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NON-MATERIAL DAMAGES ARISING OUT OF THE BREACH OF CONTRACT AND INTERPRETATION OF ART. 74 CISG[**]

Concept of non-material damages arising out of the breach of contract is far from being harmonized, much less unified. Although different national legal solutions may largely be attributed to historical reasons, one can observe an emerging trend to objectively determine legally protected sphere of non-material interests. This in turn enables a viable positive definition of non-material damages as damages inflicted upon personality rights. Although analysis shows that non-material damages arising out of the tort are generally much more accepted than those arising out of the breach of contract, we argue in favor of equating the institute of non-material damages irrespective of the nature of underlying liability. In the second part of the paper, analysis focuses on Art. 74 CISG in order to determine whether it encompasses recoverability of non-material damages. To that extent, we evaluate a number of legal theories and arguments that are being put forward in order to expand provision's scope of application. Our analysis showed that Art. 74 CISG does not encompass

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[**] During the dinner attended by small circle of friends, at the occasion of Croatian Arbitration Days Conference in Zagreb in 2013, it never occurred to me that it would be the last time I saw prof. Knežević. When only four months later we received the news of his passing – I remember going back in my mind to the moment we said our last goodbye. We hugged and wished each other all the best for the upcoming holidays. We were all in good spirits, the kind you are in after you get to spend time with people you consider friends although you get to hang out with them only a couple of times a year. I met prof. Knežević for the first time as a young assistant, working at the Department of Private International Law. My first impressions of him never changed over the years. I learned to know him as a kind and warm person, with great sense of humor and openness that, at least in my experience, only accompanies receptive and broad-minded people. Because this is primarily how I will remember him, I deliberately make no reference to his exceptional academic and professional achievements. Although I respected him as a professor and a lawyer, I cared for him because he was an extraordinary human being. I am truly grateful for the opportunity to contribute to the collection of papers published in his memory.

non-material damages, and that its (overly) extensive interpretation may undermine the very objectives that the CISG's drafters were set to promote.

Key words: *Non-material damages. – Personality rights. – Breach of contract. – Art. 74 CISG.*

1. INTRODUCTION

The original idea behind this paper was to outline and critically asses main arguments that are being invoked in an ongoing debate of whether Article 74 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) applies to non-material damages. However, the preparatory comparative research proved to be much more challenging than originally anticipated. Different solutions and diametrically opposed legal reasoning observed on the level of various national laws indicated that the concept of non-material damages is far from being harmonized, much less unified. And although such a situation can be attributed to historical reasons and different legal traditions (the reality with which the European legislator is constantly faced with), analysis showed that it is really the inherent complexity of the institute of non-material harm that should be perceived as the biggest obstacle to any future harmonization and/or unification attempts.

The problem presents itself on four distinct but intrinsically interconnected levels. The first level relates to the object of violation, usually only generically denoted as the *non-material (non-patrimonial) right*; the second level deals with the problem of determining potential circle of addressees (natural v. legal persons); the third level takes into account whether the underlying liability is of non-contractual or contractual nature; and the fourth level extends to the issue of whether non-material harm should be remedied by means of monetary compensation.[1] The distinct manner in which non-material damages are dealt with in various national laws is invariably the direct result of the position legislators took in relation to each of these four pieces of puzzle. Consequently, one should not be surprised by the heterogeneous picture at the level of national laws, as possible combinations of these four key factors often lead to incompatible legal theories and irreconcilable solutions. Coming back to the CISG, it seems that contracts for international sale of goods lie at the crossroads of all four highlighted key issues. In addition, as the contracting parties will often be legal entities concluding the sales contract

[1] Monetary compensation is in the principal focus of the analysis. To that extent, paper does not take into account other available means of relief like, e.g. publication of an apology, publication of judgment, specific performance etc.

for (predominantly) commercial purposes, the dividing line between non-material and material harm becomes additionally blurred.

The first part of the paper deals with the non-material damages in comparative perspective, by analyzing whether a legal person can recover non-material damages (2.1.) and how the existence of an underlying contractual liability influences the possibility of such recoverability (2.2.). Drawing upon comparative analysis, the second part of the paper focuses on Art. 74 CISG and various arguments put forward in favor of its extensive interpretation. It evaluates recoverability of non-material damages by taking into account CISG's gap-filling mechanism (3.1.), relevant international unification instruments (3.2.) and situations involving damage to person's (business) reputation (3.3.). As will be shown, Art. 74 CISG does not allow for recoverability of non-material damages, and legal theories opting for its (overly) extensive interpretation run the risk of undermining the fundamental values that the CISG proclaims to uphold.

2. NON-MATERIAL DAMAGES

To define what constitutes non-material damages is an ungrateful endeavor. Even before one tries to attribute specific legal meaning to the concept itself, the problem arises at the most fundamental level of legal terminology. Out of the number of terms which are often used interchangeably (e.g. extra-patrimonial damages, non-pecuniary damages, immaterial damages, non-economic damages, intangible damages, moral damages, ideal damages, non-proprietary damages), we opted for the one which is in line with what seems to be the least controversial definition – i.e. the negative definition of non-material damages.

Along those lines, *non-material damages* are generally defined as damages which are not *material* in their nature,[2] i.e. which do not result in diminishment of person's assets. To the extent that material damages amount to either real loss (*damnum emergens*) or lost profit (*lucrum cessans*), non-material damages are perceived in terms of losses which relate to person's non-material (moral, non-pecuniary) interests. Although the traditional approach puts emphasis on subjectively perceived consequences of violation (person's suffering, pain, fear etc.), it will be shown that there is an emerging trend to objectively determine legally protected sphere of non-material interests. In turn, it seems that this trend enables a viable positive definition of non-material damages, as damages to someone's *personality rights*.

[2] For a number of definitions encountered in legal theory: Vernon V. Palmer, "General introduction", *The Recovery of Non-Pecuniary Loss in European Contract Law* (ed. Vernon V. Palmer), Cambridge University Press, Cambridge 2015, 5–6.

2.1. Non-material damage and legal persons

The concept of personality rights[3] is central for the overall development of non-material damages. Originally recognized by French jurisprudence, only to be later on fully developed by the German legal theory,[4] it enabled the broadening of the legal concept of *damage* which (until 19th century) encompassed only material damages. The idea that someone's personality can be the object of protection of private law lead to the conclusion that the rights relating to personality (e.g. right to freedom, life, name, reputation etc.) represent a special category distinct from the one relating to the patrimonial rights.

Broadly defined, personality rights can be defined as legally protected immaterial rights relating to non-physical, i.e. personal sphere of interests. Although legal status of personality rights differs depending upon the specific historical reasons and path taken by national legislators,[5] their fundamental importance for determination of non-material damages is undisputed. Just like the violation of patrimonial rights may lead to diminishment of a person's assets, violation of personality rights may lead to the diminishment of a person's immaterial i.e. ideal (for the lack of a better word) assets.

