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A comparative and normative analysis of the remoteness test in the availability of significant remedies in international sales transactions

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*J.B.L. 289 Abstract

This article focuses on the remoteness of loss. It will be shown that the availability of damages under legal regimes created by the main international conventions, such as the United Nations Convention on Contracts for the International Sale of Goods, are essentially the same, although there are some wording dissimilarities in the rules dealing with the remoteness test. However, the implications of the absence of a remoteness test for the possibility of termination in the [Sale of Goods Act 1979](#) will be explored. It will be argued that the [Sale of Goods Act 1979](#) is more flexible and more effective in satisfying commercial buyers' needs than might be assumed.

Introduction

This article takes a fresh look at the role of the remoteness test with regard to the availability of buyers' remedies in the context of sales transactions. The article undertakes a critical comparison focusing on important legal regimes governing sales transactions, namely, the [Sale of Goods Act 1979](#) (SGA), the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG), the Proposal for a Common European Sales Law (CESL), and the UNIDROIT Principles of International Commercial Contracts 2010 (UPICC).¹ For this purpose, only two significant remedies are taken into account, damages and termination. The reason for this selection is that the remoteness test plays a major role in the availability of these remedies. An assessment of the availability of damages under those legal regimes will show that this test is essentially the same. Nevertheless, there is a significant difference between the regimes regarding the remoteness test for the availability of termination. Under the CISG, the CESL and the UPICC, the **J.B.L. 290* foreseeability requirement is an integral part of fundamental breach of contract, which is considered the main requirement for allowing the buyer to terminate the contract under these international legal regimes. By contrast, the foreseeability requirement is absent under the [SGA](#). The implications of this absence will be critically analysed with a view to determining which legal regime more effectively satisfies the special needs of a commercial buyer contracting international sales of goods.

To critically explore the significance of the lack of a foreseeability requirement in the [SGA](#), this article employs a normative framework, which consists of criteria that have been specifically formulated and developed in light of commercial realities and the needs of international sales transactions. In other words, this framework sets out the proper principle of the relationship that the remedial provisions have to the particular commercial utilities of a buyer. The framework incorporates four criteria that will be introduced and justified in this section. The first of these is "certainty". Rules need to be clear in order to avoid costly dispute resolution.² In the context of buyer's remedies, "certainty" implies that a buyer should know where he will stand in the event of a breach. This criterion will be used to examine how and to what extent the absence of a foreseeability requirement affects the buyer's ability to predict his future situation in the event of breach.

The second criterion is "performance interest", which Friedmann explained thus:

"A [buyer] enters into a contract because he is interested in getting that which the other party has to offer and because he places a higher value on the other party's performance than on the cost and trouble he will incur to obtain it."³

This interest is called "performance interest", and its importance must be acknowledged, for it has been called "the only pure contractual interest".⁴ This criterion will be used to identify how and to what degree the absence of the foreseeability requirement satisfies the pure contractual interest of a commercial buyer.

The third criterion is "efficiency", which has been described as "a particularly appropriate measure in transactions between commercially sophisticated parties".⁵ This is because the main goal of commercial buyers is to increase their wealth, and hence they are unwilling to choose a legal regime which incurs them some expenditure. As a result, they tend to select a legal regime with more relatively efficient remedial provisions. The efficiency of a remedy can be determined by examining the transaction costs facing the disputants.⁶ This yardstick will therefore ***J.B.L. 291** be utilised to assess whether and to what degree the absence of the foreseeability requirement minimises the transaction costs faced by a buyer exercising his right to terminate a contract.

The fourth criterion is based on the significant norm of the "relational theory of contracts", which is preservation of relations.⁷ This norm is used to determine the extent to which a remedy can prolong a contractual relationship by facilitating renegotiation, readjustment, compromise and settlement. This norm is particularly suitable for assessing buyers' remedies in contracts for international sales of manufactured goods. This type of transaction requires a high degree of communication and co-operation based on mutual trust and confidence in order to give business efficacy to the contractual arrangements.⁸ This norm will therefore be utilised to clarify whether and to what extent the absence of the foreseeability requirement provides an opportunity for the parties to enhance and sustain their relationships.

This article is structured in the following way. First, the remoteness test for the availability of damages under the aforementioned legal regimes will be briefly explained. Secondly, the wording dissimilarities between the regimes will be evaluated. Thirdly, there will be a brief description of fundamental non-performance, which is the main requirement for termination of contract under these four legal regimes. In this part, the remoteness test in each of the legal regimes will be scrutinised. Finally, this article will present a critical comparative analysis, based on the normative framework introduced above, regarding the absence of the foreseeability requirement under the [SGA](#) versus its presence under other legal regimes. Following the findings of this analysis, a conclusion will be proffered which can serve as a compelling contribution to the ongoing debate about whether the CISG should be adopted by England.

Damages

The remoteness test under English sales law

Losses are recoverable by the payment of damages when they arise in the usual course of events and fall within the reasonable contemplation of the parties at the date of the formation of the contract.⁹ The rule of remoteness was defined in the ***J.B.L. 292** leading case of *Hadley v Baxendale* as consisting of two limbs.¹⁰ The first of these is reflected in [SGA s.51\(2\)](#): "The plaintiff would recover in respect of losses arising in the usual course of things." The second limb covers more unusual losses which the contracting parties might conceive, and thus it encourages the parties to exchange information, at the time the contract was concluded, regarding their particular needs or vulnerabilities.¹¹ The second limb has not been expressly adopted in the [SGA](#). However, it is implicitly accepted by the wording of [SGA s.54](#): "nothing in this Act affects the right of the buyer or the seller to recover ... special damages in any case where by law ... special damages may be recoverable."

However, the two rules identified in *Hadley v Baxendale* can be considered as, in fact, comprising a single rule, focusing on reasonable contemplation or, in other words, reasonable foreseeability.¹² This is because the two limbs overlap rather than providing separate rules. In *Victoria Laundry Ltd*, Asquith LJ defined "something arising naturally" as "something that should have been reasonably contemplated by the defendant if he had thought about the breach".¹³ Therefore, the remoteness test under the [SGA](#) relies mainly on the knowledge of the parties at the time of the formation of the contract; it has therefore adopted an objective approach toward this matter, as confirmed by the

House of Lords in *The Achilles*: "liability for damages for breach of contract was founded upon the presumed intention of the parties and required the court to determine objectively what the common basis on which the parties had contracted."¹⁴

