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I. INTRODUCTION

In civil law, not unlike in common law, within the field of civil liability, one generally distinguishes contractual liability from tortious liability, 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, i.e., to obligations in general; the Italian Civil Code, unlike the French Civil Code which is based on the Institutionensystem, does so as well in Italian Civil Code articles 1173-1320. Nevertheless, even in those...
legislatures, there are some differences in the rules governing contractual and tortious liability in spite of an apparent crisis⁵ 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

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).


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,\textsuperscript{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."\textsuperscript{11} While there is contractual liability when there is non-performance (or bad performance) of any obligation,\textsuperscript{12} at least in the French-based systems,\textsuperscript{13} there is tortious liability when a wrong has been committed against a person to whom the tortfeasor had no obligation.\textsuperscript{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.\textsuperscript{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 \textit{actore incumbit probatio},\textsuperscript{16} in contract law it is generally the defendant who has to prove that the non-performance is not due to his fault,\textsuperscript{17} i.e., "the burden of proof falls on
the debtor.' 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. Generally, however, such a formal requisition "is not necessary... when the debt results from a tort." 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, while in tort law they are due from the day of the tortious event. Furthermore, the statute of limitations or prescriptive period of the various claims differ: the period relating to contract law is longer "in order to reach a broader protection (at least in regard to time) of the victim's interest..." The rules relating to compensation of damages differ in the French-based legal systems, unlike in German law. Indeed, while in French-
based tort law,\textsuperscript{26} such as in Italy, for instance,\textsuperscript{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.\textsuperscript{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 \textit{Hadley v. Baxendale}\textsuperscript{29} rule, have a common source: The French law.

\section*{II. Foreseeability and CISG Article 74}

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

\begin{itemize}
  \item As for the French cases, see, e.g., the decision of the French \textit{Cour de Cassation}, Civ., October 21, 1946; Civ., March 2, 1966; Civ., May 8, 1969. See also, Ferrari, supra note 18, at 24.
  \item See, e.g., Ferrari, supra note 18, at 23-24; II/2 Francesco Galgano, \textit{Diritto Civile e Commerciale} 307 (1990); Turco, \textit{supra} note 5, at 93.
  \item See, for this statement, Galgano, \textit{supra} note 27, at 307; Giardina, \textit{supra} note 6, at 79, 80; Majello, \textit{supra} note 2, at 14. A similar statement can also be found in Amos & Walton, \textit{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 \textit{infra}, there may be foreseeable events which are not in the contemplation of the parties, \textit{i.e.}, speaking of contemplation reduces the scope of application of the French rule.
  \item Arthur G. Murphey, Jr., \textit{Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley}, 23 \textit{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."

The literature on the CISG is nearly unlimited. For some commentaries, see, e.g. Bernard Audit, \textit{La Vente Internationale de Marchandises} (1990); Cesare M. Bianca et al., \textit{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*, 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 and Reinhart have stated that the rule of foreseeability comes from the common law rule laid down in *Hadley v. Baxendale*. This hazardous statement, 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, even though before the Code came into force there were

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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."


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.

some legal writers who wanted such a "foreseeability" limit enacted.\textsuperscript{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."\textsuperscript{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."\textsuperscript{41} The foregoing provisions, as well as the Louisiana Civil Code,\textsuperscript{42} use expressions similar to those used by the CISG, however, there are some important differences.\textsuperscript{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,\textsuperscript{44} but it has been abolished in favor of a principle comparable to the rule laid down in CISG article 74.\textsuperscript{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


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

\textsuperscript{41} Ital. Civ. C. art. 1225.

\textsuperscript{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."

\textsuperscript{43} In Italy, Bianca et al., \textit{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."

\textsuperscript{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)."

\textsuperscript{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, but these attempts were nullified by a constitution enacted in 531 A.D. by Justinian according to which damages were limited *ad duplum*. 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*. 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. 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.” This rule was subsequently adopted by the Code Napoléon 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.

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).


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 Schlechtfüllung 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.4 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.

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).
55. König, supra note 39, at 80.
56. Id.
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).
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) English case Hadley v. Baxendale, which has been defined by Gilmore as a "fixed star in the jurisprudential firmament" and which consequently has influenced varied legal systems, such as Israel, Scotland and South Africa.

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 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

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."


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

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.
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

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 Ltd., 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; and those systems which do not recognize a similar principle at all.

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.