Personality rights (and consequently, non-material damages) were historically viewed as the prerogative of natural persons. This hardly comes as a surprise taking into account the influence of Roman law on 19th century European national codifications.[6] However, although originally structured around the patrimonial interests of Roman citizens, Roman law also enabled protection of their non-material inter-personal interests relating to family relations, piety, religious feelings, paternity and family life.[7] Initially building upon that tradition, only to later reinvent itself on the ideals of French revolution, personality rights developed from rights inherent to all human beings.[8] In turn, this put focus on the consequences

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[3] *Pravo osobnosti* (Croatian); *das Persönlichkeitsrecht* (German); *Les droits de la personnalité* (French); *diritti della personalità* (Italian).

[4] Marko Kalođera, *Naknada neimovinske štete – Rasprava iz komparativnog prava* [*Compensation of Non-material damages – Discussion in Comparative Law*], Tiskara "Gaj", Zagreb 1941, 18–19.

[5] For extensive overview of historical development of personality rights in Europe: Gert Brüggemeier, "Protection of personality rights in the law of delict/torts in Europe: mapping out paradigms", *Personality Rights in European Tort Law* (eds. Gert Brüggemeier, Aurelia Colombi Ciacchi, Patrick O'Callaghan), Cambridge University Press, Cambridge 2010, 5–37.

[6] *Ibid.*, 7.

[7] For extensive overview of non-material damages in Roman law: M. Kalođera, 82–110.

[8] For development of personality rights in France, *see* G. Brüggemeier, 10–17; M. Kalođera, 111–145.

typical for violation of non-material interests of natural persons. E.g., as violation of natural person's physical and psychological integrity, freedom, reputation etc. results in corresponding pain, fear, suffering, shame and various other types of discomfort – non-material damages were perceived subjectively – as compensation for consequences experienced by natural persons.

Although basic logic of such a reasoning can hardly be disputed, it seems that it is precisely this characteristic that later on proved to be the obstacle for full recognition of personality rights of legal persons. Namely, problem with legal persons arose inasmuch as they cannot experience pain, fear, discomfort, shame or any other loss in the same manner as human beings with an inherent corporal and biological integrity.[9] To that extent, legal qualification of non-material damages to a certain extent starts to echo the "chicken or the egg" causality dilemma. If a natural person's physical health is harmed – should he be compensated because physical difficulties made his life burdensome, or because physical integrity itself is legally protected personal right? Dilemma is equally (if not more) applicable in non-personal injury cases. Should non-material damages be compensated because natural person experiences psychological pain and social discomfort due to the reputational harm made by defamatory statements in the newspaper or is the reputation itself an objectively determined and legally protected personal right?

Although comparative analysis of non-material damages shows a high level of diversity in substantive laws of European countries, one can observe that the paradigm shift towards objective determination of personality right(s) is gaining acceptance on both legislative and jurisprudential level.[10] E.g., 1983 reform of Swiss Civil Code revised Art. 28 in a manner which reinforces objective protection of personality rights, by providing that any person whose *personality* (rights) are unlawfully infringed may petition the court for protection against all those causing the infringement.[11] Confirmation that legal persons also have legally protected sphere of personality rights has its normative foundation in Art. 53

[9] Subjectively perceived non-material harm proved to be inadequate even in regard to certain categories of natural persons. The most obvious example involves situations of mentally incapacitated and/or comatose patients, consciously unable to "feel" specific consequences of violation (i.e. pain, suffering and/or discomfort). Marko Baretić, "Pojam i funkcije neimovinske štete prema novom Zakonu o obveznim odnosima" [*Notion and Function of Non-material damages according to the new Civil Obligations Act*], *Zbornik Pravnog fakulteta u Zagrebu,* vol. 56, 2006, 474.

[10] For comprehensive comparative analysis of recent trends in relation to non-material damages and growing acceptance of its objectively determined concept, *Ibid*., 479–487.

[11] For non-material harm under Swiss Law: Pierre Tercier, "Appendix 2: Short Comments Concerning Non-Pecuniary Loss Under Swiss Law", *Damages for Non-Pe-*

of the Swiss Civil Code, which provides that legal entities have all the rights and duties other than those which presuppose intrinsically human attributes, such as gender, age or kinship. Even more explicit example can be found in Croatian 2005 Civil Obligations Act, which fully embraced objective concept of personality rights. Instead of the previous subjective concept (which defined non-material damages as an infliction of physical or psychological pain or fear),[12] new Art. 19 (*Personality Rights*) expressly states that every natural and legal person has a right to protection of its *personality rights*, defining them by means of an open list (right to life, physical and mental health, reputation, honor, dignity, name, privacy of personal and family life, freedom and alike). At the same time, provision reinforces the objective concept by providing that legal person has all the personal rights (particularly right to reputation and good standing, honor, name, business secret, freedom to earn etc.), except for those connected to the biological essence of a natural person.[13] In Russian Federation, Art. 151 of the 1994 Civil Code contains reference to both subjective and objective criteria by providing that if the citizen has been inflicted a moral damage (*the physical or moral sufferings*) by the actions, violating his *personal non-property rights or infringing upon other non-material values in his possession* (as well as in the other law-stipulated cases), the court may impose upon the culprit the duty to pay out the monetary compensation.[14] However, both Art. 150 (*Non-Material Values*) and Art. 152 (*Protection of the Honor, Dignity and Business Reputation*) of the Civil Code of the Russian Federation contain references to specific personal rights that enjoy legal protection (life and health, personal dignity and personal immunity, honor and good name, business reputation, immunity of private life, personal and family secret, right of a free movement, choice of the place of stay and residence, right to the name, copyright). This seems to have opened the door for the jurisprudence to start paving the way for the legal recognition of personality rights of legal persons, as can be observed from the Decree of the Plenum of the Russian Federation Supreme Court of 18 August 1992 (*On Several Issues Arising during the Judicial Review of Cases Involving the Protection of Honor and Dignity of Citizens, and also the Business Reputation of Citizens and Legal Persons*) and its Decree of 20 December 1994 (*On Several Issues Involving the Application of Legislation on Compensation of Moral Torts (Punitive Damages)*) which expressly recognized that legal persons also have

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cuniary Loss in a Comparative Perspective (ed. W. V. Horton Rogers), Springer-Verlag, Wien 2001, 301–311.

[12] Art. 155 of the old 1978 Civil Obligations Act.

[13] For extensive analysis of Croatian law, M. Baretić, 464 et seq.