It has been argued that the approach taken by the House of Lords in *The Achilles* has departed from the well-known test of remoteness established in *Hadley vs Baxendale*.¹⁵ *The Achilles* is considered "the leading modern decision on the law relating to remoteness of damage".¹⁶ It "adds an interesting but novel dimension to the way in which the question of remoteness of damage in contract is to be considered".¹⁷ In this case, the defendant charterers gave notice of redelivery between 30 April and 2 May, and the owner, relying on the ship being returned on time, fixed the vessel for a new four- to six-month hire to another charterer, following on from the current charter at a new market rate, which was grossly higher than current charter rate.¹⁸ The charter failed to return the ship on the contractually stipulated dates, thereby constituting breach.¹⁹ Since the market rates had fallen by the return's date and in order to secure the company's agreement, **J.B.L. 293* the owners had to agree on a new rate that was \$8,000 less than the daily hire-rate under the previous agreement with the new charterer.²⁰ The owners sought to recover this loss from the charterer as damages.²¹ The charterers claimed that the owners were only entitled to damages to be measured as the difference between the market rate and the charter rate for the period during which they were deprived of the ship.²² The majority arbitrators and the Court of Appeal confirmed the owner's contention on the finding that in a commercial situation the loss of a follow-on fixture was not unlikely.²³ The House of Lords, however, unanimously set aside the decision of the Court of Appeal on the ground that the large amount demanded by the owner as damages was caused by volatile market conditions, which were outside the parties' contemplation and accordingly, the charterers were not liable in damages for the owner's loss of profit.²⁴

Assumption of responsibility is perceived to be the basis of the law of remoteness of damages, as a consequence of the House of Lords' decision in *The Achilles*. This means that if a type of loss falls outside the sphere of the defendant's responsibility, the recovery by the way of damages will be denied "even if the loss satisfies the probability standards of the remoteness of damages rule".²⁵ It is, however, doubtful whether this approach represents a substantial departure from the one adopted in *Hadley* and be able to displace the orthodox remoteness rule. The effect of the standard rule is that, in reality, the test of assumption of responsibility is implemented in all cases; "it is only in non-standard or unusual cases that it will produce a different result to the rest in *Hadley*".²⁶ The concept of assumption of responsibility is already incorporated or embodied in both limbs in *Hadley* itself: this has been confirmed by the Singaporean Court of Appeal.²⁷ The first limb of *Hadley* clearly incorporates an implied undertaking or assumption of responsibility on the part of the defendant, based on the premise that a reasonable person in the position of the defendant would be taken to have assumed responsibility for a loss that flowed naturally from the breach.²⁸ The notion of assumption of responsibility can also attribute to the second limb of *Hadley*, in the sense that the contract breaker is assumed to be responsible for unusual losses, for which he has been communicated special knowledge and hence has agreed to compensate them.²⁹ However, the approach adopted in *The Achilles* enables the court to examine carefully the surrounding circumstances and general understanding in the relevant market to determine whether the defendant can be held liable for loss. This is likely to be in those relatively rare cases where the application of the orthodox approach might lead "to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations".³⁰ It is therefore **J.B.L. 294* submitted that *The Achilles* does not establish a substantially different rule as part of its ratio, but importantly highlights the logic of communicating special information for recovering the losses arising in special circumstances, and can be applicable only to the unusual cases, such as *The Achilles* itself, where an exceptionally large losses originated from the extreme and unusual volatility of the shipping market at that particular time. This has been confirmed by Sir David Keene's decision in *John Grimes Partnership Ltd v Gubbins*.³¹ Therefore, the orthodox approach will be considered for the purposes of comparison and evaluation, as the standard rule of remoteness in English sales law.

The remoteness test under the CISG, the CESL and the UPICC

The CESL has adopted a dual subjective/objective approach to the remoteness test: "The debtor [seller] is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance."³² The subjective test is satisfied when the seller has actually foreseen the loss, whereas the objective test is satisfied when a reasonable person in the situation of the seller could be expected to foresee the loss. CISG art.74

seems to be functionally equivalent to this article, asserting that

"damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract".³³

Also, the UPICC art7.4.4 provides:

"The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance."

The similarities and discrepancies in wording revolving around the foreseeability of loss as a prerequisite for the availability of damages are evaluated below.

Assessing the differences

There are slight variations in the wording of the articles governing the remoteness test in each of the legal regimes. One discrepancy lies in the fact that the loss under the [SGA](#) should be within the contemplation of both parties, whereas under the other legal regimes (CISG, CESL, UPICC), it suffices that the party in breach foresees the loss. However, this difference is of minor practical significance since the courts under English law mainly consider the defendant's foreseeability of the loss. This has been described by Treitel thus: ***J.B.L. 295**

"The [injured party's] contemplation in such a situation may be necessary to establish the purpose for which he intended to use the subject matter and hence to show that his failure to obtain it actually led him to suffer the alleged loss. But it is foreseeability by the [party in breach] which is the crucial factor in determining whether the loss is too remote."³⁴

Also, the crucial point in both [Hadley v Baxendale](#) and [Victoria Laundry](#) was whether the loss had been contemplated by the defendant; the courts did not actually consider the claimant's contemplation.³⁵

There is another discrepancy which seems to be more significant, and it lies in the probability of the occurrence of loss that can be foreseen by the breaching party. The CESL only states that recoverable losses are those which arise "as a result of the non-performance", whereas CISG art.74 makes it a condition of recoverability that "the party in breach knew or ought to have known [that loss might occur] as a possible consequence of the breach of contract". The UPICC states that it depends on the harm having been "likely to result from the non-performance of contract". On the other hand, the rule under the [SGA](#) speaks of "contemplated damages" by both parties as being the "probable result" of the breach. The meanings of the various terms, in particular, "possible consequence", "likely to result", "probably result", have been the subject of much debate and scrutiny. "'Possible' is a very broad word."³⁶ It might extend the scope of a seller's liability for the losses that occurred as the result of breach. The difference between "possible consequence" and "probable result" was illustrated in [The Heron II](#):

"[S]uppose one takes a well-shuffled pack of cards, it is quite likely or not unlikely that the top card will prove to be a diamond: the odds are only 3 to 1 against. But most people would not say that it is quite likely to be the nine of diamonds for the odds are then 51 to 1 against."³⁷

In this case, it was suggested that the words "not unlikely" or some similar words denotes a much smaller degree of probability.³⁸ Also, Ziegel and Samson have argued:

"The test of foreseeability in art.74 is substantially broader than the test in [Hadley v Baxendale](#), as refined by the House of Lords in [The Heron II \(1969\) 1 A.C. 350](#). In the latter case Lord Reid expressly rejected the test of 'possible' damages adopted in art. 74. Its retention in art. 74 could lead to the admissibility of damage claims that have hitherto been rejected and enlarge the seller's already very substantial exposure to liability."³⁹

Also, in [Monarch Steamship Co Ltd v Karlshamns Oljefabriker](#), Lord du Parc expressed the view that there should be "real danger" or "serious possibility" for ***J.B.L. 296** the occurrence of the loss.⁴⁰ Thus, under English contract law, the loss should have arisen as the reasonably likely result of the breach. This can limit the extent of the recovery of lost profits, as it has imposed a limited scope of liability.⁴¹

