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Joseph M. Lookofsky

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CONSEQUENTIAL DAMAGES IN CISG CONTEXT

Joseph M. Lookofsky*

I. The Copenhagen Connection

In September 1989 E. Allan Farnsworth came to Copenhagen to serve as an "official opponent" during the public defense of my doctoral thesis, published that year as *Consequential Damages in Comparative Context*.[1] I was of course honored that Professor Farnsworth had accepted my University's invitation to help evaluate (and "oppose") my thesis, and I will never forget the way this most distinguished American Contracts scholar, taking his turn on the podium, played his "outsider's" part - with authority and eloquence, but also with sensitivity, kindness and grace.

I am therefore especially honored to contribute to this volume in memory of Professor Farnsworth, and I take the opportunity to revisit the topic of consequential damages, this time with emphasis on the Vienna Sales Convention (CISG)[2] - a rule

* Professor of Law, University of Copenhagen. The author expresses his sincere appreciation to Professor Torsten Iversen, Aarhus University, Professor Peter Møgelvang-Hansen, Copenhagen Business School, and Professor Harry Flechtner, University of Pittsburgh, for their constructive and very helpful comments on previous drafts of this article.

[1] Joseph M. Lookofsky, Consequential Damages in Comparative Context: From Breach of Promise to Monetary Remedy in the American, Scandinavian and International Law of Contracts and Sales (1989).

[2] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html [hereinafter "CISG" or "Convention"].

set which has come a long way since 1989.[3] But since my CISG message extends beyond the four corners of the Convention text, I will lay the groundwork for that discussion by restating some observations about consequential damages within my original comparative context.

II. THE *HADLEY* PARADIGM: WHERE SHALL WE STOP?

As elucidated in Farnsworth's seminal analysis of contract damages under American domestic law,[4] a promisor's failure to perform may result in a reduction in the *value* of the promised performance itself (moldy cheese may be worth less than fresh cheese); this reduced value constitutes what we sometimes call a "direct" loss.[5] In addition, such breach may result in *other loss* of a more "indirect," far-reaching or consequential kind, like lost profits[6] (if the promisee cannot re-sell moldy cheese).

To compare compensation for consequential loss under American and Scandinavian law in my 1989 thesis, my point of departure was *Hadley v. Baxendale*,[7] decided in England some 150 years before:

> *The Hadley Paradigm.* The crankshaft in Miller's Gloucester mill breaks and must be sent to Greenwich to serve as a model for a new one. Carrier undertakes to ship the shaft but negligently delays delivery. As a result, the reopening of the mill is delayed. Miller suffers lost profits, for which he sues Carrier.[8]

I focused initially on this contract of carriage, this "fixed star in the jurisprudential firmament,"[9] not only because *Hadley* remains an important precedent in Common law jurisdictions, but also because *Hadley* has become a larger symbol for a recur-

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[3] *See generally* JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (2d ed. 2004). Mainly a comparison of domestic laws, my thesis also contains a section on international (CISG) sales. *See* LOOKOFSKY, *supra* note 1, pt. 6.

[4] *See generally* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970).

[5] *Id.* at 1161.

[6] LOOKOFSKY, *supra* note 1, at 13; *see also* E. ALLAN FARNSWORTH, CONTRACTS § 12.9 (4th ed. 2004).

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

[8] LOOKOFSKY, *supra* note 1, at 12.

[9] GRANT GILMORE, THE DEATH OF CONTRACT 83 (1974).

ring contractual dilemma. Should a breaching promisor, in a given set of circumstances, be held liable for *all* the consequences? And if not, well, where should we stop?[10]

Since *Hadley* was governed by English (Common) law, the basis of Carrier's liability was the breach itself (not, as would have been the case in Scandinavia, the Carrier's "fault").[11] So, the *Hadley* issue was not *whether* Miller was entitled to damages,[12] but rather: *how much* should he get?

Taking one small step in Miller's direction, the judge in *Hadley* acknowledged that Carrier's breach had actually *caused* Miller's (indirect) loss.[13] But "just as it is wise to refuse enforcement altogether of some [e.g. unreasonable or unconscionable][14] promises, so it is wise not to go too far in enforcing those promises which are deemed worthy of legal sanction."[15] And so the judge denied Miller compensation for lost profits because that loss lay outside the parties' "contemplation," since "in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not in all probability have occurred; and that these special circumstances were never communicated."[16]

Stare decisis?[17] Perhaps, in some jurisdictions, though losses outside the parties' contemplation in 1854 might well be

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[10] LOOKOFSKY, *supra* note 1, at 11 (quoting L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 85 (1936-37)).

[11] Since the Carrier in *Hadley* committed a *culpable* (negligent) breach, he would also have been liable under Scandinavian law, where fault-based liability is the general rule. *See generally* LOOKOFSKY, *supra* note 1, pt. 3; *see also* MADS BRYDE ANDERSEN & JOSEPH LOOKOFSKY, LÆREBOG I OBLIGATIONSRET BD I, at ch. 5.5 (2d ed. 2005).

[12] Damages would compensate Miller for the reduction (direct loss) in value of the promised performance (timely carriage). *See supra* text accompanying notes 4-6.

[13] The judge found that want of a new shaft was "the only cause of the stoppage of the mill," i.e., "the loss of profits really arose from not sending down the new shaft in proper time." Hadley v. Baxendale, (1854) 9 Ex. 341, 355, 156 Eng. Rep. 145.

[14] *See* LOOKOFSKY, *supra* note 1, at 31-39 (regarding Scandinavian and American domestic law).

[15] Fuller & Perdue, *supra* note 10, at 84.

[16] *Hadley*, 9 Ex. at 356.

[17] From *stare decisis et non quieta movere* (to stand by the decisions and not disturb settled points). *See* E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 51 (3d ed. 1996) (regarding application of this doctrine in American law).

held "contemplatable" (i.e., foreseeable and therefore compensable) in the Information Age. Indeed, since *Hadley* has come to mean "all things to all men,"[18] it would seem difficult to predict which losses any modern judge or arbitrator - with a given "consequential philosophy"[19] - might find reasonably "foreseeable" on a given set of consequential facts.

In Scandinavian systems, where the whole concept of precedent is much more elastic,[20] no single consequential case or paradigm could ever reign with *Hadley*-like authority. To be sure, the concept of full expectation protection in Scandinavia is tempered by the doctrine of "adequate causation" (*adækvans*), and the single most important *element* of that doctrine translates as "foreseeability."[21] But adequate causation is itself a gaping conceptual pigeonhole,[22] within which no less than *eleven* (11) significant sub-conceptions reside,[23] including one which resembles what American jurists refer to as their (outmoded) "tacit agreement" test.[24] So, as with *Hadley*, we might say that the Scandinavian doctrine of adequate causation means "all things to all [Scandinavian] men."[25]

Quite apart from *Hadley* (and *Hadley*-related limitations), i.e., even when lost profits are held *foreseeable* (or "adequately caused"), compensation in both American and Scandinavian jurisdictions might still be denied or reduced by reference to other elastic doctrines like *mitigation* (the doctrine of avoidable loss),[26] and/or the even more elusive requirement of *certainty*

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[18] GILMORE, *supra* note 9, at 50.

[19] *Cf.* FARNSWORTH, *supra* note 6, at 802 (speaking of foreseeability and certainty in American law: "much depends on the particular circumstances of the case and the judicial philosophy of the court").