[14] For translation of relevant provisions: The Civil Code of the Russian Federation, Chapter 8. The Non-Material Values and their Protection, *file:///C:/Users/Administrator/Downloads/Chapter8.html*, 22 March 2016.

a right to non-material damages.[15] In the similar manner, legal systems which operate with the broad legislative definitions of damages, seem to use it as an opportunity to extend the circle of potential addressees of non-material damages to legal persons. E.g. Art. 1382 of the French Civil Code (providing that any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it), is interpreted by courts as the drafter's wish to compensate for all kinds of losses irrespective of their nature or origin.[16] By distinguishing between affectionate and social side of moral assets, both legal theory and jurisprudence accept that legal persons can be compensated for non-material damages.[17] To that extent, French approach is best described by the following sentence: "If legal entity does not have a heart, it does have honor and respect"[18] Likewise, in Belgian law (containing no statutory definition of either material or non-material loss), it is *the theory of personality rights* which provides basis for classification of what rights (once infringed) will give rise to cases of non-personal injury.[19] Building upon this, Belgian courts recognize that legal persons can also recover non-material damage, particularly in cases involving harm to their reputation.[20] An explicit confirmation of an emerging trend can be found in Principles of European Tort Law (hereinafter: PETL).[21] In terms of defining what is to be understood as recoverable damage, Article 2:101 PETL provides that damage requires both material or immaterial harm to a *legally protected interest*. As far as the protected interest is concerned, it is stated that life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.[22] At the same time, violation of an interest

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15 Andrei V. Rakhmilovich, "The Protection of Honor, Dignity, and Business Reputation under the RF Civil Code: Problems of Judicial Enforcement", *Private and Civil Law in the Russian Federation, Essays in Honor of F. J. M. Feldbrugge* (ed. William Simons), Martinus Nijhoff Publishers, Leiden-Boston 2009, 232. Author argues that both Decrees contradict Art. 151 of the Civil Code of the Russian Federation.

16 Suzanne Galand-Carval, "Non-Pecuniary Loss Under French Law", *Damages for Non-Pecuniary Loss in a Comparative Perspective* (ed. W. V. Horton Rogers), Springer-Verlag, Wien 2001, 87.

17 *Ibid.*, 105.

18 "*Si une personne morale n'a pas de coeur, elle a un honneur et une consideration*". Henri Mazeaud, Léon Mazeaud, André Tunc, *Traité theorique et pratique de la résponsabilité civile délictuelle et contractuelle*, Vol. II, Paris 1970, 968, cited in: Petar Klarić, *Odštetno pravo* [*Law on Damages*], Narodne novine, Zagreb 2003, 327.

19 Herman Cousy, Dimitri Droshout, "Non-Pecuniary Loss Under Belgian Law", *Damages for Non-Pecuniary Loss in a Comparative Perspective* (ed. W. V. Horton Rogers), Springer-Verlag, Wien 2001, 28, 48.

20 *Ibid.*, 49.

21 European Group on Tort Law, *http://www.egtl.org/*, 16 March 2016.

22 Article 2:102 (2) PETL.

may justify compensation of non-material damage in particular where the victim has suffered personal injury or injury to human dignity, liberty, or *other personality rights*.[23] The fact that PETL's list of personality rights seems to refer only to injuries sustained by natural persons does not mean that legal entities are excluded from its scope of application. The list of what constitutes *personality right(s)* is merely an exemplary one, and relevant provisions of PETL were not drafted with the idea of either barring or excluding awards for non-material damages in cases not specifically relating to personal injuries.[24] Finally, it should also be mentioned that the European Court of Human Rights "crossed the Rubicon" when it awarded a sum of € 7.500 to a legal person (commercial company), on account of "considerable inconvenience and prolonged uncertainty"[25] caused by the violation of Art. 6 (1) of the European Convention on Human Rights, which provides that legal proceedings must be of reasonable length.[26]

As can be observed from the above comparative analysis, recognition that legal persons also have personality rights is gaining acceptance. It goes without saying that personality rights of legal and natural persons cannot be equated. However, this should be perceived as neither the factual nor legal obstacle to recoverability of non-material damages. The most obvious example is the personality right to reputation. Namely, the argument that legal person has no interest to build and/or maintain its business reputation can hardly be sustained. Namely, a defamatory article in the newspaper can lead to serious repercussions that may negatively influence the manner in which it is perceived by its surrounding. Although a natural person will not experience consequences of such violation (psychological pain or social discomfort) in the comparable manner as legal person (presumably perceiving it as a threat to successful business endeavors), there should be no doubt that the object of violation, i.e. (business) reputation, is an intangible non-material phenomena possessed by both natural and legal persons.

Once the non-material loss is determined from the perspective of violation of *personality rights* – controversy involving legal entities seems to lose its main argument. The fact that legal persons do not experience non-material loss in the same manner as natural persons becomes legally irrelevant. This is not to say that personality rights of legal persons are

[23] Article 10:301 (1) PETL.

[24] Bernhard Koch, "The Experiences in National Legal Systems and the Perspective of EU Tort Law", *Compensation of Private Losses: The Evolution of Torts in European Business Law* (ed. Reiner Schulze), Sellier, Munich 2011, 26–27.

[25] *Comingersoll SA* v. *Portugal*, ECtHR 6.4.2000, no. 35382/97.

[26] Art. 6 (1) of the European Convention on Human Rights (*Right to a fair trial*) provides in its first sentence that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

protected in the same manner and under the same premises in all national legislations. Quite to the contrary. Substantive national laws greatly differ in terms of legal requirements, extent and manner in which non-material damages will be compensated. However, it seems that an objective determination of specific non-material interests should, at least as a matter of principle, lead to an obligation to compensate non-material damages to both natural and legal persons. Similarly, non-material damages should (at least in theory) be treated equally irrespective of whether the nature of liability is non-contractual or contractual. However, comparative analysis shows that non-material damages arising out of the breach of contract are less accepted than non-contractual ones, even in legal systems embracing the objectively determined concept of personality rights.

2.2. Non-material damages and the breach of contract

To the extent one can generalize, it can be said that while the recoverability of non-material damages arising out of the tort is seldom denied, it is only seldom recognized once it arises out of the breach of contract. Detailed analysis of reasons and legal theories that lead to the present state of law in regard to contractual non-material damages far exceeds the limits of this paper. They are invariably country specific and based upon different historic route taken by each national legislator. When it comes to contractual non-material damages, national laws differ to such an extent that even basic classification of systems according to (more or less) similar characteristics seems like an impossible task. Latest comparative attempt to classify European legal systems points towards three main categories: (1) liberal regimes (France, Spain, Italy, Bulgaria, Greece and Portugal), (2) moderate regimes (Netherlands and United Kingdom), and (3) conservative regimes (Germany, Poland, Sweden and Austria).[27] Liberal regimes are typically characterized by the permissive legislative formula, allowing for broad interpretation in line with both general tort and contractual provisions. Likewise, in those system the jurisprudence played an active role by allowing recoverability of damages arising out of the breach of contract in specific contractual relations. Unlike the situation that can be observed in the so called conservative regimes (where recoverability on non-material damages is almost always denied), national laws of countries belonging to liberal regimes do not make the recoverability of contractual non-material damages dependent either upon

[27] Vernon V. Palmer, "European contractual regimes: The contemporary approaches", *The Recovery of Non-Pecuniary Loss in European Contract Law* (ed. Vernon V. Palmer), Cambridge University Press, Cambridge 2015, 95–110. Results of the comprehensive comparative study (launched at the University of Trento in 1993) was based upon an extensive questionnaire involving eleven hypotheticals. It is published as the fourteenth book in the series The Common Core of European Private Law.

