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Comparative Ruminations on the Foreseeability of Damages in Contract Law

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I. INTRODUCTION

In civil law, not unlike in common law, within the field of civil liability,[1] one generally distinguishes contractual liability from tortious liability,[2] even though some legislatures provide general rules applicable to both contract law and tort law. The German Civil Code, for example, dedicates sections 241 through 304 to the *Schuldrecht im allgemeinen*,[3] i.e., to obligations in general; the Italian Civil Code, unlike the French Civil Code which is based on the *Institutionensystem*,[4] does so as well in Italian Civil Code articles 1173-1320. Nevertheless, even in those

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1. In civil law systems today, unlike in Roman law, civil liability is generally distinguished from criminal liability, even though it has been said that "while every lawyer feels that there are obvious differences, none can state in exact terms what they are." Sir Percy Henry Winfield, The Province of the Law of Tort 190 (1931). *See also*, in regard to this distinction, André Tunc, Introduction, XI/1 Int'l Enc. Comp. L. 29 (1974), where the author states that "[t]oday, the distinction between tort and crime does not give rise to any practical difficulty."

2. This distinction has been treated above all in French and Italian law. *See, e.g.*, Brun, Rapports et Domaines des Responsabilités Contractuelle et Délictuelle (1931); Ugo Majello, Responsabilità contrattuale e responsabilità aquiliana, in Fondamento e Funzione della Responsabilità Civile 12 (Buoncuore & Majello eds. 1975); Didier Martine, L'Option Entre la Responsabilité Contractuelle et la Responsabilité Délictuelle (1957); Maurice Rassat, La Responsabilité Civile 7-10 (1981); Carlo Rossello, Intorno ai rapporti tra responsabilità contrattuale e responsabilità extracontrattuale, Giur. It. IV 201 (1985).

For a treatment of the distinction under review by English legal writers, *see, e.g.*, A.G. Guest, *Tort or Contract?*, 3 Malaya L. Rev. 191 (1961); Tom Hadden, *Contract, Tort and Crimes: The Forms of Legal Thought*, 87 L.Q. Rev. 240 (1971); W.D.C. Poulton, *Tort or Contract*, 82 L.Q. Rev. 346 (1966).

3. The German Civil Code (hereinafter BGB) is based on the so called *Pandektensystem*, according to which a civil code should be divided in different parts: (1) a general part, encompassing rules relating to all kinds of *vincula iuris*, as well as parts relating to (2) obligations, (3) property, (4) family, and (5) succession.

4. The French Civil Code and Austrian General Civil Code, unlike most modern civil codes, follow the division of the Roman *Institutiones* which were divided in three different parts. Therefore the French Civil Code (hereinafter Fr. C. Civ.) is divided in three books: Of Persons, Of Property and the Different Modifications of Property, Of the Different Modes of Acquiring Property.

legislatures, there are some differences in the rules governing contractual and tortious liability in spite of an apparent crisis[5] of the distinction, which crisis has been caused by the recent tendency to mitigate the differences between these two types of civil liability.[6] However, it is doubtful whether this distinction can be abolished since "the distinction finds a legal justification"[7] in the fact that the two types of liability are provided for, at least partly, in different titles of the various civil codes. This is true, for example, in regard to the French,[8] the Italian,[9]

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5. It has often been said that the distinction between contractual and tortious liability is actually characterized by a crisis. For similar statements, *see, e.g.*, Claudio Turco, *Brevi considerazioni sul principio di prevedibilità del danno come profilo distintivo fra responsabilità contrattuale ed extracontrattuale*, Riv. Crit. Dir. Priv. 93 (1987): Giovanna Visintini, *Responsabilità contrattuale ed extracontrattuale (Una distinzione in crisi?)*, Rass. Dir. Civ. 1077 (1983).

6. Recently it has been stated that, in fact, the areas of those types of liability tend to overlap and that consequently common rules should cover both liabilities, Guido Alpa, Responsabilità Civile e Danno 17 (1990). *See*, for further criticism in Italy, Francesco D. Busnelli, *Verso un possibile riavvicinamento tra responsabilità contrattuale e responsabilità extrecontrattuale*, Resp. Civ. e Prev., 748 (1977); Francesca Giardina, *Responsabilità contrattuale ed extracontrattuale: una distinzione attuale?*, Riv. Crit. Dir. Priv. 79 (1987); Giuseppe Sbisà, *Responsabilità contrattuale e responsabilità extracontrattuale*, Rass. Dir. Civ. I 109 (1988); Giuseppe Sbisá, *Responsabilità contrattuale ed extracontrattuale: realtà contrapposte o convergenza di presupposti e di scopi?*, Resp. Civ. e Prev. 723 (1977).