[20] *See generally* Joseph Lookofsky, *Precedent and the Law in Denmark*, *in* PRECEDENT AND THE LAW (Ewoud Hondius ed., 2006), *available at* http://www.cisg.law.pace.edu/cisg/biblio/lookofsky15.html (regarding Danish judge-made law).

[21] In Danish: *påregnelighed*. *See generally* LOOKOFSKY, *supra* note 1, at 175.

[22] *See id.* at 176 n.453.

[23] *See generally* TORSTEN IVERSEN, ERSTATNINGSBEREGNING I KONTRAKTSFORHOLD § 6.1 (2000).

[24] *See id.* at 96 (regarding "*aftalens forudsætninger*"); *cf.* LOOKOFSKY, *supra* note 1, at 180-81; *see also infra* text accompanying notes 37-39 (regarding the American version of "tacit agreement").

[25] *Cf. supra* text accompanying note 18.

[26] *See* LOOKOFSKY, *supra* note 1, at 162.

(i.e., the substantive or procedural standard applied by the court or tribunal in the jurisdiction concerned).[27]

Besides discussing the American and Scandinavian versions of these omnipresent liability limiters in my thesis, I also noted some (then) less familiar sub-issues, including aleatory contracts and compensation for the value of "lost chance,"[28] previously covered in Farnsworth's American work.[29] In addition, I sought to compare other new and controversial liability paradigms, including limitations designed to prevent "disproportionate" compensation,[30] though in Scandinavia some might view that limitation as an old (adequate causation) sub-conception in a new set of clothes.[31]

To further explain (and perhaps further complicate) the picture, I argued that American and Scandinavian decisions which award or deny compensation for consequential loss are often best understood in terms of an even larger conceptual catalogue, a complex motivational mixture of factors (in a "consequential equation") tied to the operative facts of the particular case.[32] In some of my case study paradigms I highlighted the "degree" of contractual commitment, in others the presence (or absence) of fault. I even suggested that this mixed bag of relevant factors can sometimes affect the viability of purported disclaimers and limitations of consequential liability.

It is, I argued, easier to describe the various individual categories and factors than to explain their complex interaction in the mind of a judge, the *human* expert in our "expert system."[33] We cannot de-humanize this process by translating it to pro-

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[27] *Id.* at 181; *cf.* Djakhongir Saidov, *Standards of Proving Loss and Determining the Amount of Damages*, 22 J. CONT. L. 27, 51 (2006) ("the procedural/substantive law distinction is not entirely clear-cut").

[28] LOOKOFSKY, *supra* note 1, at 182.

[29] *See* FARNSWORTH, *supra* note 6, § 12.15 (discussion accompanying the margin heading "Impetus"; in prior editions the §12.15 head is "Recent relation of rule").

[30] *See* LOOKOFSKY, *supra* note 1, at 187-95; *see generally infra* Part III.

[31] *See* IVERSEN, *supra* note 23, at 97 (regarding "*ækvivalens mellem vederlagets størrelse og ansvarets udstrækning*").

[32] *See* LOOKOFSKY, *supra* note 1, at 217; *cf.* FARNSWORTH, *supra* note 6, at 802 (speaking of certainty and foreseeability: "much depends on the particular circumstances of the case and the judicial philosophy of the court").

[33] *See* LOOKOFSKY, *supra* note 1, at 217; *cf.* Legal Applications of Artificial Intelligence, *available at* http://www.gslis.utexas.edu/~palmquis/courses/project98/ailaw/ailaw.htm (last visited Mar. 11, 2007).

gramming language (artificial intelligence),[34] nor can we construct a workable verbal formula which accounts for all the relevant consequential factors, because so much is relevant, because *Hadley* (like *adækvans*) stands for so much.

III. Disproportionate Loss in American and Scandinavian Law

I feel neither obliged nor inclined to re-defend my thesis (been there, done that), but I will elaborate on some observations with respect to limiting compensation for foreseeable, yet disproportionate loss. I find these worth re-examining, not only because I suspect disproportionate loss was a subject close to Allan Farnsworth's heart, but also because I know (on the basis of my own part-time experience as an arbitrator) that the subject remains relevant within the CISG Convention context.

By the time I reached this particular sub-topic in my thesis, I had come to the hardly controversial conclusion that traditional liability limitations had been judged insufficient in both American and Scandinavian law, particularly regarding liability for consequential loss. The *Hadley* precedent and progeny (and Scandinavian analogues), which focus mainly on foreseeability, hardly solve the larger *Hadley* problem.[35] Consider, for example, this variation:

> *Night Light*.[36] Retail dealer S contracts to sell farmer B a tractor with lights. S knows B needs the lights to harvest at night. Delivery of the lights is delayed and, since no substitute is available, B is unable to use the tractor at night. He then sues S for (substantial) profits lost.

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[34] Some years ago, the Japanese Ministry of Education funded a project designed to clarify the detailed structures of legal knowledge in the field of contract law as embodied in the CISG, to describe the CISG in terms of "logical formalism," to apply this formalism in representing the CISG, and to implement a legal expert system to support automated reasoning. *See* Harry Flechtner, *Transcript of a Workshop on the Sales Convention*, 18 J. L. & Comm. 191, 195 (1999); Hajime Yoshino, *Development of Fuzzy Legal Expert System (FLES) for CISG*, http://www.meijigakuin.ac.jp/~yoshino/documents/thesis/2001e_1.pdf (last visited Mar. 11, 2007) (description of the resulting "fuzzy" expert system).

[35] *Accord* Lookofsky, *supra* note 1, at 172 (discussing *Hadley* progeny).

[36] Patterned after Lamkins v. Int'l Harvester Co., 182 S.W.2d 203 (Ark. 1944). The facts in my *Night Light* paradigm are a bit closer to *Lamkins* than those in Illustration 18 to § 351(3) of the Restatement (Second) of Contracts. *See infra* note 44.

Farmer B's loss was clearly "foreseeable" (perhaps even foreseen) by S at the time of contracting, but our sense of justice may lead us down other roads. In *American* law, cases like *Night Light* were originally subsumed under the notion of "tacit agreement," which denied recovery for (foreseeable) consequential loss - where the damages "are so large as to be *out of proportion* to the *consideration* agreed"[37] - unless plaintiff proved that defendant "at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part,"[38] i.e., so that "he accepts the contract with the special condition attached to it."[39]

American scholars subsequently exposed the doctrinal weakness of tacit agreement,[40] but the *Night Light* conundrum did not go away; indeed, American judges remained reluctant to hold a promisor liable for (foreseeable) consequences in an amount greatly disproportionate to the consideration received.[41] Some courts cloaked their reluctance by *covertly* twisting *Hadley*, so that what was actually foreseeable became "unforeseeable."[42] Other courts rendered foreseeable (compensable) losses "unforeseeable" (and thus non-compensable) by "particularly rigorous" application of the doctrine of certainty,[43] i.e., by covertly characterizing what was actually certain as "uncertain."

Then, in 1979, Allan Farnsworth, at the helm as Reporter of the Second American *Restatement of Contracts*,[44] added a new liability-limiter to the traditional list, one designed to help American courts "get real" in their handling of disproportionate loss. This new rule in § 351(3) provides:

> A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred

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[37] Hooks Smelting Co. v. Planters' Compress Co., 79 S.W. 1052, 1056 (Ark. 1904) (emphasis added); *see also* FARNSWORTH, *supra* note 6, at 808.

[38] *Lamkins*, 182 S.W.2d at 205.

[39] *Id.*

[40] *See* FARNSWORTH, *supra* note 6, at 794, 808; *see also* IVERSEN, *supra* note 23 (regarding criticism of the corresponding Danish conception).