the infringement of a predetermined *a priori* limited list of non-material interest and/or type of contract. To that extent, it is certainly interesting to note that one of the rare examples of "uniformity" that can be observed on a European Union level relates to travel contracts and non-material damages arising out of the so-called "wasted vacation" (a term usually used to denote distress, upset and frustration a consumer experiences due to the loss of holiday enjoyment). However, it seems that this must primarily be attributed to the transposition of European Directive 90/314/EEC on package travel, package holidays and package tours.[28] Art. 5 (1) of the Directive provides that Member States shall take the necessary steps to ensure that *the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract*. Although the Directive provides that, once implemented, such steps have to ensure that the organizer and/or retailer is/are liable *with regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract*, it does not define what harms are covered by the notion "damage". Controversy was solved by the European Court of Justice (hereinafter: ECJ), in its famous Simone Leitner case,[29] which involved a ten-year old girl who suffered salmonella poisoning during a holiday which her parents booked through the defendants. Although Austrian court awarded non-material damages for physical pain and suffering, it refused compensation caused by loss of enjoyment of the holidays. Namely, Austrian law on non-material damages did not provide for compensation in situations involving "feelings of dissatisfaction and negative impressions caused by disappointment".[30] Consequently, ECJ was called to interpret and ascertain whether Art. 5 of the Directive 90/314/EEC must be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from failure to perform or the improper performance of the obligations inherent in the provision of package travel. By recognizing that "compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers"[31], ECJ held that Directive 90/314/EEC "implicitly recognizes the existence of a right to compensation for damage other than personal injury, including non-material damage"[32]. As all national courts are required to interpret the provisions of their national laws in the light of the wording and the purpose of European directives so as to achieve the result it has in view, it is not surprising that ECJ's ruling

[28] Council Directive 90/314/EEC of 13th June 1990 on package travel, package holidays and package tours, *OJ*, 1990 L 158/59.

[29] ECJ C-168/00 *Simone Leitner* v. *TUI Deutschland GmbH & Co KG* [2002] ECR I-2631, 12 March 2002.

[30] *Ibid*., para. 10.

[31] *Ibid*., para. 22.

[32] *Ibid*., para. 23

had serious impact on national laws of the Member States, especially in (conservative) regimes which did not allow for such a compensation as they lacked an express legislative authorization.[33]

Although ECJ in its ruling never explicitly mentioned the underlying purpose of the package travel contract, Advocate General Tizanno (among other things) did notice a trend in both legislation and jurisprudence of the Member States to focus "on compensation for damage arising out of a ruined holiday, in the sense of non-material damage suffered by a tourist through not being able to derive full enjoyment, as the result of the tour operator's non-performance of the contract, *from the benefits of a trip organized for the purpose of leisure and relaxation* [emphasis added]"[34]. In other words, although the ECJ ruling is to be primarily viewed from a standpoint of consumer (i.e. tourist) protection, when it comes to the general issue of non-material damages arising out of the breach of contract – it seems to open an additional question. Namely, if non-material damages arising out of the breach of travel contracts are founded (as Advocate General effectively put it) in "the very fact that holidays have assumed a specific socio-economic role and have become so important for an individual's quality of life"[35], which "means that their full and effective enjoyment represents in itself *an asset worth protecting* [emphasis added]"[36] – it is necessary to further explore to what extent an underlying purpose of the contract itself should be deemed relevant in terms of recoverability of non-material damages. In other words, if the contract was not concluded for non-material purposes (e.g. to gratify leisure, relaxation and other immaterial interests connected with the vacation) – does that automatically mean that non-material damages cannot be recovered?

The criterion which makes the recoverability of non-material damages dependent upon the *non-material* purpose of the contract proves to be especially interesting once the focus is shifted to sales contracts. As the underlying purpose of such contracts will rarely be *non-material*, it is justified to analyze to what extent this factual setting may be regarded as an obstacle for recoverability of non-material damages. In addition, if contractual parties are entering into the underlying transaction in order to exercise their business/commercial activities (which will, presumably be the case with commercial companies), the problem seems to intensify.

[33] Vernon V. Palmer, *The Recovery of Non-Pecuniary Loss in European Contract Law* (ed. Vernon V. Palmer), Cambridge University Press, Cambridge 2015, 378, 379.

[34] Opinion of Advocate General Tizzano delivered on 20 September 2001, Case C-168/00, *Simone Leitner* v. *TUI Deutschland GmbH & Co KG*, Reference for a preliminary ruling from the Landesgericht Linz, para. 40.

[35] *Ibid.*, para. 43.

[36] *Ibid.*

Namely, if the purpose of such companies is viewed as maximization of their profit, it seems that they could never be considered as addressees of non-material damages.

Starting point in our analysis is the (above suggested) positive definition of non-material damages as damages to someone's personality rights. Fully aware that national laws do not universally accept this criterion, we rely on the fact that comparative analysis points towards an emerging trend to treat the issue of recoverability of non-material damages as a consequence of harm inflicted upon person's objectively determined sphere of non-material interest.

Once closely analyzed, the argument which relies upon non-material purpose of the contract resembles the one which was historically used to negate contractual non-material damages all together. Based on the idea that creditor's patrimonial interest is a precondition of both existence and validity of contract, damages could not be awarded for the violation of non-material interests.[37] As non-material interests of parties were considered irrelevant in terms of contractual relations, breach of contract could lead only to compensation for material harm. Although private law successfully overcame dogma that an exchange of patrimonial interests (e.g. goods for money) is an exclusive function of contract, it seems that legal theory did not keep the pace in terms of full recognition of non-material damages arising out of the breach of contract. Coming back to the argument that recoverability of non-material damages depends upon the purpose of the contract, it is as if the abandoned requirement of *contractual patrimonial interest* was being replaced with the requirement that a contract must have an underlying *non-material purpose*.

An attempt to limit recoverability of non-material damages to contracts with specific non-material purpose (presumably) has its roots in the "fear" of potential double compensation scenario. Namely, if the particular contract was concluded for non-material purposes, then compensation of non-material damages (on top of material ones) may unjustifiably put the aggrieved party in a position which is financially better than the one he would have been in had the contract been properly performed. On the other hand, if the contract was in fact concluded for non-material purpose – than the aggrieved party may also claim non-material compensation. Underlying rationale of this argument is based upon the most fundamental understanding of the contractual obligation. Parties are voluntarily entering into the binding contract. Consequently, the primary contractual relation mandates that one party acquires a right to performance while the other acquires a correlative duty to perform. If one party fails to perform, the aggrieved party acquires a right to a remedy. Its function is to provide him with the (economic, pecuniary) value of the performance to which

[37] P. Klarić, 232; M. Kalođera, 61–65.

he was originally entitled under the contract.[38] However, although such a scenario presupposes that remedial right for non-performance amounts to the aggrieved party's claim to recover material damages, it seems justified to further explore to what extent same reasoning can simply be translated to situations involving non-material harm.

First of all, to say that non-material damages can only be claimed in regard to contracts with non-material purpose would mean that the non-material (personality) rights are being treated qualitatively differently in non-contractual and contractual situations. Namely, the assumption that non-material damages arising out of tort are recoverable on account of an *objective violation of legally protected non-material personal rights* would not apply to the contractual setting, as their violation would ultimately lead to non-material damages only if the underlying purpose of the contract was at the same time non-material.