The distinction under review has been criticized in France, as well. *See, e.g.*, Tunc, *supra* note 1, at 28, where the author, after having criticized the distinction between contractual and tortious liability, states that the "unification of the rules governing them" should be advocated. *See also*, Henri Mazeaud et al., 2(1) Lecons de Droit Civil 371-373 (1985).

7. Visintini, *supra* note 5, at 1077. For a similar evaluation, *see* Tunc, *supra* note 1, at 20, where, after having pointed out the existence of a justified skepticism toward the distinction at issue, the author proclaims that "[f]rom the point of view of positive law, the practical interests of the distinction and the combination of tortious and contractual liability deserve to be studied."

8. As far as the French legal system is concerned, *see, e.g.*, Philippe Malaurie & Laurent Aynes, Droit Civil. Les Obligations 320-321 (1985), where the authors proclaim that "the Civil Code has clearly distinguished the two types of liability. Their sources cannot be found in the same place:

> the rules relating to the tortious liability are concentrated in five articles (Art. 1382 to 1386); the rules relating to the contractual liability are scattered in several provisions governing or specific contracts . . . or the general theory of contracts (Art. 1142, 1145, 1184) and are loosely gathered in articles 1146-1155.

See also, Tunc, *supra* note 1, at 24, where it is stated that "the distinction between the two liabilities is strongly entrenched in French law, being based on their treatment in two different Titles of Book III of the Civil Code: Title III, on Contracts and Contractual Obligations in General . . . and Title IV on Liability Arising Outside Any Contractual Obligation."

9. The Italian Civil Code treats contractual obligations in general in articles 1321-1469, while tortious liability is governed by articles 2043-2059. *See also*, Visintini, *supra* note 5, at 1077.

and the German civil codes,[10] even though some of these codes provide rules relating to obligations in general.

In civil law systems, the types of liability at issue differ from each other, for instance, "in regard to the source, the fact upon which the liability depends."[11] While there is contractual liability when there is non-performance (or bad performance) of any obligation,[12] at least in the French-based systems,[13] there is tortious liability when a wrong has been committed against a person to whom the tortfeasor had no obligation.[14]

However, the source of the obligation to compensate for damage is not the only element which distinguishes the two types of liability in both civil and common law.[15] The rules governing the burden of proof also differ: while the victim of a tort has to prove the defendant's fault in conformity with the principle *actore incumbit probatio*,[16] in contract law it is generally the defendant who has to prove that the non-performance is not due to his fault,[17] i.e., "the burden of proof falls on

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10. Even though the BGB provides rules governing both contractual and tortious liability, it also provides rules applicable only to contract law (BGB sec. 305-361) and only to tort law (BGB sec. 823-853).

11. Giardina, *supra* note 6, at 79, 80.

12. According to this definition, both in Italy and in France, there is respectively *responsabilità contrattuale* and *responsabilité contractuelle* even when there is no contract at all, such as in the case of the *negotiorum gestio*. In German law, however, there is contractual liability only where there is a legal transaction; all other cases (such as a tort or *negotiorum gestio*) give rise to legal obligations.

13. For a similar affirmation relating to Italian law, *see, e.g.*, Pietro Rescigno, Manuale di Diritto Privato Italiano 655 (1989). As for French law, *see* Rassat, *supra* note 2, at 8.

14. Only where there is no *vinculum iuris* between the defendant and the victim can tortious liability arise. For a similar statement by Italian courts, *see, e.g.*, Cass. civ., April 23, 1969; Cass. civ., October 29, 1988. For a comparable statement in French law, *see, e.g.*, Tunc, *supra* note 1, at 19: "The purpose of the law of tort is to oblige a citizen to make compensation for damage he has unlawfully inflicted on another citizen *outside any contractual relationship*." (emphasis added).

15. In common law, as well, it has been pointed out that the source of the two liabilities is different. Indeed, generally it is stated that "no civil injury is to be classed as a tort if it is solely a breach of contract. . . . Further, in tort the duty is towards persons generally; in contract it is towards a specific person or persons." Sir John Salmond & R.F.V. Heuston, The Law of Torts 12 (15th ed. 1969).

