 531.

<sup>321</sup> See TREITEL, *supra* note 8, at 174-77 (giving a number of examples in which different legal systems confer this right of judicial discretion). *See id.*

<sup>322</sup> This point will be further elucidated in the next section of this paper.

<sup>323</sup> See (Industrial Equipment) Court of Arbitration of the International Chamber of Commerce 8611/HV/JK (ICC 1997), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/978611i1.html>.

<sup>324</sup> Court of Arbitration of the International Chamber of Commerce 8611/HV/JK (ICC 1997), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/978611i1.html> (emphasis added). *See also* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 406-07 (PACE INT’L L. REV. ed., 1998).

<sup>325</sup> See Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1188 (1995).

<sup>326</sup> See UNIDROIT Principles, *supra* note 5, pbml.

<sup>327</sup> See Garro, *supra* note, 325 at 1155-57.



UNIDROIT Principles be regarded as “a component part of the ‘general principles’ underlying the CISG.”<sup>328</sup> Thus, considering the issue of certainty as falling within the Convention’s scope, the commentator states that the “UNIDROIT Principles [A]rticle 7.4.3 complements [Article 74] of the CISG . . . by emphasizing that the existence and extent of the harm to be compensated must be established with a *reasonable degree* of certainty.”<sup>329</sup> If this degree of certainty cannot be achieved, the court will have the discretion to assess damages.<sup>330</sup> It is submitted that this treatment of certainty represents a workable solution, which is conducive to maintaining the Convention’s international character and contributing to uniformity in its application. However, one still can argue whether this issue is governed by the Convention and whether the UNIDROIT Principles can be regarded as part of the general principles underlying the Convention.

In order to develop this discussion further let us analyze other cases decided in different jurisdictions.

In the *Delchi* case, the court found that damages for loss of profit must be proved with reasonable certainty.<sup>331</sup> This finding was based on certainty as it has been established in common law.<sup>332</sup> However, in the present context, it can be said that this decision was flawed in two respects. First, there was no basis for the decision to apply a common law standard.<sup>333</sup> Second, since certainty had been considered to be a procedural rule, its application should not have exceeded the procedural limits.<sup>334</sup> Namely, the following has been said:

There is a distinction between a court determining that evidence is unreliable or uncertain and a court not allowing any evidence of

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<sup>328</sup> See *id.* at 1156.

<sup>329</sup> See *id.* at 1188.

<sup>330</sup> UNIDROIT Principles, *supra* note 5, art. 7.4.3(3).

<sup>331</sup> See generally *Delchi Carrier, S.p.A.*, 1994 U.S. Dist. LEXIS 12820 (N.D.N.Y. 1994); Schneider, *supra* note 148; Joanne M. Darkey, *A U.S. Court's Interpretation of Damage Provisions under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step towards an International Jurisprudence of CISG or a Missed Opportunity?* 15 J.L. & Com. 139, 145 (1995), available at <http://www.cisg.law.pace.edu/cisg/biblio/darkey2.html>.

<sup>332</sup> See generally Schneider, *supra* note 148.

<sup>333</sup> See *id.*

<sup>334</sup> See *id.*

a type of loss because the law of the jurisdiction refuses to allow damages for that type of loss as a matter of law.<sup>335</sup>

Thus, the certainty rule, even if it is applied to a CISG case, should not prevent the injured party from claiming the loss that otherwise can be claimed legally under the Convention. Even though that is the way it would be applied under that particular legal system, the court does not have the right to restrict the Convention's legal regime and the legitimate rights established by the CISG. Moreover, the "international character" of the Convention as well as the need to promote uniformity in its application<sup>336</sup> should prevent the courts from applying this standard in such a way.

A case decided by the German Supreme Court on the basis of the ULIS<sup>337</sup> does not make clear whether, in determining the amount of damages, the court was guided by national law or by the principles of ULIS.<sup>338</sup> Similarly, it is unclear what standards of certainty some other German courts applied. In one case, one of the grounds for rejecting the buyer's claim for damages was that the buyer "failed to substantiate her purported damages in detail."<sup>339</sup> In another case, the court stated that under Article 74 of the CISG, the buyer had to "exactly calculate her damage."<sup>340</sup>

Thus, the standard of certainty *can be* and *is* sometimes imposed on the parties in the CISG cases, even though the Convention does not directly provide for it. This work has suggested several ways in which the requirement of certainty could be applied. The analysis of several cases has revealed different approaches to, and the lack of clarity in, the treatment of this issue. The question of what is a correct approach remains open.