[41] *See* FARNSWORTH, *supra* note 6, at 808.

[42] *Id.* at 809.

[43] *Id.*; *see also supra* text accompanying note 27 (regarding certainty as a liability limiter).

[44] RESTATEMENT (SECOND) OF CONTRACTS, § 351(3) (1981).

> in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

Though it might rhyme with older tacit agreement philosophy, the new, overtly open-ended standard in § 351(3) seems to cut deeply into conventional (full compensation) contract wisdom. Not only does the provision authorize courts to deny compensation for (foreseeable) loss of profits; it subjects "expectation protection" *as such* to discretionary limitation by the competent court.

Then again, the principle so broadly restated in § 351(3) was designed mainly as a "safety-valve," for the exceptional (one-off) case.[45] And then there's the interesting (academic) question of the "source of the source." In 1989 I found so little direct support in American *judge-made* law for this (then new) provision that I came to view § 351(3) as Allan Farnsworth's statement (not restatement) of American law,[46] an indication of the "direction" he *hoped* American judges might take.[47]

These reservations notwithstanding, I did not question the *Restatement's* significance as an important secondary source,[48] nor did I doubt the wisdom underlying § 351(3), which at least serves to codify the dissatisfaction expressed in some American quarters with respect to covert limitations of consequential liability.[49] When flexible new standards supplant outworn formal rules,[50] we can talk more openly about reasonableness and equity,[51] about all relevant operative facts. But I still think § 351(3) stands for wishful thinking. The American *Restate-*

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[45] *See id.* cmt. f ("unusual instances").

[46] *See* LOOKOFSKY, *supra* note 1, at 189 nn.530-38.

[47] *Cf.* Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 76 (2006) ("The Restatements seek to anticipate the direction in which the law is 'tending' and to assist this development by building on previously established principles.").

[48] *See generally* FARNSWORTH, *supra* note 17, at 83-89 (regarding secondary sources in American law).

[49] *See* Farnsworth, *supra* note 4, at 1208-10; *see also supra* text accompanying note 41.

[50] *See* E. Allan Farnsworth, *Some Prefatory Remarks: From Rules to Standards*, 67 CORNELL L. REV. 634, 634 (1982).

[51] When "justice so requires" a rule like § 351(3) might take up some of the "slack" left after the merger of (Common) Law and Equity. I remain grateful to Professor Charles Knapp (then at NYU, now at Hastings) for this observation.

ment (still) does not carry the force of statutory law, and there are still relatively few precedents which expressly support the rule in § 351(3).[52] Indeed, some prominent authorities - like the American Law Commissioners - have *expressly refused* to follow the *Restatement's* progressive lead.[53]

In the next step in my comparative analysis, I emphasized that flexibility and realism have long been the pragmatic business of Scandinavian courts. When, for example, the Danish Liability Act was passed in 1984,[54] the Danish judiciary had long-since judged the traditional (German-inspired) Danish doctrine of *adækvans* (adequate loss)[55] to be inadequate (as a consequential liability limitation), though § 24 of the Act did serve to put a clear legislative stamp of approval on the discretionary safety valve which the Danish judges had already made and used in their courts:[56]

> Liability may be reduced or eliminated when the imposition of same would be unreasonably burdensome or when other exceptional circumstances make such reduction or elimination reasonable. In making this decision attention shall be given to the extent of the injury, the nature of the liability, the injuring party's situation,[57] the injured party's interests, existing insurance,[58] and other circumstances.[59]

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[52] In the 4th edition of CONTRACTS, *supra* note 6, Farnsworth cites two post-Restatement (Second) precedents to support the view that § 351(3) is an "invitation [American] courts have begun to accept." *See id.* at 809, n.10.

[53] Deleting a proposed (1998) addition to Section 2B-707 of the Uniform Commercial Code which would have denied "consequential damages that are unreasonably disproportionate to the risk assumed under the contract by the party in breach," the National Conference of Commissioners on Uniform State Laws noted that § 351(3) "is not universally adopted. Also, it is a permissive, rather than mandatory limitation." *See The Impact of Article 2b*, http://www.law.berkeley.edu/institutes/bclt/events/ucc2b/draft/707.html (last visited Mar. 11, 2007).

[54] *Lov om erstatningsansvar*, Law nr. 228 of 23 May 1984. *Cf. Skadeståndslagen,* 6:2 (the comparable Swedish rule).

[55] *See supra* text accompanying notes 21-25.

[56] *See* LOOKOFSKY, *supra* note 1, at 191-94; *see also* Lookofsky, *supra* note 20 (regarding Danish "judge-made" law).

[57] In Danish, *forhold* refers not only to the "economic situation" of the tortfeasor/promisor, but also to the degree which he or she was "at fault."

[58] Covering either party.

[59] This is my translation.

We see clear and striking similarities between this Danish provision and § 353(1) of the American *Restatement*,[60] but we also find significant differences. As already noted, the Danish limitation represents a binding codification of real (as opposed to hoped-for) judge-made law.[61] It is also significant that the Danish safety valve represents a *general* damages limitation which applies in *all* cases - i.e., as a potential limitation of both contractual and delictual/tort liability - whenever Danish law applies.[62]

This leads to another distinction worth emphasizing. The prominence of the phrase *unreasonably burdensome* indicates that the main factor in determining whether liability should be reduced in accordance with § 24 is the relationship between the *size of the loss* suffered by the party injured (by tort or breach) and the *economic situation of the defendant* (tortfeasor or promisor), including whether that defendant is covered by insurance or not.[63] In my thesis, I took this proportionality factor and supporting case law[64] as evidence to support the proposition that Scandinavian courts and legislators sometimes seem a bit more willing to "socialize" private law (invade the privacy of classical contract), more willing to engage in paternalism (or "episodic altruism"[65]). When, for example, the breaching promisor is a marginal merchant (an uninsured little guy or small business with a big problem, perhaps threatening his/its eco-

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[60] Both rules represent "caps" on the measure of liability which would otherwise follow from general rules, just as both were intended mainly to apply in the exceptional or unusual case. Both rules also serve to provide new overt replacements for outworn "covert" techniques.

[61] That observation seems significant when evaluating whether American disproportionate loss doctrine might be available as a "supplement" to Article 74 of the CISG context. *See generally infra* Part V.

[62] Though the *travaux préparatoires* advocate "particular restraint" when applying the provision in contractual contexts. *Cf.* ANDERSEN & LOOKOFSKY, *supra* note 11, ch. 5.5.k. My reference to "Danish law" *includes* the CISG (which Denmark has ratified); whether the CISG "pre-empts" § 24 of the Act is a separate issue. *See infra* Part IV.

[63] *See* Commentary, *Erstatningsansvarsloven*, § 24 *in* KARNOVS LOVSAMLING, *available at* www.thomson.dk.

[64] *See, e.g.*, LOOKOFSKY, *supra* note 1, at 193-94 ("*Roof Fire*" paradigm based on the Danish Supreme Court decision reported in UGESKRIFT FOR RETSVÆSEN 1984, p. 23).