16. As for the Italian law, *see, e.g.*, Alberto Trabucchi, Istituzioni di Diritto Civile 209 (1990). For the same rule in French law, *see, e.g.*, Philippe Le Tourneau, La Responsabilité Civile 127 (1976). In German law, too, the rule is the same; *see* Hans Brox, Allgemeines Schuldrecht 146 (1987).

17. For the Italian law *see* Italian Civil Code art. 1218 (hereinafter Ital. Civ. C.). In regard to French law, *see* Tourneau, *supra* note 16. As for German law, *see* BGB sec. 282 quoted in the text.

the debtor."[18] Further differences relate, for example, to the rules governing the default: in civil law, a *mise en demeure*, a formal requisition is generally required in order to consider the performance as being unduly delayed.[19] Generally, however, such a formal requisition "is not necessary . . . when the debt results from a tort."[20] Tortious and contractual liability differ for other reasons, as well: the rules relating to the interests for delay generally do not correspond. In contract law, the right to damages for delay accrues on the day of the demand,[21] while in tort law they are due from the day of the tortious event.[22] Furthermore, the statute of limitations or prescriptive period of the various claims differ: the period relating to contract law is longer[23] "in order to reach a broader protection (at least in regard to time) of the victim's interest . . . ."[24]

The rules relating to compensation of damages differ in the French-based legal systems, unlike in German law.[25] Indeed, while in French-

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18. BGB sec. 282. However, the burden of proof as an element which distinguishes the two types of liability at issue has been criticized. *See, e.g.*, Turco, *supra* note 5, at 94 n.5; Visintini, *supra* note 5, at 1081-83. This criticism comes because there are several important exceptions to the aforementioned rules. For a comparative overview of the problems relating to the burden of proof in Germany, France and Italy, *see* Franco Ferrari, Atipicità dell'Illecito Civile 19-21 (1992).

19. *See*, for a similar affirmation, Sir Maurice Sheldon Amos and F.P. Walton, Introduction to French Law 183 (3d ed. 1966), where it is stated that a "delay in itself is not enough. It must be a delay officially noted . . . ."

20. Ital. Civ. C. art. 1219. For the existence of similar rules in both French and German law, *see, e.g.*, Amos & Walton, *supra* note 19, at 183; Brox, *supra* note 16, at 158; Le Tourneau, *supra* note 16, at 81; Malaurie & Aynes, *supra* note 8, at 345.

21. For this rule in France, *see* Fr. C. Civ. art. 1153(3): "They [damages and interests from the delay] are only due from the day of the notice to pay, except in the case where the law makes them run as a matter of law." John H. Crabb, The French Civil Code, Translation With an Introduction (1977). For the existence of a comparable rule in Italy and Germany, *see* Ferrari, *supra* note 18, at 22; Malaurie & Aynes, *supra* note 8, at 345.

22. *See*, for this rule in Italy, the decisions of the Italian Supreme Court, Cass. civ., October 20, 1984; Cass. civ., January 6, 1984; Cass. civ., October 25, 1982. As for the French rule, *see* Civ., January 27, 1983. As far as German law is concerned, *see* Ferrari, *supra* note 18, at 23.

23. In Italy, according to Italian Civil Code article 2946, the limitation period will usually be ten years if there is a contract, five years if there is no contract. In France, the time limits are respectively thirty years (Fr. C. Civ. art. 2262) and ten years (Fr. C. Civ. art. 2270-2271), while in Germany the limits are thirty years (BGB sec. 195) and three years (BGB sec. 852).

24. Giardina, *supra* note 6, at 79, 80.

25. While German law recognizes the aforementioned elements on the basis of which contractual and tortious liability can be distinguished from each other, it does not distinguish as far as the law of damages is concerned. Indeed, "[t]he German law relating to damages is very simple. The rules stated . . . apply to contracts, delicts and all other obligations alike, except if a special rule provides for an exception for the individual case." 1 E.J. Cohn, Manual of German Law 104 (1968).

based tort law,[26] such as in Italy, for instance,[27] the compensable damage includes both foreseeable and unforeseeable damages. In French-based contract law, the defendant is only bound to compensate the damages which were foreseeable at the moment the contract was concluded.[28] And it is this rule, the "foreseeability" limit, and its history which this article will examine in order to show that all the various rules which are treated in the different countries under the heading of "foreseeability" or "contemplation", even the *Hadley v. Baxendale*[29] rule, have a common source: The French law.