The [SGA](#), by using the words "probable result", which originated in [Hadley v Baxendale](#), requires a

higher degree of probability of occurrence of the loss than the CISG, which uses the term "possible consequence". However, the additional words "in light of the facts and matters" in the CISG reduce what could otherwise indicate "a potentially extensive liability".⁴² Also, in *TeeVee Toons, Inc (Records) & Steve Gottlieb Inc v Gerhard Schubert GmbH*, it was determined that, "the foreseeability requirements under the CISG are identical to the well-known rule of *Hadley v Baxendale*, such that relevant interpretations of that rule can guide the Court's reasoning regarding proper damages".⁴³ This statement does not, however, seem to be entirely correct because the CISG's remoteness test is not identical to the rule laid down by *Hadley v Baxendale*, which speaks of contemplated damages between both parties as the probable result of the breach.⁴⁴ In contrast, the CISG has chosen the expression of the foreseeability of damages on the part of the seller as the possible result of the breach. Nevertheless, it seems that this difference in wording does not make any significant practical difference worth analysing. For instance, in a case in which the seller of used automobiles delivered a defective car to the buyer and thereby caused some losses to the buyer, the CISG was the applicable law and damages were awarded.⁴⁵ In this case, the issue was whether the buyer could recover losses resulting from the resale of the car as consequential damage due to the breach by the seller, and as such, was the damage reasonably foreseeable for the seller as a possible consequence of the breach? The court considered that it was foreseeable because the seller knew that the buyer did not buy the car for his own use, but in his capacity as a car dealer. Thus, the seller could presume that the delivery of non-conforming goods would make the buyer liable towards his customer. This case was governed by the CISG, but if the *SGA* had been the applicable law, the same result was likely to be achieved. The remoteness test under the *SGA* requires the loss to have occurred as a probable result of the breach. Here, re-sale by the buyer was a serious possibility. Thus, the difference in wording between these two legal regimes is not substantial.

The extent of a seller's liability under the UPICC appears to fall between the *SGA* and the CISG, as the UPICC uses the phrase "being likely to result from the non-performance of contract". However, from a practical point of view, the difference between the CISG and the UPICC is not significant because "in many respects, the damages provisions of the UNIDROIT Principles are similar to those **J.B.L. 297* found in the CISG".⁴⁶ Therefore, the UPICC's articles regarding damages do not need to be explored separately.

Among these legal regimes, the CESL has adopted an approach in terms of the foreseeability requirement that can widen the scope of a seller's liability. CESL art.161 has only used the words "a result of the non-performance". In other words, the CESL has avoided using terms such as "probable" or "possible" result of breach which limit the seller's liability in paying damages. Losses are therefore recoverable under the CESL when they have been incurred with a lower degree of probability than under other legal regimes. In a case governed by the CISG concerning a US buyer and a Russian seller, the buyer claimed damages, as several losses were incurred as the result of defective goods.⁴⁷ The buyer had already sold the goods to the customers and the seller was aware of this. The buyer sought reimbursement of the price left unpaid by the final customers and compensation for lost profit, alleging that the non-conformity of the first instalment had resulted in a loss in that its reputation was tarnished and that made it difficult to resell the second instalment. However, the Tribunal did not award damages for this loss, as

"there was no evidence that breach of contract by the seller had caused a serious loss of the buyer's reputation, and the seller had not, nor ought to have, foreseen such a loss at the time the contract was concluded".

In contrast, it could be that if the CESL had been the applicable law, the buyer might have been successful in attaining damages, as the loss of reputation is likely to be covered by the wide scope of liability laid down by CESL art.164, according to which such loss is likely to be considered the result of the breach and thus damages might be awarded for it. It should be stated, however, that this result is simply speculative, as there is still no reported case governed by the CESL. Moreover, these arguments are rather moot, as they concentrate mainly on the wordings of the provisions and lack substantive practical importance. Thus, the slight variations in wording do not warrant assessment on the basis of the evaluative framework established in the introduction.

One might argue that there is a significant difference in the way these legal regimes formulate the objective standard. CISG art.74 states that

"the party ought to have known [that loss might occur] as a possible consequence of the breach of contract in the light of the facts and matters which he then ought to have known ...".

This approach seems to differ from that of the other legal regimes, as it has been argued that "a plain reading of the words suggests that a difference in the scope of liability apparently is intended".⁴⁸ Nevertheless, the CESL, the UPICC and the [SGA](#) have adopted a similar approach. UPICC art7.4.4 states that damages are limited to those that "the seller could reasonably have foreseen at the time of the conclusion of the contract". CESL art.161 states that the seller is liable for loss ***J.B.L. 298** "which could be expected to have foreseen at the time when the contract was concluded". Under English law, the loss should be within the contemplation of both parties, and in practice, the courts look at whether the seller was able to predict the loss at the time the contract was concluded, as explained previously. These legal regimes mainly focus on what a reasonable person in the situation of the seller could predict.

The CISG focuses mainly on the breaching party itself, not a putative reasonable person, and emphasises that the seller should be able to anticipate the loss on the basis of the facts and matters that he should know. This approach might impose some expectation on the seller to foresee the types of losses which relate to the commercial activities of the parties, based on knowledge of commercial sales transactions which the seller is presumed to have which would enable such predictions. In the type of transaction this article is discussing, the seller knows that the buyer is a commercial entity, and as such, the goods are most likely to be used either in the buyer's premises or sold to a sub-purchaser. In one case, a court stated that when commercial goods are sold to a commercial buyer, a resale "can always be assumed without any further indications".⁴⁹ This means that the seller should be able to anticipate the types of loss that are attributable to the specific facts of such a commercial transaction. In another case, the tribunal held that the seller's experience in commercial activity allowed him to foresee the losses that the buyer had suffered as a result of the delivery of non-conforming goods.⁵⁰ Also, it was ruled in another case that a commercial person ought to have expected fluctuations in the price of the goods.⁵¹ It is therefore expected that a commercial seller will know the facts and matters which enable him to predict the attributable loss

"if such knowledge generally flows from the experience of a merchant or, in other words, if such knowledge can in the given case be expected of him having regard to his experience as a merchant".⁵²

In other words, the fact that the parties are commercial and deal with manufactured goods implies that certain types of knowledge can be generally imputed and hence certain types of losses can be regarded as foreseeable.