[65] *Id.* at 195-96 (borrowing this phrase from CHARLES FRIED, CONTRACT AS PROMISE 109 (1981)).

nomic viability),[66] neither existing precedents nor the sanctity of the promise principle can "force" a Scandinavian judge to reach what *he* or *she* would consider an unjust or unreasonable result.[67]

This provides an example of what I have described as the spirit of Scandinavian Realism:[68] justice breaks the rules when the rules would break with justice.[69] Faced with a multitude of competing considerations in a complex case, the Scandinavian judge need not wend his/her way to the right decision by conceptual reasoning alone; axiomatic legal logic does not always lead to an inevitable result. Instead, the judge, having taken account of all relevant operative facts, *starts with the result*, and then "reasons backwards," using applicable legal logic to *test the correctness* of that decision.[70]

In this realistic/pragmatic environment, the *result* (outcome for the *parties*) is far more important than *ratio*, let alone the possible precedent.[71] So the main thing for a Danish judge (or arbitrator) faced with a disproportionate contract claim is to *cap the damages*, not the "how to" (the ratio) - i.e., by overt reference to § 24 or, as is more likely, by more covert, less overtly paternalistic means (e.g., by reference to a convenient adequate loss prong,[72] and/or by "rigorous application" of the certainty requirement), for even Scandinavian judges sometimes succumb to that kind of thing.[73]

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[66] *Id.* at 191.

[67] This "rule of reasonableness" - which, in contractual contexts, can serve to "cap" a promisee's (enforceable) expectation interest - is clearly "akin" to the (in)famous Scandinavian General Clause (§ 36 of the Contracts Act), which authorizes courts (and arbitrators) to *deny enforcement of any unreasonable contract or clause*. *See* Joseph Lookofsky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT "Restatement" and Danish Law*, 46 AM. J. COMP. L. 485, 485-508 (1998), *available at* http://www.cisg.law.pace.edu/cisg/biblio/lookofsky2.html (regarding the latter rule).

[68] *Accord* Heikki Pihlajamäki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 AM. J. COMP. L. 469 (2004).

[69] *Id.* at 192.

[70] *Id.* at 191-92.

[71] *See generally* Lookofsky, *supra* note 20.

[72] *See supra* note 55 and accompanying text.

[73] *See, e.g.*, Lookofsky, *supra* note 67, at 501 (in Denmark, even a *commercial* contract can be "policed" for fairness, if need be by using our "General Clause," but in *commercial* cases, our courts continue to give preference to more traditional, judge-made rules of law). *See also* IVERSEN, *supra* note 23, at 537 (regarding recov-

Having summed up my comparative framework, I can now move on to the international context.

IV. CONSEQUENTIAL DAMAGES IN CISG CONTEXT

The remedial scheme of the CISG Convention is designed to put an injured promisee in the position she would have enjoyed "but for" the breach, thus protecting that party's expectation interest,[74] *inter alia*, by providing a monetary substitute for promised performance. Under Article 74, the general CISG rule which (by default, absent contrary agreement) measures liability for breach, damages are "equal to the loss, *including loss of profit*, suffered *as a consequence* of the breach."[75]

This is, however, only the starting point. The Convention, while generally "not concerned" with refusing enforcement *altogether* (i.e., validity defenses governed by domestic law),[76] does accept the conventional wisdom of not going too far in the direction of enforcement,[77] in particular by limiting damages to the loss which the breaching party "*foresaw or ought to have foreseen* . . . as a possible *consequence* of the breach."[78]

Article 74 represents the general Convention rule on damages, as it protects against all (foreseeable) loss caused by the breach, including (e.g.) direct loss suffered by a buyer who will not or cannot avoid.[79] But Article 74 is most significant regarding indirect (consequential) loss, including lost profits and other

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ery of lost profits (*driftstab*), concluding that Danish judges, exercising wide *discretion, often reduce* damage claims (to low levels), but *without explaining why*); *supra* text accompanying notes 42-43 (regarding covert liability limitations in American law).

[74] The broadly formulated rule in Article 74 has been read by an American court to include damages measured by the "reliance interest" as well. *See infra* note 91 (regarding the *Delchi* case).

[75] *See generally* LOOKOFSKY, *supra* note 3, § 6.15; *see also* Djakhongir Saidov, *Causation in Damages: The Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 225 (Pace Int'l L. Rev. ed., 2006).

[76] *See generally id.* § 2.6 (regarding CISG Article 4).

[77] *Cf. supra* text accompanying note 15.

[78] *See* CISG, *supra* note 2, art. 74.

[79] *See id.* arts. 75-76 (regarding damages in avoidance situations). Also "incidental" damages (e.g., additional costs incurred after the breach in a reasonable attempt to avoid loss) are easily subsumed under the Article 74 rule.

purely economic loss,[80] as well as physical damage to property.[81]

With the notion of foreseeability expressly at its core, Article 74 seems similar to both *Hadley* and the corresponding prong in Scandinavian domestic (*adækvans*) doctrine,[82] though such similarities do not provide justification for American or Scandinavian courts to interpret CISG Article 74 in a parochial way, i.e. as if Article 74 and *Hadley* (or its Scandinavian analogue) were one and the same.[83] In accordance with *Hadley*, for example, but in contrast with Scandinavian domestic law, the Convention's foreseeability standard is to be evaluated solely on the basis of information available to the breaching party at the time of the conclusion (making) of the contract, in the light of the facts and matters which that party then knew or should have known.[84]

Article 74 requires only that the loss in question be foreseeable (as opposed to actually foreseen)[85] by the defendant as a

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[80] *See, e.g.*, Handelsgericht [HG] [Commercial Court], Zürich No. HG 95 0347, Feb. 5, 1997 (Switz.), *available at* http://www.cisg.law.pace.edu/cases/970205s1.html (buyer awarded damages for loss of profit and other consequential damages for losses suffered due to exchange rate fluctuation between US dollars (currency of payment) and German marks).

[81] *See* LOOKOFSKY, *supra* note 3, § 2.6 (regarding Article 5 and consequential loss which takes the form of damage to property, other than the goods themselves).

[82] *See supra* text accompanying notes 21-25.

[83] As a U.S. Federal court did in the *Delchi* case. *See infra* text accompanying note 91. *See also* LOOKOFSKY, *supra* note 3, § 2.9 (regarding the goal of uniform CISG interpretation).

[84] The underlying idea is that the parties, at that point in time, should be able to calculate the risks and potential liability they assume by agreement. *See* Oberlandesgericht, [OLG] [Provincial Court of Appeals] Köln, 22 U 4/96, May 21, 1996 (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/960521g1.html (seller aware buyer was car dealer at time of conclusion of contract; damages paid by buyer to its customer therefore foreseeable loss under Art. 74). The scope of CISG responsibility is not extended if the promisor (e.g. seller) — after the conclusion of the contract, but before the breach — learns of circumstances which indicate a risk of extraordinary loss; in this respect the extent of liability under Article 74 may differ from domestic systems where liability is based on fault. *See* Bundesgerichtshof [BGH] [Federal Supreme Court), VIII ZR 210/78, Oct. 24, 1979 (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/791024g1.html.

[85] *See, e.g.*, E.K., L. und A. v. F., Bundesgericht [BGer] [Supreme Court], 1. Zivilabteilung, 4C.179/1998/odi, Oct. 28, 1998 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/981028s1.html (buyer's loss of clientele was foreseeable consequence of breach (non-conforming delivery), since buyer was wholesale dealer in sensitive market with no alternative by which to meet its obligations to its buyers).