It is submitted that potential types of damages which are recognized in tort (irrespective of whether they originate from physical injury, damages to property or violation of personality rights) can equally be caused by the breach of contract. The fact that it is less likely that such injuries will in fact occur as a result of the breach of contract should not in itself be perceived as an obstacle for their equal treatment in the eyes of the law.[39] To embrace the concept of legally protected category of personality rights means that they can be *objectively* harmed as such, irrespective of whether the harm was inflicted by breach of contract and irrespective of whether the purpose of such a contract was non-material. Likewise, once the law accepts the premise that legal persons have a sphere of legally protected personality rights, then it equally has to accept that those rights can be objectively harmed, which in turn triggers the liability for non-material damages. To insist that certain categories of legal persons (e.g. commercial companies) should be denied compensation for non-material damages simply because they are entering into contracts in order to pursue commercial (i.e. non-material) purposes seems unsustainable. As already explained, to recognize that legal entities have personality rights does not mean that those rights are equated to that of natural persons. To that extent, the term "personality right" is somewhat misleading inasmuch as it seems to suggest that legal persons have a personal, i.e. "private" domain. It goes without saying that legal persons do not have conscience, cannot experience feelings or any other sensation like natural persons. They are

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[38] Peter Jaffey, "Damages and the Protection of Contractual Reliance", *Contract Damages – Domestic and International Perspectives* (eds. Djakhongir Saidov, Ralph Cunnington), Hart Publishing, Oxford 2008, 140.

[39] Vernon V. Palmer, "General introduction", *The Recovery of Non-Pecuniary Loss in European Contract Law* (ed. Vernon V. Palmer), Cambridge University Press, Cambridge 2015, 3.

first and foremost creatures of law, and as such do not have a traditionally defined private, i.e. intimate sphere. However, the fact that they will operate predominantly through their business sphere is not at odds with the concept of personality rights. Personality rights are inseparable from their bearer (either natural or legal person), and by definition do not have a determinable economic value or content. This in itself means that such a right may be objectively harmed irrespective of whether or not the breach concurrently lead to either direct or indirect material damages.

As it is closely connected with the problem of whether the breach of a (sales) contract may, as a matter of principle, result in non-material damages – it is appropriate to address an additional argument which is usually invoked against contractual non-material damages in general, i.e. the so-called "floodgate argument". It anticipates that extension of non-material damages to the field of contract law runs the inherent danger of opening the "floodgates" to a number of individual and non-verifiable claims. This in turn would open the problem of insurability of conduct that may lead to non-material liability[40] and unjustifiably raise parties' transaction costs.[41] Illustrated on an example of sales contract, argument presupposes that recoverability of non-material damages may put the aggrieved contracting party in a position to claim non-material damages every time the contract is breached. Or to picture it more graphically, every time the seller fails to perform under the contract, the buyer could claim non-material damages on account of e.g. "ruined" reputation assumingly resulting from such a breach.

To say that each breach of contract will always result in non-material damages represents an unjustified simplification of the problem. Quite to the contrary, determination whether the personality right was violated by the breach of contract will always depend upon the number of circumstance specific to the case. It is thus equally possible to imagine a situation in which a legal person does not even possess business reputation, or is even perceived in a negative manner by its surrounding and business community. In addition, as already pointed out, violation of personality right may result in an indirect material damages, i.e. loss of profit. It goes without saying that this will lead to recoverability of material damages, provided their existence can be proven. This is hardly surprising, as it is equally possible that the violation of patrimonial interests (usually resulting in material damages) leads to indirect non-material damages. A text book example is that of a damage inflicted upon pecuni-

[40] Floran Wagner-von Papp, *The Recovery of Non-Pecuniary Loss in European Contract Law* (ed. Vernon V. Palmer), Cambridge University Press, Cambridge 2015, 137.

[41] Vernon V. Palmer, "General introduction", *The Recovery of Non-Pecuniary Loss in European Contract Law* (ed. Vernon V. Palmer), Cambridge University Press, Cambridge 2015, 15.

ary (material) goods (e.g. a picture) which at the same time has an affectionate value for its owner. In the same manner, it is possible that same violation (either arising from tort or breach of contract) may simultaneously result in both material and non-material damages. Consequently, problem of potential "double compensation" must not be viewed (only) as a function of economic (i.e. financial) position of the aggrieved party. Such a criterion, although decisive in terms of recoverability of material damages, should not play the same role when it comes to non-material harm. Rather, one should focus on the evaluation of the specific consequences of violation, and try to determine whether the harm was inflicted upon non-material (and/or material) interests of the aggrieved party. In addition, it seems that "floodgate argument" builds upon the premise that non-material damages can not be objectively determined, that (even if they could be objectively determined) their value cannot be estimated in terms of monetary compensation, and that (even if it could be estimated) such estimation would be invariably based upon arbitrary criteria. It is submitted that none of these arguments should be viewed as justifiable obstacles to the recoverability of non-material damages arising out of the breach of contract. There is no doubt that the process of determining non-material harm is a complex issue. However, it does not mean that such an endeavor is impossible. As to the argument that the value of non-material damages arising out of the breach of contract cannot be remedied in terms of monetary compensation on account of them being impossible to estimate – it should suffice to point out that same is generally not perceived as a "deal-breaker" when it comes to non-material damages arising out of tort. Same applies to the argument relating to the "arbitrary" criteria that will supposedly have to be applied by the courts. It is submitted that these arguments are primarily the result of the apparent inability to perceive non-material damages arising out of the breach of contract as a result of violation of legally protected non-material interest, while at the same time turning the blind eye to the fact that legal systems have been successfully dealing with same problems in other areas of law.

Although it is hard to speculate (much less predict) the future development of contractual non-material damages in various national legal systems, certain conclusions may be drawn from the observed trend to recognize and legally protect category of *personality rights*. To that extent, it is (at least as a matter of principle) justified to ask why should the damage to person's reputation caused by tort (e.g. defamatory article published in the newspaper) be treated any differently then when it is caused by breach of contract (e.g. late delivery which damages buyer's reputation by exposing him as an irresponsible, unreliable or deceptive partner). Likewise, the argument that non-material damages can be recovered only when the purpose of the contract was non-material seems equally unconvincing. The very fact that specific non-material personality

right was objectively violated should trigger the institute of non-material damages. Nevertheless, it looks as if the concept of non-material damages was being developed not only in distinct stages but also on two parallel tracks. First track dealt with the acceptance of the idea that the law needs to protect not only patrimonial but also non-patrimonial interests. It started with the legal recognition of personality rights of natural persons, with gradual acknowledgment that legal persons also possess comparable rights worthy of protection. At the same time, the second track (still) struggles with the question of whether non-material damages should be treated in the same manner irrespective of the nature of the underlying liability. Above analysis showed that a number of arguments (traditionally invoked against the recoverability of contractual non-material damages) should not be upheld, inasmuch as they are equally inapplicable once they are invoked in relation to situations involving non-material damages arising out of tort. Keeping that in mind, one can only hope that the present legal status of non-material damages arising out of the breach of contract is the result of legislative lethargy and that future development will rectify such a situation.