Such an approach might be more in favour of the buyer in terms of proving the foreseeability of loss. CISG's approach presumes that the seller should have the relevant knowledge relating to the type of business he is doing with the buyer. This entails the expectation that the seller should take active steps in acquiring the relevant knowledge in the event that he lacks sufficient expertise relating to the facts and matters of the case. This suggests that he is generally liable for those types of loss that could be within the scope of his commercial knowledge. When the seller is generally liable for those losses, he has to prove that the incurred loss was not within his presumed knowledge. However, this approach has not been ***J.B.L. 299** widely accepted. The CISG Advisory Council has stated that "in order to recover damages for breach of contract, the aggrieved party must prove that it has suffered a loss as a result of the breach".⁵³ There is no indication of the seller's imputed foreseeability on the basis of his presumed knowledge. The UNCITRAL Digest of Case Law reiterates this view.⁵⁴ Furthermore, some courts have preferred to use the reasonable person test and impose the burden of proof on the person who claims damages, i.e. the commercial buyer, perhaps because there is no clear categorisation of the presumed knowledge of the commercial parties by virtue of which certain types of loss can be foreseeable.⁵⁵ As such, the courts use the classic test of what a reasonable person predicts in the seller's position, which is used under the CESL, the UPICC and the [SGA](#). In this approach, the buyer has to prove that the loss was predictable for the seller.

It seems, however, that the CISG's approach to the remoteness test does not differ substantially from that of other legal regimes. Although the CISG imposes some expectation on the seller to know the relevant facts and matters, this difference in wording does not seem to make enough of a practical difference to deserve a comprehensive evaluation.⁵⁶ This statement is supported by the Official Comments to UPICC art.7.4.4: "The principle of limitation of recoverable harm to that which is foreseeable corresponds to the solution adopted in [CISG] Article 74."⁵⁷ This shows that the respective legal regimes have adopted a same solution which yields the same result; however, the formulation of the remoteness test under the CISG is more accurate by emphasising the special knowledge of the commercial seller and taking into account "the facts and matters that the seller ought to have known". In one case governed by the CISG, the seller was aware that the buyer was a

car dealer.⁵⁸ The seller delivered a non-conforming car, and subsequently, the buyer was held liable for damages to his customer. The court ordered the seller to compensate the buyer for those damages, since they were, in the court's opinion, "foreseeable", as the seller was aware of the buyer's situation. Nevertheless, if the CESL or the UPICC or the [SGA](#) had been governing the case, the same result might have been achieved, but under these legal regimes, the courts are obliged to take an expansive approach because there is no explicit positive guidance as there is under the CISG. Under the CISG, the imputed foreseeability of the seller originating from his knowledge would help the courts to decide more quickly and easily whether the seller was liable for that particular loss. Accordingly, there is no substantial difference between these legal regimes regarding the remoteness ***J.B.L. 300** test, and as such, there is no need to examine the approaches of these legal regimes on the basis of the evaluative framework.

Termination

Fundamental breach or non-performance of contract is the main requirement for terminating a contract under the [SGA](#), the CISG, the CESL and the UPICC.⁵⁹ This requirement will be analysed briefly to reveal how the remoteness test plays a significant role in the availability of termination under each of the legal regimes.

Fundamental non-performance under English sales law

According to English sales law, the buyer is entitled to terminate the contract when a failure in performance is sufficiently serious. The courts should consider the consequences of the breach of the contract to determine whether this is the case.⁶⁰ In order to reduce the uncertainties and difficulties inherent in such a function, English law has classified contractual terms into conditions, warranties and innominate terms, with the result that if a term is considered to be a condition, there is no need to weigh the gravity of the factual consequences of the breach, which can effectively serve certainty.⁶¹ This is mainly because the breach of a condition affects "the substance and foundation of the adventure", and the range of possible consequences flowing from such a breach is normally very serious.⁶² It has been stated that

"a contractual term may be a condition because, irrespective of the objective seriousness of the likely consequences, any breach is accounted a serious matter by the parties, who regard any breach as a substantial failure to perform".⁶³

Therefore, all consequences of a breach of condition are deemed to be sufficiently serious to justify termination. The practical application of recognising particular terms as conditions reflects "the logic of termination rights, which starts from the premise that termination is permitted if a breach goes to the root of the contract".⁶⁴ A warranty is a minor promise within a contract, which has been defined in [SGA s.61](#), where it is described as an agreement

"with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise ***J.B.L. 301** to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated".⁶⁵

However, the majority of terms fall somewhere between a condition and a warranty, and as such, there was a need to introduce a new category which could cover the "grey terms".⁶⁶ This new category, called "*tertium quid*", "intermediate terms" or "innominate terms", looks at the nature and effect of the breach of the term, in contrast to the traditional approach, which looks at the nature of the contractual term.⁶⁷ This means that the court has to assess the seriousness of the consequences of the breach to discover whether it has substantially deprived the buyer of his expected contractual benefit. The result would be to limit the right to terminate the contract. Therefore, under English law, "the general principle is that any [deficiency in quality or quantity] must attain a certain minimum degree of seriousness to entitle the injured party to terminate".⁶⁸

Fundamental breach of contract under the CISG, the CESL and the UPICC

In these three legal regimes, fundamental breach is considered "the central requirement for avoidance of contract", and it has been defined in CISG art.25, CESL art.87(2), and UPICC art.7.3.1.⁶⁹ These articles show textual uniformity, and therefore reference is made to the rich experience with CISG art.25 in case law and scholarly materials in order to interpret fundamental non-performance

under these legal regimes. These articles comprise two tests which should both be satisfied in order to show that a fundamental breach has occurred. The first test deals with whether the breach has substantially deprived the aggrieved party of what he is entitled to expect under the contract. It has been suggested that "the emphasis on the expectations of the injured party was generally viewed as the key factor".⁷⁰ This test is not, however, the main concern of this article.

The second test deals with the foreseeability of loss, which corresponds to the remoteness test under termination. The foreseeability requirement in CISG Art 25 is similar to the foreseeability requirement with respect to damages in CISG Art 74. Thus, lack of foreseeability and knowledge, which might preclude the buyer from invoking the doctrine of fundamental breach of contract, relates "to the ***J.B.L. 302** detriment caused by the breach of contract, and not the breach itself or its reasons".⁷¹ It appears from the wording of art.25 ("the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result") that foreseeability is a cumulative question: the seller must both subjectively and objectively have been able to predict the result of the breach (a point which should be "assessed as of the date of the conclusion of the contract"⁷²). In other words, in order to invoke the foreseeability defence to counter a claim of fundamental breach,

"the party in breach should both show that neither he himself in no way anticipated the substantial detriment caused; nor a reasonable person in his place would have done so".⁷³

This means that the burden of proof with regard to the foreseeability exception is on the seller. It has been claimed that "the objective test cannot replace the subjective test, but complements it".⁷⁴ However, the counter-argument has been made that the focus should be on the "objective component", as it can be used as a safeguard against the defence that the seller did not actually foresee the damage.⁷⁵ This signifies that the lack of foreseeability defence is only valid when "a reasonable merchant in the same circumstances of the seller" would not have anticipated the results of his breach.⁷⁶