"possible consequence" of breach.[86] Depending on the circumstances, however, compensation for even foreseeable loss may be denied or reduced by reference to the Convention's mitigation requirement (Article 77)[87] and/or by relevant evidentiary standards which always require *some degree* of "certainty."[88] In American courts, for example, the standards of proof applicable to a lost profits claim lie well beyond the usual burdens of persuasion, but due to a relaxation of the certainty requirement, only "reasonable certainty" is now required.[89] Outside the Common law realm, lost profits may be more difficult to prove, not only because some courts insist on greater certainty, but also because Scandinavian (or Civilian) plaintiffs sometimes seem less willing (than Americans) to produce confidential business accounts in court.[90]

In the *Delchi* case, decided by a U.S. Federal Court in 1994,[91] an Italian buyer ordered 10,800 compressors from a

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[86] *Compare* FARNSWORTH, *supra* note 6, § 12.14 (American law; foreseeable as probable), *with* The Heron II (1969) 3 All E.R. 686, 708 (English law; liable to result, serious possibility or real danger).

[87] *See* LOOKOFSKY, *supra* note 3, § 6.17 (regarding Article 77).

[88] *Compare* Hans Stoll & Georg Gruber *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 758-59 (Schlechtriem & Schwenzer eds., 2005) ("CISG does not lay down what degree of probability . . . [a] judge should be convinced profit would actually have been made"), *with* Hans Stoll *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 563 (Schlechtriem ed., 1998) (citing, in the previous edition of that same commentary, the relevance of the general law of evidence of *lex fori*), *and* LOOKOFSKY, *supra* note 3, at 120. *See also* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, Art. 7.4.3 (requiring (1) only "reasonable certainty," and allowing (2) compensation for "value lost of chance" - a concept persuasively supported for application in the CISG context by Saidov, *supra* note 27, at 51, but flatly rejected by Stoll & Gruber).

[89] *See* FARNSWORTH, *supra* note 6, § 12.15. Evidence (reasonably) certain and sufficient to convince an American court was, for example, provided by the Italian plaintiff in *Delchi*. *See infra* text accompanying notes 91-94.

[90] *See* Jan Hellner, *Consequential Loss and Exemption Clauses*, 1 OXFORD J. LEGAL STUD. 13, 24 (1981). Reacting to a similar passage in my thesis, *supra* note 1, Professor Iversen rightly highlights the fact that it can be *very* expensive to hire accountants to "document" lost profits, and that an injured promisee will only be inclined to do that when the case is correspondingly "big" (and the potential damages recovery sufficiently large). *See* IVERSEN, *supra* note 23, at 172.

[91] Delchi Carrier, SpA v. Rotorex Corp., No. 88-CV-1078, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994), *aff'd in part and rev'd in part*, 71 F.3d 1024 (2d Cir. 1995); *see also* Eric Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 J. BUS. L. 615 (2005) (addressing the *Delchi* case).

seller/manufacturer in Maryland. At the time of contracting, the buyer advised that the compressors were intended for use in the production of a particular line of portable air-conditioners to be manufactured by the buyer. When the seller failed to deliver goods which conformed to the contract, the buyer sued to recover damages for various losses incurred as a result of the breach. Noting that CISG Article 74 seeks to provide the injured party with the benefit of the bargain, so as to protect that party's expectation interest, the court awarded the buyer more than one million dollars in compensation, including consequential damages for the following items of foreseeable loss: damages incurred as a result of buyer's (failed, but reasonable) attempts to remedy the non-conformity in seller's compressors,[92] expenses reasonably incurred in mitigation of the loss,[93] costs incurred for handling and storage of the non-conforming compressors, as well as lost profit resulting from a diminished volume of sales.[94] It would have been preferable if the *Delchi* court had supported its Article 74 conclusions by referring to (less parochial) secondary sources,[95] but better judicial scholarship would hardly have led to a different decision or a better result.

A special consequential question involves the relationship between Article 74 and the so-called "American rule." Under American rules of procedure (but contrary to the *lex fori* in Europe and elsewhere), the losing party in an American litigation is generally not required to reimburse the winning party for its lawyers' fees.[96] In breach of (sales) contract cases, this might look like an exception to the (substantive) principle of full ex-

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[92] Costs that would not have been incurred "but for" the breach.

[93] *See generally* LOOKOFSKY, *supra* note 3, § 6.17 (regarding Article 77).

[94] The buyer in *Delchi* was also awarded pre-judgment interest at the U.S. Treasury bill rate. *Delchi*, 1994 WL 495787. A claim for expenses related to the anticipated cost of production was denied, but to this extent the case was reversed and remanded. *Delchi*, 71 F.3d at 1030. *See also* LOOKOFSKY, *supra* note 3, § 6.18 (regarding Article 78).

[95] Such as CISG scholarly opinion. *See* LOOKOFSKY, *supra* note 3, § 6.15 n.164 (regarding this aspect of *Delchi*); Schneider, *supra* note 91 (criticizing the provincialism of the *Delchi* court).

[96] As in Europe, the losing party in an American litigation is usually required to pay the successful party's "costs" (e.g. fees paid to the court), but in the U.S. such costs do not generally include attorneys' fees. The principle has been modified in certain instances by "fee shifting" statutes, see *infra* note 98, but no-fee-shifting is still the general American rule. *See, e.g.*, Alyeska Pipeline Serv. Co. v.

pectation-interest protection for all foreseeable loss which flows from the breach,[97] but *this* very general American rule (which applies in virtually all U.S. civil cases, i.e. not just in contract cases, but in tort cases as well)[98] is best characterized as *procedural*.[99] For this reason, and since the U.S. Supreme Court, when recognizing limited statutory exceptions to the (American, no-fee-shifting) rule, has required clear evidence of legislative (fee-shifting) intent, the U.S. Court of Appeals in *Zapata* rightly – albeit controversially — held that Article 74 does not provide authority for a special (CISG) exception to the general American rule.[100]

In other words, when the United States (in 1986, as one of the first CISG Contracting States) expressly opted into the Convention's remedial scheme, including full expectation damages for breach, it did *not* impliedly "opt out" of their generally applicable domestic rule which denies recovery of attorneys' fees as part of a successful plaintiff's damages, since *that* "matter" is

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Wilderness Soc'y, 421 U.S. 240 (1975); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001).

[97] *Accord* FARNSWORTH, *supra* note 6, § 12.8; *see also supra* text accompanying note 6 (important qualification to expectation).

[98] *See, e.g.*, Thomas D. Rowe, *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125 (2003) (regarding exceptions to the fee-shifting rule).

[99] As opposed to substantive. Domestic rules which determine whether (or under what circumstances) lawyers' fees are to be "shifted" (born by the losing party) are regarded as procedural rules in many CISG jurisdictions. *See generally* Harry M. Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on Zapata Hermanos v. Hearthside Baking*, 22 NW. J. INT'L L. & BUS. 121 (2002), *available at* http://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html#iv.

[100] Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385 (7th Cir. 2002), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021119u1.html. *See also* Harry Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 VINDOBONA J. INT'L COM. L. & ARB. 93 (2003), *available at* http://www.cisg.law.pace.edu/cisg/biblio/flechtner5.html. *But see* John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91 (2003), *available at* http://cisgw3.law.pace.edu/cisg/biblio/felemegas4.html. On June 16, 2003, the U.S. Supreme Court denied the plaintiff's/Zapata's petition for certiorari (third instance review). Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 540 U.S. 1068 (2003).

neither "governed" *nor* "settled" by the CISG.[101] So, "case closed" on that (consequential) point, however hard some CISG commentators may continue to spin Article 74 in a more expansive (Article 7) direction.[102]

V. DISPROPORTIONATE LOSS IN CISG CONTEXT

All this makes for a complex consequential picture (*at least* as complex as under domestic law), but the CISG story does not end even here. If I had more time and space, I might, for example, argue that decisions which award or deny compensation for consequential loss in the CISG context are also affected by a variety of other factors, similar to those in my domestic conceptual catalogue (the complex mixture of elements which I factored into my comparative consequential equation).[103]

Granted, a proposition like that would be difficult to document (even for a younger researcher with time and pages to burn), in part because judges don't always tell the whole story (reveal the *real ratios* underlying difficult decisions),[104] just as arbitrators everywhere report even less. In 1989 there was simply no CISG case law to discuss;[105] today we have lots of reported CISG decisions,[106] including some about lost profits (and

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[101] On this particular point, Harry Flechtner and I took issue with a "technicality" in Judge Posner's opinion in *Zapata*. *See generally* Flechtner & Lookofsky, *supra* note 100.