II. FORESEEABILITY AND CISG ARTICLE 74

A "foreseeability" limit has also been provided for by an "unusual treaty":[30] the 1980 Vienna Convention on the International Sale of Goods ("CISG").[31] In fact, CISG article 74,[32] after having stated, not unlike

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26. As for the French cases, *see, e.g.*, the decision of the French *Cour de Cassation*, Civ., October 21, 1946; Civ., March 2, 1966; Civ., May 8, 1969. *See also*, Ferrari, *supra* note 18, at 24.

27. *See, e.g.*, Ferrari, *supra* note 18, at 23-24; II/2 Francesco Galgano, Diritto Civile e Commerciale 307 (1990); Turco, *supra* note 5, at 93.

28. *See*, for this statement, Galgano, *supra* note 27, at 307; Giardina, *supra* note 6, at 79, 80; Majello, *supra* note 2, at 14. A similar statement can also be found in Amos & Walton, *supra* note 19, at 185, where the authors state that the French courts "may normally take into account only that prejudice which could have been contemplated when the contract was concluded." One must, however, note that it is not correct to speak of "contemplation," since the French Civil Code speaks of "foreseeability" (Fr. C. Civ. art. 1150). As will be pointed out *infra*, there may be foreseeable events which are not in the contemplation of the parties, *i.e.*, speaking of contemplation reduces the scope of application of the French rule.

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

30. Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of* Hadley, 23 Geo. Wash. J. Int'l. L. & Econ. 415, 415 (1989), states that the treaty is unusual "because it means that some, although not all, contracts for the international sale of goods entered into by U.S. buyers and sellers will be governed by conventional international law under one treaty."

31. United Nations Conference on Contracts for the International Sale of Goods, April 11, 1980, 19 Int'l Legal Mat'ls 668, 671 (1980), entered into force January 1, 1988, reprinted in Public Notice, 52 Fed. Reg. 6262-80 (1987). As of December 14, 1992, the CISG entered into force in Argentina, Australia, Austria, Byelorussian SSR, Chile, Denmark, Federal Republic of Germany, Egypt, Finland, France, Hungary, Iraq, Italy, Lesotho, Mexico, Norway, People's Republic of China, Spain, Sweden, Syria, United States, Yugoslavia, and Zambia, Canada, Romania, Bulgaria, Guinea, Netherlands, Switzerland, Ukranian S.S.R.

The literature on the CISG is nearly unlimited. For some commentaries, *see, e.g.* Bernard Audit, La Vente Internationale de Marchandises (1990); Cesare M. Bianca et al., *Convenzione di Vienna sui contratti di vendita internazionale di beni mobili*, Nuove Leggi Civ. Comm. 1 (1989); Commentary on the International Sales Law, The 1980 Vienna Sales Convention (Cesare M. Bianca & Michael Bonell eds., 1987); Kommentar zum

most legal systems, that the compensable damages encompass both the *damnum emergens* and the *lucrum cessans*,[33] lays down the rule 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 facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

In regard to this rule, several German legal writers, such as Herber and Czerwenka[34] and Reinhart[35] have stated that the rule of foreseeability comes from the common law rule laid down in *Hadley v. Baxendale*.[36] This hazardous statement,[37] which corresponds to the German legal scholars' tendency to interpret the CISG in light of the common law, is based on the nonexistence of a similar concept in Germany. The German Civil Code does not expressly lay down a foreseeability limit on damages,[38] even though before the Code came into force there were

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Einheitlichen Un-Kaufrecht- CISG (Ernst von Caemmerer & Peter Schlechtriem eds., 1990); Francesco Galgano, *Il Diritto uniforme: la vendita internazionale,* in *Atlante di diritto privato comparato* 211 (Francesco Galgano & Franco Ferrari eds., 1992); Rolf Herber & Beate Czerwenka, Internationales Kaufrecht (1991); John Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (2nd ed. 1991); International Sale of Goods (Peter Sarcevic & Paul Volken eds., 1985).

32. CISG art. 74 corresponds to Art. 82 of the Convention Relating to a Uniform Law on the International Sales of Goods, July 1, 1964, 834 U.N.T.S. 107.

33. Fr. C. Civ. art. 1149 expresses the rule mentioned in the text: "The damages and interest due to the creditor are, in general, to the amount of the loss which he has sustained and of the gain which he has been deprived . . . ."

34. *See* Herber & Czerwenka, *supra* note 31, at 333, where the authors state that "the limitation to the foreseeable damages comes from Anglo-American law."

35. *See* Gert Reinhart, UN-Kaufrecht 170 (1991).