Evaluating the difference

There is a significant difference regarding fundamental non-performance under these legal regimes, which merits an in-depth analysis. The [SGA](#) lacks the requirement that the consequences of the breach should be foreseeable to the seller, while the other legal regimes require that the seller can subjectively and objectively anticipate those consequences. It has been said that the foreseeability requirement "constitutes a further innovation of the [CISG]", which has been adopted by the CESL and the UPICC as well.⁷⁷ This requirement arguably has a clear effect on the availability of the buyer's right to terminate the contract, which will be analysed. However, it should be noted that it is not a requirement in a sense that it has to be satisfied by the buyer proving that the detriment was foreseeable; rather, it is solely ***J.B.L. 303** on the seller to prove that the detriment was unforeseeable.⁷⁸ This is to say that "the breach is not fundamental if the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".⁷⁹ This indicates that "material loss which the promisor did not foresee and could not have foreseen should not be his responsibility".⁸⁰ In contrast, such a requirement is absent from the [SGA](#). This difference will be evaluated in light of the norms of the evaluative framework laid out in the introduction.⁸¹

Certainty

In terms of the remoteness test in the various notions of fundamental breach of contract, the [SGA](#) would provide certainty to a higher degree than the CISG, the CESL and the UPICC. This is because the foreseeability requirement under the latter legal regimes would cause uncertainty, as the buyer is not effectively able to foresee whether he will be entitled to terminate the contract, even if there is, prima facie, a fundamental breach. As explained above, the reason for this is that the seller might be able to show and therefore persuade the court that the breach is not fundamental, as he did not anticipate such detriment subjectively and objectively at the time the contract was concluded.⁸² The foreseeability requirement gives an opportunity to the seller to oppose the buyer's claim of fundamental breach of contract and therefore might preclude the buyer from terminating the contract, as suggested by Schlechtriem and Schwenger:

"The introduction of the criterion of substantial detriment meant that [the foreseeability requirement] came to be regarded as a means for the party in breach to exonerate himself. The exoneration would

come into effect by using the wording 'unless'." ⁸³

The practical effect of such a requirement is that "material loss which the promisor did not foresee and could not have foreseen should not be his responsibility".⁸⁴ The uncertainty lies primarily in the fact that "unforeseeability depends on [the seller's] knowledge of relevant circumstances", although this kind of knowledge on the seller's part might have been deficient for any number of reasons⁸⁵.
*J.B.L. 304

"He himself may have been ignorant, lacking perception, experience or talent, and there may have been other personal or organisational shortcomings within his sphere of influence and responsibility."⁸⁶

Another possible reason is that the buyer might, willingly or not, "have omitted to communicate his expectations or any other sensitive piece of information", or that

"third persons may have neglected to observe and transmit crucial occurrences: information dispatched may not have arrived as in the case of a message lost in the mails".⁸⁷

Any of these scenarios would make the process of determining the foreseeability of detriment uncertain and therefore unpredictable.

In contrast, such a requirement is absent under the [SGA](#) and the buyer can demonstrate the substantial failure of performance without needing to satisfy a requirement of foreseeability on the part of the seller. For instance, it was held in the *Shoes* case, under the CISG, that late delivery does not constitute a fundamental breach of contract, as the seller was unable to anticipate the detriment incurred as the result of this breach.⁸⁸ In other words, the seller was unaware at the time of the contract's conclusion of the buyer's "special interest in delivery on time", perhaps because the buyer failed to communicate this to the seller.⁸⁹ However, if the [SGA](#) had been the governing legal regime, it might rule that such a delay empowered the buyer to terminate the contract. In the *Shoes* case, the seller did not send 243 pairs of shoes on the designated date of delivery, and as the buyer was a commercial buyer, it was likely that he needed the shoes promptly to sub-sell. It is likely that the [SGA](#) would have allowed the buyer to terminate the contract without satisfying a foreseeability requirement, on the grounds that this delay jeopardised his ability to perform other contracts.⁹⁰ Such reasoning has not, evidently, been taken into account by the other legal regimes.⁹¹ In a case governed by English law, the seller failed to deliver an order of sugar on time.⁹² The buyers informed the seller that they were treating the contract as terminated and sought similar goods elsewhere. The House of Lords confirmed that the duty to deliver the sugar on time was a contractual condition, the breach of which entitled the buyers to the course of action that they took, with no investigation of foreseeability undertaken.⁹³ Accordingly, the [SGA](#) can enable the buyer to more effectively anticipate his future standing in the event of the seller's fundamental breach. *J.B.L. 305

Performance interest

In terms of the differences regarding the foreseeability requirement for fundamental breach, two analyses can be provided. The first analysis is based on the premise that "[termination's] inverse relationship with performance is itself potentially revealing of the extent to which performance is protected".⁹⁴ In other words, "the powerful nature of [termination] is ... contrary to the idea of maintaining contractual relationships whenever possible"⁹⁵:

"If it is hard for the injured promisee to terminate, this suggests a stronger commitment to ensuring that performance is rendered than where his exit from the contract is straightforward."⁹⁶

The foreseeability requirement makes it difficult for the buyer to end the contractual relationship. In contrast, the absence of this requirement under the [SGA](#) is likely to facilitate the termination of contracts, which strengthens the claim that "English law confers a relatively broad right to terminate on the injured promisee".⁹⁷ This might, therefore, indicate that the buyer's performance interest is not of high priority under the [SGA](#).

The second analysis is based on the presumption that performance interest is more effectively satisfied when a legal regime facilitates termination, and as a result, the buyer can claim restitution of the money paid. This claim lies on the higher capacity of restitution to serve the buyer's performance interest, compared with performance under the contract. It has been shown that the [SGA](#) allows the buyer to terminate the contract more easily than the CISG, the CESL or the UPICC. In the former,

upon termination, the buyer can make a claim for restitution of the money paid, in addition to damages, and performance interest is likely to be satisfied more effectively when the buyer is able to terminate the contract liberally and seek restitution.⁹⁸ In other words, restitution after termination might yield a more profitable result than staying in the contract and waiting for performance, particularly on a falling market and where the buyer has paid in advance. In *Ebrahim Dawood Ltd v Heath (Est 1927) Ltd*, which was governed by English law, the buyer rejected a non-conforming delivery of steel and initiated a claim for the recovery of the advance payment for 35.36 tons of steel, for which a total of £2,598 19s. had been paid (£73 10s. per ton).⁹⁹ The market price had since fallen, however, and a substitute was available at a price of £70 per ton. The buyer was **J.B.L. 306* able to obtain restitution of the money paid and acquire similar goods at the lower in the market. In contrast, if the CISG, the CESL or the UPICC had been the governing legal regime, the buyer would have had to keep the contract and exert pressure on the seller to deliver conforming goods. Under these international legal regimes, the buyer might eventually obtain the goods and thereby attain the promised situation of a performed contract, but when English law is the governing legal regime, similar goods can be obtained through another supplier at a cheaper price. This means that when the buyer has entered a bad bargain owing to a subsequent fall in the market and it would be more profitable for him if he could terminate the contract, the approach of English law can more effectively place the buyer in his expected position of a performed contract.¹⁰⁰ However, this seems to be morally unacceptable. The result might be that the binding power of a contract would be undermined. This is so because buyers might be inclined to search for some reasons not reflecting their real intention to convince the courts to recognise their right to terminate the contract. As such, the buyer should not be allowed to terminate when his genuine intention is to escape from a bad bargain. This has been confirmed by Lord Roskill:

"In principle contracts are made to be performed and not to be avoided according to the whims of market fluctuation, and where there is a free choice between two possible constructions, I think the court should tend to prefer that construction which will ensure performance and not encourage avoidance of contractual obligations."¹⁰¹

Efficiency

The foreseeability requirement under the CISG, the CESL and the UPICC makes contract termination costly compared with the *SGA*, where this requirement is absent. This is because foreseeability increases the costs at both the stages of contract formation and litigation. During the former stage, the buyer has to proactively inform the seller of the importance of certain obligations because it is primarily the responsibility of the parties to clearly specify in the contract the priority of certain qualities of the goods, so that the absence of such qualities would amount to a fundamental breach of contract by the seller.¹⁰² This is crucial because, as mentioned previously, "the relevant time for determining the foreseeability issue is the conclusion of the contract".¹⁰³ In other words, at the time the contract is signed, the buyer has to disclose sufficient knowledge or information about those obligations in order to enable the seller to foresee the substantial detriment that would be incurred owing to the breach of those obligations.¹⁰⁴ This could be particularly difficult, and therefore costly, when commercial parties are contracting internationally. For instance, in the *Cobalt Sulphate* case, a German company **J.B.L. 307* purchased cobalt sulphate from a Dutch company, and it was agreed that the goods should be of British origin and that the seller would provide certificates of origin and of quality.¹⁰⁵ However, the goods were made in South Africa, but the buyer's claim for avoidance of contract was unsuccessful, as the goods were still useable.¹⁰⁶ The main reason for this result was that the buyer did not sufficiently convey the importance he attached to the description relating to the English origin of the goods, and this occurred partly because the purchase contract was negotiated indirectly by a broker rather than directly by representatives of the companies themselves.¹⁰⁷ This shows that in international sales of manufactured goods, the parties might enter into a contract by means of a broker and that this entails a greater risk of misconception or misunderstanding with regard to the contract's important terms. The buyer must ensure that the relevant information and the significance attached to particular terms are properly imparted in order to enable the seller to foresee the substantial loss that could occur if there was a breach of these terms. This is difficult and costly. In contrast, termination under the *SGA* is more efficient, as the buyer does not need to ensure effective communication of greater volumes of more complex information at the time of the conclusion of the contract.

The foreseeability requirement also increases the litigation costs. These costs arise from the fact that a seller who is accused of causing significant problems through a breach of contract is highly unlikely to concede anticipation of those problems, but will rather maintain that they were unpredictable from

his standpoint.¹⁰⁸ Then the seller has to convince the courts not only of the above, but also that the problems would have been similarly unpredictable for any reasonable person in the same situation.¹⁰⁹ In other words, the seller has to show that he actually failed to foresee such a result and also that a reasonable merchant of the same kind would have been unable to do as well. This is difficult and costly for the seller, as it has been indicated that

"it is obviously not always easy to establish conclusive evidence for a very personal point of view of the matter. But even if such proof succeeds, a merely subjective test hardly satisfies the necessities of international trade".¹¹⁰

Furthermore, it is costly for the courts as well. The courts have to examine whether the seller has legitimate grounds for claiming the unforeseeability of the detriment. In order to do so, they first need to investigate the seller's actual foreseeability of the detriment by looking at the facts surrounding the transaction. It has been suggested that the seller's knowledge should be evaluated through reference to CISG art.74, i.e. "in the light of the facts and matters of which he then knew".¹¹¹ This means that the courts should consider subjective factors such as "the [seller's] *J.B.L. 308* (in) experience, level of sophistication, and organisational abilities".¹¹² Secondly, the courts should inquire as to whether an average merchant "with a reasonable degree of knowledge and experience in their trade" would be able to foresee the loss.¹¹³ In order to satisfy this test, the courts have to accomplish the demanding and lengthy process of taking into account varying situations, which range from

"the conditions of world and regional markets, to legislation, politics and climate, also to prior contracts and dealings and to other factors, in short: to a whole spectrum of facts and events at the relevant time".¹¹⁴

Accordingly, the foreseeability requirement renders termination under the CISG, the CESL and the UPICC significantly less efficient compared with the [SGA](#).

Relational theory

It seems that the foreseeability requirement under the CISG, the CESL and the UPICC might more effectively lead to the continuation of the relationship, compared with the [SGA](#), in which this requirement does not exist. This is because the foreseeability requirement induces the parties to exchange information by creating a powerful incentive for the buyer to disclose information to the seller when they make the contract. The buyer has to reveal an asymmetric degree of private information, which would otherwise remain unknown to the other party, in order to enable the seller to anticipate the loss that a breach would produce. Such revelations could establish or sustain relationships, as they give the parties an opportunity to learn more about each other's business activities, where they might find some common business ground which could lead to further co-operation.

For instance, in *Delchi Carrier v Rotorex*, governed by the CISG, the buyer agreed to purchase a number of compressors for use in a line of portable-room air conditioners.¹¹⁵ The buyer communicated with the seller, who was a manufacturer, and informed him of his intention to sell the air conditioners in the spring and summer.¹¹⁶ In other words, the seller was aware of the sort of business the buyer was active in and the time when his business was running. Such knowledge would help the seller to meet the buyer's needs and thereby might effectively prolong the commercial relationship between the parties. When the manufacturer/seller knows what the buyer needs his product for, he will be likely to provide the buyer with suitable goods, both at that time and in the future, which benefits the seller because it will significantly reduce his need search for potential purchasers of his products. Also, in the *Machinery* case, governed by the CISG, the buyer purchased machinery to be used in recycling plastic bags for the packaging of food products.¹¹⁷ At the time of the conclusion of the contract, the buyer conducted intense *J.B.L. 309* negotiations regarding the special features of the product, which he intended to recycle.¹¹⁸ The provision of this special information made the seller aware of the nature of the buyer's business and thus might have been an effective basis for further co-operation, thereby extending their relationship.