[102] *Cf.* Bruno Zeller, *Interpretation of Article 74* – Zapata Hermanos v. Heathside Baking – *Where Next?*, 1 NORDIC J. COMM. L. (2004), *available at* http://www.njcl.fi/1_2004/commentary1.pdf. In his commentary on Article 7, Peter Schlechtriem argues that Article 74, second sentence, represents a "principle of risk attribution" which, in his view, applies to "costs of litigation," thus (contra *Zapata*) "suspending" domestic rules qualified as procedural matters." *See* COMMENTARY, *supra* note 88, at 104-05 n.58; *but see* Stoll & Gruber, *supra* note 88, at 757 n.88 (who in their commentary on Article 74 in the same COMMENTARY, but without citing Schlechtriem or his "risk principle," accept both the substance/procedure distinction as well as the lawyers' fees holding in the *Zapata* decision).

[103] *See supra* text accompanying note 32. One consequential damages scenario I might be inclined to dissect in this connection would be the German Supreme Court's decision of 24 March 1999 (*Vine Wax*). Bundesgerichtshof [BGH] [Federal Supreme Court], VIII ZR 121/98, Mar. 24, 1999 (F.R.G.), *available at* http://www.cisg.law.pace.edu/cases/990324g1.html.

[104] *See generally* Lookofsky, *supra* note 20 (regarding the extremely opaque nature of Danish judicial decisions). *See also supra* note 73.

[105] The Convention first took effect in 1988. *See* LOOKOFSKY, *supra* note 3, at 1.

[106] *See, e.g.*, the decisions at http://cisgw3.law.pace.edu/cisg/text/casecit.html.

other indirect loss),[107] but much of this case law remains uneven and opaque.[108] Quite apart from the fact that a given CISG precedent can only bind (lower) courts *within* that judgment-rendering jurisdiction,[109] CISG consequential cases are often one-off, because (as Farnsworth put it) so "much depends on the particular circumstances of the case and the judicial philosophy of the court,"[110] because judges and arbitrators wield "covert tools,"[111] and (as I maintained in my thesis) because the whole consequential equation is so highly complex.[112]

I would, however, now like to address a particularly difficult CISG point: the possible relevance of *domestic* limitations designed to prevent disproportionate compensation. Consider this hypothetical:

> *Seller's Shaft*: The crankshaft in B's Dutch mill breaks. Danish merchant S, who knows B has no other shaft, agrees to build B a new one (using the old shaft as a model). S then negligently delays manufacture and delivery of the new shaft. As a result, the

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[107] *See, e.g.*, http://www.unilex.info/ (revealing, as of 24 July 2006, 17 decisions relating to Art. 74 and "lost profits").

[108] As summarized in the UNCITRAL Case Digest of Article 74 (conveniently available, with active case-links, at http://cisgw3.law.pace.edu/cisg/text/anno-art-74.html#forsee), some decisions have found that the breaching party *could not have foreseen* the following losses: rental of machinery by buyer's sub-buyer; the processing of goods in a different country following late delivery; exceptionally large payments to freight forwarder; attorney's fees in dispute with freight forwarder; the cost of resurfacing grinding machine where cost exceeded price of wire to be ground; lost profits where breaching seller did not know terms of contract with sub-buyer; inspection of the goods would take place in importing country rather than exporting country. On the other hand, several decisions have explicitly found that claimed damages were *foreseeable*. One such decision states that the seller of a good to a retail buyer should foresee that the buyer would resell the good, while an arbitration tribunal found that the breaching seller could have foreseen the buyer's losses because they had corresponded extensively on supply problems; another decision concluded that a breaching buyer could foresee that an aggrieved seller of fungible goods would lose its typical profit margin; a majority of another court awarded ten per cent of the price as damages to a seller who had manufactured the cutlery to the special order of the buyer (and that majority noted that a breaching buyer could expect that sum).

[109] *See generally* Joseph Lookofsky, *Digesting CISG Case Law: How Much Regard Should We Have?*, 8 VINDOBONA J. INT'L COM. L. & ARB. 181, 183 (2004), *available at* http://www.cisg.law.pace.edu/cisg/biblio/lookofsky9.html (regarding the (at best "persuasive") nature of CISG precedents).

[110] FARNSWORTH, *supra* note 6, at 802 (speaking of American domestic law).

[111] *Id.* at 808-09.

[112] *See supra* text accompanying note 32. *See generally* LOOKOFSKY, *supra* note 1, pt. 5.

> reopening of the mill is delayed, and B suffers (huge) lost profits, for which he demands compensation from S.

These days, this is a CISG contract by default.[113] That makes S liable for late delivery on a no-fault basis,[114] and given the causal connection between breach and loss,[115] the big *Seller's Shaft* question is the same as in *Hadley*: just *how much* should the injured party (B) get? Assuming B can provide sufficiently certain evidence of lost profits,[116] does the fact that those losses were clearly foreseeable (at the time of contracting) mean that full compensation is a foregone conclusion?

I have my (Scandinavian) doubts, especially if B's loss has swelled to a disproportionate size, say to one or two hundred times the price of the shaft; indeed, if S is a small merchant, awarding that kind of disproportionate compensation might even make S go belly-up.[117] But just as some found it difficult to predict (or accept) the ultimate outcome in *Zapata*,[118] it seems hard to predict how a given judge or arbitrator, with a given consequential philosophy,[119] might resolve *Seller's Shaft*.

I see at least four viable approaches: (1) obey the black letter of Article 74 and compensate B for the whole (certain, foreseeable) loss; (2) use covert tools to characterize part of the (foreseeable) loss as "unforeseeable" under Article 74,[120] perhaps also emphasizing relevant evidenciary standards which require that certain losses be proved with particular certainty;[121] (3) characterize the "matter" (i.e., the sub-issue of lia-

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[113] Because the parties have their respective businesses in Contracting States (Article 1), because it is a "sale" with S supplying the materials (Article 3), and because there is no evidence the parties have contracted out (Article 6).

[114] S would be liable even if his breach had not been negligent. *Compare* LOOKOFSKY, *supra* note 3, § 6.14 (regarding breach as the basis of CISG liability), *with supra* text accompanying note 11 (regarding the breach in *Hadley*).

[115] The paradigm indicates that B's loss is the "result" (consequence) of the breach.

[116] For example: because the mill is old and reliable, with a consistently profitable track record. That would certainly be sufficiently "certain" for some. *Cf. supra* note 88.

[117] This illustrates that a given loss can be "disproportionate" in at least two respects. *See also supra* text accompanying note 63.

[118] *See supra* note 102.

[119] *Cf.* FARNSWORTH, *supra* note 19.

[120] *See* FARNSWORTH, *supra* note 6, § 12.17 (regarding the use of this covert technique in American domestic law).