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

37. The German scholars' opinion has been briefly criticized in Ferrari, *supra* note 18, at 25 n.76.

38. However, the idea of such a limit, even though it has not been expressly provided for, seems to play a role in BGB sec. 254:

(1) If any fault of the injured party has contributed to causing the damage, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused predominantly by the one or the other party.

(2) This applies also even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of unusually high damage which the debtor neither knew nor should have known, or in an omission to avert or mitigate the damage.

For a similar affirmation, *see* Hermann Weitnauer, *Vor Artt. 78-89, in* Kommentar zum Einheitlichen Kaufrecht; Die Haager Kaufrechtsübereinkommen Vom 1. Juli 1964 540 (Hans Dolle ed., 1976).

some legal writers who wanted such a "foreseeability" limit enacted.[39]

In contrast, such a statement would never have been made in French-based legal systems where similar rules exist. For example, the French Civil Code states that "the debtor is only bound for the damages and interest which were foreseen, or which might have been foreseen at the time of the contract, when it is not in consequence of his fraud that the obligation has not been executed."[40] A similar provision can be found in the Italian Civil Code: "[U]nless the non-performance or the delay depends on the debtor's fraud, the compensation is limited to the damages which could be foreseen at the time when the obligation came into existence."[41] The foregoing provisions, as well as the Louisiana Civil Code,[42] use expressions similar to those used by the CISG, however, there are some important differences.[43] The most important one relates to the distinction, unknown to the CISG, between damages occasioned with fraud and those occasioned without fraud. That distinction initially could be found in the Draft on the Principles of International Commercial Contracts issued in 1992 as well,[44] but it has been abolished in favor of a principle comparable to the rule laid down in CISG article 74.[45]

III. History of the "Foreseeability" Limit

A. *Civil Law*

The history of the "foreseeability" limit confirms that the principle laid down in CISG article 74 cannot be a common law rule because

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39. For the history of the "foreseeability" limit with special references to German law, *see, e.g.*, Detlef König, *Voraussehbarkeit des Schadens als Grenze vertraglicher Haftung*, *in* Das Haager Einheitliche Kaufgesetz und das Deutsche Schuldrecht. Kolloquium Zum 65. Geburtstag von Ernst v. Caemmerer 75 (Hans G. Leser & Wolfgang Frhr. Marschall von Bieberstein eds., 1973).

40. Fr. C. Civ. art. 1150. For a similar translation, *see, e.g.*, George A. Berrmann et al., French Law: Constitution and Selective Legislation (1989); Charles T. McCormick, Handbook on the Law of Damages 563 n.10 (1935).

41. Ital. Civ. C. art. 1225.

42. *See* La. Civ. Code art. 1996: "An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made."

43. In Italy, Bianca et al., *supra* note 31, at 300, stated that even the Italian expressions appear to be comparable to the expressions used in the CISG, "however, there remain important differences between our system and the system of the Convention."

44. *See* UNIDROIT Document (C.D. (72) 6) (1992) former Art. 6.4.5., which read as follows: "The defaulting party is liable only for loss which he foresaw or could reasonably foresee at the time of the conclusion of the contract would be likely to result from his non-performance, unless this non-performance is deliberate or reckless (grossly negligent)."

45. *See* UNIDROIT Document (Study L-Doc. 40 Rev. 10) Art. 7.4.4.: "The defaulting party is liable only for loss which he foresaw or could reasonably have foreseen at the time of the conclusion of the contract would be likely to result from his non-performance."

the source of the *Hadley v. Baxendale* rule can be found in French law.

A vague attempt to limit the compensation of damages in contract law to foreseeable damages was made in Roman law,[46] but these attempts were nullified by a constitution enacted in 531 A.D. by Justinian according to which damages were limited *ad duplum*.[47] However, one can consider this constitution as the "starting point" of the "foreseeability" limit which can be found in many legal systems based on French law. Indeed, in 1546 Dumoulin concluded that the rationale of the constitution of Justinian was based on the fact that generally the debtor could foresee only such damage, i.e., the *duplum*.[48] On the basis of this reasoning, Dumoulin established the general rule that compensable damage resulting from a breach of contract had to be limited to foreseeable damage.[49] And it is this conclusion to which Pothier referred when he stated that "le débiteur n'est tenu que des dommages et intérêts qu'on a pu prévoir, lors du contrat, que le créancier pourrait souffrir de l'inexécution de l'obligation; car le débiteur est censé ne s'être soumis qu'à ceux-ci."[50] This rule was subsequently adopted by the Code Napoléon[51] which, by serving as model to a number of other legal systems, served as a "vehicle" for the transplantation of the rule of foreseeability into numerous legal systems, such as those in Belgium, Italy, Luxembourg, Portugal and even, for a short period of time, Switzerland.[52]

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46. *See*, as for the "foreseeability" limit in Roman law, Fritz Pringsheim, *Zur Schadensersatzpflicht des Verkaufers und des Kaufers*, *in* 6 Studi in Onore di Salvatore Riccobono 313 (1936). *See also*, Weitnauer, *supra* note 38, at 537, where the author draws attention to a Roman source: D,19.1.43-44.