However, it should be noted that the foreseeability requirement of the CISG, the CESL and the UPICC might actually lock the parties into a hostile relationship by making it difficult for the buyer to show that there is fundamental breach of contract in order to allow him to end the contractual relationship. Thus, the requirement might "imprison two parties in a long-term, loveless contract where there is an absence of trust or the prospect of mounting, incremental losses", which is futile.¹¹⁹

This means that a legal regime without the hurdle of foreseeability would facilitate the parties ending their embittered relationship and, as a consequence, would free the parties to look for new business partners, which would "avoid economic waste and put their abilities and resources to a more productive use".¹²⁰

In *Gregg & Co (Knottingley) Ltd, Allied Glass Containers Ltd v Emhart Glass Ltd*, governed by the [SGA](#), the court held that the buyer of machines for manufacturing glass receptacles was entitled to reject the machines quickly after receiving them, as the goods were unfit for the purpose and of unsatisfactory quality.¹²¹ There was no need for the seller to prove that the loss which occurred was unforeseeable. This indicates that the buyer could promptly terminate the contract and restore the purchase price and, as a result, find a suitable producer of that sort of machine in order to activate his business of manufacturing the receptacles. In contrast, if this case had been governed by any of the other legal regimes, the hostile relationship between the parties would have been prolonged and would have become unproductive owing to lengthy and wasteful legal proceedings dealing with the seller's possible claim of unforeseeability.

Concluding remarks

As explained, the remoteness test plays an important role in the availability of damages and termination. With regard to damages, it has been seen that this test is essentially similar under the [SGA](#), CISG, CESL and UPICC, although there are some differences in wording and thus superficial discrepancies. As noted, this sort of discrepancy has an insignificant effect in determining which legal regime has adopted the best approach to satisfying the specific needs of a commercial buyer. Therefore, the main focus of evaluation was the significant difference regarding the remoteness test for the availability of termination under these legal regimes. This difference is reflected in the existence of the foreseeability requirement as an integral part of a fundamental breach of contract under the CISG, the CESL and the UPICC. As shown, this requirement is absent from the [SGA](#). However, this **J.B.L. 310* article has demonstrated that the grounds for termination of contract under all four legal regimes ([SGA](#), CISG, CESL, and UPICC) are broadly similar.

It was found that the absence of the foreseeability requirement under the [SGA](#) makes it able to satisfy the norms of the evaluative framework more effectively than the other legal regimes. In terms of certainty, the buyer can show the substantial failure of performance with no concern about satisfying the foreseeability requirement for the seller. The main uncertainty of the foreseeability requirement under the other international legal regimes lies on the variable knowledge of the seller, which might be incomplete for any number of reasons, such as lacking perception and experience. In terms of performance interest, the [SGA](#), which allows contracts to be terminated more freely, serves this norm to a higher degree than the other legal regimes. The reason is that the foreseeability requirement makes termination of contract difficult, and therefore the buyer has to seek to satisfy his performance interest through the seller's performance of the contract. In the [SGA](#), this interest is satisfied more effectively by restitution of the contract price, which might place the buyer in a better situation than if the contract had been performed, especially when the market price of the goods has fallen and the buyer has paid in advance. Even when the market has risen, the buyer is able to claim both damages and restitution in order to be placed in a position equally good as that of a performed contract. In terms of efficiency, the foreseeability requirement is costly both at the time the contract is formed and for litigation. In the former stage, the buyer has to bear informational costs, including supplying the seller with knowledge regarding certain obligations and alerting him of the possible consequences of a breach. In the latter stage, the seller might bring some evidence demonstrating his inability to anticipate the loss, and the courts must examine it subjectively and objectively to determine whether the requirement of foreseeability was satisfied or not. This requirement would therefore significantly increase the litigation costs. In terms of relational theory, the foreseeability requirement might lock the parties in a hostile relationship and, as a consequence, might render their relationship unproductive. In contrast, English law allows the parties to release themselves from such a relationship, thereby helping them seek productive opportunities elsewhere.

For these reasons, the [SGA](#) is a better legal regime in terms of the provisions governing the most important remedies for a commercial buyer. This might, in turn, indicate that the [SGA](#) is more suitable for parties contracting internationally because it can address and satisfy the significant interests of commercial parties, as shown in the above assessment. On the other hand, the CISG, the CESL and the UPICC fall short of providing appropriate remedial provisions for an international commercial buyer facing a fundamental breach or the potential for one. This conclusion suggests that the [SGA](#) should be retained as a valuable legal regime in the area of international sales in the UK and that

there is no need to ratify the international legal regimes, especially the CISG.

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- *. Lecturer in Law. I would like to thank Professor Janet Ulph, Professor Francois du Bois and Dr Sean Thomas for their comments on earlier drafts of this article. The usual disclaimer applies.
1. In the article, I sometimes use "the English sales law" to make a reference to the [SGA](#); although the CESL has been recently withdrawn by the European Commission, its principles with regard to the remoteness test will be considered, as they represent the latest development on this area of law at the European level.
 2. *R. Bradgate, Commercial Law, 3rd edn (London; Butterworths, 2000), p.5; E. McKendrick, Contract Law, Text, Cases, and Materials, 4th edn (Oxford: Oxford University Press, 2010), p.761; J.H. Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law" (1981) 17 S.J.I.L. 357; E.A. Farnsworth, "Developing International Trade Law" (1979) 9 C.W.I.L.J. 461.*
 3. D. Friedmann, "The Performance Interest in Contract Damages" (1995) 111 L.Q.R. 628, 633.
 4. *D. Campbell and R. Halson, "The Irrelevance of the Performance Interest, a Comparative Analysis of 'Keep-Open' Covenants in Scotland and England" in L.A. DiMatteo, Q. Zhou, S. Saintier and K. Rowley (eds), Commercial Contract Law, Transatlantic Perspectives (Cambridge: Cambridge University Press, 2013), p.467; S. Rowan, Remedies for Breach of Contract: A Comparative Analysis of Protection of Performance (Oxford: Oxford University Press, 2012), p.2.*
 5. S. Walt, "The CISG's Expansion Bias: a Comment on Franco Ferrari" (2005) 25 I.R.L.E. 342, 345.
 6. T.S. Ulen, "The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies" (1984–85) 83 M.L.R. 341, 366–367; see also R.H. Coase, "The Nature of the Firm" (1937) 16 E.N.S. 386, 395–396; L.A. Kornhauser, "An Introduction to the Economic Analysis of Contract Remedies" (1985–86) 57 U.C.L.R. 683, 708–709.
 7. I.R. Macneil, "Values in Contract: Internal and External" (1983) 78 N.U.L.R. 340, 344; see also I.R. Macneil, "Economic Analysis of Contractual Relations: its Shortfalls and the Need for a Rich Classificatory Apparatus" (1980–81) 75 N.U.L.R. 1018, 1020; D. Campbell, "The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract" (2004–05) 11 T.W.L.R. 455; D. Kimel, "The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model" (2007) 27 O.J.L.S. 233; Y. Adar and M. Gelbard, "The Role of Remedies in the Relational Theory of Contract" (2011) 7 E.R.C.L. 399; R. Austen-Baker, "Comprehensive Contract Theory: a Four Norm Model of Contract Relations" (2009) 25 J.C.L. 216.
 8. [Yam Seng Pte Ltd v International Trade Corp Ltd \[2013\] 1 C.L.C. 662 QBD](#) at 699; see also D. Campbell, "Good Faith and the Ubiquity of the Relational Contract" (2014) 77 M.L.R. 475, 479; M.A. Eisenberg, "Relational Contracts" in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995).
 9. [Hadley v Baxendale \(1854\) 156 E.R. 145](#); [Boys v Chaplin \(1969\) 3 W.L.R. 322 HL](#); [Wroth v Tyler \[1974\] Ch. 30 Ch D](#); [Sempra Metals Ltd v Inland Revenue Comrs \[2008\] 1 A.C. 561 HL](#); [Transfield Shipping Inc v Mercator Shipping Inc \[2009\] 1 A.C. 61 HL](#); [Supershield Ltd v Siemens Building Technologies FE Ltd \[2010\] 1 Lloyd's Rep. 349 CA \(Civ Div\)](#); [SGA s.51\(2\)](#); see also G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford: Clarendon Press, 1988), p.151; Goode on Commercial Law, edited by E. McKendrick (London: Penguin Books, 2010), pp.386–388; Chitty on Contracts, 13th edn, edited by H.G. Beale, Vol.1 (London: Sweet & Maxwell, 2008), p.1626; M.G. Bridge, *The International Sale of Goods* (Oxford: Oxford University Press, 2007), p.461.
 10. [Hadley v Baxendale \(1854\) 9 Ex. 341](#) at 342.
 11. *Bridge, The International Sale of Goods (2007), p.462; M.G. Bridge, The Sale of Goods, 3rd edn (Oxford: Oxford University Press, 2014), p.655; D. Harris, D. Campbell and R. Halson, Remedies in Contract and Tort, 2nd edn (Butterworths LexisNexis, 2002), p.91; A. Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 J.L.S. 172, 175.*
 12. *A. Burrows, Remedies for Torts and Breach of Contract, 3rd edn (Oxford: Oxford University Press, 2004), pp.84–85; Bridge, The Sale of Goods (2014), p.700.* See also [C Czarnikow Ltd v Koufos \(1969\) 1 A.C. 350 HL](#); [The Pegase \(1981\) 1 Lloyd's Rep 175 QBD](#) at 182.
 13. [Victoria Laundry \(Windsor\) v Newman Industries \(1949\) 2 K.B. 528 CA](#) at 539; see also [Kpohraror v Woolwich Building Society \(1996\) 4 All E.R. 119 CA \(Civ Div\)](#) at 127; *Bridge, The Sale of Goods (2014), p.659.*
 14. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 62.
 15. See generally these articles: J. Sundaram, "Is the Court of Appeal decision in The Achilleas good law" (2008) 20 Denning Law Journal 187; A. Kramer, "The new test of remoteness in contract" (2009) 7 L.Q.R. 408; Lord Hoffmann,