[121] *See supra* text accompanying note 88.

bility for disproportionate loss) as "governed but not expressly settled" by the Convention,[122] and then locate a CISG "general principle" to settle it; (4) supplement Article 74 with domestic (Danish or Dutch) rules to prevent disproportionate compensation.[123]

Decision makers with high regard for CISG black letters may find it easiest to hold the promisor (S) liable for *all* the (clearly foreseeable) consequences (1). After all, the breach (failure to deliver) provides a clear-cut *basis* for protecting B's expectation,[124] just as Article 74 *defines* (with near-mathematical precision) the measure of CISG damages as being "*equal to the loss*, including loss of profit, suffered by the other party as a consequence of the breach."[125] And while such damages *may not exceed* foreseeable loss,[126] the Convention provides no (express) limitation for disproportionate loss. Indeed, had such a limitation been proposed in Vienna, I doubt many delegates would have been inclined to support it,[127] let alone include a "proportionality principle" in a larger Global Code.[128]

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[122] *See* LOOKOFSKY, *supra* note 3, § 2.11 (regarding Article 7(2)).

[123] *See supra* text accompanying notes 56-59 (regarding the *Danish* rule); *cf.* Dutch Civil Code, Art. 109:

> 1) The court may reduce a legal obligation to pay damages if a full award of damages would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the existing juridical (legal) relationship between the parties and their financial resources.
>
> (2) The reduction may not be made if it reduces the amount below that for which the obligor has covered his liability by insurance or was obliged to do so.
>
> (3) Any stipulation in breach of paragraph 1 is a nullity.

Id.

[124] *See supra* text accompanying note 114.

[125] CISG, *supra* note 2, art. 74 (emphasis added).

[126] *See id.*

[127] Having perused some unwieldy CISG legislative history, *see generally* LOOKOFSKY, *supra* note 3, § 2.8, I could find no evidence of such a proposal. Judging by the PECL "restatement" (*see* PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000) Art. 9:502 (General Measure of Damages) and Art. 9:503 (Foreseeability)), most Europeans would *not* have favored such a CISG limitation; nor would most Americans. *See supra* note 53 and accompanying text.

[128] *See id.* (regarding American and European reluctance in this context). For these and other reasons, I would hardly expect the "proportionality principle" to become part of a "Global Commercial Code" (i.e., if such an unwieldy creature ever came to be). *But see* Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 398 (2005).

On the basis of some highly respected (recently updated) German CISG commentary, I am tempted to suggest that this all-foreseeable-loss option (1) accords with what German commentators often call the "prevailing [German] view," since this commentary seems to reject *any* tampering with "full [CISG] compensation" for all foreseeable loss,[129] *provided* that such losses are proved with high "certainty" (a proviso which, for those commentators, rules out *any* damages to compensate "lost chance").[130] I am not sure why my German colleagues have lined up this rather rigorous way, but it may be significant that the Convention liability scheme represents a compromise between Civil and Common law views, and that part of that compromise was the decision to replace the key Civilian conception of fault as the general basis of liability for breach with no-fault liability, as in Common law.[131] That particular decision might have been (too) hard for German jurists to swallow, had it not been for (a) the foreseeable loss limitation in Article 74, which – viewed from a German domestic perspective – represents a counterbalancing step in the other (less liability) direction,[132] and (b) a Convention text which (since it says nothing about how much "certainty" is required) allows German courts to draw their own (rigorous) conclusions as to *that*. On that basis I suspect that German commentators are loath to accept any "modification" of the resulting allocation-of-risk "package;" they are loath to rock the overall remedial compromise, the larger liability boat.[133]

I do not mean to suggest that all German jurists would prefer option (1).[134] Quite the contrary, I assume many courts and arbitrators, in Germany and elsewhere, would be very reluctant

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[129] *See generally* Stoll & Gruber, *supra* note 88, at 746.

[130] *See id.* at 759 (deciding bluntly (on the basis of German scholarly *opinion*): "There is no compensation for loss of a mere chance of a profit."). *Cf.* Saidov, *supra* note 27, at 51 (a more elastic and persuasive position).

[131] *See* Lookofsky, *supra* note 3, § 6.14. *See also* Stoll & Gruber, *supra* note 88, at 750.

[132] *See* Stoll & Gruber, *supra* note 88, at 764.

[133] This may help explain Professor Schlechtriem's reluctance to accept the very sensible result in *Zapata*. *See supra* text accompanying note 102.

[134] Indeed, I am not even sure whether the authorities cited, *infra* note 148, would prefer that option.

to saddle S with *all* foreseeable losses caused by the breach,[135] since (as Allan Farnsworth would have put it): *it wouldn't be just; it wouldn't be right.*[136] In fact, I suspect that many, if not most decision makers—the perhaps prevailing (German) view notwithstanding—would actually prefer to *split* this consequential baby,[137] by using whatever tools might be available for that liability-limiting task.

As regards the application of the limited assortment of liability-limiting tools at our disposal "inside the [CISG] box," it seems to me that alternative (2) could lead to the "right" result, but for the "wrong" reason(s), e.g., by twisting Article 74, so what was (really) foreseeable becomes unforeseeable.[138] While that (shaky methodology/ratio) does not disqualify this alternative, I think we might do well to consider the other available alternatives first.

But I also have problems with CISG-toolbox alternative (3).[139] For even if we assume, *arguendo*, that the *whole* "matter" of disproportionate loss (i.e., *both* the loss/price *and* the loss/status relationships)[140] is "governed" by the Convention, it seems hardly possible to "settle" that matter satisfactorily by applying an unwritten CISG general principle, such as "reasonableness"[141] or "risk attribution,"[142] let alone more domestically-inspired concepts like *Hadley-animated* "least-cost avoidance"[143] or (say) one of eleven Scandinavian variations on

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[135] *Accord* FARNSWORTH, *supra* note 6, at 808 ("Some courts have balked at reaching such a conclusion").

[136] *See id.* (discussing a hypothetical *Hadley* variation much like my *Seller's Shaft*: "It may not seem just. . . . Would it have been right?").

[137] *See* LOOKOFSKY, *supra* note 1, at 218. For an example of a compromise CISG consequential verdict, see Rechtbank van Koophandel [District Court], Hasselt, No. AR 1849/94, May 2, 1995 (Belg.) (also reported in UNILEX) (court determined Chilean seller's lost profits *ex aequo et bono*, taking into account probability of cover sale at price significantly lower than price agreed in contract with Belgian buyer).

[138] *Cf.* FARNSWORTH, *supra* note 6, at 808 (speaking of similar applications in American domestic law).

[139] *See supra* text accompanying note 122.

[140] By "status," I refer shorthand to the defendant's "economic situation." *Compare supra* text accompanying note 64, *with supra* text accompanying note 37 (focusing on the proportion between damages and "consideration").

[141] *See generally* LOOKOFSKY, *supra* note 3, § 2.11.

[142] *Cf.* Schlechtriem, *supra* note 102.

[143] According to Judge Richard Posner, the "father" of the Law & Economics discipline, the "animating principle" behind the American version of the *Hadley*

a *Hadley*-like theme.[144] Not only do I doubt whether such foreseeability qualifications are reconcilable with the black letter of Article 74;[145] I also fear that the various Article 7(2) principles which different courts and arbitrators might select to help settle this particular problem would vary with the size of each decision-maker's foot, thus hardly advancing the nobler cause of "uniform" Convention interpretation.[146]

That leaves alternative (4), which I (still) consider viable, though I realize my thinking remains "outside the box;"[147] indeed, recent German doctrine has flatly *ruled that* alternative (4) *out*.[148] While I am aware of the drawbacks which accompany this approach, I do not share the view that Article 74 necessarily preempts the application of a Danish or Dutch statute which empowers judges to limit disproportionate compensation.[149] Quite apart from the serious problems I associate with the governed-but-not-settled alternative (3),[150] I think that (e.g.) the Danish statute, if applicable by virtue of choice-of-law rules,[151] could supplement Article 74 as a relevant *validity-related* rule, a second cousin (so to speak) to rules with which the CISG is simply "not concerned."[152]

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rule is that the consequences of breach should be *avoided* by the party who can do so at the "least cost." *See* Evra v. Swiss Bank Corp., 673 F.2d 951 (7th Cir. 1982). It would hardly require much (more) of a stretch if Posner, confronted with a large CISG lost profits claim, were to read least-cost-avoidance into Article 74, as an animating/underlying CISG general principle.