3. ARTICLE 74 CISG

Although our analysis invoked a number of arguments in favor of equating the recoverability of non-material damages in contractual and non-contractual setting – we will show that none of them can be successfully utilized in relation to Art. 74 CISG. Even though such a result might not be in line with the trend observed on the level of comparative national laws, this in itself must not be used as an excuse to unjustifiably expand scope of Art. 74 CISG.

Art. 74 CISG provides in its first sentence that *damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach*. Second sentence goes on to provide that *such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract*.

We share the prevailing view according to which Art. 74 CISG does not permit recovery of non-material damages.[42] As to the opposing theo-

[42] Peter Schlechtriem, "Non-Material Damages – Recovery under CISG", *Pace International Law Review* 1/2007, 90; CISG Advisory Council Opinion No. 6, *Calculation of Damages under CISG Article 74*, *http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html,* 12 February 2016; Ingerborg Schwenzer, Pascal Hachem, "The Scope of the CISG

ries arguing in favor of such compensation, analysis shows that they are generally based on three (often intertwined) arguments:[43] first one relates to the interpretation of Art. 74 in light of gap-filling mechanism from Art. 7 (2) CISG; second one relies on the textual differences between Art. 74 CISG and provisions of other international unification instruments, and the last one proposes a special solution to be applied in situations when breach of contract affects business reputation of the injured party. In the following text, we will show that none of the proposed arguments represents a viable ground for extensive interpretation of Art. 74 CISG.

3.1. Gap filling mechanism from Art. 7 (2) CISG

Gap-filling mechanism contained in Art. 7 (2) CISG provides that the questions concerning matters governed by CISG, but not expressly settled in it, are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. By suggesting that CISG governs *damages*, but fails to expressly settle the issue of *non-material damages*, the theory suggests application of gap-filling mechanism by invoking the underlying principle of full compensation. In turn, Art. 74 CISG is to be interpreted as to also apply to non-material damages, more specifically damages arising out of loss to reputation and goodwill.[44]

Provisions on Damages", *Contract Damages – Domestic and International Perspectives* (eds. Djakhongir Saidov, Ralph Cunnington), Hart Publishing, Oxford 2008, 100.

[43] Potential fourth argument advanced in favor of compensability of non-material damages within the CISG is based upon the underlying purpose of the sales contract. It goes to say that non-material damages should be recoverable if the parties were aware that the purpose of the underlying transaction was entirely non-material. The argument seems to be influenced by the fact that the CISG will predominantly apply to commercial transactions. As the purpose of commercial transactions is to achieve material gain – one can expect that non-material loss will not likely arise. Inversely, if an underlying purpose is non-material, non-material loss should be compensated. Djakhongir Saidov, "Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods", *Pace International Law Review* 2/2002, 327, 328. As it was already argued that the underlying non-material purpose of the contract should have no bearing on qualification of compensability of non-material damages, the issue will not be separately discussed in relation to Art. 74 CISG.

[44] Alain Dupont, *Non-Pecuniary Loss in Commercial Contracts with special emphasis on the United Nations Convention on Contracts for the International Sale of Goods*, Minor Dissertation, University of Cape Town, 32-33, *http://uctscholar.uct.ac.za/PDF/1384_DPNALA001.pdf,* February 2016; Andrew Burrows, *Remedies for Torts and Breach of Contract*, OUP, Oxford 2004[3], 317, cited in: Djakhongir Saidov, *The Law of Damages in the International Sale of Goods, The CISG and other International Instruments*, Hart Publishing, Oxford-Portland 2008, 59; Friedrich Blasé, Philipp Höttler, *Editorial remarks, Remarks on the Damages Provisions in the CISG, Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts*

The analysis of the legislative history to Art. 74 CISG shows that non-material damages were never mentioned during the drafting process and, to the best of our knowledge, never even contemplated by the drafters themselves. This in itself renders subsequent reading into the legislative intent virtually impossible or, at the very least, highly speculative. If nothing else, it seems more reasonable to conclude that non-material harm would not have been included into the wording of Art. 74 CISG even if such a proposal had been made during the drafting process, as the national laws (still) deal with the issue of compensability of non-material loss in extremely diverse and often irreconcilable manners. However, leaving such speculations aside, it seems that there should be no doubt that Art. 74 CISG envisages that the principle of full compensation relates to the real (effective) loss (*damnum emergens*) and loss of profit (*lucrum cessans*), i.e. to *material loss*.[45] The fact that all of the hypotheticals analyzed during the drafting process relate only and exclusively to compensation of material damages speaks in support of such a conclusion.[46]

The rare instances where one can draw conclusions about the actual wording of Art. 74 CISG refers to the express inclusion of specific category of *material loss*, i.e. loss of profit. Namely, as the drafters recognized that "in some legal systems the concept of "loss" standing alone does not include loss of profit"[47], they deliberately chose to address these inconsistencies in the text of the Art. 74 itself. Keeping thus in mind that Art. 74 was drafted with the (primary) purpose to enable compensation of *material loss*, one should be careful when invoking the underlying principle of full compensation. Principle of full compensation is not a principle which exists in a (legal) vacuum, detached from the underlying CISG provision embodying it. It cannot be attributed mere *colloquial* meaning, but rather the meaning that can actually be inferred from Art. 74 CISG. Consequently, it should be concluded that the intended *rationale* of the principle of full compensation was not to enable the party to recover *all of the losses it can possibly sustain* as a result of the breach of contract (including non-material loss), but rather *all the material losses* that are recoverable by Art. 74 CISG itself.

(UPICC), December 2004, *http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html#er,* 20 March 2016.

[45] Excerpt from *International Sales Law, United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods*, Commentary by Fritz Enderlein, Dietrich Maskow, Oceana Publications, 1992, *http://www.cisg.law.pace.edu/cisg/biblio/enderlein-art74.html,* 20 March 2016.

[46] Guide to CISG Article 74, Secretariat Commentary (closest counterpart to an Official Commentary), Text of Secretariat Commentary on article 70 of the 1978 Draft [draft counterpart of CISG article 74] [General rule for measurement of damages], *http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html*, 8 March 2016.

[47] *Ibid.*

In conclusion, it is submitted that the theory advocating compensability of non-material loss by means of invoking the principle of full compensation is legally unsustainable on account of its misconstrued circularity. There should be no doubt that the meaning and scope of the principle of full compensation can be properly determined only *after* one determines the scope of the CISG provision which actually embodies it. In other words, as it has to operate within the scope of the provision it originates from (more specifically, Art. 74), principle of full compensation cannot at the same time be used as a tool for an indirect broadening of the scope of that same provision by virtue of Art. 7 (2) CISG.