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<sup>335</sup> *Id.*

<sup>336</sup> See CISG, *supra* note 1, art. 7(1).

<sup>337</sup> See Bundesgerichtshof [Supreme Court] 24 Oct. 1980, *cited in* Schneider, *supra* note 148, at fn. 159, available at <http://www.cisg.law.pace.edu/cisg/wais/db/articles/schnedr2.html>. See generally Schneider, *supra* note 148.

<sup>338</sup> See *id.*

<sup>339</sup> Hanseatisches Oberlandesgericht [Appellate Court] 12 U 62/97, 5 Oct. 1998 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981005g1.html>. "The figures presented by the [buyer] do not enable the Court to estimate the purported damage." *Id.*

<sup>340</sup> Oberlandesgericht [Provincial Court of Appeals Court] 3 U 246/97, 2 Sept. 1998 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980902g1.html>.

## 6. *Fault*

Under the CISG, fault is neither a basis for liability nor a requirement for availability of any remedy or determination of the extent of liability. Accordingly, the right to recover damages under the CISG is not connected to “proof or even presumption” of the party’s “culpable breach.”<sup>341</sup> This conclusion derives from the fact that the basis of liability is any kind of objective non-performance of the obligations under the contract and the CISG.<sup>342</sup> Therefore, this concept cannot produce *any legal effects* within the framework of the Convention. It has been said, however, that the liability under the CISG cannot be regarded as “absolutely strict”<sup>343</sup> because the party can be exempt from liability under Article 79.<sup>344</sup>

## 7. *Burden of Proof*

The importance of the issue of the burden of proof should not be underestimated. Although burden of proof is a procedural matter in nature, the way it is allocated between the parties can often pre-determine the outcome of a case. Certainly, this issue is of particular importance when it comes to proving the standards of limiting damages. In order to determine who will bear the burden of proving these standards, it is necessary to identify a general principle of allocating the burden of proof. The problem, however, is that the CISG does not explicitly provide for such a rule. The Convention’s silence on this problem has produced divergent opinions of legal scholars and, most importantly, divergent interpretations and applications of the CISG. Namely, some commentators believe that the issue of the burden of proof is not governed by the Convention and should be regulated by applicable domestic law.<sup>345</sup> Several cases have reflected this view. In one case, a Swiss court held that the CISG did not contain rules on burden of proof and de-

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<sup>341</sup> BERNSTEIN & LOOKOFKY, *supra* note 3, at 97, 118.

<sup>342</sup> See CISG, *supra* note 1, arts. 45(1) and 61(1). See also BERNSTEIN & LOOKOFKY, *supra* note 3, at 97, 118.

<sup>343</sup> BERNSTEIN & LOOKOFKY, *supra* note 3, at 97.

<sup>344</sup> See BERNSTEIN & LOOKOFKY, *supra* note 3, at 97. See also CISG, *supra* note 1, art. 79.

<sup>345</sup> See generally Franco Ferrari, *Burden of Proof under the Convention on Contracts for the International Sale of Goods (CISG)*, 5 INT’L BUS. L. J. 665 (2000), available at <http://www.cisg.law.pace.edu/biblio/alpha05.html>.

cided to rely on the rules of Private International Law of the forum.<sup>346</sup> In the ICC Arbitral Award No. 6653, the Tribunal was also of the opinion that the issue of the burden of proof was not governed by the CISG.<sup>347</sup>

One case has revealed another view. Namely, the arbitral tribunal regulated the issue of burden of proof on the basis of general principles of law.<sup>348</sup> A discussion of this approach ultimately can lead to a long debate on the status of the concept of *lex mercatoria* in regulation of international commercial transactions.<sup>349</sup> Here, it will be stated only that this approach to regulation of burden of proof is lacking support.<sup>350</sup>

It is argued that the CISG governs the issue of the burden of proof.<sup>351</sup> As has been pointed out by many commentators, Article 79 contains a rule that specifically allocates the burden of proof.<sup>352</sup> Accordingly, it cannot be asserted that the CISG

<sup>346</sup> See *Bezirksgericht der Saane (Zivilgericht)* [District Court] T 171/95, 20 Feb. 1997 (Switz.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970220s1.html>.