47. *See*, for a treatment of this problem, Dieter Medicus, Id Quod Interest 288-90 (1962).

48. For a similar affirmation, *see also*, Auguste Dumas, *Les origines romaines de l'article 1150 du Code civil*, *in* 2 Etudes d'histoire juridique offertes à Paul Frédéric Girard 110 (1913).

49. *See* Weitnauer, *supra* note 38, at 537.

50. "The debtor is bound to pay only the damages and interests which one could foresee, when the contract was made, as being possibly suffered by the creditor in non-performing the obligation, because the debtor is considered as having accepted only these." Oeuvres de Pothier 181 (1821).

51. For a complete treatment of the "foreseeability" limit in French law, *see, e.g.*, I. Souleau, La Prévidibilité du Dommage Contractuel (1979).

52. Even though the Swiss system is generally considered as being a German-based legal system, the Swiss Code of Obligations (hereinafter CO), recognized the "foreseeability" limit in its first version from 1881: "The debtor who is bound to compensate the damages has to pay the damages which, at the moment the contract was concluded, could be foreseen as being an immediate consequence of the non-performance or the Schlechtërfullung of the contract." *See also*, Ernst Rabel, Das Recht des Warenkaufs 479 (reprint 1964).

B. *The "Foreseeability" Limit and its Reception in American Law*

Pothier, however, did not only influence the French-based civil law systems. He influenced the common law rules as well, and this is one reason why it is incorrect to state that the rule laid down in CISG article 74 corresponds to a rule "invented" in the common law.[53]

Towards that end, one must note that Pothier's ideas were not unknown to the English speaking legal scholars. In fact, in 1806 an English translation of his *Traité des obligations* was published.[54] And it is this Treatise which has promoted the tendency to limit contractual liability to the foreseeable damage not only in England, but also in America where "in order to solve new legal problems one referred to *English law*, as well as to *civil law*."[55] And it has been stated, that towards this end, "Pothier's writings constituted, apart from the Louisiana Civil Code, the easiest way to access the legal tradition of the European continent."[56]

Pothier's influence in America, in regard to the "foreseeability" limit, can be measured by looking at several court decisions which explicitly refer to the French scholar. The earliest case in this regard appears to be *Blanchard v. Ely*,[57] a case decided in 1839, fifteen years prior to *Hadley v. Baxendale*. In regard to the question under review, the decision states that "our courts are more and more falling into the track of the civil law, the rule of which is thus laid down by a learned writer,"[58] Pothier. Further cases can be found not only in the last century,[59] but in this century, as well: in *Manss-Owens v. H. S. Owens & Son* (1921)[60] and *Sinclair Refining Co. v. Hamilton & Dotson* (1935)[61] Pothier has been expressly referred to as the inventor of the rule which limits contractual liability to the foreseeable damage.

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53. *See also*, apart from the authors quoted in *supra* notes 34 & 35, Ingeborg Schwenzer, *Das UN- Abkommen zum internationalen Warenkauf*, Neue Juristische Wochenschrift, 606 (1990).

54. Robert J. Pothier, A Treatise on the Law of Obligations (William D. Evans trans., 1806).

55. König, *supra* note 39, at 80.

56. *Id.*

57. Blanchard v. Ely., 21 Wend. 342 (N.Y. 1839).

58. *Id.* at 346.

59. For American cases referring to the French law as a source of the Hadley v. Baxendale rule, *see* Masterton v. Mayor of Brooklyn, 7 Hill 61 (N.Y. 1845) (where judge Nelson expressly refers to the English translation of Pothier's *Traité des obligations*); Griffin v. Colver, 16 N.Y. 489 (1858); Jones v. George, 61 Tex. 345 (1884). For further citations, *see* König, *supra* note 39, at 82 n.41.

60. 105 S.E. 543 (Va. 1921).

61. 178 S.E. 777 (Va. 1935).