- "The Achilleas: custom and practice or foreseeability" (2010) 4 Edin. L.R. 47, 47; V.P. Goldberg, "The Achilleas: forsaking foreseeability" (2013) 66 Current Legal Problems 107; A Gupta, "The implications of The Achilleas on s.73 Indian Contract Act 1872" (2014) 6 Company Lawyer 179.
16. *McKendrick, Contract Law* (2010), p.884; *Chitty on Contracts, Vol. 1* (2008), para.26-122.
 17. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 90.
 18. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 65.
 19. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 65.
 20. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 66–70.
 21. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 71.
 22. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 71.
 23. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 87.
 24. [Transfield Shipping v Mercator Shipping \[2009\] 1 A.C. 61](#) at 91.
 25. *Bridge, The Sale of Goods* (2014), p.652.
 26. *Treitel: The Law of Contract, 13th edn*, edited by E. Peel (London: Sweet & Maxwell, 2011), p.1060; A. Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 J.L.S. 172, 176; [Supershield Ltd v Siemens Building Technologies FE Ltd \[2010\] EWCA Civ 7; \[2010\] 1 Lloyd's Rep. 349](#).
 27. *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2010] SGCA 36; [2011] 1 S.L.R. 150 at 140.
 28. [Hadley v Baxendale \(1854\) 156 E.R. 145](#) at 151.
 29. *Bridge, The Sale of Goods* (2014), p.654.
 30. [Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd \[2010\] EWHC 542 \(Comm\); \[2010\] 1 C.L.C. 470](#) at 471.
 31. [John Grimes Partnership Ltd v Gubbins \[2013\] EWCA Civ 37; \[2013\] B.L.R. 126](#) at [24].
 32. CESL art.161; see also G. Dannemann and S. Vogenauer, *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford: Oxford University Press, 2013), p.653.
 33. See generally P. Schlechtriem and I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn (Oxford: Oxford University Press, 2010), pp.1018–1020; S. Kroll, L. Mistelis and P.P. Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (Oxford: Hart Publishing 2011), pp.991–992; S. Vogenauer and J. Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2009), pp.885–887; F. Ferrari, "Comparative Ruminations on the Foreseeability of Damages in Contract Law" (1993) 53 L.L.R. 1257.
 34. *Treitel, Remedies for Breach of Contract* (1988), p.159; for the counter-argument see F. Ferrari, "Hadley v Baxendale v Foreseeability under Article 74 CISG" in D. Saidov and R. Cunnington (eds), *Contract Damages, Domestic and International Perspective* (Oxford and Portland, OR: Hart Publishing, 2008).
 35. [Hadley v Baxendale \(1854\) 9 Ex. 341](#).
 36. [Koufos v C. Czarnikow Ltd \(The Heron II\) \[1969\] 1 A.C. 350](#) at 390.
 37. [The Heron II \[1969\] 1 A.C. 350](#) at 390.
 38. [The Heron II \[1969\] 1 A.C. 350](#) at 390.
 39. J.S. Ziegel and C. Samson, "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods" (1981), <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html> [Accessed 23 March 2014]; for the same argument see Kroll, Mistelis and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (2011), p.1003.
 40. [Monarch Steamship Co Ltd v Karlshamns Oljefabriker \[1949\] 1 All E.R. 1 HL](#).
 41. See generally A.J. Murphey, "Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley" (1989) 23 W.J.I.L.E. 415; F. Ferrari, "Hadley v Baxendale v Foreseeability under Article 74 CISG" in *Contract Damages, Domestic and International Perspective* (2008); Ferrari, "Comparative Ruminations on the Foreseeability of Damages in Contract Law" (1993) 53 L.L.R. 1257.
 42. D. Saidov, *The Law of Damages in International Sales: The CISG and Other International Instruments* (Oxford: Hart

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43. *TeeVee Toons, Inc (Records) & Steve Gottlieb Inc v Gerhard Schubert GmbH, US Federal District Court [New York] (2006)*, <http://cisgw3.law.pace.edu/cases/060823u1.html> [Accessed 23 March 2016].
44. Ferrari, "Comparative Ruminations on the Foreseeability of Damages in Contract" (1993) 53 L.L.R. 1257, 1269.
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