<sup>347</sup> See *(Thyseen v. Maaden)* Cour d'appel [Appeal Court] 6 Apr. 1995 (Fr.), <http://www.cisg/law.pace.edu/cisg/wais/db/cases2/95040gf1.html>, cited in Ferrari, *supra* note 345.

<sup>348</sup> *(Crude Metal)* Court of Arbitration of the International Chamber of Commerce 7645 (ICC 1995), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/957645i1.html>.

<sup>349</sup> See LIBER AMERICUM FOR THE RT. HON. LORD WILBERFORCE, 3-4 at 109 (Maarten Bos & Ian Brownlie eds., 1982) (where Mustill, L.J. has compiled the list of all possible sources of *lex mercatoria*. General principles of law represented one of those sources.).

<sup>350</sup> Although it is not entirely clear from the excerpt of the decision whether the Tribunal applied general principles of law in virtue of its being a part of Austrian law, which was applicable, or of its being part of "international *lex mercatoria*," the present author is inclined to think that the Tribunal followed the second reasoning. In any event, this work does not support this decision because as will be seen later in this part of the work, this issue should be governed by the CISG.

<sup>351</sup> This seems to be a predominant view. See, e.g., HERBERT, *supra* note 317, at 47. See also KNAPP, *supra* note 23, at 541. See generally; MAGNUS, *supra* note 236; Ferrari, *supra* note 345; Franco Ferrari *Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000*, 1 UNIF L REV 212 (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/alpha05.html>.

<sup>352</sup> "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." CISG, *supra* note 1, art. 79(1). Magnus has pointed out several more provisions in the text of the Convention, which, in his opinion, "allow one to conclude a specific distribution of the burden of proof." MAGNUS, *supra* note 236.

does not govern this issue.<sup>353</sup> A number of cases, decided in different jurisdictions, can be referred to in support of this view. For example, several courts have clearly stated that, although the CISG does not expressly deal with the burden of proof, it governs this issue<sup>354</sup> and should be interpreted to allow the relevant principle to be found.<sup>355</sup>

Since the Convention governs this matter, the allocation of the burden of proof should be determined on the basis of a general principle underlying the Convention.<sup>356</sup> The *Tribunale di Vigevano* has identified such a principle.<sup>357</sup> The party that invokes its right to assert a claim must demonstrate the facts supporting this claim.<sup>358</sup> Based upon this principle, the court, in essence, has formulated another principle: if a party relies on an exception, it must prove the factual prerequisites of that exception.<sup>359</sup> It is to be noted that these principles have already been formulated in scholarly writings.<sup>360</sup>

Thus, applying these principles to the issue of damages, it can be stated that if the injured party asserts non-performance by the other party and seeks damages, the injured party bears

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<sup>353</sup> See generally Ferrari, *supra* note 345.

<sup>354</sup> See Handelsgericht [Commercial Court] HG930138 U/HG93, 9 Sept. 1993 (Switz.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930909s1.html>. See also (Cocoa Beans) Cantone del Ticino, La seconda Camera civile del Tribunale d'appello [Appellate Court] 12.97.00193, 15 Jan. 1998 (Switz.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980115s1.html>, cited in Ferrari, *supra* note 345.

<sup>355</sup> See (E.K., L. vs. A. v. F.) Bundesgericht [Supreme Court] 4C.179/1998/odi, 28 Oct. 1998 (Switz.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981028s1.html>.

<sup>356</sup> See CISG, *supra* note 1, art. 7(2).

<sup>357</sup> See (Rheinland Verisicherungen v. Atlarex) Tribunale [District Court] 405, 12 July 2000 (Italy), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000712i3.html>.

<sup>358</sup> See *id.* See also Landgericht [District Court] 2/1 O 7/94, 6 July 1994 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940706g1.html>; (Dansk Blumsterexport A/s v. Frick Blumenhandel) Oberlandesgericht [Provincial Court of Appeal] 4 R 161/94, 1 July 1994 (Aus.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940701a3.html>.

<sup>359</sup> See (Rheinland Verisicherungen v. Atlarex) Tribunale [District Court] 405, 12 July 2000 (Italy), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000712i3.html>. See generally Ferrari, *supra* note 351, at 213.