IV. *Hadley v. Baxendale*

A. The Hadley *Rule and French Source*

The common law rule upon which CISG article 74 is wrongly supposed to be based is, of course, the (immortal)[62] English case *Hadley v. Baxendale*,[63] which has been defined by Gilmore as a "fixed star in the jurisprudential firmament"[64] and which consequently has influenced varied legal systems, such as Israel, Scotland and South Africa.[65]

In *Hadley*, a carrier agreed with a mill owner to transport a broken engine shaft to the manufacturer in order to be used as a pattern for the replacement shaft. The delivery of the shaft was delayed for five days due to the carrier's fault. The carrier consequently was sued for lost profits because the mill had to be shut down those extra five days. However, the court decided that these consequential damages[66] were not compensable. On that occasion, the Court of Exchequer laid down the learned rule, according to which

> [w]here two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of

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62. *See* Murphey, *supra* note 30, at 417 n.5, where the author states in regard to Hadley v. Baxendale, that "immortality—or at least a promising future—has been ascribed to it."

63. 156 Eng. Rep. 145 (1854). This case, whose "exceptional pedagogical centrality" has been pointed out, has been treated in several pages (Richard Danzig, The Capability Problem in Contract Law (1978)). For recent articles, *see, e.g.*, Melvin A. Eisenberg, *The Principle of* Hadley v. Baxendale, 80 Calif. L. Rev. 563 (1992); Larry D. Hause, *An Economic Approach to* Hadley v. Baxendale, 62 Neb. L. Rev. 157 (1983); Janet T. Landa, Hadley v. Baxendale *and the Expansion of the Middleman Economy*, 16 J. Legal Stud. 455 (1987); Jeffrey M. Perloff, *Breach of Contract and the Foreseeability Doctrine of* Hadley v. Baxendale, 10 J. Legal Stud. 39 (1981); Louis E. Wolcher, *Price Discrimination and Inefficient Risk Allocation under the Rule of* Hadley v. Baxendale, 12 Research in L. & Econ. 9 (1989); Wyatt McDowell Wright, *Lost Profits and* Hadley v. Baxendale, 19 Washburn L.J. 488 (1980).

64. Grant Gilmore, The Death of Contract 83 (1974). One must note, however, that Gilmore earlier had described the same decision as an "essentially uninteresting case, decided in a not very good opinion by a judge otherwise unknown to fame." *Id.* at 49.

65. For a more critical statement, *see* Guenter H. Treitel, *Remedies for Breach of Contract*, VII/16 Int'l. Enc. Comp. L. 60 (1976): "it [the contemplation rule] has recently been adopted in ULIS and in the law . . . of Scotland, South Africa and Sri Lanka though it is hard to say whether it originated in those countries as a Civil law concept or whether it was accepted in them as a result of common law influence."

66. Note that "[t]here was, in effect, no claim for direct damages." Murphey, *supra* note 30, at 429.

> contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[67]

The erroneous statement made by German scholars that it is the *Hadley* rule upon which CISG article 74 is based presupposes that the *Hadley* rule itself is an innovative rule, an invention of the Court of Exchequer. And indeed, it has been argued that the rule at issue can be analyzed as a judicial invention in an age of industrial invention,[68] *i.e.*, as an invention linked to a society characterized by the industrial revolution.[69] However, as it results from the text of the decision rendered by the Court of Exchequer, this view is not tenable: the *Hadley* rule does not constitute a judicial invention in an age of industrial invention. It constitutes rather the transplantation of a foreign rule, made necessary by the age of industrial invention. This is the conclusion one must draw from reading the text of *Hadley v. Baxendale*. It is apparent that the judges of *Hadley* were aware of the aforementioned American case law,[70] based on the French "foreseeability" limit,[71] and that they were aware of the French rule since they stated that "the sensible rule appears to be that which has been laid down in France, and which is declared in their code—Code Civil 1149, 1150, 1151."[72]

V. CONCLUSION

On the basis of the foregoing observations, one may say that CISG article 74 is not based on the common law rule of *Hadley v.Baxendale* because the *Hadley* rule itself is not a rule invented under common law, as has been expressly pointed out in *Sinclair Refining Co. v. Hamilton & Dotson*.[73] The "foreseeability" limit

> is known as the rule in *Hadley v. Baxendale* and is sometimes spoken of as having originated in that case, though it is in

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67. *Hadley*, 156 Eng. Rep. at 151.

68. For a similar evaluation, *see* Richard Danzig, Hadley v. Bexendale: *A Study in the Industrialization of the Law*, 4 J. Legal Stud. 249, 250 (1975), where the author states that the Hadley v. Baxendale rule "was invented in its particular form and in this particular case, to assess the relationship between this judicial invention and the existing legal and economic technology . . . ."