3.2. Interpretation of Art. 74 CISG in light of international unification instruments

Second theory invoked in support of the recoverability of non-material damages is based on the existing textual differences between Art. 74 CISG and other, more or less comparable, international unification instruments. In its essence, it is a spin-off of the previously analyzed theory inasmuch as it is also based on the gap-filling mechanism contained in Art. 7 (2) CISG. Relying on the fact that non-material damages are expressly recognized in a number of other international unification instruments, it states that they can be used in the gap-filling process provided by Art. 7 (2) CISG.[48] Argument is made by primarily taking into account specific solutions contained in UNIDROIT Principles of International Commercial Contracts (hereinafter: UNIDROIT Principles) and Principles of European Contract Law (hereinafter: PECL), as they expressly permit compensation of non-material damages arising out of the breach of contract.[49]

Unlike the above mentioned provisions of PETL (which accept the concept of objective determination of personality rights), 2010 UNIDROIT Principles (regrettably) adhere to the subjective-based determination of non-material harm. Namely, Art. 7.4.2. provides that the aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance, and that such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm. However, although the provision provides that *such harm may be non-pecuniary*, it defines it as including, *for instance, physical suffering*

[48] A. Dupont, 42-45.

[49] Friedrich Blasé, Philipp Höttler, *Editorial remarks, Remarks on the Damages Provisions in the CISG, Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (UPICC)*, December 2004, *http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html#er,* 20 March 2016. Authors argue recoverability of non-material damages in light of international unification instruments, however by directly invoking principle of full compensation.

or emotional distress. Not surprisingly, adherence to the subjective criteria resulted in at least one award where the tribunal explicitly refused to compensate non-material damages because the harm was sustained by the corporate entity, unable to experience emotional suffering and distress.[50] In a more objective manner, Article 9:501 of the Principles of European Contract Law (PECL) provides that the aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108.[51] It goes on to provide that the loss for which damages are recoverable includes both *non-pecuniary loss* and future loss which is reasonably likely to occur. It is thus unfortunate that comments to that particular provision do not seem to recognize the potential benefits of using such a broad formula, as they (much like the solution contained in UNIDROIT Principles) suggest that non-material damages *may cover, for example, pain and suffering, inconvenience and mental distress resulting from the failure to perform*.[52]

We have already explained why the issue of non-material damages should not be perceived as an internal gap within the Art. 74 CISG. Consequently, all of the arguments made to that effect in the above text equally apply here. However, it seems justifiable to point out that suggested interpretation carries an additional problem relating to the application of Art. 7 (2) CISG. Namely, even if Art. 74 CISG had an internal gap relating to non-material damages, such a "problem" could not be resolved by merely reading specific solutions contained in UNIDROIT Principles or PECL into the text of Art. 74. While being fully aware of the growing tendency to use the international unification instruments to (often uncritically) supplement and interpret CISG, we submit that such an approach should not be upheld. This is not to say that general observance of these instruments is not informative and helpful, or that they lack theoretical or practical importance. However, they should not be perceived as exerting any direct influence in the interpretative process of the CISG, but rather may only be used in order to facilitate an understanding of what CISG's underlying principles are.[53] It should go without saying that one must be very careful while attempting to do so, as well as mindful to resist concluding that they in fact represent general principles on which the CICG is based.

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[50] Camera Arbitrale Nazionale e Internazionale di Milano, A-1795/51, 1.12.1996, *http://www.unilex.info/case.cfm?pid=1&do=case&id=622&step=Abstract*, 12 March 2016.

[51] Article 8:108 (ex art 3.108) PECL refers to the Excuse Due to an Impediment.

[52] Guide to Article 74, Comparison with Principle of European Contract Law (PECL), Comment and Notes: PECL 9:501–9:504 and 9:509–9–510, *http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html#cnpc,* 20 March 2016.

[53] John Y. Gotanda, "Using UNIDROIT Principles to Fill Gaps in the CISG", *Villanova University School of Law*, *Paper 8*, 2007, 20; John Y. Gotanda, "Using UNIDROIT Principles Recovering Lost Profits in International Disputes", *Georgetown Journal of International Law* vol. 36, 2004, 61–112.

3.3. (Bussiness) reputation

Last theory arguing in favor of compensability of non-material loss within the CISG relies on the inherent quality of *business reputation* as a "significant business asset"[54]. Argument is construed as a combination of two steps. As a first step, by drawing upon an extensive analyses of what constitutes *business reputation,* the author goes on to conclude that it is an intangible phenomena of exceptional importance to business people.[55] As a second step, he convincingly argues against a number of specific objections that theory advances against the compensability of damage to reputation and goodwill (such as the objection that intangible nature of reputation/goodwill prevents the workable definition of what constitutes damage, that such damages are too speculative, unforeseeable, difficult to prove, not capable of a rational assessment and that they might result in an overwhelming increase in court's case load).[56] The author ultimately goes to conclude that "there is no good reason why damage to reputation/ goodwill should not be recoverable"[57] and in turn submits that "the line of cases recognizing this loss as recoverable under the CISG should be followed"[58].[59]

We completely and without any legal reservations agree with the results of each of the two separate and independent steps of the author's analysis. However, it is submitted that the overall conclusion relating to an extensive interpretation of Art. 74 CISG in a manner which includes compensation of non-material damages should not be upheld.

Business reputation is without a doubt an intangible phenomena generally recognized as a valuable asset within the business community, and business people will usually invest time and money in order to both build and maintain it. To that extent, one can indeed state that business reputation is an "important commercial asset"[60]. As it was already explained, it is a *personality right* possessed by both natural and legal persons. Such a characterization does not mean that damage to business reputation cannot result in an indirect material loss. In fact, violation of

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[54] D. Saidov (2008), 61.

[55] *Ibid.*, 59–61.

[56] *Ibid.*, 61–64.

[57] *Ibid.*, 64.

[58] *Ibid.*

[59] In the similar manner: Djakhongir Saidov, "Damages: The Need for Uniformity", *Journal of Law and Commerce*, vol. 25, 2005–06, 395–399; Liu Chengwei, *Remedies for Non-performance – Perspectives from CISG, UNIDROIT Principles and PECL*, 362–363, *https://www.jus.uio.no/sisu/remedies_for_non_performance_perspectives_from_cisg_upicc_and_pecl.chengwei_liu/landscape.a5.pdf,* 20 March 2016.

[60] D. Saidov (2008), 60.

business reputation will often lead to loss of profit, recoverable under the general heading of compensable material damages. However, this should not be construed as to mean that such damages cannot be independently claimed on account of violation of specific personality right (i.e. right to reputation). Our comparative analysis has shown that this specific category of non-material loss is indeed recoverable in a number of national laws. Because business reputation is a *non-material asset*, damage to it (just like the damage to the reputation of non-business persons) will, as a rule, not be reflected in diminishment of material assets, i.e. neither as the real loss (*damnum emergens*) nor lost profit (*lucrum cessans*). In addition, we also demonstrated that arguments traditionally invoked against recoverability of contractual non-material damages are not sustainable. At the very least, non-material damages arising out of the breach of contract are equally "speculative", "unforeseeable", "difficult to prove" and capable of "increasing the court's case load" as those arising out of tort. If these arguments are not perceived as an obstacle in situations when liability for non-material loss is extra-contractual (as is the situation in the majority of national laws), there is no real reason why dealing with them should be more burdensome once the underlying liability is contractual.