<sup>360</sup> See generally MAGNUS, *supra* note 236. In addition to these two principles, the third general principle has been said to exist. That is, the facts that lie in a party's own sphere of responsibility and therefore better known to that party are to be proven by that party since it exercises control over that sphere. See *id.* See generally Ferrari, *supra* note 345.

the burden of proving the non-performance and existence of the damage.<sup>361</sup> Further, the injured party must also prove the foreseeability of loss by the other party,<sup>362</sup> the causal link between the breach and the loss<sup>363</sup> and, depending on the requirements of certainty, the actual amount of loss suffered.<sup>364</sup> As to mitigation, the rule should be as follows: the party who argues that the injured party has not taken appropriate mitigation measures bears the burden of proving this allegation.<sup>365</sup>

#### IV. CONCLUSION

The purpose of this article was to examine the methods of limiting damages under the CISG as well as to highlight issues, which need to be developed further. The first part of the article focused on the issue of interests protected and the categories of loss covered by the Convention. Special attention has been given to examining the problems of "lost volume" and "non-material" loss. Suggestions as to regulation of these types of loss under the Convention have been made. The second part of the

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<sup>361</sup> See (*Rheinland Verisicherungen v. Atlarex*) Tribunale [District Court] 405, 12 July 2000 (Italy), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000712i3.html>. See also *Handelsgericht* [Commercial Court] HG 920670, 26 Apr. 1995 (Switz.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950426s1.html>.

<sup>362</sup> See *Oberlandesgericht* [Provincial Court of Appeal] 3 U 83/98, 13 Jan. 1999 (F.R.G.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990113g1.html> (where the buyer bore the burden of proving that the seller foresaw or ought to have foreseen the buyer's loss).

<sup>363</sup> See (*Rheinland Verisicherungen v. Atlarex*) Tribunale [District Court] 405, 12 July 2000 (Italy), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000712i3.html>. See also *Handelsgericht* [Commercial Court] HG 920670, 26 Apr. 1995 (Switz.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950426s1.html>. See generally Ferrari, *supra* note 351, at 213; Ferrari, *supra* note 345.

<sup>364</sup> See (*Crude Metal*) Court of Arbitration of the International Chamber of Commerce 7645 (ICC 1995), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/957645i1.html> (where the duty to prove actual amount of loss suffered was imposed on the party claiming damages. However, it is to be borne in mind that, as mentioned above, the basis for allocation of burden of proof, used in this case, was not accepted by this work.).

<sup>365</sup> See (*Metal Concentrate*) Court of Arbitration of the International Chamber of Commerce 8574 (ICC 1996), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/968574i1.html> (where it was stated that it was the responsibility of "the party who argues that the aggrieved party has not taken appropriate steps to prevent unnecessary damage from occurring which carries the burden of proof for his allegation in this regard"). *Id.* See also *Oberster Gerichtshof* [Supreme Court] 2 Ob 100/00w, 28 Apr. 2000 (Aus.), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000428a3.html> (providing an analogous approach).

article concentrated on the methods of limiting damages. It has been shown that potential problems primarily arise in practice with respect to certain aspects of those methods, which are provided in the CISG, as well as with those that are not directly mentioned in the Convention.

The examination of the foreseeability rule did not reveal any particular difficulties. However, essential factors for evaluating foreseeability have been emphasized, and some guidelines have been given with respect to different aspects related to this rule.

As to causation, this article suggests that, in the framework of the CISG, it represents a field in which further theoretical development may be necessary. It has been shown that there is room for such an elaboration. Moreover, diverse practical situations may call for the solving of problems related to causation, although such problems are not likely to arise in international sales transactions very often.

A number of important factors connected with the mitigation principle have been considered. In general, it can be concluded that the problems with the mitigation principle are particularly acute in a situation of an anticipatory breach. In this regard, some hypothetical examples have been given and possible solutions to the problems have been suggested. Further, this article has demonstrated that the operation of the mitigation rule was impossible in the "lost volume" situation.

The certainty concept, in turn, is a principle, that has not been directly provided in the Convention as a method of limiting damages. Nevertheless, this article has shown the ways through which its application could be possible in practice. However, although its application can be justified in certain cases, it is important to bear in mind the international character of the Convention and the need to promote uniformity in its application.

Finally, the fault principle does not exist in the CISG and cannot produce any legal consequences.

In the end, the author would like to emphasize the importance of further development of these problems. Only provided that there is a "firm" theoretical basis underpinning these issues will the uniformity in application of the Convention become more realistic.