69. *Id.* at 249.

70. The American case law has been made accessible to English lawyers by the treatise of Theodore Sedgwick, Treatise on the Measure of Damages (1847).

71. *See supra* notes 57-61.

72. Hadley v. Baxendale, 156 Eng. Rep. 145, 147 (Ex. 1854).

73. 178 S.E. 777 (Va. 1935).

> reality an embodiment of civil law principles, and is substantially a paraphrasing of a rule on the subject as it had been stated at an earlier date in the Code Napoleon, by Pothier.[74]

There are, however, further reasons which necessarily lead to the thesis that CISG article 74 is not based on common law: the *Hadley* rule, or contemplation rule, does not correspond at all to the rule laid down in CISG article 74. In fact, while CISG article 74 refers to the foreseeability of damages, the *Hadley* rule speaks of "contemplated" damages. But by choosing the expression"foreseeable," the 1980 Vienna Sales Convention, not unlike the French-based legal systems, intended to widen the scope of recovery, *i.e.*, to limit the application of *Hadley*.[75]

Furthermore, while CISG article 74 requires that the damage caused must constitute "a possible consequence,"[76] the *Hadley* rule presupposes the damage as being "a probable result." There is other divergence between the two rules, and again one can state that "the CISG ostensibly widens the area of liability imposed upon the breaching party."[77]

These brief observations should be sufficient to disprove the statement that the "foreseeability limit" as laid down in CISG article 74 corresponds to a rule which finds its source in common law rules. And it is on the basis of this conclusion that one can divide all legal systems

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74. *Id.* at 779.

75. *See*, for a similar affirmation, Murphey, *supra* note 30, at 435-436, where in regard to the different expressions the author states that

> [a] plain reading of the words suggests that a difference in the scope of liability apparently is intended. Under *Hadley*, the damages must actually be "contemplated" and not merely "foreseeable." Thus, a rule that provides that damages only need to be "foreseeable" surely ought to narrow the limitations of *Hadley* and widen the scope of recovery.

76. One must also note that while CISG article 74 only takes into consideration "the party in breach", the rule of Hadley v. Baxendale refers to the "contemplation of both parties." As for this difference, *see, e.g.*, Johann Tiling, *Haftungsbefreiung, Haftungsbegrenzung und Freizeichnung im einheitlichen Gesetz über den internationalen Kauf beweglicher Sachen, in* Rabels Zeitschrift 259 (1968). *See also* Murphey, *supra* note 30, at 435, where the author states that the difference is only apparent, since "[n]o case has been found in which recovery was denied because the injured party did not foresee the loss."

77. Murphey, *supra* note 30, at 440. *See also* Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives, in* International Sales: The United Nations Convention on Contracts for the International Sale of Goods sec. 9.05 (Nina M. Galston & Hans Smit eds., 1984), where the author refers to Lord Reid's example in Koufos v. C. Czarnikow Ld., 1 A.C. 350 (H.L.) (1969), in order to illustrate the difference between "possible consequences" and "probable result": "to borrow from Lord Reid's example in *The Heron II*, if one takes a well-shuffled pack of cards it is quite possible, though not likely, that the top card will prove to be the nine of diamonds even though the odds are 51 to 1 against."

into four different categories: the countries which recognize the "foreseeability" limit as laid down in French law; the countries which are somehow based on the *Hadley* rule; the legal systems which ignore the limit at issue, except for international sales contracts, such as Germany;[78] and those systems which do not recognize a similar principle at all.

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78. As has already been pointed out, at *supra* note 38 and the accompanying text, the German legal system does not expressly recognize a rule similar to the "foreseeability" limit. *See*, for a similar affirmation, Treitel, *supra* note 65, at 60: "On the other hand, the doctrine failed to take root in Germany where it is, at least nominally, rejected even at the present day." *See also* Weitnauer, *supra* note 38, at 540. After the enactment of the CISG, however, in Germany the "foreseeability" limit applies to international sales contracts. However, one must note that in the former German Democratic Republic, the "foreseeability" limit had been introduced before the 1980 Vienna Sales Convention came into force. *See*, in this regard, the Law on International Economic Contracts (Kommentar zum Gesetz über internationale Wirtschaftsverträge) on February 5, 1976 sec. 297. *See also* Hans Stoll, *Art. 74, in* Kommentar zum Einheitlichen Un-Kaufrecht-CISG, *supra* note 31, at 611.