144 *See supra* text accompanying notes 22-23.

145 However, I think that Schlechtriem's "risk principle" might be reconcilable with the black letter of Article 74. *See supra* note 102.

146 *See generally* LOOKOFSKY, *supra* note 3, § 2.9.

147 *Cf.* Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preëmption Under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263 (2003) (differentiated solutions to the general Article 7(2) conundrum). *See also* Joseph Lookofsky, *Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's "Competing Approaches to Force Majeure and Hardship,"* 25 INT'L REV. L. & ECON. 434 (2005).

148 *See* Stoll & Gruber, *supra* note 88, at 746 ("Mandatory rules of domestic law that limit compensation for exceptionally high though foreseeable losses or grant judges a right to reduce compensation may not be applied."). *See also supra* note 6 (citing the position taken by Magnus, rejecting Lookofsky's "questioning" view).

149 *See supra* notes 55-58 and accompanying text.

150 *See supra* text accompanying notes 137-46.

151 I.e., by virtue of the Private International Law rules of the forum.

152 I have elsewhere suggested (in Danish) that § 36 of the Danish Contracts Act is "internationally mandatory." *See* JOSEPH LOOKOFSKY, INTERNATIONAL PRIVA-

On the down side, I realize that many (even Danish) decision makers would be reluctant to go out on that domestic loss-limiting limb, not only because the domestic legislator himself has called for particular restraint,[153] but also because the outside world is hardly ready for such overt contractual loss limitation.[154] Indeed, overt application of a rule like § 24 of the Danish Liability Act would surely be too paternalistic an option for those still faithful to the Contract Freedom Idol (though not always the full measure of expectation protection which flows from unflinching worship to that).[155]

My conclusion is thus that, in the real CISG world, all four (4) alternatives remain viable. For Scandinavian decision makers, at least, the *result* in a case like *Seller's Shaft* will remain far more important than the ratio,[156] and that even goes for the occasional irrational ratio, including (if need be) a decision which "tests correct" by covert application of more traditional CISG tools.[157]

That might sound "loose," but the hard fact is that the CISG orchestra has no conductor, no one with authority to make the national court-musicians march in (uniform) step.[158] We have, in other words, no supranational Court of Justice with authority to make even "preliminary rulings," for example, on the relationship between the Convention and domestic limits on compensation for disproportionate loss.[159] A related reality is

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TRET PA FORMUERETTENS OMRADE 79 (3d ed. 2003). I think the same might be said of § 24 of the Danish Liability Act. The Dutch disproportionate loss rule, see *supra* note 67, is by its own terms "mandatory," which leaves open the question of whether it is also "internationally mandatory."

153 *See supra* text accompanying note 62.

154 *Accord* ANDERSEN & LOOKOFSKY, *supra* note 11.

155 For an eloquent exposition on this point, see Lord Denning MR in *George Mitchell v. Finney Lock Seeds,* (1983) 2 Lloyd's Rep. 272, 2 All E.R. 737 ("idol" of freedom of contract "shattered" by the Unfair Contract Terms Act 1977). *See also supra* note 67 (regarding § 36 of the Danish Contracts Act). For an English abstract of recent Swedish case law on the correspondingly sensitive Swedish rule, see http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=12934&i=1051092.

156 *See supra* text accompanying note 71.

157 *See supra* text accompanying note 70.

158 *See* Lookofsky, *supra* note 108; *see also supra* text accompanying note 34 (borrowing an image from Schlechtriem).

159 *See generally* JOSEPH LOOKOFSKY & KETILBJØRN HERTZ, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION Ch. 2.2. (2d ed. 2003) (regarding ECJ preliminary rulings in a different jurisdictional context); *see also* ECJ Case C-402/

that most CISG cases are decided by arbitrators, and the rational results (awards) of arbitral tribunals are not subject to judicial review (second-guessing).[160] The rules for reviewing court decisions are of course different, but a given CISG decision can never be reviewed outside the jurisdiction concerned,[161] except of course by academics (who fortunately remain free to review and second-guess almost anything).

So, if you asked me about compensation for disproportionate loss in the CISG context - for example, whether the Danes impliedly opted out of their basic social justice conceptions when they opted into the CISG[162] - I would be inclined to leave my options open. The global jury is still "out," and I would not anticipate a definitive verdict on this issue, not in the "foreseeable" future at least.

I know some might despair at the consequences all this might have for uniform CISG interpretation, but let's remember that Article 7(1) does not (indeed could not) demand fully uniform Convention interpretation or application,[163] not only because the judicial orchestra has no conductor, but also because the Vienna drafters had no choice but to leave us with loose ends like these.[164]

Not to worry, the Scandinavian Realist might reassuringly conclude, for loose ends and open-endedness do *not* make the CISG a low-quality thing.[165]

VI. Concluding Remarks

When I started studying Law at NYU in 1967, Allan Farnsworth was uptown at rival Columbia, writing about "Meaning"

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03 (Jan. 10, 2006), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0402:EN:HTML.

[160] The awards rendered by arbitral tribunals are rarely set aside, even if a given national court would have reached a different result. *See* Lookofsky & Hertz, *supra* note 159, Ch. 6.

[161] *See supra* text accompanying note 109.

[162] *Cf. supra* text accompanying notes 63-67.

[163] *See generally* Lookofsky, *supra* note 109.

[164] *See* Joseph Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 Am. J. Comp. L. 403, 407 (1991), *available at* http://www.cisg.law.pace.edu/cisg/biblio/lookofsky6.html.

[165] *Cf.* Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 Univ. Colo. L. Rev. 541 (2000).

in the Law of Contracts.[166] By 1981, when I received my first Danish degree, Farnsworth had finished reporting the *Restatement (Second) of Contracts*. Later, as I worked on my thesis, I relied on that *Restatement,* as well as Farnsworth's own *Contracts*,[167] the modern Bible of the field.

In my thesis, as a prelude to what I (the hybrid-product of two legal cultures) had come to see as the larger *Hadley*-conundrum, I quoted the following lines from Tennyson:[168]

> Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances,
> Thro' which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame.

Led to the science of law, "to do something which had a human element,"[169] Farnsworth beat a pathway to well-deserved fame; his fine reputation preceded him wherever he went. When our paths crossed in Copenhagen, to debate *Consequential Damages,* we certainly did not agree on everything, but I was certainly very happy that Allan Farnsworth was there. We will all miss him.

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[166] E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939 (1967).

[167] *See* FARNSWORTH, *supra* note 6.

[168] Lord Tennyson, A., *Aylmer's Field* (1793).

[169] "I wanted to do something which had a human element in it as opposed to an inanimate object," he told the Columbia Law School News in a 1968 interview. *See* http://www.law.columbia.edu/media_inquiries/news_events/2005/february/farnsworth#94413 (last visited Mar. 11, 2007).