However, none of the above arguments can (either independently or in combination) be advanced in order to broaden the scope of Art. 74 CISG regarding compensation of non-material damages. If Art. 74 CISG is to be "interpreted" at all, such an interpretation must follow formula contained in Art. 7 (1) CISG, which provides that *in the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade*.

Curiously enough, although the theory obviously relies on teleological interpretation of Art. 74 CISG (on account of the inherent characteristics of business reputation, and unviability of objections raised against recoverability of non-material damages under the CISG), no express reference is made to the interpretative rule contained in Art. 7 (1) CISG. However, careful examination of the advanced arguments seems to suggest that the rationale is nevertheless firmly rooted in the presumed underlying policies and values of the CISG. Namely, by stating that "the CISG aims to support international trade and commerce and that it represents an attempt to provide a balanced set of rules which would be acceptable to international trade"[61], author argues in favor of an extensive interpretation of Art. 74 CISG by taking into account "legitimate needs, expectations and practices of commercial man"[62]. In turn, he also suggests that if dam-

[61] *Ibid.*, 59.

[62] *Ibid.*

age to business reputation is not recoverable "incentives for commercial man to invest in reputation and goodwill will be reduced"[63].

To go into the extensive analysis of Art. 7 (1) CISG would most definitely exceed the limits of the paper. For present purposes, it is sufficient to recognize that it is hardly a secret that Art. 7 CISG in general, and its first paragraph in particular, is often used to reinforce an (overly) extensive interpretation of CISG's provisions. Leaving aside the criteria of "observance of good faith in international trade" (presumably irrelevant for interpretation of Art. 74 CISG), it should be stressed that Art. 7 (1) CISG is not a tool which can be used for broadening of CISG's provisions through extensive interpretation, but rather a safeguard designed so that the specific convention's provisions would be interpreted without recourse to the national law and in a uniform manner. To that extent, requirement to observe CISG's *international character* and *the need to promote uniformity in its application* should not be understood as an open invitation to adapt its individual provisions to the trends observable in international commerce or to the legitimate expectations and practices of business man. Addressees of Art. 7 (1), i.e. national courts and arbitral tribunals, simply do not have such a mandate.

This is not to say that teleological interpretation of CISG's provisions is to be disregarded all together. Quite to the contrary, principle of autonomous interpretation embodied in Art. 7 (1) CISG is not an obstacle for applying grammatical, historical, systemic and teleological interpretation. However, interpretative criteria themselves must not be "imported" into the wording of Art. 7 (1) CISG, as the interpretative formula from Art. 7 (1) CISG is not itself subject to interpretation. Criteria from Art. 7 (1) CISG (although drafters used rather broad language) were set, much like the rest of the CISG provisions, bearing in mind that the final text represents a compromise which arose out of negotiations between states belonging to different legal traditions. This, often forgotten, but extremely important observation should serve both as a guideline and a barrier against the tendency to "re-invent the CISG" and (re)construct rules and policies by detaching them from the original text and the underlying legislative process out of which they arose. An extensive interpretation resting upon vague criteria (such as the *need to support international trade and commerce* and/or to *provide the balanced set of rules acceptable to international business community*) ultimately undermines the very objectives that the drafters were set to promote. In turn, it may also serve as a negative signal to the contracting parties, alarming them to think twice before adhering to another (similar) international instrument, out of the fear that it also may have the potential of being interpreted far beyond the framework they originally agreed to.

[63] *Ibid.*, 61.

Provision of Art. 74 CISG is almost a perfect example of potential problems that may arise out of an overly extensive interpretation. Suggested interpretation of Art. 74 which includes recoverability of non-material damages to reputation is not only legally unsustainable (as it is not based upon criteria set in Art. 7 (1) CISG), but also leads to the solution which would (in all probability) never have been included in the CISG text, even had it been proposed and discussed during the drafting process. Moreover, as the issue of non-material damages is still hotly debated in national laws – it is, at the very least, highly questionable whether such a solution would find its place in the CISG even if it were drafted today. The overwhelming gap and inherent differences observable on the level of different national laws clearly show that the quest for the legal solution relating to non-material damages arising out of the breach of contract which would, as a matter of policy, be acceptable to large number of potential contracting states just began.

4. CONCLUSION

At the beginning of paper, we proposed both negative definition of non-material damages (as damages which are not material in their nature) and positive definition of non-material damages (as damages resulting from violation of someone's personality right). There should be no doubt that these two definitions are neither contradictory nor mutually exclusive. While the violation of patrimonial rights generally leads to diminishment of material assets (material damage), violation of personality rights leads to the diminishment of person's non-material assets (non-material damage). Although we identified an emerging trend to define non-material damages in light of objectively defined personality rights (of both natural and legal persons), our analysis clearly showed that nationals laws still contain sharply divergent solutions. There should be no doubt that the field of non-material damages is strongly influenced by historical positions taken in various national legal traditions, and that those positions are still clearly reflected in contemporary legal solutions. Although we support recoverability of non-material damages arising out of the breach of contract, present state of law suggests that parity of contractual and tort actions still awaits to be fully recognized. Nevertheless, one should generally be careful when embracing the (poetic, albeit simplistic) maxim that *non-material loss begins where material damage ends*,[64] as it suggests that non-material loss is construed and understood as a category which presupposes the existence of material damage. We showed that such an understanding of non-material loss runs contrary to concept of *personal-*

[64] A. Dupont, 7.

ity rights and effectively neglects that non-material damages are a distinct and separate category which can occur irrespective of material damages. To that extent, to deny non-material damages arising out of the breach of contract (or to limit them only to contracts with specific underlying non-material purpose) might lead to situation in which the aggrieved party is in fact left undercompensated.

Although we argued in support of general recoverability of non-material damages arising out of the breach of contract (irrespective of the contract's underlying purpose and legal status of the parties), our analysis has shown that there are simply no grounds for an extensive interpretation of Art. 74 CISG. Specific interpretative and gap-filling mechanism from Art. 7 CISG cannot be used as an justification to extensively interpret Art. 74 CISG in a manner which would include recoverability of non-material damages. In addition, legislative history seems to suggest that this particular issue was never even contemplated by CISG's drafters.

Although one can certainly understand the need to interpret Art. 74 CISG in line with the contemporary legal solutions, provision itself should not be understood as an open invitation to adapt the formula originally intended to cover only material loss. While CISG provisions can be interpreted in line with Art. 7 CISG, the ratio of therein contained mechanisms is not to "re-invent" the CISG itself. Such an approach ultimately undermines the very objectives that the drafters were set to promote. Concerns that exclusion of non-material damages for breach of contract renders the CISG outdated (and its compensation scheme insufficient), should therefore be rejected. To that extent, it should not be forgotten that the CISG is first and foremost an international convention, which owes its overwhelming success to the number of its contracting parties. Overly extensive interpretation runs contrary to the very comprehension of CISG's provisions that national legislators had when they ratified it, and may undermine future attempts to harmonize/unify sales law on an international level.